

# Preventing and containing reprisals and conflict

## 1. Objectives

- To outline the obligations of organisations and senior management to prevent and contain risks of reprisals and related workplace conflict when wrongdoing is reported.
- To provide strategies that organisations can implement to prevent and contain risks of reprisals and related workplace conflict.

## 2. Why is this important?

Sometimes reports of wrongdoing can lead to workplace conflict, particularly when the identity of the internal reporter is known. They can occur both before or after any action taken in response to a report is completed. These conflicts can be between:

- the internal reporter and the subjects of the report
- the internal reporter and other co-workers who believe that the reporter has done the wrong thing or has adversely affected them by making the report
- the internal reporter and management.

While conflict at its lowest level can include differences of opinion, conflicts can become extremely harmful and destructive to both individuals and organisations if they are allowed to escalate to an unacceptable level. Organisations have a responsibility to implement prevention and control strategies to reduce the risk of and resolve any inappropriate or unacceptable workplace conflict that could constitute or lead to detrimental action in reprisal for a report of wrongdoing. As the conflict becomes more intense, so should the organisation's intervention in the workplace.<sup>1</sup>

Most forms of reprisal are quite intangible, covert and informal – making them difficult to identify and investigate. The most common types of reprisal include threats, intimidation, harassment or torment, undermining of authority, heavier scrutiny of work, ostracism, questioning of motives, unsafe or humiliating work, and being made to work with wrongdoers.<sup>2</sup>

Whether reprisals occur largely depends on the culture of the internal reporter's workplace. How people treat and relate to each other in ordinary circumstances will influence how they behave in circumstances where they feel negative emotions towards their colleagues – such as betrayal, disbelief, hostility, disappointment or awkwardness.

Organisations should be aware of those reports where assessment shows there is a high risk of reprisals or related workplace conflict (see [Guideline C4: Managing risk of reprisals and conflict](#)). Although the tendency in such circumstances

can be for managers to 'wait and see', organisations should proactively implement strategies to prevent and contain any risks. The protection and support of internal reporters is a management obligation and part of the ordinary duty of care to staff.

The *Whistling While They Work* research found that reprisals almost always come from the workplace, and managers (not co-workers) are more likely to be responsible. A substantial minority (22%) of reporters indicated that they suffered poor treatment as a result of reporting:

- 13% of this poor treatment was by management only
- 4% was by co-workers only
- 5% was by both.

Where bad treatment does occur, it is unlikely to involve a single action such as a sacking or demotion – and more likely to involve a series of smaller incidents over time. Many reporters indicate suffering more than one form of reprisal.<sup>3</sup>

## 3. Legal and management obligations

### 3.1 PID Act

The *Public Interest Disclosures Act 1994* (PID Act) aims to deter people from taking detrimental action in reprisal for the making of a public interest disclosure (PID).

Any action taken by organisations to prevent or contain reprisals must not constitute beneficial treatment – influencing a person to make, refrain from making or withdraw a PID (s.3(2)(b) of the PID Act) – or detrimental action.

#### a) Criminal offences

Under s.20 of the PID Act, it is a criminal offence to take detrimental action substantially in reprisal for the making of a PID. Detrimental action is defined in s.20(2) as action that can cause, comprise or involve any of the following:

- injury, damage or loss
- intimidation or harassment
- discrimination, disadvantage or adverse treatment in relation to employment
- dismissal from or prejudice in employment
- disciplinary proceedings.

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There is a reverse onus of proof for this offence. Once a person has demonstrated that they have made a PID and were subjected to detrimental action, it then lies on the defendant to prove that the detrimental action was not taken substantially in reprisal for the person making a PID (s.20(1A)).

## b) Injunctions

Section 20B of the PID Act provides for injunction as a remedy to prevent the taking of reprisal against an internal reporter. Only an investigating authority, or a public authority with the approval of the Attorney General, can apply for an injunction in the Supreme Court. If the circumstances are significantly urgent, an ex parte application for an interim injunction can be made.

