# Committing to Effective Whistleblower Protection

OECD

# Committing to Effective Whistleblower Protection

**Please cite this publication as:**
OECD (2016), *Committing to Effective Whistleblower Protection*, OECD Publishing, Paris.
*http://dx.doi.org/10.1787/9789264252639-en*

ISBN 978-92-64-25262-2 (print)
ISBN 978-92-64-25263-9 (PDF)



**Photo credits:** Cover © Thinkstock/Fuse and Thinkstock/bestdesigns

Corrigenda to OECD publications may be found on line at: *www.oecd.org/about/publishing/corrigenda.htm*.

# *Foreword*

Whistleblower protection is integral to fostering transparency, promoting integrity, and detecting misconduct. Past cases demonstrate that corruption, fraud, and wrongdoing, as well as health and safety violations, are much more likely to occur in organisations that are closed and secretive. In many cases, employees will be aware of the wrongdoing, but feel unable to say anything for fear of reprisals, concern about acting against the organisation's culture, or lack of confidence that the matter will be taken seriously. The negative implications of this are far-reaching for both organisations and society as a whole. Effective whistleblower protection supports employees in "blowing the whistle" on corruption, fraud or wrongdoing.

The OECD has nearly two decades of experience in guiding countries to review whistleblower protection measures, increase awareness, and develop policies founded on international good practices. The OECD pioneered the first soft law instrument on public sector whistleblower protection, with the 1998 Recommendation on Improving Ethical Conduct in the Public Service. In 2009, the OECD Council adopted its Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, requiring the 41 Parties to the Anti-Bribery Convention to put in place public and private sector whistleblower protection measures.

This report is an in-depth analysis of the evolution of standards in whistleblower protection. It takes stock of the progress made over recent years, and shows that, while OECD countries are increasingly adopting whistleblower protection legislation, there remains a long way to go before whistleblowers are effectively protected. The report provides a detailed analysis of whistleblower protection frameworks in OECD and Working Group on Bribery countries and identifies areas for reform. It also proposes next steps to strengthen effective and comprehensive whistleblower protection laws, and ensure protection in both the public and private sectors. Finally, the report includes case studies that provide a snapshot of current whistleblower protection frameworks in various country contexts.

The insights from this report's evidence-based analysis of whistleblower protection frameworks around the globe can serve as a catalyst for change and reform to ensure protection for those who report wrongdoing. Ultimately, effective whistleblower protection systems safeguard better policies, for better lives.

Mari Kiviniemi

OECD Deputy Secretary-General

# *Acknowledgements*

This report was prepared by the Public Sector Integrity Division of the Directorate for Public Governance and Territorial Development and the Anti-Corruption Division of the Directorate for Financial and Enterprise Affairs.

Under the guidance of Janos Bertók, the co-ordination and drafting of this report was led by Jovana Blagotic with contributions and sections drafted by Leah Ambler and Liz Owen. Invaluable input and guidance were provided by Julio Bacio Terracino, Jeroen Michels, and Frédéric Boehm. The preliminary draft report was prepared by Ulrika Bonnier. Data cleaning and follow-up were carried out by Minjoo Son and overseen by Emma Cantera. Editorial and administrative assistance was provided by Thibaut Gigou, Elizabeth Zachary, Anaísa Gonçalves and Anastasia Slojneva.

Special thanks go to the experts who drafted the country chapters, namely: Kristien Verbraeken, Integrity officer, Public Governance Department Corporate HR & Organizational Development Division, Flanders government; The Office of the Chief Human Resources Officer, Treasury Board of Canada Secretariat and The Office of the Public Sector Integrity Commissioner of Canada; Rodrigo Mora Ortega, President, Citizen Defense and Transparency Commission, General Secretariat of the Presidency and Francisco Sebastián Sánchez Lay, Lawyer, Citizen Defense and Transparency Commission, General Secretariat of the Presidency; Noel Tallon, Assistant Principal Officer, Government Reform Unit, Department of Public Expenditure and Reform; Anne Rivera, Head, Compliance Office and Competence Centre for Contracts and Procurement, General Secretariat, Federal Department of Foreign Affairs, Switzerland and Hélène Darwish Legal expert, Compliance Office, General Secretariat, Federal Department of Foreign Affairs, Switzerland; Mark P. Cohen, Principal Deputy Special Counsel, U.S. Office of Special Counsel and John J. Lapin, Senior Assistant to the Special Counsel, U.S. Office of Special Counsel.

The OECD also acknowledges with profound gratitude those who have contributed their expertise and experience at various stages of the development of this report. Particular appreciation goes to all the speakers and participants who actively engaged in the debates and exchanged views during the OECD Seminar on Re-visiting Whistleblower Protection on 17 June 2014 in Paris.

The Public Governance Committee, the Working Party of Senior Public Integrity Officials and the Working Group on Bribery reviewed the report in the autumn of 2015 and early 2016, respectively.

# *Table of contents*

## Figures

## Tables

# Acronyms and abbreviations

| | |
|---|---|
| **ACRC** | Anti-Corruption and Civil Rights Commission |
| **IBEN** | Brazilian Institute of Business Ethics |
| **PAS** | British Publicly Available Specification |
| **BSI** | British Standards Institution |
| **SCPC** | Central Office for the Prevention of Corruption |
| **CNIL** | Commission on Information Technology and Liberties |
| **CAA** | Consumer Affairs Agency |
| **DDPA** | Danish Data Protection Agency |
| **GAP** | Government Accountability Project |
| **G20** | Group of Twenty |
| **IRS** | Internal Revenue Service |
| **Norway's WEA** | Norway's Working Environment Act |
| **ODAC** | Open Democracy Advice Centre |
| **OECD WGB** | OECD Working Group on Bribery |
| **PSIC** | Office of the Public Sector Integrity Commissioner |
| **OSC** | Office of the Special Counsel |
| **PCaW** | Public Concern at Work |
| **PDA** | Protected Disclosures Act |
| **PID Act** | Public Interest Disclosure Act 2013 |
| **PIDA** | Public Interest Disclosure Act |
| **PSDPA** | Public Servants Disclosure Protection Act |
| **CPC** | Slovenia's Corruption Prevention Commission |
| **IPCA** | Slovenia's Integrity and Prevention of Corruption Act |
| **UK SFO** | UK Serious Fraud Office |
| **UNCAC** | United Nations Convention against Corruption |
| **UNODC** | United Nations Office on Drugs and Crime |
| **SOX Act** | United States Sarbanes-Oxley Act |
| **US SEC** | United States Securities and Exchange Commission |
| **PPIW Act** | Protection of Public Interest Whistleblowers Act |
| **WPA** | Whistleblower Protection Act |
| **WPEA** | Whistleblower Protection Enhancement Act |

# Executive summary

Whistleblower protection is the ultimate line of defence for safeguarding the public interest. Protecting whistleblowers promotes a culture of accountability and integrity in both public and private institutions, and encourages the reporting of misconduct, fraud and corruption. Five years after the G20 Anti-Corruption Action Plan highlighted the importance of protecting whistleblowers, the issue is gaining traction at national levels. Whistleblower protection contributes to an environment of trust and tolerance and enhances the capacity for countries to respond to wrongdoing and matters of public concern. However, much remains to be done to develop a climate of openness and integrity that enables effective whistleblower protection.

This report provides a detailed analysis of whistleblower protection frameworks in OECD countries and identifies areas for reform. It highlights and analyses trends identified through the 2014 OECD Public Sector Whistleblower Protection Survey completed by 32 member countries of the OECD Public Governance Committee. The analysis is supplemented by evaluation reports of the OECD Working Group on Bribery of the 41 States Parties to the Anti-Bribery Convention. Six country case studies review national practices to protect whistleblowers.

## Legal frameworks to protect whistleblowers in the public sector

More OECD countries have put in place dedicated whistleblower protection laws in the past five years than in the previous quarter century. Among respondents to the 2014 OECD Survey, 84% have enacted a dedicated whistleblower protection law or legal provision(s) related specifically to protected reporting or prevention of retaliation against whistleblowers in the public sector.

However, these laws have usually been reactive and scandal-driven instead of forward looking. Ad hoc protection through fragmented provisions continues to be the norm, which risks providing less comprehensive protection than a dedicated whistleblower protection law that has more ability to clarify and streamline the processes for disclosing wrongdoing and provide remedies for victims of retaliation. Whistleblower protection laws do not always protect both public and private sector employees or the reporting of all forms of misconduct, including corruption.

## Weaknesses of whistleblower protection laws for the private sector

While there has been progress in enacting public sector whistleblower protection laws, more is needed to protect private sector whistleblowers. Based on evaluations by the OECD Working Group on Bribery in International Business Transactions, at least 27 Parties to the Convention do not provide effective protection to whistleblowers who report foreign bribery in the public or private sector.

In addition, very few governments have taken steps to raise awareness in business and industry of the importance of encouraging the reporting of wrongdoing and protecting those who report. In practice, corporate whistleblower protection frameworks fall short: 86% of companies surveyed for the 2015 OECD Survey on Business Integrity and Corporate Governance had a mechanism to report suspected instances of serious corporate misconduct, but over one-third of these either did not have a written policy of protecting whistleblowers from reprisals or did not know if such a policy existed. By using open channels of communication and support, employers and managers can give employees the confidence to discuss concerns or alleged wrongdoing and help create a workplace guided by the tenets of integrity.

## Crucial elements of an effective whistleblower protection system

Upon identifying wrongdoing, employees in the public or private sector may be uncertain of what to do with the information, where or to whom to turn, or whether they are protected by whistleblower protection mechanisms. The many steps along the disclosure process can be daunting and vague. However, an effective and open organisational culture that promotes transparency and dialogue can help address these concerns and may make the difference between an employee speaking out or staying silent.

To facilitate whistleblowing in the public sector, some countries have adopted incentive measures, including monetary rewards or compensation, and follow-up mechanisms. Many countries also have penalties for retaliation against whistleblowers. Approximately half of surveyed OECD countries allow anonymous reporting in the public sector. In the private sector: 53% of respondents to the 2015 OECD Survey on Business Integrity and Corporate Governance indicated that their company's internal reporting mechanism provided for anonymous reporting, whereas 38% indicated that reporting was confidential.

An effective whistleblower protection system depends on clear and effective communication. Informing both employers and employees about their rights and responsibilities and the resources available to them is crucial for creating an environment of trust, professionalism and collegiality that supports the tenets of integrity in both the workplace and society. However, awareness campaigns are only conducted in the public sector by slightly more than half of OECD countries surveyed.

Given the continuing lack of effective and comprehensive whistleblower protection laws, it is timely to review current OECD standards regarding whistleblower protection and consider how they can be revised to ensure protection in both the public and private sectors.

This OECD study supports the review, on a priority basis, of the legislative frameworks for protecting whistleblowers in both sectors among members of the OECD and States Parties to the OECD Working Group on Bribery. Reviews should take into account recommendations already made by the working group in the context of implementing the Anti-Bribery Convention and related instruments.

## Key recommendations

- Implement the 1998 Recommendation on Improving Ethical Conduct in the Public Service (currently being updated); develop and regularly review policies, procedures, practices and institutions that influence ethical conduct in the public service.
- Promote greater implementation of the whistleblower protection provisions from the 2009 Recommendation on Further Combating Foreign Bribery in International Business Transactions (2009 Anti-Bribery Recommendation), which require countries to provide protection, in both the public and private sectors, for persons who report suspected foreign bribery in good faith and on reasonable grounds to the competent authorities.
- Encourage protected reporting mechanisms and prevention of retaliation in companies' internal controls, ethics and compliance systems in line with the standards set out in the OECD 2010 Good Practice Guidance, the OECD Guidelines for Multinational Enterprises and the G20/OECD Principles of Corporate Governance.
- Implement whistleblower protection broadly, covering all who carry out functions related to an organisation's mandate.
- Clearly communicate the processes in place and raise awareness through training, newsletters, and information sessions about reporting channels and procedures to facilitate disclosures.
- Encourage countries to develop review mechanisms to identify data, benchmarks, and indicators relative to whistleblower protection systems and the broader integrity framework in order to evaluate effectiveness and monitor performance.

PART I

# Whistleblower protection policies and practices

# *Chapter 1.*

# Overview of global standards for whistleblower protection

*There is a general consensus among policy makers that effective whistleblower protection legislation is needed. Many OECD countries have introduced some form of legal protection for whistleblowers. The legal frameworks in place may be dedicated whistleblower protection laws or provisions found in one or more laws. This chapter provides an analysis of the legal frameworks in place in OECD countries to protect whistleblowers.*

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

## Mainstreaming integrity and open organisational cultures through detection and protection

Fostering integrity and preventing corruption are essential to promoting good governance, maintaining public confidence in government and public decision-making, and supporting societal wellbeing and prosperity. Ensuring transparent transactions and a clean business environment in the private sector is an important component of a country's overall anti-corruption strategy. Efficient and competitive companies ensure healthier markets and greater investor confidence. Furthermore, clean companies that do business with governments can place an effective check on both private and public sector corruption. Effective mechanisms to disclose wrongdoing without fear of reprisals are at the heart of integrity in both business and government. If integrity is upheld at the core of an organisation's inner workings, and if concerns are discussed freely and there is no fear of persecution, then silence in the face of wrongdoing and adversity will no longer be the status quo.

For the purposes of this study, the definition of whistleblower protection is similar to the 2009 Anti-Bribery Recommendation (OECD, 2009), and is described as legal protection from discriminatory or disciplinary action for employees who disclose to the competent authorities in good faith and on reasonable grounds wrongdoing of whatever kind in the context of their workplace. This study also stresses the value of providing protection for internal reporting within public and private sector organisations. Unless organisations actively demonstrate that they uphold and support an effective whistleblower protection system, employees who are aware of wrongdoing are unlikely to come forward for fear of reprisal. This inhibits an open organisational culture and is detrimental to the overarching functions of an organisation as the risk of corruption and other wrongdoing is significantly heightened in environments where reporting is not encouraged or protected. This could result in an organisation being exposed to liability, or failing to detect wrongdoing that may result in a loss of revenue. (ODAC et al., 2004).

The protection of whistleblowers deters as well as detects wrongdoing. Employees in both the public and private sectors can access up-to-date information concerning workplace practices and are usually the first to recognise wrongdoing (UNODC, 2015). For example, in the United Kingdom, inquiries into the Clapham rail crash, the Piper Alpha Disaster, the Zeebrugge ferry tragedy, and the collapse of Barings Bank in the 1980s and early 1990s showed that employees knew of the dangers that existed but had either been too scared to raise the issue, or raised it incorrectly or with the wrong person (National Audit Office, 2014). The United States Challenger disaster in 1986 (Martin, 2012) led to the introduction of the Whistleblower Protection Act of 1989 (WPA), and the US Sarbanes-Oxley Act (SOX Act) of 2002 was adopted following the scandals at Enron, WorldCom and other companies (Banisar, 2011). The public disclosure by Dr. Jiang Yanyong, which revealed the gravity of the SARS virus to the public in 2003, is an example of whistleblowing that potentially saved millions of lives (ODAC et al., 2004). Speaking up about wrongdoing in the workplace and helping identify deficiencies in the system can function as a red flag that can be useful for employers as well as policy makers who are able to learn from first-hand accounts of misconduct.

A lack of legislative incorporation or active implementation of whistleblower protection frameworks can deter those who witness wrongdoing from coming forward. Fear of retaliation is an important reason for potential whistleblowers to shy away from the prospect of coming forward. In the United States, over one-third (34%) of state government employees who observed misconduct, but chose not to report it, feared

retaliation from management, and 30% of non-reporters feared retaliation from their peers (Ethics Resource Center, 2007). In Australia, the belief that nothing would be done or that no action would be taken upon disclosure has been identified as the most common reason for public sector employees not to raise concerns (Australian Public Service Commission, 2013).

In most jurisdictions, there is a legal obligation in relevant public service laws or regulations for public officials to report corruption and other criminal offences. In some jurisdictions, there are criminal sanctions for those who fail to report. Although the risk of liability for failing to report is typically low (unless liability occurs as a method of retaliation), employees who report wrongdoing may be subject to intimidation, harassment, dismissal and violence by their colleagues or superiors. In many countries, whistleblowing is even associated with treachery or spying (Banisar, 2011; Transparency International, 2009). This may be due to the influence of cultural connotations and such connotations may also have an impact on individual careers and on the internal organisational cultures (Latimer and Brown, 2008). Encouraging whistleblowing must be associated with corresponding legal protection from retaliation, clear guidance on reporting procedures, and visible support and positive reinforcement from the organisational hierarchy.

The 1998 Recommendation on Improving Ethical Conduct in the Public Service (OECD, 1998) was the first soft law instrument to put in place a dedicated principle on whistleblower protection. The current review and update of the 1998 Recommendation will draw on this report *Committing to effective Whistleblower Protection* to inform important elements of countries' integrity frameworks with an aim to enhance the culture of integrity in OECD countries. In 2009, the OECD Council adopted its Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) (OECD, 2009) and encouraged the 41 signatories to the Anti-Bribery Convention to put in place appropriate measures to protect from "discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions." The importance of whistleblower protection was reaffirmed in 2010 at the global level when the G20 Anti-Corruption Working Group recommended G20 leaders to support the Guiding Principles for Legislation on the Protection of Whistleblowers, prepared by the OECD, as a reference for enacting and reviewing, as necessary, whistleblower protection rules by the end of 2012. This study is therefore a timely stocktaking of progress by OECD member countries since the adoption of the 2010 Guiding Principles.

Providing effective protection for whistleblowers supports an open organisational culture where employees are aware of how to report wrongdoing and have confidence in reporting and the protection and follow up procedures in place. Translating public sector whistleblower protection into dedicated law legitimises and provides a structure for the mechanisms under which public officials can disclose actual or perceived wrongdoing in the public sector, protects public officials against reprisals, and encourages them to fulfil their duties in performing efficient, transparent and high quality public service. In the private sector, ensuring protection through dedicated whistleblower protection legislation provides a strong incentive for companies to recognise the value of promoting protected reporting and implementing effective reporting and protection procedures. If adequately implemented, legislation protecting whistleblowers can become one of the most effective tools to support anti-corruption initiatives and can detect and combat corrupt acts, fraud and mismanagement.[1]

However, it is important to ensure that laws are not put in place as "cardboard shields" that provide token protection for disclosing limited misconduct to specific group of people, while failing to adequately protect whistleblowers who may have risked their livelihoods by coming forward for the benefit of the organisation or public. Whistleblower laws should instead be viewed as "metal shields" behind which a whistleblower is safe from reprisal (Devine and Walden, 2013). Although many OECD countries have introduced some form of legal protection for whistleblowers, either through a dedicated whistleblower protection law or through provisions in other laws, not all legal frameworks are effective or comprehensive or provide sufficient protection.

## International and domestic sources of protection

An employee realising that an act or omission constitutes a wrongdoing may not be enough for them to feel confident in coming forward with important and sometimes vital information. Acting independently without legal backing or protection, and with a weak organisational support system, does not prompt individuals to speak out, particularly against their employer. Withholding information concerning wrongdoing can have detrimental effects on individuals' jobs and could even affect the lives of millions of people. Protection, reinforced by effective laws, is the springboard to speaking out against wrongdoing. The importance of protecting whistleblowers has been exemplified through numerous global headlines over the last decade and heralded as the way forward through international and national initiatives. OECD countries and members of the OECD Working Group on Bribery have acknowledged the serious need to protect whistleblowers, for example through the 2009 Anti-Bribery Recommendation. However, legal protection frameworks differ: from provisions found in one or more laws to that of dedicated whistleblower protection laws. The model a country chooses for whistleblower protection legislation can dictate the comprehensiveness, clarity and effectiveness of the protections in place.

### *There is emerging consensus on the need for protection*

The need for effective whistleblower protection is recognised in numerous multilateral anti-corruption treaties. The current international legal framework against corruption requires countries to take appropriate measures to provide protection for persons who report any facts concerning acts of corruption in good faith and on reasonable grounds to the competent authorities.[2]

Several international soft law instruments also provide for the protection of whistleblowers:

- The 2014 Council of Europe Recommendation of the Committee of Ministers to member states on the protection of whistleblowers envisages protection of both public and private sector whistleblowers who report or disclose information either within an organisation or enterprise, to relevant external regulatory or supervisory bodies or law enforcement agencies, or to the public on a threat or harm to the public interest in the context of their work-based relationship (Council of Europe Parliamentary Assembly, 2009).
- The 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service includes the Principles for Managing Ethics in the Public Service3 and the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service.4 These were among the first soft law instruments to

highlight the importance of public sector whistleblower protection. The review and update of the 1998 Recommendation on Improving Ethical Conduct in the Public Service will draw from this report to inform important elements of countries' integrity frameworks with an aim to enhance the culture of integrity in OECD countries.

- The OECD 2009 Anti-bribery Recommendation calls for the protection of whistleblowers in the public and private sectors.5
- The 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance (annexed to the 2009 Anti-Bribery Recommendation) is the first guidance to companies by governments at an international level and highlights the fundamental elements of an effective anti-bribery programme. In particular, it recommends effective measures for "internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds" (OECD, 2010).

Providing protected reporting and preventing retaliation against those who report may also invoke fundamental human rights. For example, the International Convention on Civil and Political Rights, Article 19(2) provides for the "freedom to seek and impart information and ideas of all kinds". International human rights law jurisprudence reinforces the protection of whistleblowers explicitly in circumstances where they are the only person aware of the reported situation and in the best position to alert the employer or the public at large.[6]

## Most OECD countries have legal protection for whistleblowers

At the national level, protection for whistleblowers may originate either from comprehensive and dedicated laws on whistleblower protection, or from specific provisions in different laws and/or sectoral laws. The importance of developing the necessary laws is evidenced by the increase since 2009 in OECD member countries, namely Australia,[7] Belgium[8] and Ireland,[9] that have developed a legal framework aimed at protecting whistleblowers in the public sector. Ireland has also included protection of whistleblowers in the private sector.

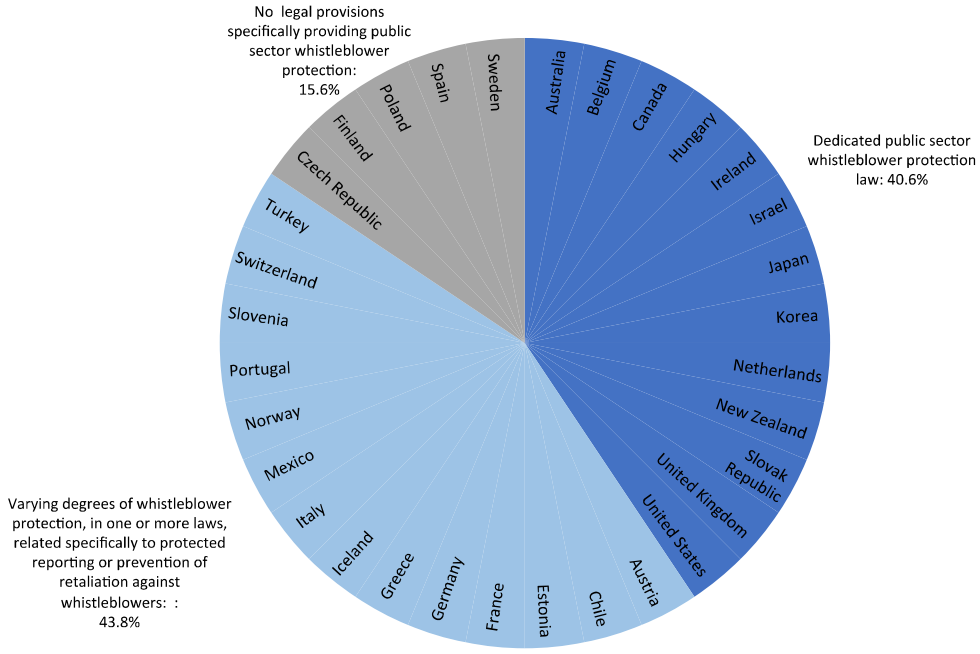
Of the 32 OECD countries that responded to the 2014 OECD Survey, 27 reported to have a dedicated whistleblower protection law or legal provision(s) that calls for the protection of whistleblowers under certain circumstances (not always for reporting of corruption offences), with 13 having passed a dedicated law that protects public sector whistleblowers (Figure 1.1). In some countries, these laws also provide protection to private sector whistleblowers. The majority of OECD countries that provide legal protection to whistleblowers do so through provisions found in one or more laws, such as anti-corruption laws, competition laws, company laws, employment laws, public servants laws and criminal codes (see Annex for a list of whistleblower protection provisions in the 41 Parties to the Anti-Bribery Convention). However, the degree of protection afforded within the provisions of these laws varies and is less comprehensive than the protection provided for within dedicated law(s), which often provide more clarity and streamline the processes and mechanisms involved in disclosing a wrongdoing.

The enactment of a comprehensive, dedicated whistleblower protection law could be one effective legislative means of providing whistleblower protection.[10] Some countries have enacted a single dedicated whistleblower protection law that applies to both public and private sector employees, such as Hungary, Ireland, Israel, Japan, Korea,[11] New Zealand, the Slovak Republic, South Africa and the United Kingdom. This approach ensures universally applicable whistleblower protection provisions, which brings clarity and makes it easier to raise awareness of the existence of these provisions, rather than the piecemeal approach of sectoral laws, which often only apply to certain employees and to the disclosure of certain types of wrongdoing (Banisar, 2011). The enactment of a dedicated law could also contribute to ensuring legal certainty and clarity.[12]

There are a variety of complex measures in place across countries to protect whistleblowers, these range from broad and general stipulations to more specific and explicit arrangements. Three situations can be observed, depending on the inclusion of public sector whistleblower protection in countries' legal frameworks:

1. **No legal provisions specifically providing public sector whistleblower protection**: The country does not have any form of legislative provision related specifically to protected reporting or prevention of retaliation against whistleblowers.
2. **Varying degrees of public sector whistleblower protection**: The country has provisions, in one or more laws, related specifically to protected reporting or prevention of retaliation against whistleblowers, but it does not have a dedicated whistleblower protection law. These provisions do not necessarily provide protection to all categories of employee or misconduct to be reported.
3. **Dedicated public sector whistleblower protection law**: The country has a dedicated law to protect whistleblowers in the public sector, although this may not provide protection to all categories of public sector employees (for example, employees of state-owned or controlled enterprises) and may not cover the reporting for all categories of misconduct, such as corruption offences.

**Figure 1.1. Provision of legal protection to whistleblowers in the public sector**




*Notes:* The figure presents a grouping of 32 OECD countries in line with the above description and on the basis of their responses to the 2014 OECD Survey on Public Sector Whistleblower Protection. Respondents were asked the following question: "Does your country provide protection of employees from discriminatory or disciplinary action once they have disclosed wrongdoing?" For the purpose of this publication, the answers provided in response to this question were analysed according to whether or not countries' legal frameworks were related specifically to protected reporting or prevention of retaliation against whistleblowers. The protection in the laws of some of the countries categorised under "Dedicated public sector whistleblower protection law" also extend to include those in the private sector. The figure does not necessarily reflect WGB analysis of countries' frameworks for protection of public and private sector whistleblowers who report suspected foreign bribery. Please see Annex for a list of whistleblower protection legislation, by country.

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* OECD (2014a), "OECD Survey on managing conflict of interest in the executive branch and whistleblower protection" (survey), OECD, Paris.

## *The growing number of dedicated whistleblower protection laws emphasises the importance of whistleblower protection*

Whistleblower protection legislation in many countries has often been reactive and scandal driven, instead of forward-looking. The notion of whistleblower protection gained increased attention in the 1980s and 1990s in the United States and the United Kingdom following scandals of corruption and preventable disasters (the terms "whistleblower" and "whistleblowing" were first included in the Oxford English Dictionary in 1986 [Vandekerckhove, 2006]). Scandals continued to arise in other OECD countries, such as in Japan with the Mitsubishi Motors' concealment of recall data and the Yukijirushi Shokuhin and Nippon Meat Packers food frauds (Mizutani, 2007). Canadians

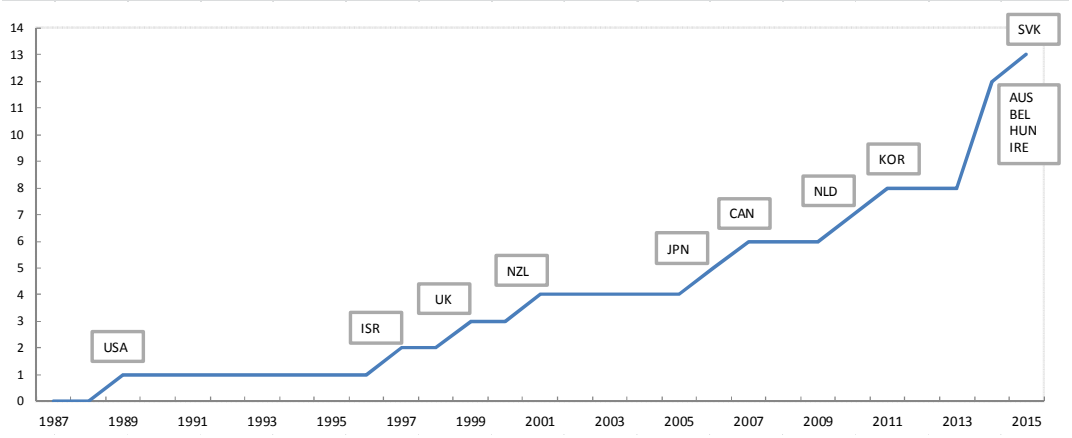
were faced with a national scandal related to federal sponsorship programs from 1997 to 2001 and associated advertising activities from 1998 to 2003 (Library of Parliament, 2013). More recently, a sequence of government and corporate scandals took place and was addressed in Ireland (see case study of Ireland).

These scandals made international headlines and led to a call for action to enact whistleblower protection laws within these countries. Japan enacted its Whistleblower Protection Act (Japanese WPA) in 2004, Canada enacted its Public Servants Disclosure Protection Act (PSDPA) in 2005, and Ireland enacted its Protected Disclosures Act (PDA) in 2014.

In France, in addition to the Law No. 83-634 of 13 July 1983 on the civil servants' rights and duties, five laws were passed from 2007 to 2013 that had provisions for protecting whistleblowers. In 2015, the Central Office for the Prevention of Corruption (SCPC) presented 11 proposals to the Government in an effort to enact a comprehensive and dedicated whistleblower protection law and move beyond a piecemeal approach. The proposals, covering both the public and private sector, include, but are not limited to: unifying the provisions within one dedicated law, broadening the scope of a protected disclosure to include public interest disclosures, and creating a support fund for whistleblowers (SCPC, 2015).[13]

Figure 1.2 sets out a timeline for the enactment of dedicated whistleblower protection legislation in the 13 OECD countries that have enacted such laws to date. Over half of these countries opted for a single dedicated whistleblower protection law that applies to both public and private sector employees.[14]

**Figure 1.2. Entry into force of dedicated whistleblower protection laws: A timeline**[15]




*Notes:* More OECD countries have put in place dedicated whistleblower protection laws in the past 5 years than in the previous 25.

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

Whistleblower protection laws are coming into force in a growing number of OECD countries. From the 1980s to the early 2000s, only four OECD countries had these laws. Since 2006, however, an additional nine have followed suit (Figure 1.2). With a string of preventable scandals that swept across many OECD countries since 2000, the protection of whistleblowers has been increasingly acknowledged as an important tool to detect and

prevent instances of wrongdoing from occurring: "The self-interest of organisations in promoting whistleblowing is now being recognised and increasingly employers are beginning to provide safe whistleblowing routes for staff" (ODAC et al, 2004 p.6). The impetus to enact whistleblower protection laws among OECD countries was further fortified by the United Nations' Convention against Corruption (UNCAC) in 2005, the adoption of the 2009 OECD Anti-Bribery Recommendation's provisions on public and private sector whistleblower protection, followed by the focus on whistleblower protection within the G20 Anti-Corruption Action Plan, drafted in Seoul in 2010. This momentum is maintained by the OECD Working Group on Bribery, which continues to make recommendations to its 41 member countries on taking measures to ensure the effective protection of public and private sector whistleblowers who report suspected foreign bribery in good faith and on reasonable grounds.

Civil society plays an important role in pressuring governments to make necessary reforms. The push to enact whistleblower protection laws in the United States and United Kingdom, two countries acknowledged as pioneers in this area of integrity, was backed and supported by civil society organisations from the outset: the Government Accountability Project (GAP) and Public Citizen in the United States, and Public Concern at Work (PCaW) in the United Kingdom. These organisations began lobbying for whistleblower protection in 1977 and 1993 respectively. The inclusion of civil society in decision-making and legislative process can contribute to the development of a clear and practical law, as was evidenced in Ireland throughout the PDA drafting process in 2013-2014, which gained momentum and insight from the world's leading anti-corruption NGO, Transparency International.[16]

While more countries have recently enacted and entered whistleblower protection laws into force, those with a history in this area have amended or enhanced provisions already in place. For instance, the protection of whistleblowers was first seen in the United States in 1978 under the Civil Service Reform Act and subsequently enshrined in the WPA in 1989, followed by the Whistleblower Protection Enhancement Act (WPEA) in 2012 (see case study of the US). In Canada, following Royal Assent, the PSDPA was incorporated as an element of the Federal Accountability Act and Action Plan, which includes specific measures to help strengthen accountability and increase transparency and oversight in government operations (see case study of Canada). In some instances, countries that recently enacted dedicated whistleblower protection laws have amended or replaced previously existing regulations. In Australia, the Australian Public Service whistleblowing scheme was replaced by the Public Interest Disclosure Act 2013 (PID Act) (Australian Public Service Commission, 2014) in January 2014.

### *Despite their common aim, dedicated whistleblower protection laws are not all the same*

Countries with dedicated laws encompass the main components of a whistleblower protection system: disclosure mechanisms and protections against reprisal. However, despite their common aim, dedicated whistleblower protection laws within these countries differ in their scope of coverage, including: the type of wrongdoing reported by the whistleblower; protections and channels of reporting; and options for anonymous or confidential reporting, remedial measures for victims of retaliation or disciplinary provisions for the perpetrators. Differences also extend to methods used to encourage reporting, including financial incentives and awareness raising campaigns.

However, although the inherent similarities in some dedicated whistleblower protection laws can be attributed to the basic overarching premise that lies at their core, that of protection against reprisals, their resemblances also reflect the benchmarking of whistleblower protection laws in other countries. For example, in July 2014, Ireland enacted its PDA (see case study of Ireland), which was largely informed by the comprehensive scope of the UK's Public Interest Disclosure Act (PIDA) and the experiences of New Zealand and Australia.

## Protection on an ad hoc basis: the way of the majority

Only thirteen out of the 32 OECD countries that responded to the 2014 OECD Survey have enacted dedicated whistleblower protection laws. The remaining countries that have enacted whistleblower protection provisions do so on an ad hoc basis through piecemeal provisions within one or more laws. They provide protection through provisions in anti-corruption laws, competition laws, corporate laws, public service laws, criminal codes, labour laws, and other laws such as environmental laws or accounting and banking secrecy laws. In some cases, provisions of protection are scattered across numerous laws, putting in place a complicated and sometimes contradicting web of safeguards and measures.

Examples of whistleblower protection provision within laws include:

### *Anti-corruption laws*

In Slovenia, Articles 23-25 of the Integrity and Prevention of Corruption Act, which was adopted in 2010 and subsequently amended in 2011, include protection for individuals in the public and private sectors who report corruption and unethical or illegal conduct. Public sector reporting in Estonia is regulated through the Anti-Corruption Act (2012), which entered into force in 2013, and in Italy through the Anti-Corruption Law – Law no. 190/2012. In Italy, this law marks the first time that the Italian legislator had introduced homogeneous protection for public sector whistleblowers who report corruption.

The provisions to protect public sector whistleblowers within eight (almost one quarter) OECD countries are included within public service and civil service laws and regulations.

### *Competition laws*

Many OECD jurisdictions have, in recent years, developed whistleblowing programmes (or informant reward programmes) to incentivise individuals (and in some cases to corporations) who possess information about cartel activities to report these activities to competition agencies. Whistleblowing programmes are only available to those who are not directly involved in the illegal activity and are a complement to amnesty/leniency programmes meant to reward individuals or corporations who are part of the illegal activity.

### *Laws regulating public servants and civil servant acts*

These may be a source of legal protection for public sector whistleblowers, although protection does not necessarily extend to all categories of public official as defined in Article 1(4)(a) of the Anti-Bribery Convention, notably, employees of state-owned or controlled enterprises are often excluded from protection. Mexico has enacted

whistleblower protection provisions in its Federal Public Officials (Administrative Responsibilities) Act of 2002, which obliges public officials to refrain from inhibiting or preventing reporting by others.[17] In Iceland, Article 13.a of the Government Employees Act no. 70/1996 stipulates that "an employee may not be adversely treated for disclosing to the appropriate parties that laws or ethical rules have been breached of which he has become aware in his work".[18]

In Austria protection is provided through provisions set out in Article 53 of the Civil Service Act 1979 that "explicitly forbids taking detrimental actions against a public servant who in good faith reports a crime" (European Commission, 2014 p.4).[19] Turkey provides protection to whistleblowers through Article 14 of its Regulation on Complaints and Applications of Civil Servants, 1982, which states that public officials who acted as whistleblowers shall neither be prosecuted nor put burden upon their work conditions directly or indirectly due to their whistleblowing (OECD, 2014b).[20]

In Switzerland, Article 22a of the Federal Personnel Act, which entered into force on 1 January 2011, stipulates that employees are required to report all crimes of which they have knowledge or that have been reported to them in the exercise of their functions to the law enforcement authorities or to their superiors or the Federal Audit institution. It states that they should not suffer a disadvantage professionally for having, in good faith, reported an offence or irregularity (see case study of Switzerland). In Chile, provisions are in place to encourage and protect those who report wrongdoing. These were established with the enactment of Law No. 20, 205 on July 24, 2007, with provisions introduced in the Administrative Statute (Law No. 18,834), the Administrative Statute for Municipal Officials (Law No. 18,883) and the Constitutional Organic Law of General Bases of the Administration of the State (Law No. 18,575). This system of laws sets forth the duty for Chilean public officials (other than officials from the General Comptroller, Central Bank, armed forces, order and public security forces, National Television Council, Transparency Council or public enterprises) to report wrongdoing and provides protection mechanisms (see case study of Chile).

Public officials in Portugal are provided protection through the General Labour law in Public Function through the Act of Law 35/2014, and through Article 20 of Law no.25/2008 of 5 June, and Article 4 of Law no. 19/2008. Under Article 4 of Law 19/2008, workers of the public administration and state-owned companies who report offences cannot be "harmed", including through "non-voluntary transfer". Greece amended its Civil Service Code (Law 3528/2007) in 2014 to provide additional protection (in articles 110(6) and 139(4)) to those designated as public sector whistleblowers by a prosecutor in a corruption case (under article 45B of Greece's Criminal Procedure Code, which was enacted at the same time). The threshold of whistleblower designation is high and at the discretion of a prosecutor. It is available only if there is a prosecution. Once designated the whistleblower cannot be subject to disciplinary measures, may be transferred upon their request, and is guaranteed anonymity during preliminary investigations and in certain circumstances thereafter.[21]

In Germany, according to section 62(1) of the Bundesbeamtengesetz Federal Civil Servants Act, public servants must indicate illegal situations within the scope of their duty to their superior. According to section 63(2) of this act, public servants must indicate any doubt against the legality of any official order to their immediate superior without undue delay. In case the order is upheld, they must report to someone who is hierarchically superior than their immediate supervisor. If the order is upheld at this level,

the public servant is obligated to follow it, they will then be relieved of all responsibility related to the matter.

### *Labour laws*

Norway's Working Environment Act (WEA) provides protection for public and private sector employees as part of its directive "to secure a working environment that provides a basis for a healthy and meaningful working situation, that affords full safety from harmful physical and mental influences and that has a standard of welfare at all times consistent with the level of technological and social development of society, and to ensure sound conditions of employment and equality of treatment at work."[22] Other countries that have enacted public and private sector whistleblower protection provisions in labour laws are described in Part II: Whistleblower protection in the private sector. It is important to note, however, that while labour laws may provide some remedies to whistleblowers who have been the victim of retaliation, provisions on unfair dismissal or workplace harassment alone do not equal comprehensive protection as they often only provide the option of post-retaliation relief. Retaliatory action can take other forms and a one-off retaliatory measure in response to a disclosure of wrongdoing may not satisfy the repeated and continuous requirements of proving harassment and reprisal.

### *Criminal codes*

In Mexico, Article 219(I) of the Federal Criminal Code states that a crime of intimidation is committed when a civil servant, or a person acting on their behalf, uses physical violence or moral aggression to intimidate another person in order to prevent them from reporting, lodging a criminal complaint, or providing information concerning the alleged criminal act. The Canadian Criminal Code criminalises retaliation against an employee who provides information about a crime.[23] The United States Federal Criminal Code was amended by the SOX Act to impose a fine and/or imprisonment for retaliation against a whistleblower who provides truthful information about the commission or possible commission of any Federal offence to law enforcement authorities.[24]

In addition to the countries that cover whistleblower protection through either a dedicated whistleblower protection law or through provisions in other laws, there are also examples where provisions included in other laws only cover specific persons or acts, resulting in limited protection. For example, in sectoral laws the subject of coverage is typically limited by the scope of the law, such as in the area of health and safety or national security and intelligence. In the private sector, some countries have adopted sector-specific whistleblower protection provisions, such as for the financial sector (for example, Australia's Banking Act 1959 and Insurance Act 1973[25] and legislative amendments enacted in Denmark in 2013/14 protect employees who report corruption in the financial sector from dismissal.[26]

In order for dedicated whistleblower protection laws and provisions protecting whistleblowers to be effective, they need to be practically functional and align with a country's broader legal system. This is particularly true for protecting fundamental rights, such as the freedom to seek, receive and impart information (ICCPR Art. 19(2)), and for ensuring complementarity and harmonisation with freedom of information, data protection and national security legislation and constitutional or other legal obligations relating to confidentiality in the public service.[27] Indeed, provisions within various laws need to be compatible with the legal landscape established by the existence of other laws and norms set out in a country's judicial system. For instance, when the Slovak Republic

passed its Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing in 2014, some of its other laws were also amended to reflect and accommodate this addition to the country's legal landscape. The Labour Code's provisions regarding restrictions on wage compensation following invalid termination of employment were amended, rendering it inapplicable to whistleblowers, under the condition that their employment was terminated while they were covered by the protections stipulated in the Act (Peterka & Partners, 2015).

### Box 1.1. Whistleblower protection within the Swiss cantons

The majority of cantons[1] have established rules for whistleblowing. Some already enacted very broad provisions, sometimes in non-specific form, as early as 2000. Some cantons have enshrined an obligation to report[2] and others merely the right to report[3] in their legislation. Finding of wrongdoing generally entails the right to report it,[4] while knowledge of serious offences or of wrongdoing that is automatically prosecuted entails an obligation to report it.[5]

Some cantonal legislation affords protection to whistleblowers[6] by specifying that anyone reporting an offence is usually released from official secrecy requirements (or the obligation to maintain secrecy, or the duty of loyalty, of care or to defend the employer's interests) or deemed not to have breached requirements.[7] Some cantonal laws also provide for protection of staff having reported offences in the course of their work to prevent them from being disadvantaged as a result.[8] Some require confidential handling of disclosures.[9] Protection is often afforded only if the whistleblower is acting in good faith and there is no obvious abuse of the right to report.[10] The canton of Glarus protects anyone reporting acts that can never be proved. In Nidwalden and Obwalden, individuals are released from the obligation to report if they have been granted the right to refuse to testify on account of personal relations, or to protect family members or themselves.

Some cantons require that a whistleblower goes through all the hierarchical channels before approaching the cantonal government or the Chairman of the Parliament.[11] Others authorise the following bodies to receive disclosures: the office of the Ombudsman,[12] the finance audit office,[13] the appointing authority,[14] an independent internal reporting body,[15] or the prosecuting authorities.[16] Under a delegation enshrined in Section 19a (2) of the Personnel Act of 17 November 1999, added in 2013, the cantonal government of Basel-City set out the details for the reporting of wrongdoing in its whistleblowing ordinance.[17] In addition to defining the term "wrongdoing" and providing for protection, this ordinance contains a description of the procedure. The office of the Ombudsman is required to study the facts and inform the employee of subsequent action. If the latter receives no reply within ten working days, he or she may make the facts public provided that he or she is acting in good faith and in the public interest.

*Notes:* Apart from the cantons of Appenzell Inner Rhodes, Appenzell Outer Rhodes, Grisons, Lucerne and Solothurn, which have not legislated in this field. [2] Fribourg, Nidwalden, Obwalden, Schwyz, Ticino, Uri, Vaud, Valais, Zug and Zurich. [3] Aargau, Basel-City, Bern, Glarus, Jura, Neuchâtel, Nidwalden, Schaffhausen, St Gallen, Thurgau, Zug and Zurich. [4] Aargau, Basel-City, Bern, Glarus, Schaffhausen, St Gallen and Zug (see also Federal Personnel Act). [5] Fribourg, Jura, Nidwalden, Obwalden, Ticino, Uri, Vaud, Valais, Zug and Zurich (see also Federal Personnel Act). [6] Aargau, Basel-City, Bern, Geneva, Glarus, Nidwalden, Obwalden, Schaffhausen, St Gallen, Thurgau and Zug. [7] Aargau, Basel-City, Schaffhausen, Schwyz, St Gallen, Thurgau and Zug. [8] Basel-City, Bern, Thurgau, Zug, and the Federal Personnel Act. [9] Bern, Glarus, St Gallen and Thurgau. [10] Basel-City, Bern, Geneva, Glarus, St Gallen, Thurgau and Zug. [11] Aargau, Jura, Neuchâtel, Schaffhausen, Vaud and Zug. [12] Basel-City, Basel-Country and Zurich. [13] Bern and Thurgau. [14] Fribourg. [15] Glarus and St Gallen. [16] Nidwalden, Obwalden and Valais. [17] Ordinance of 24 September 2013 on reporting of wrongdoing.

*Source*: Case Study: Switzerland: Whistleblower Protection, by Anne Rivera, Head, Compliance Office and Competence Centre for Contracts and Procurement, General Secretariat, Federal Department of Foreign Affairs, Switzerland; and Hélène Darwish, Legal expert, Compliance Office, General Secretariat, Federal Department of Foreign Affairs, Switzerland.

In addition to national whistleblower protection laws and provisions, whistleblower protection can also be specific to various regions, cantons, states and provinces within OECD countries that have a federal system of government. For instance, while all Australian state and territory jurisdictions have dedicated whistleblower protection legislation, some laws provide only public sector protection whereas others have been amended to extend protection to private sector whistleblowers. At the federal level, whistleblower protection under the PID Act 2013 is limited to public sector employees (Brown, 2013). In Canada, comprehensive models of private sector whistleblower protection, confirmed by case law, exist at a provincial level (Transparency International Canada, 2013). The situation in the Swiss Confederation is described in Box 1.1.

The enactment of comprehensive whistleblower protection laws creates legal obligations for employers and managers to put these measures into practice, and in turn encourages employees to feel protected by the mechanisms and have the courage to speak up. Although dedicated whistleblower protection laws may be the most effective means of providing comprehensive protection for whistleblowers, countries need to ensure that they are effectively implemented and that their measures are executed in a clear, unambiguous and reassuring way. While more and more OECD countries are opting for dedicated whistleblower protection legislation, the majority continue to provide protection on an ad-hoc basis, which may limit the efficiency and effect of protection.

## *Notes*

1 See for example Council of Europe Parliamentary Assembly (2009).

2 This includes: UNODC (2004) United Nations Convention against Corruption, Art. 33; Organization of American States (1996), Inter American Convention Against Corruption, Art. 3(8); Under the Council of Europe Civil Law Convention (1999) and African Union Convention on Preventing and Combating Corruption (2003), States Parties are required to establish appropriate protection for persons reporting corruption. See, CoE Art. 9; and African Union Art. 5(6). For a similar provision, see CoE Criminal Law Convention on Corruption (1999), Art. 22(a).

3 The 1998 Recommendation highlights the importance of public servants knowing what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. This includes clear rules and procedures for officials to follow, a formal chain of responsibility, and knowing what protection will be available to them in cases of exposing wrongdoing. The Council invited the Public Governance Committee to revise the 1998 Recommendation on Improving Ethical Conduct in the Public Service to identify new integrity challenges and serve as guidance for innovative and cost-effective integrity processes and measures. The Council recognised the need to establish a whole-of-government 21st-century integrity framework. A Roadmap for updating the 1998 Recommendation was discussed by the Working Party of Senior Public Integrity Officials (SPIO) in March 2015. An updated Recommendation is expected to be published in late 2016.

4 The 2003 Recommendation includes guidelines to advise countries to "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."

5 It recommends that member countries ensure that "appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions" Available at http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=258&Lang=en.

6 For instance, in 2008, the European Court of Human Rights ruled that the dismissal of a public servant who released unclassified documents revealing political manipulation of the judiciary system was a violation of Article 10 of the European Convention of Human Rights. Recently, the Court made a similar ruling, in the case of Heinisch v. Germany, when a nurse working for a State-owned corporation was dismissed after filing a criminal complaint against her employer for its conscious failure "to provide the high quality care promised in its advertisement … putting the patients at risk". Available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105777#{"itemid":["001-105777"]}.

7 Public Interest Disclosure Act 2013 (PID Act), entry into force 15 January 2014. The Working Group on Bribery welcomed Australia's adoption of public sector whistleblower protection, but recommended that similar protections be adopted for the private sector (Phase 3 Written Follow-Up Report, para. 6; Recommendation 15(d)).

8 Loi du 15 septembre 2013 relative à la dénonciation d'une atteinte suspectée à l'intégrité au sein d'une autorité administrative fédérale par un membre de son personnel [Law of 15 September 2013 on the disclosure of a suspected integrity breach within a federal administrative authority by a staff member]. Entered into force 04/04/2014. At the time of Belgium's Phase 3 evaluation by the WGB, this law had not entered into force and therefore has not been thoroughly analysed. Belgium's Phase 3 evaluation notes that it will not protect Belgian federal officials who report bribery of a foreign public official by a Belgian national or company and the WGB recommended that Belgium promptly take appropriate measures to protect public and private sector employees who report suspected acts of foreign bribery to the competent authorities from any discriminatory or disciplinary action (Recommendation 12(b)).

9 Protected Disclosures Act (No.14 of 2014) (2014). The Protected Disclosures Act (No. 14 of 2014) entered into force after Ireland's Phase 3 evaluation and has therefore not been analysed by the WGB.

10 See Council of Europe Parliamentary Assembly (2010), Article 6.1: "Whistleblowing legislation should be comprehensive." Available at http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm.

11 Korea has two laws to protect whistleblowers: the Act on Anti-corruption and the Establishment and Operation of the Anti-corruption & Civil Rights Commission as well as the Act on the Protection of Public Interest Whistleblowers (2011). Both acts provide protection to public and non-public sector officials. However the subject matter of protected reporting covered by each of the acts differ: the former only deals with corruption in the public sector, while the latter addresses broader public interest disclosures in the private sector. As such, the applicable act depends on the category of wrongdoing and where the wrongdoing occurred.

12 See Transparency International (2013), Principle 24: "Dedicated legislation – in order to ensure clarity and seamless application of the whistleblower framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach."

13 For a complete list of the 11 proposals set out by the SCPC see Service Central de Prévention de la Corruption (2015), "La protection des lanceurs d'alerte" in Rapport pour l'année 2014.["Whistleblower protection" in the 2014 Annual Report] Pp 236-242. Available at www.justice.gouv.fr/art_pix/rapport_scpc_2014.pdf. Transparency International France had an important role in the drafting of these recommendations; nine emerged as a result of the recommendations put forward during their 2014 Seminar and February 2014 Colloquium, on the topic. Two recommendations also stemmed from the Fondation Sciences Citoyennes. For more information on these TI France initiatives see related materials available at: www.transparency-france.org/e_upload/pdf/note_alerte_ethique_transparency_france.pdf and http://www.transparency-france.org/ewb_pages/div/Colloque_de_fevrier_2015.php.

14 Hungary, Ireland, Israel, Japan, Korea, New Zealand, the Slovak Republic and the United Kingdom.

15 *Australia*: Public Interest Disclosure Act 2013. Entry into force: January 2014. In addition, all Australian jurisdictions, except for the Commonwealth, have stand-alone acts that provide for the establishment of whistleblowing schemes and some form of legal protection against reprisals. See, for example the Australian Capital Territory Public Interest Disclosures Act 2012, the New South Wales Protected Disclosures Act 1994, the Northern Territory Public Interest Disclosures Act 2008, Queensland Whistleblowers Protection Act 1994, Tasmania Public Interest Disclosures Act 2002, Victoria Whistleblowers Protection Act 2001, Western Australia Public Interest Disclosures Act 2003, and South Australia Whistleblower Protection Act 1993.

*Belgium*: The Law of 15 September 2013 relating to the reporting of suspected harm to integrity within a federal administrative authority by a member of its staff. Entry into force: April 2014.

*Canada*: Public Servants Disclosure Protection Act of 2005. Entry into force: April 2007.

*Hungary*: The Act CLXV. of 2013 on Complaints and Public Interest Disclosures. Entry into force: January 2014.

*Ireland*: The Protected Disclosures Act (No.14 of 2014). Entry into force: July 2014.

*Israel*: Protection of Employees Law, 1997 (Exposure of Offenses of Unethical Conduct or Improper Administration).

*Japan*: Whistleblower Protection Act of 2004. Entry in force April 1, 2006.

*Korea*: Act on the Protection of Public Interest Whistleblowers of 2011.

*Netherland*s: Decree of 15 December 2009 regulating the reporting of suspected abuses in the civil service and the police (Reporting of Suspected Abuses (Civil Service and Police) Decree). Entry into force: January 2010.

*New Zealand*: Protected Disclosures Act of 2000. Entry into force: January 2001.

*Slovak Republic*: Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing. Entry into force: January 2015

*United Kingdom*: Public Interest Disclosure Act of 1998. Entry into force: July 1999

*United States*: Whistleblower Protection Act of 1989. Entry into force: July 1989

16 In the case of Ireland, prior to enacting a dedicated legislation, protection was provided in multiple laws. Whistleblowers were mainly protected through the Central Bank (Supervision and Enforcement) Act 2013, the Health Act 2007, the Employment Permits Act 2006, the Criminal Justice Act, the Prevention of Corruption (Amendment) Act 2010, the Protections for Persons Reporting Child

Abuse Act 1998, the Competition Act 2002, the Safety, Health and Welfare at Work Act 2005, the Garda Síochána (Confidential Reporting of Corruption Or Malpractice) Regulations 2007, the Charities Act 2009, and the Ethics in Public Office Act 2001. While, these Acts are still in place, Ireland has enacted a blanket dedicated whistleblower protection legislation to ensure a more comprehensive protection approach.

17 See section XXI of Article 8; Article 10 of the Federal Public Officials (Administrative Responsibilities) Act.

18 See Government Employees Act no. 70/1996, Chapter III, Article 13a.

19 See New 53a Beamten-Dienstrechtsgesetz: http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40133771.

20 See Turkey's Phase 3 evaluation report by the OECD WGB, para. 159 (http://www.oecd.org/daf/anti-bribery/TurkeyPhase3ReportEN.pdf).

21 See Greece's Phase 3bis evaluation report by the OECD WGB, paras. 202-3 (http://www.oecd.org/daf/anti-bribery/Greece-Phase-3bis-Report-EN.pdf).

22 See Working Environment Act, amended by act of 23 February 2007 No. 10, Section 1-1.

23 See Section 425.1, Criminal Code of Canada.

24 See 18 U.S.C. 1513(e). Furthermore, this provision of the SOX Act is not limited in its application to only publicly-traded companies; it covers all employers in the United States. See Kohn, S.M. (n.d.).

24 Analysed in Australia's Phase 3 evaluation report by the OECD WGB, para. 144 (http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf).

25 See Denmark's Phase 3 Written Follow-Up Report by the OECD WGB, para. 14 (http://www.oecd.org/daf/anti-bribery/Denmark-Phase-3-Written-Follow-Up-Report-EN.pdf).

