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White paper

# Whistleblowing Programs

Updated 2020

# Whistleblowing Programs

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## Background

### Purpose

The purpose of this white paper is to provide information and guidance on how to effectively implement a whistleblowing program which complies with the significant new legal and regulatory changes in this area.

Many organisations have a whistleblowing program in place. There are many more organisations considering a whistleblowing program which are keen to understand the implications, resources required, and cost to implement and maintain.

How can an organisation implement and resource a cost-effective whistleblowing program that is compliant with the new legislative changes?

### Background

Every organisation is exposed to risk and it is important for organisations to consider how best to address risk to protect employees, clients and the organisation itself from costly and damaging exposure.

Risk management includes effectively managing misconduct, some of which may be reported if the person doing so can be offered safe and secure means of reporting misconduct.

Organisations wishing to maintain a trusted reputation in accordance with good practice and comply with the law relating to whistleblowing should consider a whistleblowing program as part of their overall governance and risk management environment.

So, how does an organisation establish a whistleblowing program?

### Changes to the Law

Historically there have been numerous incidents of whistleblowers being treated poorly and suffering victimisation, harassment and detrimental conduct in Australia and internationally. In the last decade an increasing number of whistleblowers have gained national and international media publicity which has created a desire by the community, regulators and lawmakers for the system of protection to change. Whistleblowers from the #metoo movement, WikiLeaks and technology data, sexual abuse in schools and churches, the elder care industry and the financial planning industry and subsequent Royal Commissions, in addition to many other examples have helped change community, regulators and lawmakers attitudes in Australia.

New and significantly tougher whistleblowing laws for corporations in Australia officially came into effect on 1 July 2019 under the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2019 (Cth) (Whistleblower Bill). This Bill dramatically increased protections for whistleblowers and increased the individual and organisational penalties for not doing so, in the Corporations Act (2011) (Corporations Act).

## Discussion

### Issue

The issue to be discussed is:

*How can an organisation implement an effective whistleblowing program?*

A whistleblowing program is a practical and invaluable tool for managing disclosures in the workplace and is something that can be utilised by all organisations.

Effectiveness of a whistleblowing program depends on capturing necessary components that will ensure the quality of the program.

However, one size does not fit all organisations. This white paper aims to explain how whistleblowing can be useful to an organisation.

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## Benefits

Despite its growth internationally, whistleblowing has been poorly understood and, at times, subjected to bad publicity in Australia because people have suffered as a result of whistleblowing. It is fast becoming an essential tool for organisations to tackle misconduct.

Benefits for organisations include:

- › Complying with legal obligations in the Corporations Act and Australian Securities and Investments Commission (ASIC) Regulatory Guide (RG) 270 relating to whistleblowing which now carry very significant fines for non-compliance including individual fines up to \$1million, jail sentences up to 2 years and organisational fines up to \$525 million.
- › Enhancing the ability to identify systematic and recurring problems.
- › Significant costs savings by offering early detection of potential or actual wrongdoing.
- › Allowing effective management of disclosures, reducing misconduct and avoiding employees going public or to external regulators.
- › Presenting a further, and perhaps a final opportunity to intervene in wrongdoing which may otherwise go undetected – whistleblowing can still work when regulatory monitoring and good governance fails.
- › Promoting confidence and trust in organisational leadership when they are prepared to go on record for encouraging disclosures.
- › Fostering organisational stability and productivity and reducing possibility of reputational damage, litigation, prosecutions and financial impact by acting on information provided by whistleblowers.
- › Empowering employees by giving them a path to disclose wrongdoing.
- › Protecting and enhancing an organisation's reputation which can be irrevocably damaged by a whistleblowing issue covered by the media.
- › Positively impacting on organisation culture – whistleblowing calls out poor culture and practices and offers an improvement opportunity.

Whistleblowing can also help meet an organisation's workplace safety and legal obligations to employees. Left unchecked, misconduct or wrongdoing may in some cases compromise and endanger wellbeing of employees.

