



Clean as a whistle

a five step guide to better whistleblowing policy
and practice in business and government

Whistling While They Work 2 – key findings and actions
August 2019



Institute for Governance
and Policy Studies
A research institute of the School of Government

Queensland, Australia

This report presents key findings and actions flowing from the research project ***Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations*** – one of the world’s largest studies into whistleblowing, and the first large-scale project to focus on management of whistleblowing across business and government.

Coinciding with the roll-out of new corporate requirements in Australia, and proposals for further reform of whistleblower protection laws by governments from New Zealand to the European Union, the research helps pinpoint key actions which will make the difference for successful implementation of whistleblowing policies – at organisational and whole-of-government levels.

This guide works as a companion to new regulatory requirements, guidance and proposed standards for whistleblowing policies, programs and reform.

Whistleblowing is a vital pillar in the integrity, governance and compliance systems of every organisation, and healthy, corruption-free institutions across society as a whole. These key findings and actions identify what needs to be done, at practical and policy levels, to ensure this positive role is realised for all our benefits.

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www.whistlingwhiletheywork.edu.au

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KEY FINDINGS AND ACTIONS

Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations

August 2019

Whistling While They Work 2: Improving managerial responses to whistleblowing in the public and private sectors*

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- 13 Australian Securities & Investments Commission
- 14 New Zealand State Services Commission
- 15 New Zealand Ombudsman
- 16 Australian Council of Superannuation Investors
- 17 Australian Institute of Company Directors

Supporters

- 18 Telecommunications Industry Ombudsman
- 19 South Australia Independent Commissioner Against Corruption
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- 22 Transparency International Australia
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* Incorporating **Australian Research Council Linkage Project LP150100386** 'Protecting While They Prosper? Organisational responses to whistleblowing'

Contents

Summary and key actions	1
Background	4
<i>The changing regulatory context</i>	6
<i>The importance of whistleblowing</i>	8
<i>Policies, programs, processes and procedures</i>	10
1. Recognising and assessing whistleblower disclosures	12
<i>What kinds of reports do I have to respond to?</i>	12
<i>A whistleblowing case flow model</i>	14
<i>Why case assessment matters</i>	15
<i>What are the risks to reporters?</i>	18
<i>What kind of investigation?</i>	21
Key actions	22
2. Supporting and protecting whistleblowers	23
<i>Protect from what?</i>	23
<i>A proactive approach</i>	25
<i>Support – who provides it and does it work?</i>	29
<i>Creating the environment for effective outcomes</i>	30
Key actions	33
3. Roles, responsibilities & oversight	34
<i>Who is responsible in my organisation?</i>	34
<i>Key roles for governance professionals</i>	35
<i>Respecting employees’ duties to report</i>	37
<i>Reporting lines, oversight and independence</i>	37
Key actions	39
4. The regulatory role: meeting new challenges	40
<i>The case for strong institutional support</i>	40
<i>Backing up internal systems: mandatory procedures</i>	42
<i>Advice, support, clearing-house and monitoring roles</i>	43
<i>Civil remedies and enforcement</i>	44
Key actions	45
5. Public interest: respecting whistleblowing’s third tier	47
<i>Navigating the legal minefield</i>	48
<i>Citizen rights and media freedom</i>	50
Key actions	50
References	51
Acknowledgements	54

Figure 1: Five steps to better whistleblowing policy and practice



Summary

Whistleblowing processes – or systems for encouraging and protecting staff who speak up about wrongdoing – are vital to achieving integrity, good governance and freedom from corruption in institutions across the world.

Increasingly the importance of good whistleblowing processes is being recognised not only in new laws and rules, but stronger organisational systems and programs, informed by a new vision of the benefits and responsibilities that accompany the raising of wrongdoing concerns.

Stronger private sector whistleblowing requirements under Australia's *Corporations Act 2001 (Cth)* are coinciding with new reform proposals for the public sector, progress towards law reform in New Zealand, and the European Union's historic Directive requiring new or improved laws from all member states. The International Standards Organisation (ISO) is developing the world's first whistleblowing management system standard.

These reforms reflect a common vision of the importance of:

- 'Three tiered' legislative frameworks which recognise the roles of internal, regulatory and public whistleblowing in modern society;
- Requirements for organisations to have quality whistleblowing programs; and
- Striving to prevent harm to organisation members who speak up about wrongdoing, and ensure institutions act positively on their concerns – not trying to remedy harm or correct organisational failures after the event.

In support of this effort, this guide presents key findings and actions from the Australian Research Council project *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations* – the world's first large-scale research into management of whistleblowing in business and government.

Presenting data on whistleblowing policies in 699 organisations and experiences of 17,778 individuals in 46 public and private bodies, the research pinpoints key actions for successful implementation of whistleblowing at organisational and whole-of-government levels.

As set out in **Figure 1**, the guide sets out five main steps for better policy and practice.

The **first three steps** focus on lessons for the design and implementation of whistleblowing programs by organisations – especially with respect to the critical challenges of making the right first responses to disclosures, creating a supportive environment for whistleblowing, and ensuring clear and effective roles and responsibilities.

However, organisational whistleblowing programs will only be as good as the regulatory frameworks that support them. **Steps four and five** focus on key actions for policymakers, to achieve best practice regulatory arrangements including ensuring that public disclosure rights and media freedom continue to play their vital role in integrity and good governance.

This guide works as a companion to new regulatory requirements, formal guidance and standards for whistleblowing policies and programs. The findings and key actions will help everyone with a commitment to integrity – organisations and policymakers alike – act to ensure the positive role of whistleblowing is fully realised, for all our benefits.

Key actions

1. Recognising and assessing whistleblower disclosures

- Policy – an organisational policy including procedures which communicate clearly to managers on the case flow to be followed.
- Response – training and guidance for all managers on the types of wrongdoing reports that must be confidentially referred to skilled and independent staff, as soon as they are made.
- Risk assessment – clear duties and procedures for assessing the risks to a reporter from the point of first report, using a risk matrix customised to the organisation, with emphasis on the proactive action and monitoring to be taken to address risks in each case.
- Triage – a strategy for ensuring wrongdoing concerns are fully assessed for the subjects potentially involved, by appropriately experienced staff, before allocation for response; with oversight and coordination by a sufficiently senior staff member.
- Skills development – training to prepare key managers and specialist governance staff, *before* disclosures arise, for taking on investigations and cases which encompass different types of wrongdoing response (e.g. human resources, integrity and compliance); including practical experience in identifying integrity and misconduct issues that may be contained in other types of conflicts, grievance and workplace disputes.

FOR ORGANISATIONS

- Reformed, simplified, consistent, workable criteria for when whistleblowers may go public and remain protected, reflecting the presumed public interest in disclosure.
- Revised definitions of ‘intelligence information’ and ‘inherently harmful information’ to extend protection to all disclosures of wrongdoing in public interest circumstances, other than information that poses genuine risk of harm.
- Availability of a general public interest defence in all criminal cases of alleged unauthorised disclosure (whether whistleblowing i.e. employee-reported wrongdoing, or not).
- Stronger legislative protection for journalists’ use of whistleblowing information for public interest purposes.

FOR POLICYMAKERS

5. Public interest: respecting whistleblowing’s third tier

- Law reform to bring whistleblower protection laws up to or above the standard of Australia’s Corporations Act provisions, including Australia’s public sector and New Zealand laws.
- Detriment – revision of civil and employment remedies to better recognise the range and types of detrimental acts and omissions for which managers and organisations should be responsible, including:
 - expanded definitions of type and breadth of detriment;
 - liability for inadvertent but negligent breaches by omission;
 - relaxation of the mental element (*de facto mens rea*) as a precondition for civil liability in Commonwealth legislation.
- Remedies – consistency in principles for access to civil and employment remedies including:
 - Recognition of the duty to support and protect
 - Reversal of the onus of proof
 - Access to workplace tribunals as an alternative to the courts.
- Guidance – active education of companies and organisations to reinforce awareness of best practice policy approaches including risk assessment and appropriate management of cases involving both disclosable conduct and workplace grievances.
- Establishment of a fully resourced whistleblower protection authority to support reporters and organisations, including advice, support, coordination and enforcement roles.

FOR POLICYMAKERS

4. The regulatory role: meeting new challenges

2. Supporting and protecting whistleblowers

FOR ORGANISATIONS

- **Diagnosis** – ensure all staff with support responsibilities understand the range of detriment support policies are trying to prevent, including informal and ‘collateral’ repercussions in addition to direct reprisals; informed by the risk assessment.
- **Support plan** – develop a plan to support the reporter and other parties as soon as a report is made, including implementing the risk assessment, with responsibilities for support clearly assigned, independently of investigation functions.
- **Confidentiality** – ensure all parties work to maximise reporter confidentiality as a protective factor, while recognising that in practice it is often impractical or impossible, and developing alternative support and protection steps for when needed.
- **Proactive management** – processes to ensure early intervention by leaders, independently of any managers directly implicated, in addressing high risk situations and that may affect early decisions in whistleblowing cases.
- **Robust support** – task trained individuals independently of the management chain to act as case manager for support, including assisting line managers in the support offered, providing or organising direct support where needed, and upward reporting to ensure support is maintained even under management pressure.
- **Investigations** – organise support resources so as to assist timely, efficient, professional and independent case responses, to maximise confidence of all parties in the investigation as a protective factor for reporters as well as investment in outcomes.
- **Ethical environment** – actively recognise and enhance managers’ ethical leadership and reinforcement of ethical behaviour, so as to support whistleblowing processes and outcomes, by
 - Recruiting and incentivising leaders who demonstrate and communicate that they encourage the reporting of wrongdoing and know how to support employees who blow the whistle
 - Integrating ethics-related incentives and sanctions into human resources performance management programs for managers
 - Internally communicating lessons and success stories on the role of employee-reported wrongdoing, including the successful support actions of managers and leaders.
- **Policy and training** – detail the procedures to be followed by managers and key personnel responsible for delivering support and protection to disclosers (and subjects of disclosure), and support them with active training.

3. Roles, responsibilities & oversight

- **Communication** – develop and implement a strategy for ensuring all employees are aware of the organisation’s policy and their roles, including clear responsibilities and advice to potential reporters on how to report and how their report will be handled.
- **Governance** – appropriately resource an independent, specialist internal function with leadership, coordination and case support for all key whistleblowing process roles, irrespective of where performed (including risk assessment, triage, support, management intervention, problem solving and remediation).
- **Educate** each person with a role on its requirements and limits, including on all duties to report, as well as the overall approach.
- **Ensure** the professional and legal obligations of all staff, particularly governance professionals, are recognised and respected by management as forming part of their role.
- **Training** -- Provide specialised training on the skills to lead and coordinate management of whistleblowing in the organisation.
- **Oversight** – develop a framework that meets internal and external reporting obligations, reviews outcomes for reporters at the top level of the organisation, takes advantage of the information provided from employee reporting, monitors the speak up culture of the organisation, and protects the independence of key staff.

FOR ORGANISATIONS

Background

About the research

Whistling While They Work 2, funded by the Australian Research Council and 23 partner and supporter organisations in Australia and New Zealand, set out to shed new light on:

- Strengths and weaknesses in organisational responses to whistleblowing;
- The impacts and outcomes by which to judge organisational responses; and
- The most important factors explaining why better or worse responses are occurring.

Our aims are to help maximise the role of whistleblowing in organisational integrity and performance, and ensure fair outcomes for whistleblowers, by assisting organisations with their processes and informing guidance and new regulatory obligations. To identify factors which enable positive managerial responses to whistleblowing and inform better procedures, systems and policy, the research in this guide relies on two main sources of data:

- In the first stage (2016), our **Survey of Organisational Processes and Procedures** was offered to any organisation with more than 10 employees, based or with significant operations in Australia and New Zealand, and completed by a senior manager or authorised officer in **699** public, private and not-for-profit bodies (see Brown, Dozo & Roberts 2016; Brown & Lawrence 2017; and Table 2 below);
- In the main Integrity@WERQ phase (2017-2018), the **Workplace Experiences & Relationships Questionnaire** (WERQ) captured evidence of the performance of whistleblowing processes in 46 public, private and not-for-profit organisations -- the first study internationally to survey whistleblowing processes in public and private organisations at the same time (9,398 public sector respondents from 36 organisations; and 8,380 private and not-for-profit respondents from 10 organisations).

Table 1 sets out a breakdown of the **17,778** individual respondents in the main phase who consisted of:

- 9,711 staff identifying as employees, contractors or volunteers;
- 5,170 staff identifying as managers (formal direct responsibility for day-to-day management including supervising one or more employees or workers); and
- 2,897 staff identifying as governance professionals (whose work mainly comprised of compliance, risk, fraud or financial control, internal audit, integrity and conduct, ethical standards, human resources, employee assistance or similar roles).

These data include the experiences and perceptions of 7,326 individuals, or 41% of all respondents, who observed wrongdoing in their current or a previous organisation.

In this guide, analysis focuses mostly on two key groups in the main Integrity@WERQ data:

- **5,055** individuals (28% of all respondents) who raised concerns about the most serious wrongdoing they observed (3,816 in their current organisation) (**reporters**); and
- **3,604** managers and governance professionals (20% of all respondents) describing the most serious situation of which they were aware or with which they directly dealt, where other staff raised concerns about wrongdoing in their current organisation (**managed cases**).

By comparing the experiences of these groups, a rich new picture emerges of whistleblowing processes and their outcomes, provided not only by those who reported wrongdoing but by managers and professionals who dealt with or observed reporting cases.

Table 1: Organisations and individuals surveyed by Integrity@WERQ

	Organisations				Respondents (Employees, Managers & Governance Professionals)					
	Small	Medium	Large	Total	Total	Wrongdoing observers		Reporters		Managed cases**
						Current org	Prev org	Current org	Prev org	Current org
Public sector	5	15	16	36*	9,398	3,551	711	2,523	518	2,056 (22%)
						4,262 (45%)		3,041 (32%)		
Business or Not-for-profit	3	0	7	10	8,380	1,996	1,068	1,293	721	1,548 (18%)
						3,064 (37%)		2,014 (24%)		
Total	8	15	23	46	17,778	5,547	1,779	3,816	1,239	3,604 (20%)
						7,326 (41%)		5,055 (28%)		

* Public sector organisations were made up of 30 Australian agencies (8 federal, 16 state, 6 local governments) and 6 New Zealand agencies (4 national agencies and 2 local governments).

** 'Managed cases' means managers or governance professionals describing cases they dealt with or were aware of, where wrongdoing concerns were raised by other staff.

Overall there was surprising similarity in the basic nature and dynamics of whistleblowing between public and private sector respondents. For example, while the proportion of wrongdoing observers who reported was slightly higher in the public sector (74%) than the private sector (69%) – a statistically significant difference ($\chi^2(1) = 18.33, p < .001$) – in both cases this was a relatively high reporting rate. Most studies suggest that around half of employees who observe wrongdoing, typically report it (Olsen 2014).

These and other results indicate our sample was probably not representative, consisting mostly of organisations with a high existing commitment and interest in whistleblowing processes. Other relevant limitations of the study can be found in more detailed Working Papers already released from the project (see Dozo, Brown & Lawrence, 2018). Nevertheless, around 30% of cases of perceived wrongdoing were not being reported, and as will be seen, organisational experience and outcomes remained diverse.

As well as showing many consistent results across the public and private sectors, the research shows comparatively little variation in the prevalence of wrongdoing and most other results between the Australian and New Zealand public sectors (Macaulay & Brown 2018).

Together, these results confirm that most of the key questions about how best to manage whistleblowing are most likely answered by organisational and management dynamics that cut across all types of organisations, at least in the Australian and New Zealand contexts, rather than being specific to particular sectors or jurisdictions.

At the same time, whistleblowing is occurring within changing legislative landscapes, and some sectoral and jurisdictional differences do appear. The research thus provides key indications of lessons to be learned not only for organisational approaches, but regulatory best practice and legislative design.

The changing regulatory context

The most historic development, setting new precedents for business and government bodies worldwide, is the roll-out of the world's first legislative requirements for private sector organisations to have a truly comprehensive whistleblowing policy and program.

From 1 January 2020, Australia's Corporations Act requires all public, publicly listed and large proprietary companies (100 or more employees, assets of \$25 million and/or annual revenue of \$50 million) to have a policy which sets out:

- a) the protections available to whistleblowers in the company, and under the Act;
- b) whom protected disclosures may be made to, and how;
- c) how the company will support whistleblowers and protect them from detriment;
- d) how the company will investigate disclosures;
- e) how the company will ensure fair treatment of employees to whom disclosures relate;
- f) how the policy will be made available to officers and employees (section 1317AI(5)).

At the same time, **all** corporate bodies in Australia – irrespective of type or size – become subject to massively overhauled legal protections for whistleblowers. Under new provisions which commenced on 1 July 2019:

- eligible whistleblowers include former employees, contractors and unpaid workers;
- anonymous disclosures are protected;
- requirements for 'good faith' have been replaced with a test of reasonable suspicion;
- categories of wrongdoing and detriment have been made extremely wide;
- a whistleblower is protected from any criminal, civil or administrative liability;
- uncapped compensation rights attach to any person who is made to suffer for the reason of the whistleblower disclosure; and
- a whistleblower need only 'point to evidence that suggests a reasonable possibility' of this, before the company has to prove otherwise (section 1317AD(2B)).

Australia's new corporate whistleblower protections are not perfect – indeed, they still share defects with outdated public sector laws, which can and must be rectified if their policy goals are to be fully achieved. However, the new laws have three major global implications.

Three tiered legislative frameworks

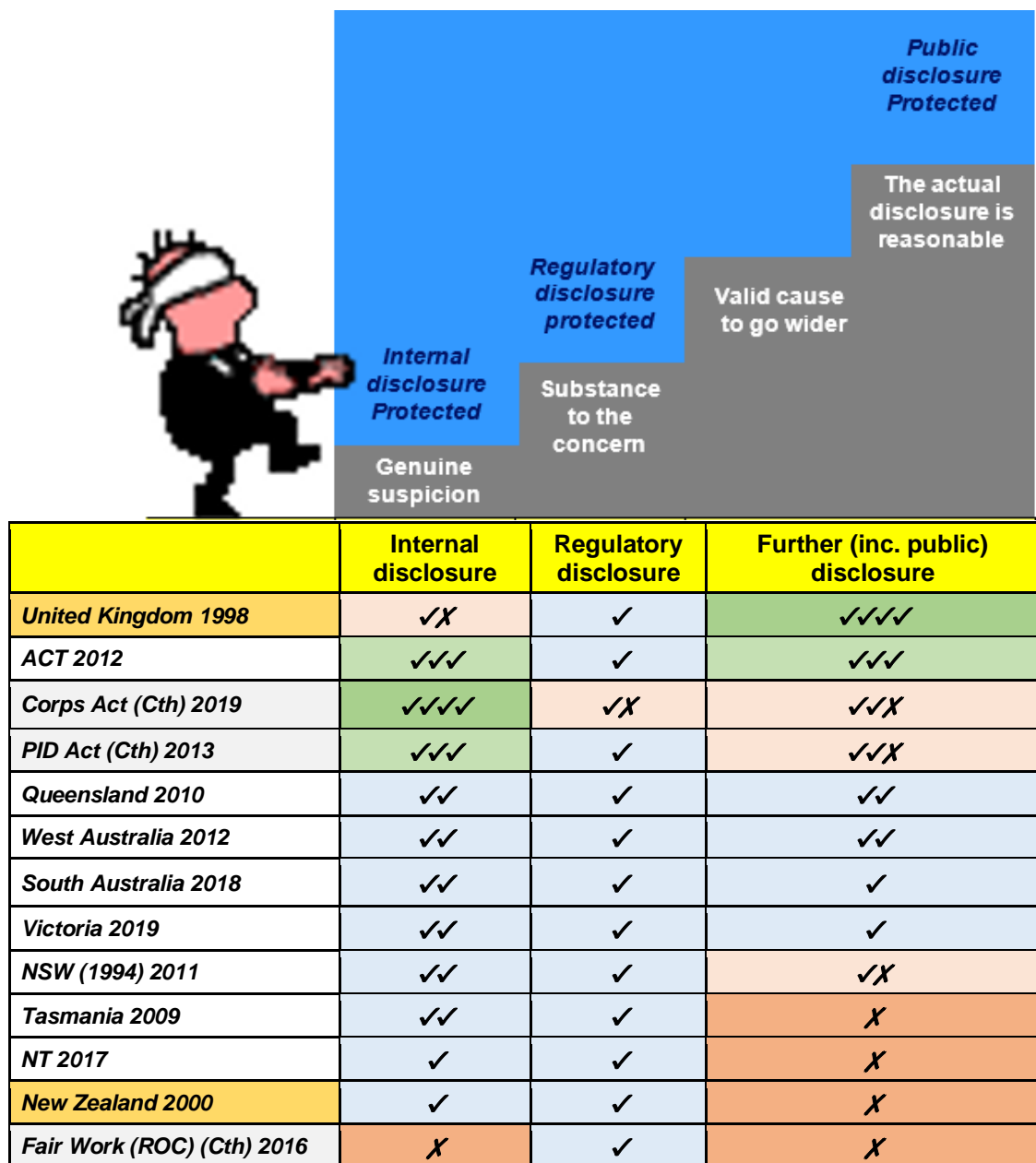
The new corporate law joins seven of Australia's nine public sector jurisdictions in adopting a 'three tiered' legislative approach, which recognises the roles of (1) internal, (2) regulatory and (3) public whistleblowing in modern society. This stepped approach is recognised as international best practice, best known from the approach established by the *Public Interest Disclosure Act 1998 (United Kingdom)* (see **Figure 2**; Vandekerckhove, 2010).

