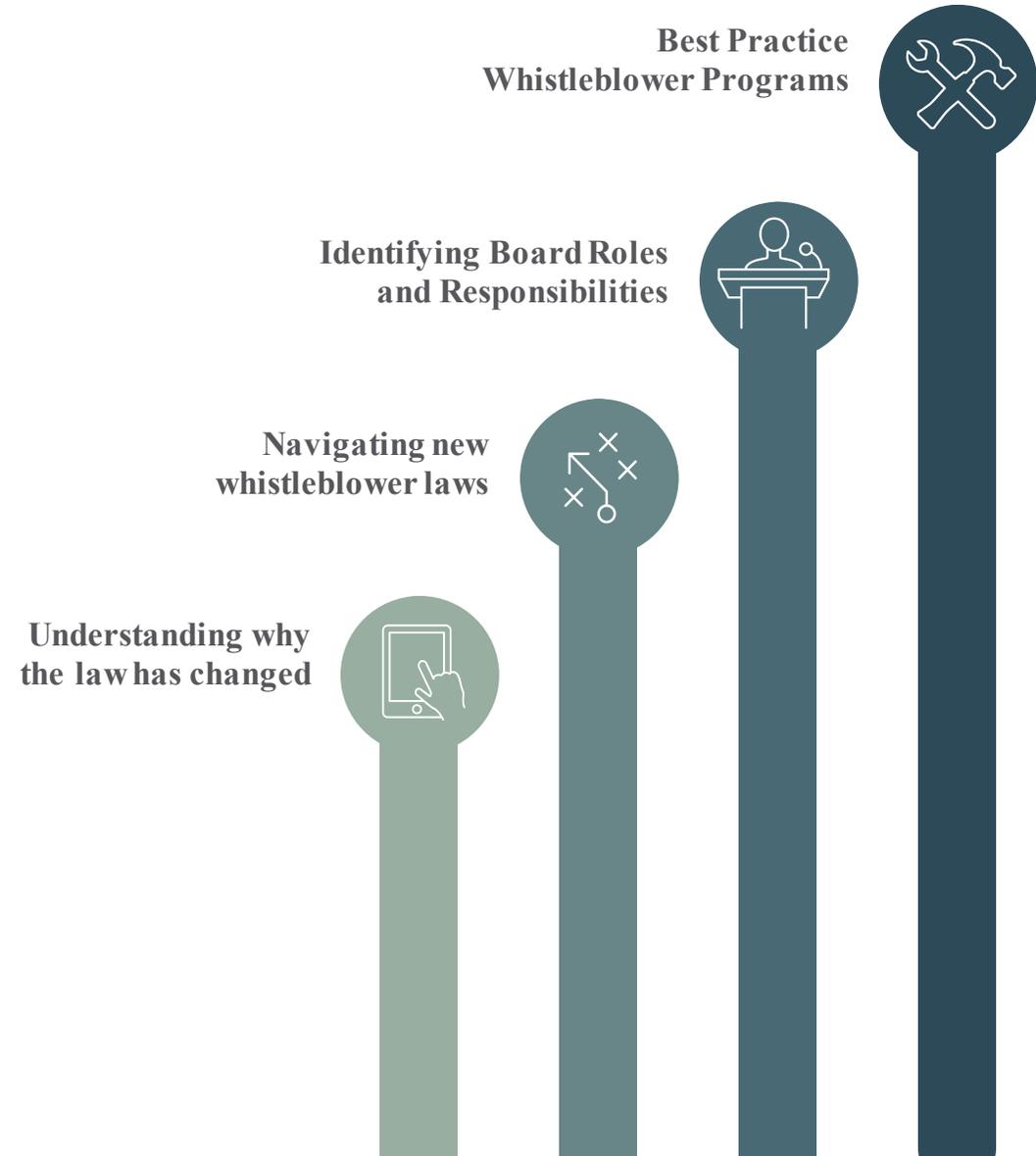


Best Practice Whistleblowing at Your Not-For-Profit

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Background



Sally McDow – LLB, MBA

One of Australia's leading Culture and Reputation experts with in-depth legal, corporate governance and whistleblowing program expertise. Sally has 20 years' experience managing culture, reputation whistleblowing, risk and compliance issues across multiple sectors in Australia, North America and Europe and has worked on international regulatory investigations relating to Sarbanes Oxley, Bribery and Corruption, Anti Money Laundering.

