



**ASIC**  
Australian Securities &  
Investments Commission

**REPORT 635**

# **Response to submissions on CP 321 Whistleblower policies**

November 2019

## **About this report**

This report highlights the key feedback from the submissions received on Consultation Paper 321 *Whistleblower policies* (CP 321) and details our responses to that feedback.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 270 *Whistleblower policies* (RG 270).

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## A Overview and consultation process

- 1 The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Whistleblower Protections Act) amended the whistleblower protections in the *Corporations Act 2001* (Corporations Act) and created a single, strengthened whistleblower regime for Australia's corporate sector. The amendments require public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy and make it available to their officers and employees by 1 January 2020.
- 2 In [Consultation Paper 321 Whistleblower policies](#) (CP 321), we consulted on our proposed guidance for establishing, implementing and maintaining a whistleblower policy that complies with the obligations under the Corporations Act.
- 3 In CP 321, we further consulted on a proposal to use our power under s1317AJ of the Corporations Act to exempt public companies that are small not-for-profits or charities from the requirement to have a whistleblower policy, and on the appropriate size threshold that should be applied.
- 4 This report highlights the key feedback from the submissions received on CP 321 and our responses to that feedback.
- 5 This report is not intended to be a comprehensive summary of all responses received. It is also not intended to be a detailed report on every question from CP 321. We have limited this report to the key issues.
- 6 We received 40 written submissions to CP 321, including eight confidential submissions. They came from a range of interested parties including legal and consulting firms, professional and industry bodies, companies, community organisations, academics and members of the public. We are grateful to respondents for taking the time to send us their comments.
- 7 For a list of the non-confidential respondents to CP 321, see the appendix. Copies of these submissions are currently on the CP 321 page on the ASIC website.

### Feedback received

- 8 Respondents recognised the importance of a robust whistleblower protection regime in encouraging the disclosure of wrongdoing and improving corporate culture and governance. They further recognised that regulatory

guidance on whistleblower policy is an important resource for entities in establishing, implementing and maintaining a policy.

- 9 The main feedback related to the following:
- (a) the structure and language of the proposed guidance relating to the requirements in s1317AI(5) of the Corporations Act and the good practice guidance;
  - (b) whether the focus of an entity's whistleblower policy should be on disclosures of information that qualify for protection, rather than reports about all issues and concerns, in relation to an entity;
  - (c) whether an entity's whistleblower policy should be made available to 'eligible whistleblowers' outside the entity;
  - (d) whether the proposed good practice guidance should state that smaller entities should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosures;
  - (e) whether small not-for-profits and charities that are companies limited by guarantee should be exempt from the requirement to have a whistleblower policy; and
  - (f) the threshold that should be applied to determine which entities are exempt from the requirement to have a whistleblower policy.

Note: In this report, all references to sections (s) are to the Corporations Act, unless otherwise specified.

- 10 We have issued [Regulatory Guide 270 Whistleblower policies](#) (RG 270). RG 270 has been informed by the feedback received on [CP 321](#).

- 11 While much of our guidance is consistent with our proposals in CP 321, we have revised the regulatory guide to further explain the approach of our guidance and our expectations on entities, including clarifying the difference between guidance on the requirements in s1317AI(5) and non-mandatory good practice guidance.

- 12 In this report, we further discuss the feedback we received on the question of providing relief to certain not-for-profits or charities from the requirement of having a whistleblower policy.

## B Proposed guidance on whistleblower policies

### Key points

This section outlines the key issues highlighted by respondents in relation to our proposed regulatory guidance, including:

- general feedback on the proposed guidance on the requirements in s1317AI(5) and the good practice guidance;
- whether the focus of an entity's whistleblower policy should be on disclosure of information that qualifies for protection, rather than reports about all issues and concerns;
- whether an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity; and
- whether the proposed good practice guidance should state that smaller entities should consider authorising independent whistleblower service providers to receive and investigate disclosures.

This section also includes our responses to the feedback we received.

