

Protected Disclosures Policy - NSW Department of Health

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Functional Sub group Personnel/Workforce - Conduct and ethics

Summary Specifies the reporting processes to ensure that any protected disclosures in Central Administration of DoH are managed appropriately.

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Applies to NSW Dept of Health

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CIRCULAR

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NSW DEPARTMENT OF HEALTH – PROTECTED DISCLOSURES POLICY

The NSW Department of Health is committed to the encouragement and facilitation of any disclosure in the public interest of corrupt conduct, maladministration and serious and substantial waste in the public sector:

In this regard the attached procedures are provided to publicise and enhance the reporting processes to ensure that any disclosures are managed appropriately in accordance with the provisions of the *Protected Disclosures Act 1994*.

This policy should be read in conjunction with Circular 2000/41 *Reporting Possible Corrupt Conduct to the Independent Commission Against Corruption* and Circular 98/101 *Policy and Guidelines for the Development of Protected Disclosures Procedures in the Health Services*.

Staff who make a protected disclosure in terms of the *Protected Disclosures Act 1994* are assured of their protection under this process and the legislative requirements of the Act.

Should you require further information concerning this policy please contact the Director of Audit on 9391 9386.

Robyn Kruk
Director-General

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In accordance with the provisions incorporated in the Accounts and Audit Determination, the Board of Directors, Chief Executive Officers and their equivalents, within a public health organisation, shall be held responsible for ensuring the observance of Departmental policy (including circulars and procedure manuals) as issued by the Minister and the Director-General of the Department of Health.

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1. PURPOSE

The purpose of this policy is to set out procedures that will encourage and facilitate the disclosure, in the public interest, of possible corrupt conduct, maladministration and serious and substantial waste in the public sector.

2. SCOPE

This policy applies to all staff employed by the NSW Department of Health and Health Administration Corporation including contractors and consultants. It should be read in conjunction with Circular 2000/41 Reporting Possible Corrupt Conduct to the Independent Commission Against Corruption and Circular 98/101 Policy and Guidelines for the development of Protected Disclosures procedures in Health services.

3. RELATED LEGISLATION AND DEPARTMENTAL POLICIES

- 3.1 Protected Disclosures Act 1994
- 3.2 Independent Commission Against Corruption Act 1988
- 3.3 Occupational Health and Safety Act 2002
- 3.4 Reporting Possible Corrupt Conduct to the Independent Commission Against Corruption (Circular 2000/41)
- 3.5 Policy and Guidelines for the development of Protected Disclosures procedures in Health services (Circular 98/101)
- 3.6 Department of Health Fraud Control Strategy (Circular 93/70)

4. DEFINITIONS

The following definitions apply for the purposes of this policy:

4.1 NSW Health

For the purposes of this document 'NSW Health' refers to the Department of Health, Mental Health Review Tribunal, NSW Institute of Psychiatry and the Health Professionals Registration Boards.

4.2 Principal Officer

For the purposes of this document 'Principal Officer' includes:

- 4.2.1** The Director-General, Department of Health, and also as corporate sole in respect to the Health Administration Corporation;
- 4.2.2** The Chief Executive Officer (however designated) of the Mental Health Review Tribunal and the NSW Institute of Psychiatry; and
- 4.2.3** Chairperson or President (however designated) of the boards administered by the Health Professional Registration Board.

4.3 Public Official

For the purposes of this document a 'Public Official' includes any person working part-time, casual or full-time within NSW Health (including Board members and persons working on projects funded by NSW Health).

In addition, a 'Public Official' may include consultants hired by NSW Health and local government employees or any other person who is able to be investigated by the Independent Commission Against Corruption, Ombudsman, Auditor-General or Police Integrity Commission.

4.4 Investigating Authority

For the purposes of this document Investigating Authorities include:

- 4.4.1** The Auditor-General;
- 4.4.2** The Independent Commission Against Corruption;
- 4.4.3** The Ombudsman; and
- 4.4.4** The Police Integrity Commission.

