Human Rights Law Centre

Griffith UNIVERSITY

New Aged Care Act Consultation
Department of Health and Aged Care
GPO Box 9848
Canberra ACT 2601
Australia

17 February 2024

By email: AgedCareLegislativeReform@health.gov.au

Consultation on the new Aged Care Act

Dear Colleagues,

Thank you for the Department's invitation to provide feedback in relation to the exposure draft of the Aged Care Bill 2023.

Please find **enclosed** a joint submission from Human Rights Law Centre and Griffith University's Centre for Governance & Public Policy. Our joint submission is directed to the issue of whistleblower protection in the Department's proposed approach in Part 5 of the exposure draft of the Aged Care Bill 2023 in particular.

We are happy for the submission to be published. We would be pleased to provide more information if this would assist.

We can be contacted at [redacted]

Kind regards,

[redacted]

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Protecting Australia's Whistleblowers in Aged Care and Beyond

Submission to the Australian Government Department of Health and Aged Care Consultation on the exposure draft of the Aged Care Bill 2023

Human Rights Law Centre

Centre for Governance and Public Policy, Griffith University

February 2024

Human Rights Law Centre
The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. Our work includes supporting whistleblowers, who are crucial to exposing human rights abuses and government and corporate wrongdoing, and to ensuring accountability. The Human Rights Law Centre is also a member of the Whistleblowing International Network.

Centre for Governance and Public Policy
Griffith University's Centre for Governance and Public Policy engages in world-class research into the capacity, accountability and sustainability of the public service and government, providing insights into improved management structures and making a tangible mark on standards and institutions of governance in Australia and beyond.

Summary

This joint submission emphasises the need for comprehensive, consistent and holistic reform of Commonwealth whistleblower protection legislation and the establishment of a whistleblower protection authority in order to effectively protect whistleblowers in the public and the private sectors, including in aged care.

We acknowledge the stakeholder input which has been considered and partially incorporated into the exposure draft of the Aged Care Bill 2023 following the publication of the Department of Health and Aged Care's Consultation Paper No. 1, '*A New Aged Care Act: the foundations*' (**Consultation Paper**). In particular, we commend the exclusion in the exposure draft of the previously proposed requirements for a discloser to provide their name in order to be protected as a whistleblower and the requirement that a whistleblower act in 'good faith' when making a disclosure – the exclusion of these requirements will help to promote consistency between the new Aged Care Act and the Commonwealth's other main whistleblowing laws.

We therefore welcome the proposed amendments as drafted in Part 5 of the exposure draft of the Aged Care Bill 2023 to strengthen protections for whistleblowers in aged care given the current narrow regime in place under the existing *Aged Care Act 1997* (Cth).

However, we strongly recommend that – notwithstanding the proposed reforms in the exposure draft – the best way to protect whistleblowers in the aged care sector is to include the sector in a reformed, state-of-the-art whistleblower protection law which covers all non-government employers and entities under Commonwealth legislation or subject to Commonwealth regulation, rather than separate legislation just for the aged care sector. This is consistent with the 2017 recommendation of the Parliamentary Joint Committee on Corporations & Financial Services (**Parliamentary Joint Committee**) for a single Whistleblower Protection Act.[1] Such an act would avoid duplication and/or inconsistencies across Commonwealth legislation which are amplified over time as piecemeal amendments are made for legislation covering different industries and sectors.

Prospective whistleblowers will continue to be deterred from raising their concerns or making complaints due to fears of retribution or reprisal[2] if protections in place on paper are not effective in practice.

Effective and enhanced whistleblower protections require a consistent, harmonised, and holistic regulatory approach. The present consultation is an opportunity that should be seized to provide the most pragmatic and efficient approach to ensuring the enhanced whistleblower protection arrangements across Australian sectors and institutions, including in aged care. Such reform is particularly pertinent given the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) recommendation concerning the need for enhanced whistleblower protections in aged care. A holistic approach to reform is the ideal way to provide enhanced and enduring protections in aged care alongside other sectors.

[1] Parliamentary Joint Committee on Corporations and Financial Services, '*Whistleblower Protections*' (Final Report, September 2017). Recommendation 3.1.

[2] Royal Commission into Aged Care Quality and Safety (**Royal Commission**) Final Report, [14.4.8], 520.

1. Context

As we stated in our submission dated 21 September 2023 in response to the Consultation Paper, the concerning findings of the Royal Commission into Aged Care Quality and Safety in its Final Report 'Care, Dignity and Respect', including fundamental failings in the sector with respect to lack of transparency and accountability, underscore the need for greater whistleblower protections in aged care.

The Royal Commission made a recommendation for comprehensive whistleblower protections to be included in the new Aged Care Act, with protections for a person receiving aged care, their family, carer, independent advocate or significant other and employees.[3] However, enhancing protections for whistleblowers in aged care would be most effective with legislative reform alongside the establishment of an independent body in the form of a Whistleblower Protection Authority with wide-ranging oversight and enforcement powers to support and protect whistleblowers, and to provide an independent, meaningful and well-resourced body to fill existing gaps in the regulatory landscape and to ensure the protection and support for whistleblowers is adequate and effective.

As mentioned in our earlier submission, we published a report in November 2022 (updated in January 2023), *Protecting Australia's Whistleblowers: The Federal Roadmap* (**Appendix 1**). This report provided an overview of the shortcomings of Australian whistleblowing law and it provided a well-informed roadmap to reform which grounds the approach for which we advocate in this submission. We strongly encourage the Department to consider each of these key priorities for reform as part of its present consultation process on the exposure draft. The steps outlined in the *Roadmap* are key to ensuring effective, enhanced, and comprehensive protections for whistleblowers in the aged care sector alongside all other sectors.

The Human Rights Law Centre's report, *The Cost of Courage: Fixing Australia's Whistleblower Protections* also provided a comprehensive analysis of whistleblowing cases under Australian law. Of the whistleblower cases which have proceeded to judgment in Australia since enactment of the relevant legislation to April 2023, the report found no cases in respect of the *Aged Care Act 1997* (Cth) (**Appendix 2**). The shortcomings of the present aged care regime apparent in *The Cost of Courage* are well-known.

The Department's present consultation therefore offers an opportunity to implement a process to ensure comprehensive, timely reform is achieved across the current complex and counterproductive legislative landscape, particularly in light of the relevant parallel reform processes presently underway to improve whistleblower protections:

- the current government is in the second stage of a process to reform public sector whistleblowing and is considering stakeholder submissions regarding necessary reforms required to the *Public Interest Disclosure Act 2013* (Cth) (***PID Act***) following a suite of 'first stage' reforms which commenced in 2023;

[3] Royal Commission Final Report, Recommendation 99.

- the whistleblowing provisions of the *Corporations Act 2001* (Cth) (***Corporations Act***) and *Taxation Administration Act 1953* will this year be the subject of statutorily-required reviews;

- the Senate Economics Legislation Committee is conducting an inquiry into the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 to extend tax whistleblower protections; and

- the Parliamentary Joint Committee on Corporations and Financial Services is considering whistleblower protections in the consulting and audit sectors as part of its 'Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry' inquiry.

There is presently a collection of almost a dozen different federal legislative regimes containing some form of whistleblower protections, many of which are out of date. Given the inconsistent and overlapping regimes that exist at present, there is a risk of inconsistencies being amplified if a piecemeal approach to reform is adopted. The urgent need for enhanced whistleblowing processes and protections in the aged care sector and beyond reinforces the need for a holistic, simplified, consistent (as and when necessary), and seamless approach to protections between the public and private sectors, including suppliers of services to the Department (and other Departments) and on behalf of the Commonwealth Government, and other relevant areas. The ongoing absence of an oversight body such as a whistleblower protection authority threatens to undermine the present reform processes given the lack of comprehensive oversight, dedicated enforcement, comprehensive monitoring and advocacy for cohesion across Commonwealth whistleblower protections.

Notably, Transparency International Australia, the Human Rights Law Centre, and Griffith University's Centre for Governance & Public Policy have this month released a joint publication *Making Australian Whistleblowing Laws Work: Draft Design Principles for a Whistleblower Protection Authority* (**Appendix 3**). A Whistleblower Protection Authority would ensure that Australia's whistleblower protection laws work in practice in the aged sector and beyond to the greatest extent possible. The Draft Design Principles are intended to provide a basis for dialogue to inform the establishment of such a new body.

The best way to prevent significant wrongdoing and the current chilling effect on disclosures, and the best way to ensure that wrongdoing is effectively identified and swiftly addressed, is to protect, support, and empower those who wish to speak up – in all sectors, in a holistic and consistent way.

In contrast, a standalone separate aged care whistleblowing regime will quickly fall behind and require updating following the introduction of the proposed new Aged Care Act. This is particularly the case given the forthcoming reforms and reviews in relation to the *PID Act* and *Corporations Act*, which are likely to result in substantial reforms, which will then need to be carried across to the new Aged Care Act.

2. Whistleblower Protections in the Aged Care Sector and challenges to overcome

Subject to the above, we support expanded aged care disclosure protections for whistleblowers that align more closely with best practice principles (as found, largely, in the existing *Corporations Act* framework). We particularly welcome changes made since the prior consultation. We make the following additional suggestions for amendments to the exposure draft.

Disclosable Conduct

Proposed section 355(c) will require that the discloser 'has reasonable grounds to suspect that the information indicates that an entity may have contravened a provision of this Act.' While the first part of this clause is unobjectionable – and mirrors the equivalent wording in section 1317AA(4) of the *Corporations Act* – the requirement for a contravention of the new Aged Care Act may unduly limit the scope of the protections. The search for specific breaches of particular provisions of the new Aged Care Act may be unduly legalistic for individuals seeking to access the protections. We would encourage the Department to consider adopting a drafting approach similar to section 1317AA(4), for example that the discloser has 'reasonable grounds to suspect that the *information concerns misconduct, or an improper state of affairs or circumstances*' (our emphasis), including where the information indicates conduct that may be in breach of the new Aged Care Act.

Eligible Recipients

We recognise that in the aged care sector, it may be desirable that whistleblower protections are extended to additional categories of people in the sector, consistent with the Royal Commission's observations[4] and in recognition of the vulnerability of older persons in aged care in particular, subject to necessary processes and procedures being introduced by the provider to provide sufficient training to all eligible recipients under the new Aged Care Act, including for appropriate protections for sensitive information.

Expanding Eligible Recipients

At present, section 355(a) provides for protected disclosures to be made to a range of individuals. In our view, several categories of individuals are missing from this list, and should be included.

First, aged care whistleblowers should be permitted to make protected disclosures to trade union officials and independent professional advocates, as logical places for seeking support. Consideration should also be given to other categories of support, such as medical professionals, currently being considered for inclusion as eligible recipients in the Treasury Laws Amendment (Tax Accountability and Fairness) Bill.

Second, aged care whistleblowers should be permitted to make protected disclosures to lawyers for the purposes of seeking legal advice and representation in relation to the protections – per section s 1317AA(3) of the *Corporations Act*.

Third, in appropriate circumstances, where issues are not addressed or where the wrongdoing is giving rise to imminent risk to health and safety, whistleblowers should

[4] Royal Commission Final Report, [14.4.8], 521.

be protected if they blow the whistle to the media or members of parliament – per section 1317AAD of the *Corporations Act* and equivalent mechanisms in the *PID Act*.

Protection for Recipients

An accompanying additional required safeguard is the need for sufficient protections for recipients. The present immunity under Part 5 of the exposure draft of the Aged Care Bill 2023 only protects the discloser from liability for making a protected disclosure. We are concerned that recipients, particularly those recipients who are not legal practitioners (where legal professional privilege applies), may be subjected to allegations of inducement to breach confidentiality obligations and similar claims, even in circumstances where such claims have no foundation. This may act to create further barriers to the prospective whistleblower seeking assistance and support to speak up. Accordingly, we consider it desirable to remove this possibility by amending the legislation to provide that a recipient is also immune from liability for receipt of a protected disclosure.

Protections

While the breadth of the protections in proposed section 356 mirrors equivalent protections in the *PID Act* and *Corporations Act*, we note the current uncertainty in relation to preparatory conduct for making a disclosure, following the decision in *Boyle v Commonwealth Director of Public Prosecutions*.

Preparatory acts with the requisite nexus to the disclosure should receive protection. In practical terms, it is difficult, if not impossible, for whistleblowers to make a disclosure which is otherwise protected without taking any reasonably necessary steps in order to make the disclosure. Given the uncertainty created by the *Boyle* judgment, we consider that it is necessary and appropriate for the broader scope of the immunity advanced in our submissions to be clarified and placed beyond doubt. We propose that section 356 be amended to expressly provide that the immunity protects the making of the disclosure and prior acts that are reasonably necessary for the making of the disclosure. Such an amendment to widen the scope of the immunity would provide whistleblowers with greater access to effective and appropriate protections, with the appropriate safeguard of requiring that the preparatory acts be 'reasonably necessary' to the making of a disclosure

Process for Claiming Protections

The exposure draft lacks an equivalent to section 23 of the *PID Act*, which sets out the process for resolving claims for protection under the immunity. This gap is also found in the *Corporations Act*, although we note the section 23 equivalent presently proposed in the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 as part of the tax whistleblowing framework. We would recommend the inclusion of an equivalent provision.

Scope of Protections

Given the context, it is important that aged care residents are protected from reprisals even where the whistleblower is a family member, friend, advocate etc. While section 358 is presently sufficiently broadly drafted, extending to conduct to directed at those beyond the whistleblower, it may be useful clarifying the explicit breadth of protections. For example, section 1317AAA of the *Corporations Act* explicitly extends eligibility to relatives and dependents.

3. Recommendations

Recommendation 1: That the Government enhance the regulation and protection of whistleblowing in the aged care sector by adopting the comprehensive, uniform approach recommended by the landmark report of the Parliamentary Joint Committee on Corporations and Financial Services (2017), namely by establishing **a single Whistleblower Protection Act** covering all non-government entities and employers and entities under Commonwealth legislation or subject to Commonwealth regulation – not another separate, duplicatory, potentially inconsistent and burdensome scheme for the specific aged care sector, such as currently exists.

Recommendation 2: That the Department support the establishment of a comprehensive, consistent approach to whistleblower protections, including by establishing a standalone and independent whistleblower protection authority with jurisdiction, ultimately, to oversee and enforce both public sector and private sector protections (including in relation to aged care whistleblowers).

Recommendation 3: That, in the absence of the introduction of a single Whistleblower Protection Act in accordance with Recommendation 1, the Department supports all elements of Part 5 of the exposure draft of the Aged Care Bill 2023 with additional amendments to as outlined in this submission.

Protecting Australia's Whistleblowers

The Federal Roadmap

Griffith UNIVERSITY
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The authors acknowledge the Ngunnawal, Yugambeh and Bundjalung peoples on whose unceded land this report was written.

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Centre for Governance and Public Policy

The Centre for Governance and Public Policy at Griffith University is an outstanding intellectual environment for world-class research engaging international scholars and government and policy communities. We examine and critique the capacity, accountability and sustainability of the public service and government, providing insights into improved management structures. Working closely with governmental and non-governmental partners, we are making a tangible mark on governance research.

Human Rights Law Centre

The Human Rights Law Centre uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas. Our vision is an Australian democracy in which civil society is robust and vibrant; public debate is informed, fair and diverse; government is open and accountable; and the wellbeing of people and the planet are at the heart of every government decision.

