ASIC
Australian Securities & Investments Commission

ASIC'S RESPONSE TO QON

1. Corporate sector

(a) *Views regarding which best practice criterion should be considered in any reforms for **corporate sector** whistleblowing legislation in Australia*

In developing ASIC's submission to the PJC Inquiry, we considered the G20 best practice criteria for whistleblowing legislation.

ASIC's experience to date in handling whistleblower matters has also helped inform our views on the areas of the law that could be improved.

The below table summarises ASIC's key views regarding a more comprehensive whistleblowing regime for the Australian corporate sector, as outlined in our submission, with each element being mapped against the most relevant G20 best practice criterion.

Key elements of a comprehensive corporate sector whistleblowing regime	Summary of ASIC's submission	Mapping to most relevant G20 best practice criterion
Scope and legislative approach to corporate sector whistleblowing reform	ASIC recommends replacing the current fragmented, sector-based approach to whistleblowing protection with a comprehensive corporate sector whistleblowing regime by enacting new, stand-alone legislation that covers all disclosures about corporate activities involving a possible breach of Commonwealth legislation. ASIC agrees that the future corporate sector whistleblowing legislation should be closely aligned to the AUS-PIDA, the recently amended Registered Organisations Act, the proposed protections for tax whistleblowers, and take into account international best practice.	#1 Broad coverage of organisations #2 Broad definition of reportable wrongdoing #4 Range of internal / regulatory reporting channels

Definition of protected disclosures: categories of qualifying disclosures	ASIC supports broadening the definition of whistleblowers to include a company's former employees, directors and officers, and contractors, a company's current and former financial services providers and their representatives, and a company's current and former accountants, auditors, unpaid workers, and business partners. In addition, we suggest including the other categories that have been proposed for tax whistleblowers i.e. tax agent, legal adviser or consultant, business partner or joint venture, and client of a financial service provider, accountant or auditor, tax agent, legal adviser or consultant.	#3 Broad definition of whistleblowers
Definition of protected disclosures: types of disclosures that should be protected	**<u>Anonymous disclosures</u>** ASIC supports extending whistleblower protections to anonymous disclosures. **<u>Confidentiality and protecting the identity of the whistleblower</u>** ASIC suggests that the proposed approach for protecting the identity of tax whistleblowers should also be considered for inclusion into the new corporate sector whistleblowing legislation. That is, the identity of a whistleblower, and the disclosure of any information which is capable of revealing their identity, should be subject to an absolute requirement of confidentiality. **<u>Good faith requirement</u>** ASIC considers there is a need to replace the 'good faith' requirement with an 'objective test' i.e. honest belief, held on reasonable grounds, that the information disclosed shows, or tends to show, wrongdoing has occurred.	#6 Thresholds for protection #7 Provision and protections for anonymous reporting #8 Confidentiality protected

Mechanisms for encouraging reporting of wrongdoing	ASIC recommends overhauling the compensation arrangements for reprisals so whistleblowers are confident they will not be disadvantaged as a result of disclosing corporate wrongdoing. We consider it is essential to clearly define 'reprisal' and 'detriment' and the nature of the damages for which a whistleblower may make a compensation claim (which should not be capped), establish a whistleblower tribunal to hear compensation claims from employees and non-employees, ensure cost protection for whistleblowers (unless a claim has been made vexatiously), and address compensation where the corporation the subject of the disclosure is insolvent.	#10 Broad protections against retaliation #11 Comprehensive remedies for retaliation #13 Oversight authority
Oversight and administrative mechanisms and procedures	ASIC considers that a comprehensive whistleblowing regime should be supported by an independent oversight agency, such as the Commonwealth Ombudsman.	#13 Oversight authority #14 Transparent use of legislation

(b) *Aspects of the recent amendments to the Registered Organisations Act that would be appropriate to include in **corporate sector** reforms*

ASIC has considered the recent amendments to the RO Act in developing our submission to the PJC Inquiry.

In our submission, we noted that it would be worthwhile considering including some of the provisions under the Registered Organisations Act in the future corporate sector whistleblowing regime. These are summarised in our response to question 6 below.