4.5 Public Authority

For the purposes of this document 'Public Authority' includes:

- 4.5.1** Department of Health;
- 4.5.2** Mental Health Review Tribunal;
- 4.5.3** NSW Institute of Psychiatry; and
- 4.5.4** Health Professionals Registration Boards

4.6 Corrupt Conduct

For the purposes of this document 'Corrupt conduct' is broadly defined in Sections 8 and 9 of the ICAC Act 1988. The key notion is the misuse of public office. Commonly it involves the dishonest or partial use of power or position resulting in one person being advantaged over another. Corruption can take many forms including (but not limited to):

- 4.6.1** Official misconduct;
- 4.6.2** Bribery and blackmail;
- 4.6.3** Unauthorised use of confidential information;
- 4.6.4** Fraud; and
- 4.6.5** Theft.

Fraud is corrupt conduct and should be reported by public officials. Fraud is dishonesty, generally in the context of a false representation made by means of a statement or conduct, with the intention of gaining a material advantage.

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All public officials are to make themselves aware of the provisions of their Department of Health Fraud Control Strategy. Public officials who make any report will be notified of actions taken and be assured that the matter will be treated confidentially.

It is departmental policy that allegations of corrupt conduct can be reported to the Director-General, Director of Audit or those other external organisations/persons specified in Department of Health circular 2000/41

4.7 Maladministration

For the purposes of this document 'Maladministration' is defined under the Protected Disclosures Act 1994 as being conduct which involves action or inaction of a serious nature that is:

4.7.1 Contrary to law; or

4.7.2 Unreasonable, unjust, oppressive or improperly discriminatory; or

4.7.3 Based wholly or partly on improper motives.

4.8 Serious and Substantial Waste

For the purposes of this document 'Serious and substantial waste' refers to any uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in significant loss/wastage of public funds/resources.

5. PRINCIPLES

5.1 Forms of disclosures that can be protected

5.1.1 The Protected Disclosures Act 1994 offers protection for public officials who make a protected disclosure concerning:

5.1.1.1 Corrupt conduct;

5.1.1.2 Maladministration; or

5.1.1.3 Serious and substantial waste of public money.

5.1.2 To be protected, a disclosure must disclose information which 'shows or tends to show' certain things. To comply with this requirement it is necessary to do more than allege. Matters must be stated which, if substantiated, amount to the relevant conduct, or tend to do so.

Additionally the disclosure must be made voluntarily. A disclosure is not voluntary for the purposes of the Protected Disclosures Act 1994 if it is made by a public official in the exercise of a duty imposed on the public official by or under an Act.

A disclosure is made voluntarily for the purposes of the Protected Disclosures Act 1994, if it is made in accordance with a code of conduct (Protected Disclosures Act 1994).

5.1.3 Public officials are considered to have made a protected disclosure if the disclosure was made in accordance with the Department of Health policy and the requirements of the Protected Disclosures Act 1994 (ie. A public official does not have to specifically state they wish to make a protected disclosure).

5.1.4 The Protected Disclosures Act 1994 does not specifically refer to anonymous disclosures or impose any obligation on a person to identify themselves in a disclosure (it should be noted however that whether anonymous complaints attract protection under the Act is yet to be clarified by Parliament or the courts). Until the issue is clarified, the investigating authorities intend to adopt a broad interpretation and assume that anonymous disclosures can be protected under the Act.

5.2 Forms of disclosures that are not protected

Protection is not available for disclosures which are:

5.2.1 Made frivolously or vexatiously;

5.2.2 Primarily question the merits of government policy; or

5.2.3 Made in an attempt to avoid dismissal or disciplinary action.

It is an offence to wilfully make a false or misleading statement when making a disclosure.

5.3 Protection and Confidentiality

NSW Health is required to maintain the confidentiality of information that may lead to the identification of a public official making a disclosure, as outlined in Section 22 of the Protected Disclosures Act 1994. The Protected Disclosures Act 1994 allows the identification of a public official making a disclosure if;

- 5.3.1 The person consents in writing to the disclosure of that information; or
- 5.3.2 It is essential, having regard for the principles of natural justice, that the identifying information be disclosed to a person whom the disclosure may concern; or
- 5.3.3 The investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

If, however, the investigating officer is of the opinion that the release of a name is required, a recommendation is to be referred to the Principal Officer for a decision.

