



UNODC

United Nations Office on Drugs and Crime



The United Nations Convention against Corruption

Resource Guide on
**Good Practices
in the Protection of
Reporting Persons**

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

The United Nations
Convention against Corruption

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Protection of Reporting Persons



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Preface

Corruption is a crime with far-reaching consequences, and yet most incidents of corruption go unreported and undetected. A primary reason for people’s reluctance to report is the impression that authorities will not take their report seriously and that nothing will be done. Other reasons for this reluctance include the lack of awareness of available reporting mechanisms and the fear of retaliation.

As multiple surveys suggest that less than 10 per cent of corruption incidents are reported,* States parties are urgently required to address those obstacles, to strengthen the effective response to reports of corruption and to protect those persons who come forward.

The United Nations Convention against Corruption contains relevant provisions laying the groundwork for such initiatives, which are set out and explained in detail throughout this Guide.

The Guide explains why encouraging and protecting those persons who report information about alleged cases of corrupt conduct are a key element in tackling corruption. It is intended to serve as a resource for States parties in implementing their obligations under the Convention in relation to assisting and protecting persons, whether members of the public or “whistleblowers”—typically understood to be persons working within an organization (public or private) or industry where wrongdoing is occurring. Taking a robust approach to this issue as a matter of law, policy and to protect the public interest will help States, authorities and organizations in all sectors detect and prosecute wrongdoers and, importantly, help prevent corruption from taking root in the first place.

The objectives of this Guide are to help States parties and other national actors identify what legal and institutional reforms may be needed to meet international requirements; to identify the resources and support available for this task; and to highlight those matters that will need to be continuously reviewed in light of new challenges that may arise.

National examples of law and practice used throughout the Guide are intended to help States parties and others to recognize distinctive features of their own legislative and institutional frameworks on which the protection of reporting persons can be built, as well as those elements that may work against it. As the protection of reporting persons is a rapidly evolving field, this Guide also directs readers to a number of resources that can serve as ongoing sources of information and updates.

* See, for instance, UNODC research on bribery in the Western Balkans. Available from <http://www.unodc.org/unodc/en/data-and-analysis/statistics/corruption.html>

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Introduction

Corruption is not limited by geography, culture or legal system. Left unchecked, corruption diverts considerable funds away from public services such as health, welfare, justice and education. Corruption in public office is a fundamental breach of public trust and accountability that fuels mistrust in governments. It also allows organized crime to take root, leads to human rights violations and threatens the security and well-being of communities.

Corrupt activity within the private sector has similarly negative consequences, particularly when it involves corrupt deals with State actors, for example with respect to contracts for public goods and services. In international business, corrupt deals can entail negative consequences for people across borders. Private sector corruption distorts competition and can increase costs; it creates unfavourable dependencies between the supply and demand sides of a corrupt act, leads to missed business opportunities and violates the interests of investors and shareholders. This is equally relevant in cases of corruption between two private sector actors. Irregularities in how business is conducted transnationally and the privatization of some public functions have increased awareness of the damaging impact of private sector corruption on society.

Tackling corruption effectively therefore requires a commitment from the whole of society. On 31 October 2003, the General Assembly of the United Nations adopted the United Nations Convention against Corruption (hereinafter “the Convention” or UNCAC). UNCAC has been very widely ratified¹ and is the only universal, legally binding instrument that provides a comprehensive framework to prevent and combat corruption.

UNCAC requires States to criminalize corrupt conduct and to strengthen the investigation and prosecution of those offences. UNCAC also recognizes that tackling corruption requires a broad approach. Protecting reporting persons is relevant to all three purposes of UNCAC, which are to: (a) promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and (c) promote integrity, accountability and proper management of public affairs and public property. Governments increasingly emphasize

¹ For signature and ratification status, see <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

how protecting those who report not only improves the detection of corruption, but is also valuable as a deterrent, as it reduces the capacity of wrongdoers to rely on the silence of those around them. This preventive aspect is underlined by UNCAC, which encourages States to promote the active participation of individuals—ensuring that they can engage safely with government authorities in particular—and the public more widely in reporting and preventing corruption.

Corruption offences have proven difficult to detect for various reasons. In some cases, all persons directly involved in the criminal conduct tend to benefit and therefore no report is filed with the police. In other situations, where the request for a bribe by a public official is coercive, the bribe-giver might fear future retaliation by the official, or criminal liability, as both the giving and receiving of a bribe are criminal offences. When those involved in corruption cooperate with authorities, they are often motivated to do so in order to negotiate or mitigate any sanctions that might be taken against them.

There may also be others who are close to the individuals involved in the corruption, but are not involved themselves. A few may witness the actual act of corruption. Others may spot the methods that were used to bypass systems and procedures or to redirect funds or benefits away from the intended purpose or recipients, or they may see the harm caused. While these people may be in a position to report what they know to the authorities, often they do not.

Making it safer and easier to report wrongdoing is also an important part of creating an organizational ethos that is more resistant to corruption. Corrupt links between business and government are more difficult to establish when organizations themselves make it clear that reporting is welcome and that retaliation against those who report wrongdoing will not be tolerated. Encouraging staff to challenge poor practices and report suspected wrongdoing strengthens an organization's resilience against malpractice.

Unfortunately, in many workplaces, workers become vulnerable if they report to anyone other than their employer because of implicit or explicit duties of confidentiality or a sense of loyalty. Members of the public who report information about corruption to the authorities may lack the legal status to be protected, even when they face intimidation or threats.

This Guide takes a holistic approach and examines the protection available for reporting persons in general. It explains why and how public officials and other employees are being protected by law and in practice around the world when they report wrongdoing, and it also explores how such measures can be made available to protect other types of reporting persons, such as members of the public.

The Guide also highlights how measures for protecting reporting persons and witnesses are interrelated and where they can overlap. Moreover, it describes and explains some of the overarching legal principles relating to human rights, such as freedom of opinion and expression and the right of access to information.

Protecting reporting persons is an aspect already included in several national anti-corruption strategies and laws, and the adoption or reform of those provisions is receiving increased attention from States and other actors. Since 2010, whistleblower protection laws have been passed in more than 15 countries, including Australia, Bosnia and Herzegovina, Ethiopia, India, Ireland, Jamaica, Malaysia, Malta, Peru, the Republic of Korea, Serbia, Slovakia, Uganda, the United States, Viet Nam and Zambia.

A. Lessons learned from research on reporting

The value of public engagement in reporting is clear: there is extensive research to demonstrate that information provided by individuals is one of the most common ways—if not the most common way—in which fraud, corruption and other forms of wrongdoing are identified.

While inspection systems are important, they have been found to be rather less effective in uncovering wrongdoing. The study described below confirms that a range of persons and institutions—from members of the public, to companies and non-governmental organizations—are in a position to report corruption to the competent authorities, and that they can all be sources of important information.

Example: Indonesia

A study of cases of local corruption in Indonesia's regions a few years after regional autonomy came into force found that, without exception, the investigations were all started on the basis of information provided by the community.

None were discovered by oversight, audit or justice sector institutions. Those who discovered and reported the cases were primarily non-governmental organizations (NGOs) or coalitions, ordinary villagers, as well as those directly affected by the corruption (e.g. companies that missed out on lucrative contracts, politicians overlooked for pre-selection, etc.).

The researchers found that, regardless of where the initial reports originated, NGOs and community coalitions were the driving force behind the public disclosure and resolution of the cases studied. In one case, a contractor who found indications of corruption in the local parliament preferred to report to a local NGO rather than to the police or district prosecutors.

*Source: Rinaldi, T. et al. (May 2007). *Fighting Corruption in Decentralised Indonesia: Case Studies on Handling Local Government Corruption*. World Bank: Washington, D.C., page 6.*

Public sector

A major Australian study identified employee whistleblowing as the single most important way in which wrongdoing was brought to light in public sector organizations. The finding was based on survey responses from 828 managers and those holding ethics-related positions in 14 national, provincial and local agencies, drawn from a total pool of 118 agencies (and a total sample of 7,663 responses).²

PricewaterhouseCoopers (PwC) issued a global report on fraud in the public sector in 2010. It based its findings on replies from 170 government representatives in 35 countries. It found that 31 per cent of fraud cases had been detected by means of internal tip-offs (informally reported by those working in the organizations),³ 14 per cent had been uncovered by external tip-offs (meaning informally reported by someone outside the government body), and 5 per cent had been detected by formal internal whistleblowing systems. In addition to the total of 50 per cent uncovered by whistleblowing

² Brown, A. J., ed. (2008). *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organizations*, Australian National University E Press: Australia.

³ Tip-offs are considered informal alerts in the sense that the staff member does not go through any formal whistleblowing or reporting system.

(including informal and formal), 14 per cent had been uncovered by accident.⁴ The share of cases detected by whistleblowing in the public sector was found to be significantly higher than in the private sector. PwC concluded that other measures to detect fraud or corruption, such as internal audit and risk management, seemed less effective in the public sector than in the private sector.

Private sector

PwC also conducts a Global Economic Crime Survey every two years.⁵ Their first survey, in 2005, found that 31 per cent of corporate fraud had been uncovered by tip-offs and whistleblowing. The survey concluded that internal “controls” designed to detect fraud were “not enough” and that whistleblowers needed to be encouraged to report wrongdoing and be protected from retaliation. In 2011, the PwC survey found that 11 per cent of fraud cases had been detected by internal tip-offs, while 7 per cent had been uncovered by external tip-offs. Five per cent had been detected by formal internal whistleblowing systems. Thus, the total number of cases resulting from whistleblowing in one form or another was 23 per cent, considerably lower than in 2005, but still significant. The most recent report, in 2014, revealed those figures to be unchanged. The 2014 survey found the five most commonly reported types of fraud were asset misappropriation, procurement fraud, bribery and corruption, cybercrime and accounting fraud.

The Association of Certified Fraud Examiners (ACFE) recurrently studies workplace whistleblowing and bases their conclusions on reports from certified fraud examiners in both the public and private sectors. Their most recent Report to the Nations on Occupational Fraud Abuse (2014) included data from 1,483 cases that occurred in more than 100 countries. Among others, the report’s summary highlights the following results:⁶

- Survey participants estimated that the typical organization loses 5 per cent of its revenues each year to fraud. Corruption schemes fell in the middle in terms of both frequency (37 per cent of cases) and median loss (US\$ 200,000).
- Tip-offs are consistently and by far the most common detection method. Over 40 per cent of all cases were detected by a tip-off—more than twice the rate of any other detection method. Employees accounted for nearly half of all tip-offs that led to the discovery of fraud.
- Organizations with hotlines were much more likely to catch fraud by means of a tip-off. Those organizations also experienced fraud cases that were 41 per cent less costly, and they detected fraud 50 per cent more quickly.
- The smallest organizations tend to suffer disproportionately large losses due to occupational fraud.

The report also found that “more than half of all tip-offs involved parties other than confirmed employees”. Thus, the importance of acknowledging tip-offs from various sources should be emphasized, including raising awareness among vendors, customers and owners/shareholders on how to report suspicions of fraud.⁷

⁴ PricewaterhouseCoopers (2011). *Global Economic Crime Survey 2010*, page 13. Available from <http://www.pwc.co.uk/forensic-services/publications/>

⁵ This is a survey of the chief executive officers, chief financial officers and responsible compliance executives from over 5,000 companies in 40 countries.

⁶ Association of Certified Fraud Examiners, Business Fraud, *Report to the nations on occupational fraud and abuse*, page 4. Available from <http://www.acfe.com/rtnn/docs/2014-report-to-nations.pdf>

⁷ *Ibid.*, page 21.

Similar results come from a 2011 study by KPMG of fraud investigations in Europe, the Middle East, the Americas, and Asia and the Pacific, which found that 10 per cent of tip-offs had been made through whistleblower mechanisms, 14 per cent from anonymous sources and 8 per cent from suppliers or customers.⁸

In 2010, ACFE carried out a worldwide assessment according to which the most common source of information on fraud (40 per cent) was whistleblowing reports by employees. It also made clear that in many cases the terms “fraud” and “corruption” were used interchangeably. ACFE concluded that “providing individuals a means to report suspicious activity is a critical part of an anti-fraud programme. Management should actively encourage employees to report suspicious activity, as well as enact and emphasize an anti-retaliation policy.”

