



K&L GATES

K&L Gates Response to

ASIC Consultation Paper 321 and
Regulatory Guide 000: *Whistleblower
policies*

18 September 2019

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Dear Andivina and Greg

ASIC Consultation Paper 321 and Regulatory Guide 000: *Whistleblower policies*

We have pleasure in attaching our response to ASIC's request for submissions in response to Consultation Paper 321 and Regulatory Guide 000: *Whistleblower policies*.

If you have any questions about our submission, please contact Caroline Carnegie or Michaela Moloney.

Yours sincerely

K&L Gates

K&L Gates submission to ASIC Consultation Paper 321 / Regulatory Guide 000: *Whistleblower policies*

1. K&L Gates background

- 1.1 K&L Gates is a global law firm with 44 offices across Australia, the United States of America, Asia, Europe, the Middle East and South America.
- 1.2 K&L Gates' specialist Corporate and Labour, Employment and Workplace Safety teams assist our clients to navigate the corporate regulatory landscape by providing specialist legal advice and drafting company policies tailored to our clients' commercial needs and corporate identity.

2. General comments

- 2.1 K&L Gates welcomes the opportunity to comment on Consultation Paper 321 (**CP 321**) and the draft guidance set out in Regulatory Guide 000 (**RG 000**): *Whistleblower policies*.
- 2.2 K&L Gates commends ASIC's move to clarify the systems and procedures that companies covered by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Whistleblower Protections Act)* are required to provide to potential whistleblowers in order to comply with the new laws. It is important for companies to have guidance around how they can deliver a whistleblower policy that adequately addresses the elements required under section 1317AI(5) of the Whistleblower Protections Act.
- 2.3 Below are K&L Gates' responses to the questions raised by ASIC in CP 321. These responses are provided by K&L Gates in the context of its experience as a law firm that provides advice and legal services to a range of public and proprietary companies that operate both domestically and cross-border, and which are affected by the Whistleblower Protections Act. In particular, this submission has been informed by K&L Gates' experience in advising clients on how to adopt good (and best) governance practices, and the impact on their governance regimes and/or policies and procedures as a result of the Whistleblower Protections Act.

3. K&L Gates response to Consultation Paper 321 / Regulatory Guide 000: *Whistleblower policies*

ASIC Proposal	Question	K&L Gates response
<p>B1. We propose to give:</p> <p>(a) guidance on the matters that must be addressed by an entity's whistleblower policy under s 1317A(5); and</p> <p>(b) some good practice guidance (which is not mandatory) on establishing, implementing and maintaining a whistleblower policy</p>	<p>B1Q1. Do you agree with our proposed guidance in Section B of draft RG 000? If not, why not?</p>	<p>Whilst the guidance, on the whole, addresses the majority of the key elements of the Whistleblower Protections Act, it does not address a number of relevant issues. In particular:</p> <ul style="list-style-type: none"> • Section B does not provide guidance on the level of detail required to be included about the protections provided in the tax whistleblower regime under the <i>Taxation Administration Act 1953</i>. For instance, can management of disclosures involving potential misconduct in relation to the tax affairs of a company be dealt with as part of its central whistleblower disclosure regime, or is a separate procedure which outlines tax-related disclosures required? • The guidance material raises the issue of a "mixed report" (conduct which relates to a personal work-related grievance but also includes information about misconduct).¹ It makes it clear that a mixed report still qualifies for protection under the whistleblower policy. It is therefore necessary for an employer to be very clear about whether misconduct is present in such a complaint. This may at times be difficult given the current lack of detail or explanation of what constitutes an "improper state of affairs" under the legislation. Further clarification of such conduct in the guidance material by way of examples may be of assistance. • Section B of draft RG 000 does not clarify whether relevant misconduct under a whistleblower policy is limited to breaches of Commonwealth laws or also encompasses criminal offences under State laws, such as Occupational Health and Safety breaches. While the details may not need to be included in the policy, guidance from ASIC as to how this will be interpreted would be a helpful inclusion in the Regulatory Guide.

