

Whistleblowing

Some Relevant Considerations



Contents

Whistleblowing: some ethical and legal considerations	2
What is whistleblowing?	3
Whistleblowing duty	4
Whistleblowing in the Accounting Professional and Ethical Standards	5
Members in Practice	5
Members in Business	5
Company auditors' obligations	7
Whistleblower protection legislation in Australia	8
The Corporations Act 2001	8
Examples of whistleblowing legislation in selected jurisdictions	9
Malaysia	9
Singapore	9
United Kingdom	9
US	9
Good Practice	9
Further information	11

Whistleblowing: some ethical and legal considerations

The objective of this publication is to inform members on issues related to whistleblowing and assist them in identifying their responsibilities in this area. It outlines some issues that must be considered or may arise in potential cases and identifies relevant [Accounting Professional and Ethical Standards \(APES\)](#) and legal requirements as they relate to whistleblowing for members in business and in public practice.

CPA Australia members are required to act ethically and professionally in accordance with not only the by-laws and standards that apply to CPA Australia members, but also in compliance with applicable laws and regulations in all relevant jurisdictions.

All members practising in Australia are required to comply with the requirements of the [Accounting Professional and Ethical Standards \(APES\)](#). Members practising outside Australia are required to comply with APES to the extent to which they are not prevented from doing so by local laws or regulations.

This publication covers:

- What is whistleblowing
- Whistleblowing duty
- Accounting Professional and Ethical Standards
- Company auditors' obligations
- Whistleblower protection legislation in Australia
- Examples of whistleblowing legislation in other jurisdictions
- Good practice
- Further Information

This publication provides general information only. If you are considering making a public interest disclosure (blowing the whistle) please ensure you seek legal advice.

Before you make a final decision about whistleblowing, you may also wish to contact [the Ethi-call](#) counselling service. This service provides counselling on ethical dilemmas and is available free of charge to members of CPA Australia who reside in Australia through St James Ethics Centre.

What is whistleblowing?

Whistleblowing, or public interest disclosure, is an action taken to further the public interest by making known a malpractice or wrongdoing that occurs in an organisation with the objective of rectifying it. It involves the disclosure of an organisational malpractice or wrongdoing by someone with privileged access to information (such as a current or former employee) to an internal or external entity that has the power to correct that wrongdoing. The wrongdoing that may be reported can involve illegal or unethical practices such as possible fraud, corruption, waste, discriminatory practices or other risks that could affect customers, colleagues, the environment, the organisation or the public.¹

Whistleblowers can be current or former, temporary or permanent employees or contractors. Intentionally or maliciously making false accusations motivated by self-interest is not whistleblowing. In addition, whistleblowing is not the same as making a complaint or raising a grievance, because the objective of blowing the whistle is to correct a wrongdoing or malpractice that affects the public interest and not to report a personal issue. Research indicates that whistleblowers are generally found to be loyal employees who believe their actions will assist in the termination of the wrongdoing.

Whistleblowing can be internal or external. Internal whistleblowing involves disclosures made within the organisation by using formal or informal channels. An employee, for example, who wishes to make a disclosure, may report it to a designated manager, a senior executive, the internal auditor or another person designated to receive whistleblower disclosures. Internal whistleblowing generally occurs outside of the chain of command so a disclosure would be made to someone other than the direct line manager or supervisor.

External whistleblowing refers to disclosures made outside the organisation and generally follow ineffective internal whistleblowing. External disclosures may be made to law enforcement agencies, public interest organisations or the media.

Effective management of whistleblowing protects the public interest and the entity.

Organisations generally prefer employees to blow the whistle internally rather than externally. This is also usually considered something employees should do so that the organisation is informed of the wrongdoing and is given the opportunity to correct it.

Whistleblowing raises a number of ethical, legal and managerial issues. Some of the ethical issues involve the treatment of whistleblowers, since many suffer retaliation for making public interest disclosures. Ethical issues also arise in the responsibility of management to address illegal or unethical acts that have been disclosed to them and ensure that the interests of relevant stakeholders are protected.

