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Whitepaper

# Whistleblowing Programs

AUGUST 2018

# Whistleblowing Programs

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## Background

### Purpose

The purpose of this white paper is to provide information and guidance on how to effectively implement a whistleblowing program.

Many organisations have a whistleblowing program in place. There are many more organisations considering a whistleblowing program which are keen to understand the implications, resources required, and cost to implement and maintain.

How can an organisation implement and resource a cost-effective whistleblowing program?

### Background

Every organisation is exposed to risk and it is important for organisations to consider how best to address risk to protect employees, clients and the organisation itself from costly and damaging exposure.

Risk management includes misconduct, some of which may only be reported if the person doing so can be offered safe and secure means of reporting misconduct.

Organisations wishing to maintain a trusted reputation in accordance with best practice and comply with the law

relating to whistleblowing should consider a whistleblowing program as part of their overall governance and risk management environment.

So, how does an organisation establish a whistleblowing program?

## Discussion

### Issue

The issue to be discussed is:

*How can an organisation implement an effective whistleblowing program?*

A whistleblowing program is a practical and invaluable tool for managing disclosures in the workplace and us something that can be utilised by all organisations.

Effectiveness of a whistleblowing program depends on capturing necessary components that will ensure the quality of the program.

However, one size does not fit all organisations. This white paper aims to explain how whistleblowing can be useful to an organisation.

### Benefits

Despite its growth internationally, whistleblowing has been poorly understood and, at times, subjected to bad publicity in Australia because people have suffered as a result of whistleblowing. It is fast becoming an essential tool for organisations to tackle misconduct.

Benefits for organisations include:

- Complying with legal obligations relating to whistleblowing including protection of whistleblowers.
- Enhancing the ability to identify systematic and recurring problems.
- Offering early detection of potential or actual wrongdoing and thereby a motive to avoid escalation of risk.
- Allowing effective management of disclosures, reducing misconduct and avoiding employees going public or to external regulators.
- Presenting a further, and perhaps a final, opportunity to intervene in wrongdoing which may otherwise go undetected – whistleblowing can still work when regulatory monitoring and good governance fails.
- Promoting confidence and trust in organisation leadership when they are prepared to go on record for encouraging disclosures.
- Fostering organisational stability and productivity and

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reducing possibility of reputational damage, litigation, prosecutions and financial impact by acting on information provided by whistleblowers.

- Empowering employees by giving them a path to disclose wrongdoing.
- Protecting and enhancing an organisation's reputation.
- Positively impacting on organisation culture – whistleblowing calls out poor culture and practices and offers an improvement opportunity.

Whistleblowing can also help meet an organisation's workplace safety and legal obligations to employees. Left unchecked, misconduct or wrongdoing may in some cases compromise and endanger wellbeing of employees.

Most people want misconduct exposed and addressed, but not everyone feels safe reporting it. Most people will only do so if they can feel safe from reprisals. A well-constructed whistleblowing program can provide a secure and safe method to report misconduct and whistleblower the option of making a disclosure via an independent channel while remaining anonymous.

A whistleblowing program should be managed by a selected group of 'Officers' holding executive leadership positions, with the senior executives or board of directors responsible for assuming ownership under the scrutiny and control of reporting and audits.

The program should be subject to periodic independent reviews and audits.

There are many facets to consider in designing a good practice whistleblowing program that assures the unique needs of an organisation are met.

## History

Whistleblowing has long been and is increasingly being used worldwide in response to good governance, legislation, regulators and standards.

Historically whistleblowing legislation has focused on the public sector with the Federal and State Governments enacting their respective disclosure Acts which are set out below.

- Whistleblowers Protection Act 1993, South Australia.
- Whistleblowers Protection Act 1994, Queensland.
- Public Interest Disclosures Act 1994, New South Wales.
- Public Interest Disclosure Act 2012, Australian Capital Territory.
- Public Interest Disclosure Act 2013, Commonwealth.
- Protected Disclosure Act 2012, Victoria.

