



PROTECTED DISCLOSURE GUIDELINES

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Document Title:	Cancer Institute NSW Protected Disclosure Guidelines
Summary:	This document establishes an Internal Reporting system for the reporting of disclosures of corrupt conduct, maladministration, or serious and substantial waste of public money. This system enables such internal disclosures to be made as a protected disclosure under the Protected Disclosures Act.
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Relevant References:	<ul style="list-style-type: none"> • Protected Disclosure Guidelines – 5th edition – NSW Ombudsman, May 2004 • Model internal reporting policy for state government agencies - NSW Ombudsman, May 2004 • Protected Disclosures Policy, NSW Department of Health - Circular 2002/95, issued October 2002.
Main Legislative Implications:	<ul style="list-style-type: none"> • <i>Independent Commission Against Corruption Act 1988</i> – with respect to the reporting of suspected corrupt conduct. • <i>Protected Disclosures Act 1994</i> – with respect to the making of a “protected disclosure”.
Applicable Delegations of Authority:	None. Delegations are subject to change – refer Cancer Institute NSW Delegations of Authority Manual for latest position.
Related Cancer Institute NSW Division Policy	<ul style="list-style-type: none"> • Employee Code of Conduct & Ethics • Board Code of Conduct • Guidelines for the reporting of suspected Corrupt Conduct to the ICAC

Cancer Institute NSW

Protected Disclosure Guidelines

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1 SUPPORT FOR PEOPLE WHO MAKE DISCLOSURES

The Cancer Institute NSW does not tolerate corrupt conduct, maladministration or serious and substantial waste of public money.

The Cancer Institute NSW Board and Chief Cancer Officer are committed to the aims and objectives of the *Protected Disclosures Act* and recognise the value and importance of contributions by employees to enhance administrative and management practices across the Cancer Institute NSW. In this context the Cancer Institute NSW strongly supports disclosures being made by employees that disclose corrupt conduct, maladministration, or serious and substantial waste of public money.

Where such disclosures are made the Cancer Institute NSW will take all reasonable steps to provide protection to staff from any detrimental action in reprisal for the making of the disclosure

2 PURPOSE OF THE POLICY

This policy establishes an internal reporting system for the reporting of disclosures of corrupt conduct, maladministration or serious and substantial waste of public money by Cancer Institute NSW employees and Board/Committee members. The system enables such internal disclosures to be made to a disclosure coordinator or nominated disclosure officers, as an alternative to reporting to the Chief Cancer Officer.

This policy is designed to complement normal communication channels between supervisors and staff. Staff members are therefore encouraged to continue to raise appropriate matters at any time with their supervisors, but as an alternative have the option of making a Protected Disclosure in accordance with this policy.

3 OBJECT OF THE ACT

The *Protected Disclosures Act* commenced operation on 1 March 1995. The purpose of the Act is to ensure that employees who wish to make disclosures under the legislation receive protection from reprisals, and that the matters raised in the disclosures are properly investigated.

The Act aims to encourage and facilitate the disclosure—in the public interest—of corrupt conduct, maladministration and serious and substantial waste in the public sector. This is achieved by:

- enhancing and augmenting established procedures for making disclosures concerning such matters,
- protecting people from reprisals that might otherwise be inflicted on them because of these disclosures, and
- providing for those disclosures to be properly investigated and dealt with.

4 DEFINITIONS

Three key concepts in the internal reporting system are 'corrupt conduct' (4.1), 'maladministration' (4.2) and 'serious and substantial waste of public money' (4.3).

4.1 CORRUPT CONDUCT

Corrupt conduct is defined in s.8 and 9 of the *Independent Commission Against Corruption Act* (ICAC Act). The definition used in the Act is intentionally quite broad—corrupt conduct includes the dishonest or partial exercise of official functions by a public official. Conduct of a

person who is not a public official, when it adversely affects the impartial or honest exercise of official functions by a public official, also comes within the definition.

Corrupt conduct can take many forms. Taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples.

4.2 MALADMINISTRATION

Maladministration is defined in the *Protected Disclosures Act* as conduct that involves action or inaction of a serious nature that is:

- contrary to law, or
- unreasonable, unjust, oppressive or improperly discriminatory, or
- based wholly or partly on improper motives (s. 11).

