Whistleblower protection laws and not-for-profit organisations

Legal information for not-for-profit organisations subject to whistleblower protection laws

This fact sheet covers:

- whistleblowing explained
- why whistleblower protections matter
- eligible whistleblowers
- organisations covered by the whistleblower laws
- complying with the whistleblower protection laws
- whistleblower policy requirements
- consequences of non-compliance

Disclaimer

This fact sheet provides information on whistleblower protection laws for not-for-profit organisations under the Corporations Act. This information is intended as a guide only, and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to the full disclaimer that applies to this fact sheet.

Whistleblowing explained

Whistleblowing is when a person connected to a company or organisation reports potential misconduct or breaches of the law by that company or organisation to an authorised person or government regulator.

Whistleblowing is important because it helps to identify misconduct and potential harm to consumers and the community. The law provides protection for whistleblowers.

Why whistleblower protections matter

Legal protections for whistleblowers are necessary to:

- encourage whistleblowers to come forward with their concerns about misconduct or breaches of the law and protect them when they make a disclosure
- promote good risk management and corporate governance, and
- promote ethical behaviour by companies and organisations and encourage them to deal with disclosures of misconduct seriously

The whistleblowing protection laws recognise that whistleblowers take a significant personal and professional risk when they choose to make a disclosure. Disclosure can also risk their personal safety or put them in a stressful and difficult situation.

Having whistleblowing protection laws makes sure there are clear rules in place about confidentiality, immunity and protection against harm or victimisation. Whistleblowing protection laws also set up penalties for failures by companies or organisations (or their officers) to comply with the protection requirements.

This fact sheet sets out the protections available to whistleblowers.

Whistleblowing protection laws

A person is able to access legal rights and protections under the *Corporations Act 2001* (Cth) (**Corporations Act**) as a whistleblower if that person meets certain criteria (see below). This fact sheet focuses on the protections available under the Corporations Act (referred to as '**whistleblowing protection laws**').

Similar whistleblower protections are also available under the *Taxation Administration Act 1953* (Cth) (**Tax Administration Act**). If you need information about disclosures under the Tax Administration Act, you should seek legal advice. Also see the Tax Practitioners Board's webpage Whistleblower legislation.

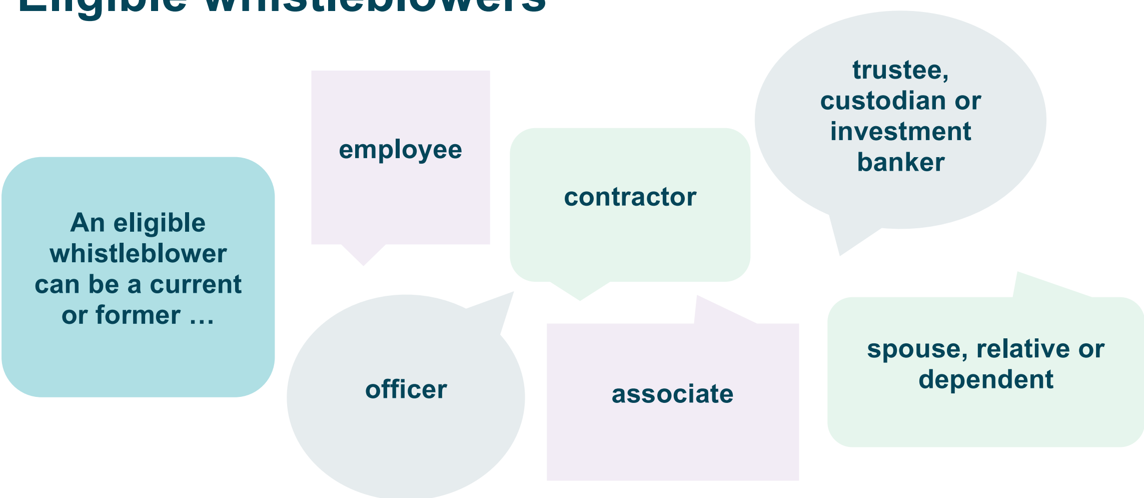
Note – other whistleblower protection regimes

This fact sheet focuses on whistleblower protections under the Corporations Act.