Transparency International Australia

Transparency International Australia is the national chapter of Transparency International, a global coalition against corruption operating in over 100 countries. Each chapter is independent and unique, and together we aspire to a unified vision: a world free of corruption. Our mission is to tackle corruption by shining a light on the illegal practices and unfair laws that weaken our democracy, using our evidence-based advocacy to build a better system.

This is an updated edition of the report, republished in January 2023

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Introduction

Whistleblowers are a vital part of Australian democracy, playing a crucial role in the integrity and accountability of public and private institutions each and every day.

Australian research confirms it is people within organisations – the officials and employees - who really know what goes on and remain the single most important way in which wrongdoing is brought to light.

At key times, Australia has led the world in legislating whistleblower protections, with impressive support from all political parties. From the early 1990s, Australian states began enacting comprehensive whistleblowing laws for the public sector – second only to the United States.

But now Australia's whistleblower protection laws are falling behind. Among more than 60 countries which now have stand-alone whistleblowing laws, many follow the US, United Kingdom and European Union by providing more effective legal remedies than Australia. In 2019, a Federal Court judge described Australia's landmark federal *Public Interest Disclosure Act* (*PID Act*) as 'technical, obtuse and intractable'.

Despite advances in corporate whistleblowing, Australia's federal public service and many industry sectors including disability and aged care suffer from limited, out of date and inconsistent protections. Complex loopholes in public and private sector laws alike mean whistleblowers are still prosecuted without due regard to the public interest they serve.

Even as Australia takes the historic step of creating the National Anti-Corruption Commission, this highlights big gaps in federal whistleblower protection. Along with better laws for whistleblowers on paper, we need an independent authority to ensure these rights are implemented and enforced in practice. Without trust and confidence in this practical support, the Commission will not be effective. Instead, public and private sector workers will be left exposed for speaking up.

This report sets out 12 key areas of reform needed to place Australia back on the road to international best practice. This is a 'check list', not a 'wish list' – every reform has been identified as necessary by prior reviews, bipartisan parliamentary committees or independent experts.

The reforms span:

- **Effective administration and enforcement** of the laws;
- Ensuring the laws contain consistent, **best practice protections**; and
- Making sure thresholds and limitations in the laws are **workable**.

Importantly, this roadmap highlights the many issues requiring a **consistent fix** across all federal whistleblowing laws – public and private sector – rather than the piecemeal approach which has led to the complex web of gaps and inconsistencies that prevails today.

With these reforms, Australia can fix the deficiencies in federal whistleblowing law. Rather than simply talking the talk about this vital pillar of democratic accountability, our parliament can – and must – make whistleblower protections real, for the benefit of all Australians.

Above:

Protests in support of whistleblowers Bernard Collaery and Witness K. Credit: Alex Ellinghausen/ The Sydney Morning Herald

Figure 1:

Protecting Australia's Whistleblowers: The Federal Roadmap

KEY REFERENCES:

AFIC	Australian Federal Integrity Commission Bill 2020
Corps	Corporations Act 2001, Part 9.4AAA (2019)
Moss	Moss Review PID Act 2016 recommendations
NIC	National Integrity Commission Bills 2018
PID	Public Interest Disclosure
PJC	Parliamentary Joint Committee on Corporations & Financial Services 2017 recommendations
SSC	Senate Select Committee 1994 recommendations

Effective Administration and Enforcement

Right:
Sharon Kelsey blew the whistle on alleged wrongdoing at a Queensland council, where she was the chief executive. She has been locked in legal battles ever since.
Credit: GetUp!

Whistleblower protection is complex. Yet there is little institutional support for whistleblowers to navigate the protections available to them. Unlike other areas of workplace law, where the Fair Work Ombudsman or human rights commissions oversee and enforce employment and anti-discrimination rights, whistleblowers are left alone and unsupported. This can and must change, through institutional and practical reforms to make the protections in all whistleblowing laws actually work.

1. Establish a whistleblower protection authority

Establish a whistleblower protection authority to enforce whistleblowing laws, provide practical support and drive the implementation of protections in practice.

Much has been done under current laws to require public bodies and companies to implement protections through their own internal procedures. Agencies like the Commonwealth Ombudsman and Australian Securities and Investments Commission (ASIC) monitor for compliance with best practice policies. However, when internal procedures fail or an organisation turns on a whistleblower, there is no federal agency tasked with independent investigation of detrimental actions or enforcement of the legal protections theoretically afforded by the law.

Research shows that a substantial proportion of whistleblowers suffer serious repercussions for doing so, of whom barely a fraction receive any protection (see 'Key Research Findings', below). This injustice has a chilling effect. At state level, only a handful of criminal prosecutions for reprisal have ever been attempted, and none have succeeded. Among the few claims for remedies or compensation brought under any federal law – including less than a dozen cases under the *PID Act* since 2013 – almost none have been successful.

First proposed by the Senate Select Committee on Public Interest Whistleblowing in 1994, a whistleblower protection authority was unanimously recommended by the landmark inquiry of the Parliamentary Joint Committee on Corporations and Financial Services into whistleblower protections across the corporate, public and not-for-profit sectors (2017). It was also promised by the Australian Labor Party in February 2019, and incorporated in the design of the crossbench's *National Integrity Commission* and *Australian Federal Integrity Commission Bills* in 2018 and 2020.

Transparency International (2018) also recommends an independent enforcement agency as part of national whistleblowing laws. Following the precedent of the US Office of Special Counsel and other North American regulators, the Dutch Whistleblowers Authority (*Huis voor Klokkenluiders*) was established in 2016, with initiatives to establish an Office of the Whistleblower underway in the United Kingdom and elsewhere.

A whistleblower protection authority, whether as a standalone agency or an extension of an existing regulatory institution (such as the National Anti-Corruption Commission) would help implement all federal whistleblowing laws, by:

- Being a source of practical guidance and support for whistleblowers;
- Assisting agencies, companies and regulatory bodies with coordination and management of disclosures (see 'no wrong doors' below);
- Promoting best-practice whistleblowing policies and procedures in collaboration with existing oversight agencies (e.g. the Commonwealth Ombudsman and ASIC);
- Investigating alleged detrimental action and recommending remedies;
- Supporting enforcement litigation in strategic cases where whistleblowers deserve remedies in the Fair Work Commission or federal courts; and
- Administering a rewards scheme for whistleblowers, also unanimously recommended by the 2017 Parliamentary Joint Committee.

For lawyers and other stakeholders to play their role in ensuring whistleblowers can access their rights, specialist independent legal support is also crucial. Whistleblower protections have gained more use in the USA, and elsewhere, in part because a dedicated ecosystem of lawyers has developed to help make the rights real. Through funding for legal support for whistleblowers, as well as an effective rewards scheme, a whistleblower protection authority will encourage 'professionalisation' of whistleblowing supports and help redress the imbalance in power between well-resourced organisations and ordinary workers who speak up.

2. Ensure a 'no wrong doors' approach

Create a 'no wrong doors' approach through coordinated referral processes and inclusion of all relevant regulatory agencies in the whistleblowing framework.

Effective whistleblower protection requires two central components: confidence that protections apply to any eligible whistleblower who takes their concerns to any authority who is reasonable or logical to approach; and machinery to ensure whistleblowers are not referred to the wrong place (e.g. back to the organisation that may already be mishandling their concern) or fall through the cracks as they shuffle between the jurisdictions of different agencies.

For the federal public sector, the 2016 Review of the *PID Act* (Moss Review) identified many agencies that do or might logically receive whistleblowing complaints – such as the Inspector-General of Taxation, or Australian Public Service Commission – who are not identified as receiving authorities under the law. Similarly, despite being reformed in 2019, the *Corporations Act* whistleblowing provisions do not list logical Commonwealth regulatory agencies such as the Australian Competition and Consumer Commission or Australian Federal Police. Instead, to attract protection, a whistleblowing concern has to be made to just a few agencies, like the Commonwealth Ombudsman or ASIC, who may not be the most likely or appropriate to investigate the information.

Almost every review, including the Senate Select Committee on a National Integrity Commission (2017), has noted the difficulty experienced by whistleblowers in navigating our opaque and complex integrity systems. Whistleblowers are often referred back to their own agency even when this is unwise, or give up after being shunted between different agencies, with damaging delays and impacts for whistleblowers and agencies alike.

A major benefit of a whistleblower protection authority is to force greater coordination and more appropriate processes for referrals of whistleblowing matters. However, existing laws also need to expressly identify all relevant integrity or regulatory agencies to whom whistleblowers are likely, and encouraged, to directly approach, across both public and private sectors.

3. Provide greater powers and resources for training and oversight

Stronger powers and resourcing for oversight and compliance, including ongoing training and education for staff, supervisors and authorised officers.

The Moss Review identified the need for the oversight agencies for the protections to have clearer powers, a more active role and more resources, as well as to provide a stronger program of training. This applied to the Commonwealth Ombudsman and Inspector-General of Intelligence and Security (IGIS), and the efforts of line agencies to implement their own policies and procedures.

In the private sector, the same remains true for the oversight and compliance roles of ASIC and the Australian Charities and Not-for-profit Commission. Even with a whistleblower protection authority to help enforce protections in specific cases, these general compliance responsibilities remain crucially important across both sectors, for ensuring employers manage disclosures properly in the first place.

Below:

Whistleblowers Brian Hood and James Shelton, who played important parallel roles in bringing Australia's biggest foreign bribery scandal to light.
Credit: Jason South

4. Enact a single law covering all non-public sector whistleblowers

Expand whistleblower protections to cover all Australian private and not-for-profit sector workers, in a consistent way, including removing loopholes in the *Corporations Act* and out-of-date, inconsistent protections in other federal laws.

The *PID Act* provides a strong basis for comprehensive coverage of all Commonwealth public officials and federal government contractors, especially once politicians and their staff are added under proposed improvements to the anti-corruption and parliamentary standards regimes.

By contrast, Australian private and not-for-profit sector organisations are covered by an incomplete and messy patchwork of inconsistent whistleblower protection laws. Amendments to the *Corporations Act* in 2019 tried to roll improved protections for corporate, banking and financial sector whistleblowers into a single, more unified regime. However, at the same time:

- A parallel, duplicate regime was created for taxation whistleblowers;
- Unions are subject to different rules under the *Fair Work (Registered Organisations) Act 2009*;
- The *Aged Care Act 1997* only offers defective whistleblower protections dating from before reform of the *Corporations Act*, renewed in this inconsistent form as recently as 2021 (see Figure 2, pages 10–11, below);
- The same applies to National Disability Insurance Scheme whistleblowers, under defective protections added to that Act in 2017; and
- Other whistleblowers who reveal wrongdoing under federal regulation, but are not corporate employees or in the above sectors, get no protection at all.

Some out-of-date laws, such as those still applying to federal aged care and disability support, do not allow anonymous whistleblowing, impose an ambiguous 'good faith' test for protection, and only allow civil remedies if a criminal reprisal is shown.

The gaps and inconsistencies flowing from multiple laws add significant regulatory complexity – especially for employers subject to more than one law, and federal contractors to whom the different standards of the *PID Act* also apply, some of them higher and some lower. Australia risks going down the path of legislative chaos seen in the US, where as at 2011, private sector whistleblower protections were already duplicated across no less than 47 different laws.

In 2017, the Parliamentary Joint Committee recommended that equivalent protections should be provided for all private and not-for-profit sector whistleblowers, under a single consolidated law. The Committee emphasised the need for consistency between the public and private sectors, wherever logical and possible. In 2019, then shadow Attorney-General Mark Dreyfus KC and Treasury spokesperson Clare O'Neill announced a Labor government would pursue this approach.

The time to do this, to avoid ongoing inconsistencies and 'catch ups' between laws in different sectors, is now – at the same time as federal public sector whistleblower protections are being reformed.

Figure 2:

How Australian whistleblowing remedies compare

KEY:

Grounds for seeking remedies:

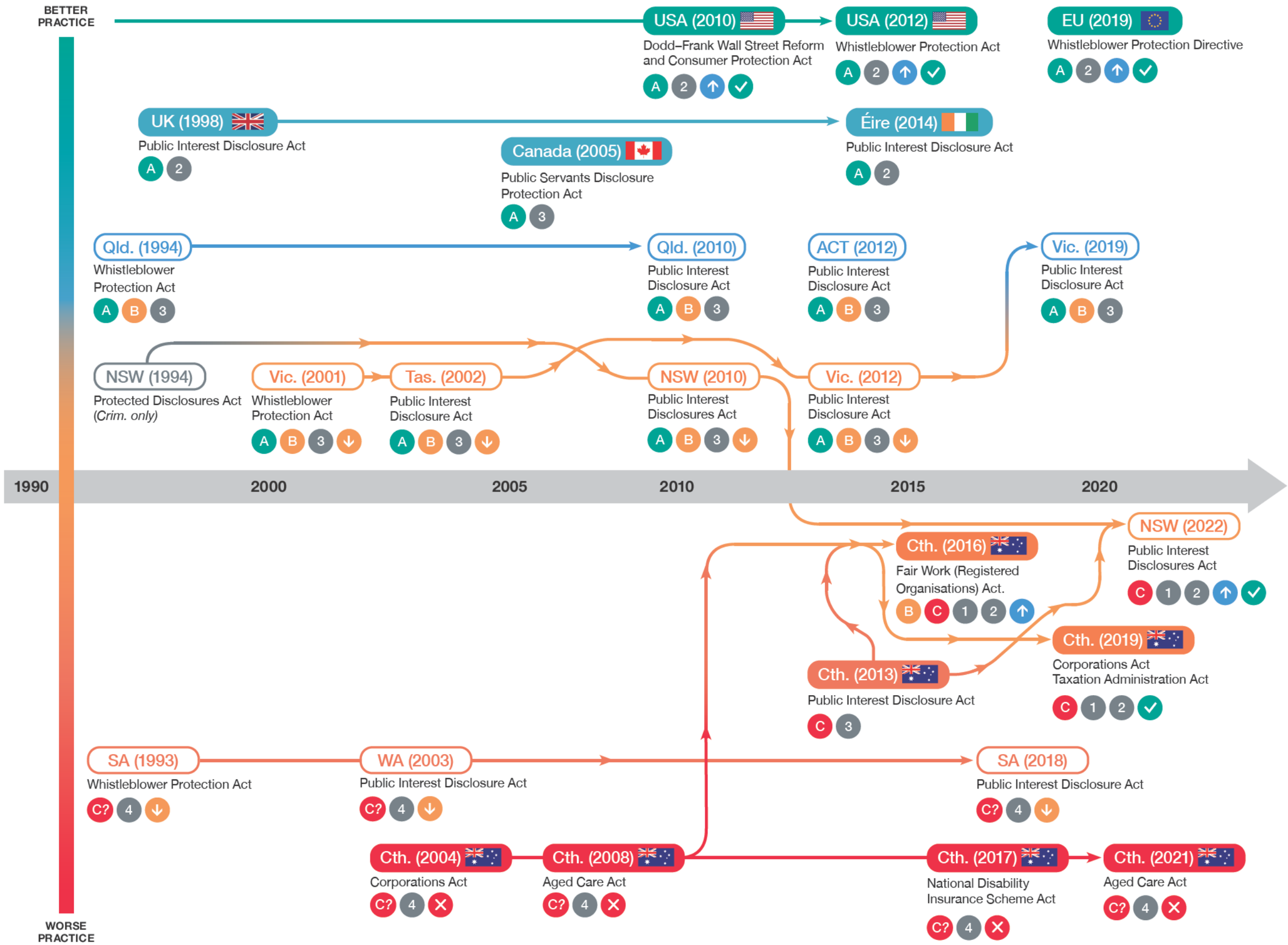
- **A** Detriment was 'because' or 'due to the fact of' the disclosure (broad)
- **B** Detriment was caused 'in the belief' of a disclosure (subjective element)
- **C** 'Reason' for detrimental conduct must be or include the 'belief or suspicion' of the disclosure (subjective element required) (narrow)

Scope of detriment:

- **1** Remedies for damage flowing from failure to fulfil a duty to prevent detriment (broad)
- **2** Remedies for detrimental conduct including acts *and* omissions
- **3** Remedies for detrimental actions 'taken' due to disclosure (implied direct reprisals only)
- **4** Remedies for 'victimisation' only

Additional elements:

- ✓ Burden of proof reverses to respondent
- ↑ Constructive knowledge allowed for ('should have known')
- ↓ Disclosure must be at least a 'substantial' reason for the detriment
- ✗ 'Good faith' required, no anonymity allowed



Quality legal protections lie at the heart of whistleblowing legislation. The second major area of reform is to ensure that when whistleblowers speak up – whether internally, to regulators or to the wider public – these protections are fit for purpose.