(c) *Views on whether any additional provisions are necessary to ensure that whistleblowing laws are effective for multinational corporations with significant management structures outside Australia*

If the corporation the subject of the disclosure is Australian registered, a prohibition on reprisals against the whistleblower or compensation for reprisal would apply to the corporation. Any practical challenges in enforcing the prohibition or compensation are not limited to the whistleblowing context. If the corporation is foreign, ASIC is unaware of what additional provisions are proposed to assist.

2. Public sector

(a) *Views regarding which best practice criterion should be considered in any reforms for **public sector** whistleblowing legislation in Australia*

ASIC understands that the Australian public sector whistleblowing regime already captures all the G20 best practice criteria, and is regarded as international best practice.

(b) *Aspects of the recent amendments to the Registered Organisations Act that would be appropriate to include in **public sector** reforms*

We do not have any suggestions in this regard.

(c) *Comments on the findings made by the Moss review of AUS-PIDA*

ASIC considers that it would be worthwhile to take into consideration the following Moss Review recommendations as part of the corporate sector reform.

Recommendation 1. That the PID Act be reviewed every three to five years to enable its operation to be assessed and regard to be given to new research and developments in similar state and territory legislation.

Recommendation 5. That the definition of 'disclosable conduct' in the PID Act be amended to exclude conduct solely related to personal employment-related grievances, unless the Authorised Officer considers that it relates to systemic wrongdoing. Other existing legislative frameworks are better adapted to dealing with and resolving personal employment-related grievances.

3. Not-for-profit sector

(a) *Views regarding which best practice criterion should be considered in any reforms for **not-for-profit sector** whistleblowing legislation in Australia*

Please refer to ASIC's response to question 6 below.

(b) *Aspects of the recent amendments to the Registered Organisations Act that would be appropriate to include in **not-for-profit sector** reforms*

Please refer to ASIC's response to question 6 below.

4. Establishing a Public Interest Disclosure Agency (PIDA) agency as an independent body to receive disclosures, provide advice to whistleblowers and a clearing-house for initial investigations

As per our submission, to provide support to whistleblowers, ASIC considers that an independent body could be appointed to guide them about the process for making a compensation claim for reprisals, including potentially providing information about accessing legal aid. In addition, the independent body could provide advice to whistleblowers regarding their disclosures (e.g. whether the nature of their disclosure falls within the scope of the whistleblowing provisions, or which regulator would be responsible for handling the subject matter).

We also consider that it would be beneficial for an established body, such as an ombudsman, to be appointed to this role—in addition to providing independent oversight for the whistleblowing regime.

5. Putting all whistleblower protection laws in a single Act versus the current situation where the laws are spread over at least four Acts

As outlined in our submission, the current fragmented, sector-based approach to whistleblowing protection for the Australian corporate sector should be replaced with a comprehensive corporate sector whistleblowing regime through enacting new, stand-alone legislation that covers all disclosures about corporate activities involving a possible breach of Commonwealth legislation.

The whistleblowing provisions under the *Corporations Act 2001* (Corporations Act) currently only cover contraventions of the Corporations legislation (Pt 9.4AAA s1317AA(1)(d)), which includes the Corporations Act and the *Austalian Securities and Investments Commission Act 2001* (ASIC Act). The provisions do not extend to the range of misconduct that ASIC may be able to investigate (e.g. they do not extend to breaches of the *National Consumer Credit Protection Act 2009*).

As there is a wide range of corporate activities and potential contraventions of Commonwealth legislation, and therefore corresponding whistleblower disclosures, that are not covered under the Corporations Act e.g. money laundering, ASIC considers there is a need for a comprehensive corporate sector whistleblowing regime implemented through new, dedicated legislation. The new legislation would cover all disclosures about corporate activities involving a possible breach of Commonwealth legislation, and would be a counterpart to the AUS-PIDA for public sector misconduct.

Enacting comprehensive, stand-alone legislation for corporate sector whistleblowing would significantly simplify the law, provide greater legal certainty and clarity for would-be whistleblowers, and ensure a consistent approach to handling disclosures from all industries across regulators. It would also avoid the additional complexities and costs of different whistleblowing requirements being applied in various areas of regulation.

Comprehensive, stand-alone legislation should also improve the visibility of the regime, making its promotion easier for regulators and corporations.