### General feedback on the proposed regulatory guidance

- 13 In [CP 321](#), we asked stakeholders:
- (a) whether they agreed with the proposed guidance in Section B of the draft regulatory guide;
  - (b) whether the information that must be covered by a whistleblower policy, as set out in s1317AI(5), had been adequately addressed; and
  - (c) whether matters included in the proposed guidance were useful in helping entities establish, implement and maintain a robust and clear whistleblower policy.
- 14 We further asked stakeholders whether the proposed good practice guidance in Section B and additional good practice guidance in Section C of the draft regulatory guide were useful and appropriate.
- 15 There was wide recognition of the regulatory guide as a comprehensive and useful resource to assist entities in establishing, implementing and maintaining a whistleblower policy. Respondents supported the greater robustness in whistleblower policies that would result from the requirement under s1317AI(5), and welcomed the inclusion of good practice guidance to further strengthen the policies.
- 16 The key feedback from respondents is discussed in paragraphs 17–29.

## Distinguishing between guidance relating to requirements in s1317AI(5) and good practice

- 17 A number of respondents observed that Section B of the draft regulatory guide needed to make a clearer distinction between the guidance relating to the requirements in s1317AI(5) and the good practice guidance.
- 18 Although the good practice guidance was clearly labelled with subheadings throughout the draft regulatory guide, some respondents suggested that the presentation could be further improved and more consistent language could be used when referring to the guidance relating to the requirements in s1317AI(5) and the good practice guidance.
- 19 Some respondents also suggested that there needed to be a clearer distinction between the good practice guidance under Section B and the additional good practice guidance under Section C.

### *ASIC's response*

We have reviewed and updated the structure of the regulatory guide to further differentiate the guidance relating to the requirements in s1317AI(5) from the good practice guidance.

We have revised Section B so it now only contains guidance on *establishing* a whistleblower policy. In addition, we have changed 'good practice guidance' to 'good practice tips' and shaded them in grey.

The revised Section C now contains good practice guidance on *implementing and maintaining* a whistleblower policy.

The regulatory guide notes that entities are not required to follow the good practice tips and guidance but highlights that following the good practice tips in Section B and good practice guidance in Section C may assist entities in enhancing the useability of their whistleblower policies.

To provide a clearer overview of the regulatory guide, the revised Table 1 ('Summary of our guidance on establishing a whistleblower policy') provides a summary of Section B only and includes separate columns for our guidance on the requirements in s1317AI(5) and our good practice tips. In addition, the new Table 2 ('Summary of our good practice guidance on implementing and maintaining a whistleblower policy') provides a summary of the good practice guidance in Section C.

We have also reviewed and updated the language in the regulatory guide by more consistently using 'must' and 'should' when referring to guidance relating to the requirements in s1317AI(5), and using 'may' and 'could' for the examples and good practice tips in Section B and good practice guidance in Section C.

## Legalistic language and references to the legislation

- 20 The majority of respondents supported the proposed good practice guidance that an entity's whistleblower policy should use plain English and avoid industry jargon.
- 21 A number of respondents expressed concern that if they incorporated the legal language in the draft regulatory guide, they would end up with a legalistic, information-dense policy that would be difficult for users to understand.

### *ASIC's response*

We have included language from and references to the legislation in the regulatory guide because we are discussing what is required to meet legal obligations. It is also to clarify what is mandatory and non-mandatory. The guidance is addressed to entities and their advisers to help them meet their obligations, not to whistleblowers themselves.

As we outline in the regulatory guide, we encourage entities to adopt plain English in their whistleblower policies and avoid legal and industry jargon.

## Level of detail and prescription

- 22 Many respondents noted that the draft regulatory guide was very comprehensive and contained useful guidance on establishing, implementing and maintaining a whistleblower policy.
- 23 Although some noted that the draft regulatory guide was too long, detailed and complex, these respondents, along with other respondents, requested further guidance on a range of matters (e.g. how multinational entities should cater to the varying whistleblowing legislation globally, and how investigations can be undertaken while preserving confidentiality of a discloser's identity).
- 24 A number of respondents expressed concern that the draft regulatory guide did not provide entities with sufficient flexibility to develop a policy that is tailored to their circumstances. For example:
- (a) keeping a discloser informed at various stages of an investigation may not be appropriate in all situations; and
  - (b) for larger entities, it is difficult to specify the names of all internal reporting points and whistleblower protection officers.
- 25 There was some confusion about whether the examples in the draft regulatory guide (which were intended for entities to adapt to their circumstances) were prescribed content for entities' whistleblower policies.



For example, the practical measures for protecting disclosers from detriment may not be applicable to some entities.

