

Whistleblowing International Standards and Developments*

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I. Introduction

We live in a complex world. Every day, decisions are made that can affect our health, safety, economic and human rights. Some of these decisions are made for the worst of reasons. They are made by the corrupt, the incompetent or the lazy. Accidents happen or corruption flourishes because employees who know about wrongdoing are afraid to say anything in fear of losing their jobs.

There has been a substantial increase in the recognition of the importance of whistleblowing as a means of reducing corruption and dangerous situations by improving the disclosure of information about illegal, dangerous or unethical activities by government and private organisations. It can also be a means of improving the internal organisational culture of organisations in both the public and private sector to prevent or reveal mistakes and accidents and improve internal management and efficiency.

Around the world, whistleblowers have been hailed as heroes for revealing corruption and fraud in organisations and preventing potentially harmful mistakes from leading to disasters. The disclosures range from revealing the theft of millions of dollars of public money in Kenya to the cover-up of SARS and other dangerous diseases that threaten millions in China, dangerous doctors in Australia to environmental hazards in the US.

However, many face also severe repercussions for their actions. They lose their jobs or are ostracized for their activities. Some are charged with crimes for violating laws or employment agreements. In extreme cases, they face physical danger.

Countries around the world are now working to develop legal regimes to encourage these important disclosures and protect the whistleblowers from retribution. Many international agreements and treaties on anti-corruption including the Council of Europe Civil Law on Corruption and the UN Convention Against Corruption include requirements that nations adopt these laws. Many organisations are also adopting internal rules to facilitate disclosures.

Over 50 countries have now adopted specific whistleblower protections. Others have adopted protections through other laws such labour laws or public sector employment rules. Only a handful of countries have adopted comprehensive whistleblowing laws. These have two major themes - a proactive part which attempts to change the culture of organizations by making it acceptable and facilitating the disclosure of information on negative activities in the organisation such as corrupt practices and mismanagement and a second aspect made up of a series of protections and incentives for people to come forward without fear of being sanctioned for their disclosures.

It is difficult to say if these laws are working. Most are too narrow, only applying to the public sector or certain types of wrongdoing. There is considerable evidence in most countries that retaliation against whistleblowers regularly occurs and that many workers' concerns about it persuade them to keep silent. However, there is some positive news. Whistleblowers are also being seen in a more positive light and there is a possible positive culture shift in seeing them more as an important part of fighting corruption and preventing mismanagement, abuses and accidents.

II. Defining Whistleblowing

What is Whistleblowing?

Whistleblowing has many different facets. Among other things, it can be an act of free speech, an anti-corruption tool, and an internal management dispute mechanism. This has led to a number of different definitions.

One of the first modern uses was by US consumer activist Ralph Nader in 1971 who described it as “An act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.”²

US academics Marcia P. Miceli and Janet P. Near set the academic standard for whistleblowing in 1982 as “the disclosure of organizational member’s (former or current) disclosure of illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.”³ They describe whistleblowing as a four state process:

- A triggering event occurs, involving questionable, unethical, or illegal activities, and this leads an employee to consider blowing the whistle.
- Second, the employee engages in decision making, assessing the activity and whether it involves wrongdoing, gathering additional information, and discussing the situation with others.
- Third, the employee exercises voice by blowing the whistle; alternatively, the employee could exit the organization, or remain silent out of loyalty or neglect.
- Fourth, organization members react to, and possibly retaliate against the whistleblower.⁴

Other academics have focused on whistleblowing as mostly an element of free speech and the right of individuals to express dissent. Australian academic Peter Jubb defines it as being necessarily a public action:

Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organisation, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organisation, to an external entity having potential to rectify the wrongdoing.⁵

More recent definitions have focused on the employment aspects. The International Labour organisation defines it as “The reporting by employees or former employees of illegal, irregular,

² Nader, Petkas, and Blackwell, Whistleblowing (1972). Quoted in Nicholas M Rongine, Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing, American Business Law Journal, Summer 1985. Vol. 23, Iss. 2; p. 28.

³ Quoted in Mesmer-Magnus and Viswesvaran, Whistleblowing in Organisations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation: Journal of Business Ethics 62: 277-297 (2005).

⁴ Miceli and Near 1992 cited in Dworkin and Baucus, Internal V. External Whistleblowers: A Comparison of Whistleblowing Processes, Journal of Business Ethics 17: 1281-198: 1998.

⁵ Peter B. Jubb, Whistleblowing: A Restrictive Definition and Interpretation, Journal of Business Ethics 21, 77-94, 1999.

dangerous or unethical practices by employers.”⁶ A pair of the leading experts in the field, Guy Dehn from the UK’s Public Concern at Work and Richard Calland of the South African Open Democracy Advice Centre, describe it as:

[T]he options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance. Whistleblowing covers the spectrum of such communications, from raising the concern with managers, with those in charge of the organisation, with regulators, or with the public [...] the purpose is not the pursuit of some private vendetta but so that risk can be assessed and, where appropriate, reduced or removed.”⁷

This paper uses an expansive view of whistleblowing. It treats whistleblowing as a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms. It recognizes that whistleblowing relates to internal and external disclosures and should apply to all organisations, public and private. The disclosure can be internal to higher-ranking officials in the organisation but also to external bodies such as regulatory bodies, ombudsmen, anti-corruption commissioners, elected officials and the media. The focus of whistleblowing is thus a free speech right, an ethical release, and an administrative mechanism. The result is to ensure individuals have the ability to speak out in their conscience and that organisations are more open and accountable to their employees, shareholders and the greater public in their activities.

Differences between Whistleblowers and Informers

Whistleblowers are often equated with informers who have a generally bad reputation. Perhaps the most important distinction is the liability of the person disclosing the information. Informants are often themselves involved in some sort of unethical enterprise and are using the disclosure of information as a means to reduce their liability, either voluntarily, or due to coercion. They are in a subordinate place to the body or person they are disclosing to and must follow their orders or face sanctions. In comparison, whistleblowing laws do not affect the liability of those that are involved in criminal enterprises. As succinctly put by Professor Alexandra Natapoff,

The focus here, however, is not on the complex moral posture of the informant and his disloyalties, or even his questionable value as a witness. It is the meaning and consequences of the very specific law enforcement practice of rewarding informants by forgiving them their crimes. This information-liability exchange between informants and the government thus distinguishes criminal snitching in part from other forms of whistleblowing in which betrayal is not rewarded by official forgiveness for other crimes.⁸

Another difference is that informants often seek favours or remuneration for their disclosures. In most cases, whistleblowers receive no benefits for their disclosures outside of the ability to maintain the status quo. However, a few types of anti-corruption laws do allow for rewards to be given to those that disclose, typically a part of the money recovered in corruption cases.

A duty to inform

⁶ ILO Thesaurus 2005. At <http://www.ilo.org/public/libdoc/ILO-Thesaurus/english/index.htm>

⁷ Calland and Dehn, *Whistleblowing Around the World: Law Culture and Practice*, ODAC and PCAW, 2004 at 9. (Calland and Dehn)

⁸ Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 *Cincinnati Law Rev.* 645 (2004).

Whistleblowing should be also distinguished from a duty to inform. In much of the literature on anti-corruption, the positive – and often non-voluntary – duty of individuals to inform superiors or others of any wrongdoing that they discover is also described as whistleblowing. This is becoming especially common in areas such as civil service, banking and accounting.

The functionality is similar - there is a disclosure and the person who made the disclosure requires some protection possible repercussions. However, the motivation and the type of problems are different. In the case of the required disclosure, the person faces the choice of being subject to criminal or other sanctions for the act of non-disclosure. In the case of the whistleblower, it is more an ethical issue – something is wrong and they wish to see it set right often for the benefit of the organisation. Their disclosure also tends have a broader scope – the act might not be criminal; it could just be that there is inefficiency or potential accidents would be prevented.

The British Standards Institute recommends against requiring employees to blow the whistle noting that it “is unlikely to bolster staff confidence in the arrangements or help foster or embed a more open and accountable culture.”⁹ It also raises issues of fairness on who will be sanctioned if many people knew of wrongdoing and pragmatic problems relating to over-reporting of suspected infractions.

Protection of witnesses

Whistleblowing should also be distinguished from laws and policies on protection of witnesses. There is often confusion on this issue with many governments and media mistaking witness protection laws for whistleblower laws.¹⁰

There is some overlap between the two, often including a promise to keep the identity of the individual confidential.

Whistleblowing is about preventing harm to the career and interests of the individual at the workplace. In whistleblowing, the focus is on the information, not the person who made the disclosure. Often, they are not asked to be witnesses but are merely bystanders once the disclosure is made. As noted by the Council of Europe Parliamentary Assembly “a whistleblower will not necessarily wish to, or need to appear in court, considering that whistle-blowing measures are designed to in the first place to deter malpractices or remedy them at an early stage.”¹¹

As a practical matter, laws on witness protection are relating to much more serious matter, involving usually the physical protection of the individual who will not testify in a criminal case unless they are promised protection including from physical threats and possible relocation.¹² Witness protection can also be broader in scope, involving people who are not in the organization and might have merely seen something or come across the information they are being asked to testify on as part of their jobs.

⁹ British Standards Institute, Whistleblowing Arrangements Code of Practice, PAS 1998:2008, July 2008. Available at: <http://www.pcaw.co.uk/bsi/index.php>

¹⁰ See e.g. Council of Europe Parliamentary Assembly, The protection of "whistleblowers": Introductory memorandum, AS/Jur (2008) 09, 3 April 2008.

<http://omtziigt.cda.nl/Portals/13/docs/whistle%20blowers%20memo%20Omtziigt.doc>

¹¹ *Id.*

¹² See e.g. UNDCP Model Witness Protection Bill, 2000. http://www.unodc.org/pdf/lap_witness-protection_2000.pdf

III. Utility of Whistleblowing

Whistleblowers often reveal information that is critically important for public life. In China, Dr. Jiang Yanyong revealed the extent of the spread of the SARS virus and potentially saved millions of lives by alerting the public after being ordered by the authorities not to reveal it.¹³ Other disclosures are essential to promote political accountability. Allan Cutler, a Canadian bureaucrat, disclosed suspicions of fraud that led to the revealing of millions of misspent public funds, the sponsorship scandal and the defeat of the Liberal party in the 2006 elections.¹⁴ Sherron Watkins of Enron internally raised the alarm over problems with the financial situation in the company that eventually led to the arrest and conviction of its CEO and other top officials.

Whistleblowing is also useful for bodies that want to improve their internal management to make it more accountable. Employees are usually the first to know of problems and whistleblowing can be an “early warning sign” for employers that something is wrong and should be corrected before it goes out of control. A 2002 KPMG report on fraud in Australia and New Zealand found 25 percent of fraud was reported by employees.¹⁵ A 2005 study from KPMG in Africa found that 44 percent of fraud was revealed by information received from whistleblowers.¹⁶

The UK’s Committee on Public Life described the importance of whistleblowing to the internal life of organisations:

[T]he essence of a whistleblowing system is that staff should be able to by-pass the direct management line, because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course. Effective whistleblowing is therefore a key component in any strategy to challenge inappropriate behavior at all levels of an organisation. It is both an instrument in support of good governance and a manifestation of a more open organisational culture. Successful whistleblowing, in terms of a healthy organisational culture is when concerns are raised internally with confidence about the internal procedures and where the concern is properly investigated and, where necessary, addressed.¹⁷

There are also many cases where the failure to listen to whistleblowers has had serious consequences. The US Securities and Exchange Commission failure for nine years to follow up on reports about fraudulent financial schemes by investor Bernard Madoff has led to billions of dollars in losses.¹⁸ The Texas Department of Health and the owner of the Peanut Company of America plant ignored reports from a manager that the food being produced was unsafe, leading

¹³ See Robin Van Den Hende, Jiang Yanong and SARS, in Calland and Dehn, *Whistleblowing Around the World: Law Culture and Practice*, ODAC and PCAW, 2004.

¹⁴ See Commission of Inquiry into the Sponsorship Program (Gomery Commission) Chapter VII: Audits and Investigations. http://www.gomery.ca/en/phase1report/ffr/FF_Chapter%207_v01.pdf

¹⁵ Cited in Scholtens, *Review of the Operation of the Protected Disclosures Act - Report to the Minister of State Services (NZ)*, December 2003 at 3.31. (NZ Review)

¹⁶ KPMG Forensic Africa, *Africa Fraud and Misconduct Survey 2005*.

¹⁷ Committee on Standards in Public Life (UK), *Tenth Report*, January 2005.

¹⁸ Pursuer of Madoff blew a whistle for nine years, *USA Today*, 13 February 2009.

to numerous illnesses.¹⁹ 8 people died from salmonella tainted products from another plant owned by the company. In the UK, failure to listen to whistleblowers in the “Baby P” case in Haringey Council led to the death of a 17-month old child who was being severely abused.²⁰

IV. Barriers to Whistleblowing

I. Fear of Retaliation

The largest barrier to whistleblowing is the concern that retaliation will result from the disclosure. Retaliation can vary from minor harassment at the workplace to much more severe consequences. Typically, once an employee has blown the whistle, increasing pressure will be placed on them to rescind their statement and refrain from further disclosures.

Most employees’ greatest concern is to be fired. In a jurisdiction with an “at will” employment, the employee can just be fired without justification. In most jurisdictions, some reasons will need to be found. These could include violations of minor rules or general findings of incompatibility.

More often, the employees are placed under severe pressure to force them to resign their job. Some common practices as listed by the US Project on Government Oversight:

- Take away job duties so that the employee is marginalized.
- Take away an employee's national security clearance so that he or she is effectively fired.
- Blacklist an employee so that he or she is unable to find gainful employment.
- Conduct retaliatory investigations in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose.
- Question a whistleblower's mental health, professional competence, or honesty.
- Set the whistleblower up by giving impossible assignments or seeking to entrap him or her.
- Reassign an employee geographically so he or she is unable to do the job.²¹

A review of over 200 fraud cases in the US between 1996 and 2004 found that 82 percent of the cases where the employee was named, the employee reported “that they were fired, quit under duress or had significantly altered responsibilities as a result of bringing the fraud to light.”²²

Fear of retaliation is still common even in jurisdictions with well established systems for protecting whistleblowers. A review in 2007 by the Ethics Resource Center found that 36 percent of employees that did not report corruption did so because they feared retaliation.²³ 12 percent of those that did report did experience retaliation.

