

## PO8.4 Whistleblower Policy

Effective Date: 1 January 2020

Policy Owner: Head of Legal & Compliance

Applies to: All Open Colleges RTOs

### 1. Purpose

Open Colleges Australia (**Open Colleges**) strives to operate with a culture of ethical and appropriate corporate behaviour in all our business activities. This includes ensuring that Open Colleges acts with integrity, honestly and in accordance with good governance principles.

This Whistleblower Policy has been developed to help support these values. In particular, to assist with:

- ensuring that Open Colleges has sound procedures to allow all employees and their families to identify and report genuine concerns about illegal conduct or any improper state of affairs pertaining to Open Colleges, without fear of reprisals;
- ensuring all employees and officers of Open Colleges are aware of the protections available under this policy and Whistleblower Laws;
- encouraging all Open Colleges employees (and non-employees) to have the confidence to speak up if they become aware of illegal conduct or any improper state of affairs pertaining to Open Colleges; and
- helping to identify wrongdoing that may not be uncovered unless there is a safe and secure means for disclosing wrongdoing.

This policy sets out information regarding whistleblower protections contained in the *Corporations Act 2001* (referred to in this policy as the Whistleblower Law), which includes identifying what disclosures may be protected and protections afforded by the Whistleblower Law.

It also sets out information to assist persons wanting to make a disclosure in relation to Open Colleges as to how they can report concerns and how such reports will be handled by Open Colleges.

This policy has focused on the Whistleblower Law because their broad application and protections means it is likely to be the most relevant source of protections for disclosers. A discloser may have rights under other laws in relation to disclosures, such as the *Taxation Administration Act 1953* (Cth) or *Fair Work Act 2009* (Cth). This policy is in addition to those laws and does not limit any rights a person may have under any laws.

### 2. Scope

This policy applies to all Disclosers, as defined in section 3 below.

The policy is not intended to create any contractually binding obligation on Open Colleges and does not form part of any contract of employment or other contract for engagements with Open Colleges.

### 3. Definitions

In this policy:

**Discloser(s)** refers to the persons eligible to make a disclosure protected by Whistleblower Laws. These persons are identified in section 6 below.

**Misconduct** includes (but is not limited to) fraud, negligence, default, breach of trust and breach of duty.

**Protected Matters** refers to the types of matters outlined at section 5 below, which are protected by Whistleblower Laws and the terms of this policy.

**Senior Manager** is a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of Open Colleges; or has the capacity to significantly affect Open Colleges' financial standing.

**Whistleblower Laws** refers to the protections contained in Part 9.4AAA of the *Corporations Act 2001* (Cth) as well as the accompanying *Corporations Regulations 2001* (Cth).

**Whistleblower Officer** is the Head of Legal & Compliance.

## 4. Types of Disclosures protected by Whistleblower Laws

A disclosure is protected by Whistleblower Laws if:

- (i) the disclosure relates to Protected Matters; and
- (ii) the information is disclosed by a Discloser identified in section 6 below; and
- (iii) the disclosure is made to one of the persons identified in section 7 below or section 8 below (provided the prerequisites in section 8 have been satisfied).

All of the above 3 conditions must be satisfied for a disclosure to be protected by Whistleblower Laws.

## 5. Protected Matters

The types of disclosures which are protected are those where the Discloser has reasonable grounds to suspect that the information disclosed concerns Misconduct, or an improper state of affairs or circumstances, in relation to any entity within the Open Colleges Australia group of companies.

These types of Protected Matters would include concerns that any entity in the Open Colleges Australia group of companies, or any employee or officer has engaged in conduct that:

- (i) constitutes a contravention of the Corporations Act;
- (ii) constitutes an offence against a law of the Commonwealth which is punishable by imprisonment for 12 months or more; and/or
- (iii) represents a danger to the public or the financial system, (including conduct posing significant risk to public safety or the stability or confidence in the financial system even if the conduct does not involve a breach of a particular law).

The Discloser can still qualify for protection under Whistleblower Laws even if their disclosure turns out to be incorrect.

