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Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Fitt

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 – Response to Questions on Notice of 2 March 2018

Thankyou for the Questions on Notice from the Committee, dated 2 March 2018.

Please find my responses attached.

Thankyou again for the opportunity to assist the Committee.

Yours sincerely

[redacted]

A J Brown
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Program leader, Public Integrity and Anti-Corruption

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 – Professor A J Brown

Responses to Questions on Notice

1) In relation to point C1 in your submission, can you provide an example of what the consequences of a lack of separation of criminal liability and civil remedies would be?

1.1. Is there a lack of separation in the Bill?

Yes.

Contrary to evidence given to the Committee by Kate Mills of Commonwealth Treasury (6 March), the Bill does **not** already separate the grounds for establishing criminal liability (sanctions) and for obtaining civil remedies, to the extent necessary to make those remedies reasonably accessible. If that was the case, the Parliamentary Joint Committee would not have needed to recommend the separation of these grounds in the *Fair Work (Registered Organisations) Act* 2009 [2016] on which the Bill's provisions are based, as well as any further legislation such as this (Recommendations 10.1 and 10.2).

The Parliamentary Joint Committee's report identified where the problematic conflation of grounds occurs in previous legislation (to which Ms Mills did not respond).

In this Bill, it occurs in s.1317AD(1)(b)&(c) which require, for a claim for civil remedies to be made out, that *(i)* the respondent must have a 'belief or suspicion' that the claimant made a disclosure and *(ii)* this 'belief or suspicion' must be the 'reason' or part of the reason for damaging conduct. In other words, for civil remedies to flow, the court must be satisfied that the respondent's "state of mind" was such that the conduct was undertaken for the specific reason that the claimant made a disclosure.

Dr David Chaikin's evidence of 6 March, otherwise supporting the workability of the provisions as proposed, confirmed that this "state of mind" must be present. (The separate question of who must prove or disprove this state of mind is dealt with below.)

The origin of these requirements lies in their inclusion as grounds for the criminal offence of reprisal – or, in this Bill, 'victimisation', under s.1317AC(1). I will explain below how this has evolved, what its consequences are, and why it is problematic.

However, it should also be noted (as per section C1 of my submission), that this express state of mind requirement for civil remedies is married with language which, implicitly and certainly for all purposes in lay interpretations and practical implementation of the Act, carries further imputations of "intent". Terms such as 'victimisation' (the criminal offence here), 'victimising conduct' (giving rise to civil remedies here), or, elsewhere, 'reprisal' or 'retaliation', all carry a clear implication that a particular state of mind should be present in connection with the detrimental acts or omissions involved. That is, that the defendant (criminal) or respondent (civil) acted or failed to act, in the damaging way, as a direct reaction or response to the disclosure.

This language is consistent with express requirements that the defendant/respondent's awareness of the disclosure must be a 'reason' for the detrimental act, and may be appropriate for the criminal offence. However, it has ceased to be appropriate or sufficient for capturing the grounds for civil remedies, and now seems to clearly explain the failure of previous provisions. It is especially inapposite in the uniquely limiting form that the Commonwealth, alone, has begun to adopt and now proposes for this Bill.

In short, while these express and implied state of mind requirements are apposite for criminal liability, and should also give rise to civil liability where they are present, civil remedies should not be **limited** to circumstances where a court or tribunal is satisfied that they are present. Rather, civil remedies should also be available wherever *any* detriment or 'damage' (the term used by Ms Mills on 6 March, and in the Exposure Draft of the Bill, but no longer in the current Bill) flows as a result of the disclosure, whether intended or negligent, and whether it is an act or an omission. These may range from:

- acts intended to punish; to
- failures to act to prevent or limit punishing behaviour by others; to
- simple mistakes in the handling of disclosures that unintentionally expose a whistleblower to added stress, psychological harm, employment disadvantage or reputational damage; to
- an entirely passive failure to support a whistleblower through an otherwise well-handled disclosure process, even in the absence of any direct "reprisal" risk, again leading to stress, psychological harm, performance and employment impacts which can prove terminal, through no fault of their own.

1.2. Practical consequences of narrowing civil remedies with a "state of mind" requirement as proposed

The grounds in s.1317AD(1)(b)&(c) and associated language have both **legal consequences**, in terms of the inability of many deserving claimants to obtain remedies from a court; and **practical consequences** within organisations, related to but also independently of these legal effects.

Our research and all my experience indicates the practical effects are just as, if not more important than the legal ones. They flow because, within organisations, the focus on whether anyone intended to cause or allow the harm – which is the natural result of a requirement that a respondent must have acted detrimentally for the specific reason of the disclosure – has a range of counterproductive effects. It places managers and organisations on the defensive; obscures what may in fact be the real causes of detrimental outcomes (e.g. simply poor response systems and management decisions); and reduces the incentives for organisations to be prepared to make good the damage to their employees without first requiring this express or *de facto* intent to cause harm, to be actually proved.

These practical effects can be seen in the experience under existing Australian laws. In this regard, it must first be appreciated that there is little evidence that *any* existing compensation provisions in Australian public sector whistleblowing laws actually work. There is widespread concern that they are a "dead letter", given the rarity of litigation and the even greater rarity of success. Few if any people consider that this is because compensable detrimental outcomes are not occurring. Rather, there are problems with the history and casting of these provisions, which point directly to the dangers in this Bill.

Which laws suffers these problems?

The first, most obvious reason why some laws have not worked, is where civil compensation provisions have been ***expressly and deliberately*** framed to shadow the criminal offence of victimisation – in effect, a criminal injuries compensation provision. This is the position under the current *Corporations Act* whistleblowing provisions since 2004 (current ss.1317AC and AD), and allied legislation, which this Bill seeks to rectify (but which for all the reasons laid out here, does not succeed in doing).

However, a second reason why compensation provisions appear not to have worked, is that even where there is no *express* dependency on criminal acts having occurred before there are also grounds for civil remedies, legislation has involved a ***conflation*** of the grounds for criminal sanctions and civil remedies which are similarly limiting (of the kind taken even further by the Commonwealth in this Bill).

For example:

- **Queensland**'s *Whistleblower Protection Act 1994* created a broad entitlement to civil remedies for 'reprisal' (s.43), but the definition and grounds for what constituted a reprisal (s.41) were always for both the criminal offence (s.42) and the civil remedies. In both cases, liability arose if a person caused 'detriment to another person ***because,*** **or** ***in the belief that***, anybody has made, or may make, a public interest disclosure' (sub-s.41(1)) (emphasis added).

  The breadth of the term 'because' should have been enough to allow a wide range of claims, but never did so. Due to the structure of the provisions, one concern was that there might be uncertainty as to whether civil action could genuinely be launched independently of any criminal prosecution. So, in the replacement *Public Interest Disclosure Act 2010* (Qld), sub-s.42(5) was added:

  > Proceedings for damages may be brought under this section even if a prosecution in relation to the reprisal has not been brought, or can not be brought, under section 41.

  This clarification was then also added to the *Public Interest Disclosure Act 2013* (Cth) (s.19A); to the *Fair Work (Registered Organisations) Act* 2009 [2016] (s.337BF); and is proposed for this Bill (s.1317AF).

  Dr Chaikin's submission suggests this provision is guaranteed to overcome any problem, if there is one. Unfortunately, experience suggests Dr Chaikin is wrong. Since 2010, this clarification has made no difference in Queensland. Still, very few cases are attempted, and none have been successful, alongside few (and no successful) applications for relief to the Queensland Civil and Administrative Tribunal. More recently there have been successful applications for interlocutory relief in just one case in the Queensland Industrial Relations Commission.

  The conclusion of the Queensland Ombudsman (Review, 2016, pp.73-74) was that the presence of the high criminal standard for proving a 'reprisal' was continuing to act as a barrier to effective investigation and resolution of 'detrimental actions' which did not entail any direct intent or "state of mind" (the other meaning of 'reprisal' under the conflated definition).

  Consequently, the Queensland Ombudsman has recommended a new 'administrative redress scheme for disclosers, witnesses and other parties who have experienced detriment as a result of their involvement in the making, assessment or investigation of a PID' (Recommendation 33), which would no longer be dependent on the concept of implicitly deliberate or direct 'reprisal' (or 'victimisation').

- **New South Wales** experience confirms the problem. The *Protected Disclosures Act 1994* (NSW) initially contained only a criminal reprisal provision (s.20), with no civil compensation provision until 2010 (*Public Interest Disclosures Act 1994* [2010], s.20A). Again, due to the definitional structure, 'reprisal' remained the basis for both the criminal offence and rights to civil damages, to the extent that it is not *any* detriment flowing from the disclosure that can give rise to civil action and relief, but only 'detrimental action… that is substantially in reprisal' for the disclosure.

In 2016, the NSW Ombudsman conducted an audit of reprisal investigations, and confirmed that at a practical level, for whistleblowers and within agencies, this regime was causing few if any remedies to flow to whistleblowers for detriment suffered. Not only has there been no known litigation, but even within agencies, when any apparent detriment was investigated (and only 25% of such cases were), the focus was on whether the detriment could constitute a criminal offence. Once it was concluded that no such criminal reprisal had occurred, no further action was taken by the agency, and it was assumed there was also no basis for other remedies.

Such findings then represent a huge obstacle for a whistleblower seeking civil damages, because the agency has already amassed all the evidence that even if detriment occurred due to the handling of the disclosure, it was not actually caused 'in reprisal' for the disclosure.

- The first two reports from the *Whistling While They Work 2* project, which I lead (www.whistlingwhiletheywork.edu.au), and which are extensively cited in the PJC report, confirm that while many organisations may now have (or claim to have) processes for responding to detrimental outcomes with criminal or disciplinary action against reprisors, comparatively few organisations have processes for remediating or compensating their whistleblowers for the detriment experienced, even in the public sector. This is a firm indicator of the way in which statutory obligations have been perceived and interpreted, at operational levels.

  Contrary to some evidence given to the Committee, I do not have confidence that the lessons of this research have been properly taken into account in the formulation of this Bill to date, even though they clearly informed the Parliamentary Joint Committee.

This experience shows the ***practical effect*** of the conflation of grounds and associated language; while also helping explain why compensation provisions of this kind are currently a "dead letter". It indicates that as long as the risk of civil liability continues to be interpreted through the lens of criminal reprisal or victimisation offences, individuals and organisations will continue to focus first on whether there is evidence of a criminal reprisal, and only turn to questions of their responsibility to remediate, compensate or prevent – if at all – in so far as the conduct is similarly deliberate or directly 'victimising'.

Is the Commonwealth's proposed approach different, or better?

Yes, it is different, but only worse.

The formulation proposed in ss.1317AC and AD in this Bill, relating to 'victimisation' and 'victimising conduct', is based on the way that ss.13-19 of the *Public Interest Disclosure Act 2013* (Cth) define 'reprisal'. This particular formulation is a unique creation of the Commonwealth in and since 2013, differing from the State legislation above.

It is worse because, whereas the above problems flow from implications and interpretations, the present Commonwealth approach *expressly* requires that the respondent have the necessary state of mind before civil liability can be imposed (i.e. the respondent must have the same 'belief or suspicion' of the disclosure, and it must be a 'reason' for the damaging conduct, in the same manner as the criminal offence).

Given this, in light of the history above, it seems no surprise that there is also little sign of civil remedies beginning to flow under the *Public Interest Disclosure Act 2013* (Cth) (as noted by the Moss Review, 2016). The same result should be expected under this Bill, as currently proposed, also taking into account the issues below.

Australia is already unique in proposing to conflate these criminal and civil grounds in this way – as seen from the submissions of Professor Tom Devine (Government Accountability Project, USA; Submission 23) and Professor David Lewis (United Kingdom; Submission 7), both recommending against this course.

As further confirmation, see Attachment 1 to these Responses – *A Best Practice Guide for Whistleblowing Legislation*, just published worldwide by Transparency International (March 2018). As can be seen, in this guide, criminal 'sanctions' for reprisals and 'relief for unfair treatments' are presented entirely separately, with the latter (civil remedies) based not only on any evidence of the respondent's motivations but on any causal link or connection between the whistleblowing and the unfair outcome (p.54).

Why did Australia go down this road in the 1990s? The answer appears to be the historical fact that we were one of the first countries to adopt criminal sanctions for reprisals in our first raft of State whistleblowing legislation, and innocently also tried to then base our civil remedies in the same provisions, or added them later. This is in contrast to jurisdictions such as the USA and UK, where the focus commenced, and remains, on civil and employment remedies, rather than criminal sanctions; and hence the same conflation of grounds has never been quite the same problem.

Significantly, the *Fair Work (Registered Organisations) Act* 2009 [2016] has only a lesser version of the problems above and below, because it is slightly different – it precludes the Court from making a compensation order if satisfied that none of the respondent's reasons for the detrimental actions included 'belief or suspicion' that the claimant made a disclosure (sub-s.337BB(2)). So, this state of mind is not necessarily required before an order can be made, but it can be raised as a conclusive defence if the respondent can prove that it was absent (unless it is also shown that irrespective, they failed to fulfil a duty to support and protect the claimant: sub-s.337BB(3), below).

While still convoluted, that treatment of the issue is preferable to the present Bill, or the *Public Interest Disclosure Act 2013* (Cth). By contrast, as already indicated, these go further by requiring that the court can never order compensation **unless** satisfied the respondent had the proscribed state of mind.

1.3. What would be the specific legal consequences?

In addition, the problem will have at least two major legal consequences:

- Many claimants will remain at a sufficiently serious disadvantage, even with a reverse onus of proof (and especially the one proposed), to the extent that many deserving claimants will be unlikely to try and even fewer succeed;
- The structure and language of the provisions will continue to limit the interpretation of 'victimising conduct' to prioritise deliberate and direct acts of harm, over failures to fulfil duties (e.g. to support, protect and properly manage the disclosure and investigation processes) which then result in harm, even though no individual may have ever intended harm to be caused.

Why won't the reverse onus of proof sufficiently fix it?

It has been argued that if there is a problem, the proposed reverse onus of proof (s.1317AE(2)) would fix it – because if a respondent wishes to resist a claim, the onus passes to them to demonstrate that no such state of mind was present (i.e. that they had no belief or suspicion that a disclosure was made, or that this provided no part of the reasons for the detrimental action). It has also been suggested that this is generally difficult.

However, the Bill's defenders appear to have overlooked the fact that, for the above reason, the grounds in s.1317AD(1)(b)&(c) also provide a respondent with a powerful **incentive** to make this argument, as a sure-fire way to knock out a claim. This is because, unlike in other legislation, the state of mind is a necessary element. It is also factually incorrect that in many cases, the respondent's onus would be difficult to discharge.

For example, Dr Chaikin's submission is correct that the proposed, vaguely-worded reverse onus will still ensure that many respondents concede and settle claims early, rather than defend them, in cases where a claimant has reasonable evidence that the disclosure was a definite or likely factor among the respondent's reasons for the detrimental action. In other words, the reverse onus will work sometimes, perhaps often.

However, the state of mind requirements in s.1317AD(1)(b)&(c) also mean that unless the claimant has such evidence, then when the onus reverses, if the respondent simply chooses to give a persuasive account of their own *reasons* for the detrimental action, they will remain in an advantageous position because these remain uniquely within their own knowledge. Especially in the many instances where true reasons are not documented, but other factors such as the deteriorating performance of a whistleblower are easily documented, convincing testimony from the decision-maker can still easily satisfy a court.

Moreover, this is a line of argument which most claimants can see, well ahead of time, will only result in further damage to their own reputation and personal well-being, with no certainty of success (much like the traditional position of complainants in sexual assault trials). Even under civil rules of procedure, and even with this reverse onus of proof, an argument regarding the state of mind of the respondent will still be at risk of being determined simply by the court's assessment of their credibility (for example, by believing their direct evidence that the entire reason they sacked a whistleblower was lack of confidence in their performance, or their unsuitability for their job, not any belief or suspicion that they may have blown the whistle).

The reasons why this will be the outcome in many cases, and why many of the whistleblowers who most deserve these remedies will walk away before putting themselves through the further trauma of fighting for them, were well articulated by Mr Jeff Morris in his evidence of 6 March.

This is why the reverse onus of proof as proposed is insufficiently robust to level the playing field. A tailored version of the reverse onus of proof identified internationally as successful, such as set out in part C3 of my submission, recognised by the OECD, supported by Professors Devine and Lewis, and now also recommended by the attached Transparency International guide, would be a clearer, more certain way of levelling the playing field than that currently proposed.

Implicit narrowing of the range of compensable acts

The final consequence of the underlying problem, even if addressed above, is that the focus on "state of mind" and the language of victimisation or reprisal – as against unfair detriment or damage – narrows the types and range of conduct that will be commonly understood by stakeholders and courts as compensable under these provisions.

This can be further addressed by making it explicit that compensation can flow wherever there is a failure to fulfil a duty to support or protect – irrespective of how the damage then manifests, in a causal sense. That is, the damage may come from individuals who undertake reprisals, who otherwise would not have; or it may come passively, from undue psychological harm, stress or loss of employment advantages accruing from deterioration

in the whistleblower's personal wellbeing and performance, which could and should have been prevented through appropriate support and management decisions.

While this range might be argued to be covered in theory by existing provisions, the structure, grounds and language of the proposed approach remains at odds with the broad principle that any harm for which a person or organisation can justifiably be held responsible, should give rise to an entitlement to seek damages.

For all these reasons, the structure and language of ss.1317AC and AD in this Bill, and ss.13-19 of the *Public Interest Disclosure Act 2013* (Cth), need to be recast in order to satisfy the intended objectives – as recommended by the Parliamentary Joint Committee.

2) Had this bill been law at the time, would Jeff Morris's disclosure of the Commonwealth Financial Planning Scandal have satisfied the threshold in the bill of an 'imminent risk of serious harm or danger to public health or safety, or to the financial system'?

Not in my assessment – certainly not at the time when his disclosures were made, and probably not even in retrospect, on the most generous assessment of the importance and significance of his disclosures.

I found the Department of Treasury's belated attempts to explain why Mr Morris' disclosure might be covered, to be totally unconvincing (Evidence of 6 March). The argument rests on the idea that in so far as the interest shown in Mr Morris' disclosures by ASIC *may* have provided evidence that there was a "systemic" problem in one financial institution, or perhaps in one section of the financial services industry, that this would qualify as an 'imminent risk of serious harm or danger… to the financial system'.

The provision is expressed in terms of 'the financial system', as a whole, not singular institutions nor even sections of the industry. Further, no argument has even been attempted as to why this scale of risk, to the system, represented one of 'imminent' serious harm or danger – i.e. that some kind of specific cataclysmic event could be prevented by the disclosure (as opposed to simply having a past and current pattern of criminal offences and other serious client harm, properly addressed).

Similarly, Dr Chaikin's evidence suggested that he believed that any disclosure which could impact significantly on the 'reputation' of financial institutions or the financial system, as Mr Morris' clearly did, could raise questions regarding the stability of the system, sufficient to qualify as a disclosure of an 'imminent risk of serious harm or danger… to the system'. In my view, this is unlikely to the point of absurdity.

The question was asked of Department of Treasury as to whether it had consulted with Mr Morris on whether he considered he would be covered by the Exposure Draft provisions, prior to putting forward a provision whose applicability he would challenge. Ms Mills responded that Treasury was dependent on submissions to its consultations to identify such issues, i.e. that it was up to Mr Morris or others to make such submissions. The Committee should note that irrespective of whether or not Mr Morris made a submission, Treasury received at least one relevant submission (that of Transparency International Australia), making explicit that this provision would not achieve its intended purpose, for exactly these reasons.

Moreover, this provision also fails to fulfil its objectives in three fundamental ways that go far beyond Mr Morris' case:

- Even if tenuous arguments can be mounted in Mr Morris' case, they would not serve to assist the wide range of other cases that would never meet these thresholds, because they have nothing directly to do with financial services or the financial 'system' (whatever that actually is).

  The obvious example available to the Committee is the case of Mr James Shelton (foreign bribery by Securency International Limited) from whom you have a submission and to whom I referred in my submission and my oral evidence.

  If the Committee intends to express a view regarding the workability of this provision, it needs to explain why – even if it thinks Mr Morris would be covered – it is appropriate for disclosures about financial services to attract this particular level of protection, but not equivalent disclosures about other types of wrongdoing, which may actually be far more serious; or the full range of crimes otherwise intended to be covered by the whistleblowing 'protections' in the Bill.

- As mentioned in my evidence – the objectives of the Bill are not served by setting any legal threshold which will necessitate a huge, expensive and uncertain legal argument over its applicability to the facts of the case, in this basic way.

  Only lawyers will benefit, and not deserving whistleblowers who are forced to fight a massive legal battle in order to have a *chance* of accessing the protections; and certainly not the public interest. The tests should be drawn up so as to minimise, not maximise this kind of uncertainty, given that the whistleblower must have already satisfied the criteria of having made a public interest disclosure which did not meet with timely or appropriate regulatory action.

- It was suggested in evidence that whistleblowers can still access "other" protections, such as "common law" protections, irrespective of this Bill.

  Please note the relevant evidence in my submission (Part C5), and in particular the conclusion reached by the Senate Select Committee on Public Interest Whistleblowing, in 1994, that even at that stage, any applicable common law protections had been so eroded or become so uncertain, that it was clear that legislative protection was needed.

  In my view, an argument such as mounted by the Department of Treasury – in effect, that this legislation is not the place to provide such protections and set out such thresholds – misses a major purpose of having this legislation in the first place. The broad public expectation is certainly that this is one of the key purposes to be served by such legislation. The best way for the Parliament to confirm publicly aired fears that these protections are simply a sham, would be to accept that argument.

Are there other provisions in the bill that would have meant that Mr Morris would not have received the protection under the bill?

Not beyond the other problems I have suggested with the Bill, in my submission and these responses – which affect all whistleblowers, including but not limited to Mr Morris.

3) In your submission you cite a number of existing provisions regarding external disclosures in other bills. Where do you believe the appropriate balance lies for external disclosures?

The Parliamentary Joint Committee arrived at an appropriate balance, in my view, when it recommended that disclosures to the media or other third parties be protected where there is 'a risk of serious harm or death' or where *any* public interest disclosure 'has been made to a law enforcement agency and, after a reasonable length of time, no action has been taken' (Recs 8.5 and 8.6; par 8.41).

Existing other precedents are useful for identifying some key guidance on what is reasonable, notably:

- Possible timeframes for 'a reasonable length of time';
- Provisos that the protections only extend to as much information as is necessary to have the disclosure acted upon, i.e. not other (e.g. purely defamatory) purposes; and
- Relevant considerations for any court or tribunal when assessing whether the further/public disclosure was, in all the circumstances, reasonable.