¹⁹ Former Manager Says Peanut Plant Complaints Ignored, ABC News, 16 February 2009.

²⁰ Watchdog dismissed whistleblower Nevres Kemal and cleared Baby P council, The Times, 14 November 2008.

²¹ Project on Government Oversight, Homeland and National Security Whistleblower Protections: The Unfinished Agenda, April 28, 2005 at 7. (POGO report)

²² Dyck, I. J. Alexander, Morse, Adair and Zingales, Luigi, Who Blows the Whistle on Corporate Fraud?(October 1, 2008). Available at SSRN: <http://ssrn.com/abstract=891482>

²³ Ethics Resource Center, National Business Ethics Survey 2007

2. Legal Liability

There are also significant legal barriers to the unauthorized disclosure of information in many countries. These include traditional notions of responsibility to employers, secrets acts and other laws. These laws are often used to punish whistleblowers and deter further ones from speaking out.

a. Duty of loyalty and confidentiality

A traditional barrier in many countries is based on a duty of loyalty and fidelity to the employer. This can prevent an employee from expressing a personal opinion or revealing internal information. The US Supreme Court ruled in May 2006 that public employees were not protected by the Constitution when speaking as part of their official duties.²⁴

Many civil service acts require that information collected is kept confidential. For example, the Australian Public Service Code requires that public employees not disclose any information received in confidence or if “it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government.”²⁵ Sanctions for these types of laws include demotions and termination of employment.

This barrier is not absolute. There is a long recognized exemption in cases of corruption. In an 1857 case, the British court ruled:

The true doctrine is, that there is no confidence as to the disclosure of inequity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part.²⁶

More recently, the European Court of Human Rights ruled that:

Since the mission of civil servants in a democratic society is to assist the government in discharging its functions and since the public has a right to expect that they will help and not hinder the democratically elected government, the duty of loyalty and reserve assumes special significance for them [...] In addition, in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one [...] In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection.²⁷

²⁴ Garcetti v. Ceballos, No 04-473. May 30, 2006

²⁵ APS Values and Code of Conduct in practice; See also David Lewis, Employment Protection For Whistleblowers: On What Principles Should Australian Legislation Be Based?, 9 Australian Journal of Labour Law, 1996.

²⁶ Gartside v Outram 26 L.J.Ch (N.S.) 113 (1857). Cited in India Law Commission report at 47.

²⁷ Guja v Moldova, Application No. 14277/04, 12 February 2008.

This practice has also been undermined by whistleblower laws. The Indian Law Reform Commission noted:

It is now recognized that while a public servant may be subject to a duty of confidentiality, this duty does not extend to remaining silent regarding corruption of other public servants. Society is entitled to know and public interest is better served more if corruption or maladministration is exposed. The Whistleblower laws are based upon this principle.²⁸

Private sector employees also have similar duties of loyalty to their employers. Violation of this duty could lead to dismissal and other sanctions. Similarly to the civil servant situation, these duties are limited by legal obligations to disclosure wrongdoing or laws such as whistleblower laws which require protections if the disclosure is within their area of protection.²⁹

b. Secrets Acts

Relating to the obligations above, most countries have criminal laws prohibiting the release of state and military secrets by officials and often even by outsiders who have signed no agreement. In most Commonwealth countries, the colonial-era Official Secrets Acts prohibit the release of any information obtained under government employment still remain on the books. For example, the Pakistan Official Secrets Act, 1923 makes illegal the disclosure of “any information [...] which has been entrusted in confidence to him by any person holding office [...] or which he has obtained or to which he has access owing to his position as a person who holds or has held office [...]”³⁰

A review in 2007 by the Organization for Security and Co-operation in Europe (OSCE) found that nearly half of its 56 participating States imposed legal liability for journalists who obtained or published classified information.³¹ The study found dozens of cases in recent time where journalists were prosecuted for publishing secrets.

These laws are often a significant barrier to anti-corruption efforts by generally prohibiting the disclosure of any information without permission. In Kenya, the whistleblower who revealed the billions of shillings of fraud in the Goldenberg affair was fired and charged under the OSA and spent years defending himself.³² In Malaysia, opposition leader Mohamed Ezam Mohd Noor was prosecuted in 2000 under the OSA for releasing police reports on high-level corruption by government ministers.³³ In the UK, a whistleblower who revealed that the London police force had released inaccurate statements about the shooting of an innocent man in a botched anti-terror action was arrested along with the reporters who published the story.³⁴ The cases were later dropped.

The laws are also used in political cases. In Denmark, intelligence official Major Frank Soeholm Grevil was convicted and sentenced to six months imprisonment in November 2004 for

²⁸ India Law Commission report at 44.

²⁹ See e.g. *Lion Labs v. Evans* [1985] QB 526 (just cause for disclosing unreliability of breathalyzer)

³⁰ Official Secrets Act, 1923. Act XIX of 1923. § 5.

³¹ OSCE Representative on Freedom of the Media, Access to information by the media in the OSCE region: trends and recommendations: Summary of preliminary results of the survey, 30 April 2007.

³² See Goldenberg hero or villain? *The Standard*, October 31, 2004; Anatomy of a Mwananchi as Shapeshifter – The Story of a Whistleblower, ADILI Issue 66, May 2005.

³³ See Keadilan Youth chief freed of OSA charges, *The Star Online*, April 15, 2004.

³⁴ *The Times*, January 25, 2006

revealing documents to journalists stating that the government had no evidence that there were weapons of mass destruction in Iraq. The two journalists were charged in April 2006 with “publishing information illegally obtained by a third party”. They were found not-guilty by a court in 2006 based on a public interest exemption in the Criminal Code.

c. Libel

In many countries, libel and defamation laws are used to deter whistleblowers from making disclosures.³⁵ Whistleblowers are threatened by senior officials or other powerful figures who can use the court systems as effective means to silence opposition. In Singapore, the National Kidney Foundation suppressed whistleblowers and others from revealing that money was being spent on excessive salaries, first class flights and gold wash taps by using defamation laws to force apologies. The story was finally fully disclosed after the NKF sued a major media company who refused to back down.³⁶ In Kenya, the former National Security Minister recently sued the former head of the Anti-corruption Committee who released a report into misdealings to force him to stop discussing the case.³⁷ In the UK, the Shipman inquiry into a doctor who was convicted of murdering 14 patients found that several of his colleagues who were concerned about his activities were afraid that if they spoke out he would sue them for libel.³⁸ Mexico has recently made some positive advances towards addressing this issue.³⁹

d. Other laws

There is also the possibility of criminal or civil charges for the release of information under other laws such as theft or trade secrets. In the US, an employee of the Drug Enforcement Agency was sentenced to one year in prison for leaking information to a reporter under the law on theft of government property.⁴⁰ In Australia, a former official was convicted in 2007 of revealing official information “without lawful authority or excuse” after disclosing sever security threats at Australian airports that were not being remedied.⁴¹

Companies can also require that workers sign contractual confidentiality clauses. In Austria, an American engineer concerned about the safety of the new Airbus 380 jet is facing criminal and civil charges levied by his former employer after going public about potential design flaws. A court has fined him \$185,000 for discussing his case publicly.⁴²

3. Cultural Barriers

There is also a significant opposition to whistleblowers in many societies that needs to be overcome. Whistleblowers are often seen negatively as “sneaks”, “narks”, “informers” or

³⁵ See e.g. Lewis, 'Whistleblowers and the Law of Defamation: Time for Statutory Privilege?' [2005] 3 Web JCLI.

³⁶ See The CEO blew his own whistle, The Straits Times (Singapore) December 21, 2005.

³⁷ Kenya: Murungaru Files Libel Suit Against Githongo, The Nation (Nairobi), May 3, 2006.

³⁸ The Shipman Inquiry, Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future Command Paper Cm 6394, 9 December 2004 at 11.120.

³⁹ See Inter American Press Association, IAPA hails decriminalization of defamation as a major advance for press freedom, 21 April 2006.

⁴⁰ See DEA Employee Gets Prison Term for Leaking to Reporter, Law.com, January 15, 2003.

⁴¹ See Brown, Privacy and the Public Interest: when it is reasonable to protect ‘whistle-blowing’ to the media?, Privacy Law Bulletin, Vol 4, No 2, July 2007.

⁴² See A Skeptic Under Pressure, LA Times, September 27, 2005.

“dobbers”. Some of this comes from the abuses of informants going back in history. Informants and anonymous denunciations were often used as a means of maintaining power during regimes such as the Inquisition, in the Nazi occupied countries, the Soviet Union and Apartheid-era South Africa.

These cultural barriers can have significant effects on the protections available, a 2008 report by the Council of Europe found that:

the question of whistle-blowing is closely intertwined with the countries’ legal cultures. Political and administrative norms in most European countries do not value whistle-blowing. In Poland or in France, for example, whistle-blowing can be quite easily considered as a denunciation, which is strongly condemned in both cultures. In some countries, the cultural argument is put forward as a justification for not legislating on a specific law protecting "whistleblowers", often considering that the few provisions scattered among different other pieces of legislation are enough to ensure any protection needed [...] In many European countries, because of the lack of a positive reporting culture, the "whistleblower" is only too often seen as a traitor or assimilated with a police informer. This approach is detrimental to the role of the whistleblower. Society is insufficiently aware that the whistleblower’s action can prevent further wrongdoings which can jeopardise the health, safety or life of others.⁴³

Equally significant is the culture inside organisations. Whistleblowers can face social sanctions for their disclosures. The disclosure of information to outsiders can feel like a betrayal. Even in the absence of formal sanctions, being excluded from social events or being shunned in an organisation can place significant pressure on individuals. Fellow employees may even engage in harassment or other retaliation without the awareness or permission of the employer.

Recent research by American academics suggest that a key factor is that top managers in organisations take a lead role in promoting ethical behaviour. They have made the following recommendations:

Before concerns are expressed

- Encourage the development of moral identity and moral agency.
- Create a tough anti-retaliation policy that permits disciplining or dismissing employees who retaliate against whistle-blowers.
- Disseminate the policy through the intranet, in orientation materials, and elsewhere.
- Search for and select employees who possess attributes associated with observation of wrongdoing, and whistle-blowing.
- Orient and train employees about what the organization considers wrongful, and what to do if wrongdoing is observed.
- Consider building incentives for valid internal whistle-blowing into the reward structure.

Once concerns are expressed

- Focus on the wrongdoing alleged in the complaint and not on the complainant.
- Investigate reports fully and fairly.
- Take swift corrective action when the complaint is well-founded.
- Provide feedback so that management gets credit for taking action.

⁴³ See e.g. Council of Europe Parliamentary Assembly, The protection of "whistleblowers": Introductory memorandum, *Id.*

- Provide multiple communication channels so that employees can choose to report to someone with whom they are comfortable.⁴⁴

V. International Agreements on Whistleblowing

There are an increasing number of international instruments that recognize the importance of whistleblowing and require or encourage countries to adopt measures to encourage and protect disclosures. Most of these agreements are in the field of anti-corruption but there is also some recognition of the importance for free speech and good governance.

I. United Nations

Convention Against Corruption (2005)

The most significant international instrument on whistleblowing is the United Nations Convention Against Corruption.⁴⁵ Work on the Convention began in December 2000⁴⁶ and the final version was approved by the General Assembly in October 2003.⁴⁷ It was adopted in December 2005 after it was ratified by 30 countries. As of the writing of this report, it has been signed by 140 countries and ratified by 131.⁴⁸

Article 32 on the “Protection of witnesses, experts and victims” provides for protections of witnesses and experts and their relatives from retaliation including limits on disclosure of their identities.

More fundamentally, Article 33 on “Protection of reporting persons” envisions countries adopting protections for reporting of corruption by any person. It states:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

The UN Office on Drugs and Crime’s “Anti-Corruption Toolkit” notes that Article 33 is an advancement on previous agreements such as the 2000 Convention against Transnational Organised Crime which only protects witnesses and experts. The Toolkit extensively covers whistleblowing and recommends legal and administrative measures for reporting and protection including compensation, creation of ombudsman institutions to receive complaints, the creation of hotlines, and limits on libel and confidentiality agreements.⁴⁹

⁴⁴ Miceli, Near and Dworkin, A Word to the Wise: How Managers and Policy-Makers can Encourage Employees to Report Wrongdoing, *Journal of Business Ethics*, 2008. (available online via www.springerlink.com).

⁴⁵ UN Convention on Anti-Corruption. http://www.unodc.org/unodc/en/crime_convention_corruption.html

⁴⁶ Resolution 55/61 of 4 December 2000.

⁴⁷ Resolution 58/4 of 31 October 2003.

⁴⁸ <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (Viewed 17 February 2009).

⁴⁹ United Nations Office on Drugs and Crime, *The Global Campaign Against Corruption: UN Anti-corruption Toolkit*, 3rd Edition, September 2004. Available at http://www.unodc.org/unodc/corruption_toolkit.html

To date, only a few of the countries that have ratified the treaty have adopted comprehensive whistleblower laws and another dozen have adopted limited provisions.

UN Special Rapporteur on Freedom of Opinion and Expression

The UN Special Rapporteur has also recognized that whistleblowing is an important aspect of freedom of expression. In 2000, Abid Hussain criticized the use of state security and other laws against individuals disclosing information in the public interest.⁵⁰ In December 2004, UN Rapporteur Ambeyi Ligabo joined with the Special Representatives on freedom of expression and the media from the OAS and OSCE in a statement on free expression calling for national governments to adopt better protections

“Whistleblowers” releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in “good faith”.⁵¹

2. Council of Europe Conventions

The Council of Europe, a treaty-based body of 46 countries, has adopted two texts on corruption. The Civil Law Convention on Corruption was adopted in 1999 and went into force in 2003.⁵² Article 9 gives specific protections to employees who disclose corruption. It states:

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

The Convention has been signed by 42 countries and ratified by 33.⁵³ However, few of the countries have adopted laws on whistleblowing. The CoE Group of States Against Corruption (GRECO) committee as part of their Second Evaluation Round reviewed the situation on whistleblower protection laws in 44 of the member states and recommended that 25 of them adopt specific protections.⁵⁴

⁵⁰ United Nations Committee on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36 E/CN.4/2000/63. 18 January 2000.

⁵¹ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. December 2004.

