Australian Institute of Company Directors

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Australian Securities and Investments Commission
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Via email: whistleblower.policy@asic.gov.au

Dear Ms Uy and Mr Hackett

Consultation Paper 321: Whistleblower policies

Thank you for the opportunity to provide a submission on ASIC's proposed guidance on whistleblower policies.

The Australian Institute of Company Directors (**AICD**) has a membership of more than 44,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

The AICD welcomed the recent reforms to strengthen Australia's whistleblowing laws. We were actively engaged in the relevant consultations leading up to the passage of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*, and believe that strong and effective whistleblower protections support high standards of governance.

The AICD agrees that all organisations should have robust internal whistleblowing frameworks which aim to detect, address and ultimately prevent corporate wrongdoing. One of the benefits of enhancing the protections afforded to whistleblowers is that it will clearly encourage entities to incentivise internal disclosures by making them easy and safe for whistleblowers.

Boards have a strong interest in corporate misconduct being brought to light early, so that it can be addressed and prevented from recurring. Strong whistleblower policies can be a final line of defence for companies against misconduct.

Executive summary

We strongly support ASIC's aim to help entities establish, implement and maintain a whistleblower policy that complies with their legal obligations. However, we are concerned that if the draft regulatory guide (**RG**) is adopted in its current form it will compel entities to adopt policies that are inflexible, lengthy and hard to digest. Further, we are concerned that it risks promoting a "tick a box" approach to compliance and undermining the board's ability

to adopt policies and procedures that are tailored to their organisation, and accessible for users of the policy (including whistleblowers).

We strongly urge ASIC to reconsider the level of detail and prescription contemplated in the draft RG, including because it cuts across the important objective of the legislative requirement – to improve culture and transparency in relation to disclosures of wrongdoing in the workplace.

While we also support ASIC in providing good practice guidance to entities, the current draft RG risks conflating legal requirements and good practice guidance, and to prescribe internal processes and procedures. This results in a lack of clarity for entities, and again leaves little flexibility to set fit-for-purpose governance arrangements. For internal whistleblowing systems to be most effective, they need to reflect the needs and structures of individual organisations, with the board playing an active role in their design.

Our detailed responses to the consultation questions are set out in the attached annexure.

Next steps

We hope our comments will of assistance. If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au or Sally Linwood, Senior Policy Adviser at slinwood@aicd.com.au.

Yours sincerely

LOUISE PETSCHLER
General Manager, Advocacy

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ANNEXURE

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

While we support ASIC's aim to help entities establish, implement and maintain a compliant whistleblower policy, we have a number of concerns about the form of the draft RG. We would urge ASIC to consider revisiting its approach to the guidance with a view to emphasising principles rather than prescription.

Our key concerns are that the guidance:

1. is overly detailed and prescriptive, and would undermine boards and entities' ability to put in place policies that are tailored and fit for purpose; and
2. conflates ASIC's interpretation of legislative requirements with views on good practice.

1. Level of detail and prescription

We agree with ASIC that whistleblower policies should be "clear and easy to understand". It is imperative that an entities' policies and procedures can be readily understood by the people they are intended to protect, and easy to communicate throughout an organisation.

The draft RG also notes that ASIC recognises that there is no one-size-fits-all whistleblower policy. We strongly agree, and believe that it is important that entities have the flexibility to adopt policies that are fit for purpose and tailored to their size, complexity and specific circumstances.

In our view, the level of detail that ASIC suggests should be included in policies is not consistent with these objectives. If adopted, the draft RG would require companies to adopt dense, lengthy and legalistic policies that would in effect require companies to re-state that law, and much of the content of the draft RG. This will undermine the usefulness and accessibility of the policy for its users. In many cases, the level of detail is likely to be simply unworkable (see below for specific examples).

We are also concerned that this approach could shift the focus of the regulatory framework further towards a "tick a box" compliance approach.

