



Law Council
OF AUSTRALIA

Legal Practice Section

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Andivina Uy
Senior Adviser, Strategic Policy
Greg Hackett
Senior Manager, Office of the Whistleblower
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: whistleblower.policy@asic.gov.au

Dear Ms Uy and Mr Hackett

CONSULTATION PAPER 321 – WHISTLEBLOWER POLICIES

1. The Law Council welcomes the opportunity to provide this submission in response to the Australian Securities and Investments Commission's (**ASIC**) Consultation Paper 321 – Whistleblower Policies (**Consultation Paper**).
2. This submission has been prepared by the Charities and Not-for-Profits Committee of the Law Council's Legal Practice Section (**the Committee**).¹
3. The *Corporations Act 2001* (Cth) (**Corporations Act**) has been amended to provide a consolidated whistleblower protection regime designed for Australia's corporate sector. The *Taxation Administration Act 1953* (Cth) has also been amended to allow for the protection of whistleblowers in relation to the tax affairs of any entity.
4. Part of the amendments to the Corporations Act is a requirement for all public companies, large proprietary companies and proprietary companies that are trustees of the superannuation funds to have a detailed whistleblower policy including the specific requirements set out in the Corporations Act and the proposed guidance.
5. A large proprietary company is a company where for a financial year, it has at least two of the following characteristics:
 - (a) consolidated revenue of \$50 million or more;
 - (b) consolidated gross assets of \$25 million or more; and
 - (c) the company, and any company it controls, has a 100 or more employees.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia. The Charities and Not-for-Profits Committee is a Committee of the Law Council's Legal Practice Section and provides a network for lawyers interested in the law affecting not-for-profit organisations and charities.

6. While the whistleblower regime in the Corporations Act applies to a broader group than public and proprietary companies, the requirement for a prescriptive policy only applies to public companies, large proprietary companies and superannuation fund trustees. The Explanatory Memorandum accompanying the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) noted:

Only large or public entities are required 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 irrespective of company or business size.²

7. The summary of the regulation impact statement within the Explanatory Memorandum states ‘there are no expected compliance costs for individuals or community organisations’.³
8. Under the amendments, ASIC has been given the power to grant relief from the requirement to have a whistleblower policy which conforms to the Corporations Act requirements, and ASIC is currently seeking views on whether it should use these powers to provide legislative relief to public companies that are small not-for-profits or charities.

9. Relating to the power to provide relief, the Explanatory Memorandum noted:

The benefits of this [the whistleblower policy] requirement in encouraging good corporate culture and governance could be outweighed by reduced flexibility and unnecessarily high compliance costs.⁴

10. The requirements of the policy are extensive (evidenced by requiring 50 pages of ASIC guidance on the content) and will most likely require a lawyer or compliance officer to ensure all the requirements are met. The policy guidelines indicate the focus on the financial services sector in the section on ‘disclosable matters’. Charities are known to wish to be compliant and may consider the recommendations in the ASIC guidance as requirements. Given the lack of advisors familiar with the charity sector, many charities may be advised that all recommendations should be met despite the challenges this may present. For example, many charities are unlikely to have a sufficient range of personnel in their management structures to satisfy the whistleblower protection officer and the whistleblower investigation officer roles as suggested in the guidance.

Consultation Paper Question C1

11. In summary, the Committee is of the view that relief from subsection 1317A(5) of the Corporations Act should be provided to all charities due to the:

- (a) low risk of misconduct and improper state of circumstances or affairs;
- (b) good organisational cultures and governance;

² Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) [2.127].

³ Ibid 4.

⁴ Ibid [2.128].

- (c) high regulatory burden in compliance – both in the drafting and the maintenance;
- (d) inappropriate content in the Corporations Act requirements reducing effectiveness of existing whistleblower policies of charities which are tailored to the risks, service area and management structures; and
- (e) application inconsistent across the sector, based on legal structure without any supporting evidence which identifies this structure as requiring more regulation.

