

Protected disclosures: internal policies and procedures

A guide for organisations

This guide provides information and advice for organisations developing and reviewing their internal procedures for protected disclosures.

The [Protected Disclosures \(Protection of Whistleblowers\) Act 2022](#) requires all public sector organisations to have and publish internal procedures for receiving and handling protected disclosures. This includes both central and local government. It is also appropriate for private sector and not-for-profit organisations to have procedures, as they are a key resource for employees who learn of serious wrongdoing in their workplace.

If your organisation is wanting to develop an open reporting culture, or is currently grappling with how to handle a protected disclosure by one of your employees, the Ombudsman can provide information and guidance.

Public service organisations should also refer to the Public Service Commission's [Model Standards](#) for 'speaking up'. These set out minimum expectations for reporting of all forms of wrongdoing, not just serious wrongdoing.

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Introduction

The [Protected Disclosures \(Protection of Whistleblowers\) Act 2022](#) (PDA) is New Zealand's 'whistle-blowing' legislation and replaces the Protected Disclosures Act 2000. It sets out certain procedural requirements for employees wanting to report concerns about serious wrongdoing in their workplace. It also provides protections so that employees can disclose their concerns in confidence and without fear. The PDA applies to both public and private sector organisations (including not-for-profit organisations), with some key differences outlined in the guidance below.

There are a number of reasons for an organisation to encourage staff reporting. Employees are often best placed to identify serious wrongdoing, and are most likely to make accurate reports that are both substantiated and promote organisational change and improvement.¹

It is also important for the general integrity of all organisations, as well as accountability of the public sector as a whole. By identifying and correcting instances or systemic patterns of serious wrongdoing, organisations can avoid legal and financial consequences, criticism and loss of confidence, as well as general inefficiencies. A 'speak up' culture should also help deter wrongdoing.

This guidance is for public, private and not-for-profit organisations establishing or reviewing their policies and procedures for handling protected disclosures. It outlines key components for best practice policies and procedures, so that organisations can use this to develop practices best suited to their operational environments.

This guidance outlines the legal requirements of the PDA as well as best practice in relation to 'whistleblowing', derived from international and Australasian research. Public service organisations should also ensure that they meet the model standards for [Speaking Up in the Public Sector](#) not just serious wrongdoing.

Internal policy and procedures

An **internal policy** is an important starting point for all organisations to demonstrate their commitment to support the reporting of serious wrongdoing by staff, and proper handling of these matters when they are raised. This commitment should be formally adopted as organisational policy and widely communicated to all staff.

It is mandatory for public sector organisations to establish **internal procedures**, to widely publish information about them and how to use them, and to republish at regular intervals. Internal procedures are also recommended for private sector and not-for-profit organisations.

¹ Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, pp. 42 – 45.

To be effective, internal procedures need to be clear and practical so that staff are aware of their obligations in relation to reports of serious wrongdoing, and the process to follow when a disclosure is made to them.

Research has demonstrated the importance of developing effective policy, procedures and practices to ensure clarity and consistency in handling reports of serious wrongdoing.

Specifically, research has shown that:²

- Organisations with effective procedures are more likely to have staff who are aware of the procedures, have positive attitudes towards reporting wrongdoing, report wrongdoing they believe to be serious, and are treated better by managers and co-workers when they do report.
- Organisations with a high proportion of staff who are aware of their organisation's policy or procedures for reporting wrongdoing are more likely to have a higher rate of reporting wrongdoing, positive staff attitudes towards reporting, and higher staff trust that reporting will be looked on positively by management.

An employee can be motivated or supported to report serious wrongdoing, in part, by an organisation's pro-reporting culture and organisational commitment to ethical and accountable conduct. Policy and procedures that emphasise and give effect to that culture of reporting can contribute to this.

The 2022 legislation has removed the requirement for employees to report internally within their organisation as a first step; they can now go directly to an appropriate authority. However this does not lessen the need for best practice internal policy and procedures. If your internal procedures give your employees the confidence to disclose internally, your organisation will have the opportunity to address any wrongdoing without the need to involve a third party. It is also useful to have internal procedures to support employees who prefer to report internally, and can also help their supervisors, to whom they are most likely to report in the first instance.

Your first response to a whistle-blower is likely to set the tone for how they perceive their treatment throughout the process, and whether they are satisfied by the outcome.

Research has also shown that staff are more aware of their internal procedures than they are of any relevant legislation. In addition, a survey commissioned by the Chief Ombudsman indicates that individuals who are aware of the PDA are substantially more likely to feel that they will be protected if they report wrongdoing (73%), compared to

² Brown, AJ, above n 1, pp. 251–257 & Roberts, P, Brown, AJ & Olsen, J 2011, *Whistling while they work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations*, ANU E Press, Canberra, pp. 27–29.

those who are unaware of the PDA (33%). This presents an opportunity to develop worthwhile and impactful policy and procedures, but also indicates a need to ensure that internal policy and procedures reflect the legislation well, and inform employees of their rights and obligations under the PDA. This may well be the only source of information that they consult when wondering whether and how to disclose their concerns about serious wrongdoing.

Organisational policy commitment

The ethical climate of an organisation, as well as the efficacy of whistleblowing policies and procedures, can determine how successfully a report of serious wrongdoing will address issues within the organisation. A culture of trust and reporting, and support and integrity at all levels of management, is essential.³ This can be promoted through a strong protected disclosures **policy**, as well as the detailed operational **procedures**.