5. Clarify immunities from prosecution

Ensure that intended protections against criminal or civil liability cover necessary preparatory actions, and address legal uncertainties arising in whistleblowing cases.

Like most whistleblowing laws, the *PID Act* and *Corporations Act* provide immunity from criminal, civil and administrative liability for disclosures of wrongdoing. However the limited cases to date, especially the Commonwealth's prosecution of Australian Taxation Office whistleblower Richard Boyle, have revealed legal gaps and uncertainties which can drag cases out for years, increasing costs for all parties and defeating the purposes of the protections.

This immunity needs to cover necessary or reasonable actions related to the disclosure – such as accessing or securing relevant information – not just the act of disclosure itself. For example, the European Union's 2019 Whistleblower Protection Directive provides for protection against all but 'self-standing', entirely unrelated offences. In France, Ireland and the United Kingdom, the law protects a whistleblower for 'misappropriating' or concealing documents containing information of which they have lawfully obtained knowledge. In Australia too, this needs to be put beyond doubt.

Below:
Tax office whistleblower Richard Boyle attends court in Adelaide. Boyle is being prosecuted for blowing the whistle on unethical debt recovery practices. Credit: AP / David Mariuz.

When whistleblowers seek immunity from a criminal offence, there also needs to be greater certainty whether this question should be heard as a separate civil question or bundled into the criminal trial. This affects multiple issues, including: whether issues should be determined on a balance of probabilities or beyond reasonable doubt; whether federal constitutional rights to a jury trial apply; and how to ensure open justice even though media coverage could impact on a later criminal trial. The *Corporations Act* procedure is even less clear than in the *PID Act*, which reverses the burden of proof in immunity claims (but not compensation claims: see 'simplify proof requirements', below).

6. Simplify and upgrade proof requirements for remedies and compensation

Make civil remedy and compensation rights workable by bringing them into line with international best practice, including reversing the burden of proof.

A fundamental purpose of whistleblowing laws is to ensure that if a whistleblower suffers unjust detriment, this can be remedied through civil or administrative orders, employment remedies like reinstatement or financial compensation for impacts on their career, current and future earnings, personal life or mental health.

This requires free-standing rights to remedies for injustice, irrespective of whether individuals knowingly or recklessly intended any harmful actions – which is the subject of separate criminal 'reprisal' or 'victimisation' offences.

However, **Figure 2** (pages 10–11) shows how Australia's federal proof requirements for accessing civil remedies have fallen behind international standards, as well as many state ones. While there are good aspects to some recent federal laws, such as the *Corporations Act*, these are undermined by the fundamental barrier to remedies unless an individual can be shown to have knowingly undertaken harmful conduct for the 'reason' of the disclosure.

Even when harmful acts are truly direct – say terminating a whistleblower's employment – this level of intent can be almost impossible to prove. But in fact, research shows that most of the suffering experienced by whistleblowers stems from organisational failures to support them, or misguided personnel actions which fail to take the whistleblowing into account – not actions which are knowing or intentional responses to the disclosure itself.

Around 80 per cent of whistleblowers suffer these indirect or 'collateral' forms of damage, despite much of it being predictable and preventable (see Figure 3, 'Key research findings' below). Yet as the research also shows, too few whistleblowers receive meaningful remedies, even when their own managers agree they have suffered serious repercussions and deserve support. Clearly, the rights intended by law have not translated into reality.

International best practice is for wide thresholds for the nexus between a disclosure and any non-criminal detriment flowing from it, which an employer or other party should be required to make good.

For example, following principles set out by the Organisation for Economic Co-operation and Development since 2011, the European Union's 2019 Whistleblower Protection Directive, provides that once a whistleblower has shown *prima facie* that they suffered, the employer can only escape responsibility for compensation by proving its actions were 'based on duly justified grounds'. The burden shifts to those allegedly responsible, to prove that the detrimental acts or omissions were 'not linked in any way' to the act of whistleblowing.

By contrast, Australia's federal laws since 2013 are uniquely restrictive in requiring that a respondent's conscious 'belief or suspicion' of a disclosure must be a positive 'reason' for the detrimental conduct before remedies can flow (*PID Act* s.13, *Corporations Act* s.1317AD). While reasonable for a criminal offence, this basis was identified as too narrow by the 2017 Parliamentary Joint Committee, which recommended separating out the wider grounds for civil remedies and compensation.

Unfortunately, the current restrictive requirements in the federal *PID Act* and *Corporations Act* were also replicated in the anti-reprisal provisions of the *National Anti-Corruption Commission Bill 2022*, rather than this opportunity being taken to begin fixing the problem.

Other problems with Australia's federal laws – and many state ones – include language which presumes unjust damage only flows from positive acts (rather than omissions and failures), and inconsistent burdens of proof. For example, while the *Corporations Act* provides a reverse burden of proof for civil remedies, the *PID Act* (s.23) does not. International best practice also provides clearer thresholds for what an organisation must prove, to escape responsibility.

Left:
Jacinta O'Leary was a nurse and midwife at offshore immigration detention facilities in Nauru, where she helped raise concerns about the failure to provide appropriate medical care to detainees. Credit: GetUp!

Right:
Former Commonwealth Bank of Australia whistleblower Jeff Morris, who helped trigger numerous parliamentary inquiries and the Royal Commission into Banking Misconduct. Credit: AP / Joel Carrett

7. Enforce a positive duty to protect whistleblowers

Promote a culture of supporting and protecting whistleblowers, by making employers liable if they fail to do so.

In 2016, Australia was the first country to make civil remedies available if a whistleblower suffers damage due to someone's failure, in part or whole, to fulfil a duty to 'prevent, refrain from, or take reasonable steps to ensure other persons… prevented or refrained from, any act or omission' likely to be detrimental (***Fair Work (Registered Organisations) Act***, s. 337BB(3)). In 2019, this was extended to all corporate whistleblowers in a narrower form, with remedies available against a company if a third person (e.g. their employee) is shown to have engaged in a detrimental act or omission, and the body failed to fulfil 'a duty to prevent the third person engaging in the detrimental conduct' or take 'reasonable steps' to ensure the third person did not do so (***Corporations Act***, s. 1317AD(2A)).

In 2022, the NSW ***Public Interest Disclosures Act*** was amended to make public agencies liable if they fail in their duty to 'assess and minimise the risk of detrimental action' against a person as a result of a disclosure. Importantly, an agency is deemed to be under that duty if a disclosure officer for the agency is either aware 'or ought reasonably to be aware' that a disclosure has been made (ss. 61,62).

These historic provisions recognise that whistleblower protection relies on organisations implementing their own responsibilities to support whistleblowers and prevent or limit any damage in the first place. A similar basis for civil remedies also needs to be added to the federal ***PID Act*** – in the form of a new streamlined provision, also applied to the ***Corporations Act***, to clearly recognise an enforceable organisational duty to protect whistleblowers from preventable indirect and collateral damage, not simply direct reprisals.

8. Ensure easier, consistent access to remedies

Vest the Fair Work Commission with new jurisdiction to conciliate whistleblowing claims against employers, in both public and private sectors.

Another reason why civil remedies have not flowed under federal laws is the difficulty in accessing federal courts – the primary avenue provided by the ***PID Act***, and only avenue under the ***Corporations Act***. As courts of law, federal courts have strict rules of evidence, expensive filing fees, and limited scope to help whistleblowers who represent themselves. Access to federal courts at any stage is vital on questions of law, to obtain binding orders, or to award remedies against a non-employer. But in most cases, whistleblowers who seek legal remedies need a more suitable independent tribunal.

For federal public servants, the ***PID Act*** also makes whistleblowing a workplace right, allowing them to seek general protections under the ***Fair Work Act 2009***. However, the special considerations and safeguards of the ***PID Act*** do not 'carry-over' to ***Fair Work*** proceedings. This may include protections against adverse costs, but more importantly, includes the risk that detrimental acts against whistleblowers will be treated like a mere workplace dispute, rather than being seen as a threat to public integrity and accountability itself. A conventional industrial relations approach can cause problems, as seen in Queensland and the United Kingdom.

The Fair Work Commission needs to be given its own jurisdiction to hear whistleblower protection claims, taking these special considerations into account. With proper resourcing and expertise, the FWC can significantly improve access to justice for whistleblowers as well as quicker resolution for employers, whether a new whistleblower protection authority is involved or not. Where conciliation is unsuccessful or arbitration by consent is refused, or orders are not constitutionally available, proceedings could still be commenced in the federal courts.

Private sector whistleblowers also deserve the same ease of access to remedies. In addition, the ***Corporations Act*** requires amendment to ensure the new protections enacted in 2019 are available to all corporate whistleblowers, fixing a loophole arising from the Federal Court's decision in ***Alexiou v Australia and New Zealand Banking Group Limited*** (2020).

9. Enhance information-sharing and ability to access support

Amend confidentiality requirements to make it easier for agencies, employers and oversight bodies to properly respond to whistleblowing cases, and for unions and professionals to provide support and representation.

Strict confidentiality is a cornerstone of whistleblower protection. To the maximum possible extent, the content of disclosures or identity (or even the fact) of a whistleblower should only be shared with those who need to know. However, both the 2016 Moss Review of the ***PID Act*** and the 2017 Parliamentary Joint Committee found that existing confidentiality requirements were often too inflexible.

Most importantly, while whistleblowers can reveal the content of a disclosure to lawyers in order to seek legal advice, neither the ***PID Act*** nor ***Corporations Act*** permit a whistleblower to reveal the information to others on whom they depend for advice, help and support – such as unions, health professionals or even immediate family. Little surprise, then, that a survey by the Moss Review found that 72% of federal government whistleblowers felt unsupported during the process. By contrast, a report commissioned by Public Services International in 2016 shows the vital role unions should be able to play in providing support.

Secrecy requirements also need to be made flexible enough that agencies can share information internally and externally to ensure disclosures are properly and speedily addressed. If the fact or identity of a whistleblower is already known in an organisation, attempting to enforce secrecy can be not only impossible, but get in the way of the information sharing needed to provide whistleblowers with effective support.

Where necessary, federal laws need to be clearer that the purposes of confidentiality are to safeguard due process and protect whistleblower welfare, including by requiring whistleblowers' consent to how information about them is shared – not to create cumbersome administrative burdens or throw an extra blanket of secrecy over the wrongdoing that is suspected to have occurred.

10. Expand the definition of detriment

Expand the *PID Act* definition of detriment to include non-employment impacts.

In 2016 and 2019, respectively, union and corporate whistleblowers got the benefit of an expanded definition of the 'detriment' for which they could seek remedies – including any damage to property, reputation or their financial position, and any form of discrimination, harassment, intimidation or other harm (including psychological harm) – whether by their employer or any other person (***Fair Work (Registered Organisations) Act***, s.337BA(2); ***Corporations Act***, s.1317ADA).

For public sector whistleblowers, section 13 of the ***PID Act*** continues to give official work-related or employment actions as the only examples of 'disadvantage' amounting to detriment – such as dismissal, injury of an employee in their employment, alteration of an employee's duties to their detriment, and discrimination in employment. This implies remedies might only be available for official or authorised workplace decisions, rather than a full spectrum of potential reprisals and collateral damage. This definition needs to be expanded, as recommended by the 2017 Parliamentary Joint Committee.

Workable Thresholds and Limitations

Below:
David McBride outside the ACT Supreme Court. McBride, a former Army lawyer, is alleged to have blown the whistle on Australia's alleged war crimes in Afghanistan. His trial is ongoing.
Credit: AAP / Rod McGuirk

Left:
Australian Federal Police officers execute their 'Afghan Files' raid on the ABC's Sydney headquarters in 2019.
Credit: ABC News.

Not every complaint constitutes public interest whistleblowing. Nor do all public disclosures of confidential information, if they lack a public interest justification. Two major reforms are needed to ensure protections are available when they are needed, and not when they aren't.

11. Properly protect public and third-party whistleblowing

Recognise the importance of whistleblowers speaking up publicly in appropriate circumstances, by making external and emergency disclosure provisions simpler and more consistent, including to cover national security whistleblowers.

Like other comprehensive whistleblowing laws, the *PID Act* and *Corporations Act* extend to whistleblowers who go public. This recognises that disclosure to the media, parliamentarians and other third parties can be a critical safety-valve, if there are no safe internal avenues or if these fail.

However, the current laws are unhelpfully complex and inconsistent with one another, on when external disclosure is deemed reasonable. This has led to uncertainty, confusion, and cost to public confidence in the transparency and accountability of government and business – including a chilling effect on all other reporting. Huge damage to Australia's reputation has been caused by recent criminal prosecutions of three federal whistleblowers for taking their disclosures outside official channels: Witness K who revealed unethical commercial espionage against Timor-Leste, ATO whistleblower Richard Boyle, and Afghanistan veteran and Army lawyer, David McBride.

In 2020, the Parliamentary Joint Committee on Intelligence and Security recommended simplifying the public interest test for federal government whistleblowers. Currently the *PID Act* imposes an objective test that a third-party disclosure must not be contrary to the public interest, with a long list of messy criteria. A simpler test, building on provisions already found in Queensland, the ACT, the United Kingdom and Ireland, is whether further disclosure is reasonable in all the circumstances to ensure wrongdoing is effectively addressed, given that revealing wrongdoing is already inherently in the public interest.

For public sector protections to work, the blanket ban must end on third party disclosure of any information that 'has originated with, or has been received from, an intelligence agency' (*PID Act*, s. 41(1)(a)). More reasonable tests under other laws, including the National Anti-Corruption Commission legislation, restrict disclosure only where there is an objective risk of actual harm to security, personnel or the national interest.

The current *PID Act* test, by contrast, allows wrongdoing to be hidden even if the information poses no security or intelligence risk, and whistleblowers to be prosecuted even if the same information is already available from other sources. As a consequence, whistleblowers like Witness K or David McBride have been left without any right to even assert a public interest defence.