The draft RG also seeks to prescribe the scope of policies and the internal processes that sit behind them. While we acknowledge the policy objectives of the legislative requirement to have a whistleblower policy, we do not support regulatory extension into internal processes and procedures.

In this regard, we note the conclusions of researchers in this field that:

> *"In order for internal whistleblowing systems to optimally fulfil their function, it is important to allow for these systems to develop "organically", rather than on the basis of prescriptive regulation. Evidence from some of Australia's largest companies shows that companies are amply able to develop nuanced internal whistleblowing systems. These "systems" not only provide a good example for smaller companies to model their own internal systems on, but their mere existence also serves to demonstrate the potential practical success of a "light-touch"*

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regulatory approach to encourage development of internal whistleblowing frameworks"[1]*.*

As an example of the level of detail and prescription required, the draft RG would require policies to:

- ***Specify the names of the entity's internal reporting points and the whistleblower protection officer (RG 000.86); emphasise that a discloser can make a disclosure directly to any of the entity's 'eligible recipients', not just its internal reporting points (RG 000.87); and include information about how to access each option (eg information on how to contact internal reporting points through post or email) (RG 000.88)***

  The requirement to specify the names of the entity's internal reporting points and the whistleblower protection officer goes beyond what is legislatively mandated, and involves unnecessary prescription. For example, in outlining internal reporting points, some entities may wish to refer to roles (rather than provide specific names that may require more regular updating). We also note that there is no legislative requirement to appoint a whistleblower protection officer.

  We are also concerned that the guidance could be read as requiring names and contact details for all eligible recipients, which in the case of larger corporate groups would run to hundreds of people.

- ***Clarify that disclosures that are not about disclosable matters are not covered by the policy because they do not qualify for protection under the Corporations Act. It should, however, note that such disclosures may be protected under other legislation (RG 000.49)***

  The AICD considers that boards and entities should have flexibility to determine the scope of internal policies, including whistleblower policies. It is important that entities have the ability to adopt policies that are considered to be most effective in encouraging people to report wrongdoing, and most efficient in the relevant organisation's specific circumstances.

  While we note that the focus of the legislative reforms is on serious, systemic issues, our primary concern with mandating a "disclosable matters" test at the outset is that it requires an early assessment by the discloser or recipient of the nature of the issue based on a technical legal lest – notwithstanding the fact that they may not have broader awareness of trends or issues within an organisation.

  Entities may prefer to adopt a more conservative approach to minimise the risk that disclosures will be incorrectly channelled (which would have several flow-on effects, including that the discloser may not receive the correct protections to which they may be entitled).

  For example, we are aware that a number of companies encourage the reporting of issues and concerns through streamlined channels in order to encourage a positive "speak up" culture and make it easier to identify trends or issues within an organisation that may point to a systemic or serious issue. Disclosures that do not

[1] S Lombard and V Brand, "Whistleblowing and Corporate Governance: Regulating to Reap the Governance Benefits of "Institutionalised" Whistleblowing" (2018) 36 C&SLJ 29.

require the legislative protections can then be channelled through alternative paths as appropriate.

- ***Provide an overview of the different steps involved in investigating a disclosure, including that an entity will need to determine the nature and scope of the investigation, the persons that should lead the investigation, the nature of any technical, financial or legal advice that may be required and the timeframe (RG 000.135-136).***

  In our view, including this level of detail in relation to investigations may be impractical, given the significant variations in the nature of investigations and the need for entities to have the flexibility to take appropriate action based on the specific factual circumstances.

  Entities should not be "locked in" to a particular process, which may not be suitable in all circumstances (and, in some cases, may be unnecessarily onerous including for the whistleblower themselves).

  In our view, it would be preferable to address overarching principles (for example, in relation to procedural and substantive fairness, independence, efficiency and timeliness), rather than prescribing procedural steps and requirements.

- ***Provide disclosers with updates at various stages – for example, when the investigation process has begun, while the investigation is in progress and after the investigation has been finalised (RG 000.144)***

  The draft RG goes on to prescribe that the policy should indicate how frequently a discloser will receive an update while an investigation is ongoing (eg once a quarter). It should also include the method for updating a discloser.

