



# RO POD episode 57 – Developing an Internal Whistleblower Policy

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## Speaker Key

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**AN:** Welcome to RO pod: Talking about governance of registered organisations with the Registered Organisation Services branch at the Fair Work Commission, the official podcast about the regulation of unions and employer associations. In this podcast we'll share essential information, uncover handy hints and tips and reveal our best tools for proactive compliance with the complex legislative requirements.

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**00:00:44**

**CC:** Hello and welcome to RO pod. I'm Claire Cotterill and I'm an Advisor in the Governance and Protected Disclosures Team of the Registered Organisations Services Branch at the Fair Work Commission. In an episode of RO Pod last year, we discussed issues that are commonly the subject of whistleblower disclosures - known as protected disclosures. We spoke about what a protected disclosure is under the *Fair Work (Registered Organisations) Act 2009* – known as the



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RO Act – and the protections that are available for whistleblowers. Today, we will be examining how registered organisations can develop and implement an internal whistleblower policy to handle matters raised, including where matters are raised within the organisation first.

Here with me today to discuss how to develop and implement an effective internal whistleblower policy in your organisation, and why it's important, is Bill Steenson, the Director of the Governance and Protected Disclosures Team. Welcome Bill.



**00:01:34**

**BS:** Hi Claire, thanks for that overview, it's good to be here to talk about this.

**CC:** Thanks Bill. Let's start with the fundamentals of whistleblowing and protected disclosures. What are protected disclosures, and what do they cover?

**BS:** So protected disclosures are basically reports from someone within an organisation or close to it about certain conduct they become aware of. But it's a bit more specific than that, in that it's got to concern a suspected breach of the law.

So in our context, the registered organisations context – with employer associations and unions – the scheme specifically covers conduct that someone suspects breaches the RO Act, or the *Fair Work Act 2009* or the *Competition and Consumer Act 2010*, or also covers conduct that may constitute an offence against a law of the Commonwealth.

So in terms of the protections, disclosers are protected if the matter is reported to the Commission, as the regulator, OR if it's reported to the organisation, but it was eligible to be reported to us at the Commission. Now the nature of things that people are concerned about, and therefore the sort of things they disclose about are many and varied, and as you can imagine some of them may or may not be against the law.



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**CC:** Yeah, absolutely. And we know people will raise concerns and issues about things that are not eligible to be a protected disclosure. So, what other kinds of matters might an organisation receive?



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**BS:** Well, a good example is breaches of the organisation's internal rules and policies, that's a common one we see, and so steps need to be taken to include these sorts of matters in the organisation's own whistleblower policy along with how to deal with Disclosable Conduct. Organisations can also receive complaints that don't fall under the scheme and therefore are not eligible to be protected disclosures. We want organisations to know that they should still have a policy that addresses complaints that aren't within jurisdiction, so that they can address that come even if they're not strictly part of the whistleblower scheme.



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**CC:** So why is it important for a whistleblower policy to address matters that aren't Disclosable Conduct?

**BS:** Well even if it's not a protected disclosure under the RO Act, it's vital that the organisation demonstrates good governance and that they have what's known as a 'speak up' culture to ensure that people can raise legitimate concerns and know that they will be heard and won't be dismissed. There's always going to be some tension between running an organisation, wanting people to disclose wrongdoing and but also having things raised that aren't necessarily strictly within the framework. But of course there's a risk that having too narrow a focus then that can mean you miss out on identifying issues that could arise as breaches later on. A good example of this is if you receive a concern and think, "well that doesn't seem to be Disclosable Conduct, but then if one aspect was slightly different then it would be. There's an opportunity to address a potential problem, before it necessarily becomes a bigger one. So if the complaint's about say recordkeeping, then that's an important underlying feature that can be part of addressing risk by keeping clear records, especially about decisions and handling conflicts of interest. That risk



mitigation is really part of good governance and strong internal management, and if you've got a standard approach to addressing issues, then it's far more likely you'll run into fewer difficulties down the track.



**00:04:49**

**CC:** Yeah that's a great point Bill. We've spoken about protected disclosures and other types of matters that organisations may receive, but what is an internal whistleblower policy, and what is its purpose?

**BS:** Well really, it's just an in-house policy that an organisation has – or should have – on reporting concerns within that organisation. In practical terms, the policy is going to be in writing and it should be circulated to everyone so they're aware of it. It shouldn't just be developed and then put on the shelf as a box ticking exercise. The whole idea of a whistleblower policy is to inform employees of what they can be report, and how it will be managed. Having a policy demonstrates the importance that the organisation places on doing the right thing and ensuring a safe environment where people can feel confident to raise issues and know that they will be listened to and actively supported throughout that process. Now all of that helps to create and cultivate a culture of speaking up.

