

How we make decisions on Protected Disclosures

Operational Policy OP 07

July 2024

The Protected Disclosures (Protection of Whistleblowers) Act 2022 (the PDA) sets out requirements and provides protections so that current and former employees can report, in confidence and without fear, their concerns about serious wrongdoing in their workplace. The PDA also provides protection for some other workers such as contractors. This type of report is often referred to as “whistleblowing”.

If a report meets certain criteria, it will be considered a “protected disclosure” under the PDA. A protected disclosure (disclosure) can be made directly to the workers’ employer or other workers organisation, or directly to an appropriate authority.

This policy applies to reports of serious wrongdoing made in confidence to Maritime NZ

This policy applies to reports made to Maritime NZ, when we are acting as an “appropriate authority” as set out in the PDA.

Maritime NZ is likely to be the appropriate authority for reports about serious wrongdoing relating to maritime safety, security, the protection of our marine environment, work on board ships and at designated ports, and in relation to ships and designated ports as workplaces.

What is a protected disclosure (the criteria)

A report is a protected disclosure if the discloser:

- is a current or former employee or other worker of the person or organisation that is the subject of the disclosure;
- believes on reasonable grounds that there is, or has been, serious wrongdoing in or by the discloser’s organisation; and
- does not disclose it in bad faith.

A report is only a protected disclosure if it is made to the discloser’s organisation or an appropriate authority. Disclosures made to the media or on social media are not protected under the PDA.

An anonymous disclosure may be made. However, if further information is required but cannot be obtained due to the discloser’s desire to remain anonymous, it may not be possible to investigate the alleged wrongdoing.

The protections given to a person making a disclosure

We will keep any information that identifies the person that made a disclosure to us confidential, unless the person consents to their information being disclosed, or disclosure of their identity is permitted under the PDA and is essential to:

- investigate a disclosure effectively;
- prevent a serious risk to public health, public safety, someone's health and safety, or the environment;
- comply with the principles of natural justice; or
- investigate for the purposes of enforcing the law.

Further, the PDA provides that a person who makes a protected disclosure:

- is immune from civil, criminal, or disciplinary proceedings in relation to making the protected disclosure; and
- cannot be treated less favourably by or suffer retaliation from their employer because of the disclosure.

If anybody breaches the discloser's right to protection, the discloser can take action under the relevant legislation. For example, they can claim a breach of the Privacy Act 2020, take a personal grievance under the Employment Relations Act 2000, or take action under the anti-victimisation part of the Human Rights Act 1998.

The discloser is not protected under the PDA if:

- they know the allegations they have reported are false;
- they make the disclosure directly to the media or on social media;
- they make the disclosure in bad faith; or
- the information disclosed is protected by legal professional privilege.

The person making the disclosure is not protected from action being taken against them for their involvement in the wrongdoing being reported.

The PDA also only provides these protections for the discloser in New Zealand or under New Zealand law. The PDA cannot protect a discloser against actions taken in an overseas jurisdiction where the PDA does not apply.

How do we manage disclosures on receipt

We will treat a report, on receipt, as a disclosure if it:

- meets all the legal requirements for a disclosure;
- states that a disclosure is being made but it is not immediately clear whether the criteria for a disclosure have been met; or
- does not clearly state that a disclosure is being made, but the content appears to be a disclosure.

A report that we treat a potential protected disclosure will be sent to the appropriate team or person within Maritime NZ for initial assessment within two working days of receipt.

We will restrict the number of people that will handle disclosures and keep a record of anyone in Maritime NZ that handles information in confidence relating to a particular disclosure.



What action will we take once we have received a disclosure

We will take action if we identify a serious immediate or imminent risk

If we reasonably believe any information disclosed relates to a situation that is, or may, pose a serious imminent or immediate risk to the health and safety of a person, property or our environment we will use our corrective and/or enforcement tools under the Health and Safety at Work Act (2015) or the Maritime Transport Act 1994.

We will investigate the majority of protected disclosures we receive

We investigate all disclosures that meet the criteria in the PDA, except for where we consider that carrying out an investigation would likely serve no purpose. For example, where:

- the length of time since the alleged wrongdoing makes an investigation impractical;
- the wrongdoing is associated with a foreign or defunct company and there is no prospect of action being taken as a result of the disclosure; or
- evidence and witnesses are not available to substantiate the allegations.

If we are not the appropriate authority to investigate the disclosure, we will contact the discloser to consult them about next steps, including transferring the disclosure to another appropriate authority.

If we decide not to undertake an investigation, we will inform the discloser that no further action will be taken and the inform them of the reason for that decision. We will also advise the discloser of their right to make a further disclosure to a Minister of the Crown for their consideration.

When an investigation is undertaken, we will:

- advise the organisation about the allegations that have been made against them and provide them with a right to respond; and
- ensure the discloser and the organisation about which allegation has been made, are kept informed of progress.

What we will do after an investigation

If serious wrongdoing is found, we may:

- consider using our corrective and enforcement tools;
- advise other agencies as appropriate – e.g. NZ Police, WorkSafe, Serious Fraud Office; or
- take no action - for example, if the wrongdoing is associated with a foreign or defunct company and there is no prospect of action being taken as a result of the disclosure.

If wrongdoing is found but it does not amount to “serious” wrongdoing as per the PDA, we will still consider taking action as a result of the investigation. If no wrongdoing is found no further action will be taken.

The outcome of an investigation will be considered and approved by the Chief Executive of Maritime NZ.

We will ensure the discloser and the organisation, about which allegation have been made, are informed of the outcome of our investigation, and any next steps we intend to take.