Most people want misconduct exposed and addressed, but not everyone feels safe reporting it. Most people will only do so if they can feel safe from reprisals. A well-constructed

whistleblowing program can provide a secure and safe method to report misconduct, and to the whistleblower the option of making a disclosure via an independent channel while remaining anonymous.

A whistleblowing program should be managed by a selected group of 'Officers' holding executive leadership positions, with the senior executives or board of directors responsible for assuming ownership under the scrutiny and control of reporting and audits

The program should be subject to periodic independent reviews and audits.

There are many facets to consider in designing a good practice whistleblowing program that assures the unique needs of an organisation are met.

## Public Sector Legislation

Historically whistleblowing legislation in Australia has focused on the public sector with the Federal and State Governments enacting their respective disclosure legislation which are set out below.

- › Whistleblowers Protection Act 1993, South Australia
- › Public Interest Disclosures Act 1994, New South Wales
- › Whistleblowers Protection Act 1994, Queensland
- › Public Interest Disclosures Act 2002, Tasmania
- › Public Interest Disclosure Act 2003, Western Australia
- › Public Interest Disclosure Act 2008, Northern Territory
- › Public Interest Disclosure Act 2012, Australian Capital Territory
- › Protected Disclosure Act 2012, Victoria
- › Public Interest Disclosure Act 2013, Commonwealth

The various state and commonwealth acts make a serious attempt to address integrity and accountability in the public sector in their respective jurisdictions, with the primary objective being the provision of safe means to make disclosures and protect whistleblowers. However, they are not without their shortcomings. Critics note that:

- › Reportable wrongdoing is ill-defined and differs between jurisdictions.
- › Anonymous complaints are not always protected.
- › It is not clear who will be protected and how.
- › Obligations on organisations differs and is unclear.
- › Absence of an oversight agency responsible for whistleblower protection.

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## Corporate Whistleblowing Legislation

The 'Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017' was passed in 2019. The Bill amended the Corporations Act and came into effect on 1 July 2019. The new protections set a standard for whistleblower protection going forward for all corporations in Australia. The Corporations Act now requires that all public companies, large proprietary companies, and proprietary companies that are trustees of registrable superannuation entities must have a whistleblower policy available to their officers and employees by 1 January 2020. Among other things, requirements in the Corporations Act:

- › Enlarge the range of whistleblowers going so far as to include a spouse or relative of any individual defined as an eligible whistleblower.
- › Allows whistleblowers to remain anonymous.
- › Makes breaching the confidentiality of a whistleblower's identity an offence.
- › Offers improved remedies to those who suffer damage due to victimisation.
- › Sets out tough penalties for individuals and organisations for non-compliance.

The protections are aimed at encouraging and making whistleblowing an acceptable and effective tool in tackling wrongdoing and creating a more uniform whistleblowing protection framework.

The law defines disclosable conduct in broad terms.

Among other things it includes 'misconduct, or improper state of affairs or circumstances relating to the company'.

This definition was made deliberately broad so as to capture conduct that doesn't necessarily break any laws but may be viewed as unethical. The Commlnsure scandal, which found the Commonwealth Bank had not engaged in illegal conduct but had nonetheless engaged in unethical conduct that harmed consumers, was given as an example as the type of conduct intended to be caught.

Specific types of disclosable conduct which are of particular concern to an organisation and which are based on their business operations and practices, may be captured and stated by an organisation in their whistleblower policy.

## ASIC Regulatory Guide 270

ASIC released its detailed and prescriptive Regulatory Guide 270 Whistleblower Policies (RG 270) in November 2019 which is used by ASIC when auditing compliance.

RG 270 sets out the components a whistleblower policy must include to comply with the law. These include:

- › Types of matters covered by a policy.