5.4 Protection against Detrimental Action

- 5.4.1 It is a criminal offence under the Protected Disclosures Act 1994 to take 'detrimental action' in reprisal against a person who makes a protected disclosure.
- 5.4.2 Detrimental action means action causing, comprising or involving any of the following:
 - 5.4.2.1 Injury, damage or loss;
 - 5.4.2.2 Intimidation or harassment;
 - 5.4.2.3 Discrimination, disadvantage or adverse treatment in relation to employment;
 - 5.4.2.4 Dismissal from, or prejudice in employment; or
 - 5.4.2.5 Disciplinary proceedings.
- 5.4.3 The Protected Disclosures Act 1994 states that: 'a person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure...'
- 5.4.4 Principal Officers and Managers are required to protect public officials against detrimental action.
- 5.4.5 NSW Health will take all reasonable steps to ensure that any form of detrimental action does not occur.

- 5.4.6** Any public official found to be involved in carrying out detrimental reprisals at any time shall be subjected to disciplinary action or other appropriate action.

That detrimental action taken against a person substantially in reprisal for the making of a disclosure is a punishable offence. The Protected Disclosures Act 1994 states:

'A person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of an offence.'

The maximum penalty for taking detrimental action is a fine of \$5000.00 or imprisonment for twelve months, or both. Additionally, any public official found to be involved in carrying out detrimental reprisals at any time shall be subjected to disciplinary action or other appropriate action.

- 5.4.7** Public officials who believe that they are experiencing detrimental action as a result of their disclosure, should report this immediately to the officer to whom they made their disclosure and/or the Police.
- 5.4.8** If a public official subjected to detrimental action seeks a legal remedy, an application may be made to the Attorney General for Crown representation. The Attorney General determines such applications. Where Crown representation is granted, the State acts for the applicant in legal proceedings.
- 5.4.9** It is the responsibility of the public official who is subjected to detrimental action to initiate a complaint.

5.5 Rights of person/s the subject of a disclosure

The rights of person/s who are the subject of disclosures will also be protected to the extent that the Protected Disclosures Act 1994 allows. In line with this:

- 5.5.1** The confidentiality of the identity of the person/s the subject of disclosures will be protected (to the extent of Section 22 of the Protected Disclosures Act 1994).
- 5.5.2** Disclosures will be assessed and acted on impartially, fairly and reasonably.
- 5.5.3** Disclosures will be investigated as discreetly as possible, with a strong emphasis on maintaining confidentiality of the person/s the subject of disclosures.

- 5.5.4** The person/s the subject of the disclosure is entitled to seek independent advice and representation.
- 5.5.5** The person/s the subject of the disclosure being investigated, at the appropriate stage of the investigation, will be informed as to the substance of the allegations or any action to be taken and be given reasonable opportunity to put their case (either orally or in writing) to the person/s carrying out the investigation. Depending on the nature of the disclosure this may occur at the conclusion of an investigation.
- 5.5.6** The person/s the subject of the disclosure will be informed as to the substance of any adverse comment that may be included in a report/memorandum/letter or the like arising out of any investigation.
- 5.5.7** Where the allegations in a disclosure have been subject to an internal investigation, the person/s, the subject of the disclosure, should be formally advised as to the outcome of the investigation, whether the outcome is adverse or favourable to them.
- 5.5.8** Where the allegations contained in a disclosure are clearly wrong or unsubstantiated, the person/s the subject of the disclosure is entitled to a statement of support or a letter setting out the NSW Health views.

5.6 Consequences for public officials who make a disclosure who are implicated in misconduct.

Without public officials who make disclosures it will often be unlikely that the disclosed corrupt conduct, maladministration or serious and substantial waste would have otherwise been uncovered and therefore likely that such wrongdoing would have continued.