### *Examples of types of Protected Matters*

- Illegal conduct, such as theft, dealing in, or use of illicit drugs, violence or threatened violence and criminal damage against property
- Fraud, money laundering or misappropriation of funds
- Offering or accepting a bribe
- Failure to comply with, or breach of, legal or regulatory requirements
- Engaging in or threatening to engage in detrimental conduct against a person who has made a disclosure or is believed or suspected to have made, or planning to make, a disclosure.

### *Work related grievances*

The disclosure of information related to a personal work-related grievance is not generally protected by Whistleblower Laws. A personal work-related grievance relates to information where:

- (i) the information concerns a grievance in relation to the Discloser's employment or former employment which has implications for the Discloser personally; and
- (ii) the information does not have significant implications for Open Colleges that do not relate to the Discloser; and
- (iii) the information does not concern conduct or alleged conduct referred to above.

Examples of personal work-related grievances include interpersonal conflicts between the Discloser and other employees, decisions regarding engaging, transferring or promoting a Discloser and decisions to discipline a Discloser or suspend or terminate the engagement of a Discloser.

A disclosure about a personal work-related grievance may still qualify for protection if:

- (i) it includes information about Misconduct, or information about Misconduct includes or is accompanied by a personal work-related grievance (e.g. a mixed report);
- (ii) the entity has breached employment or other laws punishable by imprisonment for a period of 12 months or more, engaged in conduct that represents a danger to the public, or the disclosure relates to information that suggests misconduct beyond the discloser's personal circumstances;
- (iii) the Discloser suffers from or is threatened with detriment for making a disclosure;
- (iv) the Discloser seeks legal advice or legal representation about the operation of the whistleblower protections under the Corporations Act.

Internal personal work-related grievances should be made pursuant to Open Colleges' Grievance and Dispute Resolution Policy.

If a disclosure is not about a Protected Matter, then it will not be entitled to protections under the Whistleblower Law. The disclosure may however be protected under other legislation, such as the Fair Work Act. If you are in doubt as to whether a proposed disclosure may be a Protected Matter, you may wish to speak to the Head of Legal & Compliance or obtain your own legal advice.

## **6. Who may make disclosures about Protected Matters?**

Each of the following persons may make a protected disclosure:

- (i) Open Colleges' employees and officers as well as their relatives and dependants;
- (ii) suppliers of goods or services to Open Colleges;
- (iii) employees of suppliers of goods or services to Open Colleges; or
- (iv) a director or secretary of Open Colleges' related bodies corporate.

### *Anonymity*

There is no requirement for a Discloser to identify themselves to be protected by Whistleblower Laws. That is, protected disclosures may be made anonymously. A person may choose to remain anonymous while making a disclosure, over the course of the investigation and after the investigation is finalised.

A Discloser may refuse to answer questions if they feel that the answer could reveal their identity at any time.

To help protect a Discloser's anonymity, Open Colleges provides access to an external anonymous hotline.

## 7. Who can a Protected Matter be disclosed to?

In order to be protected by Whistleblower Laws, the disclosure of a Protected Matter must be made to:

*(i) Eligible recipients related to Open Colleges:*

- A director, company secretary or senior management member of Open Colleges or its related bodies corporate.
- person authorised by Open Colleges to receive disclosures that may qualify for protection under the Whistleblower Law which are:
  - Whistleblower Officer;
  - Open Colleges' External Business Conduct Hotline (see section 12 below for details); or
  - an auditor or member of an audit team conducting an audit on Open Colleges or its related bodies corporate.

*(ii) Regulators*

ASIC or APRA or any other Commonwealth body that is prescribed by regulations made under the Whistleblower Law.

*(iii) Legal practitioners*

A legal practitioner where the disclosure is for the purposes of obtaining legal advice or representation in relation to the Whistleblower Law. Such disclosures can be protected even if the legal practitioner concludes that a disclosure does not relate to a Protected Matter.

Please see section 12 below for more information on how to make a Protected Disclosure.

## 8. Disclosures to politicians and journalists

A disclosure of a Protected Matter to a journalist or member of State or Federal Parliament will be protected by Whistleblower Laws only if it qualifies for the public interest requirements or emergency requirements outlined below.