The conduct covered by these terms includes:

- **contrary to law, e.g.:**
 - a decision or action contrary to law
 - a decision or action *ultra vires* (i.e. the decision-maker had no power to make the decision or to do the act)
 - a decision or action contrary to lawful and reasonable orders from people or agencies with authority to make or give such orders
 - a breach of natural justice or procedural fairness
 - improperly exercising a delegated power (e.g. a decision or action not authorised by a delegation or acting under the direction of another)
 - unauthorised disclosure of confidential information
 - a decision or action induced or affected by fraud
- **unreasonable, e.g.:**
 - a decision or action inconsistent with adopted guidelines or policies or with a decision or action which involves similar facts or circumstances not justified by any evidence, or so unreasonable that no reasonable person could so decide or act (e.g. irrational)
 - an arbitrary, partial, unfair or inequitable decision or action
 - a policy that is applied inflexibly and without regard to the merits of an individual case
 - a decision or action that does not take into account all relevant considerations or that takes into account irrelevant considerations
 - serious delays in making a decision or taking action
 - failing to give notice of rights
 - giving wrong, inaccurate or misleading advice leading to detriment
 - failing to apply the law
 - failing to rectify identified mistakes, errors, oversights or improprieties
 - a decision or action based on incorrect or misinterpreted information
 - failing to properly investigate
- **unjust, e.g.:**
 - a decision or action not justified by any evidence or that is unreasonable
 - a partial, unfair, inequitable or unconscionable decision or action
- **oppressive, e.g.:**
 - an unconscionable decision or action
 - where the means used are not reasonably proportional to the ends to be achieved

- an abuse of power, intimidation or harassment
- **improperly discriminatory, e.g.:**
 - the inconsistent application of a law, policy or practices when there is no reasonable, justifiable or appropriate reason to do so
 - applying a distinction not authorised by law, or failing to make a distinction which is authorised or required by law
- **based wholly or partly on improper motives, e.g.:**
 - a decision or action for a purpose other than that for which a power was conferred (i.e. in order to achieve a particular outcome)
 - a conflict of interest
 - bad faith or dishonesty
 - seeking or accepting gifts or benefits in connection with performance of official duties
 - misusing public property, official services or facilities.

4.3 SERIOUS AND SUBSTANTIAL WASTE

The term serious and substantial waste is not defined in the *Protected Disclosures Act*. The Auditor-General provides the following working definition:

Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources.

In addressing any complaint of serious and substantial waste regard will be had, to the nature and materiality of the waste.

The following delineation of the definition of serious and substantial waste may be of assistance to public officials and/or public authorities.

Types:

Absolute. Serious and substantial waste might be regarded in absolute terms where the waste is regarded as significant, for example \$200,000.

Systemic. The waste indicates a pattern which results from a system weakness within public authorities.

Material. The serious and substantial waste is/was material in terms of the public authority's expenditure or a particular item of expenditure or is/was material to such an extent so as to affect a public authority's capacity to perform its primary functions.

Material By Nature Not Amount. The serious and substantial waste may not be material in financial terms but may be significant by nature. That is it may be improper or inappropriate. [alternatively, this type of waste may constitute 'maladministration' as defined in the *Protected Disclosures Act*]

Note: It is possible that in assessing the seriousness of waste or administrative conduct for the purposes of whether either is covered by the Act, differences in the size, budgets, responsibilities of agencies may be taken into account (what is serious for a small agency may not be so serious for a large agency).

Waste can take many forms, for example:

- misappropriation or misuse of public property,
- the purchase of unnecessary or inadequate goods and services,

- too many staff being employed in a particular area, incurring costs which might otherwise have been avoided,
- staff being remunerated for skills that they do not have, but are required to have under the terms or conditions of their employment,
- programs not achieving their objectives and therefore the costs being clearly ineffective and inefficient.

Waste can result from such things as:

- the absence of appropriate safeguards to prevent the theft or misuse of public property,
- purchasing procedures and practices which fail to ensure that goods and services are necessary and adequate for their intended purpose, and
- purchasing practices where the lowest price is not obtained for comparable goods or services.

5 WHAT DISCLOSURES ARE PROTECTED UNDER THE ACT

5.1 WHAT DISCLOSURES ARE PROTECTED

Disclosures are protected under the Act if they:

- are made:
 - in accordance with this internal reporting policy, or
 - to the **Chief Cancer Officer**, of the Cancer Institute NSW or
 - to one of the investigating authorities nominated in the Act, **and**
- show or tend to show corrupt conduct, maladministration, or serious and substantial waste of public money by the Cancer Institute NSW (including Board/Committee members) or any of its staff, **and**
- are made voluntarily.

