



Whistleblower Protections under the Corporations Act 2001 (Cth)

Who should read this briefing paper?

- ✓ Governors
- ✓ Principals
- ✓ Executives
- ✓ Business Managers

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1. Executive Summary

- ✓ Substantial changes to the **whistleblower protection laws** in the Corporations Act 2001 (Cth) (Corporations Act) came into effect on 1 July 2019. The previous whistleblower protection laws applied to **companies**, including public companies limited by guarantee, which is the corporate structure of many schools. Under the new whistleblower protection laws, the **Regulated Entities** were expanded to include corporations to which the Commonwealth Constitution applies, that is, foreign corporations and **trading or financial corporations**. A not-for-profit organisation, such as a school, may meet the definition of a trading or financial corporation and accordingly be a Regulated Entity.
- ✓ The new whistleblower protection laws expand the categories of individuals who may be an **Eligible Whistleblower** and the types of misconduct that may be a **disclosable matter**. While Eligible Whistleblowers must have reasonable grounds for suspecting the misconduct they report, they are no longer required to act in good faith. They are now entitled to be **anonymous**, and to have their anonymity protected. The **penalties** for failing to protect the confidentiality of an Eligible Whistleblower's identity and protect them from detrimental conduct have increased significantly.
- ✓ A similar whistleblower protection regime was incorporated into the Taxation Administration Act 1953 (Cth) (Taxation Act) at the same time concerning whistleblower disclosures about entities' tax affairs.
- ✓ The new whistleblower protection laws require some Regulated Entities — including public companies limited by guarantee — to have in place by 1 January 2020 a **whistleblower policy** that is made available to their officers and employees. The Australian Securities and Investments Commission (ASIC) has published a Regulatory Guide that prescribes in considerable detail the matters that must be included in a whistleblower policy and provides good practice guidance on implementing and maintaining the policy. ASIC has stated that during 2020 it will survey the whistleblower policies of a sample of companies to review their compliance with the legal requirements and the extent to which they are implementing good practice.
- ✓ ASIC has the power to grant relief from the requirement to have a whistleblower policy. It has exercised its power by determining that the requirement does not apply to public companies that are small not-for-profit organisations or charities, that is, those with annual revenue of less than \$1 million.
- ✓ This determination by ASIC to relieve small not-for-profit companies from the requirement to have a Whistleblower Policy does not relieve them from the need to comply with the obligations to protect whistleblowers. It is difficult to see how any organisation can meet the legal obligations to protect whistleblowers without having and maintaining a policy, systems and procedures for receiving, assessing and investigating whistleblower disclosures. These procedures include:
 - appointing **Whistleblower Protection Officers** and **Whistleblower Investigators**
 - providing **training to employees** on their duty not to victimise someone they suspect may have blown the whistle, and
 - briefing individuals who occupy positions the whistleblower protection laws designate as **Eligible Recipients** — including members of the Board and auditors — on what to do if they receive a whistleblower disclosure.
- ✓ A school that fails to establish and implement effective systems for handling whistleblower disclosures risks substantial **reputational damage**, in addition to significant civil and criminal penalties. Where a school fails to appropriately protect a whistleblower, the whistleblower protection laws provide the whistleblower with the right to apply to the courts for compensation and other remedies.
- ✓ Schools will be less likely to be faced with these consequences if they already have in place a “speak up” culture and robust, trusted systems to identify and report wrongdoing. High levels of awareness that these systems are in place and are followed will help to deter wrongdoing from occurring in the first place.
- ✓ A **checklist** setting out key actions is provided at the end of this briefing paper.

2. How and Why Have the Corporate Whistleblower Protection Laws Changed?

The rationale for protecting whistleblowers is that they play a critical role in fostering cultures of integrity, transparency and accountability. There are many recent examples — including case studies published in the reports of Royal Commissions — where a person has “blown the whistle” outside their organisation after their attempts to report misconduct internally were ignored or dismissed following a cursory “investigation”, misconduct was covered up and the whistleblower was punished or lost their job.