- › Who can make and receive a disclosure.
- › How to make a disclosure.
- › Legal and practical protections for disclosers.
- › Investigating a disclosure.
- › Ensuring fair treatment of individuals mentioned in a disclosure.

'Robust and transparent whistleblower policies are essential to achieving sound risk management and corporate governance,' said ASIC Commissioner John Price in November 2019.

'Whistleblower policies will influence behaviour and corporate culture in positive ways – for example, by encouraging greater disclosures of wrongdoing and by deterring people from doing the wrong thing. They play a crucial role in achieving a more fair and accountable corporate environment.'

RG 270 also provides good practice guidance to assist companies develop and implement policies that are tailored to their operations. Some of the key recommendations outlined in RG 270 include the following:

### a. Requirement to foster a whistleblowing culture

Under RG270.140 to RG270.143, ASIC says: "It is important for an entity to create a positive and open environment where employees feel they can come forward to make a disclosure. A positive and open environment may also help eliminate the negative connotations associated with whistleblowing. An entity's senior leadership team plays an important role in demonstrating the entity's commitment to its whistleblower policy. They can demonstrate their commitment in practice by ensuring:

- i. disclosures are taken seriously and acted on immediately;
- ii. wrongdoing is addressed promptly;
- iii. disclosers are provided with adequate protections and support; and
- iv. early interventions are made to protect disclosers from detriment.

An effective whistleblowing program needs to be built around an organisation's culture, work environment, unique characteristics and needs. Legal requirements and standards governing whistleblowing must also be met. A commitment from the senior executives or the board of directors is essential to win trust and commitment for a whistleblowing program.

### b. Roles and responsibilities under a policy

Under RG 270.144 ASIC says "It is good practice for an entity to allocate key roles and responsibilities under its whistleblower policy. An entity could create new roles. Alternatively, the responsibilities could be integrated into existing roles. Staff members may hold more than one role, provided that this does not result in conflicts of interest. For example, it is important

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for an entity to enable its whistleblower protection officer and whistleblower investigation officer (or equivalent), to exercise independent judgement and have a mechanism through which they can escalate problems directly to the entity's board."

## c. Upfront and ongoing education and training

ASIC Good practice tip 15 says "Demonstrate the entity's commitment to the policy by promoting it actively and regularly. We encourage an entity's management to actively and regularly promote the entity's whistleblower policy. This may help demonstrate the entity's commitment to protect and support disclosers, and to identify and address wrongdoing promptly." Under RG 270.131 ASIC says "An entity should conduct upfront and ongoing education and training regarding its whistleblower policy, processes and procedures. The training should be provided to every employee."

ASIC also outlines specific topics that should be covered in training for all staff, and those with specific roles under the whistleblower policy.

## d. Ensuring the privacy and security of personal information

Under RG 270.147 ASIC says "It is good practice for an entity to have appropriate information technology resources and organisational measures for securing the personal information they receive, handle and record as part of their whistleblower policy. Due to the sensitivity of the information, any leaks or unauthorised disclosure (including from malicious cyber activity) may have adverse consequences for the disclosers, the individuals who are the subject of disclosures and the entity. It is important for the entity to consult the Australian Privacy Principles and other relevant industry, government and technology-specific standards, guidance and frameworks on data security to help safeguard their information."

## e. Monitoring and reporting effectiveness of the policy

Under RG 270.150 ASIC says "It is important for an entity to have mechanisms in place for monitoring the effectiveness of its whistleblower policy and ensuring compliance with its legal obligations. It is good practice for an entity to provide periodic reports to the entity's board or the audit or risk committee. An entity could also monitor and measure its employees' understanding of the entity's whistleblower policy, processes and procedures on a periodic basis. This may help the entity to determine where there are gaps in their employees' understanding. It may also help the entity to enhance and improve its ongoing education, training and communication about the policy."

## f. Reviewing and updating the policy

Under RG 270.158 ASIC says "It is good practice for an entity to review its whistleblower policy, processes and procedures on a periodic basis (e.g. every two years). It is also good practice to rectify any issues identified in the review in a timely manner."