An organisation's **policy** (and procedures) should therefore start with:

- Strong endorsement by the head of the organisation.
- A statement of the organisation's commitment to high standards of ethical and accountable conduct, confirmation that it will not tolerate any form of wrongdoing, and encouragement of reporting as an obligation of an employee.
- Recognition that staff who come forward and report wrongdoing have demonstrated commitment to the organisation by helping to promote integrity, accountability and good management within it.
- If it is the policy of a public sector agency, reference to the [Code of Conduct for the public service](#). For any other organisations with staff who are subject to codes of conduct or professional codes of ethics, these should also be referred to.
- Acknowledgement of the organisation's legislative obligations under the PDA to receive and handle protected disclosures while keeping the identity of the reporting employee (the discloser) confidential and preventing retaliatory conduct.
- An undertaking to staff who make a disclosure about serious wrongdoing that:
 - procedures for the handling and investigation of reports of serious wrongdoing will be followed;

³ Brown, AJ, above n 1, pp. 251–257 & Roberts, P, Brown, AJ & Olsen, J 2011, *Whistling while they work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations*, ANU E Press, Canberra, pp 18-19.

- there is a strong commitment to maintain confidentiality of the disclosers' identity, unless disclosure is permitted by law;
 - disclosers will be protected from retaliatory conduct;
 - appropriate action will be taken if wrongdoing is found; and
 - the discloser will be kept informed of the progress and outcome of their report.
- Provision for periodic review and update of the policy and procedures.

What should be included in internal procedures?

Legal obligations on public sector organisations/recommended content for private and not-for-profit organisations

All public sector organisations were required by the Protected Disclosures Act 2000 to have internal procedures. The new PDA continues that obligation and includes some additional requirements. These include enhanced obligations to refer to the protections available under the PDA and how the organisation will provide practical assistance to disclosers.⁴

Although not a requirement of the PDA, private sector and not-for profit organisations will also benefit significantly from having internal PDA procedures, for the same reasons as public sector organisations. This guidance is therefore equally relevant to those organisations.

If an organisation does not have internal PDA procedures, and an employee wishes to make a protected disclosure within their organisation, the disclosure must be made to the head or deputy head of the organisation.⁵ While this may work well for a small organisation, it may not be so practical for a large organisation. In addition, the head or deputy head of the organisation must still comply with all the legal requirements set out in the PDA in handling the protected disclosure. Creating procedures in advance is therefore of great benefit.

Section 29 of the PDA requires that all public sector organisations have *'appropriate internal procedures'* for receiving and dealing with information about serious wrongdoing. These procedures **must**:⁶

- comply with the principles of natural justice;
- set out [what the receiver should do](#) on receipt of a disclosure;⁷
- identify [who in the organisation](#) a protected disclosure may be made to;

⁴ Section 29 of the PDA 2022.

⁵ Section 11(2) of the PDA 2022.

⁶ Section 29(2) of the PDA 2022.

⁷ See section 13 of the PDA 2022.

- include reference to the requirement [not to retaliate](#), or threaten to retaliate, against the discloser or treat them less favourably than others;
- describe the circumstances when a disclosure might be referred by the organisation to an appropriate authority;
- describe how the organisation will provide [practical assistance and advice](#) to disclosers (such as a support person); and
- describe how the organisation will meet the [duty of confidentiality](#).

Additionally as a matter of good practice, the procedures **should**:

- demonstrate a clear [organisational commitment](#) to supporting the disclosure of wrongdoing by staff, and to properly handling disclosures;
- explain [who can make](#) a protected disclosure;
- define ‘[serious wrongdoing](#)’ in accordance with the PDA;⁸
- make clear the organisation’s expectations of [how an employee will be treated](#) once they make a disclosure;
- note that an employee may make their protected disclosure internally, and/or to an appropriate authority at any stage;
- note that if your organisation does not handle the disclosure appropriately, or address the serious wrongdoing, [a disclosure can be made to a Minister](#);
- identify sources of [information and guidance](#);⁹ and
- identify [support services](#) available for an employee who makes a disclosure.

Organisations should consider including information that is more than just a restatement of the relevant legislative provisions. Think about who might consult your procedures, and whether you can explain the PDA’s coverage in a user-friendly way.

Your procedures should include information about how a disclosure will be handled. It should also make clear that the procedures apply to anyone in your organisation who receives a protected disclosure, or who is responsible or otherwise involved with the handling and investigation of protected disclosures.¹⁰

⁸ See section 10 of the PDA 2022.

⁹ Such as the Ombudsman guide to [Making a Protected Disclosure](#).

¹⁰ Section 12 extends the protections under the Act to disclosers who provide information in support of or relating to or information in relation to a protected disclosure “with all necessary modifications”.

Publication

Public sector organisations **must** publish widely (and republish at regular intervals) information about the existence of the internal procedures, and adequate information on how to use the procedures.¹¹

Publication is important for all organisations, so that current and former employees can access the procedures if they wish to make a protected disclosure.

What is natural justice?

Natural justice is the 'duty to act fairly'. It has two key aspects:

- fair process; and
- ensuring that the decision maker is not biased.

A fair process is one where the complaint is taken seriously, and where both parties are kept informed about the progress of any investigation. A fair process also requires that someone be told about any allegations that have been made against them, and have the opportunity to respond to this.

If an organisation needs to tell someone about allegations that have been made against them in a protected disclosure, they must use their best endeavours to do this while keeping confidential the identity of the person who made the protected disclosure. However, if it is *essential* to disclose identifying information in order to allow the accused person to respond to the allegations, then the organisation may need to do that.

