

## Assessing risk of reprisals and conflict

# Assessing risk

This guideline outlines a process for public authorities to identify, analyse, treat and monitor the risk of reprisals and any related workplace conflict when a PID is made.

### 1. Why is this important?

Staff who report wrongdoing are likely to find the experience stressful. They could also suffer detrimental action in reprisal for reporting. All authorities have an obligation to manage the risk of reprisals against a reporter and any related workplace conflict.

To deal with these situations effectively, risks need to be identified early and appropriate treatment strategies implemented. Accurate and objective assessments of risk allow authorities to properly defend themselves against any future allegations of having mismanaged the reporting process.

Consulting with reporters about the sources and levels of risk from when they first make their report is crucial. This helps to manage the reporter's expectations about how others might perceive their report and reduces the potential for conflict – including conflict with management about whether effective support was provided.<sup>1</sup>

In each case we reviewed as part of our audit of allegations of reprisal, a risk assessment was warranted and would have assisted the public authority in managing and preventing reprisals occurring. In 58% of the cases, the reporter's identity was not able to be kept confidential and a risk assessment would have helped identify risks to the reporter. In addition, most of the cases involved pre-existing workplace conflict – a key risk factor. There were some cases that clearly warranted a risk assessment, including one where the workplace was small and regionally based.<sup>2</sup>

### 2. Legal and management obligations

#### 2.1. PID Act

Under s.20 of the *Public Interest Disclosures Act 1994* (PID Act), it is a criminal offence to take detrimental action against a person that is substantially in reprisal for the making of a public interest disclosure (PID). Detrimental action means causing, comprising or involving any or the following:

- injury, damage or loss
- intimidation or harassment

1. 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. 145.

2. NSW Ombudsman 2017, *Oversight of the Public Interest Disclosures Act 1994 annual report 2015-16*, p. 10.

# Assessing risk of reprisals and conflict

- discrimination, disadvantage or adverse treatment in relation to employment
- dismissal from, or prejudice in, employment
- disciplinary proceedings.

## 2.2. 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 authority 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).

Authorities 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.

## 3. What does this mean for public authorities?

### 3.1. Establish a process

Develop a risk assessment process to determine the level of protection and support that is appropriate for a reporter. This should include identifying and assessing direct risks of detrimental action in reprisal for reporting wrongdoing (reprisals), as well as indirect but related sources of workplace conflict or difficulties.

This process should be undertaken as soon as possible after a report of wrongdoing is made internally, or a report is made externally and the authority is notified. This gives the authority the best chance of recognising

any risk of reprisals or conflict, and preventing or containing problems. The process should not be done as an afterthought when problems emerge or at the request of the reporter.

An authority's internal reporting policy should identify who is responsible for conducting the risk assessment. Common approaches include:

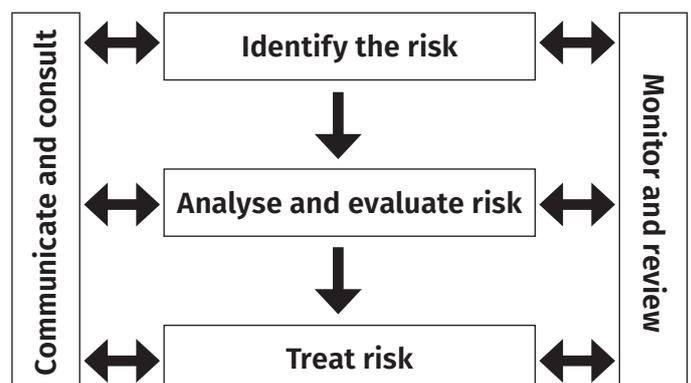
- Disclosures officers conducting a preliminary assessment and sending this to the disclosures coordinator for review or a more comprehensive risk analysis.
- The disclosures coordinator conducting all risk assessments.

Those in the workplace involved – including the reporter and their manager – are the best sources of information for the risk assessment. However effective risk assessment relies on those responsible having the knowledge and ability to ensure that risk is identified and responded to in a comprehensive and timely fashion.

### 3.2. Risk assessment process

The risk assessment process involves:

- **Communicate and consult** – what does the reporter expect and do they have any concerns about reprisal or conflict?
- **Identify the risks** – are reprisals or conflict problems or do they have the potential to be problems in the workplace?
- **Risk analysis and evaluation** – what is the likelihood and consequence of reprisals or conflict occurring?
- **Risk treatment** – what strategies should to be implemented to prevent or contain reprisals or conflict?
- **Monitor and review** – have the strategies been implemented and were they effective in preventing or containing reprisals or conflict?



