

## Guidance for Ministers

Protected Disclosures (Protection of Whistleblowers) Act 2022

*This guide provides information and guidance for Ministers who may receive protected disclosures.*

*The [Protected Disclosures \(Protection of Whistleblowers\) Act 2022](#) (or PDA) is about disclosing serious wrongdoing – sometimes called ‘whistle-blowing’ – and explains the procedures to be followed when making a disclosure, as well as the protections available to those who do make a disclosure.*

## Contents

<b>Summary – what a Minister should do when approached by a discloser</b>	<b>4</b>
<b>What is the Protected Disclosures Act?</b>	<b>5</b>
<b>What is serious wrongdoing?</b>	<b>5</b>
<b>Who is protected?</b>	<b>6</b>
<b>When is a disclosure protected?</b>	<b>6</b>
<b>What protections are there?</b>	<b>7</b>
<b>A Minister’s role under the Act</b>	<b>7</b>
<b>If the Minister is approached for advice about making a protected disclosure</b>	<b>8</b>
<b>Can a protected disclosure be made to a Minister in the first instance?</b>	<b>8</b>
What should a Minister do if they receive a disclosure in the first instance?	9
<b>Second disclosure may be made to a Minister</b>	<b>9</b>
Exceptions	9
Serious wrongdoing by an Officer of Parliament, the Office of the Clerk of the House of Representatives or the Parliamentary Service	9
Intelligence and security information	10
International relations information	10
What should a Minister do if they receive a second disclosure?	10
What does the Cabinet Manual say about what a Minister should do?	10
What does the Act say about what a Minister should do?	10
Guidance for receivers	11
Protections	12
Confidentiality	12
Other protections	12
Conclusion – what a Minister may do	13
Seek advice	13
Deal with the disclosure	13
<b>What is the role of the Ombudsman under the Act?</b>	<b>14</b>
<b>Appendix 1: Ombudsman contact details and guidance documents</b>	<b>15</b>
Contact details	15
Ombudsman online guides	15
<b>Appendix 2: Some key appropriate authorities</b>	<b>16</b>
Commissioner of Police	16
Controller and Auditor-General	16

Director of the Serious Fraud Office (SFO) _____	16
Inspector-General of Intelligence and Security _____	16
Ombudsman _____	17
Parliamentary Commissioner for the Environment _____	17
Independent Police Conduct Authority (IPCA) _____	18
Solicitor-General _____	18
Public Service Commission _____	18
Health and Disability Commissioner _____	18
Other appropriate authorities _____	19

## Summary – what a Minister should do when approached by a discloser

<a href="#">Seeking advice before making a disclosure</a>	<a href="#">First disclosure</a>	<a href="#">Second disclosure</a>
<p>A person might approach a Minister on a confidential basis for advice about whether or how to make a protected disclosure.</p> <p>If a Minister is unsure how to respond to the query, a Minister can consult with the Ombudsman or refer the person to the Ombudsman for advice.</p>	<p>A discloser <b>cannot</b> generally disclose to a Minister in the first instance.</p> <p>A disclosure must be first made to the discloser’s organisation, the Ombudsman or an appropriate authority (the receiver).</p> <p>If a Minister receives a disclosure in the first instance, <a href="#">the Minister should</a>:</p> <ul style="list-style-type: none"> <li>• treat the identity of the discloser confidentially;</li> <li>• explain that a disclosure cannot be made to a Minister in the first instance; and</li> <li>• suggest they approach the Ombudsman for advice.</li> </ul>	<p>A discloser can make a <i>further disclosure</i> to a Minister if the discloser believes the receiver has not handled the first disclosure as it should under the Act, or has not acted to address the serious wrongdoing.</p> <p><a href="#">If a Minister receives a further disclosure, the Minister should</a>:</p> <ul style="list-style-type: none"> <li>• follow the <a href="#">guidance</a> set out in section 13; and</li> <li>• <a href="#">protect</a> the confidentiality of the discloser’s identity and be aware of the other protections under the Act.</li> </ul> <p>In deciding what to do, a Minister may <a href="#">seek advice</a> from:</p> <ul style="list-style-type: none"> <li>• the Ombudsman; or</li> <li>• the relevant agency chief executive.</li> </ul> <p><i>The Minister must keep the identity of the discloser confidential when seeking advice from the relevant agency chief executive. The obligation of confidentiality does not apply when consulting with the Ombudsman.</i></p> <p><a href="#">Exceptions</a></p> <ul style="list-style-type: none"> <li>• Serious wrongdoing by an Officer of Parliament, the Office of the Clerk of the House of Representatives or the Parliamentary Service—any further disclosure should be made to the Speaker.</li> <li>• Intelligence and security information—any further disclosure should be made to the Prime Minister or Minister responsible for an intelligence and security agency.</li> <li>• International relations information—any further disclosure should be made to the Prime Minister or the Minister responsible for foreign affairs or trade.</li> </ul>