The legal issues created by whistleblowing are a consequence of its increasing regulatory and legislative coverage which creates legal obligations for public and private sector organisations. These obligations include the development of appropriate policies, systems processes and culture to manage whistleblowing and protect the whistleblowers.

The managerial issues involve the creation of an organisational culture, policies and processes that promote:

- the raising of concerns and their timely and effective resolution
- employees' understanding of what constitutes wrongdoing and what to do if it occurs
- employees' understanding that wrongdoing is not condoned but corrected

Effective management of whistleblowing is not only beneficial for the public interest but it is also part of effective risk management and governance. Risk can involve the potential harm that employees or other stakeholders may suffer as a result of the wrongdoing, the reputational damage to the organisation if the concern is reported externally and the increased resources that may be required to deal with the wrongdoing at a later stage.

Appropriate and timely resolution of concerns raised by whistleblowers reduces the organisation's exposure to lawsuits and potential reputational damage. It also reduces dysfunctional employee turnover, demoralisation and stress and promotes organisational effectiveness.

The effective management of whistleblowing can contribute to good governance and risk management.

¹ The Australian Standard on Whistleblower Protection Programs for Entities (AS 8004-2003) defines reportable conduct as dishonest, fraudulent, corrupt, illegal, in breach of legislation or local authority by-laws, unethical, serious improper conduct, unsafe work practices and any other conduct that may cause financial or non-financial loss to the entity or be detrimental to the interests of the entity.

Whistleblowing duty

While the term whistleblowing refers primarily to voluntary disclosures it is also used for disclosures undertaken when there is a legal or professional duty to disclose as, for example, may be the case in relation to audit engagements.

Having the duty to disclose (non-voluntary whistleblowing) results in the same outcomes as voluntary whistleblowing in that people who have the power to stop the wrongdoing are informed and whistleblowers may be protected. However, there are some fundamental differences in the motivations and consequences for the whistleblower.

A whistleblower who is bound by legal or professional duty to disclose faces the likelihood of being subject to criminal or other sanctions for the act of non-disclosure while someone who is not bound by such duties may consider disclosure for a wider range of issues, not only for issues specified in the law or professional standards.²

² Banisar, D. (2009) Whistleblowing International Standards and Developments, Transparency International, www.transparency.org/global_priorities/other_thematic_issues/towards_greater_protection_of_whistleblowers/the_need_for_whistleblower_protection

Whistleblowing in the Accounting Professional and Ethical Standards

The term whistleblowing is not used in APES 110 *Code of Ethics for Professional Accountants* (Code) or in other Accounting Professional and Ethical Standards. Instead, the terms used are “complaint systems”, “raise concerns” and “policies and procedures” that enable the communication of any issues. However, the term whistleblowing is used in the guidance note APES GN 40 *Ethical Conflicts in the Workplace – Considerations for Members in Business*.

Paragraph 100.12 of the Code requires all members to safeguard against any threat that may compromise or could be perceived to compromise their compliance with the fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. Effective, well-publicised complaint systems operated by the employing organisation, the profession or a regulator, which enable colleagues, employers and members of the public to draw attention to unprofessional or unethical behaviour, are examples of such safeguards.

In situations where a significant conflict cannot be resolved, the Code in paragraph 100.21 states that “a Member may consider obtaining professional advice ... without breaching the fundamental principle of confidentiality if the matter is discussed with the relevant professional body on an anonymous basis or with a legal advisor under the protection of legal privilege ... For example, a Member may have encountered a fraud, the reporting of which could breach the Member’s responsibility to respect confidentiality. The Member may consider obtaining legal advice in that instance to determine whether there is a requirement to report.”

The principle of confidentiality of the Code (section 140) imposes an obligation on all members not to disclose any confidential information acquired as a result of professional and business relationships outside the firm or employing organisation.

Such disclosures are permitted only if proper and specific authority or legal and professional right or duty to disclose exists (paragraph 140.7). Paragraph AUST140.7.1 explains that paragraph 140.7 does not take into account Australian legal and regulatory requirements and strongly advises a member considering disclosing confidential information about a client or employer without their consent to first obtain legal advice.

