

Good Practice Guide

A good practice guide to whistleblowing policies



This document forms part of the Corporate Sector *Good Practice Guide*, which is a central database comprising analytical tools, case studies, documented procedures and template policies representing 'good practice'. The distinguishing feature of the guide is that it aims to provide practical tools to help people with their day-to-day work. Organisations of all sizes have contributed, including Australia's top 20 corporations, regulatory bodies and individual members.

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A good practice guide to whistleblowing policies

A whistleblowing policy is increasingly seen to be a critical element of the internal control system and corporate governance of organisations — whether operating in the corporate, public or voluntary sectors. A number of jurisdictions, such as the US, UK and Australia, have introduced and enhanced the legislative protection for whistleblowers.

Many codes of corporate governance now recommend the implementation of whistleblowing policies. For example, the *UK Combined Code on Corporate Governance (2005)* recommends that audit committees ensure that there are arrangements in place for employees to confidentially raise concerns about possible improprieties in matters of financial reporting or other matters, and to ensure that arrangements are in place for the independent investigation of such matters and for appropriate follow-up action. The ASX Council's Principles of Good Corporate Governance and Best Practice Recommendations state that companies should have a code of conduct to enable employees to alert the management and the board to potential misconduct in good faith, without fear of retribution, and that this code should require recording and investigation of such alerts.

This reference covers the major issues that should be considered in developing a whistleblowing policy. The reference is organised into a series of questions covering why, who, what and how.

A. WHY?

A.1. Why is a policy necessary?

The whistleblowing policy should include a statement to explain the rationale for having it.

Possible reasons include:

- a) Legal requirements. US companies often make references to clauses in the *Sarbanes-Oxley Act of 2002 (SOX)* in their whistleblowing policies. In contrast, even though there is a *Public Interest Disclosure Act (1998) (PIDA)* in the UK covering whistleblowing, UK organisations tend not to make reference to the PIDA.
- b) Compliance with internal code of conduct or ethics policy.
- c) Part of risk management to protect the organisation's long-term wellbeing and reputation.

Note: While organisations may wish to refer to legislative requirements relating to whistleblowing, a whistleblowing policy should ideally not be merely a response to regulatory requirements.

B. WHO?

B.1. Who can be a whistleblower?

There are different types of persons who can be whistleblowers and therefore covered by the policy. These persons can be broadly classified as internal (employees, contract workers, vendors, etc.) or external (customers, members of the public etc.). The policy should clarify if it is strictly meant as an internal policy or whether the policy also covers "outsiders" or third parties.

Note: Legislation (such as SOX) in certain countries protects only internal whistleblowers in public companies. While, ideally, a whistleblowing policy should be extensive in terms of persons covered, organisations will need to consider their ability to effectively implement such a comprehensive policy. More extensive coverage would also entail wider dissemination of the policy.

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B.2. Who to make the disclosure to?

A whistleblower policy may cover internal and/or external persons to whom disclosure may be made.

Internal persons may include the following:

- Line manager
- CEO/CFO
- Head of HR
- Head of internal audit
- Company secretary or legal counsel
- Designated ethics officer
- Board audit committee or chairman of audit committee

Note: Line management is generally perceived as less independent. Although line managers can be included as potential recipients of disclosures, the policy should include persons who are likely to be seen as more independent of management. The policy should also require all complaints to be documented. The board of directors, or a board committee such as the audit committee, should be kept informed of complaints and their investigation. The chairman of the audit committee or another designated independent director should always be one of the persons to whom a disclosure can be made.

External persons may include the following:

- Company-appointed whistleblower service provider e.g. ethics hotline
- Company-appointed external lawyer
- Independent, external organisation providing free advice on whistleblowing e.g. Public Concern at Work in the UK
- Regulatory bodies or equivalent, including the police
- Media

Note: It is not recommended that the whistleblowing policy prohibits or strongly discourages employees from raising concerns to external parties, such as the regulatory bodies or the media. The policy should not be seen as an attempt by the organisation to circumvent disclosures to regulatory bodies because, in some cases, such disclosures may be justified (such as tax fraud or software piracy). Some organisations, in their policy, encourage complainants to consider raising concerns internally first.

One UK company includes the following in their policy:

In considering taking a concern outside the Company, you should be aware of your duty of confidentiality and you should consider whether reporting the concern externally, without first giving the Company the opportunity to look into the matter, is the reasonable course of action.