In addition to the release of RG 270, ASIC granted 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. All companies are however bound by the whistleblower protections in the Corporations Act from 1 July 2019, regardless of whether they are required to have a whistleblower policy.

## Roles and Responsibilities

### Role of internal auditors

Internal auditors are now 'eligible recipients' under the Corporations Act and whistleblowers may disclose a whistleblower matter to an internal auditor or external auditor, including a member of an audit team conducting an audit. As a result, internal auditors need to understand their obligations when receiving a whistleblowing disclosure to ensure they do not breach personal or corporate obligations.

Internal auditors have two clear roles they can play. One is optional and the other is not.

One imposes a legal obligation to receive disclosures made to them under the law. This role is not optional. Auditors must, in the first instance, receive a disclosure if it is made to them while performing an audit for a client, whether it be made openly or anonymously.

The reason is simple; the law appoints auditors as eligible recipients or persons to whom a disclosure may be made. The law does not require auditors to carry out a role beyond that unless they wish or are required by the organisation to do so. They merely have to ensure the disclosure made to and received by them is forwarded to a person legally authorised to deal with the disclosure in accordance with the legislation. Auditors must however receive the whistleblower's consent to forward on a report to the next appropriate person at the organisation. If the auditor does not receive consent from the whistleblower they may face criminal and civil penalties.

To comply with this and any other extended obligation imposed on them, auditors need to receive a sufficient level of training.

Another role which auditors are best placed to deliver is that of 'auditing' the organisation's whistleblowing framework to check for and ensure compliance with the law.

This role is optional. Miss this opportunity and the organisation misses the benefit of the sharp mind of auditors attuned to compliance.

The law is more than substantially prescriptive. Hefty penalties, including jail, may follow non-compliance with this new and technical whistleblowing framework. An audit (the new law calls it a review) of past disclosures offers assurance of compliance, an opportunity to detect breaches, and for the audit to make recommendations for improvement.

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An audit should examine procedures concerning such as:

- › Receipt of disclosures.
- › Acknowledging and recording disclosures.
- › Secure storage of information and communications.
- › Confidential and private communications.
- › Authorisation and accessibility of information.
- › Legal processes carried out within required timeframe.

Who more capable than an auditor to monitor and assure effectiveness of an organisation's whistleblower policy and framework for legal compliance.

Internal auditors also have a role in supporting a successful whistleblowing program, including:

- › Providing independent and objective monitoring and testing.
- › Providing assurance to the board of directors and management the program meets good practice.
- › Conducting risk assessments.
- › Establishing internal controls to mitigate risks.
- › Triaging significant issues with the benefit of their thoughts and suggestions.
- › In some cases, receiving disclosures.
- › Liaising with the risk management team.
- › Understanding and interpreting misconduct trends.
- › Providing regular reports to the board of directors.

## Role of whistleblower protection officer

Whistleblowers often need support and protection in what can be a traumatic and confronting experience.

A whistleblower protection officer is appointed by an organisation for that purpose; to support and protect a whistleblower, if necessary, from detrimental action. A person from within or external to the organisation may be appointed.

This role should enlighten the whistleblower of critical information contained in the organisation whistleblower policy about the protections available to them, including protections under the Corporations Act.

They play a critical role in:

- › Making the whistleblower aware of support and protection available including identity protection (anonymity and confidentiality) if they have asked to remain anonymous.
- › Fostering a supportive work environment.

- › Making an immediate assessment of the welfare and protection needs of a whistleblower
- › Remaining alert to any intimidation or detrimental acts or omissions and taking appropriate action if need be
- › Informing the whistleblower how the organisation will deal with intimidation, victimisation or detrimental action.

Among other things a whistleblower protection officer needs to be:

- › Trustworthy.
- › Impartial (independent from the allegations raised in the whistleblower's report).
- › Capable of building rapport and confidence with others.
- › Discreet.
- › Capable of addressing concerns or reports of intimidation or victimisation.