### a) Communicate and consult

The reporter should be involved in the risk assessment process, including the making of decisions about strategies to control risks. This is also an opportunity to manage any expectations about the internal reporting process, investigation and outcomes that may be unreasonable. Any concerns expressed by reporters should be seriously addressed.

#### Risk of reprisals and conflict

Discuss with the reporter their perception of the likelihood of reprisals and of their identity becoming known:

- Ask the reporter who they have told about the wrongdoing or report, and how they think those involved, the associates of those involved and work colleagues in general might respond.
- Establish details of any basis for these views. For example:
  - › the likelihood that anyone would have the intent to take reprisals – eg what have those involved got to lose, what is the chance of them getting away with reprisal undetected?
  - › their capability to take such reprisals – what opportunity or power over the reporter do they have?

#### Motive

Perceptions of motive are a second but important level of information to explore when identifying risks, especially in less serious cases where there is a high risk of low-level harassment.

The motives of a reporter will often be mixed and difficult to determine. They are also usually irrelevant to the investigator's task of determining the truth of the allegation. However, the reporter should be asked why they have reported wrongdoing to:

- assess likely perceptions as to why they came forward – and, therefore, how colleagues may respond
- identify and assess the motives of any staff allegedly involved in reprisals, if a later investigation has to occur
- assist in any later deliberations about what is a fair and positive outcome, if counter allegations or other conflict arise.

### b) Identify the risks

Risk identification involves determining the specific behaviour and circumstances that may result in reprisals or conflict. This may include workplace or personal factors affecting the reporter. Where

appropriate, it may necessary to conduct discreet inquiries with a local manager or Human Resources about potential risks to the reporter in the workplace. Maintaining confidentiality is the most effective way to prevent reprisals against reporters, but is not always practical or appropriate.

An authority should develop its own list of risk factors that can alert disclosures coordinators, disclosures officers and managers to the key problems. The indicators listed in **Table 1** are suggestions only. Take into account the organisational context and past experience when considering when and where reprisals or conflict are likely to occur.

### c) Analyse and evaluate risk

Analyse the level of risk of reprisals or conflict by considering:

- The likelihood of reprisals or conflict occurring – this may be high if:
  - › there have already been threats
  - › conflict already exists in the workplace
  - › there is a combination of circumstances and risk factors that indicate reprisals or conflict are likely to occur.
- The potential consequences if they do occur – both to the immediate and long term wellbeing of the reporter and the cost to the authority.
- Any strategies already in place (such as keeping the identity of the reporter confidential) – will they sufficiently limit or prevent reprisals or conflict?

See *Template: PID risk assessment* for a matrix that can be used to rate the risk as low, medium or high.

### d) Treat risk

Decide how any identified risks will be treated. Both good management practice and work health and safety obligations dictate that the threshold of acceptable risk should be low in relation to the possibility of people being subjected to harm within an authority. Above this level, a plan should be developed and strategies implemented to control the risks likely to expose a reporter to reprisals or conflict. Any decisions on controlling risk should be made in consultation with the reporter and will depend on the individual circumstances of the case.

Any prevention strategies should be aimed at the source of the risk and reflect the degree of risk and potential consequences. For example:

- If the risk is assessed as sufficiently high, prepare a plan to prevent and contain reprisals against the reporter or conflict (see *Guideline D4: Strategies for*

