

Proposed New ASIC Guidance Released on Whistleblower Policies

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ASIC has released proposed guidance on the new whistleblower obligations to implement a Whistleblower Policy set out under Part 9.4AAA of the Corporations Act 2001. The proposed *ASIC Regulatory Guide 000 Whistleblower policies* published on 7 August 2019, explains how companies can establish, implement and maintain a whistleblower policy (**proposed ASIC Guidance**).

The proposed ASIC Guidance reinforces the importance of the obligation to develop an effective whistleblower policy and indicates that the **effectiveness and appropriateness of whistleblower policies will be a particular area of focus for the regulator**. As is evident from ASIC's comments in the associated media release to the draft guidance: "Transparent whistleblower policies are essential to good risk management and corporate governance. They help uncover wrongdoing that may not otherwise be detected."

In addition to providing guidance to entities who have not previously had to implement whistleblower policies but must now do so under the regime, the guidance is intended to provide assistance to listed entities that have previously implemented a whistleblower policy in line with ASX Corporate Governance Principles and also to those entities who voluntarily establish mechanisms for managing disclosures on a voluntary basis.

Key Points for Consultation

Overall, the draft guidance issued by ASIC is consistent with the legislative regime and the minimum requirements which must be included in whistleblower policies. However the proposed ASIC guidance encourages organisations to expand on minimum requirements. For instance, there are a number of recommendations directed at encouraging organisations to include further clarity or explanation on minimum content requirements specified under the legislation in the whistleblower policy, to improve the overall effectiveness of the policy and to improve understanding of its application for potential whistleblowers. In addition, good practice guidance is recommended by ASIC throughout the proposed guidance such as recommendations to include practical examples and cross-referencing related internal policies (such as a regulated entity's Code of Practice). The proposed guidance also recommends including more details in the policy on specific processes, procedures, systems and training in place to support implementation of the policy. The good practice recommendations build on other published guidance available on effective Whistleblower Policies such as the *Australian Standard 8004-2003 Corporate governance – Whistleblower protection programs for entities* (currently withdrawn but to be revised) and *International Standard ISO 37002 Whistleblowing management systems-Guidelines*.

Some further key points to note are:

- proposed good practice guidance that smaller entities with a limited number of employees should consider by authorising an independent whistleblower service provider to receive disclosures and consider engaging third party service providers to help investigate disclosures;
- proposed good practice guidance to establish a risk assessment framework and procedures for assessing and controlling the risk of detriment to a whistleblower;
- organisations should establish regular training of employees, specific training to management on the Whistleblower Policy and targeted training for key persons involved in managing and implementing the whistleblower policy; and
- recommendations for ongoing monitoring and reporting on the progress of specific disclosures and ongoing reporting on statistics for handling and investigating disclosures and measures on employees' understanding of the policy.

In addition, ASIC is seeking particular views on:

- whether public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy on the basis that the costs of implementing a policy may be disproportionately burdensome for these types of entities;
- the most appropriate size threshold that should apply for the purpose of exempting public companies that are small not for profits or charities (if an exemption is considered appropriate).

Implementation

Overall, implementation of the recommendations under the proposed ASIC guidance will require careful planning in the format and structure of an organisation's whistleblower policy and supporting procedures and processes, to ensure that the overall effectiveness of the policy is maintained. In particular the proposed guidance recommends it is good practice to ensure the policy is easy to understand by:

- using plain English and avoiding legal or industry jargon;
- adopting a simple structure; and
- including diagrams and/or flowcharts where possible.

Key Timeframes

Feedback on the proposed regulatory guidance is due to ASIC on **18 September 2019**.

New or revised whistleblower policies which are compliant with the new legislative obligations must be in place by 1 January 2020.

Failure to comply with the requirement to have and make available a whistleblower policy is a strict liability offence with a penalty of 60 penalty units (currently \$12,600).

Ash St. Can Help You

The graphic features the Ash St. logo in the top left. A woman is shown in profile, resting her chin on her hand. A red circular callout box contains the text: "Action Required: New or existing organisations, previously impacted by the regime, will need to have a compliant whistleblower policy and framework in place before 1 January 2020." The main title reads "The New Whistleblower Regime". At the bottom, it states: "Australia's whistleblowing protections have changed. Effective 1 July, whistleblowers will have greater protection against harassment and victimisation, with more organisations now being captured under the regime."

The Ash St. Governance, Compliance and Regulation Team have developed three **Whistleblower Essentials Packages** - comprehensive but practical tools to assist with implementing a new whistleblower policy and framework or enhancing existing frameworks within your organisation. View our solutions [here](#).

Training solutions are also available for:

- employees (refer to our Strategic Partners - [GRC Solutions](#)); and
- management, key persons involved in managing and implementing the whistleblower policy.

More Information?

Reach out to [Catherine Tomic](#) to find out more about our solutions.

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Samantha is a governance, compliance and regulation expert with 10 years' experience in the Governance and Compliance division of a top-tier law firm and three years as the Head of Compliance for a mid-tier bank.

Samantha has significant experience advising public and private sector clients on the implementation, upgrading and review of their governance and compliance systems and is an accredited Governance, Risk and Compliance professional and Fellow GRC Institute. Samantha also has extensive experience advising public and private organisations at an executive and board level and has held board positions. She is currently the Deputy Chair on the BABI Youth and Family Service Board and a fellow of the Governance Institute of Australia.