There remain weaknesses in how this approach is applied in Australia and New Zealand, when it comes to regulatory and public disclosure, as indicated by Figure 2, and addressed by sections 4 and 5 of this guide. However, the principle that a whistleblower remains fully protected who makes a further 'public interest' or 'emergency' disclosure to the media or a parliamentarian, after at least having first made it to a regulator, is now enshrined by the new Corporations Act provisions (s. 1317AAD) – an important new precedent.

Mandatory internal procedures

Australia's public sector whistleblowing laws have led the way globally, since 1994, in requiring agencies to establish procedures for facilitating, dealing with and protecting disclosures of wrongdoing by officials (Brown 2013). More recently this reform has been called for in the UK (where despite legal protection, there are no general requirements for internal systems – see Figure 2) and is central to the European Union's 2019 Directive.

Figure 2: The three-tiered legislative approach (and gaps) – UK, Australia & New Zealand



A proactive duty to support and protect

Australia's new requirements for corporate whistleblowing policies are a world first. Previously the US *Sarbanes-Oxley Act 2002* led by requiring companies to establish whistleblowing *channels*. But until now, no legislation has required company policies to detail how they will *support and protect* employees who report. Indeed, this element remains missing even from the EU Directive and from public sector procedures required by New Zealand's *Protected Disclosures Act 2000* – also currently slated for reform.

The requirement for proactive support policies is backed up by another world first – the extension of compensation rights for detrimental acts or omissions to situations where the company fails to fulfil a duty to prevent such actions (s. 1317AD(2A)). Initially established under 2016 amendments to the *Fair Work (Registered Organisations) Act 2009 (Cth)*, this principle has gained international recognition (Transparency International 2018) and now applies to all Australian companies, irrespective of type or size.

How to implement this duty is a main purpose of this guide.

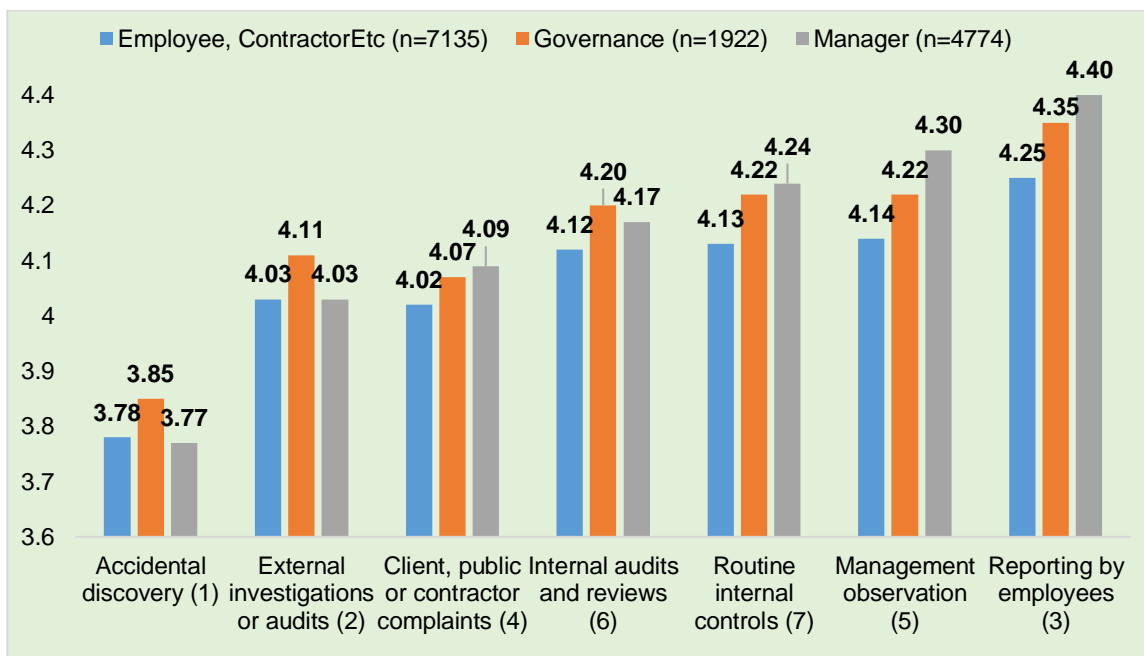
Clean as a whistle: the importance of whistleblowing

Before turning to what organisations and policymakers should do, it is worth asking the basic question: why is this important? What is it about employee-reported wrongdoing that justifies the effort and resources needed to facilitate, protect and support whistleblowing?

While anecdotal evidence about the value of whistleblowing is everywhere, little research has quantified the benefits. For example, a study of over 1 million whistleblowing reports in 937 US companies, using data from the hotline provider NAVEX, established that internal disclosure systems saved companies money by resulting in fewer lawsuits and smaller settlements (Stubben & Welch 2019). But while these findings are consistent with whistleblowing being a resource that helps management address concerns before they become costly, they still do not explain *why* it plays this role.

Figure 3: Importance of employee reporting (all respondents)

'How important do you believe each of the following is for bringing to light wrongdoing...?' (1=Not important, 2=A little, 3=Somewhat, 4=Important, 5=Very important)

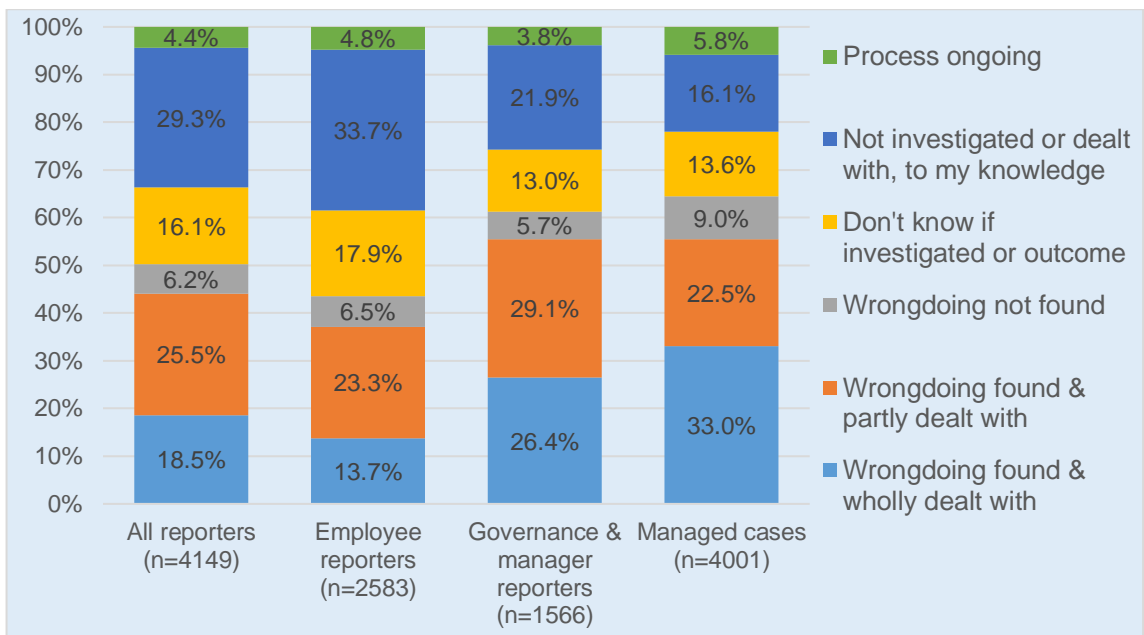


In a first step, our earlier research in 118 public agencies established that employee reporting was seen as the **single most important method** by which wrongdoing in or by organisations was brought to light, according to employees and governance staff – with managers rating it as of equal importance to their own observations (Brown 2008, p.45).

Figure 3 sets out an even clearer picture from our present research, with all types of respondents ranking employee reports as, on average, the most important – above and beyond internal audits and routine controls. Managers provided the strongest endorsement. The picture holds for both public and private sectors. Further, 89% of public and 94% of private sector respondents agreed it was 'in the best interest of the organisation when an employee reports wrongdoing', especially managers (Brown, Lawrence & Olsen 2018, p.30).

This assessment of the value of reporting was also borne out in evidence from specific cases. Two key outcomes measured by our research were the **investigation outcome** – whether the organisation investigated and found actual wrongdoing as a result of the concerns reported by employee respondents – and **organisational reforms**, that is, whether changes were made or actions taken as a result of the issues raised by the concerns.

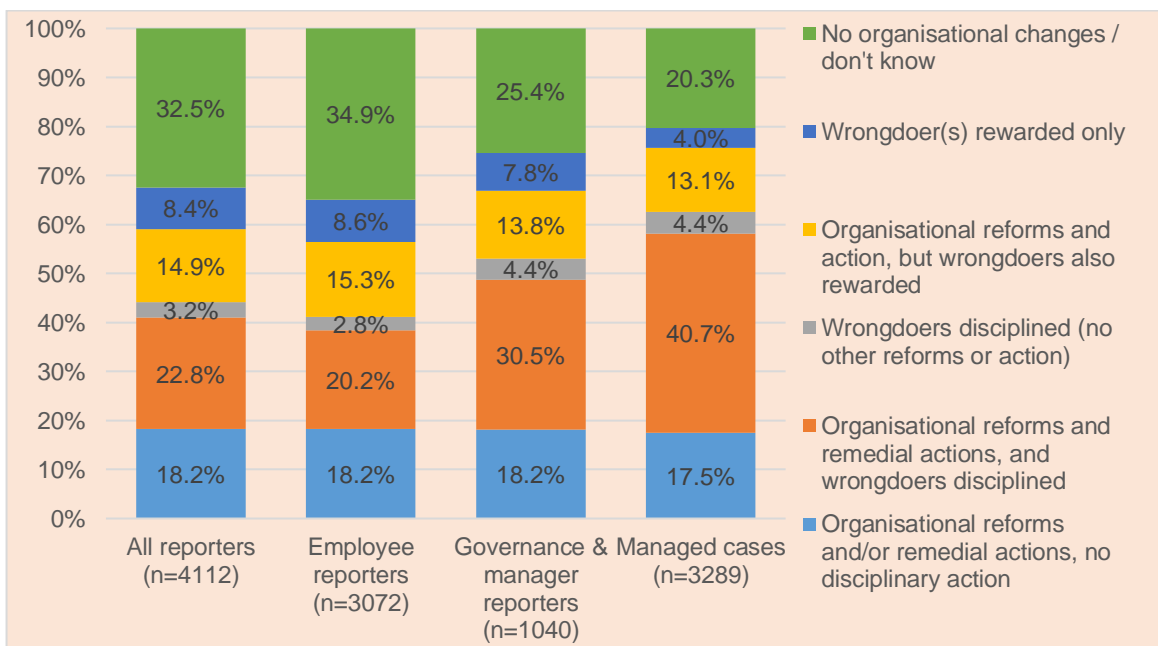
Figure 4: Investigation outcomes of employee reporting



Employee reporters were less likely to know the investigation outcome than governance staff or managers – but even 37% of employee reporters said that wrongdoing was found and dealt with as a result of their reports, with this rising to 56% of managers and governance professionals describing their experience of reporting (managed cases). Far from being dismissed as worthless, these are high substantiation rates by most complaint standards.

Positive or necessary organisational results from staff concerns ranged from disciplinary action to training, management, personnel or structural changes, changed policies and procedures, and remedial actions such as apologies or compensation. At least 41% of cases resulted in positive change according to employee reporters, and 63% in managed cases. Again the data show the central role played by employee concerns in prompting action. Dealing with employee wrongdoing concerns may be challenging and difficult, but our research confirms its fundamental role, every day, in maintaining integrity and assisting accountability and performance in the institutions on which society depends.

Figure 5: Organisational reforms, changes and actions



Policies, programs, processes and procedures

There are a range of resources and guides to help organisations ensure their policies meet these changing expectations. In each Australian public sector jurisdiction, the central responsible agency issues formal standards, guidelines and advice with which agencies must comply. For companies subject to the Corporations Act, the Australian Securities and Investments Commission (ASIC) – a formal partner to this research – is issuing Regulatory Guidance to confirm how entities should approach their responsibilities.

Further basic lessons of this research, however, are that – until now – guidance and advice have not necessarily dealt with key core challenges involved in implementing a more proactive, preventive approach to the management of whistleblowing, or covered all the key topics this implies. As well, there is strong evidence that existing policies on paper – what organisations currently think or say they do – have not translated into real-life processes and practice, even when many of the key conditions for success are already present.

Existing guidance for creating a ‘living’ whistleblowing program includes the open-access [Whistling While They Work Guide](#) (Roberts, Brown & Olsen, 2011), developed from our previous public sector research. Its 44-item checklist provides a roadmap for developing and implementing a whistleblowing management approach in a wide range of institutions, and the departure point for new lessons in this guide.

In stage one, we also set out to map the current state of whistleblowing process policies using a 10-point outline of key elements that any program must cover:

1. Advice provision	To staff on their rights and responsibilities
2. Awareness methods	How staff are made aware of specific policies and processes
3. Training	Specialised training on managing concerns, including support
4. Reporting channels	Multiple safe channels for receiving concerns
5. Investigation processes	Processes for assessing, triaging, investigating and reporting
6. Incident tracking	Processes for tracking all wrongdoing concerns from the outset
7. Support strategy	Planned strategy or program on how to support individual staff
8. Risk assessment	Processes for assessing risks of detriment from the outset
9. Dedicated support	Tailored support services and intervention strategies
10. Remediation	Processes for addressing detrimental impacts if experienced

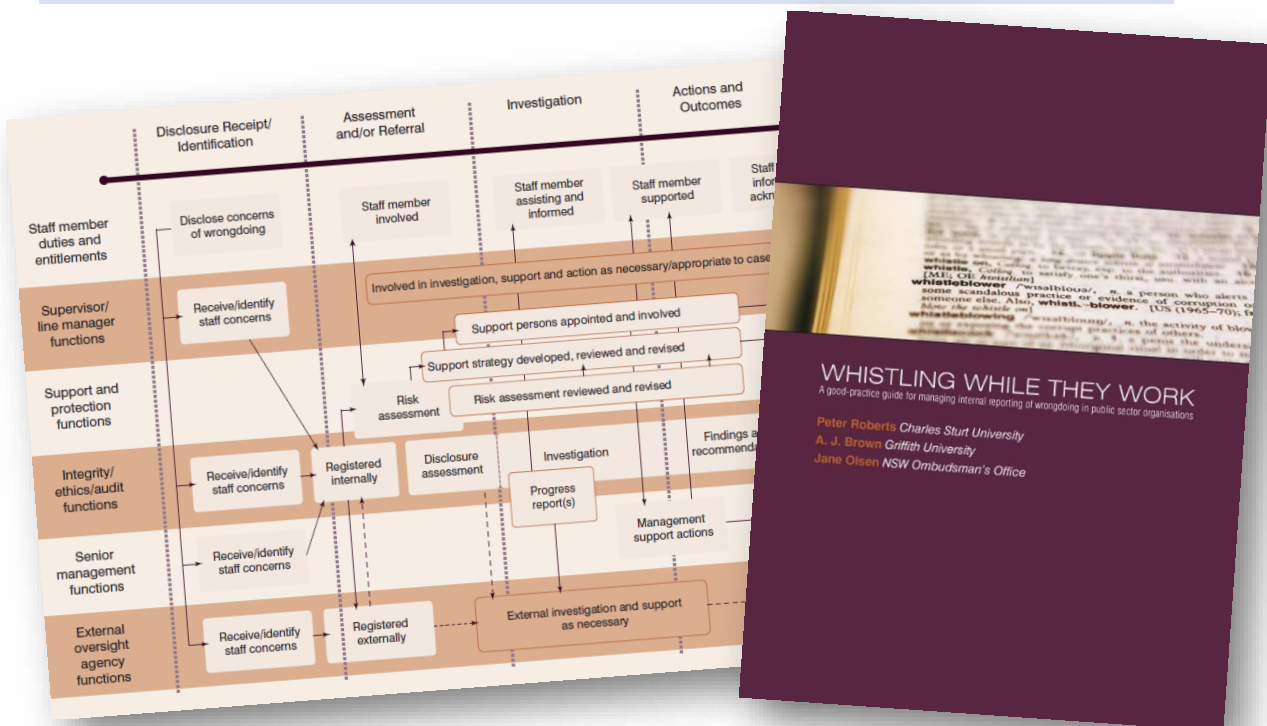


Table 2: Strength of Reported Processes by Sector (Brown & Lawrence, 2016)

	Mean	Incident tracking	Risk assessment	Support strategy	Dedicated support	Remediation	N
Australian government	6.95	1	1	1	9	2	26
Queensland government	6.59	2	6	4	1	4	54
New South Wales government	6.37	=3	3	5	7	7	86
South Australia government	6.36	=3	=4	3	4	9	47
Victoria government	6.32	5	=4	2	2	13	58
Western Australia government	6.13	6	7	6	=5	6	61
Finance and insurance	5.71	=7	8	8	3	10	53
ACT government	5.67	11	2	=17	13	1	7
New Zealand government	5.51	15	9	7	10	8	65
Health care, social (NFP)	5.21	10	10	=9	12	12	66
Other private industry	5.11	=7	13	=9	11	11	28
Northern Territory government	4.92	=7	17	14	14	3	12
Tasmania government	4.70	16	16	13	=5	17	20
Professional, admin services	4.67	=12	12	12	16	16	13
Arts, recreation, accomm (NFP)	4.67	=17	=14	16	8	14	16
Agriculture, mining, construction	4.44	=12	11	15	17	18	19
Other NFP	4.15	=17	=14	11	19	19	18
Manufacturing, wholesale, retail	4.02	=12	18	=17	18	15	35
Education & training (NFP)	3.89	19	19	19	15	5	15
Total (means)	(5.66)/(10)	(1.76)	(1.39)	(1.23)	(0.79)	(0.49)	699

As set out in **Table 2**, our initial survey of processes and procedures (Brown, Dozo & Roberts, 2016; Brown and Lawrence, 2017) allowed us to rate the strength of the process approach reported by each of 699 organisations, focused on the five elements most closely related to support and protection. As shown, of the 19 government and industry sectors covered, public sectors mostly rated higher in the reported strength of processes, but not exclusively. Some governments have already made significant efforts to upgrade guidance and procedures since release of the results (see e.g. State Services Commission NZ, 2019).

This guide does not provide detail on all aspects of organisational processes – many of which are well catered. For example, organisations are already fast learning the value of ‘speak up’ programs focused on improving reporting channels, making it easier to report, aided by research such as *The Whistleblowing Guide* (Kenny, Vandekerckhove & Fotaki, 2019).

However, little guidance addresses in detail why proactive approaches to employee support and protection are vital, what they should contain and how to implement them. Indeed, our research indicates that much of what organisations say they provide in their policies and processes is difficult to see in practice. As will be seen, many organisations do succeed in supporting whistleblowers, but this may bear little relation with their processes on paper. Early analysis suggested that whistleblowers in organisations with what might be considered ‘weaker’ official policies were actually no less likely to receive support than those in organisations who claimed to have ‘stronger’ policies (Smith 2018).

Hence the importance of not only having new policies, but translating these into living processes and practices to benefit whistleblowers, organisations and broader society alike. This guide is dedicated to helping organisations and policymakers meet that challenge.

1. Recognising and assessing whistleblower disclosures

For a long time, the basic concept of what whistleblowing is, has been clear:

‘the disclosure by organisation members of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action’ (Miceli & Near 1984: 689).