*Public interest disclosures*

A disclosure of Protected Matters to a member of State or Federal Parliament or journalist will be protected by Whistleblower Laws if all of the following requirements are satisfied:

- (i) the Discloser has previously made a disclosure of the information to ASIC, APRA or another Commonwealth body prescribed by the Whistleblower Laws;
- (ii) at least 90 days have passed since the previous disclosure was made;
- (iii) the Discloser does not have reasonable grounds to believe that action is being or has been taken to address the previous disclosure;
- (iv) the Discloser has reasonable grounds to believe that making a further disclosure of the information to a member of Parliament or journalist would be in the public interest;
- (v) the Discloser has given the body to which the disclosure was originally made written notification that identifies the previous disclosure (with sufficient information) and states that the Discloser intends to make a public interest disclosure; and
- (vi) the extent of information disclosed is no greater than is necessary to inform the journalist or member of Parliament of the relevant misconduct or improper state of affairs.

### *Emergency disclosures*

A disclosure of Protected Matters to a journalist or member of State or Federal Parliament will be protected by Whistleblower Laws if all of the following requirements are satisfied:

- (i) the Discloser has previously made a disclosure of the information to ASIC, APRA or another Commonwealth body prescribed by the Whistleblower Laws;
- (ii) the Discloser has reasonable grounds to believe that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment;
- (iii) the Discloser has given the body to which the disclosure was originally made written notification that identifies the previous disclosure (with sufficient information) and states that the Discloser intends to make an emergency disclosure; and
- (iv) the extent of information disclosed is no greater than is necessary to inform the journalist or member of Parliament of the substantial and imminent danger.

### *Taking care with emergency and public interest disclosure*

It is important for a Discloser to understand the criteria for making a public interest or emergency disclosure. Open Colleges recommends that a Discloser contact an independent legal adviser before making a public interest or emergency disclosure, to ensure the Discloser understands the criteria and can obtain the benefits of protection of the Whistleblower Law.

## **9. Confidentiality (identity protection)**

Where a disclosure is protected by Whistleblower Laws, the laws prohibit persons from disclosing the identity of a Discloser or disclosing information that is likely to lead to the identification of the Discloser (which they obtained directly or indirectly because the Discloser made a protected disclosure) except as provided below.

Persons may only disclose the identity of a Discloser as follows:

- (i) with the Discloser's consent
- (ii) to ASIC, APRA, Australian Federal Police or to other persons or bodies prescribed by regulations made under the Whistleblower Law; or
- (iii) a legal practitioner for the purposes of obtaining legal advice about the Whistleblower Laws

Persons may also disclose the existence of the Protected Matters (without disclosing the identity of the Discloser) to the extent necessary for the matters to be investigated, provided all reasonable steps are taken to reduce the risk that the Discloser's identity can be discovered. These disclosures may include disclosures to:

- (i) the Whistleblower Officer
- (ii) Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, Head of Legal or the Head of People & Culture
- (iii) delegates to People & Culture or other managers to make inquiries or to conduct investigations or order external investigations as is deemed appropriate; and
- (iv) disclosures to respondents to complaints to ensure that the person/s against whom allegations are made are given the opportunity to respond to any allegations.

Any breach of these confidentiality protections is illegal and attract significant fines for both individuals and companies.

If a Discloser believes that the confidentiality obligations outlined in this section 9 have not been complied with the Discloser may lodge a complaint to the following:

- the Whistleblower Officer
- Head of Legal & Compliance
- Open Colleges' External Business Conduct Hotline (see section 12 for details)
- Head of People & Culture

## 10. Victimization prohibited

Whistleblower Laws prohibit any person or company from:

- (i) engaging in any conduct that causes detriment to any person because that person (or another person) made a disclosure, proposes to make or could make a disclosure about a Protected Matter pursuant to Whistleblower Laws; or
- (ii) carrying out any threats to cause detriment to any person (whether express or implied threats) because that person (or another person) made a disclosure, proposes to make or could make a disclosure about a Protected Matter pursuant to Whistleblower Laws.

