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# Whistleblowing law reform in Australia: challenges and next steps

**A J Brown**

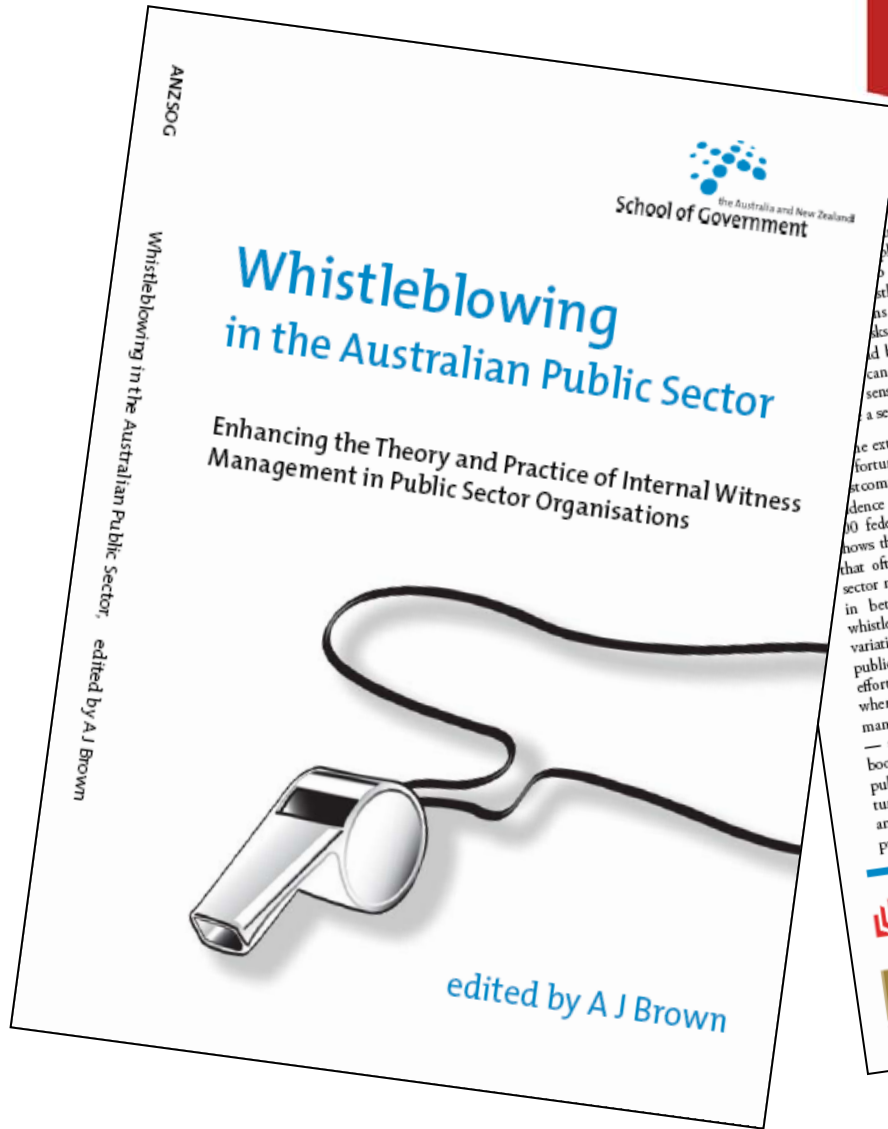
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NSW Ombudsman Seminar, Sydney  
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## Australian whistleblowing legislation

South Australia *	1993	<i>Whistleblowers Protection Act</i>
Queensland *	1994	<i>Whistleblowers Protection Act</i>
Australian Capital Territory	1994	<i>Public Interest Disclosure Act</i>
New South Wales	1994	<i>Protected Disclosures Act</i>
Commonwealth	1999	<i>Public Service Act, s.16</i>
Victoria	2001	<i>Whistleblowers Protection Act</i>
Tasmania	2002	<i>Public Interest Disclosures Act</i>
Western Australia	2003	<i>Public Interest Disclosure Act</i>
<i>Private sector *</i>	2004	<i>Corporations Act, Part 9.4AAA</i>
Northern Territory	2008	<i>Public Interest Disclosure Act</i>

