



Whistleblower Overview

Whistleblower legislation

From 1 July 2019 schools which are bodies corporate (companies limited by guarantee, incorporated associations or body corporates under any law) are required to observe the provisions of the *Corporations Act* which relate to whistleblowing. For companies limited by guarantee, there is also a requirement to have a whistleblowing policy which applies from 1 January 2020.

Under the new provisions in the *Corporations Act* a person who is an “eligible” whistleblower who makes a disclosure to an “eligible recipient” about a “disclosable matter” is entitled to certain protections, including a right to have their identity kept confidential and protection from detriment.

Set out below is a summary of the new provisions with some commentary. A draft Whistleblowing Policy is also attached.

The comments on the application of the legislation adopt a conservative (expansive) view on the application of the provisions as there is not yet any judicial or Australian Securities and Investments Commission (ASIC) guidance as to how they should be interpreted.

What is a whistleblower?

ASIC defines a whistleblower as an insider within an organisation who reports misconduct or dishonest or illegal activity that has occurred within that same organisation.

Who is an eligible whistleblower under the Corporations Act?

An individual will be an eligible whistleblower in relation to the school if they are, or have been, any of the following:

- a member of the governing body of the school;
- an employee of the school;
- a person who supplies goods or services (paid or unpaid) to the school,
- an employee of a person who supplies goods or services (paid or unpaid) to the school;
- an individual who is an associate of the School (as defined in the Corporations Act); and
- a relative or dependent (or dependents of a spouse) of any individual described above.

The extension of protection to people who provide unpaid services to the school means that parents who volunteer for activities such as camps, at the canteen or sporting activities will all be eligible whistleblowers even if they have only volunteered on one occasion. It also means their relatives or dependents (or their spouse's dependents) will also become eligible whistleblowers.

Disclosures do not have to relate to information obtained while a person provides the services, as the Act contains no clear limitation to that effect.

An “associate” is defined in the *Corporations Act* as a director or secretary of the school or of a related body corporate of the school.

Who are eligible recipients?

An eligible recipient in relation to a school is:

- an officer or senior manager of the school or a related company, such as a member of the governing body of the school, the Principal, the Deputy Principal, the Business Manager and possibly heads of departments;
- an auditor, or member of an audit team, of the school or a related company;
- an actuary of the school or a related company; and
- a person authorised by the school to receive disclosures.

Disclosures may also qualify for protection if they are made to ASIC, Australian Prudential Regulation Authority (APRA) or a prescribed Commonwealth authority, or if an eligible whistleblower makes a disclosure to a legal practitioner to obtain advice.

Whistleblower policies in schools should encourage eligible whistleblowers to make a disclosure to a particular person or people as it will assist schools in managing whistleblowing disclosures.

However, identifying a specific individual to be the recipient of whistleblowing disclosures, does not remove the responsibility from any eligible recipient to act in accordance with the policy or the *Corporations Act*.

Disclosable matters

A disclosable matter is a disclosure of information where the discloser has “reasonable grounds to suspect” that information relating to the school or a related company concerns:

- misconduct;
- an improper state of affairs or circumstances;
- illegal activity (including conduct of officers and employees) – meaning activity in breach of the Corporations Act or specified financial services legislation, or an offence against any law of the Commonwealth punishable by imprisonment of 12 months or more; or
- conduct (including conduct of officers and employees) that represents a danger to the public or financial system.

‘Reasonable grounds’ to suspect would be where the discloser has the suspicion that could reasonably be formed based on the facts and information available to them.

It is not required that the recipient believe the suspicion, merely that the suspicion held by the discloser is reasonable.

If a disclosure is made without 'reasonable grounds to suspect' (e.g. where the disclosure is unfounded) the disclosure will not be a qualifying disclosure and the discloser will not have the protections provided for under this policy and the *Corporations Act*. However, schools are strongly encouraged to seek legal advice before determining that the protections do not apply to a particular disclosure before it is concluded that the disclosure is 'unfounded' or before taking any action in relation to that disclosure.

