

## C.

# ASSESSMENT AND INVESTIGATION OF REPORTS

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**Manager**

Competent investigation of whistleblowing reports followed by an effective response is a key objective of any whistleblowing program. Responses rely on effective assessment of what the disclosure is about, so that it can be handled in the most appropriate way. Several key elements are needed to ensure these processes are in place. These include comprehensive agency systems for recording and tracking employee reports of wrongdoing and improved basic training for public sector managers on how to recognise and respond to possible public interest disclosures (Brown and Wheeler 2008:304–6). There is also a need to preserve and manage confidentiality, to begin planning for when confidentiality is not available, and to deal with issues of equity and natural justice that often arise at early stages of investigations.

A startling 97 per cent of public interest whistleblowing occurs internally in agencies, with the bulk of this occurring to supervisors and line managers, rather than to reporting hotlines or internal specialists in the first instance (Donkin et al. 2008:90). An overwhelming majority of reports of wrongdoing might not end up being handled within the formal reporting processes of the organisation, due to the common ambiguity about when reports should be handled informally by line managers and when they should be dealt with by formal reporting processes.

The very positive finding about reporters' preference for internal reporting places a number of obligations upon organisations and line managers. It would be beneficial to develop and promulgate policies that clearly set out

- when managers should handle matters themselves
- whether and where reports should be recorded
- when reports should be referred to internal or external organisational mechanisms.

Efforts to support and protect employees who report wrongdoing ideally should commence at the point of disclosure, rather than when problems begin to arise. Risk-management processes, in particular, could be built into the early stages of the assessment and investigation of disclosures.

## C1. IDENTIFICATION AND TRACKING OF REPORTS

### Checklist items

- A coordinated system for tracking all significant reports of wrongdoing (including grievances) at all levels of the organisation, including clear advice to supervisors on when, how and whom to notify about staff complaints and possible whistleblowing reports.
- Organisational procedure for mandatory reporting to regulatory or integrity agencies on whistleblowing reports, including early notification of significant or higher-risk reports.

### TRACKING REPORTS OF WRONGDOING

Most agencies currently lack sufficiently comprehensive systems for recording and tracking employee reports of wrongdoing. Systems for recording and tracking reports of wrongdoing are a basic prerequisite to effective monitoring of how many public interest disclosures are being made, what investigation or other action is

being taken, and how those involved in the disclosures are being managed, at both an agency and a whole-of-government level. They enable senior management of agencies to know what disclosures are being received at junior and middle management levels. This is where the bulk of disclosures are currently received, and where the key risks of mismanagement, mistreatment or reprisal arise. Based upon discussions in workshops of industry partners and representatives of case-study agencies, it is suggested organisations need to put into place integrated systems to mitigate the risk of mismanagement of disclosures, particularly to

- allow senior management to track reports and report-related issues wherever they are being dealt with throughout the organisation, including informally by lower level managers
- record and track wrongdoing reports in a coordinated way, together with other forms of complaints, grievances and conflicts
- record and track all reports that might possibly be classified as public interest disclosures (PIDs) under legislation
- require all reports to be assessed at the outset for the level of reprisal risk or other conflict associated with the making of the report, classified according to risk and routinely monitored for any change in risk level (see Section C2).

UNDER THE RADAR? ADVICE TO MANAGERS ON FORMAL AND

INFORMAL HANDLING

There appears to be a large discrepancy between the number of cases that organisations reported as being handled and the number of reports of wrongdoing indicated by surveyed employees (Brown et al. 2008b:44, Table 2.12). One explanation for the discrepancy is that many of the reports made by employees were done so informally to line managers and other supervisors. There was near unanimity among the managers and case-handlers that informal reporting occurred in their organisations. In interviews with managers and case-handlers, some ventured an opinion on the proportion of reports that were informal, with estimates of informal reports ranging from 10 per cent to 98 per cent. The huge differences in estimates indicate that managers were not aware of what was occurring in the organisation outside their immediate work group.

The advantages of dealing with reports of wrongdoing informally include

- matters can be handled quickly
- potential problems can be ‘nipped in the bud’
- the administrative burden of the formal reporting process can be avoided
- reporters do not feel intimidated by the legality and adversarial nature of the formal reporting process
- there is capacity to prevent issues becoming formal unnecessarily—for example, if there is a clear lack of merit in the report or personality difference only
- it enables a graduated response that gives reporters the opportunity to consider options as to how they would prefer the report to be handled
- line managers are able to deal with improper behaviour immediately and give wrongdoers a ‘gentle nudge’ to get them back on the right track so the workplace can move on. This enables managers to deal with ‘rash behaviour’ that might be best kept out of formal reporting systems.

Managers perceived handling matters informally as an important part of their day-to-day managerial responsibilities. When a problem is elevated to a formal report, often the line managers are concerned about negative perceptions about

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**Manager**

managerial ability. Informal reporting can also be viewed as a self-protection mechanism in that, as one manager observed, it 'can't come back to bite you later in your career'.

The disadvantages of informal reporting can include

- reports are often swept 'under the mat' rather than the problem being examined
- the perception could arise in the workplace that nothing has been done, leading to mistrust in the workplace and serious issues being left unresolved
- there can be a subjective dimension to informal reporting when a particular manager does not trust the bona fides of the reporter and will handle the matter formally, for the manager's own protection
- a corollary of this approach is when a manager has a positive relationship with the reporter or the subject of the allegations, and this distorts their neutrality—or the perception of their neutrality—in handling the case informally
- handling reports informally also makes it difficult to consistently articulate the expectations of the organisation
- some managers might not take informal reports seriously and might attempt to mediate a situation, even when there is a significant underlying problem and systemic change is required.

In addition, informal reporting is a mechanism that facilitates the covering up of wrongdoing or inappropriate behaviour. Informal reporting often hides missing patterns of behaviour that could indicate endemic problems within the organisation. Whether or not these are serious public interest or personnel matters, the organisation ideally should know about them so as to take effective and coordinated action.