The replacement provision would not be difficult to draft, by appropriately qualified and experienced people who actually understand the policy objectives, once those policy objectives are clarified.

4) The bill does not seem to replicate subsection 337BB(5) of the *Fair Work (Registered Organisations) Act 2009* which relates to compensation:

> ***If the reprisal wholly or partly consists, or consisted, of the respondent terminating, or purporting to terminate, the target's employment, the Court must, in making an order mentioned in paragraph (1)(a) [i.e an order for compensation], consider the period, if any, the target is likely to be without employment as a result of the reprisal. This subsection does not limit any other matter the Court may consider.***

Do you believe that this is a desirable provision to include?

Yes.

In evidence on 6 March, the Department of Treasury responded to this question by saying that this provision was already included in section 1317AB or section 1317AD of the Act, and therefore did not need to be added/incorporated.

This evidence appears to be incorrect, as no such provision is found in those current sections, nor in the Bill. The appropriate place for it to be added, along with any other mandatory or relevant considerations for the court when considering civil remedies, would be within the proposed s.1317AE between sub-sections (2) and (3).

5) Unlike the position in both the Public Interest Disclosure Act and the *Fair Work (Registered Organisations) Act 2009*, the perpetrator needs to "engage in conduct" in order to contravene the provisions in this bill rather than merely cause "any detriment" by "act or omission"? Which formulation do you believe is preferable?

At law, the phrase 'engage in conduct' is not a problem within the Corporations Act 2001, because section 9 of the Corporations Act (dictionary) defines *"engage in conduct "* to mean: "(a) do an act; or (b) omit to perform an act."

While this is common in legislation, in my view this question provides another small example of the benefit of a single private sector Act, in which – due to their importance – 'omissions' could be more explicitly included in the relevant sections, themselves, rather than buried in a definition in the same Act, hundreds of pages away.

I agree this is an important issue due to the range of types and causes of detriment or damage at which the provisions should be aimed, as discussed above and below.

6) In addition to your submission, are there further comments you wish to provide about the provisions for compensation under the bill?

No.

7) What is your view on the position that, under the bill, disclosures are protected if they are made to ASIC or APRA but not to the AFP or other regulators?

In my view the preferable approach would be to:

- list all key independent Commonwealth regulators in this Bill who are likely to receive any significant number of relevant disclosures, including especially the Australian Federal Police and ACCC; and
- add a small number of provisions which would achieve the effect of making clear that (a) where a regulator receives a disclosure that relates to their own responsibilities, it is protected; and (b) where it relates or may relate to the responsibilities of a different regulator, it is also protected but the regulator's responsibility is limited to referring that disclosure either to the other regulator or to the lead/oversight agency (in the first instance, this appears to be ASIC), or both; unless the lead/oversight agency actually asks or directs them to do more.

It remains especially odd that the AFP was proposed to be expressly listed as an eligible recipient in the Exposure Draft of the Bill, but then removed – when any Commonwealth criminal offence carrying a sufficient penalty can be the subject of a disclosure.

This outcome means that under this Bill, either:

- whistleblowers who currently go to the AFP will have to be told by the AFP to make their disclosure first to ASIC or APRA, and then have it referred back to the AFP, to ensure the protections attach; or
- the AFP will have to be prescribed by regulation as an eligible recipient, in which case why not just include them in the Act in the first place.

The same is true for the other regulators.

Basic provisions clarifying the key roles and responsibilities of all regulators, in handling disclosures, would be a preferable way of dealing with this. This is part of the reason why a single, larger private sector Act is still warranted. However, this Bill could also do much better in setting up some of those basic mechanisms, in the interests of an effective scheme from the outset, if we want it to actually work.

8) Do you believe that further protections could be provided for whistleblowers who seek the assistance of a lawyer or their union?

Yes.

While I do not regard this to be a critical failing in the present Bill, I consider that the ultimate Act should include protection for disclosures made to any person or body for the purpose of seeking any relevant form of professional assistance with respect to what to do about the disclosure, or with respect to receiving support or accessing protections in the context of the disclosure or its investigation. This could also therefore be incorporated in the Bill at this stage, if desired.

I agree with Recommendation 25 of the Moss Review (2016) of the PID Act:

> The Review recommends that the PID Act be amended to protect disclosures for the purposes of seeking advice and professional assistance about using the PID Act in the same way that disclosures to lawyers are protected.

Mr Moss referred to unions, Employee Assistance Programmes, and professional associations as examples. The benefit of such a provision is that it would not only ensure that union members can access the available supports, but others – for example, internal auditors who seek help from their professional association, corporate counsel from the Law Society, company secretaries from the Governance Institute, etc.

I see no reason why it should not be the same under this regime.

I also note the submission of the Institute of Internal Auditors that amendments are needed to ensure clarity around their role in the Bill

9) Subsection 1317AE(3) in the bill provides that a court must not make an order under paragraph (1)(b) if an employer establishes that it took reasonable precautions and exercised due diligence to avoid the victimising conduct. How does this provision compare to the imposition of a duty to support or protect?

This provision is a direct copy from sub-s.14(2) of the PID Act 2013.

No, the inclusion of this provision does not substitute for the value of more directly and positively recognising a failure to fulfil a duty to support or protect, as a basis for civil liability, in the manner of sub-ss. 337BB(3) and (6) of the *Fair Work (Registered Organisations) Act 2009*.

If redrafted, it could work effectively in support of that duty. Presently, however, as a copy from other legislation, it appears to have been thrown into the Bill without much regard for exactly how it would interact with other provisions to ensure the intended result. In particular, there is also no clear relationship with the requirement imposed on public and

larger companies to have 'policies' which include 'information about how the company will support whistleblowers and protect them from detriment' (s.1317AI(5)(c)).

Once properly drawn, the provisions should:

1. Recognise a failure to fulfil a duty to support and protect, as a basis for remedies (if detriment of whatever relevant kind has occurred);
2. Empower the tribunal to relieve the respondent (including an employer) of some or all of their liability, if they can show that they tried to discharge this duty or managed to discharge at least part of it (being some of the intended effect of sub-s.1317AE(3));
3. Ensure that mandatory considerations for the tribunal in deciding (1) and (2) include: (i) whether or not the respondent (employer) has established any processes or procedures for supporting and protecting its whistleblowers (whether as required by s.1317AI(5)(c) or otherwise, e.g. its own volition), (ii) the adequacy of those processes or procedures, taking into account any relevant standards or guidance published by the relevant regulator(s) or others, and (ii) the extent to which the employer actually followed or implemented those processes or procedures.

The sub-section is currently not sufficiently helpful in discharging point 2, because it provides a conclusive defence to the employer (there can be **no** compensation order) even though the question of how *well* the employer discharged their duty will inevitably be something for the tribunal to weigh up. Does it mean that the employer gets this benefit, if 'any' reasonable precautions were taken, or should it be 'all' reasonable precautions? What is a reasonable precaution? Should it be satisified if 'any' due diligence was shown, or should it be 'all' due diligence? Etc.

The redrawn provisions can and should also make clear at what point the respondent should raise this defence. Part C3 of my submission, setting out a clearer and more robust basis for a reverse onus of proof, suggests that the employer be required to establish that it discharged its duties to support and protect as part of its burden under that section (currently s.1317AE(2)(b)), if relevant to the claim. This is to be preferred to the risk of employers holding back, and attempting to first disprove other parts of the claim (e.g. by attacking the whistleblower in the manner set out earlier), and then trying to raise this defence only after the first attempt fails. The provisions should work to assist the tribunal in deciding the case in its totality, in the first instance.

Finally, the Department of Treasury gave evidence that more positive recognition of the existence of duties to protect and support, by making failure to fulfil these a clear basis of liability, was not required because these duties and associated remedies could already be found in other legislation. This begs two questions:

- Where? and
- If we think those duties and remedies are already sufficiently clear and accessible, why do we think that whistleblower protection legislation is even needed – or at least, why do we think it needs civil remedy provisions that go to these issues, or are wider than simply criminal reprisal compensation provisions?

It may be that in some circumstances, other legislation such as workplace health and safety legislation, or the general protections of the *Fair Work Act* do provide whistleblowers with some basis for relief. The best way to recognise this and manage any choice of law issues is to provide for whistleblowers to be able to pursue any rights under this Act in those tribunals, along with any rights under other legislation, with the proviso that whichever

forum they choose, they cannot then seek to relitigate the same questions again in another forum. Sections 22-22A of the PID Act 2013 provide an example.

There is also no risk of this basis of relief undercutting or compromising any rights in other legislation, provided it is cast in general terms and properly linked with the other provisions of this Bill which provide guidance on the type and content of the duties involved, as suggested above.

However, the fundamental fact remains that if other legislation requiring employers to provide and maintain a safe working environment, or common law requirements, were enough to convey the duties and provide access to the remedies that are needed in this field, then again, we would not need legislative protection for whistleblowers. Accordingly, such evidence again misses one of the major purposes of having this legislation in the first place. The broad public expectation is that these are key purposes which need to be served by the legislation, if it is to be credible.

Fortunately, we have now have the precedent of the *Fair Work (Registered Organisations) Act 2009* to show it is possible. The Committee will be interested to note that the recognition of this duty has now been identified as among world's best practice, in the new Transparency International guide to legislation at Attachment 1 (pp.36-37).

10) In the light of other submissions that have been made to the committee, do you have a view on the scope or wording of paragraph in 1317AAC(1)(e) of the bill, which provides for a disclosure to be received by 'an individual who is an employee of the body corporate – a person who supervises or manages the individual'?

Do you believe that this extends to all supervisors in a chain of responsibility?

Not necessarily. While it would probably be implied that the paragraph means anyone who 'directly or indirectly' supervises or manages the individual, and not only direct supervisors, it would be preferable for this to be explicit (as is the case in sub-s.17(1)(d) of the *Public Interest Disclosure Act 2010* (Qld): '(d) if the person is an [employee] of the entity—another person who, directly or indirectly, supervises or manages the person').

What is your view on the breadth of this provision?

As indicated in my oral evidence, the provisions identifying 'eligible recipients' serve two purposes: (1) to ensure that protections cover all intended disclosures, by identifying the point at which, if a disclosure is made, these protections commence; and (2) to identify to employees and organisations, the persons or entities to whom disclosures should be able to be made.

If amended as above to remove doubt, paragraph 1317AAC(1)(e) is appropriately broad for the first purpose, as it confirms that if a disclosure is made by an employee to their immediate supervisor (or a higher supervisor), the protections commence, irrespective of what then happens. This is vital because irrespective of whom a whistleblower *should* perhaps disclose to in any individual circumstance, a majority are likely to continue to disclose first to immediate supervisors; and it is at that point that risks and dangers commence, especially if, unknown to the employee, the supervisor is themselves complicit in or has reason to be defensive about the matters involved in the disclosure.

Problems arise with respect to the second purpose. Whether or not it has proved problematic in the public sector, in the private sector it could well be problematic to frame this provision so as to give the wrong impression that every supervisor is necessarily competent to receive and handle any kind of disclosure. All supervisors should have the necessary basic skills and knowledge that if an allegation of wrongdoing comes to their attention (just like customer complaints, health and safety incidents or workplace disputes), they know they need to do something about it, and who is appropriate to talk to or to take over the matter. However, if expectations regarding the responsibilities of first and second level supervisors are too high, then other risks arise, along with a potentially unrealistic burden on companies to try and achieve those expectations. This has been the subject of many submissions to the Committee.

If in doubt, the first purpose is more important than the second purpose, and should not be compromised. However, a better solution may be to amend the Bill to better distinguish between these two purposes, to ensure each is properly met.

For example, paragraph 1317AA(2)(b) and the heading of this sub-section could be amended to more clearly achieve the first purpose, by providing that a disclosure qualifies for protection if: (b) the disclosure is made to an officer or employee in a position of responsibility in the regulated entity, or who has a function of receiving or taking action on the type of information being disclosed in relation to the regulated entity, in either case including but not limited to an eligible recipient as defined by s.1317AAC.

It could also be made clear that a person 'in a position of responsibility' includes any person who directly or indirectly supervises the person making the disclosure.

Section 1317AAC, identifying classes of eligible recipient, could then be refined to more accurately cover the range of persons whom, in all circumstances, should be both able and capable of receiving disclosures as defined by the Bill. As noted earlier, this could expressly include internal auditors, for example. It should still provide that the CEO and any senior executives or managers are eligible recipients, along with specifically authorised officers, but would not then need to capture all supervisors and managers (provided paragraph 1317AA(2)(b) is appropriately cast).

There may be other solutions, or variations on this solution, that could address these issues.

11) Can you provide further detail about the effect of an obligation to investigate disclosures and reprisals, described in recommendation 12.4 of the PJC Inquiry into whistleblowers? What does this bill provide in relation to this obligation?

This bill provides nothing by way of direct obligation to investigate disclosure or reprisals, on the part of regulated entities or the prescribed regulatory authorities. The strongest *implication* that regulated entities should investigate disclosures lies in the proposed statutory requirement upon public and larger companies to have policies which include 'information about how the company will investigate disclosures that qualify for protection' (1317AI(5)(d)).

Under a full legislative scheme, of the kind recommended by the PJC, I would envisage that for private and not-for-profit sector employers or organisations:

- The objects of the Act would include that of ensuring that public interest disclosures are investigated and/or properly dealt with and resolved by regulated entities and relevant regulatory agencies;

- There could be a broadly framed statutory obligation on the CEOs or management of regulated entities to ensure that disclosures (where internally made) are appropriately investigated or otherwise dealt with – for example by confirming that a failure to do so without reasonable excuse would be a breach of the duties of company officers or directors;
- There would be a duty upon the relevant regulatory agencies to ensure that appropriate assessment, investigative or resolution action is taken with respect to those disclosures that come to their attention, supported by (i) an obligation to inform the oversight agency (whistleblowing protection authority) of the numbers of disclosures, the actions taken and the outcomes obtained, and (ii) an obligation to inform the whistleblower as to the action taken (unless reasonable circumstances exist as to why this would be impractical or not in the interests of justice), consistently with the PJC's Recommendation 8.3;
- There would be a duty on the oversight agency (whistleblowing protection authority) to assist regulated entities with minimum guidance on how to fulfil their investigative obligations with respect to disclosures, bearing in mind that these obligations are, for the most part, not new and typically already laid out in the existing regulations and compliance standards relating to the relevant wrongdoing;
- There would be minimum public reporting requirements by the relevant regulatory agencies and/or the oversight agency (whistleblowing protection authority), regarding the outcomes from those disclosures that they handle, to ensure that the scheme is functioning.

The same would automatically be true of reprisals or alleged detrimental acts, omissions, or failures to support and protect. I hope this assists the Committee.

12) You have been quoted in the AFR as describing this bill as "more a sideways than a forward step on key issues", and have cited a selection of areas where this is the case in your submission. Are there further areas of the bill where you think this is the case?

No – not beyond the areas already identified in my submission, my oral evidence or these responses.

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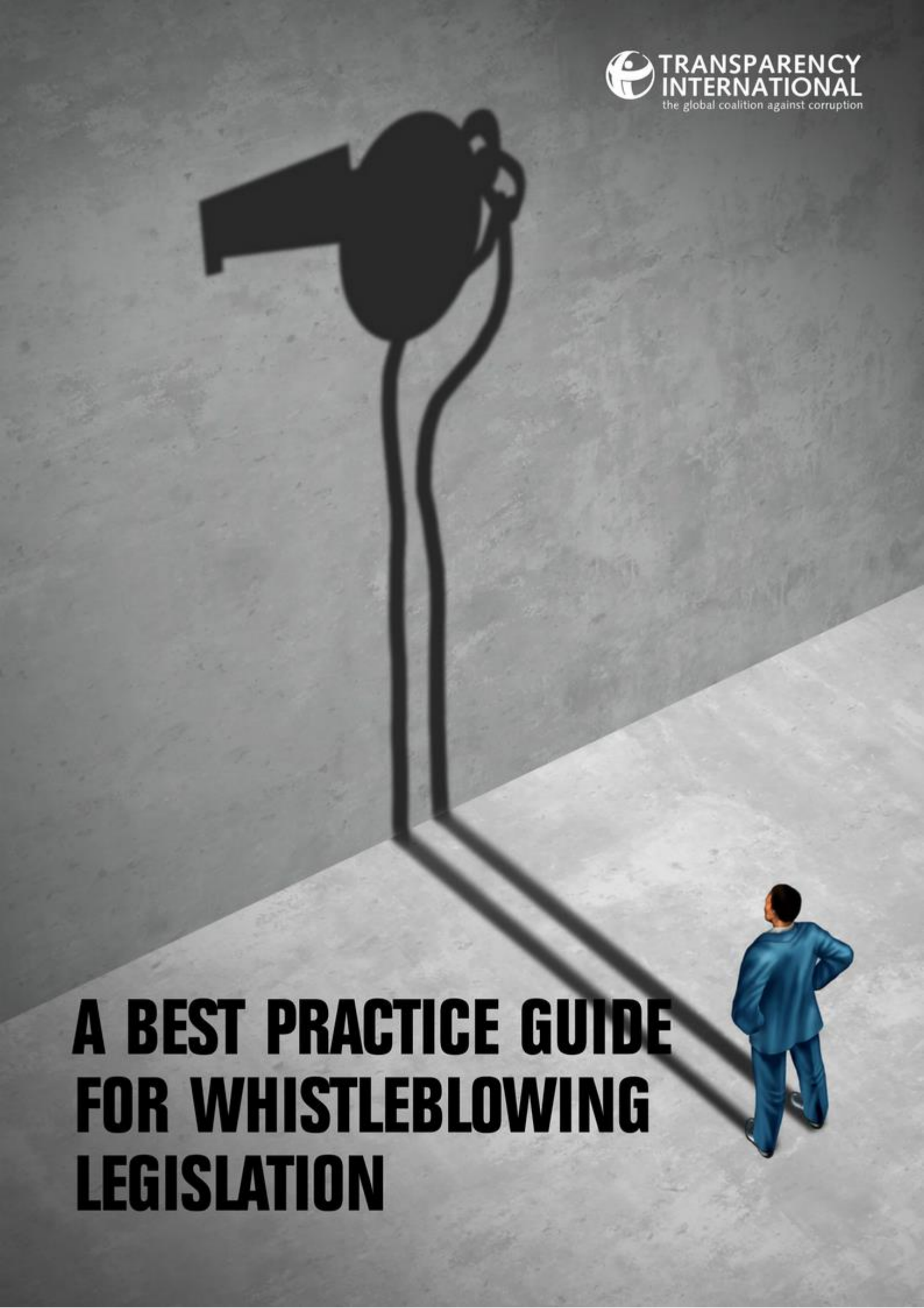

A BEST PRACTICE GUIDE FOR WHISTLEBLOWING LEGISLATION

Transparency International is a global movement with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. With more than 100 chapters worldwide and an international secretariat in Berlin, we are leading the fight against corruption to turn this vision into reality.

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INTRODUCTION

Whistleblowers play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing that threatens public health and safety, financial integrity, human rights, the environment, and the rule of law. By disclosing information about such misdeeds, whistleblowers have helped save countless lives and billions of dollars in public funds, while preventing emerging scandals and disasters from worsening.[1]

Whistleblowers often take on high personal risk. They may be fired, sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed. Protecting whistleblowers from unfair treatment, including retaliation, discrimination or disadvantage, can embolden people to report wrongdoing and thus increase the likelihood that wrongdoing is uncovered and penalised. Whistleblower protection is thus a key means of enhancing openness and accountability in government and corporate workplaces.

The right of citizens to report wrongdoing is part of the right of freedom of expression, and is linked to the principles of transparency and integrity.[2] All people have the inherent right to protect the well-being of other citizens and the common good of society, and in some cases they have a professional or legal duty to report wrongdoing. The absence of effective protection can therefore pose a dilemma for whistleblowers: they are often expected to report wrongdoing, but doing so can damage their career or expose them to retaliation.[3]

All global and regional treaties aimed at combating corruption have recognised the importance of whistleblower protection to address corruption, and have introduced requirements to protect whistleblowers. This includes the United Nations Convention against Corruption (Articles 8, 13 and 33), the Council of Europe Civil and Criminal Law Conventions on Corruption (Articles 9 and 22 respectively), the Inter-American Convention against Corruption (Article III(8)), the African Union Convention on Preventing and Combating Corruption (Article 5(6)) and the Arab Convention to Fight Corruption (Article 10(6)).

In the past decade, many countries have sought to adopt or have adopted legal protections for whistleblowing. To help ensure that whistleblowers are afforded proper protection and disclosure opportunities, Transparency International published a set of 30 principles in 2013, to serve as guidance for the adoption and improvement of whistleblower legislation. The *International Principles for Whistleblower Legislation* (in Annex) took into account lessons learned from existing laws and were shaped by input from whistleblowing experts, whistleblowers, government officials, academia, research institutes and civil society organisations (CSOs) from around the world. These principles are reflected in guidance from the United Nations, the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe.

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[1] See for example J. Scott Armstrong, “The manager's dilemma: role conflict in marketing”, University of Pennsylvania, 1 June 1978, pp. 5-6, http://repository.upenn.edu/cgi/viewcontent.cgi?article=1040&context=marketing_papers.
[2] See United Nations, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression* (2015), p. 4 and Council of Europe, *Protection of Whistleblowers, Recommendation CM/Rec(2014)7* and *Explanatory Memorandum* (2014), p. 15.
[3] Transparency International, *International Principles for Whistleblower Legislation*, 2013, p. 2, www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation.

Transparency International principles for whistleblower legislation, as all international high-level standards, should be adapted to an individual country's political, social and cultural contexts, and to its existing legal frameworks. To date, no whistleblowing law is fully aligned with the 30 Transparency International principles. In fact, all existing national laws on whistleblower protection still have loopholes and shortcomings. However, many whistleblowing laws contain provisions that, when considered independently, are in line with some of the principles and thus provide useful examples of how to implement Transparency International principles into legislation.

As more and more countries are seeking to adopt whistleblowing legislation, Transparency International has developed the present guide to provide guidance to policy-makers and whistleblowing advocates on how to implement its *International Principles for Whistleblower Legislation* into national law. It was done in collaboration with experts from Transparency International chapters who have successfully advocated for the adoption of whistleblower protection legislation in their countries.[4] For each principle, the current guide sets out what constitutes current good practice and why. Where possible, it provides examples from existing national legislation[5] or prospective best practice. The guide can be read as a whole or be used for specific principles that are of particular interest to the user, but always in tandem with the *International Principles for Whistleblower Legislation*.

It should be noted that, while the term whistleblower is often used to designate any person reporting wrongdoing, we are here referring more specifically to individuals reporting wrongdoing that they encountered in the course of their professional activities (see section "Who is protected"). Although most of the principles could apply to any person reporting wrongdoing, "insider" whistleblowers, by their position, often have crucial and reliable information that is vital to bring to light, but tend to be more vulnerable and need special protection.