Sally holds a diploma of corporate governance from the Chartered Secretaries Institute, is a graduate of the Australian Institute of Company Directors and a SAI Global qualified internal auditor. Sally is the Director of advisory firm CPR Partners.

Sally is part of the Your Call team providing whistleblowing program training and advisory services to organisations across Australia.

Learning Outcomes

1. Background- why has law changed?
2. Legislation: Treasury Laws Amendment (Enhancing Whistleblower Protection) Act 2019
3. Best Practice Whistleblower Programs
4. Role of the Board

1. Background

What is whistleblowing?

Whistleblowing is the act of drawing public attention or the attention of an authority figure, to perceived wrongdoing, misconduct or unethical activity within any type of organisation

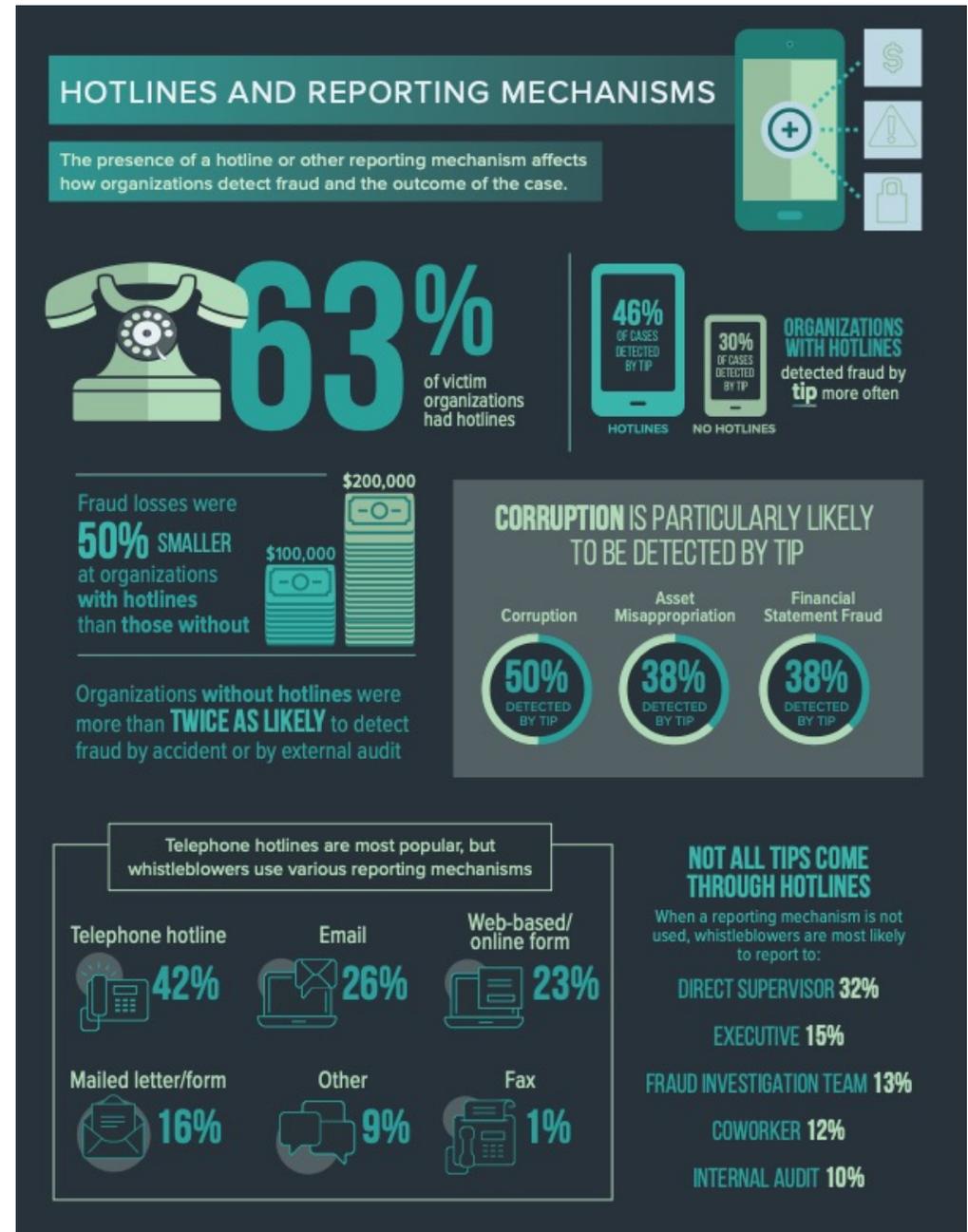
Some of the most common subjects of whistleblowing are...



