A practical guide

Protecting whistleblowers and NGOs from getting SLAPPed

Human
Rights
Law
Centre

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Disclaimer

This Guide provides general information only, and is not to be relied on as legal advice. Readers should obtain their own information and up to date legal advice applicable to their individual circumstances.

This Guide is subject to applicable laws. While every effort has been made to ensure the information is accurate at the time of publication of this document, the Human Rights Law Centre does not accept any responsibility for any loss or damage resulting from any error in this Guide.

The Climate and Environmental Whistleblowing: Information Guide

In 2024, the Human Rights Law Centre published the Climate and Environmental Whistleblowing Information Guide – a practical legal resource designed to support any person to raise concerns about climate and environmental wrongdoing in Australia. The Information Guide can be provided to any individual who may be seeking legal information about whistleblowing. The Guide can be accessed here.

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to transform laws and policies to protect 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. We provide legal advice and representation to whistleblowers, as well as continuing our longstanding tradition of advocating for stronger legal protections and an end to the prosecution of whistleblowers. We are also a member of the Whistleblowing International Network.

Acknowledgement of Country

The Human Rights Law Centre acknowledges the lands on which we work and live, including the lands of the Wurundjeri, Bunurong, Gadigal, Ngunnawal, Darug and Wadawurrung people. We pay our respect to Elders of those lands, both past and present. We recognise that this land always was and always will be Aboriginal and Torres Strait Islander land because sovereignty has never been ceded. We acknowledge the role of the colonial legal system in establishing, entrenching and continuing the oppression and injustice experienced by First Nations peoples and that we have a responsibility to work in solidarity with Aboriginal and Torres Strait Islander people to undo this.

Acknowledgements

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Purpose of this Guide

Whistleblowers are fundamental to our integrity systems. They can be sources of vital information for advocacy and campaign work but speaking up can involve risk. Understanding risk and having strategies in place to help mitigate that risk can protect the whistleblower and the organisation.

Non-government organisations (NGOs) are often the first point of contact for individuals taking direct action to speak up against wrongdoing, from human rights abuses and environmental damage to government corruption and corporate misdeeds. NGOs are critical agents to advocate for greater transparency and accountability. Whistleblowers play an important role by providing insight and information to identify where and how wrongdoing is occurring.

Without transparency there can be no accountability.

This resource is designed to protect whistleblowers and NGOs from retaliatory legal risk. It identifies the most significant legal risks associated with working with whistleblowers and provides key summaries for NGOs to consider when conducting risk assessments in their work. It aims to facilitate a greater culture of transparency and support organisations in their advocacy by leveraging the truth-telling of whistleblowers.

Glossary

Disclosure	The act of reporting information about wrongdoing, which a whistleblower has done in accordance with a whistleblower law. Also referred to as a **Protected Disclosure**. Not all whistleblowing, when it takes place outside whistleblowing laws, will be protected.
Non-government organisations (NGOs)	Independent, typically not-for-profit organisations that operate outside of government, often for the purpose of addressing social or environmental issues.
PID	A "public interest disclosure". We use this term to refer to any disclosure made in accordance with Public Interest Disclosure legislation. When a PID is made in accordance with Public Interest Disclosure legislation, it is a Protected Disclosure.
Public interest disclosure legislation	Refers to any of the whistleblower laws that cover public officers, public officials and other individuals making disclosures about public sector bodies. There are different laws across states and territories, and federally. These laws are listed in Schedule 1, at the end of this document.
SLAPPs	Strategic Lawsuits Against Public Participation, or legal actions which have the effect of intimidating, silencing, or financially burdening individuals and organisations advocating in the public interest.
Victimisation	When a whistleblower is treated detrimentally, or threatened with detrimental treatment, because they made a whistleblower disclosure. This is also sometimes referred to as **reprisal**.
Whistleblowing disclosure pathway	A pathway available to a whistleblower under a whistleblower law, to make a protected disclosure of wrongdoing.
Whistleblower Laws	The collection of legislation across the public and private sector that provide protections for people who speak up about wrongdoing by making a disclosure. There are different laws across states and territories, and federally. These laws are listed in Schedule 1.
Wrongdoing	A broad term to cover any kind of misconduct, public sector maladministration, corrupt conduct, illegal or improper conduct, or any other kind of conduct that may be able to be disclosed under Whistleblower Laws in Australia.

Who is a whistleblower?

A whistleblower is typically an employee, contractor or other worker who has access to information regarding wrongdoing that is not otherwise known to the public, and who discloses that information. This disclosure is known as whistleblowing, and can be made to an internal whistleblowing mechanism, an external oversight body, or sometimes to the public.

Whistleblowing involves disclosing incidents where law or process has been breached, including human rights abuses, fraud, corruption, maladministration, harassment, threats to health and safety or environmental wrongdoing. Because of their employment or contractual relationship, whistleblowers may have obligations to keep certain information confidential.

In Australia, there are laws that protect whistleblowers who speak up by making disclosures following particular pathways established in legislation (**Whistleblower Laws**). While Australian whistleblowing laws provide protection and immunities against these obligations in certain situations, in some circumstances a whistleblower may choose to provide that information directly to an external organisation, for example, an NGO. This can come with legal risk.

What is a SLAPP?

Strategic lawsuits/litigation against public participation (**SLAPPs**) are legal actions which have the effect of intimidating, silencing, or financially burdening individuals and organisations advocating in the public interest. Commonly filed by powerful actors like corporations, wealthy individuals or governments, these actions often target human rights defenders, journalists, whistleblowers, activists or civil society groups for their advocacy on public interest matters. They are also used to silence victim-survivors of abuse and harassment from speaking up.

SLAPPs exploit the law to silence or discourage participation, advocacy or activism. These strategies create financial and emotional strain on those they target.

Senator Tony Sheldon speaking at an action by the Transport Workers Union on the legal action initiated by Aldi against the Union for its public campaign raising concerns about Aldi's supply chain (2017). Credit: Transport Workers Union.

SLAPP tactics are varied but they typically involve three main elements:

1. The claimant is an economically or politically powerful entity, like a corporation, a government or a wealthy individual.

2. The respondent is raising awareness of a matter in the public interest, or reporting abuse or harm.

3. The issue at stake involves public participation, including the exercise of the freedom of speech or the right to peaceful assembly over a public interest issue.

Not all legal actions against whistleblowers or people advocating in the public interest are SLAPPs. However, any legal action against a whistleblower or NGO can have a chilling effect by deterring or intimidating others. This guide considers legal risks for organisations and the whistleblowers they may work with.

It is crucial that NGOs seek independent legal advice as soon as they become aware of a potential SLAPP claim. Early legal guidance can help organisations assess risk, understand their rights, and develop a strategy to protect their mission and the people they support. Taking proactive steps can make all the difference in ensuring that advocacy efforts are not undermined by legal intimidation.