The act of making a disclosure should not necessarily shield public officials from the reasonable consequences flowing from any involvement in misconduct, or acts of dishonesty, incompetence or negligence on their part. However in some circumstances an admission may be a mitigating factor when considering disciplinary or other action, provided such action does not constitute beneficial treatment for the purpose of influencing the public official to make the disclosure.

Even where it appears to a Principal Officer that disciplinary action or criminal proceedings (against a public official who makes a disclosure and is implicated in the disclosure) are possible, it may be in the public interest:

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5.6.1 For the Principal Officer to make submissions to the Director of Public Prosecutions (DPP) for the DPP to request indemnity against prosecution for the public official from the Attorney-General; or

5.6.2 To exercise a discretion not to institute disciplinary action.

The appropriate action would depend on:

5.6.3 The seriousness of the alleged misconduct disclosed by the public official;

5.6.4 The likelihood of uncovering the alleged misconduct in the absence of a disclosure (a 'but for' test);

5.6.5 The extent and level of substantiated involvement of the public official in the alleged misconduct or in any other substantiated or admitted acts of misconduct, and the seriousness of that misconduct;

5.6.6 The length of time since the alleged misconduct;

5.6.7 The relevance and importance if the information disclosed by the public official for the purpose of dealing with the alleged misconduct;

5.6.8 The degree of co-operation by the public official with those charged with investigating or dealing with the disclosed alleged misconduct;

5.6.9 Previous good behaviour and a willingness to acknowledge wrong doing on the part of the public official; and

5.6.10 The seriousness of the alleged misconduct committed by the public official and whether the misconduct is continuing or repeat conduct.

When consideration is being given to approaching the DPP seeking an indemnity or exercising discretion to refrain from taking disciplinary action (against a public official making a disclosure who is implicated in misconduct), care should be taken to ensure that other public officials are not encouraged to make a disclosure as a consequence of a promise that they will be granted beneficial treatment.

Furthermore the Protected Disclosures Act 1994 specifically provides that a disclosure that is made solely or substantially with the motive of

avoiding dismissal or other disciplinary action (other than reprisal action) is not a protected disclosure.

To avoid these problems, any discussion or decision to refrain from taking disciplinary action or seeking indemnity from the DPP should occur only after a disclosure has been made and assessed.

There may be circumstances where misconduct is committed by a public official which has no connection with a disclosure they have made and yet it is in the public interest for a Principal Officer to exercise discretion against taking disciplinary action or to seek an indemnity from the DPP. These circumstances are very limited and would arise only where;

5.6.11 The misconduct occurred prior to the disclosure being made;

5.6.12 The disclosure was not made solely or substantially with the motive of avoiding dismissal or other disciplinary action nor made as a consequence of a promise that the public official will be granted beneficial treatment; and

5.6.13 The misconduct is of a relatively minor nature.

6. PROCEDURES

6.1 Step 1 - How to prepare and report a complaint / protected disclosure

6.1.1 The required format of a disclosure should preferably be in writing (in confidential envelope to a nominated officer). However, other methods of disclosure can be made:

6.1.1.1 By telephone; or

6.1.1.2 In person; or

6.1.2 The complaint / protected disclosure might include:

6.1.2.1 A description of the complaint / protected disclosure;

6.1.2.2 The name and position of any public official involved;

6.1.2.3 The name and role of any other person/s relevant to the matter;

6.1.2.4 The date and time-frame in which the conduct occurred;

- 6.1.2.5 The date the complaint / protected disclosure was made or the date when you became aware of the matter;
- 6.1.2.6 Any other information deemed relevant to the matter;
- 6.1.2.7 Any evidence to be supplied; and/or
- 6.1.2.8 The name of the officer making the complaint / protected disclosure.

Note that employees are encouraged not to make complaints anonymously. Anonymous complaints may be difficult to pursue where further information is required and may also prevent report-back to the complainant.

