



Highlights

With only four weeks to the New Year (and only 18 business days), new research from 360Certainty Pty Limited indicates that there may be some busy days ahead for many entities that are required to have a whistleblower policy in place by 1 January 2020 under the new whistleblower protections.

360Certainty has reviewed 200 entities listed on the ASX and some of the key findings include that:

- Just over half of the ASX Small Ords (51.5%) have published their whistleblower policy on their website
- For those with a policy on their website, most (73.8%) have recently established or updated their policy in 2019
- Whilst many policies were drafted or reviewed in 2019, not all have correctly moved away from the “good faith” requirement, with only 72.3% doing so
- Very few companies (3%) provide information on how to raise a whistleblower notification via their Contact page
- Only one company (0.5%) was observed to have published their whistleblower policy in a language other than English

Background

On 13 November 2019 ASIC issued [RG 270 Whistleblower policies](#), providing its guidance on the new requirements under [Part 9.4AAA of the Corporations Act](#). That Part 9.4AAA commenced on 1 July 2019 and introduced updated protections for whistleblowers as well as an obligation for certain entities to have a whistleblower policy and make it available to their officers and employees by 1 January 2020. ASIC commenced a consultation on their proposed guidance by issuing [CP 321](#) and the [draft regulatory guide](#) on 7 August 2019, with submissions due by 18 September 2019. 360Certainty made a submission, available [here](#) and the submissions from other organisations are available [here](#). ASIC published its response to these submissions as [REP 635](#) on 13 November 2019.

ASIC’s previous guidance was guidance for whistleblowers, rather than guidance for entities, and was contained in [INFO 52](#), reissued in August 2015. Reflecting the law at the time, there are a number of differences with the current whistleblower protections, including:

- A more restrictive set of relationships to the entity (e.g. not including former employees, not extending to relatives, dependents or spouses);
- A more restrictive set of persons to whom a disclosure could be made;
- A requirement to identify yourself (i.e. anonymous disclosures did not attract protection);
- “Reasonable grounds to suspect” were limited to breaches of the *Corporations Act* or the *ASIC Act* (i.e. not extending to “misconduct or an improper state of affairs”); and
- The disclosure had to be made “in good faith” (no longer a requirement).

Under RG 270, ASIC provides both guidance on what it views as being required to comply with s1317A(5) of the *Corporations Act*, as well as “good practice tips” and “good practice guidance”, both of which are non-mandatory. Listed companies, public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities must have a whistleblower policy that complies with these updated obligations, including that the policy is accessible on their website, and that it provides for confidentiality and anonymity for whistleblowers, and has no “good faith” requirement.

In REP 635, ASIC noted that there were concerns about fully complying with the regulatory guide by the deadline of 1 January 2020. ASIC confirmed that there would not be an extension to this deadline, and noted that “[e]ntities and their advisers have been aware of the legal obligations in relation to whistleblower policies since the *Whistleblower Protections Act* passed Parliament in February 2019. In July, ASIC also released [Information Sheet 238 Whistleblower rights and protections](#) to provide guidance to whistleblowers on their rights and protections under the new regime.”

Methodology

Given the wide scope of entities that must establish a whistleblower policy by 1 January 2020, research was undertaken to observe how ready the targeted entities are to meet this deadline. The [S&P/ASX Small Ordinaries](#) were selected as a proxy for the entities that are obligated to have a whistleblower policy. The reasons for selecting this group of companies are that:

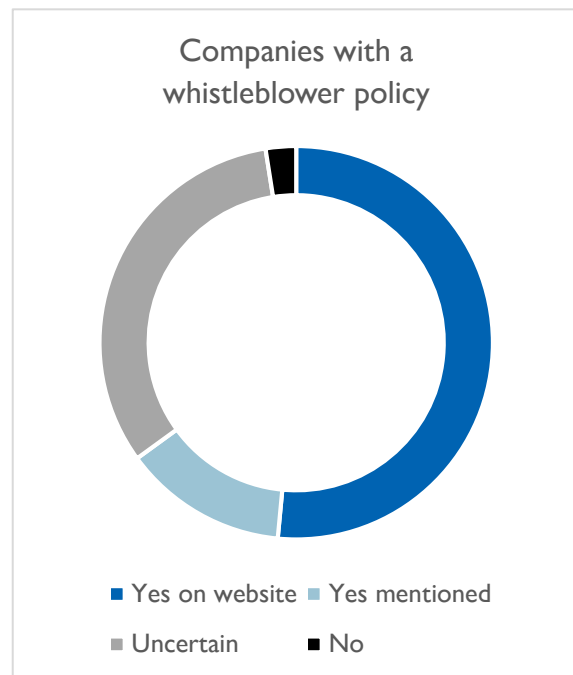
- The S&P/ASX Small Ordinaries consists of the companies in the S&P/ASX 300, but not in the S&P/ASX 100, meaning that those very large companies that are likely to be very well-resourced are excluded from the sample, better reflecting the broader set of entities that have these new obligations and are less well-resourced
- As these are listed companies, their website is listed on their “Details” page on the ASX, and there is an expectation that their key corporate governance policies should be published on their website.

