

PROTECTION OF WHISTLEBLOWERS PRACTICAL ALTERNATIVES TO CONFIDENTIALITY

Confidentiality: good in theory

The long held and widespread view has been that the best protection that can be provided for a whistleblower is confidentiality. This is often the first thing whistleblowers themselves will ask for. The reason is obvious. If no one knows you 'dobbed', you cannot suffer reprisals.

The *Protected Disclosures Act* provides that investigators, agencies and staff to whom a protected disclosure is referred should not disclose information that might identify or tend to identify the person who made the disclosure, other than in certain specified circumstances (s. 22).

Where a member of staff has 'blown the whistle', if practical and appropriate, it is certainly best practice that confidentiality be maintained by the agency, all responsible staff and the whistleblower. There are three main things to keep confidential:

- the fact of the disclosure
- the identity of the whistleblower, and
- the allegations themselves (including individuals' names).

In some cases it may be possible to keep all three confidential and still handle the disclosure effectively. Certainly this would provide the most effective protection for a whistleblower.

The likelihood of the identity of the whistleblower being disclosed or remaining confidential often determines the appropriate approach that should be adopted by CEOs and relevant managers to protect whistleblowers.

Confidentiality: problems in practice

The issue of confidentiality for whistleblowers is a particularly vexed question. In practice two main problems arise with expecting confidentiality to protect a whistleblower from retribution.

Firstly, an organisation may not be able to realistically guarantee confidentiality. It is often difficult to make even preliminary enquiries into allegations without alerting someone in the organisation to the fact that allegations have been made. Further, to ensure procedural fairness, anyone who is the subject of allegations should be given an opportunity to answer them.

Once it is known that an internal disclosure has been made, it is often not difficult to surmise who has blown the whistle. Sometimes the whistleblower has made confidentiality even more difficult by previously voicing their concerns about an issue, or their intention to complain, before making a formal disclosure.

Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way it can be certain those measures have succeeded. Human error and indiscretion cannot be discounted. The agency may not be aware or be able to predict that certain information they think can be revealed (eg allegations that certain systems are failing) is sufficient to identify the whistleblower. Someone may have simply seen the whistleblower approaching management to report his/her concerns.

In these circumstances, if the whistleblower subsequently suffers detrimental action from the person who was the subject of their allegations, it would be open to suspect this was a result of the person finding out and taking retribution. However, this may be difficult to prove. Indeed, in NSW we have seen a case where a person accused of taking 'detrimental action' against a whistleblower has been able to use the agency's attempts to guarantee confidentiality to argue that he/she could not have known about the disclosure, and therefore, could not have taken that action in reprisal for the disclosure.

A further complication arises in those cases where people find out that a disclosure has been made and take retribution against the wrong person; a person who did not actually make the disclosure. A system for protecting whistleblowers should also aim to prevent this kind of behaviour taking place.

Practical alternatives to confidentiality

The likelihood of the identity of the whistleblower being disclosed or remaining confidential often determines the appropriate approach that should be adopted by CEOs and relevant managers to protect whistleblowers. Experience indicates that pro-active management action is often the only practical option available to protect whistleblowers.

As in practice an expectation of confidentiality for a whistleblower is often not realistic, it is important that agencies determine at the outset whether or not:

- the whistleblower has telegraphed an intention to make the disclosure or has already complained to colleagues about the issue
- the information contained, or issues raised, in the disclosure can readily be sourced to the whistleblower
- the issues raised in the disclosure can be investigated without disclosing information that would or would tend to identify the whistleblower
- there is a high risk of any subject of a disclosure surmising who made the disclosure and taking detrimental action and, if so, whether publicly disclosing the whistleblower's identity would:
 - a) not expose them to any more harm than they were already at risk of, and
 - b) prevent any person who subsequently took retribution from sustaining an argument that they did not know the identity of the whistleblower.

If confidentiality is not a realistic and appropriate option, then consideration must be given by agencies to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action.

While certain minimum steps should be taken by management and persons responsible for dealing with disclosures in all cases when a person makes an initial disclosure, additional approaches must be adopted depending on whether:

- the identity of the whistleblower is and is likely to **remain confidential**, or
- the identity of the whistleblower is known or is likely to **become known** as the disclosure is dealt with.