26 See, for example, Art.20(3) of the Austrian Federal Constitutional Law: "All executive officers entrusted with federal, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies are, save as otherwise provided by law, pledged to confidentiality about all facts of which they have obtained knowledge exclusively from their official activity and which have to be kept confidential in the interest of the maintenance of public peace, order and security, of comprehensive national defence, of external relations, in the interest of a public law corporate body, for the preparation of a ruling or in the preponderant interest of the parties involved (official confidentiality). Official secrecy does not exist for executive officers appointed by a popular representative body if it expressly asks for such information" (available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf).

## *References*


Australian Public Service Commission (2013), State of the Service Report: State of the Service Series 2012–13, www.apsc.gov.au/__data/assets/pdf_file/0018/29223/SOSR-2012_13-final-tagged2.pdf.

Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing (2014), the Slovak Republic, www.peterkapartners.com/sqlcache/PETERKA%20%20PARTNERS_Whistleblowing%20News_2015_January.pdf.

Act on the Protection of Public Interest Whistleblowers (2011), Korea, www.unodc.org/res/cld/document/kor/act-on-the-protection-of-public-interest-whistleblowers_html/Republic_of_Korea_Act_on_the_Protection_of_Public_Interest_Whistleblowers.pdf.

African Union (2003), *African Union Convention on Preventing and Combating Corruption*, www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf.

Anti-Corruption Act (2012), Estonia, www.riigiteataja.ee/akt/129062012001 (in Estonian)

Anti-Corruption Law, Law no. 190/2012, (2012), Italy, www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012-11-06;190!vig=2016-02-02 (in Italian)

Banisar, D. (2011), "Whistleblowing: International Standards and Developments" in Sandoval, I. (ed.), *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, World Bank-Institute for Social Research, UNAM, Washington, DC.

Brown, A. J. (2013), "Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience", E-Journal of International and Comparative Labour Studies, Vol. 2/3.

Civil Service Act (1979), Austria.

Council of Europe Parliamentary Assembly (2010), Resolution 1729 (2010) The protection of "whistleblowers", Council of Europe, Strasbourg, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en.

Council of Europe Parliamentary Assembly (2009), *Report of the Committee on Legal Affairs and* Human *Rights, The protection of "whistle-blowers"*, 14 September 2009, Council of Europe, Strasbourg, www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19544/20110518ATT19544EN.pdf.

Council of Europe (1999), *Civil Law Convention on Corruption,* Council of Europe, Strasbourg, http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm.

Devine, T. and S. Walden (2013), *International Best Practices For Whistleblower Policies*, Government Accountability Project, Washington, DC.

Ethics Resource Center (2007), *National Government Ethics Survey - an Inside View of Public Sector Ethics*, Ethics Resource Center, Arlington, VA., www.ethics.org/files/u5/The_National_Government_Ethics_Survey.pdf.

European Commission (2014), *Annex- Austria – to the EU Anti-Corruption Report*, European Commission, Brussels, http://ec.europa.eu/dgs/home-affairs/what-we-do

/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_austria_chapter_en.pdf.

European Court of Human Rights (2011), *Heinisch v. Germany, application no. 28274/08*, July 21st, 2011, European Court of Human Rights, Strasbourg, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105777#{"itemid":["001-105777"]}.

Federal Personnel Act (2013), Switzerland, www.admin.ch/opc/de/classified-compilation/20011178/201307010000/172.220.111.3.pdf (in German).

Federal Criminal Code (2014), Mexico, www.wipo.int/edocs/lexdocs/laws/es/mx/mx148es.pdf (in Spanish).

Government Employees Act no. 70/1996 (1996), Iceland. http://eng.fjarmalaraduneyti.is/media/Starfsmannamal/Government_Employees_Act_No_70_1996.pdf.

Law No 20,205 of 24 July 2007, Protection to the public official who denounces irregularities and faults to the probity principle, (2007), Chile. http://bcn.cl/1mp8y (in Spanish).

Kohn, S.M., (n.d.), *Sarbanes-Oxley Act: Legal Protection for Corporate Whistleblowers*, National Whistleblowers Center, Washington DC., www.whistleblowers.org/index.php?option=com_content&task=view&id=27.

Latimer, P. and Brown, A.J. (2008), *Whistleblower Laws: International Best Practice*, Monash U. Department of Business Law & Taxation Research Paper No. 1326766, http://ssrn.com/abstract=1326766 or http://dx.doi.org/10.2139/ssrn.1326766.

Library of Parliament (2013) *Federal Public Sector Whistleblowing,* Publication No.2008-63-E, Revised June 2012, Government of Canada, www.parl.gc.ca/Content/LOP/ResearchPublications/2008-63-e.pdf.

Martin, D. (2012) "Roger Boisjoly, 73, Dies; Warned of Shuttle Danger", *The New York Times*, 3 February 2012, www.nytimes.com/2012/02/04/us/roger-boisjoly-73-dies-warned-of-shuttledanger.html?_r=0.

Mizutani,H. (2007), *Whistleblower Protection Act*, Japan Institute for Labour Policy and Training, Tokyo, www.jil.go.jp/english/JLR/documents/2007/JLR15_mizutani.pdf.

National Audit Office (2014), Government Whistleblower Policies, National Audit Office, London, www.nao.org.uk/wp-content/uploads/2014/01/Government-whistleblowing-policies.pdf.

ODAC, R. Calland, G. Dehn and Public Concern at Work (2004), Whistleblowing Around the World: Law, Culture & Practice, ODAC, Cape Town and Public Concern at Work in partnership with the British Council, London.

OECD (2014a), *OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection*, OECD, Paris.

OECD (2014b), *Phase 3 Report on Implementing the Anti-Bribery Convention in Turkey*, www.oecd.org/daf/anti-bribery/TurkeyPhase3ReportEN.pdf.

OECD (2010), *Good Practice Guidance on Internal Controls, Ethics and Compliance*, OECD, Paris www.oecd.org/daf/anti-bribery/anti-briberyconvention/44884389.pdf.

OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in international Business Transactions*, 28 Nov 2009, OECD, Paris, www.oecd.org/daf/anti-bribery/oecdantibriberyrecommendation2009.htm.

OECD (1998), *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, 23 April 1998, OECD, Paris.

Organization of American States (1996) *Inter-American Convention against Corruption,* Organization of American States, Washington DC., www.oas.org/juridico/english/treaties/b-58.html.

Peterka and Partners (2015), *Act on certain aspects of whistleblowing,* Bratislava, www.peterkapartners.com/en/archive-office/peterka-partners-act-on-certain-aspects-of-whistleblowing-january-2015-1404049543.html.

Protected Disclosures Act (No.14 of 2014), Ireland, www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html.

Protected Disclosures Act (2000), New Zealand, www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html?search=ts_act%40bill%40regulation%40deemedreg_protected+disclosures+act_resel_25_h&p=1.

Protection of Employees Law, Exposure of Offenses of Unethical Conduct or Improper Administration (1997), Israel, www.tamas.gov.il/NR/rdonlyres/812A9432-511A-4C08-9950-8C71D6515665/0/22.pdf

Public Interest Disclosure Act (2013), Australia, www.comlaw.gov.au/Details/C2013A00133.

Public Interest Disclosure Act (1998), United Kingdom, www.legislation.gov.uk/ukpga/1998/23/contents.

Public Servants Disclosure Protection Act (2005), Canada, http://laws-lois.justice.gc.ca/eng/acts/P-31.9/.

Public Service Regulations (1999), Australia, www.comlaw.gov.au/Details/F2015C00713.

Queensland Public Interest Disclosure Act (2010), Australia, www.legislation.qld.gov.au/legisltn/current/p/pubintdisa10.pdf.

Regulation on Complaints and Applications of Civil Servants (1982), Turkey.

Service Central de Prévention de la Corruption (2015), " La protection des lanceurs d'alerte", *Rapport pour l'année 2014*, Paris.

Transparency International (2013), *International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest*, Transparency International, Berlin, www.transparency.org/whatwedo/pub/international_principles_for_whistleblower_legislation.

Transparency International (2009), Alternative to Silence: Whistleblower Protection in 10 European Countries, Transparency International, Berlin, www.transparency.org/whatwedo/pub/alternative_to_silence_whistleblower_protection_in_10_european_countries.

Transparency International Canada (October 2013), UNCAC Implementation Review, Civil Society Organization Report, Transparency International Canada, Toronto.

The Law of 15 September 2013 relating to the reporting of suspected harm to integrity within a federal administrative authority by a member of its staff (2013), Belgium, http://goo.gl/ezLEKT

UNODC (2015), Resource Guide on Good Practices in the Protection of Reporting Persons, United Nations Office on Drugs and Crime, Vienna, www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf.

UNODC (2004), *United Nations Convention against Corruption*, United Nations Office on Drugs and Crime, Vienna, www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

Vandekerckhove, W. (2006), *Whistleblowing and Organizational Social Responsibility: A Global Assessment,* Ashgate Publishing, Ltd., Hampshire.

Whistleblower Protection Act (1989), United States of America, www.usda.gov/oig/webdocs/whistle1989.pdf.

Whistleblower Protection Act (2004), Japan, www.cas.go.jp/jp/seisaku/hourei/data/WPA_2.pdf.

Working Environment Act (2005), Norway, www.legislationline.org/documents/id/3702.

# *Chapter 2.*

# Public sector whistleblower protection laws in OECD countries

*The purpose of whistleblower protection is to protect individuals from being exposed and retaliated against for disclosing misconduct. Despite the common aim of whistleblower protection systems, the disclosure processes in place in OECD countries vary. This chapter analyses the varying elements and protections that countries have put in place and how they apply throughout disclosure processes, including: the scope of coverage and subject matter; reporting requirements; channels of reporting; fundamental safeguards, such as anonymity and confidentiality; and the prospect of incentives.*

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

Upon identifying wrongdoing or the attempt to commit wrongdoing, an employee may not be certain of what to do with the information discovered, where or whom to turn to, and whether they are protected by relevant whistleblower protection mechanisms. Throughout the disclosure process, employees may have reservations about safeguards such as anonymity and confidentiality measures, they may also be incentivised by the prospect of a reward. The multitude of steps along the disclosure process can be daunting and vague, however, if implemented according to whistleblower protection laws, the disclosure process can and should be the first system in line to protect whistleblowers from reprisal.

## Broadening the horizons of whistleblower coverage

Most employees ensure they understand their employee rights such as leave entitlements, benefits and pay, however, it is also essential for employees to recognise whether the whistleblower protection system in place applies to them and to what extent. Individuals who come forward with disclosures of wrongdoing often do not recognise themselves as whistleblowers, rather they attribute their response to detecting and disclosing information as falling within the scope of their workplace duties and responsibilities. While wrongdoing may be identifiable by anyone who witnesses it, the parameters of protection may be linked to the positions they hold, the sectors they are employed in, and whether or not they are on the payroll. For instance, coverage may not necessarily be extended to alternative employment arrangements or voluntary positions. A vague and unclear scope of coverage can cause uncertainty over the protection afforded and can leave employees feeling disenfranchised and unwilling to come forward with alleged wrongdoing for fear of not being protected or supported.

Among members of the public there can be confusion between the terms whistleblower protection and witness protection. A whistleblower may qualify as a witness if they are requested to provide evidence in trial, but whistleblowers will not necessarily always qualify for witness protection. Protection from retaliation, in the form of reprisals, is vital in the time between being designated a whistleblower to being a prospective witness.

In addition to distinguishing between the protection afforded to whistleblowers, witnesses and informants, it is important to clearly identify the types of employment arrangements that are protected through whistleblower protection frameworks, as well as to cast a wide net of protection to a range of employment categories and sectors.

### *Witness protection arrangements are not sufficient to protect whistleblowers*

The difference between whistleblower protection and witness protection is outlined in the United Nations Office on Drugs and Crime (UNODC) Resource Guide on Good Practices in the Protection of Reporting Persons, and the UNODC Technical Guide to the United Nations Convention against Corruption (UNCAC), indicating that UNCAC Article 33, specific to reporting persons, is intended to "cover those individuals who may possess information which is not of such detail to constitute evidence in the legal sense of the word" (UNODC, 2015, p.6 and 60; UNODC, 2009, p.105). While the UNCAC does not define the term "witness", Article 32 limits the scope of witness to those who give testimony concerning offences established in accordance with the Convention (UNODC, 2009, p.101).

Although the differences among the terms are clear, there is a potential overlap between whistleblowers and witnesses as some whistleblowers may possess solid evidence and eventually become witnesses in legal proceedings (Transparency International, 2013). When whistleblowers testify during court proceedings they can be covered under witness protection laws. However, if the subject matter of a whistleblower report does not result in criminal proceedings, or the whistleblower is never called as a witness, then witness protection will not be provided. Even if a whistleblower is entitled to witness protection due to eventual involvement in related criminal proceedings, the measures provided (such as relocation and changed identity) may not always be relevant. Given that whistleblowers are usually employees of the organisation where the reported misconduct took place, they may face specific risks that are normally not covered by witness protection laws – such as demotion or dismissal. Furthermore, they may need compensation for salary losses and career opportunities. Witness protection laws are therefore not sufficient to protect whistleblowers (Transparency International, 2009).

Some whistleblowers may seek immunity from prosecution or reduced sanctions, as informants are often involved in wrongdoing and are using their disclosure of information as a means to reduce their liability (Banisar, 2011). Apart from a few jurisdictions that provide financial incentives, whistleblowers usually do not receive any benefits for their disclosures (Banisar, 2011). If a strategic disclosure about wrongdoing (in which the whistleblower was personally involved) is made with the purpose of escaping or lessening the severity of sanctions, it is recommended that this should only be occur "in relation to any retaliation for making the disclosure, not for the disclosed misconduct itself" (Whitton, 2008, p.3). If an informant comes forward with information that may result in workplace retaliation, s/he should be entitled to the full range of protection against retaliation.

### *Whistleblower protection should apply to all who carry out functions related to an organisation's mandate*

Laws in place to protect disclosers can help employees identify as whistleblowers. However, in some countries, individuals who report wrongdoing may find themselves outside of the protection parameters. The scope of coverage in certain OECD countries can be delineated by a broad or narrow interpretation of the term "employee," and can be sector specific.

A broad interpretation of the term whistleblower is important, as this means a large number of individuals can be afforded protection. However a "no loophole" approach to the scope of coverage of protected persons is essential. This ensures that in addition to public servants and permanent employees, specific categories of employees are explicitly outlined as qualifying for protection, such as those outside the traditional employee-employer relationship (e.g. consultants, contractors, trainees/interns, temporary employees, former employees and volunteers). In cases of public sector whistleblower protection provisions, a no loophole approach ensures that employees of state-owned or controlled enterprises and statutory agencies also qualify for protection.

Among OECD countries, the degree of protection and to whom varies, as shown in Table 2.1.

**Table 2.1. Varying degrees of whistleblower protection in the public sector**

| | Employees | Consultants | Suppliers | Temporary employees | Former employees |
|---|---|---|---|---|---|
| Australia | ● | ● | ● | ● | ● |
| Austria | ● | ❍ | ❍ | ● | ● |
| Belgium | ● | ❍ | ❍ | ● | ❍ |
| Canada | ● | ● | ● | ● | ● |
| Chile | ● | ❍ | ❍ | ❍ | ❍ |
| Estonia | ● | ● | ● | ● | ● |
| France | ● | ● | ● | ● | ● |
| Germany | ● | ● | ● | ● | ● |
| Hungary | ● | ● | ● | ● | ● |
| Iceland | ● | ❍ | ❍ | ● | ❍ |
| Ireland | ● | ● | ● | ● | ● |
| Israel | ● | ● | ❍ | ● | ● |
| Italy | ● | ● | ❍ | ● | ● |
| Japan | ● | ❍ | ❍ | ● | ❍ |
| Korea | ● | ● | ● | ● | ● |
| Mexico | ● | ● | ● | ● | ● |
| Netherlands | ● | ❍ | ❍ | ● | ● |
| New Zealand | ● | ● | ● | ● | ● |
| Norway | ● | ❍ | ❍ | ❍ | ❍ |
| Portugal | ● | ● | ● | ● | ● |
| Slovak Republic | ● | ❍ | ❍ | ❍ | ❍ |
| Slovenia | ● | ● | ● | ● | ● |
| Switzerland | ● | ❍ | ❍ | ● | ❍ |
| Turkey | ● | ● | ❍ | ● | ❍ |
| United Kingdom | ● | ● | ● | ● | ❍ |
| United States | ● | ● | ❍ | ● | ● |
| **Total OECD 26** | | | | | |
| **Yes: ●** | 26 | 17 | 13 | 23 | 17 |
| **No: ❍** | 0 | 9 | 13 | 3 | 9 |

*Notes:* In Greece, according to Law 4254/2014, sub paragraph IE.13, the relevant prosecutor decides who will be given whistleblower status. In the United States, the term "suppliers" may or may not be inclusive of certain contractors who could be covered under certain US laws that protect public and private sector employees. The particular laws that would apply will depend on whether the "supplier," like a "consultant," is a contractor for purposes of the law. There is also a distinction between disclosures by contractors that concern wrongdoing in government and those that concern wrongdoing by a private company, including their employer, or both.

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

The comprehensive dedicated laws in effect in Hungary, Ireland, Korea, New Zealand and the United Kingdom provide some of the most wide ranging parameters for public sector whistleblower protection, and cover more ground than other OECD countries. In addition to employees, their whistleblower protection measures are applicable to temporary employees, consultants, and suppliers. However, as noted by the OECD's Working Group on Bribery (WGB) in its Phase 3 evaluations, not all of these dedicated laws provide protection to foreign consultants or expatriate employees based abroad, which limits the scope of coverage, particularly in foreign bribery cases.

### *An explicit delineation of coverage is necessary to close loopholes and gaps in a whistleblower protection system*

Unclear demarcations and inexplicit distinctions, as well as a patchwork of provisions within various laws, can create confusion and a lack of confidence in the protection system and result in fewer whistleblowers coming forward to report wrongdoing.

Unlike the approach adopted by Ireland, New Zealand and the United Kingdom, Hungary did not list specific categories of employees to be protected by its whistleblower protection mechanisms, instead its law stipulates that "anybody may make a complaint or a public interest disclosure to the body entitled to proceed in matters relating to complaints and public interest disclosures."[1] Similarly, Korea's whistleblower protection system provides protection to anyone who reports an act of corruption to the Anti-Corruption and Civil Rights Commission (ACRC).

A wide definition of the term "employee" is provided in Japan's Whistleblower Protection Act (WPA), which refers to the Labour Standards Act (Article 9) definition of workers as those eligible for protection:[2] "worker [refers to] one who is employed at an enterprise or office and receives wages therefrom, without regard to the kind of occupation." However, according to Table 2.1, Japan's distinction of the coverage provided for in its whistleblower protection system indicates a narrower scope of the term "employee" than the above-mentioned countries that use a wide application of the term. This suggests that whistleblower protection systems, backed by laws that provide broad and inexplicit provisions of coverage, may not necessarily always cover a wide spectrum of employees, in comparison to those that explicitly and broadly identify the individuals protected. Systems that identify positions protected provide coverage similar to the no loophole approach.

It is important that whistleblower protection provisions in both public and private sectors protect all those who carry out activities relevant to an organisation's mandate, whether they are full time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organisation, volunteers, or foreign or foreign-based employees (Devine and Walden, 2013).

### *Protection from prospective professional marginalisation is an important safeguard to ensure the security of whistleblowers' livelihoods*

Whistleblowers may be retaliated against and lose their positions due to an inability to return to their workplace for personal and professional reasons. They can find themselves unemployed for a long period of time as a result of being ostracised from their professional community and network and potentially blacklisted from future employment within their field of work. In this context, the United States' framework for whistleblower protection provides protection for prospective job applicants at the federal level as well as

current and former federal employees. This illustrates the importance of a more extensive and inclusive approach to the no loophole approach; which could also extend protection to a wider range of persons, including job applicants, the unemployed, persons who have been blacklisted and family members (Chêne, 2009).

The duration of protection for prospective job applicants, along with liability for those who perpetrate discrimination, are important questions. In Ireland, "the normal limitation period of six years will apply to the new statutory cause of action in tort for suffering detriment [due to having made] a protected disclosure. The person who caused the detriment will be liable. Depending on the circumstances, this could potentially be the prospective employer" (Byrne Wallace, 2014). Protecting whistleblowers from prospective professional marginalisation through confidentiality measures at the beginning of the disclosure process, along with the inclusion of remedies specific to the category of individual in the event of reprisal, can be essential for a whistleblower's livelihood and wellbeing.

## Scope of subject matter: A balancing act

One of the main objectives of whistleblower protection systems is to promote and facilitate the reporting of "illegal, unethical or dangerous" activities (Banisar, 2011). The precise classification of elements of disclosure that warrant protection is vital for clarity and public confidence in the process. The legal framework should provide a clear definition of the protected disclosures and specify the acts that constitute violations to any codes of conduct, regulations or laws, gross waste or mismanagement, abuse of authority, dangers to the public health or safety, or corrupt acts.[3] However, a balance should exist between being overly prescriptive, which makes it difficult to disclose or requires the discloser to have detailed knowledge of relevant legal provisions, and being overly relaxed, which allows for unlimited disclosures that in the end may not encourage the resolution of issues within an organisation (Banisar, 2011). UK legislation provides a balanced approach with a detailed definition, including exceptions (Box 2.1).

### Box 2.1. A detailed definition of protected disclosures in the United Kingdom

The UK Public Interest Disclosure Act provides a definition of what constitutes a protected disclosure:

Part IVA: Protected disclosures

43A: Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B: Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

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

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

**Box 2.1. A detailed definition of protected disclosures in the United Kingdom** *(continued)*

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

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

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

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

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

*Source:* UK Public Interest Disclosure Act of 1998, Part IVA

### *In some instances, minimum thresholds have been established for reportable wrongdoing to constitute protected disclosure*

Minimum thresholds regarding the extent of wrongdoing before whistleblower protection have been established in certain whistleblower systems. Protected disclosures in the United States, for example, include gross mismanagement and gross waste of funds.[4] To qualify as "gross" there must be something more than a debateable difference in opinion and the agency's ability to accomplish its mission must be implicated. The term "gross mismanagement" is also included in Canada's system.[5] Although they are not explicitly defined, the factors that the Office of the Public Sector Integrity Commissioner considers, independently of one another, when investigating an allegation of gross mismanagement include:

- Matters of significant importance.
- Serious errors that are not debatable among reasonable people.
- More than minor wrongdoing or negligence.
- Management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organisation, office or unit to carry out its mandate.
- The deliberate nature of the wrongdoing.
- The systemic nature of the wrongdoing.[6]

Similarly, New Zealand's system outlines the term "serious wrongdoing"[7] as including the following:

- An unlawful, corrupt, or irregular use of funds or resources of a public sector organisation.
- An act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment.
- An act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial.
- An act, omission, or course of conduct that constitutes an offence.
- An act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement, whether the wrongdoing occurs before or after the commencement of this Act.[8]

As with the issue of coverage, a no loophole approach would be most effective when identifying the breadth of subject matters afforded protection (Chêne, 2009).

When using whistleblower protection mechanisms to combat corruption, the disclosure of corruption risks or offences may explicitly be referred to in legislation, or the reporting of crime more generally, for clarity and legal certainty. It is important to establish protection measures for whistleblowers when they report acts of corruption that may not be recognised as crimes but could be subject to administrative investigations.[9] For example, in Australia, the public sector whistleblower protection system includes in its definition of disclosable conduct: conduct engaged in by a public official that could, if proven, give reasonable grounds for disciplinary action against the public official (Box 2.2).

**Box 2.2. Disclosable conduct as defined by the Australian Public Interest Disclosure Act 2013**

The Australian Public Interest Disclosure Act 2013 defines disclosable conduct as: conduct (in Australia or in a foreign country) that contravenes the law, that constitutes maladministration, that is an abuse of public trust, that results in wastage of public money, public property, money of a prescribed authority, property of a prescribed authority, or conduct that results in danger (or a risk of danger) to the health or safety of one or more persons or the environment. In addition, disclosable conduct also includes when a public official abuses his or her position as a public official and conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official.

*Source*: Australia's Public Interest Disclosure Act (2013) Part 2 Division 2 Section 29.

Clarifying the subject matters considered as protected disclosure may be a deciding factor in whether an individual comes forward with a disclosure or keeps quiet due to uncertainty (Box 2.3).

**Box 2.3. The clarification of protected disclosures in the United States**

The Whistleblower Protection Act (WPA), enacted in 1989, provided protection for "any disclosure" that refers to wrongdoing, such as: any violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (5 U.S. Code § 2302(b)(8)). Despite this, and contrary to the original intent of Congress, certain decisions taken by the Federal Circuit Court were based on a narrow interpretation of which acts warrant protected disclosure. These decisions maintained that the following, among others, were not to be protected: those made to the alleged wrongdoer,[1] disclosures made as part of an employee's responsibilities,[2] and disclosures pertaining to information that was already known.[3] However, in a report by the Senate on the Whistleblower Protection Enhancement Act (WPEA), it was noted that these decisions could be considered as contrary to the text of the Whistleblower Protection Act, that's main objective is to protect individuals in the event that they were suffer reprisals for coming forward with a protected disclosure.

The WPEA adjusted attention back to the original purpose of the WPA, maintaining that protection is not withheld from disclosures such as those listed above, nor is it linked to the motives or limited by time constraints.

*Notes:*

[1]Horton v. Dep't of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995).

[2] Willis v. Dep't of Agriculture, 141 F.3d 1139, 1144 (Fed. Cir. 1998).

[3] Meuwissen v. Dep't of Interior, 141 F.3d 1139, 1144 (Fed. Cir. 1998).

*Source:* American Bar Association, Section of Labor and Employment Law (2012), "Congress Strengthens Whistleblower Protections for Federal Employees," Issue: November-December 2012, www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html.

In addition to defining the scope of subject matter covered, Canadian and Australian laws include provisions on the amount of information to disclose. Australia's Public Interest Disclosure (PID) Act specifies that "[n]o more information is publicly disclosed than what is reasonably necessary to identify one or more instances of disclosable conduct".[10] Similarly, the Canadian Public Servants Disclosure Protection Act (PSDPA) states that "in making a disclosure under this Act, a public servant must (a) provide no more information than is reasonably necessary to make the disclosure […]".[11]

### *Linking Protected Disclosures to the Public Interest*

There is often a public interest dimension to whistleblowing. For instance, Korea's Protection of Public Interest Whistleblowers Act (PPIW Act) defines "violation of the public interest" as an act that infringes on the health and safety of the public, the environment, consumer interests and fair competition.[12] The public interest dimension, such as the reporting of criminal offences and unethical practices, rather than a personal grievance is a key characteristic common to whistleblowing protection, along with the disclosure of wrongdoing connected to the workplace and the reporting of wrongdoing through designated channels and/or to designated persons (Chêne, 2009).

Despite these overarching elements, a barrier may exist in the form of libel and defamation laws, which can be used to deter whistleblowers from disclosing illegal activities. Whistleblower protection systems need to be balanced with contractual duties of loyalty to organisations and other confidentiality or non-disclosure agreements. As the

European Court of Human Rights held in the case of Heinisch v. Germany,[13] the public interest in being informed about the quality of public services outweighs the interests of protecting the reputation of any organisation (European Court of Human Rights, 2011). An effective whistleblower protection system needs to take into account these obstacles and other legal hurdles to disclosure, and protect "good faith" whistleblowers from civil and criminal liability. This includes the regulation of relieving whistleblowers from civil liability for defamation or breach of confidentiality and statutory secrecy provisions. In this context, Korea, for example, provides protection from a claim for damages caused by public interest whistleblowing.[14] Its system provides that the subject of the alleged wrongdoing cannot file a claim for damages against the whistleblower following a report made in the public interest. Similarly in New Zealand, those who make a protected disclosure are not liable to civil or criminal proceedings or to a disciplinary proceeding.[15] Similar measures are in place in the Australian PID Act (Box 2.4).

**Box 2.4. Immunity from liability in the Australian Public Interest Disclosure Act of 2013**

In Australia, whistleblowers who make a protected disclosure are not liable to a disciplinary proceeding or a civil or criminal proceeding.

Section 10:

"Immunity from liability:

(1) If an individual makes a public interest disclosure:

(a) the individual is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the public interest disclosure; and

(b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the individual on the basis of the public interest disclosure.

(2) Without limiting subsection (1):

(a) the individual has absolute privilege in proceedings for defamation in respect of the public interest disclosure; and

(b) a contract to which the individual is a party must not be terminated on the basis that the public interest disclosure constitutes a breach of the contract."

The section on immunity from liability does not apply to civil, criminal or administrative liability (including disciplinary action) if the discloser knowingly made a statement that was false or misleading. In addition, it does not apply to liability for an offence against section 137.1 (knowingly giving information that is false or misleading information to another person), 137.2 (knowingly producing false or misleading documents to another person), 144.1 (forgery) or 145.1 (using forged documents) of the Criminal Code.

*Source*: Australia's Public Interest Disclosure Act (2013), Part 2 – Subdivision B, Section 10, www.comlaw.gov.au/Details/C2013A00133; Australia's Criminal Code Act 1995, www.comlaw.gov.au/Details/C2014C00151.

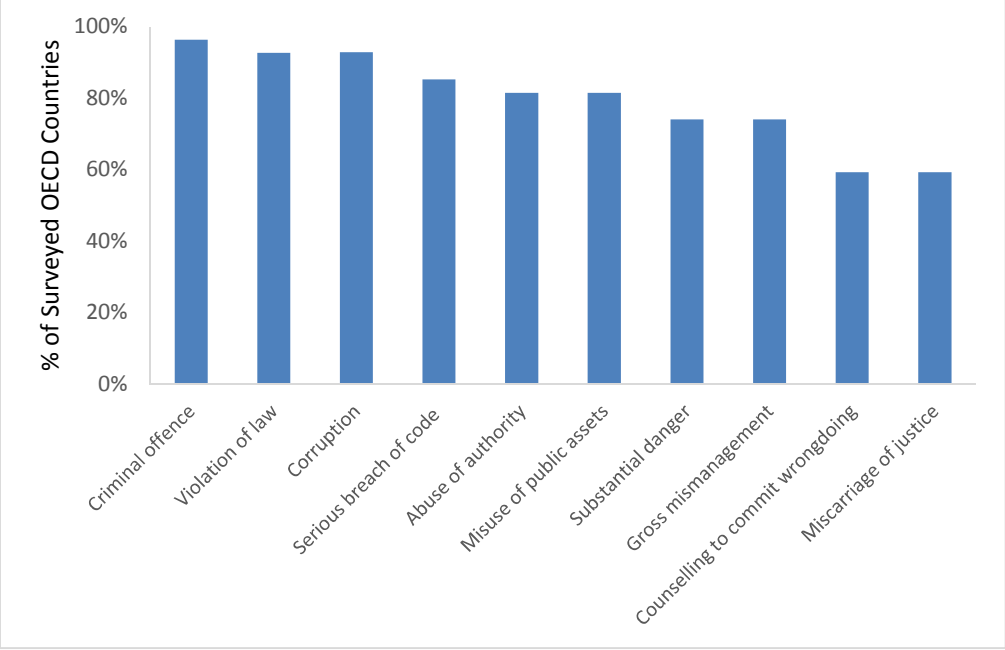
### *The reporting of legal violations and criminal offences constitutes protected disclosures in the vast majority of OECD countries*

The categories of wrongdoing, outlined in Figure 2.1 and extracted from existing whistleblower protection laws, constitute a broad range of subject matters that warrant the

status of protected disclosures. Apart from Portugal, all OECD country respondents with some form of legal protection for whistleblowers, whether through provisions in one or more laws relating specifically to protected reporting or prevention of retaliation against whistleblowers or through a dedicated law, indicated that a "violation of law, rule or regulation" constituted a protected disclosure within their respective public sector whistleblower system. Of these, 25 OECD countries (apart from Iceland and Portugal) also consider "a criminal offence has been committed, is being committed or is likely to be committed."

In total, 11 OECD countries (Australia, France, Germany, Hungary, Korea, Netherlands, New Zealand, the Slovak Republic, Slovenia, Switzerland, and the United Kingdom) implicitly or explicitly consider all the categories of wrongdoing listed below (Figure 2.1) as constituting protected disclosure. While the whistleblower systems in some of these countries explicitly outline the disclosures that are considered protected, others refer to an umbrella approach that provides protection for disclosures more generally. For countries that consider 9 out of the 10 wrongdoings as warranting protected disclosure, the wrongdoing that is most often omitted is "a miscarriage of justice is occurring or is likely to occur." For countries that protect 8 out of the 10 categories of disclosure, "knowingly directing or counselling a person to commit a wrongdoing" and "an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties of the functions of a public servant" are the wrongdoings most often not considered as constituting protected disclosure.

**Figure 2.1. Wrongdoing considered as constituting a protected disclosure in OECD Countries**[16]




*Note:* Respondents were asked the following question: "Which of the following wrongdoing constitutes a protected disclosure?"

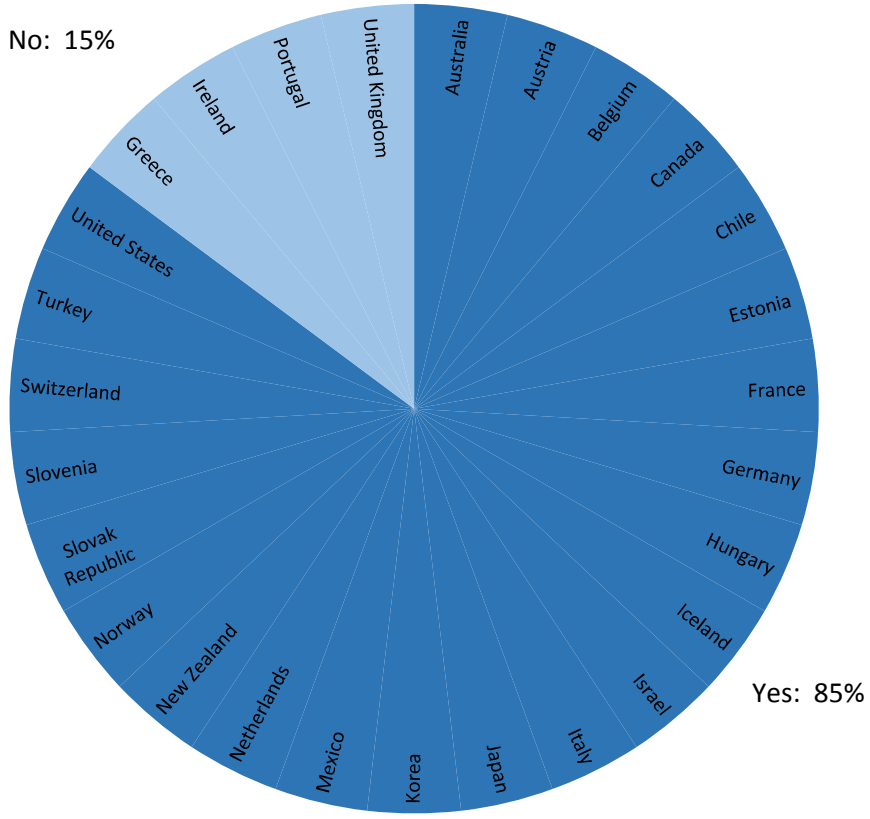
*Source:* OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

## Measures in place to preclude reporting in bad faith: The way of the majority

A principal requirement of most whistleblower protection provisions in multilateral anti-corruption instruments, and corresponding domestic whistleblower protection legislation, is that the disclosures be made in "good faith" and on "reasonable grounds." In July 2009, Mr Pieter Omtzigt, the Council of Europe's Rapporteur for the Committee on Legal Affairs and Human Rights, observed that at times "it seems that the emphasis is rather put on the motives of the 'whistleblower' rather than on the veracity of the information itself" (Council of Europe, 2009. p.29). According to the UNODC Technical Guide to the United Nations Convention Against Corruption: "good faith should be presumed in favour of the person claiming protection, but where it is proved that the report was false and not in good faith, there should be appropriate remedies" (UNODC, 2009, p107; UNODC, 2015, p. 24).

Ultimately, the whistleblower should be protected from retribution as by submitting a protected disclosure they declare to be doing so in good faith. The onus should not be on the whistleblower to prove the intent of their actions. This issue was highlighted in the OECD WGB's Phase 3 evaluation of France, which examined the offence of slanderous reporting (*calomnie*) contained in Article 226-10 of the French Penal Code. The WGB clarified, with reference to French case law (Cass. Crim., 14 December 200, appeal No. 86595) that the intentional element of this offence lies not in the falsity of the allegation itself, but in the knowledge, on the day the allegation was made, that it was false (OECD, 2012). The possibility of being held criminally liable for reporting in bad faith has an effect on whistleblowers and it is important to strike the right balance between discouraging abuse of whistleblower protection systems and encouraging disclosers to come forward. The vast majority of OECD countries surveyed reported having put measures in place to preclude individuals from reporting allegations in bad faith (Figure 2.2).

**Figure 2.2. OECD Countries with measures in place to preclude the reporting of allegations in bad faith**




*Notes:* Respondents were asked the following question: *"*Are there measures in place to preclude individuals from reporting allegations in bad faith?"

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

Measures to discourage bad faith reporting include the removal or forfeiture of protections, such as confidentiality, and in some cases libel and defamation suits, fines or imprisonment. In certain instances, the individual who was negatively affected by the bad faith disclosure is eligible for compensation or other remedial measures.

In New Zealand the motive of the person reporting wrongdoing is not relevant, but the PID Act stipulates that the employee must believe on reasonable grounds that the information about suspected serious wrongdoing is true, or likely to be true, in order for the disclosure to come within the act and its protections.[17] Similarly in the United States, motive is not a relevant factor, but the whistleblower must "reasonably believe" that the

information is evidence of wrongdoing. Section 7 of the US Inspector General Act of 1978 states that employees are not protected from reprisal for disclosing information if the disclosure is made with the knowledge that it is false or with wilful disregard for its truth or falsity. In addition, if an individual knowingly and wilfully makes a materially false statement, the individual may also be subject to criminal liability.[18]

The removal of protections if a whistleblower makes a disclosure in bad faith is also exercised in Japan, where to warrant protection a disclosure must be made "without a purpose of obtaining a wrongful gain, a purpose of causing damages to others, or any other wrongful purpose".[19] A number of other OECD countries refer to a similar forfeiture of protection; for example, in Australia, the PID Act protections do not apply to those knowingly making a statement that is false or misleading.[20] In Canada, the PSDPA refers to a "protected disclosure" as being a "disclosure that is made in good faith" by public servants. Accordingly, the Public Sector Integrity Commissioner may refuse to deal with a disclosure or to commence an investigation, and the commissioner may cease an investigation if s/he is of the opinion that the disclosure was not made in good faith or the information that led to the investigation under section 33 of the PSDPA was not provided in good faith.[21]

Estonia's Anti-Corruption Act also removes protections from those that disclose in bad faith, and specifically maintains that confidentiality shall not be ensured.[22] In Hungary, confidentiality is not ensured following disclosures in bad faith, and furthermore, if a bad faith disclosure caused unlawful damage or harm to the rights of others, the personal data of the individual who made the disclosure may be disclosed upon request of the person or body entitled to initiate proceedings.[23] In Israel, the protection for individuals who report in bad faith and render it a disciplinary matter is revoked,[24] and the court can grant compensation in favour of an employer or another employee if a disclosure was filed in bad faith.

Greece, Portugal, Ireland and the United Kingdom are the only OECD member countries surveyed not to include measures to preclude reporting in bad faith.[25] Nevertheless, in Ireland and in the United Kingdom, individuals who are discovered to have reported in bad faith are dealt with by disciplinary procedures. In Ireland, punishing those who report in bad faith was considered as a potential disincentive to genuine whistleblowers. To this end, Ireland also omitted the public interest test component, deeming it a potential obstacle for individuals to come forward and acknowledging that in practice it may be difficult to distinguish what could qualify as a matter of public interest. As a result, the measures in place in Ireland reflect the notion that the public interest involved in attracting genuine whistleblowers far outweighs the public interest in seeking to punish persons who may report allegations in bad faith.

## The availability of clear reporting channels facilitates disclosures

Channels of disclosure need to be clearly demarcated and facilitate disclosure, as otherwise whistleblowers may lack confidence in the system or may not be comfortable or persistent in coming forward. Findings from 1 000 callers to the UK's Public Concern at Work (PCaW) confidential advice line found that most whistleblowers (44%) raise a concern only once and a further 39% go on to raise their concern a second time (PCaW, 2013).

Whistleblower protection systems often establish one or more channels through which protected disclosures can be made. These generally include internal disclosures,

external disclosures to a designated body, and external disclosures to the public or to the media. Employees who witness wrongdoing should be able to disclose information first internally, without fear of reprisal. An unimpeded path, free from reprimand and retribution, can pave the way for an open organisational culture between the discloser and management. This open culture should be set by management and permeate the entire organisation. Organisations should operate on the premise that employees will come forward to management with disclosures of wrongdoing, and that management will support the individual's courage to disclose and follow the measures in place to protect them and investigate the allegations accordingly. By being receptive to disclosures, and encouraging this as a method of detection, management can mitigate the reputational damage that may ensue if an employee discloses externally.

Internal reporting is a channel that whistleblowers in many countries often explore first, as "people in the UK, Turkey and South Korea would all prefer to blow the whistle through a formal internal procedure" (Transparency International, 2009, p. 12). However, although employers should react in a supportive and accountable manner by executing the letter of the law or abiding by organisational policies, this does not always occur. In these cases, the whistleblower often fears their employer's indifference and feels as though there is no choice but to disclose externally to ensure a timely and well received response that will effect change and end the wrongdoing. Opting for external disclosures as the first port of call may be indicative of a closed organisational culture, where management is not responsible or willing to protect its employees (ODAC et al., 2004).

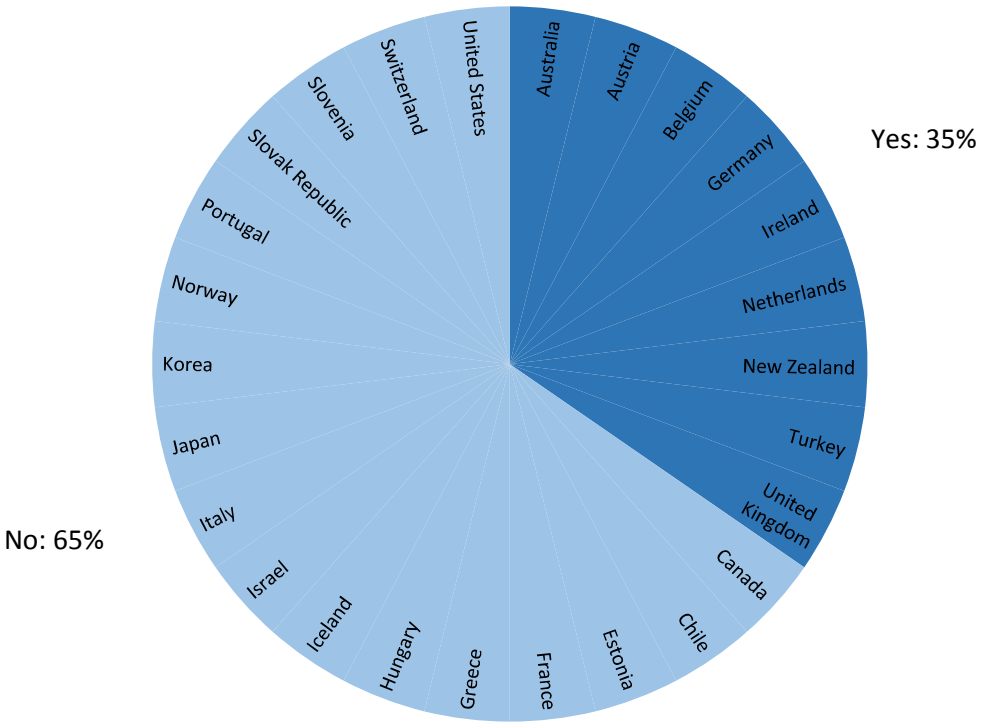
### *Availability of internal and external reporting channels enables whistleblowers to choose how to disclose*

The individual circumstances of each case should determine the most appropriate channel of disclosure (Council of Europe, 2014). As such, a variety of channels need to be available to match the circumstances and to allow whistleblowers the choice of which channel they trust most to use. As outlined by the UNODC Resource Guide on Good Practices in the Protection of Reporting Persons and the UNODC Technical Guide to the United Nations Convention against Corruption (UNODC, 2015, UNODC, 2009), channels of reporting should not be limited to a choice of either reporting internally within the organisation or directly to external authorities. Instead, both levels should operate concurrently so that potential whistleblowers have a choice in where they would like to submit their disclosures.

Individuals who decide to report should have the option of submitting their disclosure to an external body, if upon disclosing internally they were not provided with an adequate response within a certain timeframe, or if appropriate action was not taken. In addition, potential whistleblowers should have direct access to external review agencies, allowing them to skip the internal element of the disclosure process, if they fear and have reason to believe that they would be reprimanded by their organisation's internal mechanism, that their anonymity/confidentiality cannot be guaranteed, or that the misconduct would be covered up. Direct access to external channels may also be necessary in the case of a disclosure relating to an imminent threat or emergency, in which case internal channels may be overly cumbersome. Regardless of the assigned paths of disclosure, providing whistleblowers with the chance to decide to whom to disclose, or within which parameters, enables them to disclose with greater ease.

In nine OECD countries surveyed,[26] public sector whistleblowers are required to bring their disclosures to the attention of their employer first as a measure within their tiered systems (Figure 2.3).

**Figure 2.3. OECD countries following a tiered approach for reporting protected disclosures in the public sector**




*Notes:* Respondents were asked the following question: "Do whistleblowing provisions follow a tiered approach whereby disclosures need to first be made internally within the organisation, then to an external body and as a last resort to the public/media? "

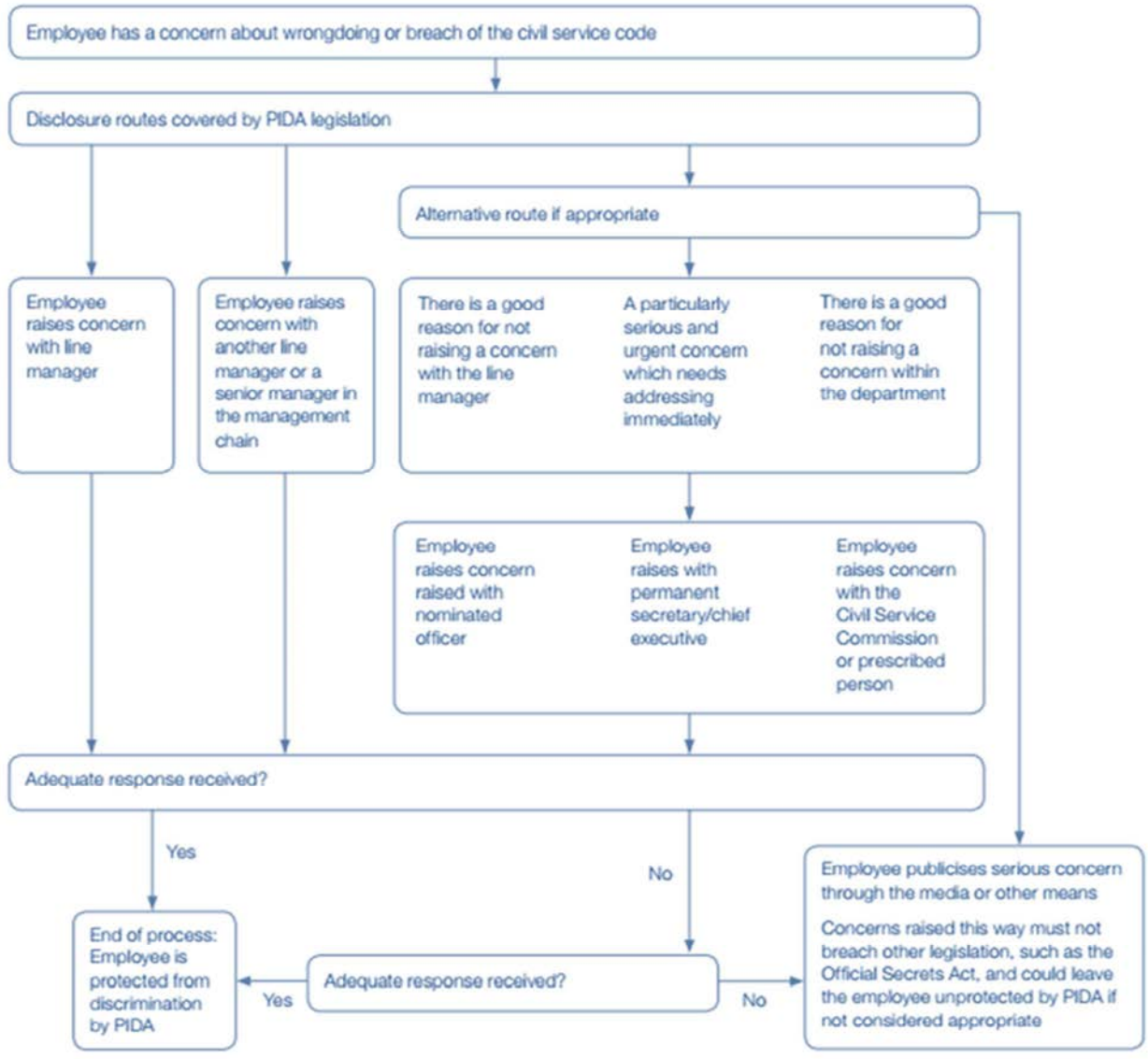
The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

The United Kingdom applies a tiered approach whereby disclosures may be made to one of the following tiers of persons (Figure 2.4):

- Tier 1: Internal disclosures to employers or Ministers of the Crown.
- Tier 2: Regulatory disclosures to prescribed bodies (e.g. the Financial Services Authority or Inland Revenue).
- Tier 3: Wider disclosures to the police, media, members of parliament and non-prescribed regulators.

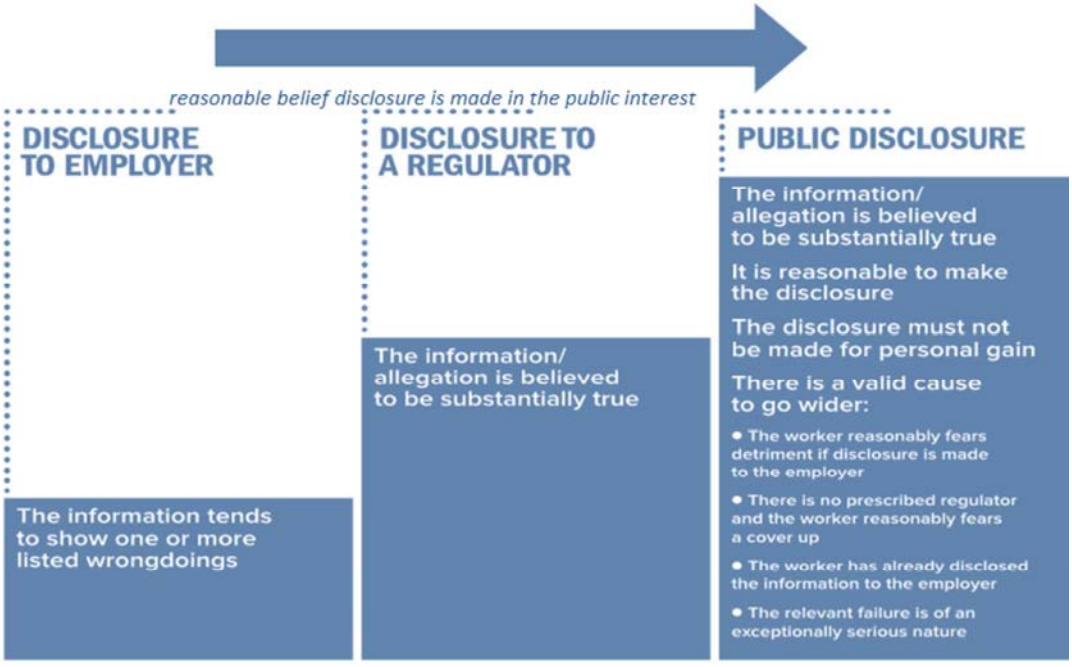
**Figure 2.4. Example of a whistleblowing process in the United Kingdom according to the Public Interest Disclosure Act (PIDA)**




Source: National Audit Office analysis

Each tier requires an incrementally higher threshold of conditions to satisfy for the whistleblower to be protected (Figure 2.5). This is intended to encourage internal reporting and the use of external reporting channels as a last resort (Banisar, 2011). In the United Kingdom, the majority of working adults (83%) indicated that if they had a concern about possible corruption, danger or serious malpractice at work they would raise it with their employers (PCaW, 2013).

**Figure 2.5. Progression of tiers in the UK System**




*Source:* ©Public Concern at Work 2014

Similarly, in Australia, a public interest disclosure can be made by an Australian public servant 1) within the government, to an authorised internal recipient or a supervisor, concerning suspected or probable illegal conduct or other wrongdoing, 2) to anybody, if an internal disclosure of the information has not been adequately dealt with, and if wider disclosure satisfies public interest requirements is a disclosure of information, 3) to anybody if there is substantial and imminent danger to health or safety, or 4) to an Australian legal practitioner for purposes connected with first three points (Table 2.2).

In Australia the Public Interest Disclosure Act gives employees four channel to disclose wrongdoing: Public interest disclosures.

**Table 2.2. Australia's procedures for a public interest disclosure**

| Item | Type of disclosure | Recipient | Further requirements |
|---|---|---|---|
| 1 | Internal disclosure | An authorised internal recipient, or a supervisor of the discloser | The information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct. |
| 2 | External disclosure | Any person other than a foreign public official | (a) The information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct.<br>(b) On a previous occasion, the discloser made an internal disclosure of information that consisted of, or included, the information now disclosed.<br>(c) Any of the following apply:<br>(i) A disclosure investigation relating to the internal disclosure was conducted under Part 3, and the discloser believes on reasonable grounds that the investigation was inadequate;<br>(ii) A disclosure investigation relating to the internal disclosure was conducted (whether or not under Part 3), and the discloser believes on reasonable grounds that the response to the investigation was inadequate;<br>(iii) This Act requires an investigation relating to the internal disclosure to be conducted under Part 3, and that investigation has not been completed within the time limit under section 52.<br>(d) The disclosure is not, on balance, contrary to the public interest.<br>(e) No more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct.<br>(f) The information does not consist of, or include, intelligence information.<br>(g) None of the conduct with which the disclosure is concerned relates to an intelligence agency. |
| 3 | Emergency disclosure | Any person other than a foreign public official | (a) The discloser believes on reasonable grounds that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the environment.<br>(b) The extent of the information disclosed is no greater than is necessary to alert the recipient to the substantial and imminent danger.<br>(c) If the discloser has not previously made an internal disclosure of the same information, there are exceptional circumstances justifying the discloser's failure to make such an internal disclosure.<br>(d) If the discloser has previously made an internal disclosure of the same information, there are exceptional circumstances justifying this disclosure being made before a disclosure investigation of the internal disclosure is completed.<br>(e) The information does not consist of, or include, intelligence information. |
| 4 | Legal practitioner disclosure | An Australian legal practitioner | (a) The disclosure is made for the purpose of obtaining legal advice, or professional assistance, from the recipient in relation to the discloser having made, or proposing to make, a public interest disclosure.<br>(b) If the discloser knew, or ought reasonably to have known, that any of the information has a national security or other protective security classification, the recipient holds the appropriate level of security clearance.<br>(c) The information does not consist of, or include, intelligence information. |

*Source:* Public Interest Disclosure Act (2013), Division 2: Public Interest disclosures

Countries such as Canada, Hungary, Italy, Korea, the Slovak Republic, Slovenia and Switzerland do not follow a tiered system, instead they have alternate reporting channels for reporting disclosures. In Canada, disclosures can be reported to an immediate supervisor, senior officers responsible for internal disclosures, or to the Office of the Public Sector Integrity Commissioner of Canada (see case study of Canada). In Hungary's whistleblower protection system there are appropriate channels through which

to disclose wrongdoing. Hungary has also introduced the Lawyer for the Protection of Whistleblowers institution, which states that: "receiving whistleblower reports concerning the contracting party, the contracted lawyer for the protection of whistleblowers can also guarantee the protection of whistleblowers through legal professional privilege. Furthermore, the engagement contract of a lawyer for the protection of whistleblowers may not be terminated without giving reasons" (Government of Hungary, 2013). In the Slovak Republic there are specific requisites for an employer with 50 employees or more to establish reporting channels and appoint a responsible person charged with receiving and assessing disclosures. This obligation is coupled with the duty to issue an internal regulation that outlines the specific measures regarding: confidentiality and the processing of personal data, keeping record of the disclosure within a specific registry, and following up with the whistleblower upon assessment of their disclosure (DLA Piper, 2015).[27]

Despite the similarity between certain elements of countries' reporting channels, they may have different approaches to protection when disclosures are reported to the media. Media outlets can be pursued as a channel of disclosure in order to attract attention to an issue or provoke action faster than would be possible through internal or other external reporting mechanisms. In addition, some disclosers, lacking trust in their superiors, designated bodies or law enforcement authorities, may turn to a public outlet in the hope that their allegations will be investigated and assessed appropriately and transparently. For instance, some Australian states provide that a public interest disclosure can be reported to a journalist if the entity to which the disclosure was made decided not to investigate it, or investigated it but did not recommend any action, or did not notify the whistleblower after six months.[28] Given the high risks of retaliation and reputational damage that can accompany reports to the media or general public, in addition to the lack of formalised follow-up processes, this channel is often considered and advised as a last resort.