The relevant investigating authorities nominated in the Act are:

- Ombudsman, for maladministration;
- Independent Commission Against Corruption (ICAC), for matters involving corrupt conduct; and
- Auditor-General, for matters involving serious and substantial waste of public money in agencies other than councils.

5.2 WHAT DISCLOSURES ARE NOT PROTECTED

A disclosure is not protected under the Act if it is made by a public official in the exercise of a duty imposed by or under an Act.

Protection is also not available for disclosures which:

- are **made** frivolously or vexatiously,
- primarily question the merits of government policy, or
- are made solely or substantially with the motive of avoiding dismissal or other disciplinary action.

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

6 REPORTING UNDER THE INTERNAL REPORTING SYSTEM

The positions to who internal disclosures can be made in accordance with the Act and this policy are:

- the disclosure coordinator – **Chief Operating Officer** (phone Ext. 8374-5678),
- a nominated disclosure officer. Positions nominated for this purpose are:
 - **Human Resources Manager** (phone Ext. 8374-5622);
 - **Finance and Administration Manager** (phone Ext. 8374-5628);
- the **Chief Cancer Officer** (phone Ext. 8374-5606).

Where a person contemplating making a disclosure is concerned about publicly approaching the disclosure coordinator or a nominated disclosure officer or Chief Cancer Officer, they can request a meeting in a discreet location away from the workplace.

7 ROLES AND RESPONSIBILITIES

This internal reporting policy places responsibilities upon people at all levels within the Cancer Institute NSW.

7.1 EMPLOYEES

Employees are encouraged to report known or suspected incidences of corrupt conduct, maladministration or serious and substantial waste in accordance with this policy.

All employees of the Cancer Institute NSW have an important role to play in supporting those who have made legitimate disclosures. They must abstain from any activity that is or could be perceived to be victimisation or harassment of a person who has made a disclosure. Further, they should protect and maintain the confidentiality of any person they know or suspect to have made disclosures.

7.2 NOMINATED DISCLOSURE OFFICERS (REFER SECTION 6)

Nominated disclosure officers are responsible for receiving, forwarding and/or acting upon disclosures made in accordance with the policy. Nominated disclosure officers will:

- clearly explain to the person making a disclosure what will happen in relation to the information received,
- when requested by a person wishing to make a disclosure, make arrangements to ensure that disclosures can be made privately and discreetly (if necessary away from the workplace),
- put in writing and date any disclosures received orally (and have the person making the disclosure sign the document),
- deal with disclosures impartially,
- forward disclosures to the disclosure coordinator (Chief Operating Officer) or Chief Cancer Officer, for assessment,
- take all necessary and reasonable steps to ensure that the identity of the person who has made a disclosure, and any person who is the subject of a disclosure, are kept confidential (where this is practical and reasonable), and
- support any person who has made a disclosure and protect them from victimisation, harassment or any other form of reprisal.

7.3 DISCLOSURE COORDINATOR (REFER SECTION 6)

The disclosure coordinator has a pivotal position in the internal reporting system and acts as a “clearing house” for disclosures. The disclosure coordinator will:

- provide an alternative internal reporting channel to nominated disclosure officers and to the Chief Cancer Officer,
- impartially assess each disclosure to determine:

- whether the disclosure appears to be a protected disclosure within the meaning of the Act,
- whether the disclosure concerns another agency and should therefore be referred to the principal officer of that agency,
- the appropriate action to be taken in relation to the disclosure that covers the Cancer Institute NSW, for example:
 - no action/decline,
 - the appropriate person to take responsibility for dealing with the disclosure,
 - preliminary or informal investigation,
 - formal investigation,
 - prosecution or disciplinary action,
 - referral to an investigating authority for investigation or other appropriate action, or
 - referral to the NSW Police (if a criminal matter) or the ICAC (if the matter concerns corrupt conduct).
- consult with a report to the Chief Cancer Officer with respect to determining and recommending what action should be taken in relation to a disclosure,
- be responsible for either carrying out or coordinating any internal investigation arising out of a disclosure, subject to any relevant directions of the Chief Cancer Officer,
- report to the Chief Cancer Officer on the findings of any investigation and recommended remedial and or other action,
- take all necessary and reasonable steps to ensure that the identity of the person who has made a disclosure, and any person who is the subject of a disclosure, are kept confidential (where this is practical and reasonable), and
- support any person who has made a disclosure and protect them from victimisation, harassment or any other form of reprisal.
- report actual or suspected corrupt conduct to the Chief Cancer Officer in a timely manner to enable him/her to comply with the ICAC Act.