ASIC notes that the current fragmented legislative approach for corporate sector whistleblowing (i.e. numerous statutes with separate, specific whistleblowing regimes) is problematic because it may require a would-be whistleblower to consult a number of statutes or a lawyer to determine whether they have protection.

Should a comprehensive corporate sector whistleblowing regime that covers all disclosures about corporate activies involving a possible breach of Commonwealth legislation not be adopted, ASIC considers the most appropriate alternative option would be to create new, dedicated legislation for the entire financial services industry. That is, new, stand-alone legislation should be enacted to replace the separate whistleblowing regimes contained in the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995*, and *Superannuation Industry (Supervision) Act 1993*, and it should also cover the *National Consumer Credit Protection Act 2009*, which does not currently include whistleblowing provisions.[1]

We consider this alternative approach would ensure ASIC could handle whistleblower reports regarding any misconduct or potential misconduct that falls within our remit. It would eliminate the need for legislative changes should ASIC's remit be broadened in future. It would also avoid the need to update each individual statute to mirror any future changes to the whistleblowing provisions in the Corporations Act. More importantly, it would ensure whistleblowers across the financial system have the same protections and obligations when making disclosures.

While one legislative option is to amend AUS-PIDA so that the public and private sector whistleblowing regimes are covered under the same legislation, we do not consider this to be the most appropriate alternative. Although we understand that AUS-PIDA is considered a best practice approach to whistleblowing legislation, we consider the creation of new, dedicated legislation as a counterpart to AUS-PIDA would ensure the final regime takes into account the different considerations that apply to disclosures about private institutions. For example, it would reflect that private sector disclosures should be subject to additional privacy and confidentiality requirements and that investigations relating to private sector disclosures should be undertaken by regulators (rather than internally by public sector agencies under AUS-PIDA).

[1] ASIC has previously suggested broadening the scope of information protected by the whistleblowing provisions in the Corporations Act to cover any misconduct that ASIC may investigate. See *Senate inquiry into the performance of the Australian Securities and Investments Commission:* *Main submission by ASIC*, October 2013, pp. 161–164.

Notwithstanding, ASIC considers the future corporate sector whistleblowing legislation should be closely aligned to AUS-PIDA, the Registered Organisations Act, the proposed protections for tax whistleblowers, and take into account international best practice.

6. Harmonisation of whistleblower provisions across the public, corporate and not-for-profit sectors (not replication, but consistency and difference where appropriate)

ASIC supports the harmonisation of whistleblower provisions across the public, corporate and not-for-profit sectors (not replication, but consistency and difference where appropriate).

As above, ASIC considers that the future corporate sector whistleblowing legislation should be closely aligned to AUS-PIDA, the Registered Organisations Act, the proposed protections for tax whistleblowers, and take into account international best practice.

The table below lists the potential areas for harmonisation, as outlined in ASIC's submission:

Key elements of a comprehensive corporate sector whistleblowing regime	Potential areas for harmonisation – as outlined in ASIC's submission
Scope and legislative approach to corporate sector whistleblowing reform	The current fragmented, sector-based approach to whistleblowing protection for the Australian corporate sector should be replaced with a comprehensive corporate sector whistleblowing regime through enacting new, stand-alone legislation that covers all disclosures about corporate activities involving a possible breach of Commonwealth legislation. The new legislation would cover all disclosures about corporate activities involving a possible breach of Commonwealth legislation, and would be a counterpart to the AUS-PIDA for public sector misconduct.
Definition of protected disclosures: categories of qualifying disclosures	ASIC considers updating the definition of whistleblowers to include former employees, officers and contractors would better align the future corporate sector whistleblowing regime with the definition of whistleblowers in AUS-PIDA, the Registered Organisations Act and international best practice. ASIC notes that the proposed definition of tax whistleblower also includes tax agent, legal adviser or consultant, business partner or joint venture, and client of a financial service provider, accountant or auditor, tax agent, legal adviser or consultant. ASIC considers it would also be beneficial to include these additional categories under the definition of