In some countries, such as Germany, the concept of professional secrecy can be considered of significant importance, and therefore going to the public with sensitive information can amount to a violation of the rules in place and result in disciplinary action. In the United States, if an employee is legally prohibited from disclosing certain information, s/he is not protected when disclosing that information to the public or media. In Canada, however, disclosures can be made to the public if it is not prohibited under the law and if there is not sufficient time to make a disclosure of what constitutes a serious offence or if there is an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.[29] In Belgium, Chile, Estonia, Korea and Switzerland, media disclosures are not protected.

Whether or not disclosures are administered through a tiered system, clear reporting channels should be available and the related considerations made apparent. The availability of channels is not sufficient to render a confusing process clear. Instead, the disclosure process should be accompanied by an explanation of the steps to follow and the processes to abide by in order to ensure that whistleblowers are not only well informed of whom to disclose to, but also of the potential repercussions of disclosing, which can depend on the party disclosed to and the subject matter.

Some countries impose criminal sanctions if employees disclose information concerning official secrets or issues pertaining to national security. For disclosures of matters concerning national security, official or military secrets, or classified information, countries may consider adopting special schemes, rules, procedures and safeguards that

take into account the nature of the subject matter and prevent unnecessary external exposure of sensitive information (Council of Europe, 2014). In Australia, for example, a disclosure of conduct that concerns an intelligence agency can be disclosed to the intelligence agency or to the Inspector General of Intelligence and Security, if the discloser believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Inspector General of Intelligence and Security (Box 2.5).[30]

**Box 2.5. Definition of intelligence information in Australia**

In Australia, Section 41 of the Public Interest Disclosure Act defines rules and procedures for the disclosure of intelligence information.

Section 41. Meaning of intelligence information

(1) Each of the following is intelligence information:

a) information that has originated with, or has been received from, an intelligence agency;

b) information that is about, or that might reveal:

I. a source of information referred to in paragraph (a); or

II. the technologies or methods used, proposed to be used, or being developed for use, by an intelligence agency to collect, analyse, secure or otherwise deal with, information referred to in paragraph (a); or

III. operations that have been, are being, or are proposed to be, undertaken by an intelligence agency;

(c) information:

I. that has been received by a public official from an authority of a foreign government, being an authority that has functions similar to the functions of an intelligence agency; and

II. that is about, or that might reveal, a matter communicated by that authority in confidence;

(d) information that has originated with, or has been received from, the Defence Department and that is about, or that might reveal:

I. the collection, reporting, or analysis of operational intelligence; or

II. a program under which a foreign government provides restricted access to technology;

(e) information that includes a summary of, or an extract from, information referred to in paragraph (a), (b), (c) or (d);

(f) information:

I. that identifies a person as being, or having been, an agent or member of the staff (however described) of the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation (other than a person referred to in subsection (3)); or

II. (ii) from which the identity of a person who is, or has been, such an agent or member of staff (however described) could reasonably be inferred; or

III. that could reasonably lead to the identity of such an agent or member of staff (however described) being established;

(g) sensitive law enforcement information.

*Source*: Australian Public Interest Disclosure Act (2013), Part 2, Division 2, Subdivision D, Section 41.

In the United States, if a whistleblower makes a disclosure that is specifically ordered by law or Executive Order to be kept secret in the interest of national defence or the conduct of foreign affairs, the disclosure is "prohibited by law" and will not be afforded whistleblower protection unless it is made to the agency's inspector general or the Office of Special Counsel. The 1999 Intelligence Community Whistleblower Protection Act only allows national security whistleblowing to the House and Senate Intelligence Committees and the agency's inspector general and provides limited protection for intelligence employees. The Military Whistleblower Protection Act regulates whistleblowing in the armed forces and protects members of the armed forces who disclose information that the member reasonably believes constitutes evidence of a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Members can report to the following:[31]

- A Member of Congress.
- An Inspector General.
- A member of a Department of Defense audit, inspection, investigation, or law enforcement organisation.
- Any person or organisation in the chain of command.
- Any other person or organisation designated pursuant to regulations or other established administrative procedures for such communications.

New Zealand's whistleblower protection system maintains that disclosures related to national security can only be made to a person who has the appropriate security clearance and who is authorised to have access to the information. The only appropriate authority to disclose to is the Inspector General of Intelligence and Security (Box 2.6). If a disclosure emerging from the Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, the Ministry of Defence, or the New Zealand Defence Force concerns the government's international relations or security and intelligence matters, the same rules regarding security clearance and authorisation apply, but the appropriate authority to disclose to is an ombudsman.[32]

**Box 2.6. Whistleblowing procedures in New Zealand's intelligence and security agencies**

In New Zealand, the internal procedures of an intelligence and security agency must:

a) provide that the persons to whom a disclosure may be made must be persons holding an appropriate security clearance and be authorised to have access to the information; and

b) state that the only appropriate authority to whom information may be disclosed is the Inspector-General of Intelligence and Security; and

c) invite any employee who has disclosed, or is considering the disclosure of, information under this Act to seek information and guidance from the Inspector-General of Intelligence and Security, and not from an Ombudsman; and

d) state that no disclosure may be made to an Ombudsman, or to a Minister of the Crown other than:

- the Minister responsible for the relevant intelligence and security agency; or
- the Prime Minister.

*Source*: New Zealand's Protected Disclosures Act (2000), Article 12.

Overly strict reporting provisions, whether inside or outside the scope of national security, could be perceived as intending to silence potential whistleblowers. The Australian Border Force Act entered into force on 1 July 2015 and (in section 42[1]) includes a penalty of two years' imprisonment for immigration or border protection workers at onshore or offshore immigration detention facilities who make a record of or disclose information obtained in their official capacity, without the authorisation of the Secretary of the Australian Department of Immigration and Border Protection. This legislation has received substantial criticism for its potential to silence reports of misconduct or wrongdoing in the context of concerns about the treatment of asylum seekers and conditions of detention centres.[33] On the same day as the Border Force Act's entry into force, more than 40 current and former workers at detention centres on Nauru and Manus Island wrote an open letter to the Australian Prime Minister and Minister for Immigration stating their intention to "continue to advocate, for the health of those for whom we have a duty of care, despite threats of imprisonment, because standing by and watching sub-standard and harmful care, child abuse and gross violation of human rights is not ethically justifiable."[34]

### *Hotlines are a useful method of detecting wrongdoing*

Hotlines or web platforms through which whistleblowers can disclose information regarding alleged wrongdoing may be established as a government directive, as part of a country's overarching goal to detect corruption and misconduct, or through third party initiatives. In addition to wide reaching governmental arrangements, these types of mechanisms can take shape through civil society or be outsourced to private ventures. However these mechanisms are established, the premise and purpose of their existence is to provide individuals with a channel for disclosing wrongdoing that they may feel more comfortable with than alternatives.

In some cases, hotlines provide potential whistleblowers with the option of disclosing information anonymously, a practice that should be coupled with the allocation of a unique identification number to callers that allows them to call back later anonymously to receive feedback or answer follow-up questions from investigators (Banisar, 2011). A number of OECD countries have established whistleblower hotlines and websites as part of their government initiatives to facilitate the reporting of wrongdoing and particularly the reporting of acts of corruption. These initiatives are sometimes complemented by non-governmental civil society organisations and national chapters of Transparency International that operate within these countries. It is important, however, that reporting persons are aware that only reporting to relevant law enforcement authorities is protected in some countries, and reports made to civil society will not necessarily receive follow up or result in protection for reprisals. Governments may also consider extending protection to reports made internally or to other external actors, such as the media and civil society.

In Korea, the ACRC has established a telephone hotline to receive whistleblower reports. In Estonia, cases of corruption can be reported through a hotline and website linked to the government's anti-corruption website. There is also the possibility to report suspicions about corruption to the Police and Border Guard Board through an anonymous line. In Hungary, an anonymous service, "Phone Witness" was set up by the National Police Department. The country's National Crime Prevention Board also has an email service in place. In Austria, Mexico, New Zealand, Norway and the Slovak Republic, government authorities have established their own reporting hotlines and websites, often through their respective Ministries of Justice or Public Administrations Bureaus (Box 2.7). In the United Kingdom, PCaW provides an advice hotline to potential

whistleblowers. The "Speak Up" hotline in Ireland provides advice and support "to witnesses, whistleblowers and victims of corruption and other wrongdoing" and is provided by Transparency International (Transparency International, 2015).

**Box 2.7. Austria's reporting hotline**

In 2013, the Federal Ministry of Justice in Austria launched a portal (https://www.bkms-system.net/wksta) to enable individuals to report wrongdoing.

Upon reviewing the measures of anonymity provided by this virtual disclosure system, the user is directed to select the type of wrongdoing that best fits the information they would like to disclose, according to the following options: corruption, white collar crime, welfare fraud, financial crime, fraudulent accounting, capital-market offences, and money laundering. Upon selecting the most suitable option, the user is invited to submit their information. The technical setup of the portal ensures that investigators from the Public Prosecutor's Office against Corruption and White Collar Crime are not able to trace submissions or attribute them to anyone's identity, rendering the system an anonymous method of communication.

To ensure that anonymity is guaranteed, when setting up their secured mailbox the discloser is required to choose a pseudonym/user name and password. The anonymity of the information disclosed is maintained using encryption and other security procedures. Furthermore the discloser is asked not to enter any data that give any clues as to their identity and to refrain from submitting their report through the use of a device that was provided by their employer.

Following submission, the Office of Prosecution for Economic Crime and Corruption provides the discloser with feedback and the status of their disclosure via a secure mailbox. If there are issues left to be clarified regarding the case, the questions are directed to the discloser through an anonymous dialogue.

*Source*: Schoenherr, (2013) *Austria: Whistleblower Hotline is launched online,* Available at: www.schoenherr.eu/knowledge/knowledge-detail/austria-whistleblower-hotline-is-launched-online/.

## The debate on anonymous reporting

Anonymous disclosures show a lack of trust in the whistleblower protection system and an organisation's integrity. The notion of anonymous reporting is debated; some consider it as a safe impetus and avenue for individuals to come forward, while others remain sceptical regarding the extent of its protections.

### *Anonymous reporting: Better safe than sorry?*

Some believe that the possibility to disclose anonymously may encourage reporting, especially where it is culturally unsuitable to be a whistleblower, or where the institutional safeguards are non-existent or too weak to provide adequate protection. In certain countries, the term whistleblower is often associated with being an informant, a traitor, a spy or even a snitch (Transparency International, 2009). Further concerns regarding anonymous disclosures, as highlighted by Transparency International, include the possibility that the identity of a whistleblower could be deduced from the circumstances, and that a disclosure made anonymously may focus attention on the identity of the person disclosing rather than on the message disclosed (Transparency International, 2013).

Australia's whistleblower protection system allows for a public interest disclosure to be made anonymously as one of three options for reporting a public interest disclosure. In addition, it provides the option of making a public interest disclosure verbally or in writing, and without the discloser asserting that the disclosure is made for the purposes of the act.[35] Within Japan, anonymous reporting is protected by the interpretation of a number of articles within the Japanese WPA.[36] In the Slovak Republic, employees may file an anonymous report to the internal disclosure handling system.[37] In Slovenia, the Commission for the Prevention of Corruption treats all reports equally, regardless of whether or not the identity of the discloser is known. To this end, reports can be submitted to the Commission via mail, e-mail, telephone, website, fax or in person.[38]

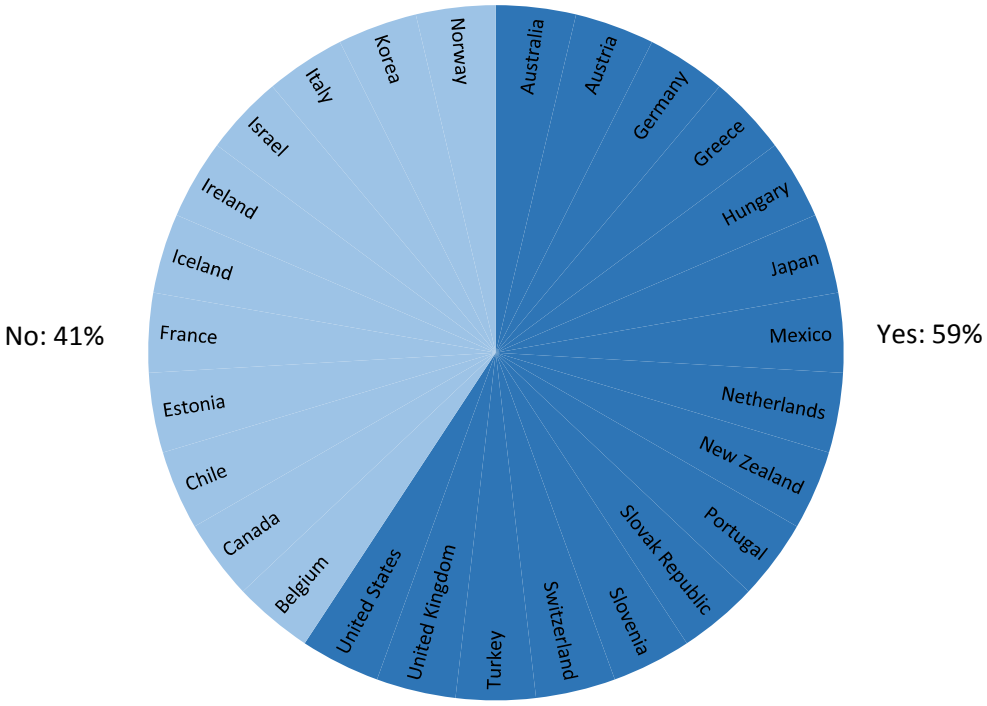
A number of countries including, Germany, the Netherlands, Hungary and the United States have established electronic intake systems and hotlines that cater to, among others, anonymous reporting. Some German states have government ombudsmen, as well as hotlines, that allow whistleblowers to report anonymously. In the United States, each inspector general has a hotline system that permits individuals to make anonymous disclosures.[39] The Netherlands has a national trustline where individuals can report suspected malpractices anonymously.[40] Hungary's whistleblower protection system enables whistleblowers to remain anonymous through the use of a protected electronic channel, ensured by the Commissioner for Fundamental Rights.[41] Furthermore, in order to provide necessary follow up measures, anonymous disclosures are assigned individual identification numbers so that their progress can be followed online (Government of Hungary, 2013).

### *Anonymous reporting: unprotected identities?*

Others believe that anonymous disclosures can render reporting systems less effective as the large volume of cases can render investigations difficult due to insufficient information and limited options for follow up. Concerns also exist regarding reliability and vindictive allegations,[42] which can be based on the assumption that anonymity may make the whistleblower unaccountable and may attract "the cranks, the timewasters and the querulents" (Latimer and Brown, 2008). It is also argued that it is easier to protect whistleblowers once their identity is disclosed, as the question of who requires this protection is crucial. Nevertheless, "some critics argue that whistleblowing laws encourage employees to speak out and reveal their identity, leading them to believe mistakenly that they are protected, while they in fact become easier targets of reprisals than if the law didn't exist" (Chêne, 2009, p.4). These differences in opinion regarding anonymity are evidenced among OECD countries: currently, whistleblowers can report anonymously in slightly over half of surveyed countries (Figure 2.6).

Although anonymity can provide a strong incentive for whistleblowers to come forward, a number of whistleblower protection systems exclude anonymous disclosures or state that they will not be acted upon. For instance, in Canada there is no provision for anonymous reporting. In order to trigger protections provided for by the whistleblower protection system, a public servant must be identifiable as the source of the disclosure or be involved in a disclosure investigation.

**Figure 2.6. OECD countries guaranteeing anonymity to public sector whistleblowers**




*Notes:* Respondents were asked the following question: "Can whistleblowers protect their identity through anonymous reporting?" While Estonia provides an anonymous reporting line with the Police and Border Guard Board, it is not considered to have anonymous reporting for the purposes of this figure. In Israel, there is no legal barrier to reporting corruption anonymously.

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

### *Most whistleblower protection systems protect the identity of whistleblowers through measures of confidentiality*

While there is discrepancy among OECD countries regarding the provision of protection to whistleblowers who disclose anonymously, most whistleblower protection systems provide for the protection of whistleblowers' identities, which are kept confidential unless the whistleblower provides his/her consent for disclosure.[43] It is important that confidentiality extends to all identifying information. The mechanisms in place in the United States, for example, prohibit the disclosure of identifying information of a federal sector whistleblower without consent, unless the Office of the Special Counsel (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."[44] Where the whistleblower's identity is disclosed, the whistleblower will be informed in advance.

In some instances, whistleblower identification is key, specifically, in cases where an access to information law may apply and result in the submission of identifying information. The whistleblower protection provisions included in Italy's Anti-Corruption Law is one example of where a whistleblowing report is not covered by an access to information law (Box 2.8).

**Box 2.8. Reports by whistleblowers and the access to administrative documents law in Italy**

In Italy the access to administrative documents law cannot be used to gain access to identifying information of the whistleblower. Under article 54b (Protection for public employees reporting offences), the fourth paragraph states that the report shall not be made available in accordance with Articles 22 and seq. of Law no. 241 of 7 August 1990. The law referred to is the Italian access to administrative documents law.

*Source*: OECD (2013), OECD Integrity Review of Italy: Reinforcing public sector integrity, restoring trust for sustainable growth, OECD Publishing, Paris.

### *Sanctions can be imposed for disclosing the identity of a whistleblower*

Coming forward and disclosing wrongdoing without resorting to channels of anonymity requires substantial trust in the disclosure system. This trust often stems from a system based on integrity and the assurance that disciplinary mechanisms are in place to reinforce provisions such as confidentiality. To this end, some countries impose sanctions for disclosing the identity of the whistleblower. Australia, for example, imposes a penalty of six months' imprisonment or a fine for revealing the identity of a whistleblower.[45] In Korea, any person who discloses a whistleblower's personal information, or other facts that infer their identity, is punished by imprisonment for up to 3 years or fined up to KRW 30 million (Korean won).[46]

However, there is some interplay between the obligation to maintain the anonymity of a whistleblower, the notion of natural justice, and the right of the accused to know the identity of their accuser. For instance, in Ireland, there are exceptions for when the anonymity of a discloser will not be maintained:

1. The person to whom the protected disclosure was made shows that he or she took all reasonable steps to avoid so disclosing any such information.
2. The person to whom the protected disclosure was made reasonably believes that the person making the disclosure does not object.
3. The person to whom the protected disclosure was made reasonably believes that disclosing any such information is necessary for:
    1. The effective investigation of the relevant wrongdoing concerned.
    2. The prevention of serious risk to the security of the State, public health, public safety or the environment.
    3. The prevention of crime or prosecution of a criminal offence.
4. The disclosure is otherwise necessary in the public interest or is required by law.[47]

## Use of incentives to encourage reporting: Monetary rewards, follow-up mechanisms and certificates

Disclosing wrongdoing can be a daunting undertaking that can lead to a loss of livelihood and professional marginalisation. In addition to the stigma that may be attached to blowing the whistle, employees may also fear financial and reputational degradation. In order to curtail these potential losses and encourage individuals to come forward in the detection of wrongdoing, countries have introduced various incentives, ranging from tokens of recognition to financial rewards. While these are often considered as incentives, financial payments to whistleblowers can also provide financial support, for example living and legal expenses, following retaliation.

### *Three OECD countries provide monetary rewards for whistleblowers who disclose wrongdoing*

In the United States, the False Claims Act allows individuals to file an anti-fraud lawsuit on behalf of the government in order to recover lost or misspent money. If the lawsuit is successful, the individual can receive up to 30% of the amount recovered.[48] Between 1987 and 2012, some USD 3 billion had been distributed to whistleblowers under the False Claims Act (Valencia, 2011). In addition, the False Claims Act has dramatically increased the amount of money recovered by the government: the US government currently recovers, on average, over USD 1 billion annually, compared to an average of USD 10 million prior to the act's enactment. The Dodd-Frank Act (2014) authorises the Securities and Exchange Commission (SEC) to provide monetary awards to eligible individuals who come forward with high-quality original information that leads to a commission enforcement action in which over USD one million in sanctions is ordered. The range for awards is between 10% and 30% of the money collected. Additional monies can be awarded to whistleblowers for qualified related actions by other law enforcement agencies.[49] Since the SEC whistleblower programme's inception, the SEC has paid more than USD 50 million to whistleblowers. Data from the Internal Revenue Service (IRS) shows that from 2007 through 2012, 1 967 bounty hunters submitted tax-evasion claims on 11 372 companies (Browning, 2014). In 2013 alone, the total award amount to whistleblowers was over USD 53 million, representing 14.6% of the total amount collected (Table 2.3).

**Table 2.3. Amounts collected and awards paid to whistleblowers by the IRS**

(Financial years 2009-2013)

| | 2009 | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|---|
| **Awards paid** | 110 | 97 | 97 | 128 | 122 |
| **Collections over USD 2 000 000** | 5 | 9 | 4 | 12 | 6 |
| **Total Amounts of Award Paid (in USD)** | 5 851 608 | 18 745 327 | 8 008 430 | 125 355 799 | 53 054 302 |
| **Amounts collected (in USD)** | 206 032 872 | 464 695 459 | 48 047 500 | 592 498 295 | 367 042 420 |
| **Awards paid as a percentage of amounts collected** | 2.80% | 4.00% | 16.70% | 21.20% | 14.60% |

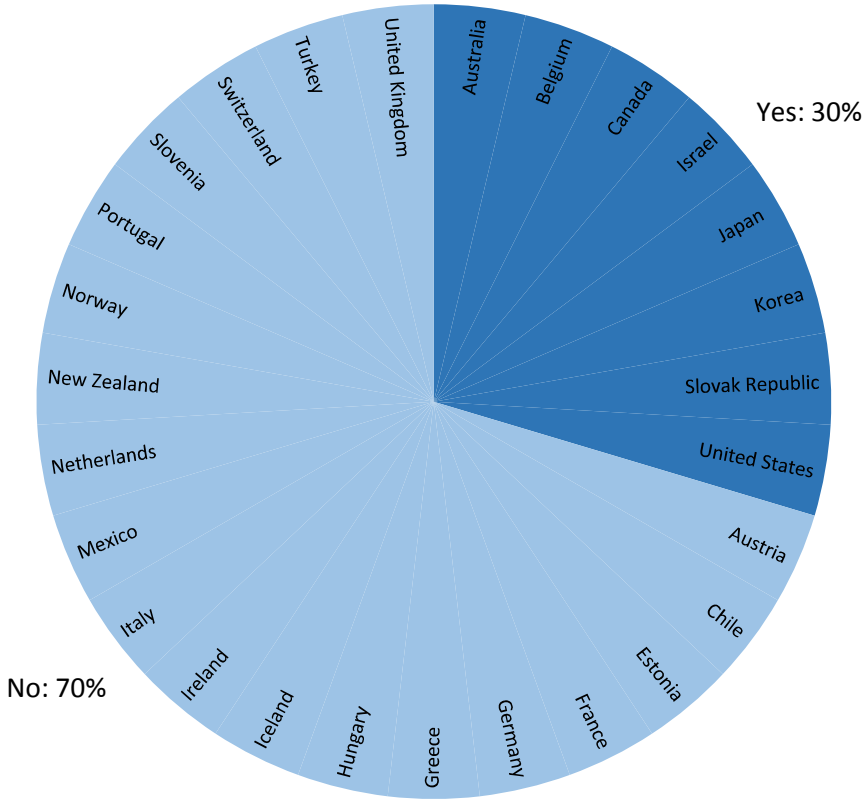
*Source*: Internal Revenue Service Fiscal Year 2013 Report to the Congress on the Use of Section 7623, p. 23, www.irs.gov/pub/whistleblower/Whistleblower_Annual_report_FY_13_3_7_14_52549.pdf.

Korea also provides monetary rewards for whistleblowers who disclose acts of corruption. Under the Enforcement Decree of the Anti-Corruption Act, which was amended and took effect in October 2015, the ACRC shall provide a maximum of approximately USD 2.6 million (KRW 3 billion) to whistleblowers who directly contribute to increasing the revenue of public agencies. It may also provide a maximum of approximately USD 170 thousand (KRW 200 million) to whistleblowers who it deems have indirectly contributed to anti-corruption efforts in the public sector. The Public Interest Whistleblower Act was also amended and is set to take effect in 2016. Under the amendments, the ACRC shall provide a maximum of an estimated USD 1.7 million (KRW 2 billion) to internal whistleblowers, such as employees, who are highly likely to undergo disadvantageous treatment from their organisation due to having blown the whistle, and who directly contributed to increasing revenue of public agencies by disclosing wrongdoing. In addition, under the amended Public Interest Whistleblower Act, the ACRC may provide up to an estimated USD 170 thousand (KRW 200 million) to internal and external whistleblowers, including citizens or customers, whom the ACRC deems to have indirectly contributed to safeguarding the public interest.

Despite the appeal of monetary incentives, it has been argued that financial rewards will be most useful and most likely to encourage disclosures in cases of low moral outrage. In cases of high moral outrage, which are likely to create a greater ethical stake in disclosure, appeals should instead be made to duty, as financial incentives may conflict with internal motivations to report.[50]

Incentive measures can be expanded to include features such as an expedited process and follow-up mechanisms. These exist in eight OECD countries (Figure 2.7). For instance, the whistleblower protection system in Israel provides for the president to award a certificate of merit to a public servant who filed a report: in good faith, with an inspected body in accordance with procedures, regarding a corrupt act or other infringement of ethical conduct that occurred at his or her workplace, and where a report has been found to have been justified. The certificate is a symbol of public recognition of that person's contribution to ethical conduct in public institutions in Israel. In a similar context, but from a civil society perspective, Ireland’s Transparency International chapter has launched a National Integrity Award in 2015, as a symbol of recognition of individuals and organisations that contributed to the public interest by disclosing wrongdoing (Transparency International, 2015).[51]

**Figure 2.7. Incentives for whistleblowers to disclose wrongdoing**




*Notes:* Respondents were asked the following question: "Are there any incentives in place for whistleblowers to come forward? This could for example include the expediency of the process, follow-up mechanisms, and financial rewards."

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

Source: OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

The decision to disclose wrongdoing is often difficult. Assuring employees that their concerns are being heard and that they are supported in their choice to come forward is paramount to the proper functioning and integrity of an organisation, and society, as a whole. There are multiple measures organisations can take to encourage the detection and disclosure of wrongdoing. These measures would contribute to an open organisational culture and help to reinforce trust, working relationships and boost staff morale. Providing explicit protection through the clear delineation of protection coverage enables those working for an organisation, irrespective of their role, to recognise their positioning concerning whistleblower protection. Furthermore, by clearly identifying the subject matter that constitutes a protected disclosure, as well as the relevant reporting channels to pursue, employees will have certainty about the types of disclosures that warrant

protection, to whom they should be reported, and in which order. Eliminating the element of uncertainty from this process can result in more people coming forward with the wrongdoing they have detected.

Throughout OECD countries, hotlines and, in some cases, the option to report anonymously, have been provided as a mechanism to encourage individuals to come forward. While measures affording anonymous reporting and incentives are not widely applied by OECD countries, the overarching mechanism that is in place by most whistleblower protection systems is confidentiality. Being certain that the information provided remains confidential, along with one's identity, is an essential factor in disclosing wrongdoing. Maintaining confidentiality is the first element of a whistleblower protection system, when this fails, reprisals may ensue.

## *Notes*

1 Act CLXV. of 2013 on Complaints and Public Interest Disclosures, (Art. 1, paragraph 4).

2 See Article 9 of the Labor Standards Act (Act No. 49 of 1947) and Whistleblower Protection Act (Act No. 122 of 2004).

3 As established in the UK PDA §43(a), (b); the Japanese WPA art. 2.3; the US WPA §2(a)(2); Australian PDA §4; and Canadian PSPDA art. 8. See also Devine & Walden (2013).

4 See title 5 of the United States Code (5 U.S. Code § 1213).

5 See Public Servants Disclosure Protection Act of 2005, under paragraph 8(c) of the Act.

6 What is 'gross mismanagement' in the public sector? Available at www.psic.gc.ca/eng/wrongdoing#whatisgross.

7 See New Zealand Protected Disclosures Act 2000, in section 3(1

8 See New Zealand Protected Disclosures Act 2000, in section 3(1).

9 See for example MESICIC (2007), p. 26; MESICIC (2008), p. 29; MESICIC (2006), p. 28.

10 See Australia's Public Interest Disclosure Act 2013 Part 2, Division 2, Subdivision A, Article 26 (1) 2 (f).

11 See Public Servants Disclosure Protection Act of 2005 Article 15.1.

12 See Korean Act on the Protection of Public Interest Whistleblowers, Article 2 (Definitions)

13 European Court of Human Rights (2011), application no. 28274/08, July 21st, 2011.

14 See Korean Act on the Protection of Public Interest Whistleblowers, Article 14(4).

15 See New Zealand Protected Disclosures Act 2000 Article 18.

16 The wrongdoing listed as possible answer choices in the 2014 OECD Survey on Public Sector Whistleblower Protection were: a violation of law, rule, or regulation; a serious breach of a code of conduct; a gross mismanagement in the public sector; a misuse of public funds or a public asset; abuse of authority; a criminal offence has been committed, is being committed or is likely to be committed; an act or omission

that creates a substantial and specific danger to the life, health of safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties of the functions of a public servant; types of wrongdoing that fall under the term "corruption", as defined under domestic law(s); knowingly directing or counselling a person to commit a wrongdoing (as set out above). 27 OECD countries responded to this survey question.

17 See New Zealand Protected Disclosures Act 2000, Section 6(1)(b).

18 U.S.C. § 1001; See www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap47-sec1001.pdf.

19 See Japan's Whistleblower Protection Act (Act No. 122 of 2004) Article 2 (Definitions) (1).

20 See Australia PID Act, 2013, Part 7, 37 1) (a).

21 See Public Servants Disclosure Protection Act of 2005, Sections 24(1)(c).

22 Anti-corruption Act (2012), Estonia.

23 Act CLXV of 2013 on Complaints and Public Interest Disclosures (Art. 3. paragraph 4).

24 Neither the Protection of Employees (Exposure of Offenses of Unethical Conduct or Improper Administration) Law, 1997 nor Sections 45(a)-45(e) of the State Comptroller Law, 1958 award protection to complaints that were not filed in good faith.

25 For the purpose of this report, measures to preclude reporting in bad faith do not include disciplinary measures. Rather they include the forfeiture of protections under the law, as well as fines.

26 26 OECD countries responded to this survey question.

27 See Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing; Section 11.

28 See Queensland Public interest Disclosure Act of 2010, part 4.

29 See Canada Public Servants Disclosure Protection Act of 2005, Section 16.

30 See Australia's Public Interest Disclosure Act 2013, Part 2, Division 2, Subdivision C, Section 34, 2.

31 See United States' Military Whistleblower Protection Act, Title 10 U.S.C. § 1034, (b) (1) and (c) (2).

32 See New Zealand's Protected Disclosures Act 2000, Article 13.

33 See, for example, Australia's Brutal Treatment of Migrants, New York Times, 3 September 2015.

34 Open letter regarding the Border Force Act 2015, The Guardian, 1 July 2015 (http://www.theguardian.com/australia-news/2015/jul/01/open-letter-on-the-border-force-act-we-challenge-the-department-to-prosecute).

35 See Australia's Public Interest Disclosure Act 2013 Part 2 Division 2 Section 28.

36 Whistleblower Protection Act namely Articles 2, 3 and 5.

37 See Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing; Section 11, point (4).

38 Provided in response to the 2014 OECD Survey on Public Sector Whistleblower Protection.

39 See Inspector General Act of 1978, 5 U.S.C. app. § 7.

40 Available at: www.nlconfidential.org/.

41 See Act CLXV of 2013 on Complaints and Public Interest Disclosures, Article 6.

42 Presentation by Professor Robert G. Vaughn, American University Washington College of Law, at the webinar "Corruption Whistleblower Systems: Challenges, Practices, Innovations" organised by the World Bank's International Corruption Hunters Alliance on 6 May 2014.

43 For example Estonia's Anti-corruption Act (2012) § 6 (2). For a more in depth discussion on this issue, see: Banisar (2011).

44 See US Whistleblower Protection Act 1989; 5 U.S.C. § 1213(h).

45 Australia's Public Interest Disclosure Act 2013, Section 20.

46 See Korea's Act on the Protection of Public Interest Whistleblowers, Chapter V Article 30 (1)

47 See Irish Protected Disclosures Act (No.14 of 2014) Section 16.

48 False Claims Act, 31 U.S.C.§3729.

49 See www.sec.gov/whistleblower.gov.

50 Presentation by Professor Robert G. Vaughn, American University Washington College of Law, at the webinar "Corruption Whistleblower Systems: Challenges, Practices, Innovations" organised by the World Bank's International Corruption Hunters Alliance on 6 May 2014.

51 See www.transparency.org/news/pressrelease/transparency_international_ireland_launches_first_speak_up_report_from_whis.

## *References*

Act CLXV. of 2013 on Complaints and Public Interest Disclosures.(2013), Hungary, http://corruptionprevention.gov.hu/download/7/a2/90000/KIM%20555_2013-4.pdf.

Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing (2014), the Slovak Republic, www.peterkapartners.com/sqlcache/PETERKA%20%20PARTNERS_Whistleblowing%20News_2015_January.pdf.

Act on the Protection of Public Interest Whistleblowers (2011), Korea, www.unodc.org/res/cld/document/kor/act-on-the-protection-of-public-interest-whistleblowers_html/Republic_of_Korea_Act_on_the_Protection_of_Public_Interest_Whistleblowers.pdf.

American Bar Association, Section of Labor and Employment Law, "Congress Strengthens Whistleblower Protections for Federal Employees," Issue: November-December 2012.

Anti-Corruption Act (2012), Estonia, www.riigiteataja.ee/akt/129062012001 (in Estonian).

Anti-Corruption Law, No. 190/2012 (2012), Italy, www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012-11-06;190!vig=2016-02-02 (in Italian).

Banisar, D. (2011) "Whistleblowing: International Standards and Developments" in Sandoval, I. (ed.), *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, World Bank Institute for Social Research, UNAM, Washington, DC. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180.

Byrne Wallace (2014), *Publications and Insights: Q&A on the Protected Disclosure Act*, Dublin, http://byrnewallace.com/qa-on-the-protected-disclosure-act-2014.html, (accessed 25 July 2015).

Decree Regulating the Reporting of Suspected Abuses in the Civil Service and the Police (Besluit van 15 december 2009, houdende een regeling voor het melden van een vermoeden van een misstand bij de sectoren Rijk en Politie), Netherlands. Devine, T. and S. Walden (2013), *International Best Practices for Whistleblower Policies*, Government Accountability Project, Washington DC.

Chêne, M. (2009), *Good Practice in Whistleblowing Protection Legislation (WPL)*, U4 Anti-Corruption Resource Centre, Bergen, www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/.

Corporations Act (2001), No. 50, 2001 as amended, Australia, www.comlaw.gov.au/Series/C2004A00818.

Council of Europe (2014), *Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers*, Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies, www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf.

Council of Europe (2009), *Report Committee on Legal Affairs and Human Rights Rapporteur*, The Protection of Whistleblowers, Mr Pieter OMTZIGT, The Netherlands, Group of the European People's Party DRAFT Resolution, www.lloydthomas.org/5-SpecialStudies/Council_of_Europe_Draft_WB_Resolution.pdf.

DLA Piper (2015), New legislation in Slovakia: Whistleblowing, DLA Piper, www.dlapiper.com/ru/slovakrepublic/insights/publications/2015/01/new-legislation-in-slovakia-whistleblowing/, (accessed 25 July2015).

European Court of Human Rights (2011), *Heinisch v. Germany*, application no. 28274/08, July 21st, 2011, European Court of Human Rights, Strasbourg, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105777#{"itemid":["001-105777"]}.

False Claims Act, 31 U.S.C. §§ 3729–3733, United States of America, www.law.cornell.edu/uscode/text/31/3729.

Federal Law against Anti-Corruption in Public Procurement Act (2012), Mexico, www.sat.gob.mx/PITA/Paginas/download/LeyFederalAnticorrupcionContratacionesPublicas.pdf (in Spanish).

Federal Criminal Code (2014), Mexico, www.wipo.int/edocs/lexdocs/laws/es/mx/mx148es.pdf (in Spanish).

Federal Criminal Code and Rules, 18 U.S.C., United States of America, www.law.cornell.edu/uscode/text/18.

Federal Law on Administrative Liability of Civil Servants (2002), Mexico, www.banxico.org.mx/disposiciones/circulares/leyes/%7B65D50D3F-E527-8E37-9EA0-360A530C0F57%7D.pdf.

Federal Personnel Act (2013), Switzerland, www.admin.ch/opc/de/classified-compilation/20011178/201307010000/172.220.111.3.pdf (in German).

Government Employees Act no. 70/1996, (1996), Iceland, http://eng.fjarmalaraduneyti.is/media/Starfsmannamal/Government_Employees_Act_No_70_1996.pdf.

Government of Hungary (2013), *Hungarian Parliament Adopts Act on Complaints and Public Interest Disclosures,* http://corruptionprevention.gov.hu/hungarian-parliament-adopts-act-on-complaints-and-public-interest-disclosures (accessed 25 July 2015).

Inspector General Act of 1978, 5 U.S.C., United States of America, www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-app-inspector.pdf.

Internal Revenue Service Fiscal Year 2013 Report to the Congress on the Use of Section 7623, www.irs.gov/pub/whistleblower/Whistleblower_Annual_report_FY_13_3_7_14_52549.pdf.

Intelligence Community Whistleblower Protection Act (1999), United States of America, www.gpo.gov/fdsys/pkg/PLAW-105publ272/html/PLAW-105publ272.htm.

Labor Standards Act No. 49 of 1947, Japan, www.ilo.org/dyn/natlex/docs/WEBTEXT/27776/64846/E95JPN01.htm.

Latimer, P. and A.J. Brown (2008), *Whistleblower Laws: International Best Practice*, Monash U. Department of Business Law & Taxation Research Paper No. 1326766, http://ssrn.com/abstract=1326766 or http://dx.doi.org/10.2139/ssrn.1326766.

Military Whistleblower Protection Act (1988), Title 10 U.S.C., United States of America, www.law.cornell.edu/uscode/text/10.

National Audit Office (2014) *Government Whistleblowing Policies*, National Audit Office, London, www.nao.org.uk/wp-content/uploads/2014/01/Government-whistleblowing-policies.pdf.

ODAC, R. Calland, G. Dehn and Public Concern at Work (2004), *Whistleblowing Around the World: Law, Culture & Practice*, ODAC, Cape Town and Public Concern at Work in partnership with the British Council, London.

OECD (2014), *OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection* (survey), OECD, Paris.

OECD (2013), *OECD Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth*, OECD Public Governance Reviews, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264193819-en.

OECD (2012), *Phase 3 Report on Implementing the Anti-Bribery Convention in France*, www.oecd.org/daf/anti-bribery/Francephase3reportEN.pdf.

Office of the Public Sector Integrity Commissioner of Canada (2015), Website, www.psic.gc.ca/eng/wrongdoing#whatisgross (accessed 25 July, 2015).

Orol, R.D. (2012), *SEC gets nearly 3,000 whistleblower tips*, 18 October 2012, MarketWatch, www.marketwatch.com/story/sec-gets-nearly-3000-whistleblower-tips-2012-10-18.

Protected Disclosures Act (No.14 of 2014), Ireland, www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html.

Protected Disclosures Act (2000), New Zealand, www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html?search=ts_act%40bill%40regulation%40deemedreg_protected+disclosures+act_resel_25_h&p=1.

Protection of Employees Law, Exposure of Offenses of Unethical Conduct or Improper Administration (1997), Israel, www.tamas.gov.il/NR/rdonlyres/812A9432-511A-4C08-9950-8C71D6515665/0/22.pdf.

PCaW (2013), *Whistleblowing: The inside story – A study of the experiences of 1 000 whistleblowers*, Public Concern at Work, London, www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf.

Public Interest Disclosure Act (2013), Australia, www.comlaw.gov.au/Details/C2013A00133.

Public Interest Disclosure Act (1998), United Kingdom, www.legislation.gov.uk/ukpga/1998/23/contents.

Public Servants Disclosure Protection Act (2005), Canada, http://laws-lois.justice.gc.ca/eng/acts/P-31.9/.

Public Service Regulations (1999), Australia, www.comlaw.gov.au/Details/F2015C00713

Queensland Public Interest Disclosure Act (2010), Australia, www.legislation.qld.gov.au/legisltn/current/p/pubintdisa10.pdf.

Regulation on Complaints and Applications of Civil Servants (1982), Turkey.

Schoenherr (2013), *Austria: Whistleblower Hotline is launched online*, Available at: www.schoenherr.eu/knowledge/knowledge-detail/austria-whistleblower-hotline-is-launched-online/.

State Comptroller Law (1958), Israel.

The Guardian (2015), *Open letter on the Border Force Act 2015: We challenge the department to prosecute*, 1 July 2015, www.theguardian.com/australia-news/2015/jul/01/open-letter-on-the-border-force-act-we-challenge-the-department-to-prosecute (accessed 16 September).

The Law of 15 September 2013 relating to the reporting of suspected harm to integrity within a federal administrative authority by a member of its staff. (2013), Belgium, http://goo.gl/ezLEKT.

Transparency International (2015), *Speak Up Report*, Transparency International, Ireland, www. transparency.ie/sites/default/files/15_TI_Ireland_Speak_Up_Report.pdf.

Transparency International (2013), *Whistleblower Protection and the UN Convention Against Corruption*, Transparency International, Berlin, www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/ti_report_/ti_report_en.pdf.

Transparency International (2009), *Alternative to Silence: Whistleblower Protection in 10 European Countries*, Transparency International, Berlin, www.transparency.org/whatwedo/pub/alternative_to_silence_whistleblower_protection_in_10_european_countries.

UNODC (2015), *Resource Guide on Good Practices in the Protection of Reporting Persons*, United Nations Office on Drugs and Crime, Vienna, www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf.

UNODC (2009), *Technical Guide to the United Nations Convention Against Corruption*, United Nations Office on Drugs and Crime, Vienna, www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

Dodd–Frank Wall Street Reform and Consumer Protection Act (2014), United States of America, www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

U.S. Securities and Exchange Commission, www.sec.gov/whistleblower.gov.

Valencia, M. (2011), "Year of the bounty hunter", 17 November 2011, From The World in 2012 print edition, *The Economist*, http://www.economist.com/node/21537931.

Whistleblower Protection Act (1989), United States of America, www.usda.gov/oig/webdocs/whistle1989.pdf.

Whistleblower Protection Act (2004), Japan, www.cas.go.jp/jp/seisaku/hourei/data/WPA_2.pdf.

Working Environment Act (2005), Norway, www.legislationline.org/documents/id/3702.

Whitton, H. (2008), Making whistleblower protection work: elements of an effective approach, U4 Anti Corruption Research Centre, Bergen, www.u4.no/publications/making-whistleblowerprotection-work-elements-of-an-effective-approach/downloadasset/117.

# *Chapter 3.*

# Public sector whistleblower protection in practice: To disclose or not to disclose

*Whistleblower protection systems protect the identity of whistleblowers through measures of confidentiality, however, sometimes these protections can fail, or the identity of the whistleblower can be deduced. As a result, retaliatory and discriminatory actions may ensue. The majority of OECD countries provides protection from a broad range of reprisals and often apply disciplinary action as a sanction and reinstatement as a remedy for retaliation. This chapter analyses the mechanisms that have been implemented in OECD countries to protect whistleblowers from reprisal after having made a protected disclosure, including the reverse burden of proof, sanctions and penalties, the role of administrative appeals bodies, and available remedies.*

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

## The correlation between dedicated law and protection from retaliatory action

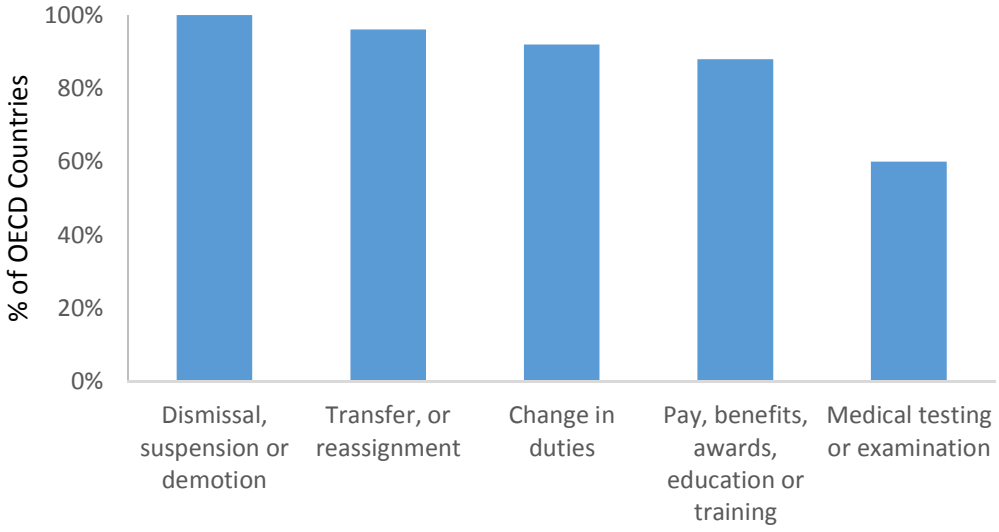
The absence of effective protection for whistleblowers can pose a dilemma as employees are often expected to report wrongdoing, but doing so can expose them to retaliation. Retaliation for whistleblowing usually takes the form of disciplinary action or harassment in the workplace. Whistleblower protection laws should provide comprehensive protection against discriminatory or retaliatory personnel action. The availability of reporting channels does not qualify as protection itself. According to the United States' Project on Government Oversight, typical forms of retaliation include (Project on Government Oversight, 2005):

- Taking away job duties so that the employee is marginalised.
- Taking away an employee's national security clearance so that he or she is effectively fired.
- Blacklisting an employee so that he or she is unable to find gainful employment.
- Conducting retaliatory investigations in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose.
- Questioning a whistleblower's mental health, professional competence, or honesty.
- Setting the whistleblower up by giving impossible assignments or seeking to entrap him or her.
- Reassigning an employee geographically so he or she is unable to do the job.

### *The majority of OECD country respondents provide protection for a broad range of reprisals*

Among the 26 OECD country respondents to the whistleblowing survey, 16 provide protection from all the discriminatory or retaliatory personnel actions listed in Figure 3.1. Of these countries, 11 have dedicated whistleblower protection laws. The exceptions are Iceland, Norway, Portugal, Slovenia and Switzerland. Countries that omit protection for one of the five personnel actions do so for "medical testing or examination."

**Figure 3.1. OECD countries providing protection from all discriminatory or retaliatory personnel actions**




*Note:* Some countries provide catch-all provisions to qualify for general prohibition of negative consequences or disadvantageous treatment, which were considered to apply to all personnel actions above. In the case of Germany, no specific examples of retaliatory personnel actions are listed. Remedies follow from German Labour Law, Civil Law and Civil Service Law. Based on a ruling by the Federal Constitutional Court, the highest court for German labour law, the Federal Labour Court, has ruled that employees who report in good faith on their company's misconduct generally enjoy protection from dismissal. Furthermore the European Court of Human Rights substantiated in 2011 the employees' right to publicly refer to nuisances at their place of employment (judgement of 21 July 2011, 28274/08). German labour courts must take these judgements into account when making their rulings in future. In Portugal, Article 4 of Law no. 19/2008 states that "workers of the Public Administration and of State owned companies, who report the commission of offences that they have knowledge of in the exercise of their duties or because of them cannot, in any form, including their non-voluntary transfer, be harmed." Respondents were asked the following question: "Are whistleblowers protected from the following discriminatory or retaliatory personnel actions?

*Source:* OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

In a comprehensive list of what disadvantageous measures whistleblowers should be protected against, Korea's Protection of Public Interest Whistleblowers (PPIW) Act provides protection against financial or administrative disadvantages, such as the cancellation of a permit or license, or the revocation of a contract (Box 3.1).[1]

**Box 3.1. Comprehensive protection in Korea**

In Korea, the term "disadvantageous measures" means an action that falls under any of the following items:

1. Removal from office, release from office, dismissal or any other unfavourable personnel action equivalent to the loss of status at work.
2. Disciplinary action, suspension from office, reduction in pay, demotion, restriction on promotion and any other unfair personnel actions.
3. Work reassignment, transfer, denial of duties, rearrangement of duties or any other personnel actions that are against the whistleblower's will.
4. Discrimination in the performance evaluation, peer review, etc. and subsequent discrimination in the payment of wages, bonuses, etc.
5. The cancellation of education, training or other self-development opportunities; the restriction or removal of budget, work force or other available resources, the suspension of access to security information or classified information; the cancellation of authorization to handle security information or classified information; or any other discrimination or measure detrimental to the working conditions of the whistleblower.
6. Putting the whistleblower's name on a black list as well as the release such a blacklist, bullying, the use of violence and abusive language toward the whistleblower, or any other action that causes psychological or physical harm to the whistleblower.
7. Unfair audit or inspection of the whistleblower's work as well as the disclosure of the results of such an audit or inspection.
8. The cancellation of a license or permit, or any other action that causes administrative disadvantages to the whistleblower.

*Source*: Korea's Act on the Protection of Public Interest Whistleblowers (2011), Act No. 10472, Mar. 29, 2011. Article 2 (6).

In the United Kingdom, a study conducted by Public Concern at Work (PCaW) showed that 40% (399 people) of a sample of whistleblowers that had contacted them through their advice line mentioned retaliation from management when raising a concern. Of the 40%, the most common response to the whistleblower was formal action short of dismissal, such as demotion, suspension or disciplinary action. If whistleblowers experience responses from co-workers, they are most likely to experience informal reprisal. This tends to occur when the concern is raised with a line manager (65%) or specialist channels (100%). Formal reprisal by co-workers is most likely when a concern is raised with higher management (46%) (PCaW, 2013).

### *The threat of reprisal also warrants protection*

Threatening to take action can have the same effect on the whistleblower as actual retaliation. In Australia's whistleblower protection system, it is not only an offence undertake an act of reprisal, but also to threaten to undertake an act of reprisal against a person because of a public interest disclosure.[2]

### *Fear of reprisal can dissuade individuals from making a protected disclosure; however it is not always the main reason for not reporting*

In Australia, a survey conducted by the Public Service Commission in 2013 showed that 59% of employees who indicated they had witnessed suspected serious misconduct[3] chose to report it so that action could be taken (Australian Public Service Commission, 2013). Those who chose not to report did so for the reasons presented in Table 3.1.

**Table 3.1. Reasons for not reporting suspected serious misconduct in Australia**

(2012 and 2013)

| Reasons for not reporting | Employees who did not report for this reason (%) | |
|---|---|---|
| | 2012 | 2013 |
| I did not think any action would be taken | 46 | 39 |
| It could affect my career | 33 | 30 |
| I did not want to upset relationships in the workplace | 30 | 25 |
| The matter was reported by someone else | N/A | 26 |

*Source:* Australian Public Service Commission (2013) State of the Service Report: State of the Service Series 2012–13, p. 60, www.apsc.gov.au/__data/assets/pdf_file/0018/29223/SOSR-2012_13-final-tagged2.pdf.

An open organisational culture is central to dissuading acts of reprisal and an important factor in determining which steps are taken following a protected disclosure, and how seriously reports are considered by management. If employees are under the impression that their concerns are not acted upon, they may be less likely to come forward and disclose wrongdoing.

### *Reprisals are not always immediate, therefore providing protection for an extended duration may be necessary*

The necessity for disclosure systems to establish follow up mechanisms and successfully ensure that whistleblowers do not suffer reprisals is evidenced by the reasons for not reporting, as outlined in Table 3.1. The length of time during which a whistleblower is protected against reprisal may also be an important aspect to consider, as reprisals can take place months and even years following a disclosure of wrongdoing. In Belgium, whistleblowers are protected against reprisal from the date they submit their disclosure, and for a two-year period following the conclusion of the associated investigation. In Chile, protections apply from the time the authority receives the report (in writing) and until it is either declared not admissible or until 90 days after the administrative investigation is complete.[4]

## Effective protection from reprisal warrants a reverse burden of proof process

Whistleblower protection systems may reverse the burden of proof whereby the employer must prove that the conduct taken against the employee is unrelated to his or her whistleblowing. This is in response to the difficulties an employee may face in proving that the retaliation was a result of the disclosure, "especially as many forms of

reprisals may be very subtle and difficult to establish" (Chêne, 2009, p. 7). In Germany, to qualify for the protection that the civil code offers, the public servant is charged with the burden of proof and has to demonstrate that his/her disclosure was legally permissible, that discrimination took place, and that retaliation happened because of his/her disclosure.[5] In the event that the employer has not explicitly mentioned this as the reason for termination, this type of proof has proven almost impossible to provide. To mitigate this, several whistleblower protection systems provide a more flexible approach to the burden of proof and assume that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified by management on grounds unrelated to the fact or consequences of the disclosure.[6]

In Slovenia, the whistleblower protection system maintains that "if a reporting person cites facts in a dispute that give grounds for the assumption that he has been subject to retaliation by the employer due to having filed a report, the burden of proof shall rest with the employer".[7] In Norway, when an employee submits information that gives reason to believe that s/he has been retaliated against as a result of having come forward with a protected disclosure, it shall be assumed that such retaliation has taken place unless the employer substantiates otherwise.[8]

The system in the United States applies a burden-shifting scheme whereby a federal employee who is a purported whistleblower must first establish that s/he:

1. Disclosed conduct that meets a specific category of wrongdoing set forth in the law.
2. Made the disclosure to the "right" type of party (depending on the nature of the disclosure, the employee may be limited regarding to whom the report can be made.)
3. Had a reasonable belief that the information is evidence of wrongdoing (the employee does not have to be correct, but the belief must be one that could be shared by a disinterested observer with equivalent knowledge and background as the whistleblower.)
4. Suffered a personnel action, the agency's failure to take a personnel action, or the threat to take or not to take a personnel action.
5. Demonstrated that the disclosure was a contributing factor for the personnel action, failure to take a personnel action, or the threat to take or not take a personnel action (in practice, this is largely equivalent to a modest relevance standard.)
6. Sought redress through the proper channels.