Companies Have Had to Comply with Whistleblower Protection Laws Since 2004

Part 9.4AAA was inserted into the Corporations Act in 2004. Since then, companies (including public companies limited by guarantee) have been required to comply with its requirements, including:

- ✓ the requirement to protect confidentiality, and
- ✓ the prohibition against victimising a whistleblower.

The Case for Strengthening the Whistleblower Protections

In November 2016 the Senate of the Australian Parliament asked the Parliamentary Joint Committee on Corporations and Financial Services (Parliamentary Joint Committee) to consider the whistleblower protections in the corporate, public and not-for-profit sectors. In its report, which was tabled in Parliament in September 2017, the Parliamentary Joint Committee observed that “whistleblower protections remain largely theoretical with little practical effect in either the public or private sectors”. This was due, the Parliamentary Joint Committee suggested, to the near impossibility under current laws of protecting whistleblowers from reprisals, holding those responsible for reprisals to account, and providing redress to whistleblowers who experienced reprisals.

The Parliamentary Joint Committee made a range of recommendations designed to improve protections for whistleblowers and achieve greater consistency between the protections provided to public sector and corporate sector whistleblowers.

The recommendations regarding corporate sector whistleblowers included expanding the type of wrongdoing that is reportable and the types of individuals who are Eligible Whistleblowers and allowing for disclosures to be made anonymously. The Parliamentary Joint Committee also recommended that the requirement for a whistleblower both to have reasonable grounds to suspect their disclosure concerned disclosable conduct and to act in good faith should be replaced with the sole requirement that they have reasonable grounds for their suspicion. In other words, the whistleblower’s motivation should not be relevant. The Government supported these recommendations.

The Government acknowledged the view of the Parliamentary Joint Committee that “effective whistleblower protection frameworks foster integrity and accountability while deterring and exposing misconduct, fraud and corruption”.

The Government did not, however, support all of the Parliamentary Joint Committee’s recommendations. For example, the Parliamentary Joint Committee made a recommendation about protections for the *recipients* of disclosures, which currently exist in the public sector for public sector officials who act in good faith. In its response to the report of the Parliamentary Joint Committee, published in April 2019, the Government indicated that it would assess how the new regime operates in the private sector before determining whether a further review is required.

The 2019 Amendments

To give effect to the recommendations it supported, the Government enacted amendments to the Corporations Act that came into effect on 1 July 2019. The amendments:

- ✓ expanded the categories of Regulated Entities that are required to comply with the whistleblower protections by including constitutional corporations — that is, foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth
- ✓ expanded the groups of Eligible Whistleblowers who may make a disclosure that qualifies for protection — now including former, as well as current officers, employees and suppliers of services or goods, their relatives and dependants — and the range of conduct that is disclosable
- ✓ removed the requirements for Eligible Whistleblowers to identify themselves and to act in good faith when they make a disclosure
- ✓ created a third disclosure channel, in addition to the existing disclosure channels — internal disclosure and disclosure to the Australian Securities and Investments Commission (ASIC) — whereby “public interest disclosures” and “emergency disclosures” may be made to a parliamentarian or a journalist in certain circumstances, after a disclosure has first been made to ASIC or to the Australian Prudential Regulation Authority (APRA)
- ✓ strengthened the protections provided to whistleblowers and people who are suspected of being whistleblowers
- ✓ created a requirement for public companies and large proprietary companies to put in place before 1 January 2020 a whistleblower policy, to be made available to their officers and employees and setting out:
 - the protections for whistleblowers under the Corporations Act
 - how to make a whistleblower disclosure that qualifies for protection
 - how the company will support whistleblowers, protect them from detriment, investigate disclosures that qualify for protection and ensure fair treatment of employees who are mentioned in them
 - how the policy will be made available to officers and employees.

It seems counter-intuitive that the policy was not required to be in place until six months after the strengthened whistleblower protection laws had commenced. It would be difficult for any organisation to effectively handle a whistleblower disclosure in compliance with the Corporations Act without having robust and comprehensive documented and implemented systems and procedures in place.