### *Examples of determinantal conduct*

Examples of detrimental conduct include:

- dismissing an employee
- injuring an employee in his or her employment
- altering an employee's position or duties to his or her disadvantage
- discrimination between employees
- harassment or intimidation of a person
- harm or injury to a person, including psychological harm
- damage to a person's property or reputation
- damage to a person's business or financial position

Examples of conduct that is not determinantal in breach of Whistleblower Laws include:

- administrative action that is reasonable for the purpose of protecting a Discloser from detriment
- managing a Discloser's unsatisfactory work performance if the action is in line with Open Colleges' performance management framework

### *Consequences for breach of these Victimization provisions*

Where a person or company engages in breaches of these protections, significant fines apply and persons who are adversely affected may obtain compensation orders from a Court in relation to any detriment caused.

Compensation and other remedies are also available to a Discloser if Open Colleges fails to take reasonable precautions and exercise due diligence to prevent detrimental conduct from occurring.

Persons who have their contracts terminated in contravention of these protections may also have their contracts reinstated by a Court.

If a Discloser believes that they have been subject to any prohibited detrimental conduct they are encouraged to notify any of the following:

- the Whistleblower Officer
- Head of Legal & Compliance
- Open Colleges' External Business Conduct Hotline (see section 12 for details)
- Head of People & Culture

You may also want to seek independent legal advice about these matters.

## 11. Protection for discloser from civil, criminal and administrative liability

If a Discloser makes a disclosure protected by the Whistleblower Law, the Discloser cannot be subject to any of the following for making the disclosure:

- Civil liability (e.g. any legal action against the Discloser for breach of an employment contract)
- Criminal liability (e.g. attempted prosecution of the Discloser for unlawfully releasing information)
- Administrative liability (e.g. disciplinary action for making the disclosure).

If a Discloser makes a disclosure protected by the Whistleblower Law, then no contractual or other remedy or right may be enforced or exercised on the basis of the protected disclosure e.g. contract of employment or contract for services cannot be terminated on the basis that a protected disclosure constitutes a breach of contract.

It is important to note that the protections granted under the Whistleblower Law do not grant immunity for any Misconduct a Discloser has engaged in that is revealed in their disclosure nor in some circumstances regarding falsity of information disclosed. If you have any concerns in this regard, you may wish to obtain independent legal advice prior to making any disclosure.

## 12. How to make a disclosure to Open Colleges and what to expect

### (a) How to make a disclosure and investigating protected matters

A disclosure may be made personally or anonymously. Open Colleges will respect a Discloser's decision to remain anonymous, but it may limit the ability of Open Colleges to investigate the complaint and to notify the Discloser of progress of the complaint.

If a Discloser chooses to remain anonymous, it will assist if the Discloser still maintains ongoing two-way communication with Open Colleges (such as through Open Colleges' External Business Conduct Hotline or an anonymised email address), so Open Colleges can ask follow-up questions or notify the Discloser of progress of the complaint.

To help protect a Discloser's anonymity, Open Colleges provides access to an external anonymous service to make disclosures and receive updates, being Open Colleges' External Business Conduct Hotline.

Persons may disclose Protected Matters by either of the following steps:

#### (i) *Internal Disclosure*

Submit a written complaint or report and any relevant documentation on any Protected Matters to the Whistleblower Officer.

#### (ii) *External Disclosure*

The Discloser may contact Open Colleges' External Business Conduct Hotline:

Via email: [wbline@ablawyers.com.au](mailto:wbline@ablawyers.com.au)

Phone: 1300 329 117 (Available weekdays 8.30am – 5pm AEST) using reference OCA

The service is operated external to Open Colleges, with experience in receiving and managing disclosures and can assist Disclosers to:

- Make a disclosure anonymously, confidentially and outside of business hours;
- Receive updates on the status of their disclosure while retaining anonymity; and
- Provide additional information to Open Colleges while retaining anonymity.

#### **(b) Investigations**

Open Colleges will refer disclosures that may be Protected Matters to its Whistleblower Officer for investigation to determine whether Misconduct or some other improper state of affairs exists.

The Whistleblower Officer will investigate the relevant matters in a manner compliant with the confidentiality obligations outlined in Section 8 of this policy.