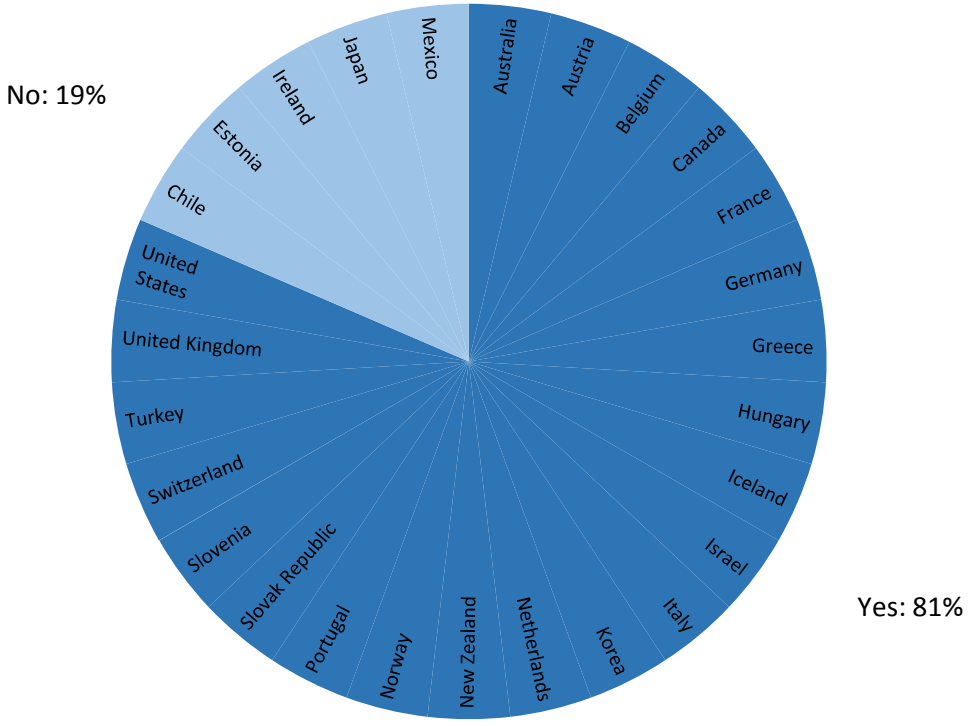
If the employee establishes each of these elements, the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same action in absence of the whistleblowing, in which case relief to the whistleblower would not be granted (US Merit Systems Protection Board, 2010). Clear and convincing evidence means that it is substantially more likely than not that the employer would have taken the same action in the absence of whistleblowing.

## Disciplinary action: A sanction for retaliation

Twenty-two OECD countries surveyed have penalties in place for retaliation against whistleblowers (Figure 3.2). However, as OECD countries do not have dedicated laws for

the protection of whistleblowers, the penalties provided are often broadly interpreted as those that would apply to employers acting against regulatory rules more generally.

**Figure 3.2. The vast majority of OECD country respondents have Penalties in place for retaliating against a whistleblower in the public sector in OECD countries**




*Note:* Respondents were asked the following question: "Are there any penalties for retaliation inflicted upon whistleblowers?"

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

### *In OECD countries, penalties range from disciplinary action to fines and imprisonment*

The approach to applying penalties varies, even among OECD countries where the whistleblower protection systems are established by a dedicated whistleblower protection law. For instance, Australia's whistleblower protection system invokes imprisonment for 2 years – or 120 penalty units[9], or both – in case of reprisal against whistleblowers;[10] while in Korea, the punishment for retaliation varies depending on the type of reprisal that took place (Box 3.2).[11] In Ireland, it was considered, in the interests of balance, that if penalties were not to be applied to persons making disclosures in bad faith, it would not be appropriate to apply penalties to employers.

### Box 3.2. Sanctions for retaliation in Korea

According to Korea's Protection of Public Interest Whistleblowers Act, any person who falls under any of the following points shall be punished by imprisonment for not more than two years or by a fine not exceeding KRW 20 million (Korean won):

1. A person who implemented disadvantageous measures described in Article 2, subparagraph 6, item (a) [Removal from office, release from office, dismissal or any other unfavourable personnel action equivalent to the loss of status at work] against a public interest whistleblower.
2. A person who did not carry out the decision to take protective measures that had been confirmed by the Commission or by an administrative proceeding.

In addition, any person who falls under any of the following points shall be punished by imprisonment for not more than one year or a fine not exceeding KRW 10 million:

1. 1. A person who implemented disadvantageous measures that fall under any of Items (b) through (g) in Article 2, Subparagraph 6 against the public interest whistleblower [(b) disciplinary action, suspension from office, reduction in pay, demotion, restriction on promotion and any other unfair personnel actions; (c) work reassignment, transfer, denial of duties, rearrangement of duties or any other personnel actions that are against the whistleblower's will; (d) discrimination in the performance evaluation, peer review, etc. and subsequent discrimination in the payment of wages, bonuses, etc.; (e) the cancellation of education, training or other self-development opportunities; the restriction or removal of budget, work force or other available resources, the suspension of access to security information or classified information; the cancellation of authorisation to handle security information or classified information; or any other discrimination or measure detrimental to the working conditions of the whistleblower; (f) putting the whistleblower's name on a black list as well as the release such a blacklist, bullying, the use of violence and abusive language toward the whistleblower, or any other action that causes psychological or physical harm to the whistleblower; (g) unfair audit or inspection of the whistleblower's work as well as the disclosure of the results of such an audit or inspection; (h) the cancellation of a license or permit, or any other action that causes administrative disadvantages to the whistleblower]

   2. A person who obstructed the public interest whistleblowing, etc. or forced the public interest whistleblower to rescind his/her case, etc. in violation of Article 15, Paragraph 2

*Source*: Korea's Protection of Public Interest Whistleblowers Act No. 10472 (2011), Chapter V Article 30 (2) and (3)

In certain circumstances, some OECD countries, such as the United States, impose criminal sanctions against employers who retaliate against whistleblowers. The US Federal Criminal Code 18 U.S.C. §1513 (e) states that "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 dedicated law and a dedicated reprisal appeals body rarely go hand in hand

In certain countries, the establishment of separate independent agencies with the capacity to receive, investigate and provide remedies for complaints related to retaliation has proved effective (Box 3.3.). Best practice when setting up an oversight and enforcement agency is to ensure that it is independent, that it has sufficient budgetary resources to enable it to operate effectively, and that it meets the objectives of the law. It is also essential to ensure that a strong and independent judiciary has the resources, capacity and independence to prosecute whistleblowing related offences.

**Box 3.3. Independent central and integrity agencies**

Best practice indicates that independent central and integrity agencies for a whistleblower to report to should exist and be identifiable. For example:

- "Proper authorities", administrative agency or administrative organ, a public interest disclosure agency, public employment agencies or a "prescribed person.
- The Auditor-General.
- The Counsel.
- Anti-corruption bodies.
- Ombudsman.
- The police and the Director of Public Prosecutions (DPP).
- Public Protector (South Africa).
- Relevant policy agencies.
- Trade unions.

*Source*: Latimer, P. and A.J. Brown (2008), *Whistleblower Laws: International Best Practice*, Monash U. Department of Business Law & Taxation Research Paper No. 1326766, pp. 12, http://ssrn.com/abstract=1326766 or http://dx.doi.org/10.2139/ssrn.1326766.

Although enacting a dedicated whistleblower protection law may increase awareness of the importance of encouraging whistleblowing and assuring protection, this will not necessarily translate into the dedication of specific resources. Currently, only Canada, the Netherlands, Korea and the United States have a dedicated reprisal appeals body that is specifically responsible for investigating and processing retaliatory action taken against whistleblowers who have reported wrongdoing. In the United States, the Office of the Special Counsel (OSC), an independent federal investigative and prosecutorial agency that protects federal employee whistleblowers, receives, investigates and prosecutes appeals from whistleblowers who claim to have suffered reprisals. In addition, the Merit Systems Protection Board, an independent quasi-judicial agency with the power to adjudicate decisions, was established to protect federal employees against political and other prohibited personnel practices and ensure that there is adequate protection from abuse by agency management.[12] In Canada, the Public Sector Integrity Commissioner is required to report annually to parliament and has the power to give recommendations to the heads of public offices. The Public Servants Disclosure Protection Tribunal is in

charge of determining remedies and sanctions when violations of whistleblowers' rights occur (Banisar, 2011).

In the OECD countries, depending on the institutional arrangements, reprisal claims are generally overseen by bodies with wider transparency and anti-corruption duties, such as National Anti-Corruption Authorities, Civil Service Commissions, Ombudsman and Integrity Councils.

## Interim relief and judicial review are necessary

Seeking to win a hearing or trial of a retaliation case may take years for the whistleblower. During this time, a whistleblower who was dismissed may have had difficulty in finding new employment and be on the brink of bankruptcy (Devine and Walden, 2013). Even if an unemployed whistleblower has won, s/he can go bankrupt while waiting for the completion of an appeals process (Devine and Walden, 2013). Interim relief for those who were reprised against for making a protected disclosure is necessary. These measures are provided for in the United Kingdom and the United States whistleblower protection systems.[13] In the United Kingdom, interim relief can be provided to an employee if an employment tribunal finds that the employee is likely to win an unfair dismissal case at a full hearing. If this is the case, the tribunal will order that the employee is reinstated in their former position, or re-engaged in another job on the same terms and conditions as if he or she had not been dismissed. Moreover, when protection is not provided or the remedy is insufficient, whistleblowers have the right to take action in court proceedings (Devine and Walden, 2013).

An identified best practice for whistleblower legislation is to ensure that whistleblowers are entitled to a fair hearing before an impartial forum with a full right of appeal ("genuine day in court") (Transparency International, 2013). A number of OECD countries have adopted such provisions within their laws. The UK Public Interest Disclosure Act (PIDA), for example, allows for appeals to the employment tribunal. Under US law, federal employees who are whistleblowers are also afforded legal standing to bring appeals before the Merit Systems Protection Board and the US Court of Appeals.

## Reinstatement as a remedy for reprisal is the norm

Most whistleblower protection systems include remedies for whistleblowers who have suffered harm. Measures of this nature cover all direct, indirect, and future consequences of reprisal.[14] They vary from return to employment after unfair termination, job transfers or compensation, or punitive damages if there was harm that cannot be remedied by injunctions, such as difficulty or impossibility to find a new job. Such remedies may take into account not only lost salary but also compensatory damages for suffering (Banisar, 2011). Canada's Public Servants Disclosure Protection Act (PSDPA) includes a comprehensive list of remedies (Box 3.4).

Under UK law, the courts have ruled that compensation can be provided for suffering, based on the system developed under discrimination law (Banisar, 2011). The total amount of damages awarded under the UK PIDA in 2009 and 2010 was GBP 2.3 million, with the highest award GBP 800 000 in the case of John Watkinson v Royal Cornwall Hospitals NHS Trust (PCaW, 2011). The average PIDA award in 2009 and 2010 was GBP 58 000, compared to average awards of GBP 18 584, GBP 19 499 and GBP 52 087 in race, sex, and disability discrimination cases respectively (PCaW, 2011).

### Box 3.4. Remedies for public sector whistleblowers in Canada

To provide an appropriate remedy to the complainant, the Tribunal may, by order, require the employer or the appropriate chief executive, or any person acting on their behalf, to take all necessary measures to:

Permit the complainant to return to his or her duties.

Reinstate the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored.

Pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant.

Rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant.

Pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal.

Compensate the complainant, by an amount of not more than USD 10,000, for any pain and suffering that the complainant experienced as a result of the reprisal.

*Source*: Canada's Public Servants Disclosure Protection Act of 2005, 21.7 (1).

Reinstatements are on the rise in whistleblower cases globally (Box 3.5). Twenty-two OECD country respondents[15] provide reinstatement following a successful reprisal claim. Among these 22 countries, 16 also provide compensatory awards (the exceptions being Belgium, Chile, Greece, Japan, Portugal and Turkey); and 17 provide opportunities for re-engagement. In some instances, such as in Chile, Estonia, and Iceland, the law does not specifically outline remedies for whistleblowers.[16] However, in Chile and Estonia, if the reporting official is suspended, dismissed, transferred or pre-evaluated within the time frame in which protections are applicable, the act by which the official has been suspended, dismissed, transferred or pre-evaluated can be declared invalid according to general administrative law.[17]

### Box 3.5. Reinstatements on the rise

Whistleblower protection laws beginning to work in practice.

Over the past two decades, more and more countries worldwide have passed designated whistleblower protection laws. At the same time, whistleblower support NGOs and media organisations have been established in all regions to help employees save their jobs or be reinstated to positions they have lost because they reported crime and corruption.

These laws and support systems are beginning to work in practice. This is evidenced by the growing number of cases in which employees who faced retaliation at work have won back their jobs.

In Europe, these cases include employees who exposed corruption in tax refunds (2015), inadequate child care (2013), elderly people overcharged for housing (2011), academic plagiarism at a university (2008), the neglect of elderly patients (2009), and psychiatric patients who were kept in a locked unit over the Christmas holiday (2012). Additionally, a growing number of employees have received whistleblower protection status from the government, including seven in two south east European countries since 2010.

In the Americas, a government employee who exposed fatal inadequacies in military equipment was reinstated in 2011 following a long and high-profile effort by government officials and NGOs. Among the many other employees who have won reinstatement include those who reported unsafe waste vehicles (2014), a railroad injury (2014), unsafe airplane landings and truck driving conditions (2013), financial wrongdoing at a large corporation (2102), and lead overexposure and unsafe drinking water (2012).

In Africa, a Justice Department employee was reinstated in 2013 after being fired for reporting corruption; a police colonel was reinstated in 2014 after being fired for uncovering wide-ranging corruption; and a bank finance director was ordered reinstated in 2014 after reporting breaches in corporate governance.

In Asia, two national anti-corruption commissions successfully blocked punitive disciplinary measures taken against employees who reported corruption and irregularities. In another Asian country, an employee of a large multinational company who had reported wrongdoing won the first ever whistleblower reinstatement case at the country's highest court.

In most of these and other cases, a whistleblower law alone was not sufficient to achieve a positive outcome. Media attention, NGO support and leadership by key government officials and policy makers were needed to tip the scales in favour of whistleblowers.

*Source:* Mark Worth, M. (2015), Reinstatements on the rise: Whistleblower protection laws beginning to work in practice, International Whistleblower Project, Blueprint for Free Speech.

Whistleblower protection systems need to be equipped with measures to protect against reprisal in the event that the mechanisms in place to protect confidentiality fail or falter. In this respect, most OECD countries provide protection for a broad range of reprisals, with penalties ranging from disciplinary action to fines and imprisonment. However, while this is apparent in the case of reprisals, dedicated laws do not necessarily signify the establishment of separate appeals bodies, and reprisal claims in OECD countries are generally overseen by bodies with wider transparency and anti-corruption duties. Ensuring that remedies are in place in the event of reprisals is imperative, however, it is also important to understand that although the fear of reprisal can dissuade individuals from making a protected disclosure, it is not always the main reason for not reporting. Employees need to be reassured by their employer, and an effective open organisational culture, that their concerns will be addressed and that their disclosures will be taken seriously.

## *Notes*

1 See Korea's Act on the Protection of Public Interest Whistleblowers, Article 2 (6).

2 Public Interest Disclosure Act 2013, Part 2 – Subdivision B (13).

3 Defined as "fraud, theft, misusing clients' personal information, sexual harassment, leaking classified documentation or other behaviour that would likely result in termination of employment".

4 See Article 90A of the Administrative Statute (Law 18,834) and Article 88A of the Administrative Statute for Municipal Officials (Law 18,883).

5 German Civil Code, Section 612a.

6 See, US WPA 5USC §1214(b)(2)(4) and §1221(e)). See also Whitton (2008), p. 3 and Devine and Walden (2013), p. 7.

7 Slovenia's Integrity and Prevention of Corruption Act Article 25 (5).

8 Norway's Working Environment Act, Section 2-5.

9 In Australia, penalty units are used to describe the payable for fines under commonwealth laws. By multiplying AUS Dollar equivalent of one penalty unit, the fine for an offence is set.

10 Australia's Public Interest Disclosure Act, Subdivision B, Part 2 – Section 19.

11 Korea's Act on the Protection of Public Interest Whistleblowers, Chapter V Article 30 (2).

12 The MSPB and the OSC were set up under the Civil Service Reform Act (CSRA) of 1978.

13 See for example Sec. 1221 (c)(1) of the US Whistleblower Protection Act.

14 See for example the United States' Whistleblower Protection Act, Subchapter III Section 1221(h)(1); the United States' False Claims Act 31 U.S.C. §3730(h)).

15 26 OECD countries responded to this survey question.

16 Norway was the only country to indicate that it does not provide reinstatement or re-engagement but nevertheless provides a compensatory award.

17 Respondents to the 2014 OECD Survey were asked the following question "Which remedies are whistleblowers entitled to, upon a successful reprisal claim, following a disclosure of wrongdoing?"

## *References*

Act CLXV. of 2013 on Complaints and Public Interest Disclosures.(2013), Hungary, http://corruptionprevention.gov.hu/download/7/a2/90000/KIM%20555_2013-4.pdf.

Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing (2014), the Slovak Republic, www.peterkapartners.com/sqlcache/PETERKA%20%20PARTNERS_Whistleblowing%20News_2015_January.pdf.

Act on the Protection of Public Interest Whistleblowers (2011), Korea, www.unodc.org/res/cld/document/kor/act-on-the-protection-of-public-interest-whistleblowers_html/Republic_of_Korea_Act_on_the_Protection_of_Public_Interest_Whistleblowers.pdf.

Administrative Statute (Law 18,834), Chile, www.leychile.cl/Navegar?idNorma=30210.

Administrative Statute for Municipal Officials (Law 18,883), Chile, www.leychile.cl/Navegar?idNorma=30256.

Anti-Corruption Act (2012), Estonia, www.riigiteataja.ee/akt/129062012001 (in Estonian).

Anti-Corruption Law, Law no. 190/2012, (2012), Italy, www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012-11-06;190!vig=2016-02-02 (in Italian).

Australian Public Service Commission (2013), *State of the Service Report: State of the Service Series 2012 to 13*, www.apsc.gov.au/__data/assets/pdf_file/0018/29223/SOSR-2012_13-final-tagged2.pdf.

Banisar, D. (2011), "Whistleblowing: International Standards and Developments" in Sandoval, I. (ed.), *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, World Bank Institute for Social Research, UNAM, Washington, DC, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180.

Chêne, M. (2009), *Good Practice in Whistleblowing Protection Legislation (WPL)*, U4 Anti-Corruption Resource Centre, Bergen, www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/.

Constitutional Organic Law of General Bases of the Administration of the State (Law No. 18,575) (1999), Chile, www.leychile.cl/Navegar?idNorma=29967.

Decree Regulating the Reporting of Suspected Abuses in the Civil Service and the Police (Besluit van 15 december 2009, houdende een regeling voor het melden van een vermoeden van een misstand bij de sectoren Rijk en Politie), Netherlands.

Devine, T. and S. Walden (2013), *International Best Practices for Whistleblower Policies*, Government Accountability Project, Washington DC.

Devine, T. and S. Walden (2013) *International Best Practices for Whistleblower Policies*, Government Accountability Project, Washington DC.

Federal Law against Anti-Corruption in Public Procurement Act (2012), Mexico.

Federal Criminal Code (2014), Mexico, www.wipo.int/edocs/lexdocs/laws/es/mx/mx148es.pdf (in Spanish).

Federal Personnel Act (2013), Switzerland, www.admin.ch/opc/de/classified-compilation/20011178/201307010000/172.220.111.3.pdf (in German).

Federal Law on Administrative Liability of Civil Servants (2002), Mexico, www.banxico.org.mx/disposiciones/circulares/leyes/%7B65D50D3F-E527-8E37-9EA0-360A530C0F57%7D.pdf.

German Civil Code, Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719).

Government Employees Act no. 70/1996, (1996), Iceland, http://eng.fjarmalaraduneyti.is/media/Starfsmannamal/Government_Employees_Act_No_70_1996.pdf.

Latimer, P. and A.J. Brown (2008), *Whistleblower Laws: International Best Practice*, Monash U. Department of Business Law & Taxation Research Paper No. 1326766, http://ssrn.com/abstract=1326766 or http://dx.doi.org/10.2139/ssrn.1326766.

Law No 20,205 of 24 July 2007, Protection to the public official who denounces irregularities and faults to the probity principle, Chile, www.leychile.cl/Navegar?idNorma=262932.

OECD (2014), *OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection* (survey), OECD, Paris.

Protected Disclosures Act (No.14 of 2014), Ireland, www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html.

Protected Disclosures Act (2000), New Zealand, www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html?search=ts_act%40bill%40regulation%40deemedreg_protected+disclosures+act_resel_25_h&p=1.

Protection of Employees Law, Exposure of Offenses of Unethical Conduct or Improper Administration (1997), Israel, www.tamas.gov.il/NR/rdonlyres/812A9432-511A-4C08-9950-8C71D6515665/0/22.pdf.

PCaW (2013), *Whistleblowing: The inside story – A study of the experiences of 1 000 whistleblowers*, Public Concern at Work, London, www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf.

PCaW (2011), *Whistleblowing: Beyond the Law, Public Concern at Work*, London, Public Concern at Work, www.pcaw.org.uk/files/PCAW_Review_beyondthelaw.pdf.

Project on Government Oversight (2005), www.pogo.org/ (accessed 25 July 2015).

Public Interest Disclosure Act (2013), Australia, www.comlaw.gov.au/Details/C2013A00133.

Public Interest Disclosure Act (1998), United Kingdom, www.legislation.gov.uk/ukpga/1998/23/contents.

Public Servants Disclosure Protection Act (2005), Canada, http://laws-lois.justice.gc.ca/eng/acts/P-31.9/.

Public Service Regulations (1999), Australia, www.comlaw.gov.au/Details/F2015C00713

Queensland Public Interest Disclosure Act (2010), Australia, www.legislation.qld.gov.au/legisltn/current/p/pubintdisa10.pdf.

Regulation on Complaints and Applications of Civil Servants (1982), Turkey.

Sarbanes-Oxley Act (2002), 18 U.S.C., United States of America, www.sec.gov/about/laws/soa2002.pdf.

Integrity and Prevention of Corruption Act Article 25 (5) (2010), Slovenia, www.regulatelobbying.com/images/Slovenia_Lobbying_Law-3.pdf.

The Law of 15 September 2013 relating to the reporting of suspected harm to integrity within a federal administrative authority by a member of its staff. (2013), Belgium.

Federal Criminal Code and Rules 18 U.S.C., United States of America, www.law.cornell.edu/uscode/text/18.

Transparency International (2013), *International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest*, Transparency International, Berlin, www.transparency.org/whatwedo/pub/international_principles_for_whistleblower_legislation.

U.S. Merit Systems Protection Board (2010), *Whistleblower Protections for Federal Employees*, Washington, DC, www.mspb.gov/netsearch/viewdocs.aspx?docnumber=557972&version=559604.

Working Environment Act (2005), Norway, www.legislationline.org/documents/id/3702.

Worth, M. (2015), *Reinstatements on the rise: Whistleblower protection laws beginning to work in practice*, International Whistleblower Project, Blueprint for Free Speech.

Whistleblower Protection Act (2004), Japan, www.cas.go.jp/jp/seisaku/hourei/data/WPA_2.pdf.

Whistleblower Protection Act (1989), United States of America, www.usda.gov/oig/webdocs/whistle1989.pdf.

Whitton, H. (2008), *Making whistleblower protection work: elements of an effective approach*, U4 Anti-Corruption Research Centre, Bergen.

# *Chapter 4.*

# Language, culture and raising awareness to encourage whistleblowing in the public sector

*Awareness raising is an important dimension of whistleblower protection, as it can help change the culture and language surrounding whistleblowing, and ultimately break down the barriers and negative connotations associated with disclosing wrongdoing. Nevertheless, almost half of OECD countries do not have awareness raising activities in place. Furthermore countries that provide whistleblower protection through provisions are far less likely to have these types of initiatives than countries with dedicated laws. This chapter examines the various awareness raising activities that have been implemented in OECD countries, and how they can encourage whistleblowing and promote an effective open organisational culture.*

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

Communication is an essential characteristic of an open organisational culture. Communicating with employees about their rights and responsibilities and the resources available to them is integral to achieving an environment that functions on a basis of trust, professionalism and collegiality. Using clear and effective methods to communicate with employees can instil confidence among employees to voice concerns when they arise. Effectively communicating to employees about how they are protected by the whistleblower mechanisms in place highlights the importance of coming forward with suspected wrongdoing and reinforces the mutual interest of defending the tenets of integrity in the workplace and society. However, despite the organisational benefits and positive effects on staff morale, awareness campaigns of this nature are not common among OECD countries.

## Half of OECD countries have awareness-raising activities

An open organisational culture and whistleblower protection legislation should be supported by effective awareness raising, communication, training and evaluation efforts. Communicating to public or private sector employees their rights and obligations when exposing wrongdoing is essential, as outlined in the 1998 Recommendation on Improving Ethical Conduct in the Public Service (OECD, 1998).[1] Principle 4 of the Recommendation states that: "public servants need to know what protection will be available to them in cases of exposing wrongdoing." Awareness-raising activities could include the publication of an annual report by a relevant oversight body or authority that includes information on the outcome of cases received, the compensation for whistleblowers and recoveries that resulted from information from whistleblowers during the year, and the average time it took to process a case. The UK's Civil Service Commission suggests including a statement in staff manuals to assure employees that it is safe to raise concerns (Box 4.1).

**Box 4.1. Example of a statement to staff reassuring them to raise concerns**

The Civil Service Commission in the UK promotes the inclusion of a statement in staff manuals that reassures employees that disclosures are protected:

"We encourage everyone who works here to raise any concerns they have. We encourage 'whistleblowing' within the organisation to help us put things right if they are going wrong. If you think something is wrong please tell us and give us a chance to properly investigate and consider your concerns. We encourage you to raise concerns and will ensure that you do not suffer a detriment for doing so."

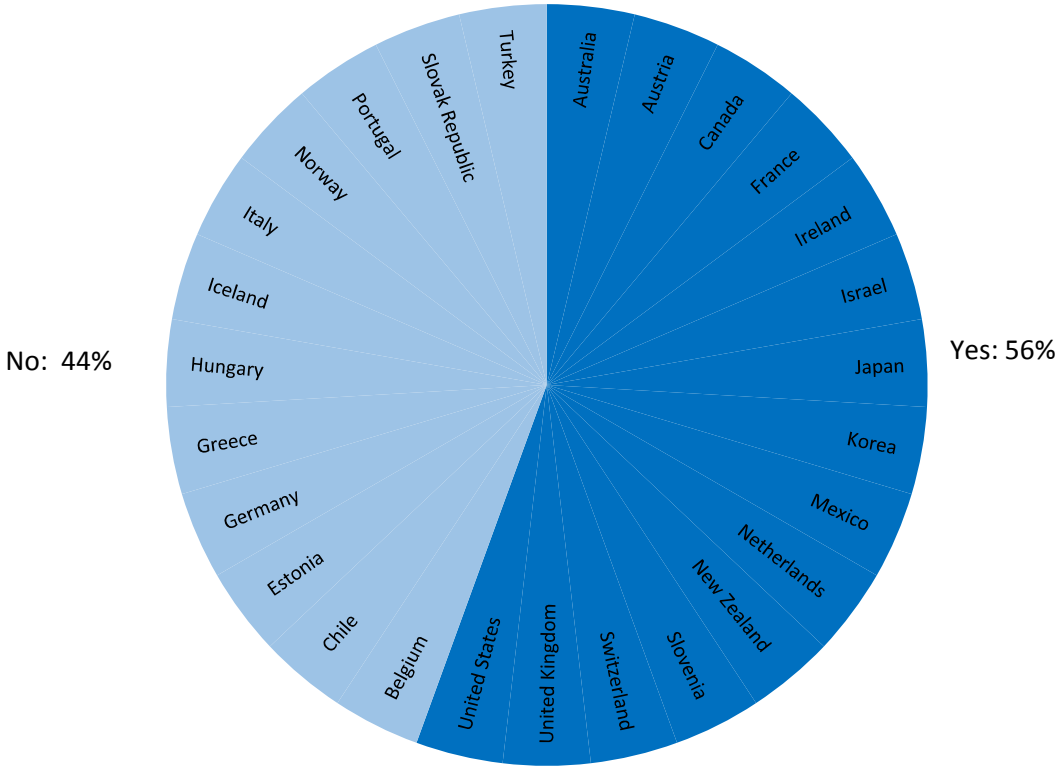
*Source*: UK's Civil Service Commission (2011), *Whistleblowing and the civil service code*: http://civilservicecommission.independent.gov.uk/wp-content/uploads/2014/02/Whistleblowing-and-the-Civil-Service-Code.pdf.

A number of OECD countries have undertaken communication efforts, however only 15 have awareness-raising activities, such as manager training, that aim to change cultural perceptions and public attitude towards whistleblowing (Figure 4.1). In Germany and the Slovak Republic, whistleblower protection is integrated into the overarching topic of corruption prevention and reviewed as part of this training.

## Countries with dedicated laws are more likely to have awareness raising activities

Among the 13 countries with dedicated whistleblower protection laws, 10 have whistleblower protection awareness-raising activities. Among the 14 countries with varying degrees of protection through provisions in other laws, only 5 have whistleblower protection awareness-raising activities. Countries with dedicated laws may therefore be in a better position to make headway in changing the culture surrounding whistleblowing.

**Figure 4.1. Whistleblower protection awareness raising activities in the public sector in OECD countries**




*Notes:* Respondents were asked the following question: "Have any awareness raising activities, such as manager training, with a view to changing cultural perceptions and public attitude towards whistleblowing been conducted in your country?"

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

Source: OECD (2014), "OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection" (survey), OECD, Paris.

### *Requirements for awareness measures are sometimes stipulated in law*

Some OECD countries have adopted provisions within their laws to ensure that awareness measures are in place. For instance, Canada's whistleblowing protection system requires the minister and public bodies to: "promote ethical practices in the public sector and a positive environment for disclosing wrongdoing by disseminating knowledge

of this Act and information about its purposes and processes and by any other means that he or she considers appropriate." (PSDPA, 2005)[2]

Furthermore, the President of the Treasury Board is required by law to promote ethical practices in the public sector and a positive environment for disclosing wrongdoing by disseminating knowledge of the Public Servants Disclosure Protection Act (PSDPA), especially its purposes and processes, by any means considered appropriate. According to the Treasury Board of Canada Secretariat's 2013-2014 Annual Report on the PSDPA:

> *"based on information submitted by organisations, an increase in awareness activities and efforts has been observed for this reporting period. Organisations are becoming more and more active in promoting the PSDPA. They do so in different ways, such as awareness sessions and dialogue or training sessions intended for employees, managers and executives. In addition, written information is made available through emails to employees, internal websites, pamphlets and posters. Some organisations invite speakers, such as the Public Sector Integrity Commissioner, to give presentations to employees on the PSDPA. Many organizations also reported that a section of their organisational code of conduct is dedicated to disclosures under the PSDPA." (Government of Canada, 2014)*

In the United States, the Occupational Safety and Health Administration Act requires federal agencies to post certain information about whistleblower protection in order to keep employees informed of their rights regarding protected disclosures. There are also special programmes for awareness raising and training in agencies that deal with public procurement, such as the Department of Defence. As part of its whistleblower programme, the Inspector General supervises whistleblower protection and informs personnel of their rights through training. This programme has significantly increased public awareness through articles and briefings to public servants. Within the agency, the Directorate for Whistleblowing and Transparency provides advice, counsel and oversight capability to the Inspector General. Outreach efforts in the United States have been applied through a Certification Programme developed under Section 2302(c) of the Office of the Special Counsel (OSC), which has made efforts to promote outreach, investigations and training as the three core methods for raising awareness.[3] Furthermore, the OSC offers training to federal agencies and non-federal organisations in each of the areas within its jurisdiction, including reprisal for whistleblowing. To ensure that federal employees understand their whistleblower rights and how to make protected disclosures, agencies must complete the OSC's programme to certify compliance with the Whistleblower Protection Act's (WPA) notification requirements.[4]

The No Fear Act in the United States requires that agencies provide annual notices and biannual training to federal employees regarding their rights under employment discrimination and whistleblower laws. Title 5 of the US Code renders the head of each agency responsible for: the prevention of prohibited personnel practices; compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management; and ensuring (in consultation with the OSC) that agency employees are informed of the rights and remedies available to them, including how to make a lawful disclosure of information that is specifically required by law or executive order to be kept classified (Box 4.2).[5]

**Box 4.2. The United States' approach to increasing awareness through the Whistleblower Protection Enhancement Act**

In the United States, the Whistleblower Protection Enhancement Act (WEPA) places the responsibility with the head of agency to increase the awareness of the rights and responsibilities of whistleblowers. Under 5 U.S.C. § 2302(c) of the WPEA, it is stipulated that "the head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (…) that agency employees are informed of the rights and remedies available to them under (…), including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures."

Furthermore, Section 117 of the Act "designates a Whistleblower Protection Ombudsman who shall educate agency employees:

I. about prohibitions on retaliation for protected disclosures; and

II. who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures."

*Source*: American Bar Association (2012), *Congress Strengthens Whistleblower Protections for Federal Employees*, Issue: November-December 2012, www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html.

In Japan, the Consumer Affairs Agency (CAA) holds explanatory meetings and symposiums nationwide for business operators, officials, and employees, to disseminate knowledge of the Japanese Whistleblower Protection Act (WPA). Additionally, in order to enhance the knowledge of officials in charge of dealing with whistleblowing within national and local governments, the CAA organises nationwide seminars that emphasise the necessity and importance of whistleblowing, and reinforce knowledge of the WPA and the guidelines.[6]

In Korea, the government has been implementing national strategies to raise public awareness of the benefits of whistleblowing and to strengthen protection for whistleblowers.[7] For example, the Anti-Corruption and Civil Rights Commission (ACRC) introduced and promoted public interest whistleblower protection systems to chief executives of private companies, conducted promotional activities using story-telling methods through internet cartoons, and displayed and aired advertisements through television and subway billboards to promote whistleblower protection systems (ACRC, 2014a; 2014b).

## Civil society can be an effective way of applying awareness-raising measures

In addition to awareness raising conducted by governments, a number of NGOs are active in the field. For example, in the United Kingdom, Public Concern at Work (PCaW) provides independent and confidential advice to workers who are unsure whether or how to raise a public interest concern. They also conduct policy and public education work and offer training and consultancy to organisations.[8] In the United States, the Government Accountability Project (GAP), primarily an organisation of lawyers, defends

whistleblowers against retaliation and actively promotes government and corporate accountability.[9]

In recent years, these whistleblowing protection organisations have begun working together across borders to support new efforts to defend whistleblowers and respond to transnational whistleblowing issues and cases. The Whistleblowing International Network, co-founded by PCaW and GAP, among others, is one example.[10] Transparency International, the global anti-corruption organisation, conducts advocacy, public awareness and research activities in all regions of the world. It has also established Advocacy and Legal Advice Centres in approximately 50 countries. These offer advice to whistleblowers and work to ensure that disclosures are addressed by the appropriate authorities.

## Increasing awareness can positively impact the perception and language of whistleblowing

Increasing the awareness of whistleblowing and whistleblower protection enhances the understanding of these mechanisms and is an important way of improving the often negative cultural connotations linked to the term "whistleblower". Communicating the importance of whistleblowing from, for example, a public health and safety perspective can help improve the public view of whistleblowers as important safeguards of public interest, and not snitches reporting on colleagues. In the United Kingdom, the cultural connotations of the term "whistleblower" have changed considerably (Box 4.3).

### Box 4.3. Cultural connotations of "whistleblower" and "whistleblowing": the United Kingdom

In the United Kingdom, a research project commissioned by Public Concern at Work from Cardiff University examined national newspaper reporting on whistleblowing and whistleblowers between 1 January 1997 and 31 December 2009. This included the period immediately before the introduction of the Public Interest Disclosure Act and tracked how the culture had since changed. The study found that whistleblowers were overwhelmingly represented in a positive light in the media. Over half (54%) of the newspaper stories represented whistleblowers in a positive light, with only 5% of stories being negative. The remainder (41%) were neutral. A similar study by YouGov found that 72% of workers view the term "whistleblowers" as neutral or positive.

*Sources*:
PCaW (2010), *Where's whistleblowing now? 10 years of legal protection for whistleblowers*, Public Concern at Work, London, p. 17, www.pcaw.org.uk/files/PIDA_10year_Final_PDF.pdf.
YouGov (2013), *YouGov/PCAW Survey Results: Whistleblowing work concerns*, YouGov, London, p.8, https://yougov.co.uk/publicopinion/archive/6888/.

The Dutch translation for the English term "whistleblower", is "*klokkenluide*r", which means bell-ringer. Professor of Public Administration, Mark Bovens, coined the term in the 1990s in order to reflect Quasimodo, the hunchback of Notre Dame: "he believed that whistleblowers were the Quasimodos of our time: like the famous hunchback, they were fighting for a just cause but were taunted and treated as outcasts." (Advice Centre for Whistleblowers in the Netherlands, 2013, p.32)

**Box 4.4. Courage when it counts**

In 2013, the campaign "Courage when it counts" was launched by the advice centre in the Netherlands. The idea behind the initiative was to portray whistleblowers as vulnerable heroes who put their fears aside to come forward with disclosures of wrongdoing. As part of this campaign, a series of photographs of employees with the courage to speak out were put on display. The aim of these visual representations was to provide an alternative image to that of ringing bells, which usually frame reports on whistleblowers in the Netherlands.

*Source:* Advice Centre for Whistleblowers in the Netherlands (2013), Annual Report: Courage when it counts, www.adviespuntklokkenluiders.nl/wp-content/uploads/2015/03/advice-centre-for-whistleblowers-in-the-netherlands-annual-report-2013.pdf.

The cultural perception of whistleblowers may constitute a significant barrier to implementing legislation on whistleblowing: "only if the good intentions of any law are matched by a change in culture can a safe alternative to silence be created" (ODAC et al., 2004). These cultural connotations need to be taken into account when developing and implementing whistleblower protection legislation. Activities must tackle deeply engrained cultural attitudes that may date back to social and political circumstances, such as dictatorship and/or foreign domination, when distrust towards "informers" of despised authorities was the norm (Council of Europe Parliamentary Assembly, 2009). Another cultural barrier may be power distance: people living in a low individualistic, high power distance country are less likely to challenge authority and those in authority are less likely to tolerate challenges (Morehead Dworkin, 2002), making it more difficult for whistleblowing to take place.

## Reviewing whistleblower protection legislation can help evaluate its purpose, implementation and effectiveness

In order to ensure that mechanisms in place are meeting their purposes, countries should regularly review their whistleblower protection systems and the effectiveness of their implementation. If necessary, the legislations upon which they are based can then be amended to reflect the findings of evaluations. Provisions regarding the review of effectiveness, enforcement and impact of whistleblower protection laws have been introduced by a number of OECD countries, such as, Canada, Japan, and the Netherlands. The Japanese WPA specifically outlines that the government must take the necessary measures based on the findings of the review. In both Canada and Australia, the review must be presented before the House of Parliament.[11]

Systematically collecting data and information is a way of evaluating the effectiveness of a whistleblowing system. This can include information on 1) the number of cases received; 2) the outcomes of cases (i.e. if the case was dismissed, accepted, investigated, and validated); 3) compensation for whistleblowers and recoveries that resulted from information from whistleblowers; 4) awareness of whistleblower mechanisms; and 5) the time it takes to process cases (Transparency International, 2013). This data, in particular information on the outcomes of cases, can be used in the review of a country's legislation in order to assess whether the framework is working effectively to protect whistleblowers in practice.

Surveys can also be distributed to staff to review staff awareness, trust and confidence in these mechanisms. In the United States, for example, the Merit Systems Protection Board has gathered information by conducting surveys with employees about their experiences as whistleblowers (Banisar, 2011). Such efforts play a key role in assessing the progress, or lack thereof, in implementing effective whistleblower protection systems.

Raising awareness about the processes and safeguards in place to report wrongdoing, and communicating them effectively within an organisation, are important elements for the workplace culture to evolve into an open and supportive environment. Training management, meeting with staff regularly, and clearly outlining the steps to follow when disclosing wrongdoing (for example through promotional materials, public campaigns or staff guidelines) can assure employees of the measures in place to protect them from reprisal.

Evaluating the processes within whistleblower systems enables necessary modifications, which may help streamline and facilitate these procedures to be more able to in promote and uphold the tenets of integrity.

## *Notes*

1 The Council invited the Public Governance Committee to revise the 1998 Recommendation on Improving Ethical Conduct in the Public Service to identify new integrity challenges and serve as guidance for innovative and cost-effective integrity processes and measures. The Council recognised the need to establish a whole-of-government 21st-century integrity framework. A Roadmap for updating the 1998 Recommendation was discussed by the Working Party of Senior Public Integrity Officials (SPIO) in March 2015. An updated Recommendation is expected to be published in late 2016.

2 Public Servants Disclosure Protection Act of 2005, c. 46, § 38.

3 See https://osc.gov/Pages/Outreach-2302Cert.aspx.

4 The OSC publishes a variety of materials on whistleblower disclosures. These publications can be printed from OSC's website at https://osc.gov/.

5 From response to OECD Survey on Public Sector Whistleblower Protection, Question 44. See 5 U.S.C. § 2302(c).

6 From response to OECD Survey on Public Sector Whistleblower Protection, Question 44. See http://www.caa.go.jp/planning/koueki/shuchi-koho/index.html.

7 From response to OECD Survey on Public Sector Whistleblower Protection, Question 44: Legal ground: Article 4 of the Act on the Protection of Public Interest Whistleblowers, "The Establishment of Policy of the Anti-Corruption and Civil Rights Commission."

8 See http://www.pcaw.org.uk/.

9 See http://www.whistleblower.org/.

10 See www.whistleblowingnetwork.org.

11 See Australia's Public Interest Disclosure Act Part 5 Section 82A, and Canada's Public Servants Disclosure Protection Act 54.

## *References*


ACRC (2014a), Annual Report 2013, Anti-Corruption & Civil Rights Commission of Korea, Seoul, http://goo.gl/Ti4S1l

ACRC (2014b), *Protecting and Rewarding Whistleblowers*, Anti-Corruption and Civil Rights Commission of Korea, Seoul, www.acrc.go.kr/eng/board.do?command=searchDetail&method=searchList&menuId=020311.

Act on the Protection of Public Interest Whistleblowers (Act No. 10472, Mar. 29, 2011), Korea, www.unodc.org/res/cld/document/kor/act-on-the-protection-of-public-interest-whistleblowers_html/Republic_of_Korea_Act_on_the_Protection_of_Public_Interest_Whistleblowers.pdf.

Advice Centre for Whistleblowers in the Netherlands (2013), *Annual Report: Courage When it Counts*, www.adviespuntklokkenluiders.nl/wp-content/uploads/2015/03/advice-centre-for-whistleblowers-in-the-netherlands-annual-report-2013.pdf.

American Bar Association (2012), *Congress Strengthens Whistleblower Protections for Federal Employees*, Issue: November-December 2012, www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html.

Banisar, D. (2011), "Whistleblowing: International Standards and Developments" in Sandoval, I. (ed.), *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, World Bank Institute for Social Research, UNAM, Washington, DC, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180.

Government of Japan (2014), Consumer Affairs Agency website, www.caa.go.jp/planning/koueki/shuchi-koho/index.html (accessed 23 July 2014).

Council of Europe Parliamentary Assembly (2009), *Report of the Committee on Legal Affairs and Human Rights, The protection of "whistle-blowers"*, Council of Europe, Strasbourg, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12302&lang=en.

Decree Regulating the Reporting of Suspected Abuses in the Civil Service and the Police (Besluit van 15 december 2009, houdende een regeling voor het melden van een vermoeden van een misstand bij de sectoren Rijk en Politie), Netherlands. Devine, T. and S. Walden (2013), *International Best Practices for Whistleblower Policies*, Government Accountability Project, Washington DC.

GAP (2015), *Government Accountability Project website*, www.whistleblower.org/ (accessed 23 July 2015).

Government of Canada (2014), *Annual Report on the Public Servants Disclosure Protection Act 2013–14*. Available at www.tbs-sct.gc.ca/reports-rapports/psdpa-pfdar/2013-2014/psdpa-pfdar-eng.asp.

Morehead Dworkin, T. (2002) "Whistleblowing, MNCs and Peace", *William Davidson Working Paper Number 437*, http://deepblue.lib.umich.edu/bitstream/handle/2027.42/39821/wp437.pdf?sequence=3.

Occupational Safety and Health Administration Act (1970), United States of America, www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=OSHACT.

ODAC, R. Calland, G. Dehn and Public Concern at Work (2004), *Whistleblowing Around the World: Law, Culture & Practice*, ODAC, Cape Town and Public Concern at Work in partnership with the British Council, London.

OECD (2014), *OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection* (survey), OECD, Paris.

OECD (1998), *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, 23 April 1998. OECD, Paris, http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=129&InstrumentPID=125&Lang=en&Book.

Office of Special Counsel, *2302(c) Certification Program*, https://osc.gov/Pages/Outreach-2302Cert.aspx (accessed 23 July, 2015).

Protected Disclosures Act (No.14 of 2014), Ireland, www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html.

Protected Disclosures Act (2000), New Zealand, www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html?search=ts_act%40bill%40regulation%40deemedreg_protected+disclosures+act_resel_25_h&p=1.

PCaW (2010), *Where's whistleblowing now? 10 years of legal protection for whistleblowers*, Public Concern at Work, London, www.pcaw.org.uk/files/PIDA_10year_Final_PDF.pdf.

Public Interest Disclosure Act (2013), Australia, www.comlaw.gov.au/Details/C2013A00133.

Public Interest Disclosure Act (1998), United Kingdom, www.legislation.gov.uk/ukpga/1998/23/contents.

Public Servants Disclosure Protection Act (2005), Canada, http://laws-lois.justice.gc.ca/eng/acts/P-31.9/.

Transparency International (2013), *International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest*, Transparency International, Berlin, www.transparency.org/whatwedo/pub/international_principles_for_whistleblower_legislation.

Treasury Board of Canada Secretariat, Annual Report on the Public Servants Disclosure Protection Act 2013–14. www.tbs-sct.gc.ca/reports-rapports/psdpa-pfdar/2013-2014/psdpa-pfdar-eng.asp (accessed 23 July, 2015).

UK Civil Service Commission (2011),*Whistleblowing' and the Civil Service Code*, http://civilservicecommission.independent.gov.uk/wp-content/uploads/2014/02/Whistleblowing-and-the-Civil-Service-Code.pdf.

Whistleblower Protection Act (1989), 5 U.S.C., United States of America, www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-app-inspector.pdf.

Whistleblower Protection Act (2004), Japan, www.cas.go.jp/jp/seisaku/hourei/data/WPA_2.pdf.

YouGov (2013), YouGov/*PCAW Survey Results: Whistleblowing work concerns*, YouGov London, p.8, https://yougov.co.uk/publicopinion/archive/6888/.

# *Chapter 5.*

# Whistleblower protection in the private sector

*This chapter describes different approaches to legislating for private sector whistleblower protection and accompanying recommendations for reform. It focuses on the practical application of dedicated whistleblower protection legislation and provisions within other laws to provide protection to private sector whistleblowers who report suspected wrongdoing, with reference to relevant case law. It also examines whistleblower protection from a business perspective, drawing on responses to the OECD Survey on Business Integrity and Corporate Governance, to illustrate how companies are organising themselves to provide protected reporting and to prevent retaliation.*

International frameworks for providing legal protection to those who report suspected acts of corruption in good faith and on reasonable grounds to competent authorities are described in Chapter 1. Whistleblower protection provisions in multilateral anti-corruption treaties and instruments apply almost uniquely in the context of external reporting to competent authorities. To address all relevant aspects of whistleblower protections, there are several additional considerations to take into account. First, protection needs to be provided for those who report suspected misconduct both internally and externally (whether to designated law enforcement authorities or the media). The most recent international standards on whistleblower protection provide protection against retaliation for those who report externally and for those who report internally within the organisation.[1] This broader approach is already reflected in private sector whistleblower protection legislation in some countries. Second, a protected (e.g. anonymous or confidential) reporting mechanism, although a part of any system providing protected reporting, cannot alone protect those who report from retributory actions. Those who make reports using a protected mechanism should also be guaranteed effective protection from retaliation, both before and after reporting. Third, at the same time as ensuring that those who report are protected against retaliatory action, those who retaliate must be held responsible.

Drawing on analysis by the OECD Working Group on Bribery (OECD WGB) of countries' implementation of the Anti-Bribery Convention and related instruments (OECD, 1997), and data from the 2015 OECD Survey on Business Integrity and Corporate Governance (see Annex 5.A1), this chapter explores, with a focus on practical application, different approaches to private sector whistleblower protection. References to examples of whistleblower protection legislation do not constitute endorsement of that specific model. Instead, they are designed to describe the different approaches taken in different legal systems. The OECD WGB operates on the principle of functional equivalence, as set out in Commentary 2 to the Anti-Bribery Convention. Various models will therefore be considered acceptable as long as they attain the goal of implementing the Anti-Bribery Convention and related instruments.

## Private sector whistleblower protection laws: Almost a legal vacuum

There are a multitude of international standards on encouraging the reporting of corrupt acts in the private sector and on protecting those who report. However, domestic legislation to implement these standards is much more advanced in relation to public sector whistleblowers than it is for private sector whistleblowers. Despite this, in common law countries[2] there has been a recent increase in the adoption of dedicated whistleblower protection legislation that encompasses both public and private sector whistleblower protection. Other forms of domestic legislation aimed at protecting private sector whistleblowers include criminal code provisions or sector-specific laws. In addition, some countries have adopted laws to recognise or incentivise the implementation of internal controls, ethics and compliance programmes by companies, for example by allowing mitigated sanctions if a company can prove that it has an effective programme in place[3]. These laws can indirectly lead to an increased adoption of internal whistleblower protection and reporting frameworks within companies, given that these tools constitute an important element in an effective internal controls, ethics and compliance programme.

Through monitoring parties' implementation of the Anti-Bribery Convention and related instruments, the OECD WGB systematically analyses legislative frameworks for

protecting private sector whistleblowers who report foreign bribery, along with the whistleblower protection practices of companies headquartered in the country under evaluation. Of the 41 Parties to the Anti-Bribery Convention, only 14 have been deemed to have adopted measures that satisfactorily meet the 2009 Anti-Bribery Recommendation's provisions on private sector whistleblower protection for those who report suspected foreign bribery. The WGB has stated that the implementation of effective whistleblower protection frameworks is a horizontal issue that confronts other Parties to the Convention.[4] Some countries have adopted laws that provide protection for whistleblower reporting in other areas, for example in relation to: anti-competitive or cartel-like behaviour; health; environment or occupational safety threats; or on a sector-specific basis, such as whistleblower protection in the finance sector.

## Dedicated legislation

Although the legislation below sometimes applies to both public and private sector whistleblowers, the examples constitute the only dedicated legislation in OECD WGB Member countries that also provides protection in the private sector. Recent examples of dedicated legislation, such as Hungary's Act CLXV of 2013 on Complaints and Public Interest Disclosures, Ireland's Protected Disclosures Act (No.14 of 2014), and the Slovak Republic's Act No. 307/2014 Coll. on Certain Measures related to the Reporting of Anti-social Activities and on Amendments to Certain Laws, have not been fully evaluated by the OECD WGB and are described in Chapter 1 based entirely on country responses to the 2014 OECD Public Sector Whistleblower Protection Survey. In accordance with the established practice of the OECD WGB, draft bills are only evaluated once they have been enacted, hence, for example, Switzerland's draft bill on private sector whistleblower protection, described in Chapter 10, has not been considered. The following examples are taken from OECD WGB monitoring reports and are intended as illustrative case studies rather than examples of best or endorsed practice:

### *UK Public Interest Disclosures Act*

The UK's Public Interest Disclosure Act 1998 (PIDA) provides protection to public and private sector employees from detrimental treatment for disclosing misconduct. As described in Part I, PIDA classifies disclosures into three tiers with increasing thresholds for affording protection. These three categories of disclosure are: internal disclosures to employers; regulatory disclosures to prescribed bodies; and wider disclosures, for example to the police, media, consumer groups or non-prescribed regulators. The UK Serious Fraud Office (UK SFO) is the designated agency for receiving public interest disclosures related to serious and complex fraud, including domestic and foreign bribery. The thresholds for protection for Tier 1 disclosures to an employer require that the disclosure be made in good faith and with a reasonable belief the information tends to show that the misconduct has occurred, is occurring, or is likely to occur. For an external disclosure, the Tier 1 threshold must be met and, in addition, the discloser must reasonably believe that the information and any allegations in it are substantially true and relevant to the regulator (for corruption this is the UK SFO).

During its Phase 3 evaluation of the United Kingdom, the OECD WGB expressed concerns about the territorial limitations of PIDA, specifically in foreign bribery cases where expatriate workers of UK companies are potential whistleblowers (OECD, 2012a). The report cited the 2011 employment tribunal dismissal of a whistleblower's claims of unfair dismissal and detriment for making protected disclosures in the case of Foxley v

GPT Special Project Management Ltd.[5] The OECD WGB therefore decided to follow-up on whistleblower protection under PIDA. The United Kingdom made subsequent changes to its whistleblowing framework through the Enterprise and Regulatory Reform Act 2013. These changes introduced a public interest test requiring individuals who make a claim at an employment tribunal to show a reasonable belief that their disclosure was made in the public interest. It also amended the good faith test so that the employment tribunal has the power to reduce any compensation award by up to 25% if it considers the disclosure was made predominantly in bad faith. According to the United Kingdom, the change to the good faith test was made to mitigate the prospect of two tests needing to be satisfied acting as a deterrent to whistleblowers (OECD, 2014a).

### *Japan's Whistleblower Protection Act (WPA)*

Japan's Whistleblower Protection Act (2006) provides protection from dismissal and unfair treatment for public and private sector whistleblowers who report to enforcement authorities, and, in some cases, to external parties such as labour unions and the media. It does not, however, set out sanctions for those who retaliate against whistleblowers in violation of the act; whistleblowers must instead seek remedies through the provisions set out in the act, or under the Labour Contract Act or Civil Code. At the time of Japan's Phase 3 Written Follow-Up Report by the OECD WGB, Japan reported that more than ten cases had been brought to court, and that in many of these cases, the whistleblower claims were successful (OECD, 2014b). To understand the act's impact on the implementation of whistleblower protection mechanisms in the private sector, Japan undertook a study, completed in June 2013, which targeted approximately 3 000 private business operators. The results shows that the awareness of the Whistleblower Protection Act among large enterprises maintained a very high level (more than 95%) and small and medium-sized enterprises' (SME) awareness rose to 64%, from 61.4% in 2008. In addition, many private business operators showed a positive attitude about the effectiveness of installing a reporting desk. For example, 57.6% of respondents selected "[t]he environment where employees could report about injustice in comfort was improved" and 48.2% responded "[i]t is functioning as a deterrent against an illegal act" (OECD, 2014b, p.21).

### *Korea's Act on the Protection of Public Interest Whistleblowers*

The Act on the Protection of Public Interest Whistleblowers mandates the Anti-Corruption and Civil Rights Commission (ACRC) to receive reports and grant awards to whistleblowers whose reports serve the public interest. The ACRC referred 1 704 whistleblowing cases to examination/investigative agencies out of the 4 158 cases reports it received since the act took effect on 30 September 2011. Among these, 60 cases, which were subject to a penal provision, were referred to an investigative agency under the "Guideline for referral of reported cases (OECD, 2014c)."

### *New Zealand's Protected Disclosures Act (PDA)*

New Zealand's Protected Disclosures Act 2000 (PDA) provides private sector whistleblower protection for employees who report, in good faith, serious wrongdoing in or by an organisation. The PDA requires public sector entities to allow reporting to specified designated authorities, such as New Zealand's Serious Fraud Office (SFO), if the internal chain of reporting cannot be used because, for example, the wrongdoing may involve the head of the organisation in question. However, during its Phase 3 evaluation of New Zealand, the OECD WGB found that the PDA does not impose a similar

requirement on private sector entities to establish reporting processes and protection for its employees. The SFO reported receiving a total of 13 corruption-related whistleblower reports over the three years up to the Phase 3 evaluation in 2013. Several participants in the Phase 3 on-site discussions from both the governmental and non-governmental sector highlighted practical difficulties confronted by small countries, like New Zealand, in encouraging whistleblowing while ensuring confidentiality (OECD, 2013a).