Another UK company states, "It would not normally be appropriate to disclose your concerns to a third party outside the company unless you have first followed the procedures in this Policy."

However, one UK company says that:

Whilst internal disclosure is encouraged at all times, an employee may be of the view that there is an exceptionally serious issue which warrants reporting to an external body. This disclosure must be made in good faith and not for the purpose of personal gain.

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B.3. Who is responsible for following up and investigating when a disclosure has been made?

The policy should state that an investigation will ensue after a report has been made. The policy should provide information of any other persons who will be informed of the disclosure (e.g. board of directors, HR, etc.) in order to follow up. The board of directors should be involved in deciding who should be tasked to lead the investigation.

The policy should undertake to keep the whistleblower informed of the progress and, subject to legal constraints, the outcome of the investigation. It should also include the caveat that blowing the whistle does not lessen the guilt or criminal liability of a whistleblower who is involved in wrongdoing, although this may be taken into account.

There should be a proper process for undertaking investigations of complaints.

Note: In deciding who will be informed of the disclosure, the organisation should bear in mind the need to maintain confidentiality and to protect the identity of the whistleblower. If the potential complainant believes that his identity will be revealed to someone whom he does not trust or, worse, to the person against whom the allegation is made, it may discourage him from making the disclosure.

The board of directors, or equivalent governing body of the organisation, should be involved in deciding who should conduct the investigation. In very serious cases or cases involving senior management it should take the responsibility for overseeing the investigation. In other cases, it should ensure that it is kept informed about the outcome of investigations. An external firm, such as an accounting firm with strong forensic competencies, may have to be hired. Where there is no internal legal counsel, an outside lawyer may need to be retained to advise on legal issues, including potential disciplinary actions resulting from the investigations.

B.4. Who will provide or ensure protection of the whistleblower?

The policy may specify the appointment of a company representative to ensure the welfare of the whistleblower and who will also update the latter on the status of the investigation. It may also specify who a whistleblower can approach if he feels that he has suffered a detriment.

Note: In the UK, the PIDA has provision for a whistleblower who has suffered a detriment, e.g. dismissal or redundancy, to seek redress and compensation. In the US, the labour laws allow the whistleblowers to file a complaint with the Department of Labour for "unlawful retaliation". Other jurisdictions may also have similar legal provisions, which can be explained in the policy.

C. WHAT?

C.1. What are the types of breaches that can be reported?

The policy should emphasise that it is intended to cover serious concerns that could have a large potential impact on the organisation, so that it is differentiated from the normal feedback and grievance channels available to employees. Serious concerns covered by the policy could include actions that:

- May lead to incorrect financial reporting
- Are unlawful
- Are not in line with company policy or its code of conduct
- Otherwise amount to serious improper conduct

Note: Generally, policies will list illegal acts and fraud. Real or potential environmental harm and/or threats to individual's safety or health, are also commonly included. In the US, SOX focuses on "questionable accounting and auditing matters".

The whistleblower policy should be linked to the company's code of conduct and cover serious breaches of the code. The code of conduct should provide realistic examples of possible breaches of the code of conduct and guide employees on how they should evaluate whether a particular decision may breach the code of conduct.

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C.2. What happens after the report has been made?

The policy should state that all complaints will be acknowledged in writing to the whistleblower within a reasonable period after the complaint is received, if the identity of the whistleblower is disclosed. It should state that an investigation will be conducted and that the organisation undertakes to keep the whistleblower informed of the progress and outcome of the investigations.

Note: If the whistleblower has revealed his identity, it is important to acknowledge his complaint and keep him informed. If the whistleblower is acting in good faith and with reasonable belief, he is putting himself at risk by making the disclosure. The least that the organisation can do is to communicate to him that his concerns are being taken seriously. Keeping him informed may also give him comfort that the issue is taken seriously internally, and this may discourage him from escalating the concerns externally.

C.3. What protection can the whistleblower expect and what disciplinary actions may result from the complaint?

The policy should include a statement providing assurance of protection from reprisals or victimisation, including harassment, retaliation or adverse employment consequences, for whistleblowing in good faith. Whistleblowers also face possible civil liability if their complaints turn out to be wrong, even though they may have reported concerns in good faith and with reasonable belief. A whistleblowing policy should, as best as possible, provide the necessary protection to employees under such circumstances.