Members in Public Practice

Paragraph 200.12 of the Code requires Members in Public Practice to ensure that any potential threat to compliance with the fundamental principles is addressed by among other means having “published policies and procedures to encourage and empower staff to communicate to senior levels within the Firm any issue relating to compliance with the fundamental principles that concerns them.”

In addition, paragraph 119 of APES 320 *Quality Control for Firms* provides the mandatory requirement for a firm to “establish policies and procedures designed to provide it with Reasonable Assurance that it deals appropriately with:

- a. Complaints and allegations that the work performed by the Firm fails to comply with Professional Standards and applicable legal and regulatory requirements; and
- b. Allegations of non-compliance with the Firm’s system of quality control.

As part of this process, the Firm shall establish clearly defined channels for Firm’s Personnel to raise any concerns in a manner that enables them to come forward without fear of reprisals.”

APES 320 requires a firm not only to establish policies and procedures to deal appropriately with complaints and allegations but also to establish policies and procedures to document complaints and allegations and the firm’s responses to them.

APES 320 explains that complaints and allegations (which do not include those that are clearly frivolous) may originate from within or outside the firm. They may be made by the firm’s employees, clients or other third parties and they may be received by the members of the engagement team or other personnel of the firm.

Members in Business

The Code states that members in business have the responsibility to further the legitimate goals and objectives of their employing organisation. It further states (paragraph 300.5) that members in business are expected to encourage an ethics-based culture in their employing organisation that emphasises the importance placed on ethical behaviour by senior management.

Certain circumstances may threaten compliance with the fundamental principles of the Code. Members in business are required to use safeguards so that compliance with the fundamental principles of the Code is not compromised. Paragraph 300.14 of the Code provides examples of such safeguards that include “policies and procedures to

empower and encourage employees to communicate to senior levels within the employing organisation any ethical issues that concern them without fear of retribution.”

Further, paragraph 300.15 of the Code states that “where a Member in Business believes that unethical behaviour or actions by others will continue to occur within the employing organisation, the Member in Business may consider obtaining legal advice. In those extreme situations where all available safeguards have been exhausted and it is not possible to reduce the threat to an Acceptable Level, a Member in Business may conclude that it is appropriate to resign from the employing organisation.”

In addition to the Code, APES Guidance Note 40 *Ethical Conflicts in the Workplace – Considerations for Members in Business* (GN 40) addresses whistleblowing and disclosure of information. Paragraph 12.1 explains: “In accordance with Section 140 Confidentiality of the Code, a Member in Business who acquires confidential information in the course of providing a Professional Service is prohibited from disclosing that information without proper and specific authority or unless there is a legal or professional right or duty to disclose it”.

GN 40 also discusses the *Privacy Act 1988* (Cth) (Privacy Act) which “prohibits the disclosure of personal information about an individual, other than in certain limited circumstances including circumstances where the individual has consented to the disclosure or the disclosure is required or authorised by or under law.”

Reporting suspected money laundering activities to Australian Transaction Reports and Analysis Centre (AUSTRAC) in accordance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or disclosure by the member of authorised whistleblower information under the *Corporations Act 2001*, are examples of a required or authorised disclosure provided in GN 40.

Paragraph 12.7 of GN 40 suggests that where a member is considering disclosing information, the member should follow any relevant internal policies and procedures of the business or public sector entity which employs the member.

If there are no relevant internal policies then when considering disclosing information in circumstances which would otherwise be a breach of the professional obligation of confidentiality some of the member’s considerations should be (paragraph 12.8):

- a. Statutory constraints and obligations on disclosure including those contained in Federal and State and Territory privacy and whistleblower laws;

