

The Protected Disclosures Act 2000

Information and recommendations

The Protected Disclosures Act, commonly known as the whistle blowing legislation addresses the difficult position employees can find themselves in when they become aware of what this Act refers to as “serious wrongdoing”.

The need for this legislation arose out of the 1994 case of Wanganui psychiatric nurse, Neil Pugmire, who was first suspended and then dismissed for disclosing to the then opposition Spokesperson for Justice, the Honourable Phillip Gough, his concerns about the danger posed to the community by releasing a patient from Lake Alice Hospital.

The purpose of the act

The effect of the Protected Disclosures Act can be summarised in a single statement: *certain legal rights and protections will apply to employees in organisations who make disclosures in accordance with the Act about serious wrongdoing in or by that organisation.* The Act provides these protections in order to encourage disclosures. This in turn enables the serious wrongdoing to be investigated.

Legal protections under the act

The Act provides three main protections in respect of disclosures properly made under the Act.

Personal Grievances

The first protection serves to prohibit retaliatory action by an employer against an employee who has made a disclosure. The act of dismissing an employee who has made a protected disclosure will be grounds for a claim of unjustified dismissal. Similarly, an action taken in retaliation by an employer that disadvantages an employee in his/her employment will provide grounds for a claim of unjustified disadvantage. The latter concept need not involve pecuniary loss to the employee and may simply involve the issuing of a warning. An employer will have a defence to any such claim if it can show that the disciplinary action was taken for a justifiable reason other than the fact the employee made a disclosure.

Immunity from legal proceedings

The second protection provided by the Act is a general immunity from legal action against a person simply because that person made or referred to a disclosure. This includes criminal and civil action, and disciplinary proceedings. This protection overrides any statute, role of law, contract, oath, or practice that would otherwise prevent an employee making a disclosure – although no disclosures can be made by solicitors in breach of a legal professional privilege.

Confidentiality

The third protection relates to the confidentiality of the identity of the person making the disclosure. The Act emphasises confidentiality of identity, but this is not absolute. The person receiving the disclosure must use their “best endeavours” to keep confidential the identity of the disclosing party.

Protections are conditional

The Act provides criteria that must be met, and procedures that must be followed, before a disclosure can be “protected”.

1. **Disclosing party must be an “employee”**

Only disclosures made by employees attract protection. The Act defines employee widely, and includes former employees and secondees. Of particular interest is the inclusion of independent contractors as employees for the purposes of this Act even although independent contractors have not been fully covered under the Employment Relations Act.

2. **Disclosures must be about “serious wrongdoing”**

There are a number of acts defined as serious wrongdoing. The most obvious is the “unlawful, corrupt or irregular use of public funds or resources”.

The discovery and investigation of fraudulent, illegal, or irregular use of public funds seems to be one of the Act’s primary objectives. Notably, the Act’s reference to “irregular” use of public funds seems to add something extra to the concept of unlawfulness or corruption.

Misuse of public funds is not the only conduct amounting to serious wrongdoing, although it may well be the one about which the most significant disclosures are made. Other serious wrongdoing consists of conduct (or omissions):

- constituting a serious risk to public health or public safety, or to the environment;
- constituting a serious risk to the maintenance of law, including the prevention, investigation and detection of offences, and the right to a fair trial;
- constituting an offence;
- by a public official that is oppressive, improperly discriminatory, grossly negligent or amounts to gross mismanagement.

3. **Disclosure must be about serious wrongdoing by or in an “organisation”**

Disclosures must relate to alleged serious wrongdoing in or by the organisation in which the employee works. Disclosures about serious wrongdoing occurring in other organisations do not attract the protection of the Act.

4. **Employee’s belief of serious wrongdoing must be reasonable**

The employee must believe on reasonable grounds that serious wrongdoing is being or has been committed. Certainty is not required, but the belief must be reasonably founded. Malicious disclosures, or ones without a reasonable basis for the belief are not protected. The employee must make the disclosure for the purpose of having an investigation commence into the serious wrongdoing, and the employee must want the disclosure to be protected.

5. **Disclosures must be made in accordance with procedures in the Act**

The Act provides procedures that must be followed in order for a disclosure to be protected.

6. **To whom disclosures should be made**

The Act provides four channels through which disclosures can be made. The channels of disclosure are:

- *internal procedures*; but if inappropriate (or in the case of private sector organisations, non-existent) then –
- *head of organisation*; but if inappropriate then –

- *appropriate authority*; but if employee dissatisfied with progress or outcome of investigation then –
- *Minister of Crown or Ombudsman*.

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Need more help?

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