7.4 CHIEF CANCER OFFICER

Disclosures may be made directly to the Chief Cancer Officer, rather than by way of the internal reporting system established under this policy. In such circumstances, the Chief Cancer Officer will:

- impartially assess each disclosure to determine:
 - whether the disclosure appears to be a protected disclosure within the meaning of the Act,
 - whether the disclosure concerns another agency and should therefore be referred to the principal officer of that agency,
 - the appropriate action to be taken in relation to a disclosure that concerns the Cancer Institute NSW, for example:
 - no action/decline,
 - the appropriate person to take responsibility for dealing with the disclosure,
 - preliminary or informal investigation,
 - formal investigation,
 - prosecution or disciplinary action,
 - referral to an investigating authority for investigation or other appropriate action, or
 - referral to the NSW Police (if a criminal matter) or the ICAC (if the matter concerns corrupt conduct),

- receive reports from the disclosure coordinator on the findings of any investigation and any recommendations for remedial action, and determine what action should be taken,
- take all necessary and reasonable steps to ensure that the identity of the person who has made a disclosure, and any person who is the subject of a disclosure, are kept confidential (where this is practical and reasonable),
- have primary responsibility for protecting any person who has made a disclosure, or provided information to any internal or external investigation of a disclosure, from victimisation, harassment or any other form of reprisal,
- be responsible for implementing organisational reform identified as necessary following investigation of a disclosure, and
- report criminal offences to the NSW Police and actual or suspected corrupt conduct to ICAC (under s.11 of the ICAC Act).

8 ALTERNATIVE AVENUES FOR DISCLOSURES

Alternative avenues available to staff for making a protected disclosure under the Act (**other than** by means of the internal reporting system established under this policy for the purpose of the Act), are as follows:

- to one of the investigating authorities under the Act (e.g. the Ombudsman, ICAC, Auditor-General, or
- to a journalist or a member of Parliament [where certain important pre-conditions apply].

Disclosures made to a journalist or a member of Parliament will **only** be protected **if certain conditions are met**:

- the person making the disclosure to a journalist or member of Parliament must have already made substantially the same disclosure through the internal reporting system or to the Chief Cancer Officer or an investigating authority in accordance with the Act,
- the responsible officer must have reasonable grounds for believing that the disclosure is substantially true and **the disclosure must be substantially true**, and
- the investigating authority, agency, staff or public official to whom the matter was originally referred has:
 - decided not to investigate the matter, or
 - decided to investigate the matter but not completed the investigation within six months of the original disclosure, or
 - investigated the matter but not recommended any action in respect of the matter, or
 - failed to notify the person making the disclosure, within six months of the disclosure, of whether the matter is to be investigated.

9 RIGHTS OF A PERSON WHO IS THE SUBJECT OF A DISCLOSURE

The rights of any person who is the subject of a disclosure will also be protected. In this regard:

- the confidentiality of the identity of any person who is the subject of a disclosure will be protected and maintained (where this is practical and reasonable),
- all disclosures will be assessed and acted on impartially, fairly and reasonably,
- responsible officers who receive a disclosure in accordance with this policy are obliged to:
 - protect and maintain the confidentiality of the identity of any person who is the subject of a disclosure (where this is practical and reasonable),
 - assess the disclosure impartially, and
 - act fairly towards any person who is the subject of a disclosure,

- all disclosures will be investigated as discreetly as possible, with a strong emphasis on maintaining the confidentiality of both the identity of the whistleblower and any person who is the subject of a disclosure (where this is practical and reasonable),
- where investigations or other enquires do not substantiate a disclosure, the fact the investigation/enquiry has been carried out, where practical the results of the investigation/enquiry, and the identity of any person who is the subject of a disclosure will be kept confidential, unless they request otherwise,
- a person who is the subject of a disclosure (whether a protected disclosure under the Act or otherwise) which is investigated by or on behalf of an agency, has the right to be:
 - informed as to the substance of the allegations,
 - 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 such investigation, and
 - given a reasonable opportunity to put their case (either orally or in writing) to the people carrying out the investigation for or on behalf of the agency, before any final decision/determination/report/memorandum/letter or the like is made.
- where the allegations in a disclosure have been investigated by or on behalf of an agency, and the person who is the subject of any allegations is aware of the substance of the allegations, the substance of any adverse comment, or the fact of the investigation, they should be formally advised as to the outcome of the investigation, regardless of the outcome, and
- where the allegations contained in a disclosure are clearly wrong or unsubstantiated, the person who is the subject of a disclosure is entitled to the support of the agency and its senior management (the nature of that support—i.e. what is reasonable and appropriate—would depend on the circumstances of the case e.g. it could include a public statement of support or a letter setting out the agency’s views that the allegations were either clearly wrong or unsubstantiated).