## What is the Protected Disclosures Act?

The [Protected Disclosures \(Protection of Whistleblowers\) Act 2022](#) (PDA) is a law that helps people to report serious wrongdoing they believe is happening in their workplace, without having to worry that action will be taken against them.

The purpose of the PDA is to promote the public interest by:

- facilitating the disclosure and timely investigation of serious wrongdoing; and
- protecting people who make disclosures in accordance with the PDA.<sup>1</sup>

The PDA applies to employees in both the public sector and private sector, including the not for profit sector.

## What is serious wrongdoing?

Serious wrongdoing has a particular meaning under the PDA.<sup>2</sup> It does not apply to all possible wrongdoing that might be going on in a workplace.

**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
- oppressive, unlawfully discriminatory, or grossly negligent conduct or 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** (the government).

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<sup>1</sup> Section 3.

<sup>2</sup> As defined under section 10.

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 Act.<sup>3</sup>

If you are unsure about whether the information in a disclosure relates to serious wrongdoing, [contact the Ombudsman](#) for advice.

## Who is protected?

The PDA protects people who disclose serious wrongdoing in their workplace. To make a protected disclosure, the person must be **someone who is or has been**:

- an employee of the organisation (ie, a salary or wage earner);
- a secondee to the organisation;
- contracted to do work for the organisation;
- involved in the management of the organisation (including a member of a board or governing body);
- a volunteer to the organisation;
- a homeworker (within the meaning of section 5 of the [Employment Relations Act 2000](#)); or
- a member of the Armed Forces (with the New Zealand Defence Force).<sup>4</sup>

Essentially, the discloser must be, or have been, in an employment-type relationship with the organisation where the serious wrongdoing is allegedly occurring.

## When is a disclosure protected?

A disclosure **will be protected** if:

- the person believes on reasonable grounds that there is, or has been, serious wrongdoing in their workplace (even if their belief is mistaken);
- they disclose information about the serious wrongdoing in accordance with the PDA (even if they do not mention the Act):
  - to their employer in accordance with any internal procedures or to the head or deputy head of their organisation, or
  - to an appropriate authority;

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<sup>3</sup> Public Service Commission [guidance](#) on protected disclosures.

<sup>4</sup> See the 'meaning of discloser' in section 8.

- they substantially comply with the PDA's requirements (even if they don't technically comply);
- they disclose information confidentially to another person, to seek advice about whether or how to make a protected disclosure.<sup>5</sup>

A disclosure **won't be protected** if:

- the person acts in bad faith; or<sup>6</sup>
- the information they're disclosing is protected by legal professional privilege.<sup>7</sup>

## What protections are there?

When someone makes a protected disclosure, they will be protected in the following ways:

- their identity must be kept confidential unless certain exceptions apply (such as for the effective investigation of the disclosure or to comply with the principles of natural justice);<sup>8</sup>
- they will be protected from civil, criminal and disciplinary proceedings that might otherwise arise *'because of making the disclosure'*;<sup>9</sup>
- they will be protected from retaliatory action or unfavourable treatment by their employer;<sup>10</sup> and
- they will be protected by the anti-victimisation provisions of the [Human Rights Act 1993](#).

For further information about these protections, [contact the Ombudsman](#).

## A Minister's role under the Act

A person might approach a Minister for advice before making a protected disclosure.

While it is not generally possible for a person to make a protected disclosure to a Minister in the first instance, the Act provides for escalation of a protected disclosure to a Minister where a discloser has made a disclosure already and believes that the receiver has not handled the

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<sup>5</sup> Section 11.

