The Cost of Courage

Fixing Australia's Whistleblower Protections

Human Rights Law Centre

Contents

Author

Kieran Pender, Senior Lawyer, Human Rights Law Centre

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

Research

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.

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.

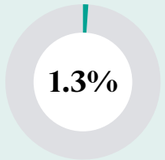
I've been able to survive due to the people who gathered around me to provide specialised advice and support, including the Human Rights Law Centre. A dedicated service to support whistleblowers is an essential next step in ensuring integrity in public office. We need to be safe to speak up. Right now,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

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

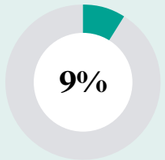
Key Findings

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

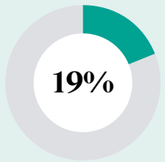
We found



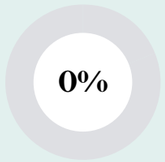
Only one judgment where the whistleblower was awarded compensation for facing detriment after speaking up.



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.

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

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.

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

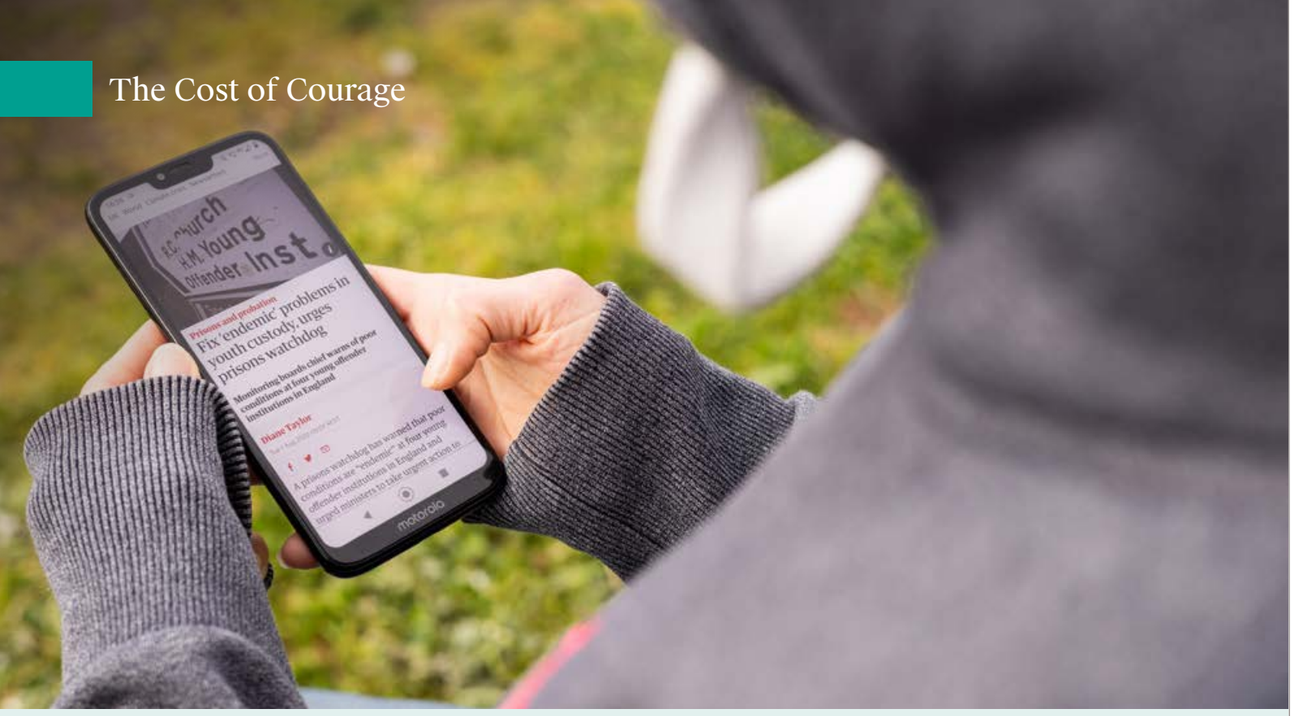
In the United States, and, increasingly, in other jurisdictions, reward schemes provide financial incentives for whistleblowers (and their lawyers) to speak up. These schemes have been very effective in encouraging legitimate public interest whistleblowing which leads to successful regulatory enforcement 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.

- Professor AJ Brown (ed), *Whistleblowing in the Australian Public Sector*, Report of the Australian Research Council Whistling While They Work Project (ANU Press, 2008)
- International Bar Association, *Whistleblower Protections: A Guide* (2018)
- Transparency International, *A Best Practice Guide for Whistleblowing Legislation* (2018)
- Professor AJ Brown et al, *Clean As A Whistle: A Five Step Guide to Better Whistleblowing Policy and Practice in Business and Government*, Report of the Australian Research Council Whistling While They Work 2 Project (Griffith University, 2019)
- Transparency International Australia and Griffith University, *Australia's National Integrity System: The Blueprint for Reform* (2020)
- Government Accountability Project and International Bar Association, *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Cases* (2021)
- Griffith University, *Human Rights Law Centre and Transparency International Australia, Protecting Australia's Whistleblowers: The Federal Roadmap* (November 2022; updated June 2023)
- Human Rights Law Centre, Griffith University and Transparency International Australia, 'Stronger Whistleblower Protections: A First Step?', Submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the *Public Interest Disclosure Amendment (Review) Bill 2022* (January 2023)
- Griffith University, Human Rights Law Centre and Transparency International Australia, Submission to the Honourable Alan Wilson KC's Review of the *Public Interest Disclosure Act 2010* (Qld) (February 2023)

Acknowledgements

Many people and organisations have contributed to the establishment of the Whistleblower Project, including everyone at the Human Rights Law Centre. Particular thanks to Frances Dreyer, Kathryn Bertram, Robert Wyld, Jade Tyrrell and Lauren Connolly at Johnson Winter Slattery, Olga Cronin and Victor Praxedes Saavedra at the International Network of Civil Liberties Organizations, and Daniel Kahn Gillmor at the American Civil Liberties Union, Tom Devine and Samantha Feinstein at Government Accountability Project, Anna Myers at Whistleblowing International Network, Andrew Wilkie MP and Rohan Wenn, Senator David Pocock and Sam LeWatt, Mark Davis and Natalija Nikolic at Xenophon Davis, Mary Inman at Constantine Cannon, Josh Bornstein at Maurice Blackburn, Richard Dennis, Polly Hemming and Bill Browne at The Australia Institute, Tosca Lloyd at GetUp!, Annica Schoo at the Australian Conservation Foundation, David Barnden at Equity Generation Lawyers, Harriet McCallum at Mannifera, Professor Ed Santow, Bernard Collaery, Fiona McLeod SC, Kate Eastman AM SC, Amanda Lyras, Tiernan Brady, Glen Klatovsky, John Wilson, Hugh de Kretser, Leah Ambler, Associate Professor Rebecca Ananian-Welsh, Kathryn Kelly, Peter Rose, Samantha Mangwana, Madeleine Castles, Camilla Pondel, Michelle Bennett, Daniel Webb and Sophia Collins.

The establishment of the Whistleblower Project has been supported by many of the Human Rights Law Centre's pro bono law firm and counsel partners. Special thanks to King & Wood Mallesons and Johnson Winter Slattery, and Bret Walker AO SC, Wendy Harris KC, Rachel Doyle SC, Stephen Warne, Matthew Lewis, Thomas Wood, Alison Hammond, Shawn Rajanayagam and Justin Pen.

Human
Rights
Law
Centre