This definition reinforces why whistleblowing is so important for organisations and for society – and why, if organisations do not get their response right, information about potential wrongdoing so rapidly becomes a matter of public interest.

However, recognising what type of concerns should trigger your organisation’s policies, including which can and should entitle staff to different protections under the law or your own program, is the first major hurdle to be overcome in practice.

Our research confirms just how pivotal this first stage is, and how much it explains the mistakes organisations can make in their handling of concerns. Despite all the theory that whistleblowing is important and protected, large numbers of employees continue to suffer for reporting, and many organisations continue to be embarrassed by revelations about their poor responses – ranging from ‘too little, too late’, to active suppression, to shooting the messenger, including by accident or default.

Fortunately, there is new evidence on how these results can be minimised or averted.

What kinds of reports do I have to respond to?

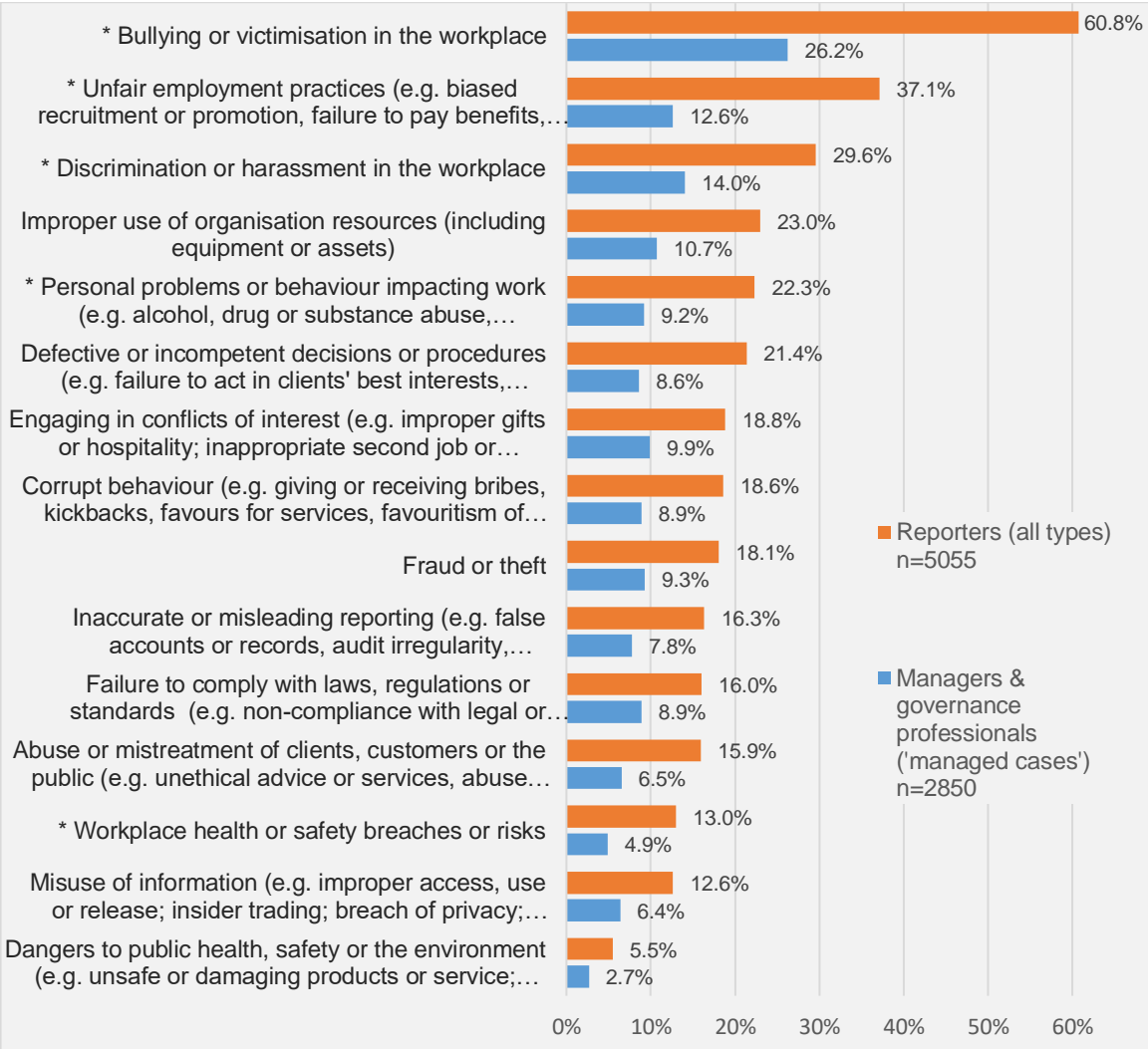
Legislation provides breakdowns of the types of ‘public interest’ wrongdoing that, if reported, triggers protections for staff. But staff can raise a wide range of grievances and complaints about things that affect them or others, including workplace or employment matters, industrial or interpersonal problems or even how their own performance is being managed.

Figure 6 shows how often, in our research, staff concerns involved each of a wide range of wrongdoing types across a comprehensive spectrum, according to the more than 5,000 reporters and 3,600 managers and governance professionals who provided data on the most serious incident in their experience. This includes both public interest or integrity types of wrongdoing, and wrongdoings often classed as related to workplace matters or personal grievances.

There are different ways of responding to these different types of problems – and many organisations do not class the latter as whistleblowing. But do they also overlap? The answer is ‘yes’ – in law and in practice, not all staff concerns can be neatly separated into integrity or public interest matters on one hand, and personal grievances on the other. Due to a new survey approach, for the first time our research reveals the high proportion that involve *both*, mixed together.

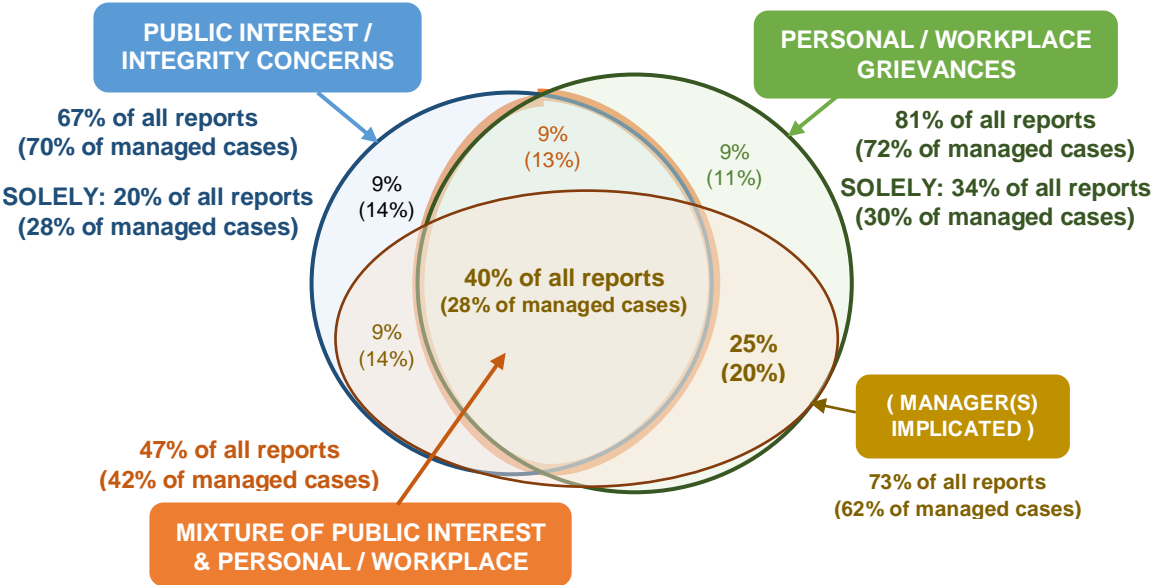
Figure 7 highlights this as the new starting point for the response to whistleblowing. In the reports described by managers and governance professionals, 70% involved integrity issues, but over half of these (42% of all cases) also involved workplace issues. Only 30% involved workplace issues alone. Reporters were similar: 66% of their concerns involved integrity issues, but over two-thirds (47% of all cases) involved a mix with workplace issues; only 34% involved workplace issues alone.

Figure 6: Types of wrongdoing concerns reported – Integrity@WERQ respondents



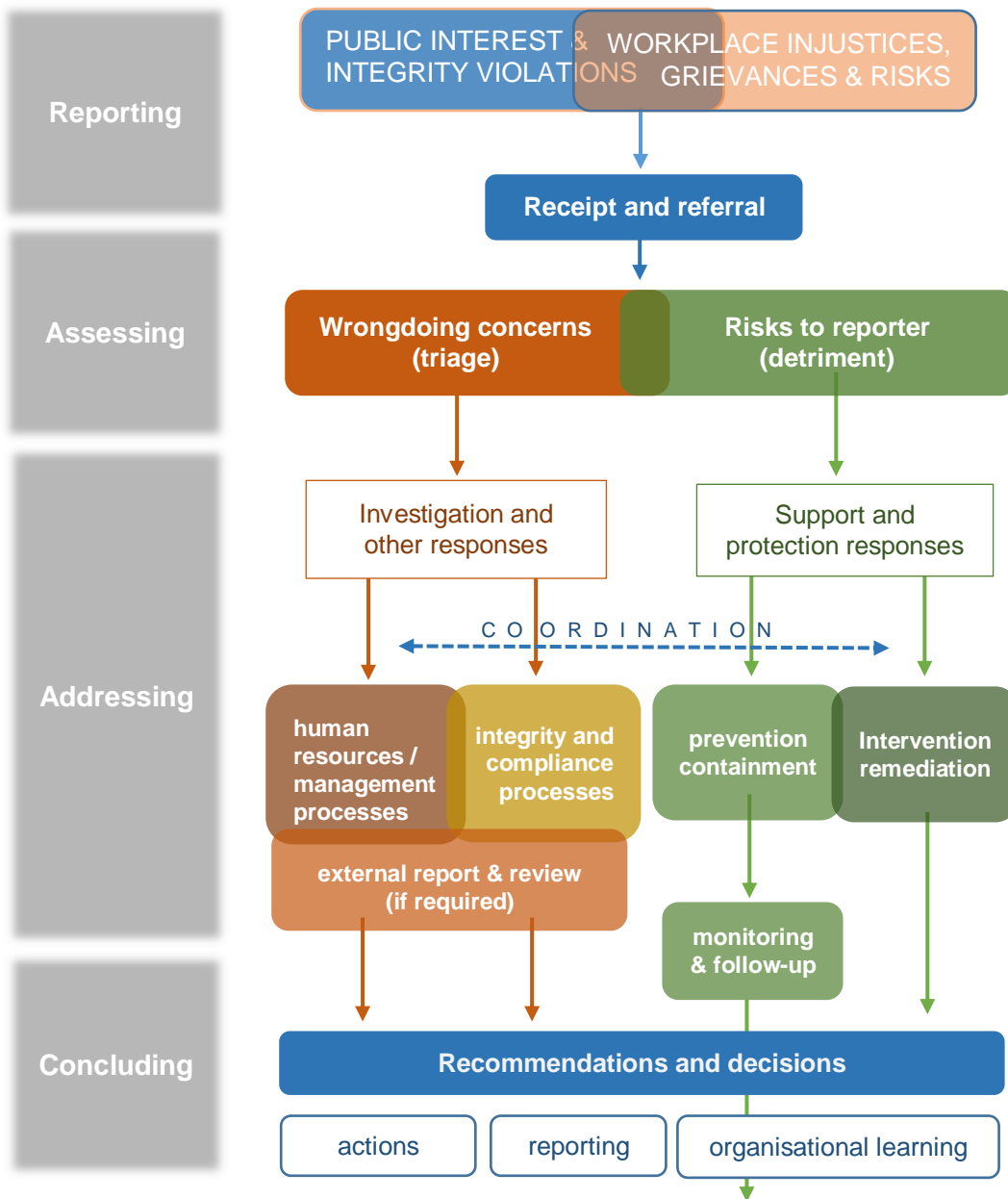
* Wrongdoing classed as 'personal or workplace grievances'. Answers total to more than 100% as more than one type could be used to describe the situation. See Dozo, Brown & Lawrence (2018), pp.17-20.

Figure 7: Types of wrongdoing reports -- grouped



A whistleblowing case flow model

Figure 8



Source: Brown, Samuels, Kayser & Vandekerckhove (2018)

In response to this new evidence and the demand for guidance, the **case flow model** in Figure 8 was developed to provide an improved concept of how disclosures should be managed in organisations. Informed by the detailed process model presented in *Whistling While They Work* (Roberts, Brown & Olsen 2011, p.109), this simplified model reflects experience across public, private and international contexts, highlighting two key lessons:

- Addressing disclosures is not a simple linear process where an organisation first responds to wrongdoing and only worries about the welfare of reporters later – instead, the **right steps for both** must be considered upfront;
- Initial assessment must recognise exactly what **mixture of wrongdoing issues** is raised by the report, in order to determine the right responses – including assessment of the true risks facing the staff-members involved, as further discussed below.

Why case assessment matters

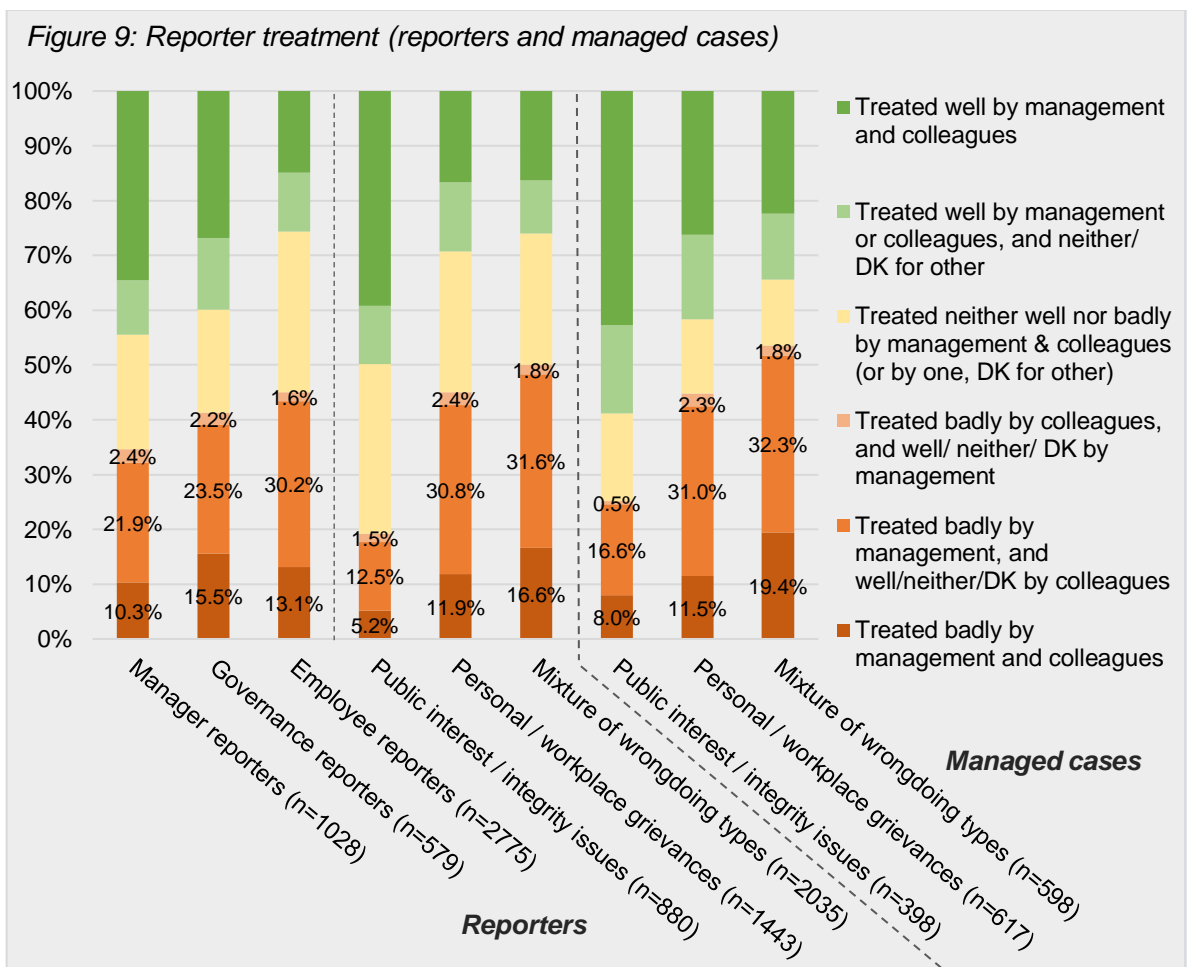
The crucial first stage in the organisation’s response – assessment – reflects both regulatory requirements and new evidence of the risks explaining how whistleblowing cases come to be mishandled in organisations, so much of the time.

Under most whistleblowing laws, including Australia’s new Corporations Act provisions, legal protections apply to all disclosures raising a reasonable suspicion or belief of an integrity issue even if they **also** involve workplace grievances. It is only if a disclosure is **solely** an individual’s workplace grievance or policy disagreement that whistleblower protections are not triggered. Even then, other laws such as the *Fair Work Act 2009 (Cth)* may still apply.

However, we know from research that failure to properly recognise a disclosure, and manage the full range of issues raised is often the first step towards bad outcomes for whistleblowers and cost and damage to the organisation.

Figure 9 shows the results when we asked our survey respondents how well or badly reporters were treated as a result of raising their wrongdoing concerns. In all, **42% of reporters said they felt they were treated badly** by their management or colleagues. Managers and governance professionals agreed reporters were treated badly in **34%** of the cases they described. As in previous research, mistreatment by management was identified as a significantly greater problem than mistreatment by colleagues (Smith & Brown 2008; Bjørkelo, Einarsen, Nielsen, & Matthiesen, 2011).

These results are averages across 46 organisations – many of whom succeeded in treating far more of their reporters well, but with many organisations treating them far worse. Overall, the results confirm why whistleblower protection is still such a vital issue.



Are these outcomes inevitable? The fact that a majority of reporters said they were treated the same or well shows they are not. And this becomes clearer, when the differences between case types are examined. As Figure 8 shows, the worst outcomes are concentrated in cases involving a mixture of workplace *and* public interest concerns. In these types of case observed by managers and governance professionals, the proportion of reporters suffering mistreatment rose to **54%**.

Why are reports involving a mixture of wrongdoing types – personal workplace grievances along with integrity issues – resulting in worse treatment outcomes for reporters?

Despite being common, in ‘mixed’ cases public interest whistleblowing can more easily go unrecognised or be mishandled. A mix of public interest and workplace issues can be raised in any single report, with whistleblowing complaints routinely associated with disagreements about employment decisions and pre-existing workplace conflict (Roberts 2014).

Miscategorising such a complaint as ‘simply’ a personal grievance can lead to the wrong investigation path being chosen, confidentiality being breached or an attempt to sweep the entire matter under the carpet – deliberately or accidentally. Various cognitive biases, mental shortcuts and other human reactions can result in management ‘blind spots’, leading organisations to fail to identify, assess and respond to reporters appropriately.

Confirmation bias, for example, suggests that people have a tendency not to see what they don’t want to see, such as wrongdoing occurring in their area. And if initial reports are rejected by managers as involving only grievances, then further grievances become likely, compounding the problem (McDonald & Ahern, 2000; Soeken & Soeken, 1987).

The research shows the use or misuse of workplace grievance processes, in ways that fail to account for wrongdoing concerns, is a major problem:

- According to managers and governance professionals, investigation competence for resolving personal and workplace grievances was significantly lower than processes for resolving public interest wrongdoing ($F(2, 2879) = 80.804, p < .001$);
- In reporter and managed cases, procedural justice (whether the investigation process was fair and just) was significantly poorer in the responses to mixed wrongdoing concerns ($F(2, 3478) = 135.533, p < .001$; $F(2, 2886) = 80.880, p < .001$);
- Organisational interpersonal justice was also lower for mixed wrongdoing concerns than other concerns, according to both managers and reporters ($F(2, 1326) = 30.415, p < .001$; $F(2, 2618) = 9.965, p < .001$);
- Investigations in mixed wrongdoing cases were more likely to bog down, with 11% taking over a year according to managers ($\chi^2(6) = 30.864, p < .001$).

According to managers and governance professionals, reporters with workplace grievance concerns (including mixed wrongdoing cases) were also more likely than those with purely public interest concerns to have a history of pre-existing workplace disputes – such as dissatisfaction with one or more policies of the organisation, a decision about employment that affected the reporter, a performance management or disciplinary process, or a personal grievance, conflict or serious disagreement with managers, supervisors or colleagues.