<http://www.unhcr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>

⁵² Civil Law Convention on Corruption CETS No.: 174. 4.XI.1999.

<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>

⁵³ Civil Law Convention on Corruption

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=&DF=&CL=ENG> (last viewed 18 February 2008).

⁵⁴ See Speckbacher, Establishing whistleblower protection mechanisms – some findings from the work of the Group of States against Corruption (GRECO) of the Council of Europe. Presentation at the 13th International Anti-Corruption Conference, 31 October 2008.

The Criminal Law Convention on Corruption was also adopted in 1999 and went into effect in 2002. It includes provisions on protection of collaborators of justice and witnesses.⁵⁵ It has been signed by 49 countries including the non-COE members Mexico and the United States and ratified by 41 countries.⁵⁶

There is also growing recognition to protect whistleblowers under human rights law. In 2008, the European Court of Human Rights ruled in the *Guja v. Moldova* case that Article 10 of the ECHR protects government whistleblowers for a variety of disclosures.⁵⁷ In the case, it found a violation of Article 10 when a public employee who had released an unclassified document that revealed political manipulation of the justice system was dismissed. The Court noted that:

[T]he signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.

2. Inter-American Convention against Corruption

The Inter-American Convention against Corruption was the first major international agreement on corruption. Work began on the Convention in 1994 following a resolution by the General Assembly to create a Working Group on Probity and Public Ethics.⁵⁸ The Convention went into effect in 1997 and today has been agreed to by all OAS member states except Barbados.⁵⁹

Article III on “Preventative Measures” sets out requirements for the member states to adopt into national legislation:

For the purposes set forth in Article II of this Convention, the States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen:

...

8. Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.

Although it was quickly ratified and went into force, implementation of the Convention has been slow. This was due in part to the lack of a monitoring mechanism and limited resources to assist countries with model legislation and advice.

⁵⁵ Criminal Law Convention on Corruption, CETS No.: 173. 27.I.1999.

<http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>

⁵⁶ Criminal Law Convention on Corruption

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=&DF=&CL=ENG> (last viewed 7 March 2006).

⁵⁷ *Guja v Moldova*, Application No. 14277/04, 12 February 2008.

⁵⁸ Resolution 1294 (XXIV-0/94). For a brief history of the creation of the convention, see Edmundo Vargas Carreño, *The Inter-American Convention Against Corruption*. Presented at the Inter-American Development Bank Conference on Transparency and Development in Latin America, May 2000.

⁵⁹ OAS, General Information of the Treaty, B-58. <http://www.oas.org/juridico/english/Sigs/b-58.html> (Viewed 7 March 2006).

In 2001, the OAS agreed to create a monitoring mechanism to evaluate the implementation of the Convention. A Committee of Experts established to monitor implementation has issued questionnaires and solicited information from governments and civil society.

The Committee of Experts agreed in February 2006 to focus on Article III.8 and review the legal measures adopted and their effectiveness with a view to making recommendations to improve national legislation and practices on protection of those making disclosures.⁶⁰

3. The African Union Convention on Corruption

The African Union Convention on Preventing and Combating Corruption was adopted in June 2003. The treaty has been signed by 43 of the 53 members of the AU and ratified by 28. It went into effect in August 2006⁶¹

Article 5 on “Legislative and other Measures” includes provisions on whistleblowing, protection of witnesses and sanctions for false reporting. It states that “State Parties undertake to:

...

5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.
7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.”⁶²

5. The Southern African Development Community (SADC) Protocol

The African Union is not the only source of treaties in Africa. Another regional instrument on anti-corruption in Africa also provides some whistleblower protection. The Southern African Development Community is made up of 14 African nations.⁶³ In 2001, it issued the Protocol Against Corruption.⁶⁴

Article 4 on “Preventive measures” states:

⁶⁰ See Anti-Corruption: Follow-up Mechanism for the Implementation of the Inter-American Convention Against Corruption, Committee of Experts of MESICIC. February 24, 2006. http://www.oas.org/juridico/english/mesicic_com_experts.htm. Proposed Methodology for the Review of the Implementation of the Provisions of the Inter-American Convention Against Corruption Selected in the Second Round and for Follow-Up on the Recommendations Formulated in the First Round. SG/MESICIC/doc.171/06, 24 February 2006. http://www.oas.org/juridico/english/mesicic_method_Iround.pdf

⁶¹ List of Countries which have Signed, Ratified/Acceded to the African Union Convention on Preventing and Combating Corruption. <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf> (Last viewed 7 March 2006).

⁶² The African Union Convention on Preventing and Combating Corruption <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>

⁶³ See SADC, History, evolution and current status. <http://www.sadc.int/english/about/history/index.php>

⁶⁴ Protocol Against Corruption. http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/protcorrupt.pdf

For the purposes set forth in Article 2 of this Protocol, each State Party undertakes to adopt measures, which will create, maintain and strengthen [...] e) systems for protecting individuals who, in good faith, report acts of corruption;

The Protocol has been signed by all 14 member states and ratified by eight of the countries.⁶⁵ It has not yet gone into force as it requires one more ratification.

6. Anti-Corruption Initiative for Asia-Pacific

There are no regional treaties on anti-corruption in the Asia-Pacific region. The Asian Development Bank has been working with the Organisation for Economic Cooperation and Development (OECD) in promoting good standards for governance and anti-corruption in the region. The two organisations have adopted an Anti-Corruption Initiative for Asia-Pacific which has been agreed to by many of the countries in the region. The Initiative has adopted an ‘Action Plan for Asia Pacific’ which has been agreed to by 25 countries but is not binding.⁶⁶ Whistleblowing and protection of witnesses play a prominent role in all three pillars of the plan.

Pillar 1 - Developing effective and transparent systems for public service

...

Measures which ensure that officials report acts of corruption and which protect the safety and professional status of those who do.

Pillar 2 – Strengthening Anti-Bribery Actions and Promoting Integrity in Business Operations

...

Strengthening of investigative and prosecutorial capacities by fostering inter-agency cooperation, by ensuring that investigation and prosecution are free from improper influence and have effective means for gathering evidence, by protecting those persons helping the authorities in combating corruption, and by providing appropriate training and financial resources.

Pillar 3 – Supporting Active Public Involvement

...

Encourage public participation in anti-corruption activities, in particular through [...] Protection of whistleblowers;

7. The Organisation for Economic Cooperation and Development (OECD)

The OECD is a treaty-based organisation of 30 industrialised countries with a “commitment to democratic government and the market economy” based in Paris, France. It focuses on a number of areas such as trade, development and science and innovation including anti-

⁶⁵ SADC, Update on the Status of Member States Signatures and Ratifications of, and Accessions to the SADC Treaty, Protocols and other Legal Instruments. <http://www.sadc.int/english/documents/legal/protocols/status.php> (Viewed 7 March 2006)

⁶⁶ ‘Action Plan for Asia Pacific’ <http://www1.oecd.org/daf/asiacom/ActionPlan.htm#actionplan>

corruption and good governance. It authors a number of different types of instruments including conventions and guidelines. As noted above, it has worked with the Asian Development Bank in the Asia-Pacific Anti-Corruption Action Plan.

The OECD has made a number of recommendations in different instruments to encourage whistleblowing.

The 2003 OECD Guidelines for Managing Conflict of Interest in the Public Service recommend:

2.3.2.(b) Complaint-handling – Develop complaint mechanisms to deal with allegations of non-compliance, and devise effective measures to encourage their use. Provide clear rules and procedures for whistle blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused.⁶⁷

The OECD Guidelines for Multinational Enterprises state that MNEs should:

II (9). Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.⁶⁸

The OECD also is the initiator of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which has been signed by 36 countries.⁶⁹ The Convention does not include any provisions on whistleblowing in the text. However, the OECD Working Group on Bribery in International Business Transactions has included questions on whistleblowing as part of the process of monitoring implementation.⁷⁰ In its Phase II reports on implementation, the Working Group has recommended that many of countries adopt whistleblower protection laws.⁷¹

⁶⁷ OECD Guidelines for Managing Conflict of Interest in the Public Service C(2003)107, 28 May 2003.

<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/BF81CE725CF6D47FC125708800581411?OpenDocument>

⁶⁸ OECD, Commentary on the OECD Guidelines for Multinational Enterprises.

<http://www.oecd.org/dataoecd/56/36/1922428.pdf>

⁶⁹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/5ACAACB6EF995C5DC125708800580E5F?OpenDocument>

⁷⁰ See questions 2.4 and 2.5 of Procedure for Self- And Mutual Evaluation of Implementation of the Convention and the Revised Recommendation - Phase 2. Questionnaire. <http://www.oecd.org/dataoecd/9/35/2090000.pdf>

⁷¹ See OECD Country Reports on the Implementation of the OECD Anti-Bribery Convention and the 1997 Revised Recommendation.

http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1.00.html

VI. National Laws on Whistleblowing

I. Reasons for Whistleblowing Laws

There is a long history of some forms of whistleblowing. One of the earliest whistleblower laws – the US False Claims Act – was adopted in 1863, following discovery that companies were selling faulty supplies to the Army during the Civil War. The Act allowed for an action of “Qui Tam” in which a citizen could sue on behalf of the government in cases of fraud and receive an award for doing so. Qui Tam originated in Roman times as a mechanism for enforcement of the law and was widely used in England starting in the Middle Ages, sometimes controversially, as a means for enforcing national laws on often reluctant local officials up until recent times.⁷² A number of 18th and 19th century statutes in the US allowed for Qui Tam recoveries.

The modern development of whistleblowing was championed by US consumer activist Ralph Nader starting in the 1960s. In 1971, he convened a meeting in Washington, DC and called on professionals working in companies and government bodies to “blow the whistle” to check “runaway or unjust bureaucracies”.⁷³ At the meeting, he recommended the adoption of legal protections for both government and corporate employees and announced the creation of the Clearinghouse for Professional Responsibility to give help to whistleblowers.

Many whistleblowing laws were adopted in response to tragedies. In the United States, the aftermath of the Challenger disaster in 1986 led to the Whistleblower Protection Act. In the United Kingdom, accidents involving ferries, trains and oil rigs resulting in serious losses of life led to the adoption of the Public Interest Disclosure Act. In all of these cases, it was later revealed that insiders were aware of the potential hazards and either too afraid to speak up or attempted to and were ignored.

They also come out of scandal. The US False Claims Act was extended in 1986 following Congressional hearings which revealed that military contractors were charging \$400 for a hammer. More recently, the US Sarbanes-Oxley law was adopted following the scandals at Enron, Worldcom and other companies⁷⁴ and in Canada, the Public Servants Disclosure Protection Act was adopted following the fraud in an advertising scandal.

There is also strong international pressure to adopt laws. As noted in section IV, there is a strong international recognition in many international instruments that whistleblowing is essential in fighting corruption. The OECD Working Group on Bribery, the COE GRECO committee and the OAS MESIC Experts Group have all placed whistleblower protections at the centre of the anti-corruption fight. These organisations routinely recommend that countries improve their whistleblower protections.

These international instruments have been enhanced by developments in the US. Following the adoption of the Sarbanes-Oxley law, international corporations that are either owned in part by

⁷² For a critical but interesting review of the history of Qui Tam, see Beck, J Randy, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. (2000). Also see M. W. Beresford, *The Common Informer, the Penal Statutes and Economic Regulation*, *Economic History Review*, Vol. 10, No. 2 (1957), pp. 221-238.

⁷³ Phillip Boffey, *Nader and the Scientists: A Call for Responsibility*, *Science*, Vol 171. No 3971 (Feb. 12, 1971) pp. 549-551.

⁷⁴ See Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 *Admin. L. Rev.* 1 (2005).

US companies or traded on US stock exchanges are required to adopt whistleblowing procedures.⁷⁵ Most have done so or are in the process. The US General Accountability Office has also found that many private companies have adopted whistleblower procedures because they “believe these practices make pragmatic business sense”⁷⁶

There is also a strong civil society presence. International anti-corruption groups such as Transparency International and specialized whistleblower groups such as the Government Accountability Project (US), Public Concern at Work (UK) and the Open Democracy Advice Centre (SA) have all assisted and advised governments on adopting new laws. In South Africa, ODAC drafted the whistleblower law. TI was heavily involved in getting whistleblowing included in the UN Convention and has produced a series of integrity reports to bring pressure on national governments to adopt laws. GAP and PCAW have advised a number of governments and international organisations on adopting laws. PCAW and ODAC also run hotlines for providing advice to whistleblowers and GAP provides legal assistance in some whistleblower cases.

2. National Laws on Whistleblowing

Whistleblowing laws are becoming increasingly common. Approximately 50 countries around the world have adopted national laws on whistleblowing of in form or another (see Appendix B). Many others have adopted limited protections in other fields that also would apply to whistleblowers. In Australia, the United States and Canada, many states or provinces have also adopted laws. The types of laws can be roughly divided into two distinct groups - comprehensive and provisional.

a. Comprehensive Laws

To date, only a few countries have adopted comprehensive laws on whistleblowing. The UK, New Zealand, Ghana, and South Africa have the most developed laws that can truly be called comprehensive and apply to the public and private sector. The US, Canada, and Romania have laws that cover the public sector broadly and Japan adopted a law covering the private sector. There are also a number of small jurisdictions such as some of the Australian states which have also adopted comprehensive laws.

A comprehensive law has a number of elements. These elements will be further defined later but the following is a summary of the important provisions.

Elements in a comprehensive whistleblower law:

- *Enacted as a free-standing law.* Most comprehensive laws are free-standing. They were adopted on their own, rather than as a section of another law. This has the advantage of giving them additional visibility and makes it easier to notice and promote. Most still amend existing employment protections.

⁷⁵ See e.g. Dichter et al, The Sarbanes-Oxley Act: New Whistleblower Protections for Employees, Morgan Lewis & Bockius, October 17, 2002; Jarmo Kääriäinen, Metso Corporation (Finland), Establishing a Whistleblower program, 2005. <http://www.aiiaweb.it/area/allegati/KAARIAINEN.pdf>; Code of Ethics for Telekom Austria Aktiengesellschaft and its Subsidiaries, November, 2003 http://www.telekom.at/Content.Node/ir/governance/code_of_ethics_en.pdf

⁷⁶ US General Accountability Office, Sarbanes-Oxley Act Consideration of Key Principles Needed in Addressing Implementation for Smaller Public Companies GAO-06-361, April 2006.