The previous *Corporations Act* provisions required that a disclosure be made in 'good faith' in order for it to be a protected or qualifying disclosure. This requirement has been removed. This means that a disclosure can be made maliciously or for an ulterior purpose and provided that the other requirements are met, can still be a qualifying disclosure.

The word "misconduct" is defined in slightly different ways in dictionaries, but generally is regarded as behaviour which is "unacceptable", "bad", "wrongful" or "improper". The more difficult question is whether the conduct is "in relation to" the school. Generally, any misconduct of a staff member in relation to their duties, for example, would be likely to be misconduct in relation to the school.

Personal work-related grievances

A personal work-related grievance is any matter in relation to the discloser's employment, or former employment, having (or tending to have) implications for the discloser personally.

Generally, disclosures that concern personal work-related grievances do not qualify for protection.

The amendments limit protection for disclosures about solely personal employment related matters, while preserving protection for disclosures about systematic issues or reprisals against a whistleblower.

A disclosure of a personal work-related grievance will remain protected if it concerns detriment to the discloser in contravention, or alleged contravention of whistleblower-related victimisation.

A disclosure of a personal work-related grievance will also remain protected if it is made to a legal practitioner for the purposes of obtaining legal advice or legal representation in relation to the operation of the whistleblower provisions

However, a disclosure is **not** a personal work-related grievance if it:

- has significant implications for the regulated entity to which it relates, or another regulated entity, that do not relate to the discloser;
- concerns conduct, or alleged conduct, in contravention of specified corporate and financial services laws, or that constitutes an offence punishable by 12 months or more imprisonment under any other Commonwealth laws;
- concerns conduct that represents a danger to the public or the financial system; or
- concerns conduct prescribed by regulation.

If you are considering not applying the whistleblower protections to a work-related grievance, you should work step-by-step through the requirements regarding personal work-related grievances from the *Corporations Act*, as set out in the sample policy. We also strongly recommend that you seek legal advice before determining that the whistleblower protections do not apply.

How are Whistleblowers Protected?

There are two protections for whistleblowers – confidentiality and protection from detriment.

Eligible whistleblowers who make a qualifying disclosure are not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure. No contractual or other remedy or right may be enforced or exercised against the person on the basis of the disclosure.

Whistleblowers who make some types of qualifying disclosures (to ASIC, APRA or a prescribed Commonwealth Authority, or a public interest disclosure or an emergency disclosure) are also provided

immunities to ensure that information they disclose is not admissible in evidence against them in criminal proceedings or in proceedings for the imposition of a penalty, other than proceedings in respect of the falsity of the information.

Detrimental action cannot be taken against a whistleblower because they have made the disclosure. However, this does not prevent an eligible whistleblower being subject to criminal, civil or other liability for conduct that is revealed by the disclosure. It simply means that the information the person has disclosed is not admissible in certain proceedings against them.

Nonetheless, schools are strongly encouraged to seek legal advice if they are considering taking detrimental action against a whistleblower in respect of information revealed by the disclosure.

Corporations and individuals may face significant civil and criminal penalties (including imprisonment) for failing to comply with confidentiality and detrimental conduct provisions.

It will be important for schools to establish processes for processing disclosures and to undertake training for all potential eligible recipients and staff members involved in this process, so that they are aware of the protections that apply, particularly relating to confidentiality and protection from detriment.

Confidentiality

If an eligible whistleblower makes a qualifying disclosure, the eligible recipient must not disclose the identity of the eligible whistleblower OR information which is likely to lead to the identification of the eligible whistleblower, subject to some exceptions. These exceptions are disclosures:

- to ASIC or APRA;
- to the Federal Police;
- to a legal practitioner for the purpose of obtaining legal advice regarding the operation of the whistleblower protections;
- to a Commonwealth authority, or a State or Territory authority, for the purpose of assisting the authority in the performance of its functions or duties (such as the Ombudsman or NESAs); or
- made with the consent of the eligible whistleblower.