### *South Africa's Protected Disclosures Act*

South Africa's Protected Disclosures Act 2000 (PDA) provides protection for public and private sector employees who report the actual or suspected commission of a criminal offence by an employer or an employee of that employer. The PDA protects whistleblowers from being subjected to "occupational detriment", which includes: any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion or being threatened with any of such actions. At the time of South Africa's Phase 3 evaluation by the OECD WGB in 2014, a bill was submitted to the Minister of Justice that aimed to address the WGB's concerns about loopholes in the PDA. The bill proposes changes including extending protection to independent contractors, consultants and temporary employees, and introducing a duty on employers to investigate disclosures of unlawful or irregular conduct.

A South African survey on economic crime reported that crime detected through whistleblower reporting dropped from 16% in 2007 to 6% in 2013.[6] The OECD WGB had grave concerns about reports of retaliatory acts against whistleblowers in South Africa at the time of its Phase 3 evaluation and therefore recommended that South Africa take concrete and meaningful steps to ensure that those who report suspected acts of foreign bribery in good faith and on reasonable grounds are afforded the protections guaranteed by the law (OECD 2014d).

## Criminal Code provisions

### *Canadian Criminal Code, section 425.1(1)*

Canada amended its Criminal Code in 2005 to introduce a new offence of retaliation against employees for reporting or planning to report a workplace offence to external law enforcement authorities, punishable by up to five years' imprisonment. Section 425.1(1) applies to three categories of person: the employer of the reporting person, a person acting on behalf of the employer and a person in a position of authority in respect of the employee. In the context of Canada's Phase 3 evaluation by the OECD WGB in 2011, the group decided it would follow-up on the new offence as it was too soon to conclude whether or not it was effective in protecting private sector whistleblowers. The report noted how the private sector and civil society viewed Canada's model for private sector whistleblower protection as ineffective due to: its reliance on prosecutorial action and requirement of a high (criminal) standard of proof of retaliation; financial and other burdens on the discloser (who will have been the victim of retaliation) that may discourage other potential whistleblowers; and recent poor examples of treatment of whistleblowers in the public sector, which undermine trust in whistleblower protection mechanisms. At the time of Canada's Phase 3 Written Follow-Up Report in 2013, there had been no cases brought under section 425.1(1) of the Criminal Code (OECD, 2011c).

Transparency International Canada's 2013 Civil Organisation Report for Canada's United Nations Convention against Corruption (UNCAC) Implementation Review notes that Canada's federal whistleblower protection model is limited because it does not provide statutory protection for whistleblowers who experience retaliation for internal reporting within private sector organisations (Transparency International Canada, 2013). The report further states that a system of deterring reprisals by criminalising retaliation is not the same as effective whistleblower protection as, while punishing those who retaliate, it does not redress the harm suffered by whistleblowers who are the victims of such retaliation. It notes that better, more comprehensive models, confirmed by case law,[7] exist at a provincial level in Canada. Transparency International Canada recommended that the government introduce more robust legislative protection for whistleblowers in the private sector that would apply irrespective of whether whistleblowers reported internally or to external authorities. It also recommended making available civil remedies that would enable whistleblowers who experience reprisals to recover damages for their treatment.

## Labour Code provisions

### *French Labour Code, Article 1161-1*

In 2007, France introduced amendments to its Labour Code, including article 1161-1, which provides that: "no employee may be punished, dismissed or subjected to any discriminatory measure, direct or indirect, in particular with respect to remuneration, training, transfer, assignment, qualification, classification, professional promotion, amendment or renewal of contract for having reported or disclosed in good faith, either to his/her employer or to the judicial or administrative authorities, acts of corruption of which s/he becomes aware in the exercise of his/her functions." This provision on private sector whistleblower protection also applies to candidates for recruitment, secondees and trainees. Article 1161-1 places the burden of proof on the company to demonstrate before a judge that the penalties imposed on the employee have no relation to that person's disclosures. At the time of France's Phase 3 evaluation in 2010, the Working Group noted that the amendments could lead to greater reporting with the help of increased awareness raising among companies. In its Phase 3 Written Follow-Up Report to the OECD WGB in 2014, France's Central Office for the Prevention of Corruption (SCPC) listed awareness-raising efforts and noted the addition of a new Article 40(6) to the Code of Criminal Procedure by No. 2013-1117 of 6 December 2013 on action against tax fraud and serious economic and financial crime, also naming the SCPC as a potential interlocutor for whistleblowers in corruption cases. However at the time of the report, the SCPC had not received any requests for intervention under this new provision (OECD, 2012b).

### *Luxembourg Labour Code, Article L.271.1*

In 2011, Luxembourg amended its Labour Code to prohibit reprisals against private sector employees who protest against or refuse acts they consider to constitute: the acquisition of an illegal interest, bribery, or trafficking in influence (trafficking within the meaning of Articles 245 to 252, 310 and 310-1 of the Penal Code [Article L. 271.1(1)]). Likewise, reprisals may not be taken against employees for reporting such an act to a line manager or to the relevant prosecuting authorities (Article L. 271.1(2)). Protective measures come into effect when the alert is raised within the company and/or reported to the law enforcement authorities. Employees have two means of redress. The first is a

special action to set aside, using the expedited procedure in Article L. 271.1(4) of the Labour Code. This allows an employee to make an application to the Employment Tribunal, after which the President of the Tribunal must take a decision within 15 days. The President may decide that the termination of the employment contract is void and order the employee to be kept on or, where relevant, reinstated. Second, the employee is also entitled to seek damages for wrongful dismissal through the courts. At the time of Luxembourg's Phase 3 evaluation, the OECD WGB considered that although employees who report a suspected offence in good faith are afforded protection, they have the burden of proving that they have been unlawfully sanctioned. It is then up to the employer to use other objective elements to prove that the sanctions were justified and that no prohibited reprisals were taken. If the employee takes legal action to seek damages for wrongful dismissal, the Labour Code provides for a reversal of the burden of proof in the employee's favour (OECD, 2011d).

### *Norway's Working Environment Act*

Norway's Working Environment Act was amended in 2007 to include provisions for notification of "censurable conditions" within an organisation (sections 2-4) and protection from retaliation against employees who use their legal right to notify (section 2-5). The act also applies to private sector employees. It includes provisions that require companies to establish reporting channels for employees who wish to notify of censurable conditions in the companies (section 3-6). Norway's Phase 3 evaluation report by the OECD WGB notes that several foreign bribery cases had been detected through whistleblower reports (OECD, 2011e).

## Sector specific laws

### *Slovenia's Integrity and Prevention of Corruption Act (IPCA)*

Chapter III of Slovenia's IPCA is dedicated to the protection of public and private sector employees who, reasonably and in good faith, report suspicions of any form of illegal or unethical behaviour. Slovenia's Corruption Prevention Commission (CPC) is responsible for the implementation of the law, which contains provisions on confidentiality, internal and external disclosure channels, a range of remedies for retaliation, fines for those who retaliate or disclose the identity of the whistleblower, and independent assistance from the CPC. The Slovene Sovereign Holdings Act also requires state-owned enterprises (SOEs) to establish whistleblowing mechanisms and protection measures. The OECD WGB commended Slovenia on its whistleblower protection provisions and recommended that it raise awareness in the private sector and among SOEs of the protections provided (OECD, 2014e).

### *US Sarbanes-Oxley Act and Dodd-Frank Act*

The United States has multiple laws that provide for private sector whistleblower protection. "Issuers" (persons or companies who issue securities) are required to provide whistleblower protection under the Sarbanes-Oxley Act and extend such protection to auditors under Section 10A. Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) amends the Securities Exchange Act of 1934 to add section 21F and create incentives and protections for whistleblowers. These incentives take the form of monetary awards for providing information, heightened confidentiality assurances, and enhanced employment retaliation protections. The Dodd-Frank Act authorises the Securities and Exchange Commission (SEC) to provide monetary awards

to eligible individuals who come forward with high-quality original information that leads to a commission enforcement action in which over USD one million in sanctions is ordered. The range for awards is between 10% and 30% of the money collected. Additional monies can be awarded for related actions, which are defined as a judicial or administrative action brought by: 1) the Attorney General of the United States; 2) an appropriate regulatory authority; 3) a self-regulatory organisation; or 4) a state attorney general in a criminal case. The action must be based on the same original information that the whistleblower provided to the commission and that led to monetary sanctions totalling more than USD one million (Securities Exchange Act of 1934, Rule 21F-3(b)).

The SEC has the discretion to base the percentage of an award on seven criteria outlined in Rule 21F-6 of the Exchange Act. The following four criteria can increase the percentage of the whistleblower award: 1) the significance of the information provided by the whistleblower; 2) the assistance provided by the whistleblower; 3) a law enforcement interest; and 4) participation in internal compliance systems. The following three factors can decrease the percentage of an award: 1) the whistleblower's culpability; 2) if the whistleblower unreasonably delayed reporting the misconduct; and 3) if the whistleblower interfered with internal compliance and reporting systems.

Certain individuals, outlined in Exchange Act Rule 21F-8, are ineligible from receiving an award. These include: certain US law enforcement officers; employees of foreign governments; people who are convicted in criminal actions related to the information they provided to the SEC; and certain auditors, including those who would violate Section 10A of the Exchange Act by reporting information to the commission in order to obtain a whistleblower reward.

In addition to the financial incentives provided by the Dodd-Frank amendments, the statute also provides protection for individual whistleblowers who provide information to the SEC. Whistleblowers can make anonymous reports by instructing a lawyer to report to the SEC on their behalf. The act bars employers from retaliating against whistleblowers. Whistleblowers who are the victims of retaliation are entitled to be reinstated at their pre-whistleblowing level of employment, double back-pay with interest, and compensation for reasonable attorney fees, litigation costs, and expert witness fees. In addition, 18 US states have enacted legislation that provides whistleblower protection to non-issuers and non-government employees (OECD, 2010a).

On 4 August 2015, the SEC issued an interpretive rule[8] clarifying that individuals are entitled to the Dodd-Frank Act's protections against retaliation, regardless of whether they report internally in the company or directly to the SEC: "Under our interpretation, an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission." The US Court of Appeals for the Second Circuit confirmed this interpretation on 10 September 2015 in the case of Bergman v Neo@Ogilvy LLC[9], overturning an earlier judgment by the District Court for the Southern District of New York. The Court of Appeals found that the whistleblower involved, Daniel Berman, was entitled to sue his former employer, advertising company Neo@Ogilvy and its parent company WPP, for allegedly sacking him in April 2013 after he reported allegations of accounting fraud to the company, but not to the SEC. The Court defer to the SEC's interpretation as to whether Dodd-Frank's anti-retaliation provisions should apply to whistleblowers who only report wrongdoing internally because of a lack of clarity between whistleblower protection provisions in the Dodd-Frank and Sarbanes-Oxley Acts.

Following the Phase 3 evaluation, in 2011 the US SEC established the Office of the Whistleblower to administer its whistleblower programme. According to its most recent annual report, since August 2011 the SEC has received a total of 10 193 whistleblower tips, and the number of tips increased by more than 20% between Fiscal Year 2012, the first year for full-year data, and Fiscal Year 2014.[10] In addition, the programme has authorised awards to 17 whistleblowers. The largest award to date exceeded USD 30 million and was granted on 22 September 2014 to a whistleblower, living in a foreign country, for providing information that allowed the SEC to discover a substantial and ongoing fraud that would otherwise have been difficult to detect, and which led to a successful enforcement and related actions.

On 28 April 2015, the SEC announced its first award to a whistleblower in a retaliation case. The award was for the maximum 30% of the amounts collected, in connection with File No. 3-15930: In the Matter of Paradigm Capital Management, Inc. and Candace King Weir (16 June 2014). The SEC charged Paradigm with retaliating against the whistleblower following her report to the commission. The retaliation in question included: "removing the whistleblower from the whistleblower's then-current position, tasking the whistleblower with investigating the very conduct the whistleblower reported to the SEC, changing the whistleblower's job function, stripping the whistleblower of supervisory responsibilities, and otherwise marginalising the whistleblower."[11]

On 1 April 2015 the US SEC invoked Dodd-Frank Act Rule 21F-17, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC, to sanction a company USD 130 000 for using improperly restrictive language, that had the potential to stifle the whistleblowing process, in confidentiality agreements. The company in question required witnesses in certain internal investigation interviews to sign confidentiality statements that said they could face disciplinary action and even be fired if they discussed the matter with outside parties without the prior approval of the company's legal department. However, there were no apparent instances in which the company specifically prevented employees from discussing matters.[12]

## Protecting the retaliator? Data protection laws and whistleblower protection frameworks

As noted in the OECD/G20 Study on G20 Whistleblower Protection Frameworks, data protection laws in some countries may impose legal restrictions on internal private sector whistleblowing procedures (OECD, 2012c). For example, companies in EU member countries must abide by national laws that implement the EU Data Protection Directive 95/46/EC.[13] In its Phase 3 evaluation of Denmark, the OECD WGB noted that despite the absence of private sector whistleblower protection legislation, Danish companies were increasingly adopting internal reporting mechanisms, but these had to be approved by the Danish Data Protection Agency (DDPA) to ensure compatibility with data protection laws. At the time of the evaluation in 2013, the DDPA had approved systems in over 100 companies. To further facilitate reporting, some companies provided measures to protect whistleblowers, however in the absence of legal protection these were judged to have limited weight. The OECD WGB recommended that Denmark promptly put in place public and private sector whistleblower protection measures (OECD, 2013b).

In France, courts have invalidated companies' internal whistleblowing procedures on the basis of data protection laws, including where the whistleblowing provisions were too

broad in scope and could apply to actions that could harm the vital interests of the company, or physical or moral integrity of an individual employee.[14] The Commission on Information Technology and Liberties (CNIL) has developed an expedited approval procedure whereby companies file a statement of compliance with the French data protection law (No. 78-17 of 6 January 1978). At the time of France's Phase 3 Written Follow-Up Report to the OECD WGB in 2014, the CNIL was aware of some 3 000 companies that had a "professional whistleblower system".

## Translating intentions to actions: Guidance on private sector whistleblower protection

### *International guidance*

As noted in the OECD/G20 Study on G20 Whistleblower Protection Frameworks (OECD, 2012c), a number of internationally recognised anti-corruption compliance tools for the private sector advise the adoption of protected reporting mechanisms and measures to prevent retaliation.[15] These include: the OECD Good Practice Guidance on International Controls, Ethics and Compliance (OECD, 2010b), Transparency International's Business Principles for Countering Bribery,[16] the International Chamber of Commerce's (ICC) Rules of Conduct and Recommendations to Combat Extortion and Bribery,[17] the OECD Guidelines for Multinational Enterprises,[18] the World Bank Integrity Compliance Guidelines,[19] and the World Economic Forum's (WEF) Principles for Countering Bribery.[20] The Anti-Corruption Ethics and Compliance Handbook for Business (OECD/UNODC/World Bank, 2013) contains a comparative table of business guidance instruments on anti-bribery. Table 5.1 brings together the main international standards and guidance relating to private sector whistleblower protection in the context of reporting suspected acts of transnational corruption.

The OECD Guidelines for Multinational Enterprises have additional guidance. In particular Commentary 13, which states:

> *Following from effective self-regulatory practices, as a matter of course, enterprises are expected to promote employee awareness of company policies. Safeguards to protect bona fide "whistle-blowing" activities are also recommended, including protection of employees who, in the absence of timely remedial action or in the face of reasonable risk of negative employment action, report practices that contravene the law to the competent public authorities. While of particular relevance to anti-bribery and environmental initiatives, such protection is also relevant to other recommendations in the Guidelines.*

The recently updated G20/OECD Principles of Corporate Governance[21] also provide guidance directed at company boards. Principle IV(E) states:

> *It is therefore to the advantage of the company and its shareholders to establish procedures and safe-harbours for complaints by employees, either personally or through their representative bodies, and others outside the company, concerning illegal and unethical behaviour. The board should be encouraged by laws and or principles to protect these individuals and representative bodies and to give them confidential direct access to someone independent on the board, often a member of an audit or an ethics committee.*

**Table 5.1. International guidance for businesses on private sector whistleblower protection**

| | |
|---|---|
| **Transparency International's Business Principles for Countering Bribery** | The enterprise should make compliance with the [Anti-Bribery] Programme mandatory for employees and directors and apply appropriate sanctions for violations of its Programme.…<br>To be effective, the Programme should rely on employees and others to raise concerns and violations as early as possible. To this end, the enterprise should provide secure and accessible channels through which employees and others should feel able to raise concerns and report violations ("whistleblowing") in confidence and without risk of reprisal.<br>These or other channels should be available for employees to seek advice on the application of the Programme." (principles 6.3.4, 6.5.1, 6.5.2) |
| **ICC Rules on Combating Corruption** | Elements of an Efficient Corporate Compliance Programme: …<br>offering channels to raise, in full confidentiality, concerns, seek advice or report in good faith established or soundly suspected violations without fear of retaliation or of discriminatory or disciplinary action. Reporting may either be compulsory or voluntary; it can be done on an anonymous or on a disclosed basis. All bona fide reports should be investigated" (part 3, article 10(m)) |
| **OECD Good Practice Guidance on Internal Controls, Ethics and Compliance** | Companies should consider … providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions; ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and iii) undertaking appropriate action in response to such reports" (para 11(i)) |
| **WEF Principles for Countering Bribery** | The [Anti-Bribery] Programme should encourage employees and others to raise concerns and report suspicious circumstances to responsible enterprise officials as early as possible.<br>To this end, the enterprise should provide secure and accessible channels through which employees and others can raise concerns and report suspicious circumstances ("whistleblowing") in confidence and without risk of reprisal.<br>These channels should also be available for employees and others to seek advice or suggest improvements to the Programme. As part of this process, the enterprise should provide guidance to employees and others on applying the Programme's rules and requirements to individual cases (principle 5.5) |
| **World Bank Integrity Compliance Guidelines** | Duty to report: Communicate to all personnel that they have a duty to report promptly any concerns they may have concerning the Programme, whether relating to their own actions or the acts of others.<br>Advice: Adopt effective measures and mechanisms for providing guidance and advice to management, staff and (where appropriate) business partners on complying with the party's Programme, including when they need urgent advice on difficult situations in foreign jurisdictions.<br>Whistleblowing / Hotlines: Provide channels for communication (including confidential channels) by, and protection of, persons not willing to violate the Programme under instruction or pressure from hierarchical superiors, as well as for persons willing to report breaches of the Programme occurring within the party. The party should take appropriate remedial action based on such reporting."(guideline 9) |
| **UN Convention against Corruption (UNCAC)** | Companies to provide disciplinary measures in case of non-compliance with company's anticorruption codes or standards. This principle is extrapolated from article 8 of the Convention which provides for States Parties to "…consider taking…disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article (8 §6)" |

*Source:* OECD/UNODC/World Bank (2013), Anti-Corruption Ethics and Compliance Handbook for Business (Annex 1), www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm.

Finally, the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD 2015b), which are intended as a complement to the G20/OECD Principles, provide guidance that is also applicable not only to wholly state-owned entities but also to commercial enterprises, which for the purpose of this chapter are "private" but which have a non-trivial remaining state ownership share. Annotations to Guidelines V.A and V.C recommend the establishment of whistleblowing channels and whistleblower protections, for example via codes of ethics, to protect and encourage stakeholders, and particularly employees, who report *bona fide* concerns regarding illegal or unethical conduct.

Some companies have established an ombudsman to deal with complaints. Several regulators have also established confidential phone and e-mail facilities to receive allegations. While representative employee bodies in certain countries undertake the task of conveying concerns to the company, individual employees should not be precluded from, or be less protected, when acting alone. In the absence of timely remedial action, or in the face of reasonable risk of negative employment action to a complaint regarding contravention of the law, employees are encouraged to report their bona fide complaint to the competent authorities. Many countries also allow cases of violations of the OECD Guidelines for Multinational Enterprises to be brought to the National Contact Point. The company should refrain from discriminatory or disciplinary action against such employees or bodies.

### *National guidance*

Some countries have enacted corporate liability legislation or guidance that takes into account the effectiveness of a company's compliance programme when determining corporate liability for a crime that may have been committed during that company's activities, or as a mitigating factor when sentencing. In some legislation and guidance, protected reporting and prevention of retaliation are included as elements of an effective compliance programme, some examples are provided below. It is important to bear in mind that although such legislation or guidance may encourage companies to provide protected reporting and prevent retaliation, it does not alone amount to private sector whistleblower protection legislation.

#### *UK Adequate Procedures Guidance*

In 2011, the United Kingdom published guidance on procedures that relevant commercial organisations can put in place to prevent bribery (UK Adequate Procedures Guidance).[22] This statutory guidance was promulgated following the entry into force of the UK Bribery Act 2010, which criminalised the failure by commercial organisations to prevent persons associated with them from committing bribery on their behalf (section 7). It is a full defence for an organisation to prove that despite a particular case of bribery it had adequate procedures in place to prevent bribery occurring. The UK Adequate Procedures Guidance (required under section 9 of the UK Bribery Act) is a statutory instrument that provides guidance on the procedures that commercial organisations can put in place to prevent persons associated with them from committing bribery.

Principle 1 of the UK Adequate Procedures Guidance includes: "The reporting of bribery including 'speak up' or 'whistleblowing' procedures" as one of the topics that a commercial organisation may use to prevent bribery, proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities.

Principle 5 concerns communication (including training) and reporting mechanisms and protection:

> *Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called "speak up" procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.*

### *US Sentencing Commission Guidelines Manual*

For the purposes of determining the appropriate sentence for legal persons (e.g. companies) convicted of criminal offences, the United States Sentencing Commission Guidelines Manual[23] sets out, in Chapter 8, six factors to be taken into account by courts when sentencing. Of these six factors, the two factors that can help to mitigate a sentence are: 1) the existence of an effective compliance and ethics program; and 2) self-reporting, co-operation, or acceptance of responsibility. Under the Manual, an effective compliance and ethics program is defined to include, "reasonable steps … to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."[24]

### *Brazil's Clean Companies Law and implementing decree*

In 2013, Brazil enacted its Clean Companies Law (Law No. 12 846 of 1 August 2013), which established a framework for corporate liability for offences against the public administration, including domestic and foreign bribery. Article 7 of the Clean Companies Law lists the factors to be taken into consideration when sentencing. These include the existence of internal mechanisms and procedures of integrity, audit and incentive for the reporting of irregularities, and the effective enforcement of codes of ethics and of conduct within the scope of the legal entity. The law also provides for the possibility of entering into a "leniency agreement" with the company, and accompanying exemptions and mitigations regarding certain sanctions (OECD, 2014f).

In a recently adopted decree to implement the Clean Companies Law, the Brazilian government defined the basic elements of an integrity programme to consider when deciding whether or not to enter into a leniency agreement. These elements include channels to report irregularities that are openly and broadly disseminated among employees and third parties, and mechanisms to protect good-faith whistleblowers. During Brazil's Phase 3 evaluation, the OECD WGB considered that these provisions may result in an increase in the number of internal whistleblower protection systems, although it also noted that most Brazilian companies did not have such regimes (OECD, 2014f). A review of 27 major Brazilian companies showed that only 7 had publicly available codes of conduct covering whistleblowing. A 2013 study by the Brazilian Institute of Business Ethics (IBEN) found that out of 360 publicly available codes of conduct, only 43% contained a policy on whistleblowing.[25] The OECD WGB recommended that Brazil put in place effective measures to protect private sector whistleblowers who report suspected acts of foreign bribery in good faith and on reasonable grounds (OECD, 2014f).

### *Chile's offence prevention model*

Chile's Law 20 393 allows corporate liability for a range of offences, including foreign bribery. Companies can avoid or mitigate liability if they have put in place an offence prevention model in accordance with the provisions of the law. One of the required elements of an offence prevention model is a channel for reporting violations. In Chile's Phase 3 evaluation report, the OECD WGB noted that these provisions offer whistleblowers a reporting channel but not protection from reprisals. They also do not detail the standards that the reporting channels should meet. Only Labour Code workplace harassment provisions provide any kind of recourse for private sector whistleblowers who suffer retaliation for reporting. The OECD WGB noted that such provisions require proof of repetitive conduct and that a single act of retaliation, such as dismissal or demotion, would not be covered. The report further noted a recent NGO survey of Chilean companies, which found that 61% of employees in 31 companies witnessed, but did not report, unethical conduct. Reasons for not reporting included a belief that remedial action would not be taken (31%), distrust in confidential reporting mechanisms (17%), and fear of retaliation (36%). The OECD WGB recommended that Chile enhance and promote whistleblower protection in the private and public sectors (OECD, 2014g).

### *Australian Standard 8004 – 2003 Whistleblower Protection Programs for Entities (AS8004-2003)*

Developed by Standards Australia, AS8004-2003 forms part of the Australian National Corporate Governance Advisory Standards and sets a standard for structural, operational and maintenance elements that a whistleblower programme entity must meet. It explains how to establish, maintain, implement and effectively manage a whistleblowing mechanism that can apply to employees, executives, directors, outside agents and sub-contractors.[26]

### *British Publicly Available Specification (PAS) 1998:2008 Whistleblowing Arrangements Code of Practice*

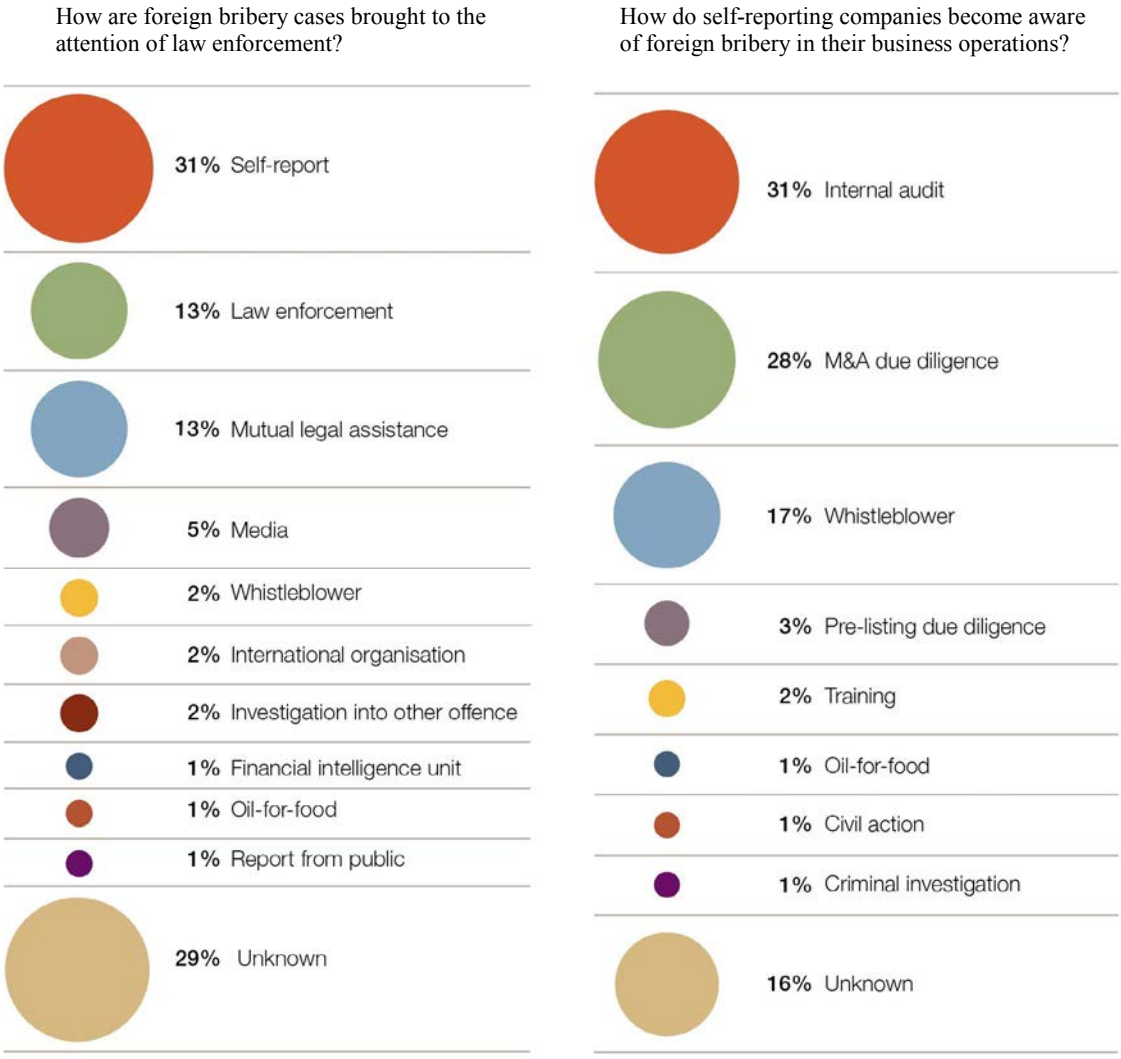
PAS 1998:2008 was developed by PCaW in collaboration with the British Standards Institution (BSI). It sets out good practice for the introduction, revision, operation and review of effective whistleblowing arrangements. It is informed, but not dictated to, by the UK PIDA and is designed to assist organisations across the private, public and voluntary sectors. The recommendations and guidance in PAS 1998:2008 are of particular relevance to public bodies, listed companies and organisations (e.g. in the health and care sectors) where there is legislative or regulatory expectation that effective whistleblowing arrangements are in place. It also covers application to small organisations.[27]

## Private sector whistleblowers initially report internally

Although protection under domestic whistleblower protection laws are most commonly provided to those reporting misconduct externally to competent authorities, in reality, private sector employees report first, if at all, inside the company. According to a recent study of private sector employees in the United States, only one in six disclosers (18%) ever chose to report externally. Of those who do report externally, 84% do so only after first trying to report internally. Half of those who choose to report to an outside

source initially, later also report internally. Only 2% of employees go solely outside the company and never report the wrongdoing they have observed to their employer.[28] Of the private sector whistleblowers who have made reports to the US SEC's Office of the Whistleblower to date, over 80% first raised their concerns internally to their supervisors or corporate compliance officers before reporting to the commission.[29]

**Figure 5.1. How often are foreign bribery cases revealed by whistleblowers?**




*Source:* OECD analysis of foreign bribery cases concluded between 15/02/1999 and 01/06/2014 (OECD, 2014h).

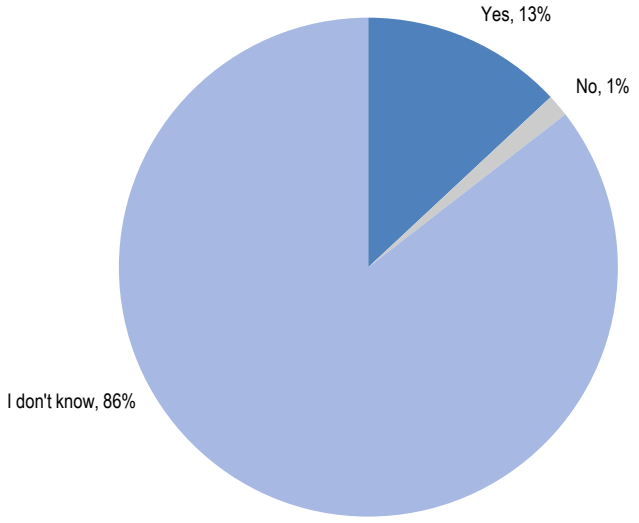
This finding is corroborated in the OECD Foreign Bribery Report (OECD, 2014h), which analyses the 427 concluded cases for bribery of foreign public officials since the entry into force of the Anti-Bribery Convention. Only 2% of concluded foreign bribery cases were brought to the attention of law enforcement authorities by whistleblowers, whereas 17% of companies that self-reported the corrupt acts became aware of foreign bribery in their business operations as a result of whistleblowers (Figure 5.1). This figure is indicative, but not conclusive, as information about whistleblower disclosures may be confidential, not disclosed, or not correctly reported in the press. In the absence of

legislation, it is up to companies to protect those who report internally and become the victims of retaliation. This section draws on the results of the OECD Survey on Business Integrity and Corporate Governance (the OECD Survey - see Annex 5.A1) to illustrate the approaches currently being taken by companies to protect reporting and prevent retaliation.

### *Whistleblower reporting mechanisms must be accompanied by effective whistleblower protection policies*

One of the first steps companies can take towards putting in place an effective private sector whistleblower protection framework is to establish a reporting mechanism. As noted above, however, this alone does not amount to whistleblower protection. Out of 69 respondents to the OECD Survey, 59 indicated that their companies had established a mechanism, such as a hotline, whereby employees could report suspected instances of serious corporate misconduct (Figure 5.2).

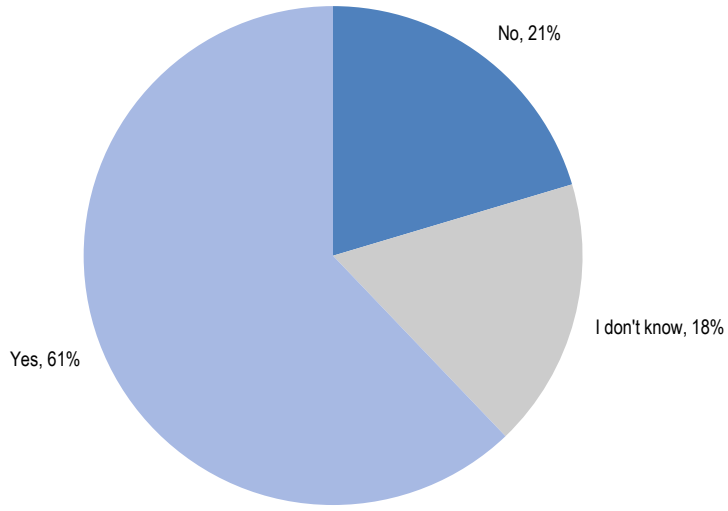
**Figure 5.2. Does your company have an existing mechanism for reporting suspected instances of serious corporate misconduct?**




*Source*: OECD Survey on Business Integrity and Corporate Governance (69 responses).

Over one-third of the respondents whose company had a reporting mechanism either indicated that their company did not have a written policy of protecting those who report from reprisals or that they did not know if such a policy existed; two respondents did not answer the question (Figure 5.3). Twenty percent of respondents whose companies did have a written whistleblower protection policy indicated that, under this policy, retaliation against disclosers was grounds for discipline up to and including dismissal. Others indicated that retaliatory actions against employees who report misconduct were prohibited in their corporate code of conduct or ethics. A non-retaliation policy alone, without a system to ensure its respect (such as disciplinary action against those who retaliate), is unlikely to encourage reporting. When asked why their companies had adopted a written whistleblower protection policy, 31 respondents indicated that such a policy was adopted on a voluntary basis. Three respondents indicated that they thought that a written whistleblower protection policy was required by relevant law.

**Figure 5.3. Does your company have a written policy of protecting those who report from reprisals?**

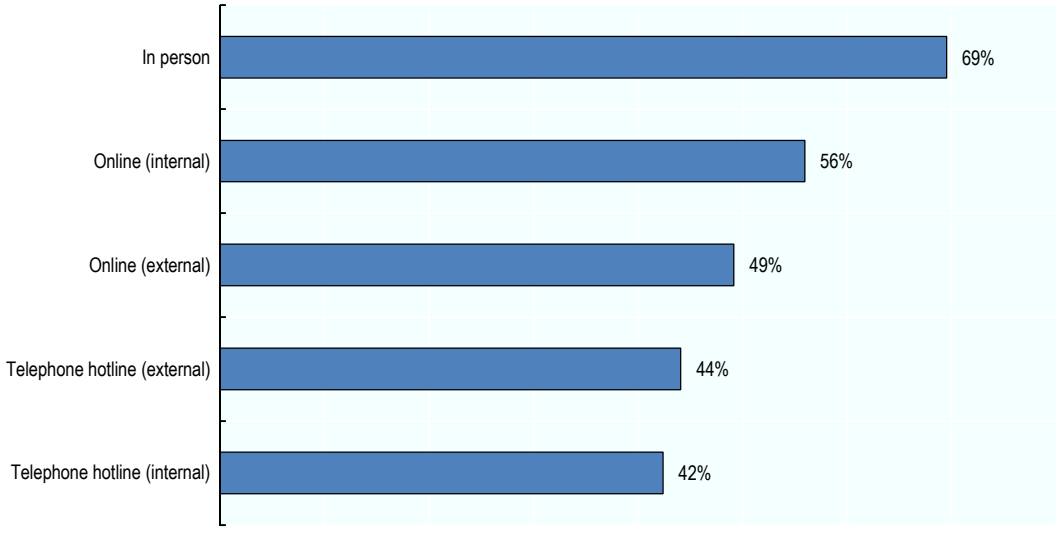



*Source*: OECD Survey on Business Integrity and Corporate Governance (57 responses).

### *Internal reporting mechanisms are varied but private sector organisations most commonly require reports to be made in person*

The OECD Survey asked company respondents to indicate how serious corporate misconduct was reported in their company. Multiple responses were possible and percentages are therefore taken from the 59 company responses. Most respondents chose several or all of the available options, suggesting that companies generally chose to put in place several options for reporting persons to come forward, both internally and using external service providers (Figure 5.4).

**Figure 5.4. How is serious corporate misconduct reported in your company?**



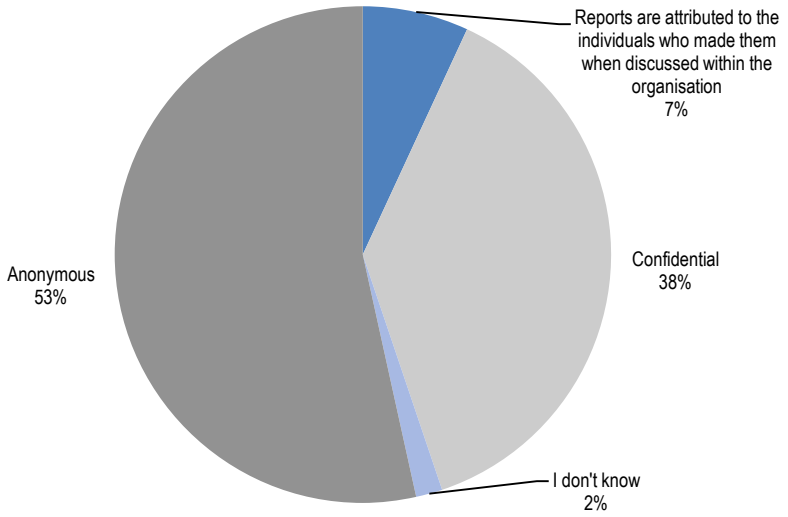

*Source*: OECD Survey on Business Integrity and Corporate Governance (59 responses).

The prevalence of in-person reporting mechanisms (69% of respondents) is likely to be a result of the widespread availability of this form of reporting and the ease with which this reporting mechanism can be put in place. (Individuals will almost always have the option of reporting to someone else in the organisation.) This form of reporting is likely to be available alongside the other, less direct mechanisms. In-person reporting alone could discourage whistleblowers from coming forward, particularly if the matter they plan to report involves the person to whom they are reporting. While there may be advantages to multiple reporting channels, such as providing options for reporting persons, depending on their preference, to report in writing or orally, it is clear that the more avenues for reporting, the more caution needs to be exercised to protect those who make such reports. For example, for telephone hotlines it is important to bear in mind that employees working in open-plan or shared offices will most commonly make reports after hours, from the privacy of their home. To be most effective, telephone hotlines therefore need to operate after hours as a whistleblower who gets through to a recorded message may be discouraged from recording his or her complaint.

### *More companies provide anonymous than confidential reporting*

The OECD Survey asked respondents to indicate whether their companies' reporting mechanisms functioned on the basis of anonymity, confidentiality or attribution of the reports to the individual who made them (Figure 5.5). The slight majority (53%) of companies selected anonymous reporting, which leads to the crucial question of how to provide effective follow-up and protection to an unidentifiable person. Another 38% of respondents indicated that their companies provided confidential reporting; 7% indicated that reports were attributed to the individuals who made them, when being discussed within the organisation; and 2% did not know on what basis reports were made.

**Figure 5.5. On what basis does your company reporting mechanism function?**

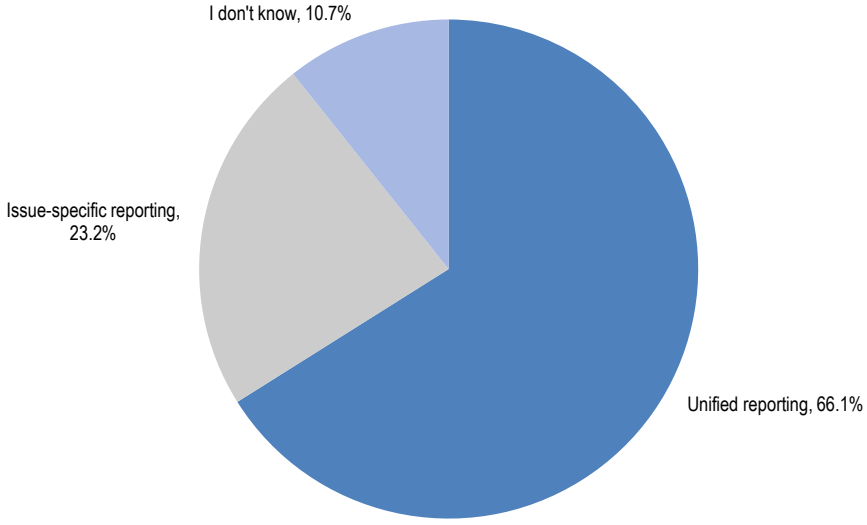



*Source*: OECD Survey on Business Integrity and Corporate Governance (58 responses).

### *Unified reporting is the most common model for internal reporting mechanisms*

Companies prioritise risks differently and may choose to have reporting lines for specific risks. The OECD Survey asked respondents to indicate whether their company had separate reporting mechanisms for different categories of risk. Two-thirds of respondents indicated that there was unified reporting (i.e. in the form of a single internal reporting mechanism), 23% indicated that there was issue-specific reporting (for example, a dedicated anti-bribery hotline) and 11% did not know (Figure 5.6).

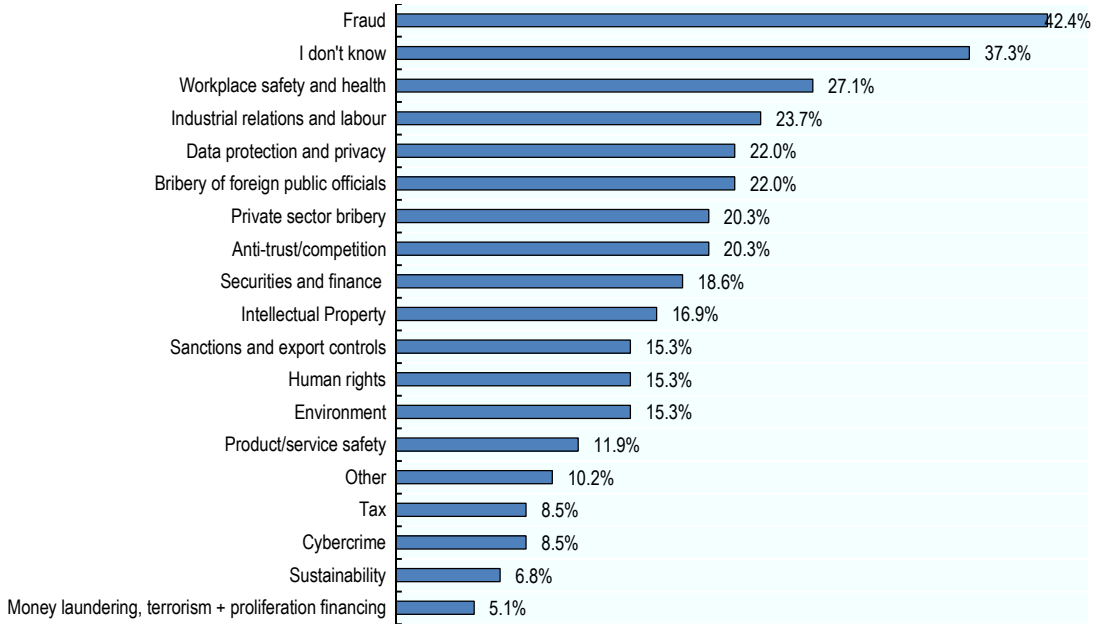
**Figure 5.6. What mechanism does your company use for internal reporting?**




*Source*: OECD Survey on Business Integrity and Corporate Governance (56 responses).

Respondents selected from a range of serious corporate misconduct categories that were reported via internal mechanisms. The most commonly reported categories were fraud (42%), work place safety and health issues (27%), and industrial relations and labour issues (24%). The most often reported economic and financial offences were foreign bribery (22%), private sector bribery and antitrust (20%), respectively. Money laundering was the least-reported category of offence, probably because the specific channels for reporting money laundering are well-established in most financial institutions.

**Figure 5.7. Types of corporate misconduct reported via internal company mechanisms**




*Source*: OECD Survey on Business Integrity and Corporate Governance (59 responses).

### *Recipients of whistleblower reporting*

The G20/OECD Principles of Corporate Governance (OECD, 2015a) are key international standards on the roles and responsibilities of company boards, and include specific recommendations on the creation of whistleblower protection frameworks (Box 5.1). The OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD, 2015b) also provide guidance. (Box 5.2).

**Box 5.1. Extracts from the G20/OECD Principles of Corporate Governance and corresponding annotations**

**Principle VI: The responsibilities of the Board…**

**D. The board should fulfil certain key functions, including:**

**6. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions. It is an important function of the board to oversee the internal control systems covering financial reporting and the use of corporate assets and to guard against abusive related party transactions.**

These functions are often assigned to the internal auditor which should maintain direct access to the board. Where other corporate officers are responsible such as the general counsel, it is important that they maintain similar reporting responsibilities as the internal auditor. In fulfilling its control oversight responsibilities it is important for the board to encourage the reporting of unethical/unlawful behaviour without fear of retribution. The existence of a company code of ethics should aid this process which should be underpinned by legal protection for the individuals concerned. A contact point for employees who wish to report concerns about unethical or illegal behaviour that might also compromise the integrity of financial statements should be offered by the audit committee or by an ethics committee or equivalent body.

*Source*: G20/OECD Principles of Corporate Governance 2015, http://dx.doi.org/10.1787/9789264236882-en.

**Box 5.2. Extracts from the OECD Guidelines on Corporate Governance of State-Owned Enterprises and corresponding annotations**

**V: Stakeholder relations and responsible business…**

**A. Governments, the state ownership entities and SOEs themselves should recognise and respect stakeholders' rights established by law or through mutual agreements.**

…Employees should…be able to freely communicate their *bona fide* concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this. SOEs should establish clear policies and processes in this regard, for example whistleblowing policies. In the absence of timely remedial action or in the face of a reasonable risk of negative employment action to a complaint regarding contravention of the law, employees are encouraged to report their bona fide complaint to the competent authorities. Many countries also provide for the possibility to bring cases of violations of the OECD Guidelines for Multinational Enterprises to a National Contact Point.

…

**C. The boards of SOEs should develop, implement, monitor and communicate internal controls, ethics and compliance programmes or measures, including those which contribute to preventing fraud and corruption. They should be based on country norms, in conformity with international commitments and apply to the SOE and its subsidiaries.**

Codes of ethics should apply to the SOEs as a whole and to their subsidiaries… Codes of ethics should include…specific mechanisms protecting and encouraging stakeholders, and particularly employees, to report on illegal or unethical conduct by corporate officers. In this regard, the ownership entities should ensure that SOEs under their responsibility effectively put in place safe-harbours for complaints for employees, either personally or through their representative bodies, or for others outside the SOE. SOE boards could grant employees or their representatives a confidential direct access to someone independent on the board, or to an ombudsman within the enterprise. The codes of ethics should also comprise disciplinary measures, should the allegations be found to be without merit and not made in good faith, frivolous or vexatious in nature.

*Source*: OECD Guidelines on Corporate Governance of State-Owned Enterprises 2015, http://dx.doi.org/10.1787/9789264244160-en.

The OECD Survey explored current practices in this area by asking respondents who, within their organisations, received reporting via internal reporting mechanisms (Figure 5.8). In contrast to the recommendation in the G20/OECD Principles of Corporate Governance, few respondents indicated that the company's audit or ethics committee was specified as the contact point for employees to report concerns about unethical or illegal behaviour.

**Figure 5.8. Person receiving reporting via internal company reporting mechanisms**

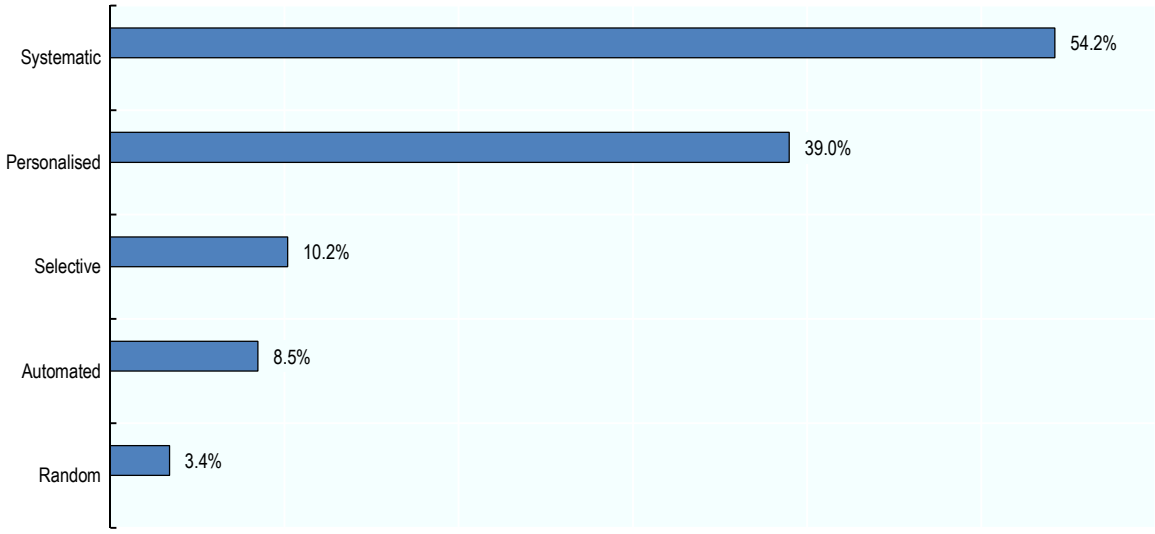

*Source*: OECD Survey on Business Integrity and Corporate Governance (59 responses).

The majority of respondents (51%) indicated that the Chief Compliance Officer received reports transmitted via the company's internal reporting mechanism (Figure 5.8). External service providers were the next highest response rate, which could correlate to the number of respondents who indicated that their company provided external online (49%) or telephone (44%) reporting channels. As multiple responses were possible for this question, it could also be assumed that reports would go first to the external service provider managing the reporting channels, then be transferred to the responsible officer within the company. Relatively few respondents indicated that internal reports went to their company's board committee (15%) or board (10%). While it would not be expected that all reports received via a company's internal reporting mechanism should be brought to the attention of the board, there may be occasional issues that merit attention from the highest levels of the company, for example where the matter being reported involves senior management. Periodic updates on the use of the mechanism and follow-up provided should form part of a company's overall compliance or integrity reporting.

### *Follow-up to internal reporting*

The majority of respondents (54%) to the OECD Survey indicated that follow-up was systematic, for example in the form of automated responses to online reporting platforms. A significant number of respondents (39%) indicated that follow-up was personalised, which leads to the question of how this is possible for the 53% of respondents whose companies provided for anonymous internal reporting (Figure 5.9).

**Figure 5.9. Company mechanisms for follow-up of disclosures**




*Source*: OECD Survey on Business Integrity and Corporate Governance (59 responses).

## Conclusion

The OECD WGB found that 27 of the 41 Parties to the Anti-Bribery Convention have non-existent or ineffective laws to protect private sector disclosers who report suspected bribery in international business. Enacting effective private sector whistleblower protection laws should be the next priority in the fight against foreign bribery. At the same time, countries should reflect on the adequacy of current OECD and international standards regarding whistleblower protection, and consider the possibilities for these standards to evolve in order to ensure more global protection for all potential reporting persons in both public and private sectors.

## *Notes*

1. Council of Europe, Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf.
2. Common law countries are those which apply laws established by judicial decisions in addition to laws established by statute.
3. Section 4.3 of the OECD report on Corporate Governance and Business Integrity: A Stocktaking of Corporate Practices provides a preliminary stocktake of such measures, www.oecd.org/corporate/corporate-governance-business-integrity-stocktaking-corporate-practices.htm.
4. See, for example, Phase 3 evaluation of Denmark, commentary p. 47, www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf and Phase 3 evaluation

of the Netherlands, commentary p. 47, www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf.

5. Foxley v. GPT Project Management Ltd., Employment Tribunal, No. 22008793/2011 (12 August 2011).

6. PricewaterhouseCoopers, Global Economic Crime Survey, South African Edition, February 2014, www.pwc.co.za/en_ZA/za/assets/pdf/global-economic-crime-survey-2014.pdf.

7. Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2252/index.do.

8. Interpretation of the SEC's Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934, www.sec.gov/rules/interp/2015/34-75592.pdf.

9. Decision available at www.sec.gov/about/offices/owb/berman-v-neo-ogilvy-llc.pdf.

10. 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, US SEC, pp. 10 and 20, www.sec.gov/about/offices/owb/annual-report-2014.pdf.

11. SEC announces award to whistleblower in first retaliation case, 28 April 2015, www.sec.gov/news/pressrelease/2015-75.html.

12. SEC: Companies cannot stifle whistleblowers in confidentiality agreements – Agency announces first whistleblower protection case involving restrictive language, 1 April 2015, www.sec.gov/news/pressrelease/2015-54.html.

13. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31995L0046.

14. Arrêt N° 2524 du 8 décembre 2009 (08-17.191) - Cour de cassation - Chambre sociale [Decision N° 2524 of 8 December 2009 (08-17.191) – Cour de Cassation – Social Law Chamber, www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2524_8_14408.html.

15. OECD/G20 Study on G20 Whistleblower Protection Frameworks: Compendium of Best Practices and Guiding Principles for Legislation, para. 72, www.oecd.org/daf/anti-bribery/48972967.pdf.

16. TI Business Principles for Countering Bribery (2003), Section 5.5, www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery.

17. ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005), Article 7, www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-%282005-Edition%29/.

18. OECD Guidelines for Multinational Enterprises (2011), Guideline II(9), http://mneguidelines.oecd.org/text/.

19. World Bank Group Integrity Compliance Guidelines (2010), Guideline 9,

20. World Economic Forum, Partnering against Corruption – Principles for Countering Bribery, www.weforum.org/pdf/paci/principles_short.pdf

21. See www.oecd.org/corporate/principles-corporate-governance.htm.

22. UK Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing, www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

23. United States Sentencing Commission, Guidelines Manual, §3E1.1 (Nov. 2014), www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual.

24. USSG §8B2.1.

25. Decree No. 8 420 of 18 March 2015, Art. 42(X). This new regulation has not been evaluation by the OECD WGB or other bodies.

26. For more information, visit the Standards Australia website, www.standards.org.au.

27. BSi website, Download PAS 1998:2008 Whistleblowing Arrangements Code of Practice, http://shop.bsigroup.com/forms/PASs/PAS-1998/.

28. Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey (2012, Ethics Resource Center), available at: www.ethics.org.

29. 2014 Annual Report, at p. 16.

## *References*

Council of Europe (2014), Recommendation CM/Rec (2014)7 of the Committee of Ministers to member States on the protection of whistleblowers.

Ethics Resource Center (2012), *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey,* Ethics Resource Center, Arlington, VA.

International Chamber of Commerce (2005), *Rules of Conduct and Recommendations to Combat Extortion and Bribery*, International Chamber of Commerce, London.

OECD (2015a), *G20/OECD Principles of Corporate Governance 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264236882-en.

OECD (2015b), OECD Guidelines on Corporate Governance of State-owned Enterprises 2015 Edition, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264244160-en.

OECD (2015c), *Corporate Governance and Business Integrity: A Stocktaking of Corporate Practices*, www.oecd.org/corporate/corporate-governance-business-integrity-stocktaking-corporate-practices.htm.