Given that managers recognise the problems with informal reporting, it is not surprising that some organisations have designed solutions for dealing with them. Organisations such as police forces often have to be a lot more meticulous in their handling of reports of wrongdoing. Figure 2.1 in the previous section described the inaction rates of employees in the case-study agencies. Some police services were among those organisations surveyed and, while their inaction rates were lower than other agencies in the sample, they were still of an order that suggests that even implementing compulsory reporting systems with universal coverage does not ensure employees will report all wrongdoing that they have witnessed. One solution is to have a policy of recording and assessing every complaint or report of possible wrongdoing, but still leaving line managers to deal with the majority of reports.

*[I]f you can't deal with the matter informally then your supervisors won't take you seriously.*

**Manager**

While that approach resolves the issue of recording matters, it does not, however, necessarily address the informal reporting problems outlined above. Even in those organisations where there was a highly formalised and elaborate system of reporting, interviews with managers and case-handlers indicated that confusion about staff obligations and what should be reported still existed. In addition to implementing policy for the recording of wrongdoing, it is also necessary for organisations to educate employees on what needs to be reported, what does not need to be reported and the processes for so doing.

It is also desirable for organisations to set criteria that would enable a coherent and logical practice for filtering those reports that can be handled appropriately in the immediate workplace from those that will need to be dealt with more formally. Most managers nominated the seriousness of the wrongdoing as being the key consideration. Other criteria nominated were the number of people who were affected by the activity being reported and the potential impact upon morale of the

work unit. Similar to the need to record all reports, however, nominating criteria to distinguish informal from formal reports appeared to be more of an aspiration than a reality in most organisations.

Given the number of reports that line managers handle on a day-to-day basis and the sheer complexity of many public sector organisations, it is a major challenge for any organisation to have a clearly articulated set of streaming criteria that can be applied consistently across the organisation.

The response to this issue arguably needs more than the promulgation of sophisticated and comprehensive procedures for the reporting and handling of wrongdoing. In a perfect organisation, all potential recipients of reports of wrongdoing would be clear in their own minds what sorts of issues they can deal with themselves and what sorts of issues need to be formally notified or referred to others in or outside the organisation. Where that line is drawn might not directly correspond with the distinction between employment-related grievances and public interest wrongdoing (discussed in Section C2). Some disclosure-related grievances (such as systemic sexual harassment) are of such seriousness that the response calls for coordination from a higher level than first-level managers.

Achieving a state where line managers are quite clear about their reporting obligations is not merely an issue of the transmission of skills. It is an issue of organisational culture. What is being suggested here is embarking upon a program of clarifying when line managers have the independence and autonomy to handle reports and when the organisation should take coordinated action to deal with the wrongdoing reported and notify external agencies.

## EARLY NOTIFICATION TO EXTERNAL AGENCIES

Ideally, agency systems for recording and tracking disclosures should extend to automatic systems for early notification of external regulatory or integrity agencies about significant or higher-risk reports. As a disclosure is logged and assessed, there could be routine notification of external agencies of matters triggering mandatory reporting requirements, other serious matters, any high-risk matters, and all alleged reprisals or cases of detrimental action.

Such a procedure recognises that there are many circumstances where an agency is better placed in knowing that another appropriate agency such as the police, an anti-corruption body or the lead agency in their jurisdiction for public interest disclosures is aware of the matter and able to intervene to provide advice or assistance with its resolution, if required. This is a recommendation made in the first report (Brown et al. 2008a:285) and requires government decision. Logically, it follows that such a notification system requires that at least one coordinating integrity agency have the statutory authority and capacity to track whistleblowing cases, and maintain an effective supportive monitoring and oversight role, including the ability to respond to early requests for assistance where need arises.

## PRACTICAL ACTION

The characteristics of a good reporting system within a public sector organisation are that it would

- have a low threshold for reporting so that senior management can track reports regardless of whether they are being dealt with formally or informally, and early intervention to protect reporters could be taken

- be a part of an integrated reporting system that includes grievances and the reporting of other sorts of incidents, complaints or conflicts
- require assessment and monitoring of all reports for the risk of reprisal or related conflict
- include *prime facie* minor incidents that could indicate patterns of more serious behaviour
- clearly define the separate roles and responsibilities of the decentralised points of authority and the central coordinating area.

## C2. ASSESSMENT PROCEDURES

### Checklist items

- Management procedures and skills for differentiating, as appropriate, between different types of wrongdoing (including grievances), and initiating appropriate action.
- A flexible approach to the types, level and formality of investigations to be conducted, including clear criteria for when no further action is required.
- Early and continuing assessment of the risks of reprisal, workplace conflict or other adverse outcomes involving whistleblowers or other witnesses.

## DIFFERENTIATING BETWEEN TYPES OF WRONGDOING

The issue of differentiation between personal grievances and public interest disclosures is more complex than it would first appear. The orthodox position is that there is a duality of disclosures, with separate reporting points for complaints dealing with personnel issues and complaints with a public interest component, and different specialist units that are responsible for ensuring appropriate action is taken in response. Public interest disclosure legislation reinforces this orthodoxy by validating the distinction in legislation, which is then often reinforced in organisational procedures.

Interviews with reporters' managers and case-handlers indicated the reality is more complex. In practice, reporters of wrongdoing do not make this distinction between grievances and public interest matters, and the types of complaints made lie across the spectrum.

Managers and case-handlers had different perspectives about this issue. Some accepted the orthodox position and saw a clear distinction. As one manager said: 'If it's just a personal conflict and there is no unethical or improper behaviour whatsoever...[it] needs to be dealt with just as HR [human resources].' Another group of managers and case-handlers recognised that in practice there is ambiguity and accepted that some issues, such as bullying, did not neatly fit within the two categories. One investigator noted that some grievances were so serious 'that they went well beyond the relationship dimensions'.

To gain further insight into the complexity of the relationship between grievances and matters of public interest, the surveys asked reporters to identify issues that were occurring at the same time as they were making a report of wrongdoing, and asked managers and case-handlers what they thought the main issues were for reporters. Table 3.1 sets out the self-assessment of case-study agency whistleblowers and the estimates of case-handlers and managers about the prevalence of such mixed

reports. Reporters were asked to nominate whether a series of circumstances related to pre-existing management or personnel difficulties coexisted with their decision to report. Managers and case-handlers were asked whether they thought those same sets of issues were related to the report. In other words, reporters were asked a factual question and managers/case-handlers were asked to attribute motivation to the reporters.