- Public Interest Disclosures Act 2002, Tasmania.
- Public Interest Disclosure Act 2003, Western Australia.
- Public Interest Disclosure Act 2008, Northern Territory.

The legislation has been described by Dr AJ Brown of Griffith University as "...a tapestry, because it's got some rich threads; the problem is that there's no single law which even approaches what would be reasonable best practice. Everybody's experimented, nobody's really got a good handle on what best practice would look like."

Proposed legislation under the Australian Government 'Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017' seeks to focus on whistleblowing in the private sector.

The various current acts make a serious attempt to address integrity and accountability in the public sector in their respective jurisdictions, with the primary objective being the provision of safe means to make disclosures and protect whistleblowers. However, they are not without their shortcomings. Critics note that:

- Reportable wrongdoing is ill-defined and differs between jurisdictions.
- Anonymous complaints are not always protected.
- It is not clear who will be protected and how.
- Obligations on organisations differs and is unclear.
- Absence of an oversight agency responsible for whistleblower protection.

Restrictive and qualified protection has been offered to the private sector. The 'Corporations Act 2001' Part 9.4AAA Section 1317 AA-AE offers qualified protection. However, to qualify for protection as a whistleblower the person making the disclosure is required to provide their name prior to disclosing the information and cannot remain anonymous. Under that act, only the following qualify as whistleblowers:

- An officer of a company; or
- An employee of a company; or
- A person who has a contract for the supply of services or goods to a company; or
- An employee of a person who has a contract for the supply of services or goods to a company; and

The Australian Standard in relation to whistleblowing is AS8004–2003 'Whistleblowing Protection Programs for Entities'. This Standard is intended to be revised when the proposed legislation under the 'Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017' is passed.

The bill requires all whistleblower regulated entities, which includes Australian Stock Exchange (ASX) listed companies

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and registerable superannuation entities, to have a whistleblowing policy in place by 1 January 2019.

Amongst other things, the Bill:

- Enlarges the range of whistleblowers going so far as to include a spouse or child of any individual defined as an eligible whistleblower.
- Allows whistleblowers to remain anonymous.
- Makes breaching the confidentiality of a whistleblower's identity an offence.
- Offers improved remedies to those who suffer damage due to victimisation.

The Bill aims at encouraging and making whistleblowing an acceptable and effective tool in tackling wrongdoing. It aims at creating a more uniform whistleblowing protection framework.

The long existing gap in legislation has in large measure been left to individual organisations to deal with, with organisations responded in varying ways, and many ignoring the issue. That will no longer be an option.

## Discussion

An effective whistleblowing program must be built around an organisation's culture, work environment, unique characteristics and needs. Legal requirements and standards governing whistleblowing must also be met. It is not intended that any program operates outside the law. A commitment from the senior executives or the board of directors is essential to win trust and commitment for a whistleblowing program.

### *Role of internal auditors*

Internal auditors have a role in supporting a successful whistleblowing program, which can take a variety of forms, including:

- Providing independent and objective monitoring and testing.
- Providing assurance to the board of directors and management the program meets good practice.
- Conducting risk assessments.
- Establishing internal controls to mitigate risks.
- Triaging significant issues with the benefit of their thoughts and suggestions.
- In some cases, receiving disclosures that may otherwise go external.
- Liaising with the risk management team.
- Understanding and interpreting misconduct trends.
- Providing regular reports to the board of directors.

Internal audit's independence from the executive and objectivity give it the potential to be involved in whistleblowing arrangements, e.g. in a triage role, as a channel of communication or carrying out investigations.

But boards require assurance that the organisation's whistleblowing policies and procedures are effective in achieving the appropriate outcomes. Internal audit cannot give that assurance if it is directly involved in managing or carrying out those procedures.

