



# PROTECTED DISCLOSURES POLICY & PROCEDURE

Adoption Date:

Review Date:

Responsible Officer: General Manager

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## POLICY STATEMENT

WSC is committed to eliminating corrupt conduct, maladministration and the serious and substantial waste of public money and to supporting those staff members who endeavour to expose such behaviour.

## OBJECTIVES:

- To ensure that Council complies with the Protected Disclosures Act 1994.
- To clearly define and establish procedures for making a disclosure within the provision of the Protected Disclosures Act 1994.
- To protect staff members from reprisals because of such disclosures and to provide that those disclosures will be properly investigated and dealt with.

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## Policy Implementation Procedures, Guidelines and Documents

Protected Disclosures Procedures

## Related WSC Policies

Code of Conduct

## **PROCEDURE**

### **Objective**

To provide a safe process for staff making protected disclosures about corrupt conduct, maladministration or serious and substantial waste of public money. Take all reasonable steps to provide protection to staff who make protected disclosures from any detrimental action in reprisal for the making of the disclosure.

### **Council Policy Reference**

Protected Disclosures Policy

### **Statutory Requirements**

Independent Commission Against Corruption Act 1998

Protected Disclosures Act 1994

Government Information (Public Access) Act 2009

### **Related Policy/Procedure**

Code of Conduct

## 1. Definitions

### 1.1 *Corrupt conduct*

'*Corrupt conduct*' is defined in the *Independent Commission Against Corruption Act 1998* (s.8 and 9) as 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, i.e. taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples.

### 1.2 *Maladministration*

'*Maladministration*' is defined in the *Protected Disclosures Act 1994* as conduct that involves action or inaction of a **serious nature** that is:

**contrary to law**, for example:

- a decisions or actions contrary to law
- a decisions or actions *ultra vires* ( i.e. the decision-maker had no power to make the decision or to do the act)
- a decisions or actions contrary to lawful and reasonable orders from persons or body's with authority to make or give such orders
- a breach of natural justice/procedural fairness
- improperly exercising of a delegated power (e.g. decisions or actions not authorised by delegation or acting under the direction of another)
- unauthorised disclosure of confidential information
- decisions or actions induced or affected by fraud

**unreasonable**, for example:

- decisions or actions 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 (i.e. irrational)
- arbitrary, partial, unfair or inequitable decisions or actions
- a policy that is applied inflexibly without regard to the merits of individual cases
- decisions or actions that do not take into account all relevant considerations or that takes into account irrelevant considerations
- serious delay in making decisions or taking action
- failure to give notice of rights
- giving wrong, inaccurate or misleading advice leading to detriment
- failure to apply the law
- failure to rectify identified mistakes, errors, oversights or improprieties
- decisions or actions based on incorrect or misinterpreted information
- failure to properly investigate

**unjust**, for example:

- decisions or actions not justified by any evidence, so unreasonable that no reasonable person could so decide or act
- **partial**, unfair, inequitable or unconscionable decisions or actions

**oppressive**, for example:

- unconscionable decisions or actions
- where the means used are not reasonably proportional to the ends to be achieved
- an abuse of power, intimidation or harassment

**improperly discriminatory**, for example

- the inconsistent application of laws, policies or practices when there is no reasonable, justifiable or appropriate reason to do so
- applying a distinction not authorised by law, or failure to make a distinction which is authorised or required by law

**based wholly or partly on improper motives**, for example:

- decisions or actions for a purpose other than that for which the power was conferred (i.e. in order to achieve a particular outcome)
- conflicts of interest
- bad faith or dishonesty
- seeking or accepting gifts or benefits in connection with performance of official duties
- misuse of public property, official services or facilities.

### 1.3 *Serious and substantial waste*

“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.

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 effect 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 1994*]

Waste can take many forms, for example:

- misappropriation or misuse of public property;
- the purchase of unnecessary or inadequate goods and services;
- too many personnel being employed in a particular area, incurring costs which might otherwise have been avoided;
- personnel 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 **and appropriate justification**; and
- purchasing practices where the lowest price is not obtained for comparable goods or services.