Even more confusingly, the *Corporations Act* approaches the test differently – requiring the whistleblower to have a reasonable belief that there is a further public interest in public disclosure. It also includes unworkable tests for the whistleblower to first notify authorities that they intend to go public, increasing the risk of detrimental outcomes. Meanwhile, whistleblowing provisions in other laws such as the *Aged Care Act* and *National Disability Insurance Scheme Act* provide no protection for public or third-party disclosure, at all.

Two sides of the public interest coin: protecting whistleblowing through stronger press freedom

Whistleblower protections do not operate in a vacuum. When whistleblowers go public, their role as public interest media sources also needs protection, as does press freedom itself, as a pillar of transparency and accountability across government and business.

Since Australian Federal Police raids on the ABC and News Corporation in 2019, Australia has fallen sharply on international press freedom rankings. While criminal offences for disclosure have multiplied, recommendations for law reform to balance secrecy and transparency under Australia's federal laws have so far gone unaddressed. These include a major inquiry by the Australian Law Reform Commission (2010), and reports by the Parliamentary Joint Committee on Intelligence and Security (August 2020) and Senate Standing Committee on Environment and Communications (May 2021).

Whistleblower protections will remain incomplete until Australia creates a general public interest defence for citizens, whistleblowers and journalists to call on when necessary against this rising tide of potential liability.

Since 2011, journalism 'shield laws' have strengthened the right of journalists not to identify their sources in legal proceedings, protecting whistleblowers from exposure and journalists from conviction for contempt. However, these laws have proved too weak, with media still exposed to prosecution simply for receiving confidential information as part of their job, and search warrant powers that can force identification of sources irrespective of what happens in court.

Under proposed reforms, search warrants could only be issued, or charges laid after 'due regard' is given to the public interest in journalism and the protection of confidential sources. But these reforms would not go far enough. For the role of whistleblowing to be fully respected, stronger shield laws should bring a higher level of privilege, so such warrants could not be issued at all, nor criminal charges brought, without clear evidence of wrongdoing by journalists outside their public interest reporting roles.

12. Exclude solely individual employment grievances

Strengthen PID Act implementation by making clear that purely individual workplace grievances do not trigger whistleblower protections.

The 2016 Moss Review of the *PID Act* recommended that the scope of 'disclosable conduct' no longer include allegations of maladministration or unlawful conduct which are 'solely about personal employment-related grievances, except when the disclosure indicates systemic wrongdoing or reprisal'. This reform would ensure the whistleblowing regime does not become bogged down and discredited, through its attempted use to resolve workplace grievances – for which it was not designed, and for which other processes exist.

Most state laws already limit the scope for whistleblower protections to be triggered by such matters. Overseas, laws such as the UK's *Public Interest Disclosure Act* have also been amended to make this clear. Under the *Corporations Act* (s. 1317AADA), employment grievances 'having (or tending to have) implications for the discloser personally' are not protected unless they involve 'significant implications… that do not relate to the discloser', a breach of federal laws, a danger to the public or the financial system, or issues of detrimental conduct.

Any employment carve out must be framed with care to ensure that legitimate whistleblowing does not fall through the cracks. The *Whistling While They Work 2* research revealed that almost half of all whistleblowing involves a mixture of workplace and public interest concerns, along with the fifth involving solely public interest concerns, as against a third involving only personal or workplace grievances. Already, *PID Act* protections do not apply to complaints relating 'only' to government policies or decisions 'with which a person disagrees'. But protections still apply to such disagreements, and should still apply even to workplace grievances, in the many cases where these also involve, or contain, information pointing to other wrongdoing.

Australia has been home to some of the world's largest studies into public interest whistleblowing. In 2008, the Australian Research Council-funded *Whistling While They Work* project surveyed over 7,000 employees from 118 public sector agencies, including 1500 whistleblowers. Cited heavily by the House of Representatives Standing Committee inquiry which recommended the *Public Interest Disclosure Act*, the research found that while not all whistleblowers suffer, at least a quarter were mistreated by their organisation, with stresses and failures affecting many more.

A decade later, Griffith University's *Whistling While They Work 2* project was the first to compare whistleblowing outcomes in public and private sector bodies. Supported by the Commonwealth Ombudsman, Australian Securities and Investments Commission (ASIC) and integrity and anti-corruption bodies from throughout Australia, it surveyed over 17,000 employees from 46 organisations, including 5,500 whistleblowers and 3,500 managers and governance staff who observed or dealt with whistleblowing cases. The project reaffirmed the crucial role of whistleblowing for integrity and good governance across all types of organisations, but found no improvement in the outcomes for public sector whistleblowers.

Crucially, according to the managers and governance staff, 56 per cent of public interest whistleblowers suffered serious repercussions – whether as indirect/collateral damage, or in 30 per cent of cases, as direct harm including adverse employment actions, harassment or intimidation. This was despite the fact that in over 90 per cent of cases, managers and governance staff assessed the whistleblower as being correct and deserving of the organisation's support.

However, as shown in **Figure 3**, only half (49 per cent) of these whistleblowers were identified as having received any remedy for the detriment they suffered – even marginal or insufficient remedies – despite its seriousness. Even fewer (43 per cent) of those who suffered serious direct harm received any remedy. Overall, less than six per cent received any compensation for the employment, health or personal impacts.

The low proportion of meaningful remedies for whistleblowers, even when managers identify that they suffered serious repercussions and deserved support, shows clearly that the rights intended by law were not translating into reality.

Figure 3:

The current whistleblowing experience: detriment vs remedy

Source: A J Brown & Jane Olsen, 'How well have Australian whistleblowing laws worked to date? Repercussions and remedies for Australasian whistleblowers', 3rd Australian National Whistleblowing Symposium, 11 November 2021. Data source: Whistling While They Work 2 ARC Linkage Project (2016-2019), Integrity@WERQ Survey. Manager and governance respondents from 33 Australian and New Zealand organisations with 5+% response rates (n=2672), describing repercussions and remedies where known for the most significant whistleblowing case dealt with or observed by them (n=1322) and assessed to be (a) not solely a personal or workplace grievance, (b) correct and (c) deserving of the organisation's support (n=646). See www.whistlingwhiletheywork.edu.au.

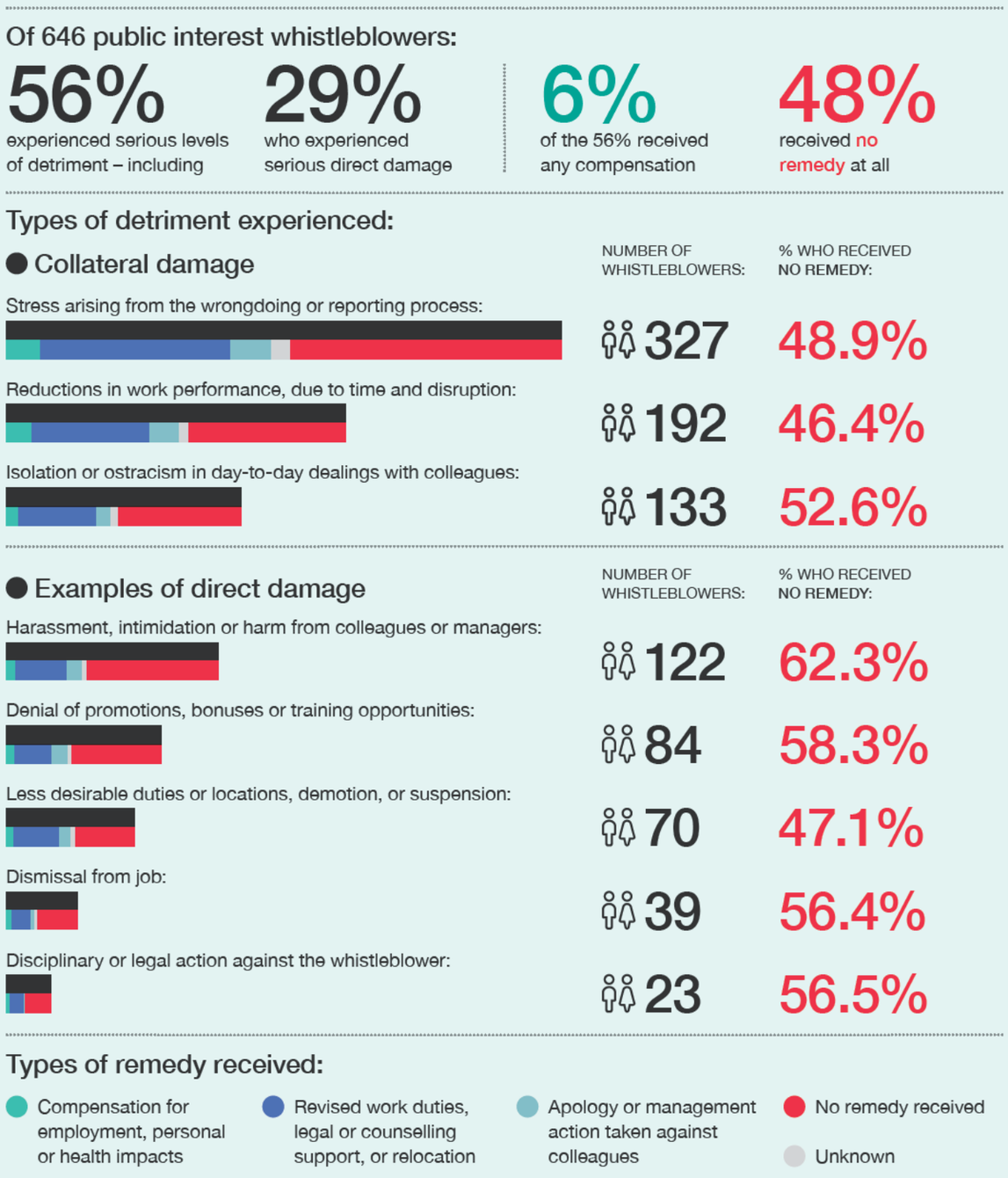


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Figure 4:

Protecting Australia's Whistleblowers – Checklist (Updated)

This table provides a breakdown of what proposed or completed federal reforms would achieve, in relation to this roadmap, since first published in November 2022. As at January 2023, the items marked as on track to be achieved (partly, substantially or wholly) reflect the reforms contained in the Public Interest Disclosure Amendment (Review) Bill 2022 (Cth).

		Sector(s)	
		Public	Private and Not-for-profit
Effective Administration and Enforcement			
1.	Establish a whistleblower protection authority	■	■
2.	Ensure a 'no wrong doors' approach	☑	■
3.	Increase powers and resources for training and oversight	☑	■
4.	Enact a single law covering all non-public sector whistleblowers		■
Best Practice Protections			
5.	Clarify immunities from prosecution	■	■
6.	Simplify proof requirements for remedies and compensation	■	■
7.	Enforce a positive duty to support and protect whistleblowers	■	■
8.	Ensure easier, consistent access to remedies	■	■
9.	Enhance information-sharing and ability to access support	☑	■
10.	Expand the definition of detriment	✓	
Workable Thresholds and Limitations			
11.	Properly protect public and third party whistleblowing	■	■
12.	Exclude solely individual employment grievances	☑	

Status

☑ Partially

✓ Substantially/wholly

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TRANSPARENCY INTERNATIONAL AUSTRALIA

The Cost of Courage

Fixing Australia's Whistleblower Protections

Human Rights Law Centre

Contents

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The author acknowledges the Traditional Owners of Country throughout Australia and recognise their continuing connection to land, waters, and culture. We pay respect to elders and acknowledge the Traditional Owners who have cared for Country since time immemorial. Sovereignty over this land was never ceded – it always was, and always will be, Aboriginal and Torres Strait Islander land.

Front cover image: Thomas Feng/Human Rights Law Centre

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. Our work includes supporting whistleblowers, who are crucial to exposing human rights abuses and government and corporate wrongdoing, and to ensuring accountability. The Human Rights Law Centre is a member of the Whistleblowing International Network.

This report was made possible thanks to pro bono research by King & Wood Mallesons. The Human Rights Law Centre's Whistleblower Project is made possible by generous support from the Susan McKinnon Foundation, Mannifera, the ACME Foundation, the McKinnon Family Foundation, and the Victorian Legal Services Board's Grants Program. The work is undertaken in close partnership with Transparency International Australia and the Centre for Governance and Public Policy at Griffith University. Special thanks to Professor AJ Brown AM.

Human Rights Law Centre | Susan McKinnon Foundation | mannifera | McKinnon Family Foundation | Victorian Legal Services BOARD + COMMISSIONER Funded through the Legal Services Board Grants Program

Whistleblowing and Human Rights

Whistleblower protection is an essential part of the wider human rights framework in this country, underpinned by Australia's international obligations. The ability of whistleblowers to speak up, and the public's right to know, is protected under the right to freedom of opinion and expression, established under Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In recent decades whistleblowers have proven critical to exposing human rights abuses around the world – without robust whistleblowers protections and public interest journalism, too often human rights violations go unchecked. Whistleblower protections have emerged as an important aspect of the obligations of state parties, including Australia, to fight corruption under the United Nations Convention against Corruption. Whistleblowers also play an important role in upholding Australia's transparent, accountable democracy, ensuring governments respect and uphold human rights and build a fairer, more compassionate country.

Credit: Thomas Feng/HRLC

Foreword

Australia needs whistleblowers.

As two of Australia's leading investigative journalists, we intimately understand the importance of whistleblowers. Without brave truth-tellers, we could not do our jobs. Many of our stories – stories that have rocked governments and companies, stories that have led to Royal Commissions, stories that have been recognised with Walkley Awards, stories that have been vindicated by court judgments – would not have been possible without whistleblowers. Insiders who see wrongdoing and speak up are indispensable to our journalism, and our democracy.

But we also know all too well the risks faced by whistleblowers. We do our best to keep our sources safe, but it does not always work out that way. Some of our sources have lost their jobs for speaking up; some of our sources have faced criminal prosecution.

While some brave whistleblowers still speak up, no doubt many others are staying silent, out of fear of being punished for doing the right thing. What stories are not making the front-page because whistleblowers are rightly afraid of speaking up?

We welcome this report and the clear call it makes for greater practical and legal support for whistleblowers. We are excited about the Human Rights Law Centre's Whistleblower Project – a vital, long overdue addition to Australian public life. Protecting and empowering whistleblowers will lead to more transparency, more accountability and more impactful public interest journalism.

Adele Ferguson AM

Investigative Journalist

Nick McKenzie

Investigative Journalist

Introduction

Australia's whistleblower protection laws are not working.

Introduced to much fanfare at federal, state and territory levels over the past three decades, Australia's efforts to protect and empower whistleblowers have placed us at the forefront of global legislative innovation. At least, that is the story on paper. Australia's laws have consistently ranked highly when measured against international standards, and even inspired whistleblowing legislation in other jurisdictions. But as this report confirms, the laws have not worked in practice. Australia's whistleblower protections have proven inaccessible and practically unenforceable. The democratic promise of these laws has gone unfulfilled.

Australia's whistleblowers are suffering. Despite the laws, whistleblowers continue to face detriment within their own workplaces for speaking up about wrongdoing. They continue to be sued by their employers for speaking out; some are even being criminally prosecuted. The chilling effect is very real.