1. Background POWER OF WHISTLEBLOWING

APPROX. 5% OF AN ORGANISATION'S ANNUAL REVENUE IS LOST TO FRAUD

2018 GLOBAL STUDY ON OCCUPATIONAL FRAUD AND ABUSE



1. Background

Why is the Law Changing?



1. Background

Benefits of Whistleblowing



act as 'smoke alarm' – may pick up issues missed in traditional internal audits and reviews



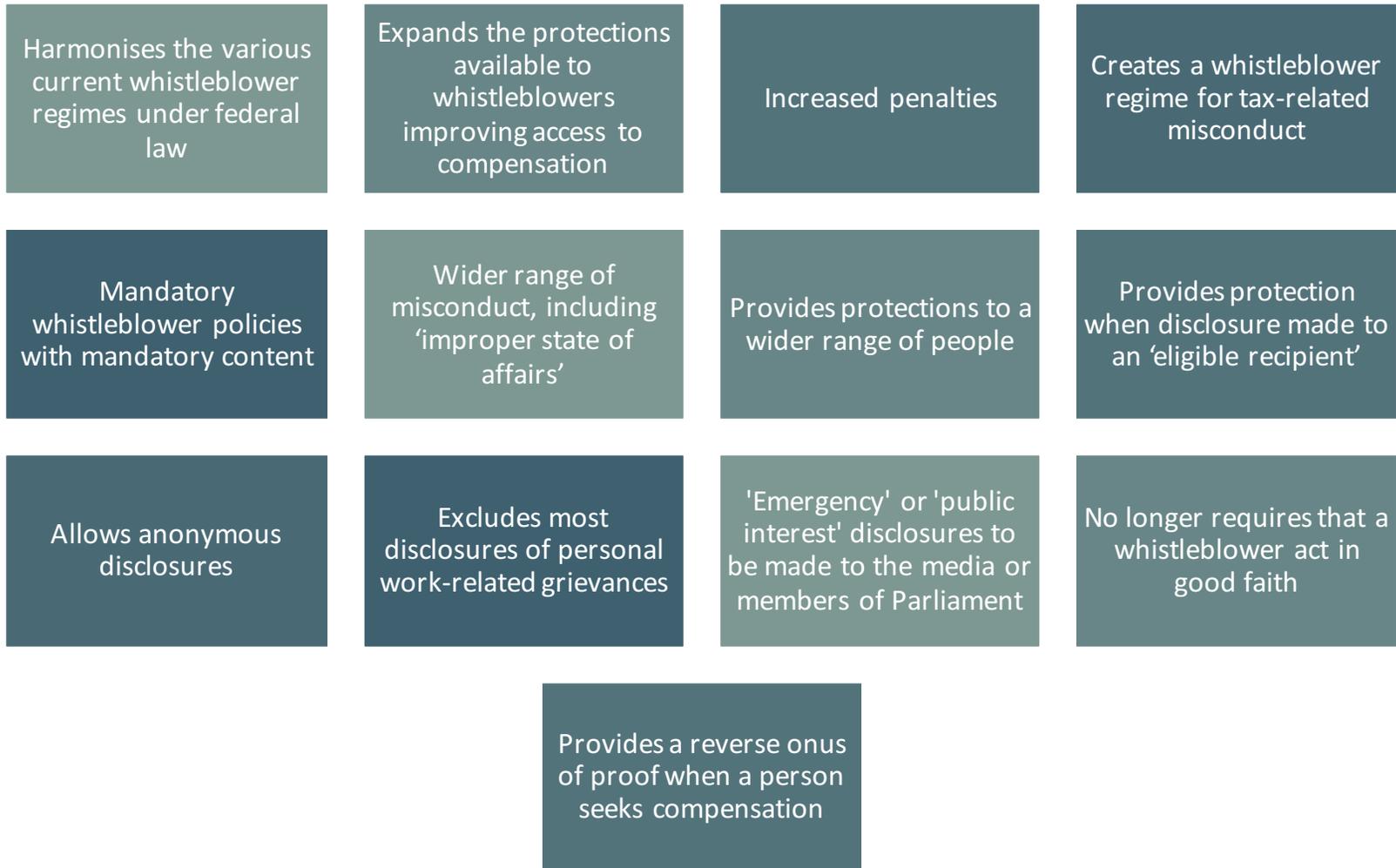
can save your organisation money - dealing with it now may cost less