## 3.2 Other legislation

Under s.43 of the *Public Sector Employment and Management Act 2002*, it is a breach of discipline to take detrimental action or disciplinary proceedings substantially in reprisal for a public official making a PID.

## 3.3 Work health and safety and duty of care requirements

Reporting wrongdoing can be a difficult process and, if not properly managed, can result in stressful interactions with colleagues and managers. Stress is a legitimate and serious workplace concern and may result in a staff member sustaining a serious injury.

The *Work Health and Safety Act 2011* states that a person conducting a business or undertaking – which includes public sector departments, authorities and councils – has a primary duty of care to ensure the health and safety of workers and others. An organisation can fulfil this obligation by doing what they reasonably can in the circumstances to manage health and safety risks. All officers who can make decisions that significantly affect their organisation must exercise due diligence to ensure compliance. Failure to comply with health and safety duties is a serious offence that attracts significant penalties (ss.31-33).

Organisations also have a duty of care under common law to provide a safe workplace for their staff. This means that managers and supervisors are responsible for taking all reasonable steps to prevent inappropriate behaviour at work – which includes harassment, bullying, discrimination and victimisation. Organisations have been successfully sued for compensation for breaching this duty of care where the staff member has become ill or suffered injury – physically or psychologically – as a result.

# 4. What does this mean for your organisation?

## 4.1 Management obligations

Your organisation, principal officer and management are responsible for ensuring that both direct and indirect detrimental action in reprisal for reporting wrongdoing ('reprisals'), as well as any related conflicts in the workplace, are prevented or contained.

It is in the wider interests of your organisation for managers at all levels to promote a culture that is responsive to and supportive of staff reports of wrongdoing. Managers and supervisors are also responsible for dealing with issues that arise in the workplace when a report is made and for supporting internal reporters. Their role complements that of your organisation's disclosures coordinator.

Your organisation should ensure that all staff are aware of your internal reporting policy. This policy should:

- Include a strong commitment by your organisation to:
  - › creating a climate of trust, where staff are comfortable and confident about reporting wrongdoing
  - › protecting staff who make reports from any adverse action motivated by their report
  - › dealing with reports thoroughly and impartially and, if some form of wrongdoing has been found, taking appropriate action to rectify it
  - › providing adequate resources, both financial and human, to protect and support staff who make reports.
- Outline the protections provided by the PID Act.
- Outline the steps that your organisation will take:
  - › to protect staff who report wrongdoing from reprisals, including conducting a risk assessment and identifying strategies to deal with those risks
  - › in response to allegations of reprisals
  - › to support staff who report wrongdoing.

For more details, see our model internal reporting policies for [organisations](#) and [local government](#) and [Guideline A1: Management commitment to internal reporting](#).

## 4.2 Strategies to prevent and contain reprisals and conflict

It is essential that you implement practical mechanisms to prevent and contain reprisals against internal reporters and related workplace conflict. The strategies you adopt will depend on the circumstances. Your organisation should have clear processes for routinely assessing the risks of reprisals or related workplace conflict when wrongdoing is reported (see [Guideline C4: Managing risk of reprisals and conflict](#)), and for implementing strategies to prevent or mitigate any identified risks.

The suggested strategies in this guideline are not exhaustive and you are encouraged to consider a broader variety of approaches. The strategies should also be adapted to comply with your organisation's policies and procedures and to suit the relevant workplace.

### a) Maintain confidentiality

If the identity of the internal reporter is not known in the workplace and is likely to remain confidential, you should take all reasonable steps to limit the number of people who are aware of the identity of the internal reporter and limit the disclosure of information that could tend to identify them (see [Guideline C7: Confidentiality](#)). The requirement under the PID Act to maintain confidentiality should be impressed on anyone who needs to be told about the matter.