See [Confidentiality](#).

Who the procedures apply to and what can be reported

The most basic requirement for effective PDA procedures is clear and understandable guidance on **who** can make a protected disclosure, and **what** they can report. This is key information that an employee will be seeking when first thinking about reporting serious wrongdoing. The procedures should:

- identify who can make a protected disclosure; and
- identify what matters can be reported as a protected disclosure.

Who do the procedures apply to?

Often procedures focus on the organisation's employees, however the organisation should keep in mind that the PDA defines a 'discloser' more broadly than this. The procedures should explain that the PDA covers disclosures by current and former:

¹¹ See section 29(3) of the PDA 2022.

- employees (ie, a salary or wage earner) of the organisation;
- secondees to the organisation;
- individuals contracted to do work for the organisation;
- people involved in the management of the organisation (including a member of a board or governing body);
- volunteers to the organisation;
- homeworkers (within the meaning of section 5 of the [Employment Relations Act 2000](#)); and
- members of the Armed Forces (where the organisation is the New Zealand Defence Force).

What about anonymous disclosures?

The PDA does allow for anonymous protected disclosures. Section 30 of the PDA says the role of the Ombudsman includes providing advice about circumstances in which an anonymous disclosure of information may be made.

The Public Service Commission also expects public service organisations to have procedures in place that enable employees to make anonymous reports, regardless of whether they meet the threshold of serious wrongdoing.¹² All organisations would benefit from considering this.

In many cases, the identity of the person making a disclosure will not need to be known in order for the organisation to make further inquiries about the alleged wrongdoing and determine whether further action is required.

Accordingly, organisations' internal procedures should anticipate receiving anonymous disclosures of information, and suggest ways in which this can be done.

However the Ombudsman does recognise that in some circumstances it may not be possible to investigate the alleged wrongdoing in an anonymous disclosure, for example where further information is required but cannot be obtained.

Organisations can seek advice from the Ombudsman in the event that they receive an anonymous disclosure.

What can be reported?

Serious wrongdoing has a particular meaning under the PDA.¹³ It does not apply to all possible wrongdoing that an employee might see and think about reporting.

¹² [Acting in the Spirit of Service, Speaking Up](https://www.publicservice.govt.nz/resources/speaking-state-services/) Model Standards, Public Service Commission, <https://www.publicservice.govt.nz/resources/speaking-state-services/>.

¹³ As defined under section 10 of the PDA 2022.

‘Serious wrongdoing’ includes:

- an offence;
- a serious risk to public health, public safety, the health or safety of any individual, or the environment;
- a serious risk to the maintenance of the law, including the prevention, investigation and detection of offences and the right to a fair trial;
- an unlawful, corrupt or irregular use of public funds or public resources; and
- conduct that is oppressive, unlawfully discriminatory, or grossly negligent, or that is gross mismanagement, by a public sector employee or a person performing a function or duty or exercising a power on behalf of a public sector organisation.

These different types of serious wrongdoing depend on whether you are working in the public sector or the private (or not for profit) sector. These differences are summarised below:

Serious wrongdoing definition applicable to all organisations (public and private)	Serious wrongdoing definition applicable to public sector organisations and parties that perform public functions or use public money
Offences	Unlawful, corrupt or irregular use of public funds or resources - applies to the public or private sector but does not include the use of private sector funds or resources
Conduct that seriously risks public health, public safety, the health and safety of any individual, or the environment	Conduct by an official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement - applies to a person performing a power on behalf of a public sector organisation
Conduct that seriously risks the maintenance of the law, including the right to a fair trial, and the prevention, investigation and detection of offences	

Organisations should bear in mind that for many employees, using the statutory language as set out in the PDA could be unnecessarily complex. Think about whether you can provide any additional explanation or examples that will assist potential disclosers with understanding whether the information they wish to report is covered.

Legally privileged information cannot be disclosed

Internal procedures should also make clear that information protected by legal professional privilege cannot be disclosed under the PDA. The protections under the PDA are not available to employees who disclose legally privileged information.

Legal professional privilege means information that is confidential legal advice. It might be emails, memos or reports written to or by a lawyer in the organisation, or a lawyer who was advising the organisation. It might also be correspondence about a legal action taking place in Court. Sometimes, it can be difficult to work out whether material is legally privileged. You can consult a lawyer or [contact the Ombudsman](#) for advice about this.

The procedures should specify that if an employee is uncertain about whether the information they wish to report relates to serious wrongdoing, they can contact the Ombudsman for advice or consult the [Ombudsman's guidance](#) on making a protected disclosure. Similarly, staff in the organisation who receive a disclosure can also contact the Ombudsman for advice about whether it relates to serious wrongdoing and what to do.

What if it's below the 'serious wrongdoing' threshold?

Dissatisfaction with the leadership of an organisation that falls short of gross mismanagement, or more minor misconduct, is unlikely to amount to serious wrongdoing under the PDA.

Internal procedures should include links to any other relevant policies or procedures, such as a code of conduct or a grievance/complaints policy. This information will be especially relevant to employees who consult the PDA procedures but determine that their concerns do not relate to 'serious wrongdoing'.

Think about how your organisation will respond if an employee purports to make a disclosure, but it is not about serious wrongdoing

Even if a disclosure does not amount to 'serious wrongdoing', it is still a valuable source of information for the organisation, on wrongdoing that may be occurring, or even wider organisational culture issues. Organisations must be willing to receive and appropriately handle all reports of concern, even those that are not about serious wrongdoing. Your PDA procedures should explain to both disclosers and recipients what to do if the report does not meet the threshold of serious wrongdoing.

