

Law Council of Australia

# Whistleblower Policy

Policy Statement

6 December 2019



Law Council  
OF AUSTRALIA

## 1. Aim

The Law Council of Australia Limited (**Law Council**) is committed to transparency and to building an environment in which people feel free to raise legitimate issues relating to the Law Council's operations. The Law Council is also committed to protecting eligible whistleblowers from detriment.

This Policy supports the Law Council's Objects, which include to promote and defend the Rule of Law in the public interest, serve as the national peak body for lawyers to further the betterment of law and promote the administration of justice.<sup>1</sup> In accordance with this mandate, the Law Council is committed to upholding the law and promoting accountable, best practice corporate governance.

## 2. Purpose

The *Corporations Act 2001* (Cth) and the *Tax Administration Act 1953* (Cth) provide for protections for whistleblowers (**Whistleblower Protection Scheme**).

The purpose of this Policy is to set out information relating to the Whistleblower Protection Scheme, including information about:

- (a) the types of disclosures that qualify for protection;
- (b) the protections available to whistleblowers;
- (c) who disclosures can be made to and how they can be made;
- (d) how the Law Council will support whistleblowers and protect them from detriment;
- (e) how the Law Council will investigate disclosures;
- (f) how the Law Council will ensure fair treatment of employees who are the subject of or are mentioned in disclosures; and
- (g) how this Policy is to be made available to officers and employees of the Law Council.

## 3. Scope of the Whistleblower Protection Scheme

### 3.1 What disclosures are protected?

A disclosure will 'qualify' for protection under the Whistleblower Protection Scheme if:

- (a) it is a disclosure by an 'eligible whistleblower' to:
  - (i) Australian Securities and Investments Commission (ASIC), the Commissioner of Taxation (in relation to tax matters), a prescribed Commonwealth authority or a legal practitioner; or
  - (ii) an 'eligible recipient'; and

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<sup>1</sup> *Constitution of the Law Council of Australia Limited* cl 2 (Objects).

- (b) the discloser has 'reasonable grounds' to 'suspect' that the disclosed information concerns a disclosable matter.

Public interest and emergency disclosures also qualify for protection – see paragraphs 6.4 and 6.5 for more detail.

## 4. Who is an 'eligible whistleblower'?

The following persons are capable of being 'eligible whistleblowers':

- (a) an officer of the Law Council, which for the purposes of this policy includes Executive, Directors, Alternate Directors, Representatives and Company Secretary;
- (b) Section Chairs and Section Committees members;
- (c) all Advisory Committee and Working Group members of the Law Council and Sections;
- (d) an employee of the Law Council;
- (e) an individual who is an associate of the Law Council; and
- (f) an individual who supplies goods or services to the Law Council (whether paid or unpaid) or an employee of a supplier.

An 'eligible whistleblower' also includes an individual who:

- (g) previously held any of the above positions or functions;
- (h) is a relative, dependent or spouse of the individuals set out above.

## 5. What information will be a disclosable matter?

### 5.1 What is a 'disclosable matter'?

A disclosable matter is information that:

- (a) concerns misconduct<sup>2</sup> or an improper state of affairs or circumstances<sup>3</sup> in relation to the Law Council or one of its related bodies corporate; or
- (b) indicates the Law Council, a related body corporate or one of its or their officers or employees has engaged in conduct that constitutes an offence against, or a contravention of, the:
  - (i) *Corporations Act 2001 (Cth)*;
  - (ii) *Australian Securities and Investments Commission Act 2001 (Cth)*;and any instrument made under these Acts.

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<sup>2</sup> Section 9 of the Corporations Act 2001 defines *misconduct* to include 'fraud, negligence, default, breach of trust and breach of duty'.

<sup>3</sup> The Corporations Act 2001 does not define *improper state of affairs or circumstances*.

- (c) constitutes an offence against or a contravention of any other law of the Commonwealth that is punishable by imprisonment for 12 months or more; or
- (d) represents a danger to the public or the financial system.