Some not-for-profit organisations may also be subject to separate whistleblower protection regimes under other Commonwealth laws. For example, registered aged care providers may have whistleblower obligations and protections under the *Aged Care Act 2024* (Cth), including requirements relating to whistleblower systems, whistleblower policies and protected disclosures.

Organisations providing aged care services should review the Aged Care Quality and Safety Commission's guidance on whistleblower protections and seek legal advice where necessary.

Eligible whistleblowers



The legal protections are available to '**eligible whistleblowers**'.

An eligible whistleblower can be:

- a current or former **employee** of the company or organisation, or a related company or organisation
- a current or former **officer** (ie. director or company secretary) of the company or organisation, or a related company or organisation
- a **contractor, consultant or service provider** (current or former) who has supplied goods and services to the company or organisation, or a related company or organisation
- a **volunteer** (current or former) who has supplied goods and services to the company or organisation, or a related company or organisation, or
- a **spouse, relative or dependant** of any of the people listed above

The definition of an eligible whistleblower is broad. It includes as many people who have a connection to a company or organisation as possible, including a spouse or family member, and who may be in a position to observe or be affected by misconduct, and may face reprisals (punishment or harm) by the company or organisation for reporting the misconduct.

Anonymous disclosures

Yes, a whistleblower may choose to remain anonymous. If a whistleblower chooses to remain anonymous, a company or organisation must treat the anonymous disclosure in the same way and with the same protections it gives to whistleblowers who identify themselves.

Legal protections for whistleblowers

The whistleblower protections are available under the Corporations Act (and the Tax Administration Act).

If an individual makes a disclosure that qualifies for the whistleblower protections, that individual:

- is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure, and
- no contractual or other remedy may be enforced and no contractual or other right may be exercised against the individual on the basis of the disclosure

Protected disclosures

For a disclosure to attract the protection of the whistleblower laws, whistleblowers must have '**reasonable grounds**' to suspect conduct that qualifies for protection under the Corporations Act or the Tax Administration Act, including misconduct or an improper state of affairs in relation to a '**regulated entity**'.

As soon as the whistleblower makes a disclosure that meets these criteria, they are automatically afforded whistleblower protections.

What are reasonable grounds?

'Reasonable grounds' means that a reasonable person in the same position as the person making the disclosure would also suspect that the information shows misconduct or a breach of the law.

The requirement for 'reasonable grounds' means that vexatious and groundless claims will not be protected. There must be a reasonable basis for the concerns that the company or their officers or employees have engaged in misconduct, breached certain laws or acted improperly.

An individual's reasons for reporting the misconduct or their personal opinion about the people involved do not stop you from being protected. The test is whether the discloser has reasonable grounds.

What is a regulated entity?

A 'regulated entity' is a company or organisation listed in the Corporations Act, and includes an incorporated association that is a trading or financial corporation. This can include some not-for-profit organisations that operate as a trading or financial corporation.

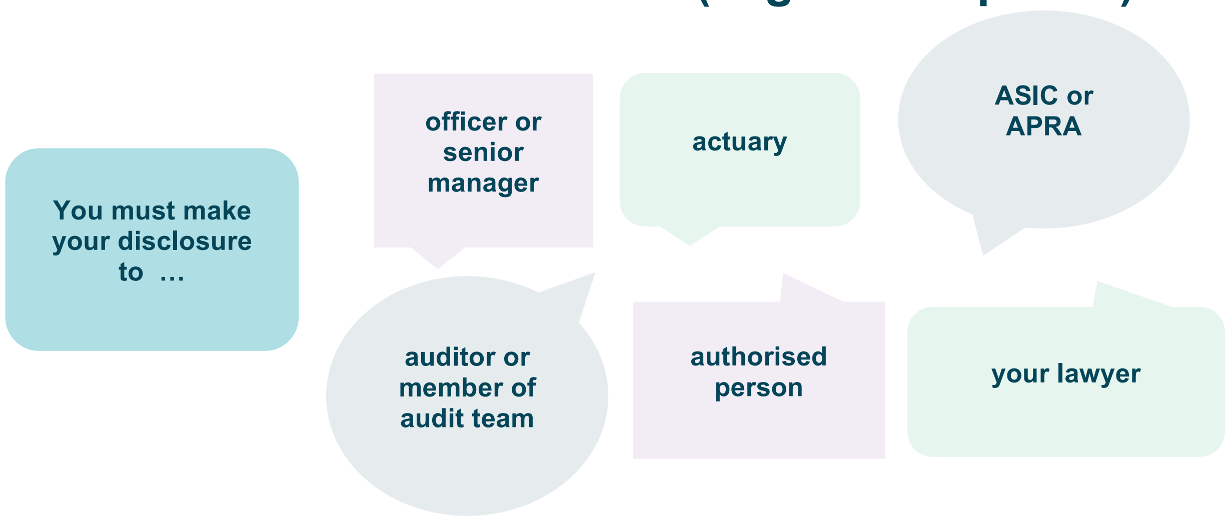
See below for more information about regulated entities.