- 26 There was also confusion among respondents that the good practice guidance was mandatory. For example, the good practice guidance relating to:
- (a) roles and responsibilities under a policy, including the good practice guidance on ‘whistleblower protection officer and whistleblower investigation officer’;
  - (b) establishing a risk assessment framework and procedures for assessing and controlling the risk of detriment;
  - (c) content of upfront and ongoing training; and
  - (d) periodic reporting to the board.
- 27 In relation to the good practice guidance on ‘whistleblower protection officer and whistleblower investigation officer’, some respondents considered that entities should have the flexibility to determine which functions in their organisation would be most suitable for protecting disclosers and investigating disclosures, and the most appropriate reporting lines for these functions.
- 28 Some respondents also suggested that it would be more appropriate for certain elements of the guidance to be incorporated into process and procedural documents supporting a whistleblower policy, or staff training, rather than be included in the policy itself. For example, specific details about the steps an entity will take, in practice, to protect disclosers from detriment and how an entity will handle and investigate disclosures.

#### *ASIC's response*

We have revised Section B to include examples of policy content to provide entities with flexibility to tailor their policy to their circumstances. For example, in relation to the steps an entity will take, in practice, to protect disclosers from detriment, we have moved detailed content into an example box to illustrate that these are approaches that entities may consider to protect disclosers from detriment.

We have also revised some aspects of our guidance to better indicate the level of detail that we expect in an entity's policy.

We have removed the guidance that an entity should specify the names of the entity's internal reporting points and the whistleblower protection officer, and that larger entities should include information about the internal reporting points and whistleblower protection officer for each site.

In relation to ‘keeping a discloser informed’, we have suggested that an entity's policy may acknowledge that the frequency and timeframe of the updates, and the method for documenting and

reporting the findings, may vary depending on the nature of the disclosure.

As we noted in the section under 'Complying with the requirements', we expect entities to establish a whistleblower policy that is supported by processes and procedures for effectively dealing with disclosures received under the policy. We have incorporated guidance on where entities may refer to and attach links to their more detailed processes and procedures in their policy document, or their staff training information, provided their whistleblower policy sufficiently covers the information required under s1317A(5) (e.g. under 'Support and practical protection for disclosers', 'Ensuring fair treatment of individuals mentioned in a disclosure', and 'Ensuring the policy is easily accessible').

The good practice tips in Section B and the good practice guidance in Section C are not mandatory. The tips and guidance are intended to help entities further enhance their whistleblower policy, processes and procedures, if they are relevant to their circumstances and/or they would benefit the users of their policy.

In relation to 'Roles and responsibilities', this has been moved to Section C to form part of the good practice guidance for implementing and maintaining a policy. We have removed the good practice guidance relating to 'whistleblower protection officers and whistleblower investigation officer'.

## Timing

- 29 Some respondents were concerned there was insufficient time to implement a whistleblower policy that fully complies with the regulatory guide by the legislated deadline of 1 January 2020.

### *ASIC's response*

Entities are required to comply with the requirement to have a whistleblower policy by 1 January 2020.

Entities and their advisers have been aware of the legal obligations in relation to whistleblower policies since the Whistleblower Protections Act passed Parliament in February 2019. In July, ASIC also released [Information Sheet 238 Whistleblower rights and protections](#) to provide guidance to whistleblowers on their rights and protections under the new regime.

We anticipate most entities will need to review and refine their whistleblower policy over time to arrive at a position that best works in the context of their operations. We encourage entities to consider and adopt our good practice tips and good practice guidance, where applicable.

## Feedback on specific aspects of the guidance

- 30 In [CP 321](#), we sought feedback on specific aspects of our guidance. They included:
- (a) whether 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;
  - (b) whether an entity’s whistleblower policy should cover ‘eligible whistleblowers’ outside the entity;
  - (c) whether the proposed good practice guidance that entities’ whistleblower policies could include a statement discouraging deliberate false reporting was appropriate; and
  - (d) whether the proposed good practice guidance should state 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.
- 31 This section provides an overview of the feedback we received on each of the questions above.
- 32 This section also covers the feedback we received on other aspects of the guidance.