The misconduct or an improper state of affairs can also be in respect of tax affairs.

Disclosable matters do not necessarily involve a contravention of a law. For example, '*misconduct or an improper state of affairs or circumstances*' could involve conduct that, whilst not unlawful, indicates a systemic issue of concern that the relevant regulator should know about to properly perform its functions. It may also relate to dishonest or unethical behaviour and practices, conduct that may cause harm, or conduct prohibited by standards or code(s) of conduct. Also, information that indicates a significant risk to public safety or the stability of, or confidence in, the financial system is a disclosable matter, even if it does not involve a breach of a particular law.

An eligible whistleblower who makes a disclosure must have 'reasonable grounds to suspect' the information to qualify for protection. This means that even if a disclosure turns out to be incorrect, the protections will still apply provided the eligible whistleblower had 'reasonable grounds to suspect'.

Disclosures that are not about a disclosable matter are not covered by this Policy and do not qualify for protection under the Whistleblower Protection Scheme. However, such disclosures may be protected under other legislation, such as the *Fair Work Act 2009* (Cth), for example, personal work-related grievances (set out below).

## 5.2 Personal work-related grievances

A disclosure does not qualify for protection under the Whistleblower Protection Scheme to the extent that the information disclosed:

- (a) concerns a personal work-related grievance of the eligible whistleblower; and
- (b) does not concern a contravention, or an alleged contravention of the detriment provisions referred to in paragraph 8.3 of this Policy.

A disclosure is a '*personal work-related grievance*' if:

- (a) the information concerns a grievance about a matter relating to the eligible whistleblower's employment, or former employment, having (or tending to have) implications for the eligible whistleblower personally; and
- (b) the information:
  - (i) does not have significant implications for the Law Council, or another regulated entity, that do not relate to the discloser; and
  - (ii) does not concern conduct, or alleged conduct, referred to in paragraph 5.1(b), 5.1(c), or 5.1(d) of this Policy.

Examples of personal work-related grievance include:

- (a) an interpersonal conflict between the discloser and another employee;
- (c) a decision relating to the employment, transfer or promotion of the discloser;
- (d) a decision relating to the terms and conditions of employment of the discloser;
- (e) a decision to suspend or terminate the employment of the discloser, or otherwise to discipline the discloser.

Disclosures about personal work work-related grievances should be raised under the Law Council's existing grievance policy, which can be found in the Law Council Staff Handbook.

## 6. Who can receive a disclosure?

For the protections under the Whistleblower Protection Scheme to apply, a disclosure must be made directly to an 'eligible recipient'. These people are detailed below as **Authorised Recipients**. If you are an eligible whistleblower your disclosure qualifies for protection from the time it is made to an eligible recipient, regardless of whether you or the recipient recognises that the disclosure qualifies for protection at that time.

### 6.1 Eligible recipients within the Law Council

The Law Council encourages you to make a disclosure internally to the individuals set out below (referred to as the Authorised Recipients) – each of whom has relevant experience and/or training to deal with such matters. The Law Council's Authorised Recipients can be contacted in the following ways:

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| <p><b>President</b><br/>           Law Council of Australia<br/>           GPO Box 1989, Canberra ACT 2601<br/>           Email: WB-President@lawcouncil.asn.au<br/>           Ph: 02 6246 3788</p>          | <p><b>Chief Executive Officer</b><br/>           Law Council of Australia<br/>           GPO Box 1989, Canberra ACT 2601<br/>           Email: WB-CEO@lawcouncil.asn.au<br/>           Ph: 02 6246 3788</p> |
| <p><b>Company Secretary</b><br/>           Law Council of Australia<br/>           GPO Box 1989, Canberra ACT 2601<br/>           Email: WB-CompanySec@lawcouncil.asn.au<br/>           Ph: 02 6246 3788</p> | <p><b>Human Resources Manager</b><br/>           Law Council of Australia<br/>           GPO Box 1989, Canberra ACT 2601<br/>           Email: WB-HRM@lawcouncil.asn.au<br/>           Ph: 02 6246 3788</p> |

Whilst the Law Council encourages disclosures to the Law Council's Authorised Recipients, if it relates to the CEO or a director of the Law Council, it should be raised directly with the **President of the Law Council**, who can be contacted as above.