It is also permissible to disclose information which could lead to the identification of the eligible whistleblower if the disclosure “is reasonably necessary” for the purpose of investigating the matter. In these circumstances, the school must take reasonable steps to reduce the risk that the eligible whistleblower will be identified.

Protection from detriment

Eligible whistleblowers are also protected from suffering any detriment (including threats of detriment) by reason of the disclosure.

The protections in the *Corporations Act* makes it unlawful for a person to engage in conduct against another person that causes or will cause a detriment:

- in circumstances where the person believes or suspects that the other person or a third person made, may have made, proposes to make or could make a qualifying disclosure; and
- if the belief held by that person is the reason or part of the reason for their conduct.

Threats of detriments will also be unlawful if:

- the person making the threat intended to cause fear that a detriment would be carried out or was reckless as to whether the person against who it was directed would fear the threatened detriment being carried out; and
- the threat was made because the person makes or may make a qualifying disclosure.

Detriment has a very broad meaning and includes dismissal of an employee, injuring an employee in their employment, alteration of an employee's position or duties to their disadvantage; discrimination between an employee and other employees; victimisation of a dependent of the discloser, harassment or intimidation of a person or harm or injury to a person, including psychological harassment; damage to a person's property, reputation or business or financial position.

Remedies for breach of these protections include compensation, damages, apologies and injunctions.

An eligible whistleblower can also make a Public Interest Disclosure or emergency disclosure

Under certain limited circumstances which are outlined in the sample policy and in Schedule B attached to this overview, an eligible whistleblower can disclose to a member of Parliament or a journalist.

Eligible whistleblowers who make a 'public interest disclosure' or an 'emergency disclosure' also qualify for protection.

Whistleblowing Policy and Complaints Handling Procedures

A registered school is required by NESA to have a complaints handling procedure which must be publicly available.

Complaints handling procedures must be available to all parents and students and are a complaint or grievance made to the school about an educational and/or operational matter relating to services provided by the school about the behaviour or decisions of a staff member, contractor or volunteer, including misconduct.

A whistleblowing policy is directed to types of misconduct as prescribed by the *Corporations Act* and is available to staff but not parents, unless they are volunteers.

A whistleblowing policy must contain matters prescribed by the *Corporations Act* – including information about protections available to whistleblowers including strict provisions regarding confidentiality and not being subjected to detriment.

Other complaint handling arrangements will have less stringent requirements regarding confidentiality.

The options for schools are:

- to have one policy and apply the highest common denominator provisions regarding confidentiality and protection from detriment;
- to have one policy but two streams within it regarding the handling of qualifying disclosures and other complaints; or
- to have two separate policies but a common recipient for disclosures/complaints who would determine whether it was a qualifying disclosure under the whistleblowing policy, or more appropriately dealt with under another policy.

Our recommendation is to have two separate policies so that the different arrangements that apply in respect of qualifying disclosures and other matters are clear.

Schools should take care when deciding whether a particular disclosure is a qualifying disclosure policy, as a result of the substantial penalties that can apply for breaching the whistleblower protections under the *Corporations Act*.

What must be included in a Whistleblower Policy

From 1 January 2020 schools that are public companies limited by guarantee will be required to have a whistleblower policy. The policy must set out:

- information about the protections available to whistleblowers;
- how qualifying disclosures may be made and to whom;
- how the school will support a whistleblower and protect them from detriment;
- how the school will investigate qualifying disclosures;
- how the school will ensure fair treatment of employees mentioned in or related to disclosures; and

- how the policy will be made available to officers and employees.

Although only schools constituted as companies limited by guarantee are required to have a whistleblower policy, we recommend that all incorporated schools implement a policy to ensure that the school complies with its obligations under the *Corporations Act*.

Attached is a:

- Sample draft whistleblower policy
- Table to assist in determining whether a disclosure is a protected disclosure (Schedule A)
- Summary of Public Interest Disclosure and emergency disclosure provisions (Schedule B)

Is the disclosure covered by the Whistleblower Policy?

