



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 321

Whistleblower policies

August 2019

About this paper

This consultation paper seeks feedback on our proposed guidance for entities that must have a whistleblower policy—public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities.

Our proposed guidance will help these entities establish, implement and maintain a whistleblower policy that complies with their obligations under the revised corporate sector whistleblowing regime in Pt 9.4AAA of the Corporations Act.

This paper also seeks feedback on whether ASIC should provide legislative relief to public companies that are small not-for-profits or charities.

We are seeking feedback from entities, their advisers and other interested stakeholders.

Note: The draft regulatory guide (draft RG 000), which is attached to this paper, is available on our website at www.asic.gov.au/cp under CP 321.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 7 August 2019 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposed guidance on whistleblower policies.

Our proposed guidance includes feedback we received from an earlier targeted consultation with academics and other experts.

We are keen to hear from you on the proposals and questions and any other issues you consider important. Your comments will help us develop our guidance on whistleblower policies.

As Treasury has previously consulted on the obligation requiring entities to have a whistleblower policy and prepared a Regulation Impact Statement (RIS) for the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 (Whistleblower Protections Bill), feedback regarding the obligation and the financial and other impacts associated with establishing, implementing and maintaining a whistleblower policy are not within the scope of this consultation.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 18 September 2019 to:

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What will happen next?

Stage 1	7 August 2019	ASIC consultation paper released with draft regulatory guide
Stage 2	18 September 2019	Comments due on the consultation paper and draft regulatory guide
Stage 3	October 2019	Regulatory guide released

A Background to the proposals

Key points

The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Whistleblower Protections Act) amended the whistleblower protections in the *Corporations Act 2001* (Corporations Act) and created a single, strengthened whistleblower protection regime for Australia's corporate sector. The amendments require public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy and make it available to their officers and employees by 1 January 2020.

ASIC has the power to make an order by legislative instrument—in some limited circumstances—to provide relief to a specified class of entities from the requirement to have a whistleblower policy.

This consultation paper seeks your feedback on our proposed guidance (set out in draft RG 000) to help entities establish, implement and maintain a whistleblower policy that complies with the obligations under the Corporations Act. Draft RG 000 also includes some good practice guidance.

The paper also seeks your views on whether ASIC should provide legislative relief to public companies that are small not-for-profits or charities.

Note: See the 'Key terms' in draft RG 000 for a list of terms and definitions used in this paper. Draft RG 000 is available on our website at www.asic.gov.au/cp under CP 321.

Introduction of the revised corporate sector whistleblowing regime

- 1 The Whistleblower Protections Act was passed by Parliament on 19 February 2019 and received royal assent on 12 March 2019.
- 2 The amendments, which are contained in Pt 9.4AAA of the Corporations Act, consolidate the whistleblower protection regime for Australia's corporate sector and strengthen the protections for whistleblowers.

Note: See the Revised Explanatory Memorandum to the Whistleblower Protections Bill.

Requirement to have a whistleblower policy

- 3 The revised corporate sector whistleblower regime requires public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy

and make it available to their officers and employees by 1 January 2020: see s1317AI of the Corporations Act.

- 4 Section 1317AI(5) requires entities to have a whistleblower policy that covers information about:
- (a) the protections available to whistleblowers, including protections under the Corporations Act;
 - (b) to whom disclosures that qualify for protection under the Corporations Act may be made, and how they may be made;
 - (c) how the entity will support whistleblowers and protect them from detriment;
 - (d) how the entity will investigate disclosures that qualify for protection under the Corporations Act;
 - (e) how the entity will ensure fair treatment of its employees who are mentioned in disclosures that qualify for protection, or its employees who are the subject of disclosures;
 - (f) how the policy will be made available to officers and employees of the entity; and
 - (g) any matters prescribed by regulation.
- 5 As outlined in the Revised Explanatory Memorandum to the Whistleblower Protections Bill, whistleblower policies should also include information about the protections provided in the tax whistleblower regime under the *Taxation Administration Act 1953*.
- Note: Since public companies, large proprietary companies and trustees of registrable superannuation entities are required to have a whistleblower policy under the Corporations Act, such a requirement has not been included in the tax whistleblower provisions.
- 6 Failure to comply with the requirement to have and make available a whistleblower policy is an offence of strict liability with a penalty of 60 penalty units (currently \$12,600), enforceable by ASIC: see s1317AI(4) and s1311(1).
- 7 It is important to note that the whistleblower protections under the Corporations Act are available to any discloser who makes a disclosure that qualifies for protection, regardless of whether the entity that is the subject of the disclosure must have a whistleblower policy.
- 8 We have set out our proposals for our guidance in Section B.