## Assessing risk of reprisals and conflict

**Table 1. Indicators of a higher risk of reprisals or related workplace conflict**

<b>Workplace culture and conflict</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Has a specific threat against the reporter been received?</li> <li><input type="checkbox"/> Is there a history of conflict between the reporter and any subjects of the report, management, supervisors or colleagues?</li> <li><input type="checkbox"/> Is there a history of reprisals, bullying or other conflict in the workplace?</li> <li><input type="checkbox"/> Is the reporter or any subjects of the report performance managed?</li> <li><input type="checkbox"/> Is the workplace environment stressful – for example are there high levels of sick leave, absenteeism, workers compensation claims or staff turnover?</li> </ul>
<b>Confidentiality unlikely to be maintained</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Who knows that the report has been made or was going to be made?</li> <li><input type="checkbox"/> Has the reporter already raised the substance of the report or disclosed their identity within the workplace?</li> <li><input type="checkbox"/> Who in the workplace knows the identity of the reporter?</li> <li><input type="checkbox"/> Is the reporter’s immediate work unit small or regionally-based?</li> <li><input type="checkbox"/> Are there circumstances, such as the stress level of the reporter, which will make it difficult for them to not discuss the matter with those in their workplace?</li> <li><input type="checkbox"/> Will the reporter become identified or suspected when the existence or substance of the report is made known or investigated?</li> <li><input type="checkbox"/> Can the report be investigated while maintaining confidentiality?</li> </ul>
<b>Significant reported wrongdoing</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Are allegations made about individuals in the report?</li> <li><input type="checkbox"/> Who are their close professional and social associates within the workplace?</li> <li><input type="checkbox"/> Is the reported wrongdoing serious?</li> <li><input type="checkbox"/> Is or was the reported wrongdoing occurring frequently?</li> <li><input type="checkbox"/> Is the report particularly sensitive or embarrassing for any subjects of the report, senior management, the authority or government?</li> <li><input type="checkbox"/> Do these people have the intent to take reprisals – for example because they have a lot to lose?</li> <li><input type="checkbox"/> Do these people have the opportunity to take reprisals – for example because they have power over the reporter?</li> </ul>
<b>Vulnerable reporter</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Is or was the reported wrongdoing directed at the reporter?</li> <li><input type="checkbox"/> On a daily basis, how closely connected are the reporter and any subject officers?</li> <li><input type="checkbox"/> Are there multiple subjects of the report?</li> <li><input type="checkbox"/> Is the report about a more senior officer than the reporter – for example a person who makes decisions affecting their employment?</li> <li><input type="checkbox"/> Is there an upcoming restructure of the workplace?</li> <li><input type="checkbox"/> Is the reporter employed part-time or on a casual basis?</li> <li><input type="checkbox"/> Is the reporter isolated – for example geographically or because of shift work?</li> <li><input type="checkbox"/> Are the allegations in the report unlikely to be substantiated – for example because there is a lack of evidence?</li> <li><input type="checkbox"/> Is the report being investigated outside the authority?</li> </ul>

- *managing risks of reprisals and conflict*). This may include verifying the organisational position or work performance of the employee at the point they reported to provide a benchmark against which alleged reprisals can be measured.
- If it has been determined that a reporter will require support, develop a strategy for providing an appropriate level (see *Guideline D1: Support strategy for reporters*). This may include appointing a support person who can be involved in helping the reporter manage their own responses to risks.
- If it is likely that the identity of the reporter is known or likely to become known, adopt a proactive approach (see *Guideline C7: Confidentiality*).

### e) Monitor and review

Risk management is an evolving process. To best prevent reprisals, the risk assessment should be regularly monitored and reviewed as necessary. Issues can arise at any point after a report has been made. This may include:

- during an investigation into the report, including when any subjects of the report are notified
- once the outcome of an investigation is known, particularly if the allegation is unsubstantiated
- if any subjects of the report are removed from and then reintegrated into the workplace.

The person responsible for monitoring and reviewing risks needs to plan how to monitor and address any problems that may arise – such as deterioration in workplace relationships or sudden unexplained changes in work performance. The person should also consult with the reporter and any support person on an ongoing basis to check if reprisals have occurred or they have concerns that they will.

### 3.3. Keeping records

Keep records of all risk assessments conducted to ensure there is written evidence that an authority is meeting its obligations to protect reporters. These records should include:

- who conducted the assessment
- the date of the assessment
- whether the reporter was consulted
- the factors that have been considered
- the assessment of the risk of reprisals or conflict
- any strategies implemented to eliminate, minimise or manage risks.

See *Template: PID risk assessment* for an example.

## 4. Your questions answered

### When conducting a risk assessment, should we consider what can go wrong in addition to reprisals or conflict?

Yes. While risk assessments are primarily used to determine the risk of reprisals against a reporter, the process outlined in this guideline can – and should – be used to assess and mitigate all risks related to the reporting of wrongdoing. These additional risks could include:

- reprisal against staff mistakenly believed to have made the PID
- non-cooperation of reporters, the subjects of the report or witnesses
- damage to the reputation of the subjects of the report
- disruption to the relevant workplace and a corresponding decline in performance and efficiency of the reporter, the subjects of the report and their colleagues
- that the reporter might make a report to an investigating authority, MP or journalist before the authority has had the opportunity to deal with the issue
- adverse health effects for the reporter, the subjects of the report or any other person affected by the making of the report.

### Are risk assessments necessary when the report is anonymous?

Yes. Even if a report of wrongdoing is anonymous, there could still be a risk of reprisal if the reporter can easily be identified. While there may be a low risk of reprisal in situations where the report could have emanated from a number of people, sometimes the nature of a report will effectively reveal the identity of the reporter, even if the report is made anonymously.

## 5. Additional resources

- PID guidelines and templates
- *Public Interest Disclosures Act 1994*
- *Work Health and Safety Act 2011*

# Assessing risk

---

## 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** [pid@ombo.nsw.gov.au](mailto:pid@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

**National Relay Service** 133 677

Telephone Interpreter Service (TIS): 131 450

We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

ISBN: 978-1-921884-48-1

© State of New South Wales, August 2017

*This publication is released under a Creative Commons license CC BY 4.0.*

 This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.