<sup>6</sup> Section 9. Acting in bad faith is doing something for dubious motives, e.g. intimidation

<sup>7</sup> Section 39.

<sup>8</sup> Sections 17, 18 and 19.

<sup>9</sup> Section 23.

<sup>10</sup> Sections 20 and 21.

disclosure as it should under the Act or has not addressed the serious wrongdoing. An Ombudsman may also refer a disclosure to a Minister in these circumstances.

## If the Minister is approached for advice about making a protected disclosure

A person might approach a Minister on a confidential basis, for advice about whether or how to make a protected disclosure.<sup>11</sup> A discloser can reveal information to another person in confidence (including a Minister) for the purpose of seeking advice about whether or how to make a protected disclosure in accordance with the Act (see section 11(4)(d)).

If a Minister is unsure how to respond to the person's query, a Minister can:

- consult with the Ombudsman about what advice to provide; or
- inform them about the Ombudsman's dedicated function for providing advice about protected disclosures, and encourage them to contact the Ombudsman.

## Can a protected disclosure be made to a Minister in the first instance?

A discloser **cannot** generally disclose to a Minister in the first instance. Such a disclosure would not be protected for the purpose of the Act.

As set out above, section 11 of the PDA states that a discloser is entitled to protection when making a protected disclosure about serious wrongdoing in their workplace to:

- their organisation (in accordance with internal procedures, or to the head or deputy head of the organisation); and/or
- an appropriate authority.<sup>12</sup>

An appropriate authority includes the head of any public sector organisation, any officer of Parliament (i.e. Ombudsman, Auditor General or Parliamentary Commissioner for the Environment), or the membership body of a profession with the power to discipline its members.<sup>13</sup>

The PDA lists examples of appropriate authorities and the types of concerns they might consider, in [Schedule 2](#). Key appropriate authorities are listed at [Appendix 2](#).

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<sup>11</sup> Section 11(4)(d).

<sup>12</sup> Sections 11(2) and (3) of the PDA 2022. This is a significant amendment to the 2000 Act which required that an employee report wrongdoing to their employer in the first instance, unless certain exceptions applied.

<sup>13</sup> Section 25.



An appropriate authority **does not** include a Minister, a member of Parliament or the media.<sup>14</sup> A discloser **cannot therefore make a protected** disclose to a Minister in the first instance.

## What should a Minister do if they receive a disclosure in the first instance?

Given the wide variety of circumstances that may lead someone to try to make a disclosure to a Minister in the first instance, a Minister should generally:

- treat any such disclosure confidentially;
- explain that disclosures cannot be made to a Minister in the first instance; and
- suggest they approach the Ombudsman for advice.

Ministers may wish to refer the person to Ombudsman guidance on [Making a protected disclosure](#).

## Second disclosure may be made to a Minister

While a disclosure cannot be made to a Minister in the first instance, section 14 of the PDA sets out the discloser's right to escalate their protected disclosure to a Minister, if they believe on reasonable grounds that their organisation or the appropriate authority to whom they made the disclosure has not acted as it should in handling the disclosure (see section 13) or not acted to address the serious wrongdoing.<sup>15</sup>

An Ombudsman may also refer a disclosure to a Minister in these circumstances, with consent of the discloser and after consultation with the Minister.<sup>16</sup>

## Exceptions

### Serious wrongdoing by an Officer of Parliament, the Office of the Clerk of the House of Representatives or the Parliamentary Service

The discloser is entitled to protection for escalating a protected disclosure to the Speaker, not a Minister (see section 14(3)).

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<sup>14</sup> Section 25(1)(e).

<sup>15</sup> Section 14.

<sup>16</sup> Section 32.

## Intelligence and security information

The only Minister a discloser may escalate a disclosure of intelligence and security information to is the Prime Minister or the Minister responsible for an intelligence and security agency (see section 27(7)).

## International relations information

The only Minister a discloser may escalate a disclosure of international relations information to is the Prime Minister or the Minister responsible for foreign affairs or trade (see section 28(3)).

