

18 September 2019

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Dear Andivina and Greg

## **Consultation paper 321 Whistleblower policies**

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations (NFPs) and the public sector.

Governance Institute has long supported reform of whistleblower legislation and gave evidence at the Parliamentary Joint Committee Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors in 2017.

We are a supporter organisation of the Whistle While They Work 2 (WWW2) national research project led by Griffith University.

Governance Institute welcomes the opportunity to provide a submission to ASIC on its draft Regulatory Guide and whether ASIC should use its powers in section 1317AJ to provide legislative relief to public companies that are small not-for profits or charities from the requirements to have a whistleblower policy.

### **General comments**

Governance Institute commends ASIC for developing this Regulatory Guide. We agree with ASIC that transparent whistleblower policies are essential to good risk management and corporate governance.

We have carefully considered the guidance and consider that there are issues with it concerning its length, level of prescription and complexity. We consider that many companies will experience practical difficulties in having a compliant policy in place by 1 January 2020 and many charities and NFP's will be unable to meet this deadline. This is due to both the short timeframe imposed by the legislation and the timing of the Regulatory Guide. The Regulatory Guide takes an extremely detailed approach to policy preparation requiring companies to develop a long and detailed policy and commensurate training materials to ensure that employees and others understand it.

We do not support exempting public companies that are small NFPs or charities from the requirement to have a whistleblower policy in accordance with the Corporations Act. However we recommend that ASIC consider granting an extension to the 1 January 2020 deadline for these companies.

### **Key recommendations**

**Governance Institute recommends** that ASIC:

1. Reframes the guidance to assist and support companies to implement an effective and tailored whistleblower regime rather than adopting a detailed and prescriptive approach.
2. Clarifies in the guidance what is the legal requirement and what is suggested best practice.
3. Simplifies the guidance to make it more concise and less complex for users.
4. Reduces the length and complexity of the recommended approach to policies in the guidance to acknowledge the over-riding need for users to be able to understand and use the policy.
5. Includes commentary in the guidance on how smaller organisations can develop a fit for purpose whistleblower policy that is appropriate for their size, complexity and number of employees. Providing clarity in the guidance on the items that are mandatory and items that are best practice will assist with this.
6. Develops separate guidance for charities and NFPs which is shorter, simpler and more relevant to that sector.
7. Co-operates with the ACNC to develop a 'basic' model or template whistleblower policy that can be adopted by charities and NFPs.
8. Grants companies that are NFPs or charities an extension of the deadline by which they need to have adopted a compliant whistleblower policy. This will enable them to benefit by learning from other organisations that have developed whistleblower policies.
9. Plays an educative rather than a punitive role and assists NFPs and charities in complying with the requirement to have a whistleblower policy rather than penalising those organisations that do not.

We provide more detailed comment on the following pages. We have limited our comments to the questions noted.

Governance Institute would welcome the opportunity to speak with you on this matter and the opportunity to be involved in further deliberations.

Yours sincerely



Megan Motto  
CEO

**Do you have any suggestions on how the guidance can be improved?  
Are there any practical problems associated with the guidance?**

**The guidance is too prescriptive**

We consider that the guidance is too long (50 pages) and detailed. It's 'one size fits all' approach may not be appropriate for all but the largest Australian listed companies with the resources to implement it. We consider that a company which applies the guidance will by necessity be required to develop a long and detailed whistleblower policy. To be effective, a whistleblower policy should be short and easily understood by the employees who may need to rely on it. We consider that a company following the requirements of this guidance would produce a policy of about 40 pages which is impractical for users of the document.

**The guidance contains a mixture of mandatory requirements and suggested good practice which goes beyond what is required by law**

The guidance contains a mixture of mandatory requirements (must) and guidance (should). The good practice suggestions in many cases exceed what is actually required by law. It would be challenging for non-lawyers to understand the difference between what ASIC considers to be best practice or 'gold' standard and what is mandatory in order to comply with the Act.

An example of where the guidance exceeds the legal requirement is contained in the section on Protection from detrimental acts or omissions. Section 1317AI (5) (c) of the Act requires a public company to include information about how the company will support whistleblowers and protect them from detriment. The guidance helpfully provides examples of the various types of detrimental conduct by reproducing the definition contained in the Act. The guidance then states that *'the policy should also provide examples of actions that are not detrimental conduct'*. This is not a legislative requirement.

In the current 'why not litigate' policy environment, it may be difficult for companies to take anything other than a conservative approach when drafting their whistleblower policies. This will result in a policy as long as the Regulatory Guide.

We consider that the guidance would benefit from an improved layout which clearly delineates the legal requirements on one hand, with suggested practice on the other. Breaking up the text with boxes and the use of diagrams would also improve readability.

