



Submission from the Association of Independent Schools of NSW

CP 321 Whistleblower policies

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Submission from the Association of Independent Schools of New South Wales (AISNSW) Ltd

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AISNSW will be pleased to elaborate on any aspects of this submission as required.

Yours sincerely,

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Chief Executive



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Introduction

About the NSW independent school sector

The Association of Independent Schools of New South Wales (AISNSW) as the peak body representing the independent school sector in New South Wales welcomes the opportunity to respond to ASIC Consultation Paper 321 - Whistleblower policies in relation to mandatory whistleblower policies under section 1317AI of the *Corporations Act 2001* (Cth) (**Corporations Act**), including the draft regulatory guide (**Regulatory Guide**).

The NSW independent school sector is diverse and provides the community with choice in education. The independent school sector in NSW has more than 500 schools and campuses, providing education for 204,000 students and accounts for 17% of NSW school enrolments and 48% of non-government students. Two-thirds (65%) of independent schools in NSW are in lower socio-economic school communities.

Over the last five years, enrolments in the NSW independent schools sector have grown by 20,000 students, or 12%, which is almost double the state's percentage growth in enrolments. Enrolment growth in the NSW independent sector has been a consistent trend for more than twenty years, with most of this growth attributable to the significant increase in the number of low fee independent schools. In NSW, 37% of independent schools are located outside of metropolitan Sydney.

It is relevant to note that 75% (294) of independent schools in NSW have consolidated revenue of less than \$50m and fewer than 100 employees. In addition, many independent schools are small, with almost half (45%) educating fewer than 200 students and have fewer than 20 teachers.

The majority of independent schools are companies limited by guarantee although there are some incorporated under legislation or under church ordinances. There are a small number of incorporated associations.

Most independent schools are set up and governed independently on an individual school basis. However, some independent schools with common aims and educational philosophies are governed and administered as systems, for example those within the Anglican Schools Corporation and Seventh-day Adventist systems.

Overview of submission

AISNSW supports practices that encourage whistleblowers and complainants to identify incorrect practices in organisations.

It is important however, that no undue, increased and disproportionate regulatory burden is inadvertently placed upon those organisations which are not well-placed to respond.

AISNSW submits that ASIC should make an order by legislative instrument under section 1317AJ of the Corporations Act to:

- relieve NSW independent schools:
 - from all of the requirements of section 1317AI of the Corporations Act;
 - in the alternative, from the requirement that a whistleblowing policy set out the matters referred to in subsection (5);

The basis for these submissions is that:

- independent schools operate in an industry that is already heavily regulated by existing compliance regimes and have (amongst other things) existing mandatory complaint processes; and
- the mandatory policy requirements set out in the Regulatory Guide are more prescriptive than is appropriate for independent schools.

The information provided in this submission is specifically in relation to independent schools in NSW. However, we are reasonably confident that similar arrangements are in place, and similar issues will arise, in other jurisdictions.

AISNSW recognises that despite there not being a mandatory policy requirement under section 1317AI of the Corporations Act, those entities that meet the definition of a 'regulated entity' will still be required to comply with Part 9.4AAA of the Corporations Act.

As a result, many independent schools will implement a whistleblower policy to properly administer and ensure compliance with Part 9.4AAA of the Corporations Act. However, for the reasons set out in these submissions, requiring compliance with section 1317AI and the Regulatory Guide will create disproportionate compliance burdens and reduced flexibility for schools to adopt appropriate mechanisms with which to comply with Part 9.4AAA of the Corporations Act.

Existing regulatory regimes for independent schools

Independent schools in NSW are already subject to significant regulation under a range of regimes and by a range of regulatory authorities including the NSW Education Standards Authority (**NESA**), the NSW Ombudsman, the NSW Department of Education, the Australian Charities and Not-for-profits Commission (**ACNC**) and the Australian Government Department of Education.

The nature and extent of the regulation of the education sector, as well as nature and size of the significant majority of schools in NSW, means that independent schools are different to other types of organisations that will be a 'regulated entity' for the purposes of Part 9.4AAA of the Corporations Act.

We have set out below some of the compliance regimes which apply to independent schools in NSW. These regimes impose prescriptive obligations which are audited, monitored and scrutinised on a regular basis. Many of the regimes include complaint handling mechanisms.

NESA

Independent schools must be registered with the regulatory authority, NESA, to operate in NSW (*Education Act 1990* (NSW)) and are required to apply for registration every five years in order to continue to operate a school in NSW.

In NSW, all independent schools must have evidence that they implement policies and procedures in relation to governance of the school and evidence that all school premises comply with all relevant legislation.