- *Coverage.* Ideally, a comprehensive law should apply to both the public and private sector. Wrongdoing is not just done by one or the other. Only the UK, New Zealand, Ghana, and South Africa have adopted laws that cover both the public and private sector. The US Whistleblower Protection Act and the Canadian Public Servants Disclosure Protection Act only apply to public employees. The Japanese Whistleblower Protection Act only applies to private sector employees.
- *Definitions.* Most create comprehensive definitions of what is wrongdoing which is not just limited to one area such as anti-corruption but apply to a wide variety of issues including violations of laws, good practices, and ethics.
- *Procedures.* Another important element is the creation of procedures that promote internal disclosure. Comprehensive laws are generally based on an assumption that changing internal culture to enhance internal communications to prevent problems is a key means of resolving problems.
- *Protections against retribution.* All comprehensive laws create broad definitions against retaliations and provide for remedies.
- *Appeals.* The laws set up procedures for review of retribution by external bodies. These after often tribunals or courts.
- *Oversight.* Most comprehensive laws have appointed a public body with some oversight role in assisting whistleblowers with advice and receiving complaints of wrongdoing. The US and Canada created new independent bodies. Most of the rest are using existing bodies such as an Ombudsman.

b. Sectoral Laws

Many countries have adopted whistleblower protections in a piecemeal fashion. These are often found in a number of different statutes and typically only cover certain types of persons or only certain types of information. In some countries, there are both comprehensive and sectoral laws for those areas such as corporate governance.

- *Anti-corruption laws.* Many anti-corruption laws have limited provisions on receiving information and protection of people who disclose information on corrupt practices. The disclosure is typically handled by the anti-corruption commissions. Protections can cover both government employees and the public but are often limited to promises of maintaining confidentiality of the whistleblower/informer. In some cases, the commission can investigate retaliations or threats. In France, the 2007 Anti-corruption Act broadly protects public servants and private employees from a wide variety of sanctions.⁷⁷
- *Public servants laws.* Increasingly, laws that regulate public employees include provisions that protect the public servant from retribution for disclosing wrongdoing. The

⁷⁷ Loi n°2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption, Art. 9, JORF 14 novembre 2007.

Netherlands Public Servants Act requires that procedures for reporting wrongdoing be created and protects those who follow those procedures from retribution.⁷⁸

- *Labour laws.* Whistleblower protections are also being included in general labour laws. The Norwegian Working Environment Act was amended in 2005 to give employees the right to inform public authorities of “censurable conditions” and to prohibit retaliation.⁷⁹ Other countries’ general provisions on requiring justifiable reasons for employment termination are generally considered to protect whistleblowing.⁸⁰
- *Criminal Codes.* A few countries have made it a criminal offence to retaliate against a whistleblower. (See below for more detail)
- *Freedom of Information Acts.* In Sweden, the Freedom of the Press Act gives civil servants a fundamental right to anonymously criticise the actions of government bodies. A number of countries, such as Moldova in 2002, Antigua and Barbuda in 2004, Uganda in 2005 and Macedonia and Montenegro in 2006, have included provisions on whistleblowing regarding public bodies. The protection in these laws is limited to only public servants and mostly has to do with the unauthorized release of personal information. The Antigua law appoints the Information Commissioner as a body to receive reports of wrongdoing.
- *Other laws.* Other statutes such as some environmental laws have protections relating to environmental hazards. Accounting and bank secrecy laws require disclosures of corporate wrongdoing. These often impose a duty on professionals to disclose wrongdoing but protect them from retribution.

There are many disadvantages with the approach of sectoral laws. Of primary concern is that they are fragmented and do not cover many types of wrongdoing. They are also generally not well known outside their own sectors by either the employees or officials so enforcement may be limited. They also only tend to focus on the disclosure and retribution facets and not on improving internal management. Almost none of these laws set up procedures for internal disclosures or standards.

Distinctions between laws in civil law and common law countries

Most whistleblowing laws (with the notable exception of Sweden) originally developed in countries with common law traditions. The differences in the two systems has been severely eroded in recent years by the development of EU law and the role of the European Court of Human Rights. In the field of whistleblowing, the distinction is considerably more blurred with many of the countries listed in Appendix A having a civil law background and the laws being broadly similar regardless of the underlying system of law. Most of the countries that have comprehensive laws come from a common law tradition but the existence of the comprehensive law is more likely due to the longer experience that the countries have had with whistleblowing. Many had sectoral laws before their more current legislation.

⁷⁸ Public Servants Act (Ambtenarenwet) §125.

⁷⁹ Act of 17 June 2005 No. 62 relating to working environment, working hours and employment protection, etc. (Working Environment Act) as subsequently amended, last by Act of 21 December No. 121 §2-4.

⁸⁰ See e.g. OECD, France: Phase 2 Follow-Up Report on The Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, March 2006.

One good practice that previously would have been true for civil law countries in particular but could now generally be applied to both in practice is the need for clear detailed rules to be set out in any legislation. That said, the role of the courts in interpreting these rights is still likely to be important.

3. Defining Wrongdoing

The essential point of whistleblowing laws is designed to promote the disclosure of illegal, unethical or dangerous activities in a manner that makes it possible to remedy these problems and prevent future problems. The comprehensive whistleblowing laws generally have broad definitions of wrongdoing that apply to the revealing of information relating to criminal acts, dangers to health or safety, and abuses of power.

The Romanian whistleblowing act law applies to fifteen different crimes including corruption, abuse of human resources, using powers for partisan political reasons, non-objective staff evaluations, violations of administrative and internal procedures, faulty or fraudulent administration of public and private assets, and the violation of other laws.⁸¹

Curiously, the Antigua and Barbuda Freedom of Information Act has one of the most comprehensive lists of categories, perhaps due to its more recent enactment. It applies to:

- (a) a serious threat to the health or safety of an individual or a serious threat to the public or the environment;
- (b) the commission of a criminal offence;
- (c) failure to comply with a legal obligation;
- (d) a miscarriage of justice;
- (e) corruption, dishonesty or serious maladministration,
- (f) abuse of authority or neglect in the performance of official duty;
- (g) injustice to an individual;
- (h) unauthorised use of public funds⁸²

Many national laws have specific provisions which relate to national scandals or conditions that led to the adoption of the law. The South African PDA includes unfair discrimination.⁸³ The Japanese Whistleblower Protection Act specifically names food and health laws, clean air and waste disposal, and personal information laws.⁸⁴

Maladministration is often included in jurisdictions that have serious concerns about the ability of the civil service to work effectively. The draft Indian bill has one of the most comprehensive definitions of maladministration:

- (i) such action is unreasonable, unjust, oppressive or discriminatory;
- (ii) where there has been negligence or undue delay in taking such action;
- (iii) where there has been reckless, excessive or unauthorized use of power in taking such action;
- (iv) where such action amounts to breach of trust;

⁸¹ Law no. 571/2004 for the protection of staff of public authorities, public institutions and other units that signals the violations of the law §6

⁸² Freedom of Information Act, § 47.

⁸³ PDA § 1(i)(g).

⁸⁴ WPA § 2.

(v) where such action involves the conduct of a public servant which would result in wastage of public funds or causes loss or prejudice to the State or is prejudicial to public interest in any manner.⁸⁵

In the sectoral laws, not surprisingly, the subjects of coverage typically are limited by the scope of the law. For example, many anti-corruption laws tend to only focus on corruption crimes.⁸⁶

Most countries also set standards on the level of importance of the wrongdoing before the protections apply. They typically require that the action is important, not trivial in nature and not previously disclosed or dealt with.

4. Procedures for Disclosures

A fundamental question in promoting whistleblowing is what types of procedures there should be on the release of information and who should be authorized recipients. An overly prescriptive law which makes it difficult to disclose threatens to undermine the basic philosophy of promoting the disclosure of wrongdoing and encourages informal or anonymous releases. However, at the same time, a law that allows for unlimited disclosures will not encourage internal resolution and promote the development of a better internal culture of openness.

Most sectoral whistleblower laws only authorize disclosures to a limited number of external bodies, such as the national anti-corruption commission. The more comprehensive whistleblowing laws set out detailed internal procedures that must be followed with standards before information can be released in particular circumstances.

a. Good Faith

An initial requirement in most whistleblower laws is that reporting be made in “good faith”. This is also recognized in most of the international treaties that promote whistleblowing. This is designed to prevent the airing of vexatious or harassing disclosures.

However, good faith can also pose a barrier to whistleblowing by focusing on the motives of the reporter rather than the information. Many whistleblowers are likely to have “mixed motives” which may include some unhappiness on how they have been treated along with an interest in revealing wrongdoing. The Canadian Public Sector Integrity Officer notes that “it is a difficult test because it is usually impossible to assess and know for certain.”⁸⁷ The focus should be on the veracity of the information, rather than the messenger. The New Zealand review found no cases of bad faith disclosures in the first three years of the Act.⁸⁸

The Shipman Inquiry into a UK doctor who was convicted of murdering fifteen of his patients found that “good faith” as defined in the UK law was an unnecessary deterrent to reporting and recommended that it be removed from the Public Interest Disclosure Act.⁸⁹ The US Courts have

⁸⁵ The Public Interest Disclosure (Protection of Informers) Bill 2002 §2(e).

⁸⁶ See e.g. Namibian Anti-corruption Act, 2003. s 52(4); Nepal, The Prevention of Corruption Act, 2059 (2002 A.D), §56, Kenya Anti-Corruption and Economic Crimes Act, 2003, §65.

⁸⁷ Canadian Public Sector Integrity Officer, Annual Report 2004-2005 at 22.

⁸⁸ NZ Review at 3.14.

⁸⁹ The Shipman Inquiry at 11.108.

also severely limited the ability of whistleblowers to challenge dismissals under the Whistleblower Protection Act by focusing on the motives of the whistleblowers.⁹⁰

More severely, in some anti-corruption laws, the filing of a false claim can result in a criminal penalty.⁹¹ However, none of the major national whistleblowing laws authorize this action. The South African review noted that none of the comprehensive national laws had adopted criminal sanctions and expressly recommended against it stating that it would have a “chilling and discouraging” effect.⁹² It also noted that those who deliberately or recklessly disclose false information are not protected under the Act from retaliation and could also face sanctions for libel.

b. Internal Disclosures

The primary and most appropriate disclosure route in most cases of whistleblowing is the organisation itself. This is based on the recognition that a well-run organisation wants to know about wrongdoing so that it can take steps to correct it. The UK group Public Concern at Work describes internal disclosure as “‘absolutely at the heart’ of the [PIDA...] as it emphasises the vital role of those who are in law accountable for the conduct or practice in question. It does this by helping that they are made aware of the concern, so they can investigate it.”⁹³

Many of the newer laws such as those in the UK, South Africa, New Zealand and Canada encourage or require that organisations adopt procedures for an initial handling of disclosures as an administrative measure. The procedures are designed to encourage employees who notice problems to be able to disclose them and for the bodies to resolve them before they grow into larger problems. Employees in most cases must follow these procedures before going to an outside body if they wish to remain protected by the law.

There are a number of different possible internal recipients. These could include supervisors, higher level superiors including heads of organisations or their boards, directors, legal counsel and agency Inspector Generals. The Canadian Public Servants Disclosure Protection Act requires that the Chief Executive of every government body appoint a senior officer to receive and handle these disclosures. The US Sarbanes-Oxley law requires that public companies must establish audit committees. The audit committee is required to receive “confidential, anonymous submissions by employees of the issuer of concerns regarding questionable accounting or auditing matters.”

Public Concern at Work and the British Standards Association have issued a detailed code of practice that could be of great use to organisations that wish to set up internal procedures for whistleblowing.⁹⁴ The International Chamber of Commerce has also issued guidelines for companies to follow.⁹⁵

⁹⁰ See POGO Report

⁹¹ See e.g. Malaysia, Anti-corruption Act, 1997 § 54; Sierra Leone Anti-Corruption Act 2000 § 6.

⁹² SA Review at 4.94.

⁹³ Public Concern at Work (UK), Public Interest Disclosure Act 1998 Annotated Guide, February 2003.

⁹⁴ British Standards Institute, Whistleblowing arrangements Code of practice, PAS 1998:2008, July 2008.

Available at: <http://www.pcaw.co.uk/bsi/index.php>

⁹⁵ International Chamber of Commerce, ICC Guidelines on Whistleblowing, April 2008.

[http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20%20as%20adopted%204_08\(2\).pdf](http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20%20as%20adopted%204_08(2).pdf)

Hotlines

Another mechanism is the use of telephone hotlines. These can be run internally, by special units of bodies or externally by anti-corruption agencies.⁹⁶ They can also be operated by independent groups. Many Transparency International chapters run Advocacy and Legal Advice Centres (ALACs) to accept reports of corruption.

In response to Sarbanes-Oxley, many companies have also arranged for the creation of hotlines to receive information. These are often run by outside organisations such as consulting companies. In a number of countries, Tip-offs Anonymous, run by Deloitte, sets up phone lines, web sites, and email accounts for organizations which receive complaints, and sends reports to company officials.⁹⁷ The company claims that it receives 12,000-15,000 contacts per month in its South African operation.⁹⁸

Issues to Consider for Hotlines

- Does it have a dedicated hotline number, fax number, web site, e-mail address, and regular mail or post office box address to expedite reports of suspected incidents of misconduct?
- Does the hotline demonstrate confidentiality?
- Does the hotline utilize trained interviewers to handle calls to the hotline rather than a voice mail system?
- Does the hotline availability 24 hours a day, 365 days a year?
- Does the hotline have multi-lingual capability to support hotline callers with different ethnic backgrounds or that are calling from different countries?
- Are callers provided with a unique identification number to enable them to call back later anonymously to receive feedback or follow-up questions from investigators?
- Does the entity have a case management system to log all calls and their follow-up, to facilitate management of the resolution process, testing by internal auditors and oversight by the audit committee?
- Does the entity effectively distribute comprehensive educational materials and training programs to raise awareness of the hotline among potential users?
- Does the entity support outreach to potential stakeholders other than employees?
- Do the entity's internal auditors periodically evaluate the design and operating effectiveness of the hotline?

Source: American Institute of Certified Public Accountants⁹⁹

The hotlines run by outside organisations have the benefit of being less expensive to operate in many cases than setting up an internal operation. They can run 24/7 and in many languages.