¹ ASIC, Regulatory Guide 000: *Whistleblower policies*, August 2019, 18.

ASIC Proposal	Question	K&L Gates response
	<p>B1Q2. Do you agree that the information that must be covered by a whistleblower policy, as set out in s 1317AI(5), has been adequately addressed in our proposed guidance? If not, please provide details</p>	<p>We consider that the information set out in the proposed guidance goes above and beyond the level of detail and content required to be compliant with section 1317AI(5). It is important to note that s1317AI(5) requires a whistleblower policy to set out certain information, but does not prevent the policy from referring out to additional guides or notes (whether internally prepared or prepared by ASIC) to provide greater context (rather than having all detail set out, or replicated in the organisation's whistleblower policy. By way of example, the policy should include "information about the protections available" to whistleblowers, but the Act does not specifically require (as the guidance note does) that the policy has to prescribe what methods the company has in place for protecting confidentiality.² Further, while the policy should be clear that it does not capture "personal work related grievances", RG 000 provides that the policy should detail what these are.³ We query if it would be enough to instead refer to examples provided in the relevant company policy and procedure that applies to such matters.</p> <p>Further, while we understand the policy needs to make clear the basis on which anonymous disclosures can be made, in our view the requirements of RG 000.93 and 94 go further than required under the Act, and will add to the length and complexity of any policy and its practical operation.</p> <p>We consider that the requirements of s 1317AI(5) could be met without the extent of detail and prescriptive nature proposed in the draft guidance.</p> <p>In our view, this ought to be amended before the guidance is formalised so as to ensure the extent of detail prescribed by the guidance is not counter-intuitive (by being too prescriptive and detailed) to the objectives of the legislation, which was to provide protection to whistleblowers.</p>
	<p>B1Q3. Do you agree that the matters we have included in our proposed guidance will be useful in helping entities to establish,</p>	<p>The proposed guidance spans some 49 pages of information that is often highly prescriptive. In our view, the comprehensive detail provided by the guide makes it more difficult to produce a clear and concise policy that</p>

² Ibid, 27.

³ Ibid, RG 000.53.

ASIC Proposal	Question	K&L Gates response
	implement and maintain a robust and clear whistleblower policy? If not, please provide details.	would be easily comprehensible for a potential whistleblower who is not familiar with the Whistleblower Protections Act or general legal concepts.
	B1Q4. Do you agree that 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.	Yes. Organisations covered by the Whistleblower Protections Act will often have their own separate policies and procedures to deal with issues and concerns that do not come within the purview of the Act, such as a grievances procedure, code of conduct or process for handling personal work related grievances. However, as outlined at B1Q1, guidance is required as to how an entity should deal with the distinction between an improper state of affairs and personal work-related grievance.
	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.	Given the Whistleblower Protections Act defines "eligible whistleblower" to include individuals from outside the organisation, it is difficult to see how an entity can avoid having a policy that covers those individuals. We consider that this can be dealt with fairly simply by having clear contact points (both internally and externally to the organisation) to which disclosures can be made by both internal and external whistleblowers.
	B1Q6. Is the proposed good practice guide useful and appropriate? If not, please provide details.	<p>The proposed good practice guide does provide some useful information for entities about the elements of a whistleblower policy and the meaning of the terms in the legislation. However, as described above, the level of detail proposed in the guide has the potential to make policies cumbersome and difficult to understand/follow for potential whistleblowers. The combination of both the obligatory elements of a whistleblower policy with good practice guidance in Part B has the potential to be confusing. We are concerned that this may make it difficult for companies (and any others who can access the guide) to delineate between what must be in a policy as opposed to ASIC's good practice recommendations.</p> <p>This is a concern in circumstances where entities run the risk of incurring significant penalties for non-compliance with the regime.</p>
	B1Q7. Do you agree with our proposed good practice guidance that entities' whistleblower policies could include a statement discouraging deliberate false	We agree that entities' whistleblower policies should include a statement discouraging deliberate false reporting. Such conduct potentially constitutes misconduct where committed by an employee.