However, there was little difference between the proportion of personal grievance *only* reports where the reporter had an existing dispute, and the cases involving mixed wrongdoing. Similarly, the presence of pre-existing disputes and conflicts does not emerge as a significant risk factor for reporter mistreatment. So, poor treatment of mixed wrongdoing reporters does not appear to be inevitable from their history, but rather, appears to relate to decisions about how the disclosure is managed.

‘Defending the organisation, but not fixing the issue’

Sally McDow, a lawyer with 15 years international experience, had been divisional head of compliance in a large Australian energy company for four years when she disclosed to superiors that other managers had requested her to falsify audit findings about high risks of non-compliance with environmental and other laws.

Sally was also asked to present the changed findings to internal and external stakeholders, including investors. Senior colleagues had previously been terminated over similar requests.

‘Rather than properly addressing the issues, the first response was to appoint a person with human resources skills to review the audit report, even though it revolved around technical engineering and legislative issues,’ Sally said.

‘This person dismissed the concerns as invalid, even though they had no engineering or legislative training or skills to make such a finding.’

‘When the Board finally asked for an investigation, several senior persons implicated in the cover-up were appointed to important roles in the investigation. One reviewer of technical issues later in the process was a relative of one of the persons involved.’

‘Terms of reference were changed until they were so narrow, they didn’t deal with the issue.’

Ultimately, a detailed review by external experts substantiated most of Sally’s allegations, but internally was deemed “not relevant” and kept under wraps. The Board declined to get further involved on the basis that the issue “was out of their scope”.

Sally was terminated but took legal action for reprisal. In 2017, after 18 months, the company settled the claim at substantial cost financially and to its reputation.

‘People independent to the allegations, with the right skills and no conflict of interest, should have been appointed to supervise and monitor the investigations.’

‘The whole focus was on people defending the organisation and themselves from potential reputational and legal risk – not on examining the issues and fixing problems.’

Now a principal consultant with CPR Partners, Sally works in governance, culture and risk, and hopes new whistleblowing policies will help prevent the mistakes from happening again.



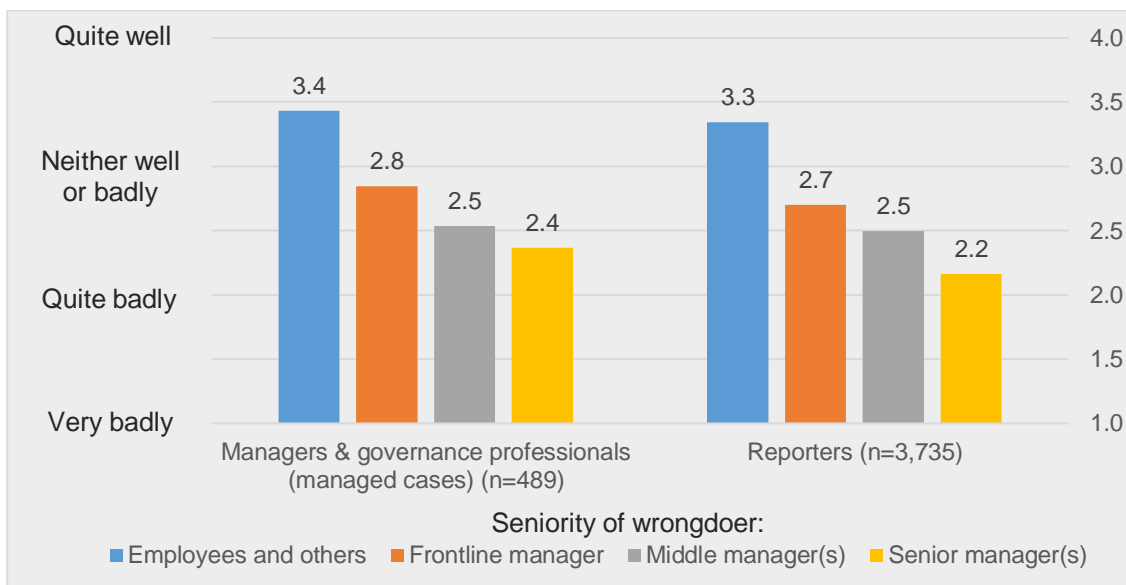
Sally McDow addressing media at Parliament House, Canberra, December 2018 (with Senator Rex Patrick, left, and Professor A J Brown). Photo: Amelia McMahon

What are the risks to reporters?

Failure to recognise and deal correctly with reports involving a mixture of wrongdoing types is just one of several things that can easily go wrong in response to staff concerns.

As also seen in Figure 8, perceived mistreatment rises among reporters who are non-managerial employees, by comparison with governance staff or managers (most of whom can be classed as ‘role reporters’ – see Section 3). **Figure 10** further highlights how reporter treatment also suffers as soon as managers are implicated in wrongdoing. Treatment worsens in direct relationship to wrongdoer seniority, confirming the role that power differentials and defensiveness play in response to reporting.

Figure 10: How reporter treated by management, by seniority of wrongdoers



Indeed, these issues can compound one another. In our research, concerns involving a mixture of public interest and personal grievances also involved significantly more wrongdoers, and wrongdoers who were more likely to be managers (77% of mixed wrongdoing reports involved more than one wrongdoer and 82% involved at least one wrongdoer that is a manager, compared to only 45% and 51% respectively for public interest type only reports ($\chi^2(6) = 331.477, p < .001$; $\chi^2(2) = 280.679, p < .001$)).

These key risks are important to identify, since preventing adverse outcomes relies on identifying such factors so that mistakes are averted.

As a result, **Table 4** uses regression analyses to show the most important risk factors associated with whistleblower mistreatment, ranked according to managers’ and governance professionals’ evidence of the highest risks of management mistreatment. This approach follows an earlier risk analysis based on our public sector research (Brown & Olsen, 2008), but refined to focus on factors an organisation is likely to be able to identify when a report is first made – and can thus address in deciding how to respond, before claims arise.

Stronger shades indicate the factors most strongly associated with poorer treatment outcomes – that is, highest risks. While the top risks stand to reason, their foreseeability also makes it feasible for organisations to start taking more concerted steps. The top three risks identified from the managed cases – seniority of wrongdoers, extent of confidentiality, and mixture of wrongdoing types – accord with those identified from the reporter cases, plus other risks relating to the scale and perceived seriousness of the wrongdoing.

Table 4: Risk factors associated with reporter mistreatment (regression analyses)

Risk factor	Poor treatment by management		Poor treatment by colleagues	
	Strength of relationship with each risk factor from the case experience described by			
	Managers & gov profs (n=675)	Reporters (n=2,373)	Managers & gov profs (n=649)	Reporters (n=2,367)
Seniority of wrongdoer/s	.27***	.25***	.05	.01
Extent of confidentiality	.25***	.17***	.23***	.13***
Mixed wrongdoing types	.08*	.15***	.10*	.08***
Existing reporter dissatisfaction with org policies	.06	NA	.09*	NA
Seriousness of wrongdoing	.05	.10***	.03	.01
Number of people involved in wrongdoing	.04	.07***	.10*	.16***
Number of people reporting	.04	-.14***	-.05	-.03
Existing: ... employment issue	.04	NA	.08*	NA
... management conflict	.03	NA	.06	NA
... performance mgt or disciplinary process	.01	NA	.02	NA
... conflict with colleagues	-.04	NA	.13**	NA
Role reporter (see section 3)	-.06	-.02	-.03	-.12***
R ²	.24	.23	.14	.06
Model	F (12,662) = 17.6***	F (7,2365) = 100.8***	F (12,636) = 8.5***	F (7,2359) = 24.1***

Note: Result significant at * $p < .05$, ** $p < .01$, *** $p < .001$. For details, see Olsen & Brown (2018).

According to reporters, a factor that reduces the risk of poor treatment by management is if more people reported the wrongdoing, although the cases described by managers and governance professionals did not identify this 'safety in numbers' as a protective factor. Also, as one would hope, staff reporting as part of their job role experienced less mistreatment from colleagues (see section 3).

In addition, as already noted, managers and governance professionals were asked whether the reporter was also concerned about a range of existing disputes when they reported. However, the presence of these mixed complaint issues did not show up as a major risk, confirming that the difficulties in dealing with disclosures lie elsewhere.

As set out in the Background, some laws already require organisations to have procedures for assessing these risks – and many organisations say they have them. For example, of the 36 organisations who provided this data in the second phase of our research, all indicated that risk assessment occurred, with 26 saying this happened as soon as a concern is raised, and 10 indicating they were assessed if and when any conflicts or problems arise.

But in fact, risk assessment currently occurs far less than many organisations claim. When we asked survey respondents, only 8% of reporters (n=3,854), 20% of governance

professionals (n=885) and 29% of managers (n=1,946) indicated any risk assessment ever took place, to their knowledge, in the cases they described.

However, where risk assessment **does** occur, it is clearly paying off.

Figure 11 shows the strong relationship between whether risks were assessed and the treatment ultimately experienced by the reporter. Crucially, the results also show it matters **when** the risks are assessed – demonstrating why the assessment phase of the case flow, right at the outset, is so important (Figure 8).

If only assessed once conflicts or problems began to arise – that is, too late – the assessment made little difference, especially according to reporters. However, the outcome was much better if risk assessment occurred **as soon as the report was made** – which was in 13% of cases according to governance professionals, and 21% of cases according to managers.

These results confirm that simply considering what could go wrong for reporters, before anything does, can make a crucial difference in helping place the organisation on the right path. For public agencies, advice is in the form of risk assessment templates for reprisals and other conflict from the [NSW Ombudsman \(2018\)](#) or [Queensland Ombudsman \(2019\)](#), as well as from the Commonwealth Ombudsman (2016) and others.

Managers and governance professionals already building this first step into their cases are yielding the results – showing great promise for better outcomes into the future.

Figure 11: The value of risk assessment – how reporter treated



Note: For managed cases, one-way ANOVAs (post hoc comparisons using Tukey HSD test) showed all significant differences at the $p < .001$ level for treatment by management ($F(2,1683) = 274.51, p < .001$) and by colleagues ($F(2,1597) = 91.93, p < .001$). For reporter cases, the same showed all significant differences at either $p < .001$ or $p < .01$ level for treatment by management ($F(2,2975) = 105.29, p < .001$), and at the $p < .001$ level between assessing risks immediately and other options for treatment by colleagues ($F(2,2977) = 44.74, p < .001$), but no difference between only assessing when problems arose and not assessing at all.

What kind of investigation?

Finally, as already shown, your organisation's first decisions regarding the right responses to the wrongdoing concerns, themselves, are crucial to the outcomes.

Our research shows how the cases with greatest complexity – and highest risks of reporter mistreatment and other conflicts and costs – demand the most careful decisions. Yet these very often are the ones most likely to be met with management avoidance or denial, unless plans are in place to ensure otherwise.

For example, Figure 9 and Table 4 showed why organisations should be alert to the risky, complex nature of mixed wrongdoing reports, rather than sweeping them away as grievances. But according to reporters (n=3,030), risks of detriment were only assessed at the outset of 5% of these mixed cases, compared with 9% of purely public interest concerns.

Organisations that mishandle investigative decisions should not expect the issue to simply go away. Research shows that employees are less likely to report if they believe management will not act to deal with wrongdoing (e.g. Near et al., 2004; Wortley, Cassematis & Donkin, 2008) – but reporting which meets with inadequate responses is often the fuel for further reporting, particularly when allegations involve management. This is especially true if the responses compound in repercussions for reporters, which far from silencing them, may become the trigger for public exposure (see section 5).

Regulatory guidance, training and external resources are available for investigations and dispute resolution, in compliance, audit, integrity, conduct, disciplinary and human resource matters. The chief lesson from new research is the need to anticipate and integrate the different responses needed to most staff-reported wrongdoing concerns **from the outset**, before investigative or other responses commence – as set out in Figure 8.

Correct assessment of the wrongdoing issues is, once again, the starting point. This is especially the case where concerns arrive with workplace grievances or management conflicts already in tow, or are painted by managers simply as such, when in fact, integrity issues may be involved. Examples of these risks include:

- Wrongly classifying disclosures as not requiring an integrity response, or as not triggering whistleblower protections, because a personal work-related grievance is involved (e.g. contrary to section 1317AADA(2)(b) of the Corporations Act); or
- Failing to deal with a concern because it *also* involves a disagreement over the policies of an organisation or a government (e.g. contrary to section 31 of Australia's *Public Interest Disclosure Act 2013*).

Practical questions need to be answered by managers or casehandlers right from the start, to avoid matters slipping 'between the cracks' or being swept to one side; compromised by rushes to judgment or to inform alleged wrongdoers; or suffering from miscommunication, inconsistent advice or poor timing of decisions. The next section highlights support roles and actions, while section 3 also further reviews key roles and responsibilities on which these decisions rest. But threshold questions include:

- Who is sufficiently independent and skilled to assess, investigate and oversight, particularly if the wrongdoing implicates senior management?
- Who will assess the right investigation path in mixed wrongdoing cases – for example, using a joint assessment and case management panel from different functional areas, such as human resources and internal audit or compliance?
- Who is sufficiently skilled and respected to ensure processes are coordinated, including to communicate with, support and manage the expectations of the reporter – without this defaulting to either the investigator(s) or ultimate decision-maker?

Key actions

- **Policy** – an organisational policy including procedures which communicate clearly to managers on the case flow to be followed.
- **Response** – training and guidance for all managers on the types of wrongdoing reports that must be confidentially referred to skilled and independent staff, as soon as they are made.
- **Risk assessment** – clear duties and procedures for assessing the risks to a reporter from the point of first report, using a risk matrix customised to the organisation, with emphasis on the proactive action and monitoring to be taken to address risks in each case.
- **Triage** – a strategy for ensuring wrongdoing concerns are fully assessed for the subjects potentially involved, by appropriately experienced staff, before allocation for response; with oversight and coordination by a sufficiently senior staff member.
- **Skills development** – training to prepare key managers and specialist governance staff, *before* disclosures arise, for taking on investigations and cases which encompass different types of wrongdoing response (e.g. human resources, integrity and compliance); including practical experience in identifying integrity and misconduct issues that may be contained in other types of conflicts, grievance and workplace disputes.

2. Supporting and protecting

The good news is that support and protection of whistleblowers is possible.

As shown in Section 1, whistleblowing does not have to be a universally damaging experience for reporters or organisations. On average, more than half of reporters in our research indicated they were treated well or no differently by management and colleagues. This is consistent with earlier research confirming that not all whistleblowers suffer, and that and the rates at which they do, vary across contexts and organisations (Smith 2014).

While this still means adverse outcomes for reporters in many organisations, it also means organisations have a major opportunity to ensure that their assessments of reports leads to actions aimed at minimising those outcomes.

Further, the fact that whistleblower suffering is not inevitable creates an obligation on organisations to make their best efforts to prevent detrimental outcomes. Under Australia's Corporations Act, the new risk of liability if a company fails to fulfil a duty to prevent detrimental acts or omissions (section 1317AD(2A)) follows on longstanding obligations to protect whistleblowers, not only under disclosure legislation but workplace health and safety, and general employment law. Examples include:

- The NSW District Court decision in *Wheadon v NSW* (2001) requiring the NSW Police Service to pay \$664,270 in damages for failing in its duty of care to one officer who reported suspected corrupt conduct, including by:
 - failing to give support and guidance to the officer;
 - failing to provide the officer with a system of protection (including active steps to prevent or stop harassment and persecution);
 - failing to properly investigate the officer's allegation; and
 - failing to assure the plaintiff that he had done the right thing by reporting corruption;
- Employers' duty of care to prevent 'reasonably foreseeable' psychiatric injury to an employee (*Koehler v Cerebros (Australia) Ltd* [2005] HCA 15);
- The Queensland Court of Appeal's decision that an employer investigating complaints of serious misconduct 'ought to have known' that the parties would be placed under great stress, and that 'prolonged workplace stress could detrimentally effect the physical and mental health of employees ... and that if unsupported in the workplace, that stress could develop into mental illness' (*Hayes & Others v State of Queensland* [2016] QCA 191).

Protect from what?

Section 1 set out known risk factors for reporter mistreatment, but what types of impact constitute mistreatment, that organisations can and should guard against?

Whereas most laws and procedures speak of "reprisals", or deliberate retaliation, our research identifies a new picture of the scale of adverse impacts experienced by many reporters. Indeed, even when not regarding themselves as having been treated badly, most reporters experience a range of negative consequences which it is the organisation's duty to try and prevent, minimise or manage.

Figure 12 sets out the types and level of repercussions experienced by reporters, according to managers and governance professionals who dealt with cases (managed cases) as well as reporters themselves. The vast majority (82.4%) of reporters experienced at least some type of repercussion, although 17.6% did report feeling no adverse repercussions at all.

Figure 12. Reporter repercussions (extent), by wrongdoing type (managed cases and reporters)



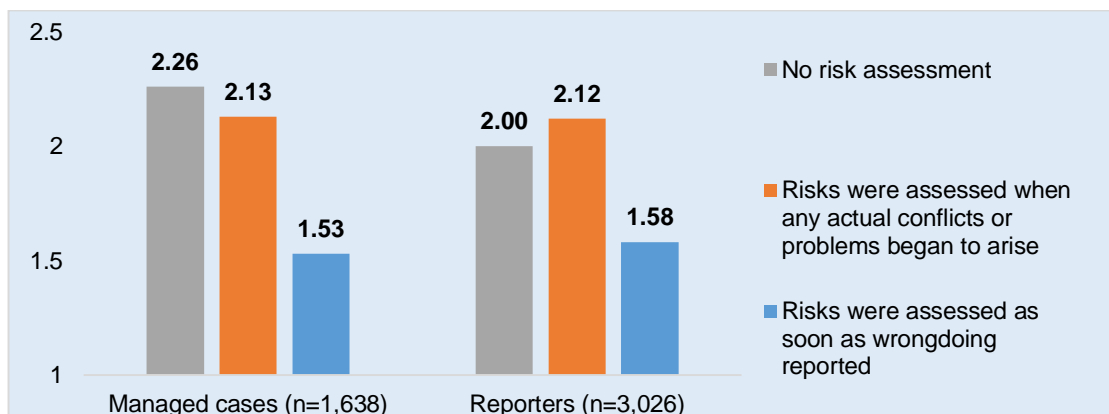
However, whereas previous research has focused on deliberate retaliation and employment reprisals (Miceli, Near & Dworkin 2009; p.101; Smith & Brown 2008, p.129; Miceli and Near 2013), Figure 12 shows these types of reprisal are actually comparatively infrequent, even if severe when they occur. Instead, the most prevalent were **informal, ‘collateral’ impacts such as stress, impacted performance and isolation**, over and above deliberate reprisals and employment actions.

Around four in every five whistleblowers (81.6%) experienced at least one type of these informal repercussions, compared with one in two (48.8%) who experienced at least one type of formal repercussion. The fact that 25% of reporters in our total sample were describing the results of reporting in a previous organisation, not their current one (from which they obviously could not have yet been sacked), reinforces the significance of these data.

Figure 12 also further confirms the importance of identifying the mix of wrongdoing types being reported when assessing and managing the risks of repercussions. Once again, reporters of mixed public interest and personal grievance matters fared significantly worse than reporters of either public interest or grievances alone – according to both reporters and managed cases. In particular, mixed wrongdoing reporters were more likely to have disciplinary or legal action against them than other reporters.

Figure 13. Extent of reporter repercussions, by risk assessment

(1 = None at all, 2 = A little, 3 = Some, 4 = Quite a lot, 5 = A great deal)



Risk assessment is once again the first step to prevent and reducing repercussions, however. **Figure 13** shows that the extent of all repercussions experienced by reporters was significantly lower if risks were assessed, according to both the managed cases and the reporters. Indeed, as also seen earlier, repercussions were no better or possibly worse if risk assessment was only undertaken when problems arose, than if there was no risk assessment at all. This reinforces the importance of risk assessment at the point of report.

These findings mean it is time to revisit fundamental assumptions about the primary risks that organisations need to seek to address, and how to address them, in their efforts to protect whistleblowers. A failure to foresee and manage the informal or ‘collateral’ effects of whistleblowing may have serious and direct detrimental effects:

- Unmanaged stress, work performance and isolation can lead to the end of a career;
- Informal impacts may precede or cause deliberate reprisals, make them easier to conceal, or harder to identify and rectify; and
- Management actions may easily be perceived as ‘reprisal’ by reporters, causing conflict and allegations, when they are simply a compounding of an organisational failure to manage and anticipate the welfare of individuals.