Internal audit should therefore either provide assurance to the board/executive or play an integral part in the process of internal whistleblowing in their organisations

Where internal audit is involved in the procedures for whistleblowing the board/executive should ensure:

- There is a separate, independent mechanism to provide assurance on the effectiveness of the whistleblowing procedures.
- Internal audit's main functions and wider assurance roles are not compromised.
- Internal audit is properly resourced in terms of staffing and skills.

Where internal audit is not playing a direct whistleblowing role it should provide assurance on the effectiveness of the system and procedures to the board. It also should have the right to be informed of all whistleblowing reports so that it can consider what impact they have on its overall opinion to the board concerning risk management and internal control in the organisation.

Internal audit should be able to reserve the right to carry out investigations into the incidents raised in whistleblowing reports as part of its work on giving assurance about internal controls. However, it is not the job of internal audit directly to detect or prevent corrupt practices. This is for executive management.

Internal audit's role can include promoting whistleblowing best practice, testing and monitoring systems and advising on change where it is needed. But the ultimate operational responsibility for whistleblowing procedures lies with executive management reporting to the board.

In each case a careful assessment of potential conflict should be made. By way of example, if you are a person is a member of a whistleblower committee, you must ensure not to assume another role such as investigator whose report goes to the committee.

### *Commitment from the top*

A strong whistleblower protection framework on its own cannot prevent misconduct.

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Ownership, leadership and assurance is essential. These ingredients are powerful determinants of workplace culture which is a major driver of corporate behaviour. These ingredients will tell employees how you do your business and expectations of them.

There are two simple ways to do this. Firstly, tell them about it in clear terms through a statement of commitment that the organisation is committed to the principles and practice of whistleblowing. That commitment can be supported with a strong code of conduct.

Secondly, demonstrate this by firm backing of the statement of commitment. This is done by taking disclosures seriously, acting promptly, and effectively remedying misconduct while supporting and protecting whistleblowers. Credibility and effectiveness of a whistleblowing program depend on it.

Managers at all levels, and in particular line managers, should practice and maintain the integrity and professionalism expected. Nobody, including management, should be excluded from being subject to investigations. Managers need to equip and empower people to speak up where they observe alleged misconduct.

## Whistleblowing policy

An organisation does not need the best whistleblowing policy in the world; it needs the best policy for the organisation. Things to be considered include:

- Use plain English and keep it simple.
- Avoid a legalistic approach.
- Be mindful not to scare off employees with a complex array of reporting and procedural requirements.
- Focus on compliance runs the risk of losing practicality and user-friendly features.

A balance is required and including the people on the 'factory floor' will help this to be achieved. Employee consultation can potentially improve the approach.

A good practice policy contains a number of components. Ultimately, the policy has to reflect the uniqueness of each organisation. Components generally include:

- A clear statement from the top of commitment to maintaining a workplace free of misconduct consistent with the code of conduct.
- A commitment to investigating and addressing reported misconduct.
- A clear process showing how to make a disclosure.
- Identifying the actions that will be taken when a report is made.
- Alternative reporting options including an external

independent third party when necessary and appropriate.

- Capacity to report information confidentially and anonymously.
- How the documentation and information provided will be kept secure and protected.
- Support and protection available against reprisals and victimisation, and to whom it will be made available, including the person against whom the disclosure is made.
- Creating key positions to assume designated responsibilities including a whistleblower protection officer when necessary as in large organisations.
- Stating names and contact details of personnel with key responsibilities under the policy.
- Spelling out consequences for misconduct.
- Articulating actions management may take if misconduct is proven.
- Identify what constitutes misconduct and what should and should not be reported under the policy.
- Ensuring changes to the law, audit and corporate governance requirements are reflected in your policy.
- Review dates to evaluate effectiveness of the policy.
- Setting realistic timeframes to commence and complete essential steps, including investigation and actioning findings.

## *Whistleblower protection officer*

Reporting misconduct can be an extremely traumatic and confronting experience, and people doing so may need support and protection.