  As above, we consider this level of detail unnecessary and potentially problematic, given it fails to reflect the nuances of different circumstances.

  For example, if a whistleblower is external to the organisation, it may not be appropriate to provide updates on internal matters (or even possible to do so, given the confidentiality obligations that may apply).

  Again, the complexities and sensitivities that may be involved in these matters highlight the importance of taking a principles-based approach where possible rather than attempting to prescribe procedural steps.

2. Conflation of legislation requirements with views on good practice

While we support ASIC's aim to provide good practice guidance to entities, the current structure of Table 1 and Section B has the potential to confuse users as to what constitutes ASIC's interpretation of the law, and what ASIC believes constitutes good practice.

We consider it would be preferable to more clearly differentiate between the two (eg in clearly marked different sections).

We are also concerned that the draft RG includes observations that are more appropriately categorised as commentary on good practice, in sections that purport to outline mandatory

legal requirements. This may cause confusion amongst entities as to what is required in a policy for ASIC to consider it legally compliant.

Outlined below are some examples of requirements that are framed as being mandatory, but which in our view reach beyond the legislative requirements into an entity's internal procedures and processes:

- An entity's whistleblower policy should identify the different types of disclosers within and outside the entity who can make a disclosure that qualifies for protection under the Corporations Act (RG 000.31). While the draft RG links this requirement to section 1317AI(5)(a) of the Corporations Act, the proposed requirement is not reflected in this section. This may cause confusion about legally required scope.

- An entity's policy should explain how the entity will, in practice, protect disclosers from detriment (RG 000.120). It goes on to list 13 specific examples that the draft RG asserts that the policy should explain (including, for example, strategies to help a discloser minimise or manage stress time or performance impacts, or other challenges resulting from the disclosure or its investigation; and processes for assessing the risk of detriment against a discloser as soon as possible after receiving a disclosure). The draft RG also provides that the policy should provide examples of actions that are not detrimental conduct (R 000.112), although this is not prescribed in the legislation. We are concerned that this level of prescription may ultimately be unhelpful and limit an entity's ability to take appropriate action based on the relevant circumstances (and contribute to the length of the policy).

- At various points throughout the draft RG, it is assumed that entities will have a whistleblowing protection officer despite this not being a legislative requirement. For example, the proposed guidance prescribes matters that need to be explained by the whistleblower officer to the discloser (RG 000.119), and that he or she should report directly into the entity's Board or Audit and Risk Committee (RG 000.76). This is a particularly prescriptive requirement that extends into an organisation's internal reporting lines and processes.

- An entity's whistleblower policy should include information about who will be responsible for handling and investigating a disclosure relating to its managing director, chief executive officer, whistleblower protection office, whistleblower investigation officer, or a director. For example, the policy may state that such disclosures will be directed immediately to the chair of the audit or risk committee (RG 000.133).

- An entity should conduct upfront and ongoing education and training regarding its whistleblower policy, processes and procedures to every employee (RG 000.155), and ensure that its eligible recipients receive training in the entity's processes and procedures for receiving and handling disclosures, including training relating to confidentiality and the prohibitions against detrimental conduct (RG 000.157).

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.

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We agree that the matters set out in s1317AI(5) have been addressed in the draft RG.

However, as discussed above, we are concerned that the guidance is unnecessarily detailed and prescriptive, and conflates legal requirements with ASIC's view of good practice.

It also imposes requirements that extend beyond the content of a whistleblower policy to an entity's internal processes and procedures.

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.

While the draft RG is detailed, and contains useful and relevant information, its length and complexity (including its focus on technical legal issues) may ultimately limit its usefulness to users.

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.

As outlined above, the AICD considers that boards and entities should have flexibility to adopt an approach that they consider is most effective in encouraging people to report wrongdoing, and most efficient in the relevant organisation's specific circumstances.