- b. Statutory protection for whistleblowers contained in Federal and State and Territory whistleblower laws;
- c. Whether the information relates to conduct which constitutes a breach of or an offence under any laws;
- d. Whether members of the public are likely to be adversely affected by the disclosure or non-disclosure of the information;
- e. The gravity of the matter, such as the size and extent of likely financial loss;
- f. The possibility or likelihood of repetition;
- g. The reliability and quality of the information available;
- h. The reasons for the Employer’s unwillingness to disclose matters to the relevant authority;
- i. When the Employer gives authorisation to disclose information, whether or not the interests of all parties, including third parties whose interests might be affected, could be harmed;
- j. Whether or not all the relevant information is known and has been substantiated. Where the situation involves unsubstantiated or incomplete information and conclusions, professional judgment should be applied to determine the appropriate type of disclosure to be made, if any. The Member requires a reasonable belief that wrongdoing has occurred, before disclosure can be made;
- k. The type of communication that is expected and to whom it is addressed. In particular, the Member should be satisfied that the parties to whom the communication is addressed are authorised recipients; and
- l. The possible implications of disclosure for the Member and the Member’s reputation.

Paragraph 12.6 of GN 40 states that a member in business who is considering disclosing information about the member’s employer or persons in the employer’s business in circumstances which would otherwise be a breach of the member’s professional obligation of confidentiality or statutory obligations is strongly advised to first obtain legal advice.

Company auditors' obligations

Company auditors, under sections 311, 601HG and 990K of the *Corporations Act 2001*, have legal obligations to notify the Australian Securities & Investments Commission (ASIC) if there are reasonable grounds to suspect that there has been a contravention of the Corporations Act. The contravention may be significant or insignificant and the auditor has to believe that it has not or will not be dealt with adequately.

The auditor's reporting obligations are not limited to matters that arose from the audit or review and auditors are expected to make appropriate inquiries when they are warranted. An auditor making a report to ASIC has qualified privilege (protection from proceedings for defamation) and an auditor failing to make a report is guilty of an offence. Guidance on when an auditor must report contraventions of the Corporations Act is contained in Regulatory Guide 34 *Auditor's obligations: Reporting to ASIC*.

Company auditors also have a legal obligation under the Corporations Act if they receive a disclosure from a whistleblower reporting breaches of the Corporations Act or the *Australian Securities and Investments Commission Act 2001* (ASIC Act) or secondary offences under these acts. These disclosures need to be handled in accordance with the legislation in order to prevent an inadvertent breach of the Corporations Act.

Under the Corporations Act the disclosure and the identity of the whistleblower (or information that may lead to the identity of the whistleblower) can only be made when:

- informing ASIC, APRA or the Australian Federal Police without the whistleblower's consent
- informing another person if the whistleblower has given consent. This means that as a member of an audit team you cannot pass on the disclosure to an audit partner unless the whistleblower has consented to this

Whistleblower protection legislation in Australia

Whistleblower protection laws in Australia provide certain people who make public interest disclosures with protection against victimisation and liability for making particular disclosures. They also prescribe specific processes that need to be followed for protection to be afforded.

In Australia, whistleblower legislation is in place federally and in states and territories. Table 1 provides an overview of legislation that covers whistleblowing, its jurisdiction and application.

The majority of legislation focuses on the public sector rather than on the private sector. Private sector whistleblower legislation is provided by the Corporations Act (part 9.4AAA), which extends whistleblower protection to officers and employees of companies and subcontractors. The South Australian Whistleblower Protection Act also extends to the private sector.

Table 1: Australian Whistleblower Protection Legislation

Act/Bill	Jurisdiction	Who is covered
Public Interest Disclosure Bill 2013	Commonwealth	Public officials, Commonwealth contractors and their employees reporting a broad range of conduct.
Public Service Act 1999, section 16	Commonwealth	APS employees reporting breaches/alleged breaches of Code of Conduct
Public Interest Disclosure Act 2012	Australian Capital Territory	Anyone disclosing public sector wrongdoing
Protected Disclosures Act 1994	New South Wales	Public officers disclosing public sector wrongdoing
Public Interest Disclosure Act 2008	Northern Territory	Public officers disclosing public sector wrongdoing
Whistleblowers Protection Act 1993	South Australia	Anyone disclosing public and private sector wrongdoing
Public Interest Disclosure Bill 2010	Queensland	Anyone disclosing public sector wrongdoing
Public Interest Disclosures Act 2002	Tasmania	Public officers and contractors disclosing public sector wrongdoing
Whistleblowers Protection Act 2001	Victoria	Anyone disclosing public sector wrongdoing
Public Interest Disclosure Act 2003	Western Australia	Anyone disclosing public sector wrongdoing
Corporations Act 2001	Commonwealth	Company officers, employees or contractors disclosing company contravention of the Corporations legislation