A simple failure to ‘stand up’ for employees who report, in complex situations, may be enough to lead to these impacts taking an irreparable and expensive toll.

The first step is for organisations to assess and develop responses to “repercussion” risk, not simply “reprisal” or “retaliation” risk. Previous assumptions regarding *what it is* that we should be trying to protect whistleblowers from, have likely been incomplete or maladjusted to the issues at hand. Fortunately, alongside refraining from and controlling deliberate reprisals, these impacts are within the control of organisations to proactively manage.

A proactive approach

In the face of these challenges, the **duty to support and protect** whistleblowers clearly means adapting processes to reduce or prevent adverse impacts, rather than waiting for negative outcomes to occur, expecting to staff to seek legal remedies once the damage is done, or warning staff that deliberate reprisals will not be tolerated.

The value of a different, supplementary approach, based on proactive management, was indicated by our earlier research (see Vandekerckhove, Brown & Tsahuridu, 2014, pp.307-314). To better establish the value of proactive intervention, our current research asked respondents about the extent of steps taken to deal with a number of risks, known, from experience, to be associated with or lead to detrimental outcomes.

Figure 14: Reporter repercussions and treatment, by extent of confidentiality (managed cases)

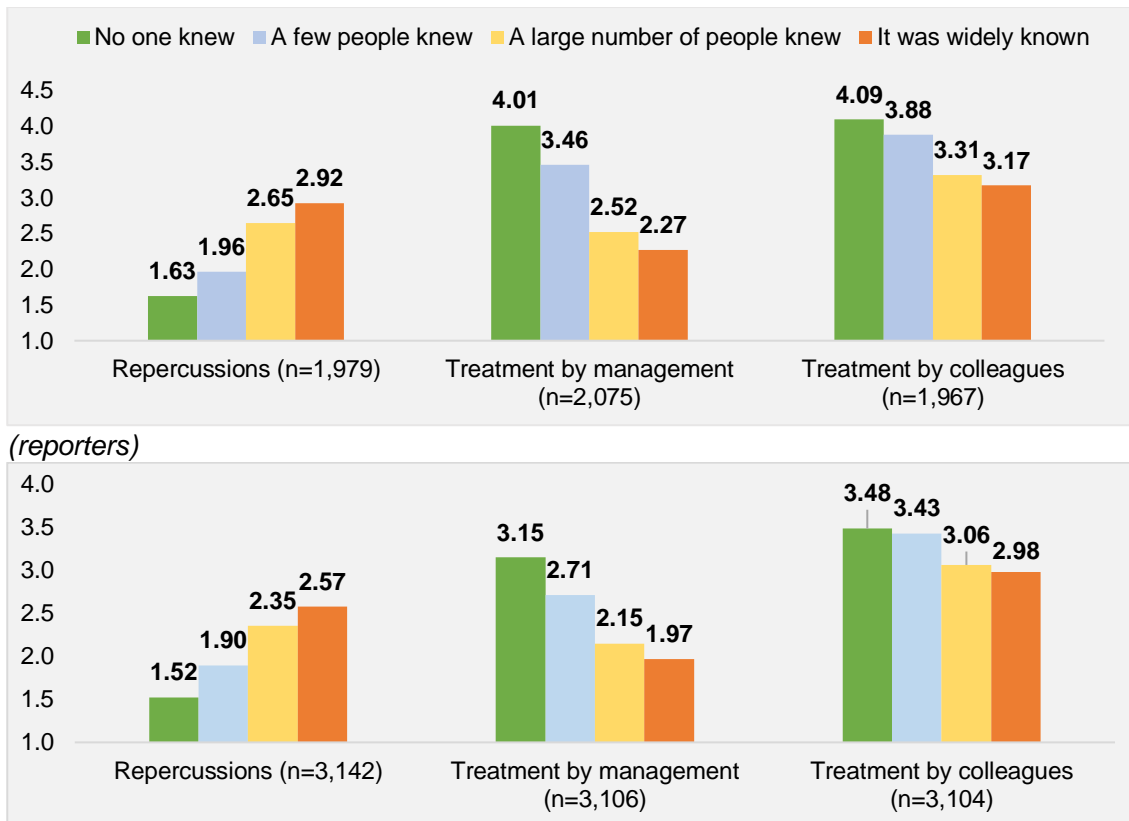
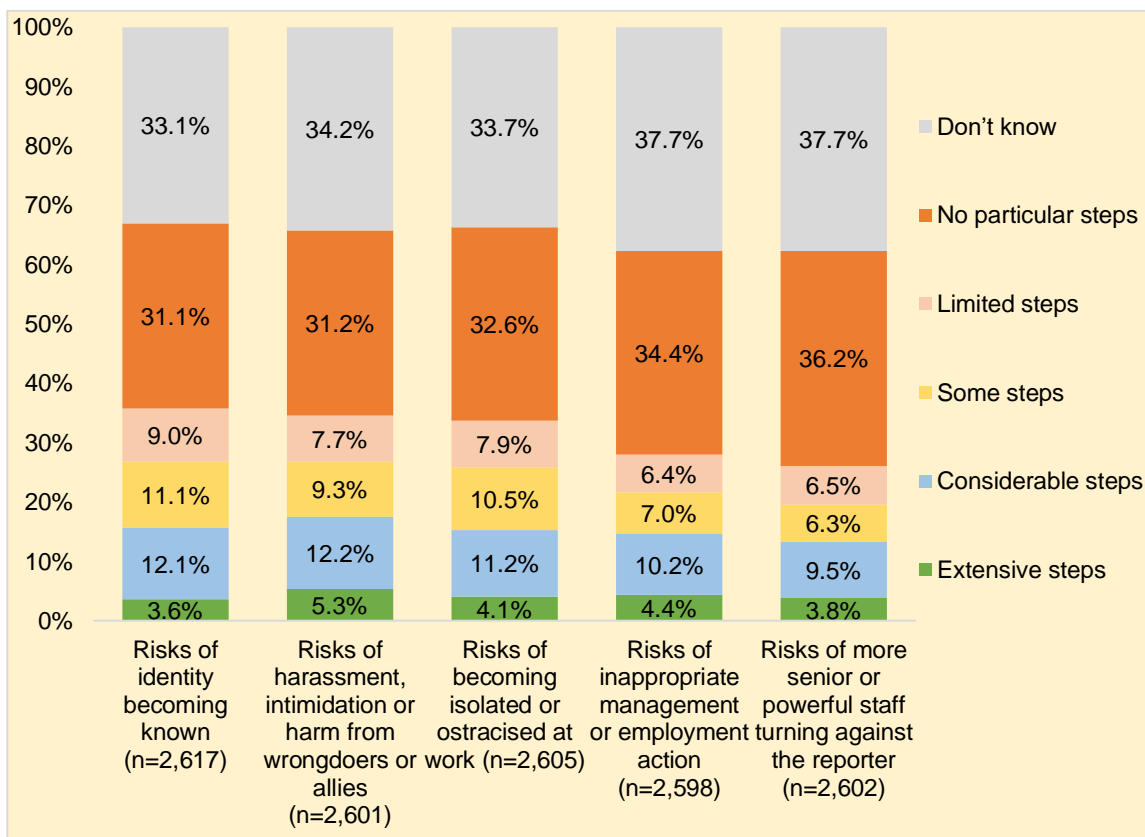


Figure 15: Proactive steps taken to deal with risks (managed cases)



For more detail and reporter results, see Olsen & Brown (2018).

The first major risk was loss of confidentiality – with the previous section highlighting the extent to which the identity of the reporter was known, as the second risk factor. **Figure 14** shows this risk just as clearly for repercussions, with these rising (and the quality of treatment falling) in direct line with how widely the reporter’s identity was known within the organisation.

Figure 15 sets out the extent of proactive steps taken by anyone in the organisation to deal with this and four other risks, according to the managed cases. Only one in four managers or governance professionals suggested at least some steps were taken to address the more common risks, such as the reporter’s identity becoming known, or harassment.

Even fewer steps were taken to deal with the more serious risks such as inappropriate management or employment action. This shows that proactive strategies are not generally in place, in the organisations surveyed. Moreover, when efforts are made to manage situations, they are not prioritised by need or complexity. Public interest only reporters indicated that significantly more proactive steps were taken to deal with risks they faced, compared to mixed wrongdoing reporters ($F(2, 2992) = 5.093, p < .01$).

Nevertheless, where it does occur, proactive intervention is associated with better outcomes for reporters. **Table 5** indicates this to be the case, from the perspective of both reporters and managed cases. The more steps that were taken to deal with risks, the better managers perceived that reporters were treated by both management and colleagues – and the same pattern was true for reporters, even though the associations were weaker.

Given the low current incidence of proactive intervention – as for risk assessment – these results show the opportunity available to organisations to address and reduce poor outcomes. Rather than over-relying on confidentiality to protect reporters, the results also show the need and value of other direct steps, especially as confidentiality may often be absent or fleeting. By taking any supportive action in the face of these risks, there is strong evidence that more organisations can achieve far better outcomes, far more of the time.

Table 5: Relationship between extent of proactive steps and reporter outcomes

Steps taken to deal with risks of:	Better treatment by management		Better treatment by colleagues		Fewer repercussions	
	Managed cases	Reporters	Managed cases	Reporters	Managed cases	Reporters
Harassment, intimidation or harm from wrongdoers or allies	.55	.38	.36	.19	.29	.17
Becoming isolated or ostracised at work	.54	.30	.34	.17	.28	.13
Identity becoming known	.50	.35	.33	.21	.26	.13
Inappropriate management or employment action	.49	.31	.32	.14	.22	.10
More senior or powerful staff turning against them	.44	.30	.29	.14	.20	.12

Note: All managed case results significant at $p < .001$; all reporter results significant at $p < .05$.

Just plain lucky?



In 2001, Dennis Gentilin joined the National Australia Bank's foreign exchange option trading desk after completing the bank's graduate program. During his first year on the desk he became aware colleagues were misreporting transactions to reduce the volatility in the daily profit and loss – a practice widely known as “smoothing”.

A year later, increasingly uncomfortable with culture and practices in his team, Dennis raised a number of concerns (including “smoothing”) with a senior manager – but his concerns fell on ‘deaf ears’. For the next 12 months he questioned his own moral judgment, wondering if he was the one who didn't belong, and coped by ‘turning a blind eye’. But eventually, becoming aware of the possible extent of the losses, he decided he couldn't continue.

‘My first instinct was to resign, but my wife implored me to say something. For the first time, I sought advice from a colleague I respected outside my team. He made me realise I really had no choice, and he gave me confidence this time, something would be done.’

Dennis approached the same senior leader, who this time had to act, and also told a supportive colleague in his own team what he had done. Within days, another bank analyst also discovered the losses were even larger than thought – ultimately \$360 million.

The incident became a defining moment in NAB's history, resulting in it losing its mantle as the nation's biggest bank. But despite the fallout, including appearing as a witness in the subsequent court cases, Dennis remained at the NAB for a further 12 years, going on to lead a FX institutional sales desk before working in group strategy.

‘Was I just plain lucky?’ Dennis says luck certainly played a role. To begin with, he didn't have to face anyone remotely associated with or supportive of the conduct – all either resigned or were dismissed. Any risk of retaliation was minimised.

‘Also, the senior leaders at NAB strove to support the whistleblowers. My identity was never publicly revealed by the company – only when the media got their hands on court documents. Most crucially, leaders and peers in my own teams continued to support me, refusing to label me as used goods. Instead they kept seeing potential and providing opportunities.’

Just prior to Dennis leaving the company in 2016, the NAB even endorsed his book on the origins of ethical failures – with chairman Dr Ken Henry writing the foreword.

‘Even if I was lucky, there's no reason the support I received couldn't be part of a planned response. My experience proves organisational justice, ethical leadership and peer support can and do work. The challenge is for organisations to ensure these are not left to chance, and establish processes to ensure they're in place, before and when they're required.’

Support – who provides it and does it work?

Support can take many forms. In addition to protecting a reporter’s confidentiality, managing situations where confidentiality is unlikely or impossible, and intervening directly to deal with potential conflicts, organisations have a responsibility to ensure “soft” forms of support.

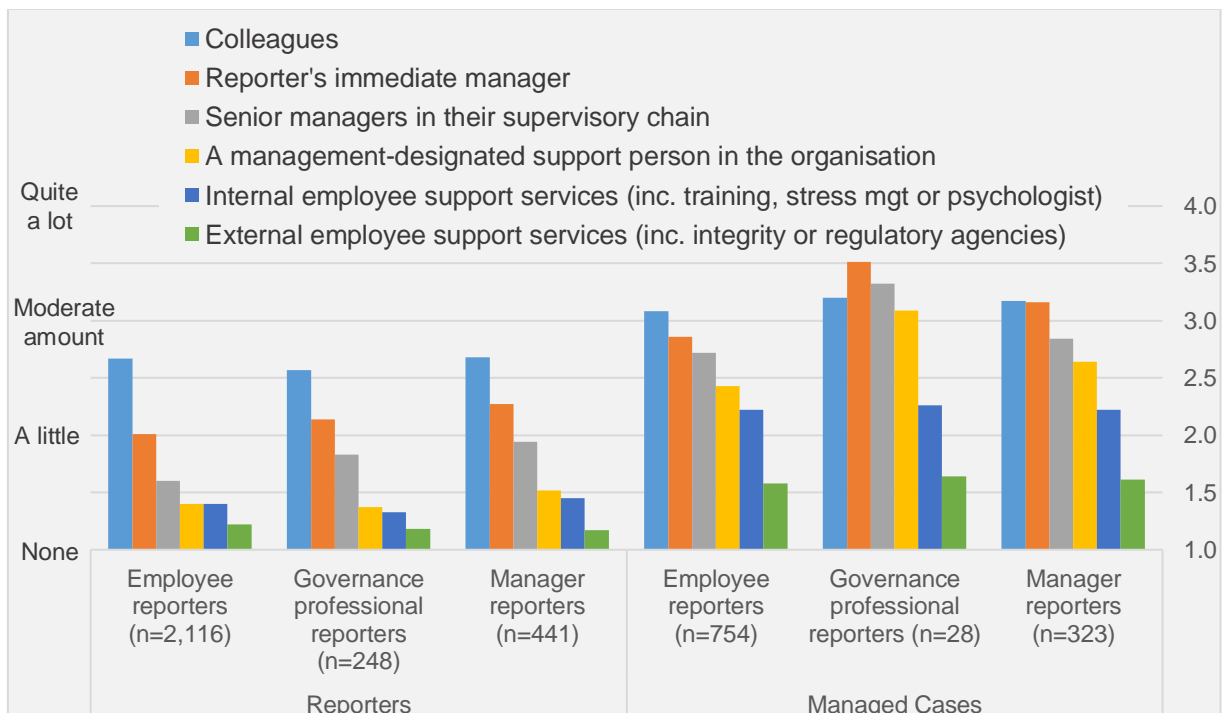
This includes basic things like information – it was a major concern that as seen in Figure 4 (p.9), half of all employee reporters either did not know if their report was investigated, or believed that it wasn’t. It may also require emotional support, overcoming the effects of stress and risks of isolation, or of fears of reprisal that may or may not be real. Practical support may mean adjustments in work duties or location, time off, conflict resolution, or access to legal and other services, in addition to the types of interventions in the last section.

Where support is provided by the organisation, especially in the form of emotional support from managers, it becomes one of the strongest predictors that a whistleblower will feel well treated. So it clearly works.

However, as with risk assessment and proactive management, our research showed that relatively low levels of support are currently provided. **Figure 16** shows the level of support experienced by reporters, on average, from a range of possible sources in the organisation. It shows that overall, managers and governance professionals have a more positive view of how much support is given than the reporters who need it. Further, they assess more support is provided to governance and manager reporters than normal employees – which while likely, emphasises that less support is provided to those who are most vulnerable.

Most importantly, after colleagues, support to reporters is currently overwhelmingly dependent on the management chain. While these sources of support are crucial if available, they highlight the great fragility in current support provision – especially when, as seen earlier, management implication in wrongdoing poses the greatest risk factor for repercussions. The low level of support provided from independent sources, designated or tasked by management for the purpose, reinforces this fragility. Given the risks of management support not being available, the lack of alternative sources does much to explain the level of poor outcomes, and points to big opportunities for establishing a more supportive environment.

Figure 16: Support provided to reporters by the organisation



Creating the environment for effective outcomes

Currently in organisations, what are the factors that are best contributing to an environment in which support is being provided to reporters? Moreover, given that efforts to support and protect whistleblowers are not 'stand alone' processes, but coincide with so many other crucial processes including those relating to the investigation response and overall management attitudes to reporting, what does the experience of the reporters, managers and governance professionals in our research tell us about what currently works?

To help gain a better overview, we conducted a systematic examination of the role played by a range of organisational factors in shaping key whistleblowing processes, and the degree to which these, in turn, influence outcomes for organisation and reporters. Using the PROCESS program (Hayes, 2013), involving regression and bootstrapping techniques, we analysed the combined lessons from 3,310 reporter cases and 2,994 managed cases, from 38 organisations in the study. To help focus on what makes the difference, we controlled for a range of other factors including respondent personality, attitudes, and several key characteristics of the wrongdoing incident at the heart of each report.

Most of the **outcomes** against which we measured the success of cases have been introduced earlier – investigation outcome and organisational reforms (see p.9), reporter treatment (p.15) and repercussions for reporters (p.24). We also added quality of the investigation, in terms of efficiency and competence, as an outcome in its own right.

To measure the overall **processes** being used in organisations to respond to reports, we focused on the level of *support* provided to the reporter by the organisation (p.29), not including colleagues or external support; how any investigation was conducted; and whether reporters were generally treated with respect. For these we used two well established concepts: the *procedural justice* of the investigation (e.g., procedures applied consistently and based on accurate information) and *interpersonal justice*, both elements of organisational justice (Colquitt et.al., 2001; Dawley, Andrews & Bucklew, 2008).

The factors and results are set out in **Figure 17**.

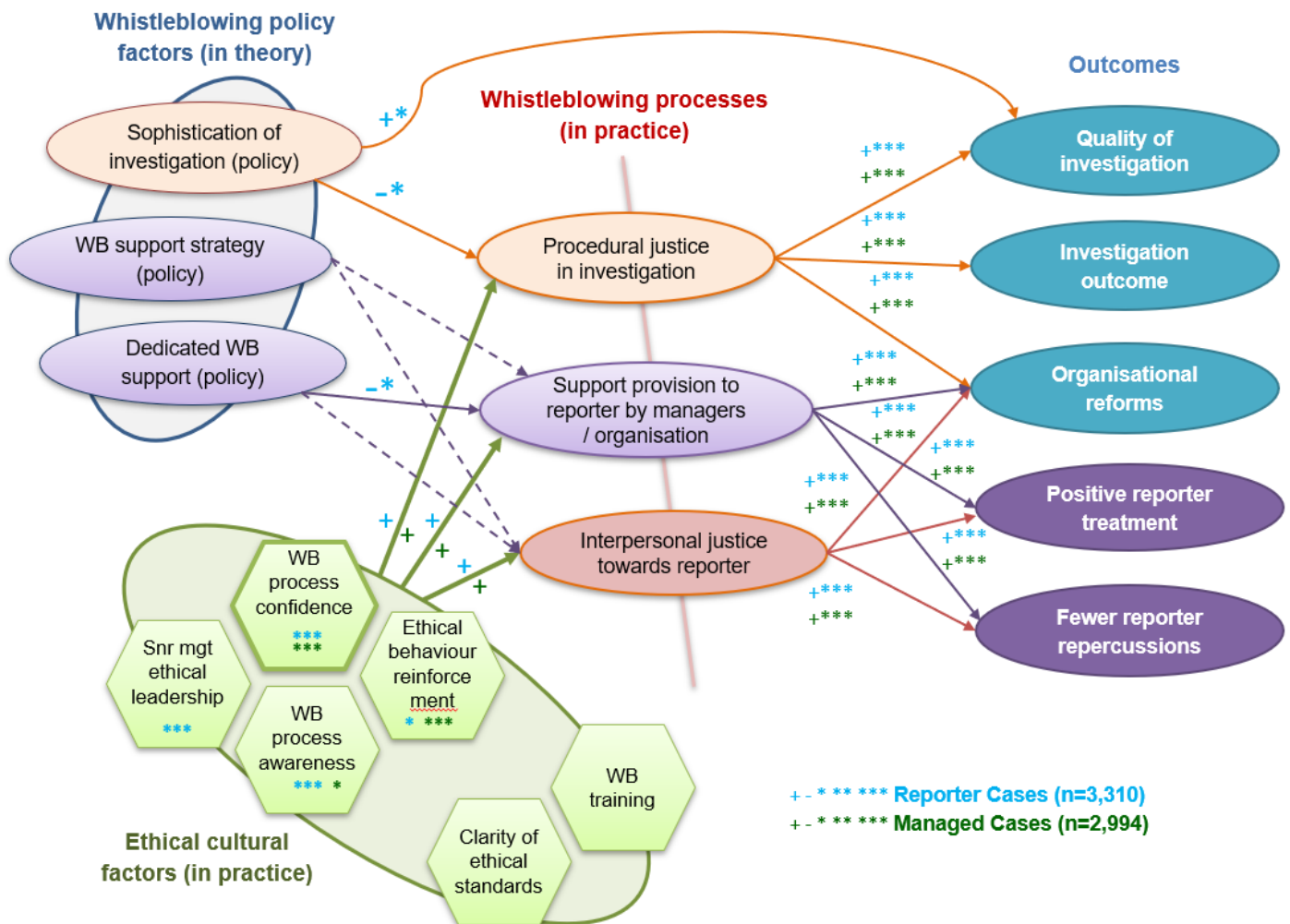
Importantly, there were strong relationships between all three key processes and the outcomes to which they were expected to relate. For example, as already noted, the level of *support* provided by organisational actors is a crucial determinant of *reporter treatment* and *repercussions*, according to not only reporters but managers and governance professionals describing cases. As well, support is itself strongly associated with the case resulting in positive organisational reforms. Similarly, professional, procedurally just investigations were crucial to whether investigation and reform outcomes were secured from the cases.