Whistleblower policy relief by legislative instrument

- 9 The revised corporate sector whistleblower regime only requires public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy. This is intended to minimise the risk of any disproportionate regulatory burden that would result from making it a universal company requirement regardless of company or business size.
- 10 ASIC may make an order by legislative instrument to relieve a specified class of entities from all or specified requirements in s1317AI: see s1317AJ. The order may be subject to conditions and may be for an indefinite or a specified period.
- 11 We are seeking views on whether public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy: see Section C.

B Proposed guidance on whistleblower policies

Key points

We are proposing to provide guidance to help entities establish, implement and maintain a whistleblower policy that complies with their legal obligations.

Proposed guidance on establishing, implementing and maintaining whistleblower policies

Proposal

- B1** We propose to give:
- (a) guidance on the matters that must be addressed by an entity's whistleblower policy under s1317A(5); and
 - (b) some good practice guidance (which is not mandatory) on establishing, implementing and maintaining a whistleblower policy.

Note: See Section B of draft RG 000.

Your feedback

- B1Q1** Do you agree with our proposed guidance in Section B of draft RG 000? If not, why not?
- B1Q2** Do you agree that the information that must be covered by a whistleblower policy, as set out in s1317A(5), has been adequately addressed in our proposed guidance? If not, please provide details.
- B1Q3** Do you agree that the matters we have included in our proposed guidance will be useful in helping entities to establish, implement and maintain a robust and clear whistleblower policy? If not, please provide details.
- B1Q4** Do you agree with our proposed guidance that an entity's whistleblower policy should focus on disclosures of information that qualify for protection, rather than reports about all issues and concerns, in relation to the entity? If not, please provide details.
- B1Q5** Do you agree with our proposed guidance that an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity? If not, please provide details.
- B1Q6** Is the proposed good practice guidance useful and appropriate? If not, please provide details.
- B1Q7** Do you agree with our proposed good practice guidance that entities' whistleblower policies could include a statement discouraging deliberate false reporting? If not, please provide reasons.

B1Q8 Do you agree with our proposed good practice guidance that smaller entities (particularly those with a limited number of employees) should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosures? If not, please provide details.

B1Q9 Do you have any suggestions on how the guidance in Section B of draft RG 000 can be improved? Please provide details.

B1Q10 Are there any practical problems associated with our guidance? Please provide details.

B2 We propose to provide additional good practice guidance on the matters that an entity should consider when establishing, implementing and maintaining its whistleblower policy: see Section C of draft RG 000.

Your feedback

B2Q1 Do you agree with our proposed additional good practice guidance in Section C of draft RG 000? If not, please provide details.

B2Q2 Do you have any suggestions on how the additional good practice guidance can be improved? Please provide details.

B2Q3 Are there any practical problems associated with our additional good practice guidance? Please provide details.

Rationale

- 12 The policy objectives of the revised corporate sector whistleblower regime and the requirements to have a whistleblower policy and make it available to officers and employees (and the penalty that may be imposed for non-compliance) are to:
- (a) improve risk management and corporate governance by entities;
 - (b) provide better protections for individuals who disclose wrongdoing;
 - (c) improve the whistleblowing culture of entities and increase transparency in how entities handle disclosures of wrongdoing;
 - (d) encourage more disclosures of wrongdoing; and
 - (e) deter wrongdoing, promote better compliance with the law and promote a more ethical culture by increasing awareness that there is a higher likelihood that wrongdoing will be reported.
- 13 Our proposed guidance is intended to help entities establish, implement and maintain a whistleblower policy that complies with s1317AI(5) and meets the objectives set out in paragraph 12. It is intended to capture all stages of the whistleblowing process:
- (a) providing advice to individuals who are considering making a disclosure;

- (b) receiving a disclosure;
- (c) assessing how a discloser should be supported and protected;
- (d) assessing whether a disclosure should be investigated;
- (e) undertaking an investigation;
- (f) supporting and protecting a discloser during and after the investigation;
- (g) communicating with a discloser, including about the outcome of an investigation; and
- (h) ensuring oversight and monitoring by the entity's board.

