

# Anonymous “Speak Up” Protocol: A guide for boards



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This document is designed to assist boards in preparing for anonymous reports of gendered harassment or sexual assault. Boards and organisational leaders may choose to work through it as a board meeting agenda item or a separate workshop. The guide may also assist in determining at what point legal advice should be sought.

NAVA strives to facilitate sustained cultural change in the arts, including to empower those who have experienced or witnessed sexual harassment or sexual assault to be confident of their voice and their rights. Reporting sexual harassment or sexual assault often involves a fear of personal and career consequences and organisations must take steps to encourage such individuals to speak up.

Whilst individuals who experience or witness sexual harassment or sexual assault would ideally feel comfortable coming forward, NAVA recognises some may have concerns regarding the disclosure of their identity. With this in mind, NAVA has developed this “speak up” protocol for the management of anonymous reports of sexual harassment or sexual assault that NAVA and other institutions are receiving at an increasing rate. Facilitating anonymous reporting is important from the perspective of encouraging disclosures and identifying problematic issues within an organisation and the broader arts community.

NAVA acknowledges that anonymous reporting can raise obvious challenges including:

- there are practical difficulties in obtaining additional information from an anonymous discloser – for example, where the information disclosed is insufficient for investigative purposes or where further information is otherwise required in order to investigate or substantiate a claim;
- there are practical limitations on the ability to provide direct support to an anonymous discloser;
- a person whom a complaint has been made against (referred to as a “respondent” in this protocol) may feel an anonymous disclosure impacts on the procedural fairness they are able to be afforded, including in the context of being able to properly understand the allegations and/or respond to the allegations; and
- an anonymous disclosure process may encourage the making of false or malicious claims (however, it is noted that this should not be a reason not to facilitate the making of genuine anonymous claims).

Set out below is:

- a protocol to assist in the management of anonymous disclosures, noting the challenges referred to above. This is a non-exhaustive protocol and specific cases may raise nuanced issues that warrant further specific consideration and advice; and
- a sample anonymous disclosure form that may be considered by an organisation for use in order to encourage more fulsome reporting of issues anonymously.

## ANONYMOUS “SPEAK UP” PROTOCOL

### Responding to anonymous disclosures

#### Immediate response – consider allegations and any legal obligations

1. The **safety** of individuals is paramount. Consider if there is an immediate threat to the safety of an artist, staff member or other stakeholder, and the nature and extent of any threat. Consider whether there are any obligations under applicable safety law to take any steps to minimise any safety risk (and, if so, what practical steps can be taken).
2. Consider whether the disclosure gives rise to any **reporting obligations under law** (for example, under s316 of the *Crimes Act 1900* (NSW), which requires a person who knows or believes a serious indictable offence has been committed to provide certain information to the Police).
3. Consider whether **sufficient information** has been provided to enable an investigation to take place. For example, there should be sufficient details regarding the specific conduct in question, the individuals involved, and the timeframe(s) in which the conduct is alleged to have occurred. The template form below seeks to encourage more fulsome reporting of whistleblowing issues to facilitate investigations being undertaken where appropriate.
4. Consider how **current** the allegations are and whether they are against a person still involved in the organisation. If the allegations are quite dated, there may be evidentiary difficulties in investigating them (e.g. if a respondent or any witnesses are no longer available or fail to recall the matters which the disclosure concerns, or it is not possible to access any objective evidence such as CCTV footage/emails).
5. Consider whether any **interim steps** should be put in place in relation to a respondent to a disclosure. For example, should they be suspended pending an investigation or their work arrangements otherwise altered? Consider the terms of any contractual arrangements in place with a respondent as part of this process (such as an employment contract) to ensure the organisation is acting within its rights.
6. Consider whether the discloser has expressed any **fear** of retribution or raised other concerns. Such circumstances may require more caution when dealing with the matter and for additional steps to be taken in response to the disclosure (for example, informing a respondent that the organisation will take victimisation of any persons very seriously).
7. Consider **media strategy**, including whether a statement should be made if the disclosure becomes public, considering any defamation risks. In this regard, a ‘less is more’ approach may be prudent.
8. If the organisation is subject to the *Public Interest Disclosure Act 2013* (Cth), ensure that any **legal restrictions or requirements** in relation to handling the disclosure, including to conduct any investigation, are observed.

#### Disclosing information in connection with an investigation

9. Only disclose information on a ‘**need to know**’ basis as required in order to investigate the matter and as permitted by any current laws. When disclosing information, do the utmost to maintain the confidentiality of the information contained in the disclosure.
10. Carefully consider **what information will be provided** to a respondent as part of any investigation, having regard to any concerns raised by the discloser (i.e. in relation to confidentiality and/or retribution) and the procedural fairness to be afforded to the respondent (i.e. giving them a fair opportunity to respond to the allegations).