- ✓ created a new whistleblower protection regime in the Taxation Administration Act 1953 (Cth) for whistleblower disclosures about entities’ tax affairs
- ✓ require the Government to undertake a review of the operation of the whistleblower protections within the Corporations Act and the Taxation Act five years after they commenced.

In parallel, the Government enacted other amendments to the Corporations Act that significantly increased the penalties for contraventions of the Corporations Act, including contraventions of the whistleblower protection provisions.

The new whistleblower protection provisions allow for regulations to be made about a range of matters. For example, the regulations could expand even further the type of individual who may be an Eligible Whistleblower or the type of conduct that constitutes a disclosable matter or prescribe another Commonwealth authority that may receive whistleblower disclosures. No regulations have been made to date.

3. Why is it Important to Comply with the Whistleblower Protection Laws?

A school that is a company or constitutional corporation can face the potential of a civil penalty of up to the greater amount of \$10.5 million or 10 per cent of annual turnover (capped at \$525 million) for failing to prevent a whistleblower from being victimised. But even if we put aside these penalties, there are cogent reasons for having in place effective systems for receiving and investigating whistleblower disclosures:

- ✓ they deter misconduct
- ✓ they allow misconduct to be identified and addressed earlier, especially where they are reinforced by effective policies and procedures for identifying compliance breaches and handling complaints
- ✓ they allow the Board to identify and maintain appropriate oversight of systemic issues through regular reports about corrective action taken in response to whistleblower disclosures.

According to the Whistling While They Work project:

“Dealing with employee wrongdoing concerns may be challenging and difficult, but our research confirms its fundamental role, every day, in maintaining integrity and assisting accountability and performance in the institutions on which society depends.”¹

4. Which Whistleblower Disclosures Qualify for the Corporations Act Protections?

The key elements of a whistleblower disclosure that qualifies for the protections provided by the Corporations Act are that it is made:

- ✓ by an **Eligible Whistleblower** in relation to a **Regulated Entity**
- ✓ to
 - an **Eligible Recipient** — a designated role within a Regulated Entity or a person authorised by the Regulated Entity to receive disclosures, or
 - ASIC, APRA or a prescribed Commonwealth authority (no other authorities having yet been prescribed) or
 - a legal practitioner for the purpose of obtaining legal advice or legal representation regarding the whistleblower protection laws
- ✓ about a **disclosable matter**.

¹ Brown A J et al, *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*. Key findings and actions of Whistling While They Work 2, Brisbane: Griffith University, August 2019, page 9; available at <http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle-A-five-step-guide-to-better-whistleblowing-policy-Key-findings-and-actions-WWTW2-August-2019.pdf>

Eligible Whistleblowers

An individual is an **Eligible Whistleblower** if they are or have been any of the following in relation to a Regulated Entity:

- ✓ a director or other officer
- ✓ an employee
- ✓ an individual who supplies services or goods, whether paid or unpaid, or their employee
- ✓ an individual who is an associate, meaning the director or secretary of a **related body corporate** — which is a holding company, subsidiary or “sister” company of the company in question
- ✓ a relative of any of the above individuals
- ✓ a dependant of any of the above individuals or of such an individual’s spouse.

The Corporations Act does not place any limits on how long an individual has or had to be in one of these roles to qualify as an Eligible Whistleblower; nor on how recently. The concept of an unpaid supplier of services would include individuals who have provided services to the school on a voluntary basis. In practice, this may make it difficult for schools to verify whether or not a whistleblower is an Eligible Whistleblower. It will also be more difficult for a school to protect former employees and suppliers, their relatives and dependants from detriment than to protect current employees, whose wellbeing can more easily be overseen by a Whistleblower Protection Officer.

As noted above, while an Eligible Whistleblower must have reasonable grounds for suspecting the misconduct they report, they are no longer required to act in good faith. They are also no longer required to identify themselves when they make a disclosure.