Note: the translations in English of legislation provided in this guide are not official translations.

[4] From TI Australia, TI France, TI Ireland, TI Italy, TI Netherlands and TI Slovakia.
[5] It should be noted that the mention of one or more provisions of a national law does not indicate an endorsement of the law in its entirety. As mentioned above, no existing national whistleblowing legislation can fully be considered an example of good practice.

SUMMARY RECOMMENDATIONS

SCOPE OF APPLICATION

Do's

- Cover a wide range of categories of wrongdoing.
- Provide a wide definition of whistleblower, beyond traditional employee–employer relationship.
- Cover both the public and private sectors.

Don'ts

- No exhaustive or closed list of reportable wrongdoings.
- No public interest test (rather, expressly exclude private employment grievances or at least set a presumption that the disclosure is in the public interest).
- No good faith or motivation test (rather, adopt the "reasonable belief that the information is true" approach).

PROTECTION

Do's

- Provide wide-ranging protections from all unfair treatments, including more discrete forms such as ostracising.
- Sanction retaliators.
- Confidentiality should cover all information identifying the whistleblower.
- Consider allowing anonymous disclosures.
- Provide protection against retaliatory actions outside the workplace (such as legal actions).

Don't

- Disclosures should not be dismissed just because they are made anonymously.

DISCLOSURE PROCEDURES AND FOLLOW-UP

Do's

- Provide multiple avenues for making a disclosure.
- Make it mandatory for public and private sector organisations above a certain size to set up internal whistleblowing mechanisms.
- Set out minimum standards for whistleblowing mechanisms.

- Allow disclosure to the public in certain circumstances.
- Provide avenues for whistleblowers to make disclosures involving matters of national security and official secrets, including through an independent oversight body.
- Provide advice channels.
- Provide training for all parties involved in the implementation of the law.
- Set an obligation to follow up on disclosures.
- Allow whistleblowers to be involved in the investigation process.

Don't

- No tiered approach: do not restrict whistleblowers' access to regulators and the authorities (no further requirements than for internal reporting).

RELIEF

Do's

- Place the burden of proof on the employer to establish that any detriment suffered by the whistleblower is not linked to his/her disclosure.
- Provide interim relief to whistleblowers.
- Provide a full range of remedies, financial and others, covering all direct, indirect, past and future consequences of unfair treatment.
- Consider providing legal and financial assistance to whistleblowers.
- Provide a forum for whistleblowers' claims to be adjudicated that is fair, impartial and timely.
- Consider non-financial awards for whistleblowers.

Don't

- Do not set a limit on reparation to whistleblowers (it should be full reparation).
- Do not put barriers such as court fees in the way of whistleblowers bringing claims.

WHISTLEBLOWING AUTHORITY

Do's

- Make an independent agency responsible for the effective implementation and enforcement of whistleblower protection.
- Provide such agency with appropriate power and resources.
- Provide advice to whistleblowers.
- Promote whistleblowing through public awareness campaigns.
- Monitor organisations' internal whistleblowing mechanisms.
- Address improper investigation of disclosures.

LEGISLATIVE STRUCTURE, OPERATION AND REVIEW

Do's

- Have a dedicated, comprehensive and coherent whistleblowing law.
- Provide a mechanism for collection and publication of data on whistleblowing cases.
- Provide for periodic review and update of the law.
- Ensure that a wide range of stakeholders are engaged throughout the legislative processes.

Don't

- No sectoral approach.

GUIDING PRINCIPLE

Numerous studies have shown that the three main reasons given by people for not reporting wrongdoing are:

- fear of the consequences (legal, financial, reputational)
- the belief that nothing will be done, that it will not make any difference
- uncertainty about how, where and to whom to report[6]

Policy-makers should keep these reasons in mind when developing whistleblowing legislation. Addressing these concerns should be at the heart of any legislative proposal if it is to achieve its objective: effectively protect whistleblowers so that more people who are aware of wrongdoing speak up, facilitating these wrongdoings to be tackled and any harm to the public interest prevented or stopped.

This is reflected in Transparency International's guiding principle on whistleblowing:

PRINCIPLE 2

Protected individuals and disclosures – all employees and workers in the public and private sectors need:

- accessible and reliable channels to report wrongdoing;
- robust protection from all forms of retaliation; and
- mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing.

[6] See for example Transparency International, *Global Corruption Barometer* (regional reports for Asia Pacific, Europe and Central Asia, Middle East and North Africa, Sub-Saharan Africa), 2017, www.transparency.org/news/feature/global_corruption_barometer_citizens_voices_from_around_the_world; European Commission, *Summary Results of the Public Consultation on Whistleblower Protection*, p. 6.

SCOPE OF APPLICATION

An important requirement of any whistleblowing legislation is to make sure that it clearly sets out its scope of application, that is, what types of wrongdoing are covered, whom it applies to and what level of belief in the concern raised the whistleblower should have. The scope of application should be as wide as possible to include every possible whistleblowing situation and ensure that all whistleblowers are protected by the legislation. Loopholes and lack of clarity might lead to situations where individuals decide to speak up in the belief that they are protected, when in fact they are not and as such are vulnerable to unfair treatments.

REPORTABLE INFORMATION

PRINCIPLES 1 AND 3

1. Whistleblowing – the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations* – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.

3. Broad definition of whistleblowing – whistleblowing is the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation**; miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest***; and acts to cover up of any of these.

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* Including perceived or potential wrongdoing.
** Including fraudulent financial disclosures made by government agencies/officials and publicly traded corporations.
*** Could also include human rights violations if warranted or appropriate within a national context.

It is important to have a broad and clear definition of whistleblowing that covers as wide a range of wrongdoing as possible. Limiting the scope of information for which individuals will be protected hinders whistleblowing. Indeed, if people are not fully certain that the behaviour they want to report fits the criteria, they will remain silent, meaning that organisations, authorities and the public will remain ignorant of wrongdoing that can harm their interests.[7]

The Council of Europe also stressed that limiting whistleblower protection to certain types of wrongdoing, such as corruption offences, disclosed to certain bodies, can create confusion between whistleblowing and informing or denouncing and can increase opposition to the law and distrust in its purpose.[8] It is therefore important that any legislative provision enables a broad spectrum of concerns to be raised.

[7] United Nations Office on Drugs and Crime (UNODC), *Resource Guide on Good Practice in the Protection of Reporting Persons* (2015), p. 22.
[8] Council of Europe, *Protection of Whistleblowers: A Brief Guide for Implementing a National Framework* (2015), p. 8.

Any matter of wrongdoing or potential harm to the public interest

There are two main approaches used to define protected disclosures: adopting a detailed definition listing all the categories covered or using a broad general term like "threat or harm to the public interest".

The Council of Europe defines "public interest report or disclosure" as the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest.[9] The public interest is generally understood as anything that touches on the welfare, well-being or "common good" of the general public or society. It is thus a rather flexible and expansive concept that can cover many situations, but it is open to interpretations, which can lead to uncertainty. Moreover, while the concept is commonly used in some jurisdictions, it cannot be assumed that the public knows what it means. This is why the Council of Europe recommends that the scope of reportable wrongdoing is clearly specified in the relevant legislation, so that the public can understand what is covered and what is not and make an informed decision accordingly.[10]

Some countries, such as Norway, have adopted a very simple but nevertheless clear and wide definition.

Norway, Working Environment Act 2005 (as amended in 2017)[11]

Section 2 A-1 The right to notify censurable conditions at the undertaking

(1) An employee has a right to notify **censurable conditions** [otherwise translated as "**conditions worthy of criticism**"] at the employer's undertaking. Workers hired from temporary-work agencies also have a right to notify censurable conditions at the hirer's undertaking.

The other approach, the list approach, has the advantage of providing a clear and transparent definition of what is a reportable wrongdoing. However, there is a risk that relevant forms of wrongdoing are omitted by accident or intent. Thus, special care should be taken to avoid creating loopholes. One way to do this is by setting out broad categories of reportable wrongdoing, a good practice example of which is the Irish Protected Disclosures Act.[12]

Ireland, Protected Disclosures Act 2014[13]

Section 5

(3) The following matters are relevant wrongdoings for the purposes of this Act—

(a) that an offence has been, is being or is likely to be committed,

[9] Principle b.
[10] Council of Europe, 2014, pp. 24-25.
[11] An English translation of Norway, Working Environment Act is available at www.arbeidstilsynet.no/contentassets/e54635c3d2e5415785a4f23f5b852849/working-environment-act-october-web-2017.pdf.
[12] It contains the same wording as the UK PIDA with the addition of two categories (f) and (g).
[13] The full text of Ireland Protected Disclosures Act 2014 is available at www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html.

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged,

(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,

(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or

(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.

France has adopted a mixed approach. The French Sapin II Law lists categories of wrongdoings that are covered and includes a public interest category, which will potentially allow individuals to be protected for disclosing information that falls outside of the other categories listed.

France, Law of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life (Sapin II)[14]

Article 6

A whistleblower is a physical person who discloses or reports [...] a crime or misdemeanour, a gross and evident violation of an international commitment France has duly ratified or approved, of a unilateral instrument of an international organisation pursuant to its commitment, of a law or regulation, or a serious threat or harm to the public interest, of which he or she became personally aware.

The mixed approach should be considered best practice, as it is in alignment with Transparency International's third principle that exclusive or exhaustive lists should be avoided in favour of indicative lists ("including but not limited to") covering a wide range of examples (corruption, criminal offences, breaches of legal obligation, miscarriages of justice, specific dangers to public health, safety or the environment, abuse of authority, unauthorised use of public funds or property, gross waste or mismanagement, conflicts of interest and human rights violations, etc.).

No public interest test

As highlighted in Transparency International's guiding definition (Principle 1), whistleblowing is about protecting the public interest. Several countries, such as the UK, Ireland and Australia, emphasise this link by mentioning the public interest in the law title or preamble. This has the advantage of

[14] The Sapin II Law is available (in French) at www.legifrance.gouv.fr/eli/loi/2016/12/9/ECFM1605542L/jo#JORFARTI000033558655.

shifting the focus from the whistleblower to the disclosure itself and portraying whistleblowing as an act of responsible citizenship.

However, some pieces of legislation go further by expressly limiting whistleblower protection to reports made "in the public interest". The intention behind such provisions is generally to exclude "private" employment grievances from the ambit of whistleblowing legislation or to limit disclosures on trivial matters.[15] However, adding a public interest requirement, which adds uncertainties and hurdles for whistleblowers, is not necessary. Ireland achieved the same result as a public interest test, without creating uncertainty, by expressly stating that breaches of the worker's own contract of employment cannot be reported under the Act.[16]

Wrongdoing that has been, is being or is likely to be committed

Individuals raise concerns not only when wrongdoing has already occurred and damage has already been done, but also, and more often, in order to avert further harm and damage.[17] The preventive aspect of whistleblowing is essential, and people should be encouraged to speak up about wrongdoings that are likely to be committed. Many examples of good practice can be found in that regard, such as in the UK Public Interest Disclosure Act[18] or in the Irish Protected Disclosures Act.[19]

Wrongdoing committed in or by public or private sector organisations

Countries that only protect disclosures about wrongdoing committed in or by the public sector put a significant number of whistleblowers at risk.[20] In addition, the potentially disastrous consequences of wrongdoing in private sector organisations (both for profit and non-profit) have been demonstrated repeatedly. In numerous high-impact cases, misconduct has caused injury and fatalities, serious environmental harm or human rights violations.[21] In many cases, it appeared that workers knew about the issue but were too scared to report it, or did make disclosures but were ignored.

Whistleblower protection should therefore cover information about wrongdoing regardless of whether it is perpetrated in or by public institutions or private sector organisations.

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[15] The UK added a public interest test to the Public Interest Disclosure Act 1998 in 2013 to reverse a decision of the courts that allowed individuals to rely on a breach of an employment contract to gain whistleblowing protection.
[16] Section 5(3)(b) of the Protected Disclosures Act 2014.
[17] Council of Europe, 2014, p. 39.
[18] Section 1.
[19] Section 5 para (3)(h), cited above.
[20] In the UK, a study of a whistleblowing advice line found that fewer than 50 per cent of the calls related to the public sector (Public Concern at Work and the University of Greenwich 2013, *The Inside Story*, www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf).
[21] Transparency International, *The Business Case for "Speaking Up": How Internal Reporting Mechanisms Strengthen Private-Sector Organisations* (2017), www.transparency.org/whatwedo/publication/business_case_for_speaking_up, p. 2.

WHO SHOULD BE PROTECTED

PRINCIPLE 4

Broad definition of whistleblower – a whistleblower is any public or private sector employee or worker who discloses information covered in Principle 3 (above) and who is at risk of retribution. This includes individuals who are outside the traditional employee–employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and former employees.*

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* Protection shall extend to attempted and perceived whistleblowers; individuals who provide supporting information regarding a disclosure; and those who assist or attempt to assist a whistleblower.

Public or private sector workers, including individuals outside of traditional employee–employer relationship

The Transparency International definition of a whistleblower is in line with the Council of Europe principle, which states that "The personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not."[22]

Wrongdoing can be encountered by a wide range of individuals, such as consultants, contractors, providers, trainees/interns, student workers, temporary workers, former employees, employees seconded from other organisations, but also individuals who apply for jobs, contracts or other funding. Volunteers are also often well placed to expose wrongdoing, in particular in the charitable and health sectors.

While labour law provisions such as protection against unfair dismissal may not be appropriate in some cases, voluntary or unpaid workers and applicants should be explicitly included within the definition of "worker" within the whistleblowing legislation. They should be provided with protections in adequacy with their situation, such as protection of their identity, the ability to sue for damages (for blacklisting, for example) and immunity against criminal/civil liability.[23]

Introducing whistleblower protection within employment legislation can thus be problematic because it could preclude individuals who fall outside the conventional employment relationship from receiving adequate protection.

An example of good practice can be found in New Zealand. The legislation provides a non-exhaustive list of categories of individuals covered, including the majority of precariously positioned individuals, such as volunteers and former employees. However, it does not seem to include applicants.

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[22] Council of Europe, 2014, Principle 3.
[23] Transparency International Ireland, *Speak Up Report 2017*, p. 32; Government Accountability Project (GAP), *International Best Practice for Whistleblower Policies*, 2016, Principle 5

New Zealand, Protected Disclosures Act 2000[24]

Section 3

employee, in relation to an organisation, includes—

(a) a former employee;

(b) a homeworker within the meaning of section 5 of the Employment Relations Act 2000;

(c) a person seconded to the organisation;

(d) an individual who is engaged or contracted under a contract for services to do work for the organisation;

(e) a person concerned in the management of the organisation (including a person who is a member of the board or governing body of the organisation);

(f) in relation to the New Zealand Defence Force, a member of the Armed Forces;

(g) a person who works for the organisation as a volunteer without reward or expectation of reward for that work.

In Serbia, whistleblowers are not defined by categories of individuals but by categories of situations where an individual might encounter reportable wrongdoing. It is an example of good practice as the categories of situations covered are quite broad.[25]

Serbia, Law on the Protection of Whistleblowers Act[26]

Article 2.2

"Whistleblower" shall mean any natural person who performs whistleblowing[27] in connection with his employment; hiring procedure; use of services rendered by public and other authorities, holders of public authority or public services; business dealings; and ownership in a business entity;

Legislation in **France, Kosovo** and **Malaysia** goes further by allowing anybody to make a disclosure, without any requirement that the individual have come across the information through their work. The French legislation requires that the individual "became personally aware" of the

[24] The full text of New Zealand Protected Disclosures Act 2000 is available at www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html.
[25] For a detailed analysis of the Serbian legislation on whistleblowing, see Transparency International Serbia, *The Law on Protection of Whistleblowers – What is the Meaning of the Norms and Where Can It Be Improved?* (2017), www.transparentnost.org.rs/images/publikacije/The%20Law%20on%20Protection%20of%20Whistleblowers%20-%20what%20is%20the%20meaning%20of%20norms%20and%20where%20it%20can%20be%20improved.pdf.
[26] An English translation of the full Serbian Law on the Protection of Whistleblowers Act is available at https://whistlenetwork.files.wordpress.com/2017/01/law-on-protection-of-whistleblowersfinal.pdf.
[27] According to Article 2.1, "Whistleblowing" shall mean the disclosure of information regarding an infringement of legislation; violation of human rights; exercise of public authority in contravention of the purpose it was granted; or danger to life, public health, safety, and the environment; or with the aim to prevent large-scale damage.

reported wrongdoing, without specifying where the whistleblower might have encountered the information.[28] In Malaysia, a whistleblower is defined as "any person who makes a disclosure of improper conduct to the enforcement agency".[29] In Kosovo, a whistleblower can be "a citizen or an employee".[30] This broad approach is in line with Article 33 of the United Nations Convention against Corruption, which does not require such link to "work".

At risk of retribution

Protection should not be limited to individuals who made a disclosure but should be extended to all individuals at risk of unfair treatment as a consequence of whistleblowing. This should include

- individuals who are about to make a disclosure, since they could suffer discriminatory measures aiming at discouraging them from blowing the whistle, or as a "pre-emptive strike" to circumvent legal protection[31]
- individuals who provide supporting information regarding a disclosure
- individuals who assist or attempt to assist a whistleblower
- individuals who are perceived as whistleblowers, even mistakenly[32]

The legislation in Serbia expressly includes the last three categories.

Serbia, Law on the Protection of Whistleblowers Act

Article 6: **Protection of Associated Persons**

An associated person shall enjoy the same protection as a whistleblower if such person makes probable that a damaging action has been undertaken against him due to his connection to a whistleblower.

Article 7: **Entitlement to Protection due to Wrongful Identification as Whistleblower**

A person who makes probable that a damaging action has been undertaken against him, due to the fact that the person performing the damaging action wrongly believed that person to be the whistleblower or an associated person, shall enjoy the same entitlement to protection as the whistleblower.

Protection should also be extended to relatives and persons close to the whistleblower who are at risk of retaliation. This goes beyond the personal protection as per Transparency International Principle 14 (see below, p. 26) to include all types of retaliation, such as legal actions brought against them or unfair treatments at the workplace. It is particularly relevant in situations where the

[28] France, Law on Transparency, The Fight Against Corruption and The Modernisation of Economic Life (Law Sapin II), Article 6.
[29] Whistleblower Protection Act 2010 of Malaysia, Part I.
[30] Kosovo Law No. 04/L-043 on Protection of Informants, Article 2 Section 1.1.
[31] GAP, Principle 4.
[32] Paul Latimer and AJ Brown, "Whistleblower Laws: International Best Practice", University of New South Wales Law Journal, 31(3), 2008, p. 790.

whistleblower's friend or relative work for the same organisation.[33] Legislation in Slovakia is an example of current good practice in that regard.

Slovakia, Act on certain measures related to reporting of anti-social activities and on amendment and supplements to certain acts (2014)[34]

Section 2(1) a

"reporter" shall mean a natural person who has reported in good faith a serious anti-social activity to a body competent to receive such report; in addition to Section 9, *any close person*[35] *of such a natural person having an employment relationship or another similar relationship with the same employer shall also be deemed a reporter;*

THRESHOLD: REASONABLE BELIEF OF WRONGDOING

PRINCIPLES 5 AND 9

5. *Threshold for whistleblower protection: "reasonable belief of wrongdoing"* – protection shall be granted for disclosures made with a reasonable belief that the information is true at the time it is disclosed.* Protection extends to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed.

9. *Knowingly false disclosures not protected* – an individual who makes a disclosure demonstrated to be knowingly false is subject to possible employment/professional sanctions and civil liabilities.** Those wrongly accused shall be compensated through all appropriate measures.

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* "Reasonable belief" is defined as when a person reasonably could suspect wrongdoing in light of available evidence.

** The burden shall fall on the subject of the disclosure to prove that the whistleblower knew the information was false at the time of disclosure.

If a person reasonably believes that the information they disclosed shows wrongdoing, and that the belief was reasonable for someone in their position based on the information available to them, that person should be protected.[36] Their motive to make the disclosure, or whether any subsequent investigation finds proof of wrongdoing, should be irrelevant to the protected status the whistleblower enjoys. However, individuals who knowingly make false disclosures should not benefit from whistleblower protection.

[33] This should be broadly interpreted, for example if they both work for government agencies, even if different ones.
[34] The full text of the law (in Slovak) can be found at www.slov-lex.sk/pravne-predpisy/SK/ZZ/2014/307/20160701.
[35] Section 116 of the Slovak Civil Code defines close person as a relative in a direct line of descent, sibling and spouse. Other persons in a family or similar relation shall be deemed to be close to each other if an injury suffered by one is reasonably felt by the other as its own.
[36] UNODC, 2015, p. 24.

Motivation should be irrelevant (no "good faith" requirement)

Several international instruments require that disclosures be made "in good faith" and on "reasonable grounds".[37] This good faith requirement has generated a major policy debate. Some link the good faith requirement to the information disclosed, meaning that the requirement is fulfilled if the person making a disclosure believes that the information they are providing is true. Others link the good faith requirement to the personal motivation of the whistleblower, considering protection should be limited to "honest" workers, and/or those who are motivated to speak up because they want the wrongdoing to be investigated (not because they are pursuing a personal agenda or vendetta).

These are understandable concerns, but a good faith requirement can have the negative effect of shifting the focus from assessing the merits of the information provided to investigating the whistleblower's motives, exposing him or her to personal attacks. This can pose a serious deterrent to potential whistleblowers.

This is why Transparency International principles make no reference to good faith and only require "a reasonable belief that the information is true at the time it is disclosed". The Council of Europe goes further by stating that their principle (Principle 22) "has been drafted in such a way as to preclude either the motive of the whistleblower in making the report or disclosure or of his or her good faith in so doing as being relevant to the question of whether or not the whistleblower is to be protected."[38]

The focus of whistleblower legislation should be the message rather than the messenger. A good faith requirement contained within the law in the UK was removed in 2013, in accordance with the principle that whistleblowers may have a number of motives but should be protected if they are speaking up about matters that are of public interest.[39]

Taking the above into account, Transparency International Ireland successfully argued that there was no need for a formal good faith requirement in the Irish legislation.[40] Irish legislation provides a good practice example in that regard, as it clearly states that the whistleblower motivation should not have an impact on protection.[41]

Ireland, Protected Disclosures Act 2014

Section 5 subsection 7

The motivation for making a disclosure is irrelevant to whether or not it is protected disclosure

[37] For example, the OECD Anti-Bribery Convention, the United Nations Convention against Corruption (UNCAC) and the Civil Law Convention of the Council of Europe on Corruption.
[38] Council of Europe, 2014, p. 39.
[39] Dame Janet Smith DBE, *The Shipman Inquiry, Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future* (2004), p. 344. In Australia, the good faith requirement was also partly removed (Fair Work (Registered Organisations) Amendment Act 2016, s.230H (deleting former paragraph 337A(c)) and there are recommendations to remove it completely (Joint Parliamentary Committee on Corporations and Financial Services, Whistleblower Protections, Parliament House, Canberra (September 2017), Recommendation 6.6).
[40] TI Ireland, *Speak Up Report 2015*, p. 20.
[41] Under the UK and Irish legislation, compensation can, however, be reduced by up to 25 per cent where a protected disclosure was not made in good faith. This is not best practice. Compensation should be in line with the damage suffered (see Principle 20 below).