B. Framework of the United Nations Convention against Corruption

Providing reporting channels

Competent authorities obtain or receive information about corruption from many different sources. Some are individuals; others are legal persons, e.g. companies or other types of organizations. They include:

- Public officials in government bodies, e.g. central and local government, administrative agencies, and State-owned enterprises, etc. (including those in other countries)
- Private sector workers, in private or publicly listed companies, and in all sectors, whether regulated or not (e.g. finance, transport, food, health, social care, education, energy, retail and construction)
- Companies or other private legal entities (e.g. competitor companies who were not awarded a specific contract because they refused to pay a bribe or otherwise participate in corruption)
- Unions or business and industry associations
- Non-governmental organizations (NGOs) and community groups
- Members of the public
- Media, including social media
- Offenders or implicated persons

UNCAC fully acknowledges this diversity. It includes several provisions recommending that States establish measures and systems to facilitate reporting and provide for access to anti-corruption bodies for the purpose of reporting (see figure I).

⁸ KPMG (2011). *Who is the Typical Fraudster?*

Figure I. Articles under UNCAC with respect to the provision of reporting channels and cooperation

<p>Article 8, para. 4: Public sector</p> <p>Consider, in accordance with the fundamental principles of domestic law, establishing measures and systems to facilitate reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.</p>	<p>Article 13, para. 2: Civil society</p> <p>Provide access to anti-corruption bodies for reporting by the public of corruption incidents, including anonymously.</p>	<p>Article 38: Cooperation between authorities</p> <p>Encourage cooperation between public authorities/public officials and authorities responsible for investigating and prosecuting criminal offences.</p>	<p>Article 37: Cooperating offenders</p> <p>Encourage persons who participate/participated in acts of corruption to supply information (mitigation of punishment or granting of immunity from prosecution).</p>
		<p>Article 39: Private sector</p> <p>Encourage cooperation between entities of the private sector/nationals/residents and authorities responsible for investigating and prosecution criminal offences.</p>	

Protective measures

With regard to protective measures, the text of UNCAC differentiates between measures to protect witnesses, experts, victims and cooperating offenders insofar as they are witnesses in a criminal proceeding on the one hand (articles 32 and 37), and measures for reporting persons more generally on the other (article 33).

Article 33 of UNCAC requires States parties to consider adopting measures to “provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”.

Article 33 is intended to include those individuals who may possess information that is not sufficiently detailed to constitute evidence in the legal sense of the word. This means that States are required to consider protection in any case and not only if the person gives testimony as a witness or expert in legal proceedings and consequently qualifies for witness protection. (For more information on the intersection between the protection of reporting persons or whistleblowers and the protection of witnesses and cooperating offenders, see chapter II, sections A and C.9.)

Additionally, article 33 requires States parties to consider protection for any person, whether a citizen, a service user, a customer or an employee, etc. What kind of protection a person may require can depend on many factors, such as the type of information reported, the position of the person and the level of threat the person faces due to the

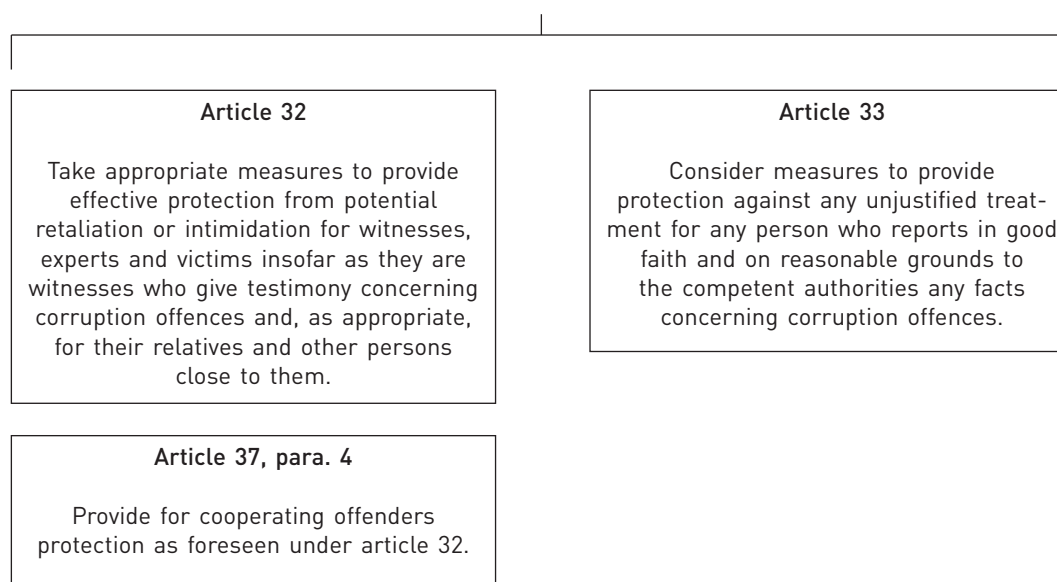
report. Employees, for example, can find themselves facing a conflict between reporting wrongdoing and respecting a duty of loyalty or confidentiality to their employer. They are also particularly vulnerable to reprisal by virtue of their ongoing working relationship. Many jurisdictions recognize the need to provide specific protection to this category of reporting persons because they may be the first to know about a problem and therefore would be best placed to raise it before any serious damage is done, or before a crime is committed. By virtue of their “inside” position, people at work may come across activities or information that indicate corrupt conduct in ways that outsiders cannot.

In some jurisdictions, workers are able to make a claim or seek relief from any unjustified treatment at work for having reported or disclosed information about wrongdoing or malpractice. Such workplace protective measures are of additional relevance in cases that are not normally covered by witness protection, and they are an additional weapon in the armoury of States parties to address corruption. Protective measures can also extend to situations where an employee who reports information about suspected wrongdoing at work suffers retaliation or harassment outside of the workplace.

In practice, a variety of approaches have been adopted to provide protection to reporting persons. Some States parties focus on protective measures for witnesses and/or cooperating offenders and set up systems for reporting corruption offences, but overlook the distinctive issues facing individuals who report in the context of work; some provide workplace-related protection for public sector employees, while others also extend such protection to the private sector or have provisions that cover any person.

In principle, States parties are encouraged to consider closing any gaps in legislation or practice that could unnecessarily deter persons from reporting to competent authorities or would exclude them from being considered for protection.

Figure II. Articles under UNCAC concerning protection for reporting persons



Further international instruments

In addition to UNCAC, there are a number of international instruments to which many States are a party and which also encourage or require them to provide enhanced

protection for reporting persons. (A collection of the relevant articles is presented in the annex to this Guide.) These instruments include the following:

- Council of Europe Civil Law Convention against Corruption (1999) and the Criminal Law Convention against Corruption (1999)⁹ and its Recommendation on the Protection of Whistleblowers (2014)¹⁰
- Organization of American States (OAS) Inter-American Convention against Corruption (1996)¹¹
- African Union Convention on Combating and Preventing Corruption (2003);¹² Protocol against Corruption of the Southern Africa Development Community (2001)¹³
- Organisation of Economic Co-operation and Development (OECD) Anti-Bribery Convention; 2009 OECD Recommendation on Further Combating Bribery in International Business Transactions, Recommendation IX(iii);¹⁴ OECD Recommendation on Improving Ethical Conduct in the Public Service (1998)¹⁵

Some of these have been accompanied by useful guidance materials, for example the OAS model laws on freedom of expression against corruption, and on facilitating reporting and protecting whistleblowers and witnesses (2004 and 2013);¹⁶ the Explanatory Memorandum attached to the Council of Europe Recommendation; and the OECD Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation (2011).¹⁷

C. Definitions and application of this Guide

In policy and research debates, it is widely recognized that policymakers and legislators need to be clear about the types of reporting persons (or information sources) they are talking about, as well as the particular challenges that individuals who report face in different circumstances. UNCAC recognizes these distinctions in its various articles, as illustrated above in figures I and II.

⁹ The Council of Europe has 47 member States and its anti-corruption evaluation mechanism, the Group of States against Corruption (GRECO), was established under an enlarged partial agreement that allows it to extend membership outside the Council of Europe and thus has 49 members. GRECO monitors the application of the Civil Law Convention against Corruption (1999). See <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>, as well as the Criminal Law Convention against Corruption (1999), <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>

¹⁰ Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>

¹¹ The Inter-American Convention against Corruption was ratified by 29 countries in Latin America and the Caribbean, and including the United States and Canada. Available from <http://www.oas.org/juridico/english/treaties/b-58.html>

¹² Thirty-one African states ratified this Convention, which requires them to adopt measures “to ensure citizens report instances of corruption without fear of consequent reprisal”. Available from <http://www.au.int/en/content/african-union-convention-preventing-and-combating-corruption>

¹³ This Protocol commits 13 African countries to protecting individuals who report acts of corruption. Available from <http://www.sadc.int/documents-publications/show/>

¹⁴ The 34 OECD member countries and seven non-member countries (Argentina, Brazil, Bulgaria, Colombia, Latvia, Russian Federation and South Africa) have adopted this Convention. See the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents. Available from <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

¹⁵ See, in particular, Principle 4. Public Servants should know their Rights and Obligations when Exposing Wrongdoing. Available from <http://www.oecd.org/gov/oecdprinciplesformanagingethicsinthepublicservice.htm>

¹⁶ Model Law Protecting Freedom of Expression against Corruption (2004), available from http://www.oas.org/juridico/english/model_law_whistle.htm; Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses (2013), available from http://www.oas.org/juridico/english/law_reporting.htm

¹⁷ OECD, Study on Whistleblower Protection Frameworks, *Compendium of Best Practices and Guiding Principles for Legislation*. Available from <http://www.oecd.org/daf/anti-bribery/48972967.pdf>

UNCAC does not use the term “whistleblower”, but refers to reporting persons broadly.

In many jurisdictions, such as the United Kingdom,¹⁸ the term “whistleblower” is understood to describe an employee or worker (an insider) who discloses public interest information (e.g. on corruption, wrongdoing, risk to health and safety). The definition adopted by the Council of Europe has the same focus: “any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether public or private.”¹⁹ Employees and others working for an organization in the public or private sector are often closer to the source of the problem and therefore better able to provide facts about wrongdoing or malpractice, which, if left unchecked, can lead to serious harm. Due diligence and the adherence to codes of conduct, internal regulations and the law is a matter of responsibility of an employing organization, whether it is a governmental institution or a private sector company.

In jurisdictions that use the term “whistleblower” in relation to workplace-related reporting and protection, lawmakers should be aware of two aspects: first, they should consider including a wide range of persons from the public and private sectors (e.g. employees, contractors, consultants, trainees, volunteers, workers in informal economy sectors and other insiders); and second, they should consider the need to provide protection for other reporting persons who would fall neither under the scope of the workplace-related whistleblower protection nor under witness protection. This would include persons who report information that is not sufficiently detailed as to constitute evidence in criminal proceedings, but still related to alleged corruption.

In other jurisdictions, such as Malaysia, the law defines a whistleblower as “any person who makes a disclosure of improper conduct” to an enforcement agency.²⁰ It is immaterial who the source of the information is (an employee or a member of the public, for example) as the framework focuses only on the nature of the concern or complaint that has been reported. The law provides protection to informers or “whistleblowers”, in terms of confidentiality of information as well as immunity from civil and criminal action.²¹

Members of the general public are more likely to make reports about harm or damage caused to them personally or that affects their communities. It may take the form of a complaint, for example, about an unwarranted delay in issuing a license, a road half built, an absent or untrained doctor, or contaminated food. These complaints can also help to uncover different forms of criminal conduct. While the person making a complaint may want the person responsible to be prosecuted for the harm caused, and may suspect corruption is involved, evidence of the misconduct or negligence is likely to need to come from other sources. Nevertheless, as seen in the example of Indonesia above, public complaint procedures can be a very useful additional source of information. They should be known and accessible to any person, in accordance with article 13, paragraph 2 of UNCAC, and the staff handling those complaints should screen them for potential indications of corruption.