Note

The content or subject of the disclosure can be information that shows that the company or the organisation, or an officer or employee of the company or organisation, is or has engaged in conduct that:

- breaches the Corporations Act
- breaches other financial sector laws enforced by Australian Securities and Investment Commission (**ASIC**) or Australian Prudential Regulation Authority (**APRA**)
- breaches any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more, or
- represents a danger to the public or the financial system

Who can receive a disclosure (eligible recipients)



The '**eligible whistleblower**' must disclose the information to one of the following recipients, who are authorised to receive whistleblower disclosures. An eligible whistleblower may not qualify for the protection in circumstances where they notify a person other than those in the following list (for example, an immediate supervisor within the company):

- the auditor or a member of the audit team for the company or organisation or a related body corporate
- a director, secretary, officer, or senior manager of the company or organisation or a related body corporate that the concerns relate to
- an actuary of the company or organisation or a related body corporate
- a person authorised by the company or organisation to receive whistleblower disclosures
- Australian Securities and Investments Commission (**ASIC**)
- Australian Prudential Regulation Authority (**APRA**), or
- the whistleblower's lawyer

If you need information about disclosures under the Tax Administration Act, seek legal advice.

Also see the Tax Practitioners Board's webpage Whistleblower legislation, and the ACNC's webpage Whistleblower protections.

In summary

Whistleblowing requires an **eligible whistleblower**, with **reasonable grounds** to suspect **improper conduct** by a **regulated entity**, and who discloses that information directly to an **eligible recipient**.

Disclosures that may not be protected

Not all people making a complaint about the company or organisation are considered whistleblowers, either because they don't meet the definition of 'eligible whistleblower' or the information they are disclosing is not protected. In either case, they will not be protected under the Corporations Act (or, where relevant, the Tax Administration Act).

People who are not protected include:

- a former or current employee making a personal employment or work-related complaint

  This can include a complaint about a personal problem or dispute they have with a colleague, a complaint about a decision relating to their employment like not being promoted, being suspended or fired, or other work conditions. However, some of these types of disclosures can be protected, for example, the disclosure will be protected if the information has significant implications for the company or regulated entity
- competitors of the company or organisation (ie. working in the same industry)
- customers or clients of the company or organisation, or
- a known false report

These people may have rights under other laws but will not be able to use the whistleblower protections in the Corporations Act.

Note

In some cases, whistleblowers can make disclosures to a journalist or parliamentarian (a member of the Commonwealth, state, or territory parliament) where there is a public interest or an emergency. These can only be disclosed if the eligible whistleblower complies with the requirements under the Corporations Act.

Additional information about these special disclosures is available on the ASIC webpage on whistleblower rights and protections.

Organisations covered by the whistleblower laws

The whistleblower protection laws (under the Corporations Act) apply to '**regulated entities**'.

Regulated entities

Note

This fact sheet does **not** include the full list of regulated entities from the Corporations Act and only focuses on not-for-profit organisations.

For not-for-profit organisations, 'regulated entities' under the Corporations Act include:

- companies registered under the Corporations Act (including unincorporated registrable bodies), and
- not-for-profit incorporated associations which meet the definition of a 'trading or financial corporation' (this may include incorporated associations incorporated under state or territory legislation, incorporated organisations registered with ASIC as an Australian registered body, or an incorporated body registered with the ACNC as a charity)

Note

This means that not-for-profit organisations that are:

- public companies, such as a company limited by guarantee (the structure of many not-for-profit and charity organisations), or
- trading or financial corporations,

must comply with the whistleblower protection laws.