In recent years, courageous whistleblowers have braved these risks to expose malpractice in the banking sector, environmental destruction, misogyny at the highest levels of our public institutions, abuses in offshore detention centres and war crimes committed by Australian forces in Afghanistan. But what don't we know because prospective whistleblowers are staying silent? In the face of these risks, too many Australians choose not to blow the whistle.

This report has two parts. First, it presents a compilation of every whistleblower protection case to proceed to judgment across all Australian jurisdictions, from enactment (the oldest dating back to the early 1990s) until April 2023. This research represents the most comprehensive empirical review of Australian whistleblower protection laws in practice yet undertaken.

The results do not make for happy reading.

Empirical research has consistently found that a majority of whistleblowers suffer unjustly after speaking up – as many as eight in 10 whistleblowers face some form of detriment at work. Yet in the three decades since the first whistleblower protection law was enacted in Australia, **just one Australian whistleblower has received court-ordered compensation** under these laws for the detriment they suffered.

Moreover, **there has not been a single successful judgment for a whistleblower** under the 'flagship' federal public and private sector whistleblower protection regimes. This report outlines the key findings of the research.

Second, the report reinforces the necessity of transforming these weak laws into accessible, enforceable protections that work in practice. Its recommendations are threefold: (1) law reform that delivers accessible, consistent, and comprehensive whistleblower protections; (2) new, dedicated institutions to protect whistleblowers, in the form of a whistleblower protection authority and a parliamentary whistleblowing office; and (3) the fostering of a wider sustainable ecosystem to support whistleblowers.

These recommendations build on, and add some detail to, the reforms identified in our joint report with Griffith University and Transparency International Australia, *Protecting Australia's Whistleblowers: The Federal Roadmap* (2022). They also underscore the need for reform not only at federal level, but across the states and territories, given the cases reviewed in this report cover all jurisdictions.

We believe that with these changes, Australia's whistleblowing laws can at long last deliver on their intended purpose: to empower whistleblowers to be vital agents of accountability and justice. Australia will be a better place when whistleblowers are protected and empowered for their courage, not punished and prosecuted.

The Human Rights Law Centre recognises that we have a role to play here, too. We see a clear nexus between secrecy and injustice across many areas of our human rights work. Time and time again we have also seen how one whistleblower speaking up can be the catalyst for major human rights change. The publication of this report coincides with the formal launch of our new Whistleblower Project – the report provides the clearest evidence to date of the need for enhanced legal services to support whistleblowers in navigating these complex laws, now and into the future as the laws are improved.

To fill the gap in accessible legal support for Australian whistleblowers, the Human Rights Law Centre's project establishes Australia's first dedicated pro bono legal service for whistleblowers. We will provide advice and representation to people blowing the whistle on human rights violations, government wrongdoing and corporate misconduct. By doing so, we hope to play our own small part in changing the results presented here, helping to protect and empower Australia's whistleblowers in the ways that the current laws intend, but are failing to achieve.

The Cost of Courage

Andrew Wilkie MP

Whistleblowing is a courageous human endeavour. Many Australian whistleblowers know the risks they are facing but speak up anyway, in the belief that they must do what is right. Their actions can be transformative, sparking investigations, reform and positive change. And yet still they suffer. The underlying intent of Australian whistleblowing law, to protect and empower whistleblowers, has not been fulfilled. We owe it to all the brave Australian whistleblowers who have faced retaliation for speaking up to change the system, so that the next whistleblowers can be protected by strong laws, empowered by dedicated institutions, and supported by a wider whistleblowing ecosystem. Throughout this report, we have included the stories of several whistleblowers – to underscore the importance of whistleblowing and the necessity of change.

Like most whistleblowers, I was hesitant to speak out. But ultimately, I felt I had no choice.

In 2003, while working as a senior analyst at the Office of National Assessments, I discovered that intelligence information was being deliberately misrepresented by the government to justify the looming war in Iraq. This would ultimately cost countless civilian lives, destroy a country and facilitate the rise of Islamic State.

I knew the Australian public was entitled to know the truth. But blowing the whistle cost me a great job and, in the turmoil that followed, my marriage ended. Close friends walked away from me. I struggled to find work and had little income for years. It was the right thing to do and I don't regret it. But no one telling the truth should be made to suffer.

My whistleblowing gave me an acute awareness of the difficulties, risks and costs of speaking out. No wonder there are so few whistleblowers, and that those who do dare speak truth to power often end up unemployed, friendless and broke, at best, or jailed or self-harming at worst. Since being elected to Parliament, I have tried to use my position to advocate for whistleblowers and help them expose wrongdoing through parliamentary privilege. But that wouldn't be necessary if organisations responded better to whistleblowers and regulatory agencies were doing their jobs. Nor would resort to Parliament be necessary if there were greater protections for whistleblowers and a safe pathway for them to effectively ventilate their concerns publicly.

A specialised whistleblowing service will help turn this around by supporting good people when they need it the most. It will also be a warning to wrongdoers that there's now a better chance they're going to get caught.

Above: Independent Member for Clark, Andrew Wilkie MP, tabling documents from a whistleblower in Federal Parliament, Canberra
Credit: Auspic

While much attention has been paid to the adequacy of Australia's whistleblower protection laws, little attention has been given to the practical operation of these laws.

To remedy this, we undertook a comprehensive search of legal databases to identify all judgments in cases:

(a) brought under federal, state and territory whistleblower legislation; and

(b) brought under different legislation but where the whistleblower legislation was materially relevant to the proceedings.

A complete list of whistleblowing laws, currently in force and repealed, is on page 10. The search was undertaken from the date each law took effect, to the end of April 2023.

Two limitations must be noted. First, there is a risk that database research is not exhaustive – cases might not have been reported or otherwise may not be available in relevant databases. Further, it is known that due to the difficulties in accessing remedies under dedicated whistleblowing laws, employees who suffer detriment for speaking up may instead seek remedies under other legislation, not surveyed here. It is likely, therefore, that some cases have been missed; but the purpose of this report is specifically to evaluate the utility of those dedicated whistleblowing laws.

Second, a vast majority of cases in all areas of law settle, such that the judgments only provide a partial reflection of the operation of the law in practice. As much is reflected in the research – many judgments related to interlocutory applications, and the absence of subsequent judgments suggested that the dispute was settled or otherwise withdrawn prior to any final determination. This is an acknowledged limitation of the research – further study may be required to understand how whistleblowing laws are facilitating negotiated settlements for whistleblowers.

The cases identified in the research generally related to two areas. These were:

(1) An application for relief (such as compensation or injunctive relief) in relation to reprisal action allegedly taken, or proposed to be taken, by another party (typically the whistleblower's employer); and

(2) An application to resist a request for information or documents on the basis that it was protected under whistleblowing laws.

The first category of cases typically involved the whistleblower as a party; many of the second category involved regulators or other bodies, rather than the whistleblower directly. The first category might be considered to be 'core' whistleblowing cases, directly protecting whistleblowers, while the second are 'incidental', where protection of the whistleblower is a secondary element. Most of the cases commenced by whistleblowers were in the first category; many of the successful cases arose under the second limb.

Findings

In total, 70 cases are recorded as proceeding to judgment under Australia's dedicated whistleblower protection laws, resulting in 78 judgments.

Among whistleblowing laws currently in force, the highest volume of cases arose under the federal public sector law (***Public Interest Disclosure Act 2013*** (Cth)), the federal private sector law (***Corporations Act 2001*** (Cth)), and the Queensland public sector law (***Public Interest Disclosure Act 2010*** (Qld)). Together, these three laws accounted for more than half of cases in search results in relation to current legislation. Noticeably, there has not been a single successful case (the meaning of which is discussed below) brought by a whistleblower under the federal public or private sector laws, or the federal union sector laws (***Fair Work (Registered Organisations) Act 2009*** (Cth)), since their respective enactment.

Additionally, our research did not identify any successful claims brought under current whistleblowing laws in Victoria, Western Australia or the Northern Territory, and did not uncover any concluded cases at all under whistleblowing laws in Tasmania and South Australia.

Successful Cases

Barely one in five cases, 15 in total, saw the whistleblower, or the party seeking to vindicate whistleblower protections, succeed. Of these, only seven were substantive, merits-based judgments in relation to whistleblower protections.

The successful cases can be summarised as follows.

A. Only one case saw a whistleblower awarded damages for victimisation following a public interest disclosure. The whistleblower was awarded $5,000 for non-economic loss, plus interest. No economic loss – for the financial or career impact of the retaliation – was awarded.

B. Four involved successful applications or appeals to restrict or prevent the disclosure of documents or information which might reveal a whistleblower's identity, contrary to whistleblowing laws.

C. Two related to injunctive relief to prevent reprisal action against whistleblowers. Both appear to have subsequently settled.

D. Two related to the ability of whistleblowers to seek access to documents or information.

E. Four cases were preliminary/interlocutory involving the commencement of whistleblower proceedings (including one unsuccessful application to strike out a whistleblower's pleadings alleging reprisal action).

F. Two cases involved successful appeals.

A number of the successful actions noted above involved interlocutory applications or appeals which, although they were found in favour of the whistleblower, did not appear to result in subsequent proceedings for final determination on the merits. Of these 15 cases, ten saw the whistleblower or whistleblower-related party represented by counsel.

Of the 15 cases, only seven represented substantive, merit-based judgments in relation to the core intent of whistleblowing laws: protecting the whistleblower. The cases we include in this grouping are the one compensation case, the four identity-protection cases, and the two injunctive relief cases. That represents just 9% of the total number of cases.

Unsuccessful Cases

In the vast majority of the cases in our data set, the whistleblower was unsuccessful. Key trends are as follows.

A. Most cases do not proceed to final determination – they are either discontinued or settled.

B. The most common barrier to a successful claim for whistleblower protection was a failure by the whistleblower to prove the retaliation. Particularly, whistleblowers struggled to establish the causal element between the alleged reprisal action and the relevant public interest disclosure that was made (i.e. that the fact that the public interest disclosure was made must be linked to why the employer undertook the relevant reprisal action). This is a recurring challenge in the global whistleblower protection experience, with unrealistic expectations on what whistleblowers can prove given the power asymmetry between employer and employee. In our data set, courts and tribunal have found in various instances that either an appropriate reason existed for the adverse action against the alleged whistleblower or that the alleged whistleblower's claim had no proper basis and was instead a mere grievance or a vexatious claim.

C. A number of judgments have made it difficult for whistleblowers to succeed, for example because parliamentary privilege is not displaced by whistleblowing law (preventing relevant evidence being relied upon), new provisions do not have retrospective effect in relation to prior reprisal action, or whistleblowing laws have been considered not to be industrial relations laws for the purposes of interaction with other statutory regimes, such as the ***Fair Work Act 2009*** (Cth).

D. In 21 of the unsuccessful cases, the whistleblower was self-represented, suggesting access to justice is an acute issue.

The Cost of Courage

Alysha, Tasmanian Youth Justice Whistleblower

Alysha worked at the Ashley Youth Detention Centre in Tasmania when she blew the whistle on the sexual and physical abuse of vulnerable children and teen detainees, together with a systematic cover-up and mishandling of complaints.

When I blew the whistle on unimaginable wrongdoing at the Ashley Youth Detention Centre, my mandatory reports were ignored and incident reports went missing. Those in positions of power inexplicably failed to intervene to keep children safe. Simultaneously, my job, safety and wellbeing were targeted from all angles.

I continued reporting. The more I reported, the more the bullying, threats and assaults intensified. The abuse is systemic; it is a broken system. A Commission of Inquiry was announced; I became a witness.

What followed has been surreal at best, life threatening at worst. The reprisals were relentless, my health suffering immeasurably. We nearly lost our home to manage the legal costs protecting ourselves from further harm.

Few life events can have such a catastrophic impact on your physical and emotional health, finances, family, and career all at once, but blowing the whistle against powerful, well-resourced institutions is one of them.

Blowing the whistle can break us, but much like the organisations we set out to fix, we can rebuild – and if the right supporting structures are in place, we can become stronger in all the broken places. Being courageous can be scary. It's also a fundamental necessity to see positive change.

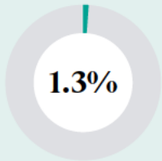
I've been able to survive due to the people who gathered around me to provide specialised advice and support, including the Human Rights Law Centre. A dedicated service to support whistleblowers is an essential next step in ensuring integrity in public office. We need to be safe to speak up. Right now, we aren't.

Above: Alysha, Youth Justice Whistleblower attends a press conference at Parliament Lawn in Hobart
Credit: ABC/Luke Bowden

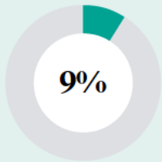
Key Findings

We reviewed case law from **23 different whistleblowing laws**, analysing **78 judgments** across **70 cases** over three decades.

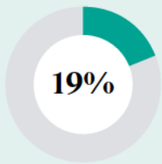
We found



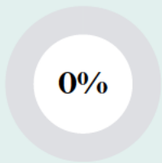
Only one judgment where the whistleblower was awarded compensation for facing detriment after speaking up.



Only seven judgments where the whistleblower succeeded on a substantive issue.



In total, only 15 judgments where the whistleblower succeeded in part or in full (on both substantive and procedural issues) (19%). Of these, only nine came in relation to laws still in force (11.5%).



There was not a single successful judgment under several key, in-force whistleblowing regimes, including federal laws protecting public sector whistleblowers, private sector whistleblowers, union whistleblowers, and public sector whistleblowing laws in Victoria, South Australia, Western Australia and the Northern Territory.

Recommendations

1. Robust law reform delivering accessible, consistent and comprehensive whistleblower protections
2. New, dedicated institutions to protect and empower whistleblowers
3. A wider, sustainable ecosystem to support whistleblowers

Key Findings

Table of Legislation

In force

1. *Public Interest Disclosure Act 2013* (Cth)
2. *Corporations Act 2001* (Cth)
3. *Fair Work (Registered Organisations) Act 2009* (Cth)
4. *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
5. *Aged Care Act 1997* (Cth)
6. *National Disability Insurance Scheme Act 2013* (Cth)
7. *Taxation Administration Act 1953* (Cth)
8. *Public Interest Disclosures Act 1994* (NSW) (previously titled *Protected Disclosures Act 1994* (NSW))[1]
9. *Public Interest Disclosures Act 2012* (Vic) (previously titled *Protected Disclosure Act 2012* (Vic))
10. *Public Interest Disclosure Act 2010* (Qld)
11. *Public Interest Disclosure Act 2018* (SA)
12. *Public Interest Disclosure Act 2003* (WA)
13. *Public Interest Disclosure Act 2012* (ACT)
14. *Public Interest Disclosure Act 2002* (Tas)
15. *Independent Commissioner Against Corruption Act 2017* (NT)

Repealed

16. *Aboriginal Councils and Associations Act 1976* (Cth)
17. *Whistleblowers Protection Act 2001* (Vic)
18. *Whistleblowers Protection Act 1994* (Qld)
19. *Whistleblowers Protection Act 1993* (SA)
20. *Anti-Corruption Commission Act 1988* (WA)
21. *Parliamentary Commissioner Act 1971* (WA)
22. *Public Interest Disclosure Act 1994* (ACT)
23. *Public Interest Disclosure Act 2008* (NT)

1 *The Public Interest Disclosures Bill 2021* (NSW) was passed in early 2022, replacing the *PID Act 1994* (NSW) from late-2023 onwards.