	corporate whistleblower. We also consider it would be beneficial to align the protections available to a person where they make a disclosure to a regulator based on information received in the course of providing client advice. Currently under s1317AB of the Corporations Act, a person has qualified privilege in relation to a protected disclosure. However, under AUS-PIDA, a person who makes a public interest disclosure has absolute privilege in proceedings for defamation in respect of the public interest disclosure.
Definition of protected disclosures: types of disclosures that should be protected	**<u>Anonymous disclosures</u>** ASIC suggests broadening the definition of protected disclosures to include anonymous disclosures to ensure the future corporate sector whistleblowing regime is consistent with the approach under AUS-PIDA, the Registered Organisations Act and international best practice. **<u>Confidentiality and protecting the identity of the whistleblower</u>** ASIC suggests that the new whistleblowing legislation should clearly outline the circumstances under which regulators should be able to resist an application for the production of documents that may reveal a whistleblower's identity. We consider a similar approach to what has been proposed for protecting the identity of tax whistleblowers should also be considered for the new corporate sector whistleblowing legislation. As proposed, the identity of a tax whistleblower, and the disclosure of any information which is capable of revealing their identity, will be subject to an absolute requirement of confidentiality. **<u>Good faith requirement</u>** ASIC suggests removing the motive of a discloser from the criteria for whistleblower protection by replacing the 'good faith' requirement with an 'objective test' i.e. honest belief, held on reasonable grounds, that the information disclosed shows, or tends to show, wrongdoing has occurred. ASIC understands that the 'good faith' requirement is generally considered to be out-of-date and inconsistent with the 'objective test' adopted under AUS-PIDA, the Registered Organisations Act and the UK *Public Interest Disclosure Act 1998* (UK-PIDA).

Mechanisms for encouraging reporting of wrongdoing	**<u>Compensation</u>** ASIC considers there is merit in incorporating the below features in the corporate sector whistleblowing compensation arrangements: 1. Clearly outline the circumstances under which a whistleblower has a right to a compensation claim, by adopting the approach under AUS-PIDA and the Registered Organisations Act. In particular, provide a right to compensation for detriment suffered from a reprisal or threat of reprisal by defining: (i) 'reprisal' as an act or omission that causes detriment to another person because they believe or suspect that the person may have made or intends to make a disclosure; and (ii) 'detriment' as including any disadvantage to a person, including dismissal; injury to a person in his or her employment; discrimination; alteration of their position to their disadvantage; harassment or intimidation; harm or injury to a person, including psychological harm; damage to a person's property; and damage to a person's reputation. 2. The provisions should clearly state that compensation may be payable where no action by a regulator, on the basis of the disclosure or for contravention of a prohibition against reprisal, occurs or is successful. For example, under AUS-PIDA, it is clear that civil remedies are available even if a prosecution for criminal reprisal has not been brought or cannot be brought (s19A). 3. Consistent with the approach under AUS-PIDA, the compensation arrangements should provide whistleblowers with cost protection. That is, all legal costs should be covered by the corporation the subject of the disclosure, unless the whistleblower's reprisal claim is vexatious.

Oversight and administrative mechanisms and procedures	ASIC considers that a comprehensive corporate sector whistleblowing regime should be supported by appropriate and effective oversight arrangements. ASIC is aware that the independent oversight arrangements under AUS-PIDA, which is supported by two agencies (i.e. the Commonwealth Ombudsman and, for intelligence agencies, the Inspector-General of Intelligence and Security), are considered core to AUS-PIDA's success. We are also aware that the inclusion of independent oversight arrangements is in line with international best practice. Based on the above, and to avoid the need to establish a new oversight body, we consider the Commonwealth Ombudsman would be an appropriate independent oversight body for the whistleblowing regime.

(a) *Suggested arrangements for ensuring that companies or not-for-profit organisations (including their staff) that undertake contracts or work for the public sector are not subject to conflicting arrangements*

ASIC suggests that this should be mitigated by clearly outlining in the whistleblowing provisions: the range of reportable wrongdoing; the range of entities about which disclosures can be made; and the range of individuals who can benefit from the processes and protections in the Act.

This would ensure that companies and not-for-profit organisations (and their employees) that undertake contracts or work for the public sector and are making qualifying disclosures about misconduct in or affecting public sector entities will only be covered by the arrangements under AUS-PIDA.