Not-for-profit organisations that are not public companies limited by guarantee need to decide if the organisation's activities are 'trading or financial' activities.

This decision must be made by the not-for-profit organisation on a case-by-case basis with reference to the organisation's activities. However, generally, trading activities involve buying and selling goods or services and financial activities involve commercial dealings or transactions in finance, such as borrowing, lending, investing or providing advice on financial matters.

If the not-for-profit organisation's trading or financial activities are a major part of its overall activities, then the organisation will likely be a trading or financial corporation.

Deciding whether a not-for-profit organisation or charity falls within the definition of a 'trading or financial corporation' is not always easy, especially where the organisation carries out trading or financial activities as part of its not-for-profit or charitable activities.

Note

If your organisation is in any doubt about whether it meets the definition of a trading or financial corporation, you should get independent legal advice.

Tip

You can find examples of trading and financial activities that may help not-for-profit organisations decide if they are trading or financial corporations on ASIC's webpage on whistleblower protections for not-for-profit organisations.

Complying with the whistleblower protection laws

To comply with the whistleblower protection laws a not-for-profit organisation must:

1.	• keep a whistleblower's identity and information confidential, unless the whistleblower consents to its disclosure, or another exception applies
2.	• prevent the not-for-profit organisation, or an officer or another employee of the organisation, causing detriment (harm) to or victimising (threatening or harassing) a whistleblower
3.	• depending on how the not-for-profit organisation is registered and the organisation's size, it may need to put a whistleblower policy in place

Keeping whistleblower information confidential

Except for the situations where disclosure is allowed (set out below), it's illegal to reveal the identity of a whistleblower, or disclose information that is likely to lead to a whistleblower being identified (or the spouse or relatives of a whistleblower being identified). This includes not disclosing the whistleblower's identifying details to others, including to other eligible recipients.

The conduct that has been disclosed by the whistleblower should be investigated in a way that doesn't identify the whistleblower as the source of the information.

Breaching confidentiality

The Corporations Act makes it illegal (through a criminal offence and a civil penalty) for someone to disclose the identity of a whistleblower, or information likely to lead to their identification.

The offence and penalty only apply if the not-for-profit organisation or its employees or officers make an unauthorised disclosure of the whistleblower's identity, or information likely to lead to their identification, that has been taken directly or indirectly from the whistleblower's disclosure. This does not include releasing other information from the whistleblower's disclosure (for example, information about the alleged misconduct), as long as it doesn't also result in unauthorised disclosure or release of the whistleblower's identity or information that is likely to lead to their identification.

ASIC has the power to investigate allegations that a person has made an unauthorised disclosure of a whistleblower's identity, or information likely to lead to their identification.

The company or organisation could also be ordered to pay compensation to a whistleblower if they suffer loss, damage or injury from detrimental conduct (harmful conduct) by someone within the company or organisation for making their report. 'Detrimental conduct' includes damage to the whistleblower's reputation, which could result from a breach of their confidentiality.

Situations where disclosure is allowed

In some situations, disclosing a whistleblower's identity is allowed under law.

A whistleblower's identity may be disclosed if the disclosure is:

- to ASIC, APRA, or the AFP
- to a lawyer for advice about the disclosure
- to a body prescribed by the Corporations Regulations, or
- made with the whistleblower's consent

If the organisation is disclosing the whistleblower's identity with their consent, this consent must be very clear including any limits that might apply to the consent. If the consent is not clear, the organisation should clarify with the whistleblower how they wish their identifying information to be treated as soon as practicable after receiving the whistleblower's report.

Under the Tax Administration Act, the regulators of the tax system, including the Commissioner of Taxation, Tax Practitioners Board, the Commissioner of the ACNC and the Inspector-General of Taxation can share whistleblower information.

Disclosing information as part of the investigation process

An organisation may be able to disclose information provided by the whistleblower that can cause the whistleblower to be identified if:

- the information disclosed is not the whistleblower's identity
- releasing the information was reasonably necessary for the purposes of investigating the misconduct, breach of law, or improper conduct disclosed in the whistleblower's report, and
- the organisation or eligible recipient has taken all reasonable steps to reduce the risk that the whistleblower will be identified from the information

If a not-for-profit organisation is not sure whether it can rely on any exemption or qualifying disclosure, the organisation should seek independent legal advice.