**The guidance is not scalable**

We do not consider that the guidance is scalable for smaller organisations. While paragraph 13 of the guidance refers to ASIC's expectation that entities will 'establish a whistleblower policy that is aligned to the nature, size, scale and complexity of the entity's business' there is no actual guidance on how smaller organisations can adapt or tailor the policy to suit their own operations. In particular, we consider that entities with small numbers of employees will find the guidance unhelpful. Our comments in this regard are not limited to charities and NFP's. Large proprietary companies, public companies and even some listed entities will not be able to meet the 'gold' standard expected by the guidance.

We provide the following examples of guidance which would only be applicable to very large entities:

- Paragraph 73 – the guide states that as a matter of good practice an entity should outline the key roles and responsibilities under its whistleblower policy and sets out ten separate roles in the whistleblower process including a whistleblower protection officer.
- Paragraph 122 onwards – the guide outlines the expectation for entities to have a detailed risk assessment framework and procedures for assessing and controlling the risk of detriment.

The obligation to have a whistleblower policy applies across a broad spectrum of companies. Most ASX200 companies are a fraction of the size of the ASX10 to which this guidance appears

to be directed. Many mid-cap companies will not have the personnel to implement this guidance.

At the other end of the spectrum, a charitable company limited by guarantee which administers a small trust, with a volunteer board and one employee will only require a very basic whistleblower policy which contains the mandatory elements. The guidance in its current form contains no commentary on how a small organisation with few employees can develop a 'fit for purpose' policy which complies with the Act, taking into account its specific circumstances.

#### **The guidance is not 'user friendly'**

The guidance uses very legalistic language and we consider that most companies will find the document difficult to understand and apply. Our comments in this regard are not limited to charities and NFPs. Larger companies will also find the guidance lengthy and complex. ASIC needs to simplify the guidance. We also encourage ASIC to develop separate guidance aimed at charities and NFPs to ensure that it engages effectively with this sector.

#### **Companies will experience practical difficulties in complying with the 1 January 2020 deadline**

Governance Institute considers that many companies will experience practical difficulties in having a compliant policy in place by 1 January 2020.

We note that ASIC anticipates issuing the final version of the guide in October 2019. We consider that this will be too late to assist many companies to comply with a 1 January 2020 deadline. A company that becomes aware of the guidance in late October 2019 will have very little time available to develop, finalise and obtain board sign off on their whistleblower policy before Christmas.

These practical difficulties are magnified for companies limited by guarantee that are charities and NFPs. They are less likely to have the financial or human resources required to develop a policy and implement it in the time that is available. Many charities and NFPs are reliant on volunteers. According to the Australian Charities Report 2017, just under half of all charities (49%) are operated solely by volunteers. Many of these charities are companies limited by guarantee and are captured by the requirement to have a mandated whistleblower policy. The lead up to Christmas is often the busiest time of year for charities and NFPs. Once Christmas arrives, most volunteers are no longer available until late January or early February.

A lack of financial resources is another issue for charities and NFPs. Application of funds for advisors and consultants as well as internal administration time will generally have to be taken from funds intended for pursuing their charitable purposes.

Additionally, companies in the charitable sector may be unaware of the requirement to have a compliant whistleblower policy. Charitable companies are regulated by the ACNC. With the establishment of the ACNC, important obligations under the Corporations Act were 'switched off' for charities. Organisations in the charitable sector may not be aware that changes to the Corporations Act will have an impact on them.

We also consider that the guidance will not assist smaller entities develop a 'fit for purpose' whistleblower policy within the required timeframe.

Accordingly, we anticipate that many charities and NFPs will not be compliant by the 1 January 2020 deadline.

#### **A template or model would assist the charitable and NFP sector**

We note that ASIC does not propose to endorse any particular whistleblower policy template that may be available for entities. We also understand from our discussions with the ACNC that it does not intend to develop a model policy.

We consider that a template or model whistleblower policy would greatly assist companies in the charitable and NFP sector in complying with their statutory whistleblowing obligations. Governance Institute encourages ASIC to collaborate with ACNC as the charity regulator to develop a model or template policy that charities and NFPs can adopt. While we encourage organisations to carefully develop their own 'fit for purpose' policies we consider that the following reasons support the development of a template or model policy for whistleblowing:

- The failure to have a policy that complies with the whistleblower provisions is a strict liability offence attracting a penalty of \$12,600.
- The mandated provisions are relatively complex and there are significant penalties for breach - contraventions can attract civil penalty provisions of up to \$1.050 million for an individual or three times the benefit derived or detriment avoided. For a body corporate the penalty amount is up to \$10.5 million or three times the benefit derived or detriment avoided or 10% of the body corporate's annual turnover up to \$525 million.
- Charities and NFPs would otherwise have to engage lawyers to assist them to develop a policy and provide advice that their policy complies with the Corporations Act. They would expend funds that are best spent furthering their purpose.
- Allowing charities and NFPs to adopt a model or template policy will greatly increase the numbers of companies able to comply with the provisions and improve whistleblower practice in the sector.
- It is in the community's best interests that companies covered by the provisions have a compliant whistleblower policy to encourage disclosure of misconduct and protection of whistleblowers.
- Any template or model policy could act as a base level policy upon which entities could build their own improvements.
- The time and money saved by charities and NFP's in adopting a model policy could be used by those entities to embed the policy within their operations.