A whistleblower protection officer should be given direct access to human resources and legal advisors. Where necessary in serious matters, they should have direct access to the audit committee, chief executive officer or other senior executive.

## Role of investigator

Disclosures that qualify for protection are usually investigated to determine whether the disclosure is proven or not, and accordingly decide an appropriate response.

An investigation should be carried out by an investigator appointed under the whistleblower policy and in the manner set out in the policy; by law the policy must outline key steps of the investigation process.

To be sure, the investigator should, in the first instance, satisfy themselves the 'disclosure' qualifies as a protected disclosure as a pre-requisite to the investigation.

In accordance with good practice tips provided by ASIC, an investigation should focus on the substance, rather than the motive, of disclosures and ensure the investigation follows good practice and good governance. The investigator must ensure confidentiality requirements under the Corporations Act are met during the investigation or they may face criminal and civil penalties.

The organisation should provide an avenue for review of the investigation should a party to the disclosure challenge the findings.

## Role of employees

Employees are key players in a whistleblowing program, with a key role to:

- › Keep on the alert for misconduct.



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- › Report known or suspected misconduct.
- › Be an active bystander and do not let bad behaviour go unreported.
- › Support whistleblowers.
- › Avoid doing anything which could be seen as intimidation or victimisation.
- › Keep confidential the identity of anyone they know or suspect of having made a disclosure.

## Role of external and anonymous reporting providers

It is appropriate to encourage employees to use internal whistleblower processes in the first instance because it:

- › Promotes and strengthens efficient use of organisation resources.
- › Encourages ownership and early resolution of issues.
- › Can avoid adverse publicity.
- › Builds confidence and trust in the organisation and the whistleblowing process.

However, provision should also be made for anyone who does not feel comfortable or safe in making a disclosure openly and to do so using an optional process which allows the whistleblower to remain anonymous and feel safe.

Providing an alternative channel sends a positive message to potential whistleblowers their disclosure is valued and they should not be deterred by barriers such as fear of retaliation. The integrity and viability of a whistleblowing program will be strengthened if an alternative avenue for making disclosures is available.

Elements of a good practice external whistleblowing service includes:

- › True independence.
- › Confidentiality.
- › Impartiality.
- › Security.
- › Whistleblower-focused.
- › Modern reporting tools.
- › Expert team to manage whistleblower disclosures.

## Conclusion

### Summary

Providing a way for people to disclose misconduct is a positive incentive to those who want to do the right thing. It can also be a strong deterrent for potential wrongdoers.

Establishing a whistleblowing program can send a powerful message demonstrating an organisation's commitment to ethical behaviour and in compliance with relevant law. Observing and maintaining the program is confirmation of an organisation's determination to conduct its business with integrity and respect.

### Conclusion

There are many facets to a whistleblowing program which are of equal value and importance.

Ignoring or compromising components of a whistleblowing program may compromise the program. Periodic review and audit is important to assure effectiveness, integrity and reliability of a whistleblowing program is maintained.

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## Purpose of White Papers

A White Paper is an authoritative report or guide that informs readers concisely about a complex issue and presents the issuing body's philosophy on the matter. It is meant to help readers understand an issue, solve a problem, or make a decision.

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As the chief advocate of the Internal Audit profession, the IIA serves as the profession's international standard-setter, sole provider of globally accepted internal auditing certifications, and principal researcher and educator.

The IIA sets the bar for Internal Audit integrity and professionalism around the world with its 'International Professional Practices Framework' (IPPF), a collection of guidance that includes the 'International Standards for the Professional Practice of Internal Auditing' and the 'Code of Ethics'.

IIA–Australia ensures its members and the profession as a whole are well-represented with decision-makers and influencers, and is extensively represented on a number of global committees and prominent working groups in Australia and internationally.

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