TABLE 3.1

Comparison of internal witness circumstances coexistent with making a report with managers’ and case-handlers’ attribution

Issue	Internal witnesses (n = 214)		Managers (n = 860)	
	Issues cited (%)	Ranking of issues	Mean	Ranking of issues
Conflict or serious disagreement with the employee’s manager(s) or supervisor(s)	37.1	1	3.22	1
Dissatisfaction with one or more agency policies	12.6	2	2.88	7
Dissatisfaction with the employee’s work duties	11.7	3	2.97	4
Another grievance against the employee’s manager(s) or supervisor(s)	11.6	4	3.01	3
A decision about a promotion that affected the employee	11.2	5	2.73	6
Conflict or serious disagreement with the employee’s co-worker(s)	10.7	6	3.22	1
Another grievance against the employee’s co-workers	4.9	7	2.95	5
Failure to renew the employee’s contract	0.5	8	2.04	8

Notes: Internal witnesses (n = 224) were asked: ‘When you first reported or provided information about the wrongdoing, were any of the following already causing you concern?’ Respondents were able to circle more than one option. Managers and case-handlers (n = 860) were asked: ‘When employees first report wrongdoing, how often do you think any of the following issues were already also causing them concern?’ (1 = never, 2 = rarely, 3 = sometimes, 4 = often, 5 = always, 6 = don’t know). The list of issues was identical.

Sources: Question 23 of the Internal Witness Survey and Question 26 of the Case-Handler and Manager Survey.

The results above indicated that there was a divergence of perspectives between reporters and managers/case-handlers. The following is a summary.

- Both groups agreed that conflict or serious disagreement with supervisors was the most common existing situation at the time of reporting—cited by 37.1 per cent of reporters. That issue was also rated highly by managers and case-handlers, but was ranked equally highest with another issue: conflict or serious disagreement with the employee’s co-workers. While managers and case-handlers saw the issue as being important, its importance was *underestimated*.
- Managers and case-handlers also *underestimated* the importance of reporters’ dissatisfaction with agency policies.
- Managers and case-handlers *overestimated* the importance of reporters’ conflict or serious disagreement with co-workers.
- Managers and case-handlers appeared to agree with reporters on the importance of
  - decisions about promotion



- dissatisfaction with work duties
- grievances against managers
- grievances against co-workers.

**Manager:** *Where it's more weighted to the wrongdoing [than it] is to the personal grievance, I guess I'd use more of a didactical approach where I'd actually look at the facts of 'okay, why is the wrongdoing so important to you?' Particularly if it's been happening for some time, what has changed in your life or your organisation that you now feel it's necessary to bring this wrongdoing up and then go backwards from there with it.*

**Interviewer:** *OK, so you'd look at the motive as well as the facts?*

**Manager:** *Yep.*

These results show that most of the issues faced by reporters at the time that they report wrongdoing (policy difference with the organisation being the exception) are likely to be the basis of a personnel grievance. It demonstrates that reporting in organisations frequently reflects the personal and administrative complexities of public sector workplaces.

The spectrum of reports from personal grievances to public interest disclosures could include

- solely public interest reports, which are recognised as such by the reporter and the organisation
- solely grievances (while noting that sometimes the seriousness and the endemic nature of the issue might verge on maladministration or official misconduct)
- issues that commence as a grievance matter and, upon further inquiries, have a public interest component (One reporter was concerned with the way in which allegations of bullying against her were investigated. On review, it was found that the investigators were biased and had denied her natural justice. These clearly were public interest issues that the organisation was duty-bound to deal with.)
- issues that the reporter believes are public interest issues but the organisation handles as a grievance matter (another reporter interviewed made allegations about problems with the procurement of outsourced services, however, his dispute with the organisation centred upon the sending of unauthorised internal emails and thus turned into a grievance matter).

Across this categorisation should be overlaid yet another level of complexity. Analysis of the reporter interviews indicated that a number of reports of wrongdoing were made in reaction to complaints against reporters, either by management or by colleagues. While most of these 'tit-for-tat' reporting events were grievance based, some of them unearthed public interest matters. Certainly, the reporters involved in these situations perceived them as having a strong public interest component.

There is a temptation for managers to look at the issue of the reporters' motives rather than the content of the report when deciding how to deal with the matter. Ideally, the internal procedures of public sector organisations would ensure that appropriate action is initiated in response, which is relevant to the type of report received, and that managers are provided with guidance on how matters should be streamed (see 'Practical Action' for more information).

## APPROPRIATE ACTION TAKEN TO DEAL WITH THE REPORT

Taking appropriate action—including by way of investigation—is a key element of managing whistleblowing. While in many instances the nature of the alleged wrongdoing is serious enough to warrant detailed investigation, some public interest matters (such as those alleging less serious misconduct such as inappropriate staff behaviour) can be dealt with by less formal approaches, such as by resolving the matter managerially, conducting an internal audit or a review of an issue or the operations of a particular unit, or implementing or changing policies, procedures or practices. Of course, if there is the potential for some criminal sanctions to be applied then the investigation needs to be conducted professionally with a view to referring the matter to the police for possible prosecution.



As well as interviews with reporters, managers and case-handlers, the last two categories were asked in the survey to nominate desirable changes that could occur in their organisations to improve reporting of wrongdoing. Much of the commentary from these sources about the standard of investigations conducted in public sector organisations was negative. While reporters' comments could be explained by their dissatisfaction with the outcome of the reporting process, the comments made by managers and investigators were generally in line with those expressed by reporters. It should be noted, however, that not all managers, investigators and reporters were critical of the investigation of reports. Comments by respondents from organisations with a good investigation record—particularly law enforcement agencies—were much more positive about the investigation capacity of their organisations.

The most common complaints about the investigation of reports of wrongdoing from the reporters interviewed included

- a lack of impartiality, with management interference and influence over investigations
- the uncritical acceptance of hearsay evidence
- the variable quality of persons undertaking investigations (that is, carelessness, incompetence)
- inconsistency of outcomes
- lack of experience of persons undertaking investigations
- lack of discretion
- the adversarial approaches taken by investigators.

A number of suggestions—distilled from interviews conducted with managers and investigators—for the improvement of investigations at both the administrative and the procedural levels can be found below under 'Practical Action'.