can increase confidence and assurance in leadership, improving workplace culture

2. Legislation

Key changes in the new laws



2. Legislation Organisations Impacted

Organisations listed on the ASX, superannuation entities & large private companies are directly impacted.

Definition of 'large private company' - must fit 2 out of 3 of the following conditions:

Size: Have more than 50 employees

Revenue: Have a consolidated revenue of \$25 million or more

Assets: Have consolidated gross assets of \$12.5 million or more

All organisations in Australia including all levels of the public sector, smaller private companies and not-for-profits will need to be aware of the new benchmarks - these requirements will set the 'new norm'

2. Legislation

Who can be an eligible whistleblower

Who can make a protected disclosure?

Whistleblower disclosures will be able to be made by current and former

Employees and
officers

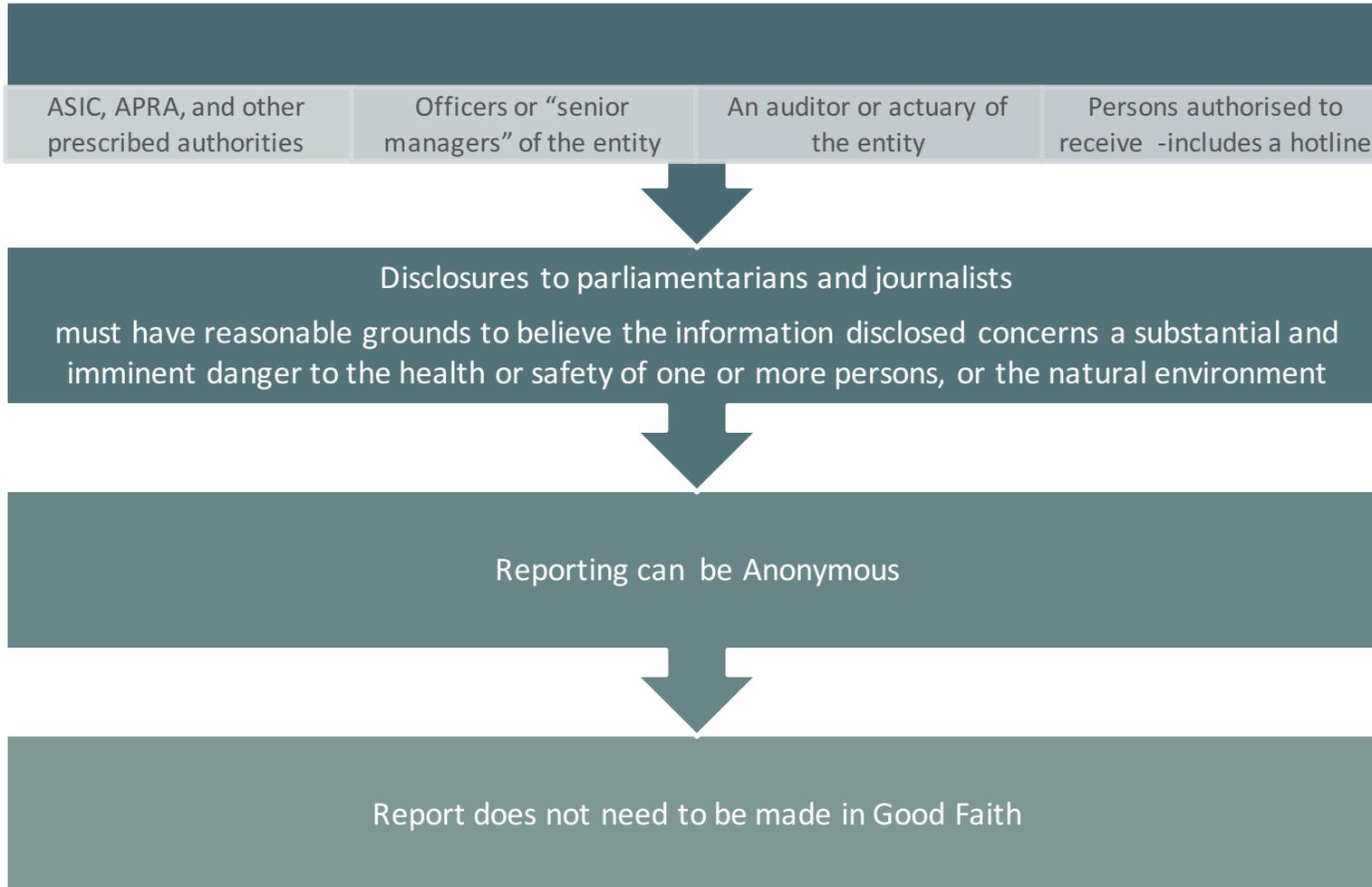
Contractors,
suppliers and
their employees