Schools must be compliant with the registration requirements at all times and can be inspected by NESA to ensure they are compliant.

The *Education Standards Authority Act 2013* (NSW) articulates the extensive requirements that independent schools must evidence they meet in order to be allowed to operate. These areas include:

- Requirements for the school's 'responsible persons' (i.e. senior officers and board members) to be fit and proper.
- Proper governance of the school.
- Financial viability.
- Annual reporting.
- Providing data to the Minister.
- Complaints and grievance. For example, all independent schools in NSW are already required by NESA to publish and implement complaints handling policy and procedures.

These are further elaborated on in the Registered and Accredited Individual Non-government Schools (NSW) Manual published by NESA (which runs to approximately 100 pages) and the Registration Systems and Member Non-government Schools (NSW) Manual (which is approximately 125 pages).

A school's compliance with the registration requirements is reviewed in detail by inspectors from NESA each five years.

NESA can also monitor compliance with registration requirements on an ongoing basis as needed.

Complaints about the conduct of schools can also be, and on occasion are, made to NESA which can investigate such complaints.

Not-for-profit requirements

Under the *Australian Education Act 2013* (Cth) and the *Education Act 1990* (NSW), independent schools must also be not-for-profit institutions in order to receive Commonwealth and State government funding. The NSW Department of Education undertakes an annual audit program of independent schools to ensure that funds are being used appropriately. This involves detailed auditing of a school's governance and financial arrangements to ensure that school assets and income are being used only as required for the operation of the school; to ensure that property, goods and services are purchased as required for the operation of the school, at reasonable market value and on a basis that is not otherwise unreasonable in circumstances where the school is receiving government funding; and to ensure that members of the governing body are not remunerated for their services.

Child protection legislation and reporting requirements

There are also stringent legislative reporting requirements in relation to child protection issues under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), *Child Protection (Working with Children) Act 2012* (NSW) and the *Ombudsman Act 1974* (NSW). The handling of reportable conduct matters by schools is also subject to review and supervision by the NSW Ombudsman.

Australian Charities and Not-for-profits Commission

Under the Australia Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act) entities that are registered charities and not-for-profits have obligations under the ACNC Act. These include in relation to keeping financial records and operational records, reporting their information annually and complying with ACNC governance standards and (if applicable external conduct standards). The ACNC Act was introduced to enhance public trust and confidence as well as promoting the reduction of unnecessary regulation in the not-for-profit sector.

Mandatory policy requirement is overly prescriptive and limits flexibility

AISNSW respectfully submits that for independent schools, the policy requirements set out in section 1317AI of the Corporations Act in the Regulatory Guide:

- are overly prescriptive and create a disproportionate compliance burden;
- do not sufficiently reflect that organisations, such as independent schools:
 - are already heavily regulated,
 - already have significant existing compliance burdens (set out above) and
 - require flexibility in how they deal with disclosures; and

- appear to have been designed for larger organisations with greater resources (as is recognised by the application of the requirement to large proprietary companies only).

AISNSW submits that the mandatory whistleblower policy requirements under section 1317AI of the Corporations Act (when viewed alongside the Regulatory Guide) are not appropriate for independent schools.

The policy and procedures adopted in schools for all compliance requirements will vary according to both their size, organisational structure and financial resources. Independent schools will therefore require varying levels of flexibility within which to apply the requirements under Part 9.4AAA of the Corporations Act.

The AISNSW recognises that the Regulatory Guide acknowledges that one size does not fit all (RG000.25). However, independent schools are generally risk averse and because the Regulatory Guide sets out highly detailed best practice recommendations, schools may feel compelled to include the level of detail apparently expected, while struggling to manage the lack of flexibility that may result.

Breadth of eligible whistleblowers in independent schools

A unique feature of independent schools is there are a significant number of people who, under Part 9.4AAA of the Corporations Act, would be 'eligible whistleblowers' as they are individuals who provide unpaid services (i.e. volunteers) to the school. This includes many parents who at some stage in their child's attendance at a school will volunteer in some capacity or another including for a short period of time (whether a one-off, for a school term or holiday camp etc).

This also means that their relatives, in particular their children who attend the school, are capable of being 'eligible whistleblowers'. This unique situation, where the majority of an organisation's clients (namely parents, children and their families) are also eligible whistleblowers would be very different to most organisations, including most other charitable organisations. As identified above, all independent schools in NSW are required to have policies and procedures in place for managing complaints.

Given the broad nature of matters that can be disclosed that qualify for protection, it is likely that independent schools will be in numerous situations where they will have to treat parents and potentially children, as 'eligible whistleblowers'.

