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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

via email to corporations.joint@aph.gov.au

Dear Mr Hodder

Inquiry into Whistleblower Protections – Questions on Notice

The Australian Institute of Company Directors (**AICD**) welcomes the opportunity to provide a response to the questions on notice for the Parliamentary Joint Committee on Corporations and Financial Services' (**PJCCFS**) Inquiry into Whistleblower Protections.

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The protections afforded to whistleblowers in Australia are insufficient and are in need of substantive reform to broaden and strengthen their coverage. The AICD believes that strong systems for whistleblowing promote strong standards of governance.

Our responses to the questions on notice are included in **Attachment A.** The AICD's views on many of the issues raised by these questions are addressed in greater detail in our original submission dated 10 February 2017 (submission number 53). However, for ease of reference we have provided a summary where relevant. Our responses focus on the corporate sector, but our comments may be read as applying to the not-for-profit sector as well.

We hope our comments will be of assistance to you. Should you wish to discuss any aspect of this submission, please contact our Senior Policy Adviser, Lucas Ryan via

Yours sincerely

LOUISE PETSCHLER
General Manager, Advocacy

AUSTRALIAN INSTITUTE of COMPANY DIRECTORS

ATTACHMENT A: Responses to questions on notice

Question 1a

What are your views on which of the best practice criteria should be considered in any reforms for corporate sector whistle blowing legislation in Australia?

The AICD considers that the following good practice criteria should be considered in reform of corporate whistleblowing protections in Australia.

#	Criterion short title	AICD summarised view
1	Broad coverage of organisations	Whistleblowing legislation should apply to all entities in the private and not-for-profit sectors and, ideally, be structured under one standalone Act to ensure consistency.
2	Broad definition of reportable wrongdoing	The definition of 'disclosable conduct' should be expanded to more accurately reflect the range of potential corporate wrongdoing about which a whistleblower might seek to make a disclosure.
3	Broad definition of whistleblowers	The definition of 'discloser' should be expanded to more completely capture the range of people who may be aware of corporate wrongdoing (including former officers, staff and contractors, as well as current and former accountants and auditors, and unpaid workers).
4	Range of internal/regulatory reporting channels	The range of government agencies to whom a disclosure can be made should be expanded to those with a relevant regulatory interest. Disclosures made to a legal practitioner should also be protected. However, as a matter of principle, the company should be the primary first point of contact for whistleblowing disclosures.
6	Thresholds for protection	Replace the requirement of 'good faith' with a more objective test.
7	Provision and protections for anonymous reporting	Protections should be extended to disclosures made anonymously.
8	Confidentially protected	The confidentiality of anonymous disclosures should be protected where possible.
10	Broad protection against retaliation	Protections against retaliation should be strengthened (including adding detail on the definition of retaliation).
11	Comprehensive remedies for retaliation	The compensation framework for whistleblowers who experience retaliation should be further developed and expanded (including adding detail on the operation of the framework).
12	Sanctions for retaliators	Sanctions for retaliation (or threatened retaliation) should be strengthened (including increasing the penalties for relevant offences).

13	Oversight authority	An independent office of the Australian Securities and Investments Commission (or another independent agency) should respond to and handle (corporate) whistleblower complaints.

However, there are certain parts of the 'best practice criteria' that the AICD believes should be out of scope for these reforms (for private sector entities) or which, if they are to be considered, should be the subject of further consultation.

#	Criterion short title	AICD summarised view
5	External reporting channels (third party/public)	The AICD does not support this at this time. Although there may be merit in considering extending protections to third parties in extraordinary circumstances, whether such an amendment is desirable will hinge on the detail of the model proposed and further consultation is necessary.
9	Internal disclosure procedures required	The AICD opposes this proposal. Statutory requirements for internal disclosure requirements are unnecessary and would shift the focus of a whistleblowing framework from prevention and detection of wrongdoing to compliance.
14	Transparent use of legislation	The AICD opposes this proposal. Although it may be useful to track and publicly report aggregate information about whistleblowing disclosures from the regulator, there is no need for this to happen at the company level and it would create substantial regulatory burden.

Question 1b

*Are there aspects of the recent Fair Work Registered Organisation amendments (**ROC amendments**) to legislation for whistleblowing that would be appropriate to include in corporate sector reforms?*

The AICD broadly supports the substance and detail of the recent amendments to the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**).