\* Private sector coverage



any challenges in public sector management, few are as complex as the management of whistleblowing. Because the discovery and rectification of wrongdoing, public whistleblowing is widely acknowledged as being positive for us and for society at large. However, the conflicts and risks often associated with whistleblowing also support a firm belief that every whistleblower is destined to suffer, and that little can be done to protect them from reprisals. Even if they did, sensible employees are often seen as unlikely to ever blow the whistle a second time around.

The extensive research in this book reveals a more complex and, fortunately, more positive picture. The product of one of the world's most comprehensive research projects on whistleblowing, the book draws evidence from over 8,000 public servants in over 100 federal, state and local government agencies to show that whistleblowers can and do survive, and that often their role is highly valued. Public sector managers face significant challenges in better managing and protecting whistleblowers. There is great variation between the many public agencies making the effort, and the many agencies where the outcomes — for managers and whistleblowers alike — are still likely to be grim. This book is compulsory reading for all public sector managers who wish to turn this negative trend around, and for anyone interested in public accountability generally.



<http://www.griffith.edu.au/whistleblowing>

[http://epress.anu.edu.au/whistleblowing\\_citation.html](http://epress.anu.edu.au/whistleblowing_citation.html)

## Some key findings

- **Prevalent** – at least 12% of public employees reported public interest wrongdoing outside their role in 2 years.
- **Important** – the single most highly valued source of information about wrongdoing in the public sector.
- **Not always mistreated** – 25-30% public interest whistleblowers reported mistreatment by management and/or co-workers.
- **Difficult, stressful** – c.43% high stress, 62% some stress.
- **Much higher risk in some situations.**
- **Unmanaged, under-managed processes in a large proportion of organisations.**

AS 8004–2003  
(Incorporating Amendment No. 1)

**Australian Standard™**

# Whistleblower Protection Programs for Entities

**Only 5 out of 175  
federal and state  
agencies had  
'reasonably strong'  
procedures  
measured against  
the Standard**

Second report: ***Whistling While They Work:  
Towards best practice whistleblowing programs  
in public sector organisations***  
(Roberts, Brown & Olsen, forthcoming)

Required elements of an organisational  
whistleblowing program:

1. Organisational commitment
2. Encouragement of reporting
3. Assessment and investigation of reports
4. Internal witness support and protection
5. An integrated organisational approach

**Revised Australian Standard (AS-8004)**

## **Chapter 11.**

# **Best Practice Whistleblowing Legislation for the Public Sector: The Key Principles**

***A J Brown, Griffith University***

***Paul Latimer, Monash University***

***John McMillan, Commonwealth Ombudsman***

***Chris Wheeler, Deputy NSW Ombudsman***



## Towards a federal Public Interest Disclosure Act...

### **ALP 2007 Government Information Policy, 'Restoring Trust and Integrity'**

'Federal Labor will provide best-practice legislation to encourage and protect public interest disclosure within government to an integrity agency... [and,] where a person has exhausted all legitimate mechanisms and avenues of complaint, ... to third parties such as journalists... dependent upon the circumstances.'

**House of Representatives Standing Committee on Legal & Constitutional Affairs.** *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector.* Commonwealth of Australia – February 2009.

**Commonwealth Government Response** – Senator the Hon Joe Ludwig, Special Minister of State, 17 March 2010.

## Key legislative issues

1. **Public whistleblowing** – *when is it justified / reasonable?*



## ***At Death's Door***

**27/06/2005**

Australian Story tells the untold personal story of the nurse who lifted the lid on a medical scandal making front page news, not just in Australia, but around the world.