## What should a Minister do if they receive a second disclosure?

### What does the Cabinet Manual say about what a Minister should do?

The [Cabinet Manual](#) provides some brief guidance for Ministers about the Protected Disclosures Act:

*3.101 An employee may wish to disclose a serious wrongdoing in or by an agency under the Protected Disclosures (Protection of Whistleblowers) Act 2022. A Minister may receive such a disclosure under the Act only if the employee has first followed the agency's internal procedures for such disclosures, or has disclosed the matter to the agency's chief executive or to an appropriate authority (as defined in the Act).*

*3.102 If, an employee having disclosed a serious wrongdoing, the matter has not been resolved to the employee's satisfaction, the Minister may:*

*(a) refer the matter to an appropriate authority or to the Ombudsman for consideration, if the Ombudsman has not already considered the matter; or*

*(b) where appropriate, commission an independent investigator to investigate the disclosure on the Minister's behalf.*

### What does the Act say about what a Minister should do?

A Minister who receives a second disclosure is treated as a *receiver* for the purpose of the Act.<sup>17</sup> This means:

- a Minister should follow the guidance for receivers; and
- the protections in the Act apply to the discloser.

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<sup>17</sup> Section 14(2).

## Guidance for receivers

The section 13 guidance states that within 20 working days<sup>18</sup> of receiving a protected disclosure, the Minister as receiver should:<sup>19</sup>

- acknowledge receipt of the disclosure;
- consider whether it warrants investigation;
- check with the discloser to see whether they have made the disclosure to anyone else; and
- deal with the matter by doing one or more of the following:
  - investigating the disclosure;
  - addressing any serious wrongdoing by acting or recommending action;
  - referring the disclosure—after consulting with the discloser and the intended recipient—to an appropriate authority (including the Ombudsman), or back to the organisation;<sup>20</sup> and/or
  - deciding that no action is required.

The Minister should inform the discloser, with reasons, what they have done or are doing to deal with the matter. When it is impracticable to complete all these actions within 20 working days, the Minister should commence the process, inform the discloser of a timeframe within which they expect to deal with the matter and keep them updated.

If the Minister decides that no action is required, they must inform the discloser of that decision, with reasons. Section 15 sets out reasons that may be appropriate for deciding that no action is required:<sup>21</sup>

- the Minister doesn't consider they meet the requirements of the PDA to be an *employee* that 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.

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<sup>18</sup> See the Ombudsman's [online OIA calculator](#) to work out when the 20 working days are up.

<sup>19</sup> Section 13. Note: this is guidance only, and does not confer a legal right or impose a legal obligation on a receiver.

<sup>20</sup> All the obligations under the PDA still apply to the receiver of the referral, including confidentiality and the various [protections](#).

<sup>21</sup> Section 15.

## Protections

### Confidentiality

The key protection that a Minister should be aware of is the protection of confidentiality. A Minister, as a receiver, must use their best endeavours to keep confidential any information that might **identify** the discloser.<sup>22</sup>

However, there are some exceptions to this:

- where a discloser consents to the release of identifying information;
- where there are reasonable grounds to believe that the release of identifying information is essential:
  - for the effective investigation of the disclosure;
  - to comply with the principles of natural justice;
  - 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.

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

Further guidance<sup>23</sup> is available about confidentiality, including the obligation to consult disclosers before identifying them and practical ways to protect confidentiality.

### Other protections

Other protections for disclosers under the Act include:

- an obligation for their employer not to retaliate, or threaten to retaliate, against a them;<sup>24</sup>
- an obligation for a person not to treat, or threaten to treat, another person less favourably because of a protected disclosure;<sup>25</sup>

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<sup>22</sup> Section 17.

<sup>23</sup> See [Protected disclosures: internal policies and procedures](#), pages 18-21; [Checklist: Protecting whistleblower confidentiality](#).

<sup>24</sup> Section 21.

<sup>25</sup> Section 22.

- immunity from any civil, criminal or disciplinary proceedings because of making or referring the disclosure.<sup>26</sup>

## Conclusion – what a Minister may do

### Seek advice

A Minister may receive disclosures about matters dealt with by the agencies in their portfolio. In some cases, a Minister may wish to seek advice from the relevant agency chief executive about the matter.

Ministers are still subject to the provisions requiring them to keep the identity of the discloser confidential when seeking advice from an agency chief executive. This means there are two options available to a Minister when seeking advice from an agency chief executive:

- discuss the nature of the concerns only, while ensuring that no identifying information about the discloser is revealed—this would require careful consideration to ensure information that could by its nature identify the discloser is not inadvertently shared; or
- seek the consent of the discloser first, in order to share information that would identify them when seeking advice—there may be a reason a discloser has chosen to disclose to a Minister, as opposed to someone else, such as a chief executive, so it is important to consult with the discloser and understand any concerns they may have.