Tip

Having a whistleblower policy, strategy or plan that clearly sets out how your organisation will handle disclosures made by whistleblowers, including steps your organisation will take to protect confidentiality, will help your staff be well-informed and prevent breaches of confidentiality.

See 'Developing a whistleblower policy' below.

Steps your organisation can take to prevent confidentiality breaches include:

- training your staff (especially officers who are likely to receive reports from whistleblowers) about:
  - why whistleblower protection is necessary
  - their responsibility in maintaining confidentiality
  - the penalties for breaching confidentiality, and
  - the organisation's process for maintaining confidentiality
- informing employees of the organisation's process for them to make an internal disclosure including details of the people that they are required to make the disclosure to (to ensure only trained officers receive whistleblower reports)
- having clear processes for staff that handle whistleblower correspondence and limiting access to materials related to disclosures using secure record-keeping and technology systems

  Some staff (like IT technicians) may see whistleblower reports as part of their day-to-day work, so these staff members need training and an established process to make sure they don't accidentally breach confidentiality.

Protecting whistleblowers from detrimental conduct (harm) and victimisation

Organisations covered by the whistleblower protection laws have an obligation to protect whistleblowers from detrimental conduct and victimisation.

Under the Corporations Act it's illegal for an organisation, its employees or officers to cause detriment to, or victimise, a person because they believe or suspect that the person has made, may have made, or could make a whistleblower disclosure.

Detrimental conduct and victimisation

'Detrimental conduct' as defined in the Corporations Act is actions or conduct that results in a detriment or harm to a person, which includes making threats to cause detriment or harm to that person.

Detrimental conduct can include:

- dismissing the person from employment
- injuring the employee in their employment
- altering the position or duties of the employee to their disadvantage
- discriminating against them as an employee by treating them differently to employees of the same employer
- harassing or intimidating the person
- harming or injuring the person, including causing them psychological harm
- damaging the person's property, reputation, business or financial position, or
- causing the person any other damage

'Victimisation' is also defined in the Corporations Act.

Victimisation means actually causing or threatening to cause a detriment (harm) to a person where the organisation (including its employees or officers):

- believes or suspects that the person has, is planning to, or could make a whistleblower report, and
- that belief or suspicion is the reason, or part of the reason, for the action that causes detriment to the person

ASIC has the power to investigate allegations that a person has caused or threatened to cause detriment to a whistleblower. This may result in a penalty to the offender or the company, or officers and employees of the company who are involved in the detrimental conduct or victimisation.

A company or organisation may also be legally responsible for the actions of a third person who causes another person detrimental conduct, if the company or organisation has a duty to take reasonable steps to ensure the third person does not carry out the detrimental conduct, but fails to fulfil its duty. A company or organisation, including its employees and officers may also be ordered by a court to pay compensation to a person if that person suffers loss, damage or injury as a result of detrimental conduct in response to making a whistleblower report.

Whistleblowers may also be protected from detriment under workplace laws, for example under the *Fair Work Act 2009* (Cth), if by making the whistleblower report the person is also accessing a workplace right. Further information about these other protections is available from the *Fair Work Ombudsman*.

Steps your organisation can take to prevent detriment to and victimisation of a whistleblower include:

- training your employees, officers, directors, executives and contractors on how to comply with whistleblower laws and avoid penalties for detrimental conduct laws
- publish a statement or strategy showing:
  - how your organisation takes detrimental conduct and victimisation seriously, and
  - your organisation will take action against any staff who harms or threatens another staff member for making a whistleblower report

Tip

In making an order about an employer, a court may consider any reasonable steps that could have been taken by the employer to avoid detrimental conduct, including if it has a whistleblower policy (strategy or plan) in place. A court can also make non-monetary orders, such as an injunction, apology, reinstatement of employment, or any other order the court thinks appropriate.

Tip

Providing training to staff will help the organisation create a culture where whistleblowing is seen as a positive part of the workplace, and staff will feel encouraged and supported in their decision to make a whistleblower report if they become aware of any improper conduct.

Caution

There are serious criminal and civil penalties for breaches of a whistleblower's confidentiality and causing detriment to or victimising a person who has, may have, or could make a whistleblower report.