¹⁸ Public Interest Disclosure Act (1998).

¹⁹ Council of Europe Recommendation CM/Rec (2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>

²⁰ <https://www.bheuu.gov.my/portal/pdf/Akta/Act%20711.pdf>

²¹ Under the Act, a whistleblower does not enjoy any protection if he decides to communicate his allegation of wrongdoing to a person other than a government enforcement agency. The protection can be revoked if the whistleblower commits an offence under the Act, such as disclosing the contents of his report to a third party, thereby revealing his identity, which makes protection of the confidential information, i.e. identity or the information provided, difficult.

While drawing heavily on the knowledge and lessons learned in protecting individuals who disclose information that they encounter during the course of their work (in the public or private sector), this Guide will also showcase examples that address other reporting persons and seek to support State strategies for handling such a large range of case scenarios and reports. Consideration must be given to how best to protect members of the public, who can also face serious intimidation and reprisals if they dare to report or otherwise cooperate with the authorities.

D. Results from the Implementation Review Mechanism

The Implementation Review Mechanism²² of the United Nations Convention against Corruption is an intergovernmental peer review mechanism whereby each State party is reviewed by two peer States parties. The aim of the review mechanism is to assist States parties in their implementation of UNCAC by identifying successes, challenges and technical assistance needs for each provision of UNCAC. Each review is concluded with a country report and executive summary comprising observations and recommendations on the implementation of the provisions of the Convention.²³

In many of the completed reviews, recommendations were made for the adoption of appropriate legislation and measures for the protection of reporting persons, for the strengthening of existing schemes for whistleblower protection, and for offences under UNCAC to be brought clearly within the ambit of the act on the protection of whistleblowers.²⁴

The vast amount of information that is collected in the course of the review mechanism also generates information on regional and global trends. An analysis of the reviews has shown that technical assistance was needed most in regard to witness protection, cooperating offenders and the protection of reporting persons (articles 32, 33 and 37 of UNCAC).²⁵

This Guide is a response to the technical assistance needs raised by States parties and aims to provide them with resources and examples to develop effective and robust legal and institutional mechanisms for assisting and protecting reporting persons.

²² <http://www.unodc.org/unodc/en/treaties/CAC/IRG.html>

²³ Information by country can be found on the country profile pages. Available from <http://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html>

²⁴ CAC/COSP/IRG/2014/10, Implementation of chapter III (Criminalization and law enforcement) and IV (International cooperation) of the United Nations Convention against Corruption: Thematic Overview of Recommendations. Available from <http://www.unodc.org/unodc/en/treaties/CAC/IRG-session5.html>

²⁵ CAC/COSP/IRG/2014/3, Analysis of technical assistance needs emerging from the country reviews, page 5. Available from <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/2-6June2014/V1402636e.pdf>

For an analytical summary of the observations and recommendations made to States parties in regard to article 33 of the Convention, please see Conference Room Paper 7, entitled “The state of UNCAC implementation”, published at the fifth session of the Conference of States Parties to the United Nations Convention against Corruption. Available from <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session5.html>



National assessment

States parties that are planning to introduce or reform their legislative and institutional framework for the protection of reporting persons should be aware of the importance of starting with an analysis of the current situation and consulting with the key stakeholders. This chapter is intended to help Governments develop a national assessment plan and decide who best to consult when determining what new measures are needed. Such a needs or gap analysis is an important basis for informed policy decisions and legal reforms. It may also be helpful for countries to benchmark standards with other countries that have already adopted laws to protect reporting persons.

States parties should consider a proactive approach from the outset. The approaches that have been taken in different jurisdictions vary and have been influenced by different considerations including distinct legal, cultural and policy contexts. Some have focused on tackling corruption and organized crime; others have been developed in response to a disaster or scandal in which the existing accountability or regulatory systems were found to have failed. The measures that have been implemented as a result have been adjusted over time to meet new challenges as more has been learned about what is effective in practice.

In some jurisdictions, civil society and community groups play an active role in supporting new laws and in helping to ensure they are properly implemented. Such groups can help ensure that information about wrongdoing, corruption and risk is reported and investigated (see the examples in chapter II). Finally, the importance of corruption reporting by the media, as well as the impact of new technology on the ways and means people can employ to communicate information about corruption also need to be taken into account.

Broadly, there are a number of key questions individuals may ask themselves when deciding whether or not to report wrongdoing:

- Is the information I have worth reporting? How many details do I need to provide and what factors should I consider before I report?
- Who should I report to and are there different options?
- What kind of protection can I expect immediately and what happens if someone retaliates against me at a later stage?

- How will the information be handled by those I report to?
- Who can provide help and advice?

From the perspective of a reporting person, these are pragmatic and serious considerations. From the perspective of Governments, considering how to answer these questions is a helpful way to identify what needs to be addressed within the laws and national systems in order to make it easier and safer for corruption issues to be reported. All of these points are discussed in detail in chapter II.

A. The importance of informed decision-making

When considering how best to facilitate reporting and protect reporting persons, it is important to identify the factors that work for and against public engagement with the current system. This includes, for example, assessing what is working well, the strength of the rule of law in the country (e.g. access to an impartial, fair and efficient legal process) and the existing institutional capacity to deliver investigations, corrective action and protective measures. A comprehensive review of existing reporting mechanisms will help determine the ways in which they can be improved.

Experience shows that laws developed through consultation with relevant stakeholders are more likely to be effective. Proper consultation is a vital step in creating legitimacy for any programme of reform and is essential when seeking to support public engagement with the system. This is all the more important in cases where the social and cultural environment is particularly hostile, for historical or other reasons, to the idea of someone alerting the authorities about a problem that does not directly affect them.

Whistleblowers are not “traitors”, but people with courage who prefer to take action against abuses they come across rather than taking the easy route and remaining silent. It requires tackling deeply engrained cultural attitudes which date back to social and political circumstances such as dictatorship and/or foreign domination under which distrust towards “informers” of the despised authorities was only normal.²⁶

A comprehensive review requires careful preparation. States parties will need to frame and focus the aim of new measures and ensure the cooperation and participation of national and local bodies and government agencies. Those who are involved in the improvement of systems to facilitate and protect reporting persons tend to have a greater stake in their effectiveness and are more likely to be willing partners in monitoring and evaluating the measures over time. This helps ensure that Governments have access to both qualitative and quantitative information about the effectiveness of the mechanisms and legal protections that are put in place.

B. Stakeholder consultations

It is important to seek the active contribution of key stakeholders in and outside Government. Particular regard should be paid to: (a) those who engage directly with the

²⁶ Parliamentary Assembly of the Council of Europe (14 September 2009). Report on the Protection of Whistleblowers, Document 12006, Committee on Human Rights and Legal Affairs, para. 1. Available from <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=12302&lang=en>

public in a range of key areas, including law enforcement, tackling corruption and delivering important public services; and (b) those working in areas particularly vulnerable to or associated with corruption, whether it is in education, health services, border control, customs or public procurement. Some of these stakeholders will have already implemented reporting mechanisms, such as telephone hotlines or online systems, and will be able to report on how those methods are being used, how often, by whom and for what purpose.

Trade unions, legal and business groups, civil society organizations and community groups often have experience in using existing reporting mechanisms or in supporting those who do. They can help the Government identify which aspects work well, which don't and why, and what barriers to reporting remain. They can inform the Government about which measures are likely to have the greatest impact. These might include simple, practical measures such as access to a free phone line rather than an online portal, or the setting up of local focal points from whom individuals can gather information and advice in person.

In Bosnia and Herzegovina, a whistleblower law covering State-level employees was passed in December 2013 following a two-year public and political campaign. The effort engaged numerous civil society organizations, parliamentarians from a range of political parties and government officials. This multi-stakeholder initiative was seen as unique in Bosnia and Herzegovina,²⁷ where the law was passed unanimously in its Parliament. Similar efforts are under way in many other countries, including the Czech Republic, Finland, Germany, Greece, Italy and Ukraine.

States parties should also bear in mind that practical measures that can be implemented quickly may still need to be enshrined in law in order to be sustained. Nonetheless, consulting widely will help in planning, in tailoring to the national context and in prioritizing reforms (i.e. by focusing on the most vulnerable individuals or corruption risk areas).

It may mean, for example, that immediate efforts are focused on creating or improving reporting mechanisms for public officials and training those charged with handling reports of corruption. Or it may become clear that the capacity of one or more existing authorities needs to be significantly increased to better protect the reporting persons who have already contacted them. Some experts question whether or not a more centralized system would be more beneficial for environments with a weak reporting culture. This might be an area for future research. Whatever approach is taken, ensuring that people are able to report safely, securely and in a way that recognizes and strengthens the accountability of such systems is essential if States want to tackle corruption effectively.

This list below is indicative of those who could be and have been involved in national legal and institutional reviews:

- Relevant ministries, including justice and labour/employment
- Ministries dealing with sensitive areas or those affected by corruption, e.g. customs, education, health-care and public procurement

²⁷ USAID, Protecting Whistleblowers in Bosnia and Herzegovina. Available from <http://www.usaid.gov/results-data/success-stories/protecting-whistleblowers-bosnia-and-herzegovina>

- Other inspection and enforcement bodies, e.g. health and safety and trading standards
- Information, privacy and data protection commissioners
- Human rights commissioners and ombudspersons
- Ethics and integrity bodies, including civil service commissioners at the central and local government levels
- Trade unions and staff associations
- Human rights, community rights and consumer groups
- Legal and advocacy organizations, including those advising and protecting whistleblowers and addressing corruption issues
- Professional bodies for lawyers, auditors, engineers, doctors, etc. (including disciplinary or ethics committees)
- The judiciary and judicial bodies
- Law enforcement bodies, including police, prosecution and special prosecutors
- State and local audit authorities
- Sector regulators, e.g. education, social care, health and safety, financial, anti-competition and fair-trade bodies
- Professional bodies, e.g. medical, legal and auditors
- Business organizations and private sector associations

Example: Serbia, consultation on a new law

In 2012, the Information Commissioner and the Ombudsman's Office set up a working group that included the Anti-Corruption Agency to draft an unofficial bill to protect whistleblowers in Serbia. A two-day conference was held in May 2013 gathering national and international experts, academics, lawyers, technologists, campaigners and advocates to explore good practice. It was covered by the media and live-streamed, and the participants' contributions were published online in December—the first book of its kind in the Serbian language.

The Ministry of Justice started the formal process of drafting a law on workplace whistleblowing in 2013, and in keeping with a multidisciplinary approach, it set up a working group of more than 20 key representatives from the relevant ministries; judges from all court levels, including the Deputy President of the Supreme Court; representatives of the major unions and employers associations, including the chambers of commerce; as well as civil society representatives. Also included were two Serbian whistleblowers—a judge and a police inspector. Four international experts on anti-corruption and whistleblower protection were invited to participate in specific meetings of the working group. Once prepared, the draft bill was published in order to allow for comments from interested parties, after which it was reviewed by the working group.

The law was adopted by the Parliament of Serbia in November 2014. A six-month implementation period allowed the Government to train judges on the new law and gave them time to prepare a code of practice that employers have been required to implement since the new law came into force in June 2015.

Source: See the website of the Serbian Information Commissioner, available from http://www.poverenik.rs/images/stories/dokumentacija-nova/Publikacije/Uzbunjivaci/zastita%20uzbunjivaca_kraj.pdf. Selected chapters in English are available from the website of the Whistleblowing International Network at www.whistleblowingnetwork.org and there are plans to translate the full publication.

C. Key examination areas

The three broad areas that will need to be addressed are:

- Legislation and institutional arrangements
- Needs and gaps
- Awareness and confidence

1. Legislation and institutional arrangements

An increasing number of States parties have some form of legal provision for the protection of reporting persons or even very specific stand-alone laws. Traditionally, protection tended to be restricted to witnesses in the context of a criminal trial, or in general rules on public sector duties, conditions of employment or labour law.