If you do not feel comfortable raising your disclosure with an Authorised Recipient, you could also raise it with any of the following:

- (a) an officer or senior manager of the Law Council or a related body corporate; or
- (b) the auditors or actuaries of the Law Council or a related body corporate (including a member of an audit team conducting an audit).

- (c) A lawyer, for the purposes of taking advice about whistleblower protections.

## 6.2 Disclosure to external regulatory bodies

While it is the Law Council's preference for disclosures to be made internally - to give the Law Council the opportunity to investigate and deal with them - an eligible whistleblower may choose to raise disclosable matters outside of the Law Council with:

- (a) ASIC; or
- (b) a Commonwealth authority prescribed in the Corporations Regulations.

This policy does not affect any mandatory reporting requirement that the Law Council may have under any other Commonwealth or State/Territory law.

## 6.3 Disclosure to a legal practitioner

A report of a disclosable matter will also be protected if it is to a qualified legal practitioner for the purpose of taking legal advice or legal representation in relation to the operation of the whistleblower provisions in the Corporations Act.

## 6.4 Public interest disclosures

There is an additional category of disclosures called 'public interest disclosures' that qualify for protection. These can be made to journalists and members of Parliament (Commonwealth, State or Territory) but only if the eligible whistleblower complies with the following strict requirements:

- (a) the eligible whistleblower must have first made a qualifying disclosure to ASIC or a prescribed Commonwealth authority;
- (b) at least 90 days has passed since the qualifying disclosure was made;
- (c) the eligible whistleblower does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the qualifying disclosure related;
- (d) the eligible whistleblower has reasonable grounds to believe that making a public interest disclosure would be in the public interest;
- (e) after 90 days has passed, the eligible whistleblower must give the body to which the qualifying disclosure was originally made, a written notification that:
  - (i) includes sufficient information to identify the qualifying disclosure; and
  - (ii) states that the eligible whistleblower intends to make a public interest disclosure; and
- (f) the extent of the information disclosed in the public interest disclosure is no greater than to inform the journalist or member of Parliament of the misconduct or improper state of affairs or circumstances, or other conduct falling within the scope of the Whistleblower Protection Scheme.

## 6.5 Emergency disclosures

There is an additional category of disclosures called 'emergency disclosures' that qualify for protection. These can be made to journalists and members of Parliament but only if the discloser complies with the following strict requirements:

- (a) the discloser must have first made a qualifying disclosure to ASIC or a prescribed Commonwealth authority;
- (b) the discloser has reasonable grounds to believe that information concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment;
- (c) the discloser gave notice to the body to which the qualifying disclosure was made that states:
  - (i) that they intend to make an emergency disclosure; and
  - (ii) includes sufficient information to identify the qualifying disclosure; and
- (d) the extent of the information disclosed in the emergency disclosure is no greater than is necessary to inform the journalist or member of Parliament of the substantial and imminent danger.

## 7. Anonymous Disclosures

An eligible whistleblower can choose to make a disclosure anonymously. For example, they may do so because of concerns about their identity becoming known. If such concerns exist, an eligible whistleblower may prefer to adopt a pseudonym for the purposes of their disclosure (not their true name) – or to create an anonymous email address to submit their disclosure to an Authorised Recipient. Regardless, anonymous disclosures are still capable of being protected under the Whistleblower Protection Scheme.

In some cases, though, it may be more difficult for the Law Council to investigate an anonymous disclosure. However, it may be possible to address this if the whistleblower provides a means of contact for any follow up questions (eg, via an anonymous email address).

## 8. Protections

Important protections relating to confidentiality and detriment apply to eligible whistleblowers who report disclosable matters in accordance with the Whistleblower Protection Scheme outlined in this Policy.