You can read more in our Stop the SLAPP report, designed to inform policymakers, civil society organisations, and the public about the human rights implications of SLAPPs.

Other resources

- The Impact of SLAPPS on Human Rights and How to Respond (OHCHR Brief, 2023)
- SLAPPed but not silenced: Defending human rights in the face of legal risks (Business & Human Rights Centre Report, 2021)
- Special report on legal harassment and abuse of the judicial system against the media (OSCE Report, 2021)

How can whistleblowers help my organisation?

Whistleblowers are vital accountability mechanisms in Australia. Because whistleblowers can witness wrongdoing which harms people and our planet, many NGOs utilise whistleblowers for shaping their advocacy. While whistleblowers can report to regulators, some whistleblowers choose to pass on information directly to the organisations working on relevant issues to hold wrongdoers to account.

However, there are risks attached to receiving information from whistleblowers. When a whistleblower provides information directly from their workplace to an NGO, it is usually not protected under whistleblowing laws. Risk mitigation strategies are important for both the whistleblower and the NGO when engaging in this sort of work.

Figure 1 – Whistleblowers' role in the accountability lifecycle

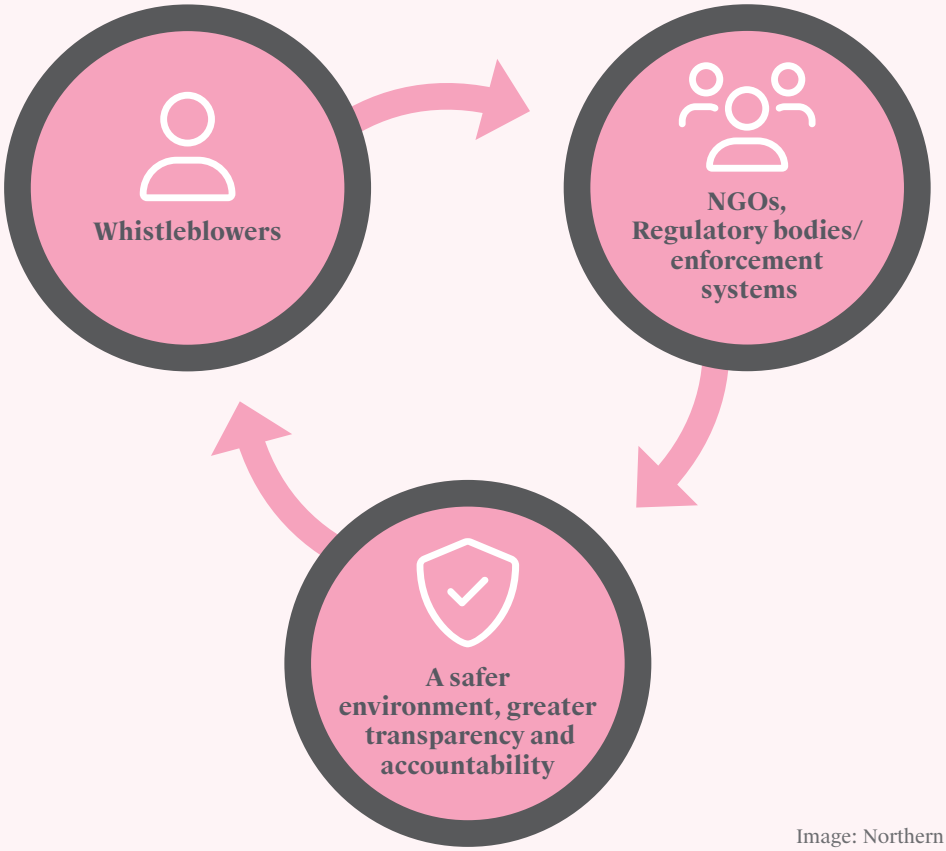


Image: Northern Territory Nurses Union press conference on Middle Arm, April 2024.

How to identify a whistleblower

The word 'whistleblower' can be used in many ways. In Australia, protections for whistleblowers who speak up are currently found in a patchwork of different laws, which can be challenging to navigate. Schedule 1 of this document contains a list of Whistleblower Laws in Australia. These laws are designed to protect individuals who may be at risk of suffering harm for speaking up.

Whistleblower Laws in Australia can be categorised into two broad fields:

- **Public Sector**: At the federal level, and for each state and territory, there is a law protecting people who speak up about public sector wrongdoing. These are often referred to as public interest disclosure ("**PID**") legislation.
- **Private Sector**: There are many sector-specific laws. Private companies regulated under the *Corporations Act* will be covered by the protections found in that Act, but there are also sector-specific protections in the tax sector, National Disability Insurance Scheme, aged care, Aboriginal and Torres Strait Islander Corporations and more.

Generally, all Whistleblower Laws have three elements:

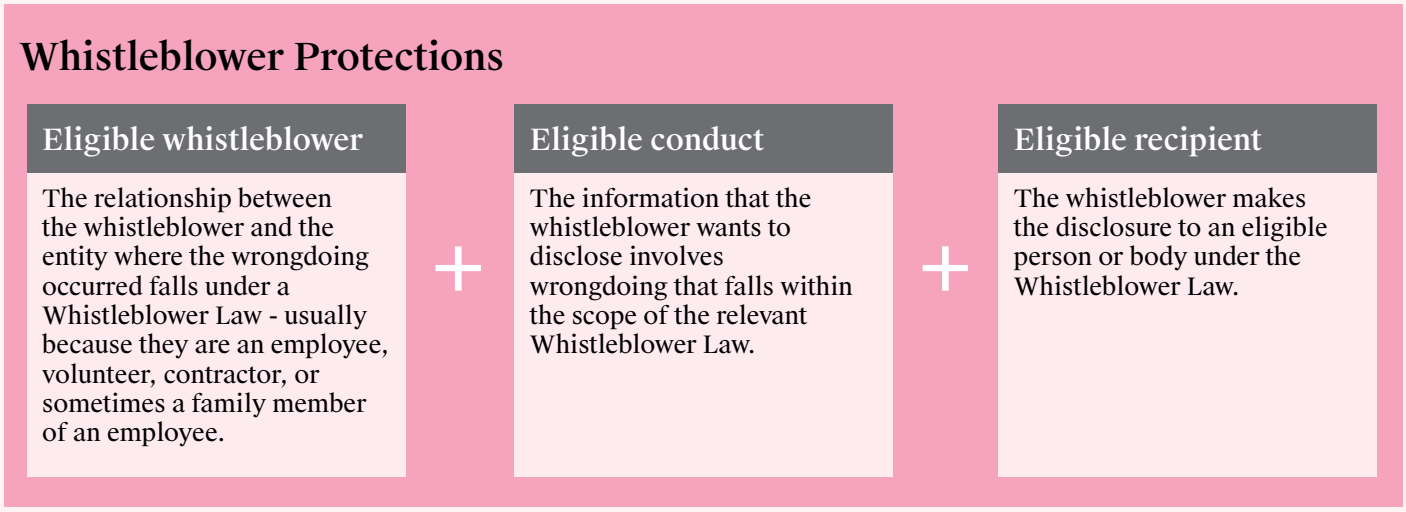


Figure 2 – All Whistleblower Laws have three elements: eligible whistleblower, eligible conduct and eligible recipient

The first sign a person may be a whistleblower is that they are providing you with information about their workplace.