States should strive for a comprehensive overview and assessment of their legislative frameworks. Importantly, a review should identify whether laws or policies overlap, contradict or undermine each other and therefore pose a risk to the protection of reporting persons generally and workplace whistleblowers specifically. In particular, defamation and libel laws, restrictive confidentiality rules, data protection rules and bank secrecy or other secrecy laws could pose a challenge. States parties should consider how to harmonize the different provisions. Failing to take into account how different duties and obligations apply to reporting persons risks rendering any new measures ineffective. If individuals are uncertain as to what protective measures are available to them and in what circumstances, they are more likely to remain silent. Experience shows that even very good reporting systems will not be used if they conflict with existing rules and obligations.

In 2012, the Government of Ireland decided to move away from sectoral provisions for the protection of whistleblowers and to consolidate and enhance the protections in a single law (see the Mahon Inquiry example in chapter I, section C.2). The Minister in charge of the reforms stated that the new draft law represented “a major step in the delivery of the Government’s programme of political reform”, and further stated that “It provides for the first time a comprehensive whistleblower protection across all sectors of the economy addressing what has been identified—nationally and internationally—as a significant gap in Ireland’s legal framework for combating corruption.”²⁸ Some experts suggest that comprehensive and stand-alone legislation may give the law heightened visibility, thereby making its promotion easier for governments and employers.²⁹ This approach also allows for the same rules and procedures to apply to public and private sector employees, rather than a more piecemeal approach involving several different laws, which often only apply to certain employees and to the disclosure of certain types of wrongdoing.

Below is a non-exhaustive list of laws and rules that States parties are likely to need to take into account when considering any new measures to protect reporting persons:

²⁸ The Minister announced that the Government was implementing a single overarching framework protecting whistleblowers in a uniform manner in all sectors of the economy and has since done so by implementing a new law, the Protected Disclosures Act, 2014. Press Release (3 July 2013) Publication of the Protected Disclosures Bill, 2013. Available from <http://www.per.gov.ie/publication-of-the-protected-disclosures-bill-2013/>

²⁹ D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), pp. 19-21. Transparency International, *Recommended Principles for Whistle-blowing Legislation*, Recommendation 23: “Dedicated legislation – in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach.”

- Criminal law, in particular with respect to criminal prosecution for defamation and false reporting, sanctions for failure to report certain categories of crimes, prohibiting retaliation against those who report a crime, obstruction of justice, and laws on the protection of witnesses.
- Sector-based laws, for example legislation on anti-corruption, competition, health and safety, accounting, environmental protection, corporations and securities.
- Specific anti-corruption measures, including any laws on conflict of interest, etc.
- Human rights law, with particular regard to protecting the right to freedom of expression, as required by article 19 of the International Covenant on Civil and Political Rights.
- Access or right-to-information laws, with specific regard to any limits to the disclosure of information on the basis of national security or foreign relations, and any rules that undermine the ability of public officials to fulfil their duties to provide information under the law.
- Laws on classified or privileged information, professional secrecy and/or confidentiality, and personal data protection.
- Media law, in particular the protection of journalists and their sources and copy-right rules.
- Contract and employment law, in particular protection against breach of confidentiality or loyalty; prohibition or nullification of any agreement that purports to preclude an individual from making a public interest report or disclosure; protection from unfair dismissal or any other form of employment-related retaliation, including acts committed by peers or colleagues.
- Labour law and labour agreements, in particular the collective right to report or disclose public interest concerns.
- Professional reporting duties: protection for those who have specific duties to report or disclose (for example, compliance officers, health and safety officers, company directors and child protection officers).
- Codes of conduct: rules on conduct and integrity and the reporting of breaches of those rules.
- Disciplinary policies and procedures, particularly with regard to (administrative) offences of breaches of confidentiality or defamation.
- Other organizational policies or rules, including implementation of data protection laws, codes of conduct and ethics, disciplinary codes, policies on media communications and publication rules.

National consultation could also assist in the identification of reporting channels, including which of them are most trusted by the population. Examining these in detail, both as to how the information and the person who discloses it is handled, can be very instructive. Examples are to be found in national audit bodies or other independent oversight bodies, including ombudspersons and privacy or information commissioners, professional integrity bodies such as judicial ethics or civil service commissions, police oversight or sector regulators such as civil aviation authorities.

In some jurisdictions there is a strong constitutional or legal basis for openness and transparency in government, and fewer legal barriers to speaking up about a range of issues including wrongdoing or malpractice. In these contexts, there tends to be less social stigma and fewer problems associated with disclosing information about wrongdoing or other matters of public interest—whether to the authorities or to the public. While reforms to strengthen the ability of individuals to speak up about specific problems

may still be needed in these jurisdictions, the measures required are likely to be simpler in detail and focus.

Cultural, legal and religious traditions around the world also recognize to some extent the importance of individuals speaking up to protect the interests of others. For example, aspects of Islamic law that stress the role of witnesses could permit “whistleblowers to be perceived as witnesses to the truth”.³⁰ In the United Kingdom, the law to protect public interest disclosures enshrined and modernized a common law principle dating back to 1743, that there can be “no confidence as to the disclosure of iniquity”.³¹ The principle recognized that, in circumstances where an employee learns their employer is—or is planning to be—involved in malpractice, the employee is no longer bound by any contractual obligation of confidentiality and is entitled to reveal it. The United States Whistleblower Protection Act is based on the principle of public freedom of expression as the basis for the right to make a protected disclosure. Identifying such principles is important in building a sustainable national system; good practices that already exist should not be undermined.

2. Needs and gaps

A number of scandals in Japan helped convince lawmakers that greater whistleblower protection was needed. These included the infection of hundreds of haemophilia patients with the HIV/AIDS virus as a result of contaminated blood used in transfusions during the 1990s, of which public officials were aware; the failure by Mitsubishi Motors to issue a model-wide recall despite receiving 64,000 customer complaints and instead trying to conceal the problem by repairing individual cars; and the cover-up of damage to some of its nuclear power plants by the Tokyo Electric Power Company in 2003.³²

Examining the details of such cases can provide critical information about where and how accountability mechanisms have failed, as well as the risks and challenges facing those who were or might have been in a position to alert the authorities or the public to the danger.

Example: Ireland, Tribunal of Inquiry

In 2012, the Mahon Inquiry in Ireland reported on its investigations into corrupt payments to politicians in connection with political decisions on planning permissions and land rezoning in the 1990s. Many believed this scandal, as well as the collapse of the Irish banks in 2008, could have been avoided if information about potential wrongdoing had been disclosed early enough and if those who did so had been offered effective protection. The Inquiry was the longest-running public inquiry into corruption in Ireland’s history and involved the collection of extensive evidence.

Among a raft of recommendations made by the Inquiry were a number specifically aimed at making whistleblower protection more robust by:

³⁰ Vaughn, R. (2012). *The Successes and Failures of Whistleblower Laws*. Edward Elgar Publishing: United States, page 261.

³¹ *Gartside v. Outram*, [1856]. 26 L.J.Ch.113. It is interesting to note that this principle can be found as long ago as 1743 in the case of *Annesly v. the Earl of Anglesea*, 17 State Tr 1139 (noted at L.R. 5 Q.B. 317 n.), in which it was stated that “no private obligation can dispense with the universal one which lies on every member of the Society to discover every design which be formed, contrary to the laws of the Society, to destroy the public welfare.”

³² Vaughn, R. (2012). *The Successes and Failures of Whistle-blower Laws*. Edward Elgar Publishing: United States, page 243.

(a) Implementing a law to protect all workers in all sectors who report suspected offences and breaches of regulatory measures from any form of liability, relief or penalization arising from that report;

(b) Extending the protection under the Prevention of Corruption (Amendment) Act 2001 to independent contractors who report suspicions of corruption;

(c) Removing the existing limit on the amount of compensation that may be awarded to those penalized for whistleblowing; and

(d) Amending the Criminal Justice Act 2011 to cover those reporting or giving evidence on offences under the Public Bodies Corrupt Practices 1889.

Source: See, in particular, Tribunal of Inquiry into Certain Planning Matters and Payments (Mahon Tribunal) Final Report and Recommendations (2012), Recommendations 7 and 8, page 2645, available from <http://www.planningtribunal.ie/images/finalReport.pdf>

Analysing criminal cases for corruption or other serious wrongdoing, whether successfully prosecuted or not, can be very useful as a basis for reform. Cases can be analysed to determine whether and how reporting persons played a role and at what stage; what reassurance, if any, was offered or required; and how necessary the ongoing cooperation of a reporting person was to the outcome. More research is needed to assess the impact of whistleblowing systems. The increasing number of laws, institutional models and acts of jurisprudence should provide a good basis for future research.

3. Trust and confidence

While awareness is important, it is vital that reporting persons are treated sensitively and appropriately and that the information they provide is handled professionally. This will build long-term confidence in the measures that States implement.

Whether or not a State decides to establish a new institution or system to handle corruption reporting will depend on what is identified in the national assessment. Clearly, when judicial, prosecutorial, legislative or police services in the country are weak, inefficient or compromised, or where there is a high level of mistrust in government institutions generally, a separate body protected from undue influence is an option. However, while it may be necessary to create alternative ways to address the protection of reporting persons effectively in the short term, it is important not to ignore the potential in the long run for traditional systems of law (i.e. effective policing, an independent prosecution service and impartial judiciary) to be more effective.

Whatever measures are introduced, experience shows that trust is earned and confidence gained through effective and proactive practice and by building public accountability into the system. Peru has taken a number of steps to proactively contain organized crime and corruption, and the most recent steps to protect reporting persons provide an interesting case study.

Example: Peru, Sistema Nacional de Atención de Denuncias

Peru adopted a new Constitution in 1993 after a period of civil unrest and violence in the 1980s and early 1990s, during which an estimated 70,000 people died. In the late 1990s, a scandal involving a corruption network in the national customs service that

included senior public officials rocked the Government. An inquiry into the allegations led to the resignation of seven government ministers. In 2001, Peru focused on a number of important democracy-building and anti-corruption measures, including a new Law of Transparency and Access to Information and by strengthening its criminal justice system. In particular, the reforms focused on witness protection programmes to encourage individuals involved in corruption and organized crime to collaborate with the authorities. Despite the success of these efforts to reduce serious crime, studies in the early 2000s showed that 7 out of 10 Peruvians had a high or medium tolerance for corrupt acts and that 86 per cent believed reporting corruption was ineffective. Surveys also revealed little public trust in the judiciary, Congress and the police.

In 2010, Peru passed the Whistleblower Protection Act. The law provides protection from dismissal or reprimands for public sector whistleblowers, confidentiality to those reporting acts of corruption, and compensation, currently based on a percentage of any fines imposed on those found to be guilty as a result of a report.

The national auditor, the Comptroller General's Office (Contraloría General de la República) of Peru, is in charge of handling disclosures made under the Act. The Office has 23 regional branches and 800 internal control offices located in important government institutions nationwide; this means 824 front desks are able to receive corruption reports. In order to coordinate and consolidate the receipt and handling of reports, the Office set up the National System for Denunciations (Sistema Nacional de Atención de Denuncias (SINAD)) to provide a safe and secure channel for reporting and a centralized system to respond.

It took three years to set up the system, the procedures and the technology. A key element is assuring the individual confidentiality through a coded system such that analysts are not able to determine the identity of the source.

The steps of the SINAD process are:

1. Receipt of a report or complaint (technology allows reporting persons to remain confidential, but also to engage in two-way communication)
2. Report assessment (meets admissibility criteria)
3. Case organization (putting information together)
4. Preparation for verification (determining site visits, documents and witnesses)
5. Verification and report (field work and conclusions)
6. Providing feedback to whistleblowers/reporters

One of the main challenges in implementing the legal protections in the law is the coordination required between the different agencies (e.g. labour authorities in charge of investigating reprisals and tax authorities in charge of collecting fines), and the intersection between this administrative system of corruption reporting and the criminal law.

Source: Presentation by Fernando Ortega Cadillo, Gerente del Departamento de Prevención de la Corrupción, delivered at the International Expert Group Meeting on the Protection of Reporting Persons, held from 22 to 23 May 2014 in Vienna.



Facilitating reports and protecting reporting persons

How best to facilitate reporting will depend on who the target group is, the nature of the information they are likely to be able to provide and the risks they can face if they do. Different types of protection (procedural, physical, proactive or retroactive) need to be considered in different circumstances.