## Undertaking an investigation

11. Consider if there is **sufficient information** to commence an investigation. If so, consider if it is appropriate to commence an investigation into the allegations, in order to make findings as to whether the allegations are substantiated, not substantiated or unable to be substantiated. There may be insufficient information to enable an investigation. If so, **make a record of the factors why** an investigation cannot be undertaken.
12. Consider whether **legal advice** should be sought in relation to how an investigation should be structured or undertaken. If legal advice is to be sought, ensure that any communications with legal advisers are marked 'Privileged & Confidential'. If the dominant purpose of undertaking the investigation is to obtain legal advice, consider whether the investigation should be conducted under legal professional privilege – further specific advice should be sought in relation to this issue, as privilege issues can be complex.
13. Query whether the disclosure involves any **third parties** external to the organisation. If so, consider whether it is appropriate for the organisation to investigate the matter or whether the investigation should be more properly conducted by another entity. If it is appropriate for the organisation to investigate, consider seeking the participation of relevant third parties and, if such participation is not forthcoming, consider whether factual findings are able to be made in the absence of such participation.
14. Ensure that the person investigating the matter is **independent** of the issues under review. Depending on the nature of the matter, consider if an external investigator should be engaged to investigate the matter. This may be appropriate where serious allegations have been made or where it is believed that individuals involved in an investigation are more likely to disclose information to an independent third party.
15. If insufficient information has been provided by the discloser, consider whether there are any **ways to obtain further information**. For example, consider if there are any witnesses who have been named or objective evidence (such as CCTV footage/emails) that is available. Note there are restrictions in NSW and the ACT in relation to conducting surveillance of workplace camera or computer surveillance under the NSW and ACT Workplace Surveillance Acts.  
*NOTE: There are third party whistleblower service providers (e.g. Whispli: <https://whispli.com/>) which allow for direct ongoing dialogue with anonymous disclosers in order to obtain further information.*
16. Consider whether there is any available data that would enable **patterns or trends** to be identified in relation to a specific individual, location or alleged conduct, in connection with the allegations that have been raised anonymously.
17. Consider how **procedural fairness** will be afforded to a respondent. For example, unless there are confidentiality or other reasons not to do so, a respondent should be given an opportunity to respond to the allegations and, in some circumstances, the opportunity to have a support person present. Care should be taken not to draw any conclusions about a respondent prior to the conclusion of the investigation and factual findings being made.
18. Emphasise the **confidentiality** of the process to all involved and obtain confirmation from all participating individuals that the matters discussed will remain confidential and not be discussed with any third parties.

## Following an investigation

19. Make **factual findings** as to whether the allegations are substantiated, not substantiated or unable to be substantiated. Do not make any additional observations.

20. Prior to finalising the factual findings of the investigation:
- consider whether **legal advice** should be obtained in relation to the draft factual findings of the investigation in order to assess any legal risk. If legal advice is to be sought, ensure that any communications with legal advisers are marked 'Privileged & Confidential'.
  - consider whether the findings of the investigation give rise to any **reporting obligations** under law (e.g. see item 2 above), or pursuant to any contractual obligations to other third parties. If so, make to ensure that, once the findings are finalised, reporting can occur in accordance with any obligations (including any requisite timeframes).

Consider whether any actions (including disciplinary or remedial actions) are required to be implemented following the investigation.

21. Unless there are confidentiality or other reasons not to do so, **advise the respondent** of the high level findings of the investigation (i.e. whether each of the allegations made are substantiated, not substantiated or unable to be substantiated) and, if appropriate and applicable, what actions will be taken following the investigation.
22. Ensure all findings and decisions made and the reasoning for such actions are **documented** and retained.
23. Ensure that file notes of discussions or meetings with the respondent and other individuals involved in the investigation are **documented** and retained.
24. Consider **publicly re-affirming the organisation's commitment** to avoiding sexual harassment, sexual assault or other inappropriate workplace behaviour and whether appropriate staff refresher training on these matters should be undertaken.

## Disclosure form

This is a sample wording of a form or a set of questions you might provide to someone who wishes to make a report. The questions may also be useful in responding to anonymous reports made by phone.

Thank you for seeking to make a disclosure that concerns [organisation].

Please let us know your concerns and/or allegations by answering the questions set out below. We ask that you provide as much detail as possible so that your concerns and/or allegations can be fully considered and any appropriate steps can be taken in response.

All reports will:

- be taken seriously;
- be handled confidentially; and
- not be investigated by any person you may have raised concerns about.

### Questions:

1. Please describe in detail your concern, including the **nature** of any conduct the subject of your concern, **when** this conduct occurred, **where** this conduct occurred, **how** this conduct occurred, **who** was involved in the conduct or is otherwise aware of it (including direct perpetrators and any witnesses) and any other relevant information.

2. Does your disclosure concern a particular individual or individuals? If so, please identify those individual(s) and explain how your disclosure concerns them (to the extent not outlined above).
3. Are there any relevant witnesses to the matters outlined in your disclosure? If so, please identify those witnesses and explain how your disclosure concerns them (to the extent not outlined above).
4. Is there any other evidence (documentary or otherwise) that support the matters raised in your concern? If so, please identify this evidence and attach any supporting material in your possession.
5. Did you tell anyone details of your concern? Have you reported the matter to the police or any other authorities?
6. Are there any people who would have further information regarding your concern?
7. What is the current status of the matter?
8. Would you be open to sharing your identity with us? If so, please provide details of your identity.

*Sharing your identity:*

- *will help us with conducting any investigation that is commenced;*
- *enable us to contact you if we need further information in order to understand your concerns and/or manage them (including, where appropriate, to investigate them and/or take any action in response); and*
- *enable us to provide updates to you in relation to the handling of your disclosure.*

*We take confidentiality seriously and will handle your report confidentially even if you share your identity with us.*

9. If not, is there a way we can otherwise contact you whilst maintaining your anonymity (for example, via an email address)?

***Your disclosure will be treated seriously and confidentially and only disclosed on a strict 'as needed' basis. We will not tolerate anyone being discouraged from bringing matters to our attention or being disadvantaged or victimised as a result of making a disclosure.***

**IF YOU OR SOMEONE YOU KNOW IS STRUGGLING AND NEEDS SUPPORT, PLEASE SEEK HELP.**

If your organisation has an Employee Assistance Program, include their details here.
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**LIFELINE CAN BE CONTACTED ON 13 11 14.**