

A-Z Guide

PROTECTED DISCLOSURES (PROTECTION OF WHISTLEBLOWERS) ACT 2022



Contents

Overview	2
Introduction	2
Definitions	2
Application	3
Procedure	3
Protection	4
Conclusion	4

Overview

The Protected Disclosures (Protection of Whistleblowers) Act 2022 (“the Act”) which came into force 1 July 2022 replaces the Protected Disclosures Act 2000.

The Act extends the definition of serious wrongdoing to cover the misuse of public funds and delivery of public services by the private sector. It also enables disclosers to report directly to an appropriate authority at any time. It provides guidance on the process for disclosers and receivers, and clarifies potential forms of adverse conduct against disclosers.

Introduction

The Protected Disclosures (Protection of Whistleblowers) Act 2022 was enacted to facilitate the disclosure and timely investigation of serious wrongdoing in, or by, an organisation which the public has an interest in seeing disclosed, and to protect the people who make those disclosures.

Definitions

These definitions are provided in section 4 of the Act.

Protected Disclosure

A disclosure of information is a protected disclosure if the discloser believes on reasonable grounds that there is, or has been, serious wrongdoing in or by the discloser’s organisation. For it to be protected, the information needs to be disclosed in accordance with the Act and not in bad faith.

Discloser

“Discloser”, in relation to an organisation, means a person who is or was an employee; a homeworker within the meaning given in section 5 of the Employment Relations Act 2000; a secondee to the organisation; contracted to do work for the organisation; involved in the management of the organisation (including a member of its governing body); a member of the New Zealand Defence Force; or a volunteer working for the organisation without reward.

Organisation

Means a body of persons (comprising 1 employer and 1 or more employees), whether corporate or unincorporate; and whether in the public or private sector.

Serious wrongdoing

The Act will continue to apply only to allegations of “serious wrongdoing”. However, the Act aims to clarify the definition of serious wrongdoing. The Act widens the definition to capture private sector use of public funds or resources.

Under this Act, “serious wrongdoing” includes any act, omission, or course of conduct in (or by) any organisation that is an offence; a serious risk to public, individual or environmental health or safety; a serious risk to the maintenance of law; or unlawful, corrupt or irregular use of public funds or resources.



The definition also includes acts, omissions, or courses of conduct that are oppressive, unlawfully discriminatory, grossly negligent, or that are gross mismanagement by those performing a function, duty or power on behalf of a public sector organisation or the Government. This includes private sector bodies who are fulfilling public functions, duties, or powers.

Appropriate authority

Under the previous legislation, a disclosure made directly to an appropriate authority was only available in certain limited circumstances, without first raising it under an internal process. The Act will allow the discloser to make a disclosure to an “appropriate authority” at any time.

Without limiting its meaning, “appropriate authority” includes the head of any public sector organisation; any officer of Parliament; the membership body of a particular profession, trade, or calling with the power to discipline its members. It expressly does not include a Minister or member of Parliament.

The appropriate authority for a protected disclosure that is, or includes, international relations information is an Ombudsman only, and for or a protected disclosure that is, or includes, intelligence and security information is the Inspector-General of Intelligence and Security only.

The Act adds a new schedule containing examples of the most likely appropriate authorities and examples of the nature of concerns they deal with, making the rules easier for those who may need to use it.

Application

A discloser is entitled to protection under the Act for a protected disclosure about serious wrongdoing made in accordance with any internal procedures or to the head or a deputy head of their organisation, or to an appropriate authority.

The protection is available even if the discloser is mistaken and there is no serious wrongdoing, or if they do not refer to the name of the Act when making the disclosure. They are entitled to protection even if they technically fail to comply with the Act as long as they have substantially complied, and even if they have also disclosed to another person as long as they do so confidentially when seeking advice about whether or how to make a protected disclosure.

Procedure

The Act requires public sector organisations to have appropriate internal procedures. These internal procedures must comply with the principles of natural justice. The procedures must set out what is required of those receiving a disclosure in accordance with the Act, and to state how practical assistance and advice for disclosures will be provided. Adequate information about the internal procedures must be regularly provided.

The Act does not require private sector organisations to have any internal procedures.

Receivers of protected disclosures must use their best endeavours to keep confidential information that might identify the discloser. There are specified circumstances in which the receiver need not keep a discloser’s identity confidential. A receiver who believes it is essential to release the identifying information must consult with the discloser. Receivers must refuse requests

for information under the Official Information Act 1982/Local Government Official Information and Meetings Act 1987 if it might identify the discloser's identity.

A receiver of information should acknowledge receipt, deal with the matter, inform the discloser about what the receiver is doing and provide reasons. The Act explicitly states that a receiver can decide that no action is required and, if so, inform the discloser, with reasons for the decision.

Protection

The Act strengthens the protections of a discloser. This includes protection from employers retaliating against a discloser who is an employee. If an employer retaliates, or threatens to retaliate against an employee, that employee has a personal grievance under the Employment Relations Act 2000.

An employee who makes a protected disclosure is not liable to any civil, criminal, or disciplinary proceeding because of making, or referring, the disclosure.

The Act includes that a person must not treat another less favourably because of a protected disclosure. Under the Act, employees are protected against victimisation within the meaning of section 66 of the Human Rights Act 1993. Receivers of protected disclosures must use best endeavours to keep information that might identify the discloser confidential.

Conclusion

Disclosing serious wrongdoing is a difficult and stressful task and your internal procedure for receiving and dealing with disclosures of this nature should take account of this.

Appointing an appropriate person to provide support to your employees in the event that they disclose serious wrongdoing may be a proactive way of encouraging them to do so. This may help to reassure employees that they will have their employer's support and that any problems that arise out of the whistleblowing for them will be addressed in a timely and sensitive fashion.

The Protected Disclosures (Protection of Whistleblowers) Act 2022 enhances the ability of employees to "blow the whistle" on serious wrongdoing. Making disclosures will be more straightforward and easier, and employees of both public and private organisations will be supported and encouraged to do so through the increased protection the Act provides.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.



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