A national assessment as outlined in chapter I should help States parties determine what already exists and identify any weaknesses or gaps in their national systems. The law should enable authorities to use preventive protective measures, such as the granting of confidentiality to prevent reprisals from occurring in the first place. In addition, it should provide enforceable remedies to those who are victimized or suffer from reprisal, for instance if the preventive measures have failed.

It is up to authorities to explain to the public the value and importance of their engagement with the system and the assistance and protection that is available. The government needs to be able to articulate why increased public engagement to tackle corruption will ensure that the risks facing any individual reporting person will be significantly reduced. The aim must be to shift as much of the burden of risk from the shoulders of individual reporting persons as possible.

The present chapter identifies a range of measures that have been implemented in various jurisdictions to facilitate reporting and to protect reporting persons. It is divided into broad areas which are explained in more detail below. These areas are:

- A. Range and scope of information
- B. Reporting channels
- C. Protections against unjustified treatment
- D. Facilitating reports
- E. Handling reports
- F. Advice

Many of the reforms and reporting mechanisms that have been implemented in different jurisdictions are still fairly new and their full impact has not yet been assessed. While this chapter identifies some of the emerging trends, it is not an exhaustive examination

of all the elements that should be considered for the protection of reporting persons. It should, however, provide States parties with a good overview and a strong basis from which to determine what is possible and what is necessary.

States are also advised to conduct their own research as a basis for policymaking and improvements. A list of resources provided at the end of this Guide could help in this regard and may be of interest to anyone examining corruption reporting or whistleblowing more generally.

A. Reportable wrongdoing: range and scope of information

Internationally, the trend is towards broadening the scope of information for which individuals will be protected to any matter of wrongdoing or potential harm to the public interest. While there might be differentiation in the terminology that is used, the essential element is to provide a broad definition in order to cover as wide a range of malpractice as possible.

While the term “public interest” is more common to some jurisdictions than to others, it is generally understood to mean the “welfare” or “well-being” of the public.³³ Some policymakers refer to the “common good”. The relevant law in the United Kingdom, for example, is called the “Public Interest Disclosure Act”, rather than a “law to protect whistleblowers”. Protecting the public interest is also useful as a way to convey the negative impact of corruption on society, and it applies to the activities of corporate entities as well as those of the State. In an organizational setting, for instance, relevant information for the purposes of identifying and preventing corruption can be anything that undermines the organization’s mission to the public, stakeholders, investors or customers.

Furthermore, identifying malpractice or wrongdoing broadly makes it easier to understand and to report. States parties that focus on information narrowly defined to corruption offences as defined by the criminal law should take the following two points into consideration. First, they should understand that such information can be difficult for lay persons to identify accurately. It is quite likely that a given individual only observes or witnesses a part of the problem—i.e., the facts indicating corruption. The narrower the focus, the more it requires the reporting person to assess the quality and seriousness of the information prior to reporting it, also making it more likely that they will remain silent—particularly if they are uncertain whether or not they will be protected. Independent and confidential advice is of paramount importance in such cases. Secondly, the narrower the definition, the less information will be received by competent authorities—who are the technical authorities—and consequently, the fewer opportunities the authorities will have to identify facts that could lead to successful investigations and prosecutions.

Nonetheless, it cannot be assumed that the public will always know what is meant by broad terms such as “the public interest”, so it makes sense to set out the range or type of wrongdoing that is covered. The United States Whistleblower Protection Act, which protects those working in the federal public sector, for example, covers information relating to gross mismanagement, gross waste of funds, abuse of authority, or substantial

³³ In law and policy, the concept of “public interest” allows judges and policymakers to consider interests at stake that are not necessarily represented in the specific case or matter before them. Such flexibility is intended to respond to new or different factors affecting the public interest according to the circumstances of each situation.

and specific danger to public health or safety. The Public Interest Disclosure Act of 2013 of Australia defines public interest, among other factors, by whether the disclosure would promote the integrity and accountability of the public sector, or would expose a failure to address serious wrongdoing in it.

The Whistleblower Protection Act 2010 of Malaysia,³⁴ for example, does not use the terms “public interest” or “wrongdoing”, but refers to a broad spectrum of information that can be considered a protected disclosure under the Act. It refers to improper conduct, meaning “any conduct which if proved constitutes a disciplinary or a criminal offence”, and a disciplinary offence is defined as “any action or omission which constitutes a breach of discipline in a public body or private body as provided by law or in a code of conduct, a code of ethics or circulars or a contract of employment, as the case may be”. According to section 6 (2), “A disclosure of improper conduct under subsection (1) may also be made—

- (a) Although the person making the disclosure is not able to identify a particular person to which the disclosure relates;
- (b) Although the improper conduct has occurred before the commencement of this Act;
- (c) In respect of information acquired by him while he was an officer of a public body or an officer of a private body; or
- (d) Of any improper conduct of a person while that person was an officer of a public body or an officer of a private body.”

In the context of corruption, criminal offences are often accompanied by other types of malpractice and wrongdoing, and broadening the scope increases the likelihood of detecting and addressing it. *The Technical Guide to the United Nations Convention against Corruption* states:

Article 33 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. Such information is likely to be available at a rather early stage of a case and is also likely to constitute an indication of wrongdoing. In corruption cases, because of their complexity, such indications have proved to be useful to alert competent authorities and permit them to make key decisions about whether to launch an investigation.³⁵

Article 33, which addresses protection for any reporting person, should thus be viewed as complementary to article 32, which covers witnesses, victims or experts who give testimony concerning corruption offences.

Recognizing the potential overlap between information and evidence, and the evolution of a case as an investigation unfolds (e.g. a person may no longer be required as a witness in a trial due to the discovery of new or more relevant evidence or vice versa), the *Legislative Guide* also proposes that States parties may wish to interpret article 32 broadly and that they should seek to make the protection available to any person, as is appropriate and within their means. This could therefore include any reporting person (for more details on this aspect, see chapter II, sections C.8 and 9).

The experience of States with witness-protection schemes suggests that a broader approach to implementing this requirement will be needed to guarantee sufficient

³⁴ <https://www.bheuu.gov.my/portal/pdf/Akta/Act%20711.pdf>

³⁵ *Technical Guide to the United Nations Convention against Corruption*, page 105.

protection to ensure that witnesses are willing to cooperate with investigations and prosecutions. In addition to witnesses who have actually testified, protection schemes should generally seek to extend protection in the following cases: (a) To persons who cooperate with or assist in investigations until it becomes apparent that they will not be called upon to testify; and (b) To persons who provide information that is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons. Legislators may therefore wish to make provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of a corruption offence, whether this is produced as evidence or not.³⁶

In light of the complexity of investigating corruption and the potential for cases to contain cross-border elements, States parties should also consider how the law can facilitate the reporting of corruption information without unduly restricting its scope in terms of geography or time, or placing other unnecessary or arbitrary barriers in the way of disclosure based on context or formality.³⁷

Example: Council of Europe, international guidance on the public interest

The Recommendation on the Protection of Whistleblowers (adopted in April 2014) recognizes that there will be common ground between most States as to what is considered to be in the public interest in most areas, but that in others there may well be a difference of appreciation. Principle 2 states that the scope of information qualifying for protection should include violations of law and human rights, as well as risks to public health and safety and to the environment. The Explanatory Memorandum goes on to provide a non-exhaustive list of matters typically considered as falling within the categories of information for which individuals should be protected if they report or disclose:

- Corruption and criminal activity
- Violations of the law and administrative regulations
- Abuse of authority or public position
- Risks to public health, food standards and safety
- Risks to the environment
- Gross mismanagement of public bodies (including charitable foundations)
- Gross waste of public funds (including those of charitable foundations)
- A cover-up of any of the above

Source: Explanatory Memorandum to the Council of Europe Recommendation on the Protection of Whistleblowers (2014), paragraph 43. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2170183&Site=CM>

1. Good faith and reasonable grounds for reporting

Article 33 of UNCAC states that protection against any unjustified treatment should be considered for any person who reports in good faith and on reasonable grounds to the competent authority. Hence, if a person has reasonable grounds to believe that the information shows wrongdoing or malpractice, and that the belief was reasonable for someone in his or her position based on the information available to him or her, that person should be protected. Under these circumstances, even if someone is mistaken as

³⁶ *Legislative Guide to the United Nations Convention against Corruption*, paras. 442 and 443.

³⁷ For example, the Public Interest Disclosure Act of the United Kingdom is drafted in such a way to ensure that information that would qualify for protection is not restricted by time—it can relate to past, current or future breaches or risks of harm—or geography, as the law states that it is “immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere...” (section 43B).

to the purport of the information they have provided and no corruption or wrongdoing is found, they would still be protected for having made the report. If, however, someone reports information that they know to be untrue, then clearly there should be safeguards, meaning that the individual would not be able to seek protection from the law and could be sanctioned if harm was caused.

A number of different approaches have been adopted in relation to the aspect of good faith and how it is interpreted. In a number of jurisdictions, concerns have been raised regarding the risk of over-emphasizing the good faith element or of mixing it up with “motive”. Where individuals believe the main focus would be on their motive for reporting rather than on a proper assessment of the merits of the information they could provide in good faith, they might not speak up at all. Due to this risk, the Council of Europe has not included the element of good faith in its recommendations.³⁸

Some States parties have also clarified the point in national laws. Under Norwegian law, for example, bad faith does not rule out lawful reporting. This recognizes that the public interest is served if an employee reports reasonable suspicions, even if his or her personal motivation is malicious. In other words, the information could be necessary and useful to uncover corruption, and the motive of the person reporting does not change this (e.g. if A reports on reasonable grounds information about B, it should not matter if they have a good or bad working relationship). This approach retains the requirement of reasonable grounds and therefore can exclude protection of a reporting person who knowingly reports wrong information or should reasonably have known that the information was wrong.

In 2013, the United Kingdom removed the term “good faith” from its law in relation to determining whether a disclosure qualifies for protection, but retained the criteria in relation to deciding the remedial compensation or reimbursement. Where bad faith is found, the compensation for a person that has been victimized due to reporting can be reduced by up to a maximum of 25 per cent if it is considered just and even-handed given all other circumstances.³⁹

Ensuring that good faith is not mixed up with motive also might help to prevent the situation wherein individuals take it upon themselves to become amateur detectives rather than reporting the facts as they understand them. Otherwise, the reporting person might fear that “premature” reporting could be construed as bad faith.

The risk could also be minimized by providing that good faith means “honestly” or “bona fide” with respect to the information, thus linking it with the information, and not the personal motivation of the reporting person. A number of national laws passed in recent years, while keeping the notion of good faith, emphasize the quality of the whistleblower’s information and make no mention of motive, nor clarify or limit the issue of motive:

- Bosnia and Herzegovina’s Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina (2013) defines good faith as “the stance of the whistleblowers based on facts and circumstances of which the whistleblower has his own knowledge of and which he or she deems to be true.”

³⁸ The Council of Europe states that the term “good faith” was not included in the Recommendation for the Protection of Whistleblowers “in order to preclude either the motive of the whistleblower in making the report or disclosure or of his or her good faith in so doing as being relevant to the question of whether or not the whistleblower is to be protected” (Explanatory Memorandum, paragraph 85). See Recommendation, Principle 22: “Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy.”

³⁹ United Kingdom (2013). Enterprise and Regulatory Reform Act (ERRA), which changes the provisions of the Public Interest Disclosure Act (1998) and Employment Rights Act (1996).

- Zambia’s Public Interest Disclosure Act (2010) states in its article 22 that a protected disclosure is made in good faith by an employee “who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law”.

Another approach in regard to the element of good faith is taken in the Organization of American States (OAS) model law to protect whistleblowers and witnesses who report corruption. The law includes a presumption of good faith until or unless the contrary can be shown.⁴⁰ The Romanian law on the protection of public officials who make complaints about violations of the law works according to the same presumption. When drafting laws to protect reporting persons, States parties should keep these different approaches and opinions regarding the notion of “good faith” in mind.