We will also advise the discloser that if they consider their concerns have not been handled appropriately, or the serious wrongdoing has not been addressed, that they can make a disclosure to a Minister of the Crown or seek guidance from the Ombudsman.



What happens if we decide to release information related to a protected disclosure

We will consult the discloser in advance, if practical, if we intend to disclose the information in accordance with the PDA, and we will inform the discloser if any information is released. A decision to release information that identifies the person making the disclosure will be made on a case-by-case basis by the Chief Executive of Maritime NZ.

What happens if information about a discloser is inadvertently released

We will take all possible steps to mitigate the damage done if the confidentiality obligations are breached and the discloser's identity is inadvertently released, including:

- advising the discloser of the release of their identity and the actions that have been taken to remedy the matter;
- requesting that the discloser advise us of any adverse action that may have been taken against them by any recipients;
- considering what might be done to further support the discloser and help remedy the release of their identity and any harm arising from it;
- advising the discloser of their right to complain to the Privacy Commissioner;
- ascertaining whether the recipient(s) passed on or used the identifying material (and if so, to whom), and requiring any recipients to delete or destroy any documents that include information that could identify the discloser; and
- seeking a clear assurance from any recipients that they will not pass on or use the identifying material, or take any action against the discloser, and actively monitoring that this assurance is adhered to.

How we update and raise awareness of this policy

We will:

- publish information at regular intervals about this policy to ensure those involved in the maritime sector, at ports, and at designated ports are aware of their rights to make a disclosure and how their disclosure will be handled; and
- periodically review and update this policy and associated procedures.

Legislative basis for this policy

Protected Disclosures (Protection of Whistleblowers) Act 2022.

Key terms

Appropriate Authority

refer section 25 and Schedule 2 of the PDA; Maritime NZ is likely to be the appropriate authority for matters pertaining to maritime safety and security, protection of the marine environment, as well as work on board ships or at designated ports, and in relation to ships and designated ports as workplaces.

Bad faith / acting in bad faith

for the purposes of this policy, means making a disclosure for dubious motives such as intimidation.



Believe on reasonable grounds that serious wrongdoing has taken place

means that based on the information at hand, a reasonable person, exercising normal and honest judgement, would believe that serious wrongdoing has taken place.

Designated ports

for the purposes of this policy means a port operated by a port company within the meaning of the Port Companies Act 1988 and includes the following ports:

- Northport
- Ports of Auckland
- Port of Tauranga
- Eastland Port
- Port Taranaki
- Port of Napier
- CentrePort Wellington
- Port Marlborough
- Port Nelson
- Lyttleton Port
- PrimePort Timaru
- Port Otago
- South Port
- Ports used in connection with the Cook Strait inter-island ferries.

The definition also includes:

- any area within the security fenced boundaries of a port listed above, whether or not that area is operated by a port company; and
- the buildings, installations, other structures or equipment on or adjacent to a port listed above and used in conjunction with that port's operation or administration.

Discloser

means the person making the report. As per section 8 of the PDA, the discloser must be someone who is (or has been):

- an employee of the organisation;
- a secondee to the organisation;
- someone 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; or
- a person who discloses information in support of, or relating to, a protected disclosure by someone else is also entitled to protection, as long as they meet the other requirements of the PDA.

Homeworker

as set out in section 5 of the Employment Relations Act 2000, means a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwelling house (not being work on that dwelling house or fixtures, fittings, or furniture in it). The definition includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.



Investigate	means to carry out formal, structured inquiry and detailed examination in order to discover and confirm facts and/or information.
Maritime sector	for the purposes of this policy, means all people, operations and vessels that come under our mandate to regulate, or by association we have a level of responsibility for or to. This includes the shipbuilding industry, ships, ports, port services, marine tourism and yachting, living and non-living natural resources and the environment.
Principles of natural justice	means the principles that all affected parties should be given the opportunity to be heard, and that decision makers should be unbiased – in line with Section 27 of the NZ Bill of Rights Act 1990.
Property	means (either private or publicly owned) items with a legal title associated with maritime activity on ships or on designated ports, and physical property that may be affected by adverse maritime activity such as an aquaculture farm.
Serious wrongdoing	(refer section 10 of the PDA) means any act, omission, or course of conduct in (or by) any organisation that is one or more of the following: <ul style="list-style-type: none"> • an offence; • a serious risk to: <ul style="list-style-type: none"> ○ public health; or ○ public safety; or ○ the health or safety of any individual; or ○ the environment. • a serious risk to the maintenance of law, including: <ul style="list-style-type: none"> ○ the prevention, investigation, and detection of offences; or ○ the right to a fair trial. • an unlawful, a corrupt, or an irregular use of public funds or public resources; • oppressive, unlawfully discriminatory, or grossly negligent, or that is gross mismanagement, and is done (or is an omission) by: <ul style="list-style-type: none"> ○ an employee (if the organisation is a public-sector organisation); or ○ a person performing (or purporting to perform) a function or duty or exercising (or purporting to exercise) a power on behalf of a public-sector organisation or the Government.

Disclaimer

This document provides information on Maritime NZ's policies on how we deal with a report that is (or that might be) intended to be treated as a protected disclosure, as per the Protected Disclosures (Protection of Whistleblowers) Act 2022, but this document is not a substitute for the requirements set out by the legislation.

This document is also not a guide on how to make a protected disclosure - detailed guidance for a person who is considering making a protected disclosure is available via the website of the Office of the Ombudsman.

This document may not be the most current version available so please check maritimenz.govt.nz/operationalpolicy to confirm that you are referring to the current version of this publication.