Advice for Independent School staff

All four requirements below must be met for a disclosure to be considered under the [School] Whistleblower Policy.

If all four requirements are not met, the disclosure does not qualify for protection under the [School] Whistleblower Policy. [School] will manage the complaint under the appropriate policy, including the *Complaints Handling Procedures*, *Staff Grievance Policy*, *Child Protection Policy* and *Discrimination, Harassment and Bullying Statement*.

However, disclosures may qualify for protection if they are a 'public interest disclosure' and 'emergency disclosure' or if they are made to ASIC, APRA or a prescribed Commonwealth authority.

Question	Requirement	Specifically...
1. Who the disclosure is made by	The disclosure must be made by an eligible whistleblower	<p>An eligible whistleblower is an individual who is <u>or has been</u> any of the following, in relation to the school:</p> <ul style="list-style-type: none"> • a member of the governing body of the school; • an employee; • a person who supplies goods or services (paid or unpaid); • an employee of a person who supplies goods or services (paid or unpaid); and • a relative or dependent (or dependents of a spouse) of any individual described above. <p>Anonymous complaints, where the discloser's name is not known, can also meet the 'eligible whistleblower' requirement.</p>

<p>2. Who the disclosure is made to</p>	<p>The disclosure must be made to an eligible recipient</p>	<p>An eligible recipient is an individual who occupies any of the following roles, in relation to the school:</p> <ul style="list-style-type: none"> • an officer (such as a member of the governing body of the school) or senior manager of the school or a related company; • an auditor, or member of an audit team, of the school or a related company; • an actuary of the school or a related company; and • a person authorised by the school to receive disclosures that may qualify for protection. <p>Eligible recipients also include ASIC, APRA or a prescribed Commonwealth authority.</p>
<p>3. The nature of the disclosure</p>	<p>The disclosure must be about a disclosable matter</p>	<p>Information that concerns:</p> <ul style="list-style-type: none"> • misconduct or an improper state of affairs or circumstances in relation to the school or a related company; • illegal activity of the school or a related company (or its or their officers and employees) – meaning activity in breach of the Corporations Act or specified legislation or an offence against any law of the Commonwealth punishable by imprisonment of 12 months or more; or • a danger to the public or financial system.
<p>4. Is there reasonable suspicion by the eligible whistleblower</p>	<p>The eligible whistleblower has reasonable grounds to suspect</p>	<p>Reasonable grounds to suspect is where the discloser has the suspicion that could reasonably be formed based on the facts and information available to them.</p> <p>It is not required that the recipient believe the suspicion, merely that the suspicion held by the discloser is reasonable.</p>

Public Interest Disclosure and emergency disclosures

When can an eligible whistleblower make a Public Interest Disclosure?

An eligible whistleblower can disclose to a member of Parliament or a journalist only if the information has been previously disclosed to ASIC, APRA or a prescribed Commonwealth authority, and:

- 90 days has passed since the time of the first disclosure; and
- the eligible whistleblower does not have reasonable grounds to believe action is being, or has been, taken to address the information in the disclosure; and
- the eligible whistleblower has reasonable grounds to believe that making a further disclosure of the information would be in the public interest; and
- the eligible whistleblower informs the original recipient they intend to make a public interest disclosure; and
- the extent of information disclosed is no greater than necessary to inform the recipient of the disclosable matter.

When can an eligible whistleblower make an 'emergency disclosure'?

An eligible whistleblower can disclose to a member of Parliament or a journalist only if the information has been previously disclosed to ASIC, APRA or a prescribed Commonwealth authority, and:

- the eligible whistleblower has reasonable grounds to believe that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment; and
- the eligible whistleblower informs the original recipient they intend to make an emergency disclosure; and
- the disclosure of information is no greater than necessary to inform the recipient of the substantial and imminent danger.

What protections apply to whistleblowers who make a public interest disclosure or emergency disclosure?

Eligible whistleblowers who make a 'public interest disclosure' or an 'emergency disclosure' also qualify for protection.