⁹⁶ See e.g. Information Portal on Corruption, African Anti-Corruption Hotlines, <http://www.ipocafrika.org/content/view/45/86/>

⁹⁷ See <https://www.tip-offs.com/>.

⁹⁸ Whistle-blowers get tech, ITWeb, 26 May 2008.

⁹⁹ AICPA, Anonymous Submission of Suspected Wrongdoing (Whistleblowers) – Issues for Audit Committees to Consider, 2005. http://www.aicpa.org/audcommctr/spotlight/jan_05_whistleblower.htm

Employees may also feel more comfortable in disclosing information to an outside source where it is not traced back to them.

Some whistleblowing experts believe they are counterproductive. Richard Calland, one of the authors of the South African PDA, is critical of these hotlines:

[A] Hotline is a false economy. The company may feel it is doing something, but, I would argue, what is really doing is abrogating its responsibility to change culture inside the organisation. In fact, if anything it is worse than that: what it is really saying is that we can neither be bothered nor can we be trusted to do the “hard yards” necessary to put in place the conditions for an internal disclosure system or strategy.

Second, Hotlines are counter-productive. They tend to provide an ideal cloak to the malevolent [...They] tend to encourage people to lie and to use the opportunity provided by the hotline to settle scores with colleagues.

Thirdly and finally, hotlines raise expectations that often cannot be met. When a genuine whistleblower takes the significant step of raising his or her concern, even through an anonymous hotline, it is a big deal for that person. They think, and they are right to think, that something will happen – that there will, at the very least, be a proper investigation of what it is they have disclosed. That task is made much harder by virtue of the fact that the employer does not know, and does not have the advantage of face-to-face contact with the whistleblower.¹⁰⁰

In the US, the National Business Ethics Survey 2007 found that employees only used hotlines 3 percent of the time, while speaking to a supervisor or higher management nearly 80 percent of the time.¹⁰¹ It found that:

even in companies with an anonymous reporting mechanism, use of hotlines generally lags significantly behind talking with a person, especially someone with whom an employee already has a relationship. The data does suggest that reporting via hotlines is higher when employees observe bribes and misuse of competitors' inside information, but the numbers reporting these two kinds of misconduct are very small, so the trend cannot be projected more broadly.

C. External Disclosures

Most whistleblowing laws also provide for an alternative to internal disclosures to an external body still within the government. Typically there is a higher threshold required. For instance, it is often required that the individual have both a good faith belief that a serious problem exists and also that they attempted to disclose internally or reasonably believed that if they had made an internal disclosure that it would have resulted in retribution or the destruction of evidence.

External Bodies

Many of the comprehensive laws and some of the sectoral laws provide for specific external bodies. The South African PDA allows disclosures to the Public Protector and the Auditor

¹⁰⁰ Richard Calland. Whistleblowing Around the World and in South Africa: Some Critical Observations, Paper Delivered at Institute for Directors Breakfast, 6 October 2004.

¹⁰¹ National Business Ethics Survey 2007

General.¹⁰² In New Zealand, the Ombudsman can receive some complaints. In Antigua, whistleblowers can disclose to the Information Commissioner.¹⁰³ In Canada, the Public Sector Integrity Commissioner can receive reports from both public servants and members of the public.¹⁰⁴ In sectoral laws on anti-corruption, the anti-corruption commission is the standard recipient.

Some countries, such as the UK and South Africa, also allow disclosures to outside legal advisors or union representatives to get advice on rights. However, the outside advisors are not allowed to further disclose. Public Concern at Work in the UK runs a helpline that gives advice to workers on whether to blow the whistle on a variety of issues.¹⁰⁵ The Canadian Public Sector Integrity Commissioner can also give legal advice.

Releases and the Media

The final (and most visible) venue for whistleblowers is the media. The media can be a crucial outlet, especially where the leadership of an organisation is involved in the behaviour. A review of over 200 fraud cases in the US between 1996 and 2004 found that the media was responsible for revealing the fraud 13 percent of the cases, while the employees (presumably some by public statements) were responsible for another 17 percent of cases.¹⁰⁶ Another study found 30 percent of the cases of fraud in small companies were first revealed in the media.¹⁰⁷

Many of the laws recognize the importance of disclosure to the public including the media as a last worst case scenario. The South African Labour Court has ruled that:

The media is one of the pillars that promote and uphold democracy. Corruption undermines democracy. The media's exposition of corruption is good for democracy. Whistle-blowers depend on the media and other organs of civil society to help level the playing fields as they are often lonely voices against powerful interests. As an employee the isolation and vulnerability are even more acute. So symbiotic is the relationship between whistle-blowers and the media that Brewster's Dictionary defines whistle-blowing to mean "exposing to the press a wrongdoing or a cover-up in a business or government office."¹⁰⁸

In Canada, the UK and South Africa, the laws allow for disclosures to the media as a last resort if a procedure or series of conditions have been satisfied. This higher threshold is intended to make it more difficult for whistleblowers to obtain protection to discourage public disclosures and encourage internal disclosures. In Canada, disclosures can be made to the public if disclosure is not prohibited under other acts and:

¹⁰² PDA § 8(1).

¹⁰³ Freedom of Information Act, 2004, §47.

¹⁰⁴ See <http://www.psic-ispcc.gc.ca>

¹⁰⁵ See <http://www.pcaaw.co.uk/individuals/helpline.htm>

¹⁰⁶ Dyck, I. J. Alexander, Morse, Adair and Zingales, Luigi, 'Who Blows the Whistle on Corporate Fraud?' (October 1, 2008). Available at SSRN: <http://ssrn.com/abstract=891482>

¹⁰⁷ Miller, 'The Press as a Watchdog for Accounting Fraud.' *Journal of Accounting Research* 44, no. 5 (2006): 1001-1033. Cited *Id.*

¹⁰⁸ *Tshishonga v Minister of Justice and Constitutional Development and Another* (JS898/04) [2006] ZALC 104 (26 December 2006).

[...] there is not sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that

- (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
- (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.¹⁰⁹

The media's role in whistleblowing is also recognized by the generally accepted legal principle that they should have a special privilege to protect their sources from disclosure.¹¹⁰ Over 100 countries have laws, constitutional protections or court judgements that specifically provide that journalist are not required to disclose the sources of information except in limited circumstances.

Among public officials, there is often a resistance to releases to the media. The NZ review of the legislation cautioned against allowing for media releases to be protected:

The media cannot effectively investigate a matter itself. It relies on publicity and public pressure to ensure the appropriate authorities adequately investigate matters. [...] Serious wrongdoing could be alleged without foundation and without consequences for the discloser. In this situation, there is a risk of misreporting, sensationalism and public disclosure of commercially sensitive matters and damage to the reputations of innocent persons. It could undermine the integrity and morale of the public sector by subjecting organisations to repeated and unwarranted demands to defend themselves in the media. It may put at risk the justifiable confidentiality that attaches to many political, social or commercial aspects of their work. It would bring an unwarranted risk into the private business of private organisations if its employees could disclose, for example, commercially confidential matters to the media without risk of reprisal in circumstances where the concerns may be quite misplaced.¹¹¹

The media is also often sceptical of the procedures required, seeing them as means to “muzzle” free speech.¹¹²

Recently, there has been an increase in the use of 3rd party Internet sites to facilitate disclosures. The most well known is Wikileaks, which describes its mission as “developing an uncensorable Wikipedia for untraceable mass document leaking and analysis. Our primary interest is in exposing oppressive regimes in Asia, the former Soviet bloc, Sub-Saharan Africa and the Middle East, but we are of assistance to people of nations who wish to reveal unethical behavior in their governments and corporations.”¹¹³ It has released numerous corruption related documents including a suppressed report on massive corruption by the Kenyan government.¹¹⁴

¹⁰⁹ Public Servants Disclosure Protection Act 2005, c. 46, §16.

¹¹⁰ See e.g. Privacy International, Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources, November 2007. <http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-558384>; Council of Europe, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information; Chapultepec Declaration; OAS Declaration of Principles on Free Expression; African Union, Declaration on Principles of Free Expression.

¹¹¹ NZ Review at 7.20.

¹¹² *Id* at 3.81.

¹¹³ See <http://wikileaks.org>

¹¹⁴ See Kroll Associates, Project KTM: Consolidated Report, 27 April 2004. http://wikileaks.org/wiki/KTM_report

5. Protections

This section reviews the major provisions found in whistleblowing laws that protect the whistleblower and encourage disclosures.

a. Confidentiality/Protection of Identity

Most whistleblower laws provide for the protection of the identity of the whistleblower. This is important in cases where the employee feels that there will be retaliation if they disclose information.

The New Zealand review described confidentiality as “perhaps the most significant protection”. The Public Disclosures Act requires that those who receive protected disclosures “use his or her best endeavours not to disclose”¹¹⁵ identifying information unless it is “essential to the effective investigation, essential to prevent risk to public health or public safety, or it is essential having regard to the principles of national justice.”¹¹⁶ The South African review of the PDA states that “if identities were not protected, people would tend to blow the whistle anonymously.”¹¹⁷

In the US, the Whistleblower Protection Act prohibits the Office of Special Counsel from disclosing the identity of an individual without consent unless the OSC “determines that the disclosure of the individual’s identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.”¹¹⁸

The South African PDA does not include a provision for confidentiality. The Law Reform Commission has recommended that it be amended to include one, stating that “a provision expressly creating a duty to protect the identity of a whistleblower would constitute a positive incentive to whistleblowers”.¹¹⁹ However, it has said that the confidentiality should not be a blanket prohibition because of competing interests and recommended the development of guidelines on the issue.¹²⁰

However, confidentiality may provide a false sense of security. There is typically only a small number of people in an organisation who would be aware of the disclosed wrongdoings so it would not be difficult to identify them. In many cases, the employee has raised concerns about it already. The NZ review found that the protection was not very effective due to misunderstandings over the issue of “natural justice.”¹²¹ The Council of Europe GRECO Committee has recommended that countries provide more protection, noting:

GRECO considers that the protection of the identity of whistleblowers and/or the possibility for making anonymous reports can be important elements of a whistleblower

¹¹⁵ *Id* at 4.22.

¹¹⁶ PDA § 19.

¹¹⁷ South African Law Reform Commission, Protected Disclosures. Discussion Paper 107. June 2004. at 4.51.

¹¹⁸ 5 U.S.C. § 1213(h).

¹¹⁹ SALRC Discussion Paper at 4.52.

¹²⁰ South African Law Reform Commission, Protected Disclosures, Report, August 2008.

¹²¹ NZ Review at 4.25.

regime. Nevertheless, these measures are not sufficient to fully protect whistleblowers from retaliatory acts.¹²²

Whistleblower groups such as UK's Public Concern at Work recommend that most people should make their concern publicly as a means of improving internal work culture.¹²³

Difference between confidentiality and anonymity

Confidentiality should be distinguished from anonymity, in which disclosures are made without the recipient knowing who the sender is. Generally, the legal protection in comprehensive whistleblowing laws only applies to individuals who identify themselves as part of their disclosure. Some whistleblower laws allow the body that receives anonymous disclosures to ignore them while others either recommend against or outright prohibit their use.

The US Sarbanes-Oxley law requires that companies set up "anonymous, confidential" hotlines. The New Zealand review recommended that the act should be extended to cover anonymous disclosures, perhaps by doing so via a third party.¹²⁴ Some jurisdictions also recognize a constitutional right of anonymity as a part of free speech rights. In Sweden, public employees have a constitutional right of anonymity to speak.¹²⁵ In Norway, the Governmental Commission on Free Expression specifically suggested that the constitution be amended to include protections for anonymous speech.¹²⁶

Anonymity may be also useful (not to say essential) in some cases, such as in jurisdictions where the legal system is not so strong or there are concerns about physical harm or social ostracization. In Sierra Leone, the Anti-corruption Commission runs a web site for anonymous disclosures.¹²⁷ The Mauritius Prevention of Corruption Act specifically allows for anonymous reports.¹²⁸

The reluctance to accept anonymous disclosures probably comes in part from concern over distinguishing whistleblowing from previous discredited techniques such as secret informants that are frequently used in totalitarian regimes.

It is also part of the effort to make whistleblowing more socially acceptable and part of a normal work environment. Whistleblowing experts Dehn and Calland strongly oppose anonymous disclosures, stating that "anonymity fuels mistrust and makes the powerful unaccountable".¹²⁹

The EU Article 29 Working Group on Data Protection lists a number of mostly practical problems for both individuals and organisations with anonymous disclosures:

- being anonymous does not stop others from successfully guessing who raised the concern;
- it is harder to investigate the concern if people cannot ask follow-up questions;

¹²² CoE GRECO, Second Evaluation Round: Compliance Report on Estonia, Greco RC-II (2006) 3E, 13 October 2006.

¹²³ See Calland and Dehn, Chapter 1.

¹²⁴ NZ Review at 80.

¹²⁵ Freedom of the Press Act, Chapter 3

¹²⁶ See NOU 1999: 27. <http://odin.dep.no/jd/norsk/publ/utredninger/NOU/012005-020029/index-hov012-b-n-a.html>

¹²⁷ See <http://www.anticorruption.sl/anonymous.html>

¹²⁸ Prevention of Corruption Act, 2002 § 43.

¹²⁹ Calland and Dehn at 8-9.

- it is easier to organise the protection of the whistleblower against retaliation, especially if such protection is granted by law, if the concerns are raised openly;
- anonymous reports can lead people to focus on the whistleblower, maybe suspecting that he or she is raising the concern maliciously;
- an organisation runs the risk of developing a culture of receiving anonymous malevolent reports;
- the social climate within the organisation could deteriorate if employees are aware that anonymous reports concerning them may be filed through the scheme at any time.¹³⁰

b. Protection of Employment Status

The most important protections that whistleblower laws can provide is prohibit discrimination and ensure that any harms to the employment status of the person are remedied immediately. The definitions should be broad enough to catch any possible retaliation. The South African Protected Disclosures Act sets out an extensive list of harms that are prohibited:

- being subjected to any disciplinary action;
- being dismissed, suspended, demoted, harassed or intimidated;
- being transferred against his or her will;
- being refused transfer or promotion;
- being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- being refused a reference or being provided with an adverse reference, from his or her employer;
- being denied appointment to any employment, profession or office;
- being threatened with any of the actions referred to paragraphs (a) to (g) above; or
- being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;¹³¹

Under the 2007 French Law on the Fight Against Corruption, there are also broad employment protections:

No person shall be excluded from recruitment or access to an internship or a period training, no employee may be disciplined, dismissed or be the subject of a discrimination, direct or indirect, particularly in terms of remuneration, training, reclassification, assignment, qualification, classification, promotion professional, transfer or contract renewal reported to have testified or, in good faith, or his employer, either judicial or administrative of corruption which he has acquired in the exercise of its functions.¹³²

An important issue is the burden of proof. The question is whether the employee is required to make the often very difficult showing (with little chance of getting evidence) that the dismissal was a result of making the disclosure, or placing the burden on the organisation to show that the decision is legally justified and not based on their whistleblowing. In South Africa, a dismissal

¹³⁰ Article 29 Data Protection Working Party, Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime, 00195/06/EN, WP 117. 1 February 2006.