Burden disproportionate to risk/benefit

12. The Committee considers the requirement for a whistleblower policy containing the detailed requirements set out in the Corporations Act and the ASIC guidance imposes a disproportionate regulatory burden on all charities which are public companies limited by guarantee, in relation to the risks of misconduct in the charitable sector by public companies and the benefits of encouraging more whistleblowers and therefore discouraging misconduct.
13. Many charities currently have whistleblower policies as part of their commitment to good governance and these will be drafted as appropriate to the charity's risks and management structure. The content requirements and level of detail set out in the Corporations Act and the ASIC guidance will generally not be appropriate to the charitable sector.
14. The requirement for regulating the content of whistleblower policies has arisen in the corporate and financial services sectors in relation to events unrelated to the charities sector. In the context of the whistleblower regime, there have been no concerns raised as to the risks and requirements in the charitable sector. It is generally recognised (and noted in the ACNC regulatory approach statement), that most people involved in charities are honest, act in good faith and try to do the right thing. There is a low rate of corporate crime and misconduct in charities and there is good culture and governance. Issues arising from historical wrongs and under current Royal Commissions are being addressed with regulatory changes specific to the area of service, in the same manner as this regulatory change has arisen in relation to the Banking Royal Commission.
15. There is no research or evidence to show or suggest that the charitable sector (and particularly the public companies limited by guarantee operating in the charitable sector) as a whole, present the same level of risk of the issues which the content requirements for whistleblower policies in the Corporations Act are seeking to address within the corporate and financial services sectors.
16. The regulatory burden in both time and cost, requiring lawyers or other advisors to review current processes, prepare a whistleblower policy (with all the required detail of areas of possible eligible disclosure and attempting to identify acceptable 'eligible recipients') and undergo the necessary training, would be not only a disproportionate, but also, an unreasonable burden for charities in relation to the risks that the regulation wishes to address and the benefits it wishes to achieve.
17. The charitable sector does not have ready or customary access to appropriate advisors or consultants to assist them with this specialised work, nor available funds to cover the associated costs. Application of funds for advisors and consultants as well as internal administration time will generally have to be taken from funds intended for

pursuing the charitable purposes. This is of particular concern in light of increasing pressure and scrutiny on charities to ensure administration costs are kept low to maximise the application to the charitable purposes.

Inconsistent requirements

18. Charities exist in a number of different legal structures, of which, public companies limited by guarantee is only a small percentage. The whistleblower policy content requirements is specifically targeted at large companies in the corporate sector. When considering the charitable sector as a whole, it is not consistent to require only a small part of this sector to have the regulatory cost and burden of ensuring they have whistleblower policies which include all the content required in the Corporations Act and ASIC guidance. The increased compliance burden may make the company limited by guarantee structure less appealing to new charities, while existing companies limited by guarantee may find themselves at a disadvantage as a result of the increased regulatory burden.
19. Any policy as to whistleblower protection in the charitable sector, should be made consistently across the sector after examination of the issues. This could be done through the dedicated charity regulator, the Australian Charities and Not-for-profits Commission (**ACNC**).
20. Indeed, one of the policy reasons for the establishment of a dedicated charity regulator was the recognition that the charity sector should be subject to appropriate and tailored regulation based on the unique circumstances of the charity sector. With the establishment of the ACNC, many of the obligations under the Corporations Act were 'switched off' in order to ensure that obligations imposed upon charities would be consistent across the sector, irrespective of the legal form of a charity. Importantly, there was also a recognition that charities should be subject to a more principle-based, and less prescriptive form of regulation. The imposition of the requirement to adopt a whistleblower policy on some charities based on legal structure is inconsistent with these policy objectives.
21. As such, a single type of legal structure should not be singled out without there being particular increased risks in relation to that legal structure. This is not the situation nor circumstance giving rise to the legislative requirement for the existence of, and content for, whistleblower policies.
22. There is no policy rationale nor risk basis to require charitable companies (and not other forms of charitable entities) to have such a detailed whistleblower policy. The Committee also notes that given the statement in the Explanatory Memorandum that there were no compliance costs expected for community organisations, it may be that consideration was not given to the impact of the law on charities (many 'community organisations' are established as companies limited by guarantee).

Consultation Paper Question C2

23. The Committee submits that all public companies limited by guarantee which are registered charities with the ACNC should be exempted.
24. There seems no policy rationale for imposing the costs and regulatory burden of requiring a detailed whistleblower policy in the terms required in the Corporations Act on charities of any size.

25. If ASIC is minded to only provide the relief to 'small' not-for-profits and charities, the Committee recommends that the same threshold as for small proprietary companies is used (i.e. the requirement would only apply to charitable companies which meet the same characteristics of a large proprietary company).
26. While there is no policy rationale for including charities in the requirement for a proscriptive policy, if ASIC decides they should be included, then there is no rationale for treating charities any differently to proprietary companies in relation to 'company or business size' (see paragraph 2.127 of the Explanatory Memorandum, extracted above).
27. The existing size thresholds referred to in the Consultation Paper relating to small companies limited by guarantee and small, medium and large charities were created and utilised for entirely different regulatory reasons and these thresholds are not relevant when considering the regulatory burden of the whistleblower policy requirements.
28. In addition, if ASIC provides only limited relief, the Committee requests that an extension of time in which to get a policy in place be given. Charities will generally not be prepared for this requirement and may find it difficult to find the time and funds to amend their existing policies to insert all the additional details required by the new provisions in the Corporations Act.

Contact

29. The Committee is grateful for the opportunity to provide this input in relation to the Consultation Paper. If you require further information or clarification, please contact the Chair of the Committee, Ms Jennifer Batrouney QC, on (03) 9225 8528 or at Jennifer.Batrouney@vicbar.com.au.

Yours sincerely



Jonathan Smithers
Chief Executive Officer