For example, we are aware that a number of companies encourage the reporting of issues and concerns through streamlined channels (in order to encourage a positive "speak up" culture and make it easier to identify trends or issues within an organisation that may point to a systemic or serious issue, thereby enlivening whistleblower protections).

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.

While it may be logical for an entity's whistleblower policy to cover all eligible whistleblowers (given they are entitled to legislative protection), this is not mandated by the legislation. Indeed, the legislation provides only that the policy must be available to officers and employees.

Accordingly, we suggest that this be identified as good practice guidance rather than a mandatory requirement.

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

We agree that it is useful and appropriate to include good practice guidance in the draft RG.

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As outlined above, while we support ASIC's aim to provide good practice guidance to entities, the current structure of Table 1 and Section B has the potential to confuse users as to what constitutes ASIC's interpretation of the law, and what constitutes good practice.

We suggest the draft RG be re-structured to clearly delineate between legal requirements and good practice guidance.

We also note that paragraph 000.169 notes that there should be a mechanism to enable the entity's board or the audit or risk committee to be notified immediately, if a disclosure relates to serious misconduct. We do not agree with this proposal. While boards must certainly have oversight of whistleblower complaints, and periodic reporting is critical, it is highly impractical (and potentially ultimately unhelpful) to require each instance of serious misconduct to be "immediately" reported to the board.

Further, we are concerned about the inclusion of specific matters that need to be included in periodic reports to the board. This could promote a "tick the box" approach to important internal reporting processes, and assumes that one-size-fits all.

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.

We agree that it is good practice to discourage deliberate false reporting, and to address the issue in a policy (while ensuring that it does not deter legitimate reports).

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.

We agree that it is good practice for smaller entities to consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosure. Indeed, it may be good practice for all entities to consider putting in place such arrangements to provide an alternative path for reports.

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

As outlined above, we consider that the guidance should be significantly simplified, and recrafted to take a principles-based rather than prescriptive approach.

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

Our key concerns relate to the unnecessary prescription and complexity, which would result in lengthy and dense policies that do not achieve their objectives.

B2Q1 Do you agree with our proposed additional good practice guidance in Section C of draft RG 000? If not, please provide details.

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We agree with ASIC's aim to provide good practice guidance to entities to foster a whistleblowing culture. We also agree with the position that an organisation's senior leadership team has a responsibility to lead by example.

The AICD emphasises that the board sets the tone from the top in establishing behavioural standards, including through effective governance of organisational culture. What leaders do and say set the tone for the rest of the organisation.

In the AICD's Guide on Governance of Organisational Culture[2], we list a number of questions that are designed to assist directors to reflect on metrics that might be relevant to their circumstances in the context of governing culture. Some of the questions directed at people and risk issues include whether robust whistleblowing policies are in place that encourage a 'speak up' culture, whether they are utilised, and whether they provide the board with clear visibility.

B2Q2 Do you have any suggestions on how the additional good practice guidance can be improved? Please provide details.

As outlined above, we are concerned that the structure of the draft RG (ie, including paragraphs that address ASIC's good practice recommendations in Section B, as well as additional good practice guidance in Section C) is confusing.

We consider it would be preferable to more clearly differentiate between ASIC's interpretation of what is legally required based on the legislation, and ASIC's views on good practice (eg in clearly marked different sections).

B2Q3 Are there any practical problems associated with our additional good practice guidance? Please provide details.

While the draft RG is detailed, and contains useful and relevant information throughout, its length and complexity may ultimately limit its usefulness to users.

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.

The AICD recommends that, as a matter of good governance, entities should implement whistleblower policies.

The AICD's Not-For-Profit Governance Principles (**NFP Principles**)[3], which were revised in January 2019 and are intended to provide a framework for all NFPs (not just companies limited by guarantee) to consider good governance practices, specifically addresses the role of whistleblowers.