Toni Hoffman is nurse in charge of the Intensive Care Unit at the Bundaberg Base Hospital in Queensland. ....

  
**Australian  
of the Year  
Awards 2006**

Local  
Hero

## ***Commonwealth Government - March 2010***

The PID Bill will protect **public disclosures (including to the media)**:

(a) where:

- (i) matter disclosed has **previously been disclosed** to the responsible agency and the integrity agency, or the integrity agency directly;
- (ii) a **serious** matter;
- (iii) disclosure **not acted upon** in a reasonable time or the discloser has a reasonable belief that the **response was not adequate** or appropriate;
- (iv) no more information than is **reasonably necessary** to make the disclosure is publicly disclosed; and
- (v) the **public interest in disclosure** outweighs countervailing public interest factors (e.g. protection of international relations); OR

(b) where:

- (i) discloser has a reasonable belief that a matter threatens **substantial and imminent danger or harm to life or public health and safety**; and
- (ii) there are **exceptional circumstances** explaining why there was no prior disclosure internally (i.e. to the responsible agency) or externally (e.g. to the Commonwealth Ombudsman).

## Key legislative issues

1. **Public whistleblowing** – *when is it justified / reasonable?*
2. **Better organisational systems for encouraging & managing whistleblowing**
  - *Comprehensive definitions and applications*
  - *Minimum standards for agency obligations and procedures*
  - ***Central agency with clearinghouse, monitoring, oversight and early intervention role***

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- 3. Employers' and managers duties of care to protect and support, and remedial mechanisms**

*Managerial responsibilities and systems*

*Effective remedies for breaches and failures*

  - *stress, psychological injury, injury to career*

*Relationship between whistleblower support and other management obligations (bullying, OH&S, Fair Work).*

## **Employers' obligations – common law of employment *versus* statutory 'whistleblowing' compensation**

### ***Wheadon v State of NSW*, NSW District Court (2001)**

No. 7322 of 1998

NSW Police Service

Breach of common law duty of care to its employee

\$664,270 in damages:

- failing to provide a proactive system of protection;
- failing to give support and guidance;
- failing to prevent conduct of colleagues who ostracised him.

## *Owens v University of Melbourne & Anor*

[2008] Supreme Court of Victoria No. 174 (27 May 2008)

per Judd J

Detrimental action [under the *Whistleblowers Protection Act 2001*] includes injury but importantly, extends to what may be described as collateral damage to a person's career, profession or trade, all of which may be apt to describe aspects of loss and damage suffered by employees ....

The breadth of the compensable loss and damage under the Act defines the cause of action within an entirely different category to claims under the *Accident Compensation Act*, notwithstanding an overlap that might occur in the case of injury. ... s 19 creates a **new, novel and additional class of rights and remedies to those which already existed ... for work related injury. ...**

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# Whistleblowing law reform in the USA: challenges and next steps

**Terry Morehead Dworkin**

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Visiting Professor, Seattle University

Senior Specialist, Australian-American Fulbright Commission

## Key United States legislation

<i>Whistleblowers Protection Act (US)</i>	<b>1989</b>
<i>False Claims Act (US)</i>	<b>Amended 1986</b>
<ol style="list-style-type: none"> <li>1. Amended by <i>Recovery Act</i> <ol style="list-style-type: none"> <li>a. <i>'Trouble Asset Relief Program' (TARP)</i></li> </ol> </li> </ol>	<b>2009</b>
<ol style="list-style-type: none"> <li>2. <i>Deficit Reduction Act</i></li> </ol>	<b>2002</b>
<ol style="list-style-type: none"> <li>3. <i>State False Claims Acts</i></li> </ol>	<b>Various</b>
<i>Internal Revenue Service (Tax)</i>	--
<i>Sarbanes-Oxley Act</i>	<b>2002</b>
<i>NOFEAR Act</i>	--