This may be as simple as referring to the appropriate procedure elsewhere in the organisation. However, keep in mind that the employee may still be concerned about confidentiality and retaliation. How the organisation handles this will provide a clear signal to other employees about whether or not they are safe to raise both concerns about serious wrongdoing and lesser concerns.

Importantly, a discloser is **still protected** under the PDA, as long as:

- the discloser believes on reasonable grounds that there is, or has been, serious wrongdoing;
- the disclosure is made under the organisation's procedures or to the head or deputy head of the organisation in accordance with the PDA; and
- the discloser does not act in bad faith.

This means that, even if a discloser is mistaken as to the nature or accuracy of the information (eg the allegations do not amount to serious wrongdoing), the matter should still be treated as a protected disclosure.¹⁴ Essentially, this means that the protections under the PDA still apply (more details below).

Employees should feel safe to report information within their organisation.

Who can a report be made to?

An employee may make a protected disclosure to their organisation **or** directly to an appropriate authority at any time.¹⁵ (This is a significant amendment to the 2000 Act which generally required that an employee report wrongdoing to their employer in the first instance.¹⁶)

An appropriate authority includes the head of any public sector organisation, any officer of Parliament (including the Ombudsman), or the membership body of a particular profession or trade with the power to discipline its members.

¹⁴ In accordance with section 9 of the PDA 2022.

¹⁵ See section 11 of the PDA 2022.

¹⁶ Unless certain exceptions applied, see sections 6A, 7, 8 and 9 of the Protected Disclosures Act 2000.

The 2022 Act also lists examples of appropriate authorities, and the types of concerns they might consider, in [Schedule 2](#).

Who can receive a protected disclosure within your organisation?

Your procedures should provide clear advice to employees on who they can report to within your organisation, and how.

Public sector organisations are required to include in internal procedures, the identity of the person(s) within the organisation to whom a disclosure can be made.¹⁷ It is appropriate that private organisations also include this information.

Procedures should cover a number of reporting alternatives, reflective of the following:

- An employee may believe, on reasonable grounds, that a person they are required by the procedures to report to is or may be involved with the wrongdoing.
- An employee may believe, on reasonable grounds, that it is not appropriate to report to a person identified in the procedures, because of their relationship or association with the alleged wrongdoer.
- The PDA allows for reporting both internally, or externally to an appropriate authority.

The overwhelming majority of employees who report serious wrongdoing would likely make that report within their organisation and to a line manager in the first instance.¹⁸ It is therefore best if an organisation's procedures can include line managers as people who can receive protected disclosures, as well as other appropriate people within the organisation. Ideally, there will be alternative reporting lines within an organisation, so that no employee has only one individual to whom they may report, particularly if that individual is their direct line manager.

The procedures should also include how to contact the head of the organisation in the event that the disclosure needs to be made directly to them.

Organisations should identify in policy which positions have specific roles and responsibilities, and these should be reflected in the procedures as well as in position descriptions.

The mechanics of making a disclosure

The procedures should also refer to the mechanics of actually *making* the report. For example:

- Is there a specific email address that employees can send their disclosure to?
- Can disclosures be made by telephone or in person?

¹⁷ Section 29(2) of the PDA 2022.

¹⁸ Research conducted by the Ombudsman shows that 55 percent of respondents would most likely report concerns about serious wrongdoing to their manager.

- Is there a preferred template or form for employees to complete?
- How can an anonymous disclosure be made?

Employees may also need guidance on the level of information or ‘evidence’ they are required to submit when making a disclosure. It may be useful for organisations to specify basic information that may generally be expected. For example, this might be approximate dates, the name and title of the alleged wrongdoer if known, a description of the alleged wrongdoing and source of their knowledge.

Employees can also be asked to explain if they have any particular concerns about keeping their identity confidential, so this can be taken into account in dealing with the protected disclosure.

Organisations should be cautious to avoid setting an inflexible evidential threshold to receive or act on a protected disclosure. This could be a disincentive to reporting, and promote a reluctant approach amongst staff who receive disclosures. Further information can always be sought after receipt of the initial disclosure.

Obligations on the receiver

Internal procedures for public sector organisations must include the requirements on the receiver of a protected disclosure.¹⁹ Internal procedures for private or not-for-profit organisations should also include these matters.

The rights of the employee if they do not believe their disclosure is being addressed should also be covered.²⁰

What must organisations do on receipt of a protected disclosure?

Within 20 working days²¹ of receiving a protected disclosure, the organisation should take a number of steps:

- acknowledge to the employee the date of receipt of their disclosure (and if the disclosure was made orally, summarise the disclosure that was made);
- consider the disclosure and whether it warrants investigation;
- check with the employee whether they have also made a disclosure somewhere else;
- deal with the matter by doing one or more of the following:
 - investigate the disclosure;
 - address any serious wrongdoing by acting or recommending action;

¹⁹ Section 13 of the PDA 2022.

²⁰ Section 14 of the PDA 2022.

²¹ See the Ombudsman’s [online OIA calculator](#) to work out when the 20 working days are up.

- refer the disclosure to an appropriate authority; and/or
- decide that no action is required.

The organisation should inform the employee, with reasons, what they have done or are doing to deal with the matter.