6.2 Step 2 - How to lodge a complaint / protected disclosure

6.2.1 Internal Procedure

- 6.2.1.1 Public officials who wish to report matters where there is evidence that shows or tends to show corruption, maladministration and serious and substantial waste to an officer *within NSW Health* can make a disclosure as per NSW Health policy and the Protected Disclosures Act 1994 to:
 - 6.2.1.1.1 The Director-General of the Department of Health;
 - 6.2.1.1.2 The Director Audit, Department of Health (nominated collection point); and
 - 6.2.1.1.3 The immediate Supervisor (for current employees only); or
 - 6.2.1.1.4 Other Supervisor (for current employees only).
- 6.2.1.2 Complaints or reports by current employees should generally be made to the employee's immediate supervisor. Note that supervisors are required to maintain confidentiality and are required to make complete written notes of the complaint / protected disclosure.

- 6.2.1.3** The supervisor must also report the matter immediately to the nominated senior manager. The nominated senior manager and collection point for NSW Health is the Director Audit, Department of Health.
- 6.2.1.4** Note that the NSW Health Director-General's responsibility under the Protected Disclosures Act 1994 cannot be delegated. As such, the Director Audit is required to regularly brief the Director-General on any complaints / protected disclosures. Briefings will be accompanied by a written summary to ensure accurate transmission of complaints / protected disclosures and enable appropriate records to be kept.
- 6.2.1.5** Where an employee has a legitimate fear about reporting to an immediate supervisor, even where the complaint / protected disclosure does not involve the supervisor, the alternative channels available for confidential reporting include:
- 6.2.1.5.1** An alternate supervisor;
 - 6.2.1.5.2** The nominated senior manager (Director Audit, Department of Health); or
- Where the complaint / protected disclosure involves the nominated senior manager, to the:
- 6.2.1.5.3** Director-General of the Department of Health.
- 6.2.1.6** Furthermore, employees are advised that a complaint / protected disclosure may be made to an investigating authority (see 4.4 for investigating authorities) where the employee does not wish to report the matter to their immediate supervisor, alternate supervisor, nominated senior manager or the principal officer (Director-General).

6.2.2 External Procedure

- 6.2.2.1** Public officials who wish to report matters where there is evidence which shows or tends to show corruption, maladministration or serious and substantial waste and who chooses to report to an *external investigating authority* can make a protected disclosure to:

- 6.2.2.1.1** The Independent Commission Against Corruption (Section 10, Protected Disclosures Act 1994) for issues involving possible corrupt conduct. For the Commission to become involved in an issue the conduct must involve a criminal or disciplinary offence, or conduct serious enough to warrant dismissal;
- 6.2.2.1.2** The Auditor General (Section 12, Protected Disclosures Act 1994) for issues related to serious and substantial waste;
- 6.2.2.1.3** The Ombudsman (Section 11, Protected Disclosures Act 1994) for issues relating to maladministration; or
- 6.2.2.1.4** The Police Integrity Commission for issues relating to serious misconduct by Police Officers.

- 6.2.2.2** In certain limited circumstances a protected disclosure can be made to a *Member of Parliament or a journalist*.

To be protected, the NSW Health public official making a disclosure to a *Member of Parliament or to a journalist* must have already made substantially the same disclosure to an investigating authority or NSW Health in accordance with the Act. The authority to which the disclosure was made must have:

- 6.2.2.2.1** Decided not to investigate the matter; or
- 6.2.2.2.2** Decided to investigate the matter but not completed the investigation within six months of the original disclosure being made; or
- 6.2.2.2.3** Investigated the matter but not recommended the taking of any action in respect of the matter; or
- 6.2.2.2.4** Failed to notify the person making the disclosure, within six months of the disclosure being made, of whether or not the matter is to be investigated.

6.2.2.3 A NSW Health public official making a disclosure to a *Member of Parliament* or to a *journalist* must have reasonable grounds for believing the disclosure is substantially true and the disclosure must be substantially true.

6.2.2.4 Public officials are encouraged to report matters where there is evidence that shows or tends to show corruption, maladministration and serious and substantial waste internally within NSW Health to ensure matters can be dealt with quickly and efficiently.

6.3 Step 3 - What happens after a public official makes a disclosure?

6.3.1 Once a disclosure has been made in line with the requirements of the Protected Disclosures Act 1994 and NSW Health policy, the allegations are assessed by a nominated officer (Director Audit, Department of Health) to determine whether an investigation is warranted.