These results provide important confirmation that the key processes on which current guidance and governance efforts are already focused, as set out in this guide, really do matter for achieving success in the management of disclosures.

But what currently contributes to effective processes? We examined the role of nine different factors as possibly contributing to each of these processes, directly, as well to each of the outcomes directly and via their influence on the processes.

Importantly, we found no relationship at all between manager and governance professionals' assessments of how the key processes were working, and the supposed strength of their **organisation's policies** as relevant to each process. In fact, any signs of relationships tended to be negative. As explained earlier (p.10-11), there are already reasons to doubt whether what organisations think or say they are doing, on paper, is translating into practice. It should be remembered, evidence about the current state of the policies came from a single senior manager or governance professional in each organisation. These results tend to confirm those doubts.

Figure 17: Factors influencing successful whistleblowing processes (PROCESS)



By contrast, provision of procedural justice, support and interpersonal justice, and their positive effects on outcomes, were highly explained by four of the six factors providing indications of the **state of the ethical culture** of the organisation – in practice. In the experience of reporters and those managing cases alike, all processes were boosted where:

- the respondent assessed that *ethical behaviour was reinforced* in their immediate work area (for example that ethical conduct was normally valued and rewarded, and that unethical conduct would normally be fairly punished);
- the respondent had higher *awareness of the organisation's whistleblowing processes*, including what support was available; and
- the respondent had more *confidence in the organisation's responsiveness to whistleblowing* (such as beliefs that reports would be taken seriously and that management was serious about staff protection).

As well, although this did not appear as a significant factor for managers and governance casehandlers, reporters' experience of the processes was positively influenced if they assessed there to be stronger *ethical leadership by senior management* in their organisation – for example, if senior managers communicated the importance of ethics and integrity clearly and convincingly, and set a good example.

These results provide support to other research indicating that ethical leadership positively influences employee attitudes, performance and ethical behaviours, including the internal reporting of wrongdoing (Den Hartog, 2015; Cheng, Bai & Yang, 2019) – but that low ethical

culture leads not only to increased unethical behaviour, but reluctance to report wrongdoing (Kaptein, 2011; see also Treviño, Butterfield & McCabe, 1998). Similarly, while there is already strong reason to believe that a positive whistleblowing culture will encourage the reporting of wrongdoing (Berry, 2004; Mesmer-Magnus & Viswesvaran, 2005), our research tends to confirm that whether the overall *response* will be strong and effective, depends on the underlying ethical culture and leadership in the organisation, consistent with integrity and compliance more generally (Treviño et.al., 1999; Busmann and Niemeczek, 2019).

One practical factor that did not show an influence, however, was the respondent's level of *training* in how reporting should happen, be investigated or managed. This was unexpected, given the association proved with knowledge and *awareness* of the organisation's whistleblowing processes. While this does not mean training is unimportant for ensuring quality processes and outcomes, it suggests current training may not be contributing well enough to awareness and to those processes. This issue is examined further in section 3.

A final factor that did not show an influence was the perceived *clarity of ethical standards* in the organisation – even though ethical behaviour reinforcement and senior management ethical leadership did. In other words, the simple fact that the organisation makes clear the standards of conduct and responsibility expected of staff at a general level, and that these are well communicated, does not appear to be enough to ensure successful processes.

Overall, the analysis confirmed that attention to the **written whistleblowing policies** of the organisation is crucial, but also not enough. In reporters' experience, the relevant whistleblowing policy did sometimes influence processes and outcomes, but only in mixed ways that were contrary to expectations. For example, more sophisticated support policies tended to have a negative relationship with their actual experience of support and were associated, in turn, with higher repercussions, not less. As investigation policies increased in sophistication, reporters perceived less procedural justice and, in turn, described less positive investigation and reform outcomes. Likewise, among the managed cases the only signs were of weak negative relationships between having a more sophisticated support policy and the level of actual support provision, and between having a more sophisticated investigation policy and the level of perceived procedural justice

However, these perverse results do not mean that strong policies are not important. There was some evidence from reporters that policies become more important, in ways one would hope, in organisations with lower ethical culture – where perhaps they are needed more. For example, where confidence in the organisation's responsiveness to reports was low, a more proactive support policy *did* appear to lead to more support being provided and to reduced repercussions – even though other outcomes (treatment and reforms) remained poor. Similarly, where *senior management ethical leadership* was perceived as lower by reporters, stronger support policies did appear to at least help protect interpersonal justice.

More importantly, the results confirm that more important than policies on paper – or at least current ones – the successful embedding of whistleblowing processes, including provision of support, currently relies on **high awareness of the processes** and **high confidence in the overall responsiveness and seriousness of management** for supporting reporting. This has major implications for the importance of training, education and awareness throughout the organisation, if good processes are to yield results.

Most importantly, the research shows that effective championing and reinforcement of an ethical approach to conduct more generally, in the working life of the organisation, is vital. Far from being a mere 'feel good' factor in the style and rhetoric of managers, **senior management ethical leadership and behaviour reinforcement** are critical to an environment in which support flows, and good investigation outcomes and benefits are achieved. Whistleblowing responses are not technical processes that can be delivered without that wider commitment and supportive environment, delivered by the management culture and actions of the organisation, in practice.

Key actions

- **Diagnosis** – ensure all staff with support responsibilities understand the range of detriment support policies are trying to prevent, including informal and ‘collateral’ repercussions in addition to direct reprisals; informed by the risk assessment.
- **Support plan** – develop a plan to support the reporter and other parties as soon as a report is made, including implementing the risk assessment, with responsibilities for support clearly assigned, independently of investigation functions.
- **Confidentiality** – ensure all parties work to maximise reporter confidentiality as a protective factor, while recognising that in practice it is often impractical or impossible, and developing alternative support and protection steps for when needed.
- **Proactive management** – processes to ensure early intervention by leaders, independently of any managers directly implicated, in addressing high risk situations and that may affect early decisions in whistleblowing cases.
- **Robust support** – task trained individuals independently of the management chain to act as case manager for support, including assisting line managers in the support offered, providing or organising direct support where needed, and upward reporting to ensure support is maintained even under management pressure.
- **Investigations** – organise support resources so as to assist timely, efficient, professional and independent case responses, to maximise confidence of all parties in the investigation as a protective factor for reporters as well as investment in outcomes.
- **Ethical environment** – actively recognise and enhance managers’ ethical leadership and reinforcement of ethical behaviour, so as to support whistleblowing processes and outcomes, by
 - Recruiting and incentivising leaders who demonstrate and communicate that they encourage the reporting of wrongdoing and know how to support employees who blow the whistle
 - Integrating ethics-related incentives and sanctions into human resources performance management programs for managers
 - Internally communicating lessons and success stories on the role of employee-reported wrongdoing, including the successful support actions of managers and leaders.
- **Policy and training** – detail the procedures to be followed by managers and key personnel responsible for delivering support and protection to disclosers (and subjects of disclosure), and support them with active training.

3. Roles, responsibilities & oversight

Who is responsible in my organisation?

An effective whistleblowing program relies on well-designed strategies for achieving all the outcomes set out in the previous two sections, among many others. However, as the previous analysis shows, implementation of a high quality approach relies equally on clear identification of the roles to be performed, and responsibility for fulfilling them – from frontline managers to oversight by the Board or external agencies.

Leadership is vital. Ultimately, responsibility for ensuring safe, fair and effective processes for responding to wrongdoing lies with the top management of the organisation. Board members, chief executives and other senior leaders have a powerful impact on how speaking up about integrity risks and wrongdoing is perceived, through the attention they pay, resources they devote, language they use and messages they communicate. Organisational leaders are crucial to creating and sustaining the ethical organisational culture on which good outcomes depend, as demonstrated in section 2.

Management commitment is needed to translate values into actions that create trustworthy processes. For whistleblowing to be effective, there needs to be functional separation between many key roles, with independence for those entrusted with investigating and resolving disclosures, as well as those tasked with ensuring support.

While specialist reporting channels and hotlines may increasingly be employed in organisations, frontline managers continue to play an important role not only as initial recipients of many disclosures but also as the most accessible and available source of support, with the closest pre-existing relationship with staff (Donkin, Smith & Brown, 2008). In our research, 60% of reports of wrongdoing were first made to immediate supervisors.

Key roles therefore include knowing how to deal with reports, where they should be referred, and who should be involved for assistance and support, at the front-line of the organisation. As well, organisational procedures need to clearly outline responsibility for the range of back-room roles on which successful casehandling depends, as suggested in section 2 (Figure 7):

- assessors (e.g. what are the risks to the reporter, other parties and the organisation, how can those risks be mitigated, what action needs to be taken in response to the concerns, does the report attract legislative protection?)
- support persons (for the discloser, witnesses, the subject/s of disclosure etc.)
- investigators (may involve grievance handlers or mediators for personal grievance and public interest disclosures)
- decision-makers (determining the outcome of an investigation and response actions including implementation of systemic changes, communication and feedback), and
- coordinators (those with responsibility to coordinate different roles and the overall whistleblowing process).

Importantly, as the last section showed, these roles must not only exist in policies – to support living processes, they must be fulfilled in practice; communicated to all staff, and supported by management. There must also be organisational commitment to dealing with reports of wrongdoing promptly and thoroughly, with commensurate resourcing.

Key roles for governance professionals

Almost all organisations have one or more professionals dedicated to supporting integrity, governance, risk and compliance. Governance professional(s) play a key part in the management of whistleblowing by fulfilling many, if not all, of the following:

- specialist roles where independence is required (e.g., receiving confidential reports, conducting investigations and assessing the risks to the reporter and other parties);
- support and advice roles to managers, executives and the board;
- direct support to reporters and others, or organising and overseeing this support;
- training and education to improve awareness and capability of policies and processes;
- coordination, ensuring that others perform their role and act in accordance with policies; monitoring process and progress; and facilitating communication.

A key finding from the research is that the lack of present support for ensuring those with whistleblowing management responsibility have the expertise to fulfil their role. **Figure 18** shows the level of training that managers and governance professionals said they had received in their current role, on different aspects of reporting.

Even among our most experienced governance professionals (those who have dealt with more than 25 reports of wrongdoing), only 46% indicated they had formal or professional training in investigations, dropping to 39% in how the workplace should be managed when wrongdoing reports are made. Less than 20% of less experienced managers and governance professionals had any relevant formal or professional training.

All organisations, and especially smaller organisations which manage fewer cases, face a real exposure to risk. As seen in section 2, the quality or relevance of current training may also be an issue. But organisations whose managers and governance professionals are unprepared do not have appropriate capabilities to fulfil their responsibilities and take advantage of the benefits whistleblowing offers, damaging organisations and their people.

Figure 18: Level of training of managers and governance professionals (by experience with the number of reporting cases in current organisation)

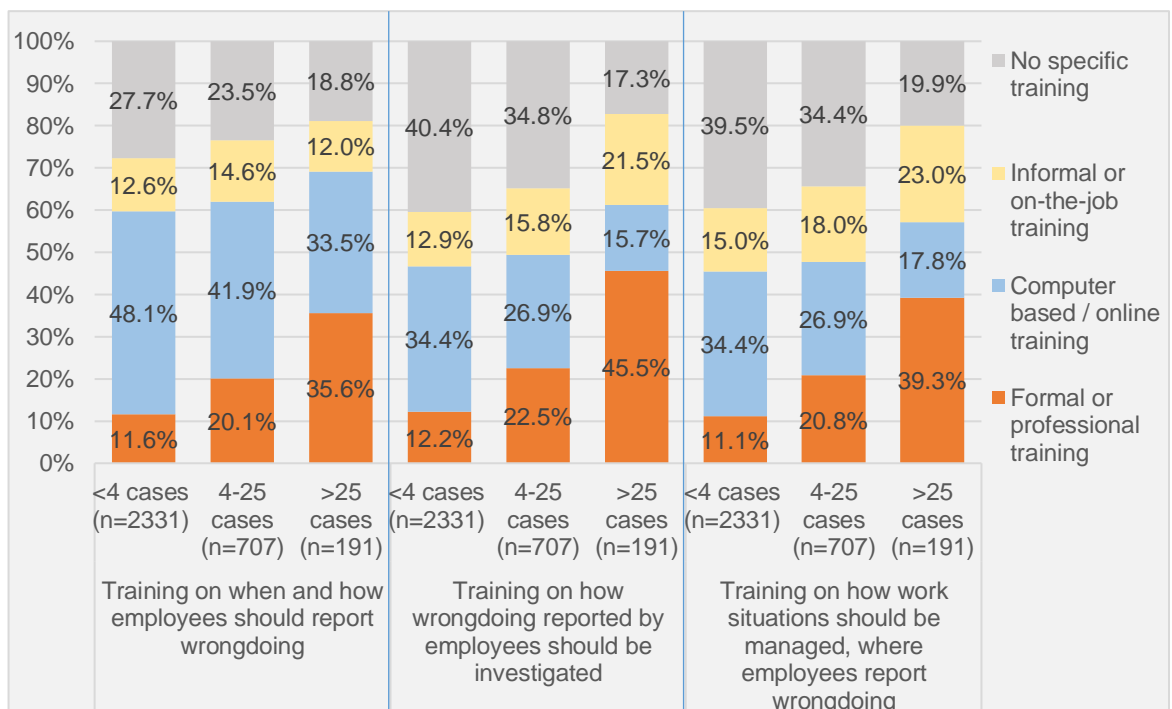
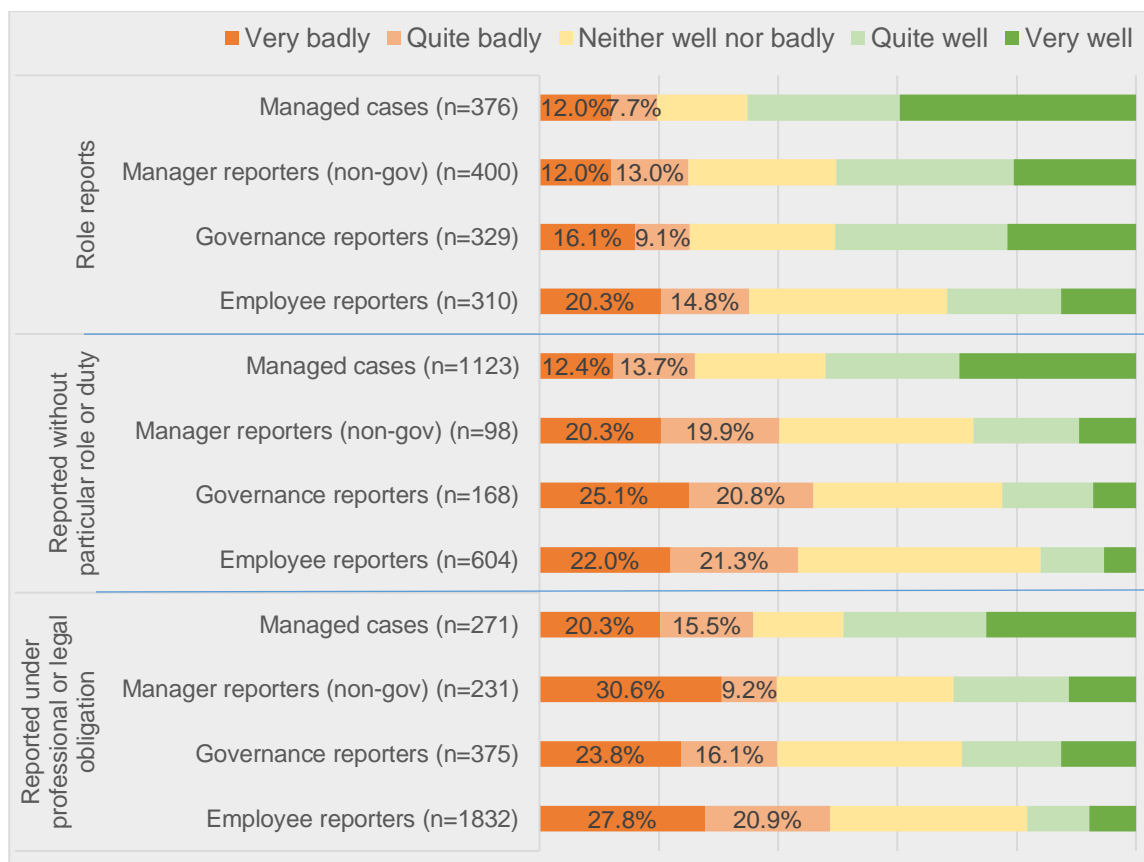


Figure 19: How reporters treated by management, by role or other obligation (managed cases n=1770 and reporter cases n=4347)



Governance professionals also need strong support from executives and oversight bodies for the independence of their roles – or it is unlikely they can be properly fulfilled.

Figure 19 outlines some serious challenges faced by organisations in ensuring that roles are understood and fulfilled in the reporting process.

It describes how respondents thought reporters were treated by management, depending on whether the concern was raised as part of their role (as managers or governance professionals), in fulfilment of a professional or legal obligation, or under no specified duty apart from an ethical responsibility. Figure 19 also captures what managers and governance professionals said about cases they dealt with (managed cases), as well as what reporters said, whether they were managers, governance professionals or other employees.

What should be of concern to most organisations is that even governance professionals and managers who reported wrongdoing because it was required by their role experience mistreatment (about 25%). An even higher proportion of governance professionals who reported outside the requirements of their immediate role said they were treated badly by management (46%).

Although managers and governance professionals described better outcomes in cases they were dealing with (managed cases), they expressed increased poor outcomes about wrongdoing cases they reported. Research shows that organisations rely on the higher likelihood of professional staff (such as auditors) to speak up (Casal & Zalkind, 1995). But even when governance professionals also have their own personal reasons for reporting (Mesmer-Magnus & Viswesvaran, 2005) it is vital management listens and protects them.

Respecting employees' duty to report

Our research also indicates that when everyday employees report wrongdoing as a result of professional or legal obligations, including obligations created by the organisation itself, they too suffer adverse consequences.

Figure 19 further shows that when employees reported outside their role obligations, but under 'an ethical responsibility as a member of a particular profession' or 'a legal duty to report including duties of employment', 49% indicated that management treated them badly – a higher rate of mistreatment than those who reported without such an obligation or duty.

This outcome was also evident in managed cases, with managers and governance professionals describing poor treatment in 36% of reported cases they dealt with, compared to 26% of cases when there was no obligation to raise concerns.

These insights demonstrate the fragility of organisational whistleblowing programs in practice, as well as the lack of understanding of the roles and responsibilities of all employees and the provision of support to them. As we have confirmed in this research, the mere existence of whistleblowing policies and procedures has little effect on the types of support whistleblowers receive or the extent of the negative repercussions they suffer.