10 PROTECTION AVAILABLE UNDER THE ACT

10.1 PROTECTION AGAINST REPRISALS

The Act provides protection by imposing penalties on a person who takes detrimental action against another person substantially in reprisal for a protected disclosure. Penalties can be imposed by means of fines and imprisonment. Detrimental action means action causing, comprising or involving any of the following:

- injury, damage or loss,
- intimidation or harassment,
- discrimination, disadvantage or adverse treatment in relation to employment,
- dismissal from, or prejudice in, employment, or
- disciplinary proceeding.

In any such proceedings the whistleblower only needs to show that they made a protected disclosure and suffered detrimental action. It then lies on the defendant to prove that the detrimental action shown to have been taken against the whistleblower was **not** substantially in reprisal for the person making the protected disclosure.

Any member of staff who believes that detrimental action is being taken against them substantially in reprisal for the making of an internal disclosure in accordance with this policy should immediately bring the allegations to the attention of the Chief Cancer Officer.

If a member of staff who made an internal disclosure feels that such reprisals are not being effectively dealt with, they should contact the Ombudsman or the ICAC.

If an external disclosure was made to an investigating authority, the authority will either deal with the allegation or provide advice and guidance to the person concerned.

10.2 PROTECTION AGAINST ACTIONS

The Act provides 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. This provision has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure by a public official.

A person who has made a protected disclosure has a defence of absolute privilege in proceedings for defamation.

A person who has made a protected disclosure is taken not to have committed any offence against an Act which imposes a duty to maintain confidentiality with respect to any information disclosed.

10.3 CONFIDENTIALITY

The Act requires investigating authorities, agencies and public officials to whom protected disclosures are made or referred, not to disclose information that might identify or tend to identify the person who makes a disclosure. The exceptions to the confidentiality requirement are where:

- the person consents in writing to the disclosure of that information, or
- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to the person who is the subject of the disclosure, or
- the investigating authority, agency, staff or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or disclosure is otherwise in the public interest.

Decisions about natural justice, effective investigation and public interest will be made by the Chief Cancer Officer. In all cases the person who made the disclosure will be consulted before such a decision is made.

Note: If guidance is needed in relation to the requirements of natural justice, effective investigation and public interest, this may be sought from an investigating authority.

10.4 FREEDOM OF INFORMATION EXEMPTION

Under the *Freedom of Information Act 1989*, a document is exempt from release if it contains matters the disclosure of which would disclose matters relating to a protected disclosure within the meaning of the Act.

11 NOTIFICATION OF ACTION TAKEN OR PROPOSED

Any person who makes a protected disclosure must be notified, within six months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

If a disclosure is made in accordance with this policy, the disclosure coordinator is responsible for the six month notification to the person who made the disclosure, unless this

responsibility has been retained by or allocated to another staff member by the Chief Cancer Officer.

The notification provided to the person who made the disclosure should contain sufficient information to demonstrate that adequate and appropriate action was taken, or is proposed to be taken, in respect of the disclosure. **This should include a statement of the reasons for the decision made or action taken in response to the disclosure.**

The notification should include sufficient information to enable the person who made the disclosure to make an assessment as to whether the circumstances listed in section 19(3)(a)-(c) of the Act (relating to disclosures to members of Parliament and journalists) apply, i.e. whether:

- a decision was made not to investigate the matter, or
- a decision was made to investigate the matter, but the investigation was not completed within six months of the original decision being made, or
- a decision was made to investigate the matter, but the investigation has not been completed within six months of the original decision being made, or
- the matter was investigated but no recommendation was made for the taking of any action in respect of the matter.

One of the purposes of this is to give the whistleblower enough information to be able to properly assess whether it is appropriate or warranted to make a disclosure to an MP or journalist.

12 REVIEW

This policy shall be reviewed annually to ensure that it meets the object of the legislation, and facilitates the making of disclosures under the Act.

13 MODEL INTERNAL REPORTING SYSTEM