This responsibility should be allocated to Human Resources or other designated persons. If necessary, as is not uncommon in large organisations, the appointment of a whistleblower protection officer (WPO) may be required.

A whistleblower protection officer plays a critical role in supporting and protecting whistleblowers in difficult circumstances in which they often feel intimidated and fearful. Their engagement is an effective way to keep things moving along, preventing disclosure going off track, and bringing about a timely resolution.

The WPO role includes:

- Foster a supportive work environment.
- Making an immediate assessment of the welfare and protection needs of a whistleblower.
- Making the whistleblower aware of the support and protection available.

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- Keeping the identity of the whistleblower confidential if they have asked to remain anonymous.
- Remaining alert to any intimidation or victimisation of a whistleblower, and taking appropriate action.
- Informing the whistleblower how the company will ensure intimidation or victimisation is dealt with.

A WPO needs to be:

- Trustworthy.
- Impartial.
- Capable of building a rapport and confidence with others.
- Discreet.
- Capable of addressing any concerns or reports of intimidation or victimisation.

They should be given direct access to human resources and legal advisors. Where necessary in serious matters, they should have direct access to the audit committee, chief executive officer or other senior executive.

## *Employees*

Employees are key players in a whistleblowing program, with a key role to:

- Keep on the alert for misconduct.
- Report known or suspected misconduct.
- Be an active bystander and do not let bad behaviour go unreported.
- Support whistleblowers.
- Avoid doing anything which could be seen as intimidation or victimisation.
- Keep confidential the identity of anyone they know or suspect of having made a disclosure.

## *External and anonymous reporting pathway*

It is appropriate to encourage employees to use internal whistleblower processes in the first instance because it:

- Promotes and strengthens efficient use of organisation resources.
- Encourages ownership and early resolution of issues.
- Avoids unnecessary adverse publicity.
- Builds confidence and trust in the organisation and the whistleblowing process.

However, provision must also be made for anyone who does not feel comfortable or safe in making a disclosure openly, to do so using an optional process which allows the whistleblower to remain anonymous and feel safe.

Providing an alternative channel sends a positive message to potential whistleblowers that their disclosure is valued

and they should not be deterred by barriers such as a fear of retaliation. The integrity and viability of a whistleblowing program will be strengthened if an alternative avenue for making disclosures is available.

Elements of a good practice external whistleblowing service includes:

- True independence.
- Confidentiality.
- Impartiality.
- Security.
- Whistleblower-focused.
- Modern reporting tools.
- Expert team to manage whistleblower disclosures.

## *Definition of 'disclosable misconduct'*

Not all inappropriate or unacceptable behaviour is 'disclosable.' To resolve the tension and frustrations between frivolous and significant misconduct disclosures, a clear definition is needed.

While a non-exhaustive list of disclosable misconduct should be offered, the misconduct should be one that is capable of harming or threatening the interests of your organisation or employees.

To these may be added misconduct which may be unique to your organisation.

## *Support and protection*

Providing support and protection to whistleblowers is pivotal to promoting a culture that encourages speaking up. Moreover, the progress and outcome of a given case may hinge on that. Workplace safety laws require duty holders to consider all risks associated with work, not only those for which regulations and codes of practice exist. The protection should not be confined but extend to anyone who:

- Intends to or actually makes a disclosure.
- Acts as a witness.
- Participates in any way with respect to preventing victimisation arising from the disclosure.

Complaints of victimisation should be thoroughly investigated and anyone against whom victimisation is proven made subject to disciplinary action, up to dismissal.

## *Training*

Employees need to fully understand the organisation's attitudes, policies and procedures in relationship to whistleblowing. Training should:

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- Assess the needs of employees at all levels.
- Make employees aware of the policy and reporting procedures.
- Make policy and procedures easily accessible.
- Provide employees with a practical working knowledge of procedures.
- Connect the core elements of the whistleblowing program to the values of the organisation.
- Provide an avenue to receive feedback on the program, for example employee feedback surveys.
- Not be done just once, but be periodically refreshed.