The Law Council takes contraventions of these protections very seriously and may take disciplinary action against anyone for doing so. If you have any particular concerns about this, you can raise them with an Authorised Recipient.

Civil and criminal sanctions also apply for breaches of these protections.

## 8.1 Confidentiality

Strict confidentiality obligations apply in respect of any disclosures that qualify for protection under the Whistleblower Protection Scheme.

Unless the eligible whistleblower consents, it is illegal for a person to disclose an eligible whistleblower's identity or any information that may lead to their identification (subject to the exceptions set out below).

The Law Council is committed to ensuring the confidentiality of eligible whistleblowers. There may be some circumstances when the Law Council may ask eligible whistleblowers to consent to the disclosure of their identity - or information that may lead to their identification. This consent may be needed to appropriately investigate and resolve the matter and/or prevent the disclosable matter occurring again.

If an eligible whistleblower does not consent to their identity being disclosed, it will still be lawful to disclose their identity to:

- (a) ASIC, the AFP or the Commissioner of Taxation (in relation to tax matters);
- (b) a legal practitioner for the purposes of obtaining legal advice or legal representation about the disclosure; or
- (c) to a body prescribed by the Corporations Regulations.

It will also be lawful to disclose information that may lead to the identification of the individual if this is reasonably necessary for the purpose of investigating the disclosure (provided the Law Council takes all reasonable steps to reduce the risk that the eligible whistleblower will be identified as a result of the disclosure).

ASIC or the AFP can disclose the identity of an eligible whistleblower, or information that is likely to lead to the identification of the discloser, to a Commonwealth, State or Territory authority to help the authority in the performance of its functions or duties.

If there is a breach of confidentiality, an eligible whistleblower can lodge a complaint with an Authorised Recipient or a regulator such as ASIC for investigation.

If your disclosure qualifies for protection set out in this Policy, it is likely you may be asked to provide consent to the disclosure of your identity or information that is likely to lead to your identification. This would only be to facilitate any investigation and/or resolution of the matter. If consent is withheld, it may not be possible to adequately investigate and respond (if at all) to the disclosure.

## 8.2 The Law Council cannot pursue action against the discloser

An eligible whistleblower is protected from any civil liability, criminal liability, administrative liability (including disciplinary action) for making a qualifying disclosure in accordance with the Whistleblower Protection Scheme, and no contractual or other remedy may be enforced or exercised, against the eligible whistleblower on the basis of a qualifying disclosure.

However, the protections do not grant immunity for any misconduct a Discloser has engaged in that is revealed in their disclosure.

### 8.3 Detriments and threats of detriment prohibited

The protections also make it unlawful for a person to engage in conduct against another person that causes or will cause a detriment:

- (a) 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
- (b) if the belief or suspicion 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.

Threats may be express or implied, conditional or unconditional. A discloser (or another person) who has been threatened in relation to a disclosure does not have to actually fear that the threat will be carried out.

The meaning of 'detriment' is very broad and includes:

- (a) dismissing an employee;
- (b) injuring an employee in their employment;
- (a) altering an employee's position or duties to their disadvantage;
- (b) discriminating between an employee and other employees;
- (c) harassing or intimidating a person;
- (d) harming or injuring a person;
- (e) damaging a person's property, reputation, business or financial position;  
and
- (f) any other damage to a person.

It may be necessary during the course of an investigation to take reasonable administrative action to protect an eligible whistleblower from detriment (e.g. changing the whistleblower's reporting line if the disclosure relates to a manager). Such conduct will not be detrimental conduct. A disclosure will also not prohibit the Law Council from managing (in the ordinary way) any separate performance issues that may affect the work of an eligible whistleblower.

A whistleblower may be subject to disciplinary action if, in the course of investigating a disclosure, the Law Council determines that the eligible whistleblower was complicit in the misconduct or improper state of affairs or has otherwise acted in an improper way.

If an eligible whistleblower believes they have suffered detriment they can lodge a complaint with an Authorised Recipient or a regulator such as ASIC for investigation. An eligible whistleblower can also seek their own independent legal advice.

