

Whistleblower policies

Consultation paper 321

Feedback on questions

B1Q1 – While I agree with the bulk of the guidance in Section B of the draft Regulatory Guide, I have some issues with certain paragraphs:

1. At RG 000.5 it would be helpful to specify whether any State or Territory owned or controlled entities are likely to be subject to the requirements of s1317AI (1).
2. While the interests of relevant regulators re referred to in RG 000.41, reference should also be included to the interests of the entity in being made aware of such matters.
3. Should RG 000.48 be expanded to refer to deliberately false reports being a breach of an employee's duty of fidelity to his/her employer, and most probably a breach of any code of conduct applying to the employee?
4. Re RG 000.49, the reference to disclosures being protected under the Fair work Act needs some explanation. Is the Corporations Act a 'workplace law' for the purposes of the Fair Work Act 2009 such that a disclosure made pursuant to the Corporations Act would constitute a 'complaint or inquiry' under s.340 and s 341 (1)(c) of the Fair Work Act? If so, a cross-reference to those provisions would be helpful. If not, some other explanation should be provided for this statement. If any State or Territory entities are likely to be subject to the requirements of s1317AI (1), it would also be helpful to note that they are already likely to be subject to their jurisdiction's PID Act.
5. There is an inconsistency between the last sentence of RG 000.57 which refers to protections applying from the time a person makes a disclosure, and s1317AI and RG 000.109 which refer to the protection against detrimental action applying where a person believes or suspects that another person proposes or could make a disclosure that qualifies for protection.
6. Re RG 000.75, it is unclear what 'outside the chain of command' means in this context. Outside of which chain of command?
7. **Re 000.85, if entities that are NDIS service providers may be subject to the requirements of s1317AI (1) (or to the whistleblower protection provisions of the Corporations Act generally), they will need to have their attention drawn to the fact that they are covered by both the disclosure provisions in the Corporations Act and the disclosure provisions in Division 7 of the NDIS Act 2013. This is particularly important because the disclosure provisions in the NDIS Act are based on the old Corporations Act provisions and are in important respects in conflict with the new provisions in that Act (e.g. re anonymity, good faith and confidentiality). The officers and senior managers of such entities could be complying with the NDIS provisions and committing offences under the Corporations Act.**
8. Re RG 000.102 (d), it would be helpful to include a further paragraph that expands on the consent issue. For the purposes of the Act it does not appear to me that

consent is not an all-or-nothing issue. A discloser could be asked to consent to a limited disclosure, for example disclosure to the entity's whistleblower protection officer/coordinator and the person who will be charged with any investigation of the disclosure. It would be helpful to refer explicitly to this option in the guidance as a discloser is more likely to consent to a limited disclosure than to one that is effectively unlimited. By my reading of the Act, if such a partial consent (or a full consent) is not obtained, the recipient of the disclosure would be prohibited from disclosing the identity of the discloser, or information likely to identify the discloser, to anybody else. In my experience over 25 years in relation to the NSW PID Act, it is common that people who make disclosures are very concerned about reprisal action being taken against them if they are identified as the reporter. It is also common that when people in a workplace become aware that a disclosure has been made about certain matters or that those matters are being investigated, this points them to the identity of the person who made the disclosure. I think it is very important that practical guidance be provided by ASIC to assist recipients of disclosures, and those responsible for dealing with disclosures, to navigate through the confidentiality minefield.

9. Re RG 000.103, there is no prohibition in the Act on the disclosure of information contained in a disclosure, other than identifying information. Maybe the paragraph could start: "*With or without the discloser's consent, a person can ...*".
10. Re RG 000.107 (c), it should be noted in the paragraph that this can only be done with the consent of the discloser.
11. Re RG 000.133, should a further option be added at the end of the last sentence, being referral to a relevant external regulator?
12. Re RG 000.149, it would be helpful to include some information about the powers of ASIC and APRA to deal with complaints about such matters, and details about how such complaints should be made (e.g. email addresses and phone numbers).
13. Re RG 000.150 (i), it would not be appropriate to inform such employees of a referral to ASIC, APRA or the Federal Police if this could detrimentally impact on any subsequent investigation by such bodies.

B1Q2 – Subject to the issues raised in answer to **B1Q1** above I believe the information that must be covered by a whistleblower policy has been adequately addressed in the proposed guidance.

B1Q3 – I agree

B1Q4 – It is important that entities attempt to manage employee expectations from the outset by reducing the likelihood that employees may assume that an issue of concern will qualify for protection in circumstances where this is not the case (e.g. personal grievances). The policies developed and adopted by entities therefor need to put disclosures that qualify for protection under the Corporations Act into the context of all reports that may be made within the entities about issues and concerns. This should include listing the other options and directing employees as to how/where to raise those other concerns. The proposed ASIC guidance should reflect this.

B1Q5 – I think it is very important that an entity’s policy cover ‘eligible whistleblowers’ outside the entity. Apart from putting their policies on the web, entities need to consider ways to ensure that contractors are made aware of the policy.

B1Q6 - Subject to my comments in answer to **B1Q1** above and **B1Q9** below, I think the proposed good practice guidance will be useful and appropriate.

B1Q7 – See **B1Q1** above at 3.

B1Q8 – I am in principle in agreement with this approach, however the costs likely to be incurred by investigations undertaken by third parties may well be prohibitive for smaller organisations.

B1Q9 – I think it is reasonable to assume that as a general rule, there is an almost direct relationship between the likelihood that a person will read a document and the length and complexity of that document. I therefore think it unlikely that a 49 page document containing 196 paragraphs of text covering complex matters will be read by the average employee, office or senior manager of a corporation (before something goes wrong). If potential disclosers were to read the document, it can be assumed they will be primarily (or only) interested in finding out how to make a disclosure and the protections that will be available to them, not the procedural detail.

One way to reduce the size of the document would be to separate the information intended for potential disclosers from the guidance intended for officers, senior managers and those responsible for dealing with disclosures. The former would be the guide to assist entities to draft a policy as required by the Act, and the latter would be a procedural guide to assist entities to establish and manage a whistleblower protection system.

B1Q10 – See comments at B1Q1 above, particularly in relation to the implications of the confidentiality provisions in the Act.

B2Q1 – I believe the guidance in Section C of the draft is far too general to provide much practical assistance to the officers and senior managers of entities in the development of appropriate policies and procedures to manage whistleblowing.

B2Q2 - While the section on ‘*Fostering a whistleblowing culture*’ might be the basis for part of the introduction to procedural guidance, by itself it is basically aspirational. This is one of the most complex and difficult objectives that needs to be achieved for whistleblowers to be protected by an organisation. Merely saying what a culture should look like is of little practical use. What is needed is some advice about how to analyse an existing culture and options to address any deficiencies that are identified.

The section on ‘*Ensuring the privacy and security of personal information*’ draws attention to this crucial issue, but:

- The second sentence in RG 000.188 warrants being its own paragraph
- RG 000.189 would be more useful if it gave examples of key standards, guidance and frameworks it is referring to.

The guidance under '*Other whistleblowing principles and standards*' refers to a withdrawn (and very out of date) standard and another standard that will not be finalised and available for at least a year after entities are required to have a policy in place.

Chris Wheeler PSM