Where possible, investigators should use approaches that are least likely to result in the internal reporter being identified. For example:

- Arrange for a 'routine' internal audit of an area or activity that covers but is not focused solely on the issues disclosed.
- Arrange for an appropriate person to 'find' relevant documentation or evidence by accident or in the course of their normal supervision of staff.
- Don't identify any trigger or reasons for an audit or investigation or alternatively allude to a range of possible triggers without confirming any particular one – there is no obligation to inform staff that a PID has been made.
- Ensure that the internal reporter is among those interviewed if it would be expected that everyone in the workplace would be interviewed.

## b) Independently verify work performance

It can be difficult to separate justified management action from inappropriate action – and to determine whether particular work performance issues or workplace conflict started before, simultaneously with or after wrongdoing was reported.

These risks can be minimised by implementing a process for verifying the organisational position (for example, work performance) of internal reporters as closely as possible to the time when they first reported. This will provide a benchmark against which alleged reprisals can be measured, as well as seek to prevent unjustified actions being taken. This process should be undertaken by a person unconnected with the relevant workplace and staff.

Verifying work performance could include:

- Collecting evidence existing at the time the wrongdoing was reported about the internal reporter's work performance, such as their personnel file – undertaken with the knowledge and, if necessary, participation of the reporter.
- If a report is still confidential, undertaking alternative strategies such as a general audit of the work histories of all staff in the relevant workplace to establish the relative position of the internal reporter.

You should also implement strategies to monitor any workplace decisions made about the internal reporter – such as leave approvals, higher duties opportunities, referee reports, training opportunities, transfer decisions and work allocation.

## c) Develop an internal reporter support strategy

There is a wide range of potential support people who can be involved in preventing or containing workplace problems (see [Guideline D1: Internal reporter support strategy](#)). For example, if the allegations involve the conduct of the internal reporter's supervisor or line manager – or they are somehow involved in the conduct reported – then a person external to the area should be appointed to support the internal reporter.

If confidentiality is likely to be maintained, you should put arrangements in place to make sure the internal reporter can communicate with any support people and investigators without alerting others to the fact that they reported wrongdoing.

The internal reporter should be told how and by whom they will be contacted and also who to contact if they need further advice or information.

## d) Communicate with managers and supervisors

If managers or supervisors are aware that one of their staff has made a report, they should be reminded of their responsibilities. These responsibilities include:

- creating and supporting a workplace culture where reporting wrongdoing is valued and reprisals and related workplace conflict are not acceptable
- keeping the identity of the internal reporter and anyone who is the subject of a report confidential, where this is practical and appropriate
- providing support to the internal reporter, including ensuring that they have access to any necessary professional support
- ensuring that appropriate systems and strategies are established to minimise any risk of reprisals that the internal reporter faces
- notifying the disclosures coordinator or principal officer immediately if they believe a staff member is being subjected to reprisals as a result of reporting wrongdoing
- effectively managing the workplace situation, particularly if reprisals are threatened or take place or there is related workplace conflict
- taking appropriate action against anyone who threatens or takes reprisals against a person for reporting wrongdoing.

## e) Communicate with internal reporters

Internal reporters should be advised to:

- only discuss the matter with authorised people and not alert anyone who is the subject of a report that a PID has been made
- assist those assessing and dealing with the report, including supplying any information on request
- if needed, seek support from their support officer, manager or supervisor, the disclosures coordinator or any external support organisations or services
- notify their manager or supervisor, the disclosures coordinator or principal officer immediately of any suspicions they have that reprisals are occurring or have been threatened.

Internal reporters should regularly be given information, advice and feedback – particularly in relation to any support or protection that is available to them (see [Guideline D1](#) and [Guideline D2](#)). It is important to manage the expectations of the internal reporter and it may be necessary to help them distance themselves from the situation. You should reassure the internal reporter of the value of their role in bringing the information to light, but also stress that it is now the responsibility of your organisation to resolve the matter. This may help to relieve any pressure the internal reporter feels to get the problem fixed and make the situation seem less personal.

