Our Ref: S Kerr
Your Ref: Consultation Paper 321

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Dear Sir/Madam

Submission in response to Consultation Paper 321 (Whistleblower Policies)

We refer to Consultation Paper 321 (Whistleblower Policies) (**Consultation Paper**) and provide our written submission below.

Background

Christian Ministry Advancement (**CMA**) is making this submission in response to part C of the Consultation Paper, pertaining to the Australian Securities Investment Commission (**ASIC**) providing relief pursuant to section 1317AJ of the *Corporations Act 2001* (Cth) (**CA**) to public companies that are small charities.

Executive Summary of Submission

For the reasons set out below, CMA submits that ASIC should grant relief to small charities from the requirements of section 1317AI of the CA pursuant to section 1317AJ of the CA, as compliance with those requirements will impose a disproportionate regulatory burden upon them (**Submission**).

About CMA

CMA is a charitable not-for-profit organisation that seeks to help the Christian sector in Australia become more effective (about CMA). It does this by offering resources, training, and networking across a range of areas such as:

- Governance
- Fund-raising
- Staff & volunteer management
- Financial management
- Leadership
- Marketplace ministry
- Mission & strategy
- Legal & compliance

- Risk management

CMA has over 1,400 members and engages with between 300 and 400 Christian organisations.

CMA also has a separate division, called the CMA Standards Council, which publicly accredits Christian organisations which meet its 54 Principles and Standards of Good Governance, Transparency and Accountability (CMA Standards Council). The ACNC has recognised and endorsed the accreditation provided by the CMA Standards Council (ACNC and CMA Standards Council Standards). The overarching purpose of the CMA Standards Council is to help build faith and trust in Christian organisations in order for them to achieve more effective outcomes.

Consistent with the purposes of CMA, it has a strong interest in assisting the Christian sector in complying with its legal obligations. Many of the Christian organisations that CMA engages with are small companies limited by guarantee (**CLG**), in the form of a small charity as defined in the Australian Charities and Not-for-profits Commission Act 2012 (Cth) (**ACNC Act**).

Legal Structures in the Christian sector

In the experience of CMA, the 3 main types of legal structures used within the Christian sector are unincorporated associations, incorporated associations and CLGs. Many churches are structured as unincorporated associations, but churches also take the form of incorporated associations and CLGs. Other Christian organisations, including charitable organisations and schools, tend to be structured as incorporated associations or CLGs. CMA understands that the ACNC has registered approximately 60,000 charities, and that approximately 30% of them have the primary purpose of the advancement of religion. Another almost 20% include the advancement of religion as one of their purposes. We do not know the number of those organisations which are CLGs, but we suspect that they include thousands of CLGs. CMA also understands that well over half of the charities the ACNC has registered are classified as “small” as defined under the ACNC Act.

Reasons supporting the CMASC Submission

Reason 1: Charities which are CLGs are already partly exempted from other provisions of the CA to foster flexible governance practices and regulatory compliance:

(a) If a CLG is registered as a charity, it means that the primary regulatory body for governance issues switches from the ASIC to the Australian Charities and Not-for-profits Commission (**ACNC**). As a result, a number of the provisions in the CA do not apply to a registered charity, in accordance with Part 1.6, section 111K of the CA.

(b) Instead, the *Charities Act 2013* (Cth), the ACNC Act and the *Australian Charities and Not-for-profits Commission Regulations 2013* (Cth) (**ACNC Regulations**) apply to CLGs which are registered as charities.

(c) The ACNC Regulations provide 'Governance Standards' that charitable with which CLGs must comply. The Governance Standards cover many of the same principles of corporate governance as those under the CA, but are less complicated and prescriptive. Therefore, even though not all CA provisions apply, charities which are CLGs are still accountable for governance issues in accordance with the legislation stated in part 5.1(b) of this submission.

(d) The purpose of exempting CLGs which are charities from these provisions of the CA is to *simplify regulatory compliance*. The CA is complex piece of legislation, which not only prescribes *what* companies must adhere to, but also *how* they must adhere to it. To

reduce the burden of adhering to the technicalities and nuances of the CA, charitable CLGs can meet the requirements set out in the ACNC Act and Regulations through different approaches and what best suits that particular charity.

(e) For example, a normal CLG must have an annual general meeting of its members within a prescribed period, and the members can compel the directors to call a meeting pursuant to the CA. In contrast, the members of a CLG which is a charity do not have these rights under the CA. However, the ACNC Regulations provide that the directors of a charity must be accountable to its members and provide members with an adequate opportunity to raise any concerns (referred to as 'Governance Standard 2'). Governance Standard 2 then provides *recommendations* on how the directors can effect Governance Standard 2. This means that it is up to the directors how they will exercise these duties. This example demonstrates the overlapping concepts of directors being held responsible to the charity's members, but in different ways.

(f) CMA submits that a similar approach should be taken in relation to the provisions of section 1317I. That section basically requires a formal whistleblower policy to be adopted. An exemption in respect of that section would not exempt a charitable CLG from compliance with the other whistleblower provisions of the CA. Accordingly a charitable CLG would not be exempted from the substantive purpose of these provisions.

(g) This would match up with the existing policy of exempting charities from the strict wording of the governance provisions of the CA, but still achieving the same substantive effect as the provisions of the CA.

Reason 2: Financial and regulatory burden on small charitable CLGs

(a) Small private companies are exempt:

- The explanatory memorandum of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (**Explanatory Memorandum**), at 2.127 states as follows:

  "*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*."