If countries nevertheless consider that the element of "good faith" is necessary, they should make clear in the legislation that the requirement relates to the information reported and not to the motives of the whistleblower.[42] An example of this approach can be found in Slovakia.

Slovakia, Act on certain measures related to reporting of anti-social activities and on amendment and supplements to certain acts (2014)

Section 2 subsection 2 of the Law 307/2014

Action in good faith shall be understood for the purposes of this act as action taken by a person who is convinced in light of the circumstances and their knowledge at the time of the reporting that matters reported by them are true; in case of doubt, conduct in good faith shall be sustained unless proved otherwise.

Inaccurate disclosures made in honest error

Whistleblowers decide to raise a concern based on the information they have. This is often partial information, such as a conversation they have overheard or a document they have seen. It is possible that investigation of the disclosure will not find any evidence of wrongdoing; there may have been another, legitimate explanation for the act reported. Whistleblowers who make a disclosure with a reasonable belief that the information tends to show wrongdoing should not lose their protection if it turns out that they were mistaken.

Requiring whistleblowers to have more than a reasonable belief that the information tends to show wrongdoing may lead to whistleblowers either not making a disclosure or doing their own investigation to assure themselves that they meet the requisite standard. Neither of these options is desirable. If a whistleblower does not raise their concern, the wrongdoing may continue and cause significant damage. If the whistleblower investigates, they could be found to breach rules and obligations, or expose themselves and face unfair treatment.

The reasonable belief threshold provides the foundations for a whistleblower to trust the organisation while preventing frivolous claims. This should alleviate business concerns that have been raised in the past as a reason to not support whistleblowing laws.

Knowingly false disclosures

Stakeholders have raised the concern that whistleblower protection might be abused by individuals making false reports to defame someone or to protect themselves from disciplinary sanctions. However, research and practice suggest that trivial or false reports are uncommon.[43]

False disclosures can have a negative impact on organisations and people, and can discredit whistleblowing mechanisms. Individuals who make knowingly false disclosure should not benefit from whistleblower protection. Further, Transparency International consider that they should be subject to possible sanctions and civil liabilities, and those wrongly accused should be compensated

[42] OECD Greece report, p. 22.
[43] See, for example: Trace International, ISIS Management, IBLF, *First to Know – Robust Internal Reporting Programs* (2004), p. 14; Transparency International (2017), p. 12.

through all appropriate measures. Sanctions could be employment/professional or criminal, depending on what is considered appropriate and proportionate in the national context. Sanctions that are considered too severe will act as a deterrent to whistleblowing.

Where action is taken against a person who knowingly made a false disclosure, the burden of proof should fall on the person asserting that the information was misleading, untrue or fabricated. They will need to prove that the whistleblower knew it to be false at the time of making the disclosure.

PROTECTION

A variety of protection measures is necessary to ensure effective whistleblower protection. Naturally, whistleblowers should be protected against all forms of unfair treatment. This includes any retaliation, disadvantage or detriment suffered by a whistleblower at the workplace, but also outside, such as legal actions undertaken against a whistleblower, or even physical attacks. Effective protection should include the protection of the whistleblower's identity. Providing for sanctions against the perpetrators of retaliation will ensure effective enforcement and can be an effective deterrent for the future. These measures are all essential to ensure effective protection of whistleblowers and should be combined.

CONFIDENTIALITY AND ANONYMITY

PRINCIPLES 7 AND 13

7. Preservation of confidentiality – the identity of the whistleblower may not be disclosed without the individual's explicit consent.

13. Anonymity – full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent.

One of the most efficient ways to prevent retribution against a whistleblower is to ensure that potential retaliators do not know the identity of a whistleblower. If they do not know who has made a disclosure, they cannot take negative action against them. Not knowing the identity of the whistleblower has the additional advantage of shifting the focus from the individual to the concern raised.

There are two different ways to protect the identity of a whistleblower: preserving confidentiality and allowing anonymous reporting. In the first case, only the recipient of the disclosure knows who the whistleblower is, and the identity of the whistleblower may not be disclosed without the individual's explicit consent. Anonymity goes a step further since no one knows the identity of the whistleblower.

Preserving confidentiality

Confidentiality is a minimum requirement of any legislation that aims to protect whistleblowers. It is a first line of protection and it will increase the trust in the whistleblowing system. Guaranteeing confidentiality will also incidentally help reduce anonymous disclosures.[44]

[44] South African Law Reform Commission, Protected Disclosures, Discussion Paper 107 (2014), p. 45.

Confidentiality applies not only to the name of the whistleblower, but also to "identifying information". In small organisations, or when some facts are known only to a few, some pieces of information could allow people to identify the whistleblower.[45]

In any case, the protection offered by confidentiality is not absolute, and the recipient of the disclosure should make it clear to the whistleblower.[46] Before making a disclosure using appropriate channels, the whistleblower might have mentioned his concerns to colleagues, for example, in which case there is a risk that the disclosure is traced back to him/her.

In addition, in some countries, in specific situations, the law might require the disclosure of identifying information, even without the whistleblower's explicit consent. This might be the case, for example, when the disclosure reveals a criminal offence, if the case goes to trial and the whistleblower is called as a witness. This should not be considered good practice. Good practice dictates that the identity of the whistleblower may not be disclosed without the individual's explicit consent.

If those exceptions to confidentiality cannot be avoided, they should be clearly stated in the legislation (no existing legislation fully satisfies that requirement to date). Most importantly, when identifying information must be disclosed, whistleblowers should be given notice sufficiently in advance and potentially provided with additional protection measures. This is foreseen in the Serbian legislation.

Serbia, Law on the Protection of Whistleblowers Act

Article 10

Protection of Whistleblower's Personal Data

A person authorised to receive the information shall be required to protect the whistleblower's personal data and any data that may be used to discover the identity of the whistleblower, unless the whistleblower agrees to reveal such personal data in accordance with the law regulating personal data protection.

Any person who learns about the data referred to in paragraph 1 of this Article shall be required to protect such data.

A person authorised to receive the information shall be required to, at the time of receiving such disclosure, notify the whistleblower that his identity may be revealed to a competent authority if actions of that authority cannot be undertaken without revealing the identity of the whistleblower, and notify the whistleblower of the safeguards available to participants in criminal proceedings.

Where it is necessary to reveal the identity of a whistleblower in the course of proceedings, the person authorised to receive the information shall be required to notify the whistleblower of this fact before revealing the whistleblower's identity.

Data referred to in paragraph 1 hereof may not be revealed to any person named in the information, unless otherwise provided by other law.

[45] GAP Principle 6.
[46] David Banisar, "Whistleblowing: International Standards and Developments", in Irma Sandoval (ed.), Corruption and Transparency: Debating the Frontiers between State, Market and Society (Washington D.C.: World Bank-Institute for Social Research, UNAM, 2011).

Outside of the very limited and well-defined cases where legal provisions allow the disclosure of the whistleblower's identity, breach of confidentiality should be sanctioned. In France, the law provides for strict confidentiality of both the identity of the whistleblower and the person implicated in a disclosure, with severe criminal sanctions for any breach.

France, Sapin II Law

Article 9

I. - The procedures implemented to collect disclosure, under the conditions mentioned in Article 8, shall guarantee a strict confidentiality of the identity of the authors of the disclosure, the persons targeted by it and the information collected by all the recipients of the disclosure.

Outside of the judicial authority, information identifying the whistleblower can only be disclosed with his/her consent.

Outside of the judicial authority, information identifying the person implicated by an alert can only be disclosed once the merits of the alert have been established.

II. - Disclosing the confidential elements defined in I is punishable by two years' imprisonment and a €30,000 fine.

Allowing anonymous reporting

Anonymous reporting provides a mechanism to make a disclosure for individuals who fear negative consequences or assume that insufficient care will be taken to protect their identity, and would not otherwise speak up.[47] Allowing anonymous reporting should especially be considered in countries where the legal system is weak, or where the physical safety of whistleblowers is a concern.[48]

Anonymity, however, has its limitations. First, it is practically difficult to provide comprehensive protection to a person whose identity is unknown. Second, dialogue between the recipient of the disclosure and the whistleblower is important in cases where the disclosure does not contain sufficient information to make investigations and take corrective actions. It might then be necessary to ask the whistleblower for clarification or additional information they might have. Third, the whistleblower may not be informed of the progress and outcome of the investigation.

To remedy this, anonymous email can be used by whistleblowers, while there are also online platforms that allow anonymous reporting and provide channels for dialogue between the whistleblower and the recipient of the disclosure. Organisations can also use the services of an external party, such as an Ombudsman or a CSO. In Romania, the Transparency International chapter acts as an intermediary between Electrica, a big electricity provider, and the employees who blow the whistle. Transparency International Romania receives and anonymises the reports before transmitting them to the employer. TI Romania then acts as a go-between to allow dialogue between

[47] Paul Latimer and AJ Brown, 2008, p. 774; UNODC, 2015, p. 50; see also, for example, a French survey that found that 20 per cent of workers would blow the whistle only anonymously (Harris Interactive, *"Lanceurs d'alerte": quelle perception de la part des salariés?*, 2015, p. 9).
[48] Banisar, 2011.

the whistleblower and the employer. The whistleblower is not anonymous in the general sense but the company does not know who he or she is.

In any case, while anonymous disclosures can make it harder to investigate a concern, this should not necessarily prevent a concern being taken seriously. And if an anonymous whistleblower's identity is uncovered, they should be granted the same rights and protections as other whistleblowers.

Employers have raised the concern that anonymous reporting might reduce the feeling of personal liability and thus encourage false reporting. However, research and practice suggest that trivial or false reports are uncommon, including when anonymous reports are allowed.[49]

Australia is an example of a country that protects anonymous whistleblowers.

Australia, Public Disclosure Act 2013[50]

Section 28

(1) A public interest disclosure may be made orally or in writing.

(2) **A public interest disclosure may be made anonymously.**

(3) A public interest disclosure may be made without the discloser asserting that the disclosure is made for the purposes of this Act.

PROTECTION AGAINST ALL FORMS OF UNFAIR TREATMENTS

PRINCIPLE 6

Protection from retribution – individuals shall be protected from all forms of retaliation, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. This includes all types of harm, including dismissal, probation and other job sanctions; punitive transfers; harassment; reduced duties or hours; withholding of promotions or training; loss of status and benefits; and threats of such actions.

Unfair treatment occurs when an individual is treated in a negative manner because they have raised a concern. Unfair treatments can take many forms – from retaliation to disadvantage or discrimination. The more visible and formal types of unfair treatments include dismissal, disciplinary action or reduction of wages. Other forms are not so visible and rather informal, such as ostracising

[49] See, for example: Trace International, ISIS Management, IBLF, *First to Know – Robust Internal Reporting Programs* (2004), p. 14; Navex Global, *2015 Ethics & Compliance Hotline Benchmark Report*, p. 17; Transparency International (2017), p. 12.
[50] The full text of the Australia Public Disclosure Act 2013 is available at www.legislation.gov.au/Details/C2013A00133.

the whistleblower or withholding training.[51] Fear of unfair treatment is one of the main reasons why people do not make disclosures.[52]

According to Transparency International Principle 6, countries should prohibit all forms of retaliation, disadvantage or discrimination. Exhaustive lists of types of prohibited actions or omissions should be avoided, as it is a difficult exercise and may fail to capture all forms of detriment. Forms of unfair treatments will vary depending on the nature of the whistleblower's relationship with the organisation: a volunteer cannot suffer from a reduction in wages so retaliation will more likely be to stop using the volunteer's services or giving a negative reference for future employment.[53] As noted by the GAP, "the forms of harassment are limited only by the imagination."[54]

A good practice example is that of South Korean legislation. First, it covers employment-related measures but also blacklisting, bullying, and administrative and economic disadvantages. Second, and most importantly, for each category of unfair treatment listed, it specifies that the actions listed are not exclusive (see in italics below).

South Korea, Protection of Public Interest Reporters Act 2011[55]

Article 2.6

The term "disadvantageous measures" means measures falling under any of the following items:

(a) dismissal, release from office, discharge, *or other disadvantageous measures against a person's social position equivalent to the loss of social position*;

(b) disciplinary punishment, suspension from office, curtailment of salary, demotion, restrictions on advancement, *or other unfair personnel measures*;

(c) transference of position, transference of office, withholding duties, reassignment of duties, *or other personnel measures against the intention of the person himself/herself*;

(d) discrimination in performance evaluation, colleague evaluation, *etc*. and discriminative payment of wages, bonuses, *etc.* attendant thereon;

[51] Typical forms of retaliation include: (1) taking away job duties so that the employee is marginalised; (2) taking away an employee's national security clearance so that he or she is effectively fired; (3) blacklisting an employee so that he or she is unable to find gainful employment; (4) conducting retaliatory investigations in order to divert attention from the waste, fraud or abuse the whistleblower is trying to expose; (5) questioning a whistleblower's mental health, professional competence or honesty; (6) setting the whistleblower up by giving impossible assignments or seeking to entrap him or her; (7) reassigning an employee geographically so he or she is unable to do the job. (*Project on Government, Oversight Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, 2005). It should also include negative performance assessments and employment references, or other reputation damage; order to undergo medical test or examinations; change in duties, responsibilities or working conditions; any act that constitutes an unwarranted modification of workplace or hierarchical relations; and any other harassment that would chill the exercise of free speech rights. *Blueprint for Free Speech, Protecting Whistleblowers in the UK: A New Blueprint* (2016), pp.19-20.

[52] Hayden Teo and Donella Caspersz, "Dissenting discourse: Exploring alternatives to the whistleblowing/silence dichotomy", *Journal of Business Ethics*, 104(2), 2011, pp. 237-249.

[53] Council of Europe, 2014, p. 38.

[54] GAP, 2013, Principle 7.

[55] As amended by Act of 18 April 2017. An English translation of the entire act can be found at https://elaw.klri.re.kr/eng_service/lawView.do?hseq=43327&lang=ENG.

(e) cancellation of opportunities for self-development, such as education or training, restrictions on or removal of available resources, such as budgets or human resources, suspension of the use of or cancellation of qualifications for dealing with security information or classified information, or other discrimination or measures that have a negative effect on the working conditions, *etc.*;

(f) preparation of a list of persons subject to surveillance, or disclosure of such a list, bullying, violence or threatening language, *or other acts that cause physical or mental harm*;

(g) an unjust inspection or investigation of duties, or disclosure of the result thereof;

(h) cancellation of approval or a permit, *or other acts that give administrative disadvantage*;

(i) cancellation of a commodity or service contract, *or other measures that give economic disadvantage;* [56]

The Council of Europe recommends that whistleblowers are protected against direct but also indirect forms of unfair treatment such as retaliation against close friends and relatives of the whistleblowers (see above under Principle 4, p. 13).[57]

Protection should extend to recommended, threatened and attempted unfair treatment, as such action can be a barrier to whistleblowing. It also will help prevent managers turning a blind eye as to why subordinates are targeting a colleague.[58] Further, legislation should extend the employer's responsibility to protect whistleblowers from retaliation committed by third parties linked with the employer.[59] Ireland provides a good practice example in that regard.

Ireland, Protected Disclosures Act 2014

Section 12(1)

An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure.

Protection against unfair treatment should not be limited in time, as experience has shown that retaliation can happen months or even years after a disclosure is made.[60] The whistleblower should also be protected against measures that are taken after the work-based relationship has ended (for example, defamation of the whistleblower towards a potential new employer).

PROTECTION AGAINST LEGAL ACTIONS

[56] Italics added.
[57] Council of Europe, 2014, Principle 21 and p. 39.
[58] GAP, 2013, Principle 7; Council of Europe, 2014, p. 38.
[59] UNODC, 2015, pp. 53-54.
[60] If a time limitation is anyhow provided, the period should run from the moment the retaliator discovered the existence of the disclosure, not from the time of the disclosure itself.

PRINCIPLES 10 AND 12

10. *Waiver of liability* – any disclosure made within the scope of whistleblower legislation shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection. The burden shall fall on the subject of the disclosure to prove any intent on the part of the whistleblower to violate the law.

12. *Preservation of rights* – any private rule or agreement is invalid if it obstructs whistleblower protections and rights. For instance, whistleblower rights shall override employee "loyalty" oaths and confidentiality/non-disclosure agreements ("gag orders").

As numerous high-profile whistleblowing cases have shown, whistleblowers can face legal consequences for making a disclosure, either because they find themselves accused of charges relating to, for example, libel, professional secrecy or data protection (Principle 10) or because they have breached a contractual obligation (Principle 12). The threat and fear of such consequences can be serious deterrents to speaking up. Whistleblowers should be protected from disciplinary and judicial proceedings.

Preservation of rights

Legislation should ensure that no one can contract out of the right to blow the whistle.[61] Loyalty clauses or confidentiality or non-disclosure agreements ("gag orders") should not preclude whistleblowing.

Consultants, sub-contractors, interns, volunteers or trainees, as well as employees and former employees, should not be forced to sign contracts or non-disclosure agreements that prohibit them from making disclosures of wrongdoing. This view is supported by the UNODC, which recognises that in cases where loyalty or confidentiality clauses in employee contracts prohibit a person from raising a concern, "the law removes or settles any doubt that reporting wrongdoing or harm to the public interest will override any such duties to the employer".[62]

Good practice examples can be found in Ireland, Malta and Zambia.[63]

Ireland, Protected Disclosures Act 2014

No contracting-out of protections

23. Any provision in an agreement is void in so far as it purports—

(a) to prohibit or restrict the making of protected disclosures,
(b) to exclude or limit the operation of any provision of this Act,
(c) to preclude a person from bringing any proceedings under or by virtue of this Act, or

[61] Council of Europe, 2014, p. 30.
[62] UNODC, 2015, p. 27; see also Council of Europe, 2014, Principle 11 and GAP, 2013, Principle 8.
[63] Article 4 of the Zambian law has the same wording as Article 21 of the Maltese law. See Zambia, Public Interest Disclosure (Protection of Whistleblowers) Act 2010.

(d) to preclude a person from bringing proceedings for breach of contract in respect of anything done in consequence of the making of a protected disclosure.

Malta, Protection of the Whistleblower Act 2013[64]

3. Subject to the exceptions stated in this Act, despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath or practice a whistleblower may not be subjected to detrimental action on account of having made protected disclosure.

21. Any provision in a contract of service or other agreement between an employer and an employee is void in so far as it—

(a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
(b) purports to preclude the employee or has the effect of discouraging the employee from making a protected disclosure in terms of this Act.

Waiver of liability

The Council of Europe recognises that action taken against a whistleblower outside the workplace can undermine whistleblower protection, and recommends that policy-makers ensure that making a disclosure in accordance with national law can be used as either a defence from proceedings or a release from liability under civil, criminal or administrative law.[65]

Transparency International's Principle 10 recommends the waiver of liability approach, as the defence approach does not prevent a whistleblower being taken to court or made to undergo disciplinary proceedings, which can be damaging in itself and is often retaliatory. A waiver of liability offers encouragement to those considering making a disclosure, as they can know beforehand that no disciplinary or legal action will follow.

Care should be taken not to allow loopholes in the waiver of liability. Examples of good practice can be found in Ghana and New Zealand.

Ghana, Whistleblower Act 2006[66]

Section 18

A whistleblower is not liable to civil or criminal proceedings in respect of the disclosure unless it is proved that that whistleblower knew that the information contained in the disclosure is false and the disclosure was made with malicious intent.

[64] The full text of Malta Protection of the Whistleblower Act 2013 is available at www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=25151&l=1.
[65] Council of Europe, 2014, Principle 23 and p. 39.
[66] The full text of Ghana Whistleblower Act 2016 is available at www.drasuszodis.lt/userfiles/Ghana%20Whitsleblwer%20Act.pdf.

New Zealand, Protected Disclosures Act 2000

Section 18

(1) No person who—

(a) makes a protected disclosure of information; or

(b) refers a protected disclosure of information to an appropriate authority for investigation—

is liable to any civil or criminal proceeding or to a disciplinary proceeding by reason of having made or referred that disclosure of information.

(2) Subsection (1) applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice.

In France, the legislation even provides for an increased civil fine (up to €30,000 instead of €15,000) for individuals who bring abusive or vexatious criminal proceedings against a whistleblower (for defamation).[67]

RIGHT TO REFUSE PARTICIPATION IN WRONGDOING

PRINCIPLE 11

Right to refuse participation in wrongdoing – employees and workers have the right to decline to participate in corrupt, illegal or fraudulent acts. They are legally protected from any form of retribution or discrimination (see Principle 6, above) if they exercise this right.

If wrongdoing is occurring in a workplace, employees may find themselves expected or under pressure to participate. An employer or colleague who seeks to engage others in the wrongdoing may do so intentionally or because they are unaware that their actions constitute wrongdoing. In any case, an individual who refuses to participate should not face retribution.

In most countries, general labour law or criminal law contain provisions allowing workers to refuse to participate in illegal or dangerous activities. However, legislation should specify that such persons are protected against all forms of unfair treatment. Such good practice can be found in the United States.

USA, Dodd-Frank Wall Street Reform and Consumer Protection Act[68]

Section 1057. Employee protection.

[67] France, Sapin II Law, Article 13.
[68] The full text of the Dodd-Frank Wall Street Reform and Consumer Protection Act is available at www.govtrack.us/congress/bills/111/hr4173/text.

(a) IN GENERAL. — No covered person or service provider shall terminate or in any other way discriminate against, or cause to be terminated or discriminated against, any covered employee or any authorized representative of covered employees by reason of the fact that such employee or representative, whether at the initiative of the employee or in the ordinary course of the duties of the employee (or any person acting pursuant to a request of the employee), has— […]

(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.[69]

PERSONAL PROTECTION

PRINCIPLE 14

Personal protection – whistleblowers whose lives or safety are in jeopardy, and their family members, are entitled to receive personal protection measures. Adequate resources should be devoted for such protection.

In some circumstances, whistleblowers may face retaliation that puts their lives or safety, or that of their family, in danger. The need for personal protection can arise in cases involving organised crime or grand corruption, as well as in other contexts. Any such protection should extend to affected family members.