Indeed, when employees report wrongdoing as a result of their professional responsibilities (for example, in line with their obligations as an accountant or auditor), or because of a legal duty to report (for example, mandatory reporting of specific corrupt conduct or child abuse or neglect), an organisation's failure to treat cases appropriately has additional ramifications – affecting employees' professional standing and accreditation and the likelihood of critical external scrutiny and legal repercussions. This suggests failings in policies, procedures and implementation and creates additional risks for organisations in the new and emerging legislative and policy frameworks.

These results also underscore the importance of respect for the independent mechanisms that are most likely to help avert these outcomes, by ensuring the integrity of responses to reported wrongdoing even when this may seem to pose a challenge to management.

Reporting lines, oversight and independence

If executives and boards are to have confidence that their organisation is appropriately responding to wrongdoing, they need to put in place effective oversight arrangements – to ensure that the frequent risks associated with the poor management of whistleblowing are identified and addressed, and to seek accurate information so they can identify, prevent and address any deficiencies in policies, procedures and practices.

Corporations may be subject to duties to disclose specific issues externally, to investors, the market or regulators. Public sector agencies will usually be subject to statutory requirements to disclose all serious wrongdoing (for example, suspected corruption) raised by employee reports, to oversight or integrity agencies. Additionally, reporting to whistleblowing oversight agencies is generally required at least on a periodic basis, which often is made public.

This external accountability is a reminder of the broader public interest in all institutions handling whistleblowing effectively (see further in section 4).

Within organisations, mechanisms must be in place not only to meet these formal accountability requirements, but to monitor that whistleblowing and integrity programs are working effectively, and any cultural issues addressed. Given the risks, challenges and opportunities set out in the previous two sections, it comes as no surprise that management cannot operate nor oversee the required whistleblowing infrastructure alone, but must rely on – and respect – independent support and scrutiny from above and within.

The cost of a CEO's overstep

Barclays Group is one of the world's largest financial institutions. Its Chief Executive, James (Jes) Staley is a global corporate leader.

However what the boss says, does not always go. Jes Staley was lucky to keep his job after the UK Financial Conduct Authority (FCA) and Prudential Regulation Authority found in May 2018 that he had 'breached the standard of care required and expected of a Chief Executive in a way that risked undermining confidence in Barclay's whistleblowing procedures.'

Fined £642,430 (over \$1.1 million), Staley also had his 2016 salary cut by £500,000. In December 2018, the New York State Department of Financial Services (DFS) also fined Barclays \$US 15 million, finding Barclay's governance and whistleblowing controls to be in breach of New York State banking laws.



The trouble started when the board received two anonymous letters raising allegations about Mr Staley and the recruitment of his friend to a senior role in the bank's New York office. Mr Staley directed internal security staff to attempt to identify the author. Although the first letter was not initially recognised as a whistleblowing complaint, he continued to push for the source to be identified even after the second was determined to be from a whistleblower.

According to the FCA, 'given his conflict Mr Staley should have maintained an appropriate distance; he should not have taken steps to identify the author.'

Instead, he 'should have explicitly consulted fully with those with expertise and responsibility for whistleblowing in Barclays and sought express confirmation from them that what he wanted to do was permissible. He failed to do this.'

Announcing the settlement of the case, the DFS emphasised 'whistleblowers are vital to uncovering and addressing intentional wrongdoing' and concluded that 'actions at the top... exposed the bank to risk and created an atmosphere in which employees might doubt that it was safe to escalate issues of concern'.

The case set a clear demonstration of the importance of independent governance roles in support of whistleblowing and compliance programs, and the limits they impose on management, even on a global CEO.

Sources: <https://www.fca.org.uk/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements>; <https://www.fnlonon.com/articles/barclays-fined-15m-over-ceos-whistleblowing-error-20181218>.

The ASX Corporate Governance Council (2019, p.17) recommends that a company's board or board committee should be informed of all 'material incidents reported under the entity's whistleblower policy, as they may be indicative of issues with the culture of the organisation'.

In partnership with the Australian Institute of Company Directors, we asked 118 Australian board directors whether their board should receive information on whistleblowing cases. The majority (**60%**) agreed such information should be received by the board through regular reporting on all cases – not simply 'specific cases that seem likely to have serious consequences'. However, only **36%** indicated that management currently provided such information and only **29%** indicated a board committee was active in overseeing the program.

A best practice approach includes active board oversight as part of culture, conduct, ethics and risk activities and – subject to confidentiality protections as needed – a systematic flow of information to the board or its committee on:

- the numbers, nature and status of staff concerns (along with other conduct metrics);
- confirmation that risk assessments and responses have occurred and remain effective;
- outcomes and actions, including reasons for cases being closed or no action taken.

Most crucially, the issues and risks involved in managing whistleblowing dictate a high level of independence for the staff responsible for its operation and reporting. As in other compliance activities, best practice sees chief executives delegating day-to-day operational responsibility for the program to suitably qualified and senior officers, independent of management decision-making, including human resources. As well as a direct line of communication to the chief executive, and ability to escalate matters as needed, delegated staff will be responsible for documentation and analysis on which accountability depends -- with a direct line, as needed, to the board, board committee or external oversight agency.

Key actions

- **Communication – develop and implement a strategy for ensuring all employees are aware of the organisation's policy and their roles, including clear responsibilities and advice to potential reporters on how to report and how their report will be handled.**
- **Governance – appropriately resource an independent, specialist internal function with leadership, coordination and case support for all key whistleblowing process roles, irrespective of where performed (including risk assessment, triage, support, management intervention, problem solving and remediation).**
- **Educate each person with a role on its requirements and limits, including on all duties to report, as well as the overall approach.**
- **Ensure the professional and legal obligations of all staff, particularly governance professionals, are recognised and respected by management as forming part of their role.**
- **Training -- Provide specialised training on the skills to lead and coordinate management of whistleblowing in the organisation.**
- **Oversight – develop a framework that meets internal and external reporting obligations, reviews outcomes for reporters at the top level of the organisation, takes advantage of the information provided from employee reporting, monitors the speak up culture of the organisation, and protects the independence of key staff.**

4. The regulatory role: meeting new challenges

The case for strong institutional support

So far, this guide has presented key actions for organisations to take in developing and implementing their whistleblowing programs. But it is clear that effective recognition and management of whistleblowing in organisations – and across society – relies on a strong policy and legislative framework to back up these programs, as well as deal effectively with all the circumstances where organisations cannot or do not handle these issues alone.

As explained in the Background (p.6), the regulatory context is changing, in Australia and elsewhere, and generally for the better. Australia's Corporations Act framework for private sector whistleblowing sets new standards on how to approach many key issues. But what is needed to ensure this framework is effective? And what else needs to be done?

For the benefits of whistleblowing as uncovered by our research to be realised more widely, attention is still needed in five areas of the regulatory approach in Australia and New Zealand, as in many other contexts:

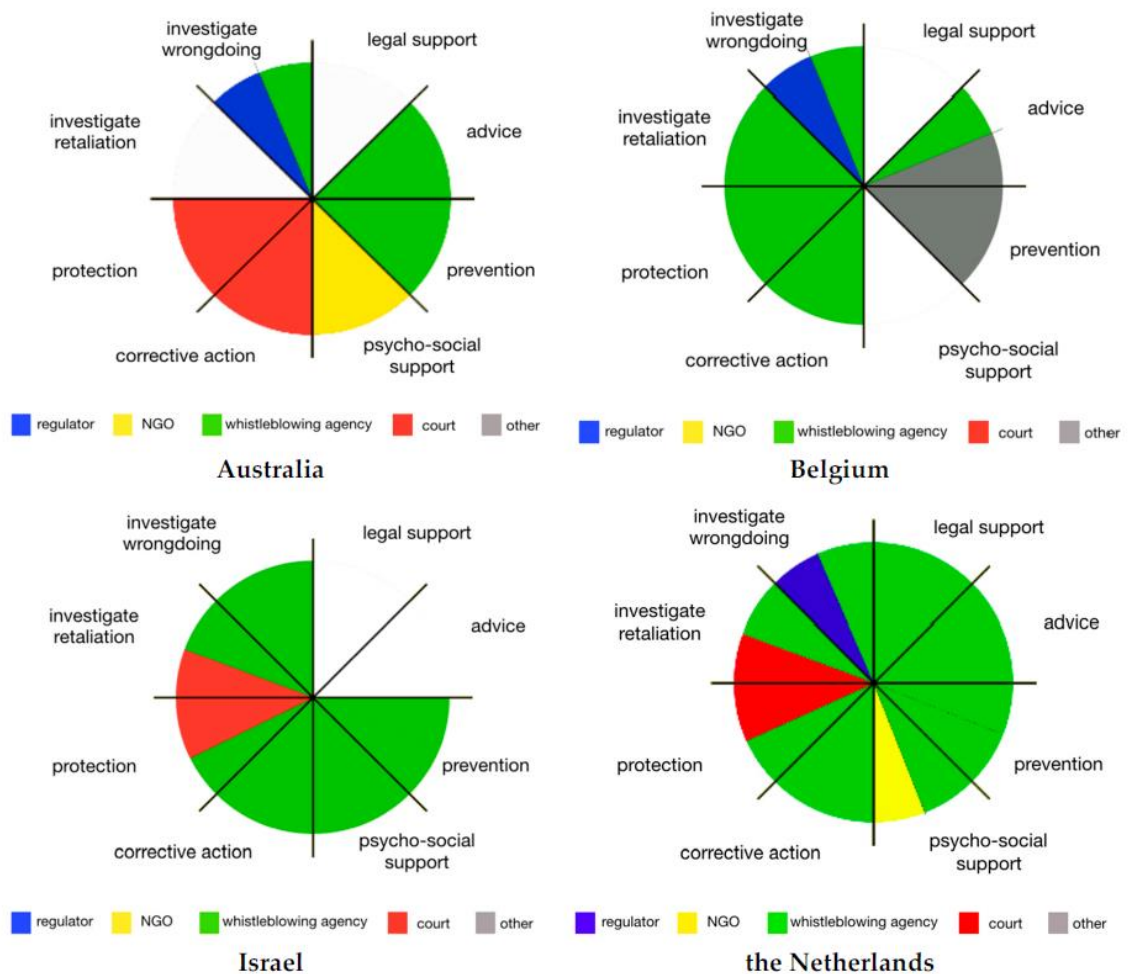
- Law reform to bring existing and old laws into line with new standards, especially for the public sector, for example Australia's *Public Interest Disclosure Act 2013* (Cth) and New Zealand's *Protection Disclosures Act 2000* (NZ);
- Establishment of a central whistleblower protection authority, to ensure organisations and persons who report wrongdoing have important institutional support;
- Action to ensure organisational policies are high quality, and implemented, given the strength of evidence that these will be ineffective in practice without improving employee awareness and active engagement in risk management;
- Development of new clearing-house and coordination roles for the lead whistleblowing authority, to support organisations and other regulatory bodies in getting it right;
- Active resources for ensuring legal protections are delivered, the laws are enforced, and mistreated whistleblowers achieve justice in practice, not simply in theory.

In Australia, all of these priorities were laid out in the comprehensive national inquiry by the Parliamentary Joint Committee (PJC) on Corporations and Financial Services (2017). For the federal public sector, the opportunity to catch up was laid with an existing review of the Public Interest Disclosure Act (Moss 2016), recommending substantial overhaul; with recent confirmation from the Attorney-General that reform is proceeding (Merritt & Berkovic 2019).

However, our research confirms the need for this reform to be substantial. A major gap was identified in a central recommendation of the PJC that a 'one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors... in an appropriate existing body' (PJC 2017, p.158). Indeed, a federal whistleblowing agency to ensure whistleblower protections are fully implemented was first recommended in the context of public sector whistleblowing as far back as 1994 (Senate Select Committee 1994).

This gap is confirmed in **Figure 20**, which reports on a recent international study of the institutional whistleblowing protection arrangements in six key jurisdictions. Focusing only on the federal public sector regime, the research found that Australia was the only country studied that did not have an independent or specialist whistleblowing agency that either investigates retaliation or is able to assist whistleblowers with accessing remedies.

Figure 20.: Institutional whistleblowing arrangements (public sector)
(Loyens & Vandekerckhove 2018)



Even with new reform, the remains true of Australia's private sector regime. While two years of additional funding was announced for ASIC to 'better receive, assess, triage and address whistleblower disclosures about misconduct' under the new Corporations Act provisions (Morrison & O'Dwyer 2018), this does include ASIC acting as a whistleblower protection authority, for which it has no specific power or duty.

The case for a joint authority is clear. It allows for efficiencies of resources, expertise and the possible overlap between public and private sector wrongdoing. Advice on safe reporting, protection, managing investigations and legal remedies, including employment remedies obtained from the Fair Work Ombudsman, Fair Work Commission or Federal Court, is also likely to be the same in both contexts. Our research confirms the need for greater institutional support for all of the functions identified as needing to be performed by the PJC (2017, p.157):

- a clearing house for whistleblowers bringing forward public interest disclosures;
- advice and assistance to whistleblowers; and
- support and protect whistleblowers, including by:
 - investigating non-criminal reprisals in the public and private sectors; and
 - taking matters to the workplace tribunal or courts on behalf of whistleblowers or on the agency's own motion to remedy reprisals or detrimental outcomes.

Backing up internal systems: mandatory procedures

While much of the focus on regulatory frameworks is rightly on whistleblower protection rights, the research has reinforced why new mandatory requirements for whistleblowing policies are so timely and necessary. Improving corporate whistleblower policies and practices is clearly important to developing and maintaining a strong internal culture in a company. Our findings also reinforce why all laws should be updated to require such procedures and specify clear requirements for their content, and the importance of regulator action to ensure awareness and correct implementation.

Implementation of the Corporations Act requirements have been given the further incentive of section 1317AE(3), providing that a court may have regard to whether a company took reasonable precautions and exercised due diligence to avoid detrimental conduct when deciding whether to make an order granting compensation to a whistleblower. If a company's promises via its policies to protect its staff, it can be absolved of responsibility if it then makes every reasonable effort to do so.

However, as section 2 showed, organisational policies are not enough, in and of themselves, to promote strong reporting cultures and ensure whistleblower wellbeing in organisations. Even assuming the objectives and approach of whistleblowing policies are correct, they are only as good as the efforts made to implement them.

This is demonstrated by the concrete example of **risk assessment** procedures, demonstrated as so important in section 1, and an increasing feature of regulatory arrangements. This principle has been reflected in Queensland's *Public Interest Disclosure Act* since 2010, which requires agencies to assess the level of risk prior to referring to another entity (s.31). The Australian Capital Territory and federal Public Interest Disclosure Acts have required agencies to establish procedures for assessing the risk of reprisal against reporters since 2012 and 2013 respectively.

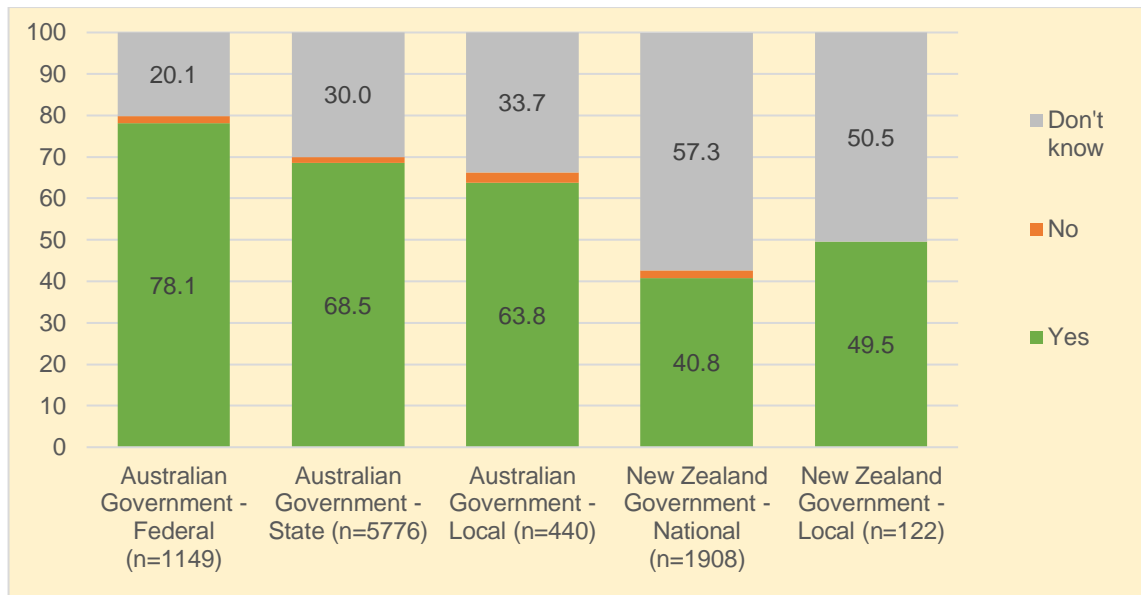
However, while there is some evidence of this principle finding its way into procedures (see Table 2 earlier), it is clear from the research that despite claims by many organisations that they have such processes, few of them document this process (Brown, Dozo and Roberts 2017) and there is little evidence of them in practice.

The case for more comprehensive mandatory procedures to be backed up with active guidance, enforcement and awareness-raising is supported by some of our research results from **New Zealand**, where the *Protected Disclosures Act 2000* (NZ) requires every New Zealand public sector organisation to have 'appropriate internal procedures for receiving and dealing with information about serious wrongdoing', but no statutory requirement for these procedures to deal with whistleblower support and protection, and no central or oversight agency to set and enforce standards for the procedures.

As noted in the Background, our initial analysis of whistleblowing processes and procedures (Brown & Lawrence 2017) indicated that New Zealand procedures were weaker than in most Australian jurisdictions, and was followed by new directions (see State Services Commission 2019). The opportunity for reform of the Act as a whole is also well advanced, with the Government having initiated formal review of the Act in 2017, including public consultation on options for reform in October-December 2018. This provides a welcome opportunity for substantial overhaul of the Act, including as it also applies to the private sector, to bring it up to or beyond the standard of Australia's Corporation Act provisions.

The need is reinforced by the results in **Figure 21**, showing the level of awareness among Australian and New Zealand public sector respondents regarding whether their agency had a whistleblowing policy. The lower awareness among New Zealand respondents coincided with evidence of less training (see Macaulay & Brown 2018). Section 3 showed employee awareness to be a contributing factor to effective processes, but without active guidance, enforcement and awareness raising by regulators, such results are likely to continue in many sectors, including the private sector.

Figure 21: Does your organisation have a formal policy about how wrongdoing should be reported?



Advice, support, clearing-house and monitoring roles

The provision of gateway advice to whistleblowers and organisations are crucial roles not currently sufficiently filled by regulatory agencies, again mitigating in favour of a stronger framework including support from a dedicated agency.

For reporter advice and support, the study by Loyens & Vandekerckhove (2018) identified only a few countries where regulators provide or fund psychosocial care for reporters, but as section 2 showed, this has high promise for helping meet the high support needs of reporters, and assisting whistleblowers and organisations alike by providing independent advice on how to raise concerns in ways that minimises risk of detrimental action.

However dedicated resources are needed, enabling external support to be provided to reporters without compromising the responsibility of other regulators to impartially examine the conduct of organisations. It is now clear that supporting reporters requires a different operating model to traditional complaint handling functions.

Effective regulatory support also needs to include an ability to actively monitor and oversight both regulatory and line organisations' handling of disclosures, given the frequency with which somewhat complex legislation can be misinterpreted in practice.

For example, our findings in sections 1 and 2 demonstrate the importance of organisations not treating integrity or compliance breaches as **personal grievances**, simply because they fall into the 47% of whistleblowing cases where both public interest and workplace grievances are involved. However, this is likely to remain an issue in practice, not least due to provisions such as the important exception under s. 1317AADA of the Corporations Act that information concerning a 'personal work-related grievance' does not qualify for protection.

In fact, the Act defines such a grievance as being a matter which involves **solely** such a grievance, by virtue of only having 'implications for the discloser personally', no other 'significant implications' for the entity, and no relationship with other disclosable conduct under the Act. In other words, overlapping conduct will still be protected even if a workplace grievance is involved. These are areas where active regulatory oversight will be needed, to ensure other regulators and organisations now how to assess and respond to cases that involve a range of disclosable and non-disclosable matters.

The same issue points to the importance of extra institutional support to provide a clearing-house and referral point for regulators, including assisting whistleblowers and regulators to ensure that disclosures do not fall between the cracks of regulatory responsibility and that all regulators know how to deal with them productively and lawfully.