These approaches can be grouped under the following three headings.

If confidentiality is not a realistic and appropriate option, then consideration must be given by agencies to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action.

A. *The minimum steps to be taken in all cases, whether or not the identity of the whistleblower has or will become known:*

1. **Supporting the whistleblower**

Agencies and their senior management should provide active support to the whistleblower, including:

- an assurance that he or she has done the right thing
- an assurance that management will take all reasonable steps necessary to protect him or her
- giving the whistleblower advice about counselling or support services that are or can be made available to assist him or her, and
- appointment of a senior officer as a mentor (in consultation with the whistleblower) to provide moral support and positive reinforcement to the whistleblower, and to respond appropriately to any concerns the whistleblower might raise.

[Note: The mentor should not be any person appointed to investigate the disclosure or who will make decisions for the agency based on the outcome of any such investigation.]

2. **Guidance**

Guidance should be given to the whistleblower as to what is expected of him or her (eg, not to 'blow their own cover', not to draw attention to themselves or their disclosure, not to alert any subjects of the disclosure that a disclosure has been made about them, to assist any person appointed to investigate their allegations, etc).

3. **Information**

Information should be given to the whistleblower about how the disclosure is to be dealt with, the likely time periods involved, and the nature of any ongoing involvement of the whistleblower in the process (ie, provision of further information to investigators, provision of progress reports and information as to the outcome of any investigation to the whistleblower, etc).

4. **Responsibility**

An appropriate senior member of staff of the agency should be given responsibility for ensuring that the disclosure is dealt with appropriately and expeditiously.

5. **Prompt investigation**

All reasonable steps should be taken by agencies to ensure that the disclosure and related matters can be dealt with expeditiously including, where there is to be an investigation:

- approval of terms of reference and realistic deadlines for investigation
- appointment of one or more investigators
- provision of necessary resources
- provision of necessary powers/authority to investigators, and
- assessment of the report and recommendations arising out of the investigation.

*[Note: This includes properly and adequately dealing with allegations made by the whistleblower as well as any allegations made **against** the whistleblower.]*

6. Enforcement

Agencies should ensure that they appropriately respond to any actual or alleged detrimental action taken against the whistleblower, for example by:

- investigating allegations of detrimental action
- warning or counselling staff
- taking disciplinary action, or
- initiating criminal proceedings or referring a matter to the DPP.

B. The approaches available where the identity of the whistleblower is and is likely to remain confidential:

1. Secrecy

All reasonable steps should be taken by agencies and staff responsible for dealing with disclosures to limit the number of people who are aware of the identity of the whistleblower or of information that could tend to identify the whistleblower.

Consideration should be given to the capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the whistleblower or to take actions detrimental to the success of any investigation (such as tampering with evidence or improperly influencing witnesses). The strict legal requirement to maintain confidentiality should be impressed on anyone who needs to be told about the disclosure.

2. Procedures for maintaining secrecy

The importance of being discreet and the possible consequences if they are not, should be emphasized to the whistleblower (eg, not to 'blow their own cover', not to draw attention to themselves or their disclosure, not to alert any subjects of disclosure that a disclosure has been made about them, etc).

Procedures should be put in place to make sure the whistleblower can communicate with investigators without alerting others to the investigation. For example, the whistleblower should be told how and by whom he or she will be contacted should further information be required and how and who to contact if he or she wishes to obtain further advice or information about how the disclosure is being dealt with.

3. Appropriate investigation techniques

Consideration should be given to which approaches to dealing with the allegations are least likely to result in the whistleblower being identified, while still being effective, eg:

- arranging for a 'routine' internal audit of an area, program or activity that covers, but is not focused solely on, the issues disclosed
- not identifying any 'trigger' or reasons for an audit or investigation
- alluding to a range of possible 'triggers' or reasons for an audit or investigation, without confirming any particular one or acknowledging that a protected disclosure has been made, and/or

- where it might be expected that everyone in a workplace would be interviewed, ensuring that the whistleblower is also called for an interview (even though they have already provided their information) and, where appropriate, directing him/her to provide certain information.