### Focus on disclosures of information that qualify for protection

- 33 A number of submissions disagreed that entities’ whistleblower policies should focus only on disclosures of information that qualify for protection as required under s1317AI(5). They noted that:
- (a) the proposed guidance may encourage legalistic policies that make it very difficult for employees to understand what is covered by their entity’s policy;
  - (b) encouraging employees to report all concerns, regardless of whether they qualify for protection, is important to good corporate culture;
  - (c) a sole focus on disclosures that qualify for protection would not provide adequate information to potential disclosers about how their disclosure would be treated if it is assessed to *not* qualify for protection;
  - (d) limiting policies to disclosures that qualify for protection, with reporting for all other issues and concerns reflected under a separate policy, may potentially cause confusion about how to report concerns and dissuade people from raising concerns; and

- (e) many entities, particularly larger entities, already have well-established communication channels that deal with disclosures that are protected by the Corporations Act and the *Taxation Administration Act 1953* (Taxation Administration Act) as well as with disclosures that are not protected.

34 In contrast, some submissions agreed with the proposed guidance that entities should only be required to establish a whistleblower policy that focuses on disclosures that qualify for protection, as required under s1317AI(5). They noted that:

- (a) if a whistleblower policy applied to reports about all issues and concerns, this could confuse and mislead disclosers into believing they will be covered by the whistleblower protections for all information they disclose, which may leave them potentially exposed and unprotected;
- (b) it is important that entities manage expectations at the outset to reduce the likelihood that disclosers assume a report about a concern will qualify for protection when it does not (e.g. personal work-related grievances); and
- (c) the scope of ‘disclosable matters’ under the legislation is very broad, therefore entities may need to treat virtually all complaints as disclosures that qualify for protection to ensure that they do not inadvertently breach the confidentiality provisions.

35 A number of respondents suggested that the guidance should be updated to provide entities the flexibility to exercise discretion to determine the types of matters that are appropriate to be included in their whistleblower policies, based on their company structure, investigative process and the potential disclosures that may be made to the entity. One respondent suggested that the guidance should note that the legislation sets a minimum standard and that entities’ policies may cover a broader range of reports to support a culture of ethical conduct.

#### *ASIC’s response*

The approach to our guidance reflects the requirements in s1317AI(5).

We have revised our guidance under the section on ‘Matters the policy applies to’ in order to provide entities greater flexibility.

We expect an entity’s whistleblower policy to identify the types of wrongdoing that can be reported under the policy, based on the entity’s business operations and practices. We also expect the policy to outline the types of matters that are not covered by the policy.

Entities may choose to implement a whistleblower policy that incorporates a broader range of reports as part of their ‘speak up’

culture. They may choose to handle all reports under their 'broader' whistleblower policy at the same standard as required under legislation (e.g. in relation to anonymous disclosures and identity protection).

However, it is important that the policy does not lead users to believe that all reports of issues and concerns will qualify for the statutory whistleblower protections available under the Corporations Act (or the Taxation Administration Act, where applicable).

### Covering external 'eligible whistleblowers'

- 36 The majority of respondents agreed with the proposed guidance that an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity, since they are captured within the definition in s1317AAA. Some respondents suggested that an entity's policy should contain clear contact points for external disclosers and consider ways to ensure that such disclosers are made aware of the policy.
- 37 One respondent suggested that the guidance should provide entities with the flexibility to publish a whistleblower policy that excludes information that would not be relevant or useful to external disclosers on their external website. They noted that an entity's whistleblower policy will likely contain significant information that would not be appropriate in the public domain (e.g. the names and contact phone numbers of internal eligible recipients for employees).
- 38 A small number of respondents noted that the guidance should not require entities to make their policy available to external disclosers, since s1317AI(5) only requires entities to make their whistleblower policy available to the entity's officers and employees. Some respondents suggested that the proposed guidance would be more appropriate as good practice guidance.

#### *ASIC's response*

We have retained our guidance that an entity's whistleblower policy should cover and be made available to external 'eligible whistleblowers'. This approach supports the legislative intent to encourage whistleblowing, including from external parties.

To ensure disclosers outside an entity can access the entity's whistleblower policy, the policy should be made available on the entity's external website. However, where appropriate, an entity can choose to exclude certain information that is not useful or relevant to external disclosers or not suitable for external publication (e.g. the names and contact numbers of internal eligible recipients for employees).

## Discouraging deliberate false reporting

- 39 Most respondents supported the proposed good practice guidance that entities' whistleblower policies should include a statement discouraging deliberate false reporting. Consistent with the guidance, some noted that the language should be carefully considered to avoid discouraging well-intentioned disclosers from reporting their concerns. Others suggested that entities' whistleblower policies should mention that deliberate false reporting may impact on the reporters' reputation and may breach the entities' employee code of conduct.