When it is impracticable to deal with the matter within 20 working days, the organisation should still acknowledge receipt of the disclosure, consider whether it warrants investigation, and check with the employee whether the disclosure has been made somewhere else within 20 working days. However, the organisation can then take longer to deal with the matter, as long as it:

- informs the employee how long it is expected to take; and
- keeps the employee updated about progress.

An organisation's procedure should include a commitment that the employee will be kept informed of the progress and outcome of their disclosure.

If the organisation decides that no action is required, it must inform the discloser of that decision, with reasons.²²

Reasons to take no action may include that:

- the requirements of the PDA are not met, to be an *employee* who has made a *protected disclosure* about *serious wrongdoing*;
- the length of time since the alleged wrongdoing makes an investigation impractical or undesirable; or
- the matter is better addressed by other means.

The organisation may also refer a protected disclosure to an appropriate authority. Before making a referral, the organisation must consult the employee who made the disclosure and the intended recipient of the referral.²³

Organisations should also be aware that when an appropriate authority receives a disclosure from the organisation's employee, the authority may decide to refer the matter back to the organisation. If so, the organisation must inform both the authority and the employee what is being done to deal with the matter.²⁴

Information for staff receiving the disclosure

²² Section 15 of the PDA 2022.

²³ Section 16 of the PDA 2022.

²⁴ Section 16(5) of the PDA 2022.

Common concerns of employees who have made a protected disclosure are that they:

- were not advised of what to expect after making the disclosure;
- did not know the process that was being followed by their organisation; and
- were not kept informed either throughout the investigation or at the outcome.

Detailed, but sufficiently flexible, procedures can provide a useful and reassuring source of information to employees who have made a disclosure, as well as to those who must receive and handle disclosures.

Procedures should encourage the appropriate consideration of all disclosures received by the organisation, as well as adequate updates to the employee on the handling and outcome of their disclosure. The organisation should bear in mind that an employee has additional steps available to them, if they believe that their organisation is taking insufficient action on a disclosure.

Internal procedures should include additional information to support the organisation's staff who are responsible for receiving a disclosure, such as:

- where information about protected disclosures should be recorded by the recipient of the disclosure, in order to keep it confidential;
- who within the organisation will ordinarily be informed of a protected disclosure having been made, and any exceptions (e.g. where there is a conflict of interest due to who is allegedly involved in the serious wrongdoing);
- how and when the organisation will undertake an assessment of the disclosure to determine whether it falls within the definition of serious wrongdoing;
- how the organisation will assess and implement any protective measures for the employee;
- how the organisation will maintain confidentiality of the employee's identity, and what will happen in the event that potentially identifying information needs to be released; and
- how and when the employee will be kept updated about what is being done.

What if the disclosure is not actually covered by the PDA?

Both employees making a disclosure, as well as those receiving them, should be aware that a disclosure of information is protected, as long as:

- the employee believes on reasonable grounds that there is, or has been, serious wrongdoing;
- information is disclosed to their organisation or an appropriate authority in accordance with the PDA; and
- the employee does not disclose in bad faith.

This means that, even if an employee is mistaken as to the nature or accuracy of the information (ie the allegations do not amount to serious wrongdoing), the matter should still be treated as a protected disclosure.²⁵

In these circumstances, an employee is still protected by the confidentiality provisions of the PDA, has immunity from any civil, criminal or disciplinary proceedings, and is protected from retaliatory action, unfavourable treatment and victimisation.

Even if an employee's disclosure is not covered by the PDA, the concerns that they have raised should still be considered under the organisation's usual procedures. This is important to the organisation's commitment to fostering a 'speak up' culture.

It is important that an organisation's procedures make this clear, and that it is understood by all employees, including those who may receive or handle disclosures.

What can an employee do if they believe their disclosure is not being addressed?

An employee may believe on reasonable grounds that their organisation²⁶ has not acted as it should or has not dealt with the matter so as to address the serious wrongdoing. In this case the employee may make the disclosure to:²⁷

- an appropriate authority, including an Ombudsman (which the employee can do at any time);
- a Minister; or
- the Speaker, for organisations supporting Parliament.²⁸

²⁵ In accordance with section 11 of the PDA 2022.

²⁶ Or an appropriate authority if the disclosure has been made there.

²⁷ Section 14 of the PDA 2022.

²⁸ A further disclosure may be made to the Speaker if it relates to serious wrongdoing in or by an Officer of Parliament (Auditor-General, Ombudsman, Parliamentary Commissioner for the Environment), the Office of the Clerk of the House of Representatives, or the Parliamentary Service.

Special rules apply to escalating disclosures that involve international relations information or intelligence and security information, to ensure the security of that information.²⁹

Protections available to employees

A public sector organisation's internal procedures must explain the protections provided by the PDA. Private or not-for-profit organisations are encouraged to do the same.

The protections an employee is entitled to are:³⁰

- confidentiality;³¹
- protection from retaliation or unfavourable treatment by the employer;³²
- immunity from civil, criminal and disciplinary proceedings '*because of making...the disclosure*';³³ and
- application of the anti-victimisation provisions of the *Human Rights Act 1993*.³⁴

These protections apply even if the employee initially makes their disclosure another person for the purposes of seeking advice about making a disclosure, as long as they do so confidentially.³⁵

Organisations may wish to make clear that the protections will not be available to employees who knowingly make false allegations or otherwise act in bad faith.