As will be seen in section 5 (Figure 22), comparatively little whistleblowing (perhaps 16% of reports) ever currently reaches external regulators, even though there is a strong public interest case that, probably, more should. The lack of mechanisms and resources for referral, monitoring and follow-up likely play a significant role. These needs again strengthen the case for a dedicated agency, with resources beyond those currently provided to ASIC, the Commonwealth Ombudsman or any other national agency for such purposes.

Civil remedies and enforcement

Finally, our research confirms the need for continued strengthening of legal thresholds and enforcement resources for dealing with the detriment suffered by reporters of wrongdoing. As noted in sections 1 and 2, high proportions of reporters experience mistreatment and repercussions, which the evidence shows are often largely preventable if organisations act to do so, provide the necessary support, and put an ethical culture in place.

In fact, for the public sector, our research suggests no fundamental improvement since our earlier research in 2006. Even though different sampling and methods were used, almost identical proportions of public interest non-role reporters among our public sector respondents perceived that they suffered mistreatment, as in our earlier results (Smith & Brown 2008, p.123; see Brown, Olsen & Lawrence 2018).

Three main areas of reform arise. First, all existing laws need to be **brought up to par** with improved compensation rights in the Corporations Act, including:

- Recognition of failure to fulfil a duty to prevent detriment as a basis for liability and compensation, where it occurs, and
- Reversal of the onus of proof, as explained in the Background.

There is also need for greater consistency across Australian laws in many of the basic thresholds and mechanisms for whistleblower protection. For example, while the federal Public Interest Disclosure Act and some State legislation give whistleblowers the alternative of pursuing claims in lower cost tribunals such as Fair Work Australia, in addition to the courts, the Corporations Act provisions allow only for claims to a court.

Second, reform is needed to fully recognise the **range and type of detriment** that whistleblowers unjustly suffer, leading to damage, beyond traditional concepts of reprisal.

While current definitions of detriment are broad – especially in the Corporations Act – the range of examples needs to match the types of preventable detriment most frequently suffered, including stronger recognition that these often occur through omission or negligence in organisations, not only through design to punish. It is important that new evidence of the forms of detriment that confront whistleblowers be incorporated not only in organisational processes, such as risk assessment, but properly reflected in legislation.

In Commonwealth legislation, including the new Corporations Act provisions, this means addressing a particularly restrictive formulation for how liability must be shown – which is that the ‘belief or suspicion’ that a protected disclosure was made, must be ‘the reason, or part of the reason’ for the detrimental act or omission: Corporations Act, ss. 1317AC(1) and 1317AD(1); copying Public Interest Disclosure Act, ss.13-19).

This mental element – a de facto requirement that the court be satisfied that the wrongful party intentionally caused harm to the whistleblower for that reason – goes even beyond other restrictive civil liability provisions in the US, UK, or even Queensland where the court

may use any grounds to determine that the detriment occurred ‘*because, or in the belief that*’ a disclosure was made (*Public Interest Disclosure Act 2010* (Qld), s.40(1)).

As well as hinging on evidence regarding the respondent’s state of mind – rather than whether the respondent failed to meet their duty of care – the provisions are poorly suited to enabling liability to be established for omissions, which typically do not have ‘reasons’, as opposed to positively harmful acts.

Third, there is a clear need for **institutional support and legal resources** to enable whistleblowers to activate their rights, or for demonstration cases to be taken on their behalf, to create the precedents that will change organisational behaviour.

As seen at the outset, Australia’s regimes have been weak in providing any such support. As noted by the PJC, presently a person reporting wrongdoing effectively has no protection unless they experience a criminal reprisal which they can take to the police, or are personally able to seek an injunction or remedies in a court or tribunal. In respect of seeking remedies under the Public Interest Disclosure Act, the Commonwealth Ombudsman’s office advised the PJC it had simply no power or role to take action or seek any remedies, nor even to ‘investigate whether or not reprisal action has occurred’ (see PJC 2017, p.151).

Even with an altered onus of proof and protection against adverse cost orders, the costs and stresses of taking legal action are still enough to explain why many whistleblowers are forced to live with adverse outcomes rather than seek compensation. This statement confirmed that the whistleblowing regime was (and is) largely incapable of effectively supporting whistleblowers without an independent agency empowered and resourced for this role.

Key actions

- **Law reform to bring whistleblower protection laws up to or above the standard of Australia’s Corporations Act provisions, including Australia’s public sector and New Zealand laws.**
- **Detriment – revision of civil and employment remedies to better recognise the range and types of detrimental acts and omissions for which managers and organisations should be responsible, including:**
 - **expanded definitions of type and breadth of detriment;**
 - **liability for inadvertent but negligent breaches by omission;**
 - **relaxation of the mental element (*de facto mens rea*) as a precondition for civil liability in Commonwealth legislation.**
- **Remedies – consistency in principles for access to civil and employment remedies including:**
 - **Recognition of the duty to support and protect**
 - **Reversal of the onus of proof**
 - **Access to workplace tribunals as an alternative to the courts.**
- **Guidance – active education of companies and organisations to reinforce awareness of best practice policy approaches including risk assessment and appropriate management of cases involving both disclosable conduct and workplace grievances.**
- **Establishment of a fully resourced whistleblower protection authority to support reporters and organisations, including advice, support, coordination and enforcement roles.**

The country we want to be?

On 4 June 2019, the Australian Federal Police (AFP) executed a search warrant on the Canberra home of News Corporation journalist, Annika Smethurst, over a 2018 article revealing plans for the Australian Signals Directorate to monitor Australian citizens. A day later, the AFP raided the ABC's Ultimo headquarters, seeking the files of journalists behind a 2017 report on the conduct of Australian Defence Force operations in Afghanistan.

A third AFP raid, planned for News Corporation's Sydney headquarters, was cancelled.

Behind the raids lay whistleblowers – an unknown leaker of government plans to Smethurst, and a military lawyer charged with giving official secrets to the ABC. The raids coincided with other prosecutions of public servants for speaking to the media, but now apparently extended to proposed charges against the journalists themselves.



Australian Federal Police officers entering the ABC Ultimo headquarters, Sydney, 5 June 2019

ABC chair Ita Buttrose condemned the 'seismic' events as 'clearly designed to intimidate'. From across the world, the New York Times stressed the danger of intimidating those who told 'uncomfortable truths', while the BBC described it as a deeply troubling attack: 'when the media is becoming less free across the world, it is highly worrying if a public broadcaster is being targeted for doing its job of reporting in the public interest'.

Bret Walker SC, former national security legislation monitor, warned the raids were a calculated attempt to 'deter rather than encourage inquiry by people outside officialdom'. UNSW's Professor George Williams said they showed just a 'tiny aspect' of laws now capable of being used against journalists and whistleblowers. Human Rights Commission President, Rosalind Croucher was prompted to warn: 'national security may sometimes be a legitimate ground for intruding upon rights, but overreach in the name of national security is not'.

As the Australian Press Council denounced the raids for their 'chilling effect on journalists', another need was made clear – overhaul of Australian laws supposedly meant to *protect* the provision of official information to the media, when in the public interest. Arthur Moses SC, president of the Law Council of Australia, emphasised that without proper protections, the raids could also only have a 'chilling effect' on public interest whistleblowing itself.

Sources: www.smh.com.au/politics/federal/balancing-act-national-security-collides-with-freedom-of-the-press-20190607-p51vfv.html; www.abc.net.au/news/2019-06-05/why-raids-on-australian-media-present-clear-threat-to-democracy/11183396; www.journalistsfreedom.com/afp-raids-attack-on-liberty-of-australians/; www.canberratimes.com.au/story/6204413/how-public-servants-will-react-to-the-afp-raids/

5. Public interest: respecting whistleblowing's third tier

The protection of officials and employees who, when needed, go outside official channels to the public with information about serious wrongdoing, is vital to the functioning of whistleblowing as a process of integrity and accountability in society.

As set out in the Background, 'three tiered' whistleblowing protections are now accepted as best practice frameworks in most leading jurisdictions (see Figure 2, p.7). This is true of seven of Australia's nine public sector whistleblowing laws, and also now for the private sector. The Corporations Act extends protection not only to internal and regulatory disclosures, but to disclosures made to journalists and parliamentarians, where a whistleblower has previously disclosed to ASIC, APRA or a defined regulator, and:

- At least 90 days have passed; the whistleblower does not have reasonable grounds to believe action is being or has been taken; and has reasonable grounds to believe a further disclosure would be in the public interest (s. 1317AAD(1)); or
- They have reasonable grounds to believe that the information concerns a substantial and imminent danger to the health or safety of one or more persons, or to the natural environment ('emergency disclosure', s. 1317AAD(2)).

In both cases, the whistleblower must first notify the relevant regulator that they intend to make a public disclosure; and for protection to apply, the extent of the information disclosed must be no greater than is necessary to inform the recipient of the misconduct or danger.

Protection of whistleblowing's third tier reflects the fundamental reality that, from time to time, whistleblowers do go public and reveal important information, alerting regulators and society to wrongdoing which is only properly acted upon when this occurs.

The need for protection is high because without it, a whistleblower may be directly exposed to criminal or civil liability for unauthorised disclosure, as well as risks of reputational damage, and heightened risk of direct reprisal due to the reputational threat posed to the organisation or its leaders. However, it is also high because the vast bulk of whistleblowers only go public after having first disclosed internally and experienced inaction or adverse treatment.

In our research, whistleblowers who reported externally (whether to a regulator, the media or another party) experienced at least a third more repercussions than whistleblowers who remained internal, either because they went external or because they were already experiencing mistreatment, or both (Smith 2018; Smith and Brown 2008).

Organisations need to understand the legitimacy accorded to public whistleblowing under this approach. Indeed, it also aims to encourage organisations to facilitate internal whistleblowing as much as possible, so as to have first opportunity to deal with the issues, and does have this effect. For example, the controls and compliance manager for Philip Morris Limited, Bob Ansell, has said publicly that protection of public whistleblowing makes 'a compelling case' for organisations to develop effective whistleblowing policies: 'I would much rather people speak to me than a newspaper or *Today Tonight*' (see Mezrani 2013).

Public whistleblowing can be high profile and signal a crisis or major impacts for companies or governments (Lee & Fargher, 2013; Near & Miceli, 1985). However, it is nevertheless statistically rare, as a part of whistleblowing overall. As noted in section 3, managers in organisations are overwhelmingly the most frequent first point of report for employees.

Figure 22: Reporting paths (current and previous organisation reporters)

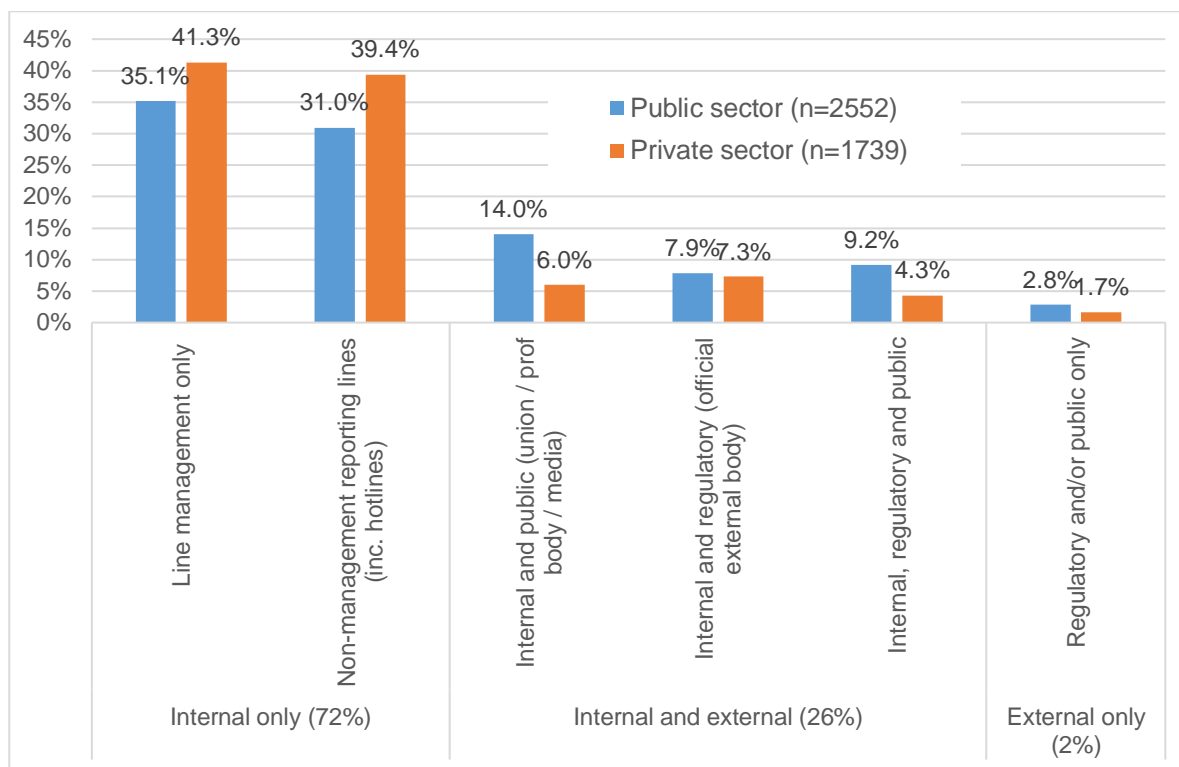


Figure 22 sets out the reporting paths used by whistleblowers in our research, broken down for the public and private sectors. Confirming the critical importance of organisational whistleblowing policies, 72 percent of reporters only ever made use of internal reporting channels, including many who went no further even though the wrongdoing was not dealt with, or they suffered repercussions. A quarter (26%) reported internally first but also then went outside to regulatory channels, other public channels or both. Only 2% went outside their organisations in the first instance and never reported internally.

Even within these figures, however, most ‘public’ reporting was not to the media, or at least not directly. Of the 20% of reporters who ever went public, 19% (n=876) went to a union, professional association or professional industry body. Only 1% of reporters who provided data on this (n=37) ever went directly to a journalist, media organisation or public website.

These data indicate there is hardly a crisis of leaking and external disclosure of information in Australian institutions. Indeed, only 16% of reporters ever went to an external regulatory body at any stage – fewer than who went public – even though research indicates that staff often believe external sources are more likely to take the wrongdoing seriously, treat the reporter more fairly, or enact change (Jeon, 2017; Rothschild & Miethe, 1999; Dworkin & Baucus, 1998). What may be a “healthy” level of external disclosure cannot be defined, but there is little reason to think that current levels are unhealthy – if anything, the reverse.

Navigating the legal minefield

For public whistleblowing to be a real option when needed or desirable, governments must ensure that the legal thresholds are fit for purpose. A final lesson of our research is that, just as other aspects of Australian and New Zealand legislation are not currently best practice for their task, public whistleblowing provisions are problematic.

A first problem is simple inconsistency. Figure 2 (p.7) provided a summarised picture of the differences, including different levels of adequacy, in basic approaches of various laws. For

example, the Corporations Act requirements above are different to those in the Public Interest Disclosure Act, each with their own problems. Each references the ‘public interest’, but the Corporations Act requires only that the whistleblower have a reasonable belief that this be satisfied. By contrast, the PID Act imposes an objective test that the disclosure must not be *contrary* to the public interest, with a long list of criteria. The reverse applies in respect of the requirement for a prior official disclosure: the PID Act requires that the whistleblower have a reasonable belief that the response was inadequate, whereas the Corporations Act is the reverse, requiring *no* reasonable grounds for believing wrongdoing is being addressed.

Most Australian states have different, simpler tests, but again with wide variations. The problem of inconsistency is likely to be real, because State-owned corporations are subject to both laws, and all Commonwealth contractors are also covered by both laws. This provides both an imperative and an opportunity to resolve a best practice approach.

Four major problems currently limit the effectiveness of public whistleblowing protections, apart from sheer inconsistency. The first is insufficient consensus on when further disclosure is in the public interest. In fact, State laws do not even mention this test, presuming that if the ‘public interest’ wrongdoing is not addressed after an internal or regulatory disclosure, it is likely automatically in the public interest to further disclose. For protections intended to encourage disclosure of public interest wrongdoing, this is the correct approach.

A base test is whether ‘it is reasonable in all the circumstances for the disclosure to be made to some other person or body to ensure that it is effectively investigated’ (Brown et al 2008, p.286). But no Australian law includes such a test. While all require prior disclosure, none readily admit of circumstances – other than emergencies – where it may well be impossible or unreasonable to expect a prior disclosure. All this compares unfavourably with the criteria posed by the UK regime, which, while not perfect, protects any further disclosure (whether to media or others) in a more logical set of circumstances:

- the disclosure is reasonable in all the circumstances;
- the disclosure is not made for personal gain; and
- the disclosure meets at least one of four preconditions:
 - a) the whistleblower reasonably believed he or she would be victimised;
 - b) there was no prescribed regulator and he or she reasonably believed the evidence was likely to be concealed or destroyed;
 - c) the concern had already been raised internally or with a prescribed regulator; or
 - d) the concern was of an exceptionally serious nature (*Employment Rights Act 1996* (UK), ss 43G and 43H; *Public Interest Disclosure Act 1998* (UK))

The first priority is thus to arrive at a simple, all-encompassing set of principles for when and why it may be reasonable for a whistleblower to go public, which is superior to the current inadequate state of the law in all Australian sectors and jurisdictions.

A second priority is to ensure that “carve-outs” for particular areas of industry or government cannot work to defeat the law’s purposes in practice. State laws are comprehensive and do not present this problem, but Commonwealth laws present it in the form of carve-outs for ‘intelligence information’ (PID Act) and ‘inherently harmful information’ (Criminal Code).

The difficulty with these exceptions is not that particular categories of sensitive information should not be treated differently – rather, they fail to adhere to their intended principle, because they go beyond information that is objectively sensitive or ‘harmful’. For example, any information ever generated, possessed or communicated by or within an intelligence agency is excluded from protection, irrespective of whether there is any risk of harm in disclosing it, or indeed it relates in any way to intelligence (see Brown 2013). As long as unjustified exceptions remain, they complicate the scheme and undermine its credibility.

Citizen rights and media freedom

A third challenge lies in debate over whether there should be any restrictions at all on the ability of public officials, in particular, to release official information in the public interest – as well as lack of public interest protection for others who might reasonably disclose official or confidential information, who are either not officials or employees, or are disclosing important information which is not about ‘wrongdoing’ (and hence, who are not whistleblowers).

These questions were recently highlighted by the Alliance for Journalists Freedom (2019). But they have been around much longer, and undermine public whistleblowing principles by again fuelling claims that whistleblowing laws do not work.

The answer lies in the direction of conclusions reached by the Australian Law Reform Commission’s Secrecy Laws inquiry (2010), which is still yet to be fully implemented. This proposed replacing blanket criminal prohibitions on the unauthorised release of information with more tailored offences recognising public interest principles.

The challenge was, and remains, how to ensure the general law protects all persons who might need to justifiably breach confidentiality, by enabling any person to call on and argue a public interest defence in such circumstances – such as traditionally existed under common law principles (see Brown 2007). Such a reform would parallel improvements to whistleblower laws, rather than seeking to convert whistleblower protection laws into more general laws aimed at public disclosure of information.

Finally, notwithstanding the existence of journalism ‘shield laws’ and 2018 amendments to Commonwealth official secrets laws to recognise the role of journalism, the effectiveness of public whistleblower protections has been directly undermined by recent evidence of the extent to which journalists and media organisations can still be forced to reveal information about their confidential sources, so as to jeopardise those sources; and indeed, could themselves be targeted for receiving and publishing information from those sources.

Clearly, the principle of the ‘third tier’ of public whistleblowing protection cannot function if there is serious doubt as to the viability of using that channel, in the mind of the whistleblower, or a ‘chilling effect’ on the ability of the media to play its own part. Such doubt provides compelling reasons for not only reforming and clarifying whistleblowing laws, but reinforcing this with stronger legislative protection for journalists’ use of whistleblowing information for public interest purposes (see Alliance for Journalists Freedom, 2019).

Key actions

- **Reformed, simplified, consistent, workable criteria for when whistleblowers may go public and remain protected, reflecting the presumed public interest in disclosure.**
- **Revised definitions of ‘intelligence information’ and ‘inherently harmful information’ to extend protection to all disclosures of wrongdoing in public interest circumstances, other than information that poses genuine risk of harm.**
- **Availability of a general public interest defence in all criminal cases of alleged unauthorised disclosure (whether whistleblowing i.e. employee-reported wrongdoing, or not).**
- **Stronger legislative protection for journalists’ use of whistleblowing information for public interest purposes.**

FOR POLICYMAKERS

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