The research was conducted over the period 27 October to 24 November 2019, and involved:

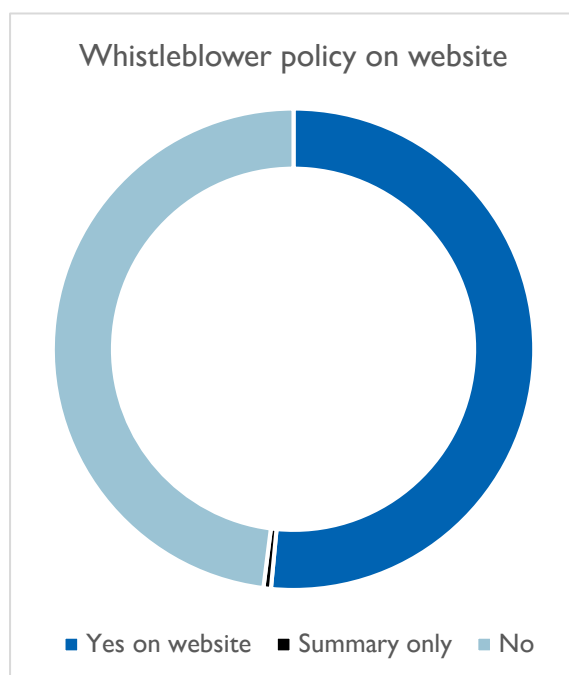
- Reviewing each company’s website for a whistleblower policy (or similar document, for example several were titled a “Speak Up Policy”), by looking at likely pages such as “Corporate Governance”, “Investor Relations”, or “About Us”
- Failing locating the policy manually, the website was searched using either its own in-built search functionality or an external, site-specific search for whistleblower-related keywords.
- Lastly, the Corporate Governance Statement and Code of Conduct were searched for whistleblower-related keywords.
- Key data points were captured relating to the entity and its whistleblower policy if it had one, which support the analysis below.

Obligation to have a policy

The basic requirement to have a whistleblower policy in place on the face of it appears to be met by a majority of companies, with 65% of those reviewed having a whistleblower policy on their website (51.5%) or referring to the existence of that policy in other material, such as their Corporate Governance Statement or Code of Conduct (13.5%). However, this obviously leaves a significant proportion of companies (35%) where it is unclear whether they do have a whistleblower policy, and the lack of reference to one in other documentation makes it likely that either they do not have such a policy in place, or it is not sufficiently well-regarded to be referenced in a Corporate Governance Statement or Code of Conduct. A small proportion of these companies specifically noted that they did not have a whistleblower policy, and typically this was accompanied by a statement that they were intending to implement one in the current financial year (although if after 1 January 2020, they will have missed the deadline).



Based on statistics contained in [ASIC's Annual Report for 2018-19](#), the population of listed companies, public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities would be greater than 32,000 entities, meaning that if the level of compliance observed in this research applied across that whole population, over 11,000 entities will need to be hurriedly drafting and implementing a whistleblower policy in the next few weeks. Obviously that number may reduce with corporate groups reflecting multiple entities to which one group policy would apply, but nonetheless, it would appear there is a considerable gap and one that presumably ASIC will focus on.



Obligation to publish on website

Just over half of the ASX Small Ords (51.5%) have published their whistleblower policy on their website, with a further one company having published a summary of their whistleblower policy on their website (0.5%) and 96 companies are yet to publish their policy (48%).

In RG 270, ASIC made it clear that it expects the whistleblower policy to be made available on the entity's external website (see RG 270.138). Interestingly, this was not an explicit requirement under the provisions of the *Corporations Act*, but may be considered necessary to give effect to the requirement to make the policy "available to officers and employees" (see s1317A1).

Policy accessibility

Of those companies with a whistleblower policy on their external website, the vast majority (87.4%) placed the policy on a governance-related page, which itself was found primarily under either an “About Us” or similar page (47.8%) or under an “Investors”, “Investor Relations” or “Shareholders” page (44.4%). Typically this meant that a person searching for a whistleblower policy would average 2.17 mouse clicks to access the policy, with a maximum of 4 and a minimum of 1 mouse clicks.

Although the research did not indicate that any companies had attempted to publish but bury their whistleblower policy in an obscure location and many mouse clicks down into their website, we do question whether a potential whistleblower will necessarily think to click on an “Investors”, “Investor Relations” or “Shareholders” page to then find a governance-related page and then the whistleblower policy. Accordingly, we believe that best practice would be to place the whistleblower policy or at least information about how to make a disclosure on the “Contact Us” page, however we only observed that just six companies (3%) took this approach.