## f) Communicate with the subjects of the report

If the subjects of the report are aware of the allegations against them, reassure them that the report will be assessed impartially, objectively and reasonably – and they are only allegations until evidence collected shows otherwise. Explain the importance of the confidentiality of the internal reporter under the PID Act, where practical and appropriate.

Staff who are the subject of a report should be advised to:

- only discuss the matter with authorised people
- assist those dealing with the report, including supplying any information on request
- not take reprisals against another staff member whom they know or suspect has reported wrongdoing
- if necessary, seek support from their manager or supervisor or any available external support organisations or services.

Maintain ongoing communication with the subjects of the report, and update them on the progress and outcomes of any investigations.

## g) Take proactive management intervention

If maintaining confidentiality is not practical or appropriate (see [Guideline C7: Confidentiality](#)), it may be best that the colleagues of the internal reporter and any subjects of the report are told that a report has been made, the general substance of the allegations, and the identity of the internal reporter.

The principal officer and senior management of your organisation should:

- Reinforce that they are committed to supporting staff who report wrongdoing and will not tolerate any related harassment or victimisation.
- Emphasise that the matter will be investigated impartially, objectively and reasonably – and are only allegations until evidence collected shows otherwise.
- Point out that the protections in the PID Act are likely to apply and make staff aware that criminal, disciplinary or management action may be initiated if reprisals are taken or threatened against the internal reporter.

Before any intervention, you should explain the need to be proactive to the internal reporter and seek their agreement for their identity to be disclosed.

Information that identifies the subjects of the report should not be disclosed unless it is impossible to keep this confidential. If identifying the subjects of the report is necessary, they should be informed of this decision.

## h) Provide general awareness or training

Managers and supervisors should consider whether the culture of their organisation is resistant to reprisals or related workplace conflict. They can take action to create a climate where reporting is valued by involving all staff in the workplace in training, awareness sessions, discussions at staff meetings or by providing general information.

Depending on the circumstances, this could include:

- confronting general workplace prejudices about reporting wrongdoing
- training staff about the importance of your internal reporting policy and the PID Act in maintaining the effectiveness and reputation of your organisation
- reminding staff that they are all expected to report wrongdoing within your organisation
- warning staff that taking reprisals against a person for making a PID is a breach of your organisation's code of conduct and a disciplinary and criminal offence
- promoting a clear message that reprisals are unacceptable in the workplace and will be investigated
- providing conflict or interpersonal skills coaching to people to help them better understand their situation and manage the conflict.

## i) Ensure the report is dealt with in an appropriate timeframe

Delays in assessing and investigating reports of wrongdoing can allow workplace relationships to deteriorate and may increase the risk of reprisals against internal reporters.

Your organisation is responsible for ensuring that all reasonable steps are taken to deal with the report and any related matters promptly. This includes ensuring that investigations are fully resourced so that they can be finalised as quickly as possible, consistent with procedural fairness requirements.

## j) Facilitate alternative dispute resolution options

In some instances, alternative dispute resolution options may be an appropriate way to address ongoing concerns held by the internal reporter – for example, when a report results in workplace conflict or where no wrongdoing has been established. These options can include conciliation, mediation, workplace conferencing or a formal grievance process.

Conciliation requires both parties to have a genuine interest in reaching a resolution. It is most appropriate when an ongoing working relationship between the internal reporter, colleagues, supervisors or the subjects of the report needs to be repaired or preserved, and when relationships have not completely broken down. Conciliation should only be undertaken by an appropriately skilled and trained person.

## k) Change employment arrangements

Sometimes conflicts lead to a total and irreparable breakdown in workplace relationships. There may be concerns about the internal reporter's safety or wellbeing, or other factors that would make it impossible for them or the subjects of the report to remain in their current workplace.