Whistleblower policy requirements

Your organisation must have a whistleblower policy if it is a public company (including a public company limited by guarantee), a large proprietary company or a proprietary company that is the trustee of a registrable superannuation entity. It is a strict liability offence if an organisation fails to implement a whistleblower policy (where it is required to do so).

However, there is an exemption for not-for-profit public companies limited by guarantee with annual consolidated revenue of less than $1 million.

If the annual consolidated revenue of a not-for-profit organisation that is a public company limited by guarantee increases to $1 million or more, then that not-for-profit organisation must have a whistleblower policy in place by six months after that financial year ends. (See ASIC Corporations (Whistleblower Policies) Instrument 2019/1146).

Note

Incorporated associations or other bodies corporate that are not are not structured as public companies limited by guarantee, do **not** need to have a whistleblower policy.

What entities must have a policy?

Public companies (limited NFP exception)	**Large proprietary companies**	**Proprietary companies that are trustees of registrable superannuation entities**

Not-for-profit exemption

1.	company limited by guarantee
2.	operated on a not-for-profit basis, and
3.	annual consolidated revenue of under $1m

Even if your not-for-profit organisation isn't required to have a whistleblower policy, if the organisation is a regulated entity, it may benefit from putting a policy or strategy in place for dealing with any whistleblower reports that it may receive.

Implementing a whistleblower policy will help your organisation demonstrate that it took reasonable precautions to limit or prohibit any detrimental conduct or victimisation.

Not-for-profit organisations should get legal advice before implementing any changes to meet requirements under the whistleblower protection laws.

Developing a whistleblower policy

Having a whistleblower policy allows a not-for-profit organisation to show:

- strong corporate management by the organisation
- respect and fair treatment for whistleblowers
- support for a positive whistleblower culture
- its promise to take whistleblowers seriously and to investigate whistleblower reports
- compliance with the law, and
- proper reporting to regulators like ASIC, APRA and ACNC

Things to include in a whistleblower policy:

A whistleblower policy must include information about:

- protections available to whistleblowers
- how a whistleblower may make the disclosure
- who may make a disclosure ('eligible whistleblowers')
- how the company will support whistleblowers and protect them from detriment
- the types of wrongdoing that can be reported under the policy (and examples of disclosable matters)
- the matters that are not disclosable matters covered by the policy
- how the company will investigate disclosures
- how the company will make sure employees mentioned in disclosures, or related to disclosures, will be fairly treated, and
- how the policy will be made available to officers and employees

Consult ASIC's regulatory guide to whistleblower policies (RG 270) for a full list of the legal requirements of a whistleblower policy.

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Caution

If your not-for-profit organisation is required to have a whistleblower policy but fails to have a compliant whistleblower policy, this is an offence.

Consequences of non-compliance

The obligation to maintain a whistleblower's confidentiality and to not engage in detrimental conduct applies to both the organisation that is a regulated entity and its employees and officers.

Public and large private companies that are required to have a whistleblower policy will also be legally responsible if they fail to have a compliant policy in place.

Breaches of the relevant provisions are taken very seriously, and an organisation who is found to have acted inconsistently with their obligations may face significant civil or criminal penalties (including in some cases, imprisonment).

Contact ASIC or obtain legal advice if you would like more information on the potential penalties.

Other protections for whistleblowers

Yes, the whistleblowing protection laws protect a person who makes a whistleblower report from certain legal actions related to making the whistleblower report, including:

- criminal liability (the whistleblower report can't be used against the whistleblower in a prosecution, unless the report is false)
- civil liability (the whistleblower can't be sued for breach of an employment contract, duty of confidentiality, or other contractual obligations that they owe to their employer), and
- administrative liability (this means disciplinary action cannot be taken against the whistleblower purely for making a report)

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Note

This immunity from legal action doesn't protect the whistleblower if that person was involved in the misconduct that has been reported in the whistleblower disclosure.

Although, guidance published by ASIC states that cooperation by making a voluntary self-report will be taken into consideration when pursuing any wrongdoing and the kind of remedies sought.

Employment action and whistleblowers

No. A not-for-profit organisation can still take employment action against the person who makes a whistleblower report, as long as the reason any disciplinary action is taken is not for making the report itself.

This can be a difficult decision and organisations should get independent legal advice before taking any employment action against a person.