### *ASIC's response*

We have retained the good practice guidance that an entity may include in its policy a statement discouraging deliberate false reporting while ensuring that such a statement does not unintentionally deter staff from making disclosures: see good practice tip 4 in [RG 270](#).

## Use of independent service providers by smaller entities

- 40 Respondents generally agreed with the proposed good practice guidance that smaller entities may consider using independent whistleblower service providers to receive disclosures and consider engaging third-party service providers to help investigate disclosures. However, it was noted that some small entities may not have the financial resources to engage external assistance.
- 41 Some respondents suggested that larger entities should also use independent whistleblower providers as a matter of good practice.

### *ASIC's response*

We have retained the good practice guidance that smaller entities (particularly those with a limited number of employees) may consider authorising an independent whistleblower service provider to receive, handle and investigate disclosures. This discussion now appears under the section 'Who can receive a disclosure' along with other options that smaller entities may consider in this context: see good practice tip 6 in [RG 270](#).

Smaller entities may consider using independent service providers, where it is financially viable for them to do so, or refer disclosers to their external eligible recipients (e.g. auditor or actuary) to help avoid any potential conflicts of interest and to provide better protections to disclosers.

## Interaction with the whistleblower regime under the Taxation Administration Act

- 42 As outlined in the [Revised Explanatory Memorandum](#) to the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 (Whistleblower Protections Bill), whistleblower policies should include information about the protections provided in the tax whistleblower regime under the Taxation Administration Act.
- 43 One respondent noted that the proposed guidance was not clear on the level of detail that should be included in the whistleblower policy about the protections afforded under the Taxation Administration Act.

### *ASIC's response*

We have included notes in the guidance referring to the Taxation Administration Act, where relevant.

## Encouraging internal disclosures

- 44 There was a variety of views about the good practice guidance that an entity's policy may encourage disclosures to the entity in the first instance.
- 45 Some argued that reporting through internal corporate mechanisms would strengthen corporate compliance, as no one is able to execute change as quickly and thoroughly as an entity itself. In contrast, others noted that a policy should encourage potential disclosers to choose the reporting method and channel they are most comfortable with.
- 46 Some suggested the guidance should clarify that public interest disclosures under s1317AAD of the Corporations Act should be viewed as a last resort.

### *ASIC's response*

Our approach is consistent with the intent of the three-tiered reporting framework embedded in legislation (i.e. disclosures qualifying for protection can be made internally to the entity, or externally to regulatory bodies, followed by reporting to parliamentarians and journalists).

We have retained our good practice guidance that an entity may encourage its employees and external disclosers to make a disclosure to the entity in the first instance (by making a disclosure to one of the entity's internal or external eligible recipients): see good practice tip 5 in [RG 270](#). We have highlighted that it is important for entities to provide an external disclosure option (e.g. an entity-authorised external hotline) to better enable disclosers who are uncomfortable making a disclosure internally, or feel it is inappropriate to do so, to make a disclosure to the entity.

In our guidance we have noted the importance of providing disclosers with a range of internal and external disclosure options, including options for disclosures to be made anonymously and/or confidentially, securely and outside of business hours. We have also highlighted the benefits of encouraging entities to authorise an independent whistleblower service provider for receiving disclosures, if it is financially viable for them to do so.

Under s1317AI(5)(b), an entity's policy is required to include information about to whom disclosures that qualify for protection may be made, and how they may be made. This includes public interest and emergency disclosures. We have updated our guidance to note that an entity should highlight that a public interest or emergency disclosure may qualify for protection if it has previously been made to ASIC, APRA or another Commonwealth body and written notice provided to the body to which the previous disclosure was made. The policy should also highlight that, in the case of a public interest disclosure, at least 90 days must have passed since the previous disclosure.

### Internal auditor as eligible recipient

- 47 Under s1317AAC(1)(b), an eligible recipient to a regulated entity that is a body corporate includes 'an auditor, or a member of an audit team conducting an audit, of the body corporate or a related body corporate'.
- 48 A small number of respondents disagreed with the approach of the draft regulatory guide to include an internal auditor as an eligible recipient for a body corporate. They argued that 'audit', as defined by the Corporations Act, captured only external auditors.

Note: 'Audit' is defined in the Corporations Act as 'an audit conducted for the purposes of this Act and includes a review of a financial report for a financial year or a half-year conducted for the purposes of this Act'.