## 2. Disclosures protected under the Act

Disclosures are protected under the Act if they:

- (a) are made:
  - in accordance with the internal reporting procedures; or
  - to the General Manager; or
  - to one of the investigating authorities nominated in the Act; **and**
- (b) show or tend to show corrupt conduct, maladministration, or serious and substantial waste of public money by the **Walgett Shire Council** or any of its staff, **and**
- (c) are made voluntarily.

### 3.2 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.

## 3. Reporting under the internal reporting system

The persons or positions to which internal disclosures can be made in accordance with these procedures are the:

- General Manager
- the Mayor (if the disclosure concerns or involves the General Manager or a councillor)

Where persons contemplating making a disclosure are concerned about publicly approaching any of the designated officers they can ring the relevant official and request a meeting in a discrete location away from the workplace.

## 4. Roles and Responsibilities

### 5.1 Staff

- Are encouraged to report known or suspected incidences of corrupt conduct, maladministration or serious and substantial waste in accordance with these procedures.
- Should support those who have made legitimate disclosures. They should protect/maintain the confidentiality of persons they know or suspect to have made disclosures.
- Must abstain from any activity that is or could be perceived to be victimisation or harassment of persons who make disclosures.

## 5.2 *Nominated Officers*

The General Manager may delegate to a Nominated Officer who is responsible for receiving, forwarding and or acting upon disclosures in accordance with these procedures.

Nominated Officers will:

- (a) clearly explain to persons making disclosures what will happen in relation to the information received;
- (b) when requested, make arrangements to ensure that disclosures can be made privately and discretely (if necessary away from the workplace);
- (c) commit to writing and date any disclosures received orally (and have the person making the disclosure sign the document);
- (d) deal with disclosures impartially;
- (e) forward disclosures to the General Manager or Mayor for assessment;
- (f) take all necessary and reasonable steps to ensure that the identity of persons who make disclosures, and the persons the subject of disclosures, are kept confidential; and
- (g) support persons who make disclosures and protect them from victimisation, harassment or any other form of reprisal.

## 5.3 *General Manager*

Disclosures may be made direct to the General Manager. The General Manager will:

- (a) impartially assess each disclosure to determine:
  - (i) whether the disclosure appears to be a protected disclosure within the meaning of the Act; and
  - (ii) the appropriate action to be taken in relation to the disclosure, for example:
    - no action/decline;
    - the appropriate person to take responsibility for dealing with the disclosure;
    - preliminary or informal investigation;
    - a formal investigation;
    - prosecution or disciplinary action;
    - referral to an investigating authority for investigation or other appropriate action;
    - or
    - referral to the police (if a criminal matter) or the Independent Commission Against Corruption (ICAC) (if the matter concerns corrupt conduct);
- (b) be responsible for delegating the carrying out or coordinating of any internal investigation arising out of a disclosure;
- (c) provide a report on the findings of any investigation and remedial action;
- (d) take all necessary and reasonable steps to ensure that the identity of persons who make disclosures, and the persons whom are the subject of disclosures, are kept confidential;
- (e) support persons who make disclosures, and actively support them from victimisation;
- (f) be responsible for implementing organisational reform identified as necessary following investigation of a disclosure; and
- (g) report actual or suspected corrupt conduct to Council in a timely manner and comply with the Independent Commission Against Corruption Act.

## 5.4 *The Mayor*

The Mayor may receive internal disclosures from any member of staff of the council or any councillor(s) concerning the General Manager or a councillor. The Mayor will:

- (a) impartially assess each disclosure made to him/her about the General Manager or a councillor to determine:
  - (i) whether the disclosure appears to be a protected disclosure within the meaning of the Act;

Note: In making this assessment the Mayor may seek guidance from: the General Manager (if appropriate); an investigating authority (i.e. the Independent Commission Against Corruption (ICAC), or NSW Ombudsman); or the Office of Local Government.