14 Our proposed guidance reflects that, if a discloser seeks compensation and other remedies through the courts because they have suffered detriment, including because the discloser's employer failed to prevent detriment from occurring, the court may take into account the extent to which the employer gave effect to their whistleblower policy (if the entity has a policy in place): see s1317AE(3)(b).

15 In addition, our proposed guidance is consistent with research on whistleblowing management. Research indicates that an entity's whistleblower policy plays a critical role in the overall management of whistleblowing by the entity; however:

- (a) having a formal whistleblower policy is not enough; and
- (b) even if the objectives and approach of a whistleblower policy are correct, the policy will not be meaningful and effective unless it is implemented consistently and applied throughout the entity in practice.

Note: See AJ Brown and SA Lawrence, [Strength of organisational whistleblowing processes—Analysis from Australia & New Zealand: Further results: Whistling While They Work 2](#) (PDF 757 KB), report, Griffith University, July 2017. ASIC is a member of the Whistling While They Work 2 research project.

Structuring, drafting and presenting a whistleblower policy

16 The requirement to have a whistleblower policy applies to entities of varying sizes that operate in different sectors. Apart from some listed entities, many entities may not have experience in establishing, implementing and maintaining a whistleblower policy. Our proposed guidance is intended to provide entities with a potential structure from which to develop their own whistleblower policy. It is also intended to help listed entities that have previously implemented a whistleblower policy—in line with the 'if not, why not' approach of the ASX [Corporate Governance Principles and Recommendations](#)—to review their policy and update it where necessary.

Note: We do not propose to endorse any particular whistleblower policy template that may be available for entities.

17 Since the whistleblower protections under the Corporations Act are available to any discloser who makes a disclosure that qualifies for protection—regardless of whether the entity that is the subject of the disclosure must have a whistleblower policy—our guidance will also help entities that would like to establish mechanisms for managing disclosures on a voluntary basis.

Focus on disclosures of information that qualify for protection

18 We have proposed that an entity’s whistleblower policy should focus on disclosures of information that qualify for protection, rather than reports about all issues and concerns.

19 Our proposed approach reflects the requirement in s1317AI(5), which requires entities to have a whistleblower policy for dealing with disclosures that qualify for protection.

20 We have included in our guidance that an entity should:

- (a) explain the purpose of its whistleblower policy;
- (b) set out the criteria for a discloser to qualify for protection as a whistleblower under the Corporations Act;
- (c) explain that disclosures that do not qualify for protection under the Corporations Act are not covered by its whistleblower policy;
- (d) explain that disclosures that relate solely to personal work-related grievances do not fall under its whistleblower policy;
- (e) explain the circumstances when a disclosure about a personal work-related grievance qualifies for protection;
- (f) outline the steps the entity will take after it receives a disclosure and explain that each disclosure will be assessed by the entity to determine whether it falls within its whistleblower policy; and
- (g) ensure the confidentiality of its disclosure handling and investigation process.

21 In addition, we have included guidance that an entity’s whistleblower policy could:

- (a) provide information about how its employees can internally raise personal work-related grievances and other types of issues or concerns that are not covered by the policy; and
- (b) encourage employees to seek legal advice about their rights and protections under employment or contract law and advice about how to resolve their personal work-related grievance.

Covering external ‘eligible whistleblowers’

- 22 Since the protections under the revised corporate sector whistleblowing regime also apply to ‘eligible whistleblowers’ outside an entity, we consider it important for them to be covered under an entity’s whistleblower policy. Our proposed approach is intended to encourage more whistleblowing by external ‘eligible whistleblowers’, so entities are better able to identify and deter wrongdoing.