¹³¹ PDA §1(VI).

¹³² Loi n°2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption, Art. 9, JORF 14 novembre 2007. (unofficial translation)

following a disclosure is deemed to be an "automatically unfair dismissal". In the US, the agency has the burden to show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure".¹³³ In the UK the burden of proof depends on the length of employment of the employee. If they have been an employee for more than one year, then the employer must prove the dismissal had nothing to do with the disclosure; if they have been employed less than one year, the employee must prove that it did.

The remedies vary depending on the detriment. Most laws specially allow for a return to employment if the person has been terminated. In the United Kingdom, a whistleblower can obtain an injunction to return to their job if they complain within a week.

In the US, South Korea, and South Africa, whistleblowers can get transfers to other comparable jobs if it can be shown that problems such as further harassment would arise if the person stayed at their current position. However, in smaller jurisdictions or companies, this may not be possible.

In the UK, the Employment Appeals Tribunal has ruled that detriment only applies in cases of employment and where the employer continued to act in a way that caused harm to the person several years after the employment had ended, no compensation could be given.¹³⁴

c. Compensation

Most whistleblowing laws provide for compensation to the whistleblower in cases where they have suffered harms that cannot be remedied by injunction. This includes lost salary but can also include money for suffering. Often, the laws use discrimination statutes to determine harm from harassment.

The compensation should not be limited. Some workers may have a difficult time finding a new job following their disclosure. In the UK, an award of £278,000 was given to a 56-year-old man who successfully argued that he would not be able to find another job. In South Africa, compensation for lost employment is capped at two years but the Law Reform Commission has recommended eliminating the cap.

The UK PIDA also allows for additional compensation for suffering. The courts have ruled that compensation can be allowed based on a three-tiered system developed in discrimination law. The top tier in cases of serious continuous and prolonged harassment, the maximum compensation can be £25,000 (~US \$40,000).¹³⁵

Some jurisdictions also allow for punitive damages to punish the employer. This may not be possible in all jurisdictions. The SA Law Reform Commission recommended against including them, noting that there was no history of such an action in SA law.

d. Criminal Sanctions

A few jurisdictions impose criminal sanctions against those who take retaliatory actions against whistleblowers. In Hungary, Article 257 of the Criminal Code on "Persecution of a Conveyer of an Announcement of Public Concern" states:

¹³³ 5 U.S.C. § 1214(b)(4)(B)(ii).

¹³⁴ Focus on Whistleblowing: Whistleblowing Update, Employment Law Brief 794, December 2005. p16 citing cases of *Woodward v. Abbey National* EAT 0240/05.

¹³⁵ Focus on Whistleblowing, *Id.*

The person who takes a disadvantageous measure against the announcer because of an announcement of public concern, commits a misdemeanour, and shall be punishable with imprisonment of up to one year, labour in the public interest, or fine.

In Canada, the Criminal Code broadly prohibits retaliation against those who provide information about a crime:

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

In the US, the Sarbanes-Oxley law amended the Federal Criminal Code to impose a criminal penalty for those who retaliate against a whistleblower who reveals a violation of any criminal act to a law enforcement official.¹³⁶

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

A criminal penalty sets out a strong message that an activity is not to be tolerated. However, it also sets a very high threshold that is not likely to be used in many cases. Few government bodies are going to prosecute their own officials for preventing leaks that embarrass the government. In Australia, where comprehensive state laws have been in force for the longest period, there have been no reported cases of criminal sanctions being used to punish people who retaliated against whistleblowers.¹³⁷ The South African Law Reform Commission recommended against creating new offences, stating that it would “be likely to add to unnecessary tension to employment relationships and jeopardise good labour relations.”¹³⁸ It recommended that a better approach would be to improve remedies, give whistleblowers immunity, and create a duty of confidentiality.

¹³⁶ 18 U.S.C. §1513(e).

¹³⁷ Trott, *The Australasian Perspective*, in Calland and Dehn at 139.

¹³⁸ SALRC at 4.95.

6. Oversight and Enforcement

An essential requirement for whistleblowing, indeed for many kinds of laws, is adequate oversight. Many countries with whistleblowing laws or provisions have some form of oversight body but they vary in function and utility. Most are limited to a single sector such as anti-corruption.

a. Independent Bodies

One model is to create a single independent body that can both take disclosures and examine cases of retribution. Thus far, only Canada and the US have attempted this.

The most comprehensive system can be found in Canada. The 2005 Public Servants Disclosure Protection Act set up a new Public Sector Integrity Commissioner who reports directly to the Parliament.¹³⁹ The Commissioner can receive complaints of wrongdoings, investigate wrongdoings and reports of reprisals from whistleblowers and issue recommendations to heads of public authorities. The Commissioner is also required to report annually to Parliament. It replaced the Public Sector Integrity Officer who was not considered effective because of a lack of independence and resources. When violations of whistleblowers' rights are found, the Public Servants Disclosure Protection Tribunal can make remedies and sanctions.¹⁴⁰

In the US, the Whistleblower Protection Act of 1989 set up the Office of Special Counsel as an independent investigative body. The OSC can investigate "prohibited personnel practices" including taking or failing to take action because of a whistleblowing. It can recommend corrective or disciplinary action with the public body involved and bring cases before the Merit Systems Protection Board. The OSC can also receive reports from whistleblowers for violations of law, rules and regulations, waste of public funds, mismanagement, abuse of authority and dangers to public safety or health and forward them to the agency or to the Attorney General within 15 days if it is meritorious. It also reports to Congress and the President.

The OSC does not appear to have been particularly successful in providing assistance. Over a period of seven years, 96 percent of the whistleblower cases were backlogged. Many cases were dismissed for lack of information without asking the whistleblowers for more information. In that time, it only found for the whistleblower in four percent of the cases. Congressional committees and the General Accounting Office conducted a number of investigations into the effectiveness of the Whistleblower Protection Act and have both found serious problems with the protections and enforcement of the Act. The head of the OSC was forced to resign in 2008. Thus far, the Congress has amended the original 1978 law several times based on findings of problems, including increasing the powers of the OSC,¹⁴¹ most recently enacting the NoFEAR Act in 2002 to ensure that there was better reporting on whistleblower cases.¹⁴²

This lack of independent oversight is in contrast to related laws such as freedom of information acts where nearly 30 countries have created an independent body, known as an information

¹³⁹ Homepage: <http://www.psic-ispc.gc.ca/>

¹⁴⁰ Homepage: <http://www.psdpt-tpfd.gc.ca/>

¹⁴¹ See Fisher, Louis, National Security Whistleblowers RL33215, Congressional Research Service (US), December 30, 2005.

¹⁴² Public Law 107-174. May 15, 2002.

commissioner, to provide a mechanism for appeals and oversight of freedom of information laws.¹⁴³ Many of those commissioners have the power to order releases of information or other remedies. In Antigua and Barbuda, the Information Commissioner has the authority to receive reports from whistleblowers related to a variety of offences.¹⁴⁴

b. Ombudsman

Another possibility is to provide oversight capabilities to the existing Ombudsman, who is usually parliamentary officer. Over 120 countries have created an Ombudsman.¹⁴⁵ Nearly 30 countries have appointed the existing ombudsman to enforce freedom of information legislation.¹⁴⁶

The Ombudsman in many countries already receives complaints and institutes investigations of public bodies. A general Ombudsman typically investigates maladministration so it likely to be receiving complaints from whistleblowers already.

Ombudsmen do have some limitations which may not make them ideal. For one thing, they generally only have authority over public bodies. In addition, they tend to only have limited powers to order remedies. Most Ombudsmen rely on their moral authority to force public bodies to follow their recommendations. This may not be ideal when the body has already made a decision to sanction an employee and does not wish to reverse it.

In New Zealand, the Ombudsmen have jurisdiction to receive complaints and provide general advice to whistleblowers. Disclosures in many cases are other public bodies with jurisdiction such as the Commissioner of Police, Controller and Auditor-General or Health and Disability Commissioner. The Ombudsmen do not handle the cases of retribution. That is handled by the Human Rights Commission. The 2003 review recommended that the Ombudsman be given a larger role.¹⁴⁷

In Ireland, the Ombudsman has also been appointed as the Information Commissioner with different powers and staff for his different functions.

c. Sectoral Bodies

Most countries have some form of a limited jurisdiction body that can receive reports of possible illegalities or other issues. Some also have the power to protect whistleblowers and sanction discrimination. For the most part, these are anti-corruption bodies but a few countries also include the functions in other bodies such as competition commissions. Generally, the downside with this approach is the jurisdictional limitation placed on the body. They can only investigate within their own area and mostly only for crimes instead of unethical or dangerous behaviour.

The Korea Independent Commission against Corruption (KICAC) can investigate claims of discrimination by whistleblowers and award them for their disclosure if it results in significant

¹⁴³ See Banisar, *Freedom of Information Around the World 2006* (Privacy International, 2006).

¹⁴⁴ <http://www.privacyinternational.org/foisurvey>

¹⁴⁵ Freedom of Information Act, 2004 §47.

¹⁴⁶ See International Ombudsman Institute. <http://www.law.ualberta.ca/centres/foi/eng/history.html>

¹⁴⁷ See Banisar, *Id.*

¹⁴⁷ NZ Review at p. 60.

money being returned to the treasury. The OECD review of the legislation noted that the law only protected whistleblowers reporting directly to the KICAC and not to other law enforcement agencies and recommended that it be extended.¹⁴⁸

Some jurisdictions are considering giving the existing anti-corruption body broader powers. The draft Indian Public Interest Disclosure (Protection of Informers) Bill 2002 gives broad powers to the Central Vigilance Commission to receive reports of dishonourable conduct or mal-administration, investigate the claims and make recommendations to the authorities who are required to take actions, including initiating criminal proceedings.¹⁴⁹ The Commission can also receive complaints of retaliation and can order the public body to restore the public servant and prevent any future victimization.

d. Courts and Tribunals

Most of the countries with comprehensive laws use existing employment tribunals or courts for appeals.

The UK PIDA allows appeals to the Employment Tribunal. The Tribunal receives around 800 cases each year and issues over 100 decisions. Advocates such as Public Concern at Work are fairly satisfied that the Tribunal is working reasonably well.¹⁵⁰

In the US, employees can appeal to the Merit Systems Protection Board and then to the US Court of Appeals. This does not appear to be working as well. Since 1999, whistleblowers have only won two cases at the Board and the Court of Appeals has been increasingly criticized limiting rights.¹⁵¹

In Canada, the Public Servants Disclosure Act allows for appeals of reprisals to the Public Service Labour Relations Board and the Canadian Industrial Relations Board. This provision was criticized by the Public Service Integrity Officer who stated that he believes that they will not be able to deal with disciplinary measures that are not part of the conditions of employment such as harassment. He also noted that neither of the boards have any experience or mandate on disclosures about wrongdoing.¹⁵²

Another avenue for referrals is directly to the courts. They tend to be very expensive, especially in the case of an employee who has just been terminated and no longer has a source of income to take a measure to court. This is one of reasons why most countries have set up a specialized body to protect rights in a less formal, quicker and more citizen-friendly jurisdiction for FOIA laws. In South Africa, under the Protected Disclosures Act, an individual who has been subject to a detriment such as termination of employment may appeal to the Labour Court or other court. Thus far, there have been few cases brought before the courts.

Some countries such as UK and South Africa do not have any oversight body and only rely on the tribunals and courts to provide for remedies. The disadvantages of this approach is the lack of a body to receive information and also provide any general oversight on the system. They are

¹⁴⁸ OECD, Korea: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials In International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, 5 November 2004.

¹⁴⁹ Public Interest Disclosure (Protection of Informers) Bill 2002 §§6-8.

¹⁵⁰ See Dehn, "Where's Whistleblowing" in Focus on Whistleblowing, *Id.*

¹⁵¹ POGO at 8.

¹⁵² PSIO Report at 26.

also limited in jurisdiction to those cases involving employment discrimination and not other kinds of retaliation.

7. Special Issues

a. Rewards

Some jurisdictions allow for whistleblowers to receive rewards for disclosing wrongdoing, especially in cases of fraud and corruption. Many whistleblower experts are weary of such provisions, seeing them as detracting from the public interest principles of legislation. However, some do admit that there is a positive aspect: it is one of the few times where whistleblowers are not considered to be victims.

One approach is to allow individuals to sue on behalf of the government to recover lost or misspent money. As mentioned before, this is typically known as a Qui Tam action and has a long history. Typically, this is seen as a way of improving a weak enforcement system by allowing for private individuals to conduct some investigation and enforcement on behalf of the government. As one US Senator noted in 1944, "What harm can there be if 10,000 lawyers in America are assisting the Attorney General of the United States in digging up war frauds?"¹⁵³

The US False Claims Act allows individuals to file claims on behalf of the government to receive up to thirty percent of the amount retrieved. The FCA also prohibits retribution against those who file cases and allows for additional compensation on top of the recovery. The US Government estimates that \$17 billion has been recovered under the Act since 1986.¹⁵⁴ A number of US states also allow for this action. It is now being considered in other countries including Uganda and Canada.

Alternatively, a number of jurisdictions, especially in Asia, give rewards to those who have revealed corruption. These are in some ways more like informer statutes than whistleblowing, but also promise confidentiality and protection from retribution.