An investigation, or a line of investigation, might need to be avoided or discontinued where there is potential for the identity of the whistleblower to become known, and the risk of serious detrimental action being taken far outweighs any likely benefit from continuing.

C. The approaches available where the identity of the whistleblower is known or is likely to become known as the issues are dealt with:

[Note: The approaches set out below should be adopted either at the outset if the identity of the whistleblower is known, or at the appropriate stage in any investigation where the identity of the whistleblower is likely to become known, will need to be disclosed, or actually becomes known for whatever reason.]

1. Proactive management intervention

The work colleagues of the whistleblower and any subject(s) of the disclosure should be informed:

- that a disclosure has been made
- of the substance of the allegations identified in the disclosure (preferably without identifying any subject(s) of the disclosure)
- of the identity of the whistleblower
- that management of the agency, from the CEO down, welcomes the disclosure, will support the whistleblower and will not tolerate any harassment or victimisation of the whistleblower
- if the disclosure appears to be a protected disclosure, that protections in the *Protected Disclosures Act* would be expected to apply
- of the likely criminal, disciplinary or other management related repercussions should anyone take or threaten detrimental action against the whistleblower, and
- how the disclosure is likely to be dealt with (in general terms only).

[Note: Preferably the prior agreement of the whistleblower should be obtained before this is done, but where this is not possible the whistleblower should at least be given prior warning].

2. Responsibility for supporting and protecting the whistleblower

The direct supervisor and line managers of the whistleblower should be made responsible for:

- providing on-going support for the whistleblower (including after any investigation is over), and
- protecting the whistleblower from harassment, victimisation or any other form of reprisal by the subject(s) of disclosure or any other employees.

3. Advice and training

Relevant staff (in particular the colleagues of the whistleblower and any subject(s) of disclosure) should be given appropriate advice and/or training in relation to the importance of whistleblowing, the relevant provisions of the agency's internal reporting policy and the *Protected Disclosures Act*, and the reasons why it is in the interests of staff, management and the agency to protect whistleblowers.

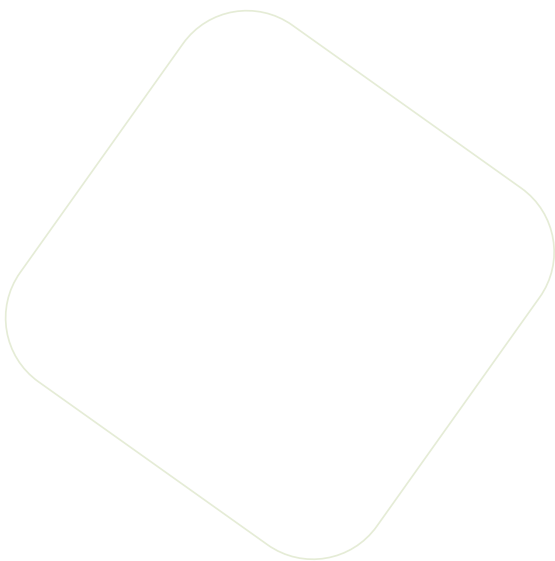
4. Relocation or transfer

At the whistleblower's request (for example if the whistleblower fears for their personal safety) consideration may need to be given to whether it is necessary and practicable to relocate the whistleblower within the agency, transfer the whistleblower to an equivalent position in another agency, or to assist the whistleblower to obtain appropriate alternative employment. If such action is taken, it should be made clear to other staff that this was at the whistleblower's request and he or she is not being punished.

Note: The material in this brochure expands on the relevant material in *Protected Disclosures Guidelines* (5th edition), NSW Ombudsman, 2004 (at A.4.6.3, C.1.5.3 & C.1.5.4).

Further information

- *Protected Disclosures Guidelines* (5th edition), NSW Ombudsman, May 2004
- *Thinking of Blowing the Whistle?* NSW government (brochures for State agencies and councils)
- *Protected disclosures fact sheet*, NSW government (for use by agencies dealing with protected disclosures)



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