Directors and
associates of the
entity or related
entity

Spouses and
relatives of any of
the categories
listed

2. Legislation

Reports can be made to



2. Legislation

Conduct reportable

Misconduct

Disclosures protected by the Act cover "misconduct, or an improper state of affairs or circumstances" including:

- breaches of particular legislation in the corporate, financial and credit sectors, including (but no longer limited to) the Corporations Act and ASIC Act
- any breaches of any Commonwealth legislation punishable by imprisonment of 12 months or more
- behaviour which represents a danger to the public, or to the financial system
- 'Misconduct' under your organisation's policies

2. Legislation

Exclusions – personal work grievances

Exclusion of certain 'personal work-related grievances':

- Most personal work-related grievances (that are not connected to victimisation as a whistleblower) are excluded from protection



The exclusion will not apply in a limited range of circumstances, including:

- If the information has broader significant implications for the entity, concerns certain offences, involves systemic issues, represents a danger to the public or financial system or involves detrimental conduct to the whistleblower; or
- If it is made to a legal practitioner to obtain legal advice or representation in relation to the whistleblower provisions

2. Legislation

Protections for Whistleblowers

Detriment

- Detrimental conduct towards a whistleblower is a crime
- Do NOT threaten or cause "detriment" to a whistleblower because of their disclosure

Confidentiality

- Do NOT reveal the identity of the whistleblower without the whistleblower's consent
- Do NOT disclose information likely to lead to the whistleblower's identification without the whistleblower's consent

Report Anonymously

- Whistleblowers can opt for anonymity at any point (even after case is closed)
- Organisations must to take all reasonable steps to protect identity and explicitly outline who will have knowledge of the disclosure

2. Legislation

Mandatory requirements of Policy



The persons/ organisations to whom protected disclosures may be made



Information regarding how a protected disclosure can be made



How the organisation will support whistleblowers and protect them from detriment



How the organisation will investigate protected disclosures



How will ensure fair treatment of employees of the company who are mentioned in protected disclosures, or to whom such disclosures relate



The protections available to whistleblowers



How the policy is to be made available to officers and employees of the organisation.

