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Ms Andivina Uy
Senior Adviser, Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
BRISBANE QLD 4001

Online: whistleblower.policy@asic.gov.au

Dear Ms Uy,

Consultation Paper 321 Whistleblower policies

CPA Australia represents the diverse interests of more than 164,000 members working in 150 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

CPA Australia is confining its comments on the Consultation Paper to Part C (treated collectively C1Q1 and C1Q2) dealing with proposed legislative relief for public companies that are small not-for-profits as this presents, in our view, the most challenges from the perspectives of proportionality and indeterminacy.

At the outset it is appropriate to set some context with reference to one of the introductory paragraphs of the draft Regulatory Guide which, to paraphrase, states: "(E)ntities have a whistleblower policy - - - that is aligned to the nature, size, scale and complexity of the entity's business". (RG 000.13(a)(i)). CPA Australia believes that the better approach is to assist businesses to tailor their obligations under s 1317AI, subsection (5) in particular, in a manner suitable to their specific characteristics. To emphasise our point that the seeking out of thresholds of targeted relief, though of course contended for by s 1317AJ, may bring with it unintended consequences, it is beneficial to reference relevant passages of the Bill's Explanatory Memorandum dealing with both the requirement to have a whistleblower policy and class orders exemption:

> 2.141 Transparent internal whistleblower policies are essential to good corporate culture and governance.
>
> 2.150 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 benefit of this requirement in encouraging good corporate culture could be outweighed by reduced flexibility and **unnecessarily high compliance costs**. (Emphasis added)

Though obviously never intended to be inferred, a view might be taken that essentials of good corporate governance could be read-down or reduced by overarching considerations of cost. The perspective CPA Australia believes should be adopted is the perspective of who it is that is intended to be protected—that

is, the potential whistleblower—as distinct from those who should provide the protection and whose action it is that may be the subject matter of complaint. Similarly, the key operative sections (ss 1317AA, 1317AAA, 13217AAB and 1317AAC) apply on a non-differentiated basis. These factors we believe point to a need for all entities to have some level of internal policy documentation fit for their specific characteristics, including size. Nevertheless, CPA Australia recognises that a potentially substantial number of small charities will be ill equipped to apply each of the requirements of subsection 5. As such, we would urge ASIC to liaise closely with the ACNC to determine both the appropriate threshold and what would constitute sufficient broader awareness raising across the sector(s) more generally, in place of a mandated requirement for a whistleblower policy under subsection 5.

A further general observation is that the compliance cost argument may be a misnomer. An absence of an articulated policy may, in fact, make an organisation more vulnerable.

Turning to the specific reference of relief for not-for-profits or charities. We perceive a number of difficulties stemming from isolating this sub-category of companies limited by guarantee. By necessity, the relief requires reference to categorisations of structures or purposes falling outside of the Corporations Act which may, or may not, extend beyond the ACNC Act but which are nevertheless subject to change or under consideration, as may be the case of a definition of not-for-profit as distinct from a charity. Relatedly, we perceive that there may be complexities that will need to be worked though, namely in relation to the future interaction of Part 9.4AAA and s 111L *Provision not applicable to the body corporate.* Whilst the ACNC Act remains under review, it is uncertain which Corporation Act provisions will remain "turned-off." As such, there may at some future point arise a circumstance where an eligible whistleblower may seek to make a qualifying disclosure in relation to a possible contravention of a currently turned-off provision, perhaps most notably general duties of directors. Whilst such matters remain unsettled, it seems in CPA Australia's view unwise to develop rules affecting this category of company limited by guarantee which may not be readily reversed.

More generally in relation to the not-for-profits and charities sector, the relief contemplated might be taken as an inference that the sector is less prone to misconduct and that consequences are less impactful, either from a good governance or societal perspective. Again, the vulnerability to adverse outcomes would weigh in favour of a mechanism such as a policy document that would direct employee attention to protections and avenues of relief, whilst at the same time heightening management's awareness of its obligations.

If you have any queries do not hesitate to contact Dr John Purcell FCPA, Policy Adviser ESG at CPA Australia on ... or ....

Yours sincerely

Dr Gary Pflugrath CPA

Executive General Manager, Policy and Advocacy
CPA Australia