

## **PUBLIC INTEREST DISCLOSURE (WHISTLE-BLOWING) POLICY AND PROCEDURES**

Date policy adopted: 01/04/2011

Date of last review: 01/06/2021

### **1. Purpose and Scope**

Whistleblowing is 'making a disclosure in the public interest'. It describes a situation in which an employee raises a concern about danger or illegality that affects others. This policy's intent is to encourage employees to raise appropriate concerns when anyone working with or for the Ethical Standards Commissioner (ESC) engages in activities or behaviours that are clearly incompatible with the values and policies of the work of ESC, the required standards of conduct that flow from those, and the public interest.

This policy applies to all employees regardless of working pattern or nature of employment contract. It will not apply to others carrying out work on behalf of ESC (agency staff, contractors etc) who will be governed by the contract under which they have been employed or contracted.

### **2. Policy Statement**

The law provides protection in certain circumstances against, or a right to compensation for, unfair dismissal or victimisation for those who report wrongdoing either to their employer or to some appropriate external body. A summary of the key provisions of the relevant legislation is appended to this policy for information. The appendix also provides links to advice and sources of further information for those considering raising a concern.

This policy makes clear that employees will be supported when making such a disclosure and will suffer no detriment for having done so.

This policy will apply equally in cases in which employees raise legitimate concerns about the Commissioner. Any legitimate concern raised about the Commissioner will involve the Accountable Officer making contact with the Auditor General for Scotland.

### **3. Implementation, monitoring and review of the policy**

Overall responsibility for policy implementation, monitoring and review lies with ESC. Everyone covered by the scope of the policy is obliged to adhere to, and facilitate implementation of the policy. Appropriate action will be taken to inform all new and existing employees and others covered by the scope of the existence of the policy and their role in adhering to it. The policy will be reviewed at such times as legislation or a change to the ESC policy position requires it. The policy will be made available to the general public.

### **4. Senior Management Team Commitment**

The senior management team commitment to implement this policy by:

- Treating concerns raised by an employee fairly, timeously and consistently
- Ensuring no adverse repercussions for any employee raising a concern under the Policy, from either the Commissioner or their colleagues. If they raise appropriate

concerns; any attempt to maltreat a whistle-blower will be dealt with promptly under the Disciplinary Policy

- Providing appropriate training about this policy to employees
- Taking all reasonable steps to maintain the confidentiality of people who have asked for this to be done in relation to the concerns that they raise
- Where the concerns that employees raise are not raised anonymously, giving feedback on what has been done to address those concerns

## 5. Expectations

Whistle-blowing externally can be very damaging to the reputation of both the organisation and the individual concerned, regardless of the legal protections afforded to the whistle-blower.

This policy therefore requires employees to raise their concerns internally first unless they have a good reason for not doing so. This is not intended to prevent legitimate disclosures or to enable the concealment of wrongdoing. It is intended to ensure that potentially damaging disclosures are not made in error, that legitimate concerns are acted on swiftly and that potential acts of wrongdoing can be prevented.

This policy does not override the rights of employees to protection when they raise valid concerns externally. It should be necessary for employees to do so only in exceptional circumstances. Employees are advised to seek independent advice before raising concerns externally so that they can be advised whether the proposed disclosure may be protected under the legislation. It is accepted that employees may disclose information to a legal adviser in the course of obtaining legal advice.

More information on external disclosure is contained in the appendix to this policy.

## 6. Interaction with other policies

This policy is linked to other policies that all employees should be familiar with. These include, in particular, the Code of Conduct, Health and Safety Policy, Anti-Fraud Policy and Disciplinary Policy.

These policies, among others applicable to the work of the Commissioner and employees, give direction as to the required standards of conduct.

If an employee is considering raising a complaint about an aspect of their own work situation the Resolution Policy should be considered instead of, or alongside this policy.

This policy will be conducted in accordance with the Equality, Diversity and Inclusion policy.

## 7. Types of disclosure covered

To acquire protection against dismissal or detriment, the disclosure by the whistle-blower must satisfy certain requirements. The disclosure must be a “qualified disclosure”. This is about the subject matter of the disclosure. It must also be a “protected disclosure”. This is about the circumstances in which and to whom the disclosure is made.

Qualified disclosures are about:

- criminal offences

- a breach of any legal obligation
- a miscarriage of justice
- danger to the health and safety of individuals
- damage to the environment
- deliberate concealment of information about any of the above.

The disclosure must also be in the public interest. As a consequence, disclosures about personal grievances are unlikely to qualify for protection unless they involve an aspect which could be considered to be in the public interest. Personal grievances such as those related to bullying or harassment should be raised by reference to the resolution policy.