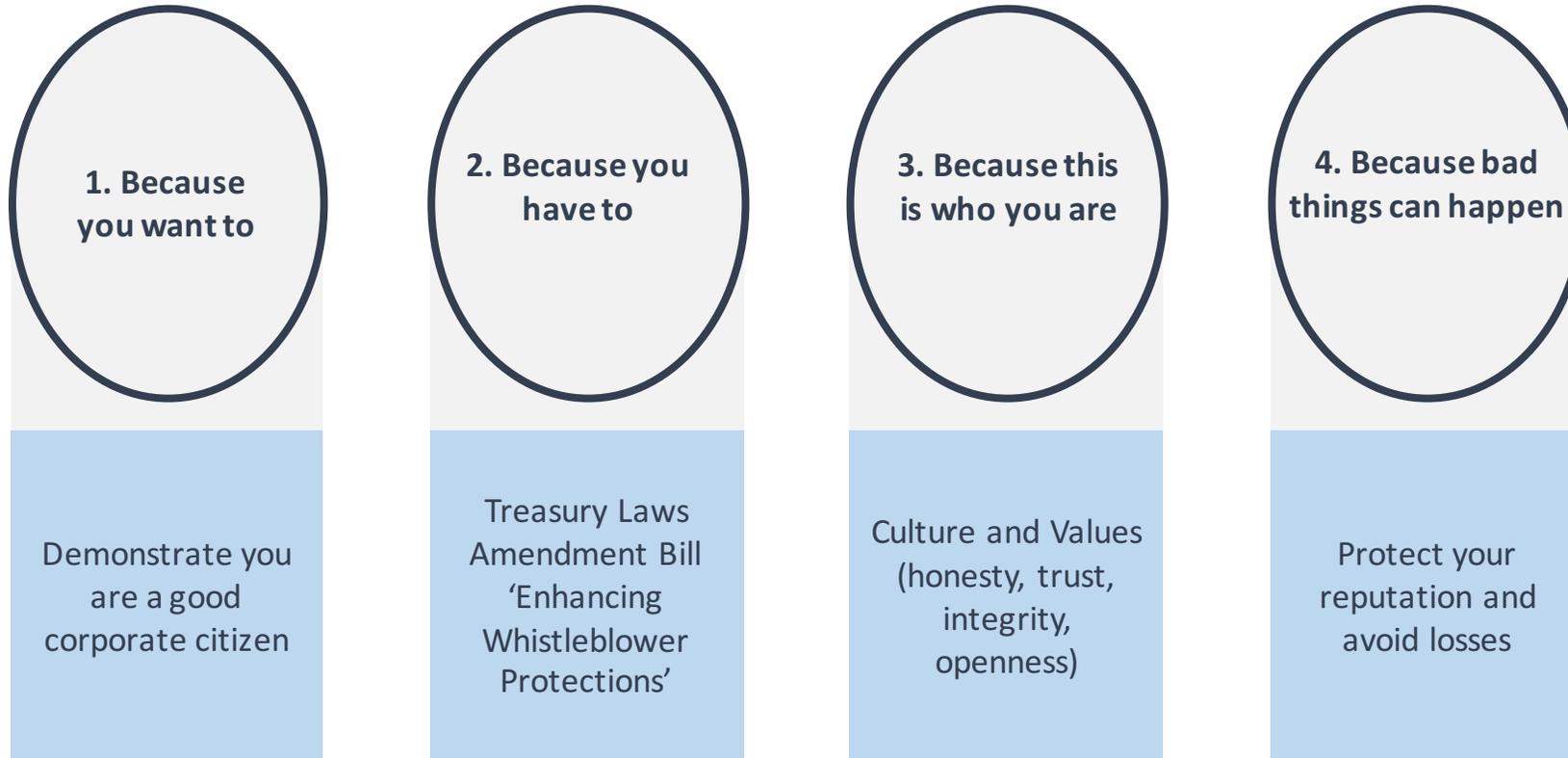
2. Legislation

Significant penalties

Contravention	Penalty
<u>Civil Penalty provisions (<i>Corporations Act</i>)</u>	
Breach of confidentiality of identity of whistleblower <i>or</i> Victimisation or threatened victimisation of whistleblower	<ul style="list-style-type: none"> •For an individual, 5,000 penalty units [\$1.050M] or three times the benefit derived or detriment avoided; and •For a body corporate, 50,000 penalty units [\$10.5M], three times the benefit derived or detriment avoided, or 10% of the body corporate’s annual turnover (up to 2.5 million penalty units [\$525M]).
<u>Criminal offences (generally <i>Corporations Act</i> and <i>Taxation Administration Act</i>)</u>	
Breach of confidentiality of identity of whistleblower	<p>For an individual</p> <ul style="list-style-type: none"> •Under the <i>Corporations Act</i>: 6 months imprisonment or 30 penalty units [\$6,300] or both •Under the <i>Taxation Administration Act</i>: 6 months imprisonment or 60 penalty units [\$12,600] or both
Victimisation or threatened victimisation of whistleblower	<p>For an individual</p> <ul style="list-style-type: none"> •Under the <i>Corporations Act</i>: 2 years imprisonment or 120 [\$25,200] penalty units or both •Under the <i>Taxation Administration Act</i>: 2 years imprisonment or 240 penalty units [\$50,400] or both
Failure to have whistleblower policy (Corporations Act only)	60 penalty units [\$12,600]