In these circumstances, you should consider whether it is practical to make changes to the employment arrangements of the internal reporter or the subjects of the report. For example, you could:

- assign a project that results in them not being present in the workplace during the ongoing investigation – this also allows for the true explanation of the person's removal from the workplace to be kept confidential

- implement new workplace reporting or supervisory arrangements
- relocate their workstation to another part of the premises or to separate premises
- relocate a manager or supervisor into the workplace for a period to help manage relationships and interactions
- relocate, transfer or second them to another part of your organisation
- relocate, transfer or second them to an equivalent position in another organisation
- grant them a leave of absence during any investigation and re-introduce them to the workplace in stages
- help them to obtain alternative employment
- negotiate a voluntary redundancy package.

If someone needs to be relocated, whether this is the internal reporter or the subjects of the report will depend on the circumstances. Other than in exceptional circumstances, you should only require someone to relocate if the new position has the same pay and conditions, at least equal seniority and responsibilities, and preferably the same accessibility between their home and place of work.

Any actions that directly affect the working arrangements of an internal reporter should preferably be implemented with their agreement. It should then be made clear to staff that the action taken was at the request of the person and is not punishment. However, if there is an irreparable breakdown in working relationships and a high risk of reprisals, it may be necessary to relocate a person without first getting their agreement (see case study in text box).

Changing the employment arrangements of an internal reporter without getting their agreement may create the perception that this management action is being taken in reprisal for making a PID. If you are contemplating taking management action, you should be able to clearly demonstrate that:

- The action is reasonable, proportionate and, if relevant, consistent with action taken in similar circumstances in relation to staff who were not internal reporters.
- The particular circumstances of the internal reporter have been taken into account.
- The action is not causally connected to making the PID, as opposed to the content of the PID or other available information.
- The action complies with your organisation's policies and procedures.

It is critical your organisation can prove the actions were taken for a legitimate reason. Make sure you thoroughly document all actions taken and the reasons for any decisions. Your organisation will then be in the strongest position to defend claims of reprisal that may arise. In such circumstances, the onus of proof is reversed. If an internal reporter can demonstrate that they made a PID and were subjected to detrimental action, it is the defendant that has to prove that the detrimental action was not taken substantially in reprisal for them making their PID.

If there are sufficient grounds, the allegations are so serious and the risks associated with the alleged conduct so great, it may sometimes be appropriate to suspend the subjects of the report – see [Guideline C8](#) for more information about people subject to internal reports.

The powers of an organisation to relocate employees differ between the various legislation or employment agreements or awards under which public sector staff are employed. The [Public Sector Employment and Management Act 2002](#) outlines the employment arrangements of many public sector staff. This includes when it is appropriate to temporarily or permanently transfer staff within and between organisations, or suspend staff from the workplace pending a decision in relation to misconduct or a criminal offence.

### What principles should apply when considering whether to relocate someone?

In the UK, two nurses alleged they were redeployed against their wishes because they had made protected disclosures. When considering the case, the Court of Appeal observed there may be workplace situations so 'dysfunctional' that removal may be the only feasible method of resolving a problem.<sup>4</sup> The Court noted that:

- However hard management might try, there are some situations that arise in the workplace following a disclosure having been made which are extremely difficult to control and prevent.
- The employer is not obliged to ensure that reporters are not adversely treated in such a situation and that it will sometimes be an impossible objective. For example, if contending parties make reports and cannot work harmoniously, the employer may need to separate them and subject one to detriment. However, the detriment must not be *because* they had made a protected disclosure.
- There will also be cases where it will not be practical to resolve workplace disputes by removing subject officers because they are key personnel or because of the potential damage it will otherwise cause to the operation of the business.

In Queensland, the [Public Interest Disclosures Act 2010](#) (Qld) states that managers are not prevented from taking reasonable management action in relation to an internal reporter. However, their reasons for doing so must not include the fact that the person has made a PID. Depending on the circumstances, reasonable management action might include suspending the reporter from the workplace, transferring or deploying the reporter, and ending the reporter's employment by way of redundancy or retrenchment.