ASSESSING RISKS OF REPRISAL, CONFLICT AND DETRIMENTAL

OUTCOMES

The research shows that employees who come forward with reports of wrongdoing can potentially suffer some form of retaliation, and are likely to experience stress, as a result of reporting. That detriment was confirmed by responses to the Employee Survey, where a significant proportion (22 per cent) of employees who reported public interest wrongdoing perceived themselves as having been mistreated as a result. Additionally, responses to the Internal Witness Survey indicated that approximately 43 per cent of public interest whistleblowers suffered extreme stress and 62 per cent suffered at least some increased stress (Smith and Brown 2008:133). The research team was also aware of the rapid acceptance of the principles of risk management in the Australian public sector and therefore focused upon the potential use of risk-management techniques to lessen the likelihood of destructive outcomes befalling employees who report wrongdoing.

Public sector organisations are under an active obligation to protect all their employees by virtue of their occupational health and safety obligations. Therefore, logically, some formal risk-management process should be taken at the point where an employee comes forward with a report. The research has revealed that public sector organisations rarely use risk-management techniques for dealing with reprisals. When asked in the Agency Survey at what stage in the reporting process risk-management techniques were used, there was a very high 'no response' rate

from participating agencies. Similarly, when asked if anyone in the organisation had responsibility for ensuring risk assessments were conducted when a report of wrongdoing was received, the 'no response' rate of agencies was very high. Very few organisations were found to have formal risk-management procedures that could be applied to reporters.

There is a disturbing lack of interest in agencies in establishing procedures to assess risk and implementing structures to ensure that risk assessments actually take place. During interviews, managers and investigators were probed about the use of risk-management techniques in the area of whistleblowing. Almost universally, respondents indicated that risk management was rarely applied to the whistleblowing process and, if it was, it was not usually done very well. One manager described it as an 'afterthought'. This was one of the major shortcomings identified in the assessment of procedures and practices for dealing with employees who report wrongdoing (Roberts 2008:246, Table 10.8).

Undertaking some level of risk management upon receipt of a report implies that recipients have some level of skill and comprehension in the procedure. When asked about what training officers authorised to receive reports were provided with (n = 297, Question 15 of the Agency Survey), agencies reported that 43.1 per cent had no training, 49.8 per cent had only informal training and 22.9 per cent were professionally trained. Given that 97 per cent of initial reports were made internally, and most of these to line managers, it is clear that considerable variation exists in the levels of preparation and training being given to recipients of the initial reports.

While risk management is primarily employed to determine the risk of reprisal against a reporter, the workshops of industry partners and representatives of case-study agencies highlighted that the process can, and should, be utilised to assess and treat all the risks related to the reporting of wrongdoing. Risks additional to reprisal include

- risk of damage to the reputation of a third party if allegations of wrongdoing have been made against another employee of the organisation
- risk of paralysing the reporter's work unit if the issue is not managed optimally
- risk that the reporter might breach confidentiality requirements and speak to the media before the organisation has had the opportunity to deal with the issue
- risk of adverse health effects to the reporter, the subject officer or any other person affected by the making of the report.

## PRACTICAL ACTION

The internal procedures of public sector organisations should be capable of initiating appropriate action or investigation that is relevant to the report received. Most organisations have established processes for dealing with workplace grievances, and can simply stream these matters into that process. Appropriate action needs to be taken, however, in response to public interest disclosures, including by way of investigation either by internal or by external resources. The shortcomings outlined above could be addressed by managers being provided with guidance on how matters should be streamed and dealt with in both organisational procedures and relevant training.

As noted above, the current standard of investigations conducted by public sector organisations is perceived as low. Based upon interviews with managers and case-handlers, organisations can improve investigations at the administrative level by

- resourcing the investigation function adequately
- ensuring robust administrative structures, including clear accountability structures for those staff tasked with investigations and comprehensive investigation guidelines
- selecting staff with expertise in investigations or ensuring adequate training is undertaken (where organisations do not have in-house investigation resources, they will need to provide managers with practical guidance on undertaking an investigation); the following references are two generic investigation guides (Crime and Misconduct Commission 2007; ICAC 2009)
- where necessary, using investigation staff from outside the immediate work area where the report has been made
- providing auditors with greater powers to investigate
- freeing staff undertaking investigations from their regular duties
- if not already in place, establishing a whole-of-agency investigation unit
- employing senior investigators at appropriate pay rates to avoid the problems associated with junior staff investigating more senior staff
- ensuring external investigators are available for serious and controversial issues.

At a procedural level, organisations can improve the standard of their investigations by

- ensuring timeliness in investigation outcomes
- undertaking investigations in accordance with professional standards
- following up reports of wrongdoing by taking statements or seeking further information from reporters
- communicating more effectively with external providers
- ensuring good investigation processes and procedures are in place
- having review, planning and mentoring processes in place
- committing to providing natural justice to all parties
- exploring informal resolution processes, particularly mediation or other management action.

Finally, organisations tend to place a low emphasis upon the issue of dealing with reprisals against and other adverse outcomes for reporters. All solutions to this problem begin with early and ongoing identification of risk, and the implementation of prevention or containment strategies that are aligned accordingly.

Appendix II of this guide contains a practical introduction to undertaking a risk assessment based on lessons from the research. Performing a risk assessment of the likelihood of reprisals and adverse outcomes can be a quite difficult task. In particular, the persons assessing risk need to clearly define the individual factors of the reporter (both organisational and personal) that could influence the process or the chances of risks materialising.

## C3. CONFIDENTIALITY

### Checklist items

- Commitment to the confidentiality of whistleblowing reports to the maximum extent possible, including
  - procedures for maintaining the confidentiality of whistleblowers, persons against whom allegations have been made, and other witnesses to the maximum extent possible
  - clear advice about possible limits of confidentiality
  - procedures for consulting and, wherever possible, gaining consent of whistleblowers prior to any action that could identify them, including to external agencies.
- Procedures for determining when confidentiality cannot be ensured, and active strategies for supporting employees and managing workplaces where confidentiality is not possible or cannot be maintained.

### THE IMPORTANCE OF CONFIDENTIALITY

The issue of confidentiality is closely linked to anonymity, which was discussed in Section B4. That link is clearly seen in Figure 3.1.