Consider: will the whistleblower be breaching any employment obligations by giving you the information?

This should alert you to consider any specific legal obligations in relation to the information, and whether there is a risk in communicating any information.

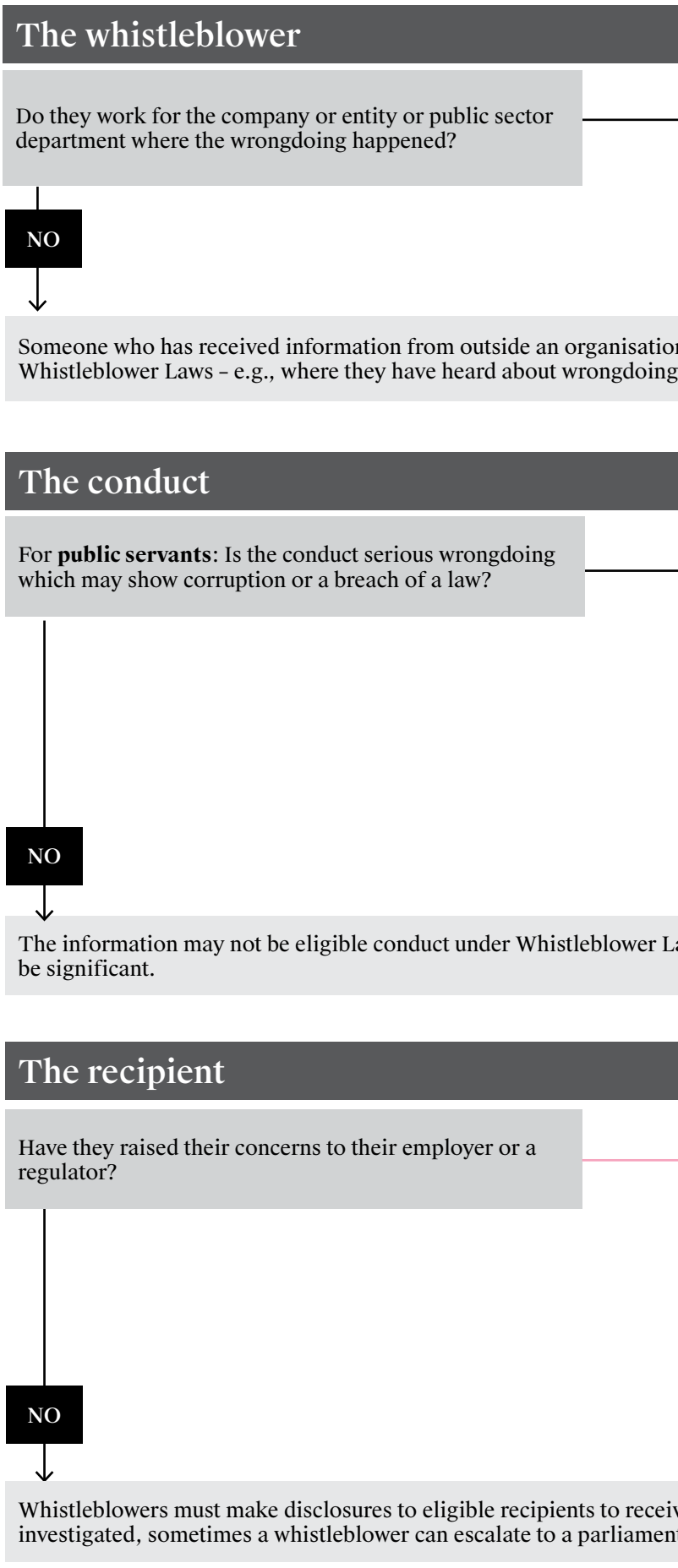
The flowchart on the next page (Figure 3) is designed to help NGOs identify information sources that may give rise to whistleblower protections, and make an assessment on when it is useful to direct the individual to make protected disclosures under Whistleblowing Laws.

How to identify a whistleblower

We have created a flowchart to help you identify whether someone is a whistleblower and if there might be a relevant whistleblower law. These flowcharts consider each of the three elements established in Figure 2.

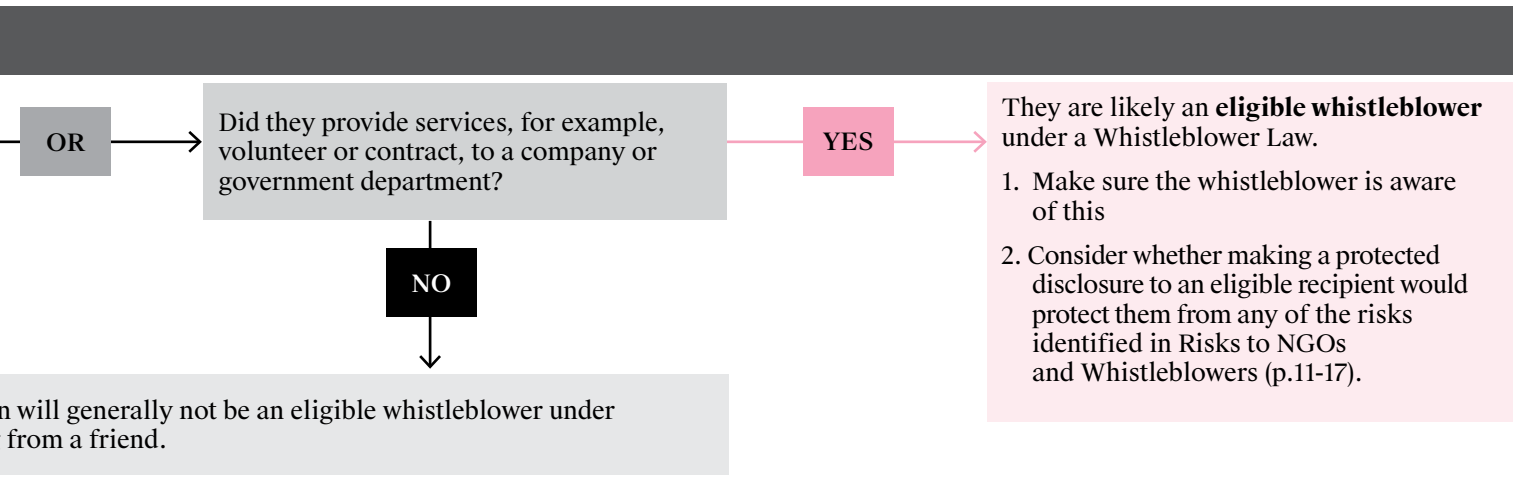
Follow each row on the flowchart to help you consider whether Whistleblower Laws are likely to protect the information source, and what steps you should take to help the whistleblower consider their options.