6.3.2 When it has been determined that an investigation is warranted, such an investigation must be conducted within 6 months.

6.3.3 The nominated officer will ensure that feedback is provided on the actions taken, as considered appropriate, to the public official who makes the disclosure.

6.3.4 That public officials are considered to have made a protected disclosure if the disclosure was made in accordance with NSW Health procedures and the requirements of the Protected Disclosures Act 1994 (ie; a public official does not have to specifically state they wish to make a protected disclosure).

6.3.5 Public officials making disclosures to an external investigating authority being the ICAC, the Ombudsman, the Auditor General or the Police Integrity Commission should receive acknowledgment of their disclosure from that external investigating authority.

6.3.6 A public official who makes a disclosure should be notified, within six months of the disclosure being made, of the action taken or proposed in respect of the disclosure. The information provided should indicate whether:

6.3.6.1 A decision was made not to investigate the matter; or

6.3.6.2 A decision was made to investigate the matter, but the investigation has not been completed within the six months of the original decision being made; or

6.3.6.3 The matter was investigated but no recommendation was made for the taking of any action in respect of the matter.

7. MANAGERIAL RESPONSIBILITIES

7.1 Principal Officers are responsible and accountable for:

7.1.1 Leading by example to create an organisational culture that gives a clear message that making disclosures is encouraged and valued and corruption, maladministration and serious and substantial waste is not acceptable;

7.1.2 Ensuring that strategies to prevent corruption, maladministration and serious and substantial waste are included in the NSW Health Business Plan to ensure they are treated as an integral part of work activities;

7.1.3 Ensuring that a protected disclosures procedure, including reporting channels, is in place and evaluated on a regular basis;

7.1.4 Ensuring that all public officials involved in conducting investigations understand the principles of the Protected Disclosures Act, in particular confidentiality;

7.1.5 Ensuring that internal disclosures are addressed quickly and effectively;

7.1.6 Taking all reasonable steps to ensure that public officials who make disclosures are not subject to reprisals or any form of detrimental action;

7.1.7 Ensuring the rights of those who are the subject of a disclosure are protected;

7.1.8 Ensuring public officials have access to information on the Protected Disclosures Act 1994, and reporting channels in NSW Health;

7.1.9 Implementing organisational change necessary as a result of a disclosure;

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7.1.10 Reporting offences to the appropriate investigating authorities, particularly that any criminal offence should be reported to the NSW Police Service;

7.1.11 Initiating investigations following a disclosure, as well as any disciplinary or corrective action required;

7.1.12 Supporting staff who make disclosures; and

7.1.13 Referring to Circular 2000/41 for reporting conduct guidelines for principal officers.

7.2 Managers, supervisors and team leaders are responsible and accountable for:

7.2.1 Leading by example to contribute to an organisational culture that gives a clear message that making disclosures is encouraged and valued and corruption, maladministration and serious and substantial waste is not acceptable;

7.2.2 Ensuring that a public official making a disclosure is not subject to reprisals or any form of detrimental action;

7.2.3 Establishing clear lines of authority and accountability;

7.2.4 Ensuring all public officials have access to information on the reporting channels for corruption, maladministration and serious and substantial waste;

7.2.5 Implementing staff awareness and training; and

7.2.6 Implementing system improvements and strategies if a disclosure relates to their particular area of control.

8. STAFF RESPONSIBILITIES

8.1 All public officials are responsible and accountable for:

8.1.1 Reporting matters where there is evidence that shows or tends to show corruption, maladministration and serious and substantial waste; and

8.1.2 All public officials have a role in ensuring the success of the Protected Disclosures Act 1994 within their workplace; and

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8.1.3 Identifying areas where opportunities for corruption, maladministration and serious and substantial waste may occur and/or management systems are inadequate.

Additionally, all public officials play an important role in supporting those who have made disclosures.

9. DOCUMENT CONTROL

9.1 This policy is updated by the Corporate Personnel Services Branch, Executive and Corporate Support Division, NSW Health Department.