3. Whistleblower Program

Why establishing a Whistleblower program makes sense



3. Whistleblower Program

Establish/Update whistleblower policy

Whistleblower
policy must set
out information
about:

- Protections available to whistleblowers
- To whom protected disclosures can be made
- How disclosures can be made
- How the organisation will support/protect whistleblowers
- How the organisation will investigate disclosures
- How the company will ensure fair treatment of employees mentioned in disclosures, or to whom disclosures relate
- How the policy is to be made available

3. Whistleblower Program

Designate Roles

Designate who will act in roles specified by your whistleblower policy:

- Who will act as ‘manager’ of the whistleblower program?
- Who will act as a ‘recipient’ of whistleblower reports?
- Who will act as a ‘whistleblower protection officer’?
- Who will act as an ‘investigation officer’?
- Who will receive the investigation report and decide the outcome?

3. Whistleblower Program

Specify Roles

- Specify how these roles will coordinate with existing teams who manage bullying, sexual harassment claims and other relevant matters
- Specify what roles can and cannot be done by the same person
- Don't forget that stakeholders other than the whistleblower may also need support and protection

3. Whistleblower Program Tools & Investigations

1. Review your internal processes and tools to give effect to your updated whistleblower policy

- Do you have an existing tool that is adequate to provide whistleblower reporting?
- How will you provide anonymous reporting mechanisms?
- Do you need to review third party solutions?

2. Review Processes relating to Investigations

- Procedural and substantive fairness
- Investigation methodology (planning and documenting the process)
- Understanding your legal obligations and those of the parties involved
- Interviewing the parties and witnesses - the do's and don'ts
- When and how to draft findings, determinations and recommendations
- Maintaining confidentiality and privacy considerations
- Legal professional privilege – when and why attach it?

3. Whistleblower Program Risk Assessment

- Ensure risks have been properly identified, categorised and managed
- Ensure appropriate resources are allocated to manage the whistleblower program
- Risks associated with non-compliance of whistleblower program will significantly increase in terms of consequence and likelihood
- There is likely to be a sharp increase in whistleblowing activity as a consequence of the new legislation
- Prevention is better than cure – risk assessments and proactive management are linked with substantially improved outcomes

		Consequence				
		Insignificant	Minor	Moderate	Major	Severe
Likelihood	Almost certain	Medium	High	High	Extreme	Extreme
	Likely	Medium	Medium	High	Extreme	Extreme
	Possible	Low	Medium	Medium	High	Extreme
	Unlikely	Low	Low	Medium	High	High
	Rare	Low	Low	Low	Medium	High

3. Whistleblower Program Training

A whistleblower program only works effectively if staff know about the program and how to use it.

Training program considerations:

Training Category	Who Needs Training	Content	Timing
Whistleblower Policy	All staff in organisation including Board	Staff need to know what is in the whistleblower policy	Before 1 Jan 2020 then refresher each year
Whistleblower Designated Roles	a) Recipients of whistleblower reports including senior managers b) Investigation officers c) Protection officers d) HR Department	Focused on roles and responsibilities – ensure confidentiality issues covered	Before 1 July 2019 then refresher each year

4. Role of the Board

Actions of Leaders linked to Outcomes



Effective Whistleblower Program Outcomes

4. Role of the Board Leadership Behaviour

Junior staff model leaders' behaviour

Leadership to "walk the talk"

Reframe negative bias to whistleblower reports

4. Role of the Board

- Ensure compliance with legislation or benchmarks for organisation
- Request regular report on whistleblower program

Thank you, questions?

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