ASIC Proposal	Question	K&L Gates response
	reporting? If not, please provide reasons.	We consider that the guidance should clarify whether it is appropriate for an entity to engage in disciplinary action against a discloser who makes a deliberate or malicious false report which has significant detrimental effects for the organisation. Also, the guidance should clarify what options are available where a deliberately false report is made by an external discloser. While these details do not need to be included in a company's policy <i>per se</i> , guidance on how they will be interpreted will be helpful to clients in managing their policies.
	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.	Encouraging smaller entities to authorise an independent whistleblower service provider to receive disclosures, or engaging a third party service provider to help investigate disclosures, is appropriate. We agree with ASIC's rationale that these organisations often have an insufficient number of staff to take on eligible recipient responsibilities, particularly given ASIC's recommendation that a whistleblower policy nominate eligible recipients who are outside the chain of command to take on whistleblower protection and investigation officer responsibilities. ⁴ In those situations, using an outside service provider can help maintain the independence and impartiality of an investigation into a disclosure. The use of a third party provider for any entity (large or small) to manage and investigate disclosures will help ensure the confidentiality and anonymity of the disclosure and investigation process. That said, it should be recognised that the engagement of an external provider will result in increased compliance costs for smaller companies.
	B1Q9. Do you have any suggestions on how the guidance in Section B of draft RG 000 can be improved? Please provide details.	The guidance can be improved by being simplified, and providing a streamlined approach that identifies the information required to satisfy the 7 elements of a whistleblower policy identified in s 1317AI(5), and separating other elements (such as the good practice guidelines that have been incorporated into Part B), so as to make the document easier to navigate. This will also assist entities in creating a policy that is tailored to their business and staff and meets their legal compliance obligation. We would be happy to provide a mark-up of our suggested changes to the

⁴ Ibid, RG 000.75.

ASIC Proposal	Question	K&L Gates response
		<p>guidance note to assist with achieving this objective, if ASIC considers it appropriate.</p> <p>The note will also need to make clear to what extent, and in what circumstances the "good governance" aspects of the note will be taken into account by a regulator (rather than the top line compliance requirements).</p>
	<p>B1Q10. Are there any practical problems associated with our guidance? Please provide details.</p>	<p>In our view, the proposed guidance offers an overly prescriptive procedure which may prove onerous for companies to follow, and does not accord with ASIC's acknowledgement that there "is a no one-size-fits-all whistleblower policy".⁵</p> <p>The guidance raises a number of practical problems for companies covered by the Whistleblower Protections Act. In particular:</p> <ul style="list-style-type: none"> • The proposed guidance is so prescriptive and extensive so as to risk going against the intention of the Whistleblower Protections Act. That is, to make it easier for potential whistleblowers to know when and how to report misconduct. • The level of detail required by the guidance may undermine an organisation's ability to develop a policy that is tailored to its requirements, size, structure and business. In addition, an extensive whistleblower policy which covers every aspect of the guidance may increase the risk of unnecessary reports or claims against the company. • Further, the level of detail set out in the guidelines does not readily lend itself to a standard company policy and procedures document. An ideal whistleblower policy, whilst being robust and addressing the requirements of s 1317AI(5), should be user-friendly, such that a potential whistleblower can easily understand who to approach to make a disclosure, what are the requirements and protections around making a disclosure, and what the organisation will do to investigate potential wrongdoing. A long and cumbersome

⁵ Ibid, RG 000.25.