Protecting the confidentiality of a reporter of wrongdoing is often perceived as important, and organisations are perceived as effective when they have such measures in place. Maintaining confidentiality is important from the perspective of case-handlers and reporters. In the Case-Handler and Manager Survey, case-handlers (n = 253) and managers (n = 394) were asked: 'What are the most important things that could be changed within your organisation to ensure that wrongdoing in your organisation is reported more often and dealt with more effectively?' Issues relating to confidentiality were mentioned by 16 case-handlers and 23 managers.

In interviews, many managers and case-handlers indicated a desire for confidentiality in the handling of reports of wrongdoing; they considered it important for protecting reporters; they believed it required greater emphasis; and yet many saw the confidentiality processes within their organisations as being less than optimal. They were pessimistic about the possibility of protecting reporters' confidentiality. In practice, it might be impossible to keep the identity of a reporter confidential for a number of reasons.

*There are certain difficulties [with confidentiality]. One of the things I do tell people straight up is that we will protect their confidentiality as much as we can, but as you know, it may come to a point where we can't progress the complaint unless maybe they will be identified. We spend a lot of time with people to make sure they're comfortable to go on with the investigation. Often I think it's the case that people tend to leave [the organisation] and [then] make a complaint.*

**Manager**

- Many managers see a conflict between maintaining confidentiality and the principles of natural justice. When a report of wrongdoing involves allegations against another staff member, even though, technically, there is no requirement to reveal the identity of the reporter, this was frequently deduced, particularly in small workgroups.
- Strict application of confidentiality processes can limit the capacity of an organisation to provide support for a reporter. Some reporters indicated that because of the confidentiality provisions, they were constrained from talking to their colleagues about the report and therefore could not avail themselves of their support.
- There can be overriding legal obligations that conflict with protecting the confidentiality of a reporter.
- Reporters might inadvertently reveal their identity or the report might be part of a sequence of events initiated overtly by the reporter. In many cases, by the

time someone is approaching their organisation to make a report, they will have already discussed the issue with others.

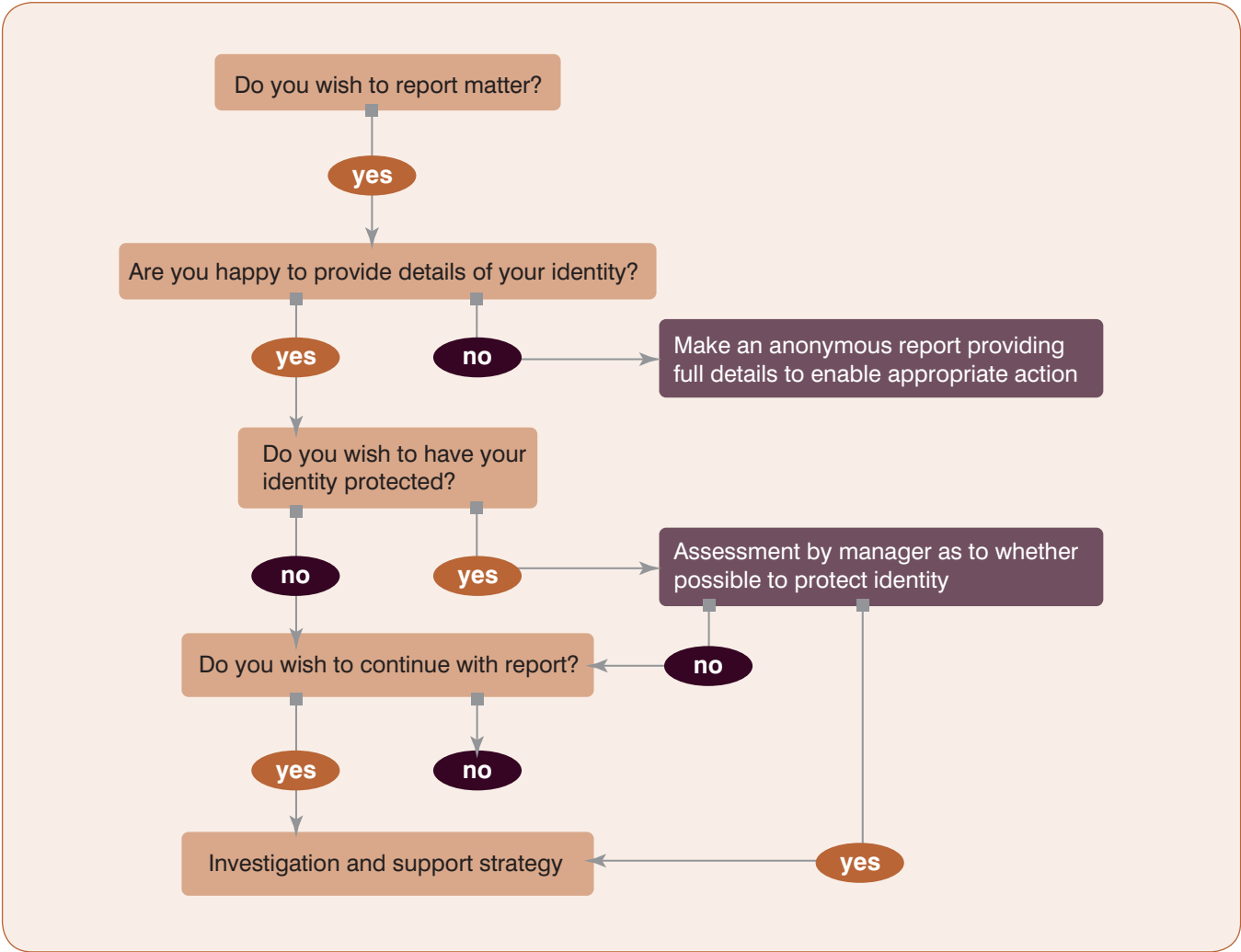
- When action is taken by management to deal with a report of wrongdoing, work colleagues will often attempt to guess the identity of the reporter—sometimes getting it right and sometimes getting it wrong.
- Some reporters indicated in the interviews that they believed that management had breached their confidentiality; however, that attitude appeared to be based upon expectations of confidentiality that might have been unrealistic.