## 8.4 Court orders

Courts are given broad scope to make orders remedying a detriment or threatened detriment. These include injunctions, compensation orders (including against individual employees and their employer), reinstatement, exemplary damages and the making of apologies. Civil and criminal sanctions also apply to breaches of the Whistleblower Protection Scheme.

## 8.5 Are there any other protections that are available?

Disclosures may also amount to the exercise of a workplace right by an employee or contractor. The Law Council and its employees are prohibited under the *Fair Work Act 2009* (Cth) from taking adverse action against employees or contractors because they exercised or propose to exercise any workplace rights.

## 9. Further steps and investigation of disclosures

The Law Council will acknowledge receipt of a disclosure within a reasonable period, assuming the 'eligible whistleblower' can be contacted (including through anonymous channels). The Law Council will assess disclosures to determine whether:

- (a) they fall within the Whistleblower Protection Scheme; and
- (b) an investigation is required – and if so, how that investigation should be carried out.

Generally, if an investigation is required, the Law Council will determine:

- (c) the nature and scope and timing of the investigation;
- (d) who should lead the investigation – including whether an external investigation is appropriate;
- (e) the nature of any technical, financial or legal advice that may be required to support the investigation; and
- (f) the anticipated timeframe for the investigation.

Where practicable, the Law Council will keep the eligible whistleblower informed of the steps taken or to be taken (or if no action is to be taken, the reason for this), and provide appropriate updates, including about the completion of any investigation. However, the extent of the information provided, or whether it will be provided at all, will be subject to applicable confidentiality considerations, legal obligations and any other factors the Law Council considers relevant in the particular situation.

The Law Council may not be able to undertake an investigation, or provide information about the process etc, if it is not able to contact the discloser, for example, if a disclosure is made anonymously and has not provided a means of contact.

## 10. Support and fair treatment

The Law Council is committed to transparency and to building an environment in which people feel free to raise legitimate issues relating to the Law Council's operations. The Law Council is also committed to protecting eligible whistleblowers from detriment.

When a qualifying disclosure under the Whistleblower Protection Scheme is made, the Law Council will reiterate the requirements of this Policy to relevant individuals to ensure the protections are not undermined.

Disciplinary action up to and including dismissal may be taken against any person who causes or threatens to cause any detriment against a whistleblower.

In addition, the Law Council's usual Employee Assistance Program (EAP) services will be available to all whistleblowers and other employees affected by the disclosure, should they require that support.

If the disclosure mentions or relates to employees of the Law Council other than the eligible whistleblower, the Law Council will take steps to ensure that those individuals are treated fairly. Typically, this would include giving those persons an opportunity to respond to the subject matter of the disclosure having regard to principles of procedural fairness. In addition, action would only be taken against such a person if there is cogent evidence of wrongdoing.

## 11. Vexatious disclosures

A discloser will only be protected if they have objectively reasonable grounds to suspect that the information that they disclose concerns misconduct or an improper state of affairs or circumstances or other conduct falling within the scope of the Whistleblower Protection Scheme.

The protections under the Whistleblower Protection Scheme will not extend to vexatious complaints. If any investigation of a disclosure demonstrates that it was not made on objectively reasonable grounds, it will not be protected.

Depending on the circumstances, it may be appropriate for the Law Council to take disciplinary action against any person who does not have objectively reasonable grounds for their disclosure. Such action may include the termination of employment.

## 12. Other matters

This Policy will be made available to employees and officers via the Staff Handbook and intranet (for Staff) and provided to all officers via email and made available on the Policies and Guidelines page of the Law Council of Australia website: <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>

For further information on whistleblowing protections and general information on whistleblowing can be obtained from the ASIC website - <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>

This Policy is not intended to go beyond the legislation. This Policy is not a term of any contract, including any contract of employment and does not impose any

contractual duties, implied or otherwise, on Law Council. This Policy may be varied by the Law Council from time to time.