The better ability to handle anonymous disclosures is one of the reasons ASIC gives for recommending, in its Regulatory Guide 270 Whistleblower policies (RG 270), that Regulated Entities authorise an independent whistleblowing service provider as an Eligible Recipient. ASIC points out that, through these services, whistleblowers can make their disclosures anonymously and both provide further information, if needed, and receive updates on the status of their disclosure, while retaining their anonymity.

Regulated Entities

Regulated Entities now include corporations referred to in the Constitution, as well as companies (including public companies limited by guarantee). ASIC has published guidance on [Whistleblower protections for not-for-profit organisations](#), which notes that:

“Not-for-profit organisations that are incorporated under state or territory legislation, such as incorporated associations or cooperatives, can meet the definition of a trading or financial corporation, despite being formed for a not-for-profit, charitable, or community benefit purpose.

...

“If your organisation’s trading or financial activities are a sufficiently significant proportion of its overall activities, the organisation will likely be a trading or financial corporation...”

“ASIC cannot give legal advice to organisations or members of the public, and we cannot give a ruling to your organisation on whether or not it meets the test for being a trading or financial corporation. If your organisation is in doubt about whether it meets the definition of a trading or financial corporation, we encourage your organisation to seek legal advice.”

Trading activities involve buying or selling goods or services. Financial activities involve commercial dealings or transactions in finance, lending, investing or providing advice on financial matters.

Eligible Recipients

Eligible Recipients include a person authorised by the school to receive disclosures — such as an independent external whistleblower service or a Whistleblower Protection Officer — as well as individuals who occupy the following positions in relation to a school or a related body corporate of the school:

- ✓ an officer or senior manager
- ✓ an auditor — according to ASIC, this includes both internal and external auditors — or member of an audit team conducting an audit for the purposes of the Corporations Act.

It makes sense for schools to encourage potential whistleblowers to make their disclosures to an independent external whistleblower service provider. These service providers have systems for communicating with anonymous whistleblowers and protecting their identity. They also have expertise in conducting initial discussions with whistleblowers. This can be particularly important if a whistleblower does not wish to be contacted later to provide further information.

The whistleblower protection laws nevertheless provide that a whistleblower may elect to make a disclosure to a member of the Board, senior manager or an auditor. Schools should ensure they have identified all the individuals who meet the definition of Eligible Recipient, and ensure those individuals are briefed on what they should do if they are approached by a whistleblower.

The whistleblower protection laws also provide for public interest disclosures and emergency disclosures to be made to a member of Parliament or a journalist in circumstances where a prior disclosure was made to ASIC or APRA and certain other criteria are met.

Disclosable Matters

The expanded range of disclosable matters in the new whistleblower protection laws encompasses misconduct or an improper state of affairs or circumstances in relation to the school or a related body corporate of the school.

“Misconduct” is defined in the Corporations Act to include fraud, negligence, default, breach of trust and breach of duty. “Improper state of affairs or circumstances” is not defined in the Corporations Act.

Such misconduct or improper state of affairs or circumstances may, but need not, involve conduct that constitutes an offence against the Corporations Act or another Act of the Commonwealth that is punishable by imprisonment for a period of 12 months or more, or represents a danger to the public or the financial system.

Personal work-related grievances, such as decisions about the whistleblower’s engagement, transfer or promotion, are specifically excluded from being a disclosable matter, except where they have significant implications for the school and relate to an offence or a danger to the public or the financial system, or relate to actual or threatened detrimental conduct against the whistleblower.

Examples of wrongdoing that would be reportable are:

- ✓ fraud, forgery, misappropriation, misuse, misdirection, misapplication, maladministration or waste of funds
- ✓ gross mismanagement
- ✓ grooming and/or child abuse that is not reported or not managed appropriately
- ✓ conflicts of interest that are not declared or managed appropriately, nepotism, favouritism
- ✓ corruption, taking or offering bribes or secret commissions
- ✓ harassment or discrimination by or affecting staff, volunteers or contractors
- ✓ assault.