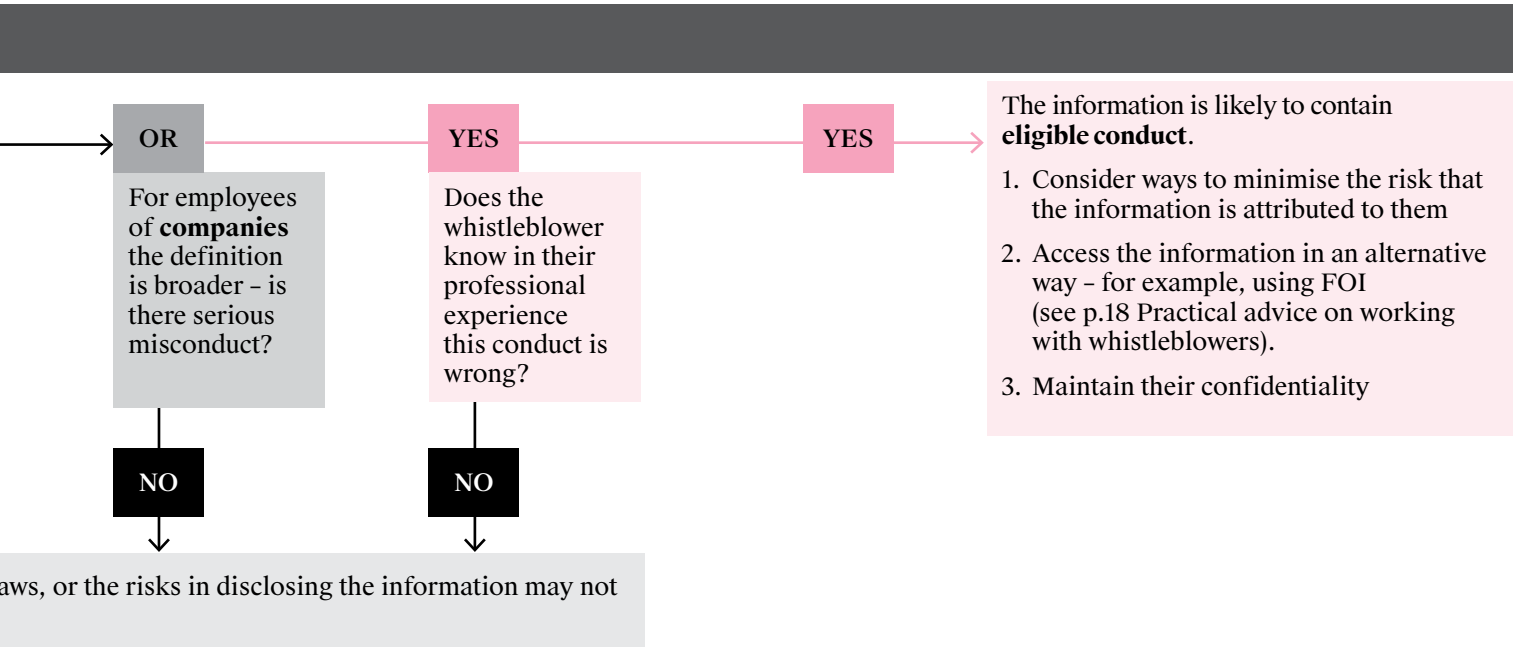
Figure 3 – Working with whistleblowers risk assessment tool

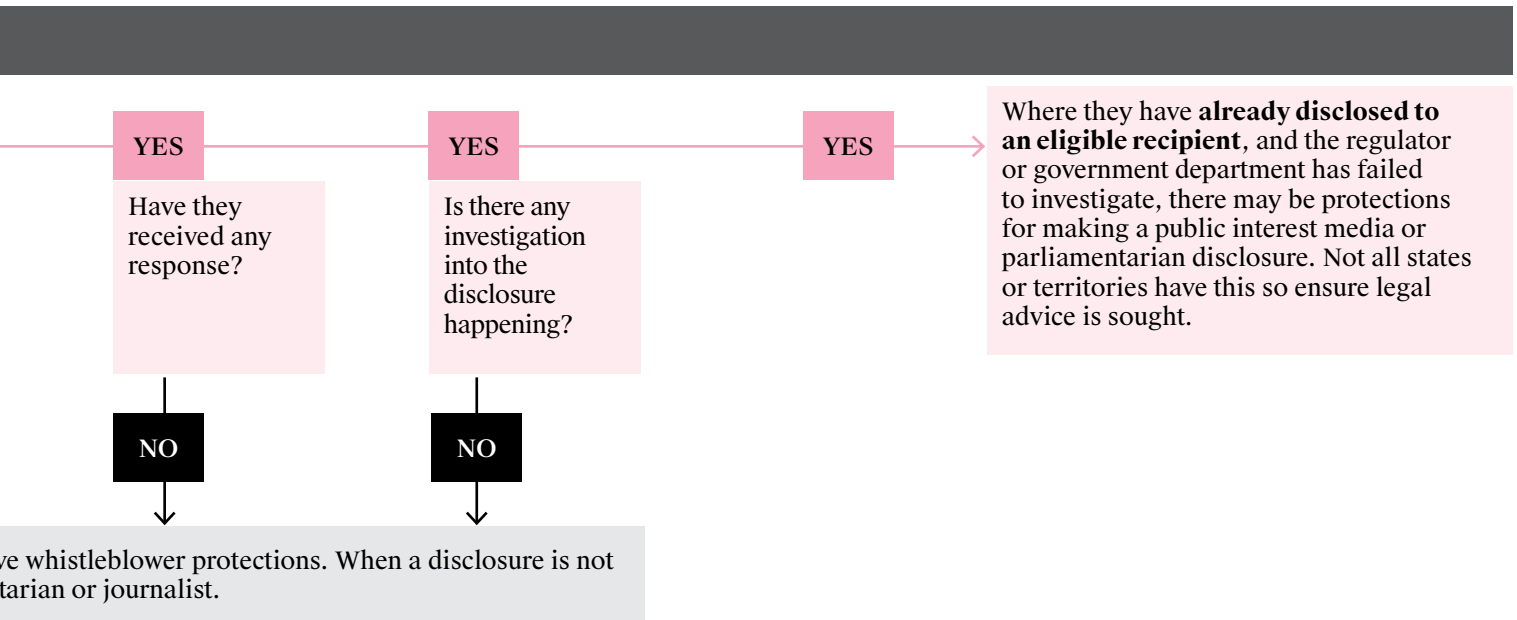


Takeaways

- Where you identify that a whistleblower or other information source may be covered by Whistleblower Laws, you should consider speaking with them about their options to disclose the information in a way that may help them to be covered by whistleblower protections, before you use the information.
- When in doubt, it is best to encourage the whistleblower to seek independent legal advice, including from the Human Rights Law Centre's Whistleblower Project via the online enquiry form.