Now of course, it needs to be recognised and acknowledged that policy itself isn't enough if culture doesn't support it. On the other hand, having no policy can in itself cause issues. For instance, if there is a dispute over different treatment of reports that have been made by different people.



**00:06:01**

**CC:** We actually hear a lot in the media about whistleblowers coming forward. How common is it for matters to be reported internally versus externally?

**BS:** Well as you know, the Commission can receive and investigate protected disclosures. But many people might choose to report their concerns internally within the organisation first. There's a



bit of misconception out there about how frequently issues get reported externally. In fact, research across a range of organisations (in the private and public sector) has shown that 98% of whistleblowers raised their concerns internally and some of them only raised them internally, and so only 2% go outside their organisation first. And of that 2%, some go to an external regulatory, some go public, and some went to a professional association or peak body in their field. The statistics from that research, is that only 1% ever went to directly to a public website, a journalist or the media organisation.



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**CC:** So, if there's no legislative requirement and it's not mandatory for a registered organisation to have an internal whistleblower policy, and disclosers can also simply report things to the Commission, why should registered organisations have a policy?

**BS:** Very fair question Claire, and in the end there's nothing forcing a registered organisation to adopt a whistleblower policy, but there's no doubt that the benefits of having one far outweigh any perceived downside or effort in putting it in place. As I mentioned before, if you've got an internal whistleblower policy it demonstrates the organisation's commitment to support and encourage calling out conduct that could be harmful to the organisation, its officers, its employees or its members. And it provides people with the confidence to raise issues internally, so they don't have to go externally every time. There are also benefits for the organisation and for individuals.



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**CC:** Yes, that's what I've seen too. Organisations that model the right behaviours, encourage early reporting of issues and act with integrity have higher levels of compliance and are recognised as such. Do you know if any other jurisdictions legally require whistleblower policies?

**BS:** Well the Corporations Act introduced a legal requirement in 2020 requiring many of its organisations to have a whistleblower policy. Now that includes public companies, large proprietary companies as well as companies that are the trustees of registrable superannuation



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entities. Likewise charities that are structured as public companies limited by guarantee also require a whistleblower policy. So there's a very clear move, including enshrining it in law, towards encouraging internal reporting of potential misconduct. And for those of our organisations who are registered under the Corporations Act too, they have to comply with both requirements. So really for them it's just simpler to have one policy and encourage people to speak up.



**00:08:48**

**CC:** Thanks for that insight. I'd like to get into the detail of what an internal whistleblower policy looks like. What are some of its key elements?

**BS:** Well look one of the most important elements, and probably the best place to start, is to outline the scope of the policy: so what does it cover? At its most basic, it'll clearly set out things like how complaints will be managed, including breaches of internal rules or policies, such as those that are set out in the organisation's rule book.

Obviously if it is a whistleblower policy it should also address the reporting of Disclosable Conduct. Disclosable conduct is what it's defined in section 6 of the RO Act – put simply it's what the discloser reasonably suspects may be a breach of the law by an organisation, or by its officers or employees.

In practical terms, it's also essential for the policy to designate who can receive and handle disclosures. The role, responsibilities and contact details of each person who can receive a complaint needs to be clear and needs to obviously be accessible to people who want to make that complaint. On top of that, you need to provide for procedural fairness, giving a reasonable opportunity to respond and ensuring the investigation is as thorough and as impartial as possible and the decision-making that comes out of that investigation is based on evidence and isn't influenced. This will also include providing things like clear outcomes and the reasons to the parties involved, outlining if a particular claim or allegation has or hasn't been substantiated, and which of them there might not have reached a conclusion on.



It's also really good practice to have some reference to expected timeframes on the investigation and when an outcome can be expected so things aren't just left hanging.



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**CC:** They are some really good tips about what to include. One of the most important aspects though, and I think it's essential we look at this specifically on its own, is ensuring the wellbeing and safety of the person reporting their concerns. It seems to me that whistleblowing takes a huge amount of courage, and dealing with wrongdoing is not enough if you're failing to support the people who do speak up. You don't want whistleblowers to feel like they've reported an issue and then been left out to dry. They need to feel confident that they're appreciated and encouraged to raise issues, and that they won't face repercussions for speaking up – even in scenarios where their concerns aren't substantiated or where the investigation won't be taken further.

**BS:** You're absolutely right Claire, it's a really big step for someone to step-up and whistleblow so it's a crucial part of a whistleblower policy. The policy will need to outline what protections from reprisals there are for people who report and what supports available to them. Now under the RO Act, it's illegal to take action against someone because disclosable conduct has been reported. And that includes making threats against anyone because a disclosure has been made or it's about to be made. I can give some examples of what that covers if you like.



