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Consultation Paper 321 – Whistleblower Policies

Dear Sir/Madam,

Philanthropy Australia welcomes the opportunity to make this submission to the Australian Securities Investments Commission (ASIC) in response to Consultation Paper 321 – Whistleblower Policies. Our submission specifically addresses the issue of granting an exemption to the whistleblower protection regime contained within the *Corporations Act 2001* as it applies to public companies registered with the Australian Charities and Not-for-profits Commission (ACNC).

About Philanthropy Australia

As the peak body, Philanthropy Australia's purpose is to serve the philanthropic community to achieve more and better philanthropy.

The community we serve consists of funders, grant-makers, social investors and social change agents working to achieve positive social, cultural and environmental change by leveraging their financial assets and influence.

Informed, independent and with reach and credibility, Philanthropy Australia gives its Members a collective voice and ability to influence and shape the future of the sector and advance philanthropy.

We also serve the community to achieve more and better philanthropy through advocacy and leadership; networks and collaboration; professional learning and resources; and, information and data-sharing.

Our membership consists of approximately 800 trusts, foundations, organisations, families, individual donors, professional advisers, intermediaries and not-for-profit organisations.

Comments on Proposed Exemption for Public Companies that are Charities

Philanthropy Australia notes that ASIC is consulting on a proposal to exempt public companies that are small not-for-profits or charities from the requirement to have a whistleblower policy.

Philanthropy Australia recognises the importance of having appropriate whistleblower protections in place within organisations. However, it is important that the benefits flowing from any mandatory requirements are balanced against the additional regulatory burden they may impose, and also that any requirements take into account the different contexts in which organisations operate.

In this regard, Philanthropy Australia notes that the ACNC regulatory framework was established in 2012 to provide a dedicated regulatory framework for charities. This framework seeks to reflect the specific context within which charities operate, and is also consistent across the different organisational types of charities. It includes governance standards and financial reporting requirements, and involved ‘turning off’ various governance requirements previously contained within the *Corporations Act 2001* and administered by ASIC prior to the establishment of the ACNC.

The new whistleblower protection regime contained within the *Corporations Act 2001* was not designed specifically for charities. Charities undertake various activities, and have different operating characteristics to for-profit entities. This is the case for philanthropic organisations, some of which use a public company structure, usually in the form of a company limited by guarantee with no shareholders.

It is problematic to adopt a ‘one size fits all’ approach focused on the corporate form of an entity, rather than the operating characteristics of the entity. However, the new whistleblower protection regime has adopted this latter approach.

As a result of the regime, charities which are public companies will be subject to an increased regulatory burden, without evidence of the benefits that justify this increased regulatory burden.

In addition, there will be inconsistent requirements applying to different types of charities, with some charities required to have a whistleblower policy in place, and others not required to do so, purely on the basis of the organisational type that the charity has adopted.

For this reason, Philanthropy Australia believes that ASIC should use its broad powers under s1317AJ of the *Corporations Act 2001* to exempt all charities registered with the ACNC from the requirement to have a whistleblower policy. The ACNC should then be requested to develop appropriate guidance for charities to promote the adoption of appropriate and proportionate whistleblower protections within charities.

Recommendation 1

The Australian Securities and Investments Commission should use its powers under s1317AJ of the Corporations Act 2001 to exempt all charities registered with the Australian Charities and Not-for-profits Commission from the requirement to have a whistleblower policy. The Australian Charities and Not-for-profits Commission should then be requested to develop appropriate guidance for charities in relation to whistleblower protection.

If ASIC does not agree with recommendation 1, Philanthropy Australia believes that it should provide a more targeted exemption for charities registered with the ACNC that are public companies with the equivalent of 50 full-time equivalent employees or less. Such a threshold strikes a balance between not burdening smaller and less complex charities, whilst still including larger and more complex charities within the whistleblower protection regime. The ACNC could be requested to develop appropriate guidance in relation to whistleblower protection for charities under this threshold.

We would strongly caution against using revenue or assets as the measure for determining whether an organisation is 'small'.

This is because in the case of philanthropic organisations, it will be common to have organisations whose revenue or assets may be quite high, however their operations will primarily be focused on grant-making. They will therefore be less complex than other forms of 'operating' charities and will generally only employ a small number of employees. In such situations, the benefits of a mandatory requirement to have a whistleblower policy are questionable and would be outweighed by the additional regulatory burden such a requirement imposes.

Recommendation 2

If the Australian Securities and Investments Commission does not agree with recommendation 1, it should instead provide an exemption from the requirement to have a whistleblower policy for charities registered with the ACNC that are public companies with the equivalent of 50 full-time equivalent employees or less.

Next Steps

Philanthropy Australia once again thanks ASIC for the opportunity to provide these comments. If ASIC wishes to discuss any of the matters raised in this submission further, please do not hesitate to contact Sarah Wickham, Policy & Research Manager ([...](#)).

Yours Sincerely



Sarah Davies

Chief Executive Officer