OR
Did they provide services, for example, volunteer or contract, to a company or government department?
YES
They are likely an **eligible whistleblower** under a Whistleblower Law.
1. Make sure the whistleblower is aware of this
2. Consider whether making a protected disclosure to an eligible recipient would protect them from any of the risks identified in Risks to NGOs and Whistleblowers (p.11-17).
NO
n will generally not be an eligible whistleblower under from a friend.


OR
For employees of **companies** the definition is broader – is there serious misconduct?
YES
Does the whistleblower know in their professional experience this conduct is wrong?
YES
The information is likely to contain **eligible conduct**.
1. Consider ways to minimise the risk that the information is attributed to them
2. Access the information in an alternative way – for example, using FOI (see p.18 Practical advice on working with whistleblowers).
3. Maintain their confidentiality
NO
NO
aws, or the risks in disclosing the information may not


YES
Have they received any response?
YES
Is there any investigation into the disclosure happening?
YES
Where they have **already disclosed to an eligible recipient**, and the regulator or government department has failed to investigate, there may be protections for making a public interest media or parliamentarian disclosure. Not all states or territories have this so ensure legal advice is sought.
NO
NO
ve whistleblower protections. When a disclosure is not tarian or journalist.

Whistleblower Rights and Protections

When a whistleblower makes disclosures under whistleblowing laws, there are protections that will apply to them. The main three protections are:

1	**Confidentiality**	Unless consent is given, a person will be in breach of the law for disclosing the whistleblower's identity. Civil and criminal penalties can apply.
2	**Non-victimisation**	It is an offence under most Whistleblower Laws to victimise, or take 'detrimental action' against a person for making a whistleblowing disclosure. This means an employer or individual cannot dismiss, demote, discriminate, harass or intimidate, cause harm or injury (including psychological injury), or reputational damage because a person blew the whistle. Taking any sort of detriment carries civil and criminal penalties. A whistleblower can also sometimes bring a legal claim for compensation for loss suffered due to detrimental action.
3	**Immunity**	A whistleblower who has followed the correct pathways in making a disclosure will also have certain immunities in relation to their making of the disclosure. Under most Whistleblower Laws, they are protected from criminal, civil and administrative liability for making a disclosure.

Risks in preparing a PID

It is important to note that the immunity for criminal and civil liability does not extend to actions taken by a whistleblower prior to making their disclosure, which are sometimes referred to as 'preparatory acts'.

In the case of *Boyle v Director of Public Prosecutions*[1], the South Australian Court of Appeal found that the immunity does not apply to any preparatory acts taken in gathering evidence to support a disclosure.

Whistleblowers and NGOs should therefore exercise caution when thinking about using documents to substantiate the wrongdoing they are disclosing.

These rights and protections are considered in greater depth in the Human Rights Law Centre's Climate and Environmental Whistleblowing: Information Guide at pages 16 and 17.

Takeaways

- If you are working with a whistleblower who has suffered detriment for speaking up, you should advise them to seek independent legal advice as soon as possible as time limits may apply to any legal remedies available.
- If you receive information from a confidential source, greater care should be taken in dealing with that information.

Image: Whistleblower Richard Boyle leaving the Supreme Court of South Australia following his sentencing hearing in August 2025. Credit: Matt Turner, Whistleblower Justice Fund.

NGOs play a vital role in exposing wrongdoing, advocating for justice, and holding powerful actors accountable. However, these efforts can make NGOs who work with whistleblowers vulnerable to legal action.

This section outlines key legal risks NGOs should be aware of when handling confidential information and supporting whistleblowers. By understanding these risks, NGOs can take proactive steps to safeguard their organisation and the whistleblower.

Criminal risks in disclosing and receiving confidential information

If the whistleblower disclosure relates to government information, there can be criminal risks involved with sharing and using confidential documents or information for both whistleblowers and (less commonly) NGOs. If you are receiving information from a whistleblower who is a current or former public official (anyone who works or has worked for a government agency, whether federal, or state or territory) you should exercise caution.

Risks to the whistleblower

As discussed in the previous section, whistleblowers can be protected from civil or criminal liability if their protected disclosure is made in accordance with procedure under Whistleblower Laws. However, these protections do not apply to sharing information outside of a protected disclosure pathway under a Whistleblower Law, and do not apply to the sharing of documents (as discussed in the previous section).

There are separate offences under the relevant criminal laws, public service laws and information laws in each state and territory, and at the federal level, for taking and communicating information or documents that the whistleblower has obtained while performing services to a government agency.

Risks to the organisation

While the criminal risks associated with sharing government information are usually faced by the whistleblower, there are criminal offences related to the receipt and communication of certain types of government information by third parties (such as employees of NGOs). In relation to Commonwealth government information, these offences (often referred to as "secrecy offences") are found under Part 5.6. of the Commonwealth *Criminal Code*.

If you receive or deal with any information from someone who has worked for the Commonwealth government, that:

- has a security classification of secret or top secret;
- could be considered to damage the security or defence of Australia;
- interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence; or
- may be harmful to health or safety of the public, or a section of the public,

you may be at risk of breaching these offences, which carry significant criminal penalties. Where a whistleblower provides documents or materials to an NGO, there may also be risks relating to possession of unlawfully-obtained material.

The best way to ensure that you or your organisation do not fall foul of these offences is to speak with any whistleblower who comes to you about the nature of the information and how they obtained it, before they provide you with any specific details.

Takeaways

- Check with a whistleblower about the nature of any information they want to provide, and how they obtained it.
- Make sure the whistleblower is aware there can be criminal offences that apply to sharing certain kinds of information, and recommend they seek independent legal advice if unsure.

Confidentiality obligations

We routinely see employers use legal threats associated with a whistleblower's employment confidentiality obligations. In the workplace, confidentiality obligations may apply to employees, company directors, officers, and other individuals who, because of their role or position, have access to sensitive information.

- **Employment contract**: confidentiality obligations may be explicitly set out in the contract, but are also generally implied through the duty of fidelity and good faith, requiring employees not to misuse confidential information to their employer's detriment.
- **Statutory provisions** can impose confidentiality obligations on company officers, preventing them from improperly using information obtained through their position. For example, see s 183 of the *Corporations Act*.

These legal duties remain in place during employment and, in many cases, continue after someone has left their employment.