Examples of good practice can be found in Ghana and South Korea. Between 2008 and 2013, the South Korean Anti-Corruption and Civil Rights Commission provided physical protection to all 22 persons who requested it.[70]

Ghana, Whistleblower Act 2006

Section 17

(1) A whistleblower who makes a disclosure and who has reasonable cause to believe that

(a) the whistleblower's life or property, or

(b) the life or property of a member of the whistleblower's family is endangered or likely to be endangered as a result of the disclosure, may request police protection and the police shall provide the protection considered adequate.

(2) Despite subsection (1), the Commission or the Attorney-General as appropriate may in relation to a disclosure of impropriety made or about to be made direct that the person who has made or is about to make the disclosure and the person's family be given police protection.

[69] The Bureau of Consumer Financial Protection established by the Dodd-Frank Act.
[70] UNODC, 2015, p. 38.

(3) “Family” for the purposes of this section means spouse, father, mother, child, grandchild, brother and sister.

South Korea, Protection of Public Interest Reporters Act 2011[71]

Article 13 (Personal Protection Measures)

(1) Where it is evident that a public interest reporter, etc., his/her relative or cohabitant, has suffered or is likely to suffer serious harm to his/her life or body due to a public interest report, etc., he/she may request the Commission to take necessary measures for his/her personal protection. In such cases, where the Commission deems it necessary, it may request the chief of a police station to take measures for his/her personal protection.

(2) The chief of a police station requested to take measures for personal protection under paragraph (1) shall immediately take measures for personal protection, as prescribed by Presidential Decree.

While physical protection of whistleblowers is essential, it is only one aspect of whistleblower protection. In addition, many whistleblowers do not qualify for witness protection. Indeed, whistleblowers may possess information that is not sufficiently detailed to constitute evidence in the legal sense of the word and they might thus not be asked to testify as witnesses. Thus, countries that have a witness protection scheme should not consider that their obligations in terms of whistleblower protection are fulfilled because of it.

SANCTIONS FOR RETALIATION AND INTERFERENCE

PRINCIPLE 29

Penalties for retaliation and interference – any act of reprisal for, or interference with, a whistleblower’s disclosure shall be considered misconduct, and perpetrators of retaliation shall be subject to employment/professional sanctions and civil penalties.*

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* Criminal penalties may also apply if the act of retaliation is particularly grievous (i.e. intentionally placing the whistleblower’s safety or life at risk). This would depend on a country’s particular context, and should be considered as a means to establish proportionate sanctions only when needed.

Where retribution occurs, this can send a message to other potential whistleblowers that they will face the same treatment if they decide to speak up. To deter repeated violation of whistleblower protection, it is important to hold retaliators personally accountable and to sanction them.

[71] As amended by Act of 18 April 2017. The entire act can be found in English at https://elaw.klri.re.kr/eng_service/lawView.do?hseq=43327&lang=ENG.

Best practice dictates severe sanctions to those who retaliate against or threaten whistleblowers. Employers should be required to take disciplinary actions against retaliators. In Italy, retaliators in the public sector face administrative fines. In Australia, legislation provides for criminal sanctions.

Italy, Provisions for the protection of individuals reporting crimes or irregularities that have come to light in the context of a public or private employment relationship, 2017[72]

Article 1 (Protection of public employees reporting illicit activities)

6. When NACA [the National Anti-Corruption Authority] ascertains the adoption of retaliatory measures by a public administration, it issues an administrative pecuniary sanction of €5,000 to €30,000 on the responsible person.

[…]

The sanction issued by NACA is calculated considering the size of the public administration involved.

Australia, Public Interest Disclosure Act 2013

Section 19

Taking a reprisal

(1) A person commits an offence if the person takes a reprisal against another person.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the other person made, may have made or intended to make a public interest disclosure.

Threatening to take a reprisal

(3) A person (the first person) commits an offence if:

(a) the first person makes a threat to another person (the second person) to take a reprisal against the second person or a third person; and

(b) the first person:

(i) intends the second person to fear that the threat will be carried out; or

(ii) is reckless as to the second person fearing that the threat will be carried out.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

[72] The full text of the law (in Italian) can be found at www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2017-12-14&atto.codiceRedazionale=17G00193&queryString=%3FmeseProvvedimento%3D%26formType%3Dricerca_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D179%26testo%3D%26annoProvvedimento%3D2017%26giornoProvvedimento%3D&currentPage=1.

(4) For the purposes of subsection (3), the threat may be:

(a) express or implied; or

(b) conditional or unconditional.

(5) In a prosecution for an offence under subsection (3), it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

In **Ireland**, the Protected Disclosures Act specifically allows whistleblowers to bring a civil law suit against a retaliator for damages.[73] In France, the law provides an increased civil fine for a person bringing a defamation complaint against a whistleblower, as well as criminal sanction for a person interfering with the making of a disclosure.

France, Sapin II Law

Article 13

I. Any person who obstructs, in any way whatsoever, the transmission of a disclosure to the persons and bodies mentioned in the first two paragraphs of I of Article 8 is punishable by one year's imprisonment and a fine of €15,000.
II. When the investigation judge or the investigation chamber (before the court of appeals) receives a defamation complaint against a whistleblower, the amount of civil fine that may be imposed pursuant to Article 177-2 and 212-2 of the Code of Civil Proceedings is increased to €30,000.

[73] Irish Protected Disclosures Act 2014, Section 13.

DISCLOSURE PROCEDURES AND FOLLOW-UP

The main objective of whistleblowing is to prevent or stop and remedy wrongdoing. It is thus important that the recipient of the disclosure is in a position to address the reported wrongdoing. Whistleblowers also need to trust the reporting mechanism and feel comfortable using it. For this reason, the Council of Europe recommends that several types of reporting avenues be available and that the circumstances of each case determine which is the most appropriate channel to use.[74]

There are three main avenues for reporting wrongdoing: reporting within the workplace, to the authorities, and to external parties ("the public"). They should each provide several channels allowing safe reporting, ensure that disclosures are acted upon and allow for participation of the whistleblower. Special procedures may be put in place to report matters of national security and official secrets.

REPORTING WITHIN THE WORKPLACE

PRINCIPLES 15, 18 AND 27

15. Reporting within the workplace – whistleblower regulations and procedures should be highly visible and understandable; maintain confidentiality or anonymity (unless explicitly waived by the whistleblower); ensure thorough, timely and independent investigations of whistleblowers' disclosures; and have transparent, enforceable and timely mechanisms to follow up on whistleblowers' retaliation complaints including a process for disciplining perpetrators of retaliation).*

18. Disclosure and advice tools – a wide range of accessible disclosure channels and tools should be made available to employees and workers of government agencies and publicly traded companies, including advice lines, hotlines, online portals, compliance offices, and internal or external ombudspersons.** Mechanisms shall be provided for safe, secure, confidential or anonymous disclosures.***

27. Whistleblower training – comprehensive training shall be provided for public sector agencies and publicly traded corporations and their management and staff. Whistleblower laws and procedures shall be posted clearly in public and private sector workplaces where their provisions apply.

* Employees are encouraged to utilise these internal reporting channels as a first step, if possible and practical. For a guide on internal whistleblowing systems, see Public Appointments Service Code of Practice for Whistleblowing Arrangements, British Standards Institute and Public Concern at Work, 2008.
** Individuals seeking advice shall also be fully protected.
*** In accordance with relevant data protection laws, regulations and practices.

[74] Council of Europe, 2014, Principle 14.

The adoption of internal whistleblowing mechanisms

Obligation to adopt internal reporting mechanisms

Various studies have shown that the majority of whistleblowers first use internal reporting mechanisms. The employer is often the best placed to deal with wrongdoing within their own organisation.[75] This is why public and private sector organisations should be required, or at least strongly encouraged, to put an effective internal reporting mechanism in place. Most whistleblower protection laws make it mandatory for public sector organisations to do so. Recently adopted legislation in **France**, the **Netherlands** and **Slovakia** also make it mandatory for private companies with more than 50 employees. In the Netherlands, legislation includes minimum standards that internal policy must satisfy. In France, this was done via implementing decree.[76]

Netherlands, The Whistleblower Authority Act 2016[77]

Section 2

2.1 Any employer who usually has at least 50 people in his/her employment draws up a procedure for dealing with a report of an alleged wrongdoing within the organisation.

2.2 The procedure referred to in subsection 1 must in any event:

a) set out how an internal report is to be handled

b) describe when an alleged wrongdoing is deemed to exist, in accordance with the definition of an alleged wrongdoing in this Act

c) identify the designated officer or officers to whom an alleged wrongdoing can be reported

d) set out the employer's obligation to treat such a report confidentially at the employee's request

e) state that an employee may consult an adviser confidentially about an alleged wrongdoing

2.3 The employer is obliged to provide a written or electronic statement of the procedure referred to in subsection 1 to everyone in his/her employment. The employer at the same time must provide information about

[75] A survey in the UK has shown that 91 per cent of whistleblowers reported internally on the first occasion and 73 per cent again used an internal process in a second attempt (Public Concern at Work and the University of Greenwich 2013, *The Inside Story*, www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf).
In Australia, 97 per cent of public sector whistleblowers who responded to a survey blew the whistle internally (Marika Donkin, Rodney Smith and AJ Brown, "How do officials report? Internal and external whistleblowing", in AJ Brown (ed.), *Whistleblowing in the Australian Public Sector* (2008), pp. 83-108.
In Ireland, a 2016 survey found that more than 90 per cent of respondents said they would report to their line manager, senior manager or board member within their organisation (TI Ireland, *Speak Up Report 2017*, p. 38).
In France, according to a 2015 survey, 63 per cent of the workers would report it internally (Harris Interactive, 2015, p. 8).

[76] Decree No. 2017-564 of 19 April 2017 on the procedures for the collection of whistleblowers' disclosures in public or private organisations or state administrations, Article 5. The text in French is available at https://www.legifrance.gouv.fr/eli/decret/2017/4/19/ECFM1702990D/jo/texte.

[77] The full text of the law (in Dutch) can be found at http://wetten.overheid.nl/BWBR0037852/2016-07-01.

a) the circumstances in which an alleged wrongdoing can be reported outside the organisation

b) the legal protection for an employee when reporting an alleged wrongdoing

Countries should consider civil penalties and other sanctions for employers who fail to implement an internal whistleblowing mechanism within a given time period after the law takes effect.[78] For example, the French legislation foresees high financial sanctions for private and state-owned enterprises with more than 500 employees and a turnover higher than €100 million, as well as for their CEO, if they do not put in place internal whistleblowing procedures to disclose information about acts of corruption and influence-peddling (up to €1 million for the company and €200,000 for the CEO personally).[79] In Italy, if a public administration does not implement whistleblowing procedures as provided by the legislation, the Anti-Corruption Authority can sanction the anti-corruption officer of this institution with a fine of up to €50,000.[80]

Incentives to adopt internal reporting mechanisms

Beyond requiring organisations to adopt robust internal whistleblower protection mechanisms, there are other ways in which governments can incentivise the adoption of such mechanisms. In several countries, a company's pre-existing and demonstrably effective ethics and compliance programme can be considered a mitigating factor in sanctioning against corporate misconduct, or as a factor in determining whether or not to enter into a settlement.[81]

Some jurisdictions recognise compliance as a complete or partial defence against corporate liability. The UK Bribery Act, for example, states that it is a full defence for an organisation to prove that, despite a particular bribery incident, it has adequate procedures in place to prevent the bribery from occurring. "Speak up" or "whistleblowing procedures" are considered a key component of such procedures.[82]

In some countries, self-reporting by companies can also result in mitigated sentences and the ability to negotiate a plea or settlement, or in some cases exemption from prosecution or sanction.[83] This should incentivise companies to adopt robust ethics and compliance programmes and encourage whistleblowers to come forward internally, so companies can self-disclose to regulatory or other government agencies, and receive the associated benefits.

Other incentives have been adopted by some countries, which offer preferential terms to companies who adopt stringent anti-corruption and corporate transparency measures. Many governments, international bodies and multilateral development banks take business integrity considerations into account when deciding to disqualify, suspend or debar companies convicted for certain offences.[84] Government agencies may also consider making the existence of a robust ethics and compliance

[78] Blueprint for Free Speech, 2016, p. 23.
[79] Sapin II Law, Article 17.
[80] Italy, Provisions for the protection of individuals reporting crimes or irregularities that have come to light in the context of a public or private employment relationship, Article 1.6.
[81] OECD, *Corporate Governance and Business Integrity, A Stocktaking of Corporate Practices* (2015), p. 80.
[82] UK Ministry of Justice, *The Bribery Act of 2010 Guidance (2011)*, pp. 21 and 29.
[83] OECD, 2015, p. 80. For examples see US Sentencing Commissio*n, Guidelines Manual* (2016), § 8B2.1; and US Department of Justice and US Securities and Exchange Commission, *Resource Guide to the US Foreign Corrupt Practices Act* (2012), pp. 56 and 61 (specifically addressing confidential reporting mechanisms).
[84] OECD, 2015, p. 81. See, for example, the World Bank's Suspension and Debarment Program.

programme a criterion for being eligible to receive access to licences or be awarded public contracts, or as part of due diligence on suppliers and contractors.

Components of an effective internal reporting mechanism

Transparency International has published a topic guide on internal whistleblowing mechanisms, which provides an overview of the current debate and a list of the most up-to-date and relevant studies and resources on the topic.[85] The following four components are essential for an effective internal whistleblowing mechanism.

1. Promotion and training (Principle 27)

Internal policies should be unambiguously endorsed by management, and regularly promoted to staff (via leaflets, posters and organisational communication tools such as company intranet and general staff meetings). An annual report on the use, outcomes and lessons learned from the internal whistleblowing mechanism should be produced and communicated to staff.

General training should be provided to all staff, as they are all potential whistleblowers or retaliators. Special training should be given to managers and individuals in charge of implementing whistleblowing policies. The UNODC considers such training of "vital importance", and recommends that it addresses, inter alia, the legal framework, maintaining confidentiality, ensuring feedback, providing reassurance, record keeping and safeguards to ensure against leaks, and matters of internal and external accountabilities.

Best practice in legislation should outline minimum standards of training for organisations in all sectors, and create a responsibility to employers to adequately promote the policy to employees. To date, no whistleblowing legislation includes training obligations.[86] In Serbia, the law requires the employer to post the internal whistleblowing policy in a visible location.

Serbia, Law on the Protection of Whistleblowers Act

Article 16

Each employer with more than 10 employees shall be required to adopt an internal enactment governing the internal whistleblowing procedure.

The employer shall be required to post the general enactment referred to in paragraph 1 of this Article in a visible location that is accessible to each employee, as well as on its website, provided that there are technical conditions to do so.

[85] Transparency International, *Internal Reporting Mechanisms – Topic Guide* (2017), https://knowledgehub.transparency.org/guide/topic-guide-whistleblowing/4250; see also Transparency International Netherlands, *Whistleblowing Frameworks – Assessing Dutch Publicly Listed Companies (2017)*, www.transparency.nl/wp-content/uploads/2017/12/Whistleblowing-Frameworks-TI-NL-final-report-13-12-2017.pdf.
[86] In Italy, anti-corruption training is mandatory in public institutions (Law n.190/2012, "Provisions to prevent and contrast corruption and illegality in public administrations", more commonly known as "Anti-Corruption Law" or "Severino Law", Article 1, paragraph 8).

2. Confidential or anonymous channels

A wide range of accessible disclosure channels and tools are necessary in order to meet the varied situations faced by potential whistleblowers, and the varied needs that may arise when making a disclosure. For example, factors such as time zones, languages and cost should be taken into account. Most importantly, when designating disclosure recipients, care should be taken to ensure their independence from any potential wrongdoer implicated in a case. Reporting channels could include anonymous concern boxes placed around the organisation, a designated email address, phone hotline, or in-person meeting.

Legislation should not go into too much detail, as the pace of legislation is slower than developments in the field, but it should require multiple channels and tools that are accessible and reliable and guarantee confidentiality or anonymity. It is appropriate to set more detailed standards for best practice in guidelines.

3. An effective response system

Procedures must ensure thorough, timely and independent investigations of whistleblowers' disclosures. Steps must be taken both to ensure any wrongdoing is quickly addressed and stopped, and to keep the whistleblower updated on and (possibly) engaged in the investigation. The whistleblower should be informed of the outcome of any investigation or finding, and they should be allowed to review and comment on any results (see Principle 22, p. 46 and principle 30, p. 44).

4. Robust user protection

There should be transparent, enforceable and timely mechanisms to follow up on whistleblowers' complaints of unfair treatment. These should include mechanisms to restore whistleblowers who faced unfair treatment to their previous positions and status[87], as well as a process for disciplining perpetrators of retaliation (see Principle 29, p. 27).

Unfair treatment can occur through negligence in the management of whistleblowing, and not only through deliberate retaliation. For example, if an organisation fails to support a whistleblower and simply allows stress, fear and negative impacts on their performance to destroy their health or career, or spreads information that they disclosed wrongdoing, causing loss of reputation and career prospects. Managers may allow damage to occur simply by "turning a blind eye" to retaliation or harassment they know will be carried out by others.

Best practice is for legislation to require employing organisations to have internal procedures for ensuring not only protection against retaliation, but also support for whistleblowers, prior to retaliation occurring. Examples include **Ireland**, where legislation requires every public body to establish and maintain procedures for the making of protected disclosures by workers, in line with official guidance, which in turn states that consideration should be given to strategies for providing advice and support to a discloser and that information regarding these matters should be supplied in the procedures.[88]

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[87] Blueprint for Free Speech, 2016, p. 23.

[88] Ireland, Protected Disclosures Act 2014, section 21; Government Reform Unit, Department of Public Expenditure and Reform, "Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act" (2016), p. 11. See also Lauren Kierans and David Lewis, "Using statutory guidance and codes of practice to build on whistleblowing legislation: The Irish experience", *La Revue des droits de l'homme*, 24 November 2016, http://revdh.revues.org/2716.

In Australia, legislation goes further, as it places an obligation on public sector employers to try to prevent retaliation against whistleblowers. Indeed, the heads of all Australian public bodies have a legal responsibility to take "reasonable steps" to protect whistleblowers from suffering negative consequences. In addition, all public bodies must have procedures for assessing the risk that reprisals may be taken against a whistleblower.

Australia, Public Interest Disclosure Act 2013[89]

59. Additional obligations of principal officers

(1) The principal officer of an agency must establish procedures for facilitating and dealing with public interest disclosures relating to the agency. The procedures must include:
   (a) assessing risks that reprisals may be taken against the persons who make those disclosures; and
   (b) providing for confidentiality of investigative processes.

[…]

(4) The principal officer of an agency must take reasonable steps:
   (a) to protect public officials who belong to the agency from detriment, or threats of detriment, relating to public interest disclosures by those public officials; and
   (b) to ensure that the number of authorised officers of the agency is sufficient to ensure that they are readily accessible by public officials who belong to the agency; and
   (c) to ensure that public officials who belong to the agency are aware of the identity of each authorised officer of the agency.

[…]

Best practice is to make employers' protection obligations enforceable by providing rights to compensation not only where someone takes detrimental action against a whistleblower for the specific reason that they blew the whistle, but also where a person or the employer fails to fulfil a duty to protect a whistleblower from unfair treatment. To date the leading example is in Australia.

Australia, Fair Work (Registered Organisations) Act 2009 (as amended 2016)[90]

337BB Civil remedies

(1) If the Federal Court or Federal Circuit Court is satisfied, on the application of a person mentioned in subsection (4) (the applicant), that another person (the respondent) took or threatened to take, or is taking or threatening to take, a reprisal against a person (the target), the Court may make any one or more of the following orders:

(a) an order requiring the respondent to compensate the target for loss, damage or injury as a result of the reprisal or threat;

[89] See also Australia Capital Territory Public Interest Disclosure Act 2012, section 33, www.legislation.act.gov.au/a/2012-43/current/pdf/2012-43.pdf.
[90] This act protects whistleblowers in unions, industrial organisations and employer associations. The full text of Australia, Fair Work (Registered Organisations) Act is available at /www.legislation.gov.au/Details/C2017C00147.

(b) an order granting an injunction, on such terms as the Court thinks appropriate, to prevent, stop or remedy the effects of the reprisal or threat;

(c) an order requiring the respondent to apologise to the target for taking, or threatening to take, the reprisal;

(d) if the target is or was employed in a particular position with the respondent and the reprisal wholly or partly consists, or consisted, of the respondent terminating, or purporting to terminate, the target's employment – an order that the target be reinstated in that position or a position at a comparable level;

(e) if the Court thinks it is appropriate – an order requiring the respondent to pay exemplary damages to the target;

(f) any other order the Court thinks appropriate.

(2) However, the Court must not make an order under subsection (1) if the respondent satisfies the Court that the belief or suspicion [that the person made or may make a disclosure] is not any part of the reason for taking the reprisal.

(3) Notwithstanding subsection (2), the Court may make an order under subsection (1) if satisfied that:

(a) the target made, may have made, proposed to make or could have made a disclosure that qualifies for protection under this Part; and

(b) the respondent was under a duty to prevent, refrain from, or take reasonable steps to ensure other persons under the respondent's control prevented or refrained from any act or omission likely to result in detriment to the target; and

(c) the respondent failed in part or whole to fulfil that duty.

REPORTING TO REGULATORS AND AUTHORITIES

PRINCIPLE 16

Reporting to regulators and authorities – if reporting at the workplace does not seem practical or possible, individuals may make disclosures to regulatory or oversight agencies or individuals outside of their organisation. These channels may include regulatory authorities, law enforcement or investigative agencies, elected officials, or specialised agencies established to receive such disclosures.

If reporting internally has not been effective – for instance, there was a decision not to investigate, or the investigation is not completed within a given period of time, or no action is taken despite the positive results of the investigation, or the whistleblower did not receive information about the case

within a given period of time – whistleblowers must be able to turn to the authorities so that the wrongdoing can be addressed.[91]

There are also many valid reasons why a whistleblower might prefer to report a wrongdoing directly to the authorities rather than use internal reporting mechanisms. For example, if they fear or have reasons to believe that they would suffer unfair treatment, that their confidentiality/anonymity cannot be guaranteed, or that the wrongdoing might be covered up.[92]

This is why it is best practice to allow equal access and protection to reporting within the workplace and to the authorities. There should be no restrictions or extra burden for whistleblowers who wish to report directly to regulators and the authorities. Examples of this approach can be found in **Canada**, Ghana and **Serbia**.[93]

Ghana, Whistleblower Act, 2006

Section 3

(1) Disclosure of impropriety may be made to any one or more of the following:

(a) an employer of the whistleblower;

(b) a police officer;

(c) the Attorney-General;

(d) the Auditor-General;

(e) a staff of the Intelligence Agencies;

(f) a member of Parliament;

(g) the Serious Fraud Office;

(h) the Commission on Human Rights and Administrative Justice;

(i) the National Media Commission;

(j) the Narcotic Control Board;

(k) a chief;

(l) the head or an elder of the family of the whistleblower;

(m) a head of a recognised religious body;

(n) a member of a District Assembly;

(o) a Minister of State;

[91] OECD, 2017, p. 25.
[92] OECD, 2015, p. 53.
[93] Serbia, Law on the Protection of Whistleblowers Act, Article 18.