The Whistleblower Officer may alternatively:

- (i) appoint an appropriately qualified and impartial person or entity to investigate the relevant matters; or
- (ii) refer Protected Matters directly to ASIC, APRA or the Australian Federal Police.

Whilst every investigation process will differ according to the relevant circumstances, the Whistleblower Officer will ordinarily ensure that appropriate enquiries are made to determine whether:

- (i) the disclosure qualifies for protection;
- (ii) the allegations are substantiated; and
- (iii) responsive action needs to be taken in order to address any established misconduct or other improper state of affairs.

The timeframe for conducting investigations will differ depending on the complexity of a disclosure, however, all disclosures will be investigated as promptly as is reasonably practicable.

The Discloser will be provided with regular updates, assuming the Discloser can be contacted. The frequency and timeframe of updates may vary depending on the nature of the disclosure. Key updates will ordinarily include (but are not necessarily limited to):

- (i) that the disclosure has been received;
- (ii) when the investigation processes has begun; and
- (iii) when the investigation process has concluded.

The method for documenting and reporting the findings to those responsible for oversight of the policy and the information the Discloser will receive at the end of the investigation, will depend on the nature of the disclosure. Usually, the circumstances are such that it is not appropriate to provide details of the findings or outcome to the Discloser. At all times, Open Colleges must have regard to its obligations of confidentiality, including to the Discloser and obligations regarding procedural fairness to its employees.

### **13. Support Whistleblowers: providing fair treatment and protections from detriment**

Open Colleges intends to support Disclosers making disclosures about Protected Matters and to put in place procedures to promote fair treatment of Disclosers and protect them from detriment. This can be achieved by:

- handling disclosures confidentially, where practical and appropriate in the circumstances and subject always to whether the Discloser consents to having their identity disclosed;



- ensuring each disclosure is assessed and is subject of an assessment and investigation (if the disclosure qualifies as a Protected Matter);
- ensuring secure record keeping processes that restrict information to disclosures about Protected Matters to those persons who may receive such information pursuant to this policy;
- providing access to EAP counselling services to all Disclosers. These services may be accessed by contacting Access EAP on 1800 81 87 28;
- investigating all complaints in accordance with the procedures outlined in this policy;
- implementing investigation processes which are procedurally fair to both Disclosers and respondents to allegations;
- in circumstances where a Discloser consents, having an appropriate senior manager or People & Culture representative monitor the Discloser's treatment in the workplace for relevant periods to ensure no victimisation takes place;
- where practicable, allowing the Discloser to perform their duties from another location, reassign the Discloser to another role at the same level, make other modifications to the Discloser's workplace or the way they perform their duties to assist in protecting the Discloser from detrimental acts;
- ensuring all Disclosers are aware of the process for lodging complaints if they believe their identity has been improperly disclosed or if they believe that they have been subject to improper victimisation in breach of this policy;
- conducting periodic training on the Whistleblower Laws and this policy;
- communicating this policy to Open Colleges employees and officers; and
- taking appropriate disciplinary action against any employees or contractors that breach the victimisation or confidentiality provisions of the Whistleblower Laws.

## 14. General matters

### (a) Access to this policy

This policy will be made available to all Open Colleges employees and officers by making a copy available in Open Colleges' policy repository. Open Colleges will continue to communicate its existence of the Open Colleges External Business Conduct Hotline to assist Disclosers to make disclosures and these will usually refer to this policy.

To ensure persons outside Open Colleges can access the policy, the policy will also be published on Open Colleges' website.

### (b) Breaches of this policy

All employees and contractors of Open Colleges are required to comply with this policy at all times, as well as with Whistleblower Laws.

Non-compliance with this policy or Whistleblower Laws may result in disciplinary action up to and including termination of employment or termination of a contractor's services.

(c) Variations to policy

This policy may be varied, amended, replaced or terminated from time to time and at any time at the absolute discretion of Open Colleges.

**Version control**

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Review Date	1/01/2025				
Version Control Changes					
Version	Authored By	Approved By	Description of Changes	Date Approved	Effective Date
1.0	Head of Legal & Compliance	CFO	New policy		1 January 2020