Strict adherence to the principles of confidentiality can impede the progress of an investigation. This can occur when a report is made to an integrity agency and then that integrity agency refers the matter back to the organisation, without revealing the identity of the reporter, or if the identity of the reporter is known internally only by the internal witness support unit. In these cases, investigators might have difficulty in successfully investigating the case because they cannot interview or seek further information from the reporter.

Finally, confidentiality did not emerge as a risk factor of whistleblower mistreatment (Brown and Olsen 2008b:149). This is probably because, while confidentiality is important for as long as it can be preserved, in many cases, it is simply not an option or ceases to be an option.

FIGURE 3.1

*Anonymous and confidential approach flow chart*



## CONSULTING ON CONFIDENTIALITY DECISIONS

In circumstances where confidentiality cannot be maintained or it is desirable for the whistleblower's identity to be revealed to any person, it is vital that the whistleblower is consulted and, if possible, their informed consent obtained for the decision regarding the desirable action. In some circumstances, the optimal way of dealing with the issues raised by the report might be to explain to all the staff concerned what has happened and what has been done, and publicly commending the whistleblower for bringing the matter forward. Such a strategy should, however, be undertaken only in appropriate circumstances with the fully informed consent of the whistleblower and if they have appropriate support.

## WHEN CONFIDENTIALITY CEASES OR IS IMPOSSIBLE

The practical difficulties in maintaining confidentiality raise a complex dilemma for the organisation and, in particular, the recipient of the report. Reporters might fear reprisals, and assurances about (and expectations of) confidentiality can maintain the reporter's confidence in the process. The recipient of the report, however, also faces an obligation to honestly advise the staff member about the possibility of confidentiality not being maintained. This could dissuade the reporter from providing further information about the wrongdoing and thus the organisation might lose the opportunity to investigate and correct a potentially serious problem.

There is also a chronological dimension to maintaining confidentiality, as confidentiality can be easier to safeguard at the beginning of the reporting process. As more people within the organisation, or even externally, come to know about the report, confidentiality becomes more difficult to maintain. While this is the reality of dealing with whistleblower reports, it might not be any comfort to the reporter. When an organisation receives a report, there is a relatively short time frame within which an investigation can be launched unimpeded by issues of compromised confidentiality.

Misunderstandings around the requirements of natural justice are a source of confusion and practical difficulty in the area of maintaining confidentiality. When an allegation is made against a person, natural justice principles require that the person be made aware of the allegations against them if an adverse decision is to be made. Many managers, however, incorrectly assume that natural justice obligations require the identity of the person making the report to be revealed. In small work groups, making someone aware of the allegations against them can also inevitably mean signalling the identity of the reporter.

## PRACTICAL ACTION

***Being realistic.*** Assurances given to the reporter about confidentiality need to be realistic, but not couched in terms that will stop them from proceeding. This is not simply a matter of establishing procedures for routinely explaining the likely outcomes to potential reporters. Rather, it involves creating an environment and a culture whereby all employees (and potential reporters) have confidence that they will be treated well by managers and by co-workers for reporting wrongdoing. It is important that potential whistleblowers are given credible commitments regarding confidentiality as well as accurate advice regarding the circumstances in which confidentiality might not be able to be maintained.

***Dealing with the issue early.*** Ideally, organisations should use the window of

opportunity for confidentiality at the start of the process to identify strategies for supporting the reporter while confidentiality still acts as a temporary shield. Without detracting from the requirements of legislation, organisations need to be realistic about their capacity to safeguard confidentiality and should take a proactive approach to managing the (usually inevitable) disclosure of the reporter's identity.

**Consultation.** In circumstances where confidentiality cannot be maintained or it is desirable for the whistleblower's identity to be revealed to any person, it is most desirable that the whistleblower be consulted and, if possible, their informed consent is obtained. In some situations, the optimal way of dealing with the issues raised by the report might be to explain to all staff concerned what has happened and what has been done, and publicly commend the whistleblower for bringing the matter forward. Such a strategy should, however, be undertaken only in circumstances where the whistleblower has the necessary support and with the fully informed consent of the whistleblower.

**Awareness.** It is suggested that training for line managers include practical advice on the meaning of natural justice. Where possible, there should be readily accessible advice to line managers on how to handle the competing pressures of confidentiality and affording natural justice.

**Confidentiality checklist.** Practical considerations for line managers, specialist internal units or external watchdog agencies responding to issues of confidentiality include

- who knows about the report
- is the organisation required to notify an external agency that the disclosure has been received
- has the reporter told anybody that they reported or were thinking about reporting
- is it obvious from the nature of the disclosure who has made it
- what is the risk to the reporter or their colleagues if their identity is revealed
- what is the risk to the investigation if the organisation reveals any information that suggests the identity of the reporter at this point?

It is suggested that in dealing with the issue of confidentiality, a key principle is that confidentiality is highly desirable but subject to practical limitations. In procedures and in training, a difficult balance needs to be struck between encouraging reporters to come forward and not raising expectations of confidentiality that are unable to be realised.

*I think we do our best to support bona fide reporters and that's why I've always argued with senior management that we can't go after people who've been vexatious. Because, even though you'd really like to sometimes, because you see what fallout their horrid behaviour has done to some people, you cannot risk frightening genuine complainants off. Complainants tell you a whole lot of useful things about your services and how you deliver your services. And there are a lot of very vulnerable people out there who have great difficulty making a complaint. It's not that there is this sea of nasty people out there wanting to make complaints*

**Manager**

## C4. EQUITY AND NATURAL JUSTICE

### Checklist items

- Clear procedures for the protection of the rights of persons against whom allegations have been made, including appropriate sanctions against
  - false or vexatious allegations
  - unreasonable breaches of confidentiality.
- Clear advice to managers about to whom, when and by whom information about allegations of wrongdoing need to be given, for reasons such as natural justice.



In formal whistleblowing policies and their implementation, a number of organisations recognised the need to treat staff at all levels within the organisation equitably (Roberts 2008:246, Table 10.8). This means that all members of the organisation who make disclosures, or have disclosures made about them, are dealt with fairly and consistently.

The issue of confidentiality for those against whom allegations had been made was considered to be important by participants in the study, as outlined in Table 3.2.