In South Korea, the Anti-corruption Act allows for individuals who disclose corruption to recover up to twenty percent of the recovered amount. The reward was raised to SK2 billion in 2006 to encourage more cases. In Taiwan, the Anti-corruption Informant Rewards and Protection Regulation sets seven different levels of rewards. If person is convicted of a penalty of 15 years to life imprisonment or the death penalty(!), the person can receive NT 4.5 million to NT6 million (US\$140,000-\$180,000). For those convicted of less than one years imprisonment or detention or a fine, the maximum award is NT500,000 (\$US15,000). In Nepal, the Prevention of Corruption Act allows for the anti-corruption agency to give an "appropriate reward to the person assisting it in connection with inquires, investigation or collection of evidences in the offences punishable under this Act."¹⁵⁵

¹⁵³ Statement of North Dakota Senator William Langer 1 89 Cong. Rec. 7606 (1943). Cited in Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, *id.*

¹⁵⁴ Taxpayers Against Fraud Education Fund, False Claims Act Update & Alert, January 24, 2006.

¹⁵⁵ The Prevention of Corruption Act, 2059 (2002 A.D).

b. National Security

A difficult area that has not been well addressed is the issue of whistleblowing relating to national security. Bodies that are involved in protecting national security are often rife with abuses because of excessive secrecy and the lack of external oversight. Former Kenyan Anti-Corruption Commissioner John Githongo recently noted, “The most serious corruption taking place in many African countries is taking place under the shroud of what they call national security [...] As corruption has slowly been removed from public procurement processes - for example roads and large infrastructure projects - the last little hole where corruption is hiding is in the area of so called "national security", which means that any whistle blower who causes malfeasance in that area can be very easily charged with treason.”¹⁵⁶

Most whistleblower laws fail to adequately deal with the problem in this area, either by ignoring it or by setting special, weaker procedures. As noted in an earlier section, many countries have laws on official secrets that provide a significant barrier to whistleblowing.

In the UK, the PIDA does not apply to disclosures that violate the Official Secrets Act. In 2002, the House of Lords ruled that there is no public interest test in the Act. As noted before, the Act has been used in a number of recent cases against whistleblowers who disclosed material of public interest to the media.¹⁵⁷ The UN Human Rights Commission has called on the UK to the use of it to allow for whistleblowers to release information of “genuine public concern”.¹⁵⁸

In the US, special legislation allows national security whistleblowing only to the Congressional oversight committees. The 1999 Intelligence Community Whistleblower Protection Act allows employees to report to the House and Senate Intelligence Committees and the agency’s Inspector General. However, it provides little protection for intelligence employees. There has been an increasing number of threats against whistleblowers who are revealing information on mismanagement of agencies such as the NSA and FBI and abuses by military contractors.¹⁵⁹ The whistleblowers often face loss of their security clearances which prevent them from continuing their work.¹⁶⁰

In Canada, the 2005 Public Servants Disclosure Protection Act only requires the Canadian Security Intelligence Service and the Communications Security Establishment to adopt procedures similar to those required for other departments. Employees will not be able to complain to the Public Service Integrity Commissioner.

Some whistleblower laws override these acts. In New Zealand, the PDA overrides other laws (note that the OSA was repealed in 1981 with the adoption of the Official Information Act). However, in cases of national security, reporting is more limited. Disclosures can be made to only the Ombudsman or the Inspector-General of Intelligence and Security. In India, the Law Commission’s draft bill overrides the OSA. The Commission describes this as “a clear

¹⁵⁶ Interview of the Month - Kenya’s anti-corruption tsar, Transparency Watch, April 2006.

¹⁵⁷ Regina v Shayler. [2002] UKHL 11. 21 March 2002. <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd020321/shayle-1.htm>

¹⁵⁸ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 05/11/2001. CCPR/CO/73/UK,CCPR/CO/73/UKOT.

¹⁵⁹ See Project on Government Oversight, Homeland and National Security Whistleblower Protections: The Unfinished Agenda, April 28, 2005.

¹⁶⁰ *Id.*

improvement over the [UK PIDA...] where the protection as already indicated is very restricted.”¹⁶¹

VII. Discussion of whistleblowing laws and practices

Evaluating whether whistleblower laws work is a difficult task. Only a few of the countries have conducted in-depth reviews of their legislation. Whistleblowing procedures are only part of a larger package of laws and cultural activities needed to move societies to a more open society. These include a strong culture of rule of law, laws and good practices on freedom of information, freedom of expression, anti-corruption, and a culture that respects differences and openness. Whether or not whistleblowing leads to a greater shift in openness and transparency is a long-term process that is difficult to quantify at any given time. At best, some proxies can give indicators that there are strengths and weaknesses in any system.

As a rough estimate, it appears that the existing whistleblower laws in most jurisdictions are not working as well as hoped or anticipated. They are not comprehensive enough, there seems to be problems with continued cases of retribution against whistleblowers, awareness of the laws, weak oversight, implementation of internal procedures and most importantly the continuing belief by most potential whistleblowers that they will face retaliation.

That said, there is some evidence that whistleblowing is taking hold. Many jurisdictions are reporting increased disclosures. Many companies have now implemented whistleblowing procedures. Whistleblowers are now receiving greater public recognition and acceptance.

The UK appears to have the most successful law. There is high awareness of the law and a reasonable system of oversight and appeals. However, media reports of whistleblowers being sanctioned still regularly appear in newspapers. It is has limited applicability to developing countries that might not have such well developed systems of law, government accountability and other things.

I. Criteria for Evaluating the Effectiveness of Whistleblowing Laws

A number of different metrics can be used to measure the effectiveness of whistleblowing procedures. It may be possible using a combination of these to develop some comparisons internationally on which systems are working better and how to better examine whistleblowing systems.

a. Increased Disclosures

Is more wrongdoing being disclosed? Are more people coming forward both internally and externally? This is a difficult thing to measure since in a properly working comprehensive law, most will be internally dealt with and there will be little public notice. There is some evidence that disclosures are increasing.

If there is an external body that receives complaints, this can give some indicators of the level of public interest. Some examples:

¹⁶¹ India Review at 7.16.

- In the US, the Office of Special Council saw a steady growth in disclosures from 1997-2001 and a substantial increase following September 11.¹⁶²
- In South Africa, the Public Service Commission reported that calls to the Anti-Corruption Hotline have gradually risen since its inception in 2004.¹⁶³
- In Namibia, the Anti-corruption Commission reported being “flooded” with information in the first week of opening.¹⁶⁴

There is also some evidence that internal disclosures are increasing. Studies in the UK, Africa and Australia have found that a significant portion of fraud discovered by companies (between 25 and 40 percent) is from whistleblowers.

b. Reported Cases of Reprisal

A second indicator on the success of whistleblowing is the reports of retribution. Are employees being sanctioned for releasing information that is of a public interest? Do these appear in the media? This is not a perfect indicator since the dismissals or other actions could have been justified on other grounds and the media tends to focus on high-profile negative cases since it makes for a better story. However, reporting of cases will often shape the cultural and employee perceptions on the benefits and downsides of whistleblowing and effectiveness of laws.

This does not appear to be as successful. A cursory review of media finds a considerable number of stories of cases where whistleblowers have been sanctioned, even in jurisdictions such as the UK, South Africa, and US that have relatively strong whistleblowing laws.¹⁶⁵

Related to this is the number of cases brought in courts or tribunals. However, this is also not a perfect number due to problems such as high barriers to legal cases, secret settlements and fear of further retribution even when there is a strong case.

There is little systemic information collected on cases. It appears to be fairly consistent in more successful jurisdictions such as the UK and increasing in less successful ones such as the US. In many such as New Zealand and South Africa, there are few cases probably due more to the problems of bringing lawsuits rather than the success of the laws.

- In the UK, the number of cases brought under the Public Interest Disclosure Act before the Employment tribunals has been steady at around 800 each year for the past five years with sixty percent settled before the case was brought to the tribunal.¹⁶⁶ Due to a rule change adopted secretly by the government in 2000, it is not possible to review any of

¹⁶² GAO p10.

¹⁶³ South African Public Service Commission, Measuring the effectiveness of the National Anti-Corruption Hotline (NACH), 2007. http://www.psc.gov.za/docs/reports/2007/73155_Inside.pdf

¹⁶⁴ Whistleblowers Flood Graft Agency, New Era (Windhoek), February 8, 2006.

¹⁶⁵ See e.g. POGO Homeland & National Security Whistleblower Profiles, April 2005.

<http://www.pogo.org/p/government/go-050401-whistleblower.html>

¹⁶⁶ Focus on Whistleblowing: Whistleblowing Update, Employment Law Brief 794, December 2005.

the cases that are settled before the cases are brought before the tribunal to evaluate their merit.¹⁶⁷

- The number of cases of retaliation reported to the Office of Special Counsel increased substantially following the terrorist acts on September 11, 2001. However, most were immediately rejected by the OSC in a controversial move to reduce a substantial backlog.¹⁶⁸ The Court of Appeals has also consistently limited rights under the WPA. The number of complaints under the US Sarbanes-Oxley Act has grown since its adoption in 2002. There were 526 complaints of reprisals in the first 3 years of the Act.¹⁶⁹ However, recent litigation under the Act has led to restrictions on the persons covered and the types of improper behaviour that can be disclosed.¹⁷⁰
- In New Zealand, the 2003 review found that the Human Rights Commission had not received a single case of victimisation.¹⁷¹ However, the review also found that whistleblowers were very negative about their experiences.¹⁷²
- In South Africa, there have only been a few cases brought before the courts since the Act went into effect in 2000. This is partially attributed to the lack of legal aid for cases brought under the Labour Courts.¹⁷³

Information can also be gathered by surveying employees about their experiences. The US Merit Systems Protection Board found in 2000 that 44 percent of those who made a formal disclosures faced retaliation.¹⁷⁴ The results were worse than a previous study done in 1993 which found that 37 percent had suffered reprisals. In the 2000 study, only 4 percent who had not made a formal claim reported reprisals. There appears to be somewhat higher confidence in the private sector. A 2005 study of the private sector found that whistleblowers reported retaliation in 22 percent of the cases while 48 percent reported receiving positive feedback.¹⁷⁵ An updated survey in 2007 found that only 12 percent reported retaliation.¹⁷⁶

In South Korea, 67 percent of public employees who reported wrongdoing said that they were victims of retaliation.¹⁷⁷

c. Refunds of Money to the Public Treasury

A less defined indicator is how much money is returned to the public treasury due to whistleblowing.

¹⁶⁷ See Parliamentary and Health Service Ombudsman (UK), Report by the Parliamentary Ombudsman to Mr Richard Shepherd MP of an Investigation into a complaint made by Public Concern at Work, 1 August 2005.

¹⁶⁸ POGO Report, *Id.*

¹⁶⁹ Blowing the whistle can lead to harsh aftermath, despite law, USA Today, July 31, 2005 citing figures from US Department of Justice.

¹⁷⁰ See e.g. *Welch v. Chao*, No. 07-1684 (4th Cir. Aug. 5, 2008). (Failure to comply with Generally Accepted Accounting Procedures not per se violation of SOX).

¹⁷¹ NZ Review at 3.15.

¹⁷² *Id.* at 3.108.

¹⁷³ South African Law Reform Commission, Protected Disclosures. Discussion Paper 107. June 2004. (SALRC)

¹⁷⁴ Merit Systems Protection Board. The Federal Workforce for the 21st. Century: Results of the Merit.

Principles Survey 2000, September 2003. <http://www.pogo.org/m/gp/wbr2005/AppendixC.pdf>

¹⁷⁵ 2005 National Business Ethics Survey: How Employees Perceive Ethics at Work in the United States (NBES).

¹⁷⁶ 2007 National Business Ethics Survey.

¹⁷⁷ Mute whistle-blowers, The Korea Herald Thursday, October 6, 2005.

In jurisdictions that allow for Qui Tam actions, the amount of money that has been returned to the public treasury due to those actions is the best indicator. In the US, an estimated \$25 billion has been recovered under the False Claims Act since 1986.¹⁷⁸

In Korea, the Anti-Corruption Commission (now the Anti-Corruption & Civil Rights Commission (ACRC)) have been giving awards for whistleblowers since 2002. The amount given has increased from KR740,000 in 2002 to KR328 million in 2008.¹⁷⁹ The rewards were increased since January 2006 to encourage more disclosures.

d. Existence of Whistleblowing Procedures in Organisations

Are organisations, both in the public and private sector adopting whistleblowing procedures. Do they encourage disclosures? Are the whistleblowers protected from sanctions?

There appears to be a positive trend here. Generally, reviews done of countries that require or encourage procedures have found that most have adopted them, at least in the public sector. This is due both the legal requirements and voluntary recognition of the importance of the procedures.

- In the UK, most organisations that have adopted internal procedures. A review by Middlesex University found that “a very high percentage of employers in the sectors surveyed have introduced confidential reporting/whistleblowing procedures. Good practice and compliances with the law were the reasons most frequently given for introducing such as procedure.”¹⁸⁰
- A 2007 survey of employees in 13 countries across Europe by Ernst & Young found that 62 percent of companies had a code of conduct while 38 percent reported that their companies had hotlines.¹⁸¹
- In South Africa, a study by KPMG in 2001 found that 76 percent of private sector organisations did not have a policy. A 2005 review by KPMG found that it had risen to 59 percent.¹⁸² The same survey found that 78 percent of organisations in Zimbabwe had hotlines, and over 40 percent in Malawi, Botswana, Ghana, and Swaziland. In Uganda, (which just adopted whistleblower protections as part of the 2006 FOI law), only 19 percent of organisations had them while Mauritius was at the bottom with 12 percent.
- The New Zealand review found that most state sector organisations had internal whistleblower procedures.¹⁸³ However, they were less common in the private sector.

¹⁷⁸ Labaton, From 'Rats' to Riches: Whistle-Blowers Deserve Increased Protection, Daily Journal Newswire, February 07, 2008.

¹⁷⁹ Whistleblower Reward Program Reaches New Record, Korea Times, 9 December 2008.

¹⁸⁰ Lewis and Homewood, 'Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected?' [2004] 5 Web JCLI.

¹⁸¹ Ernst & Young, A Survey into Fraud Risk Mitigation in European Countries, May 2007

¹⁸² KPMG Africa Fraud and Misconduct Survey 2005.

¹⁸³ NZ Review at 3.20.