While whistleblowers may be protected from disclosing information in specific circumstances, the law is complex, and the boundaries of lawful disclosure are not always clear. Anyone considering passing on information should consider the legal ramifications of speaking about confidential workplace information by seeking independent legal advice.

Takeaways

- Whistleblowers often have contractual confidentiality obligations and implied duties of good faith and confidentiality to their employer which exist even if their employment ends.
- By passing information to an NGO they may be breaching these confidentiality obligations and there is a risk of legal action to the whistleblower and potentially the NGO.
- Making a disclosure via a whistleblower pathway ensures a whistleblower is protected but there may be other risk mitigation steps an NGO can take when dealing with whistleblowers (see Section 3).

Inducement to breach contract

As discussed in the previous section, there are duties of confidentiality found in a worker's employment contract. Encouraging or facilitating a person to breach their contractual duty of confidentiality can amount to a legal claim known as 'inducement to breach contract' - also known as 'tortious interference'. This is a type of claim that an NGO may be at risk of, in certain circumstances where they have worked with a whistleblower who owed confidentiality obligations to their employer or another entity.

Understanding when this risk arises and how to manage it is crucial for NGOs seeking to support whistleblowers while minimising the organisation's legal exposure.

For an NGO (or any party) to be held liable for inducing a breach of contract, certain elements must be proven. In simple terms, a claim generally requires:

1. **A valid contract to exist** – There must be a legally binding agreement between the plaintiff (e.g. the employer) and a third party (e.g. the employee or former employee);
2. **Knowledge of the contract** – The defendant (e.g. the NGO) must be aware that the contract exists;
3. **Awareness of the breach** – The defendant (NGO) must know that if the third party takes (or fails to take) a particular action, it will breach the contract;
4. **Intent to induce a breach** – The defendant must intend to encourage or cause the third party to break the contract;
5. **Actual inducement** – The third party (the whistleblower) must be influenced or persuaded by the defendant's (NGO) actions to breach the contract; and
6. **Loss or damage** – The breach must result in financial loss or harm to the plaintiff (employer).

These elements were established in *Daebo Shipping Co Ltd v The Ship Go Star* [2012] FCAFC 156 and *Sealed Air Australia Pty Limited v Aus-Lid Enterprises Pty Ltd* [2020] FCA 29.

Even if an NGO does not explicitly instruct someone to breach their contract, it is important to be cautious about any actions that could be interpreted as encouraging or facilitating a breach.

If proven, an NGO may have to pay damages for the loss associated with the inducement. For example, if an NGO induced or encouraged a whistleblower to breach their employment contract by providing confidential documents and the NGO took strategic campaign action based on that information, which caused financial damage to the company, the NGO may be liable to pay damages for the loss suffered.

There are limited defences available to a claim, including:

- **Justification** – The defendant (NGO) would need to show the interference was reasonably necessary to protect an 'existing superior legal right' of the defendant. Factors include the specific circumstances of the case, the nature of the contract and the breach, the relationship between the parties, and the intention behind the interference.

  See *Independent Oil Industries Ltd v Shell Co of Australia Ltd* [1937] NSWStRp 43.

- **The contract's terms had been waived, varied or rescinded** – The defendant (NGO) would need to show they reasonably believed that the contract had been rescinded or that performance of its terms had been waived or varied.

  See *Glamorgan Coal Co Ltd v South Wales Miners' Federation* 2 K.B. 545, A.C. 239 (H.L.) (1903) and *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56.

Ultimately, each case is different. NGOs should seek independent legal advice when these issues arise and be aware of these possible legal actions when campaigners are working on strategic advocacy campaigns.

Takeaways

- Exercise caution in relation to any actions that could be seen as encouraging a whistleblower to breach their employment contract.
- Check that the whistleblower has an understanding of their obligations to current or former employers, and always recommend they seek independent legal advice.

Injunctions

An injunction is a court order that requires a person to take a specific action or stops them from engaging in certain conduct. While injunctions are a legitimate legal remedy for preventing certain negative action from occurring, they can be used to silence those who speak up.

In the employment context, injunctions can be sought by employers to prevent employees—current or former—from disclosing or using sensitive information.

Applications for injunctions are usually heard quickly and can be made ex parte - meaning the affected person may not have prior notice or an opportunity to respond in court before the injunction is issued. This makes injunctions a powerful tool for those seeking to stop someone from using, relying on, or sharing confidential information.

A court may also require a person accused of sharing confidential information to give undertakings, like:

- returning or destroying the confidential information;
- providing details on how the information has already been used; or
- preventing a person from making further disclosures of confidential information.

A failure to comply with an injunction can have serious legal consequences, including prosecution for contempt of court.

Injunctions can be commenced against an organisation like an NGO who wanted to use confidential information they have received from a whistleblower. If the whistleblower's employer knew they leaked documents, the employer could take steps to prevent the NGO from publishing or using that information.

Since injunctions can be sought and granted quickly and can have serious consequences for breaches, individuals who have access to confidential information should be aware of the risks involved. Independent legal advice should be sought immediately if an injunction is threatened or issued.

Case study: Injunctive relief against whistleblower Troy Stolz

Clubs NSW commenced proceedings against whistleblower, Troy Stolz, in relation to the breach of his confidentiality obligations, after he blew the whistle to journalists and independent MP Andrew Wilkie over alleged non-compliance with anti-money laundering laws. They also sought injunctive relief against Mr Stolz, asking the Court to restrain him from publishing any statement online or in the media related to the ongoing breach of confidence case. The injunction was awarded to restrain Mr Stolz from making statements about Clubs NSW which are calculated to harass, intimidate or bring improper pressure on Clubs NSW relating to the conduct of the substantive Court case.

Mr Stolz was required to pay 60% of Clubs NSW's legal costs related to the injunction. The matter later settled.

See *Registered Clubs Association of New South Wales v Stolz* (No 2) [2021] FCA 1418.

Takeaways

- Injunctions can be sought to prevent whistleblowers or NGOs from disclosing or using sensitive or confidential information.
- Use safe communication channels with whistleblowers, and regularly review the information security of your organisation.

Defamation

Risk to the whistleblower

Defamation law is concerned with protecting a person's reputation. To defame a person is to publish defamatory material (like an untrue statement) to a third person which injures a person's reputation.[2] This can be something as simple as communicating something to one person. While there are defences available to a defamation claim, they can be legally complex and may require a person to obtain legal assistance to defend the proceedings.[3]

Most whistleblower protection laws across the various jurisdictions in Australia provide some level of protection against defamation claims for disclosures made in the public interest via the legal pathway.