Table of Cases

In force

Public Interest Disclosure Act 2013 (Cth)

1. *Clement v Australian Bureau of Statistics* [2016] FCA 948
2. *Hutchinson v Comcare* [2017] FCA 1145
3. *Walsh v Registrar, Supreme Court of Norfolk Island* [2018] FCA 1075
4. *Hutchinson v Comcare (No 2)* [2018] FCA 1179
5. *Hutchinson v Comcare (No 4)* [2019] FCA 1133
6. *Hutchinson v Comcare (No 5)* [2019] FCA 1665
7. *Applicant ACD13/2019 v Stefanic* [2019] FCA 548
8. *BOC v MDL* [2019] NSWSC 278
9. *Turner v Commonwealth* [2019] FCA 463
10. *Sweeney v National Disability Insurance Agency* [2021] FedCFamC2G 4
11. *McBride v Director of Public Prosecutions (Cth)* [2021] ACTSC 68
12. *McBride v Director of Public Prosecutions (Cth)* (No 2) [2021] ACTSC 201
13. *BDR21 v Australian Broadcasting Corporation* [2021] FCA 960
14. *BDR21 v Australian Broadcasting Corporation (No 2)* [2021] FCA 1347
15. *Messenger v Commonwealth of Australia (Represented by Dept of Finance)* [2022] FCA 677
16. *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27

Corporations Act 2001 (Cth)

17. *Australian Securities and Investment Commission v P Dawson Nominees Pty Ltd* (2008) 247 ALR 646
18. *Duffy v ASIC* [2012] AATA 556
19. *Environmental Group Ltd v Bowd* (2019) 137 ACSR 352
20. *Blenkinsop v Wilson* [2019] WASC 77
21. *Alexiou v Australia and New Zealand Banking Group Ltd* [2020] FCA 1777
22. *Quinlan v ERM Power Ltd* (2021) 303 IR 200
23. *Duma v Fairfax Media Publications Pty Ltd (No 2)* [2021] FCA 1299
24. *Wu v United Overseas Bank Ltd, Sydney Branch (No 2)* [2021] FedCFamC2G 264
25. *Pigozzo v Mineral Resources Ltd* [2022] FCA 1166
26. *Saridas v Papuan Oil Search Ltd* [2022] NSWSC 825
27. *Saridas v Papuan Oil Search Ltd (No 3)* [2022] NSWSC 1515
28. *Sheldon v Donvale Christian College* [2022] FedCFamC2G 980
29. *Express Cargo Services Pty Ltd v Mysko* [2023] SASC 11

Fair Work (Registered Organisations) Act 2009 (Cth)

30. *Summers v Flight Attendants' Association of Australia* [2018] FWC 2876

Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)

31. *Walsh v Umoona Tjutagku Health Service Aboriginal Corporation (ICN 7460) (No 2)* [2017] FCA 852
32. *Bonney v Ngunytju Tjitji Pirni Aboriginal Corporation* [2009] WASC 209

Aged Care Act 1997 (Cth)

N/A

National Disability Insurance Scheme Act 2013 (Cth)

N/A

Taxation Administration Act 1953 (Cth)

N/A

Public Interest Disclosures Act 1994 (NSW)

33. *McGuirk v University of New South Wales* [2009] NSWSC 1424
34. *Nichols v Singleton Council* (2011) 81 NSWLR 442
35. *Ryde City Council v Petch* [2012] NSWSC 1042 (Unreported)
36. *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293
37. *DNM v NSW Ombudsman* [2019] NSWCATAP 77

Public Interest Disclosures Act 2012 (Vic)

38. *Hawkey v Macedon Ranges Shire Council* [2017] FWC 5376
39. *Somasundaram v Department of Education and Training* [2018] VSCA 318
40. *McNally and Waddell v Victoria Police (Review and Regulation)* [2021] VCAT 1164
41. *Rogerson v City of Greater Dandenong* [2022] VSC 612

Public Interest Disclosure Act 2010 (Qld)[2]

42. *State of Queensland (Queensland Police Service) v Workers' Compensation Regulator* [2012] QIRC 366
43. *Wyatt v Cutbush* [2016] QSC 253
44. *Baragan v State of Queensland* [2019] QCAT 119
45. *Gilmour v Waddell* [2019] QSC 170
46. *Flori v Winter* (2019) 3 QR 22
47. *Dawson v State of Queensland (Dept of Premier and Cabinet)* [2021] QIRC 342
48. *Kelsey v Logan City Council (No 8)* [2021] QIRC 114
49. *Dean-Braieoux v Queensland (Queensland Police Service)* [2021] QIRC 209
50. *Ryle v State of Queensland (Dept of Justice and Attorney-General)* [2021] QIRC 307
51. *Bali v Public Trustee of Queensland* [2022] QIRC 255
52. *Wall v State of Queensland (Dept of Education)* [2022] QIRC 460
53. *Braun v St Vincent's Private Hospital Northside Ltd* [2023] FCA 166
54. *Phillips v State of Queensland (Department of Transport and Main Roads)* [2023] QIRC 19

Public Interest Disclosure Act 2018 (SA)

55. *BWI v Department for Child Protection* [2020] SACAT 84

Independent Commission Against Corruption Act 2012 (SA)

2 The Hon Alan Wilson's review into the operation of Queensland's whistleblowing regime, which was published on the eve of this report going to press, undertook a complete analysis of Queensland case law with a whistleblowing nexus and identified a number of additional cases. It may be that these cases did not meet our criteria, or were not readily accessible to us. The report can be found here.

Key Findings

Table of Cases (continued)

Public Interest Disclosure Act 2003 (WA)

56. *Glew v Shire of Greenough* [2006] WASCA 260
57. *Rothnie v St John of God Hospital (No 2)* [2017] FCCA 3129; 277 IR 116
58. *Schroder-Turk v Murdoch University* [2019] FCA 1152
59. *Schroder-Turk v Murdoch University (No 2)* [2019] FCA 1434
60. *Weeks v Nationwide News Pty Ltd (No 3)* [2019] WASC 268

Public Interest Disclosure Act 2012 (ACT)

61. *Jones v University of Canberra* [2016] ACTSC 78
62. *Ashton v Australian Capital Territory* [2019] ACTSC 93

Public Interest Disclosure Act 2002 (Tas)

N/A

Independent Commissioner Against Corruption Act 2017 (NT)

63. *Sherrington v Independent Commissioner Against Corruption (NT)* [2022] NTSC 67

Repealed

Aboriginal Councils and Associations Act 1976 (Cth)

N/A

Whistleblower Protection Act 2001 (Vic)

64. *Municipal Association (Vic) v Victorian Civil & Administrative Tribunal* [2004] VSC 146
65. *Owens v University of Melbourne* (2008) 19 VR 449
66. *Police Federation of Australia v Nixon* [2010] FCA 315
67. *Police Federation of Australia v Nixon* [2011] FCA 601
68. *Police Federation of Australia v Nixon* (2011) 198 FCR 267
69. *Smith v Victoria Police* [2012] VSC 374
70. *Tomasevic v Victoria* [2012] VSC 148
71. *Allon v RMIT University* [2018] VSC 167

Whistleblowers Protection Act 1994 (Qld)

72. *Howard v State of Queensland* [2000] QCA 223
73. *Reeves-Board v Queensland University of Technology* [2002] 2 Qd R 85

Whistleblowers Protection Act 1993 (SA)

74. *Sutton v South Australia* (1996) 68 SASR 13
75. *Morgan v Workcover Corporation* [2013] SASCFC 139
76. *Machado v Underwood* [2016] SASCFC 65

Anti-Corruption Commission Act 1988 (WA)

N/A

Public Interest Disclosure Act 1994 (ACT)

77. *Berry v Ryan* (2001) 159 FLR 361
78. *Falk v Australian Capital Territory* [2006] ACTSC 68

Public Interest Disclosure Act 2008 (NT)

N/A

Recommendations

The research shows that Australian whistleblowing laws are not working as intended – protections that look good on paper have not translated into practically-accessible, enforceable rights in practice. Australia's whistleblower protections are too often paper shields. That must change. As part of the ongoing reform process at a federal level, and a number of current and proposed reform processes at state and territory level, we make the following recommendations for positive change.

1. Robust law reform delivering accessible, consistent and comprehensive whistleblower protections

The first step in improving the practical outcomes of Australia's whistleblowing laws is ensuring the laws are as robust as possible. For example, the research demonstrated that many whistleblowers find it difficult in litigation to prove the causal nexus between their disclosure and the retaliation. Some Australian whistleblowing laws have already addressed this through a reverse onus provision (for example the *Corporations Act 2001* (Cth) protections) or by providing for an enforceable duty on the employer to prevent detrimental acts or omissions. All Australian whistleblowing laws should contain these provisions, drafted in a consistent, user-friendly way.

Major federal reform processes are already underway or scheduled to occur. The first tranche of reform to the *Public Interest Disclosure Act 2013* (Cth) passed Parliament in June 2023, with a wider second tranche pending. A statutory review of the whistleblowing provisions contained in the *Corporations Act 2001* (Cth) must commence in 2024. Queensland's whistleblowing law was recently reviewed by the Hon Alan Wilson KC.

Australia's whistleblowing laws should be, to the maximum extent possible, accessible, simple, consistent and comprehensive. As a starting point, the Albanese government should grasp the current reform window by bringing all federal whistleblowing laws up to the same, world-leading standard, and consolidating those laws where possible into a simpler form as recommended by parliamentary committees, rather than proceeding with piece-by-piece reform of existing legislation. The key reform needs can be found detailed in our joint report with Griffith University and Transparency International Australia, *Protecting Australia's Whistleblowers: The Federal Roadmap* (2022), most recently updated in June 2023.

2. New, dedicated institutions to protect and empower whistleblowers

Australian whistleblowing laws should be overseen and enforced by dedicated, specialist, appropriately empowered regulatory bodies. Whether established on its own, or co-located with another body, a whistleblower protection authority is needed in each jurisdiction to ensure that whistleblowers are empowered and protected as intended by these laws, without them needing to face the extra burden of securing their own independent legal resources to do so. Such a body would oversee agencies as they investigate wrongdoing alleged by whistleblowers, investigate allegations of reprisals or other detrimental treatment of whistleblowers, take enforcement action in cases of suspected breaches of whistleblowing law, manage alternative dispute resolution for whistleblower complaints, and intervene in important whistleblower cases.

At national level, the concept for a whistleblower protection authority first arose in Australia in a Senate report in the early 1990s. It was reiterated in a bipartisan joint parliamentary committee report in 2017, and it was taken to the 2019 election by the Australian Labor Party. Such a body was also included in the cross-bench's national integrity commission bills in 2018 and 2020, making it a critical missing piece of the reforms entailed in the government's establishment of the National Anti-Corruption Commission (**NACC**).

There is also scope for independent oversight and enforcement capacity in state and territory whistleblowing schemes; the need for such a body was among the issues raised during the recent review into Queensland's legislation. While the smaller scale at state and territory level may make co-location more desirable, it does not negate the need for an independent, properly-resourced body to protect and empower whistleblowers. Doing so would align Australia with emerging international best-practice, with similar bodies already existing in the United States, the Netherlands, Ireland and Slovakia and being considered in the United Kingdom.

The Attorney-General, Mark Dreyfus KC, has committed to a discussion paper in 2023-2024 on the need for a whistleblower protection authority; but to date, only in respect of the public sector. This report reinforces that the need is already clear, that an authority should be established as a priority, and that, as recommended by past parliamentary committees, the need extends across all sectors, not simply the public sector.

Another important institutional innovation would be the establishment of a dedicated whistleblowing office within Federal Parliament. In the United States House of Representatives, the Office of the Whistleblower Ombuds helps congresspeople and committees in their dealings with whistleblowers, including through training and best-practice intake procedures. Given the important role of Members of Parliament and Senators in receiving whistleblower disclosures, and in some cases raising them in Parliament with the protection of parliamentary privilege, the establishment of a dedicated office within Parliament would support this function and reduce the burden on the Clerks and Committee staff.

The Cost of Courage

Anonymous Santos Whistleblower

This is an edited extract of a statement tabled in Senate Estimates by Senator David Pocock in February 2023. Increasingly, parliamentary privilege is being used to protect whistleblowers in the absence of a robust legal system and institutional support for whistleblowers.

In March last year, while working for Santos, a large Australian oil and gas company, I witnessed an incident – and subsequent cover-up – which forced me to confront questions about organisational values and my own responsibility as an employee. The incident took place 300 kilometres off the coast of Karratha, Western Australia, in the Lowendal Islands – known for pristine white sand beaches, gorgeous blue turquoise water and abundant marine and bird life. Early one morning at Santos's Varanus Island Gas Plant, a scent of condensate (a light form of oil) filled the island. Over the coming hours we would learn that a subsea hose had been torn as it was loading an oil tanker parked a kilometre from the beach. The tear had been left unidentified for more than 6 hours, pouring a reported 25,000 litres of condensate into the ocean.

Regardless of efforts to cease the spill, the mood on the island became sombre when learning that dead dolphins, including a pup, were found floating in the centre of the spill; in other areas, sea snakes writhed in agony. The tragedy of dolphin carcasses amid a kilometre-wide oil slick should be the story. But it's not. The story is Santos's subsequent cover-up and total disregard for the values they say they hold dear, values such as accountability and integrity.

A month after the spill I was intrigued when news of the incident surfaced with no mention of impact on local wildlife. I was then shocked at the public comment from Santos: 'the event had negligible harm to the environment'. I felt strongly that Santos' comment was baseless, designed to mislead and avoid accountability.

We hoped that, maybe, the situation would be rectified. Instead, when news of the dolphin deaths became public late last year, Santos denied any connection. It said: 'These sightings were a couple of hours after the incident, in which time no harm would have resulted from this incident'. I was shocked, again, to be reading what I can only see as an outright lie. I was appalled at the culture and management within Santos which demonstrated such wilful refusal to accept responsibility.

These lie[s] spurred me to speak up. This was no longer grey, but a black and white lie from Santos - potentially with market, financial and regulatory consequences. Companies should not be able to lie to the public.

I hope that employees in the industry can read this and be encouraged to speak up against wrongdoing at all levels. I never expected to be faced with this, but I found myself in a situation that I felt was wrong. The lack of accountability made me truly believe that it is in the public interest for this information to be released.

Image of evidence from Santos whistleblower tabled under parliamentary privilege

Above: Senator David Pocock tabled the evidence from anonymous Santos whistleblower in Senate Estimates
Credit: AAP/ Mick Tsikas

3. A wider, sustainable ecosystem to support whistleblowers

Better laws and dedicated institutions will go a long way towards making Australian whistleblowing laws accessible and enforceable in practice. But the missing piece of the puzzle is a wider ecosystem of support. Although a whistleblower protection authority will be able to provide high-level guidance and resources, and perhaps intervene in significant cases, it will not be able to help whistleblowers on a day to day level. Support, particularly legal advice and representation, is critical. The prevalence of unrepresented litigants bringing (unsuccessful) claims in the research only underscores this point.