The Corporations Act 2001

Part 9.4AAA of the Corporations Act protects an officer, an employee or a current contractor of a company who has reasonable grounds to suspect that the information reported in good faith indicates that the company, or an officer or employee of that company, has or may have contravened the Corporations legislation, which includes the Corporations Act or the ASIC Act.

The Corporations Act prohibits any victimisation that causes or threatens to cause detriment against a person who has made a disclosure that qualifies for protection. It further provides whistleblowers with a right to seek reinstatement of employment and a right to compensation while it protects them from civil and criminal liability for making the disclosure.

Part 9.4AAA – s 1317AA of the Corporations Act states that to be protected the disclosure must be made to:

- ASIC
- the company's auditor or a member of the audit team
- a director, secretary or senior manager of the company
- another person authorised by the company to receive whistleblower disclosures

To gain protection under the Corporations Act, whistleblowers must give their name before making the disclosure and have reasonable grounds to suspect that the information disclosed indicates the company or an officer or employee of the company has, or may have, contravened the Corporations legislation and act in good faith. The protection offered by the Corporations Act only covers whistleblowers reporting breaches of the Corporations Act and the ASIC Act (protected disclosure).

To find out if you are entitled to protection as a whistleblower under the law it is important to receive legal advice.

Examples of whistleblowing legislation in selected jurisdictions

Malaysia

- The Malaysian *Companies Act 1965* imposes a duty on auditors to report breaches of company law to the relevant authorities.
- The *Capital Market and Services Act 2007* offers protection from victimisation to auditors and specific employees of listed companies who report breaches of securities laws and stock exchange rules to relevant authorities.
- The *Whistleblower Protection Act 2010* offers confidentiality, protection and immunity from civil and criminal liability to whistleblowers who report wrongdoing to external authorities only.

Singapore

- The Singapore *Companies Act 2005* imposes a duty on auditors to report to the authorities if they have reason to believe that a serious offence involving fraud or dishonesty is being or has been committed against the company by officers or employees of the company.
- The revised Singapore Corporate Governance Code (2005) recommends that “The AC [audit committee] should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The AC’s objective should be to ensure that arrangements are in place for the independent investigation of such matters and for appropriate follow up action.”

United Kingdom

The UK Corporate Governance Code (formerly the Combined Code) recommends audit committees review confidential concerns raising arrangements about possible improprieties in matters of financial reporting or other matters by which staff of the company may raise concerns. The audit committee should also ensure that arrangements are in place for the investigation of such matters and for appropriate follow-up action.

The *Public Interest Disclosure Act 1998* provides protection for employees in the public, private and voluntary sectors for a broad range of disclosures.

USA

- The *Sarbanes-Oxley Act* provides protection for corporate employees and mandates companies to establish procedures to permit anonymous reporting by employees. It places an obligation on the audit committee to establish these procedures.
- The *Federal False Claims Act* allows private individuals (whistleblowers) not associated with the US Government to initiate a lawsuit against federal contractors and allege that they committed fraud against the government. Whistleblowers are entitled to a percentage of the fraud recovery and are protected.
- The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) includes significant amendments to the whistleblower protection provisions of the Sarbanes-Oxley Act and adds new private rights of action for whistleblowers. The Dodd-Frank Act offers rewards (up to 30 per cent of the fines levied) to individuals who report violations of US Securities Laws including the Foreign Corrupt Practices Act.