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		<p>document may run the risk of deterring, rather than encouraging disclosures of wrongdoing, and may be confusing for staff who are not "au fait" with the law.</p> <ul style="list-style-type: none"> <li data-bbox="1167 371 2049 1077"> <p>A large number of companies in Australia have a global presence. These companies are required to navigate the differing regulatory environments in which the company exists through their policies. An overly prescriptive policy on managing whistleblowers in the Australian jurisdiction undermines an international company's ability to take a uniform approach towards whistleblowing as part of its global policies and corporate governance regime, and can undermine the organisation's ability to foster a culture of transparency if differing standards are applied across jurisdictions. This has the potential to cause confusion with respect to disclosures that have cross-border implications (whether from employees or other "whistleblowers"). In this regard, we respectfully disagree with ASIC's perspective that "[d]ue to varying whistleblowing legislation across jurisdictions, multinational entities should consider whether it would be more appropriate to establish, implement and maintain a standalone whistleblower policy for their Australian operations."⁶ Such an approach does not accord with ASIC's guidance elsewhere in RG 000 that "[l]arger entities or geographically dispersed entities could appoint a number of whistleblower protection officers who report to an individual who is appointed as the coordinator of the entity's whistleblower policy"⁷ – is it the intention that the individual coordinator administer and manage several different whistleblower policies?</p> <li data-bbox="1167 1098 2049 1216"> <p>Whilst RG 000 allows an entity's policy to encourage employees and external disclosers to make a disclosure to the entity in the first instance,⁸ there is no guidance provided on how to manage and coordinate eligible recipients. The legislation details several</p>

⁶ Ibid, RG 000.36.

⁷ Ibid, RG 000.78.

⁸ Ibid, 20.

ASIC Proposal	Question	K&L Gates response
		<p>eligible recipients, and a multitude of roles which can be appointed, including whistleblower officers, investigation officers and independent service providers. This multitude of roles may prove confusing and undermine the policy's intent to provide a procedure that is easy to follow, and may result in extensive use of resources and high compliance cost.</p>
<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.</p>	<p>B2Q1. Do you agree with our proposed additional good practice guidance in Schedule C of draft RG 000? If not, please provide details.</p>	<p>K&L Gates agrees with the principles set out in the good practice guidelines, however we consider that the good practice guidelines should be consolidated in Schedule C, rather than being split between Schedules B and C. The current format of RG 000 is confusing and detracts from the central elements required to be included in a compliant policy under s 1317A(5).</p>
	<p>B2Q2. Do you have any suggestions on how the additional good practice guidelines can be improved? Please provide details.</p>	<p>See response to B2Q1.</p>
	<p>B2Q3. Are there any practical problems associated with our additional good practice guidance? Please provide details.</p>	<p>Schedule C invites entities to consider the Australian Standard AS 8004-2003 <i>Corporate governance – Whistleblower protection programs for entities</i> and International Standard ISO 37002 <i>Whistleblowing management systems – Guidelines</i> in drafting its whistleblower policy, however these documents are currently unfinalised, and may serve to further confuse the process of drafting a whistleblower policy where there may be conflict between ASIC's guidance and other documents.</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</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>The draft Regulatory Guide in its current form would pose a disproportionate regulatory burden on public companies that are small not-for-profits or charities. However, we do not consider that such entities should be exempt from implementing a whistleblower policy for this reason, as they are not immune to the types of misconduct that are contemplated by the Whistleblower Protections Act.</p> <p>A less prescriptive, simpler guidance material could make it easier for not-for-profits and charities to implement their own whistleblower policies. Alternatively, ASIC could provide a short precedent document detailing the basic elements of a compliant whistleblower policy which could be adapted</p>

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<p>exempting public companies that are small not-for-profits or charities, if an exemption is considered appropriate.</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> <ul style="list-style-type: none"> (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? <p>Please provide details</p>	<p>by small organisations with limited resources.</p> <p>See response to C1Q1.</p>

Contacts	
<p>Caroline Carnegie Partner +... _____</p>	<p>Michaela Moloney Partner +... _____</p>
<p>Sarah Goegan Lawyer +... ... _____</p>	