- The defence of **absolute privilege** attaches to whistleblowing disclosures made under the *Public Interest Disclosure Act 2013* (Cth) and the *Independent Crime and Corruption Act 2017* (NT). Whistleblowing disclosures made in accordance with these laws cannot be pursued for defamation.
- The scope is more limited in other jurisdictions. For example, private sector employees only receive the defence of '**qualified privilege**' under the *Corporations Act*. This means they would have to defend a defamation claim by proving they made the disclosure containing alleged defamatory material to a person who had an interest in receiving that information.

See, for example, *Defamation Act 2005* (NSW) s 30(1)(a).

Most corporations cannot bring defamation claims against an individual. An exception applies to not-for-profit corporations, as well as small corporations with fewer than 10 employees that are not part of a larger corporate group.

Defending a defamation claim is often lengthy and costly. The caselaw shows that defamation claims often favour the plaintiff who is alleging they have been defamed, and Courts can award high damages to the plaintiff if their claim is successful.[4] This is why defamation threats and claims may be used to silence an individual giving information to an NGO. Seeking independent legal advice is essential when dealing with potential defamation SLAPPs.

Takeaways

- Whistleblowers can face defamation SLAPPs by disclosing information about individuals or small businesses, regardless of whether their information is true.
- Whistleblowers should consider defamation risks and ways to prevent any legal actions by only sharing information with trusted sources and consider any layers of protection under the relevant Whistleblower Law.

Risk to the organisation

As above, NGOs can also be pursued for defamation if they publish any defamatory material which injures a person or small business' reputation. For an NGO, the risk is more real if any individuals are named in their public communications.

Takeaways

- An NGO can mitigate defamation risk by avoiding any reference to an individual or small business in their campaign strategy.
- The risk is still there even if an individual is not named. It is best to avoid any reference to a person who may be identifiable by the material published.

Injurious falsehood

Risk to the organisation and the whistleblower

Corporations can pursue other similar legal claims, such as 'injurious falsehood'. An action for injurious falsehood is available in all jurisdictions and it protects traders from financial loss caused by false and malicious statements about their business, property, or goods. Injurious falsehood requires the following elements:

- **Publication** – the publication of a false statement about a business;
- **Malice** – the publication must have been made maliciously; and
- **Damage** – the false publication must lead to actual damage as the natural and probable consequence of the publication of the false statement.

See *Swimsure (Laboratories) Pty Ltd v McDonald* [1979] 2 NSWLR 796.

Injurious falsehood claims can be complex, and a number of legal factors must be considered, so seeking independent legal advice is essential to understand the risks and potential liabilities involved.

Takeaways

- Public statements about businesses which are false and made maliciously can be pursued for injurious falsehood. Even if it does not meet threshold of 'malicious', a SLAPP may still be filed.
- Consider the veracity of your information source and conduct a risk assessment before publishing negative material.

Costs

Risks to the organisation and the whistleblower

Any legal action gives rise to the risk of a potential adverse costs order. This can be a concern for both individual whistleblowers and NGOs, who are usually less well-resourced than the other side. In Australia, generally the rule is that a losing party has to pay the legal costs of the other side, in addition to their own legal costs.

All the potential claims set out above (breaches of confidence, inducement to breach contract, defamation and injurious falsehood) involve cost risks.

Image: A community rally against the Middle Arm development in the Northern Territory (2024).

How to safely work with a whistleblower

1. Recommend seeking legal advice

The safest way for a whistleblower to protect themselves is to obtain independent legal advice on how to make protected disclosures of wrongdoing under whistleblowing laws. However, there may be reasons why whistleblowers will choose not to seek legal advice or make disclosures through protected channels at first instance.

The Whistleblower Project is a free legal service. We provide advice to current and prospective whistleblowers, and individuals can reach out to us for assistance through our secure online intake platform: hrlc.org.au/whistleblower-project. We also accept referrals from NGOs.

We recommend you access our resources on PID disclosure pathways and detailed explanation of the Whistleblower Laws on our website.

Whistleblowers may also want to seek advice from a private employment lawyer. You can direct any person to search for a private lawyer by going to the Law Society website for their relevant state or territory.

2. Document sourcing: Is the information available in the public domain?

Whistleblowers may provide information which is available or can be sought elsewhere.
The whistleblower's insight may help point your organisation to where that information can be found. Many of the risks identified in Risks to NGOs and Whistleblowers (p.11-17) relate to the use of documents by whistleblowers and NGOs that may be confidential. If the document or information may be held by a government agency or authority, the safest way to obtain the documents is through Freedom of Information (**FOI**) or Right to Information (**RTI**) laws.

FOI laws (known as RTI laws in Queensland and Tasmania) give members of the public a legally enforceable right to information held by public authorities or a Minister. There are many exemptions in each jurisdiction, but it is a good place to start when trying to protect a whistleblower from risk. Once a document is released through FOI, it is considered to be public and available to the world at large.

When submitting an FOI request:

- Keep your request focussed and specific – provide dates, names and information that will help locate the documents you are looking for.
- Check on the webpage of the department or agency you are searching, and make sure you use their correct form.
- Where there is a fee for application, consider whether you can request a fee reduction or waiver – e.g. releasing the information is in the general public interest, or the charges would cause financial hardship.
- Make sure to submit any appeals within the time limitation.

When using FOI to retrieve documents identified by a whistleblower, you should be conscious about whether the request can be linked back to them – as even the sharing of information about what might be FOIed could give rise to the risks considered above. It is best to submit the FOI request on behalf of your NGO, rather than the whistleblower making the request personally.

3. Use safe communications channels

Any organisation which works with whistleblowers should be regularly reviewing the security of its information channels, to implement robust practices which protect all parties.

4. Utilise risk assessment tools for whistleblower engagement

A risk assessment tool is any system used to identify and evaluate potential risks, to help an organisation make more informed decisions and implement risk mitigation strategies. If your organisation has a general organisation risk assessment tool for things like governance, data security, work health and safety (for example) consider adding the working with whistleblowers risk assessment tool at Figure 3, as well as this resource to the organisation's risk management resources. You should use this resource to evaluate the risk to (i) your organisation, (ii) the whistleblower, and (iii) any other third parties, in relation to working with the whistleblower.

This Guide can be used to adapt a general risk assessment tool to whistleblowing:

- Use the Risks to NGOs and Whistleblowers section to identify the legal risks for the organisation and the whistleblower.
- Use the flowchart at Figure 3 to help you categorise the level of risk to the whistleblower in relation to their personal circumstances.
- Use the practical tips in this section as risk mitigation strategies.

5. Check whether the whistleblower has previously disclosed the information

Where a whistleblower has come to you after already raising concerns about the wrongdoing – whether internally to their employer, or externally to a regulator – you should consider:

(a) Is the employer more likely to know or suspect that they have given you information?

(b) Are there any additional risk mitigation strategies you can take – for example, by sourcing the documents through FOI?

(c) Do any confidentiality obligations apply to the whistleblower in respect of an investigation by a regulator?