OECD (2014), *France: Follow-up to the Phase 3 Report and Recommendations*, www.oecd.org/daf/anti-bribery/France-Phase-3-Written-Follow-up-ENG.pdf.

OECD (2014a), *United Kingdom: Follow up to the Phase 3 Report and Recommendations*, www.oecd.org/daf/anti-bribery/UnitedKingdomPhase3WrittenFollowUpEN.pdf.

OECD (2014b), *Japan: Follow-up to the Phase 3 Report and Recommendations*, www.oecd.org/daf/anti-bribery/JapanP3WrittenFollowUpReportEN.pdf.

OECD (2014c), *Korea: Follow-up to the Phase 3 Report and Recommendations*, www.oecd.org/daf/anti-bribery/KoreaP3WrittenFollowUpReportEN.pdf.

OECD (2014d), *Phase 3 Report on implementing the Anti-Bribery Convention in South Africa*, www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf.

OECD (2014e), *Phase 3 Report on implementing the Anti-Bribery Convention in Slovenia* www.oecd.org/daf/anti-bribery/SloveniaPhase3ReportEN.pdf.

OECD (2014f), *Phase 3 Report on implementing the Anti-Bribery Convention in Brazil*, www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.

OECD (2014g), *Phase 3 Report on implementing the Anti-Bribery Convention in Chile*, www.oecd.org/daf/anti-bribery/ChilePhase3ReportEN.pdf.

OECD (2014h), *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, http://dx.doi.org/10.1787/9789264226616-en.

OECD (2013a), *Phase 3 Report on implementing the Anti-Bribery Convention in New Zealand*, www.oecd.org/daf/anti-bribery/NewZealandPhase3ReportEN.pdf.

OECD (2013b), *Phase 3 Report on implementing the Anti-Bribery Convention in Denmark*, www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf.

OECD (2012a), *Phase 3 Report on implementing the Anti-Bribery Convention in the United Kingdom*, www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf.

OECD (2012b), Phase 3 Report on implementing the Anti-Bribery Convention in France, www.oecd.org/daf/anti-bribery/Francephase3reportEN.pdf.

OECD (2012c), *OECD/G20 Study on G20 Whistleblower Protection Frameworks: Compendium of Best Practices and Guiding Principles for Legislation*, www.oecd.org/daf/anti-bribery/48972967.pdf.

OECD (2011a), *Phase 3 Report on implementing the Anti-Bribery Convention in Japan*, www.oecd.org/daf/anti-bribery/Japanphase3reportEN.pdf.

OECD (2011b), *Phase 3 Report on implementing the Anti-Bribery Convention in Korea*, www.oecd.org/korea/Koreaphase3reportEN.pdf.

OECD (2011c), *Phase 3 Report on implementing the Anti-Bribery Convention in Canada*, www.oecd.org/canada/Canadaphase3reportEN.pdf.

OECD (2011d), *Phase 3 Report on implementing the Anti-Bribery Convention in Luxembourg*, www.oecd.org/daf/anti-bribery/anti-briberyconvention/Luxembourgphase3reportEN.pdf.

OECD (2011e), *Phase 3 Report on implementing the Anti-Bribery Convention in Norway*, www.oecd.org/daf/anti-bribery/Norwayphase3reportEN.pdf.

OECD (2011f), *OECD Guidelines for Multinational Enterprises, 2011 Edition*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264115415-en.

OECD (2010a), *Phase 3 Report on implementing the Anti-Bribery Convention in the United States*, www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf.

OECD (2010b), *Good Practice Guidance on Internal Controls, Ethics and Compliance*, www.oecd.org/daf/anti-bribery/44884389.pdf.

OECD (1997), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, www.oecd.org/corruption/anti-bribery.

OECD/UNODC/World Bank (2013), *Anti-Corruption Ethics and Compliance Handbook for Business*, www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm.

PricewaterhouseCoopers (2014), Global Economic Crime Survey, South African Edition, PricewaterhouseCoopers, Bloemfontein, www.pwc.co.za/en/publications/global-economic-crime-survey.html.

Transparency International (2003), *Business Principles for Countering Bribery*, Transparency International, Berlin, www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery.

Transparency International Canada (2013), *UNCAC Implementation Review, Civil Society Organisation Report*, Transparency International Canada, Toronto.

UK Ministry of Justice (2011), *Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing*, Ministry of Justice, London, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

US Securities and Exchange Commission (2014), *Annual Report to Congress on the Dodd-Frank Whistleblower Program*, US Securities and Exchange Commission, Washington DC, www.sec.gov/about/offices/owb/annual-report-2014.pdf.

US Sentencing Commission (2014), *Guidelines Manual*, US Sentencing Commission, Washington DC, www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual.

World Bank Group (2010), *Integrity Compliance Guidelines*, World Bank, Washington DC.

# Annex 5.A1. **Methodology**

This chapter on whistleblower protection in the private sector is informed primarily by analysis of legal frameworks for private sector whistleblower protection in the 41 States Parties to the Anti-Bribery Convention. This analysis is conducted by the OECD Working Group on Bribery in the context of its monitoring of countries' implementation of the Convention. Information dates from the time of adoption of each country's respective Phase 3 evaluation report.

The chapter is also informed, in part, by the 2015 OECD Survey on Business Integrity and Corporate Governance (the Survey). The Survey was conducted in the context of the OECD Trust and Business Project and served as the basis for the report, *Corporate Governance and Business Integrity: A Stocktaking of Corporate Practices*. (This report also contains a description of the survey methodology.) The Survey received a total of 88 responses and aimed to identify and describe how companies are organising themselves in order to address specific integrity risks. It included questions about mechanisms for reporting misconduct within the company and corporate policies for protecting reporting persons from retaliation. The Survey questionnaire was developed based on a review of previous surveys focusing on aspects of corporate ethics and compliance. It was further refined through a piloting process that involved seeking feedback on survey questions and structure from the Business and Industry Advisory Committee to the OECD (BIAC) Anti-Corruption and Corporate Governance Taskforces. The majority of questions were optional and allowed multiple responses; percentages have therefore been calculated for each question based on the percentage of respondents who answered that question. This method explains the variations in the number of responses per question and why the percentages for some questions do not add up to 100%.

As is the case for any analysis based on self-reporting, the possibility of error cannot be excluded. For example, survey respondents may have interpreted questions incorrectly or may not have provided accurate answers. It is also important to bear in mind that the respondents may be well aware of business integrity practices and challenges, and are not therefore representative of broader perceptions and approaches in this area. In addition, there were negligible responses from state-owned or controlled companies or small or family-run businesses. Survey results therefore do not necessarily represent the specific circumstances of these categories of company.

The Survey respondents' organisations were primarily headquartered in the United States (20%), United Kingdom and Germany (all 8%), Brazil, France and Portugal (all 7%). The remaining respondents' organisations were headquartered in both OECD member and non-member countries around the world. These organisations operated primarily in the following sectors: financial services (22%), manufacturing (17%), energy, IT and pharmaceuticals and medical devices (all 16%). In terms of the respondent's role within their organisation, most identified themselves as Chief Compliance Officers (28%), followed by Legal Counsel/General Counsel (16%) and CEO/President/Managing Director (12%). In total, 18% of respondents were board members, including chairperson and non-executive director (6%, respectively).

PART II

# Country case studies on whistleblower protection in the public sector

# *Chapter 6.*

# Belgium (Flanders): The Flemish Government's central point of contact for integrity and wellbeing at work

by

Kristien Verbraeken, Integrity officer, Public Governance Department
Corporate HR & Organisational Development Division, Flanders government

*The Flemish government has developed unique contact points through which to report wrongdoing to the relevant authorities: the Spreekbuis and 1700. These tailor-made channels are open to staff members and members of the public, and are responsible for receiving, registering and following through on integrity concerns. This chapter focuses on the central points of contact to report wrongdoing within the Flemish government authorities, and provides an overview of how these channels function, their scope, their impact, as well as their costs and benefits.*

## Spreekbuis and 1700: Tailor-made channels to report wrongdoing

Under Belgian penal law, all civil servants have the duty to report cases of wrongdoing that they encounter while performing their tasks and duties as civil servants. The duty to speak up is also laid down in the staff regulations of the Flemish government authorities. These regulations ensure that members of staff who become whistleblowers can get special protection under the whistleblower protection decree, ratified by the Flemish government in 2004 and renewed in 2014. The whistleblower protection procedure is also laid down in the ombudsman decree, which dates from 1998 and has been recently renewed in 2014.

The former competent Minister for Public Governance announced in a 2009-2014 policy document the establishment of a unique contact point for reports on integrity issues, for both members of staff and members of the public. This contact point would enable a uniform, consistent and professional way of receiving, registering and investigating reports.

Although many steps had previously been taken to establish and improve the whistleblower system and procedure for the Flemish government authorities, this was the first time that a point of contact with a focus on integrity issues had been established. As the Flemish government authorities have a multidisciplinary approach to integrity, the integrity officer, together with key partners in the (virtual) integrity office, decided to develop a central contact point for both issues of integrity and wellbeing at work for staff members. The specific point of contact for staff members is called "Spreekbuis", which translates as "mouthpiece" Members of staff can turn to different channels and authorised contact persons to report cases of wrongdoing, such as to their superior, Audit Vlaanderen (the internal audit division of the Flemish government authorities) and Spreekbuis.

Spreekbuis is staffed with trained professionals and specialists who know how to deal with the highly emotional calls and messages they receive. Reports on wellbeing and integrity showed that members of staff often raise concerns when they are confronted with the personal effects of wrongdoing. When they suffer because of conflicts or bullying, or when they feel they are being treated unfairly, they decide to speak up. Their stories often reveal that wellbeing issues go hand in hand with integrity issues. For this reason it makes sense to receive these reports via a single point of contact. It proves successful for staff members, who know there is a single point of contact they can turn to and that they do not have to use different channels or contact persons to address issues. It is also good for the competent divisions and people who investigate and deal with the cases, as they can join forces and deal with the cases from a multidisciplinary point of view.

Spreekbuis[1] provides:

- One central point of contact for all types of concerns at work involving integrity, wellbeing and issues relating to the private life of members of staff, which may have an impact on their work.
- A gateway to other authorised channels to report wrongdoing.
- A channel that operates "outside" the Flemish government authorities and may be perceived as more neutral. It also offers an alternative to the other "internal" channels.

- More and improved communication and awareness raising, which boost the number of contacts (email and telephone). The central point of contact for members of the public for the Flemish government is 1700, a tailor-made service. The call centre at 1700 has received specialised training to receive, register and transfer concerns or complaints regarding integrity issues to the authorised actors.

Together Spreekbuis and 1700 offer unique contact points through which to report wrongdoing to the Flemish government authorities.

### *The expected results*

Spreekbuis and 1700 are expected to improve services regarding wellbeing and the integrity of the Flemish government authorities through:

- Rendering Spreekbuis the gateway to different authorised persons and divisions for receiving and dealing with reports of wrongdoing. Making Spreekbuis the go-to resource when staff members want to raise concerns regarding issues of wellbeing and integrity at work.
- Encouraging as many entities as possible of the Flemish government to make use of Spreekbuis in order to offer it to their employees as a central point of contact through which to raise concerns.
- Designing and implementing clear process flows between the front and back office of the central point of contact to ensure optimal investigation and follow-up of reports.
- Offering a central point of contact to all "clients and partners" of the Flemish government, such as citizens, businesses, organisations.
- Improving follow-up and evaluation of the policies for integrity and wellbeing at work. Developing evidence-based policy proposals by determining the categories of wrongdoing and the use of consistent terminology to ensure the correct registration of questions, reports and complaints.

## The design of Spreekbuis and 1700

### *Evaluation of various cost and benefit options to address concerns*

As there was no allocated budget for the development of the central point of contact for reports of integrity issues, it was decided to make use of existing services and bring together the expertise and specialised know-how of relevant key players. For this reason, both Spreekbuis and 1700 were engaged to offer a new service to receive, register and pass on reports of integrity concerns.

This approach has a number of important benefits:

- The existing channels were already known to the respective target groups. Staff members were familiar with Spreekbuis as a channel for wellbeing at work and 1700 as the gateway to all Flemish government services for the general public. No expensive communications campaign was needed to introduce the channels to the target groups.
- Both channels had a solid expertise and professionalism and were well trained in working with the specific target groups.

- The channels were very knowledgeable in the services and workings of the Flemish government authorities.
- Working with existing channels and thereby eliminating the need for extra budgets or extra staff to set up the services.

Other options reviewed included:

1. Organising Spreekbuis as an internal instead of an external channel. As there were already several internal channels members of staff could turn to for reporting wrongdoing, it was decided to keep Spreekbuis as an external channel that may also be perceived as more neutral by some staff members.
2. Making Spreekbuis the central point of contact to report integrity issues for both staff members and members of the public. This option would fulfil the requirements of a unique central point of contact for integrity issues, as stipulated by the minister, and was a valid option. It was not chosen because Spreekbuis and 1700 were both specialised in their specific target groups: Spreekbuis was a tailor-made service for staff members, while 1700's focus was on members of the public. Spreekbuis has trained psychologists working in the front office because the calls and messages they receive are often of a very emotional nature and need special care and confidentiality. It would have been very costly to engage trained psychologists to also receive and deal with reports made by the public. The reports made by members of the public are usually not of a highly emotional nature. Moreover, 1700 is used to dealing with all kinds of questions regarding the services of the Flemish government authorities. As part of the project, the employees in the front office at 1700 received special training to pick up on issues that have a bearing on integrity and ethics. If all integrity issues had to be reported to one unique central point of contact, it would have been necessary to explain to the public the scope of integrity issues for which they had to address the "integrity point of contact", and that for all other questions they had to turn to 1700. It did not seem particularly client-orientated to make this distinction nor very feasible. It was therefore decided to work on a parallel process flow in both Spreekbuis and 1700, regarding integrity reports, and use them as distinct channels for their respective target groups.
3. Financing Spreekbuis through contributions from all entities of the Flemish government authorities that make use of its services. As there were no allocated budgets to develop the central point of contact for reports of integrity issues, numerous financing options were considered for this project. One option was to divide the costs among all entities that make use of it, taking into account the number of employees and an assessment of the integrity risks in these entities. It was decided that financial contributions from these entities would not be sought for the development, launch and promotion of the new services of Spreekbuis. This prompted the channel to be open and accessible to all staff members, which helped render it an important channel to report wrongdoing at work. The channel has been financed by the Department of Public Governance. In the long run, the idea of joint financing is still a valid option.

### *Involvement in the consultation and design of the channels*

The Minister for Public Governance and his cabinet assigned an integrity officer to develop and implement the central point of contact for integrity issues. The integrity

officer worked with the key players from all relevant domains of expertise to make the channel multidisciplinary, in keeping with the multidisciplinary integrity approach of the Flemish government authorities. The key players of the relevant domains of expertise included: Internal Audit, Wellbeing at Work, Social Services, Diversity and Equal Opportunities, and Training and Support, all of whom gathered in the (virtual) integrity office. Senior representatives of these key actors were actively involved in the design and development of the channel. In addition, the psychologists who worked in the front office of Spreekbuis contributed and gave important feedback on the renewal of Spreekbuis: changing it from a channel for wellbeing issues to a channel for both wellbeing and integrity at work. Colleagues with special expertise in gathering and analysing big data were involved in setting up the design, including the development of clear and workable process flows. Technically skilled colleagues advised on matters of security.

For setting up the channel there was close collaboration with colleagues from 1700. A special training for employees in the call centre was established and a process flow was designed, similar to that of Spreekbuis. Both channels delivered monthly reports on the number of disclosures and an overview of the categories and types of disclosure reported. As the channels receive sensitive information, including personal details, an extensive file was compiled for the privacy commission that explained the purpose of storing this information, as well as how long it is kept on record and how it is used.

### *The scope of the channels*

When Spreekbuis was re-launched in 2013 as the central point of contact for both wellbeing and integrity at work, its scope extended to all staff members of the Flemish government authorities, which covered about 25 000 employees. The new and improved services of Spreekbuis were promoted with a communications campaign that included posters in all buildings of the Flemish government authorities, postcards and calling cards that were distributed amongst employees and key actors in the entities, and articles on the internal website and in the staff magazine. In addition, a webpage was created and presented at several network events and forums.

In 2014, the use of Spreekbuis was offered to all entities of the "Flemish government services" (a specific scope within the Flemish government authorities) and all entities that contributed financially. This amounted to 47 entities and approximately 18 000 employees.

The scope of 1700 includes citizens, entrepreneurs, and organisations looking for information on the services of the Flemish government authorities. In 2014, 1700 received 1 042 708 calls, emails and chat messages.

To sum up, the Minister of Public Governance mandated the development of a central point of contact through which employees and members of the public could report integrity issues to the Flemish government authorities. The integrity officer was project leader and reported to a steering committee of principal stakeholders (which included the minister's representative, the head of the public governance department, and a senior representative of the internal audit division). To offer a tailor-made channel to the general public to report integrity issues, a close collaboration was set up between two departments, and the Public Governance department, in charge of integrity policy, and the Services for the General Government Policy department, which is in charge of 1700.

### *The impact of the channels*

Establishing Spreekbuis as a central point of contact for reports on issues of wellbeing and integrity surpassed its goals. From the start of the project, 3 ambitious goals were determined:

1. To double the number of reports/cases received by Spreekbuis. In 2012 Spreekbuis received 45 cases, in 2013, after the renewal of Spreekbuis and its improved services, it received 93 cases (Figure 6.1 and Figure 6.2).

**Figure 6.1. Number of reports received by Spreekbuis**


*Source:* Corporate HR & Organisational Development Division, Flanders government

**Figure 6.2. Breakdown of cases submitted through Spreekbuis**


*Source:* Corporate HR & Organisational Development Division, Flanders government

2. Achieve an average score of 4 out of 5 for client satisfaction, following the introduction of a client satisfaction survey. After the first year of the renewed Spreekbuis services the average score on the client satisfaction survey was better than anticipated: 4.02 out of 5 (Figure 6.3).

**Figure 6.3. Spreekbuis client satisfaction in 2013**


*Source:* Corporate HR & Organisational Development Division, Flanders government

3. Render Spreekbuis the go-to point of contact for reporting issues of integrity and wellbeing at work. This goal was also met: 60% of the people who had contacted Spreekbuis and who filled out the client satisfaction survey indicated that Spreekbuis was the first channel they had used to file a report. Most of them knew Spreekbuis as a result of the communications campaign (Figure 6.4).

**Figure 6.4. Awareness and use of Spreekbuis in 2013**


*Source:* Corporate HR & Organisational Development Division, Flanders government

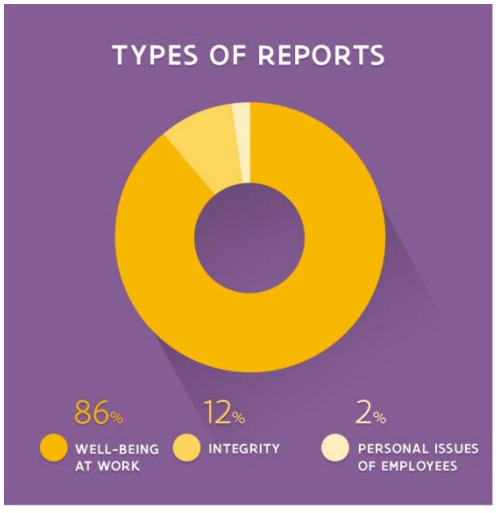
### *Evaluation and monitoring mechanisms introduced to assess the implementation and impact of the channels*

As part of the renewal and improvement of the Spreekbuis services, everyone who contacted Spreekbuis was invited to fill out a short survey to measure client satisfaction.

The survey consisted of five questions that requested client feedback on various elements, such as the rate of response to their call or email, the quality of the response or advice provided by Spreekbuis, to what extent the client felt empowered to deal with the situation, and an open-ended question on how the services of Spreekbuis could be improved.

In 2013, Spreekbuis and 1700 provided monthly reports on the number of calls and emails and on the types and categories of integrity and wellbeing issues that had been disclosed. In 2014, the monthly reports were replaced by quarterly reports. The overall results are compiled in an annual report. These results are analysed and discussed by the central key actors in the (virtual) integrity office and published on the website.[2] The 2013 results on the services of both Spreekbuis and 1700 as central points of contact for wellbeing and integrity issues were presented to an audience of more than 200 at the first full scale integrity event in April 2014. Spreekbuis received a total of 93 reports in 2013, of which 13 were information requests and 80 were real cases that were investigated and dealt with by the competent experts. Among these reports: 86% concerned wellbeing at work, 12% concerned integrity and 2% were related to personal issues of employees (Figure 6.5). The issues that were reported on most were conflicts at the workplace, bullying and yearly appraisals (Figure 6.6).

**Figure 6.5. Types of reports reported through Spreekbuis in 2013**




*Source:* Corporate HR & Organisational Development Division, Flanders government

**Figure 6.6. Most reported issues through Spreekbuis in 2013**


*Source:* Corporate HR & Organisational Development Division, Flanders government

The results and figures of 2014 are very similar to those of 2013. In 2014, Spreekbuis received 87 cases, which is only slightly less than in 2013 and may be due to the new scope (Figure 6.7). In 2013, Spreekbuis was offered for free to all the entities of the Flemish government authorities; whereas in 2014 it was a service offered to the entities that also make use of the services for prevention or that have paid a contribution to use Spreekbuis. These 87 cases included 9 information requests and 78 reports that had to be further investigated and dealt with. In 2014, Spreekbuis received 91 telephone calls and 183 email reports (Figure 6.8).

**Figure 6.7. Number of case files received through Spreekbuis in 2014**

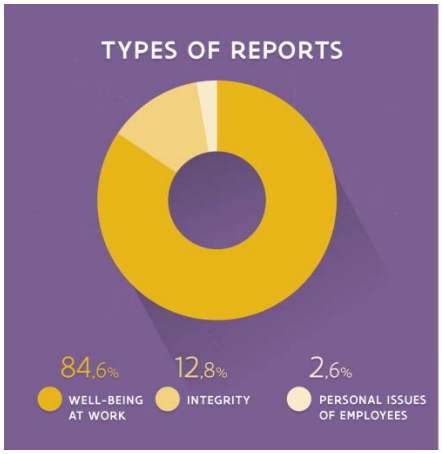

*Source:* Corporate HR & Organisational Development Division, Flanders government

**Figure 6.8. Telephone and e-mail reports addressed to Spreekbuis in 2014**


*Source:* Corporate HR & Organisational Development Division, Flanders government

As in 2013, most reports that Spreekbuis received in 2014 related to wellbeing at work (84.6%), 12.8 % of the reports related to integrity issues and 2.6% of the reports dealt with issues in the private life of employees (Figure 6.9). In 2014, the most reported issue was bullying, followed by conflicts and concerns regarding yearly appraisals (Figure 6.10).

**Figure 6.9. Types of reports reported through Spreekbuis in 2014**



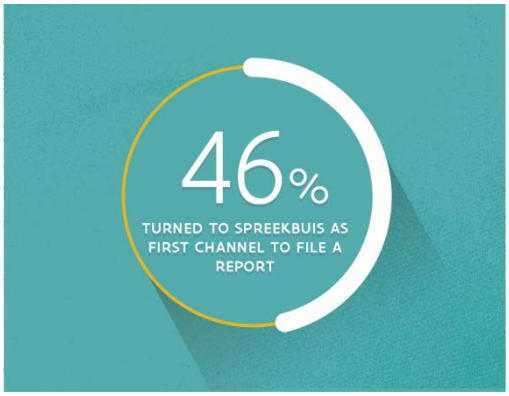

*Source:* Corporate HR & Organisational Development Division, Flanders government

**Figure 6.10. Most reported issues through Spreekbuis in 2014**


*Source:* Corporate HR & Organisational Development Division, Flanders government

Although only 46% of callers in 2014 indicated that Spreekbuis was the first channel they turned to, versus 60% in 2013 (Figure 6.11), the service was ranked better than in 2013: the average score in 2014 was 4.18 on a scale of 5, compared with 4.02 in 2013 (Figure 6.12).

**Figure 6.11. Awareness and use of Spreekbuis in 2014**




*Source:* Corporate HR & Organisational Development Division, Flanders government

**Figure 6.12. Spreekbuis client satisfaction in 2014**


*Source:* Corporate HR & Organisational Development Division, Flanders government

In 2013, 1700 registered 42 reports by citizens, businesses and organisations on integrity and wellbeing concerning the different levels of government:

- 27 related to the Flemish government authorities (15 regarding integrity and 12 regarding wellbeing).
- 7 related to the federal government (all of them integrity matters).
- 8 related to local government authorities (7 regarding integrity and 1 on wellbeing).

In addition, in 2013 1700 received 142 reports by the general public on integrity and wellbeing issues at school or in the work place of private businesses. The majority of these reports were on issues at school (127) and only 15 on matters regarding the work place. The top two issues reported by the general public dealt with bullying, violence and other improper behaviour.

In 2014, 1700 received 37 reports from the general public on integrity and wellbeing issues regarding different levels of government in Flanders:

- 20 reports related to the Flemish government authorities (18 on integrity and 2 on wellbeing).
- 4 reports related to the federal government (3 on integrity and 1 on wellbeing).
- 13 reports related to local governments (12 on integrity and 1 on wellbeing).

In addition to the reports on the different government authorities, 1700 also received 111 reports on integrity and wellbeing issues at schools and 15 at the workplace in the private sector.

1700 is a well-known contact point for all questions that the general public may have regarding the services of the Flemish government authorities. In 2013, 1700 received 958 901 contacts in total[3]:

- 917 293 telephone calls
- 32 202 emails
- 9 405 chat sessions

In 2014, 1700 received 1 042 708 contacts in total:

- 988 588 telephone calls
- 43 899 emails
- 10 221 chat sessions

Every six weeks the (virtual) integrity office meets and the services and results of Spreekbuis and the integrity issues reported via 1700 are monitored and analysed by the key integrity and wellbeing actors in the office. This data and information constitute important input for continuous improvement and development of the overall policy, but also for instruments and initiatives to enhance integrity and wellbeing in the workplace.

### *Reviews of the channels*

In the annual report, the individuals who work in the front office of Spreekbuis give advice on how to improve the services of Spreekbuis and on what measures could be taken to improve the overall policy and the day-to-day experience of integrity and wellbeing in the entities of the Flemish government authorities.

The workings, process flows and processing of private information and contact details through Spreekbuis and 1700 has been declared to the Belgian Privacy Commission through a detailed file. The contract with the supplier that provides the front office service of Spreekbuis holds a stipulation regarding discretion and professional secrecy. This was drawn up with the advice of the supervisory commission for privacy regulations and is used by the expert division for public procurement as a good example.

### *Main findings from the review and key lessons learned*

The main findings are:

- To continue to enhance the people management skills of superiors.
- To enable both superiors and employees to deal with disagreements and give them conflict-handling skills.
- To stimulate internal key players, such as superiors and trusted intermediaries, to contact Spreekbuis for advice on dealing with wellbeing issues and cases.
- To continue the promotion of Spreekbuis as a central point of contact for reporting wrongdoing.
- To inform employees of their duty to speak up if they know of integrity issues and keep them informed on the rules and regulations in the code of conduct.

### *Achieving successful implementation*

Implementation was successfully achieved by:

- Implementing efficient and harmonised workflows that enabled better transfer from front to back office.
- Introducing uniform registration categories and an improved way of registering data, leading to a higher quality of clear-cut data.

- Promoting Spreekbuis as a channel for questions and reports on wrongdoing for both wellbeing and integrity issues through a successful communications campaign.
- Generating monthly reports and continuous follow-up on the number and type of reports and on the collaboration between the different competent actors in charge of investigating and dealing with cases.
- Maintaining engaging and open communication on the workings of the channels and their results, including presenting and discussing the results of specific entities with the key actors within these entities to advise them on ways to improve integrity and wellbeing in the workplace.

*Assessment of the costs and benefits of compliance and enforcement mechanisms*

Compliance and enforcement has been mainly achieved through communication and by underlining the benefits for the entities. Some entities decided not to make use of Spreekbuis and rely on their internal channels: trusted intermediaries, integrity contact person and superiors. Entities are not obliged to make use of Spreekbuis, however they do need to communicate the appropriate channels to report wrongdoing. The costs for the communications campaign were minimal as it was largely developed and produced in house.

## Challenges and risks

There were several risks that could have jeopardised the project and its goals. The following risks were taken into account from the start of the project:

- Not being able to respect the foreseen deadline for the project.
- Insufficient means (budget and resources) to realise the entire project.
- Not reaching the desired scope: making Spreekbuis the channel to report internal wrongdoing for the entities of the Flemish government authorities and offering it to as many employees as possible.
- Not reaching a mutual scope for all the central key integrity actors who are competent in the back office to investigate and deal with the cases received via Spreekbuis and 1700.
- Not finding a suitable external supplier to provide the front office services of Spreekbuis, in case there were not enough solid candidates to take part in the public procurement procedure.
- Not reaching an agreement on the partnership with Vlaamse Infolijn, the service implementing 1700 to take on the front office services of 1700 for the reports of the general public, or not being able to obtain the necessary expertise for 1700 to deal with reports on integrity issues.

### *Foreseeing the challenges*

The risks listed above were foreseen thanks to a risk analysis that was made as part of the preliminary preparations for managing the project. All steps and preparatory documents were made as part of good project management, which ensured an efficient progress of the different sub-projects and the project as a whole.

### *Managing the challenges*

To respect the foreseen deadline for the project, detailed project planning was undertaken, including an estimate of working days needed to complete the project on time. A strict follow-up of the project's progress helped to reach the foreseen deadlines of both the sub-projects and the overall project, and the determined goals and results.

As there were no additional budgets for financing the project, it was funded within the existing funds of the Department of Public Governance. To guarantee the services and quality in the long run, a system of mutual funding is a valid option whereby each entity that makes use of the services contributes in a fair measure to the costs of Spreekbuis. No extra people were hired or attributed to the project, and it was realised by a very limited number of people who made up the project management team and who, in addition to working on this demanding project, also had several other duties and tasks to perform. The limited manpower continued to be a known risk throughout the whole duration of the project.

In order to reach the desired scope and to offer the services of Spreekbuis to as many employees as possible, the Department of Public Governance financed the project and offered the services of Spreekbuis for free to all entities of the Flemish government authorities. This gave the entities an excellent opportunity to get to know the services and opened the door to promote Spreekbuis in all entities and include them in the communication campaign.

No common scope has been established yet and all central key players who work together in the (virtual) integrity office have their own specific scope. To overcome this obstacle, and to guarantee a professional handling of cases, detailed process flows and scripts have been drawn up and are being used by both the front offices of Spreekbuis and 1700 and the back office actors to correctly transfer cases to the appropriate and competent division or contact person.

To find a suitable external supplier to provide the front office services of Spreekbuis, a European public procurement procedure was applied. Only three suppliers submitted an offer. Due to the demands of high quality services, the know-how in dealing with both reports of wellbeing and integrity, and the requirement to provide the services in Dutch, only a very limited number of suppliers meet these requirements.

The close collaboration with Vlaamse Infolijn to engage 1700 as front office for reports on integrity and wellbeing by the general public was laid down in a collaboration agreement. The people in the front office were trained in house to recognise integrity issues, to know how to deal with them, and to what competent divisions they should be dispatched. Clear-cut scripts and workflow charts were made to guide staff. There was a trial period of approximately two months before the actual services were offered to the public. The monthly reports and close follow-up of the reports and their dispatching led to a steep learning curve.

## *Notes*

1 Since the beginning of 2015, the central point of contact, Spreekbuis, has been managed by internal central trusted intermediaries.

2 See www.bestuurszaken.be/spreekbuis-2013-cijfers.

3 See www.vlaamseinfolijn.be/resultaten/2013.

## *References*

Flemish Government, *Rechten, plichten, onverenigbaarheden en cumulatie van activiteiten [Rights, duties, incompatibilities and concurrent activities]* Staff Regulations of the Flemish, www.bestuurszaken.be/BVR_Deel02-h1 (in Flemish)

Penal Code (1867), Belgium, www.wipo.int/edocs/lexdocs/laws/fr/be/be138fr.pdf.

# *Chapter 7.*

# Canada: The Public Servants Disclosure Protection Act

Co-developed by the following institutions:

The Office of the Chief Human Resources Officer, Treasury Board of Canada Secretariat

The Office of the Public Sector Integrity Commissioner of Canada

*Canada's Public Servants Disclosure Protection Act (PSDPA) came into force in 2007 as part of the Government of Canada's ongoing commitment to promoting ethical practices in the public sector. Representing a renewed phase in the movement to build greater trust in Canada's public sector, the PSDPA provides federal public sector employees and others, such as contractors, with a legislated, secure and confidential process for disclosing serious wrongdoing in the workplace. This chapter provides an overview of: the legislation's objectives; its design, including its implementing authorities; its scope regarding disclosure processes and reprisal mechanisms; and an overview of the associated impacts, challenges and risks.*

## Introduction and objectives of the Public Servants Disclosure Protection Act

The PSDPA was introduced to provide federal public sector employees and others, such as contractors, with a legislated, secure and confidential process for disclosing serious wrongdoing in the workplace. The PSDPA also protects public servants from reprisal measures taken against their employment as a result of having filed a protected disclosure in accordance with the legislation, or of having co-operated in a related investigation. The act was part of the Government of Canada's ongoing commitment to promoting ethical practices in the public sector and replaced the Treasury Board's[1] Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace.

The PSDPA represented a renewed phase in the movement to build greater trust in Canada's public sector. This movement was first expressed in A Strong Foundation: Report of the Task Force on Public Service Values and Ethics (best known as the "Tait Report"), released in 1996. The report included the recommendation that, as part of a proper ethics regime, "there must be means, consistent with public service values, for public servants to express concern about actions that are potentially illegal, unethical or inconsistent with public service values, and to have those concerns acted upon in a fair and impartial manner."

Following recommendations made in 2000 by the Auditor General on values and ethics in the public service, the Treasury Board adopted the Internal Disclosure of Information Concerning Wrongdoing in the Workplace policy in 2001. This policy required organisations in the core public administration to establish procedures for reporting wrongdoing and created the position of Public Service Integrity Officer as a neutral third party for investigating alleged wrongdoing in the workplace. In 2003, the Values and Ethics Code for the Public Service (the Public Sector Code) was adopted, this reinforced the 2001 policy by adding breaches of the code to its definition of wrongdoing.

In 2003 and 2004, to accompany the Auditor General's release of her report on the Sponsorship Program, reports were published from the House of Commons Standing Committee on Government Operations and Estimates, and from a Working Group on the Disclosure of Wrongdoing. These recommended a new, legislated regime for the disclosure of wrongdoing in the federal public sector, including Crown corporations. The first version of the PSDPA was introduced in Parliament on 22 March 2004. A revised version was introduced on 8 October 2004, while Parliament was also focusing attention on the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Inquiry). After extensive study and amendment by Parliament, the act received Royal Assent on 25 November 2005. Parliament subsequently amended the PSDPA as part of the Federal Accountability Act and Action Plan. The amended act came into force on 15 April 2007 and forms a key element of the values and ethics regime of the federal public service.

### *Expected results*

The PSDPA was expected to establish effective procedures for the disclosure of wrongdoing and to protect public servants who disclose possible wrongdoing. Another objective was to promote a positive ethical culture, including establishing a code of conduct applicable to the entire federal public sector and for each organisation to establish its own code, consistent with the broader public sector code. As a result, the Public Sector Code came into effect on 2 April 2012. Organisations subject to the PSDPA have established their own codes of conduct consistent with the Public Sector Code.

Ultimately, the legislation was expected to build greater public confidence in the integrity of public servants and public institutions by maintaining and enhancing transparency, accountability, financial responsibility and ethical conduct in the Canadian public sector. The PSDPA was intended to provide a fair and expeditious investigation and adjudication process that respected the principles of natural justice and procedural fairness. More broadly, it was expected to support a positive public sector culture that is grounded in values and ethics.

## The design of the Public Servants Disclosure Protection Act

### *The evaluation of various cost and benefit options to address concerns*

Policy options for addressing any concerns were framed by the Working Group on the Disclosure of Wrongdoing. This group was tasked, by the President of the Treasury Board, with examining various options for instituting a disclosure regime. Specifically, issues related to transparency, independent decision making, and various policies and legislative frameworks were scrutinised, with cost being a consideration.

### *Involvement in the consultation and design of the legislation*

The PSDPA underwent a broad and comprehensive process that included numerous stakeholders. In late 2003, the President of the Treasury Board announced the formation of a working group to examine the issue of instituting a disclosure regime within the public sector, as well as the enactment of related legislation. The draft legislation was later amended significantly by Parliament as part of the broader government initiative aimed at fostering accountability, known as the Federal Accountability Act.

The Working Group on the Disclosure of Wrongdoing sought the advice and guidance of a range of stakeholders, including representatives from bargaining agents, the Association of Professional Executives of the Public Service and officials from selected Crown corporations. A large network of practitioners from the internal disclosure community was also engaged in the consultative process that eventually led to a new legislative regime for the disclosure of wrongdoing in the federal public sector. The Department of Justice also had a key role in the design and drafting of the legislation.

### *The implementing authority*

The PSDPA outlines the roles and responsibilities of the Treasury Board, the Public Sector Integrity Commissioner, the Chief Human Resources Officer, chief executives, and senior officers regarding disclosure within federal public sector departments and organisations. It also outlines the roles and responsibilities of the Public Servants Disclosure Protection Tribunal regarding disclosures of possible wrongdoing in the public sector. Each of these key players have a critical and distinct role in implementing the act, and in doing so, work collaboratively, while respecting each other's independence and authority.

The Treasury Board Secretariat supports the President of Treasury Board in the exercise of his or her legislated responsibilities and acts as the central agency that assumes overall responsibility for the act. The responsibilities of the President of the Treasury Board include the promotion of ethical practices in the public sector, and fostering a positive environment for disclosing wrongdoing by disseminating knowledge of the act and information about its purposes and processes by any means that he or she considers appropriate. The Treasury Board was responsible for establishing a Code of

Conduct for the public sector as a whole. Regarding administration of the PSPDA, the Treasury Board Secretariat oversees the internal disclosure process. The Chief Human Resources Officer is responsible for preparing an annual report on activities related to internal disclosures, which the President of the Treasury Board tables in both houses of parliament. According to section 54 of the PSDPA, "the President of the Treasury Board must cause to be conducted an independent review of the act its administration and its operation". This must take place five years after coming into force.

The PSPDA requires the chief executives of all public sector departments and organisations to appoint senior officers for disclosure of wrongdoing and to establish procedures for the management of disclosures within their organisation. A senior officer within each organisation receives and deals with internal disclosures made under the act. They have key leadership roles in the implementation of the act in their organisations and provide information and advice to employees and supervisors on the act. Furthermore, they receive, record and review disclosures of wrongdoing, lead investigations of disclosures, and make recommendations to the chief executive regarding any corrective measures to be taken in relation to wrongdoing found. Chief executives must provide public access to information on cases of founded wrongdoing resulting from an internal disclosure under the PSDPA.

The Office of the Public Sector Integrity Commissioner (PSIC) is an independent federal organisation. PSIC reports directly to Parliament and is a neutral third party that deals at arm's length with the public sector. The Commissioner is appointed by Parliament and administers the external disclosure system. PSIC handles disclosures of wrongdoing from both public servants and members of the public. The Commissioner is the final decision maker regarding disclosures made directly to PSIC, and, in instances of founded wrongdoing, is required to table case reports in Parliament. Additionally, under the PSDPA, PSIC has exclusive jurisdiction over complaints of reprisal made by public servants who have disclosed wrongdoing or who have co-operated in related investigations. These cases are examined on a priority basis and if an investigation leads the Commissioner to reasonably believe that reprisal actions have occurred, an application is made to the Public Servants Disclosure Protection Tribunal to have the case heard.

The Public Servants Disclosure Protection Tribunal is an independent quasi-judicial body comprised of judges of the Federal Court, or a superior court of a province, and presided over by a chair. The tribunal's mandate is to hear reprisal complaints referred by the PSIC after investigation, in order to determine if the reprisal occurred. The tribunal has the authority to grant remedies in favour of complainants and order disciplinary action against those who take reprisals, when requested by the Commissioner. The tribunal's power to order disciplinary sanctions is broad and can include fines of up to CAD 10 000 or imprisonment of up to two years. The existence of an independent tribunal with quasi-judicial powers to adjudicate reprisals is reflective of Parliament's intention of emphasising and addressing the gravity of retaliation against individuals who come forward to report suspected wrongdoing.

## The scope of the legislation

### *Application*

The PSDPA applies to disclosures of wrongdoing and complaints of reprisal "in or relating to the federal public sector". In this regard, the PSDPA focuses on actions or omissions rather than on the individuals or organisations.

Section 2 of the PSDPA broadly defines the "public sector" to include: departments, agencies, boards, offices, authorities, offices of commissioners, commissions and permanent councils, Crown corporations and other separate organisations, and the staff of courts and administrative tribunals. It has wide reach as the definitions of "public sector" and "public servant" extend to persons who are not employees under the Public Service Employment Act, including the chief executives of federal organisations. This accounts for approximately 375 000 persons in the federal administration. The Canadian Forces, the Communications Security Establishment and the Canadian Security Intelligence Service are excluded, but the act requires that these organisations establish comparable disclosure protection regimes.

The PSDPA does not, however, apply to the private sector nor wholly owned subsidiaries of Crown corporations. It also does not apply to members or employees of Parliament, including political staff, who are governed by a separate integrity regime.

Furthermore, as Canada's system of government consists of three levels - federal, provincial and territorial, and municipal - the act only applies to wrongdoing by federal public servants. A number of provincial and territorial governments within the sub-national levels of government, including some municipal governments, have established different forms of integrity regimes within existing frameworks.

### *Definition of wrongdoing*

Section 8 of the PSPDA defines acts of wrongdoing as:

- A contravention of an Act of Parliament or of the legislature of a province or any regulations made under any such Act.
- A misuse of public funds or a public asset.
- A gross mismanagement in the public sector.
- An act or omission that creates a substantial threat and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant.
- A serious breach of a code of conduct (established by Treasury Board or by an organisation, as required by the Act).
- Knowingly directing or counselling a person to commit a wrongdoing as defined above.

### *Disclosure process*

Under the act, public servants have four options for making disclosures of wrongdoing. If proceeding through the internal disclosure system, they have two options: 1) disclose to their immediate supervisor; or 2) the senior officer for disclosure of wrongdoing appointed within their organisation. If they prefer, however, they may choose

a third option of disclosing directly to the PSIC at any time, as there is no requirement that they first exhaust the internal mechanisms. As provided by the act, a disclosure may be made publically if there is not sufficient time to make the disclosure through these means, and the public servant believes, on reasonable grounds, that the subject matter of the disclosure is an act or omission that constitutes a serious offence under an act of Parliament or of the legislature of a province, or constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.

While the PSDPA does not provide for members of the public to make protected disclosures in the same manner as public servants, they may provide information concerning allegations of wrongdoing in the public sector to the PSIC.

### *Investigation*

Once a disclosure has been made, the information is examined according to the definition of wrongdoing as set out in the PSDPA, and a decision is taken as to whether or not to proceed with an investigation. It is important to note that the purpose of investigations under section 26 of the PSDPA is to bring the existence of wrongdoing to the attention of chief executives of organisations in order for recommendations concerning corrective actions to be taken. The act focuses on a pro-active approach to corrective measures and recommendations, as opposed to taking a strict disciplinary stance.

The rights to procedural fairness and natural justice of all persons involved in investigations are respected throughout the investigation process. This means that any person adversely affected by the allegations will be informed of the details of the allegations in due course and will have a full and ample opportunity to respond to them, either orally or in writing, or both, during the process and before a final decision is rendered.

### *Reprisal*

The PSPDA also applies to reprisals taken against a public servant for having made a disclosure of wrongdoing or having co-operated in an investigation. Under section 2 of the act, reprisal is defined as any of the following measures:

- A disciplinary measure.
- The demotion of the public servant.
- The termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal.
- Any measure that adversely affects the employment or working conditions of the public servant.
- A threat to take any of the measures referred to above.

Reprisals are expressly prohibited under the act (section 19) and they can take many forms, some more subtle than others. In all cases, for a measure to be considered a reprisal there must be a link between the measure taken and the alleged victim having made a disclosure of wrongdoing or co-operated in a related investigation. Reprisals are criminal offences that bear legal consequences and penalties that include fines of CAD 10 000 or up to two years imprisonment.

### *Conciliation*

At any point in the investigative process of reprisal complaints, the Public Sector Integrity Commissioner may request that an independent third party is hired to bring the parties together to negotiate and settle the complaint. This process is important as it provides an alternative solution for all parties to come to a timely and satisfactory settlement. This mechanism can resolve complaints efficiently and effectively and reduce a potentially time consuming, emotionally difficult and financially expensive process(es).

### *Protection*

In addition to protection from reprisal, the PSDPA includes strong provisions intended to ensure confidentiality for persons involved in the disclosure process. This is a cornerstone feature of the act. The Public Sector Integrity Commissioner, and every person acting on behalf of or under the Commissioner, is prohibited from disclosing any information that comes to their knowledge in the performance of their duties under the act. The act creates a legal duty to protect the identity of persons involved in the disclosure process, including disclosers, witnesses, and the alleged wrongdoers themselves. Confidentiality is maintained throughout the process to the extent possible under the law. Any record requested under the PSDPA that was created in connection with a disclosure or investigation into a disclosure can be exempted from release in accordance with Canada's privacy and access to information legislation.

### *Access to legal advice*

Under the PSDPA, the Commissioner may provide access to legal advice for disclosers who are not able to retain legal counsel themselves. The maximum amount the Commissioner may grant for legal advice is CAD 1 500, however, under exceptional circumstances this amount can be increased to CAD 3 000.

## The impact of the introduction of the PSDPA

### *Meeting expected objectives*

The introduction of the PSDPA resulted in an increased level of accountability and transparency within government. Specifically, the act has resulted in: the creation of new formal internal disclosure processes, an external independent body that receives disclosures of wrongdoing and reprisal complaints (PSIC), and the establishment of the Public Servants Disclosure Protection Tribunal.

The implementation of the act is an evolving process. Similar to other international experience, establishing a new, complex regime takes time in terms of setting up the infrastructure, developing robust policies and procedures, and increasing broad based awareness and understanding of the regime among public servants, the public and other stakeholders, such as non-government organisations.

### *Evaluation and monitoring mechanisms introduced to assess the implementation and impact of the PSDPA*

Oversight mechanisms are in place to assess the implementation of the act. The Chief Human Resources Officer and the Public Sector Integrity Commissioner each report regularly to Parliament on PSDPA activities and on cases of founded wrongdoing.

The act requires chief executives to report annually to the Office of the Chief Human Resources Officer on internal disclosures received and investigated, inquiries made regarding the act, and promotional and awareness activities. The President of Treasury Board annually tables the summary report in both houses of Parliament.

The legislation also requires that PSIC table a separate annual report to Parliament that details activities in the previous fiscal year, such as the number of general inquiries and investigations relating to the act, the decisions, the recommendations for corrective action by the chief executives, any systemic problems that could give rise to wrongdoing, as well as other matters. This reporting requirement is a form of monitoring and assessment by Parliament to ensure that PSIC is held to account and reports on progress and activities publicly. PSIC has also put in place internal mechanisms to monitor the performance of the office's handling of cases, such as monthly and quarterly reports on intake and operational performance, as well as service standards.[2] This monitoring helps the organisation to identify new policies, processes or procedures that could assist in the administration of its responsibilities under the PSDPA, and supports its public reporting on performance through annual reports and other reporting activities.

In addition, in accordance with the PSDPA, it is the responsibility of organisations to:

- Provide public access to information that describes the wrongdoing.
- Indicate any recommendations that result from the finding of wrongdoing.
- Report on any corrective action he or she has taken, or explain why no corrective action has been taken.

As a result of this requirement, each organisation makes information publically available on cases of internal disclosures, while maintaining the strictest confidentiality of all involved parties.

### *Reviews of the PSDPA*

A formal review of the act is pending. As previously mentioned, section 54 of the act requires the President of Treasury Board to cause an independent review of the legislation to be conducted, including its administration and operation, five years after its coming into force. The independent review must result in a report submitted to Parliament on the adequacy of the act and any proposed policy and legislative recommendations to enhance the act and the regime.

In late 2010, the Auditor General of Canada issued a report on a performance audit of PSIC's operational handling of disclosures and complaints since its inception. This audit was undertaken to examine a number of concerns, including whether the mandate was being properly implemented given the lack of findings of wrongdoing and referrals to the tribunal between 2007 and 2010. PSIC also commissioned a third party extensive review of its handling of all closed files by early 2011 to help inform management decision making and ensure accountability and consistency in file management.

#### *Main findings from the review and key lessons learned*

The 2010 Auditor General of Canada report provided a number of lessons learned and opportunities for PSIC to enhance and strengthen processes in place to ensure consistency, accountability and sound management practices. Regarding the audit's findings on operational handling of files, it concluded that: operational guidance and procedural documents were not finalised and implemented; gaps remained regarding the

development of procedures for handling disclosure and complaints; there was reluctance by the then Commissioner to investigate; and decisions on whether to investigate were not fully supported by thorough processes and documentation on file.

All of the reviews undertaken between 2010 and 2012 supported PSIC to evolve and further strengthen its management and operational functions. An operational performance management framework was subsequently implemented in April 2013. PSIC also created an Audit Committee comprised of senior executives within PSIC and external experts in areas of accountability and audit.

Additionally, PSIC created an Advisory Committee comprised of external government, non-government and academic experts to provide advice to the Public Sector Integrity Commissioner. To date, the Advisory Committee has discussed a number of issues related to the PSDPA, ranging from its performance and accountability frameworks, to outreach and engagement activities. The creation of the Advisory Committee recognised the need for a forum to share diverse views, experiences and implementing standards on integrity, values and ethics as well as measures for strengthening to the federal whistleblowing regime.

### *Achieving successful implementation*

Successful implementation relies on the awareness and administration of the PSDPA, as well as trust in the disclosure process without fear of reprisal. This is an ongoing process and progress is evidenced through annual reporting by both the Treasury Board Secretariat and PSIC.

The Treasury Board Secretariat's annual reports on the act indicate that there have been over 1 500 disclosures made within organisations since 2007. The Treasury Board Secretariat's Annual Report on the Public Servants Disclosure Protection Act 2013-2014[3], indicates that 275 cases were handled during the reporting period: public sector organisations reported 182 new disclosures and 93 cases were carried over from 2012-2013. Among these cases, 111 were acted upon, 39 new investigations were launched, 29 led to corrective measures and 17 led to findings of wrongdoing as defined by the PSDPA. The disclosures not acted upon either did not meet the definition of wrongdoing under the act, or were referred to more appropriate processes.

To date, PSIC has received over 530 disclosures and 180 reprisal complaints. Since 2011, there has been an increase in the number of disclosures to the Public Sector Integrity Commissioner, and the number of disclosures in organisations has remained steady. The increase in reported cases of wrongdoing and referrals of reprisals indicate a greater stakeholder confidence in PSIC and greater administration of the act. To date, PSIC has issued 10 case reports to Parliament.

### *Assessment of the costs and benefits of compliance and enforcement mechanisms*

Federal departments and organisations are implementing the PSDPA within their existing resources, including establishing and communicating procedures for internal disclosures and developing organisational codes of conduct. Oversight mechanisms are in place to assess implementation and ensure compliance and enforcement of the act through, for example, the requirement that both the Public Sector Integrity Commissioner and the Chief Human Resources Officer report regularly to Parliament on PSDPA activities and on cases of founded wrongdoing.

Additionally, PSIC is required to issue case reports to Parliament on founded cases of wrongdoing. Case reports are an important mechanism as they are intended to and indeed do hold federal public sector departments and organisations accountable. These case reports do not only describe wrongdoing and findings but rather, in line with the greater objective of investigations, provide the opportunity to make recommendations to chief executives for corrective action. This supports and promotes a pro-active approach to wrongdoing, as opposed to a strict disciplinary stance.

In every case to date, departments and agencies implicated in case reports have taken measures to ensure compliance with Government of Canada policies and procedures, as well as relevant legislation, regulations and other authorities.

## Challenges and risks

### *Challenges faced during the design and implementation phases of the PSDPA*

Public servants have come forward with disclosures of possible wrongdoing regularly since the PSDPA came into effect in 2007. However, given the size of the federal public sector, including Crown corporations, the number of disclosures remains relatively small. This may partly be due to a fear of reprisal for coming forward. Only an average of 51% public servants indicated that they felt safe to initiate a formal recourse process without fear of reprisal in the 2011 Public Service Employee Survey (PSES) of 42 organisations.

Preliminary findings from the 2014 PSES indicate that this fear may be a continuing trend. However, based on further information submitted, organisations are becoming more and more active in promoting the PSDPA. They do so in different ways, such as engaging in dialogue and holding awareness sessions for employees, managers and executives. In addition, written information is made available through emails to employees, internal websites, pamphlets and posters. Some organisations invite speakers, such as the Public Sector Integrity Commissioner, to give presentations to employees on the PSDPA. Many organisations have also reported that a section of their organisational code of conduct is dedicated to disclosures under the PSDPA.

The process of embedding the principles of the act in each organisation's operations and culture will take time. Employees must understand that procedures and protections are in place and trust that they are effective. As organisations continue to implement the act, employees will better understand and appreciate the related principles and procedures. The establishment of a new code of conduct for the public sector and the corresponding organisational codes of conduct are expected to contribute in this regard.

Even once broad awareness of the act is achieved, it remains unlikely that there will be more than a small number of disclosures relative to the size of the public sector. Wrongdoing of the sort defined in the act is rare; ethical behaviour is the norm in the public sector and the information reported under the act is consistent with this fact. Furthermore, as was the case under the former policy on internal disclosure, the majority of disclosures do not lead to the discovery of wrongdoing as defined in the act. This observation applies to cases of disclosure as well as reprisal complaints received by PSIC. This does not to devalue or minimise the importance of coming forward, given the fear of reprisal or the possible dissuasive effects of a full and robust regime, but rather it is important to recognise the inherent challenges in implementing any whistleblowing regime.

Many disclosures concern workplace matters, such as interpersonal relationships with colleagues, harassment, labour relations or performance management. The PSDPA is not intended to replace mechanisms already in place for these matters. Nevertheless, the fact that employees choose to disclose matters not related to wrongdoing is a sign that disclosure procedures are trusted and that supervisors and senior officers for disclosure of wrongdoing are seen as having an important leadership role in values and ethics.

### *Foreseeing the challenges*

Parliament clearly foresaw several of the challenges that could likely arise in the implementation of the PSDPA, including the fear of reprisal and the risk of negative impacts to a career that disclosers could potentially face in coming forward to report wrongdoing. With these challenges in mind, Parliament designed the PSDPA to include comprehensive safeguards and supportive measures in order to protect and support individuals throughout the disclosure process. The act's confidentiality clauses, the availability of legal support, the criminalisation of reprisal, and the creation of a special quasi-judicial tribunal to hear allegations of reprisal point to Parliament's foresight and intent to mitigate reluctance and apprehension faced by disclosers in the reporting of wrongdoing. The additional challenge of accessibility was also foreseen by Parliament. This is reflected in the PSDPA's creation of a comprehensive disclosure system that provides public servants the option to disclose internally within their immediate workplace or externally to the Commissioner, a neutral third party. The act was designed to ensure that the system fosters a secure and trusting environment to report wrongdoing to, and that it is both easily and readily accessible to the public servant.

### *Managing the challenges*

The majority of organisations that participated in the Treasury Board Secretariat's annual Management Accountability Framework (MAF)[4] exercise included activities in their Values and Ethics Plan to address the challenge of the fear of reprisal amongst employees. The MAF is a key tool of oversight used to help ensure that federal departments and agencies are well managed, accountable and that resources are allocated to achieve results. Some examples of activities include:

- Conducting awareness activities and information on the processes, roles and responsibilities regarding internal disclosure.
- Providing training on disclosures of wrongdoing, code of conduct and Prevention and Resolution of Harassment to employees and managers.
- Holding ethics dialogue sessions.