**Governance Institute recommends** that ASIC:

1. Reframes the guidance to assist and support companies to implement an effective and tailored whistleblower regime rather than adopting a detailed and prescriptive approach.
2. Clarifies in the guidance what is the legal requirement and what is suggested practice.
3. Simplifies the guidance to make it more concise and less complex for users.
4. Reduces the length and complexity of the recommended approach to policies in the guidance to acknowledge the over-riding need for users to be able to understand and use the policy.
5. Includes commentary in the guidance on how smaller organisations can develop a fit for purpose whistleblower policy that is appropriate for their size, complexity and number of employees. Providing clarity in the guidance on the items that are mandatory and items that are best practice will assist with this.
6. Develops separate guidance for charities and NFPs which is shorter, simpler and more relevant to that sector.
7. Co-operates with the ACNC to develop a 'basic' model or template whistleblower policy that can be adopted by charities and NFPs.

### **Should public companies that are small NFPs or charities be exempted from the requirement to have a whistleblower policy?**

Governance Institute does not support exempting public companies that are small NFPs or charities from the requirement to have a whistleblower policy in accordance with the Corporations Act.

### **Whistleblower policies are good governance**

Whistleblower processes that encourage staff to speak up about wrongdoing concerns and integrity challenges and protects them from detriment are vital to the integrity and good governance of all organisations as well as to society as a whole.

We agree with ASIC that transparent whistleblower policies are essential to good risk management and corporate governance and to help uncover misconduct that may not otherwise be detected.

Key conclusions from research conducted by the WWW2 Project (Brown, 2018) highlight the importance of effective whistleblower processes within all organisations. Employee reporting is seen as the single most important method by which wrongdoing in or by organisations is brought to light according to employees and governance staff – with managers rating it as of equal importance to their own observations (Brown, 2008). The WWW2 research found similarity in the basic nature and dynamics of whistleblowing between the private and public sector, underscoring that questions of how best to manage whistleblowing are not likely to be answered by the sector involved but by organisational and management dynamics that cut across all types of organisations. While whistleblowing is seen as critically important for organisations, research participants who had reported wrongdoing responded that they were treated badly by their management or colleagues and experienced negative repercussions in up to 81 percent of cases. Interestingly, the research found that if wrongdoing reports were properly dealt with ‘in house’ by organisations, then negative repercussions for whistleblowers appeared to be reduced.

Good governance is important for all companies, including those in the NFP and charitable sector. We consider that ‘carving out’ certain companies from the whistleblower provisions is at odds with the policy objectives of the reforms which is to improve transparency and integrity.

#### **Whistleblower policies assist companies comply with their statutory obligations**

All public companies are subject to the requirements of the new whistleblower provisions. Disclosures made in accordance with the Act qualify whistleblowers for protection from victimisation and create rights to compensation and confidentiality. These legal obligations have serious regulatory, financial and reputational consequences for companies that fail to comply. A whistleblower policy is an important tool to ensure that a company can comply with the legislative requirements imposed on it in the event a whistleblower disclosure is made.

This is highlighted by section 1317AE (3) (b) of the Corporations Act that provides that if a whistleblower seeks compensation and other remedies through the courts because they have suffered detriment, including because a 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. An organisation without a policy that complies with the Act will be unable to rely on that section to mitigate the extent of any damages awarded against it.

#### **Whistleblower policies ensure employees are aware of important protections**

A policy is an important way to make employees aware of the fact that they can make disclosures of misconduct and be subject to statutory protection from victimisation. The expanded whistleblower protections are an important regulatory reform. In the past, instances of whistleblowing reported in the media often resulted in the whistleblower suffering significant detriment. We agree with ASIC that a whistleblower policy will encourage increased disclosure of wrongdoing as employees will have more confidence that their disclosure will be treated confidentially, and they will be protected from detriment and victimisation.

Employees of small charities and NPFs that are companies limited by guarantee are covered by the whistleblower protections but may not be made aware of them if their organisations are exempted from the requirement to have a policy available to them.

#### **Extension of the deadline for NFPs and charities to have a compliant whistleblower policy**

We have outlined previously, the practical difficulties companies will experience in complying with the 1 January 2020 deadline that are magnified for companies limited by guarantee that are charities and NFPs.

**Governance Institute recommends ASIC:**

1. Grants companies that are NFPs or charities an extension of the deadline by which they need to have adopted a compliant whistleblower policy. This will enable them to benefit by learning from other organisations that have developed whistleblower policies.
2. Plays an educative rather than a punitive role and assists NFPs and charities in complying with the requirement to have a whistleblower policy rather than penalising those organisations that do not.