[2] https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/2019/pdf/governing-culture/07236-3-mem-3-organisation-governing-organisational-culture-july-19-a4-web-v3.ashx

[3] https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/not-for-profit-resources/nfp-principles/pdf/06911-4-adv-nfp-governance-principles-report-a4-v11.ashx

The NFP Principles recognise that whistleblowers are an important line of defence against wrongdoing, and providing them with adequate protection against retribution can encourage them to come forward with valuable information. The Principles further note that it is a good idea to establish a whistleblower policy, and list a number of matters to be addressed including how to make a disclosure. We are aware that many organisations already have whistleblower policies in place as part of their overall corporate governance framework, and aim to encourage and facilitate reporting of wrongdoing.

However, the AICD is concerned about the application of a strict legal requirement (breach of which is an offence of strict liability with a penalty of 60 penalty units) to NFPs and charities, particularly given the complexity and prescription contemplated in the draft RG.

In our view, unless the proposed guidance is substantively amended to support a principles-based approach that is straightforward to comply with, the requirement would place an unduly onerous regulatory burden on the sector and would require entities to expend unnecessary costs and utilise (potentially very limited) internal resources to put in place policies and processes that are unlikely to be fit for purpose and that do not reflect an organisation's risk management framework and organisational structure.

We also note that it would result in inconsistency in governance standards across the sector, given the requirement would only apply to companies limited by guarantee (rather than other legal structures such as incorporated associations).

In the context of charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**), it is relevant to note that the introduction of the ACNC in 2012 recognised the special nature of the sector and the need to standardise charities regulation across the sector irrespective of legal structure. One of the objectives of the ACNC is to promote the reduction of unnecessary regulatory obligations on the sector.

In our view, the focus should first be on education, training, support and good practice guidance that is suitable for the sector. In the context of charities, we believe that this should be led by the ACNC as the specialist, independent regulator of charities. If this is not effective, the appropriateness of an exemption can be reconsidered.

If ASIC is not minded to grant an exemption, we strongly submit that NFPs must be given more time to comply with the legislative requirement.

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.

The AICD believes that robust and effective whistleblower frameworks support governance oversight. The AICD recommends that, as a matter of good governance, all entities should implement whistleblower policies. As noted, the AICD has provided guidance to NFPs (including charities) through our NFP Governance Principles.

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However, for the reasons discussed above, we are not convinced of the merit of applying prescriptive legislative and regulatory obligations to the detail of internal NFP and charity organisation policies (including the strict liability offences for breaches). This is distinct from the substantive expanded protections and obligations to whistleblowers which rightly apply to all organisations, regardless of size or purpose.

In relation to thresholds for exemptions, at a minimum, the threshold for small proprietary companies should apply consistently to all entities, including charities and NFPs.

In this regard, we note the following:

- we do not believe there is any policy justification for applying a different (more onerous standard) to the not-for profit sector as compared to the for-profit sector;
- the Explanatory Memorandum notably addresses concerns about disproportionate regulatory burdens, observing that "only large or public entities are required to have a whistleblower policy. This is intended to minimise the risk of any disproportionate regulatory burden that would result from making it a universal company requirement irrespective of company or business size."; and
- NFPs are likely to face proportionally higher administrative burdens and compliance costs in meeting the requirement given resourcing and funding constraints.

We also see the force in the argument that the ACNC, as the charities regulator with responsibility for charity governance standards, is the most appropriate body to set guidance on the expectations of whistleblower frameworks and policies for charities.

The establishment of the ACNC in 2012 recognised, amongst other things, that a national regulatory system would promote good governance, accountability and transparency for the sector, and that regulation should be proportional to size and risk and allow registered entities to focus on achieving their mission[4].

In this context, we encourage consideration of whether the ACNC should take the lead in setting expectations of charities on whistleblowing policies, through guidance or potential inclusion in governance standards. Such an approach would support an exemption for all charities from the legislative requirement to have a whistleblower policy.

[4] https://www.legislation.gov.au/Details/C2012B00142/Explanatory%20Memorandum/Text