(p) the Office of the President;

(q) the Revenue Agencies Governing Board; or

(r) a District Chief Executive.

(2) A whistleblower may take into account

(a) a reasonable belief or fear on the part of the whistleblower that the whistleblower may be subjected to dismissal, suspension, harassment, discrimination or intimidation;

(b) a reasonable belief or fear that evidence relevant to the impropriety may be concealed or destroyed;

(c) that the person to whom the disclosure is made will not frustrate the objective;

(d) that the impropriety is of an exceptionally serious nature and that expeditious action must be taken to deal with it;

(e) the place where and the prevailing circumstances under which the whistleblower lives;

in determining to whom the disclosure may be made.

Having multiple competent authorities to receive disclosures provides a range of channels for whistleblowers, but could potentially lead to confusion as to where they should go to make a disclosure. In addition, such systems can prove to be rather disjointed, with overlapping jurisdictions and unclear mandates for the various institutions. A lack of referral mechanisms would place the obligation on the whistleblower to keep making the disclosure until they reach the correct regulator.[94] It should not be the burden of the whistleblower to ensure that their complaint is forwarded to the correct regulatory agency or investigative body.

In **New Zealand**, an authority that received a disclosure can refer the case to another body if it considers it can more suitably and conveniently investigate it (in which case they need to inform the whistleblower promptly). In **South Korea,** the Anti-Corruption and Civil Rights Commission (ACRC) can receive disclosures on a wide range of public interest matters.[95] It does not investigate the disclosures itself but passes the cases to relevant bodies. However, it retains oversight of the cases and the time limits that apply for dealing with them.[96] For this reason, the Korean ACRC should be considered an example of good practice in that regard.

Whatever model is adopted, the designated authority(ies) should be provided with sufficient capacity, powers and resources to investigate the disclosures and deal with the potential wrongdoing. They should have a regulatory or oversight role in the organisation where the wrongdoing is taking place, so that they can order actions to address the wrongdoing.

[94] Arron Phillips and David Lewis, *Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?* Project Report (2013).
[95] It combined the Independent Commission against Corruption with the Ombudsman and the Administrative Appeals Commission.
[96] UNODC, 2015, p. 37.

REPORTING TO EXTERNAL PARTIES

PRINCIPLE 17

Reporting to external parties – in cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest, individuals shall be protected for disclosures made to external parties such as the media, civil society organisations, legal associations, trade unions, or business/professional organisations.*

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* If these disclosure channels are differentiated in any manner, the disclosure process in any event shall not be onerous and must allow disclosures based alone on reasonable suspicion (e.g. UK Public Interest Disclosure Act).

There is always a risk that disclosures about wrongdoing are not properly addressed or investigated by those specifically in charged or required to do so, that is, the employers or the authorities. Not all wrongdoing can be solved behind closed doors. Sometimes a public debate is needed to bring about change.

In the UK, a nurse working in a residential hospital made a disclosure to his employer about patient care in the care home. The employer ignored his concerns, so he went to the regulator. When they failed to rectify the situation, he went to the BBC, who undertook an undercover investigation. The airing of the documentary resulted in several of the staff being held criminally responsible for abuse. It also led to changes within the regulatory agency.[97] This was made possible by the fact that the UK allows whistleblowers to make disclosures to the media.

Legislation should also protect disclosures made to CSOs, such as Transparency International. In 2009 in the Czech Republic, a government employee contacted the Transparency International national chapter about a massive overpricing in an environmental clean-up project. Following an advocacy campaign, two successive biding processes were cancelled, allowing the country to save more than €2 billion. Following the scandal, the Czech government introduced major amendments to public procurement legislation, bringing in more transparency and efficiency. The whistleblower had tried to complain to his superiors about the bidding process, but they had rebuffed his allegations.[98]

Cases where the amount of money involved is so high can be very sensitive and political. It is thus important that whistleblowers have the possibility to turn to external parties. Other potential external recipients of disclosures should include legal associations, trade unions, business associations and professional organisations. Enabling public disclosures allows the public to hold organisations and the authorities to account. It can highlight wrongdoing that has been overlooked or covered up. As stressed by the Council of Europe, ensuring that whistleblowers can make disclosure to external parties (to the public) is “a vital safeguard to protecting the public interest”. It is also enshrined in the right to freedom of expression.[99]

Many countries allow reporting to the public but set restrictions. The Council of Europe recognises that protecting the interest of third parties, such as employers, must be balanced with the interest of

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[97] Steven Swinford and Caroline Gammell, “Warnings of care home ‘were ignored for months’”, *The Telegraph*, 1 June 2011, www.telegraph.co.uk/news/health/news/8551025/Warnings-of-care-home-were-ignored-for-months.html.
[98] Transparency International, “Hidden Costs”, www.transparency.org/news/story/hidden_costs.
[99] Council of Europe, 2014, p. 31.

the public to be protected from harm, wrongdoing or exploitation.[100] The European Court of Human Rights noted that "the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence".[101] Transparency International considers that whistleblowers should be protected for making public disclosures in cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest, without additional requirements.

Legislation in Romania is notable as it allows disclosures to be made to parliamentary commissions, the mass media, and professional, trade union or employers' organisations, as well as to non-government organisations without restrictions, thus going further than Transparency International Principle 17.

Romania, Law on the protection of public officials complaining about violations of the law, 2004[102]

Article 6: Contactable Authorities

The notification concerning the violation of law or of the deontological and professional norms, according to Art.4 letter h), may be made alternatively or cumulatively:

a) to the hierarchical superior of the person having breached the legal provisions, according to Article 5;

b) to the manager of the public authority, the public institution or budgetary unit within which the person having breached the legal provisions according to Article 5 is employed, or within which the illegal practice is notified, even if the author cannot be identified;

c) to the discipline committees or to other similar bodies within the public authorities, public institution or unit set forth at Art.2 within which the person having violated the law according to Art.5 is employed;

d) to the judicial bodies;

e) to the bodies in charge of finding and researching conflicts of interest and incompatibilities;

f) to the parliamentary commissions;

g) to the mass media;

h) to the professional, trade union or employers' organisations;

i) to non-government organisations.

[100] Council of Europe, 2014, p. 28.
[101] Guja v. Moldova [GC], no. 14277/04, ECHR 2008.
[102] An English translation of the full Romanian law on the protection of public officials complaining about violations of the law is available at www.drasuszodis.lt/userfiles/Romanian%20whistleblower%27s%20law.pdf.

REPORTING MATTERS OF NATIONAL SECURITY AND OFFICIAL SECRETS

Principle 19

National security/official secrets – where a disclosure concerns matters of national security, official or military secrets, or classified information, special procedures and safeguards for reporting that take into account the sensitive nature of the subject matter may be adopted in order to promote successful internal follow-up and resolution and to prevent unnecessary external exposure. These procedures should permit internal disclosures, disclosure to an autonomous oversight body that is institutionally and operationally independent from the security sector, or disclosures to authorities with the appropriate security clearance. External disclosure (i.e. to the media, civil society organisations) would be justified in demonstrable cases of urgent or grave threats to public health, safety or the environment; if an internal disclosure could lead to personal harm or the destruction of evidence; and if the disclosure was not intended or likely to significantly harm national security or individuals.*

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* "Classified" material must be clearly marked as such, and cannot be retroactively declared classified after a protected disclosure has been made.

Public interest disclosures involving matters of national security or official secrets are among the most contentious areas of whistleblowing.[103] This is the area where whistleblower protection is the weakest and national security whistleblowers often suffer the most severe retaliation: not only do they lose their jobs, they face criminal investigations, prosecution and harsh sentencing.[104]

Most international instruments recognise that the right to freedom of expression can be subject to certain restrictions for the protection of national security or of public order.[105] But these restrictions should not be so overly broad as to prevent effective public scrutiny and debate about government decision-making and activities, and to make it much more difficult to detect and address wrongdoing. As stressed by the UNODC, disclosure of information that shows wrongdoing or is a matter of significant public interest should be considered "protected", regardless of whether or not the information is classified, and there should be effective channels to report such information.[106]

The Council of Europe recognises that a special scheme or rules may apply to information relating to national security, defence, intelligence, public order or international relations.[107] If a whistleblower makes a disclosure in accordance with those rules, they should receive full protection.

[103] Benjamin Buckland and Aidan Wills, *Whistleblowing in the Security Sector* (2013), p. 1.
[104] United Nations, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression* (2015), p. 18.
[105] For example: International Covenant on Civil and Political Rights, Article 19(3)(b); UNCAC Article 13(1)(d).
[106] UNODC, 2015, pp. 27-28.
[107] Council of Europe, 2014, Principle 5.

Narrowly and clearly defined information covered

The Council of Europe further specifies that special schemes cannot be generally applied to categories of persons that handle national security and official secrets. The special rules should apply to the category of information being disclosed, without considerations to the person making the disclosure.[108] Thus, a military officer raising a concern about irregularity in the procurement of office supplies should not be subject to a special whistleblowing scheme for information relating to national security.

The Irish legislation clearly defines the type of information that falls under the special regime.

Ireland, Protected Disclosures Act 2014

Section 18

Security, defence, international relations and intelligence

(1) This section applies to a disclosure of information if it might reasonably be expected—
  (a) to affect adversely—
    (i) the security of the State,
    (ii) the defence of the State, or
    (iii) the international relations of the State,
  or
  (b) to reveal, or lead to the revelation of, the identity of a person who has given information in confidence to a public body in relation to the enforcement or administration of the law or any other source of such information given in confidence.

(2) Without prejudice to the generality of subsection (1) this section applies to a disclosure of information—
  (a) which was obtained or prepared for the purpose of intelligence in respect of the security or defence of the State,
  (b) which relates to—
    (i) the tactics, strategy or operations of the Defence Forces in or outside the State, or
    (ii) the detection, prevention or suppression of activities calculated or tending to undermine the public order or the authority of the State (which expression has the same meaning as in section 2 of the Offences Against the State Act 1939),
  (c) which consists of a communication between a Minister of the Government and a diplomatic mission or consular post in the State or a communication between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government,
  (d) which consists of a communication between a Minister of the Government and a diplomatic mission or consular post of the State,
  (e) which was communicated in confidence to any person in or outside the State from any person in or outside the State, relates to a matter referred to in subsection (1) or to the protection of human rights and was expressed by the latter person to be confidential or to be communicated in confidence,
  (f) which was communicated in confidence from, to or within an international organisation of states or a subsidiary organ of such an organisation or an institution or body of the European Union or relates to negotiations between the State and such an organisation,

[108] Council of Europe, 2014, p. 25.

organ, institution or body or within or in relation to such an organisation, organ, institution or body, or

(g) which is contained in a record of an organisation, organ, institution or body referred to in paragraph (f) and the disclosure of which is prohibited by the organisation, organ, institution or body.

Special disclosure schemes

The Global Principles on National Security and the Right to Information, or "Tshwane Principles", set out a proportionate approach to facilitate whistleblowing related to sensitive information.[109] Similarly to "regular" whistleblowers, national security whistleblowers should have multiple avenues to make disclosure.

Disclosures made internally and to independent oversight bodies

As is the case for "regular" whistleblowers, individuals wishing to make a disclosure that includes "secret" information should be able to do so internally or to go directly to a competent authority.

The Tshwane Principles recommend that the law should require organisations dealing with national security and official secrets to establish internal procedures and designate persons to receive such disclosures. States should also establish or identify independent bodies to receive and investigate such disclosures. These bodies should be institutionally and operationally independent from the security sector and other organisations from which disclosures may be made. They should be authorised to handle classified information and have adequate powers and mandate to effectively investigate the disclosure.[110]

The possibility to make disclosure to an independent oversight body that has the power to investigate and address the concerns raised may make it less likely that whistleblowers will turn to the media, potentially putting themselves and that information at risk.

Disclosures to the public

The Tshwane Principles consider that "national security" whistleblowers who make a public disclosure should be protected if three conditions are met:

(1) the person attempted to report the wrongdoing internally and/or to an independent oversight body, unless there was no functioning body that was likely to undertake an effective investigation or if reporting would have posed a significant risk of destruction of evidence or retaliation against the whistleblower or a third party;

(2) the disclosure was limited to the amount of information reasonably necessary to bring to light the wrongdoing; and

[109] These Principles were drafted by 22 organisations and academic centres in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, and in consultation with the UN Special Rapporteur on Counter-Terrorism and Human Rights, as well as with the special rapporteurs on freedom of expression and/or media freedom in the UN, and the African, European and Inter-American systems.
[110] Tshwane Principles, 2013, Principle 39.

(3) the whistleblower reasonably believed that the public interest in having the information revealed outweighed any harm to the public interest that would result from disclosure.[111]

Public interest defence

The Tshwane Principles also recommend that the law provides a public interest defence for whistleblowers who make a disclosure that is not protected and are facing criminal, civil or administrative sanctions, if the public interest in disclosing the information in question outweighs the public interest in non-disclosing the information. The principles provide guidance to prosecutorial and judicial authorities to decide whether the public interest in disclosure outweighs the public interest in non-disclosure.[112]

INVESTIGATING DISCLOSURES AND ADDRESSING WRONGDOING

PRINCIPLE 30

Follow-up and reforms – valid whistleblower disclosures shall be referred to the appropriate regulatory agencies for follow-up, corrective actions and/or policy reforms.

Firstly, the organisation or relevant authority receiving a valid disclosure has a duty to assess the information disclosed, and if it has merit, to follow up. The UNODC consider that this duty is part of the protection of the whistleblower, as it shifts the burden of responsibility to pursue the matter from the whistleblower to the competent body.[113]

In addition, the existence of a clear legal obligation to follow up on the disclosure might increase the number of people speaking up about wrongdoing. Indeed, multiple surveys have identified a lack of confidence that anything will be done about a complaint as a key reason why people do not blow the whistle.[114]

The Council of Europe recommends that employers, appropriate regulatory bodies or law enforcement agencies "promptly" investigate disclosures.[115] Promptly means that action should be taken without delay, taking into account available resources and the scale of the potential consequences of the wrongdoing.[116]

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[111] Tshwane Principles, 2013, Principle 39.
[112] Tshwane Principles, 2013, Principle 43.
[113] UNODC, 2015, p. 47.
[114] See T. Devine, "Whistleblowing in the United States: The Gap between Vision and Lessons Learned", in R. Calland and G. Dehn (eds.), Whistleblowing Around the World: Law, Culture and Practice (Cape Town: Open Democracy Advice Centre, 2004); Transparency International, *Global Corruption Barometer* (regional reports for Asia Pacific, Europe and Central Asia, Middle East and North Africa, Sub-Saharan Africa), 2017, www.transparency.org/news/feature/global_corruption_barometer_citizens_voices_from_around_the_world; European Commission, Summary Results of the Public Consultation on Whistleblower Protection, p. 6.
[115] Council of Europe, 2014, Principle 19.
[116] Council of Europe, 2014, p. 36.

Many organisations do not have appropriate systems in place to address and investigate disclosures in a timely manner, often because they do not consider that aspect when they establish internal whistleblowing mechanisms.[117] Procedures and processes must be developed, and the individuals or bodies designated to handle disclosures should be provided with sufficient capacity, powers and resources to investigate and deal with the potential wrongdoing.

Legislation in Jamaica is an example of good practice, as it includes dispositions for how responsible persons should follow up on valid whistleblower disclosures.

Jamaica, The Protected Disclosures Act, 2011[118]

Section 18

Duty to receive and carry out investigations into disclosures.

(1) Every person to whom—
  (a) an employee makes a disclosure in accordance with sections 7, 8 or 9; or[119]
  (b) a disclosure is referred in accordance with section 19(4), shall receive the disclosure and take appropriate steps in accordance with this section to investigate or cause the disclosure to be investigated.

(2) Subject to the provisions of this Act, the person who receives a disclosure pursuant to subsection (1) shall—
  (a) receive and record the matter being disclosed;
  (b) take steps, where the person considers that an investigation should be proceeded with and that the circumstances specified in section (19)(2) do not apply, to cause the conduct disclosed to be investigated in accordance with subsection (3).

(3) Having considered that an investigation should be proceeded with, the person shall—
  (a) commence investigations forthwith and issue periodic updates on the investigation to the employee making the disclosure, at intervals of thirty days;
  (b) ensure that investigations are carried out fairly;
  (c) review the results of investigations into disclosures and report the findings to the employee who made the disclosure and to anybody appearing to the person receiving the disclosure to be appropriate (having regard to the relevant improper conduct and the area of responsibility of that body);
  (d) make recommendations regarding the measures to be taken to correct the improper conduct;
  (e) take steps to remedy the improper conduct, provide redress where appropriate, take disciplinary action where appropriate, and reduce the opportunity for recurrence of the conduct;
  (f) ensure that the rights of the employee making the disclosure, any witness and any person alleged to be at fault are protected; and
  (g) receive, record, review, investigate and otherwise deal with complaints made in respect of reprisals as a result of a disclosure made under this Act.

[117] UNODC, 2015, p. 69.
[118] The full text of the Jamaica Protected Disclosures Act is available at www.japarliament.gov.jm/attachments/341_The%20Protected%20Disclosures%20Act,%202011.pdf.
[119] Disclosure made internally and to prescribed persons.

To ensure that disclosures are investigated and addressed promptly, the Council of Europe suggests empowering the courts or regulatory bodies to award damages to whistleblowers and sanction the employer or other responsible person for failing to conduct a prompt and adequate investigation.[120] This is the case in **Italy**, where the National Anti-Corruption Authority (NACA) can sanction the individuals in charge of handling disclosures in public institutions for inaction.

Italy, Provisions for the protection of individuals reporting crimes or irregularities that have come to light in the context of a public or private employment relationship, 2017

Article 1 (Protection of public employees reporting illicit activities)

6. […] When NACA ascertains that the responsible person has not verified and analysed a report from a whistleblower, it issues an administrative pecuniary sanction of €10,000 to €50,000 on the officer.

The sanction issued by NACA is calculated considering the size of the public administration involved.

Following the investigation, corrective action should extend beyond fixing the immediate issue to ensure that the wrongdoing does not reoccur in the future, or lead to more serious harm.[121] In some cases, a disclosure can indicate and help to identify systemic issues. In this regard, whistleblowing is a very powerful tool for reform.

THE RIGHT TO PARTICIPATE

PRINCIPLE 22

Whistleblower participation – as informed and interested stakeholders, whistleblowers shall have a meaningful opportunity to provide input to subsequent investigations or inquiries. Whistleblowers shall have the opportunity (but are not required) to clarify their complaint and provide additional information or evidence. They also have the right to be informed of the outcome of any investigation or finding, and to review and comment on any results.

Acting on a disclosure is a key concern of whistleblowers.[122] It is thus essential to inform them when any kind of action is taken in response to their disclosure. It includes decisions not to pursue the matter, regular updates on the investigation and notification of the findings and outcome of the investigation. Whistleblowers who are informed about the investigation process are less likely to make further disclosures (such as to the authorities or to the public).[123]

In addition, giving the whistleblower an opportunity to provide clarifications, additional information or evidence, to direct the investigator to relevant information and to review and comment on the draft report can mitigate and correct any errors made during the investigation.

[120] Council of Europe, 2014, p. 36.
[121] Council of Europe Principle 19/73.
[122] Council of Europe, 2014, p. 36.
[123] Council of Europe, 2014, Principle 20.

To date, no existing piece of whistleblower protection legislation provides for a full participation of the whistleblower, as described above. Legislation in Jamaica provides for the regular update of the whistleblowers but does not allow them to provide feedback on the findings. In the Netherlands, both the whistleblowers and their organisation can review and comment on the draft report. If no adjustments are made to the report in light of the feedback, the investigation department of the House for Whistleblowers needs to explain why. The anonymised report is then published on the website of the House.

Jamaica, The Protected Disclosures Act, 2011

Section 18

(3) Having considered that an investigation should be proceeded with, the person shall—

(a) commence investigations forthwith and **issue periodic updates on the investigation to the employee making the disclosure, at intervals of thirty days;**
(b) ensure that investigations are carried out fairly;
(c) review the results of investigations into disclosures and **report the findings to the employee who made the disclosure and to anybody appearing to the person**

[…]

Section 19

(3) Where an employer decides to refuse to carry out an investigation the employer shall provide reasons in writing to the employee within fifteen days of the decision.

Netherlands, The Whistleblowers Authority Act, 2016

Section 17

1. When an investigation is completed, the investigation department prepares a report, in which it presents its findings and its judgement. In doing so, it observes Article 10 of the Government Information (Public Access) Act.
2. In any case, the report contains, as far as the investigation extends to this:
    a) an analysis of the wrongdoing,
    b) the determination of the causes or suspected causes of the wrongdoing and the extent of its consequences, and
    c) recommendations to the employer if there is reason to do so.
3. **The investigation department sends a draft of the report to the employer and the applicant.**
4. **The employer and the applicant can provide written comments for a period of four weeks, starting from the day after the day on which the draft report was sent. They are obliged to maintain confidentiality of the report.**
5. **If the comment gives rise to this, the investigation department can adjust the report. In the case where the comments do not lead to an adjustment, the investigation department will state the reasons for this in its report.**
6. If the investigation department makes a recommendation to an employer as referred to in the second paragraph, the employer shall inform the research department within a

reasonable period of time how the recommendation will be followed up on. If the employer considers not to follow the recommendation, it will inform the investigation department of this with reasons.

7. The investigation department makes the report publicly available.
8. Information held by the House for Whistleblowers about the investigation that is not included in the report is not public.

RELIEF

When whistleblowers suffer any type of unfair treatment because of their disclosure, it is important that they are able to seek restitution and remedies. Not only do they need an avenue for their claim, they need to know that the remedies available are sufficient and appropriate. Also, they should not have the burden to prove that the unfair treatment they suffered was linked to their disclosures. In some countries, whistleblowers can receive rewards.

THE RIGHT TO REMEDIES

PRINCIPLE 20

Full range of remedies – a full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering.* A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered.

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* This may also include medical expenses, relocation costs or identity protection.