The Ombudsman can also provide advice in confidence to a Minister if they receive a second disclosure.

When consulting with the Ombudsman, the confidentiality obligations about the identity of the discloser do not apply. A fundamental part of the Ombudsman’s role is to provide information and guidance to any person on any matter about the PDA.<sup>27</sup> The purpose of this role is to facilitate the proper administration of the Act, which the Ombudsman could not do if people could not have full and unfettered discussions with the Ombudsman. Ministers can feel confident in consulting with the Ombudsman as staff are subject to statutory secrecy obligations.

### Deal with the disclosure

Based on the Cabinet Manual and the guidance set out in the Act, a Minister who receives a second disclosure may choose to:

- refer the disclosure (after consultation with the discloser and the intended recipient of the referral) to the organisation concerned, or an appropriate authority, such as the Ombudsman;
- investigate the disclosure, e.g. by commissioning an independent investigator; or

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<sup>26</sup> Section 23.

<sup>27</sup> Section 30.

- decide to take no action—in this instance they should inform the discloser about this decision and explain why, following the guidance for receivers.

In deciding what action to take, it would be useful for a Minister to consider the nature of the alleged serious wrongdoing, and the reasons why the discloser believes their organisation or the appropriate authority to whom they made the first disclosure has not acted to address the matter.

## What is the role of the Ombudsman under the Act?

The Ombudsman has a key role to provide information and guidance to anyone about protected disclosures. This includes if someone is seeking guidance about making a protected disclosure, or how the PDA works.

As an ‘appropriate authority’ the Ombudsman can receive, refer, and investigate some protected disclosures.

The Ombudsman also has a special role when a protected disclosure concerns serious wrongdoing in or by a public sector organisation. In some circumstances, the Ombudsman can take over an investigation or investigate together with an organisation.<sup>28</sup> The Ombudsman can also review and guide investigations carried out by public sector organisations.<sup>29</sup>

If you have any queries about the Act, or would like guidance on a specific disclosure, please don’t hesitate to reach out to the Ombudsman’s Protected Disclosures Team for advice.

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<sup>28</sup> Sections 32 and 33.

<sup>29</sup> Section 34.

## Appendix 1: Ombudsman contact details and guidance documents

### Contact details

Freephone: 0800 802 602

Email: [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz)

### Ombudsman online guides

The Ombudsman has published four other protected disclosures guides on its website:

- Making a protected disclosure – a guide to “blowing the whistle” ([link](#))
- Protected disclosures – guidance on internal policies and procedures ([link](#))
- Checklist – Am I ready to make a protected disclosure? ([link](#))
- Checklist – Protecting whistle-blower confidentiality ([link](#))

## Appendix 2: Some key appropriate authorities

### Commissioner of Police

The role of the New Zealand Police is to serve the community by reducing the incidence and effects of crime, detecting and apprehending offenders, maintaining law and order and enhancing public safety.

If you think that a disclosure relates to criminal offending, you might want to talk to Police in the first instance.

[www.police.govt.nz](http://www.police.govt.nz)

### Controller and Auditor-General

The role of the Controller and Auditor-General is to assist Parliament to strengthen the effectiveness, efficiency and accountability of public sector organisations, including local government organisations.

The Controller and Auditor-General is independent of the Government, and has the power to make inquiries and report to Parliament.

Some of the matters that the Controller and Auditor-General considers include: conflicts of interest relating to financial gain; procurement; fiscal matters; and public sector management.

[www.oag.govt.nz](http://www.oag.govt.nz)

### Director of the Serious Fraud Office (SFO)

The SFO is responsible for complex or serious fraud investigations and prosecutions. This doesn't include more common dishonesty offences, which are a Police matter.

If a disclosure relates to potentially significant fraudulent activities, you may want to talk to the SFO in the first instance.

[www.sfo.govt.nz](http://www.sfo.govt.nz)

### Inspector-General of Intelligence and Security

The role of the Inspector-General is to assist the Minister responsible for the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) in the oversight and review of those intelligence agencies.