Another way of managing the fear of reprisal is the reinforcement of confidentiality. The PSDPA requires allegations of wrongdoing to be treated with an appropriate degree of confidentiality. Everyone involved in a disclosure and its investigation must make every effort to maintain the confidentiality of information related to the matter. This includes refraining from discussing any disclosure or the identity of disclosers or witnesses, except when required as part of an investigation. Furthermore, organisations must protect any information they collect about disclosures, including the identities of those making disclosures and of others involved, subject to other acts of Parliament and the principles of natural justice and procedural fairness. In this way, the PSDPA provides a fair and objective process for those against whom allegations are made.

Regarding awareness-raising efforts, over recent years PSIC and the Treasury Board Secretariat have increased their focus and resources dedicated to improving communication with public servants and the public through their websites, awareness presentations, presence at key public sector events, and the development of communication tools and products. It is anticipated that over time these collective efforts will continue to build greater confidence in the overall regime.

## *Notes*

1 The Treasury Board is a Cabinet committee of the Queen's Privy Council of Canada and is responsible for accountability and ethics, financial, personnel and administrative management, comptrollership, approving regulations and most Orders-in-Council. The Treasury Board of Canada Secretariat is responsible for the management of the government by translating the policies and programmes approved by Cabinet into operational reality, and by providing departments with the resources and the administrative environment they need to do their work.

2 For more information on PSIC service standards, please visit the following link: www.psic.gc.ca/eng/investigations#howlong.

3 See www.tbs-sct.gc.ca/psm-fpfm/ve/psdp-pfdar/psdpa-pfdar-1314-eng.asp.

4 For information on the Management Accountability Framework exercise, visit: www.tbs-sct.gc.ca/maf-crg/index-eng.asp.

## *References*

Federal Accountability Act and Action Plan (2006), Canada, www.tbs-sct.gc.ca/faa-lfi/index-eng.asp

Office of the Chief Human Resources Officer (2011), *Public Service Employee Survey*, Treasury Board of Canada Secretariat, www.tbs-sct.gc.ca/pses-saff/2011/introduction-eng.asp (accessed 19 January 2016).

Office of the Auditor General of Canada (2010), *Report of the Auditor General of Canada to the House of Commons - The Public Sector Integrity Commissioner of Canada,* www.oag-bvg.gc.ca/internet/docs/parl_oag_201012_e_34448.pdf.

Public Servants Disclosure Protection Act (2005), Canada, http://laws-lois.justice.gc.ca/eng/acts/P-31.9/.

Tait, J. (1997), *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics (the summary).* Canadian Public Administration.

Treasury Board of Canada Secretariat, *Annual Reports on the Public Servants Disclosure Protection Act* (2007-14), Treasury Board of Canada, www.tbs-sct.gc.ca/psm-fpfm/ve/psdp-pfdar/psdpa-pfdar-eng.asp.

Treasury Board of Canada Secretariat, *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace policy* (2001), Treasury Board of Canada.

Values and Ethics Code for the Public Sector (2012), Canada.

Values and Ethics Code for the Public Service (2003), Canada, www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.pdf.

# *Chapter 8.*

# Chile: Protection for whistleblowers in the public administration

by

Rodrigo Mora Ortega, President, Citizen Defense and Transparency Commission, General Secretariat of the Presidency

Francisco Sebastián Sánchez Lay, Lawyer, Citizen Defense and Transparency Commission, General Secretariat of the Presidency

*In Chile, the rules for regulating, encouraging and protecting the reporting of wrongdoing and breaches of probity were established with the enactment of Law No. 20 205 on 24 July 2007. This law contains provisions aimed at detecting, preventing and sanctioning conduct related to wrongdoing or corruption in the public sector, and can be considered an integral part of a broader system that regulates the conduct of public sector employees. This chapter provides a contextual background for the creation of the law, describes the scope of protection, the requirements for protection, the elements of disclosure proceedings, the mechanisms in place to protect from reprisal, as well as the progress and challenges that have emerged since the establishment of these rules.*

## Context for the creation of law no. 20 205

Prior to the current whistleblower protection provisions in place, the Administrative Statute and the Administrative Statute for Municipal Officials had set forth an obligation for public officials to report disclosures of wrongdoing to the relevant authorities. Although the general provisions on the principle of probity had been established in 1999, at that time the law did not regulate explicitly the reporting of breaches of the principle of probity as wrongdoing. The law did not contain specific protection for individuals reporting wrongdoing, nor did it stipulate sanctions to be applied to those reporting in bad faith (Library of the National Congress of Chile, 2007).[1]

Towards the end of 2006, various corruption cases emerged in Chile: one case related to maladministration within the agency in charge of national sports policy (Chiledeportes), and another related to the diversion of public funds for the financing of electoral campaigns. These cases negatively impacted public opinion. In response, the government sought to adopt measures to prevent recurrences of this nature.

The President of the Republic established a working group of experts to develop a set of proposals aimed at improving efficiency, objectivity, public responsibility and the professional quality of state management. The working group issued a report of recommendations, which included providing protection for public officials who disclose misconduct in good faith (Barros B.E. et al, 2006):

> *Increasing the probability of being identified as a wrongdoer reduces the inclination to commit a criminal or administrative offence…Consequently, it is necessary to establish protection measures, for private individuals or public officials who report disclosures of wrongdoing, which amount to a criminal offence or breach of a legal duty related to public probity, or report information related to the concealment or attempted concealment of such acts.*

The Executive welcomed the proposals and developed an agenda pertaining to Modernisation, Transparency and Quality of Politics that consisted of various bills and amendments to legal initiatives that were under discussion in Congress. Among these proposals aimed at preventing corruption was the bill on whistleblower protection, which subsequently evolved into Law No. 20 205.

## Officials covered by the provisions

The provisions within the Administrative Statute and the Administrative Statute for Municipal Officials that require public officials to report disclosures of wrongdoing apply to the following persons: personnel working in ministries, mayors (government at regional –sub-national- level), governorates and all public services (centralised or decentralised). However, provisions do not apply to personnel working in the General Comptroller, the Central Bank, the Armed Forces, the Order and Public Security Forces, the National Television Council, the Transparency Council nor within public enterprises established by law.[2] Protections do apply for municipal officials, from staff or by contract, and the mayors.[3]

## Wrongdoing that constitutes protected disclosure

Chile does not have a list of wrongdoing that constitutes protected disclosure**.** In comparative law, these lists include specific issues such as the mismanagement of public

funds, fraud, and serious risk to public health and safety. However, in Chile, the law only provides protection for the reports disclosing irregularities and breaches of the principle of public probity.

Although the law does not provide an exact definition of "irregularity" or "act of irregular nature", such terms broadly encompass any breach of law or non-compliance of an official's duties.

The principle of probity is established in Article 8 of the Constitution, which states in its first paragraph: "The exercise of public functions requires its holders to strictly comply with the principle of probity in all their actions."

The principle of administrative probity, according to the Law of General Bases of the Administration of the State (article 52, paragraph 2), "consists of observing an unimpeachable official conduct and an honest and loyal performance of the function or position, privileging general interest over particular interest."

Both the Administrative Statute and the Administrative Statute for Municipal Officials contain the obligation of strictly observing this principle.[4]

Regarding a "breach" of administrative probity, the Law of General Bases of the Administration of the State (article 62) refers to conduct that "specifically contravenes the principle of administrative probity", which includes insider trading, the abuse of functions to obtain undue advantage, the misuse of public goods, bribery and conflicts of interest.[5] Importantly, the whistleblower is protected, irrespective of whether the reported conduct personally affects them or not, or if they became aware of the wrongdoing through the course of their professional duties or through other means.

## Compulsory reporting of wrongdoing and breaches of probity

A key aspect of the Chilean legal provisions on whistleblower protection stipulates that the reporting of wrongdoing and criminal offences is an obligation for employees and not only a prerogative.

The obligation to report criminal offences, the regulation, and the consequences of not reporting such offences are regulated in the Criminal Procedure Code. The compulsory reporting of a criminal offence must be made within the 24 hours following the moment that the official becomes aware of the offence. The breach of this duty is sanctioned according to article 494 of the Criminal Code.[6]

If an official does not disclose a wrongdoing or a breach, they are in contravention of the Administrative Statute[7]and the Administrative Statute for Municipal Officials[8], which oblige them to report a wrongdoing. In this context, disciplinary sanctions may apply, after a summary investigation is conducted or administrative proceedings are held.

## Requirements for a disclosure to constitute protection

### *Admissibility of the disclosure*

The whistleblower protection provisions in the Administrative Statute and the Administrative Statute for Municipal Officials require that a disclosure satisfies three requisites:

- It must be made to the competent authority: the reporting official must intentionally communicate the information.

- It must be made with due expediency: the timeframe associated to this criterion is not specified in law, but according to jurisprudence this requirement is considered unfulfilled when the reporting official has allowed a certain lapse of time between gaining knowledge of the acts and submitting the disclosure.9 According to this criterion, the official must disclose the wrongdoing, as soon as they become aware of it.
- It must be grounded (containing reasonable grounds): according to the Comptroller General, the report must contain the motives and reasons that explain why the referred acts are of irregular nature or amount to breaches of probity.[10]

The report must fulfil the following formal requisites:[11]

- It must be made in writing.
- It must be signed by the reporting official, or by a third party if the discloser cannot sign.
- It must express a requirement to keep the identity of the official and/or of the information contained in the report confidential (in case the reporting official wishes to make use of this right).
- It must contain :
  - Identification of the reporting official and his/her place of residence.
  - A description of the facts.
  - The identification of witnesses or other persons that are aware of the issue, if possible.
  - Attached background information and documents that serve as grounds for the report, if possible.

Non-compliance of these requisites could mean the dismissal of the report, with no time extensions or other exceptions.

### *Proof of wrongdoing*

The law does not impose the burden of proof of wrongdoing on the discloser. If the report leads to an investigation, the burden of proof is on the administrative authority to prove that wrongdoing or a breach of probity has occurred.

The intention of Law No. 20 205 was precisely to relieve the whistleblower from having to provide evidence, as a way of encouraging reporting.

## Confidentiality

According to the Administrative Statute and the Administrative Statute for Municipal Officials, the whistleblower may request that his/her identity and the contents of the report be kept confidential. This request is sufficient to prohibit the disclosure of this information. A breach of confidentiality calls for corresponding administrative liability.

The law does not include the possibility of denying the reporting official's request for any reason, and does not include any other requirements for the reporting official to comply with for confidentiality to be kept. According to jurisprudence, the request does not exclude the application of any of the other protections.[12]

## Disclosure proceedings

According to the law, the authority that receives the disclosure of wrongdoing has three working days to determine whether it is admissible or not. If the person that receives the report is not able to determine this, he/she has 24 hours to transfer it to the competent authority.

If the authority does not determine whether or not the disclosure is admissible within the time frame, the report will be considered as admissible. Therefore, the law assumes that silence on behalf of the receiving authority amounts to acknowledging its admissibility and rendering it to the competent authority.

Once the authority has determined the report as admissible, the whistleblower is not entitled to file the same report to another entity, as this will not provide him/her with protection. This provision is in place to prevent the filing of successive reports by one person (Library of the National Congress of Chile, 2007).

Once the disclosure of wrongdoing or breaches of the principle of probity have been filed, the competent authority must initiate a disciplinary procedure – a summary investigation or administrative proceeding - to determine the administrative liability. These procedures have no special regulation and therefore follow the general rules on disciplinary procedures. The law does not specifically regulate the applicable sanctions for such wrongdoing or breaches and therefore their sanction is governed by the same rules that are applicable to the general breaches of official duties.

Once the summary investigation or administrative proceedings are concluded, a 90-day lapse starts in which the protections for a whistleblower remain effective.

### *Reporting in bad faith*

One particularity of the Chilean legislation on whistleblower protection is that although it aims to encourage and protect whistleblowers, it emphasises the sanctions for unfounded or false reports made with the deliberate intention of harming the person disclosed against. This appears in the elaboration of Law No. 20 205, where it was expressed that the main idea of the law was to "protect the officials of the Administration of the State that report, to whom it was appropriate, the commission of acts that amount to a criminal offence or a breach of probity by a public official, and simultaneously, to establish a drastic sanction against those who make reports in an irresponsible way or in bad faith." (Report of the Government Commission of the Chamber of Deputies, 2006)

Consequently, both in the Administrative Statute (article 125, d) and in the Administrative Statute for Municipal Officials (article 123, e), unfounded reports that are proven false or made with the deliberate intention of harming the person reported against are sanctioned with dismissal from office (and not with any other lighter disciplinary measure).

Similarly, making reports that are proved to be false or made with the deliberate intention of harming someone amount to a conduct that contravenes the principle of administrative probity (Law of General Bases of the Administration of the State, article 62.9).

In order for sanctions to apply, reports made in bad faith must have the following elements:

- The reporting official must have explicitly asserted to have knowledge of the irregularities or breaches of the principle of probity that he/she has reported.
- Be unfounded.
- It must be proven, in relation to the reported acts, that they are false or that the report has been made with the deliberate intention of harming the person that is reported against.

To sanction reports made in bad faith, the law requires that the reporting person effectively asserts that he/she has knowledge of the acts; therefore, it would not be appropriate to sanction a person who only expressed concern or a suspicion in this regard.

Sanctions apply for the official who has made a false report or a report in bad faith only if the report is also considered as unfounded, this means that it is proved upon investigation that they had no grounds. However, if the discrepancy in reporting lays in the erroneous explanation of the grounds for the disclosure at the moment it is submitted, it will not carry sanctions for the reporting official.

An accusation of bad faith reporting must always be founded and not simply presumed. During the discussions preceding the law, the Executive declared that the law must require proof of bad faith, as this could lead to the dismissal of the reporting official, which is an extremely drastic sanction (Report of the Government Commission of the Chamber of Deputies, 2006).

## Protection from reprisals in the workplace

There are legal protections in place to protect reporting public officials from reprisals such as dismissal or demotion. The reporting official is entitled to these protections by filing a valid report[13] that complies with the legal requisites. These protections are:

- Not being subject to the disciplinary measures of suspension or dismissal from office, or being transferred without his/her written authorisation, from the date in which the competent authority receives the report and until 90 days after the investigation is concluded.
- Not being subject to (annual) evaluation if the reported official is the hierarchical superior, from the moment the complaint is filed and until 90 days after the investigation is concluded, except if the reporting official requests it him/herself. If there is no such request, the latest evaluation will be valid for all legal purposes.

Regarding suspension or dismissal from office, it is important to highlight that the law refers exclusively to these disciplinary measures and not to other sanctions, such as admonishment:

- If the protected official is effectively transferred without his/her written authorisation, such measure will be rescinded and the administrative authority must return the official to the same functions he/she performed before.[14]
- If the reporting official chooses to make use of the right not to be subject to evaluation, his/her latest evaluation will be valid for any legal purpose. The General Comptroller acknowledges that this does not signify that the official has received the same evaluation twice, but rather that the official has not been evaluated for the respective period.

## Duration of the reporting official's protections

The reporting official is protected from reprisals from the moment the report is made and until 90 days after the conclusion of the investigation, or until 90 days after the authority decides not to investigate the disclosure. These protections, which cannot be rescinded, are only available within this 90-day timeframe, which cannot be altered. However, if the reporting official has requested confidentiality of his/her identity and of the disclosure, confidentiality will persist indefinitely after the 90-day timeframe has lapsed.

According to administrative jurisprudence, the 90-day timeframe is initiated from the date the report is received.[15]

### *Reverse burden of proof*

For the protections to apply, the law does not require the whistleblower to prove that the administrative measures originated as a consequence of their disclosure. It is sufficient – according to administrative jurisprudence - for the employee to have reported wrongdoing or a breach of probity. On the other hand, the administrative body or authority that decides to suspend, dismiss, transfer or evaluate the official cannot maintain the validity of any such measures without arguing or proving that the measures were not caused by the reporting or that they have not been adopted as reprisal.

Whistleblowers are protected even if wrongdoing is not identified or if a breach of the principle of probity has not been established.

## Progress and challenges

The rules that were established in 2007 to protect whistleblowers are important for Chile's corruption prevention. This set of rules is a landmark within a broader set of reforms that have taken place during the past 20 years: the Law on Probity (1999); the modernisation of public procurement and recruiting in the Administration of the State (2003); the constitutional reform that introduced the principle of probity and established the access to acts and resolutions by state bodies (2005); the Law on Access to Public Information (2008); the constitutional reform on transparency, modernisation and quality of politics (2010); and the Law that Regulates Lobbying (2014).

In recent years, Chile has also made progress on the subject of whistleblower protection outside the scope of the Administration of the State. Law No. 20 393 established criminal liability for legal persons for criminal offences of money laundering, financing of terrorism and bribery. This law also established that legal persons can adopt a crime prevention model – that serves in extenuating circumstance or as an exemption from criminal liability - that must include "proceedings for the reporting or prosecution of pecuniary liability against the persons that breach the crime prevention system" (article 4.3, d).

Regarding citizen reporting, the Comptroller General has implemented a web-based platform named "Comptroller and Citizen", in which any person can submit reports or suggestions for oversight of the activity of state administration bodies. Using this platform, a citizen can submit a "report" in which he/she informs the Comptroller General of one or more specific acts related to a possible irregular situation and committed by an official or an agency subject to oversight by the Comptroller. The objective of the report is that the Comptroller General investigates and determines the veracity of the exposed

situation and the liabilities that may ensue. "Suggestions" refer to a proposal made by any citizen who provides general information related to a specific matter and agency which he/she considers should be reviewed, based on grounds such as possible irregularities or insufficient oversight. The requests for reports or suggestions are made voluntarily and the identity of the reporting person is kept confidential.

Since its launch in September 2012 until December 2014, 6 724 citizen requests had been received: 90% (6 022) were reports and the remaining 10% (702) were suggestions. Among the requests, 3 712 led to control activities (such as special investigations or audits) of oversight procedures that were set in motion or had been planned at the moment of the request. There were also citizen requests that allowed the planning of future oversight actions.[16] The results of the Comptroller and Citizen web portal are promising for the initiative and promotional activities are being considered to increase its use.

## Conclusion

In spite of the progress that Chile has made in these matters, the Chilean Government seeks to keep improving the protection mechanisms for whistleblowers.

Chile is a state party of the United Nations Convention Against Corruption, the Inter-American Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. As such, Chile is subject to the follow-up mechanisms for the implementation of these conventions. Additionally, Chile is a member of the Open Government Partnership. As a participant in these international initiatives aimed at preventing and combating corruption, Chile welcomes the opportunity to share its experiences with other member countries.

In Phase 3 of the Report on Implementing the Anti-Bribery Convention in Chile, the OECD Working Group on Bribery recommends, with regards to awareness raising and reporting, that Chile: "enhance and promote the protection from discriminatory or disciplinary action of public and private sector employees who report in good faith and on reasonable grounds to competent authorities suspected acts of foreign bribery" (OECD, 2014). The Chilean Government takes this recommendation into consideration and acknowledges the importance of these measures to prevent and counter foreign bribery and corruption in general.

## *Notes*

1 Message from Her Excellence the President of the Republic by which initiates a bill of law that protects the official who reports irregularities and breaches of the principle of probity, December 6, 2006. Library of the National Congress of Chile, *Historia de la Ley Nº 20.205. Protege al funcionario que denuncia irregularidades y faltas al principio de probidad*. 24 July 2007, pp. 6-7.

2 Article 1 of the Administrative Statute (Law No. 18,834).

3 Article 1 of the Administrative Statute for Municipal Officials (Law No. 18,883).

4 Administrative Statute (Law No. 18,834), Article 61 g) and Administrative Statute for Municipal Officials (Law No. 18,883), Article 58 g).

5 *"The following conducts especially contravene the principle of administrative probity:*

*Using for one's own benefit or the benefit of third parties the classified or insider information to which one has access because of the public function that is performed;*

*To unduly enforce the official position for influencing on a person with the purpose of obtaining a direct or indirect benefit for oneself or for a third party;*

*To use, in any way, money or assets of the institution, for the advantage of oneself or of third parties;*

*Executing activities, occupying workday time or using personnel or resources of the agency for one's own benefit or for purposes that are alien to the institutional ones;*

*To request, be promised or accepting, because of the position or function, for oneself or for third parties, gifts, advantages or privileges of any nature.*

*Exempt from this prohibition are the official or protocol gifts, and those authorized by custom as manifestations or courtesy and good education. The mileage or other similar benefit provided by airlines for national or international flights in which authorities or officials travel, that are financed with public resources, cannot be used in private activities or travel;*

*To intervene, because of the functions, in matters in which one has personal interest or in which the spouse, children, adopted children or relatives within the third degree of consanguinity and second degree inclusive.*

*In the same way, to participate in decision in which any circumstance exists that could take away impartiality. The authorities and officials must refrain from participating in these matters, and must put into knowledge of the hierarchical superior the implication that affects them;*

*To omit or elude the public tendering in the cases that the law provides for it;*

*To contravene the duties of efficiency, efficacy and legality that govern the performance of the public office, seriously obstructing the service or the exercise of citizen rights before the Administration, and*

*Making reports of irregularities and breaches of the principle of probity of which one has asserted to have knowledge, with no grounds and of which it is proved that they are false or made with the deliberate intention to harm the reported person."*

6 Articles 176 and 177 of the Criminal Procedure Code.

7 Articles 119 to 125 of the Administrative Statute (Law No. 18,834).

8 Articles 118 to 123 of the Administrative Statute for Municipal Officials (Law No. 18,883).

9 Decision No. 5,879, of 6th February 2009, of the General Comptroller of the Republic.

10 Decision No. 61,457, of 29th December 2008, of the General Comptroller of the Republic.

11 According to Articles 90 B of the Administrative Statute (Law No. 18,834) and 88 B of the Administrative Statute for Municipal Officials (Law No. 18,883).

12 Decision No. 24,355, of 12th May 2009, of the General Comptroller of the Republic.

13 Decision No. 24,355, of 12th May 2009, of the General Comptroller of the Republic. "(…) it is convenient to clarify that the rights established by article 90 A of the Administrative Statute (Law No. 18,834) are provided, without being subject or any condition, to whomever validly files the referred reports (…)."

14 Decision No. 58,731, of 23rd October 2009, of the General Comptroller of the Republic.

15 Decision No. 58,731, of 23rd October 2009, of the General Comptroller of the Republic.

16 See www.contraloria.cl/NewPortal2/portal2/ShowProperty/BEA+Repository/Sitios/Ciudadano/Estadisticas/diciembre2014.pdf.

## *References*

Barros Bourie, Enrique; Carmona Santander, Carlos; Ferreiro Yazigi, Alejandro; Harasic Yaksic, Davor; Recart Herrera, María Olivia; Valdés Prieto, Salvador and Zalaquett Daher, José, (2006), Informe sobre medidas para favorecer la probidad y eficiencia de la gestión pública encargado por S.E. la Presidenta de la República. Santiago, Chile, www.cdc.gob.cl/wp-content/uploads/documentos/InformeFinal06.pdf.

Constitutional Organic Law of General Bases of the Administration of the State (Law No. 18,575), Chile, www.oas.org/juridico/spanish/chi_res22.pdf (in Spanish).

Controlaría General de la República, *Portal Controlaría y Ciudadano*, Chile. http://www.contraloria.cl/NewPortal2/portal2/ShowProperty/BEA%20Repository/Sitios/Ciudadano/Inicio (accessed 19 January 2016).

Law No. 18,834 on the Administrative Statute Establishing the Obligations of Public Officials, Chile, www.leychile.cl/Navegar?idNorma=30210 (in Spanish).

Law No. 20,393 establishing criminal liability for legal persons for criminal offences of money laundering, financing of terrorism and bribery, www.leychile.cl/Navegar?idNorma=1008668 (in Spanish).

Library of the National Congress of Chile (2007), *Historia de la Ley Nº 20.205. Protege al funcionario que denuncia irregularidades y faltas al principio de probidad [History of Law Nº 20.205. Protection to the public official who denounces irregularities and faults to the probity principle],*Chile, www.leychile.cl/navegar/scripts/obtienearchivo?id=recursoslegales/10221.3/488/1/hl20205.pdf.

OECD (2014), *Phase 3 Report on implementing the Anti-Bribery Convention in Chile*, www.oecd.org/daf/anti-bribery/ChilePhase3ReportEN.pdf.

Report of the Government Commission of the Chamber of Deputies, (2006) account in Session 112, Legislature 354. in *Historia de la Ley Nº 20.205*, http://goo.gl/h5fE7j (in Spanish).

# *Chapter 9.*

# Ireland: The Protected Disclosures Act (no.14 of 2014)

By

Noel Tallon

Assistant Principal Officer

Government Reform Unit, Department of Public Expenditure and Reform

*Drawing on the experience of relevant legislations worldwide, Ireland enacted its Protected Disclosures Act, which came into effect in July 2014. This legislation marks an important new departure in Irish Law as it represents the first occasion on which an attempt has been made to put in place, in a single location, a framework for the protection of whistleblowers. This chapter provides an overview of the purpose, timing and key elements of this legislation, including the concerns that needed to be addressed, the legislative options considered, as well its overall scope.*

## The Protected Disclosures Act 2014: Why now?

In 2012, the fifth and final report of a long-standing Tribunal of Inquiry into planning matters outlined detailed recommendations in relation to existing legislation in the areas of conflicts of interest, ethics in public office, political finance, planning, local government, the investigation and prosecution of corruption, and the transparency of corporate bodies. Included were a number of recommendations in relation to whistleblowing.

The issue of whistleblowing was also raised in the Nyberg Report (2011) on Ireland's banking crisis, which found that a contributor to the crisis was that those expressing contrarian views risked sanctions and potential loss of employment.

The growing international emphasis on the necessity to put in place legislation protecting whistleblowers, together with Ireland's international commitments to improve its anti-corruption frameworks, provided a significant impetus towards the adoption of these recommendations.

The important work carried out by the OECD on the protection of whistleblowers as part of the development of the G20 Anti-Corruption Action Plan also provided a strong impetus for the development of whistleblower protection legislation in Ireland that was consistent with best international practice, as set out in the OECD's report (2012).

## The concerns that needed to be addressed

The Programme for Government, agreed by the incoming government in 2011, contains a suite of measures to strengthen public governance in Ireland. The stated aim of the commitments proposed in the area of political reform is to create a new openness and transparency in the operation and conduct of public life in Ireland, which will in turn:

- Deliver greater accountability in relation to the activities of all bodies and agencies charged with delivering services to the citizen.
- Promote greater efficiency and effectiveness in the public sector.
- Rebuild public trust in our system of government.
- Encourage enhanced participation.
- Strengthen democracy.

As part of this vision, the Programme for Government contained an explicit commitment to introduce whistleblower protection legislation.

Prior to the introduction of the new legislation, a small number of statutes already contained long-standing whistleblowing provisions. In addition, following a government decision in 2006 that sectoral whistleblowing provisions should be included in legislation where appropriate, whistleblowing provisions were included in a number of other statutes. The legislative provisions enacted after 2006 demonstrated certain broad similarities in their approach to whistleblowing, but there was no central co-ordination of these efforts and there were some important differences.

The main similarities between the sectoral provisions were:

- A differentiation between "persons" and "employees".

- A separate provision for immunity against civil liability for "persons" who report breaches of the legislation in question.
- A distinct set of protections for persons described as "employee" who makes disclosures under the legislation in question. The protections included a prohibition on employers from penalising employees as well as the provision of redress through the already existing industrial relations machinery for employees who suffer such penalisation.
- In some, but not all cases, specific reference was made to a person who suffered dismissal as a consequence of having communicated one of the wrongdoing listed as having recourse to the Unfair Dismissals Acts.

The main differences between the sectoral provisions revolved around a lack of consistency concerning the nature and content of reports that attracted protection, and the extent to which criminal offences are created. Most, but not all, of the sectoral statutes provided for the criminalisation of employees who deliberately made false or misleading reports, while some of the more recent statutes also provided for the criminalisation of employers who breached the prohibition on the penalisation of employees.

The net result of this sectoral approach was a patchy, incomplete, inconsistent and often confusing set of protections spread across several pieces of legislation and several, but not all, sectors of the economy. The outcome was fragmented and provided ineffective and often confusing standards of protection for both employers and workers.

As stated above, the legislative programme of the new government elected in March 2011 contained a clear commitment to the introduction of whistleblower protection legislation. The newly appointed Minister for Public Expenditure and Reform subsequently reiterated this commitment on a number of occasions and introduced overarching legislation that would provide protection for workers in all sectors. The drafting of the Protected Disclosures Bill was approved early in 2012, with the aim of not merely mirroring international best practice, but as far as possible, representing a "best in class" legal framework.

## The objectives of the proposed legislation

In considering the approach to the drafting of the legislation, the objectives could be summarised as follows:

- Insofar as possible, and consistent with international precedent and best practice guidance, to encourage disclosures by workers relating to wrongdoing in the workplace by ensuring the protection of such workers against reprisals from their employer.
- To provide for such protection for all sectors of the economy on a uniform basis.
- To adopt a wide definition of "worker" so as to ensure that as many individuals as possible within the workplace have access to the protections to be made available.
- To promote an approach in which the vast majority of disclosures are made to the employer in the first instance, whilst at the same time providing for a "stepped" disclosure regime in which a number of distinct disclosure channels would be available to a worker where, having regard to the circumstances, disclosure to the employer would neither be possible or appropriate.

- To make certain that the protections available under the legislation would still be available to a worker even if the alleged wrongdoing to which the disclosure relates cannot be sustained, providing the disclosure conformed to the requirements included in the legislation.
- To remove any risk of potential criminalisation of a worker on account of breaching statutory prohibitions against the disclosure of confidential information when he or she is considering making a protected disclosure.
- To ensure that the legislation becomes a vehicle for the disclosure of matters that are in the public interest rather than to replace existing Human Resources and Industrial Relations mechanisms and procedures for dealing with grievances in the workplace.
- To safeguard workers who make a disclosure in the public interest from being subject to occupational detriment and to provide immunity against civil liability in such circumstances.
- To make available certain remedies providing redress for workers who suffer detriment as a consequence of having made a protected disclosure.
- To ensure that employees who are dismissed from their employment following the making of a protected disclosure are entitled to the protections of the Unfair Dismissals Acts, regardless of the length of their service.
- To bring workers who make disclosures under the sectoral acts within the scope and protections of the overarching legislation so as to provide a uniform standard of protection for all workers who make such disclosures.
- To design a protected disclosure regime under which the regulatory burden placed on responsible employers is proportionate.
- To make special arrangements for the disclosure of information, which although of public interest could have an adverse effect on law enforcement or which concerns security, intelligence, defence and international relations matters.
- To provide clarity in the law in relation to protected disclosures.
- To provide strong safeguards to maintain the confidentiality of persons making protected disclosures in order to ensure that the focus is on the message (i.e. the reported wrongdoing) rather than the messenger (i.e. the person making the disclosure).

It became clear over the course of the detailed drafting process that the inclusion of provisions, such as criminal sanctions for false reporting, could potentially disincentivise well-intentioned workers from coming forward.

It was considered that the public interest in encouraging genuine whistleblowers to come forward far outweighed any public interest that might exist in relation to the punishment of the few who might attempt to abuse the legislation. This approach was adopted generally in the drafting process and where any potentially disincentivising provision was identified, steps were taken to reverse or eliminate such provisions. To ensure an appropriate balance in the legislation, it was decided that the bill should contain no criminal sanctions for employers who are found to have penalised workers for making a protected disclosure, although such penalisation would have significant financial disincentives.

By way of example, reference can be made here to the exclusion of a "good faith" requirement on the part of the person reporting the wrongdoing. If a worker was found not to have reported in "good faith" they could potentially be found to have reported in "bad faith", thus calling into question their motivation for the making of the report. It was considered that a scenario where a discloser correctly reported wrongdoing, but may subsequently find themselves not entitled to the protections of the act, would be unsustainable and unjust. The motivation of the discloser was therefore specifically excluded.

No public interest test was included on the grounds that it would also be unjust to expect a worker to determine where the public interest lay in any particular case. It was considered that the placing of such obstacles in the way of a person genuinely wishing to report wrongdoing would provide potential grounds of attack against the worker by an unscrupulous employer, thus making a worker fearful of the consequences of disclosing.

## Evaluation of options

As noted above, there was a strong government commitment to the introduction of comprehensive whistleblower protection, and the Minister for Public Expenditure and Reform viewed it as a significant priority. However, in line with the overall Better Regulation agenda it is a requirement before preparing a bill to conduct a Regulatory Impact Assessment to ensure that all options have been adequately considered.

The options examined ranged from simply continuing the existing sectoral approach, to the introduction of overarching legislation for "workers". Each option was considered in the context of how much they were likely to meet the overall objectives that had been set for the legislation.

The following legislative options were considered:

- Do nothing and continue with existing sectoral legislation.
- Introduce legislation covering the public sector only.
- Introduce legislation that provides whistleblower protections for all.
- Introduce overarching legislation, but confine to "employees" only.
- Introduce overarching legislation for "workers", while retaining the protections in sectoral legislation if they extend beyond that which the legislation was intended to provide.

A detailed consideration of each of these options was included in the Regulatory Impact Assessment of the legislation, prepared in July 2013.

The relative merits of each option were considered in the context of the overall objectives set out for the legislation. While the analysis discounted each option in turn it was decided that, having regard to the established objectives, the final legislation should provide for protection to as many persons in the workplace as possible, extend those protections to all sectors, and maintain the existing sectoral protections for persons who were not workers but who were provided with protection in the sectoral provisions.[1] An outline, or general scheme, of a bill was prepared on this basis.

## Consultation and design of the legislation

Initial consideration of the general scheme was informed by a significant programme of research, in particular:

- A review of the most relevant international models, particularly the arrangements in the United Kingdom and New Zealand, but also drawing on the experience in Australia and legislative proposals in other countries.
- A review of international best practice as set out by bodies such as the OECD and Transparency International. Direct consultation with some international experts was also undertaken.

Following government approval of the general scheme, the Minister for Public Expenditure and Reform presented the draft bill to the Joint Committee on Finance, Public Expenditure and Reform in 2012. The committee subsequently engaged in a series of public hearings to discuss the proposals. Representatives from the Irish Congress of Trade Unions (ICTU), the National Union of Journalists, The Irish Business and Employers Confederation (IBEC) and Transparency International Ireland, together with a number of other experts, were heard.

Following publication of the committee report, the Department of Public Expenditure and Reform continued the detailed process of consultation, including meetings with ICTU, IBEC and the Irish Human Rights Commission (IHRC).

While the proposals outlined in the general scheme were welcomed, some key issues arose from the consultation. These included the need to ensure that the proposed protections would apply to all workers, including contractors; the role of the legislation in terms of Ireland's international reputation; the reconciliation of the existing sectoral protections with the single overarching legislative proposal; the nature of the stepped disclosure process and whether, as an alternative, it should be cumulative rather than discrete; that the protections should not replace existing grievance mechanisms; the maintenance of corporate confidentiality; the maintenance of the confidentiality of the person making the disclosure; whether anonymous reporting should be allowed; the need to ensure that disclosures are made in good faith; the need to ensure that the protections apply even if a disclosure made in good faith and with a reasonable belief subsequently turn out to be untrue; the assignment of the burden of proof; the necessity for clarity in relation to the making and handling of disclosures; the speedy handling of complaints made by penalised workers; the payment of uncapped compensation to penalised/dismissed workers; the status of criminalisation provisions; and the potential regulatory/compliance burden.

These issues were considered in detail during the drafting of the bill.

## Scope of the legislation

The act's objective is the protection of all "workers" (a wider group of persons than direct employees), in both the private and public sectors, against reprisals in circumstances where they have made a disclosure of information related to wrongdoing which comes to their attention in the workplace (this is referred to as a "protected disclosure").

The term "worker" includes employees, contractors under express or implied contracts, agency workers, people gaining work experience, and trainees. It also covers

members of the civil service, the national police force (An Garda Síochána) and members of the defence forces. It is therefore reasonable to assume that every person employed by the state is covered by the act. A person who is an employee can seek protection using the existing industrial relations dispute resolution machinery of the state. Workers such as contractors, who are not direct employees, may instead take an action in tort against the person who has caused the detriment due to making the disclosure.

"Wrongdoing", as defined in the act, concerns a broad range of matters that it is in the public interest to correct. The following matters are relevant wrongdoing for the purposes of this act:

1. That an offence has been, is being, or is likely to be committed.
2. That a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services.
3. That a miscarriage of justice has occurred, is occurring, or is likely to occur.
4. That the health or safety of any individual has been, is being, or is likely to be endangered.
5. That the environment has been, is being, or is likely to be damaged.
6. That an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring, or is likely to occur.
7. That an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement.
8. That information tending to show any matter falling within any of the preceding paragraphs has been, is being, or is likely to be concealed or destroyed.

## Implementation and review

One of the issues that emerged from the consultation process was the potential for the legislation to create a regulatory compliance burden on employers. Similar concerns emerged within the Department of Public Expenditure and Reform regarding the state of the public finances and the necessity not to impose further costs on the public purse by the introduction of elaborate regulatory structures.

Having considered the substantial oversight already provided by the courts and the industrial dispute resolution mechanisms, and taking into account the fact that the legislation represents an entirely new departure in Irish law, a policy decision was made not to include any additional centralised oversight structures at this stage.

While every public body is required to establish and maintain procedures for the making of protected disclosures by its current and former workers, the content of those procedures will be heavily influenced by the guidance that the Minister for Public Expenditure and Reform will issue. Having considered the matter in detail, it was decided that pending the formal review of the legislation after three years (as is provided for in the act itself), and the necessity to allow a period of time for the concepts contained in the act to gain traction in the judicial and administrative systems, these measures, in addition to the annual publication of details by individual public bodies, would be sufficient in the short term to ensure the necessary oversight of the new arrangements.

## Impact of the legislation

Given its recent enactment, it is too early to determine the detailed impact of the Protected Disclosures Act 2014. However, it is already clear that it has led to a significant change in the perceived environment for whistleblowing. While no particular case has as yet progressed its way through the courts or the industrial dispute resolution mechanisms, at least one high profile case of whistleblowing concerning tax evasion reported to members of the Oireachtas Public Accounts Committee has resulted in significant parliamentary and media references to the legislation.

In this regard it is worth noting that the general use of the term "whistleblower" does not always coincide with the definition of making a protected disclosure under the act. While the act may be mentioned in connection with high profile cases it does not always necessarily follow that an individual labelled as a "whistleblower" will have disclosed information in accordance with the provisions of the act, in which case the protections set out in the act may not be relevant. Certain whistleblowers may have deliberately, or unintentionally, bypassed the provisions of the act and not be entitled to its protections. Thus, while the media may label a person as a "whistleblower" that person may not necessarily have made a protected disclosure.

At the time of writing it is understood that other cases where disclosures were made prior to enactment have been or are in the process of preparation for presentation to the relevant authorities. It is worth noting, however, that where reports of wrongdoing have been made to employers and adequately dealt with, particularly in the private sector, such reports are unlikely ever to come to more widespread attention.

The Department of Public Expenditure and Reform has campaigned to raise awareness of the act and its provisions across the public sector. This campaign has been intensified in 2015 following the publication of the Ministerial Guidance on the procedures to be established and maintained by public bodies (2015).

In addition, the Labour Relations Commission, which forms a significant part of the industrial dispute resolution mechanisms, following a request from the Minister for Public Expenditure and Reform, worked closely with the Irish Congress of Trade Unions and the Irish Business Employers Confederation with a view to the publication of an agreed Code of Practice for dealing with protected disclosures. The publication of the Code in 2015 provided another opportunity to bring the legislation to the attention of both workers and employers.

## Challenges and risks

The Protected Disclosures Act is an important new departure in Irish law. It represents the first occasion whereby attempt has been made to put in place, in a single location, a framework for the protection of persons who come forward with reports of wrongdoing in the workplace. Many challenges were faced in the design and implementation of the legislation, most significantly:

- Ensuring consistency between existing protections and the act.
- Securing the support of both employers and unions to the proposals.
- Striking the correct balance around encouraging disclosures while limiting the scope for vexatious reports.

- Ensuring that the legislation was structured in such a way as to encourage reporting of wrongdoing to the employer in the first instance.
- Ensuring that the act did not prejudice the security of the state.

The act is a new, untried and, at the time of writing, untested piece of legislation. The enactment of any piece of whistleblower legislation is likely to bring with it certain risks.

Perhaps the most significant risk regarding the enactment of whistleblower protection legislation is the potential for workers to misinterpret its provisions as a wide-ranging permissive authority to disclose information into the public domain with impunity. A failure to properly consider the implications of disclosing information, without regard to the provisions of the act, could result in workers assuming protection, but subsequently discovering that they are not entitled to the assumed protection.

Another potential risk is that workers dependent on low paid or minimum wage jobs are unlikely to actively engage with the concept of whistleblowing in the absence of strong trade union support. Although the legislation provides a framework of protection, the risk remains that workers in relatively weak positions will not find themselves in a position to report wrongdoing. The response of the trade union movement to the introduction of the legislation will be critical in this regard.

Even more so than usual, the untried and untested nature of the act leaves open a significant potential for differing interpretation of its provisions. Differences of interpretation must inevitably await the formal rulings of third party adjudicators and until a body of case law is developed, the position regarding these risks will remain uncertain.

## Conclusion

The Protected Disclosures Act is a new and innovative piece of legislation. While no piece of legislation could claim to resolve every problem associated with whistleblowing, it does represent a positive contribution to the overall anti-corruption framework and is likely, as was the case with the introduction of Freedom of Information and Data Protection legislation, to have the effect of positively changing public sector behaviour.

It is hoped that the cultural effect on the private sector will be similar. Workers can now access significant protections in situations where they were penalised for having raised concerns, or threatened with penalisation prior to raising concerns, in relation to actual or potential wrongdoing in the workplace. They can also be assured that if their confidentiality is not maintained, a right of action in respect of any loss suffered is available. Employers are therefore incentivised to respond to complaints made to them with a view to ameliorating any potential harm at the earliest possible time. This can only make good business sense and should not be seen as a threat to good employers.

Cultural change does, however, take time. The working through of individual cases and the development of a body of case law will undoubtedly provide greater clarity regarding the practical operation of Ireland's whistleblowing regime. A formal review of the act is scheduled to take place in 2017 and is likely to provide a basis for further development of the legislative system embodied in the Protected Disclosures Act 2014.

## *Note*

1 While the decision was taken to restrict the protections to "workers" concerns arose that the wholesale repeal of the existing sectoral legislation would extinguish the rights to protection granted to persons other than "worker" in the existing sectoral legislation. After much consideration this issue was resolved by amending the relevant sectoral legislation with a view to ensuring that reports made by a person considered a "worker" would fall to be dealt with under the Protected Disclosures Act thus leaving the exiting protections for "persons" who were not "workers" intact. See Schedule 4 to the Protected Disclosures Act 2014.

## *References*

Commission of Investigation into the Banking Sector in Ireland (2011), Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland, www.bankinginquiry.gov.ie/Documents/Misjuding%20Risk%20-%20Causes%20of%20the%20Systemic%20Banking%20Crisis%20in%20Ireland.pdf.

Government Reform Unit (2013a), Regulatory Impact Assessment – Protected Disclsoures Bill 2013, Department of Public Expenditure and Reform, Government of Ireland, Dublin, www.per.gov.ie/wp-content/uploads/Protected-Disclosures-Bill-2013-Regulatory-Impact-Assessment1.pdf.

Government Reform Unit (2015), Guidance for the purpose of assisting public bodies in the performance of their functions under section 21(1) of the Protected Disclosures Act 2014, Department of Public Expenditure and Reform, Government of Ireland, Dublin, www.per.gov.ie/wp-content/uploads/Draft-Guidance-Document-Proctected-Disclosures1.docx

OECD (2012), OECD/G20 Study on G20 Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation, OECD, Paris, www.oecd.org/g20/topics/anti-corruption/48972967.pdf.

Protected Disclosures Act (2014), Ireland, www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html.

S.I. No. 464 of 2015, Industrial Relations Act 1990 (Code of Practice on Protected Disclosure Act 2014) Orderm Statutory Instrument, Ireland, www.djei.ie/en/Legislation/Legislation-Files/SI-464-of-2015-CoP-on-Protected-Disclosre.pdf.

Tribunal of Inquiry into Certain Planning Matters and Payments (2012), The Final report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Dublin. www.oireachtas.ie/parliament/media/committees/archivedcommittees/cnranda/The-Final-Report-Mahon.pdf.

# *Chapter 10.*

# Switzerland: Whistleblower Protection

by

Anne Rivera, Head, Compliance Office and Competence Centre for Contracts and Procurement, General Secretariat, Federal Department of Foreign Affairs, Switzerland

Hélène Darwish Legal expert, Compliance Office, General Secretariat, Federal Department of Foreign Affairs, Switzerland

*As a tool for combating corruption, whistleblower protection has become increasingly important in Switzerland over recent years. At present, there are two whistleblower protection systems, one for public sector workers and another for private sector employees. This chapter outlines the rules on whistleblower protection in the federal public sector and draws on the various legal standards for private sector employees, as of June 2015.*

## Background

In Switzerland, the debate about whistleblower protection began in earnest in the 1990s following various corruption scandals implicating public officials in particular. At that time, whistleblowers were looked on as traitors and suffered not only retaliation from their employers but also the criticism of the public at large.[1]

In response to these cases, the Swiss authorities sought to ascertain the real scale of corruption in the country and identify preventive action. To this end, a "corruption and safeguards" working party was set up in summer 1995 on the initiative of the head of the Federal Department of Justice and Police (FDJP). In February 1995 the Control Committee of the National Council (CC-NC)[2] asked all federal departments to set out in their management reports the internal steps they had taken to prevent corruption (Federal Gazette, 1999). The departments' replies suggested that they were not unduly concerned about such practices, which led the Federal Council[3] to state that: "the situation regarding corruption in Switzerland offered no real cause for alarm" (Federal Council decision on Motion 96.3457, 1996). Nevertheless, given the political climate, the Council thought it of sufficient concern to instruct the Administrative Control Department to conduct an inquiry in the federal administration with respect to ethics in public service.

On the basis of the inquiry's findings, the Federal Council advised all departments to review activities that could be exposed to risks of corruption and, where necessary, take steps to reduce these risks (Federal Gazette, 2000).[4] This call gave rise to various measures for preventing conflicts of interest.[5] In addition, for the purposes of prevention, the Federal Council instructed the Federal Department of Finance (FDF) to draw up a code of conduct available to all federal administration staff. On the legal front, it entrusted the FDJP with strengthening criminal law on corruption. On 19 April 1999, the Federal Council adopted a message and draft amendment of criminal law on corruption, together with the proposed accession of Switzerland to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Federal Gazette, 1999). Further measures were introduced, including a ban on tax deductions for hidden commissions,[6] thus evidencing a genuine change of policy on corruption.

In 2003, the Federal Council named the Federal Audit Office as the official body to which irregularities within the federal administration should be reported (Federal Audit Office, 2010) (see examples of whistleblowing below).[7] Because of its mandate it was well placed to check allegations itself during its audits and to report serious cases to the prosecuting authorities if necessary (Federal Gazette, 2003). Since all whistleblowing was dealt with confidentially, whistleblowers could approach the Federal Audit Office without the risk of reprisals. It was therefore decided not to formalise the whistleblowing and whistleblower protection procedure. The Federal Council was afraid of creating an unhealthy atmosphere, despite its belief that disclosure of information, particularly to prevent corruption, should be encouraged.[8]

The debate was reopened with the tabling of a parliamentary motion by Remo Gysin in 2002 (Motion 03.3214), and a postulate by Dick Marty in 2003[9] for rules to ensure that individuals disclosing cases of bribery or other wrongdoing in the workplace are protected against wrongful termination and other forms of reprisal. These requests led to a major legislative package designed to clarify the whistleblowing system in the private sector that is currently before Parliament (see section below).

In the federal public sector, which is also covered by these parliamentary requests, the idea of whistleblower protection mainly reflected Switzerland's international commitments, especially with regard to international prevention of corruption. Two recommendations in particular played an important role. First, in 2004 the OECD Working Group on Bribery in International Business Transactions invited Switzerland to: "consider the establishment in federal legislation of a formal obligation for any federal authority, civil servant or public official […] to report indications of a possible act of bribery to competent authorities".[10] Second, in 2008 GRECO recommended that legislation be enacted to require federal employees to report suspicions of corruption and to offer proper protection to persons reporting such suspicions (GRECO, 2008). On 1 January 2011, new rules came into force establishing whistleblowing as both an obligation and a right, and affording protection against retaliation.

## Whistleblower protection in Switzerland: Current legislation

Since whistleblower protection is bound up with the obligation and the right to report irregularities,[11] this section will explain the general rules governing whistleblowing in Switzerland. At present there are two separate systems: one for public sector staff and the other for private sector employees.

### *Public sector*

Since 2003, federal administration staff have been able to report suspicions of irregularities, including those relating to corruption, to an independent state body:[12] the Federal Audit Office (Federal Audit Office, 2010).[13] This informal procedure was similar to the whistleblowing hotlines that existed in several neighbouring countries and guaranteed the confidential handling of reports. The practice was sanctioned on 1 January 2011 by enactment of a new section in the Federal Personnel Act[14] that established a genuine whistleblowing system in the federal public sector.

Under the rules of Swiss federalism, this system applies to federal employees (central government),[15] while the cantons (federal states) and communes remain responsible for organising their own whistleblowing systems. To date, many cantons have introduced similar systems to legitimate the reporting of criminal acts and other irregularities by their staff, while affording whistleblowers protection.

The system governed by federal public law has a dual structure:

First, it lays down the conditions under which federal employees have the obligation, or right, to make a disclosure and indicates to whom it can be made:

- As state employees, federal staff have an **obligation to report**[16] any offences automatically prosecutable of which they have knowledge or which are reported to them in the course of their duties. Reference should here be made to the Swiss Criminal Code, which specifies whether a criminal offence is to be automatically prosecuted. This is the case for active and passive bribery, forgery of documents and numerous offences against property. The duty to report is construed broadly, since it covers offences committed not only by federal staff – irrespective of grade or position – but also by the public at large.

  A whistleblower may make his or her disclosure to: 1) the prosecuting authorities; 2) his or her supervisor; or 3) the Federal Audit Office. The law does not specify a

set order, and so a member of staff can decide freely between these channels according to the circumstances.

- Federal employees also have the **right to report**[17] any other irregularities that they have noted in connection with their work. The law does not define the concept of irregularity, which is construed broadly in practice. It specifically covers failure to comply with the rules of conduct applying to federal employees (relating, for example, to acceptance of gifts and other benefits, management of conflicts of interest, pursuit of a secondary activity, granting of expenses and allowances), project mismanagement, and waste of state resources.

In such cases, the law provides for only one external reporting channel, the Federal Audit Office.[18]

Some federal offices have also introduced a system of internal reporting to an independent body, which whistleblowers have the option of using.[19] It is then up to this reporting body to forward disclosures deemed plausible to the Federal Audit Office or the prosecuting authorities, if necessary.

Second, it clearly affirms the principle of whistleblower protection while providing for redress in the event of retaliation:

- An individual making a disclosure in good faith is afforded legal **protection against any occupational disadvantages**.[20] In the event of retaliatory dismissal, a federal employee can demand reinstatement to his or her previous position or, if this is impossible, assignment to an equivalent position. However, a whistleblower is at liberty to forgo reinstatement or reassignment and opt instead for financial compensation ranging between 6 and 12 months' salary.[21] For other forms of retaliation, such as assignment to duties or a position not matching the whistleblower's qualifications, or denigration and bullying, a federal employee can require his or her employer to take protective or corrective action.[22] In each case, a whistleblower can refer his or her employer's decisions to the Federal Administrative Court under an appeals procedure that is free of charge.[23]

Regarding the concept of good faith, the intention is not to require the whistleblower to produce irrefutable evidence or in-depth clarification of the disclosure, but solely to prevent the practice of whistleblowing being deflected from its purpose for the sake of defamation. The existence of (objectively substantiated) suspicions is sufficient for disclosure and corresponding whistleblower protection.

However, disclosure of information externally (to the public or the media) constitutes a breach of official trust[24] and does not normally qualify for protection; thus whistleblowers are in principle liable to disciplinary action and/or prosecution. However, the courts recognise the legitimacy of external disclosure if it is justified by an overriding interest and respects the principle of proportionality.

The entry into force of the new whistleblowing rules was followed by a large-scale awareness campaign within the federal administration, with every member of staff being personally informed through a leaflet of his or her rights and obligations in this field[25] (Federal Office of Personnel, 2011). The Confederation also offers a number of in-house training courses on the subject and posts a range of information for whistleblowers on its websites and intranet.[26]

### *Private sector*

Before explaining the current major legislative package to standardise the whistleblowing system under private law, it is necessary to describe current whistleblower protection in Swiss law. Whistleblowing in the private sector is not expressly regulated by law but is governed by a number of legal standards, principally the Code of Obligations:

- Employees under private law are bound by a duty of loyalty arising out of labour law, and this requires them faithfully to protect their employers' legitimate interests.[27] In certain circumstances, this duty of loyalty gives rise to an **obligation to report** internally any incidents or irregularities to the detriment of the employer in order that the latter may take the requisite action. The factors to be taken into account in determining whether this obligation will be recognised are the seriousness of the wrongdoing and the employee's position in the firm and whether it entails a supervisory role (Federal Gazette, 2013).[28] The duty of loyalty does not, however, entail mandatory external disclosure, which can only be made under express legislation.[29]

- The legislation also imposes a duty of confidentiality on employees, prohibiting them from exploiting or revealing confidential information obtained in the course of their duties.[30] This duty prevents any external disclosure of facts likely to harm an employer's reputation, even if these facts amount to illegal acts. Switzerland's Supreme Court nevertheless recognises an employee's right to report irregularities externally in the event of overriding public or private interests, and subject to the principle of proportionality.[31] This principle assumes that employees will follow a "tiered" reporting procedure, first approaching their supervisors or a specialist internal body and only then, if no action is taken by the employer, going to the competent authority. If there is no response from the competent authority, an employee is entitled, as a last resort, to put the case before the public.

- In the private sector, a whistleblower acting in good faith in accordance with the principle of tiered disclosure is entitled to **protection in the event of reprisals** by the employer, although this is more limited than in the public sector. In the event of dismissal, an employee can argue that it is wrongful[32] or without just cause,[33] depending on whether ordinary notice has been given (statutory or contractual) or the dismissal is with immediate effect. In either case, the dismissal cannot be reversed but entitles the former employee to court-ordered damages not exceeding six months' salary. Any other retaliation against the whistleblower would be in breach of the employer's statutory obligation to protect the worker's personal rights, which entails protecting his or her physical or mental health and preventing attacks from third parties (especially colleagues and supervisors). A whistleblower thus has several remedies, particularly in terms of demanding appropriate protection and claiming damages for infringement of personal rights.[34] A complaint to the Cantonal Labour Inspectorate is also possible in the event of injury to an employee's health.[35]

At the same time as preparing and introducing a whistleblowing system for the federal public sector, in 2008 Switzerland began a wide-ranging review of whistleblower protection under private law. The consultation procedure for the preliminary draft, and then the draft of the partial revision of the Code of Obligations, was much discussed

among the relevant communities of interest, a debate that is now being continued in Parliament.

In its present form (dating from 20 November 2013), the draft revision explicitly regulates reporting of irregularities by introducing a system of tiered disclosure, as established in case law, and also reaffirming the principle of whistleblower protection:

- For the sake of clarity, the concept of irregularities has now been defined and covers criminal offences, other illegal acts and contravention of an employer's instructions, guidelines or regulations. This is a specimen list that must be construed broadly. It does not, however, include wrongdoing by third parties outside the company.
- The proposed revision enshrines the principle that internal reporting must take precedence over external reporting, while providing for a number of exceptions. A whistleblower who has reasonable suspicions that an irregularity has been committed must first approach his or her employer, who has the option of remedying the irregularity. If, within a period of sixty days, the employer has not taken adequate steps to clarify the facts and remedy the wrongdoing, has not acknowledged receipt of the report, or has not notified the whistleblower of measures taken and how the case is being handled, the whistleblower may then refer the matter to the competent (criminal or administrative) authority.[36] The same applies if, following his or her report, the whistleblower suffers occupational disadvantages.