Protected disclosures are made internally or to a prescribed person. Employees should consult the appendix for more detail. Where individuals refer a matter directly to an external body or party they should ensure that they have good reason to conclude that this was necessary and that it was not appropriate to refer the matter for internal consideration in the first instance.

## 8. Process to be followed

### Making a disclosure

Employees who feel they have a legitimate concern should first raise it with the Accountable Officer in writing. They should make it clear at that point whether they are raising their concern confidentially. They should only raise a concern where they believe that the disclosure they are making:

- is qualified (see list above)
- is made in the public interest
- is substantially true
- is of a serious nature
- does not give them personal gain.

If the concern is about the Accountable Officer, the whistle-blower should raise their concern in writing with the Commissioner.

Whilst anonymous complaints can be made they will be harder for the organisation to investigate and it is unlikely to be possible for the anonymous whistle-blower to be informed of the outcome of any investigation.

### What happens when a disclosure is made

The person with whom the concern has been raised:

- will listen carefully and not attempt to contradict what is being reported
- may wish to seek clarification and/or review whether other conclusions may be drawn from what is being recounted
- will summarise what has been reported in order to check that they have properly understood what is being reported and keep comprehensive notes of the discussion
- will remind the individual making the report that if they were found to be making malicious, unfounded allegations, this would constitute a serious disciplinary matter
- if it is considered that the issue should more appropriately be dealt with informally and/or under another policy/procedure, may discuss this with the individual

- if the concern appears to be legitimate, take immediate steps to prevent the destruction of relevant evidence.
- once the process to be followed has been decided, for example an investigation, inform the individual of what is likely to happen such as whether external authorities and/or the Auditor General for Scotland are to be involved.
- where the allegations have proved to be baseless, and there are good grounds to suggest that the allegations were made maliciously, consider whether the individual making them should be dealt with under the Disciplinary Policy or in terms of the review of any contract or agreement with ESC. It will not be automatically assumed that any unfounded allegations have been made maliciously.
- will inform the individual of the process that has been followed and where appropriate feedback on what has been done to address their concerns.
- once the matter is closed, review the position of the individual who has made the disclosure to ensure that they will not be disadvantaged or feel harassed as a result of doing so.

## Conduct of investigations

The role of the person investigating is to ensure that individual making the allegation feels able to discuss with them any areas of concern that they may have regarding malpractice within the organisation. Where possible they will only discuss the matters raised with those people whom the individual consents to be involved. Nevertheless they have the right where they consider it necessary, for example, to protect others or the reputation of ESC, to discuss the matter confidentially with other parties.

In all cases raised internally, the issue will be investigated thoroughly and the employee who raised it will be advised about the outcome within six weeks of doing so. Wherever possible, investigatory interviews and discussions relating to the progress of an investigation will be held offsite and/or away from the day-to-day activities of the office.

If the investigation takes longer, the employee will be advised of the delay and given an indication of the likely time required for the investigation to be finalised and the outcome of it given. The Accountable Officer or Commissioner, as appropriate, will also offer support and reassurance to the whistle-blower for the period of any investigation and thereafter.

If a concern is considered serious enough it may be referred to an external prescribed person or body, such as the police, the Auditor General for Scotland or the Health and Safety Executive, for investigation.

## When concerns are not resolved

If the whistle-blower believes that their concerns have not been properly dealt with and/or investigated internally they should escalate those concerns to the Commissioner for satisfactory resolution. In cases in which the concerns are about the Commissioner, the Auditor General for Scotland will already be involved rendering escalation unnecessary.

If the whistle-blower believes that their legitimate concerns have not been dealt with appropriately internally and they have exhausted the avenues available to them, they can consider raising their concerns externally by either taking legal advice or by reporting to what is termed a “prescribed person”. This is explained in more detail in the appendix.

## 9. Breaches of the Policy

When, following investigation, a disclosure is substantiated, disciplinary action, or other appropriate sanction, may be taken against the person who is the subject of the disclosure.

Disciplinary action will be taken against any person who victimises anyone for raising a genuine concern under this policy or deters them for doing so. Such conduct will be treated as gross misconduct and could lead to dismissal.

This policy provides protection for employees to make disclosures in confidence and an assurance that they will not be subject to detrimental treatment as a result. Disciplinary action may be taken against any person who

- deliberately makes false or malicious allegations
- makes a non-protected disclosure without exhausting the internal procedure.

Such actions will be treated as gross misconduct.