The policy should also state that those found to have taken reprisal actions or victimised the whistleblower will face disciplinary action, including the possibility of dismissal. It should also state that malicious allegations may result in disciplinary action.

Note: Some policies allow the whistleblower to make a transfer request to a position elsewhere at equivalent pay and seniority.

In communicating the policy, it should be emphasised that complaints made in good faith and with reasonable belief will not result in disciplinary actions, even if investigations subsequently find them to be untrue.

D. HOW?

D.1. How can the disclosure be made?

The policy may mention that the first step should be to approach one's line manager. However, it should also specify other persons to whom a disclosure can be made (see B.2.) if the potential complainant feels that a disclosure should be made to another person other than the line manager.

Methods of submission should also be specified. These could include via internal mail, a complaint box, telephone, email, or a website. Contact details of persons to whom a disclosure can be made should be clearly available.

Note: Increasingly, companies are using external "ethics lines" for receiving disclosures under a whistleblowing policy. These hotlines provide greater confidence to complainants that their identity will be protected.

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D.2. Are anonymous disclosures accepted?

The policy may encourage employees to put their names to allegations in order to facilitate appropriate follow-up questions and investigation. However, it should not prohibit anonymous disclosures or disregard all anonymous disclosures. The policy should state that concerns expressed anonymously will be investigated, but consideration will be given to:

- The seriousness of the issue raised
- The credibility of the concern
- The likelihood of confirming the allegation from other sources

Note: SOX states that anonymous disclosures must be accepted and investigated by the audit committee. In other countries, this is left to the individual organisation, although the Australian *Corporations Act* (2001) does not provide protection for anonymous whistleblowers.

D.3. How is confidentiality of whistleblower's identity ensured?

The policy should state that the whistleblower's identity will be protected. The organisation should ensure that it has proper procedures in place to ensure that it is able to fulfill its undertaking to protect the whistleblower's identity. The policy may spell out the treatment of files and who will have access to them.

Note: The organisation may be liable if it fails to take reasonable steps to protect the whistleblower's identity if it has undertaken to do so.

D.4. How is the whistleblower policy to be communicated and implemented?

The whistleblowing policy should be widely disseminated to relevant persons covered by the policy. This may include posting the policy on notice boards, including the policy in the employee handbook, or putting it on the internet.

Briefings should be held with employees to communicate management's commitment to the policy and to explain how they can use it.

Officers, managers and supervisors should be made responsible for ensuring the procedures are fully implemented within their areas of responsibility.

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Appendix

Useful links and information

Sample Whistleblowing Policies

Amcor Limited, Australia:

http://www.amcor.com/content/aboutus/downloads/Amcor_Whistleblower_Policy.pdf

Filtrona, UK:

<http://www.filtrona.com/Whistleblowing.asp>

Financial Services Authority, UK:

http://www.fsa.gov.uk/Pages/Library/Other_publications/Staff/staff_handbook/wrong/whistleblowing/index.shtml

National Express Group, UK:

<http://www.nationalexpressgroup.com/nx/cr/policies/policy/>

Qantas, Australia:

<http://www.qantas.com.au/infodetail/about/corporateGovernance/ProtectedDisclosuresPolicy.pdf>

Willis Group Holdings Ltd, US:

<http://www.willis.com/Who%20we%20are/Corporate%20Governance/Ethical%20Code%20including%20our%20Whistle-Blowing%20Policy.pdf>

Survey on Whistleblowing

FreeHills Whistleblowing eSurvey 2003:

<http://www.freehills.com/extfilelib/HomepagePublications/Freehills%20Whistleblowing%20eSurvey.pdf>

Legislation on Whistleblowing

UK Public Interest Disclosure Act (PIDA) 1998:

<http://www.opsi.gov.uk/acts/acts1998/19980023.htm>

US Department of Labour 29 CFR Part 1980 Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Final Rule:

<http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-19197.pdf>

Others

ASX Exposure Draft on “Principles of Good Corporate Governance and Good Practice Recommendations” (November 2006):

http://www.asx.com.au/supervision/pdf/asxcgc_amended_principles_021106.pdf

Australian Standard – Whistleblower protection programs for entities

[http://www.saiglobal.com/PDFTemp/Previews/OSH/as/as8000/8000/8004-2003\(+A1\).pdf](http://www.saiglobal.com/PDFTemp/Previews/OSH/as/as8000/8000/8004-2003(+A1).pdf)

(Preview only. Copy of the standard can be purchase at www.saiglobal.com)