Good Practice

For whistleblowing to be effective in both the cessation of the wrongdoing and the protection of the whistleblower it is essential that it is seen “not as betrayal nor disloyalty but a service to society.”³

Employees should be encouraged to raise concerns with identified members in the organisation or through other channels provided by the organisation. To encourage reporting of concerns, employees need to be confident that they can raise concerns without suffering any retaliation, that their concerns will be taken seriously and any wrongdoing will be corrected. Whistleblowing can be an early warning system for employers and an effective policy can provide a clear framework for action for employees and employers alike. Guidance on good practice is included in the following publications:

- The Australian Standard on *Whistleblower Protection Programs for Entities* (AS 8004-2003) provides guidance for establishing, implementing and managing an effective whistleblower protection program and can be applied within companies, government entities and their agencies and not-for-profit entities. The Standard requires:
 - Commitment by people in all levels of the entity to effective reporting of corrupt and illegal behaviours or behaviours that are contrary to the Code of Conduct
 - A whistleblower protection policy that encourages the reporting of reportable conduct, specifies the mechanisms to be used for disclosures, and guarantees confidentiality and whistleblower protection
- The Australian Stock Exchange’s *Corporate Governance Principles and Recommendations* recommend in “Principle 3: Promote ethical and responsible decision making” that companies should establish a code of conduct which includes reference to how the company encourages the reporting of unlawful or unethical behaviour and actively promotes ethical behaviour. This might include reference to how the company protects whistleblowers who report violations in good faith and its processes for dealing with such reports.
- British Standards (BSI) has published a Whistleblowing Arrangements Code of Practice under the classification PAS 1998/2008, offering guidance on introducing, updating, running, reviewing and evaluating a whistleblowing scheme.
- A good practice guide for managing internal reporting of wrongdoing in public sector organisations has been published as part of the Australian “Whistling While they Work” project. The guide focuses on the processes needed for public employees and employees of public contractors to be able to report concerns about wrongdoing in public agencies and programs; and managerial responsibilities for the support, protection and management of those who make disclosures about wrongdoing, as part of an integrated management approach.
- The Australian Public Service Commission’s circular 2011/5 offers advice to agencies on procedural fairness in whistleblower investigations.

³ Parliament of Australia (2005) *Whistleblowing in Australia – transparency, accountability... but above all, the truth*, Research Note 31.

Further information

The whistleblower provisions of the Corporations Act in Part 9.4AAA, which commenced on 1 July 2004.
www.comlaw.gov.au

Standards Australia has an Australian Standard (AS 8004-2003) *Whistleblower protection programs for entities* that assists in the implementation of appropriate procedures in companies and other organisations.
<http://fraud.govspace.gov.au/files/2010/12/Australian-Standard-8004-2003.pdf>

ASIC Regulatory Guide 34: Auditor's obligations: Reporting to ASIC
[www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg34.pdf/\\$file/rg34.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg34.pdf/$file/rg34.pdf)

ASIC Whistleblowers: Company auditors' obligations
www.asic.gov.au/asic/asic.nsf/byheadline/Whistleblowers%20A+Company+auditors%27+obligations?openDocument

ASIC How ASIC deals with reports of misconduct
www.asic.gov.au/asic/asic.nsf/byheadline/How-ASIC-deals-with-reports-of-misconduct?openDocument

Guidance for audit committees: Whistleblowing arrangements, March 2004, ICAEW
www.pcaaw.co.uk/organisations_pdf/icaew.pdf

British Standards (BSI): Whistleblowing Arrangements Code of Practice PAS 1998/2008, July 2008
www.pcaaw.co.uk/bsi/

Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations, Roberts, P., Brown, A. J., Olsen, J. 2011, ANU E Press
http://epress.anu.edu.au/titles/australia-and-new-zealand-school-of-government-anzsog-2/whistling_citation

Australian Public Service Commission: Advice to agencies on providing procedural fairness in whistleblower investigations, Circular 2011/5, October 2011
<http://www.apsc.gov.au/publications-and-media/circulars-and-advises/2011/circular-20115>

The Parliament of the Commonwealth of Australia, Whistleblower protection: A comprehensive scheme for the Commonwealth public sector, Report of the Inquiry into whistleblowing protection within the Australian Government public sector, February 2009
<http://fraud.govspace.gov.au/files/2010/12/Whistleblower-protection-House-of-Representatives.pdf>