Management is responsible for the development, dissemination and demonstration of its commitment to address misconduct through responsible reporting.

## *Investigation process*

All disclosures must be investigated, but only to the extent necessary to determine whether or not the misconduct is proven. For example, a preliminary investigation may determine a matter raised in the disclosure is not a matter covered by the policy, therefore a formal investigation is not required.

In some matters it may be necessary to appoint an independent external investigator who is not connected with the matter. Investigations should:

- Be conducted in a fair and unbiased way.
- Be completed as quickly as is reasonably practicable.
- Ensure all relevant information, material and documentation is collected.
- Have rules of evidence observed.
- Be conducted in private with confidentiality maintained.
- Allow legal or other representation to anyone in serious matters.

On completion, the investigator should provide a report which includes:

- A finding of relevant facts.
- A determination as to whether the misconduct is proven.
- Recommendations, when requested to do so, to the most appropriate action to take in response to the finding and determination.

## *Monitoring, feedback and improving, consultation.*

When developing a whistleblowing policy, good practice calls for feedback in relation to the scope and application of the policy and associated procedures. The best way of achieving that is to involve the people in the organisation.

If asked, they will tell you, including what works and what doesn't work. Consultation should address such things as whether the policies and procedures:

- Are helpful and easy to understand.
- Reflect current state of knowledge and developments in relation to preventing and responding to misconduct in the workplace.
- Provide an appropriate level of information, for example, does it set out the protections available to the whistleblower and how the organisation will deal with victimisation.

A problem that can often affect an organisation is the reason employees do not respond to whistleblowing programs. The answer can be because they have had nothing to do with them. Consultation and input, within reason, will make for an informed and involved workforce.

## *Review*

Rarely does an organisation get it right the first time. Complexity of a whistleblower program and seriousness of the disclosures requires periodic review to assure adverse impacts are identified and rectified. It is suggested a whistleblower program be reviewed every two years.

## *Reporting*

The organisation should establish assurance mechanisms to assure the board of directors and management are kept informed about effectiveness of the whistleblowing program. The board of directors should be:

- Immediately informed of any disclosure of a serious matter.
- Periodically informed of all disclosures to satisfy itself the organisation is meeting compliance in addressing disclosures and, where necessary, to intervene.

Reports should contain information such as:

Number of disclosures.

- Subject matter of disclosures.
- Action taken in response to each.
- Expected timeframe for resolution.
- How resolved.
- Outcome.

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## Conclusion

### Summary

Providing a way for people to disclose misconduct is a positive incentive to those who want to do the right thing. It can also be a strong deterrent for potential wrongdoers.

Establishing a whistleblowing program can send a powerful message demonstrating an organisation's commitment to ethical behaviour and in accordance with the relevant laws. Observing and maintaining the program is confirmation of an organisation's determination to conduct its business with integrity and respect.

### Conclusion

There are many facets to a whistleblowing program which are of equal value and importance.

Ignoring or compromising components of a whistleblowing program may compromise the program. Periodic review and audit are important to assure effectiveness, integrity and reliability of a whistleblowing program is maintained.

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# Whistleblowing Programs

## Purpose of White Papers

A White Paper is an authoritative report or guide that informs readers concisely about a complex issue and presents the issuing body's philosophy on the matter. It is meant to help readers understand an issue, solve a problem, or make a decision.

## Author's Biography

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Dominic is Senior Legal Counsel at LS Partners Workplace Behaviour Consulting Services which specialises in workplace behaviour matters. He is a lawyer with over 30 years of experience. Dominic has practiced extensively in workplace behaviour including bullying, harassment, sexual harassment, workplace violence, victimisation, discrimination and the impact of such behaviours on employers. He has worked for major insurers, private and government organisations, defendant and plaintiff legal firms. He is considered an expert in developing proactive approaches in the management and prevention of inappropriate behaviour.

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