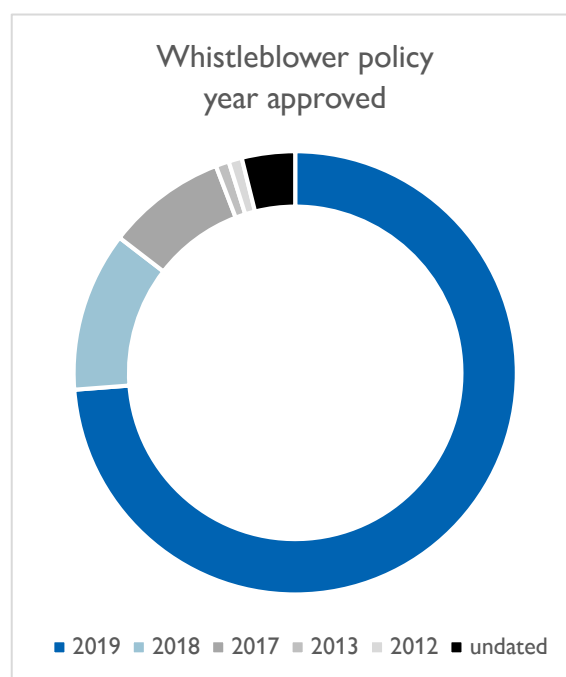
A theme of ASIC’s guidance in RG 270 is that whistleblower policies should “use plain English and avoid legal or industry jargon [and] adopt a simple structure” (see RG 270.33). Of the 103 whistleblower policies reviewed as part of this research, we observed that some were so brief as to not be capable of addressing all requirements (several were only a single page), whereas others were excessively wordy and legalistic, with the longest at 21 pages. The average length of these policies was 6.94 pages with a median of six pages, which is likely to strike the right balance between covering all required aspects yet being clear and easy to understand.

360Certainty in its submission to ASIC’s consultation had recommended that the good practice guidance in the regulatory guide be improved by recommending that the policy should be translated into languages other than English, if the entity’s workforce has a significant proportion of non-English speaking workers, or those for whom English is a second language. Whilst this does not appear in RG 270, during the course of the research, only one company (0.5%) was observed to have published their whistleblower policy in a language other than English, with Super Retail Group (ASX:SUP) also publishing on their website a translation of their policy in Chinese.

Policy currency

Of the 103 whistleblower policies reviewed as part of this research, 76 (73.8%) were approved in 2019, and at the other end of the spectrum, two (1.9%) were more than five years old, based on the date either explicitly stated in the document, or if undated, then based on metadata for the file, if available. Of the 76 dated this year, about a third were approved in August or later, meaning that they could take into account at least ASIC’s draft regulatory guide, although given that the final regulatory guide does differ, many of these policies approved in 2019 may need further refinement.

Whilst many policies were drafted or reviewed in 2019, not all have correctly excluded the “good faith” requirement, which was a feature of the earlier provisions of the *Corporations Act* and ASIC’s guidance in INFO 52. This raises the



question as to whether some companies or their advisers are relying on old templates or have not adequately assessed the new whistleblower regime. In the course of our research we observed that for those policies dated in 2019, only 72.3% had correctly omitted any reference to a whistleblower only being covered by the policy and the protections if making the disclosure in good faith.

Many of the policies reviewed were an updated version of an earlier policy (43.7%), whilst only ten policies were clearly the first version (9.7%), and 46.6% of policies did not clearly state whether they were a first or updated version.

Confidentiality and anonymity

Almost all whistleblower policies stated that the process was confidential (95.1%), however when looking at the change in approach to anonymity, there were 14 policies that did not address the anonymity requirements correctly, including 6 that did not provide for anonymous disclosures, 2 that permit anonymous disclosures but only to their external auditor, and further 2 that allow anonymous disclosures, but incorrectly state that the whistleblower loses their protections if not disclosing their identity. Anonymous disclosures are a critical part of an effective whistleblower policy, and so organisations should review their policies to ensure they are providing that communication channel and not deterring people from making such disclosures.

External whistleblowing service

In “good practice tip 6” in RG 270 ASIC recommends that both smaller and larger entities consider the use of an independent whistleblowing service provider, given that this can increase the confidence with which whistleblowers approach the making of a disclosure, and provide greater assurance that anonymous disclosures will remain anonymous. In our research, we observed that approximately half (48.5%) of those companies with a whistleblower policy on their website utilise an external whistleblower service to facilitate disclosures. A further nine companies while not publishing their policy on their website did reference that they also utilise an external whistleblower service. A number of the service providers were observed to be the “Big 4” accounting / consulting firms, and so whether these are independent of the entity would need to be considered carefully.

Further details

If you wish to discuss this report, or explore how 360Certainty can assist your business with complying with the new whistleblower obligations, including operating a whistleblower hotline, please contact us on 02 9375 2360 or info@360certainty.com