If a disclosure relates to intelligence and security information, the only appropriate authority is the Inspector-General of Intelligence and Security (IGIS), and not the Ombudsman.<sup>30</sup> An

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<sup>30</sup> Section 23(2)(b).



Ombudsman also cannot provide advice or guidance on such matters, and such advice or guidance should be sought from IGIS.<sup>31</sup>

If a disclosure includes intelligence and security information, and that disclosure also relates to serious wrongdoing by or within IGIS, the disclosure should be made to the Prime Minister.<sup>32</sup>

[www.igis.govt.nz](http://www.igis.govt.nz)

## Ombudsman

The Ombudsman is an Officer of Parliament with a number of roles, including:

- investigating public sector administration (acts, decisions and omissions made within the public sector, including central and local government);
- investigating and reviewing decisions on official information requests;
- providing advice and guidance on the PDA, and receiving protected disclosures;
- monitoring places of detention (including prisons, court cells, immigration detention facilities, and health and disability places of detention (including mental health facilities, intellectual disability facilities, aged care facilities, and isolation and quarantine facilities));
- monitoring implementation of the United Nations Convention on the Rights of Persons with Disabilities.

The Ombudsman is independent of the Government, and has the power to investigate and report to Parliament.

If a disclosure relates to general concerns about the actions of a central or local government agency, you may wish to contact the Ombudsman.

If you need advice or information about protected disclosures, you can contact the Ombudsman.

[www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz)

## Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment has wide-ranging powers to investigate environmental concerns.

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<sup>31</sup> Section 25 of the PDA. The Act states that anyone who has made, or is considering making a protected disclosure of this type, may seek information and guidance from IGIS, and not from an Ombudsman. If IGIS fails to respond appropriately, the discloser may escalate the matter to either: the Minister responsible for an intelligence and security agency; or the Prime Minister.

<sup>32</sup> Section 25.

If a disclosure relates to environmental concerns, you may wish to contact the Parliamentary Commissioner for the Environment.

[www.pce.parliament.nz](http://www.pce.parliament.nz)

## **Independent Police Conduct Authority (IPCA)**

The IPCA's role is to consider complaints of misconduct or neglect of duty by any member of the Police, or concerning any practice, policy or procedure of the Police affecting the person or body of persons making the complaint in a personal capacity.

If a disclosure is about Police, you should go to IPCA in the first instance.

[www.ipca.govt.nz](http://www.ipca.govt.nz)

## **Solicitor-General**

The Solicitor-General is the Chief Executive of the Crown Law Office.

The Crown Law Office provides legal advice and representation services to the government in matters affecting the executive government, particularly in the areas of criminal, public and administrative law.

The Crown Law Office is not an investigatory body. In practice, while the Solicitor-General may be well placed to co-ordinate a response, most protected disclosures will be referred to another more appropriate agency.

[www.crownlaw.govt.nz](http://www.crownlaw.govt.nz)

## **Public Service Commission**

The Public Service Commission provides leadership through a range of activities including statutory functions and powers under the Public Service Act 2020. These functions include appointing and developing public service chief executives, and advising the government on the performance of public service departments and agencies. The Commissioner sets the minimum standards of integrity and conduct for the public service which are promulgated in a code of conduct for state servants.

If a disclosure is about the integrity and conduct of the public sector, especially Chief Executives, you may wish to contact PSC.

[www.publicservice.govt.nz](http://www.publicservice.govt.nz)

## **Health and Disability Commissioner**

The role of the Health and Disability Commissioner (HDC) is to investigate complaints about persons or bodies that provide health care or disability services. The Commissioner can make public statements and publish reports on any matter affecting the rights of health and

disability consumers and can bring matters that impact on the public interest, particularly public safety, to the attention of any appropriate persons.

If a disclosure relates to health care or disability services, you should contact HDC in the first instance.

[www.hdc.org.nz](http://www.hdc.org.nz)

## **Other appropriate authorities**

In addition to the authorities listed above, every head of a public sector organisation is an appropriate authority. Some of them have the power to investigate.

Private sector bodies having disciplinary powers over members of a profession or calling are also appropriate authorities.

If you're not sure which authority to approach, you can [contact the Ombudsman](#) for information and guidance.