Full reparation

Unfair treatments expose whistleblowers to loss – financial loss, loss of status or even emotional hardship. Legislation should provide for whistleblowers to have access to suitable remedy and/or relief that makes sure their position does not deteriorate as a result of having made a disclosure. All losses should be covered, including indirect and future losses, financial and non-financial. The appropriate remedy will be determined by the kind of unfair treatment that has been suffered.[124] Where possible, the whistleblower should be restored to a situation that would have been his/hers had he or she not suffered unfair treatment.

Reinstatement and other non-financial remedies

Best practice is to make sure that any unfair treatment is made null and void. In practice, this means that if a whistleblower has been dismissed, transferred or demoted, they should be reinstated to the position that they occupied before suffering retaliation, or in another similar position, with equal salary, status, duties and working conditions. Similarly, whistleblowers should be given fair access to promotion and training that had been previously withheld following their disclosure. Outside of the employment context, remedy can involve the restoration of a cancelled permit, licence or contract, or

[124] Council of Europe, 2014, p. 40.

withdrawing a litigation against an individual.[125] Any negative records that could constitute a "dossier" for blacklisting or later retaliation should be deleted.[126]

This is the approach taken in France, for example.[127]

France, Labour Code

Article L1132-4

Any provision or act taken in respect of an employee in breach of the provisions of this chapter[128] is void.

Financial remedies

If the whistleblower or the court/responsible authority find that reinstatement would be difficult, or even detrimental to the whistleblower, given the hostile environment that they would face, financial compensation should be available as an alternative.[129] It should include compensation for lost past wages but also future losses of earnings, and costs linked to a change of occupation, such as moving expenses or professional training. Many whistleblowers face the prospects of no longer working in the industry they were educated or trained for, or having to accept a much lower paid job. Thus, compensation should not be capped by legislation, but determined according to the circumstances of each case.[130]

Where reinstatement is possible, it should not exclude financial compensation. Reinstated whistleblowers might have suffered economic damage, such as loss of past earnings and incurred expenses (for legal fees, cost of medical treatment, etc.). Compensation should also be provided for suffering.

Most whistleblowing laws do not stipulate that whistleblowers are entitled to compensation, merely stating that retribution is prohibited. Instead, whistleblowers rely on general legal principles (such as laws governing contracts or tort). The legislation in Serbia expressly states that whistleblowers are entitled to compensation under the general regime.[131]

Injunctive and interim relief

Whistleblowers can wait a long time to get their day in court to prove they suffered unfair treatment. Therefore, it is important that whistleblowers have some form of remedy from day one, to limit potential damages suffered. As previously explained, some forms of unfair treatments, especially dismissal, can be difficult to reverse if a long period of time has passed. Interim relief can help preserve the working relationship and prevent it from breaking down completely.[132] When a whistleblower has been dismissed, they should have the right to seek interim measures, such as

[125] UNOCD, 2015, p. 47; GAP, 2013, Principle 14.
[126] Blueprint for Free Speech, 2016, p. 26.
[127] France, Labour Code, Article L1132-4; Serbia, Law on the Protection of Whistleblowers Act, Article 21.
[128] This refers to the Labour Code chapter on the principle of non-discrimination.
[129] OECD, 2017, p. 41.
[130] Banisar, 2011.
[131] Serbia, Law on the Protection of Whistleblowers Act, Articles 22 and 26.
[132] UNODC, 2015, p. 64.

reinstatement or continued pay, until the legal claim has been adjudicated or settled. If the whistleblower is still employed it can take the form of an injunction requiring the employer to act or stop acting in a certain way.

Without interim relief, a whistleblower might be unable to maintain professional and financial status until the legal proceeding ends. As pointed out by GAP, a whistleblower can go bankrupt waiting for the completion of appeal processes, even if they won a first hearing or trial.[133] This can be a serious deterrent for potential whistleblowers and give an unfair advantage to employers, who generally have much larger financial means than individuals.

Interim relief can be provided by courts via interim injunctions and orders. This is the case in Malta, for example.

Malta, Protection of the Whistleblower Act, 2013

Article 7

(1) A person who believes that detrimental action has been taken or is imminently to be taken against him in reprisal for a protected disclosure may file an application to the First Hall, Civil Court for—
   (a) an order requiring the person who has taken the detrimental action to remedy that action; or
   (b) an injunction.
(2) The court, pending the final determination of an application under this article may
   (a) make an interim order; or
   (b) grant an interim injunction.
(3) If, in determining the application under sub-article (2), the court is satisfied that a person has taken or intends to take detrimental action against a person in reprisal for a protected disclosure, the court may:
   (a) order the person who took the detrimental action to remedy that action and determine the amount of damages, including, but not limited to, moral damages as the court may determine, due to the person who suffered the detrimental action; or
   (b) grant an injunction in any terms the Court considers appropriate.
(4) Notwithstanding the provisions of the Code of Organisation and Civil Procedure, an injunction granted in terms of sub-article (3)(b) shall be for an indefinite period until an application for its revocation is made and need not be followed by an action on the merits. […]

In addition to courts, regulatory bodies in charge of whistleblower protection can be empowered to take such temporary measures.[134] Legislation in Slovakia goes even further by preventing an employer to take any action against a whistleblower without the prior approval of the authority in charge of whistleblower protection. To obtain this approval, the employer must prove that there is no causal relationship between the action and the employee blowing the whistle. This is good practice as it is preventive rather than corrective.

[133] GAP, 2013, Principle 15.
[134] Council of Europe, 2014, p. 40.

Slovakia, Act on certain measures related to reporting of anti-social activities and on amendment and supplements to certain Acts (2014)

Section 7

Protection with Regard to the Reporting of a Serious Anti-Social Activity

(1) An employer may perform a legal act or make a decision in an employment relationship (hereinafter "employment-related action") against a protected reporter without that protected reporter's consent only with prior approval of the Labour Inspectorate; where the protected reporter is a professional soldier, the Labour Inspectorate's approval shall be required only if so stipulated in the special law.[135]). Such Labour Inspectorate's approval shall not be required in respect of an employment-related action by which a claim is admitted, or an employment-related action concerning termination of employment that is a consequence of another legal fact other than depending on the employer's consideration.[136]).

(2) The employer shall file the request for approval with the Labour Inspectorate. The request for approval shall contain

b) the identification of the employer;

c) the name, surname, date of birth and residential address of the protected reporter;

d) the identification of the employment-related action for which the Labour Inspectorate's approval is sought;

e) justification for the need to accomplish employment-related action.

(3) Before issuing its decision on a request for approval, the Labour Inspectorate shall give the protected reporter an opportunity to submit their statement regarding the proposed employment-related action within a reasonable time limit.

(4) In straightforward matters, particularly matters that can be decided on the basis of the employer's request and the protected reporter's statement, the Labour Inspectorate shall render the decision on the request for approval without undue delay. For other matters, the Labour Inspectorate shall issue the decision within 30 days from the date of receipt of the request for approval.

(5) The Labour Inspectorate shall grant its approval for the proposed employer's employment-related action against the protected reporter only if the employer has demonstrated that there is no causal link between the proposed employment-related action and the report; otherwise the request for approval shall be dismissed.

[135] Section 5 (2)(a) of the Act No. 346/2005 on the employment of professional soldiers of the armed forces of the Slovak Republic and on amendments to certain laws, as amended.

[136] For example, Section 192(1)(f) and (g) of the Act No. 73/1998 on the civil service of members of the Police Force, Slovak Information Service, Prison and Judicial Guard Force of the Slovak Republic and the Railway Police, or Section 60(1) of the Act No. 315/2001 on the Fire and Rescue Service, as amended.

(6) The employer and the protected reporter may appeal against the decision on the request for approval.

(7) From the time of filing the employer's request for the Labour Inspectorate's approval to the notification of the final decision on the request for approval to the employer, time limits and trial periods provided for in special laws shall be suspended.[137]

(8) Any legal act for which the Labour Inspectorate's approval, as referred to in paragraph 1, was not granted, shall be void.

Legal and financial assistance

Whistleblowers should not be at a financial loss for having to bring a claim to enforce their rights or seek compensation for breaches. A significant cost for whistleblowers can be legal fees. Whilst whistleblowers could recover these fees at the end of the case, they might not be able to cover the fees upfront, especially if they are unemployed and blacklisted. If whistleblowers are not able to afford the costs to enforce their rights, it questions the reality of those rights. Slovakia provides for legal assistance in proceedings.

Slovakia, Act on certain measures related to reporting of anti-social activities and on amendment and supplements to certain Acts (2014)

Article XIV.4

[…]

(1) A reporter of anti-social activity shall be entitled to receive legal assistance to the extent they have applied for legal assistance and do not have a representative for the proceedings for which the legal assistance under this Act is sought.

In addition, whistleblowers who do not have sufficient revenues, and/or could not benefit from appropriate interim relief, should be provided with financial assistance until the final proceedings are concluded.

THE RIGHT TO A FAIR HEARING

PRINCIPLE 21

Fair Hearing (genuine "day in court") – Whistleblowers who believe their rights have been violated are entitled to a fair hearing before an impartial forum, with full right of appeal. Decisions shall be timely, whistleblowers may call and cross-examine witnesses, and rules of procedure must be balanced and objective.

[137] For example, Section 45 of the Labour Code, as amended; Section 57 of the Act No. 73/1998 as amended by the Act No. 181/1998; Section 51(2) of the Act No. 400/2009.

It has been noted that, while whistleblowers should be entitled to a fair hearing in case that their rights have been violated, this is not always the case, with factors such as institutionalised conflicts of interest leading to hearings that function more like traps.[138] The right to a genuine "day in court" should include witnesses, objective and balanced rules of procedure, as well as reasonable deadlines.[139]

Best practice would establish this right in law. It could take the form of a hearing in court or through alternative means, for example via the whistleblower complaint authority (see Principle 28 p. 57) or Alternative Dispute Resolution.[140] Benefits of alternative procedures include lower costs and expedited procedure.

In **Ireland**, employees who have faced unfair treatment can make a complaint to the Rights Commissioner with an appeal to the Labour Court against any decision of the Rights Commissioner.[141] In cases where the individual has been dismissed, the legislation on unfair dismissal applies. Unlike employees in other unfair dismissal cases, whistleblowers are protected from their first date of employment. Alternatively, a whistleblower who is not an employee and who has suffered detriment because of making protected disclosure has a right of action in tort against the person causing them harm.[142] Employees can also take tort action against someone who has caused them harm, but they cannot also take an action to the Rights Commissioner in respect of the same matter or person.

THE BURDEN OF PROOF

PRINCIPLE 8

Burden of proof on the employer – in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower's disclosure.

It can be very difficult for employees to demonstrate that they have suffered negative treatment because they have blown the whistle. On the other hand, employers usually have processes in place to document actions taken against employees and why, and easier access to witnesses. As the employer has the greater power and resources, the onus should be placed on them to prove that the action taken was not due to the whistleblower raising a concern. This is why international standards recommend that whistleblowing legislation reverses the burden of proof onto the employer.

This means that the employee should only need to establish a prima facie case that (1) he or she made a disclosure and (2) suffered a negative treatment. It is then up to the employer to prove that the treatment was fair and not linked in any way to the whistleblowing, that is, it would have

[138] GAP, 2013.
[139] GAP, 2013, Principle 10; Blueprint for Free Speech, 2016, p. 26.
[140] Also supported by GAP, 2013, Principle 11.
[141] Ireland, PDA 2014, Schedule 2.
[142] Ireland, PDA 2014, Section 13.

happened anyhow. A similar approach is taken in anti-discrimination law in some countries and in EU legislation.[143]

An example of good practice can be found in Norway.

Norway, Working Environment Act 2005

Section 2 A-2. Protection against retaliation in connection with notification

(1) Retaliation against an employee who notifies pursuant to Section 2 A-1 is prohibited. As regards workers hired from temporary-work agencies, the prohibition shall apply to both employers and hirers. If the employee submits information that gives reason to believe that retaliation in breach of the first or second sentence has taken place, it shall be assumed that such retaliation has taken place unless the employer or hirer substantiates otherwise.

REWARDS FOR WHISTLEBLOWERS

PRINCIPLE 23

Reward systems – if appropriate within the national context, whistleblowers may receive a portion of any funds recovered or fines levied as a result of their disclosure. Other rewards or acknowledgements may include public recognition or awards (if agreeable to the whistleblower), employment promotion, or an official apology for retribution.

Financial rewards

Rewards should not be confused with remedies, especially financial compensation. Remedies seek to make the whistleblower whole, that is, restoring the whistleblowers to a situation they would be in if they had not blown the whistle and thus suffered unfair treatment. Rewards also help to restore the whistleblower's situation, but their main aim is to incentivise whistleblowers to come forward.

The benefits and disadvantages of financially rewarding whistleblowers are highly debated among policy-makers and researchers.[144] Transparency International considers that the appropriateness of a financial rewards system very much depends on the national context. In any case, where a reward system is established, it should come in addition to a comprehensive national whistleblower protection framework.[145]

Non-financial rewards: Awards and honours

[143] Council of Europe, 2014, p. 40.
[144] Transparency International, *Financial Incentives for Whistleblowers* (2016), www.transparency.org/files/content/corruptionqas/Financial_incentives_for_whistleblowing.pdf; Transparency International France, "Faut-il rémunérer ou indemniser les lanceurs d'alerte ?" (2015).
[145] UNODC, 2015, p. 67.

Many countries confer honours to individuals whose actions have contributed significantly to the common good, or who put themselves at risk to protect others. As protectors of the public interest, whistleblowers should be eligible to receive such public honours. Awards can also be afforded by the employers, to thank them for the service they rendered the organisation. Such recognition helps to promote whistleblowers as "good citizens" or "good employees", presenting whistleblowing as a positive act that is welcomed by the organisation/country. It can also help with the emotional recovery of the whistleblowers by restoring their reputation and standing.[146] Finally, it might help stymie further unfair treatment.

Such public awards should only be possible with the express consent of the whistleblower, in line with the principle of confidentiality of the whistleblower's identity (see Principles 7 and 13, p. 17).

[146] Robert Vaughn, *The Successes and Failures of Whistleblower Laws* (Cheltenham: Edward Elgar, 2012).

WHISTLEBLOWING AUTHORITY

An independent agency should be responsible for the oversight and enforcement of whistleblowing legislation. Countries may decide to create a new dedicated whistleblowing authority or to extend the competencies of an existing agency (such as the Ombudsman). Whatever the chosen approach, best practice dictates that such agencies should be independent and have sufficient power and resources to operate effectively.[147] Transparency International considers that, in order to ensure effective whistleblower protection, a whistleblowing authority should be competent to receive, investigate and address complaints of unfair treatments and improper investigations of whistleblower disclosures, as well as provide advice and support to whistleblowers. A whistleblowing authority should also monitor and review whistleblower frameworks, collect and publish data and information regarding the functioning of whistleblowing laws and frameworks, raise public awareness to encourage the use of whistleblower provisions, and enhance cultural acceptance of whistleblowing.

PRINCIPLES 28 AND 25

28. Whistleblower complaints authority – an independent agency shall receive and investigate complaints of retaliation and improper investigations of whistleblower disclosures. The agency may issue binding recommendations and forward relevant information to regulatory, investigative or prosecutorial authorities for follow-up. The agency shall also provide advice and support, monitor and review whistleblower frameworks, raise public awareness to encourage the use of whistleblower provisions, and enhance cultural acceptance of whistleblowing. The agency shall be provided with adequate resources and capacity to carry out these functions.

25. Publication of data – the whistleblower complaints authority (Principle 28) should collect and regularly publish (at least annually) data and information regarding the functioning of whistleblower laws and frameworks (in compliance with relevant privacy and data protection laws). This information should include the number of cases received; the outcomes of cases (i.e. dismissed, accepted, investigated, validated); compensation and recoveries (maintaining confidentiality if the whistleblower desires); the prevalence of wrongdoing in the public and private sectors; awareness of and trust in whistleblower mechanisms; and time taken to process cases.

RECEIVE, INVESTIGATE AND ADDRESS COMPLAINTS OF UNFAIR TREATMENTS

Complaints of unfair treatments need to be investigated and resolved. Internal whistleblowing mechanisms should include policies and procedures to receive, investigate and address complaints of unfair treatment. However, whistleblowers who are victims of retaliation will often not trust that the

[147] OECD, 2015, p. 85.

organisation in which the unfair treatment occurred will appropriately address their complaint. Therefore, they should also be able to turn to an external, independent authority for investigation.

The agency should have sufficient powers to allow proper investigation of the complaint. As stressed by GAP, "an ombudsman with sufficient access to documents and institutional officials can neutralise resource handicaps and cut through draining conflicts to provide expeditious corrective action."[148]

The authority should have the power to order protective measures when there is unfair treatment and to enforce those measures. This is the case in South Korea, where the Anti-Corruption and Civil Rights Commission (ACRC) can impose a fine for non-compliance with protective measures[149] and is even mandated to check whether the protective measures were implemented and whether the whistleblower faced any further disadvantages.[150]

South Korea, Protection of Public Interest Reporters Act 2011[151]

Article 20 (Decision to Take Protective Measures)[152]

(1) Where the Commission deems that, as a result of investigation, an applicant has been subjected to disadvantageous measures (excluding any disadvantageous measure falling under subparagraph 6 (h) and (i) of Article 2) due to a public interest report, etc., it shall make a decision requesting the person who has taken disadvantageous measures to take protective measures set forth in the following subparagraphs (hereinafter referred to as "decision to take protective measures") within a fixed period not exceeding 30 days, and where it deems that the applicant has not been subjected to disadvantageous measures due to the public interest report, etc., it shall make a decision dismissing the request for protective measures (hereinafter referred to as "dismissal decision"):

1. Measures of reinstatement;

2. Payment of differentiated wages paid, wages in arrears, etc. (including interest);

3. Cancellation or prohibition of other disadvantageous measures.

(2) Where the Commission deems that an applicant has been subjected to disadvantageous measures falling under subparagraph 6 (h) or (i) of Article 2 due to a public interest report, etc., it may recommend (hereinafter referred to as "recommendation") the person who has taken such disadvantageous measures take necessary protective measures, such as maintaining the validity of approval or a permit, or a contract, etc., within a fixed period not exceeding 30 days.

(3) The Commission shall issue a decision of dismissal without prejudice prescribed in Article 18, decision to take protective measures, and dismissal decision prescribed in paragraph (1), and

[148] GAP, 2013, Principle 9.
[149] ACRC, Manual on the Handling of Public Interest Reports and Protection of Public Interest Whistleblowers, pp. 67-68.
[150] ACRC, "Protection for public interest whistleblowers to be significantly strengthened", 28 September 2017, www.acrc.go.kr/en/board.do?command=searchDetail&method=searchDetailViewInc&menuId=020501&boardNum=67072.
[151] As amended by Act of 18 April 2017. The entire Act can be found in English at https://elaw.klri.re.kr/eng_service/lawView.do?hseq=43327&lang=ENG.
[152] See Article 19 of the Korean Act on the Protection of Public Interest Whistleblowers regarding the ACRC investigative powers.

recommendation prescribed in paragraph (2) in writing and shall notify both the relevant applicant and the person who has taken disadvantageous measures thereof.

(4) Where the Commission makes a decision to take protective measures, it may request the person who has the right to take disciplinary action against the person who has taken disadvantageous measures due to a public interest report, etc. to take disciplinary action against him/her.

(5) Necessary matters concerning the standards for payment of differentiated wages paid, wages in arrears, etc. prescribed in paragraph (1) 2 and the method for computation thereof, etc. shall be prescribed by Presidential Decree.

ADDRESS IMPROPER INVESTIGATIONS OF WHISTLEBLOWER DISCLOSURES

It is recommended that the investigation of a disclosure itself is separated from the investigation of reports of unfair treatment. As highlighted by the UNODC, this reduces the risk of perceived conflict of interest between how the disclosure is handled and how the whistleblower is treated. The assessment of the complaint of unfair treatment should not be influenced by the result of the investigation into the disclosure, especially in cases where no wrongdoing is found.[153]

However, to ensure that disclosures are investigated and addressed promptly, the Council of Europe suggests that courts or regulatory bodies are empowered to award damages to the whistleblower and sanction the employer or other responsible person for failing to conduct a prompt and adequate investigation.[154] This is the case in **Italy**, where the National Anti-Corruption Authority (NACA) can sanction the individuals in charge of handling disclosures in public institutions for inaction.[155]

PROVIDE ADVICE AND SUPPORT

Whistleblowers should have access to individual confidential advice, free of charge. Even where legislation, policies and guidelines exist, questions about how such rules might apply to individual cases always remain. Access to specialist advice will help ensure that the disclosures are made through the appropriate channels, in a timely and responsible manner, thus ensuring that the wrongdoing is dealt with in the best way possible and, most importantly, that the whistleblower is protected. In addition, individuals who are not sure about how to raise a concern or whether they will be protected will often decide not to speak up.

The Council of Europe recommends that structures able to provide such information and advice be identified or potentially created, and their details made available to the general public.[156] In its

[153] UNOCD, 2015, pp. 71-72.
[154] Council of Europe, 2014, p. 36.
[155] Italy, Provisions for the protection of individuals reporting crimes or irregularities that have come to light in the context of a public or private employment relationship, Article 1.6, see above p. 46.
[156] Council of Europe, 2014, Principle 28.

Principle 28, Transparency International recommends that the whistleblower authority also provide direct advice and support to whistleblowers.

The Netherlands is one of the few countries where the legislation has set up and provided resources to an independent specialised body to provide advice to whistleblowers: The Advice Department of the House for Whistleblowers.[157]

The Netherlands, The Whistleblower Authority Act, 2016

Article 3a

1 The House has an advice department of advice and an investigation department.

2 The advice department is tasked with:

a. informing, advising and supporting an employee about the steps to be taken regarding the suspicion of wrongdoing;

b. the referral to administrative bodies or services charged with the investigation of criminal offences or charged with the supervision of any statutory provision or to any other competent authority where the suspicion of wrongdoing can be reported; and

c. providing general information about dealing with a suspicion of wrongdoing.

[…]

In **Jamaica,** the whistleblowing authority is mandated to give advice to whistleblowers but also to the persons responsible for the handling of whistleblower disclosures (see below Section 21(3)(b) of the Protected Disclosures Act, 2011).

Advice can also be provided by civil society, trade unions and independent lawyers. Transparency International's Advocacy and Legal Advice Centres provide free and confidential legal advice as well as support to witnesses and victims of corruption, including whistleblowers. Advocacy and Legal Advice Centres were first opened in 2003. Today there are over 80 centres worldwide.