It is situations like these where independent schools require flexibility within which to apply Part 9.4AAA of the Corporations Act. It is difficult to see how such flexibility can be achieved if independent schools are required to have a mandatory policy in place that complies with the ASIC Regulatory Guide.

Order regarding independent schools

It is therefore submitted that ASIC should make an order by legislative instrument under section 1317AJ of the Corporations Act to:

- relieve NSW independent schools:
 - from all of the requirements of section 1317AI of the Corporations Act; or
 - in the alternative, from the requirement that a whistleblowing policy set out the matters referred to in subsection (5).

Discussion questions

In response to the particular questions set out in Part B1 and C1 of the Consultation Paper, our response in respect of independent schools is:

B1Q1 Do you agree with our proposed guidance in Section B of draft RG 000? If not, why not?

No, for the reasons set out in this submission.

B1Q2 Do you agree that the information that must be covered by a whistleblower policy, as set out in s1317AI(5), has been adequately addressed in our proposed guidance? If not, please provide details.

No, it is not appropriate for the independent school sector.

B1Q3 Do you agree that the matters we have included in our proposed guidance will be useful in helping entities to establish, implement and maintain a robust and clear whistleblower policy? If not, please provide details.

No, for the reasons set out in this submission.

B1Q4 Do you agree with 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.

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.

No, as the potential list is too large. This is particularly the case in respect of volunteers in organisations like a school.

B1Q6 Is the proposed good practice guidance useful and appropriate? If not, please provide details.

No, for the reasons set out in this submission.

B1Q7 Do you agree with our proposed good practice guidance that entities' whistleblower policies could include a statement discouraging deliberate false reporting? If not, please provide reasons.

Yes.

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.

No. The cost could be prohibitive for small organisations.

B1Q9 Do you have any suggestions on how the guidance in Section B of draft RG 000 can be improved? Please provide details.

See suggestions set out in this submission.

B1Q10 Are there any practical problems associated with our guidance? Please provide details

Yes, see issues set out in this submission.

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.

Yes, for the reasons set out in this submission.

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: (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? Please provide details.

If AISNSW's primary submissions are not accepted, AISNSW respectfully submits that ASIC should make an order by legislative instrument under section 1317AJ of the Corporations Act to:

- relieve public companies that are registered charities and not-for-profit organisations with a size threshold consistent with the test for 'small proprietary companies' set out in section 45A of the Corporations Act:
 - from all of the requirements of section 1317AI of the Corporations Act;
 - in the alternative, from the requirement that a whistleblowing policy set out the matters referred to in subsection (5).

It is not clear to AISNSW why 'small proprietary companies' are exempt from the policy requirement under section 1317AI of the Corporations Act and there is no identical threshold for public companies.

AISNSW submits that the existing legislative size thresholds of:

- a small company limited by guarantee; or
- the size thresholds under the ACNC Act,

are not appropriate to apply to determine the compliance burden of companies under s1317AI of the Corporations Act. The revenue tests under the above thresholds are wholly disproportionate to the test applied in determining a 'small proprietary company', and would have no effect on reducing the disproportionate compliance burden that exists within the legislation as is currently drafted.

Taking for example the highest existing revenue threshold of \$1m for a 'large charity' under the ACNC Act, most entities, including most independent schools, would be above \$1million in revenue, and therefore such a threshold would have no effect in reducing the disproportionate compliance burden. To set such a threshold would be ineffective.

If a threshold is to be placed on companies limited by guarantee that are charities, AISNSW submits that it is appropriate to implement a similar threshold test as that set out in section 45A of the Corporations Act, that is, a public company limited by guarantee is only required to have a policy under section 1317AI if it satisfies at least two of the below criteria:

- a) the consolidated revenue for the financial year of the company and any entities it controls is \$50 million or more;
- b) the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is \$25 million or more; and
- c) the company and any entities it controls have 100 or more employees at the end of the financial year.

Concluding remarks

AISNSW appreciates the opportunity to contribute to the development of the Regulatory Guide and to provide comments in response to Consultation Paper 321 Whistleblower policies.

AISNSW supports practices that encourages schools to correct practices within their organisation. However considering the extensive regulatory requirements already placed on independent schools in NSW, the proposed Regulatory Guide is more prescriptive than appropriate for schools and the vast majority (75%) of independent schools in NSW have consolidated revenue of less than \$50m and fewer than 100 employees. To remediate this undue regulatory burden, AISNSW submits that ASIC should make an order by legislative instrument under section 1317AJ of the Corporations Act to relieve NSW independent schools:

- from all of the requirements of section 1317AI of the Corporations Act; or
- in the alternative, from the requirement that a whistleblowing policy set out the matters referred to in subsection (5).

AISNSW is happy to provide further comment on any of the points raised in this submission.