

Factsheet: Whistleblowing law changes

In 2018 IIA–Australia published a white paper concerning Whistleblowing Programs. The white paper was based on the status of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 as it was at the time of publication.

On 13 February 2019 we issued the Fact Sheet reflecting the proposed legislation before it was passed. The Bill was finally passed by Parliament on 19 February 2019. This Fact Sheet incorporates the legislation passed by Parliament.

For ease of reference, we have outlined the most notable changes of the new laws, including commentary in the white paper and previous Fact Sheet. The new laws make significant amendments to:

- › Corporations Act 2001.
- › Taxation Administration Act 1953.
- › Banking Act 1959.
- › Insurance Act 1973.
- › Life Insurance Act 1995.
- › Superannuation Industry (Supervision) Act 1993.

For the purpose of this fact sheet, the focus is proposed changes to the Corporations Act 2001 (Act).

The new law essentially applies to public companies, large companies, corporations and entities referred to therein. The public sector has its own legislative framework which governs it. A few sections of the new law apply to the public sector.

The proposed changes

Class of whistleblowers	Enlarges the class of whistleblowers eligible for protection, going so far as to include a relative or dependant of all individuals defined, or of such an individual's spouse.
Former employees	Former employees and associates are now included as eligible whistleblowers.
Range of misconduct	Expands the scope of disclosable conduct, but specifically excludes personal work-related grievances. The new laws will impact on the role of an internal auditor, to include conduct in a regulated entity such as 'misconduct, improper state of affairs or circumstances, contravention of any law administered by ASIC and APRA, conduct that represents a danger to the public or the financial system, or a breach of any Commonwealth law that is punishable by imprisonment for 12 months'.
Anonymity	There is no requirement for a whistleblower to identify themselves in order for a disclosure to qualify for protection under the Act.
Recipients of disclosures	Restricts the persons in a company who may receive disclosures to an officer, senior manager, auditor, actuary, or person authorised by the company. In this regard IIA-Australia made a number of submissions to parliamentary inquiries in 2017, and appeared before Joint Parliamentary Committee hearings in 2017. This resulted in internal auditors being included under section 1317AAC of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 as 'eligible recipients', which includes (1) (b) an auditor, or a member of an audit team conducting an audit, of the body corporate or a related body corporate.
Offences	Makes it an offence to breaching the confidentiality of a whistleblower's identity without their consent, other than in the exceptions provided for, and increases penalties for doing so.
Redress	Makes it easier for a whistleblower to seek redress and compensation for victimisation.
Reasonableness test	Replaces the current 'good faith' test with a reasonableness test, which requires the whistleblower have reasonable grounds to suspect misconduct.
Immunities	Strengthens immunities for whistleblowers.
Emergency disclosures	Allows disclosures to be made to parliamentarians and journalists in matters of public interest or emergency.
Penalties	Increases penalties up to \$200,000 for an individual and \$1 million for a body corporate.
Compensation claims	Makes it easier for whistleblowers to be compensated if they suffer victimisation, with a reverse onus of proof on the defendant.
Court Orders	Expands the orders that may be made by a court in favour of a person who has suffered loss, damage, or injury as a result of detrimental conduct.
Whistleblower policy	Requires public and large proprietary companies to have a compliant whistleblower policy by 1 January 2020 the set date, and to make it available to their officers and employees. The policy must contain the stated provisions.

What to do next

Establish whether and how the new provisions apply to your organisation. As a first step, conduct a gap analysis, consider seeking legal advice, and select a method to receive whistleblower reports.

While only publicly listed and large proprietary companies are required to have a whistleblower policy, all organisations should adopt a whistleblower policy as a

matter of good governance to ensure requirements of the new legislation are observed.

A thorough review should include:

- Review the existing whistleblower policy to ensure it complies with the new requirements.
- Make changes to policy and human resource practices as necessary.
- Determine how best to make the policy available to officers and employees of the company.
- Determine how the organisation will support whistleblowers and protect them from victimisation.
- Establish how and to whom protected disclosures may be made.
- Determine and provide practical training to officers, senior managers and others who will receive disclosures.
- Provide those who are to receive disclosures with training so they know how to respond if a protected disclosure is made.
- Establish how the company will investigate disclosures.
- Determine how to ensure fair treatment of employees who are mentioned in disclosures, or to whom such disclosures relate.
- Ensure employees are made aware of the whistleblower system in place.

It should be noted a failure to comply with the legislation can lead to heavy penalties.

To whom do the new laws apply?

They apply to all companies. However, only publicly listed and large proprietary companies are required to have a whistleblower policy. A large proprietary company is defined as one that has at least two of the following criteria: consolidated revenue of at least \$25 million, consolidated gross assets of at least \$12.5 million, or at least 50 employees within the company and the entities it controls.

To whom can a disclosure be made to qualify for protection?

To qualify for protection, a disclosure must be made to one of the following people or bodies:

- › Australian Securities and Investments Commission (ASIC).
- › Australian Prudential Regulation Authority (APRA).
- › An officer or senior manager of the company.
- › An auditor, or member of an audit team conducting an audit into the company.
- › An actuary of the company.
- › A person authorised by the organisation to receive protected disclosures.
- › A lawyer, for the purpose of legal representation or legal representation regarding the whistleblower protections.
- › In cases which are in the public interest or matter of emergency only, to a parliamentarian or a journalist.

Important dates

The new laws come into effect on the first of one of these dates: 1 January, 1 April, 1 July or 1 October, which occurs 3 months after Royal Assent is given. This is likely to be 1 July 2019. If the new laws commence on 1 July 2019 public and large proprietary companies must have a whistleblower policy no later than six months thereafter being 1 January 2020.

Guidance

White Paper 'Whistleblower Programs', IIA–Australia

Acknowledgement

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