## l) Respond to reprisal concerns or allegations

Any concerns expressed by internal reporters about fears of reprisals should be seriously and promptly addressed. By ignoring or not dealing with alleged reprisals, you are in effect condoning such action – and problems in the workplace are likely to escalate. You may also expose your organisation to liability for damages for breaching your duty of care to prevent or deal with reprisals if the internal reporter suffers injury as a result.

Your organisation should investigate any allegations of reprisals against an internal reporter thoroughly, either as a breach of discipline under the [Public Sector Employment and Management Act 2002](#) or – if particularly serious – as a potential criminal offence

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under s.20 of the PID Act. For more information, see [Guideline D6: Reprisals – investigating, acknowledging, remedying](#).

If an allegation is made, you should also review your assessment of the risks of reprisal and related workplace conflict, and implement any additional support or prevention strategies necessary. If the conduct of staff is inappropriate or unacceptable, you may consider:

- clearly requesting that certain conduct stop
- instructing that certain conduct stop
- issuing a formal caution
- providing formal counselling or training.

## m) Seek an injunction

Investigating authorities, and public authorities with the approval of the Attorney General, can apply for an injunction to prevent the taking of reprisals against an internal reporter. The authority making the application must be able to prove that:

- there is some legal basis for making the application
- unless the injunction is granted, the internal reporter is likely to suffer irreparable harm – that is, harm for which damages are not an adequate remedy
- the detriment caused to the internal reporter by not granting the injunction is greater than the detriment caused by granting the injunction.

Injunctions should only be sought in rare circumstances where there is clear evidence of actual or proposed detrimental action substantially in reprisal for the making of a PID. At a minimum, your organisation should seek legal advice and notify the [Public Interest Disclosures Unit](#) at the NSW Ombudsman before seeking the approval of the Attorney General to apply for an injunction.

## n) Monitor and review

To effectively prevent and contain reprisals and related workplace conflict, any strategies implemented should be regularly monitored and reviewed. The strategies that are most appropriate initially may change. Issues can arise at any point after a report has been made – such as:

- during an investigation into the report
- once the outcome of an investigation is known
- if the subject of the report is moved from and then reintegrated into the workplace.

Identify who will be responsible for monitoring and reviewing risks and when this should be done. Also, plan how to monitor and address any problems that may arise – such as a

deterioration in workplace relationships or sudden unexplained changes in work performance.

The disclosures coordinator should consult with the internal reporter and any support person on an ongoing basis to check if any reprisals have occurred or if they have any concerns that they will.

## 5. Additional resources

- Model internal reporting policies for [organisations](#) and [local government](#)
- [Guideline A1: Management commitment to internal reporting](#)
- [Guideline C4: Managing risk of reprisals and conflict](#)
- [Guideline C7: Confidentiality](#)
- [Guideline C8: People subject to internal reports](#)
- [Guideline D1: Internal reporter support strategy](#)
- [Guideline D2: Information, advice and feedback to internal reporters](#)
- [Guideline D6: Reprisals – investigating, acknowledging, remedying](#)
- [Public Interest Disclosures Act 1994](#)
- [Public Sector Employment and Management Act 2002](#)
- [Work Health and Safety Act 2011](#)

## 6. Last updated

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## 7. Endnotes

- 1 Glasl, F 1982, 'The process of conflict escalation and the roles of third parties'. In GBJ Bomers and R Peterson (eds.), *Conflict management and industrial relations*, Kluwer-Nijhoff, Boston, pp. 119-140.
- 2 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, p. 129.
- 3 Brown, pp. 123, 129.
- 4 *NHS Manchester v Fecitt & Ors* [2011] UK Court of Appeal, EWCA Civ 1190 per Mummery, LJ, Elias, LJ & Davis, LJ.

## Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

Level 24, 580 George Street  
Sydney NSW 2000

**Email** [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

**Web** [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

**General inquiries** 02 9286 1000  
**Facsimile** 02 9283 2911

**Toll free** (outside Sydney metro) 1800 451 524

**Tel. typewriter** (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450  
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