2. Rights of others and duties to third parties

The disclosure of suspected corruption or other malpractice protects the interests of society by helping to ensure that the information gets to the right people at the right time, and where possible, early enough for something to be done before damage occurs. As such, there should be few restrictions on what facts or when such disclosures can be made. Restrictions should be clearly defined and based on a legitimate aim that is necessary and proportional to the circumstances. This is a general principle that is also underlined in article 13 of UNCAC.⁴¹

When information is reported to competent authorities, the duty to protect the interests of others who may be affected by the disclosure (for example, with respect to their personal data) typically transfers automatically to those authorities. However, in rare circumstances where the appropriate channels have been tried, or are blocked, or are themselves corrupted in some way, and a wider disclosure is made (via the media, for example), then care must be taken on the part of the reporting person to ensure that the interests of third parties are protected. This would apply, for example, to private medical information of individual patients, legal clients or, indeed, the personal data of customers.

The seriousness of any breach of third-party rights is likely to be one of the factors that a court will take into account when determining whether a public disclosure of information by a public official or private sector employee was justified and reasonable (see chapter II, section B.3 on wider disclosures and public accountability).

This is one of the reasons why it is important for people to have access to information and impartial advice. Advice at an early stage can help ensure that individuals report in the most appropriate way for the issue to be addressed while minimizing the risk to themselves or any other innocent third party.

It is also important that individuals are able to defend themselves against untrue allegations made in the public domain. Japan, for example, has a provision in its Whistleblower Protection Act requiring whistleblowers to make efforts not to damage the justifiable interests of others.⁴² This may be a way to ensure against irresponsible disclosure—for example, publishing personal details that would damage the reputations of others and those who are entitled to the presumption of innocence. The publication of personal details should not normally be necessary for a case to be pursued.

⁴⁰ Organization of American States (OAS) (2013). Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses, article 2 (*h*).

⁴¹ See “Reporting on Corruption – A Resource Tool for Governments and Journalists”, page 33 et seq.

⁴² Japan (2004). Whistleblower Protection Act, article 8.

Loyalty to the employer

In many jurisdictions, and particularly with respect to the private sector, employees are subject to duties of loyalty or confidentiality with respect to technical or operational information, which means that it is often a disciplinary offence to report outside the organization itself. Business reputation is also highly valued and thus many workers are subject to strong contractual obligations in this regard.

Therefore, it is important—above all with respect to reporting to competent or appropriate authorities, or more widely where necessary—that the law removes or settles any doubt that reporting wrongdoing or harm to the public interest will override any such duties to the employer.

3. National security

In principle, all government information should be accessible and open to the public for scrutiny, as this enables democratic participation and the development of sound public policies, even in sensitive areas such as national security. While there are valid grounds to protect certain information relating to *ordre public* or national security as also provided for in international standards, including article 13(1)(d) of UNCAC, care must be taken to ensure that this exception to access to information is not so overly broad as to prevent effective public scrutiny and debate about government decision-making and activities, and importantly, in this context, to make it much more difficult to detect corrupt activities in public services.⁴³

Former Kenyan Anti-Corruption Commissioner John Githongo stated that “The most serious corruption taking place in many African countries is taking place under the shroud of what they call national security [...] As corruption has slowly been removed from public procurement processes—for example roads and large infrastructure projects—the last little hole where corruption is hiding is in the area of so-called ‘national security’, which means that any whistleblower who causes malfeasance in that area can be very easily charged with treason.”

Source: Interview of the Month – Kenya’s anti-corruption tsar, Transparency Watch, April 2006, as quoted in Banisar, D. (2011) *Whistleblowing: International Standards And Developments* in Irma E. Sandoval (ed.) “Corruption and Transparency: Debating The Frontiers Between State, Market And Society”, World Bank-Institute For Social Research, UNAM: Washington, D.C. Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180.

The Explanatory Memorandum to the Council of Europe Recommendation (2014) acknowledges that there may be legitimate reasons why States parties may wish to apply a set of restrictions with respect to national security information, but makes clear that these restrictions need to be based on the information itself and not on the categories of persons involved (such as police officers or military personnel, for example).⁴⁴

International practice is developing with respect to defining the scope of, and limitations to, a State’s authority to withhold information on national security grounds, as well as when it is appropriate to sanction those who make an unauthorized disclosure of classified information. Some of the key principles include ensuring that the grounds for classification are clearly and restrictively applied (e.g. to specific information that protects a legitimate national security interest and not, for instance, to all information in relation to a

⁴³ See *Reporting on Corruption – Resource Tool for Governments and Journalists*, page 21. Available from http://www.unodc.org/documents/corruption/Publications/2014/13-87497_Ebook.pdf

⁴⁴ Explanatory Memorandum to the Council of Europe Recommendation on the Protection of Whistleblowers (2014), paragraphs 46-47. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2170183&Site=CM>

department or agency), and that withholding information on such grounds may only be asserted by those authorities whose specific responsibilities include protecting national security.⁴⁵ Furthermore, any laws that regulate disclosures with respect to information deemed vital to national security should be publicly available.⁴⁶ In the United States, for example, information that is not marked as classified cannot restrict public disclosure.⁴⁷

Finally, disclosure of information by public personnel—regardless of whether or not the information is classified—that shows wrongdoing or is a matter of significant public interest should be considered “protected”, and there should be effective channels for persons with such information to report internally and to bodies that are independent of the national security sector, impartial and that have adequate powers and the mandate to investigate allegations and protect witnesses.⁴⁸ Individuals should also retain the right to defend themselves on public interest grounds for having made an unauthorized disclosure.

Example: The Global Principles on National Security and Right to Information (Tshwane Principles)

The Global Principles on National Security and the Right to Information (Tshwane Principles) were developed to provide guidance to those engaged in drafting, revising or implementing laws or provisions relating to the State’s authority to withhold information on national security grounds or to punish the disclosure of such information. They were drafted by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world and are based on international and national law, standards and good practices.

They set out a proportionate approach to facilitating internal whistleblowing for those working with sensitive information, and the protection that should be available to those who publicly disclose wrongdoing or other information in the public interest (Principles 39-46). Importantly, the Tshwane Principles include a public interest defence for public servants, whether or not they meet the conditions for whistleblower protection as laid out in the Principles, if the public interest in the disclosure outweighs the public interest in keeping the information secret.

The Tshwane Principles were endorsed by the European Parliament as guidance both on transparency as a component of democratic oversight in the field of intelligence and on protection for unauthorized disclosures of national security information.^a Paragraph 89 of the Main Findings calls on Member States to “ensure that their legislation, notably in the field of national security, provides a safe alternative to silence for disclosing or reporting of wrongdoing, including corruption, criminal offences, breaches of legal obligation, miscarriages of justice and abuse of authority, which is also in line with the provisions of different international (United Nations and Council of Europe) instruments against corruption, the principles laid out in the PACE Resolution 1729 (2010), the Tshwane principles, etc.”

^a <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0230&language=EN&ring=A7-2014-0139>

Source: The Tshwane Principles have been translated into a number of different languages. They can be downloaded in Arabic (pdf), French, German, Japanese (pdf), Mandarin (pdf), Portuguese, Serbian, and Spanish. Available from <http://www.right2info.org/exceptions-to-access/national-security/global-principles>.

⁴⁵ Global Principles on National Security and Right to Information (Tshwane Principles). See Principle 3. Available from <http://www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points>

⁴⁶ PACE Resolution 1551, 2007.

⁴⁷ Under the United States Whistleblower Protection Act, information that is not marked as classified cannot restrict public disclosures (5 USC 2302(b)(13)). The provision applies the National Security Act’s definition that classified information means “information or material designated and clearly marked or clearly represented ... as requiring a specific degree of protection against unauthorized disclosure for reasons of national security”. (50 USC 426).

⁴⁸ Tshwane Principles. See Principle 39.

Danish criminal law provides a public interest defence for publication of State secrets where the person is acting in “the legitimate exercise of obvious public interest”,⁴⁹ which has been interpreted to require that this interest shall exceed the interest in keeping the information secret.⁵⁰ Under the Canadian Security of Information Act, it is an offence for a government official to improperly communicate special operational information, but a public interest defence is available where a public servant discloses information in the public interest.⁵¹

B. Reporting channels

In acknowledgment of the differences between national systems, UNCAC uses the terms “appropriate”, “competent” or “relevant” authorities (see articles 8, 13 and 33 of UNCAC), leaving enough flexibility to States parties to determine the details of establishing and designating reporting channels.

When States parties make this determination, much will depend on the range of competent authorities that are in place already and their effectiveness, as well as specific issues relating to labour and employment rights, for example, or constitutional guarantees such as freedom of expression and media protection.

States parties should also keep in mind a variety of different possible case scenarios that could arise when designing or reforming their legislation to protect reporting persons. If a person reports internally to his or her employer and subsequently becomes the victim of retaliation, is he or she protected? How does this situation differ when the person reports to a competent authority such as a regulator, anti-corruption agency or law enforcement body? And under which exceptional circumstances could protection still be considered if the person reports externally, e.g. to the media or via the Internet? These questions require answers for both private and public sector employees and, in part, also in regard to other persons. Another emerging issue is that of international cases, e.g. where an employee of a multinational corporation reports to the authorities of another State in which the company is registered or conducts business.

Going step by step through the different scenarios is the best way to identify potential gaps and to consider measures to strengthen the system. Some States parties protect disclosure to competent authorities but overlook that employees might also require protection in cases where they reported internally and suffered from a reprisal. Other States parties might have laws in place for the public sector, but leave the private sector in a grey area.

In most countries, there are a range of office holders and authorities who are in a position to receive reports of corruption or other types of wrongdoing. It is paramount that they have not only the “competency” to receive such reports, but are also empowered to act in response and are held accountable for their action. The national assessment should

⁴⁹ Criminal Code (Denmark), section 152(e) (2010).

⁵⁰ Amanda Jacobsen, *National Security and the Right to Information in Europe*, 2013 (survey of the University of Copenhagen, in collaboration with the Open Society Justice Initiative) pp. 48-49. Available from http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/jacobsen_nat-sec-and-rti-in-europe

⁵¹ The Security of Information Act of Canada provides a public interest defence for those who would otherwise be bound by secrecy laws. It provides that no person is guilty of an offence under sections 13 or 14—which makes it an offence for anyone “permanently bound to secrecy” to intentionally and without authority communicate or confirm “special operational information”—if they can establish that they “acted in the public interest”. This means that they must show they acted in order to disclose an offence and that “the public interest in the disclosure outweighed the public interest in non-disclosure”.

identify the relevant actors, which ones receive most reports and how effectively they respond to such reports. Such an exercise is important to ensure any new reforms do not undermine the good practice that already exists.

The rationale for a stepped or tiered disclosure regime

In Ireland and the United Kingdom, for example, the decision was made to adopt a three-tier approach for protecting workplace whistleblowers in the public and private sectors: the first tier is internal reporting to the employer or another person according to the authorized procedure by the employer; the second tier is reporting to an authorized person or the Minister; and the third tier is wider disclosures. Reflecting the two countries' legal and oversight systems, the strongest protection is provided for internal reporting, which essentially means that the basis for protection will be easier to prove in a prima facie case. So while not making it a requirement that a disclosure must first be made internally, the design of the law still reflects a preference for internal reporting, as protection could be achieved more easily. In both countries, workplace whistleblowers can disclose information to the media in exceptional circumstances, but only if specific conditions have been met, including that the individual has a reasonable belief that he or she would be retaliated against by the employer if the case were raised internally or with a competent authority.

In 1996, and in the context of good governance, the Committee of Standards in Public Life of the United Kingdom,⁵² whose work helped inform and influence practice on whistleblowing across and beyond the public sector in the United Kingdom, observed that:

The essence of a whistleblowing system is that staff should be able to bypass the direct management line because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course.⁵³

The Parliamentary Assembly of the Council of Europe has asserted that there should be protection from penalty for public disclosures “where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistleblower”.⁵⁴ This means that public and private sector institutions should consider the establishment and proper functioning of a reporting system and also consider how to provide individuals with alternatives, including protection if such mechanisms do not exist, do not function or cannot reasonably be expected to function.