- (ii) the appropriate course of action to be taken in relation to the disclosure (in consultation with the General Manager (if appropriate), 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 police (if a criminal matter) or the Independent Commission Against Corruption (ICAC) (if the matter concerns corrupt conduct);
- (b) refer disclosures to the General Manager for appropriate action if they concern the council's administration, within the day to day responsibilities of the General Manager;
- (c) protect/maintain the confidentiality of:
  - (i) the identity of persons who make disclosures (unless any of the criteria in s.22 of the Act apply); and
  - (ii) the identity of persons the subject of the disclosures (unless disclosure is required to enable the allegations to be investigated or otherwise appropriately dealt with).

## 6 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 these procedures for the purpose of the Act), are as follows:

- to one of the investigating authorities under the Act (i.e. the Independent Commission Against Corruption (ICAC) and NSW Ombudsman)

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

- (i) 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 General Manager or an investigating authority in accordance with the Act;
- (ii) the public official must have reasonable grounds for believing that the disclosure is substantially true and the disclosure must be substantially true; and
- (iii) the investigating authority, public authority or officer to whom the matter was originally referred has:
  - (a) decided not to investigate the matter; or
  - (b) decided to investigate the matter but not completed the investigation within six months of the original disclosure; or
  - (c) investigated the matter but not recommended any action in respect of the matter; or
  - (d) failed to notify the person making the disclosure, within six months of the disclosure, of whether the matter is to be investigated.

## **7 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:

- (1) the confidentiality of the identity of persons the subject of disclosures will be protected/maintained (where this is possible and reasonable);
- (2) disclosures will be assessed and acted on impartially, fairly and reasonably;
- (3) responsible officers who receive disclosures in accordance with these procedures are obliged to:
  - protect/maintain the confidentiality of the identity of persons the subject of the disclosures;
  - assess disclosures impartially; and
  - act fairly to persons the subject of disclosures;
- (4) disclosures will be investigated as discretely as possible, with a strong emphasis on maintaining confidentiality both as to the identity of persons making protected disclosures and the persons whom are the subject of disclosures;
- (5) where investigations or other enquiries do not substantiate disclosures, the fact the investigation/enquiry has been carried out, the results of the investigation/enquiry, and the identity of persons whom are the subject of the disclosures will be kept confidential, unless these persons request otherwise;
- (6) the persons whom are the subject of disclosures (whether protected disclosures under the Act or otherwise) who are investigated by or on behalf of a Council, have the right before any decision/determination/report/memorandum/letter or the like is made or finalized, to
  - (a) be informed as to the substance of the allegations;
  - (b) 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 such investigation; and
  - (c) be given a reasonable opportunity to put their case (either orally or in writing) to the persons carrying out the investigation for or on behalf of the Council;
- (7) where the allegations in a disclosure have been investigated by or on behalf of an authority, and the person who is the subject of the allegations is aware of the substance of the allegations, the substance of any adverse comment, or the fact of the investigation, he or she should be formally advised as to the outcome of the investigation, regardless of the outcome; and
- (8) where the allegations contained in a disclosure are clearly wrong or unsubstantiated, the person whom is the subject of the disclosure is entitled to the support of the authority and its senior management (the nature of the support that would be reasonable and appropriate would depend on the circumstances of the case, but could include a public statement of support or a letter setting out the authority's views that the allegations were either clearly wrong or unsubstantiated).

## **8. Protection**

### **8.1. 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.



Any member of staff or councillor who believes that 'detrimental action' is being taken against them substantially in reprisal for the making of an internal disclosure to the General Manager or in accordance with these procedures should immediately bring the allegations to the attention of the General Manager or Mayor (as appropriate).

If a member of staff or councillor who made an internal disclosure feels that such reprisals are not being effectively dealt with, they should contact the Independent Commission Against Corruption (ICAC) or **the Investigations and Review Branch** of the Office of Local Government.

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

### 8.2. *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 defense 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.

### 8.3. *Overriding Secrecy Laws*

Under the Government Information (Public Access) Act 2009, a document is exempt from release if it contains matter the disclosure of which would disclose matters relating to a protected disclosure within the meaning of the Act.