TABLE 3.2

**Managers’ and case-handlers’ views on the importance of protecting confidentiality for those against whom allegations had been made**

Statement	Case-handlers (n = 338)		Managers (n = 534)	
	Mean	SD	Mean	SD
Importance of protecting the identity of the subject of allegations (1 = not at all to 5 = extremely)	<b>4.39</b>	0.71	<b>4.38</b>	0.68

Source: Question 57 of the Case-Handler and Manager Survey.

**Manager** (when asked about the impact of a report of wrongdoing upon the person against whom the allegation was made):

Just totally devastated by the fact that someone makes an accusation and their integrity has been questioned even though the person has come back with the evidence and said that it is not correct. There is no right of reply. The [name of the investigation entity] inquiry can destroy a person’s self-belief, their belief in their own worth, their value to the organisation.

The issue of whether persons against whom allegations have been made received the same level of support as was afforded to whistleblowers prompted some passionate responses. The issue of protection of the subject of allegations was raised in 16 of the 34 interviews: six interviewees believed that the subject of allegations needed support; two indicated that they thought that reporters needed more support than the subject of allegations; and five interviewees indicated that there should be a balance and that both parties to the dispute needed support. It is clear that many managers felt that the processes of support and protection for reporters were weighted unfairly against the persons about whom allegations have been made. The interviews also highlighted that, where reports of wrongdoing involving managers are made, those managers’ colleagues can be placed in a difficult situation.

Such attitudes are not typical, however, of the response of managers and case-handlers to this question. The overwhelming majority of respondents expressed support for a balanced and even-handed treatment of both sides in this often-adversarial situation.

Section A discussed the attitudes of managers when a report of wrongdoing was an allegation against another staff member. These sorts of reports are not infrequent and create significant difficulties for organisations. As mentioned in that section, this is a cultural issue where, ideally, managers are aware that the rights and interests of all parties need to be protected. The sample procedures below contain suggestions as to how this might be achieved.

## APPROPRIATE SANCTIONS AGAINST FALSE OR VEXATIOUS

### ALLEGATIONS

When reports of wrongdoing are made, they frequently involve specific allegations against a particular individual. This has the effect of creating an adversarial situation and, unless it is handled in a transparent and even-handed way, enables those within the organisation who are sceptical about the value of whistleblowing to claim that it has a corrosive effect by encouraging unfounded allegations that can damage professional reputations.

This is another emotion-charged area of whistleblowing and can cause considerable concerns within organisations. In reality, the problem of false or vexatious disclosures appears to be overstated and most managers have a more balanced view of disclosures. Of the 34 interviews with managers and case-handlers, only five mentioned malicious or vexatious reporters.

Nevertheless, it is likely that line managers might feel under threat from the risk of false or vexatious allegations, and this can be addressed only by ensuring thorough, transparent and even-handed investigation processes. Relatively few organisations included any description of sanctions for those making false or vexatious allegations in their whistleblowing procedures: of the 24 items assessed in the analysis of agency procedures, sanctions for those making false or vexatious allegations were ranked twenty-first (Roberts 2008:246, Table 10.8). Organisations are encouraged to include this element in their procedures and also to include in their awareness-rating programs that the organisation will be neutral and even-handed in investigating and dealing with reporter complaints that involve a particular employee.

*[C]omplainants use the protected disclosure legislation really badly and use it for their own interests and make vexatious complaints against their colleagues and their managers, etc. And because everyone is so damned terrified to actually deal with those sorts of vexatious matters—for the fear of being seen to be doing detrimental action—people get away with absolute murder in terms of the level of complaints they make about their colleagues.*

**Manager**

### NATURAL JUSTICE

It is a common misconception that confidentiality is often breached because it is a requirement of natural justice. In interviews, many managers and investigators insisted that it was necessary for the name of a reporter to be revealed when a serious allegation was made against another person. The quotation in the box encapsulates this belief.

Natural justice typically does not require the revelation of a reporter's name. Natural justice requires that the person against whom the allegation is made is told of the substance of the allegation and given the opportunity to refute it, *prior to any decision regarding action being taken against them*.

*I'm no expert, but I do understand the legislation and its intent...My understanding is that, in certain circumstances, you do have to make the complainant's name available because it may be the only way that you can actually put fairly serious allegations to someone.*

**Manager**

### PRACTICAL ACTION

Reports of wrongdoing that allege wrongdoing by another employee are not infrequent and create significant difficulties for organisations. Ideally, the ethical culture of an organisation would promote fair treatment and support for all parties involved in a report, and managers would be fully aware of how to protect the rights and interests of all parties. The sample procedures below contain suggestions as to how this might be achieved.

Organisations are encouraged to include sanctions for those making false or vexatious allegations in their procedures. Additionally, awareness-raising programs should promote the organisation's commitment to dealing with and investigating reports that involve employees in an objective and transparent manner.

In some jurisdictions, there is a legislative requirement that organisations may only provide the name of the reporter for natural justice purposes if it is unlikely that a reprisal will be taken against them as a result of that disclosure and it is essential to do so for the purposes of natural justice. That approach clearly has some benefits, and organisations are encouraged to consider including this in their own procedures.

While the subject of the allegations might come to their own conclusion as to the identity of the reporter, it is not a requirement for organisations to reveal this information. It is suggested that organisations provide clear advice to supervisors and managers about to whom, when and by whom information about allegations needs to be given to persons affected by a report of wrongdoing, for reasons such as natural justice.

## **SAMPLE POLICIES AND PROCEDURES**

### **Assessment and investigation of reports**

#### **Identification and tracking of reports**

In addition to the issues listed in 'Practical Action' in Section C1 and subject to the consideration below, all reports of wrongdoing will be recorded and notified to the 'Whistleblower Report Coordinator' mentioned in the 'Sample policies and procedures: Section C' (name, position title, location and contact details). That notification will include

- identification number of report
- name of reporter (where reporter has consented)
- recipient of the report
- date and time
- nature of the allegation; if the report has been made in writing, this should be attached
- relation to other reports (if known)
- to whom the report has been referred for investigation.

At each step in the handling of the report, the responsible officer shall notify the officer listed above of

- results of preliminary assessment of the risk of reprisal
- an active process of checking with relevant line managers of any suspicions that reprisals might be occurring
- if no further action is to be taken on the report, reasons for that decision
- feedback provided to the reporter at each stage in the process
- details of support offered and provided
- if an investigation occurs, name of investigating officer and the outcomes
- referral or notification to external integrity agency or agencies
- contact with the subject of the allegation
- any remedial action taken as a result of the report
- reasons and process for ceasing support for the reporter.