Confidentiality

Organisations in receipt of a protected disclosure must use their best endeavours to keep confidential all information that might identify the employee making the disclosure.³⁶ There are limited exceptions to this:

- where the employee consents to the release of identifying information; or
- if there are reasonable grounds to believe that the release of identifying information is *essential*:
 - for effective investigation of the disclosure;

²⁹ Sections 27 and 28 of the PDA 2022.

³⁰ Part 3 of the PDA 2022.

³¹ Sections 17, 18 and 19 of the PDA 2022.

³² Sections 20 and 21 of the PDA 2022.

³³ Section 23 of the PDA 2022.

³⁴ Section 22 of the PDA 2022.

³⁵ Section 11(4)(d) of the PDA 2022.

³⁶ Section 17 of the PDA 2022.

- to prevent a serious risk to public health, public safety, the health or safety of any individual, or the environment;
- to comply with the principles of natural justice; or
- to an investigation by a law enforcement or regulatory agency for the purpose of law enforcement.

The PDA sets a high threshold for when information that identifies or risks identifying the employee who made the disclosure may be disclosed—it must be **essential** to disclose the particular information, for one of the above reasons.

A decision to disclose identifying information for natural justice reasons or to undertake an investigation should not be made lightly and would apply only in very narrow circumstances, where there was no other alternative. Careful consideration is required, and the responsible decision maker should seek legal advice on this point where practicable.

Obligation to consult the employee before and after disclosure of identifying details

The organisation **must** consult the employee **in advance**, where release of identifying information is considered essential to effectively investigate the disclosure, or comply with the principles of natural justice.³⁷

The organisation **must if practicable** consult the employee **in advance**, where release of identifying information is considered essential to:

- prevent a serious risk to public health, public safety, the health or safety of any individual, or the environment; or
- to an investigation by a law enforcement or regulatory agency for the purpose of law enforcement.³⁸

In all cases, the organisation **must** inform the employee **after** releasing identifying information (even if consultation was undertaken prior to the decision to release).³⁹

Staff should also be encouraged to discuss openly with employees who have made a disclosure whether there might be any particular concerns or issues with maintaining confidentiality, as well as any additional protections that could be put in place to mitigate the consequential effects of identification, where it is essential to disclose identifying information.

The employee may make a complaint to the Privacy Commissioner about an interference with their privacy, if information that might identify the employee is released in breach of the obligations of confidentiality.⁴⁰

³⁷ Section 17(3)(a) of the PDA 2022.

³⁸ Section 17(3)(b) of the PDA 2022.

³⁹ Section 17(4) of the PDA 2022.

⁴⁰ Section 18 of the PDA 2022.

Internal procedures should supplement a policy commitment to confidentiality, by providing practical guidance for staff on how the organisation goes about maintaining confidentiality, and the precise responsibilities and actions required of staff who receive or handle protected disclosures. For example, will communications or documents pertaining to the disclosure have restricted access, and routinely omit the name and position of the employee who made the disclosure or use a pseudonym? Will any meetings needed with the employee be held in a safe and private place, perhaps offsite?

Ways to investigate the disclosure without revealing the employee's identity should be considered, such as:

- obtaining evidence from another authoritative source, such as documents, video footage, telephone or computer records;
- interviewing the employee who made the disclosure as part of a process of interviewing other staff (preferably not first or last); and
- planning how to best describe the alleged wrongdoing in a manner that does not inadvertently reveal the identity of the employee who made the disclosure.

Internal procedures should expressly provide for consultation with the employee who made the disclosure, and should encourage or require staff to obtain legal advice, prior to the disclosure of any potentially identifying information.

Overall, conversations with the disclosing employee should:

- be honest and realistic about any difficulties with maintaining confidentiality, as well as reasons why the organisation may consider it essential to disclose identifying information (for example, if it will assist with investigation);
- take place early on in the process, close in time to when the disclosure is made; and
- continue throughout the process of handling and addressing the disclosure, as circumstances and risks change.

Processes should be put in place to mitigate any harm that may be associated with the disclosure of the employee's identity, and to support them through the process. Consider peer support and senior staff member support, as well as access to external support. Monitor the welfare of the employee.

If identifying information is inadvertently disclosed, take all possible steps to limit further disclosure and mitigate the effects of the disclosure, as would be required for any privacy breach.

Organisations may also wish to refer to the effect of section 19 of the PDA, which provides that a request for official information that might identify a person who has made a protected disclosure must be refused as contrary to the PDA.⁴¹

For further information, see our [Checklist: Protecting whistleblower confidentiality](#).

Obligation not to retaliate or treat less favourably

An employer must not retaliate⁴² or threaten to retaliate against an employee because the employee has made, or intends to make, a protected disclosure. If this occurs the employee is able to take a personal grievance under the Employment Relations Act 2000.⁴³

A discloser who is treated less favourably than others in the same or similar circumstances may also be able access the anti-victimisation protections in the Human Rights Act 1993. This applies even if the person is not covered by the Employment Relations Act.⁴⁴

Immunity from civil, criminal and disciplinary proceedings

An employee who makes a protected disclosure is protected from liability from any civil, criminal or disciplinary proceeding because of making the disclosure.

In addition, an organisation which receives a protected disclosure and refers it to an appropriate authority is protected from liability from any civil, criminal or disciplinary proceeding because of referring the disclosure.