5. What Protections are Provided under the Corporations Act?

The whistleblower protection laws provide the following protections:

- ✓ confidentiality of the whistleblower's identity
- ✓ protection against actual or threatened detriment, which is defined to include:
 - dismissal
 - injury in an employee's employment
 - alteration of an employee's position or duties to their disadvantage
 - discrimination relative to other employees
 - harassment or intimidation
 - harm or injury to a person, including psychological harm
 - damage to a person's property, reputation, business or financial position, or
 - any other damage to a person
- ✓ the whistleblower is not subject to civil, criminal or administrative liability for blowing the whistle (as distinct from liability for their involvement in misconduct that is revealed in their whistleblower disclosure)
- ✓ the whistleblower may seek compensation and other remedies from the courts for loss, damage or injury suffered as a result of detriment they experience.

Schools will need to consider how to protect the confidentiality of a whistleblower's identity and protect a whistleblower from detriment. In RG 270, ASIC provides the following examples of actions that can be taken:

- ✓ to reduce the risk that the whistleblower will be identified from the information contained in a disclosure:
 - redacting personal information and references to the whistleblower witnessing an event
 - referring to the whistleblower in a gender-neutral context
 - contacting the whistleblower (if possible) to help identify aspects of their disclosure that could inadvertently identify them
 - ensuring disclosures are handled and investigated by qualified staff
- ✓ in relation to secure record-keeping and information-sharing processes:
 - ensuring paper and electronic documents and other materials relating to disclosures are stored securely
 - limiting access to information about a disclosure to those who are directly involved in managing and investigating it
 - not sending communications and documents to email addresses and printers that are accessible by other staff members
 - reminding all individuals who are involved in managing and investigating a disclosure of their obligations regarding confidentiality

- ✓ to protect a whistleblower from detrimental acts or omissions:
 - assessing the risk of detriment as soon as a disclosure is received
 - providing support services such as counselling or other professional services to the whistleblower
 - discussing with the whistleblower strategies to help them minimise and manage stress and other challenges resulting from the disclosure or its investigation
 - allowing the whistleblower to perform their duties from another location, reassigning them or other staff involved in the disclosable matter
 - putting in place processes to ensure managers are aware of their responsibilities to maintain confidentiality, address the risks of harassment and manage conflicts
 - ensuring the whistleblower is aware of how to lodge a complaint if they suffer detriment and taking disciplinary action to address any detriment that does occur.

6. What Needs To Be in Your Whistleblower Policy?

Schools that are public companies limited by guarantee are required to have a policy that is available to their officers and employees and complies with the new requirements. Schools that already have a policy in place should review it to ensure that it sets out the following matters:

- ✓ information about the protections available to whistleblowers, including those provided under the Corporations Act
- ✓ information about to whom disclosures that qualify for protection under the Corporations Act may be made, and how they may be made
- ✓ information about how the school will support whistleblowers and protect them from detriment
- ✓ information about how the school will investigate disclosures that qualify for protection
- ✓ information about how the school will ensure fair treatment of employees who are mentioned in disclosures that qualify for protection
- ✓ information about how the policy is to be made available to officers and employees.

ASIC's RG 270 specifies in much greater detail what is to be included in whistleblower policies. It states in several places that, although entities may refer to or include a link to documents that outline more detailed processes and procedures, the policy itself must cover the information ASIC requires. Examples of content that ASIC requires to be in whistleblower policies are:

- ✓ an explanation of the purpose of the policy
- ✓ the types of wrongdoing that can be reported under the policy, based on the entity's business operations and practices, and the types of matters that are not covered by the policy
- ✓ information about the protections provided in the tax whistleblower regime under Part IVD of the Taxation Act
- ✓ the key steps involved in investigating a disclosure, including the timeframes
- ✓ how the findings from an investigation will be documented and reported to those responsible for oversight of the policy, while preserving confidentiality.

While the Corporations Act stipulates that the whistleblower policy must be made available to officers and employees, and must indicate how it will be made available to them, ASIC states in RG 270 that, to ensure disclosers outside the entity can access its whistleblower policy, the policy should be available on the entity's external website.