#### *ASIC's response*

We have retained the inclusion of internal auditors as eligible recipients in the regulatory guide. This is consistent with the intent of the whistleblower protections reform. As outlined at paragraph 2.60 of the [Revised Explanatory Memorandum](#) to the Whistleblower Protections Bill, 'a reference to an auditor in the Bill includes both internal and external auditors'.



## C Proposed relief by legislative instrument

### Key points

This section outlines the feedback we received about:

- whether public companies that are small not-for-profits or charities should be exempt from the requirement to have a whistleblower policy; and
- if so, the appropriate exemption threshold to be applied.

This section also outlines our response to the feedback we received.

### Exemption for public companies that are small not-for-profits or charities

- 49 The revised corporate sector whistleblower regime only requires public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have a whistleblower policy. This is intended to minimise the risk of imposing a disproportionate regulatory burden on some entities if a universal company requirement is imposed regardless of company or business size.
- 50 ASIC may make an order by legislative instrument to relieve a specified class of entities from all or specified requirements in s1317AI: see s1317AJ. The order may be subject to conditions and may be for an indefinite or a specified period. ASIC will only grant relief from the requirement to have a whistleblower policy in limited circumstances.
- 51 In [CP 321](#), we asked for views on whether public companies that are small not-for-profits or charities should be exempt from the requirement to have a whistleblower policy. We also sought views on the most appropriate threshold that should apply for the purpose of an exemption.
- 52 We received 21 submissions in relation to the exemption proposal. Eighteen of those supported the idea of providing relief in some form. A small number of these respondents suggested that there should be a broader exemption that provides relief to all public companies that are not-for-profits or charities.

### Reasons for supporting an exemption

- 53 Respondents noted that many not-for-profits and charities have few or no paid staff (or are run by volunteers). Many have limited financial resources and, as they do not have dedicated compliance or human resources functions, would incur higher costs to obtain professional advice or training to

implement a whistleblower policy. Furthermore, it was noted that many organisations may not be aware of the existence of the requirement to have a whistleblower policy.

54 Key reasons for supporting an exemption included the following:

- (a) The whistleblower policy requirement would impose a compliance burden that outweighs the benefits of encouraging good corporate culture and governance and of uncovering misconduct.
- (b) The requirement for all public companies that are not-for-profits or charities to have a whistleblower policy appears unfair when viewed in relation to the exemption for small proprietary companies.
- (c) While many not-for-profits and charities already have a whistleblower policy in place, they would require significant additional resources to prepare and implement policies to the same level of detail as required of larger for-profit entities.
- (d) The regulation impact statement to the Whistleblower Protections Bill had indicated there was no expected compliance costs for individuals or community organisations.

Note: See [Revised Explanatory Memorandum](#) to the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018, p. 4.

- (e) The establishment of the Australian Charities and Not-for-profits Commission (ACNC) recognised the need for a dedicated regulator to provide appropriate and tailored regulation to the sector. Accordingly, the ACNC is best placed to set guidance for whistleblower policy and framework for charities.
- (f) It is undesirable to discriminate between not-for-profits and charities based on legal form, of which public companies limited by guarantee is a small percentage. The requirement creates inconsistencies across the charitable sector, placing undue burden on some entities but not others.
- (g) The whistleblower policy requirement under the Corporations Act had arisen in response to misconduct in the corporate and financial services sector (events unrelated to the charitable sector).

### Reasons for opposing an exemption

55 A small number of respondents opposed the idea of providing relief to public companies that are small not-for-profits or charities. The key reasons provided include the following:

- (a) Having a policy that is consistent with the law will help entities comply with their statutory obligations, raise employee awareness, and uncover misconduct.

- (b) It is important for the public to have a high degree of trust in not-for-profits and charities, which are not immune to misconduct.
- (c) Due to the review of the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act), it is uncertain which provisions in the Corporations Act will remain ‘turned off’ for the charitable sector. While such matters remain unsettled, it is undesirable to develop rules affecting this category of companies limited by guarantee, which may not be readily reversed.