## **9. Notification of action taken or proposed**

A 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 WSC policy and procedures, the General Manager is responsible for the notification to the person who made the disclosure, unless this responsibility has been retained by or allocated to another officer by the General Manager.

If a disclosure is made to the Mayor under this Policy, the Mayor is responsible for such notification to the person who made the disclosure, unless he or she directs the General Manager or another nominated officer to assume this responsibility

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.

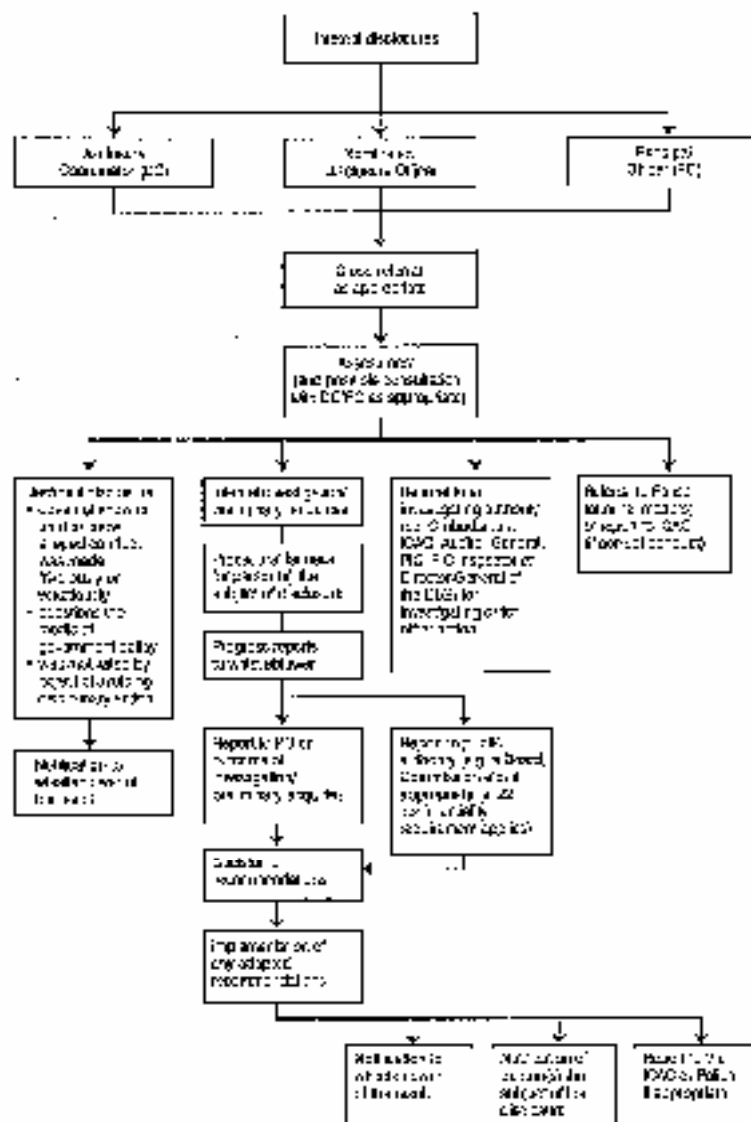
The notification should include sufficient information to enable the person who made the disclosure to make an assessment as to whether the circumstances listed in section 19 (3)(a) - (c) of the *Protected Disclosures Act 1994* (relating to disclosures to members of Parliament and journalists) apply, i.e. whether:

- (1) a decision was made not to investigate the matter; or
- (2) a decision was made to investigate the matter, but the investigation was not completed within six months of the original decision being made; or
- (3) 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
- (4) the matter was investigated but no recommendation was made for the taking of any action in respect of the matter.

Without such information it would be difficult for the person to be able to properly assess whether it is appropriate or warranted to make a disclosure to an MP or journalist.

Annexure 3: Model Internal Reporting Policy for State Government Agencies

Figure 3: The Internal Reporting System



**Procedure Review History**

Date	Changes Made	Approved By
June 2020	Complete Review	Michael Urquhart – Acting General Manager
June 2020	Reviewed	