The ROC amendments remove the requirement of good faith (section 337A(e) in the RO Act). The AICD supports this, but believes that it should be replaced by a more objective test to shift the focus of eligibility requirements towards the truthfulness of the disclosure, rather than the motivation of the whistleblower. Without this additional change, the threshold for a protection would be too low to prevent against spurious disclosures.

More detailed analysis of this issue is available in Attachment A to our original submission to the PJCCFS on page 6.

Question 1c

Are any additional provisions necessary to ensure that whistleblowing laws are effective for multinational corporations, with significant management structures outside Australia?

In order to ensure that whistleblowing laws effectively capture the broadest possible range of corporate wrongdoing, the AICD recommends that the definition of disclosable conduct be extended to include offences against the law of a foreign country that is also in force in Australia.

This would extend protections to witnesses who observe and report corporate wrongdoing outside Australia to ensure that the whistleblowing framework effectively accommodates multinational corporations.

PIDA Agency, harmonisation and consistency

Question 4

Some submitters and witnesses have commented on the idea of 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 (e.g. Submissions 32, 22). What do you consider to be the potential advantages and disadvantages of such an approach?

The AICD is supportive in principle of the establishment of a Public Interest Disclosure Agency (**PIDA**) as an independent authority to oversee a whistleblowing framework.

However, it is likely that many whistleblowers, in the first instance, will report wrongdoing (if they choose to make a report to a government agency) to the authority they think will be best positioned to investigate the wrongdoing. For example, a whistleblower who observes a company causing unlawful environmental damage (assuming this was included in a revised definition of 'disclosable conduct') may make a report to an Environmental Protection Agency.

The establishment of a PIDA should not prevent whistleblowers from receiving protection when they make every effort to make their disclosure to a relevant authority they reasonably believe would have responsibility for investigating the substance of such a complaint. It is unlikely that all whistleblowers will know to contact a PIDA in the first instance and access to protections should not be prejudiced by failing to contact a PIDA in the first instance.

If the definition of 'disclosable conduct' is broadened, some disclosures may relate to offences at the state or territory level, which may create jurisdictional issues if a PIDA is the only entity to whom disclosures can be made.

Recognising this, a PIDA should be charged with providing advice and education to whistleblowers and potential whistleblowers to try to raise its profile as the primary point of contact for such disclosures and to make the process of making a disclosure simple for whistleblowers.

Question 5

What do you consider to be the advantages and disadvantages of putting all whistleblower protection laws in a single Act versus the current situation where the laws are spread over at least four Acts?

A core consideration of any reform to Australia's whistleblowing framework should be the ease-of-use of the framework, both for whistleblowers and for businesses and organisations.

Currently, whistleblowing frameworks exist across several pieces of legislation and there is variation in the substance and detail of each regime. The AICD considers that the concurrent operation of several whistleblowing frameworks is not conducive to establishing a cohesive system of protections for whistleblowers.

This fragmentation creates substantial regulatory burden for companies in seeking to understand and comply with their obligations. Through doing so, it increases the risk of whistleblowers "falling between the gaps".

To the extent that the people involved in establishing and overseeing internal whistleblowing systems may work across multiple sectors, consistency between regimes is critical to ensuring the effective operation of a cohesive framework.

Accordingly, the AICD considers that a standalone Act establishing a regime that applies to all private sector entities has merit.

Question 6

To what extent should there be harmonisation (not replication, but consistency and difference where appropriate) of whistleblower provisions across the public, corporate and not-for-profit sectors?

The AICD believes that there is a need to differentiate between the whistleblowing framework that applies to the public sector and that which applies to the corporate and not-for-profit sectors.

The public's expectations of public sector entities (particularly in relation to their transparency) are \ fundamentally different to those of the private sector, and this is reflected in the operation of AUS-PIDA. For example, protections under AUS-PIDA are extended to specific areas that are appropriate to government (for example, relating to wastage of public money or property). This is not necessary or appropriate for private sector entities.

The *Public Interest Disclosure Act 2013* (Cth) (**AUS-PIDA**) also provides both a mechanism for protected disclosures and also a system of compliance for government departments. This is right in a public sector context, as legislation can and is used for the purpose of creating governance architecture within public sector entities.

However, mandatory systems of internal disclosure (especially to the detail provided by AUS-PIDA) are not necessary, desirable or appropriate for private sector entities.

For this reason, the AICD believes it is necessary for there to be separate whistleblowing frameworks for public sector entities and private sector entities (including not-for-profits). However, it is desirable that there is consistency between regimes to the greatest extent possible.