

Whistleblower protection: risk assessment and management plans

Whistleblower risk assessment and management plans

"Whistleblowing is a vital pillar in the integrity, governance and compliance systems of every organisation, and healthy, corruption-free institutions across society as a whole."¹

Whistleblowing is critical to the organisational health of private and public institutions because it helps to identify risk. It promotes informed, ethical and responsible decision-making and leads to more effective compliance with relevant laws, policies and procedures.

Whistleblowing is a warning system. It identifies risk close to the source and promotes a culture of accountability in which wrongdoing is not tolerated. It can improve financial management where reports of waste or loss are involved. It allows management to identify where they need to take action and strengthen internal controls designed to protect against improper conduct.

In order to provide protected persons with the best possible protection against retaliation, public bodies must have a framework in place for confidentially receiving and managing reports of improper conduct.²

¹ Brown, A J et al, *Clean as a whistle: a five-step guide to better whistleblowing policy and practice in business and government. Key findings and actions of Whistling While They Work 2*, Brisbane: Griffith University, August 2019.

² section 106 of the *Independent Commissioner Against Corruption Act 2017*.

In the Northern Territory, public bodies have a duty to foster a culture that encourages internal reporting of wrongdoing. Public bodies have the primary responsibility for providing protected persons with protection and support. In fact, they must take all reasonable steps to protect whistleblowers from retaliation in the course of their employment.

The Independent Commissioner Against Corruption (ICAC) has a duty to provide advice to public bodies about frameworks and practices for minimising risks of retaliation against whistleblowers.

According to guidance issued by ICAC, when a public body receives a report, they may perform a reprisal risk assessment after giving consideration to the circumstances of the person reporting improper conduct and other people impacted.

The risk assessment will inform a management plan to mitigate risks identified in each individual assessment.

A reprisal risk assessment and management plan is one of several measures that should be included in an internal reporting and whistleblower protection framework in order to properly protect those who make a report of improper conduct.

The agency's response to the advice outlined in the ICAC's guidance may be a key consideration to determine vicarious liability if a public body or person is found to have retaliated against a protected person.

This document provides information

that public bodies may wish to consider as part of their reprisal risk assessment and management planning processes.

Why is a risk assessment and management plan required?

Protected persons are at higher risk of retaliation because they have disclosed information that may implicate their colleagues or employer in serious wrongdoing.

Under the ICAC Act, a person engages in retaliation against another person (the victim) if the person causes, or threatens to cause, harm to the victim:

- a) with the intention of discouraging the victim or a third person from taking protected action; or
- b) with the intention of discouraging the victim or a third person from supporting a protected person; or
- c) because of protected action taken, or suspected by the person to have been taken, by the victim; or
- d) because of action taken, or suspected by the person to have been taken, by the victim to support a protected person.³

Research⁴ shows that whistleblowers are at higher risk of retaliation in the following situations: the allegation reported is against a

³ Section 95, ICAC Act

⁴ Brown, A J (ed), *Whistleblowing: New Rules, New Policies, New Vision* (Work-in-progress results from the Whistling While They Work 2 Project), Brisbane: Griffith University, November 2017.

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senior officer; few people know about the matter reported; there are multiple 'wrongdoers'; and/or the wrongdoing is perceived as serious, systemic, sensitive or contemporary.

Whistleblowers are less likely to report improper conduct if they do not feel they will be protected and supported. A thorough risk assessment and management plan is one of a number of tools that can help make whistleblowers comfortable to report improper conduct.

A number of other tools are outlined in the ICAC's *Guidelines on Frameworks and Practices for Minimising Risks of Retaliation*.

When should a risk assessment be conducted, and by whom?

Public bodies may commence a risk assessment at any time. It is not a requirement for public bodies to have received a report of improper conduct before commencing a risk assessment. In fact, it is a sign of a healthy culture of reporting if the public body actively and regularly assesses the risks of retaliation in the workplace.

Where a risk assessment has not commenced and a report is received, a risk assessment should commence as soon as practicable after receiving a report from a whistleblower. Unnecessary delays may be detrimental to the outcome for the whistleblower. Action may need to be prioritised if there is an immediate risk to the health, safety and wellbeing of the whistleblower.

Risk assessments should be reviewed periodically, particularly if the whistleblower is at heightened risk of retaliation.