### How alleged detriment will be handled

If any individual believes that they are being victimised by or suffering any detriment from someone from within ESC or working in any capacity for ESC as a result of reporting a concern or assisting in any investigation of such a disclosure, they must inform the Commissioner immediately and appropriate action will be taken to protect them. If the Commissioner is the person that is victimising or causing detriment then the individual must inform the Accountable Officer who in turn will involve the Auditor General for Scotland to ensure that appropriate action is taken.

### Equality Impact Assessment

Does this policy comply with the general Public Sector Equality Duty (s149 Equality Act 2010)?

This policy applies to all employees. Its impact was considered when drafting and specific mention is made of its' interaction with the Equality, Diversity and Inclusion policy. We consulted with all employees prior to publication to identify and address any issues.

### Data Protection Impact Assessment

Have we considered any effect the policy may have on the collecting, processing and storing of personal data?

The records generated by this policy will contain personal data and may contain sensitive and special category personal data. Suitable retention and destruction policies are in place to manage this material.

### Information Security Impact Assessment

Have we considered the impact any policy may have on our cyber-resilience?

This policy should have no impact on our cyber-resilience.

### Records Management Impact

Have we considered the impact any policy may have on our ability to manage our records?

This policy should have no impact on our ability to manage our records.

Version	Description	Date	Author
1.0	First draft	01/06/21	Public Appointments Officer

## APPENDIX – legislation and sources of further information

### Relevant legislation

The Public Interest Disclosure Act 1998 introduced legal protection for individuals who disclose information to expose acts such as criminal acts. The legislation made substantial amendments to the Employment Rights Act 1996 ('ERA') to protect whistle-blowers in certain circumstances from dismissal and detrimental treatment by their employer. In some cases, whistle-blowers may bring a case before an employment tribunal, which can award compensation. Legal protection may apply if the individual has a reasonable belief in what they are reporting, they are telling the right organisation or person as defined by the ERA, and they reasonably believe that their disclosure is in the public interest.

The ERA whistleblowing provisions aim to protect whistle-blowers from victimisation and dismissal when they raise genuine concerns about misconduct or wrongdoing. These rights were developed further in June 2013 by the Enterprise and Regulatory Reform Act 2013 with the result that:

- A disclosure must be made in the public interest.
- A whistle-blower who makes a disclosure in the public interest will be protected by the ERA and the whistle-blower no longer has to demonstrate that they have made the disclosure in good faith in order to be protected. A tribunal may however reduce the level of compensation it awards if it feels that the disclosure was not made in good faith.

A whistle-blower that makes a disclosure in the public interest is protected if they are bullied or harassed by co-workers. A whistle-blower can take a claim to an employment tribunal for compensation if they are victimised (subjected to a detriment) for blowing the whistle. Co-workers can be held responsible for bullying and harassment and in some cases employers can be liable, even if this takes place without the employer's knowledge. An employer will have to prove that it has done everything possible to protect the whistle-blower from bullying and harassment.

A worker who blows the whistle may be protected if the disclosure is made in the public interest and is about:

- criminal offences
- a breach of any legal obligation
- a miscarriage of justice
- danger to Health and Safety of any individual
- damage to the environment
- deliberate concealment of information about any of the above

Whistle-blowers may be protected when they:

- Raise concerns internally
- Make disclosures to a prescribed person such as the Health and Safety Executive.

Workers who decide to blow the whistle to a prescribed person rather than their employer must make sure that they have chosen the correct person or body for their issue. A full list of [prescribed persons](#) has been published by the UK Government. The same document also includes a brief description about the matters that workers can report to each prescribed person.

Prescribed persons have individual policies and procedures for handling concerns and complaints. Generally these will be accessible on their websites.

Alternatively, a worker might choose to approach the media with their concerns. If a worker goes to the media, they can expect in most cases to lose their protection under the PIDA. It is only in exceptional circumstances that a worker can go to the media without losing their rights. They must reasonably believe that the information they disclose and any allegation contained in it are substantially true. They cannot be acting for personal gain. Unless the wrongdoing is exceptionally serious, if they have not already gone to their employer or a prescribed person, they must reasonably believe that their employer will subject them to “detriment” or conceal or destroy evidence if they do so. And even then, their choice to make the disclosure must be reasonable.

### Sources of further advice

Further advice is also available from the following sources:

The UK Government’s website:

<https://www.gov.uk/whistleblowing/what-is-a-whistleblower>

The Charity Protect:

<https://protect-advice.org.uk/>

Whistleblowing Advice Line: 020 3117 2520

Email – through the web contact form:

<https://protect-advice.org.uk/contact-protect-advice-line/>

Address

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