- Moreover, the Explanatory Memorandum states at 2.128 that:

  "The rationale for providing ASIC with a power to relieve certain classes of companies from this requirement is to provide it with flexibility in making a determination whether in some limited circumstances, the benefits of this requirement in encouraging good corporate culture and governance would be outweighed by reduced flexibility and unnecessarily high compliance costs."

- Small proprietary companies are companies with revenue less than $25 million (section 45(A)(2) of the CA). Small CLGs are CLGs with revenue less than $250,000 (section 45B of the CA). If "small" proprietary companies are exempted from section 1317I, it seems ridiculous that small CLGs with revenue 100 times less should not also be exempted.

- In response to the Explanatory Memorandum, in which small private entities are exempt from the Whistleblower Policy, for the purpose that it would be overly burdensome, CMASC poses the question - how will small charitable CLGs be equipped to absorb the regulatory burden of complying with the Whistleblower Policy, when small ***private*** companies which are ***profit making entities***, are exempt for the reason that it is a 'disproportionate regulatory burden'?

- Small charitable CLGs do not have the same profit motive as small private companies, and therefore CMA would submit that such CLGs are likely to encounter *even more* of a 'disproportionate regulatory burden' than small private companies.

Accordingly, CMA submits that small charitable CLGs should be treated the same way as small private companies, so as to maintain a consistent policy framework.

(b) Indicative costs

Paragraphs 2.177 to 2.199 of the Explanatory Memorandum include a rough estimate of costs to implement a Whistleblower Policy.

By way of summary, the rough indicative costs (based on time) are based on an "average company [that] already has a base structure in place for compliance and ethics policies and training and so development of a whistleblower policy in accordance with the proposed reforms will leverage this basis":

- administrative time required to develop a policy - 20 hours;
- legal advice in developing the policy - 4 to 5 hours (depending on which policy option is elected (see part 2.166 of the EM); and
- production of informative materials for staff members - 4 hours.

On account of legal costs alone, CMA has been informed that it would itself need to spend roughly $2500 on external lawyers to develop a policy. Moreover, legal advisers of CMA have indicated that 4 - 5 hours to develop a compliant Whistleblower Policy is a conservative estimate, as there are no “precedent” policies, and there is a relatively short period of time within which many thousands of entities will need to have one prepared.

Additionally, legal advisers have commented that entities such as small CLGs which have no “base structure” (as alluded to in the Explanatory Memorandum at 2.180) will pay substantially higher legal fees, as the Whistleblower Policy will need to be tailored to the non-existent policy framework of the small charity.

A large proportion of these CLGs rely on donations from the public, government grants (ranging from local municipal council to federal level) and other sources of alternative funding. It is well known that these CLGs carry out their aims with an element of frugality. In short, small charitable CLGs run on the proverbial “sniff of an oily rag”.

CMA represents and interacts with many Christian small CLGs that are very thinly resourced, not only in relation to finances, but also in relation to employees and

volunteers. A high proportion of the time of those people and the funds available are applied to carrying out the mission of that small charity.

In accordance section 45B of the CA and div 60 of the ACNC Act, a small charity has less than $250,000 revenue in a year. When taking into account all fees that a charity is to pay (not limited to employee fees, legal fees, etc), the true cost to the organisation in terms of dollars and manpower will be very substantially more than $2,500, and will place an unnecessary restraint on the small CLG carrying out its true charitable functions.

CMA does not believe that it was Parliament's intention to subject small CLGs to increased regulatory practice when taking into account the practical effect of the costs, and the fact that small private companies are exempt. CMA respectfully submits that when Parliament extended the net to “public companies” and “large proprietary companies” in section 1317I(1) and (2), it was intending to catch the BHPs of this world, not small charities with turnover under $250,000.

Reason 3: Protections for whistleblowers would not be removed for employees of small charitable CLGs by this exemption

Exempting small charitable CLGs from adopting a Whistleblower Policy does not mean that these CLGs are not required to comply with the whistleblower provisions of the CA.

As stated in the Consultation Paper at Part 7, item 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."*

Accordingly CMA submits that the true policy behind the whistleblower legislation will still be met even if small charitable CLGs are exempted from the operation of section 1317I.

Submissions

CMA submits that small charitable CLGs within the meaning of the ACNC Act should be exempted from compliance with the section 1317I of the CA.

In line with the intention of the Whistleblower Policy, and this Submission, CMASC recommends alternative solutions for small charities that should be considered by ASIC:

(a) the ACNC and ASIC inform small charities of whistleblower legislation under the CA by:

- publishing material on their websites;
- correspondence with the charities (such as an email alert or letter); and
- providing a free a Whistleblower Policy template on its website for small charities to adopt;

(b) the ACNC provide a *recommendation* that each small charity develop a Whistleblower Policy in the way it deems fit.

For the avoidance of doubt, CMA does not believe that it would be appropriate for large or medium NFPs and charities (ie, with revenue over $250,000) to be exempted by the Whistleblower Policy. Medium and large NFPs and charities are more likely to have the budget to adopt a Whistleblower Policy.

Next steps in consultation

CMA would be pleased to meet with the ASIC representatives administering the Consultation Paper if that would be useful in ASIC's consideration of the views put in this submission, or if CMA can assist in some other way in the work of improving the Whistleblower Policy in the CA.

Yours faithfully

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