In relation to (c) – sometimes, when a regulator is investigating a whistleblower disclosure, there will be additional confidentiality obligations imposed on the whistleblower in respect of the information. Regulators will do this so that the whistleblower does not share any information that could prejudice their investigation. In some circumstances, there can be civil and criminal penalties for whistleblowers who breach these obligations.

Make sure to ask the whistleblower about any correspondence they have received from their employer or a regulator, and advise them to seek independent legal advice if necessary.

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6. Engaging with the media and using "Shield Laws"

Under whistleblowing laws in Australia, whistleblowers can make protected disclosures to the media in certain circumstances. If you are working with a whistleblower and you assess there is too much risk in your organisation using the information, you may consider advising the whistleblower to seek legal advice or approach the media.

There are separate laws in Australia that also protect journalists from being compelled (for example, by a court), to disclose their sources. These are often referred to as "Shield Laws". This can provide an additional or alternate protection for individuals who want to disclose wrongdoing to the media. This protection does not extend to NGOs.

These shield laws are found across each state and territory, and at the federal level, and are often referred to as "journalist privilege".[5] In most states, the privilege will only apply where the person protecting their source is a journalist by profession or occupation. However, at the federal level, in the ACT and in the Northern Territory, the shield may be applied more broadly to any person engaged in publishing new or noteworthy information in a news medium.

The key features of the shield are:

1. **Rebuttable presumption**: The journalist raises the 'shield', and then the opposing party must show that the information should be disclosed.

2. **Qualified privilege**: The privilege can be removed by judicial decision.

3. **Public interest test**: Whether the public's right to know the source outweighs the interest in protecting that source and maintaining freedom of the press.

The privilege belongs to the journalist, not the source. These features show that shield laws cannot be relied on in all circumstances. However, shield laws can be advantageous where a whistleblower is concerned about their identity being kept confidential because of risks to their employment or reputation.

Checklist for working with whistleblowers

To reduce the legal risks associated with receiving disclosures, NGOs should consider implementing some of following safeguards:

1.	Empower whistleblowers with knowledge about the risks associated with their actions and alternative pathways available and allow them to make an informed decision.	☐
2.	Check that the whistleblower has support, and provide referrals if possible.	☐
3.	Keep the whistleblower informed about how you are planning to use the information they have provided, where practicable, and seek their express consent.	☐
4.	Establish robust confidentiality processes to protect any sensitive information provided or received.	☐
5.	Consider alternate means of sourcing documents under FOI or RTI laws if the whistleblower is employed by a government department.	☐
6.	Establish secure communication channels and processes around engagement with whistleblowers.	☐
7.	Use whistleblowers as information sources generally about an industry practice.	☐
8.	Seek legal advice as early as possible to assess risks and ensure compliance with legal obligations.	☐

Conclusion

Whistleblowers can be sources of vital information for advocacy and campaign work. Often, non-government organisations (NGOs) are the first point of contact for individuals taking direct action to speak up against wrongdoing. Working with whistleblowers responsibly means ensuring that the whistleblower is empowered with the knowledge to be able to make an informed decision about the information they provide. This guide is designed to assist campaigners and NGOs to identify where a whistleblower or other information source may be covered by whistleblowing laws, and how to reduce the risk to the whistleblower and the NGO of retaliatory legal action.

This guide can be used as a starting point to develop risk assessment tools and procedures for working with whistleblowers within your organisation.

The Whistleblower Project provides independent legal advice and casework assistance to whistleblowers in Australia. We can be contacted through our online enquiry form.

Schedule 1 - List of Whistleblower Laws

This list of Australian whistleblower laws is current at the date of publish. A breakdown of how these laws specifically apply to individuals can be found in our Climate and Environmental Whistleblowing Guide at Appendices 1 and 2.

Legislation name	**Relevant Part**
Federal laws	
Public Interest Disclosure Act 2013 (Cth)	Whole Act
Corporations Act 2001 (Cth)	Part 9.4AAA (within Volume 6)
Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)	Part 10-5
Fair Work (Registered Organisations) Act 2009 (Cth)	Part 4A
Taxation Administration Act 1953 (Cth)	Part IVD
National Disability Insurance Scheme Act 2013 (Cth)	Part 3A, Division 7 (within Chapter 4)
National Anti-Corruption Commission Act 2022 (Cth)	Part 4
Parliamentary Workplace Support Service Act 2023 (Cth)	Part 2A, Division 8
Aged Care Act 2024 (Cth)[6]	Part 5 of Chapter 7
State and territory laws*	
Public Interest Disclosure Act 2022 (NSW)	Whole Act
Public Interest Disclosures Act 2012 (Vic)	Whole Act
Public Interest Disclosure Act 2012 (ACT)	Whole Act
Public Interest Disclosure Act 2010 (Qld)	Whole Act
Public Interest Disclosures Act 2002 (Tas)	Whole Act
Public Interest Disclosure Act 2018 (SA)	Whole Act
Independent Commissioner Against Corruption Act 2017 (NT)	Part 6
Public Interest Disclosure Act 2003 (WA)	Whole Act

* This schedule includes only the main whistleblower laws in each state and territory in Australia. There are some other protections for disclosers of information located in other state or territory legislation not included in this Schedule, for example, state or territory anti-corruption agencies' legislation.

Endnotes

1 *Boyle v Director of Public Prosecutions (Cth)* [2024] SASCA 73.

2 *Defamation Act 2005* (NSW) s 10A(1) introduced on 1 July 2021. *Newman v Whittington* [2022] NSWSC 249, [43] recently endorsed 'serious harm' threshold, that a plaintiff must prove that the harm caused by the defamatory publication was, or will, be serious. All jurisdictions but WA and NT have now implemented the 'serious harm' threshold.

3 Defences include justification, contextual truth, absolute privilege, publication of public documents, fair report of proceedings of public concern, public interest, qualified privilege, scientific or academic peer review, honest opinion and innocent dissemination. See e.g. *Defamation Act* (NSW) ss 25–32.

4 Margaret Thornton, Kieran Pender and Madeleine Castles, 'Damages and Costs in Sexual Harassment Litigation' (Study Conducted for Respect@Work Secretariat, Australian National University, 24 October 2022) 21 [Graph 5].

5 *Evidence Act 1995* (Cth) s 126K; *Evidence Act 1995* (NSW) s 126K, *Evidence Act 1906* (WA) s 20I; *Evidence Act 2008* (Vic); *Evidence Act 1929* (SA) s 72B; *Evidence Act 2011* (ACT) s 126K; *Evidence (National Uniform Legislation) Act 2011* s 127A; *Evidence Act 1977* (Qld) Div 2B s 12V; *Evidence Act 2001* (Tas) s 126B.

6 *The Aged Care Act 1997* (Cth) has equivalent protections; the 2024 Act will enter into force in November 2025.

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