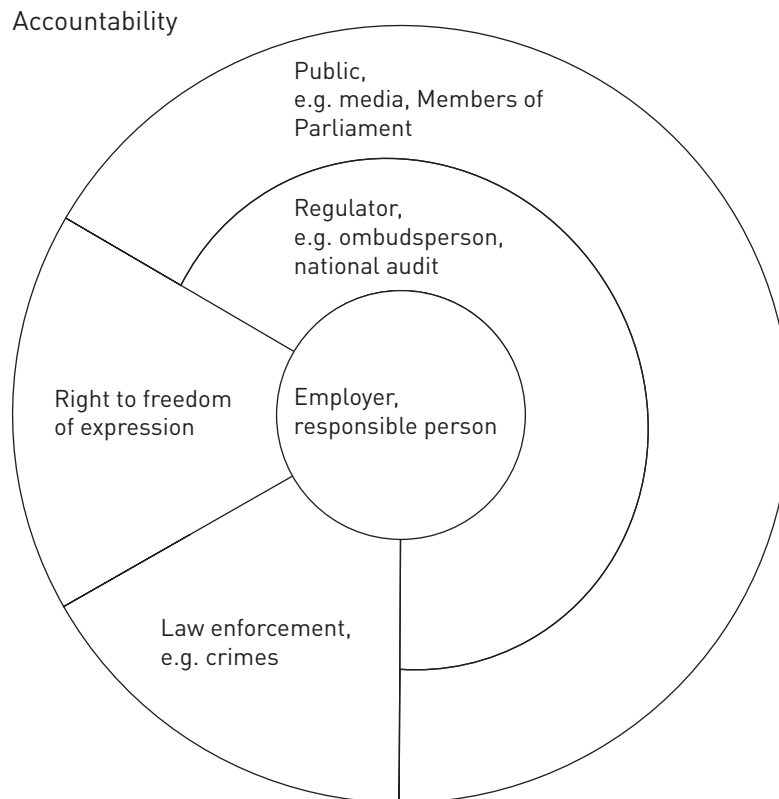
⁵² The United Kingdom Committee on Standards in Public Life was set up in 1994. It is not a parliamentary committee, but reports to the Prime Minister. Its terms of reference are to “examine concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations for changes in present arrangements which might be required to ensure the highest standards of respectability in public life.”

⁵³ Committee on Standards in Public Life, *Third Report* (1996), page 48.

⁵⁴ Parliamentary Assembly of the Council of Europe, resolution 1729, adopted 29 April 2010, arts. 6.1.2, 6.2.3. At least seven European countries (Albania, France, Germany, the Netherlands, Romania, Serbia and the United Kingdom) provide as a defence or a mitigating circumstance for those dismissed or otherwise treated detrimentally at work, the attempted or actual use of internal channels prior to public disclosure. Amanda Jacobsen, *National Security and the Right to Information in Europe*, 2013. Available from http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/jacobsen_nat-sec-and-rti-in-europe

A stepped or tiered disclosure regime, as it applies to the protection of a reporting person, is particularly relevant to those reporting in the context of work and who may be subject to specific duties of confidentiality or loyalty to their employer. In terms of facilitating reports from members of the public, consideration of different tiers relates to the questions of who is accountable for the wrongdoing and who should receive such reports. Access to protection might change if the report is directly addressed to the public at large and not to a competent authority.

Figure III. Accountability and potential reporting channels



Source: Reproduced from the Council of Europe Recommendation on the Protection of Whistleblowers, Explanatory Memorandum, para. 61.

A legislative and institutional framework for facilitating corruption reporting and protecting reporting persons, as set out in UNCAC, should consider the provision of a sensible range of effective as well as potentially alternative channels for reporting. This will help ensure that individuals in the workplace can bypass their managers or go outside the organization, particularly if that is where the problem lies, and thus avoid the creation of a bottleneck or a potential breaking point in the regulatory or judicial system. In some jurisdictions, it has been suggested that individuals should be able to appeal against a decision of a competent authority not to investigate or where there is reason to believe the investigation falls below acceptable standards. In some ways this could be considered as an alternative to parallel reporting channels, particularly in smaller jurisdictions with fewer competent authorities.

The challenge for States parties is to keep all different aspects in mind, to establish clear and coordinated rules and processes to provide reporting persons with alternatives, and to make reporting safer. (Further information on the subject of inter-agency coordination and the handling of reports is captured in chapter II, section E.)

Example: Ghana, list of competent persons to receive reports

The 2006 Whistleblowers Act (Act 720) of Ghana covers all voluntary reporting persons in or outside the workplace. A guide to the Act, developed by the Anti-Corruption Agency (Ghana, 2010), explains that anyone can make a disclosure of impropriety to any of the following persons or institutions and be protected for doing so. It reflects the system of accountability and responsibility in Ghana:

- An employer
- A police officer
- The Attorney-General
- The Auditor-General
- A staff member of one of the intelligence agencies
- A member of Parliament
- The Serious Fraud Office
- The Commission on Human Rights and Administrative Justice
- The National Media Commission
- The Narcotics Control Board
- A chief
- The head or elder of the whistleblower's family
- A head of a recognized religious body
- A member of a district assembly
- A Minister of State
- The Office of the President
- The Ghana Revenue Commission
- A District Chief Executive

Source: Ghana Anti-Corruption Coalition (2010). *A Guide to Whistleblowing in Ghana*. Available from <http://wacmn.gaccgh.org/downloads/files/A%20Guide%20to%20Whistleblowing%20in%20Ghana1.pdf> and <http://www.track.unodc.org/LegalLibrary/pages/LegalResources.aspx?country=Ghana>

1. Internal reporting arrangements

Even in jurisdictions where the law specifically protects those who report wrongdoing to a competent authority external to their employer, most people choose to first report information about wrongdoing or malpractice within their workplace to a supervisor, a department head, or someone responsible for investigating such issues.⁵⁵

⁵⁵ According to research conducted in 2013 by Public Concern at Work and the University of Greenwich on 1,000 British whistleblowing cases, in 82 per cent of the cases, individuals raised their concerns to their employers first. See Public Concern at Work and University of Greenwich (2013). *Whistleblowing: The Inside Story. A study of the experiences of 1,000 whistleblowers*. PCaW: London. Available from <http://www.pcaw.org.uk/whistleblowing-the-inside-story>. A 2010 report from the Ethics Resource Center found that only 4 per cent of whistleblowers in the United States made their disclosures outside the corporate system, and only 3 per cent to hotlines; 46 per cent went to their supervisor. See Ethics Resource Center (2010). *Reporting: Who's Telling You What You Need to Know, Who Isn't, and What You Can Do About It*. Supplemental Research Brief: 2009 National Business Ethics Survey. Available from <http://ethics.org/files/u5/Reporting.pdf>

Public sector

It is increasingly considered good practice for employers in all sectors to encourage those who work for them to communicate any information or concern they have that could adversely affect the service they are meant to deliver, including information about corruption or other wrongdoing or malpractice. The Council of Europe's Explanatory Memorandum to the Recommendation on the Protection of Whistleblowers, which applies to those working in the public and private sectors, states:

The encouragement for internal reporting is given in the recommendation because setting up effective reporting systems is part of good and transparent management practice and governance and together with reports to public regulatory authorities, enforcement agencies and supervisory bodies, they can contribute in many cases to the early and effective resolution of risks to the public interest.⁵⁶

Interestingly, research indicates that where a company or a public service makes the effort to ensure that those who work for them can raise matters of concern, including poor standards of service, systemic risks as well as misconduct issues, they are not only more trusted by their staff and the public, but they are also perceived as providing a higher-quality service.⁵⁷

The Federal Public Interest Disclosure Act 2013 of Australia, and most Australian state legislation since the 1990s, contains a strong framework by which all public bodies must have in place and implement internal reporting and protection procedures. These must be consistent with best practice standards promulgated by central oversight agencies and are usually centrally audited and monitored.⁵⁸ International good practice includes ensuring that reports can be made in confidence and to senior management in good time, thus bypassing the normal hierarchy whenever necessary.⁵⁹ This is important, as there are also countries that require public officials to report cases in writing to their supervisors. While both requirements (written form and single reporting channel) may be well-intended, they can in fact have the opposite effect. Limitations on possible reporting channels can risk reducing internal reporting.

⁵⁶ Council of Europe Recommendation CM/Rec (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, page 13. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>

⁵⁷ A small survey of nurses in the National Health Service of the United Kingdom in 2008 found that 80 per cent of nurses who said their organization promotes whistleblowing well also described their organization as having an open or very open relationship to the public. Where organizations do not promote whistleblowing, only 34 per cent of nurses answered similarly. Available from <http://www.pcaw.org.uk/nhs-care-papers>. In 2010, the Corporate Executive Board released details of its survey of 500,000 employees in over 85 countries, which found a direct relationship between a culture of integrity in the workplace and a lower incidence of misconduct. Twelve indicators were used, and the one that most strongly correlated with a higher level of long-term shareholder return (over 10 years) was employee comfort in speaking up. A lack of fear of retaliation was identified as a key element in ensuring comfort. Available from <http://news.executiveboard.com/index.php?s=23330&item=50990>

⁵⁸ See generally, Brown, A. J. (2013). "Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience", *E-Journal of International and Comparative Labour Studies*, September/October, 2(3): 153-182. For examples of the minimum and recommended content of such procedures, see the online Public Interest Disclosures Guidelines of the New South Wales Ombudsman, Australia, prepared under the Public Interest Disclosures Act 1994 (NSW). Available from <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures>

⁵⁹ There are a number of resources available regarding internal arrangements, including: OECD (2012), CleanGovBiz Toolkit on Whistleblower Protection. Available from <http://www.oecd.org/corruption/ethics/whistleblower-protection.htm#Resources>; British Standards Institute (2008), Whistleblowing Arrangements Code of Practice (2008). Available from <http://shop.bsigroup.com/forms/PASs/PAS-1998/>; Public Concern at Work (2013) Whistleblowing Commission, Code of Practice for effective whistleblowing arrangements. Available from <http://www.pcaw.org.uk/whistleblowing-commission>. Further resources are listed in the annex to this Guide.

The United Kingdom Committee on Standards in Public Life recommended that good internal arrangements are ones that:

- Provide examples that distinguish whistleblowing from grievances.
- Give staff the option to report a matter outside of line management.
- Provide access to an independent helpline offering confidential advice.
- Offer staff a right to confidentiality when reporting their concerns.
- Explain when and how a concern may be safely raised outside the organization (e.g. to a regulator).
- Provide that it is a disciplinary matter: (a) to victimize a bona fide whistleblower; and (b) for someone to maliciously make a false allegation (i.e. to deliberately report information they know to be untrue).⁶⁰

Any obligations on public services or other organizations to implement internal arrangements for reporting should be proportionate to their size and to the level of risk their activities pose to the public interest (e.g. toxic waste disposal) or their vulnerability to corruption (e.g. running high-value infrastructure projects). The processes for reporting should be clear and simple, as overly onerous or complex procedures will deter reporting.

Examples from different jurisdictions demonstrate that there a number of ways to encourage a more open culture for raising concerns and to provide clear alternatives where the normal routes are blocked, deliberately or otherwise. In the public sector, central and local government departments can designate someone at a senior level or someone outside the management hierarchy who has the power to initiate an investigation and can take action to protect staff against reprisals. Those could be institutional ethics officers, ombudsmen or similar roles.

In some jurisdictions, for example, the role of an ombudsman is very important, and in the public sector, an ombudsman with independent powers who reports directly to parliament is usually considered part of the public service rather than external to it. The Government of the Region of Flanders, in Belgium, for example, has involved the Ombudsman in its whistleblower protection scheme.⁶¹

Example: Code of Conduct, Government of Flanders, Belgium

The Government of Flanders has implemented a Code of Conduct that sets out the general principles, rules and agreements with which staff members must comply. It states that the arrangements and principles of conduct are based on values taken from the Flemish staff regulations and value-related competences, and explains that the Code refers to existing legislation and other codes relating to integrity within the Flemish authorities.