Discouraging false reporting

- 23 We have proposed good practice guidance that entities could include a statement discouraging false reporting, while ensuring that the tone and language they use do not unintentionally deter staff from making disclosures.
- 24 Our proposed approach is consistent with Australian Standard [AS 8004–2003 Corporate governance—Whistleblower protection programs for entities](#). It also reflects that one of the policy objectives of the revised corporate sector whistleblower regime is to encourage more disclosures of wrongdoing.

Note: AS 8004–2003 has now been withdrawn and is intended to be revised.

Use of third-party service providers by smaller entities

- 25 In our good practice guidance, we have proposed that smaller entities (particularly those with a limited number of employees) should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosures.
- 26 The purpose of this good practice guidance is to encourage more whistleblowing in smaller entities (by providing better protections for disclosers, including from detriment) and to help mitigate potential conflicts of interest.
- 27 For smaller entities, particularly those with a limited number of employees, it may not be possible to nominate an appropriate staff member who is outside the chain of command for receiving disclosures. It may also not be possible to nominate separate staff members for protecting disclosers (i.e. equivalent to a whistleblower protection officer) and investigating disclosures (i.e. equivalent to a whistleblower investigation officer).

C Proposed relief by legislative instrument

Key points

We are seeking views on whether we should use our power in s1317AJ to provide legislative relief to public companies that are small not-for-profits or charities.

Proposed legislative relief for public companies that are small not-for-profits or charities

Proposal

c1 We are seeking views on:

- (a) whether public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy; and
- (b) the most appropriate size threshold that should apply for the purpose of exempting public companies that are small not-for-profits or charities, if an exemption is considered appropriate.

Your feedback

C1Q1 Do you consider that the requirement for public companies to have a whistleblower policy would impose a disproportionate regulatory burden on public companies that are small not-for-profits or charities, such that the benefits would be outweighed by the costs that these companies would incur to establish, implement and maintain a whistleblower policy? Please provide reasons.

C1Q2 If you consider public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy, do you have any views about:

- (a) the most appropriate type of size threshold (e.g. total revenue, total employees or total assets);
- (b) the most appropriate threshold value; and
- (c) whether more than one type of size threshold should apply?

Please provide details.

Rationale

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All public companies are required to have a whistleblower policy: see s1317AI(1). This includes small not-for-profits and charities that are public

companies. The most commonly used public company structure for not-for-profits and charities is company limited by guarantee.

- 29 Small proprietary companies are not required to have a whistleblower policy: see s1317AI(2).

Note: The requirement to have a whistleblower policy does not apply to a significant number of proprietary companies, following the doubling of the large proprietary company thresholds on 1 July 2019.

- 30 In Table 1, we set out the types of size threshold and threshold values that currently apply to small proprietary companies and small companies limited by guarantee under the Corporations Act. We also set out the type of size threshold and threshold values relating to charities under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act).

Table 1: Existing types of size threshold and threshold values relating to small companies and charities

Entity type	Legislation	Description
Small proprietary company	s45(A)(2) of the Corporations Act	<p>A proprietary company is a small proprietary company for a financial year if it has at least two of the following characteristics:</p> <ul style="list-style-type: none"> the consolidated revenue for the financial year of the company and any entities it controls is less than \$50 million; the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than \$25 million; and the company and any entities it controls has fewer than 100 employees at the end of the financial year.
Small companies limited by guarantee	s45B of the Corporations Act	<p>A company is a small company limited by guarantee in a particular financial year if:</p> <ul style="list-style-type: none"> it is a company limited by guarantee for the whole of the financial year; it is not a deductible gift recipient at any time during the financial year; and its revenue (or consolidated revenue, if that applies) for the financial year is less than \$250,000. <p>This definition excludes Commonwealth companies or subsidiaries, subsidiaries of Commonwealth authorities, transferring financial institutions of a state or territory, building and credit societies, and credit unions.</p>
Charities that are registered with the Australian Charities and Not-for-profits Commission (ACNC)	Div 60 of the ACNC Act	<p>The reporting obligations of a charity registered with the ACNC are based on the charity's size, in terms of revenue, as follows:</p> <ul style="list-style-type: none"> 'small charities' have an annual revenue of less than \$250,000; 'medium charities' have an annual revenue of more than \$250,000 but less than \$1 million; and 'large charities' have an annual revenue of more than \$1 million.