The development of a wider support ecosystem begins with further necessary law reform – at present, whistleblowers can make protected disclosures under most schemes to lawyers for the purpose of seeking legal advice. But most whistleblowing laws do not explicitly recognise the potential role of unions, employment assistance programs and close friends in supporting whistleblowers. Wider third-party disclosure channels for support, with appropriate safeguards in place, is an important aspect of law reform. At the federal level, the lack of legal support for whistleblowers speaking up about matters relating to intelligence or security-classified materials is problematic and also needs to be addressed.

This support ecosystem must be sustainable. Our Whistleblower Project will only be able to support a limited number of whistleblowers. For private practice lawyers and law firms to specialise in whistleblower protections, it must be financially viable. At present, there are only a handful of private practice lawyers with recognised whistleblowing expertise in Australia, largely acting on a no-win, no-fee basis (many whistleblowers are unable to self-fund legal advice). But the no-win, no-fee approach is only viable in whistleblowing cases where reprisal action has already taken place (with consequent loss). It does not lend itself to advising whistleblowers on avoiding reprisal action in the first place. There are a number of ways in which this gap in accessible legal support for whistleblowers could be addressed.

Public funding

Given the public interest in whistleblowers being properly advised and represented (including potential downstream costs-savings), consideration should be given to government funding for whistleblowers to access legal support. Such an approach was considered in Victorian with a discussion paper published by the Department of Premier and Cabinet in 2018 proposing a pilot of government funding for legal advice, albeit the proposal was not progressed – it is not clear why.

Labelled the Discloser Support Scheme, it had been proposed that funding would be available for legal support up to $24,000 (for the 'cost of seeking advice from a solicitor in relation to making a protected disclosure, participating in an investigation and any detrimental action proceedings'), plus up to $2,000 for 'career transition costs and welfare costs' (being 'advice, assistance and coaching from a recruitment or human resources firm; re-skilling costs; counselling from a counsellor, psychologist or psychiatrist'). We firmly support such a model and believe it should be considered at federal and state level.

Rewards Schemes

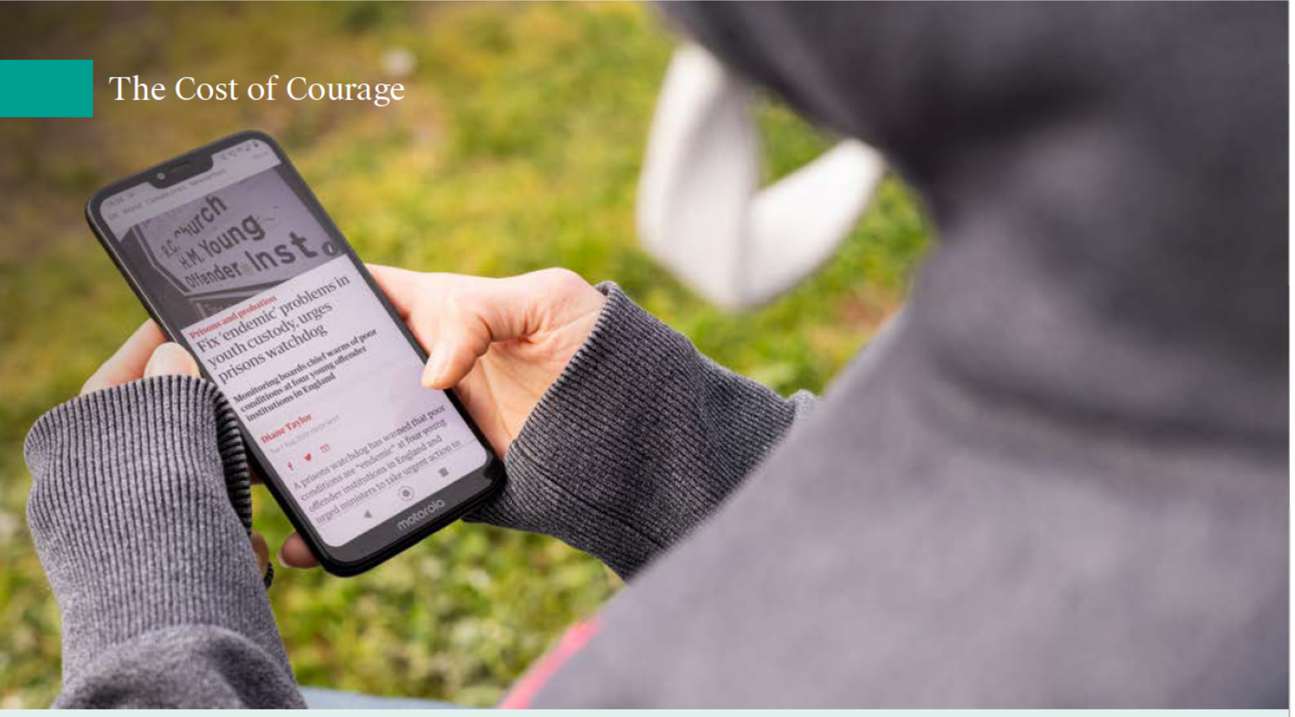
In the United States, and, increasingly, in other jurisdictions, reward schemes provide financial incentives for whistleblowers (and their lawyers) to speak up. These schemes have been very effective in encouraging legitimate public interest whistleblowing which leads to successful regulatory enforcement action, with rewards often paid as a percentage of the sum recovered in penalties etc. The US Securities and Exchange Commission's Whistleblower Program, for example, has led to enforcement action resulting in almost A$10 billion in sanctions, with about A$2 billion paid out to 328 whistleblowers, since the scheme was established a decade ago.

Rewards schemes recognise that a compensation-only model (as with current Australian protections) does not adequately address the career-long effects of the stigma, industry-wide backlisting and mental health impact of whistleblowing. Rewards schemes also provide an economic model for lawyers to assist whistleblowers on a no-win, no-fee basis, with fees paid out of any ultimate reward. Consideration should be given to the introduction of whistleblower rewards schemes in Australia, possibly administered by the whistleblower protection authority.

***Qui Tam* Laws**

Finally, in the United States, the *False Claims Act* and state equivalents have been extremely successful in recovering damages for fraud in taxpayer-funded programs. These typically operate on a *qui tam* basis, whereby a whistleblower who knows about fraud in government contracting can commence proceedings on behalf of the government. After the claim is commenced, the government has the opportunity to take-over the suit; if it elects not to, the whistleblower can continue to pursue the claim. In either eventuality, if the government recovers by way of judgment or settlement, the whistleblower is entitled to a percentage of the recovery (between 15-30%), and their lawyers can recover fees and/or a percentage in turn.

These provisions have been extraordinarily successful in the United States, by deputising (and incentivising) whistleblowers and their lawyers to become anti-corruption fighters. Since 1986, over A$100 billion had been recovered for the government – for fraud which might not have come to light in the absence of courageous whistleblowers. Consideration should be given to establishing an equivalent *qui tam* law in Australia, given the financial incentive it provides for law firms to assist whistleblowers in addressing fraud against the taxpayer.



Anonymous Youth Justice Whistleblower

This is an edited extract of a column published anonymously in *The Saturday Paper*, authored by a former Victorian government youth justice employee.

The children who live at the Parkville Youth Justice Precinct in Melbourne are in state care. In a way, we are all their parents – we have a duty of care to them. It is our voting power, our voices, our interest and our considerations that determine what happens to them. As it stands, we are failing them.

Over the several years of my work in youth justice, including at Parkville, I have witnessed gross negligence in the care of children by an outdated justice system that is criminalising and alienating young people and doing nothing to make our streets safer.

There have been countless public interest disclosures, commissions and investigations into youth justice in Australia, but once the box is ticked and the investigation is completed, these reports do little but gather dust. The public interest disclosure is made, but it is followed by a lack of public interest. The recommendations from these reports are unenforced and all too easily ignored.

The capacity for individuals to speak up is neutered by weak whistleblowing laws and tight confidentiality obligations, making it impossible to raise a hand and ask for help. It is not for nothing that I am writing this anonymously – and even then, hold lingering concerns about the risk of reprisal. But I cannot ignore the voice inside me: What I'm witnessing is wrong. How can we do something about this?

Above: Parkville whistleblower
Credit: Thomas Feng/HRLC

Introducing the Whistleblower Project

People who blow the whistle on serious wrongdoing are crucial to our democracy. They expose human rights violations, make governments and companies accountable, and are a key enabler of effective public interest journalism. But right now Australia's whistleblowers are vulnerable and unsupported – as this report has shown. Many are staying silent, while those who do speak up are often prosecuted and punished.

The publication of this report coincides with the launch of the Human Rights Law Centre's dedicated, specialist legal project for whistleblowers. By providing advice and representation, we will protect and empower whistleblowers as agents of accountability and change.

The project will help whistleblowers:

1. Safely reveal wrongdoing under the protection of law
2. Ensure the wrongdoing they disclose is dealt with promptly and fairly
3. Protect themselves against reprisals
4. Vindicate their rights when they do suffer retaliation

The project will integrate our existing advocacy, policy, and law reform work. This holistic approach will enable better legal service, aided by our media and political expertise, and enhanced policy and advocacy, informed by our practice experience acting for whistleblowers. Cumulatively, we hope the Whistleblower Project will have a transformative impact on public interest whistleblowing in Australia.

Our pro bono legal partnerships with some of the best law firms and barristers in the country will be central to the legal service, allowing us to efficiently achieve impact in this area and scale to meet demand. The project is modelled off organisations in other jurisdictions which provide a range of cognate services, including Government Accountability Project and Whistleblower Aid in the United States, Protect in the United Kingdom, Transparency International Ireland, Pištaljka in Serbia, Platform to Protect Whistleblowers in Africa, and the Signals Network. By learning from the experiences of these organisations, many of which have been protecting and empowering whistleblowers for decades, we hope the Project will launch ready to achieve impact.

Ultimately, we want to create an environment in which whistleblowers in Australia are supported, legally protected, and valued when they speak up about human rights violations and government and corporate misconduct. The Australian public, and Australia's whistleblowers, deserve nothing less.

Further Reading

This report builds on a number of key research reports assessing Australia's whistleblowing laws. Rather than footnote throughout the report, key references are listed below.

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Human
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Law
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Making Australian Whistleblowing Laws Work

Draft Design Principles for a Whistleblower Protection Authority

TRANSPARENCY INTERNATIONAL AUSTRALIA
Human Rights Law Centre
Griffith UNIVERSITY

Transparency International Australia
Transparency International Australia is the national chapter of Transparency International, a global coalition against corruption operating in over 100 countries. Each chapter is independent and unique, and together we aspire to a unified vision: a world free of corruption. Our mission is to tackle corruption by shining a light on the illegal practices and unfair laws that weaken our democracy, using our evidence-based advocacy to build a better system.

Human Rights Law Centre
The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. Whistleblower protections are an essential part of the wider human rights framework in this country, underpinned by Australia's international obligations. Whistleblowers play an important role in upholding Australia's transparent, accountable democracy and ensuring governments and corporations respect and uphold human rights. In 2023, we launched the Whistleblower Project, Australia's first dedicated legal service to protect and empower whistleblowers who want to speak up about wrongdoing. The Human Rights Law Centre is also a member of the Whistleblowing International Network.

Centre for Governance and Public Policy
The Centre for Governance and Public Policy at Griffith University is an outstanding intellectual environment for world-class research engaging international scholars and government and policy communities. We examine and critique the capacity, accountability and sustainability of the public service and government, providing insights into improved management structures. Working closely with governmental and non-governmental partners, we are making a tangible mark on governance research.

The authors acknowledge the Traditional Owners of Country throughout Australia and recognise their continuing connection to land, waters, and culture.

We pay respect to elders and acknowledge the Traditional Owners who have cared for Country since time immemorial. Sovereignty over this land was never ceded – it always was, and always will be, Aboriginal and Torres Strait Islander land.

February 2024

Rawan Arraf, from the Australian Centre for International Justice, calls for stronger whistleblower protections.

Summary

Draft Design Principles for a Whistleblower Protection Authority

A Whistleblower Protection Authority would be a new, dedicated statutory agency or office which will make Australia's federal whistleblowing laws work. The Whistleblower Protection Authority would do this by enforcing improved legal protections for people from inside agencies or organisations who raise concerns about wrongdoing under federal laws; providing support, information and assistance to prospective, current and former whistleblowers; facilitating receipt and referral of whistleblowing disclosures; investigating and addressing complaints of unfair treatment; and playing an important role in monitoring, advocacy and outreach in support of integrity, accountability and fair treatment of those who speak up. Right now, a Whistleblower Protection Authority is the missing piece of Australia's integrity landscape.

These draft design principles, jointly developed by Transparency International Australia, the Human Rights Law Centre, and Griffith University's Centre for Governance & Public Policy, provide a basis for policy dialogue to inform the design and establishment of the new body.

Our principles are grouped around the 10 key concepts:

1	Pro-protection purpose
2	Support
3	Prevention
4	Remedies focus
5	Mediation & administrative redress
6	Legal actions
7	Rewards, compensation & financial support
8	Comprehensive, seamless jurisdiction
9	Adequate powers & resources
10	Independence

A Time for Reform

Australia's whistleblower protection laws are crucial for protecting public integrity, and ensuring all our decision-makers and institutions are upholding the highest standards of good governance and ethical behaviour.

These Draft Design Principles set out a detailed proposal for how to fill the biggest missing link in our federal whistleblower protection systems – a dedicated, independent agency or office to actually enforce these vital protections, and make the systems work.

No regulatory system is ever entirely self-enforcing. Australia currently has at least seven different sets of whistleblower protections operating under Commonwealth laws, including the best known *Public Interest Disclosure Act 2013*, covering the federal public sector. As well, there are public sector whistleblower protections operating in each State and Territory.

But while we have tried different systems for administering these laws over the last 30 years, we now know that without strong and capable central enforcement, the protections will simply not be applied in the cases where they are most needed.

Research shows that too many Australian whistleblowers continue to experience retaliation or unfair treatment for speaking up, too much wrongdoing is going unreported because of the lack of support, and current legal protections are inaccessible and making no difference. There has been just one award of compensation under any of Australia's dedicated whistleblowing laws over the past three decades.

The Draft Design Principles for an Australian Whistleblower Protection Authority are a key step to finding the answer – setting out a comprehensive outline of what is needed to ensure Australia's federal whistleblowing laws work in practice.

Key Submissions

These Draft Design Principles were first presented to the Australian Government in December 2023 as part of Transparency International Australia's submission to the Attorney-General Department's consultation into the next phase of whistleblowing reform. The Draft Design Principles were also discussed and endorsed in submissions by Griffith University and the Human Rights Law Centre.

Image credit: Amanda Smith

Using these Principles

The Draft Design Principles for a Whistleblower Protection Authority were developed jointly in late 2023 by Transparency International Australia, the Human Rights Law Centre and Griffith University with input from distinguished experts with direct experience of all aspects of whistleblowing, including former senior public servants, whistleblowing hotline providers, expert practitioners from private law firms, and Transparency International Australia corporate members including representatives from mining, finance and professional services.

Most importantly, the Principles have had input and support from members of Transparency International Australia's national whistleblowing advisory group – with direct personal experience of bringing about positive change for integrity and accountability, through the often difficult process of blowing the whistle.

These are **draft** design principles – we encourage input and discussion among policy, civil society, legal, regulatory and political stakeholders to arrive at the right final design principles for reform.