ASIC has reminded Regulated Entities that courts can have regard to a company's whistleblower policy and how it has been implemented when they are deciding compensation claims. ASIC has also announced its intention to review compliance with the legal requirements and the extent to which companies are implementing good practices.

In its report on the submissions it received on the public consultation draft Regulatory Guide, ASIC discusses the relationship between disclosable matters and other issues and concerns that might be reported by Eligible Whistleblowers.

Some submissions noted that, in a good corporate culture, employees are encouraged to report all their concerns, regardless of whether they qualify for the statutory protections. On the other hand, if a whistleblower policy applies to all issues and concerns, potential whistleblowers could be confused and misled into believing they will be covered by the whistleblower protections for all information they disclose. ASIC's view is that entities may choose to implement a whistleblower policy that incorporates a broader range of reports as part of their "speak up" culture, but the policy should not lead users to believe that all reports of issues and concerns will qualify for the statutory whistleblower protections.

Good Practice Guidance

In RG 270, ASIC also provides good practice guidance on:

- ✓ identifying roles and responsibilities, including, in addition to an independent whistleblower service provider:
 - Whistleblower Protection Officers, responsible for protecting whistleblowers and ensuring the integrity of the reporting mechanism
 - Whistleblower Investigation Officers, responsible for investigating disclosures
 - service providers that may be engaged to assist with investigating disclosures
 - a role that is responsible for supporting training, education and communications about the whistleblower policy
 - the owner of the whistleblower policy who is responsible for its oversight and monitoring, and a role responsible for reviewing and updating the whistleblower policy and procedures

- ✓ processes for assessing and controlling the risk of detriment to a whistleblower, which could be based on the entity's existing risk management framework
- ✓ handling and investigating disclosures, including keeping the whistleblower informed during the investigation
- ✓ providing an avenue for review, where a whistleblower is not satisfied with the outcome of the investigation
- ✓ training for employees, including on how to make a disclosure, how whistleblowers are protected and the consequences of engaging in detrimental conduct
- ✓ training for Eligible Recipients on what to do if they receive a disclosure.

7. Checklist — What You Need To Do

Here's a list of things to do in order to ensure that your school is compliant with its obligations under the new whistleblower protection laws.

Task	Completed
Obtain legal advice, if necessary, as to whether you are a Regulated Entity that is required to comply with the whistleblower protections and the requirement to have a whistleblower policy	
Identify people in key roles, such as the owners of the whistleblower policy, Whistleblower Protection Officers and Whistleblower Investigators	
Recommend that your Board authorises an independent external whistleblower service and Whistleblower Protection Officers as Eligible Recipients to receive whistleblower disclosures	
Document your whistleblower policy and procedures and publish your whistleblower policy on your website	
Identify people who are Eligible Recipients — officers, senior managers, auditors — and brief them on what to do if they receive a whistleblower disclosure	
Provide training to all employees	
Put in place a process for reporting regularly to the Board on the number, nature and status of whistleblower disclosures that have been received	
Put in place a process for reporting regularly to the Board on the corrective action that has been taken as a result of whistleblower disclosures	

8. How CompliSpace Can Help

At CompliSpace we combine governance, risk, compliance and policy management expertise with technology solutions to deliver sustainable governance solutions to non-government schools in every state and territory in Australia. Our team of lawyers and industry experts actively monitor changes to relevant laws and registration standards and deliver a full suite of online policies, procedures and governance programs that enable schools to continuously comply with their legal and regulatory obligations.

In response to the changes to the whistleblower protection laws and the release of ASIC's RG 270 CompliSpace has developed a detailed Whistleblower Program, Whistleblower Policy and training to address the provisions under the legislation and the best practice requirements in RG 270. CompliSpace works with schools to tailor compliance and risk management systems to a school's individual needs and characteristics, ensuring meaningful compliance with their legal and regulatory obligations. If you would like to know more about how CompliSpace can assist you with your governance, risk and compliance, including whistleblower compliance, contact us on:

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