- 31 We will only grant relief from the requirement to have a whistleblower policy in limited circumstances. As outlined in the Revised Explanatory Memorandum to the Whistleblower Protections Bill, the rationale for providing ASIC with this power is to provide it with flexibility in making a determination in some limited circumstances, if the benefits in encouraging good corporate culture and governance are outweighed by reduced flexibility and unnecessarily high compliance costs.

D Regulatory and financial impact

- 32 In this paper we are proposing to provide guidance for entities that must comply with the whistleblower policy requirement, introduced by the Whistleblower Protections Act. Treasury prepared a RIS for the Whistleblower Protections Bill. This is set out at paragraphs 2.164–2.242 of the Revised Explanatory Memorandum to the Whistleblower Protections Bill.

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to give:</p> <ul style="list-style-type: none"> (a) guidance on the matters that must be addressed by an entity's whistleblower policy under s1317AI(5); and (b) some good practice guidance (which is not mandatory) on establishing, implementing and maintaining a whistleblower policy. <p>Note: See Section B of draft RG 000.</p>	<p>B1Q1 Do you agree with our proposed guidance in Section B of draft RG 000? If not, why not?</p> <p>B1Q2 Do you agree that the information that must be covered by a whistleblower policy, as set out in s1317AI(5), has been adequately addressed in our proposed guidance? If not, please provide details.</p> <p>B1Q3 Do you agree that the matters we have included in our proposed guidance will be useful in helping entities to establish, implement and maintain a robust and clear whistleblower policy? If not, please provide details.</p> <p>B1Q4 Do you agree with our proposed guidance that an entity's whistleblower policy should focus on disclosures of information that qualify for protection, rather than reports about all issues and concerns, in relation to the entity? If not, please provide details.</p> <p>B1Q5 Do you agree with our proposed guidance that an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity? If not, please provide details.</p> <p>B1Q6 Is the proposed good practice guidance useful and appropriate? If not, please provide details.</p> <p>B1Q7 Do you agree with our proposed good practice guidance that entities' whistleblower policies could include a statement discouraging deliberate false reporting? If not, please provide reasons.</p> <p>B1Q8 Do you agree with our proposed good practice guidance that smaller entities (particularly those with a limited number of employees) should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosures? If not, please provide details.</p> <p>B1Q9 Do you have any suggestions on how the guidance in Section B of draft RG 000 can be improved? Please provide details.</p> <p>B1Q10 Are there any practical problems associated with our guidance? Please provide details.</p>

Proposal	Your feedback
<p>B2 We propose to provide additional good practice guidance on the matters that an entity should consider when establishing, implementing and maintaining its whistleblower policy: see Section C of draft RG 000.</p>	<p>B2Q1 Do you agree with our proposed additional good practice guidance in Section C of draft RG 000? If not, please provide details.</p> <p>B2Q2 Do you have any suggestions on how the additional good practice guidance can be improved? Please provide details.</p> <p>B2Q3 Are there any practical problems associated with our additional good practice guidance? Please provide details.</p>
<p>C1 We are seeking views on:</p> <p>(a) whether public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy; and</p> <p>(b) the most appropriate size threshold that should apply for the purpose of exempting public companies that are small not-for-profits or charities, if an exemption is considered appropriate.</p>	<p>C1Q1 Do you consider that the requirement for public companies to have a whistleblower policy would impose a disproportionate regulatory burden on public companies that are small not-for-profits or charities, such that the benefits would be outweighed by the costs that these companies would incur to establish, implement and maintain a whistleblower policy? Please provide reasons.</p> <p>C1Q2 If you consider public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy, do you have any views about:</p> <p>(a) the most appropriate type of size threshold (e.g. total revenue, total employees or total assets);</p> <p>(b) the most appropriate threshold value; and</p> <p>(c) whether more than one type of size threshold should apply?</p> <p>Please provide details.</p>