In addition to the Attorney-General's ongoing second phase of reform to the *PID* Act, for the federal public sector and all public contractors, these principles are crucial for the Commonwealth Government's wider whistleblowing reform agenda. There are currently reform processes underway to improve protections for tax-related whistleblowers and whistleblowers in aged care, while the Corporations Act protections for all private sector whistleblowers will be reviewed in 2024. The time is right for discussion about how best to enforce comprehensive, consistent and accessible protections for all whistleblowers under Australian law.

Context

There is a strong consensus among diverse stakeholders and experts that it is time for a dedicated federal body to protect whistleblowers in the public sector, and beyond.

A federal whistleblowing authority was first recommended by the unanimous, bipartisan Senate Select Committee on Public Interest Whistleblowing in 1994, chaired by Liberal Senator Jocelyn Newman.

On their slow road to public sector whistleblower protections in 2013, and private sector whistleblower protections in 2004 and 2019, Commonwealth governments have tried various initial institutional arrangements to support the protection regimes. But in 2017, the landmark review by the bipartisan Parliamentary Joint Committee on Corporations and Financial Services, into federal whistleblower protections across the corporate, not-for-profit and public sectors, was clear that a simpler approach based on the original idea, was both right and feasible. The Joint Committee unanimously recommending 'a one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors.'

Following the analysis in Transparency International's assessment of Australia's national integrity system, Independent MP Cathy McGowan included a strong whistleblower protection commissioner in her *National Integrity Commission Bill 2018*, showing how easily it could be legislated.

In fact, the same proposal was introduced by the Australian Greens, where it passed the Senate in 2019; as well as by Dr Helen Haines MP in her "gold standard" *Australian Federal Integrity Commission Bill* 2020.

In the end, the Albanese Government's National Anti-Corruption Commission, established following the 2022 election, did not contain a whistleblower protection commissioner. But the idea has a history of strong support within the Government – for example, in the Australian Labor Party's election commitment in 2019 to:

> *strengthen protections for whistleblowers through the establishment of a Whistleblower Protection Authority a one-stop-shop to support and protect whistleblowers. The Authority will have dedicated staff to advise whistleblowers on their rights, assist them through the disclosure process and help them access compensation if they face reprisals.*

In November 2022, members of every political party in the Australian Parliament helped launch *Protecting Australia's Whistleblowers: The Federal Roadmap.* This report from Griffith University, Human Rights Law Centre and Transparency International Australia set out the 12 areas for reform of Australia's national whistleblowing landscape, with establishment of a whistleblower protection authority as the first, key area.

There is now a groundswell of support for the establishment of such an authority. Business groups, the Law Council of Australia, Centre for Public Integrity and The Australia Institute have voiced their support for the idea. In September 2023, 30 members of the House of Representatives and the Senate crossbench wrote to the Albanese government urging it to commit to establishing a whistleblower protection commission.

2024 marks 30 years since the first Senate Select Committee on Public Interest Whistleblowing recommended an independent whistleblower protection authority (or Public Interest Disclosures Agency) to 'receive public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures,' and other functions. Thirty years on, experience shows it is the missing piece of Australia's transparency and integrity landscape – an idea whose time has come.

Above: Anti-corruption whistleblower Sharon Kelsey, former CEO of Logan City Council, whose case highlighted the need for every government to have an independent whistleblower protection office.

Draft Design Principles for a Whistleblower Protection Authority

1. Pro-Protection Purpose

The Whistleblower Protection Authority **(WPA)** should be a Commonwealth statutory agency to:

a. **enforce** public interest whistleblower protections in federal laws,

b. provide **support, information and assistance** to current, former, and prospective public interest whistleblowers, as well as general assistance to organisations,

c. investigate, and ensure remedies in response to, alleged **detrimental treatment** of whistleblowers, and

d. **support** other federal integrity and regulatory agencies, and relevant state-based authorities, in the receipt, assessment, referral and response to whistleblowing disclosures.

2. Support

The WPA should provide **information and advice** to prospective whistleblowers, and case worker-style **advice and support** to actual whistleblowers, on both legal and non-legal aspects of whistleblowing – including referrals to and funding for relevant legal, career, health and other personal support services.

Above: Human Rights Law Centre Secondee Lawyers Jade Tyrell and Massooma Saberi at a rally for whistleblowers.

3. Prevention

The WPA should help prevent adverse outcomes for public interest whistleblowers and their organisations through:

a. support and leadership of a **'no wrong doors' intake and referral approach** among integrity and regulatory agencies and organisations, including secure information channels for ongoing communication with whistleblowers,

b. **monitoring powers** in relation to handling of referred cases, helping ensure agencies and organisations fulfil their positive duties to support and protect whistleblowers, and

c. provision of **general information, guidance and training** on best practice whistleblower support and protection approaches for agencies and organisations, along with relevant continuing professional development for legal practitioners and tribunal members.

4. Remedies Focus

The WPA's central responsibility is to ensure remedial action in response to *prima facie* cases of detrimental treatment of whistleblowers. This is done in pursuit of the public interest in all persons being able to safely speak up about wrongdoing in, by or related to their organisation without undue risk or reprisal, and in line with a principle that whistleblowers should be left 'no worse off'.

In response to complaints, referrals, monitoring or on its own initiative, the WPA's remedial powers should include:

a. **preventative action** (e.g. injunctions) in relation to anticipated detrimental acts, omissions, failures to support, or agency non-compliance with disclosure-handling obligations, and

b. **investigation, reporting, recommendations and enforcement action** in respect of past detrimental treatment, including but not limited to direct or knowing reprisal.

The WPA would not investigate primary allegations of wrongdoing, except to the extent necessary to assess and/or refer cases for response or action by other agencies, or ensure appropriate investigations occur and that disclosures are resolved.

Reserve Bank foreign bribery whistleblowers Brian Hood & James Shelton.
Credit: Jason South/The Age

> “Even with the best legislation, there will always be organisations where people don’t feel comfortable using internal channels, and that’s what the whistleblower protection commissioner/ authority will do. It will provide them an avenue. At the moment, the ones who have lost faith in their organisations, they start kicking some rocks over to see whether or not they should raise concerns and there’s nowhere to go.”

— Dennis Gentilin, former banking fraud whistleblower - Evidence to the Parliamentary Joint Committee on Corporations and Financial Services, October 2023

5. Meditation & Administrative Redress

In support of its prevention and remedies focuses, the WPA should have power to conduct ‘early intervention’ **conciliation or mediation** of alleged/apparent detrimental treatment , and recommend informal and administrative remedies to resolve cases, where the whistleblower and organisation consent and where it is not contrary to the public interest to do so. The obligation of agencies and organisations to address primary allegations of wrongdoing would remain unaffected and not be a subject for conciliation or mediation.

Given the public interest in fairness and transparency in public interest whistleblowing outcomes, the WPA would retain power to initiate formal investigation and enforcement where informal resolution does not occur or is unsuccessful. Even where successful, the WPA would track all resolution outcomes for inclusion in its reporting in at least aggregate or deidentified form.

6. Legal Actions

The WPA should have a discretion to bring **civil (including employment) proceedings** for remedies, in the public interest, including on behalf of individual whistleblowers (with their consent). It would also have power to intervene in criminal or civil cases raising public interest whistleblower protection issues, and would be required to be consulted by any federal public agency proposing to take legal action against a whistleblower as to the reasonableness of that action.

Above: Award winning author and financial services expert Dennis Gentilin blew the whistle on banking fraud, highlighting the need for improved protections

A multi-partisan group of politicians speak at the launchpeaks at the launch of the predecessor to this report, *Protecting Australia's Whistleblowers: The Federal Roadmap*

7. Rewards, Compensation, Financial Support

The WPA should have power to:

a. **seek financial remedies** on behalf of whistleblowers,

b. administer **redress and reward schemes** based on a proportion of penalties, financial savings or other income derived by the Commonwealth as a result of whistleblower disclosures, and

c. seek **legal costs protection** for whistleblowers, including on a full indemnity basis, in appropriate cases.

8. Comprehensive, Seamless Jurisdiction

The WPA should ensure the efficiency and effectiveness of whistleblower protections by having jurisdiction to enforce protected disclosures **under any and all Commonwealth laws** (public sector, corporate, not-for-profit, union and sector-specific) – including to ensure whistleblowers do not 'fall through cracks' in protection, whether they are public servants, contractors, consultants, corporate or NGO employees or any other person working in a federally-regulated industry or sector who speaks up about wrongdoing in or by their own or a related organisation.

9. Adequate Powers & Resources

The WPA should have **all the powers necessary** to fulfil its functions, including to: compel evidence and information; issue guidance and recommendations; monitor progress on outcomes arising from disclosures; maintain confidential communications with whistleblowers and organisations; conduct reviews of the effectiveness of organisational policies, regulations and legislation; and report publicly on specific cases or general issues. The WPA should be appropriately **funded** to undertake its functions, overseen by a joint, multi-party parliamentary committee.

Whistleblower Jeannie-Marie Blake gives evidence to the Robodebt royal commission

10. Independence

The WPA should be headed by an independent, suitably-qualified, specialised statutory officer (Whistleblower Protection Commissioner) supported by:

a. **security of tenure** equivalent to a judicial officer,

b. a **stand-alone budget** and dedicated body of staff, including those with personal experience of having blown the whistle, and

c. **statutory coordination and advisory committees,** including advice from civil society, employer, union and former whistleblower representatives.

> “I feel like the APS needs to have an independent authority that could investigate and help protect staff speaking out in the interest of the public that they serve. I strongly believe that if we had an independent body protecting staff, then more staff would be comfortable to speak out on issues that matter.
>
> Currently, you are left weighing up whether you can live with the consequences of going on the record or live with the consequences for the public if you don’t speak out.”

— Jeannie-Marie Blake, former Robodebt whistleblower - interviewed in The Mandarin

Meeting International Standards

Transparency International's global *Best Practice Guide for Whistleblowing Legislation* (2018) describes the need for any country's 'whistleblowing authority' to have clear functions to:

1. Receive, investigate and address complaints of unfair treatments
2. Address improper investigations of whistleblower disclosures
3. Provide advice and support
4. Monitor and review whistleblowing frameworks
5. Publish data and undertake monitoring
6. Raise public awareness

It is time for Australia to catch up, and even again lead the way with effective institutions to support whistleblowers and oversee whistleblowing laws. In the United States, since 1989, the Office of Special Counsel (OSC) has been a whistleblower protection authority for American federal public sector whistleblowers – requiring agencies to investigate whistleblower disclosures, receiving and investigating complaints of reprisal, conciliating disputes between whistleblowers and agencies and intervening in significant whistleblower protection litigation.

The OSC has independence and security of tenure, with the Special Counsel appointed by the President with advice and consent from the Senate. The OSC has proven an effective actor in supporting public sector whistleblowers, working in collaboration with individual inspectors-general across different agencies. The OSC's work is complemented by the Office of the Whistleblower Ombuds in the United States House of Representatives, which helps congresspeople and committees in their dealings with whistleblowers, including through training and best-practice intake procedures.

Recently, there has been momentum in establishing whistleblowing offices in Europe, coinciding with passage of the *European Union Whistleblowing Directive*. In the Netherlands, the *Huis voor Klokkenluiders* (House of the Whistleblowers) was established in 2016 to oversee and enforce Dutch whistleblower protections. In Slovakia, the Slovak Republic Whistleblower Protection Office has a comprehensive range of functions including assisting during the whistleblowing process, intervening in retaliation cases (including issuing interim orders to pause impacts to a whistleblower's employment), directing disclosures to the appropriate body, supporting organisations in establishing internal whistleblower programs, and working to promote whistleblower protections across Slovakian society. Whistleblowing bodies with more limited functions have also been established in Ireland and Finland.

Every country, and every whistleblower protection regime is different – so there is no 'off the shelf' model for Australia. The draft design principles fill the gaps presently existing in the Australian whistleblowing context, informed by international standards and functions that have proven successful in other jurisdictions.

Above: Banking whistleblower Jeff Morris, whose courageous whistleblowing helped spark the banking royal commission.

Hon Tony Fitzgerald AC KC at the launch of the Whistleblower Project in Sydney.

What are the Gaps?

We know there is a general problem with the inaccessibility of current legal protections for whistleblowers – in terms of time, cost, and legal expertise needed to secure remedies if or when a whistleblower suffers from a lack of support or from unfair treatment, for having done the right thing and raised their concerns about wrongdoing.

But research shows there are also other gaps, despite the best efforts of existing agencies, like the Commonwealth Ombudsman and the Australian Securities and Investments Commission (ASIC), to try and make whistleblowing regimes work with the limited responsibilities and resources they have.

Figure 1, from Griffith University's submission to the Attorney-General's review of public sector whistleblower protections, summarises the different functions that are needed in a central oversight or implementation agency – and which ones are currently provided for, if at all, in our main federal whistleblowing laws.

The analysis confirms the whistleblower protection authority should be independent, sufficiently-resourced and operate in a manner that complements existing integrity bodies, with some functions migrated as required. A dedicated whistleblowing body will support existing investigative and regulatory agencies, such as the Ombudsman and ASIC, by allowing them to focus on their core responsibilities and supporting whistleblowers to engage effectively with them, as well as many other agencies.

A federal whistleblower protection authority would not enforce State laws – which are limited to the public sector – but would provide an important new precedent to help inform the strengthening of State institutional arrangements. A federal whistleblower protection authority could also play a significant role in cooperating with State bodies in the future to foster nationally consistent support and guidance, or even provide support to state and territory whistleblowers under intergovernmental agreements.

A wide range of federal whistleblowing reform across the public, private and non-profit sectors is anticipated in the immediate months and years ahead. Without a whistleblower protection authority, these reforms will be incomplete – but by taking this critical step to ensure these laws work in practice, not just on paper, we can make sure the previously unfulfilled democratic promise of all our federal whistleblowing laws finally becomes a reality.

Figure 1: Filling the Gaps

Current Institutional Roles in Whistleblowing Oversight

Key: Role largely provided for ✓ | Substantial gap ✕ | Total gap ✕

Roles needed		Description		Public sector	Private/ Not for profit sectors
Advisory	1	Awareness	General awareness-raising of importance of whistleblowing	✓	✕
	2	Training	Information, skill development, capacity-building, organisational standards	✓	✕
Support and protection	3	Psychosocial support	Access to personal/career coaching & mental health services	✕	✕
	4	Prevention	Early management intervention in higher risk matters	✕	✕
	5	Legal support	Access to free legal advice for whistleblowers	✕	✕
	6	Conciliation	Alternative dispute resolution or admin remedies for unfair treatment	✕	✕
Investigation	7	Wrongdoing	Investigation of alleged primary disclosure (wrongdoing)	✓	✓
	8	Detriment	Investigation of alleged detrimental/unfair treatment	✕	✕
	9	Reviews	Independent review of internal investigations	✕	✕
Adjudication	10	Corrective action	Ensuring primary wrongdoing is dealt with & sanctioned	✓	✓
	11	Protection remedies	Ensuring redress & compensation for unfair treatment	✕	✕
Institutional	12	Policy evaluation	Ongoing review of effectiveness of the regime	✕	✕
	13	Auditing	Systemic & individual reviews of organisation compliance	✕	✕
	14	Monitoring	Ongoing review of the implementation of the system	✕	✕
	15	Coordination	Strategic & operational coordination of roles across the system	✕	✕

(Source: Griffith University 2024)

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