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**CC:** Yes, I think some practical examples would really help.

**BS:** Okay, so if an organisation says to a person that we're take action against you or against someone else if you report this particular issue, then that's covered. The reprisals section of the RO Act, section 337BB, describes the sort of behaviour that can be a reprisal or a threatened reprisal – and it's pretty broad. So taking action against someone or threatening action against someone, whatever form that might take, because of that disclosure being made or because



they are thinking about making one. Organisations need to bear in mind that their behaviour towards a whistleblower is going to be under scrutiny.

So there's the overarching law that explicitly says what applies to organisations and disclosers. But again, in practical terms, that's not an exhaustive list nor is it on its own a 'how to' guide, and there are definitely some other things that should be covered in a policy if an organisation is serious about dealing with complaints and dealing with the people who raise them. And one of the most important of them is confidentiality. So a whistleblower policy needs to say that a person can report concerns anonymously, or that they can provide their details but request that they not be disclosed. Like you alluded to before Claire, it's a really big step to stick up your hand and raise these sort of concerns. So some reassurance that the disclosure's details are protected and the information they've provided will be treated appropriately, and they won't 'outed' is so important.

Under the Corporations Act whistleblower scheme – which started after the RO Act scheme and ASIC had the advantage of seeing ours operate – there are some specific provisions about not disclosing a whistleblower's details.

So it should be really clear both to the organisation and in the policy, that the organisation's only going to share a person's details and information on a strictly need-to-know basis, with those who have a role to play in looking into the matter, or if a particular law obliges them to disclose or share those details.



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**CC:** What about some other elements?

**BS:** Well look another thing that should really be included (and it can support disclosers and also give a bit of clarity to the organisation) is information on avenues for seeking a review, or how someone can report to an external agency, such as the regulator (in our case the Commission), if they're dissatisfied with the outcome of the internal investigation or complaint handling.





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It's also always open to you to take steps that make a discloser feel more at ease, and we'd definitely encourage that. Now that might take some different forms. Sometimes, it's just maintaining confidentiality. Other times it might be allowing for a temporary or permanent change, particularly a transfer of duties or location if that will protect the whistleblower.



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**CC:** Yes, and I think one of the biggest challenges is making people feel comfortable reporting and speaking up. How can registered organisations build that trust with them?

**BS:** Well look I think independence and a transparent process are really essential in building trust. Now that might be ensured by appointing an independent investigator or if the organisation has appointed an independent ombudsman who can be called on if and when issues arise. Now they don't necessarily have to be totally external, but clearly they've got to be independent from any of the involved parties. Some of the most effective ones I've seen are where a person with undoubted expertise and integrity is engaged. One organisation for example, has got a former state Industrial Court judge as its independent ombudsman; others have commissioned law firms, or any independent industrial relations consultant or an experienced investigator to look into serious issues.

Of course, declaration of any conflicts of interest, whether real or perceived, is also critical in gaining trust.

And it should also be obvious, but it's worth saying, that policy must be supported by an ethical culture. So for something to be the real deal it can't just be words on a page that are referred to if and when convenient, or just a 'paper exercise' that's ignored entirely in practice. There's got to be consistency. It's meaningless to have a policy if there's going to be a culture of fear around speaking up. And there's a lot of research that suggests that employees will look for cues in their environment as guidance on how to behave, especially in ambiguous or uncertain situations. You know, they'll be looking at the behaviours, not what's on a piece of paper. So modelling the right behaviours from the top down is important, but it's got to be demonstrated and endorsed



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at ALL levels of the organisation. This includes the formal and the informal approaches that the organisation takes to promote a speak up culture.



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**CC:** Would you be able to take us through some examples of those formal and informal approaches?

**BS:** Sure. So some of the formal or explicit approaches couple be things like education around the whistleblowing policy. You can put the whistleblowing policy in an obvious place in your organisation’s website or in files, circulating emails, reminding people of its existence during meetings. Governance and ethics training programs for office-bearers and providing information for members are all strategies to increase awareness and, to complement that, having a code of conduct for example around behaviour and what is and isn’t allowed can further entrench these values and demonstrate accountability across the organisation.

In terms of some of those more informal approaches, sometimes there can be a cultural reluctance to what you might call ‘dobbing someone in’. That’s why it’s important to promote and acknowledge the importance of speaking up about ethical and governance concerns.