This applies even if there is a prohibition or restriction on disclosing information such as in any contract, agreement or internal procedure. The PDA cannot be contracted out of so the rights and protections apply even if the employee has agreed not to disclose information, for example, under an employment agreement, confidential settlement or non-disclosure agreement.⁴⁵

Support for employees making a disclosure

Research has shown that employees who report serious wrongdoing are at real risk of suffering some form of retaliation within the workplace. Australian research suggests up to 22 per cent of employees who reported wrongdoing perceived themselves as having been mistreated as a

⁴¹ Section 17(c)(i) of the Local Government Official Information and Meetings Act 1987, section 18(c)(i) Official Information Act 1982.

⁴² Including dismissing or retiring the employee, failing to offer the same terms and conditions of employment as other employees, and subjecting the employee to any detriment or disadvantage. See section 21(4) of the PDA 2022.

⁴³ Sections 20 and 21 of the PDA 2022.

⁴⁴ This also applies to anyone who has encouraged another person to make use of their rights, or has promoted the rights of another person, under this Act.

⁴⁵ Section 23(2) and 24 of the PDA 2022.

result of making the disclosure.⁴⁶ Even where retaliatory conduct does not occur, most employees are likely to experience stress after making a disclosure. Some 43 per cent of whistleblowers report suffering ‘extreme’ stress, with 62 per cent experiencing some increase in stress.⁴⁷

Employers have responsibilities and obligations under the *Health and Safety at Work Act 2015* to ensure the health and safety of their workers, the definition of which includes both physical and mental health. It is therefore important that organisations take steps to identify, assess and mitigate the risk of detriment to an employee who makes a disclosure, and also provide support to them following the disclosure.

In addition to this, one of the factors influencing employees’ willingness to report serious wrongdoing is their experience of organisational support in the past, and observed behaviours towards other whistleblowers.⁴⁸

Internal policy should provide a clear commitment to preventing retaliatory conduct and other detrimental effects when an employee makes a disclosure. Procedures should identify available supports to employees who have made, or are considering making, a disclosure. These supports should include:

- employee assistance programmes, or other external wellbeing assistance;
- the provision of peer support to the employee (by an individual not involved in investigating the disclosure); and
- identification of an appropriately senior contact within the organisation, to whom the employee can escalate any concerns or issues.

Procedures should supplement this commitment and available support by providing for some form of risk assessment and ongoing monitoring to ensure that risks do not eventuate, to account for risks that may not arise until action commences on the disclosure, and to implement support services as required.

Organisational procedures should also refer to the role of the Ombudsman in providing information and guidance to employees who have made a disclosure. This extends to the ability of an employee, in the case of a public sector agency, to complain to the Ombudsman about the handling of their protected disclosure.

Seeking further advice

An organisation’s procedures should also identify sources of further advice for both employees considering making a disclosure, and staff who have received a disclosure. Referenced sources should be both internal and external. For example:

⁴⁶ Above, n 2, pp. 60 – 61.

⁴⁷ Above, n 2, pp. 60 – 61.

⁴⁸ Above, n 2, pp. 75 – 76.

- Within the organisation, identification of individuals who can provide guidance. This might include both technical and procedural advice on the receipt and handling of disclosures within the organisation, as well as advice on available support and what to do about any reprisal conduct or detriment that may be occurring.
- Reference to the Ombudsman’s statutory role in providing information and guidance to both organisations handling protected disclosures, and a confidential advice service for employees who are considering making, or who have made protected disclosures. Advice can be sought from the Ombudsman in a number of ways:

Telephone: 0800 802 602
Email: info@ombudsman.parliament.nz
Post: PO Box 10152, Wellington 6143

- Links to external information, such as that produced by the Ombudsman and the Public Service Commission. In particular:
 - The Ombudsman’s [Guide to Making Protected Disclosures](#).
 - The Public Service Commission’s [Speaking Up Standards](#), which should also be consulted in respect of the ‘continuum’ of speak-up culture. The standards set out how organisations should go about seeking *all* feedback and concern, not just protected disclosures.

Communicating and embedding your policy and procedures

The PDA requires that public sector organisations publish their internal procedures widely, and republish them at ‘regular intervals’.⁴⁹ Private and not-for-profit organisations should also seek to have their procedures well known and accessible, and preferably published, for both current and former employees.

Organisations can achieve the effective communication of their policy and procedures in a number of key ways:

- Promotion of the policy and procedures by senior management, including in staff communications and newsletters, or Chief Executive updates.
- Leadership commitment to, and promotion of, a general culture of openness and speaking up.
- Publication of the policy and procedures on the organisation’s website (or for private sector and not-for-profit organisations a reference on the website to how former employees can anonymously access the policy and procedures). This is important given that the definition of ‘employee’ under the PDA extends to former employees and

⁴⁹ Section 29(3) of the PDA 2022.

contractors, parties who otherwise might need to contact individuals within the organisation for a copy of this information.

- Visibility of the policy and procedures within workspaces (electronic and physical). For example, on an intranet, posters, noticeboards and payslips.
- Periodic discussion within staff meetings.
- Where possible, positive reinforcement and reporting on the outcomes of concerns that have been raised within the organisation.

There are a number of additional steps that should also be taken:

- Ensure that policy and procedures are user-friendly, and understood by all. Consider the various audiences within your organisation, and take into account any communication needs of particular employees.
- Keep all policy and procedures consistent. Cross-reference and link them to one another where relevant, including to external documents such as professional codes of conduct and ethics. An organisation's PDA policy and procedures may be just one in a suite of measures aimed at encouraging and supporting employees to 'speak up'. There may be areas of commonality, and if an organisation's 'speaking up' policies are robust and comprehensive, the PDA procedures will supplement this overarching commitment and approach to the reporting of *all* concerns.
- Regular review, in particular of procedures, to ensure that they remain up-to-date. Once procedures appear to be out of step with current organisational process or structure, there is a risk that the underlying policy and aims of the procedures will also be seen as no longer relevant.
- Ensure that employees (and former employees) can easily find and access the policy and procedures without the need to consult other colleagues. This can be a deterrent where identification and reprisal are a concern.