The public body's internal reporting and whistleblower protection framework should outline the roles and responsibilities of those who conduct risk assessments. It is important that these people have suitable skills and training to perform this task.

Most government agencies have an appointed Nominated Recipient. The Nominated Recipient is appointed to fulfil the obligations of a person responsible for the management or control of a government body, for example, a Chief Executive Officer or Commissioner. The Nominated Recipient is the appropriate person to conduct a risk assessment in most circumstances, but this may not always be appropriate. Other personnel may be allocated responsibility for this task, provided they possess suitable skills and training.

What should be included in the risk assessment process?

Each public body is unique to the organisation's size, the legislative and policy environment in which the organisation operates; the experience, skills and expertise of staff; and many other factors.

Each public body should take into account its operating environment when considering its internal reporting and whistleblower protection framework, including its risk assessment processes.

Wherever possible, the public body should keep the identity of a whistleblower confidential. Risk assessments should prioritise risks where the identity of a whistleblower could be disclosed, and any action

that may identify the whistleblower should be avoided.

The ICAC has provided guidance that the risk assessment process involves:

- communication and consultation—what does the reporter expect and do they have any concerns about reprisal or conflict?
- identifying the risks—are there reprisals or conflict problems or do they have the potential to be problems in the workplace?
- conducting a risk analysis and evaluation—what is the likelihood and consequence of reprisal or conflict occurring?
- facilitating risk treatment—what strategies should be implemented to prevent or contain reprisals or conflict, and how will they be resourced?
- monitoring and review—have the strategies been implemented and were they effective in preventing or containing reprisal or conflict?⁵

Risk assessments should give consideration to all personnel involved in an internal report, not just the person who has reported alleged wrongdoing.

Public bodies may wish to use a risk identification matrix that characterises the category of probability or likelihood against the category of consequence severity.

See table for example.

⁵ Ombudsman NSW, Public Interest Disclosure Guideline, Responding to Allegations of Reprisal

LIKELIHOOD	CONSEQUENCE				
	Insignificant	Minor	Moderate	Major	Critical
Rare	LOW	LOW	LOW	MEDIUM	HIGH
Unlikely	LOW	LOW	MEDIUM	MEDIUM	HIGH
Possible	LOW	MEDIUM	MEDIUM	HIGH	HIGH
Likely	MEDIUM	MEDIUM	HIGH	HIGH	EXTREME
Certain	MEDIUM	MEDIUM	HIGH	EXTREME	EXTREME

What should be included in a management plan?

Upon completing a risk assessment, a public body should prepare a management plan to mitigate or eliminate any risks identified in the risk assessment. It is not enough for a public body to identify retaliation risks and take no further action.

Management plans should identify the frequency and timing of risk assessment reviews depending on the circumstances identified in the risk assessment process. Management plans should discuss the current situation, describe any risks identified during the risk assessment, and outline the measures to mitigate or eliminate these risks. The management plan should clearly delineate those with responsibility for actioning risk mitigation or elimination measures, and those responsible for providing support and communication to the whistleblower.

Beware of detrimental action against the whistleblower

If there is a clear risk of reprisal or pressure to withdraw a report, public bodies should consider options to reduce the likelihood of the whistleblower and retaliator interacting in the workplace.

Anyone threatening a whistleblower is acting in a manner contrary to the ICAC Act and may have committed an offence. Removing a whistleblower from the workplace may tend to identify them. In addition, removing the whistleblower is potentially detrimental to the whistleblower and may act as a disincentive against reporting wrongdoing, which will not promote an ethical culture.

Questions for consideration


Those with responsibility for protecting whistleblowers may wish to consider the following questions for further discussion internally:

- who is responsible for ensuring that whistleblowers are protected in your organisation?
- who has oversight of your internal reporting framework and whistleblower protection policies and procedures?
- how often are the internal reporting framework and whistleblower protection policies and procedures reviewed to ensure they are fit for purpose?
- are internal reporting and whistleblower protection

conversations part of your employee induction processes?

- are managers and supervisors within your organisation provided with information regarding internal reporting and whistleblower protection frameworks?
- are all employees in your organisation aware of the organisation’s internal reporting framework and whistleblower protection policies and procedures?
- who is responsible for risk assessments and management plans?

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