Another one is, clearly condemning and responding to unlawful and unethical conduct when it’s discovered. You know that is an excellent way to model the right behaviour. It can send a great message and it can make a massive difference. Just as an example, I remember early in my career, starting a job in another organisation, and hearing that many months beforehand, you know, something like 12-18 months beforehand, a senior manager had been dismissed for, well let’s just call them ‘integrity issues’. So even though I wasn’t there at the time the incident occurred, more than a year later, the story was still circulating when I got there – “You know they marched a senior guy out of the place because he’d apparently been giving work to his mates and spending money without approval”. And to this day, to me it’s the best illustration of the culture of ‘walking the talk’ and the adage that strong action by the leadership, courageous action by leadership of an organisation can be legendary.



So if managers support and encourage speaking up, even if it means hearing dissenting views. Then that's a good thing. From a governance point of view, seeking even encouraging feedback, and then genuinely considering it is both good practice and it's a real 'sense check' in terms of what's really going on with compliance.



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**CC:** Thanks for sharing that Bill. What are some examples of what's worked and what hasn't worked for organisations in the past when it comes to developing an internal whistleblower policy?

**BS:** Well, like I touched on before, providing for the appointment of an independent and/or external investigator, such as a law firm or other specialised expertise, to investigate issues can be a really effective tool. It allows things to be done without involving the person that was the subject of the allegations, and it's done at arm's length. Another really important element is to have a clear, person-centric process to support those people raising the concerns.

I guess in terms of what hasn't worked, I'd say not having clear processes and potential outcomes, having ambiguous wording and having multiple (and potentially conflicting) processes, as well as an unclear scope policy or inconsistent application of it. For reality is, is that the policy has got to apply to everyone!

And you don't define the scope of wrongdoing then that can mean people will be uncertain about whether their concerns fall within the scope and can be reported and, flowing on from that, whether they're protected.

Look at the end of the day, I think people just want to know that they have been heard and treated fairly. If things are done arbitrarily and there's no reference to a written policy (or if there are a bunch of inconsistencies), then they won't feel like they have been treated fairly. Similarly, a failure to consider mechanisms for practical support of people during the investigations process is also likely to deter them from coming forward.



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**CC:** Yeah that's a great point Bill. And to add to that, I've seen organisations have an internal whistleblower policy which refers to an investigation plan. And this was great to see, however it turned out that there was no way the organisation could practically comply with the provisions of their investigation plan. So, I also wanted to emphasise that the systems and processes in place have to be practical and achievable. There needs to be a clear and concerted effort to educate officers, employees and members involved in investigations about the whistleblower policy, the investigation plan and its requirements, and any likely timeframes.

For someone who might not know much about whistleblowing and wants to take the first step, how can the Commission help?

**BS:** I think as a starting point, hopping on our website, I would recommend reading through the resources we have available on there. There are Fact Sheets about the whistleblower scheme, the obligations for organisations, and what constitutes a reprisal. I guess for the purpose of today's discussion there is also a Guidance Note, the *Designated Official and Manager's Guide to Handling Matters Within Registered Organisations*.

There's also a template for a whistleblower policy for registered organisations, which they can use as a starting point and adapt. And the sort of things it sets out:

- what's the purpose and scope of the scheme; and
- how's organisation will deal with matters and the relevant officials responsible,
- what are the protections that apply, and
- what are the consequences for people for not abiding by the law.

On top of that there is some other documents like an investigation checklist and a planning template, so they're designed to help the officer or employee in the organisation, whether they're looking at breaches of the RO Act or whether they're looking at internal rule or policy issues.

So we've got some other Templates as well that we've published. There's a template for example which is a Notice of an internal investigation commencing – so a bit of procedural



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fairness element there, and likewise a Template for giving Notice to attend interview – as part of the evidence gathering process of that investigation



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**CC:** And of course, if you'd like more information or would like to speak to one of our staff you can always call us on 1300 341 665.

That brings me to the end of the questions I have for you today. Bill, what would you say are the key messages for our listeners to take away?

**BS:** Well I think one of them is if you already have a policy, start by reviewing it. Check that it is clear and check that it is accessible to people. If you don't have one, then start the discussion now about implementing one and getting it into endorsed by your organisation.

As I've mentioned a minute ago, there are templates on our website to assist, and obviously it's open to people to edit them to suit their own circumstances. It's got to fit your organisation. Now regardless of whether you already got a policy or you are intending to implement one, it's important to remember that a whistleblower policy doesn't work in isolation. It requires a culture that supports speaking up. And for more information, you can also listen to Episode 6 of our RO Pod podcasts which gives some information about what research into public interest whistleblowing says, and for that we draw on the expertise we draw on the governance and whistleblower policy expert Professor A.J. Brown during that podcast.



**00:23:05**

**CC:** Thanks for your time today Bill, and for providing your expertise and insights into whistleblowing as part of developing an internal whistleblower policy.

**BS:** Thanks for the opportunity Claire, I hope it's helped.

**CC:** And thank you to our audience for listening today, and please join again next time.



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