MONITOR AND REVIEW WHISTLEBLOWER FRAMEWORKS

Increasingly, whistleblowing legislation is making it mandatory for public organisations, and sometimes private sector organisations, to adopt internal whistleblowing mechanisms. The whistleblowing authority should provide guidance and advice to employers on how to set up effective mechanisms. It should also monitor whether organisations that are required to set up such mechanisms comply with their obligation. Monitoring and reviewing whistleblowing frameworks should have the added benefit of facilitating the collection and dissemination of information on good

[157] The Dutch House for Whistleblowers also has an Investigation Department that can receive and investigate disclosures. The grouping of the advice and investigative functions in one body, even though the departments are separated by a "Chinese Wall", raises concern about perceived conflicts of interest. The UNODC considers that authorities in charge of receiving whistleblower disclosure can provide general guidance on the meaning of the law as well as information on how they handle disclosure, but they are not in a position to provide impartial or individual legal advice (UNODC, 2015, p. 75).

and bad practices. It can also present an opportunity to explore the reasons why individuals do not use internal channels and thus tackle obstacles to internal whistleblowing.

In **Jamaica**, the whistleblowing authority is mandated to publish guidelines on internal whistleblowing mechanisms, to review the operation of organisations' internal mechanisms, and provide recommendations where relevant (see below Section 21(3)(a), and (d) to (f) of the Protected Disclosures Act, 2011). In **Italy**, NACA can pronounce sanctions against the anti-corruption officers of public institutions that have not put in place the appropriate internal mechanisms.

Italy, Provisions for the protection of individuals reporting crimes or irregularities that have come to light in the context of a public or private employment relationship, 2017

Article 1 (Protection of public employees reporting illicit activities)

6. […] When NACA ascertains the lack of whistleblowing procedures or the non-compliance with paragraph 5, it issues an administrative pecuniary sanction of €10,000 to €50,000 on the responsible person.

The sanction issued by NACA is calculated considering the size of the public administration involved.

PUBLICATION OF DATA AND MONITORING

Collecting and publishing information on how a law is being used can provide a measure of its effectiveness. Publishing data on its functioning (such as number of cases received, outcomes of cases, compensation and recoveries) can provide whistleblowers, employers and other stakeholders with a sense of how much trust they can place in the country's whistleblowing framework. Such data will be a primary source of information to evaluate the implementation in practice and effectiveness of the whistleblowing legislative and institutional framework.

Data should be published following the six key principles of the International Open Data Charter. It should be:

- open by default
- timely and comprehensive
- accessible and usable
- comparable and interoperable
- for improved governance and citizen engagement
- for inclusive development and innovation[158]

In Ireland, every public body must publish annually a report on the number of disclosures received and the action taken in response.[159] In Australia, additional data is gathered, and the collection and publication of the relevant data is centralised, under the responsibility of the Ombudsman. This is good practice as it allows an overview of the application of the law.

[158] International Open Data Charter, https://opendatacharter.net/principles/.
[159] Irish Protected Disclosures Act 2014, Section 22.

Australia, Public Interest Disclosure Act 2013

Section 76

Annual report

(2) The Ombudsman must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to Parliament, a report on the operation of this Act during that financial year.

(3) The report must include:

(a) in relation to each agency, statements of the following:

(i) the number of public interest disclosures received by authorised officers of the agency during the financial year;

(ii) the kinds of disclosable conduct to which those disclosures relate;

(iii) the number of disclosure investigations that the principal officer of the agency conducted during the financial year;

(iv) the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations; and

(b) a statement of the number and nature of the complaints made to the Ombudsman during the financial year about the conduct of agencies in relation to public interest disclosures; and

(c) information about the Ombudsman's performance of its functions under section 62; and

(d) information about the IGIS [Inspector-General of Intelligence and Security]'s performance of its functions under section 63.

(4) The principal officer of an agency must give the Ombudsman such information and assistance as the Ombudsman reasonably requires in relation to the preparation of a report under this section.

(5) Despite subsection (3), the principal officer may delete from a document given to the Ombudsman under that section any material:

(a) that is likely to enable the identification of a person who has made a public interest disclosure or another person; or

(b) the inclusion of which would:

(i) result in the document being a document that is exempt for the purposes of Part IV of the Freedom of Information Act 1982; or

(ii) result in the document being a document having, or being required to have, a national security or other protective security classification.

(6) A report under this section in relation to a financial year may be included in a report under section 19 of the Ombudsman Act 1976 relating to the operations of the Ombudsman during that year.

RAISING PUBLIC AWARENESS

A whistleblowing law, policy or procedure is futile if people do not know of its existence or if organisations do not know how to respond when a concern is raised.

To ensure effective implementation of the legislation, it is important that all the actors are aware of their rights and obligations under the legislation, and of the consequences of violations. Employers

should understand why encouraging whistleblowing and protecting whistleblowers is in their interest.[160] In addition, potential whistleblowers should know they can raise concerns in a protected way. For this reason, the Council of Europe recommends widely promoting the national whistleblower protection framework.[161]

In Jamaica, the whistleblower authority is in charge of such public awareness programmes (Section 21(3)(c)).

Jamaica, The Protected Disclosures Act, 2011

Section 21

Oversight by authority

(1) The Minister shall, by order, designate an individual or entity as the designated authority for the purposes of this Act.
(2) The designated authority shall be responsible for monitoring compliance with this Act and the provisions of the Third Schedule shall apply in relation thereto.
(3) In furtherance of its functions under subsection (2) the designated authority shall—
    (a) publish such procedural guidelines regarding the making, receiving and investigation of disclosures under this Act, as it considers appropriate;
    (b) provide such assistance as may be practicable to—
        (i) any person who seeks to make a disclosure under this Act;
        (ii) any person who is a designated officer, employer or other person subject to the requirements of this Act;
    (c) on an ongoing basis, plan, implement and monitor public awareness programmes aimed at informing and educating employees, employers and the general public in Jamaica about the making, in a responsible manner, of protected disclosures and about the procedures for receiving and investigating such disclosures;
    (d) review from time to time the procedures required under this Act to be established by any person;
    (e) review the implementation and operation of such procedures;
    (f) make recommendations to any person arising from any review under paragraph (c) or (d);
    (g) where it considers it appropriate to do so—
        (i) initiate an investigation;
        (ii) take over an investigation, or
        (iii) authorize a body to undertake in whole or in part an investigation.
(4) The designated authority shall, within six months after the end of each year or within such longer period as the Minister may in special circumstances approve, cause to be made and transmitted to the Minister a report dealing generally with the activities of the authority during the preceding year.
(5) The Minister shall cause a copy of the report to be tabled in the House of Representatives and the Senate.

[160] See Transparency International, *The Business Case for Speaking Up': How Internal Reporting Mechanisms Strengthen Private-Sector Organisations* (2017), www.transparency.org/whatwedo/publication/business_case_for_speaking_up.
[161] Council of Europe, 2014, recommendation 27.

(6) The designated authority shall not disclose in a report under subsection (4) any information that would directly or indirectly identify any person who has made a disclosure under this Act, or a person about whose conduct a disclosure was made.

LEGISLATIVE STRUCTURE AND REVIEW

Effective whistleblower protection relies on dedicated legislation that is designed, monitored and regularly reviewed with the involvement of all relevant stakeholders.

"Every whistleblower law should include a formal review process that tracks how many whistleblowers use the new rights, whether they have proven effective empirically, and what changes should be enacted based on lessons learned."[162]

ONE COMPREHENSIVE LAW

PRINCIPLE 24

Dedicated legislation – in order to ensure clarity and seamless application of the whistleblower framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach.

The Council of Europe recommends that the whistleblowing normative framework reflects a "comprehensive and coherent approach to facilitating public interest reporting and disclosures."[163] Comprehensive means that the coverage of persons and situations should be as wide as possible. Coherent means that legal provisions do not overlap, contradict or undermine each other, which could reduce the effectiveness of whistleblower protection.[164] The UNODC provides a useful list of laws and rules that policy-makers should take into account when considering whistleblower protection measures, such as defamation or libel, professional reporting duties, data protection and so on.[165]

Transparency International recommends stand-alone legislation to lend both clarity and coherence to the legal framework protecting whistleblowers. Sectoral or thematic provisions increase the risk of loopholes and legal incoherence and make it difficult for whistleblowers to understand whether or not they are protected. Legislation should also be accessible. Whistleblowers and employers should be able to easily understand what their rights and obligations are. Dedicated legislation will also give the law better visibility, making its promotion easier for governments and employers.[166]

There are numerous examples of stand-alone whistleblowing legislation, many of which are cited throughout this guide.

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[162] GAP, 2013, Principle 20.
[163] Council of Europe, 2014, Principle 7.
[164] Council of Europe, 2014, p. 27; UNODC, 2015, p.15.
[165] UNODC, 2015, p.16.
[166] Banisar, 2011.

STAKEHOLDER INVOLVEMENT

PRINCIPLE 26

Involvement of multiple actors – the design and periodic review of whistleblowing laws, regulations and procedures must involve key stakeholders including employee organisations, business/employer associations, civil society organisations and academia.

Experience shows that reforms developed through consultation with relevant stakeholders inside and outside government are more likely to be effective. Stakeholder engagement will ensure that the legislation takes into account the needs and concerns of all parties that will be affected, thus building buy-in, trust and support of those who will have a role in implementing the legislation.[167]

Consultations will also enrich the process with relevant experience and expertise. Some stakeholders, such as ombudspersons or financial regulators, have already implemented reporting mechanisms. Others have experience using reporting mechanisms, or advising those who do, such as CSOs, trade unions or business/employer associations. Lessons learned from those actors will inform the legislative process and strengthen the effectiveness of the resulting law.[168]

Finally, wide consultation can be the first step in a public awareness campaign to promote whistleblowers as people acting for the common good and out of loyalty to their organisations or profession. This is particularly important in countries where the cultural perception of whistleblowers is negative.[169]

The UNODC and the Council of Europe recommend consultations with the following stakeholders:

- relevant ministries, including justice and labour/employment, and ministries dealing with sensitive areas (for example, customs, education, health care and public procurement)
- inspection and enforcement bodies (for example, health and safety and trading standards)
- independent human and public rights bodies, such as ombudspersons and commissioners for information, privacy, data protection and human rights
- ethics and integrity bodies, including civil service commissioners at the central and local government levels
- trade unions and staff associations
- CSOs, including human rights, community rights and consumer rights groups, and legal and advocacy organisations (especially those advising and protecting whistleblowers and addressing corruption issues)
- professional bodies for lawyers, auditors, engineers, doctors, etc. (including disciplinary or ethics committees)
- the judiciary and judicial bodies
- law enforcement bodies, including police, prosecution and special prosecutors
- public accountability bodies, such as national and local audit authorities

[167] UNODC, 2015, p. 12.
[168] UNODC, 2015, p.13.
[169] Council of Europe, 2015, p.15.

- sector regulators, including education, social care, health and safety, financial, anti-competition and fair-trade bodies
- business organisations and private sector associations.[170]

This applies to the design, monitoring and review of whistleblowing legislation.

PERIODICAL REVIEW

Any legislation would benefit from an assessment of its implementation and effectiveness.[171] Practice reveals what works and what does not, giving important clues as to how to improve the normative and institutional framework.

Very few whistleblower laws provide for review. Where they do, it is limited to one review, at a certain point in time.[172] Best practice dictates that reviews should happen periodically, as per the Council of Europe recommendation.[173] This is the case in Jamaica, although the time interval could be more precise. Blueprint for Free Speech recommends a review every five years.[174]

Jamaica, Protected Disclosures Act, 2011

Section 27

(1) This Act shall be reviewed, from time to time, by a committee of both Houses of Parliament appointed for that purpose.

(2) The first such review shall be conducted not later than three years after the appointed day.

[170] UNODC, 2015, pp. 13-14, Council of Europe, 2015, p.15.
[171] For example, the OECD 2009 Anti-Bribery Recommendation requests countries to periodically review their laws implementing the OECD Anti-Bribery Convention and their approach to enforcement, in order to effectively combat international bribery (recommendation V).
[172] For example, in Ireland, a review must be commenced three years after the law was passed with a report published within 12 months thereafter (Irish Protected Disclosures Act 2014, section 2). In the Netherlands, a report on the effectiveness of the law must be produced within five years (Dutch Whistleblowers Authority Act 2016, section 20). It will include matters such as cultural change, the publicity regime and governance structure.
[173] Council of Europe, 2014, Principle 29.
[174] Blueprint for Free Speech, 2016, p. 28.

ANNEX: INTERNATIONAL PRINCIPLES FOR WHISTLEBLOWER LEGISLATION

BEST PRACTICES FOR LAWS TO PROTECT WHISTLEBLOWERS AND SUPPORT WHISTLEBLOWING IN THE PUBLIC INTEREST

PREAMBLE

Whistleblowers play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing that threaten public health and safety, financial integrity, human rights, the environment, and the rule of law. By disclosing information about such misdeeds, whistleblowers have helped save countless lives and billions of dollars in public funds, while preventing emerging scandals and disasters from worsening.

Whistleblowers often take on high personal risk. They may be fired, sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed. Protecting whistleblowers from such retaliation will promote and ease the efficient exposing of corruption, while also enhancing openness and accountability in government and corporate workplaces.

The right of citizens to report wrongdoing is a natural extension of the right of freedom of expression, and it is linked to the principles of transparency and integrity. All people have the inherent right to protect the well-being of other citizens and society at large, and, in some cases, they have the duty to report wrongdoing. The absence of effective protection can therefore pose a dilemma for whistleblowers: they are often expected to report corruption and other crimes, but doing so can expose them to retaliation.

Recognising the role of whistleblowing in corruption-fighting efforts, many countries have pledged to enact whistleblower protection laws through international conventions. And, ever more governments, corporations and non-profit organisations around the world are putting whistleblower procedures in place. It is essential, however, that these policies provide accessible disclosure channels for whistleblowers, meaningfully protect whistleblowers from all forms of retaliation, and ensure that the information they disclose can be used to advance needed reforms.

To help ensure that whistleblowers are afforded proper protection and disclosure opportunities, the principles presented here serve as guidance for formulating new and improving existing whistleblower legislation. They should be adapted to an individual country's political, social and cultural contexts and to its existing legal frameworks. They take into account lessons learned from existing laws and their implementation in practice, and have been shaped by input from whistleblower experts, government officials, academia, research institutes and NGOs from all regions. These principles will be updated and refined as experiences with legislation and practices continue to unfold.

GUIDING DEFINITION

1. *Whistleblowing* – the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations[175] – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.

GUIDING PRINCIPLE

2. *Protected individuals and disclosures* – all employees and workers in the public and private sectors need:

- accessible and reliable channels to report wrongdoing
- robust protection from all forms of retaliation
- mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies and prevent future wrongdoing

SCOPE OF APPLICATION

3. *Broad definition of whistleblowing* – whistleblowing is the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation;[176] miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest;[177] and acts to cover up of any of these.

4. *Broad definition of whistleblower* – a whistleblower is any public or private sector employee or worker who discloses information covered in Principle 3 (above) and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers, and former employees.[178]

5. *Threshold for whistleblower protection: "reasonable belief of wrongdoing"* – protection shall be granted for disclosures made with a reasonable belief that the information is true at the time it is disclosed.[179] Protection extends to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed.

PROTECTION

6. *Protection from retribution* – individuals shall be protected from all forms of retaliation, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. This includes all types of harm, including dismissal, probation and other job sanctions; punitive transfers;

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[175] Including perceived or potential wrongdoing.
[176] Including fraudulent financial disclosures made by government agencies/officials and publicly traded corporations.
[177] Could also include human rights violations if warranted or appropriate within a national context.
[178] Protection shall extend to attempted and perceived whistleblowers; individuals who provide supporting information regarding a disclosure; and those who assist or attempt to assist a whistleblower.
[179] "Reasonable belief" is defined as when a person reasonably could suspect wrongdoing in light of available evidence.

harassment; reduced duties or hours; withholding of promotions or training; loss of status and benefits; and threats of such actions.

7. *Preservation of confidentiality* – the identity of the whistleblower may not be disclosed without the individual's explicit consent.

8. *Burden of proof on the employer* – in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower's disclosure.

9. *Knowingly false disclosures not protected* – an individual who makes a disclosure demonstrated to be knowingly false is subject to possible employment/professional sanctions and civil liabilities.[180] Those wrongly accused shall be compensated through all appropriate measures.

10. *Waiver of liability* – any disclosure made within the scope of whistleblower legislation shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection. The burden shall fall on the subject of the disclosure to prove any intent on the part of the whistleblower to violate the law.

11. *Right to refuse participation in wrongdoing* – employees and workers have the right to decline to participate in corrupt, illegal or fraudulent acts. They are legally protected from any form of retribution or discrimination (see Principle 6, above) if they exercise this right.

12. *Preservation of rights* – any private rule or agreement is invalid if it obstructs whistleblower protections and rights. For instance, whistleblower rights shall override employee "loyalty" oaths and confidentiality/nondisclosure agreements ("gag orders").

13. *Anonymity* – full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent.

14. *Personal protection* – whistleblowers whose lives or safety is in jeopardy, and their family members, are entitled to receive personal protection measures. Adequate resources should be devoted for such protection.

DISCLOSURE PROCEDURES

15. *Reporting within the workplace* – whistleblower regulations and procedures should be highly visible and understandable; maintain confidentiality or anonymity (unless explicitly waived by the whistleblower); ensure thorough, timely and independent investigations of whistleblowers' disclosures; and have transparent, enforceable and timely mechanisms to follow up on whistleblowers' retaliation complaints (including a process for disciplining perpetrators of retaliation).[181]

16. *Reporting to regulators and authorities* – if reporting at the workplace does not seem practical or possible, individuals may make disclosures to regulatory or oversight agencies or individuals outside of their organisation. These channels may include regulatory authorities, law enforcement or

[180] The burden shall fall on the subject of the disclosure to prove that the whistleblower knew the information was false at the time of disclosure.
[181] Employees are encouraged to utilise these internal reporting channels as a first step, if possible and practical. For a guide on internal whistleblowing systems, see *PAS Code of Practice for Whistleblowing Arrangements*, British Standards Institute and Public Concern at Work, 2008.

investigative agencies, elected officials, or specialised agencies established to receive such disclosures.

17. *Reporting to external parties* – in cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest, individuals shall be protected for disclosures made to external parties such as the media, civil society organisations, legal associations, trade unions, or business/professional organisations.[182]

18. *Disclosure and advice tools* – a wide range of accessible disclosure channels and tools should be made available to employees and workers of government agencies and publicly traded companies, including advice lines, hotlines, online portals, compliance offices, and internal or external ombudspersons.[183] Mechanisms shall be provided for safe, secure confidential or anonymous disclosures.[184]

19. *National security/official secrets* – where a disclosure concerns matters of national security, official or military secrets, or classified information, special procedures and safeguards for reporting that take into account the sensitive nature of the subject matter may be adopted in order to promote successful internal follow-up and resolution and to prevent unnecessary external exposure. These procedures should permit internal disclosures, disclosure to an autonomous oversight body that is institutionally and operationally independent from the security sector, or disclosures to authorities with the appropriate security clearance. External disclosure (that is, to the media or civil society organisations) would be justified in demonstrable cases of urgent or grave threats to public health, safety or the environment; if an internal disclosure could lead to personal harm or the destruction of evidence; and if the disclosure was not intended or likely to significantly harm national security or individuals.[185]

RELIEF AND PARTICIPATION

20. *Full range of remedies* – a full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering.[186] A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered.

21. *Fair hearing (genuine "day in court")* – whistleblowers who believe their rights have been violated are entitled to a fair hearing before an impartial forum with full right of appeal. Decisions shall be timely, whistleblowers may call and cross-examine witnesses, and rules of procedure must be balanced and objective.

22. *Whistleblower participation* – as informed and interested stakeholders, whistleblowers shall have a meaningful opportunity to provide input to subsequent investigations or inquiries. Whistleblowers

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[182] If these disclosure channels are differentiated in any manner, the disclosure process in any event shall not be onerous and must allow disclosures based alone on reasonable suspicion (for example, UK Public Interest Disclosure Act).
[183] Individuals seeking advice shall also be fully protected.
[184] In accordance with relevant data protection laws, regulations and practices.
[185] "Classified" material must be clearly marked as such, and cannot be retroactively declared classified after a protected disclosure has been made.
[186] This may also include medical expenses, relocation costs or identity protection.

shall have the opportunity (but are not required) to clarify their complaint and provide additional information or evidence. They also have the right to be informed of the outcome of any investigation or finding and to review and comment on any results.

23. *Reward systems* – if appropriate within the national context, whistleblowers may receive a portion of any funds recovered or fines levied as a result of their disclosure. Other rewards or acknowledgements may include public recognition or awards (if agreeable to the whistleblower), employment promotion, or an official apology for retribution.

LEGISLATIVE STRUCTURE, OPERATION AND REVIEW

24. *Dedicated legislation* – in order to ensure clarity and seamless application of the whistleblower framework; stand-alone legislation is preferable to a piecemeal or a sectoral approach.

25. *Publication of data* – the whistleblower complaints authority (below) should collect and regularly publish (at least annually) data and information regarding the functioning of whistleblower laws and frameworks (in compliance with relevant privacy and data protection laws). This information should include the number of cases received; the outcomes of cases (that is, dismissed, accepted, investigated or validated); compensation and recoveries (maintaining confidentiality if the whistleblower desires); the prevalence of wrongdoing in the public and private sectors; awareness of and trust in whistleblower mechanisms; and time taken to process cases.

26. *Involvement of multiple actors* – the design and periodic review of whistleblowing laws, regulations and procedures must involve key stakeholders including employee organisations, business/employer associations, civil society organisations and academia.

27. *Whistleblower training* – comprehensive training shall be provided for public sector agencies and publicly traded corporations and their management and staff. Whistleblower laws and procedures shall be posted clearly in public and private sector workplaces where their provisions apply.

ENFORCEMENT

28. *Whistleblower complaints authority* – an independent agency shall receive and investigate complaints of retaliation and improper investigations of whistleblower disclosures. The agency may issue binding recommendations and forward relevant information to regulatory, investigative or prosecutorial authorities for follow-up. The agency shall also provide advice and support, monitor and review whistleblower frameworks, raise public awareness to encourage the use of whistleblower provisions, and enhance cultural acceptance of whistleblowing. The agency shall be provided with adequate resources and capacity to carry out these functions.

29. *Penalties for retaliation and interference* – any act of reprisal for, or interference with, a whistleblower's disclosure shall be considered misconduct, and perpetrators of retaliation shall be subject to employment/professional sanctions and civil penalties.[187]

30. *Follow-up and reforms* – valid whistleblower disclosures shall be referred to the appropriate regulatory agencies for follow-up, corrective actions and/or policy reforms.

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[187] Criminal penalties may also apply if the act of retaliation is particularly grievous (that is, intentionally placing the whistleblower's safety or life at risk). This would depend on a country's particular context, and should be considered as a means to establish proportionate sanctions only when needed.

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