- In Australia, the OECD review of the implementation of the Anti-Bribery Convention reported that as of 2005, over half of the top 100 companies had whistleblower protection policies.¹⁸⁴

However, the mere existence of a procedure does not indicate that good practice has been adopted. Many have expressed the concern that the procedures are being adopted merely for regulatory compliance rather than as a serious effort to improve processes and change culture. As noted above by Calland, some procedures such as external hotlines can actually be a negative factor as they allow for companies to ignore needed management reforms.¹⁸⁵

A recent study by Ernst and Young found that there is significant geographic differences in the perception by senior corporate officials on the effectiveness of whistleblowers in reducing corruption with it being considered the most effective in North America and the least effective in Asia.¹⁸⁶

Percentage saying whistleblowing is a successful measure for minimizing bribery and corruption

North America	77
Australia/New Zealand	58
Latin America	50
Middle East, India and Africa	37
Western Europe	23
Central and Eastern Europe	20
Far East	15
Japan	6

Source: Ernst & Young

e. Staff Awareness and Perceptions

Are staff aware of their rights and duties? A review of staff can be an important indicator of whether a whistleblower system is working. Are they aware of the laws? Do they believe they will be protected? A belief by workers that they are not protected, even if unfounded, would seriously undermine the effectiveness of any law. Finally, if they had the chance, would they do the same thing over again? Some of these questions have been asked in jurisdictions.

Overall, employees seem to be gaining awareness of their rights to protection. However, the perceptions that they will face sanctions is still strong in many jurisdictions.

- A review by the UK Audit Commission in 2004 found that fifty percent of employees were aware of the PIDA. A 2006 survey of private sector employees found that 46 percent of workers said their employers were more ethical than three years before. 33

¹⁸⁴ OECD, Australia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions. 4 January 2006 at 1.35.

¹⁸⁵ Richard Calland. Whistleblowing Around the World and in South Africa: Some Critical Observations, Paper Delivered at Institute for Directors Breakfast, 6 October 2004.

¹⁸⁶ Ernst & Young, Corruption or compliance — weighing the costs: 10th global fraud survey, May 2008.

percent said they would report illegal activities and 64 percent said they would report wrongdoing to outside bodies if their internal reporting was ignored.¹⁸⁷

- The 2007 survey of employees in 13 countries across Europe by Ernst & Young found that 94 percent of employees believed that employees rights should be protected if they report fraud, bribery or corruption but only 68 believed that their company would do so.¹⁸⁸ 61 percent said that fear of reprisals was the largest reason for not reporting.
- In South Africa, 60 percent of persons who reported corruption were unwilling to give personal details to the corruption hotline run by the Public Service Commission.¹⁸⁹ This is even with the existence of Protected Disclosures Act, a strong whistleblower protection law. A 2007 study by the Open Democracy Advice Centre found only 31 percent had heard of the PDA.¹⁹⁰
- In Korea, there appears to be strong scepticism of the law. A study by the Korea Institute of Public Administration found that 43 percent of public employees that had reported corruption regretted doing so and half would not recommend others to do so.¹⁹¹
- A 2005 study by the Australia Public Services Commission found that 77 percent of public employees were aware of the protections for revealing breaches of the Code of Conduct.¹⁹² In 2004, between 69 and 77 percent of APS employees felt confident that they would not be subject to sanctions for revealing breaches of the Code.¹⁹³ It found that there was less confidence in employees where the employee had actually witnessed a breach of the Code.¹⁹⁴ A 2006 survey by the Whistling While Your Work project found that 66% percent believed that whistleblowing legislation made it easier for them to consider reporting corruption while only 40% of public officials were confident that legislation would protect them.¹⁹⁵
- A series of studies by the Ethics Resource Center in the US has found that the willingness by private sector employees to reveal wrongdoing to management increased from 48 percent in 1994 to 65 percent in 2003.¹⁹⁶ However, it dropped to 53 percent in 2005 and remained at only 58 percent in 2007.¹⁹⁷

¹⁸⁷ Your staff will report your dodgy dealings, warns BSA, OUT-LAW News, 9 March 2006.

¹⁸⁸ Ernst & Young, A Survey into Fraud Risk Mitigation in European Countries, May 2007

¹⁸⁹ South African Public Service Commission, Measuring the effectiveness of the National Anti-Corruption Hotline (NACH), 2007. http://www.psc.gov.za/docs/reports/2007/73155_Inside.pdf

¹⁹⁰ Open Democracy Advice Centre, Whistleblowing, the Protected Disclosure's Act, Accessing Information and the Promotion of Access to Information Act: Views of South Africans, 2007, July 2007. http://www.opendemocracy.org.za/documents/section_file_detail/19

¹⁹¹ Mute whistle-blowers, The Korea Herald, October 6, 2005.

¹⁹² Australian Public Service Commission, State of the Service 2004-2005 Employee Survey Results at 27.

¹⁹³ Australian Public Service Commission, State of the Service 2003-2004 at 116.

¹⁹⁴ *Id* at 111.

¹⁹⁵ Brown, A.J., Public Interest Disclosure Legislation in Australia: Towards the Next Generation, An Issues Paper, November 2006.

¹⁹⁶ National Business Ethics Survey 2003, Executive Summary, May 2003.

¹⁹⁷ National Business Ethics Survey: How Employees View Ethics in Their Organizations 1994-2005, Executive Summary, 2005; National Business Ethics Survey 2007.

f. Responses by Organisations to Outside Disclosures

How do organisations respond to outside disclosures, especially to the media? Do they focus on the problems or do they use legal measures to identify the sources or attempt to punish the journalists or their organisations? A strong push to identify sources that reveal wrongdoing indicates that there is a culture of reprisal. This area still seems to be problematic, even with the right of journalists to protect sources enshrined in laws around the world.

- In the United States, there have been a series of demands, especially in the field of national security, to force reporters to disclose their sources following disclosure of serious misconduct including alleged CIA torture camps, and unlawful electronic surveillance by the National Security Agency.
- There have also been a number of serious cases in the UK. Following reports in the BBC that the government had misled the public in the lead up to the Iraq war, severe pressure was placed on the BBC to reveal its sources. The source, senior scientist David Kelly, eventually committed suicide and the head of the BBC was forced to resign. In 2005, several media organisations were threatened by the government under the Official Secrets Act following disclosures of information from an investigation into police misconduct in the shooting of Brazilian Juan Menezes¹⁹⁸ and notes from a meeting between President Bush and Prime Minister Blair where the bombing of the al-Jazeera news agency were discussed.¹⁹⁹
- In South Africa, the Mail and Guardian newspaper has fought a long legal battle to protect the source of information in the “Oilgate” scandal that revealed that a company had illegally directed money to the African National Congress just after receiving a government contract.²⁰⁰

g. Cultural Beliefs

An area that is hard to investigate is whether the laws and practices have changed the often negative perception of whistleblowers in the culture at large. Are whistleblowers still seen negatively?

In South Africa, 2006 and 2007 studies by the Open Democracy Advice Centre still found significant resistance. While around 70 percent of the population supported protection of whistleblowers, 30 percent still perceived whistleblowers as “troublemakers”.²⁰¹ And distinguished groups such as the Kwazulu-Natal Society of Advocates told the Law Reform Commission that “there was something distasteful in the notion of encouraging and protecting informers, whistleblowers and other odious individuals.”²⁰²

¹⁹⁸ See Woman arrested over Menezes leak, BBC, 25 September 2005; ITN journalist arrested over leak from Stockwell shooting inquiry, The Guardian, January 25, 2006.

¹⁹⁹ See Fury over gagging threat 'to spare Bush's blushes, The Times, November 24, 2005.

²⁰⁰ See IPI Deplores Use of Subpoena Against South African Newspaper's On-Line Host, October 2005.

²⁰¹ Open Democracy Advice Centre, Survey shows that large proportion of South Africans believe whistleblowers not deserving of protection, 10 May 2006.

²⁰² SA Review at 4.5.

To some extent, there are some indicators of a positive change. Time Magazine's proclamation of the three whistleblowers "as people of the year" in 2004 was probably a milestone. Similarly, the public recognition that companies such as Enron and Worldcom had deliberately engaged in large scale fraud and controversies in many countries over political questions such as reasons for invading Iraq have lowered public confidence in companies and government institutions to police themselves and promoted whistleblowers as a means of resolving those problems.

International events may also be helping. The ongoing move from totalitarian governments to democracies around the world also reduces the incidents of the anonymous informer and the knock on the door in the middle of the night that led so many to fear those hiding behind anonymity.

VIII. Conclusion and Recommendations

The field of whistleblowing is still in its infancy. Only a few countries have attempted to adopt laws that have general application. Fewer have made a serious effort to address cultural issues to internalize whistleblowing as a positive means of improving organisations and governments.

In many places, the laws are limited in scope and provide few protections. Many governments and organisations seem hostile and whistleblowers around the world regularly face hostility, job loss and worse.

There are some positive signs. Some, such as the UK, seem to have some success towards improving the internal attitudes towards disclosures. The corporate sector seems to be more open to whistleblowing than government bodies.

There is now considerable international pressure for countries to adopt standard laws and practices on whistleblowing, but if these laws are adopted in a vacuum, it is unlikely that they will succeed.

More research needs to be done on the effectiveness of the existing legislation and policies to determine better what works, how workers and the general society feel towards whistleblowing laws and what measures can be taken to improve the culture of openness.

Appendix A - Principles for whistleblowing legislation

Broad application

The law should have a broad application. It should cover a wide variety of wrongdoing including violations of laws, rules and ethical norms, abuses, mismanagement, failures to act and threats to public health and safety. It should apply to public and private sector employees and also those who may face retribution outside the employer-employee relationship such as consultants, former employees, temporary workers, volunteers, students, benefit seekers, family members and others. It should also apply to national security cases.

Disclosures procedures

The law should set up reasonable requirements to encourage and facilitate internal procedures to disclose wrongdoing. However, the procedures should be straightforward and easily allow for disclosure to outside organisations such as higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective. There should be easy access to legal advice to facilitate disclosures and reduce misunderstandings.

Outside agency

The law should create or appoint an existing independent body to receive reports of corruption, advise whistleblowers and investigate and rule on cases of discrimination. However, this body should not have exclusive jurisdiction over the subject. The whistleblower should be able to also appeal cases to existing tribunals or courts. Legal advice and aid should be available.

Confidentiality

The law should allow for whistleblowers to request that their identity should remain confidential as far as possible. However, the body should make the person aware of the problems with maintaining confidentiality and also make clear that the protection is not absolute.

Protection against retribution

The law should have a broad definition of retribution that covers all types of job sanctions, harassment, loss of status or benefits, and other detriments. Employees should be also to seek interim relief to return to the job while the case is pending or be allowed to seek transfers to other equivalent jobs within the organisation if return to the existing one is not advisable due to possible retribution.

Compensation

Compensation should be broadly defined to cover all losses and place the person back at their previous situation. This should include any loss of earnings and further earnings. This loss should not be capped. There should also be provisions to pay for pain and suffering incurred because of the release and any retaliation.

Protection of free speech

The law should recognize that there is a significant importance in free speech whistleblowing. Public interest and harm tests should be applied to each release and for public bodies it should be expressly stated that the unauthorized release of any information that could have been released under freedom of information laws cannot be sanctioned.

Waiver of liability

Any act of authorized disclosure should be made immune for liability under other acts such as Official Secrets and libel/slander laws. An even more significant move would be to eliminate archaic Official Secrets Acts such as already has been done in New Zealand.

Rewards

In some cases, whistleblowers should be rewarded for making disclosures that result in important recovery of funds or discoveries of wrongdoing. Qui Tam cases, such as have been used in the US, may be an appropriate mechanism for recoveries.

No sanctions for misguided or false reporting

The law should still protect whistleblowers who made a disclosure in good faith even if the information was not to the level of a protected disclosure. The law should not allow for the threat of criminal sanctions against whistleblowers who make false disclosures. In cases of deliberate falsehoods, allowing for normal sanctions such as loss of job should be sufficient.

Extensive training and publication

Governments and private bodies should be required to adopt management policies to facilitate whistleblowing and train employees on its provisions. A high level manager should supervise this effort and work towards developing internal culture to facilitate disclosures as non-confrontational processes.

Reviews and disclosures

Government bodies and large corporate bodies should be required to publish annually a review of disclosures and outcomes, reports on discrimination and outcomes including compensation and recoveries. The law should require a regular review of the legislation to ensure that it is working as anticipated.

Appendix B - List of national laws

Comprehensive National Laws

Canada	Public Servants Disclosure Protection Act
Ghana	Whistleblower Act
Japan	Whistleblower Protection Act
New Zealand	Protected Disclosures Act
Romania	Act on the Protection of Whistleblowers
South Africa	Protected Disclosures Act
United Kingdom	Public Interest Disclosure Act
United States	Whistleblower Protection Act

Sectoral Laws (Partial list)

Albania	Law no. 9508 of 3 April 2006 “on the Co-operation of the Public in the Fight against Corruption
Antigua and Barbuda	Freedom of Information Act, 2004
Australia	Public Services Act 1999
Belize	Prevention of Corruption in Public Life CAP. 12
Canada	Criminal Code
Cayman Islands	Freedom of Information Act
Chile	Estatuto Administrativo y al Estatuto Administrativo Municipal
Croatia	Law on Civil Servants
France	Loi n°2007-1598 relative à la lutte contre la corruption
Georgia	Law on Freedom of Speech and Expression
Hungary	Act IV of 1978 on Criminal Code
Iraq	Order 59 Protection and fair Incentives for Government Whistleblowers 01 June 2004
Ireland	Standards in Public Office Act, 2001
Israel	State Comptroller Law (SCL)
Latvia	Administrative Procedure Law, Labour Law
Kenya	Anti-Corruption and Economic Crimes Act, 2003
South Korea	Anti-Corruption Act
Macedonia	Law on Free Access to Information of Public Character
Malawi	The Corrupt Practices Act, 1995
Mauritius	The Prevention of Corruption Act 2002
Moldova	Law on Access to Information
Montenegro	Law on Free Access to Information/Civil Servants Act
Nepal	The Prevention of Corruption Act, 2059 (2002 A.D)
Netherlands	Civil Servants Act
Norway	Working Environment Act
Sierra Leone	Anti-Corruption Act 2000
Slovakia	Labour Code
Slovenia	Code of Conduct of Public Employees
Sweden	Freedom of Press Act
Uganda	Access to Information Act 2005
United States	Sarbanes-Oxley Act
Uruguay	Decreto N° 30/003 de 23/01/03

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