We have a policy and procedures – we’re sorted, right?

The fact that an organisation has both policy and procedures relating to the PDA is not sufficient alone to encourage and protect employees who are concerned about serious wrongdoing.

For many organisations, what will also be required is culture change. This could include:

- Regular discussion and reinforcement of the organisation’s commitments by the Chief Executive and senior management.
- Tailored, regular training, provided in some form to *all* employees.
- Regular communications reinforcing the policy and procedures.
- When you do receive a protected disclosure about serious wrongdoing, as well as lesser reports of concern or just feedback, handling it appropriately. This includes following legislative requirements and your internal procedures, taking any allegations of wrongdoing seriously and where appropriate investigating, and taking all necessary steps to keep the identity of the employee who made the disclosure confidential. Employees will be watching, and an organisation’s culture will be impacted if such concerns are perceived to be poorly handled.

Training

Training on protected disclosures should be provided to all staff when they commence work for the organisation (induction/orientation), as well as regular refresher training for all staff. This training might also cover wider expectations that concerns about lesser wrongdoing should be raised. At a minimum, training should cover:

- the organisation’s commitment to supporting, and encouragement of, the reporting of serious wrongdoing;
- where internal policy and procedures can be accessed;
- how internal policy and procedures operate;
- confidentiality and unacceptable reprisal conduct; and
- for management staff, the obligation to support employees who make a report, and to foster a professional environment in which reporting is encouraged and valued.

An organisation should also consider how best to provide specialist training and support to those staff members who will be receiving and handling protected disclosures. This might include:

- specific training on legislative and organisational procedural requirements for handling protected disclosures, including confidentiality requirements and risk management; and

- nominated advisors for those receiving protected disclosures, who can be approached for confidential advice, including legal advice.

Appendix 1. Checklist

Best practice PDA policy and procedures

This checklist will assist organisations assessing their existing policy and procedures, as well as those planning new ones. It is intended to help identify areas for improvement, so that policy and procedures represent best practice as opposed to bare compliance with the provisions of the PDA.

Protected disclosures policy and procedures should include:

<input type="checkbox"/>	Identification of the PDA 2022 as the relevant legislation.
<input type="checkbox"/>	Strong statement of organisational commitment to supporting the disclosure of wrongdoing by employees, and to properly handling disclosures.
<input type="checkbox"/>	Recognition that employees who report wrongdoing are helping to promote integrity, accountability and good management within the organisation, and that reporting is highly valued.
<input type="checkbox"/>	Commitment to the proper handling of disclosures, including regular updates, risk management, and support.
<input type="checkbox"/>	Information about who the policy and procedures apply to – who can make a disclosure?
<input type="checkbox"/>	Adequate explanation of what is ‘serious wrongdoing’, and the need for the employee to believe on reasonable grounds that the information they are disclosing is true, or likely to be true.
<input type="checkbox"/>	Reference to other relevant policies, in particular those relating to less serious forms of concerns or wrongdoing.
<input type="checkbox"/>	Identification and explanation of internal and external reporting paths, including an explanation that an employee can report wrongdoing externally to an appropriate authority at any time.
<input type="checkbox"/>	Identification of the roles within the organisation to whom a disclosure can be made.
<input type="checkbox"/>	Responsibilities of staff to whom a disclosure is made, actions that must be taken.
<input type="checkbox"/>	Obligations on the receiver on receipt of a disclosure.
<input type="checkbox"/>	Advice on the practical steps that should be taken to make the disclosure (whether it should be in writing, where it should be directed, what to do if making the disclosure anonymously).

Best practice PDA policy and procedures

<input type="checkbox"/>	Strong commitment to confidentiality, and an outline of the steps that will be taken to protect confidentiality, as well as steps that must be taken before any identifying information is disclosed.
<input type="checkbox"/>	Information about how the employee will be supported, and any risk assessments and ongoing monitoring.
<input type="checkbox"/>	Protections available to the employee, and what the employee should do in the event that they need support or are concerned about reprisal conduct or other detrimental effects.
<input type="checkbox"/>	Provision for regular review and updates of the policy and procedures.
<input type="checkbox"/>	Advice on where staff who may be thinking of making a disclosure can seek further information.
<input type="checkbox"/>	Written in plain English, suitable for all audiences within the organisation.
<input type="checkbox"/>	Reference to the Ombudsman's guidance for employees .
<input type="checkbox"/>	For public sector organisations, reference to the PSC's Model Standards on speaking up.

Embedding your PDA policy and procedures

<input type="checkbox"/>	Leadership and promotion of the PDA and 'speak up culture'.
<input type="checkbox"/>	Visible and explicit statements about the organisation's commitment to receiving concerns about serious wrongdoing in the workplace.
<input type="checkbox"/>	Policy and procedures are published and readily accessible to all employees, including former employees.
<input type="checkbox"/>	Training is provided to all staff, with specialist training provided to those who receive and handle protected disclosures.
<input type="checkbox"/>	Regular review and update, and re-communication of the policy and procedures.

Acknowledgement

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