In certain circumstances a whistleblower may go to the competent authority directly. This is the case if a whistleblower is able to infer on the basis of past experience that the report will have no effect internally, if failure to make a direct report immediately could hinder the authority's work, or if there is a serious and imminent danger to life, health, safety or the environment.

Disclosure to the public is a last resort that can be used only if the authority fails to notify the whistleblower of the action taken within fourteen days of receipt of the disclosure.

However, a response from the authority that is deemed inadequate or has not had the anticipated effect does not entitle an employee to turn to the public.

- The existing rules on retaliatory dismissal remain valid (payment of damages equivalent to no more than six months' salary). It was specifically decided that a whistleblower should not be reinstated in the company because it would place him or her in a more favourable legal situation than a worker having been wrongfully dismissed on other grounds. Moreover, the proposed revision explicitly prohibits all other types of retaliation by requiring an employer to protect the whistleblower against any occupational disadvantages.
- A disclosure that meets statutory requirements is construed as a defence in criminal law, which means that a whistleblower who complies with the requirements of the reporting procedure cannot be prosecuted.

Regarding proceedings in Parliament, the Council of States[37] passed the revision bill on 22 September 2014. The National Council referred it to the Federal Council on 5 May 2015, with a mandate to adopt simpler and clearer phrasing. The bill's basic structure, however, is to be maintained, particularly regarding the disclosure system and the encouragement of creating an internal reporting body. The Council of States must now

decide on the referral to the Federal Council and the simplification requested by the National Council.

## Some examples of whistleblower protection

In order to judge the effectiveness of the whistleblowing system that came into force in the federal public sector in 2011, it is useful to look at its impact by considering the practice of two bodies responsible for receiving reports: one external to the federal offices concerned, the Federal Audit Office, and the other internal, the Compliance Office of the Federal Department of Foreign Affairs.

### *Whistleblowing to an external body: The Federal Audit Office*

The Federal Audit Office is Switzerland's supreme financial supervision body. It assists Parliament and the Federal Council. Although it is officially attached to the Federal Department of Finance, it is independent and bound only by the constitution and the law. However, it is supervised indirectly by Parliament and specifically by the Finance Delegation of Parliament. Its main task is to supervise the financial management of the federal administration and many other semi-governmental and international organisations.

Since 2003 it has also been the department officially designated by the Federal Council to receive reports of irregularities from within the administration. As such, it has dealt with all information of this kind disclosed to it by federal employees and individuals. Because of its unique status and discreet and confidential handling of information, it has been able to offer whistleblowers effective protection against any retaliation. This protection has since been laid down as a fundamental principle of the whistleblowing system in the federal public sector with the inclusion on 1 January 2011 of a new section in the Federal Personnel Act, as mentioned in the section above.

In 1996, the Federal Audit Office indicated the importance of whistleblowing system in facilitating the exercise of its duties (Federal Gazette, 1996).[38] At the time it believed that it did not have sufficient resources to combat corruption because it used sampling for its audits and its rules of procedure prevented it carrying out swift, unannounced investigations. The Federal Audit Office was finding that most cases came to its attention by chance through information from third parties, rather than as a result of systematic audits.

Reports to the Federal Audit Office can be made by e-mail, fax or post, in person or by telephone.[39] Anonymous reports are taken into account but do not allow more information to be obtained if necessary. Anonymous reports represent only approximately 10% of disclosures. The vice director, whose telephone number appears on information leaflets, and the Federal Audit Office website can be contacted in person to show the whistleblower that he or she will be taken seriously (Transparency International, 2013). Every report is taken into consideration, whether criminal, financial or concerning failure to comply with rules of conduct, since the law allows the Federal Audit Office to verify not only the economic character of an act, but also whether it is lawful.

All disclosures are acknowledged, but whistleblowers receive no feedback about taken or planned actions. Suspicions are investigated and their plausibility verified by a panel of three Federal Audit Office staff comprising the vice director, the head of the legal service and a legal expert. Simple and minor cases are usually handled in direct co-operation with the federal office concerned, allowing the requisite clarifications and

providing a swift resolution. Where appropriate, the whistleblower's identity will be kept confidential. Other cases are clarified during the Federal Audit Office's routine audits. If the suspicions are not confirmed, or no further action can be taken on an anonymous disclosure because it is incomplete, the case is closed. However, if it turns out that the allegations must be reported to the prosecuting authorities, the Federal Audit Office attends to this itself.

Since it is not a criminal authority that prosecutes serious offences automatically, the Federal Audit Office very rarely receives reports of indictable offences that are prosecuted as a matter of course. However, every year it is notified of 60 to 80 irregularities, of which about 12 require short- or medium-term action. Almost half of all reports come from people outside the federal administration, such as rival suppliers.

Owing to its mandate, the Federal Audit Office guarantees the principle of whistleblower protection. Because of its independence and in-depth knowledge of the federal administration, it is able to verify suspicions as part of its routine auditing, while protecting the identity of the person behind the disclosure. It also checks that the information it receives is detailed and well documented. The Federal Audit Office has the advantage of being able to centralise the handling of disclosures and therefore has an overview. Consequently, we can say that the creation of an independent authority in charge of combating corruption is not justified at present in Switzerland.

### *Whistleblowing to an internal body: The FDFA Compliance Office*

Owing to its international sphere of activity, the Federal Department of Foreign Affairs (FDFA) manages a network of Swiss representations across the globe that are sometimes confronted with difficult environments and even acts of corruption. For this reason it established an internal body for reporting irregularities in 2006. Originally designed to receive and process reports of irregularities among the FDFA's contracting partners in the fields of development co-operation and humanitarian aid, this body was bolstered by a reporting office responsible for the rest of the department when the new whistleblowing system came into force in the public sector.

In July 2013, the two bodies merged into a central compliance office, the FDFA Compliance Office, which is in charge of handling offences and irregularities reported by FDFA staff, contracting partners and third parties. As part of the Competence Centre for Contracts and Procurement,[40] which reports directly to the General Secretary, the FDFA Compliance Office has no routine line functions or supervisory duties within the department, which guarantees its independence in both fact and law. Its twofold mission consists of preventing, detecting and co-ordinating the handling of irregularities within the department and enhancing FDFA staff capabilities and ethical conduct through training courses.

Individuals wishing to make a disclosure can contact the FDFA Compliance Office by post, e-mail (a dedicated e-mail address is available for this purpose) or telephone. Every report, whether anonymous or from a named individual, is treated confidentially.

Upon receipt of the report, the FDFA Compliance Office sends the whistleblower an acknowledgement. It then examines the facts reported and, if they are inadequate, vague or contradictory, undertakes any further clarification needed, if necessary in co-operation with the whistleblower or any other relevant body. The FDFA Compliance Office takes steps to protect the whistleblower's identity; these cover not only his or her name and

position, but also any information by which he or she could be identified, especially in the case of small teams or units.

If, on the basis of its clarification, the FDFA Compliance Office considers the reported facts to be plausible, it will advise the General Secretary of the FDFA on the action required, which may consist of:

- Reporting the case to the prosecuting authorities if there are reasonable suspicions that a criminal offence has been committed.
- Opening a disciplinary inquiry or taking other personnel action (responsibility of the FDFA Legal Service) if the overriding aspect is a possible breach of staff regulations.
- Opening an administrative inquiry, a decision taken by the Head of Department or the Federal Council,41 if a complex factual situation requires further clarification (particularly to determine various personal liabilities).
- Forwarding the case to the Federal Audit Office for any other serious irregularities.
- Taking direct action itself (e.g. recommendations to the relevant unit) for minor cases.

The initial results of FDFA Compliance Office work are positive. As a result of various awareness-raising measures (article the FDFA in-house magazine, information on the intranet, training courses in Switzerland and representations abroad), FDFA staff have shown a growing interest in the internal reporting system and are quick to use it, including for purposes of prevention (guidance for staff confronted with borderline situations). Although disclosures vary in nature, the FDFA Compliance Office has met with very few cases of clearly unwarranted, or even defamatory, whistleblowing. Furthermore, most whistleblowers prefer to reveal their identity of their own free will, indicating a high degree of trust and satisfaction with regard to whistleblower protection in the FDFA.

This experience shows that the option of an internal reporting system that does not rule out subsequent referral to another authority (such as the Federal Audit Office) is appreciated by staff, some of whom are reluctant to take the step of external disclosure to the statutory authorities.

## Reflections and progress on key challenges

Until 2011 there were no rules governing either the right/obligation to report or the protection of whistleblowers in the federal public sector. The duties of loyalty and confidentiality prohibited the disclosure of sensitive information by employees. This prohibition was relative, however, since if the employer's interests were threatened, a public sector employee could be required to report certain facts – depending, among other things, on their seriousness – if the public interest so demanded. In this case, employees were expected to use internal channels first to respect the principle of proportionality, but they could not claim any special protection.

A significant step was taken with the entry into force of the new whistleblowing system in the federal public sector. Whistleblowers are now entitled to report criminal acts and other irregularities to one of a number of authorities, since the new system does not provide for a "tiered" procedure. However, they are usually still prevented from

disclosing internal information to third parties, including the media, at the risk of being in breach of their official duties (see current legislation section above).

The new system, however useful, has not solved every problem faced by whistleblowers. The following considerations relate to the present system in the federal public sector, since the new draft legislation to standardise the whistleblowing system in the private sector has not yet been implemented.

### *The system: Centralised or decentralised?*

Switzerland does not have a centralised anti-corruption agency for both prevention and enforcement. However, the Swiss authorities do not lack the means to prevent and punish corruption. These include, as we have seen above, the whistleblowing system in the federal public sector (see current legislation section above), but also the Interdepartmental Working Group on Combating Corruption,[42] which is responsible for promoting a coherent anti-corruption strategy at the national and international levels and serves as a forum for raising awareness.[43]

The whistleblowing system, which might be termed decentralised, has proved its worth insofar as there is currently no real discussion of the need to establish a centralised body in Switzerland. Rather the reverse: there is just as much support among anti-corruption experts for the setting up of internal reporting bodies,[44] which are now a subject of growing interest, especially in the cantons.

A decentralised system has its advantages, especially for whistleblower protection. If we take the example of the whistleblowing system in the federal public sector, the fact that whistleblowers have a choice of reporting channels (internal and external) and therefore the option of going to the body that, in their view, will afford them the best protection, can only encourage them to make disclosures. In this system, the work of the various reporting bodies is complementary, which is their great strength.

Ultimately, what counts is the effectiveness of the reporting procedure and the protection afforded to the whistleblower, rather than the type of system.

### *The reporting body: Internal[45] or external?[46]*

As we have seen above, because of its special sphere of activity, the FDFA has set up its own reporting body. Although it encourages its employees to use this channel first, they are free to go to another reporting body.

For an institution such as the FDFA, whose activity spans the globe and some of whose staff work in difficult, or even highly corrupt, environments, there are a number of advantages in having an internal reporting body.

First, it helps to strengthen the FDFA policy of good governance, one aspect of which is specifically zero tolerance. It also enables the necessary corrective action to be taken (whether disciplinary, administrative or structural) on the basis of the facts reported, which enables the institution to maintain control over its system. At the same time it avoids bad publicity outside the organisation, particularly in the media.

Second, it ensures swift and effective handling of reports, especially in critical situations requiring urgent action, not least because the internal body is thoroughly familiar with the operation of the institution and its internal procedures. Moreover, the presence of the internal body within the institution is encouraging to employees, making

them more aware of whistleblowing issues and therefore readier to report any fraud or irregularities that they may come across.

Setting up an internal reporting body is nevertheless burdened with a number of challenges, the first of which is the availability of adequate resources, as it is important for the body to have sufficient credibility and to be able to respond quickly, particularly if there is a sudden increase in the number of reports. To resolve this problem, the institution may be tempted to entrust receipt and handling of reports to an outside service provider. Although this solution is particularly helpful for small organisations, which because of their size do not possess enough resources to have their own internal body, it is not necessarily the most effective, particularly with respect to whistleblower protection. The outside provider, contrary to what might appear at first sight, is not fully independent as it is bound by a contract to the institution (principal) and therefore liable to receive instructions. Furthermore, it has neither the powers to intervene directly within the organisation, particularly in the event of retaliation against the whistleblower, nor the capacity to react in an emergency. As the agent it does not have the same legitimacy as an official body, so its access to internal information, which will depend mainly on the scope of its mandate, will be limited. Because it lacks in-depth knowledge of the institution and broader access to internal information, it is doubtful whether an external provider would be able to conduct internal investigations in compliance with the principle of proportionality, without the risk of compromising the whistleblower's rights, and even the rights of the individual being reported, as well as the institution's reputation.

To succeed in its task and, more particularly, to guarantee genuine whistleblower protection, the reporting body must be able to act independently. An outside body, such as a prosecuting authority, has this capacity, as does the Federal Audit Office, which is accountable only to Parliament. As for internal bodies, their degree of independence will depend on the circumstances. Officially attached to the organisation, they may receive internal instructions and run the risk of being used for the organisation's ends. This risk will vary according to their position in the institution and the extent of their powers. The culture of the institution will also be important in this respect. As an example, the FDFA Compliance Office is attached to the General Secretariat, a staff unit,[47] and this gives it broad powers. The fact that it has no line functions also guarantees its independence in law and fact from line units, which do not come under the same chain of authority.

It is worth noting that the challenges encountered by an internal reporting body are, contrary to expectations, not seen as obstacles to its proper functioning and if given a free choice, an institution's employees do not necessarily opt for an external reporting channel. Few reports handled by the Federal Audit Office relate directly to the FDFA and its partners.[48] The number of reports to the FDFA Compliance Office, since its establishment in 2006, has remained steady or even risen slightly, which proves its credibility among department staff. Only 1% of reports to the FDFA Compliance Office are anonymous. FDFA employees thus have no apprehensions about taking their cases to this internal body openly and transparently.

One of the Federal Audit Office's major assets is the fact that it possesses the qualities of both an internal body, because of its sound understanding of the federal administration, and an external body, owing to its independence within that administration. It collaborates with the internal auditing units of the various federal departments, which are required to forward their annual auditing programmes and all their reports to the Office and notify it immediately of any serious financial or non-financial irregularities.[49] Because of its size it has the flexibility to handle all the reports it

receives, regardless of number and frequency. It also has broad powers that are not confined to financial disclosures, but also cover any reported failings in federal offices' organisation, administrative management and performance of duties. Disclosures to the Federal Audit Office are usually of a higher standard (better supported and documented) than those to internal reporting bodies.

However, if the facts require the opening of a criminal investigation, the Federal Audit Office must refer the case to the prosecuting authorities. Because of its unique status and discreet and confidential handling of information, it is able to give whistleblowers effective protection against retaliation during its audits. It may, depending on the circumstances, react slightly slower than an internal body as it usually intervenes only once the acts have already occurred and the need for urgent action no longer exists. If the Federal Audit Office fails to act, a whistleblower has the option of reporting the facts to the Finance Delegation of the Parliament, a channel which, apparently, no whistleblower has ever used or had occasion to use to date.

Whether internal or external, each reporting body has its uses, and it is the complementary nature of the various bodies that ultimately ensures the effectiveness of whistleblower protection in Switzerland's federal public sector.

### *Anonymity or confidentiality*

When whistleblowers report an irregularity they cannot be absolutely sure that their identities will be protected throughout the procedure. To avoid this risk, they may choose to make an anonymous report. Although anonymity has the advantage of protecting a whistleblower's identity, it may make a disclosure ineffectual if it contains inadequate, vague or contradictory information that can be completed only by the whistleblower. The difficulty for the reporting body will then be how to investigate. In such cases, the Federal Audit Office, as an audit body, has auditing tools that allow it to make certain checks. However, due to a lack of similar resources, the FDFA Compliance Office is less able to handle anonymous disclosures, although it can leave clarification of some facts to the FDFA internal control body.

Anonymity may sometimes conceal bad intentions, such as revenge or slander. Although this method enables whistleblowers to escape the consequences of their disclosures, it also prevents them being able to ascertain whether action is being taken on their reports and whether it is necessary to make the disclosure to another authority or even the public at large.

Despite these reservations, any disclosure, even if anonymous, should be taken into consideration by the reporting body, as far as available information permits.

To avoid whistleblowers resorting to anonymity, the reporting body must be able to guarantee confidential treatment of the information provided. The Federal Audit Office can make this guarantee owing to its independence and unique mandate. During its audits, it is not required to disclose the source of the information that it is seeking to verify. Although it may seem at first that the situation would be different for the FDFA Compliance Office as an internal body, it can in fact undertake its clarifications with the utmost discretion, while scrupulously respecting official secrecy and data confidentiality. In some situations involving small units, where the individuals possessing the information concerned are few in number and therefore easy to identify, the FDFA Compliance Office must decide which method of investigation will best protect the whistleblower and, if

necessary, use indirect investigation (through another unit) to obtain the information needed.

Despite its virtues, confidentiality also has its limits as it becomes difficult to implement if the report results in the opening of a criminal investigation[50] and then becomes evidence. In such circumstances, the parties' right of access to the case file will take precedence over confidentiality, with the result that the whistleblower's identity can no longer be kept secret.

### *Protection for the whistleblower and the individual being reported*

In recent years, the importance of setting out a clear framework for whistleblowing and whistleblower protection has become obvious in Switzerland, particularly in the context of preventing corruption. It is also a matter of public trust in institutions and the economy.

Nevertheless, a system that is too favourable to whistleblowers may have the pernicious effect of generating an unhealthy atmosphere and certain abuses, such as defamation or infringements of the personal rights of the individuals being reported, and bring the practice of whistleblowing into disrepute. It is therefore important for reporting bodies to respect the principle of proportionality and ensure the protection of individuals reported as well as whistleblowers. In practice, this means that a reporting body must conduct its investigations in such a way as to avoid any infringements of the personal rights of the person reported, who must be able to comment, at the latest during a disciplinary inquiry, on the charges levelled against him or her.

This delicate balance is the main issue confronting reporting bodies, including the FDFA Compliance Office, in their day-to-day work.

## *Notes*

1 Among the string of scandals in the news was the case of the head of the Zurich water department, Hans-Peter Heise, and his personal assistant Angela Ohno, who in 1992 disclosed dubious practices on the part of the company responsible for treating the canton's sewage sludge, in collusion with a corrupt public official. They lost their jobs before being reinstated in 1997.

2 The National Council is one of the two chambers making up the Swiss Parliament (chamber of representatives of the people).

3 The Confederation's executive branch.

4 Secondary occupations of public officials and occupations of former public officials, particularly in terms of conflicts of interest. Federal Council replies dated 12 January 2000 to the National Council Control Committee report of 12 March 1999.

5 Including stricter regulation of secondary occupations of public officials and the occupations of former public officials, introduction of an integrity clause to prevent corruption in the public procurement sector, reinforcement of internal control services and the Federal Audit Office, and provision of courses for managers.

6 Effective from January 2001.

7 The Federal Audit Office is the Confederation's supreme financial supervision body.

8 Motion 03.3212.

9 Motion 03.3344, subsequently converted into a postulate.

10 Recommendation 146 of the OECD Working Group's report of 24 December 2004.

11 At present there is no statutory definition of the concept of "irregularity" in either public or private law (see "Public sector" and "Private sector" sections for a description of some typical cases covered by this concept). In general, it is assumed that the concept will be construed broadly.

12 This official reporting channel was introduced by decision of the Federal Council. It was not confined to federal administration employees, but was available to anyone having knowledge of irregularities relating to government activities.

13 The Federal Audit Office is the Confederation's supreme financial supervision body. Its field of competence is governed by a special law (Federal Audit Office Act, Classified Compilation (CC) 614.0).

14 Section 22a, subsequently supplemented by Section 34c, of the Federal Personnel Act, CC 172.220.1.

15 At federal level some decentralised bodies nevertheless have their own legal provisions for staff and do not come under the Federal Personnel Act.

16 Federal Personnel Act, Section 22a (1). However, this obligation to report is not unqualified, and a member of staff may be exempted under certain conditions, particularly if such reporting were likely to incriminate him or her or if he or she is closely related to the suspect or cohabits with that person, has had a child with or adopted, or been adopted by, that person or has been appointed to act as guardian, official legal advisor or deputy of that person (see Federal Personnel Act, Section 22a (3), which refers to Sections 113 (1), 168 and 169 of the Swiss Code of Criminal Procedure, CC 312.0).

17 Federal Personnel Act, Section 22a (4).

18 See Section 3 for details on the external reporting procedure for this authority.

19 See Section 3 for an example of the internal reporting procedure for the FDFA Compliance Office.

20 Federal Personnel Act, Section 22a (5).

21 Federal Personnel Act, Section 34c (1a) and (2).

22 Federal Personnel Act, Section 22a (5) in conjunction with Section 4 (2 g), and Federal Personnel Ordinance, Section 9, CC 172.220.111.3.

23 Federal Personnel Act, Section 34 and what follows.

24 Swiss Criminal Code, Section 320, CC 311.0.

25 As are all new federal staff members.

26 See information from the Federal Audit Office: www.efk.admin.ch/index.php?option=com_content&view=article&id=223&Itemid=238&lang=en.

27 Federal Act on the Amendment of the Swiss Civil Code, Section 321a (1), Code of Obligations, CC 220.

28 Federal Supreme Court, ATF 113 IV 68, under 6; Federal Council message of 20 November 2013 on partial revision of the Code of Obligations.

29 Such as Section 9 of the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (CC 955.0), which requires financial intermediaries to report any reasonable suspicions that a criminal money-laundering offence has been committed.

30 Code of Obligations, Section 321a (4). This duty of confidentiality covers not only information that an employer has explicitly termed confidential but also any information whose disclosure the employer seems to wish to prohibit.

31 See, for example, Federal Supreme Court, ATF 127 III 310, under 5.

32 Code of Obligations, Section 336.

33 Code of Obligations, Section 337.

34 Federal Council's explanatory report on partial revision of the Code of Obligations (penalties for wrongful or groundless dismissal), September 2010, page 8 (in French).

35 Federal Labour Act, Section 6, CC 822.11.

36 The right to report is nevertheless limited to criminal offences and violations of public law.

37 The chamber of representatives of the cantons.

38 Report dated 22 March 1996 on the work of the Federal Audit Office in 1995, addressed to the Finance Delegation of the Federal Assembly and to the Federal Council.

39 Federal Audit Office website on whistleblowing: www.efk.admin.ch/index.php?option=com_content&view=article&id=223&Itemid=238&lang=en.

40 The Competence Centre for Contracts and Procurement is a division with 20 members of staff divided among four sections: the Advice on Contract Law Section, the Contract Office, the Advice on Procurement Section and the Compliance Office.

41 See Sections 25, 26 and 27a of the Ordinance on Public Sector Organisation, CC 172.010.1.

42 This group was established following a Federal Council decision of 19 December 2008 further to a recommendation from the Group of States against Corruption (GRECO) set up by the Council of Europe. It comprises representatives from various federal offices, the Office of the Attorney-General of Switzerland, the cantons, cities, industry and civil society.

43 Website of Interdepartmental Working Group on Combating Corruption: www.eda.admin.ch/eda/en/home/aussenpolitik/finanzplatz-wirtschaft/kampf_gegen_korruption geldwaeschereiundterrorismusfinanzierung/korruption/arbeitsgruppe-korruptionsbekaempfung.html.

44 Such as the FDFA Compliance Office.

45 An internal reporting body is taken to mean a body within the federal administration that reports directly to a federal office, such as the FDFA Compliance Office.

46 An external reporting body is taken to mean a body independent of the federal administration, such as the Federal Audit Office (although this is part of the federal administration) or a prosecuting authority.

47 As a staff unit, the General Secretariat supports the Head of Department in his daily work. It co-ordinates business for the Parliament and the Federal Council, informs the

public about the activities of the Department and raises Switzerland's profile abroad. In addition, it is responsible for ensuring equality of opportunity in the FDFA and ascertaining the effectiveness of internal controlling and control systems for all areas covered by the department. It has a Competence Centre for Contracts and Procurement, which supports FDFA line units with regard to procurement of services and drafting of public- and private-law contracts as well as some international treaties. It also administers the FDFA Compliance Office.

48 As for disclosures about the FDFA to the media or prosecuting authorities, there do not seem to have been any so far, which may be explained amongst other things by the fact that use of such a channel is more restrictive and unpredictable.

49 Federal Audit Office Act, Section 11.

50 In criminal proceedings a whistleblower does not have the status of a claimant (see Sections 30 and what follows of the Swiss Criminal Code and Section 118 of the Code of Criminal Procedure in combination with Section 115), since the whistleblower system presumes an offence without an injured party or, at the very least, an offence of which the whistleblower is not the direct victim. Nor do whistleblowers have the status of witnesses (see Code of Criminal Procedure, Section 162).

## *References*


Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (CC 955.0) (1997), Switzerland, www.admin.ch/opc/en/classified-compilation/19970427/index.html.

Federal Audit Office (2014), *Whistleblowing*, Bern, www.efk.admin.ch/index.php?option=com_content&view=article&id=223&Itemid=238&lang=en (accessed 29 July, 2015).

Federal Audit Office (2010), *Annual Report,* Bern, https://egov.nik.gov.pl/g/egov/CH/2010/ETHZurichITstrategy/2010_jahresbericht_e.pdf.

Federal Audit Office Act (1967), Switzerland.

Federal Council decision (1996), 9 December on Motion 96.3457, 'Bribery cases. Legislative consequences', tabled by Mr Schüle on 5 June 1997.

Federal Department of Foreign Affairs, *Interdepartmental Working Group on Combating Corruption*, www.eda.admin.ch/eda/en/home/aussenpolitik/finanzplatz-wirtschaft/korruption/arbeitsgruppe-korruptionsbekaempfung.html.

Federal Gazette (2013), *Federal Council message of 20 November 2013 on partial revision of the Code of Obligations.*

Federal Gazette (2003), *Federal Council report of 16 June 2003 on prevention of corruption.*

Federal Gazette (2000), *Secondary occupations of public officials and occupations of former public officials, particularly in terms of conflicts of interest. Federal Council replies dated 12 January 2000 to the National Council Control Committee report of 12 March 1999.*

Federal Gazette (1999), *Report by the National Council Control Committee dated 12 March 1999 on secondary occupations of public officials and occupations of former public officials, particularly in terms of conflicts of interest.*

Federal Gazette (1999), Draft revision to the Criminal Law on Bribery (Amendment to th e Criminal Code and the Military Penal Code).

Federal Gazette (1996), *Report dated 22 March 1996 on the work of the Federal Audit Office in 1995, addressed to the Finance Delegation of the Federal Assembly and to the Federal Council.*

Federal Labour Act, Switzerland.

Federal Office of Personnel (2011), *Prevention of corruption and whistleblowing*: www.efk.admin.ch/images/stories/efk_dokumente/whistleblowing/370_korruptionspraeventi on_flyer_e.pdf (website accessed 29 July, 2015).

Federal Personnel Act (2013), Switzerland, www.admin.ch/opc/de/classified-compilation /20011178/201307010000/172.220.111.3.pdf (in German).

Federal Staff Ordinance (2001), Switzerland.

GRECO (2008), *Evaluation Report on Switzerland,* Strasbourg.

Motion 03.3212 (Remo Gysin) of 7 May 2003; http://search.parlament.ch/f/cv-geschaefte?gesch_id=20033212 [in French; also available in German].

OECD (2004), *Switzerland: 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*, OECD, Paris, www.oecd.org/switzerland/34350161.pdf.

Swiss Civil Code (1911), Switzerland, www.admin.ch/opc/fr/classified-compilation /19110009/200206010000/220.pdf (in French).

Swiss Criminal Procedure Code (2007), Switzerland, www.wipo.int/edocs/lexdocs/laws/en/ch/ch314en.pdf.

Transparency International (2013), *Interview with Michel Huissoud, Deputy Director of the Federal Audit Office*, 8 May 2013, www.transparency.ch/fr/aktuelles_schweiz/meldungen/2013_05_08_NL_Entretien_Huissoud.php?r=1 (in French) (website accessed 29 July, 2015).

# *Chapter 11.*

# The United States of America: Federal Whistleblower Protection

by

Mark P. Cohen, Principal Deputy Special Counsel, U.S. Office of Special Counsel

John J. Lapin, Senior Assistant to the Special Counsel, U.S. Office of Special Counsel

*There is a growing body of statutory laws in the United States that provide protection to whistleblowers. This chapter will focus on the development of the modern federal whistleblower protection statutes, their origin in good government initiatives, the elements needed to prove whistleblower retaliation under the law, and the role of the US Office of Special Counsel.*

Government employees are critical in uncovering corruption, the waste of public funds, dangers to health and safety, and abuse. They are on the inside and so are well positioned to learn of wrongdoing. Understandably, however, few insiders will come forward unless they are protected against reprisal when disclosing information about wrongdoing (MSPB, 2013).

In the United States, the First Amendment to the Constitution provides that Congress may not abridge freedom of speech. However, government employees do not enjoy full free speech rights; the Supreme Court has ruled that the First Amendment only protects an employee when commenting on matters of public concern.[1] A government employee's speech rights must be balanced against their agency's interest in promoting the efficiency of government operations.[2] This balance is often struck against employee rights. For example, the Supreme Court ruled the First Amendment did not protect a prosecutor who reported police misconduct.[3]

There is, however, a growing body of statutory laws in the United States that provide additional protection to whistleblowers, that is, employees who speak out about wrongdoing in the workplace. This case study will focus on the development of the modern federal whistleblower protection statutes,[4] their origin in good government initiatives, the elements needed to prove whistleblower retaliation under the law, and the role of the US Office of Special Counsel (OSC).[5]

## Modern history of federal whistleblower protection law

In 1880, James A. Garfield was elected President of the United States. Charles Guiteau believed a pamphlet he wrote resulted in Garfield's victory. Guiteau was incensed that Garfield did not appoint him to an ambassadorship, and he assassinated the President in 1881. Largely in response to President Garfield's assassination, the United States Congress passed the Civil Service Act of 1883, commonly known as the "Pendleton Act", aimed at moving the federal government from a "spoils system" - wherein elected politicians placed their cronies in government jobs - to a professional civil service. The law required that applicants for federal employment be chosen on their own merit, determined by a competitive civil service examination, rather than on the basis of political affiliation or personal connections. The Pendleton Act also made it illegal to solicit co-workers and subordinates for campaign contributions or to fire them for political reasons.

In the 1970s, the US government again faced significant credibility, transparency, and accountability challenges. The Watergate scandal and high profile instances of whistleblower reprisal were on the minds of Congress as it moved to modernise the civil service system. A US senator's investigation found that "[a]lthough statutes do exist which might be interpreted as applicable to whistleblower cases," the "Courts have been reluctant to play an active role in the whistleblower problem" (Leahy, 1978). Congress concluded that protecting whistleblowers would help detect wrongdoing in government, and ultimately prevent it from occurring in the first place. The Senate wrote in its report:

> *In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of*

> *dollars in cost overruns, the [General Services Administration] employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation (S. Rep. No. 95-969, at 8 [1978]).*

In 1978, Congress passed the Civil Service Reform Act (CSRA) in order to make sure that "[e]mployees are…protected against arbitrary action, personal favouritism, and from partisan political coercion" (*id* at 19; 1978 U.S.C.C.A.N. 2723, 2741). The CSRA enumerated merit system principles[6] and prohibited personnel practices, including retaliation for whistleblowing, to protect applicants for employment with the federal government and current civil servants. The new law disbanded the Civil Service Commission, the agency that had been charged with ensuring federal employees were chosen based on merit, due to "a built-in conflict of interest in the agency because of its dual role as personnel manager and protector of employee rights" (Tolchin, 1978). In its place, Congress created the Office of Personnel Management (OPM), which provides guidance and regulations on human resources; and the Merit Systems Protection Board (MSPB or Board), a quasi-judicial body that hears appeals from federal employees who have suffered adverse personnel actions, such as suspension or termination. Initially, the Office of Special Counsel was created as the prosecutorial arm of the MSPB.

In 1989, Congress revisited the CSRA and added the Whistleblower Protection Act (WPA) to:

> *strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by: 1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and 2) establishing…that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration. (5 U.S.C. § 1201 nt.)*

The WPA "provides protections for many federal employees who make disclosures evidencing illegal or improper government activities" (Shimabukuro et al., 2013; 53). The WPA also made the Office of Special Counsel an independent law enforcement agency with broad jurisdiction over the federal government.[7] OSC protects federal government employees, former employees, and applicants for employment (hereafter referred to as "federal employees" or "employees") from prohibited personnel practices, including reprisal for whistleblowing. It also provides a safe channel for government employees to disclose wrongdoing.[8] OSC accomplishes its mission through investigating and prosecuting allegations of prohibited personnel practices, obtaining corrective actions for employees subjected to prohibited personnel practices, and initiating disciplinary actions against government officials who commit prohibited personnel practices. If a personnel action is serious (e.g. removal and long-term suspension), an employee may either appeal the action directly to the Board or seek OSC's assistance. If the personnel action is not otherwise appealable directly by an individual employee, they may still ask OSC to bring the matter before the Board. If OSC declines to do so or does not act on the complaint within 120 days, under the WPA, the employee may then file a retaliation claim to the Board, known as an "individual right of action" (IRA).

In 1994, Congress again reinforced federal whistleblower protections with the Office of Special Counsel Reauthorization Act of 1994. More recently, Congress further

strengthened the law with the Whistleblower Protection Enhancement Act of 2012 (WPEA).[9]

## The whistleblower protection enhancement act of 2012

The US Court of Appeals for the Federal Circuit was the sole federal appeals court with jurisdiction to hear appeals arising under the Whistleblower Protection Act. Generally speaking, the Federal Circuit took a narrow view of whistleblower protections. For example, it held that a disclosure of wrongdoing to a co-worker or supervisor may not be protected if made as part of an employee's normal job duties. (For example, an auditor who reported unlawful financial practices was not protected because it was their professional duty to report such illegalities.) These restrictive decisions spurred Congress, with OSC's support, to pass the WPEA, which President Barack Obama signed into law on 27 November 2012.[10] As a pilot project for two years (since renewed for another five years), the WPEA enables appeals to the other eleven courts of appeals that are not bound by Federal Circuit precedent.

The WPEA reversed the effects of restrictive, precedential Federal Circuit court decisions. Sections 101 and 102 of the WPEA restore the original intent of the WPA by clarifying that a disclosure does not lose protection because it: 1) was made to a person, including a supervisor, who had participated in the wrongdoing disclosed; 2) revealed information that previously had been disclosed; or 3) was made while the employee was off duty. In addition, the WPEA makes it clear that an employee or applicant's motive for making the disclosure is irrelevant to its validity, as is the amount of time that has passed since the occurrence described in the disclosure. Section 101(b)(2) also clarifies that a disclosure is not excluded from protection because it was made during the employee's normal course of duties, provided the employee is able to show that the personnel action was taken in reprisal for making the disclosure.

Section 102 of the WPEA defines protected disclosure of wrongdoing as above "a formal or informal communication" that a whistleblower "reasonably believes" evidences "*any* violation of law, rule, or regulation; or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety" (Library of Congress, 2012). This was intended to clarify that an employee's disclosure is protected if "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger." (WPEA, 2012)

The WPEA also adds a thirteenth prohibited personnel practice requiring that a nondisclosure agreement specifically states that its "provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or executive order" concerning classified information, communications to Congress, disclosures to an Inspector General, or any other whistleblower protection (Library of Congress, 2012).

The WPEA extends whistleblower protection to employees and applicants for employment of the Transportation Security Administration of the Department of Homeland Security, who had previously been excluded from statutory protections. It also "requires agency heads to advise their employees on how to make a lawful disclosure of information that is required to be kept classified in the interest of national defence or the conduct of foreign affairs." (Library of Congress, 2012)[11]

In addition, section 113 authorises the Special Counsel to file, as a non-party, *amicus curiae* briefs in whistleblower cases before federal courts to help clarify the broader implications of a specific legal dispute. OSC first used this authority before the Federal Circuit in 2013 in Berry v. Conyers & Northover[12] and before the United States Supreme Court in Department of Homeland Security v. MacLean,[13] which recently ruled that the prohibition on disclosures that are "specifically prohibited by law" under 5 U.S.C. § 2302(b)(8) do not prohibit disclosures that are prohibited by agency regulation rather than statute.[14]

Finally, the WPEA is continually reviewed and evaluated. Congressional oversight committees, for example especially US Senate Committee on Homeland Security and Governmental Affairs and the US House Committee on Oversight and Government Reform, frequently hold hearings relating to whistleblower protection. Additionally, the Office of Special Counsel and Merit Systems Protection Board annually report to Congress on enforcement of the WPEA. Section 116 of the law directs the Government Accountability Office and the Merit Systems Protection Board to report to Congress on the broader implementation of the law by no later than 2016.

## The elements of a federal whistleblower retaliation case

### *How to prove whistleblower retaliation under 5 U.S.C. § 2302(b)(8)*

The eighth prohibited personnel practice, found in section 2302(b)(8) of title 5 of the United States Code, makes it illegal to retaliate against a whistleblower.[15,16] To prove whistleblower retaliation, a covered employee must show their protected disclosure was a contributing factor in a personnel action*;* it need not be the principle reason for the personnel action (Shimabukuro et al., 2013; 54).[17] A covered employee must also show that the responsible official had knowledge that the employee made a disclosure and that the employee was reprised against. If an employee meets these burdens, then to prevail, an agency must establish by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure.

#### *What is a "personnel action"? (Element 1)*

According to 5 U.S.C. § 2302, a "personnel action" means "an appointment; a promotion . . . a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation . . . a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; a decision to order psychiatric testing or examination; the implementation or enforcement of any nondisclosure policy, form, or agreement; and any other significant change in duties, responsibilities, or working conditions."

#### *What counts as a "protected disclosure"? (Element 2)*

In order to claim retaliation for whistleblowing, an employee must have made a "protected disclosure." A protected disclosure is a disclosure of information that an employee "reasonably believes evidences a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" (5 U.S.C. § 1213). The Board has held that even if the employee was mistaken in believing wrongdoing occurred, their disclosure is

still protected if their belief was reasonable. Reasonable belief is determined by whether, given the information available to the whistleblower, a person standing in their shoes could reasonably believe that the disclosed information evidences a violation of the statute. Generally under the WPEA, a whistleblower may make their disclosure to anyone,[18] including the news media or Congress; it need not be made through the employee's chain of command. However, if the disclosure is specifically prohibited by law or must be kept secret in the interest of national defence or the conduct of foreign affairs, or its release is prohibited by a Presidential order, the disclosures may only be made through the agency's Office of Inspector General or to OSC (5 U.S.C. § 2302(b)(8)(A)). In some cases, the specific law prohibiting disclosure allows the employee the additional option of making a disclosure of restricted information to a member of Congress or a congressional committee with the necessary clearance to receive the information.

*Did the deciding official have knowledge of the disclosure? (Element 3)*

The official who took the personnel action in retaliation for the whistleblower's protected disclosure must have had either actual or constructive knowledge that the whistleblower made the disclosure. Constructive knowledge is present where the agency has been informed of the alleged violation and that knowledge can be imputed to the deciding official, or where an official with actual knowledge influenced the deciding official.

*Was the protected disclosure a contributing factor in the personnel action? (Element 4)*

In order to prove that a whistleblower has suffered reprisal as a result of making a protected disclosure, it must merely be shown that the disclosure contributed to the official's decision to take the retaliatory personnel action. The disclosure need not be the principal reason for the personnel action. The employee may prove this through direct evidence. However, an employee may also present circumstantial evidence that: 1) the official taking the personnel action knew of the disclosure; and 2) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. This is called the "knowledge-timing" test.

The Board has held that knowledge and timing are, by themselves, enough to establish a *prima facie* case of retaliation. However, if the knowledge-timing test is not met, the Board will consider any other circumstantial evidence to determine whether the contributing factor test has been met (for example, Jones v. Department of the Interior [failure to find contributing factor]; Powers v. Department of the Navy).

## The impact of the federal whistleblower protections

Solid metrics that evaluate the impact and success of federal whistleblower protection laws in the United States do not exist. It is fair to say, nevertheless, that 37 years after the passage of the Civil Service Reform Act of 1978, federal whistleblowers have strong protections in law against reprisal. However, the effectiveness of these protections is circumscribed by the adequacy of resources dedicated to ensuring the vitality of whistleblower rights.

Despite Congress's clear intent to foster an environment where employees feel comfortable blowing the whistle, as recently as five years ago, roughly one-third of federal employees who said they had been identified as blowing the whistle reported they experienced retaliation or were threatened with retaliation (MSPB, 2011; i). In 1992, a government-wide survey found the same result (MSPB, 2010; 13).

This information helped the non-profit groups, members of Congress, and the Office of Special Counsel advocate for improvements to the federal whistleblower protection law, which resulted in the passage of the WPEA of 2012. There has not, however, been another formal survey on whistleblower retaliation since the passage of the WPEA.

What OSC can determine is that federal employees are availing themselves of whistleblower protections more frequently. The Office of Special Counsel received twice the number of whistleblower reprisal complaints in the first full year after the passage of the Whistleblower Protection Act (1990) than it did the year before (OSC Annual Report to Congress, 1990). In fiscal year 2013, the Office received 12% more complaints of whistleblower retaliation than in 2010, before the passage of the Whistleblower Protection Enhancement Act (OSC Annual Report to Congress, 2014).[19]

The dramatic increase in allegations of whistleblower reprisal result, in part, from an increasingly potent protection statute: the WPEA. In addition, OSC has become an increasingly trusted and valued means for federal employees to disclose wrongdoing and seek protection for whistleblower retaliation. OSC has achieved record numbers of corrective actions for federal employees and disciplinary actions against retaliators since Carolyn Lerner was appointed Special Counsel by President Obama in 2011. As a result, federal employees' awareness of the Office of Special Counsel has increased, as have the number of outreach and training events.

## The ongoing mission to better protect federal whistleblowers

Creating a work culture in which employees feel secure raising issues with their supervisors and co-workers, or making disclosures to the Office of Special Counsel, is an ongoing process. The White House Second National Action Plan mandated federal agencies to educate their workforce about rights and responsibilities under whistleblower protection laws through the Office of Special Counsel's 5 U.S.C. § 2302(c) Certification Program.[20] Section 2302(c) requires agency heads to ensure, in consultation with OSC, that employees are informed of the rights and remedies available to them under the Whistleblower Protection Act and related laws. Last year, the White House directed agencies to take affirmative steps to complete OSC's program. Agencies were required to establish a plan for completing the Certification Program and post them on their websites. Currently, 41 agencies have been certified, and another 23 are in the process.

The WPEA also mandates that inspectors general at federal agencies and departments designate a whistleblower protection ombudsman, charged with educating employees about rights, responsibilities, and remedies under whistleblower protection laws. The ombudsman is not, however, an employee's or agency's legal representative or advocate. OSC assists agencies in facilitating their whistleblower protection ombudsman programs and in educating their workforces.

## *Notes*

1 *Connick v. Myers*, 461 U.S. 138 (1983).

2 *Pickering v. Board of Education*, 391 U.S. 563 (1968).

3 In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court noted, however, that the "dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing."

4 While the statutory protection for federal whistleblowers was first contained within the Civil Service Reform Act of 1978, it is commonly referred to as part of the Whistleblower Protection Act of 1989. This paper largely adopts this practice, except when discussing changes to the law.

5 OSC also enforces the Hatch Act, which prohibits partisan politics in the federal workforce, including soliciting political contributions from co-workers and subordinates; and the public-sector employment rights of returning and reserve members of the Armed Forces (the Uniformed Services Employment & Reemployment Rights Act (USERRA)). This paper will not focus on the Hatch Act or USERRA, as neither law is specifically relevant to whistleblower protection, except that reprisal of federal employees for filing USERRA or Hatch Act complaints with OSC is not permitted.

6 The Civil Service Reform Act listed nine merit system principles that were set forth at 5 U.S.C. § 2301(b):

"(1) Recruitment should be from qualified individuals from appropriate sources in an endeavour to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, colour, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organisational and individual performance.

(8) Employees should be:

(A) protected against arbitrary action, personal favouritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences:

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

The thirteen extant prohibited personnel practices are set forth at 5 U.S.C. § 2302(b).

7 Though OSC has jurisdiction over most employees in the civil service, employees of certain agencies – chiefly those that conduct foreign- and counterintelligence, including the Central Intelligence Agency and the National Security Agency – enumerated at 5 U.S.C. § 2302(a)(2)(C) are not covered. For information on whistleblower protections and the disclosure process for employees of the Intelligence Community, see Presidential Policy Directive 19 and the Intelligence Authorization Act for Fiscal Year 2015.

8 Today, OSC is also responsible for advising the federal employees on, and enforcing prohibitions against, certain partisan political activities (Hatch Act), and protecting the federal employment rights of returning members of the uniformed services (USERRA).

9 Other whistleblower protections exist for private sector employees, and information about these protections can be found at www.whistleblowers.gov.

10 For more information on the changes between the WPA and the WPEA, see the House, Senate, and Conference Committee Reports.

11 For more information on whistleblowing in the Intelligence Community, please see Presidential Policy Directive 19, issued by President Barack Obama on 10 October 2012, and available at https://www.fas.org/irp/offdocs/ppd/ppd-19.pdf.

12 For the Office of Special Counsel's brief, please see https://osc.gov/Resources/amicus-berry-v-conyers-northover-2013-03-14.pdf.

13 For the Office of Special Counsel's brief, please see https://osc.gov/Resources/amicus-dhs-v-maclean-2014-09-30.pdf.

14 Department of Homeland Security v. MacLean, No. 13-894 (U.S. 21 January 2015).

15 The statute says: "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority…Take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation,

or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety…"

16 5 U.S.C. § 2302(b)(9) says that it is a prohibited personnel practice to retaliate against an employee (or applicant, or former employee) for: a) exercising an "appeal, complaint, or grievance right;" b) "testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (a);" (c) "co-operating with or disclosing information to the Inspector General of an agency, or the Special Counsel…;" or (d) "refusing to obey an order that would require the individual to violate a law."

17 Though employees can often appeal directly to the MSPB, file at OSC, or go through their employer's negotiated grievance procedure, this paper will focus mainly on complaints of whistleblower reprisal brought before OSC.

18 Federal employees may be protected for making a disclosure to a person unrelated to the professional context in which the employee discovered the wrongdoing. However, the employee must demonstrate that his or her employer had knowledge of the disclosure to establish a retaliation claim.

19 This figure from fiscal year 2014 will be published in the forthcoming Annual Report to Congress. For more information on OSC's case numbers, please see our Reports and Information page at https://osc.gov/Pages/Resources-ReportsAndInfo.aspx.

20 For more information, see https://osc.gov/Pages/Outreach-2302Cert.aspx.

## *References*

An Act To Reauthorize The Office Of Special Counsel, And For Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994). [Cited in text as 'Office of Special Counsel Reauthorization Act of 1994'.], United Sates of America.

Berry v. Conyers & Northover, 73 F.3d. 1148 (Fed. Cir. 2013), United Sates of America.

Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111., United Sates of America, www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1111.pdf.

Civil Service Act, ch. 27, 22 Stat. 403 (1883), United Sates of America.

*Connick v. Myers*, 461 U.S. 138 (1983). United Sates of America.

Fong, Bruce D., "Whistleblower Protection and the Office of Special Counsel: The Development of

Reprisal Law in the 1980s," 40 Am.U.L. Rev. 1015, 1017-1018 (1991)., United Sates of America.

*Garcetti v. Ceballos*, 547 U.S. 410 (2006), United Sates of America.

*Jones v. Dep't. of the Interior*, 74 M.S.P.R. 666, 678 (1997)., United Sates of America.

Library of Congress summary for Whistleblower Protection Enhancement Act of 2012. [Cited in text as 'Library of Congress, 2012.'], www.congress.gov/bill/112th-congress/senate-bill/743/text.

Lerner, Hon. Carolyn N. and Jason M. Zuckerman (2013), "The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing," U.S. Office of Special Counsel, osc.gov/ppp (accessed October 24, 2014).

Martin Tolchin (1978), "Carter Acts to End Civil Service Panel," *The New York Times*, January 4, 1978, nytimes.com (accessed January 5, 2015).

MSPB (April 2013), *Blowing the Whistle: Barriers to Federal Employees Making Disclosures – Research Highlights*, Merit Systems Protection Board, mspb.gov/studies (accessed January 5, 2015).

MSPB (November 2011) *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*, Merit Systems Protection Board, mspb.gov/studies (accessed January 5, 2015).

MSPB (June 2010), *Prohibited Personnel Practices: A Study Retrospective,* Merit Systems Protection Board, mspb.gov/studies (accessed January 6, 2015).

OSC (2015, forthcoming), *A Report to Congress from the U.S. Office of Special Counsel: Fiscal Year 2014*, U.S. Office of Special Counsel, osc.gov/reportsandinfo (forthcoming). [Cited in text as 'OSC Annual Report to Congress, 2014; forthcoming'.]

OSC (September 2014), brief for respondent as *amicus curiae* in *Dep't. of Homeland Security v. MacLean*, 574 U.S. (2015), U.S. Office of Special Counsel, https://osc.gov/Resources/amicus-dhs-v-maclean-2014-09-30.pdf (accessed January 22, 2015).

OSC (March 2013), brief for respondent as *amicus curiae* in *Berry v. Conyers & Northover*,

73 F.3d. 1148, Fed Cir. (2013).OSC (1991), *A Report to Congress from the U.S. Office of Special Counsel: Fiscal Year 1990*, U.S. Office of Special Counsel, osc.gov/reportsandinfo (accessed January 6, 2015). [Cited in text as 'Annual Report to Congress, 1990.]

*Pickering v. Board of Education*, 391 U.S. 563 (1968), United Sates of America.

*Powers v. Dep't of the Navy*, 69 M.S.P.R. 150, 156 (1995), United Sates of America.

Shimabukuro, John O., L. Paige Whitaker, Emily E. Roberts (2013), *Survey of Federal Whistleblower and Anti-Retaliation Laws*, Congressional Research Service, April 22, 2013, fas.org/sgp/crs/misc/R43045.pdf (accessed November 13, 2014).

United States Title 5 Code §§ 1201, 1213, 2302(b), United Sates of America, http://uscode.regstoday.com/5USC.aspx.

United States Code of Congressional and Administrative News 2723, 2741 (1978), United Sates of America.

United States Senate Committee on Governmental Affairs, (February 1978), *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption*, United States Senate. [Cited in text as '(Leahy, 1978)'.] Referenced in MSPB (September 2010), *Whistleblower Protections for Federal Employees*, Merit Systems Protection Board, mspb.gov/studies (accessed January 22, 2015).

United States Senate Report No. 95-969 (1978), United Sates of America.

Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, United Sates of America, www.gpo.gov/fdsys/pkg/PLAW-112publ199/html/PLAW-112publ199.htm.

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16., (codified as amended in scattered sections of Title 5 of the United States Code).

# Annex

## Whistleblower protection provisions in the 41 Parties to the Anti-Bribery Convention

Relevant legal provisions on the protection of whistleblowers in OECD countries can be found in either one dedicated framework or in several legal provisions throughout the legal framework:

| Legal references for whistleblower protection in OECD countries | |
|---|---|
| **Australia** | Public Interest Disclosure Act 2013<br>Public Service Regulations (1999)<br>Corporations Act (2001), No. 50, 2001 as amended |
| **Austria** | Civil Service Act 1979 |
| **Belgium** | Law of 15 September 2013 relating to the reporting of suspected harm to integrity within a federal administrative authority by a member of its staff |
| **Canada** | Public Servants Disclosure Protection Act (2005)<br>Criminal Code (R.S.C., 1985, c. C-46) (1985) (s. 425.1(1)) |
| **Chile** | Law No 20,205 of 24 July 2007, Protection to the public official who denounces irregularities and faults to the probity principle (2007)<br>Law No. 20, 205 on July 24, 2007 with provisions introduced in the Administrative Statute (Law No. 18,834),<br>Administrative Statute for Municipal Officials (Law No. 18,834)<br>Constitutional Organic Law of General Bases of the Administration of the State (Law No. 18,575) |
| **Estonia** | Anti-Corruption Act (2012) |
| **France** | Loi du 13 novembre 2007 n°1598 relative à la lutte contre la corruption crée l'art. L1161-1 du Code du travail (CT) [Law N°1598 of 13 November 2007 on Anti-Corruption establishing section L1161-1 of the Labour Code],<br><br>Loi du 29 décembre 2011 n°2011- 2012, relative au renforcement de la sécurité du médicament et des produits de santé crée l'art. L 5312-4-2 du code de santé public (CSP) [Law of 29 December 2011 N° 2011-2012 on reinforcing the safety of drugs and other health products establishing section L5312-4-2 of the Public Health Code],<br><br>Loi du 16 avril 2013 n°2013-316 relative à l'indépendance de l'expertise en matière de santé et d'environnement et à la protection des lanceurs d'alerte crée l'art. L 1351-1 du CSP [Law of 16 April 2013 N°2013-316 on the independence of health and environment expertise and on whistleblower protection establishing section L1351-1 of the Public Health Code],<br><br>Loi du 11 octobre 2013 n°2013-907 relative à la transparence de la vie publique article 25, Loi du 6 décembre 2013 n°2013- 1117 relative à la lutte contre la fraude fiscale crée l'art. L 1132-3-3 du CT et l'art. 6 ter A (Fonction publique) [Law of 11 October 2013 N°2013-907 on public life transparency, section 25; Law of 6 December 2013 N°2013-1117 against tax fraud establishing section L1132-3-3 of the Labour Code and section 6 ter A (Public Service)] |
| **Germany** | Bundesbeamtengesetz, Federal Civil Servants Act, section 62 (1), section 63 (2) |
| **Greece** | Civil Service Code (Law 3528/2007)<br>Criminal Procedure Code (article 45B) |

| Legal references for whistleblower protection in OECD countries | |
|---|---|
| **Hungary** | Act CLXV. of 2013 on Complaints and Public Interest Disclosures |
| **Ireland** | Protected Disclosures Act (No.14 of 2014) |
| **Iceland** | Government Employees Act no. 70/1996 |
| **Israel** | Protection of Employees Law, Exposure of Offenses of Unethical Conduct or Improper Administration (1997) |
| **Italy** | Anti-Corruption Law, Law no. 190/2012 |
| **Japan** | Whistleblower Protection Act (2004) |
| **Korea** | Act on the Protection of Public Interest Whistleblowers (2011) |
| **Luxembourg** | Act 6104 of 13 February 2011 introducing article L271.1 to the Labour Code |
| **Mexico** | Federal Public Officials (Administrative Responsibilities) Act (2002)<br>Federal Criminal Code (article 219(1)) |
| **Netherlands** | Decree of 15 December 2009 regulating the reporting of suspected abuses in the civil service and the police |
| **New Zealand** | Protected Disclosures Act (2000) |
| **Norway** | Working Environment Act (2005) |
| **Portugal** | General Labour law in Public Function through the Act of Law 35/2014 and through Article 20 of Law no.25/2008, of 5 June and Article 4 of Law no. 19/2008 |
| **Slovak Republic** | Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing |
| **Slovenia** | Integrity and Prevention of Corruption Act (2010) |
| **South Africa** | Protected Disclosures Act 2000 |
| **Switzerland** | Federal Personnel Act (2011) |
| **Turkey** | Regulation on Complaints and Applications of Civil Servants (1982) |
| **United Kingdom** | Public Interest Disclosure Act (1998) |
| **United States** | Whistleblower Protection Act (1989)<br>False Claims Act (31 U.S.C. §§ 3729–3733)<br>Sarbanes-Oxley Act (18 U.S.C.) |

# ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Union takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

OECD PUBLISHING, 2, rue André-Pascal, 75775 PARIS CEDEX 16
(42 2016 06 1 P) ISBN 978-92-64-25262-2 – 2016

# Committing to Effective Whistleblower Protection

**Contents**



Consult this publication on line at ***http://dx.doi.org/10.1787/9789264252639-en***.

This work is published on the OECD iLibrary, which gathers all OECD books, periodicals and statistical databases.
Visit ***www.oecd-ilibrary.org*** for more information.

OECD*publishing*
www.oecd.org/publishing

**ISBN 978-92-64-2526-22**
**42 2016 06 1**