## Appropriate threshold to determine who is exempt from the whistleblower policy requirement

- 56 A large number of respondents that supported an exemption believed only large not-for-profits and charities should be required to comply with the whistleblower policy requirement.
- 57 Some respondents supported a revenue threshold that was consistent with the existing ACNC criteria, mainly preferring the test for a ‘large’ registered entity under the ACNC Act (i.e. the exemption should apply to not-for-profits and charities with annual revenue of less than \$1 million).
- 58 Other respondents that also indicated support for this revenue threshold noted that it was consistent with the threshold for the full financial reporting and auditing requirements that applied to companies limited by guarantee under the Corporations Act.
- 59 A number of respondents believed the thresholds should be consistent with those for a small proprietary company in s45A(2). As small proprietary companies are exempt from the requirement to have a whistleblower policy under s1317AI(2), they argued there was no justification for applying a more onerous threshold to not-for-profits.
- 60 As an alternative, some respondents suggested an employee-based threshold. They noted that it would provide:
- (a) more consistency with aspects of employment law; and
  - (b) more appropriate treatment of not-for-profits that have significant revenue or assets but no substantial operations beyond grant-making.
- 61 Table 1 provides a summary of the thresholds suggested by respondents.

**Table 1: Thresholds suggested by respondents in relation to providing relief from whistleblower policy requirement**

| Approach   | Suggested thresholds  |
|--|---|
| Exempt public companies that are not-for-profits or charities, as proposed in <a href="#">CP 321</a> | <ul style="list-style-type: none"> <li>• Revenue of \$1 million or less—same as the threshold under which a company limited by guarantee may have its financial reports reviewed rather than audited</li> <li>• ‘Large registered entities’ as defined in s205.25 of the ACNC Act (annual revenue of \$1 million or more)</li> <li>• ‘Medium registered entities’ as defined in s205.25 of the ACNC Act (annual revenue of between \$250,000 and \$1 million)</li> <li>• ‘Small registered entities’ as defined in s205.25 of the ACNC Act (annual revenue of less than \$250,000)</li> <li>• Threshold for small proprietary company as defined in s45A(2) of the Corporations Act. A proprietary company is defined as a small proprietary company if it satisfies at least two of the criteria below: <ul style="list-style-type: none"> <li>– consolidated revenue for the financial year of the company and any entities it controls is less than \$50 million;</li> <li>– the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than \$25 million; and</li> <li>– the company and any entities it controls has fewer than 100 employees at the end of the financial year.</li> </ul> </li> <li>• Annual revenue of \$10 million or less</li> <li>• 15 employees or less, excluding casual employees, consistent with the small business employer threshold defined in s23 of the <i>Fair Work Act 2009</i></li> <li>• 50 full time employees or less</li> </ul> |
| Exempt all not-for-profits and charities   | All public companies limited by guarantee that are registered with the ACNC   |
| No exemption   | N/A   |

**ASIC’s response**

We recognise the importance of striking a balance between the compliance burden imposed by the requirement to have a whistleblower policy and the resulting benefits of better corporate governance and culture. This should be considered in the context of strong public support for transparency and integrity in the corporate sector.

Having considered the feedback we received, and the legislative intent behind the reform (including ASIC’s power to provide relief under s1317AJ), we are granting relief to public companies that are not-for-profits or charities with annual revenue of less than \$1 million from the requirement to have a whistleblower policy under s1317AI: see [ASIC Corporations \(Whistleblower Policies\) Instrument 2019/1146](#).

This is consistent with the threshold for:

- the full financial reporting and auditing requirements that apply to companies limited by guarantee under the Corporations Act; and
- ‘large’ not-for-profits and charities registered with the ACNC.

## Appendix: List of non-confidential respondents

- 360Certainty
- Allens
- Arnold Bloch Leibler
- Association of Corporate Counsel
- Australian Banking Association
- Australian Council of Superannuation Investors
- Australian Institute of Company Directors
- Ben Goodwin
- Bendigo and Adelaide Bank Limited
- Better Renting
- Chris Wheeler Consulting
- Clubs Australia
- CMA Standards Council
- Community Council for Australia
- Corrs Chambers Westgarth
- CPA Australia
- Financial Planning Association of Australia
- Financiers Association of Australia and Min-It Software
- Governance Institute of Australia
- K&L Gates
- KPMG
- Law Council of Australia
- Liz Haldane
- Marianna Fotaki, Warwick Business School, and Kate Kenny, NUI Galway
- NSW Department of Education
- Perpetual Limited
- Philanthropy Australia
- Regulatory Institute ASBL
- The Association of Independent Schools of NSW
- Uniting Church in Australia
- WEAL
- Whistleblower Australia Inc