## Assessment procedures

The responsibilities of the officer receiving the report are to

- maintain the confidentiality of the reporter and any person who is the subject of allegations
- address whether the report requires further investigation to establish the facts and to advise the Whistleblower Report Coordinator of the outcome of that consideration
- advise the reporter not to discuss the report with anyone else
- explain to the reporter what will happen as a result of the report
- if requested, make arrangements to meet the reporter discreetly
- advise the reporter of the desirability of putting the report in writing
- advise the reporter of the organisational support mechanisms available and the names and contact details of that support as well as any relevant organisational function (such as the Whistleblower Report Coordinator).

It is appropriate that some reports of wrongdoing are handled at the line-management level and no reporting or formal investigation action is undertaken. This can occur if

- the matter is minor and is normally dealt with at line-management level
- the matter has relevance only to the local work unit
- the number of parties involved is minimal
- no disciplinary or legal action is warranted
- the activity does not, on its face, indicate a wider pattern of behaviour in the organisation
- reprisal action is considered to be unlikely
- the reporter has been consulted and is satisfied that the matter does not proceed.

If line managers are in doubt about any of the above criteria, the matter should be recorded, notified and handled formally. Line managers who make the decision not to deal with the report formally should record the incident in accordance with the guidance above and retain the record.

Where the matter is covered specifically by another organisational policy—for example

- bullying and harassment
- personnel selection matters
- occupational health and safety
- breaches of professional practice

the report must be dealt with in accordance with those policies.

## Investigation

All disclosures will be promptly and thoroughly assessed. Decisions as to the most appropriate action to be taken on the disclosure will also be made promptly.

The basis for these decisions will be fully documented.

Where a report warrants investigation, the Whistleblower Report Coordinator will arrange for that investigation to occur. The investigator will

- have appropriate skills and experience in investigation
- be independent of the reporter, other witnesses and any subject of the allegations

- as far as possible, protect the confidentiality of the reporter, any other witnesses and any person against whom allegations have been made
- conduct the investigation in accordance with procedures set down by the organisation.

If an internal investigation is to be conducted, terms of reference will be drawn up in order to clarify the key issues to be investigated. An investigation plan will be developed to ensure all relevant questions are addressed, the scale of the investigation is in proportion to the seriousness of the allegation(s) and sufficient resources are allocated.

Strict security will be maintained during the investigative process. All information obtained will be locked away to prevent unauthorised access.

All relevant witnesses will be interviewed and documents examined. Contemporaneous notes of all discussions, phone calls and interviews will be made. Where possible, interviews will be taped.

A report will be prepared when an investigation is complete. This report will include

- the allegations
- a statement of all relevant facts and the evidence relied upon in reaching any conclusions
- the conclusions reached and their basis
- recommendations to address any wrongdoing identified and any other matters arising during the investigation.

The principles of procedural fairness (natural justice) will be observed. In particular, where adverse comment about a person is to be included in a report, the person affected will be given an opportunity to comment beforehand and any comments will be considered before the report is finalised.

### **Risks of reprisal**

The 'Sample policies and procedures' for Part D include detailed advice on the recommended risk-assessment process. This process needs to occur as soon as possible after the notification processes outlined above have occurred.

### **Confidentiality**

Maintaining confidentiality is very important in the handling of a report of wrongdoing. Confidentiality not only protects the reporter against reprisals, it also protects any other people mentioned in or affected by the report.

Confidential information may include

- the fact a disclosure has been made
- any information that might identify the reporter or any person who might be the subject of a report of wrongdoing
- the actual information that has been disclosed in the report
- information relating to the disclosure that, if known, might cause detriment to any person.

When dealing with a report of wrongdoing, this organisation will fully comply with *(the relevant privacy legislation)*.

While every attempt to protect confidentiality should be made, there will be occasions when disclosure of the reporter's identity might become necessary.

These include

- providing natural justice to the person against whom the allegations have been made
- responding to a court order or legal directive (for example, subpoena, search warrant, notice to produce, direction by a parliamentary committee)
- court proceedings.

The reporter must be advised if their identity needs to be revealed for any reason listed above and the reporter's consent sought, where appropriate. The organisation will make all reasonable attempts to avoid a situation where identity will need to be revealed even though the reporter has not given consent. In protecting confidentiality, the organisation will ensure that the details of the report, the investigation and related decisions will be kept secure.

While the organisation should be prepared to take all steps necessary and appropriate to protect the confidentiality of the information that has been provided, the reporter also has some obligations. The reporter should not talk to colleagues or any other unauthorised person about the report and, in particular, disclose any information about the progress of the investigation.

Where confidentiality has been compromised, or is likely to be compromised, the organisation will, in consultation with the reporter, actively pursue strategies to limit any detrimental action and to support the reporter. This might include

- relocating the reporter to another work unit
- approving leave
- ensuring that other staff are aware of the consequences of initiating reprisal action
- openly acknowledging the organisation's commitment and support to the reporter.

### **Equity and natural justice**

When the organisation receives a report of wrongdoing, it is often necessary to interview employees in the area where the suspected wrongdoing has occurred. An investigator appointed by the organisation will conduct these interviews. Persons who are the subject of a report of wrongdoing should be advised that

- they are encouraged and expected to assist the investigator
- if any allegations have been made against another officer, they will be notified formally about the nature of those allegations
- they may have a person of their choice present at the interview (for example, a colleague, peer support officer, confidant, union representative, legal representative or interpreter)
- they will be given an opportunity to make a statement, either orally or in writing
- if the allegations are referred to the police, they have a common-law duty not to obstruct them in their inquiries
- if in the course of the investigation evidence emerges that the subject of a whistleblowing report might be involved in the commission of a criminal offence, they will be informed of their legal rights
- where possible, their confidentiality and privacy will be respected.

Where it is determined that the whistleblowing report constitutes a false or misleading allegation, or that the report involves an unreasonable breach of confidentiality, sanctions will be applied against the reporter. These sanctions may be authorised by the relevant public interest disclosure legislation or some other authority.