The section entitled “Reporting irregularities” describes what staff members can and should do if facing an ethical dilemma or a more serious irregularity, including how to report it. There are also ethics officers in each department to whom staff can go in confidence with questions or to seek more information about what to do in specific circumstances. This approach combines the preventive value of encouraging staff to speak up early with the potential for serious irregularities—misconduct or criminality—to be detected:

⁶⁰ As reproduced in Whistleblowing Arrangements Code of Practice, PAS 1998:2008, British Standards Institute, page 3. Available from <http://shop.bsigroup.com/forms/PASs/PAS-1998/>

⁶¹ See the website of the Flemish Parliament: <http://www.vlaamsparlement.be/Proteus5/showPersbericht.action?id=8792>

Reporting irregularities

In an ethical organization everyone takes responsibility. You think about the various values and standards that apply to a concrete situation. In case of doubt you consult with your superior and together look for a suitable solution. In case of irregularities the duty to speak applies. If you observe violations of ethics, you take appropriate action, depending on the gravity of the violation. If necessary you tackle colleagues about it and you report the violations to the authorised bodies.

It all depends on the nature of the violation. Is it a colleague making a photocopy for private use or a real case of fraud? Naturally it is also important whether you only suspect that there is a violation or whether you can present tangible evidence of that violation.

On the website <http://www.bestuurszaken.be/integriteit> you will find an overview of the various contacts and departments where you can go with questions about ethics and to report violations. On the website you will also find more information about the whistle-blower protection scheme that you can request from the Flemish Ombudsman service and that will offer you protection if you fear that your report has negative consequences for you.

Source: See the Government of Flanders web page on the Integrity Coordinator. Available from <http://www.governance-flanders.be/integrity-0>

Private sector

Many large corporations have internal reporting mechanisms and regulators sometimes require certain standards, which may include systems for whistleblowing, in order for companies to be publicly listed. The points mentioned above in relation to the public sector, in particular that the mechanisms should be proportionate to the size of the organization and that alternatives should be available, are equally relevant for the private sector. The crucial aspect is that an employee should know where to address alleged wrongdoing.

The next step is the consideration of how an employee could be protected if he reported internally and subsequently was retaliated against. Ireland and the United Kingdom, for example, include protection for these cases in their laws.

In the private sector in the Netherlands, unions and employers have developed a code of practice to guide the conduct of employers and encourage responsible use of arrangements and policies by employees. These efforts build on existing common values of service and conduct across all workplaces. It is clear that employers and heads of services in all sectors should endeavour to ensure that there is adequate training for those charged with responsibility under any whistleblowing or reporting arrangements on how to handle reports and individuals fairly, and to ensure the arrangements are clearly explained to all staff members and working partners (e.g. volunteers, contractors, etc.)

Example: The Netherlands Labour Foundation's Statement on Dealing with Suspected Malpractices in Companies

The Ministry of Social Affairs and Employment in the Netherlands commissioned a study and found that both employers and employees wanted a code of conduct to help them put in place the necessary reporting arrangements. The Labour Foundation was asked

to work on such a project and the result was a Statement on Dealing with Suspected Malpractices in Companies (3 March 2010, updated August 2012). The following is an excerpt from the introduction:

The Labour Foundation is happy to comply with this request. In its view, it is important to lay down conditions enabling employees to bring any malpractice within their companies to light without putting themselves at risk, giving their employers an opportunity to rectify it. Not only is this safer for the employees involved, but it is also in the interests of companies since management should be made aware of suspected malpractice as soon as possible so that it can take steps against them. In addition, it may be possible to resolve the situation before the employee is forced to resort to whistleblowing [i.e. outside the company.] The Foundation's statement is intended as an initial step towards creating company or industry-level guidelines for reporting suspected malpractice.

2. Reporting to competent authorities

The role of competent authorities, including ombudspersons, independent regulators and enforcement bodies, is crucial because they have an oversight remit that rises above working relations within and between public sector and other organizations and, often, national politics as well. The heads of such authorities tend to be experts in their field and their experience helps ensure that reports made to them are handled effectively and professionally. Furthermore, the capacity of regulatory and supervisory authorities to ensure the activities or bodies that they oversee are operating properly depends on the information they gather or receive from many sources, including directly from the bodies themselves.

One source of information for competent authorities are members of the public. Reports from the public may tend to take the form of a complaint about poor service that directly affects them.

Complaints may well come from disgruntled or upset clients or other stakeholders. However, they can provide agencies with valuable information about specific acts of corruption or misconduct. They may also help identify poorly-functioning staff or divisions. Identifying and improving these poor practices could reduce the opportunity for corrupt conduct.⁶²

Some members of the public will bypass the service where they think the problem lies and report directly to a competent authority—perhaps as a result of the authority promoting a reporting mechanism such as a telephone hotline. Again, some reports will not fall within the remit of the authority and some will be better dealt with as a complaint requiring individual redress. In any event, if there is any doubt about what course of action is appropriate, it would be prudent to ask the individual how they wish to have the matter pursued. In New Zealand, information can be transferred between authorities, but the person who originally reported the matter must be informed.⁶³

Information from inside sources (from those working in a particular sector or industry, for example) can help competent authorities focus their energies and resources more effectively and efficiently. In New Zealand, the Ombudsman's Office has jurisdiction to

⁶² See the website of the Independent Commission against Corruption of New South Wales, Australia: <http://www.icac.nsw.gov.au/preventing-corruption/detecting-corrupt-conduct/complaints-and-grievances/4881>

⁶³ New Zealand (2000). Protected Disclosures Act, section 16.

receive “protected disclosures” and takes an overall lead in guiding individuals on making a disclosure and in reviewing investigations conducted by public sector organizations, including by taking the investigations over when necessary or by escalating them to another agency or ministry.⁶⁴ The law lists other “responsible persons” with remits over specific areas, including the Commissioner of Police, the Controller and Auditor-General and the Health and Disability Commissioner, to whom disclosures can be made.

In the United Kingdom, a single law to protect workers in all sectors includes a list of “prescribed persons” or bodies to whom disclosures can be made rather than to an employer or via a reporting channel established by the employer. There is no requirement to first report internally in the United Kingdom, nor in many other jurisdictions that have adopted specific whistleblower protection laws. Such “prescribed” bodies include the Financial Conduct Authority, the Office of Rail Regulation, the National Crime Agency and the Children’s Commissioner for England.⁶⁵

In most cases, any information falling within the remit of a competent authority is automatically accepted regardless of its source. In the case of the Dodd-Frank Law (2010) of the United States, for example, a new Office of the Whistleblower was added to the existing regulator, the Securities and Exchange Commission, to specifically administer its whistleblower protection programme.

In many jurisdictions, bodies have been established with specific mandates to address corruption and receive reports of corruption or corruption-related information from the public, in accordance with article 13(2) of UNCAC. The Anti-Corruption and Civil Rights Commission of the Republic of Korea is interesting in terms of recent innovations to combine anti-corruption and public interest whistleblowing.

Example: Anti-Corruption and Civil Rights Commission, Republic of Korea

The Anti-Corruption and Civil Rights Commission (ACRC) of the Republic of Korea was created in 2008 by combining the Independent Commission against Corruption with the Ombudsman and the Administrative Appeals Commission. This means that reports on corruption and a wide range of public interest matters can be made to the ACRC. The ACRC does not investigate the reports of corruption itself, but passes the cases to other bodies. Importantly, the ACRC retains oversight of the cases and the time limits that apply for dealing with them.

There are two laws governing the protection of reporting persons and workplace whistleblowers in the Republic of Korea: the Anti-Corruption Act, 2002, which covers whistleblowing in the public sector, and the Act on the Protection of Public Interest Whistleblowers 2011.

Public sector workers can disclose information related to corruption or any violation of the Code of Conduct. The public interest matters under the Protection of Public Interest Whistleblower law cover a wide range of information, including public health and consumer issues, environmental risks, etc., and violations which relate to 180 Korean laws.

Between 2002 and 2013, approximately 28,000 reports were filed with the ACRC. Of these, 1,000 were referred to investigative agencies and 9,680 were forwarded to other agencies. Out of the 1,000 cases investigated, 907 cases were substantiated (meaning that they

⁶⁴ See the New Zealand Protected Disclosures Act (2000). Available from <http://www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html>

⁶⁵ There are over 65 listed “prescribed persons”. See <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2>

were judged to be related to corruption) and codes of conduct violations were found in 430 cases.

During the same period, the ACRC received 181 requests for protection—146 related to concerns about employment, 22 requesting physical protection and 13 asking for their confidentiality to be guaranteed. The ACRC ordered corrective action as a result of employment retaliation in 48 cases. It has the power to do so under article 62 of the Protection of Public Interest Whistleblower Law, by requiring the Minister of Public Administration and Security or the head of the appropriate public organization to take the necessary steps and to inform the Commission of the result. The ACRC also provided physical protection to all 22 persons who requested it; the Commission can request protective measures from the Commissioner General of the Korean National Policy Agency, the chief of a local police agency or the chief of the competent police station (article 64). The law also makes it clear that it is prohibited for any employee of the ACRC or any investigative agency to which a matter of corruption has been referred to “disclose or suggest the identity of the informant, complainant or whistleblower” without his or her consent. Disciplinary action was taken in four cases where the individuals’ identity was revealed.

In 2006, the ACRC introduced the possibility for reporting persons to receive award money. It can provide reporting persons with rewards of up to US\$ 2 million if their report of corruption contributes directly to recovering or increasing revenues or reducing expenditures for public agencies. Also, the ACRC may grant or recommend awards if the whistleblowing has served the public interest. The total amount awarded in 63 cases since 2006 is approximately US\$ 487,000. Since 2002, however, the amount of money recovered by the ACRC from 220 reports of corruption reached approximately US\$ 60 million.

The Commission is currently shifting its protection paradigm from an ex post facto system to a pre-emptive and preventive one by focusing on:

- The foundations for a protection system by recommending that agencies set up their own protection policies and arrangements.
- Promoting the importance of whistleblowing through customized activities and education programmes for business, public organizations and the wider public (and by signing memorandums of understanding with top companies).
- Introducing an interim relief system to suspend any actions that would place a whistleblower at any disadvantage during an investigation.
- Whether or not to provide financial rewards on an ongoing basis.

For more information about the ACRC and the laws that regulate its functions, see: <http://www.acrc.go.kr/eng/index.do>

While there is a tendency for jurisdictions with similar legal and cultural systems to adopt equally similar reporting mechanisms and models of protection, States are advised not to assume that these can always be quickly assimilated into their existing systems without having conducted proper consultations and assessments on their own national situation.

Some key factors that have been identified as underpinning the effectiveness of a competent agency are its ability to carry out its functions impartially and without undue influence, clear and unambiguous powers to perform its functions—whether to investigate and prosecute wrongdoing or to protect reporting persons in cases of retaliation or both, publication of the results of its work, and the necessary resources to fulfil its mandate.

The New Zealand Protected Disclosures Act amends the Human Rights Act and makes it unlawful to treat internal reporting persons less favourably than others in similar circumstances. The system in New Zealand separates the handling and investigation of the substance of a disclosure from the handling of complaints of reprisals for having made a report. Complaints of victimization made by a reporting person are handled in the first instance by the Human Rights Commission (for further information see chapter II, section E.2).

3. Wider disclosures (external) and public accountability

In all jurisdictions, there is the possibility that information about wrongdoing may not be properly assessed or investigated by those specifically charged or required to do so. Around the world, individuals have put themselves at risk in order to alert the authorities and the wider public of significant issues, including corruption. In Canada, for example, a civil servant disclosed suspicions of fraud to his supervisor and to his trade union that helped to reveal millions of misspent public funds in a sponsorship scandal that extended to the top of the governing political party.⁶⁶

While it is preferable that suspected wrongdoing is addressed early and close to the source of the problem, this is not always possible, and alternative channels for reporting wrongdoing should be considered in line with international human rights standards. In practice, in certain circumstances, it may only be by virtue of public disclosures of information that corruption is properly identified and effective action is able to be taken.

Article 33 of UNCAC regulates cases in which reports are made to competent authorities, and State parties also need to consider their responsibilities under article 13 of UNCAC, which calls on them to take appropriate measures to promote the active participation of society in anti-corruption efforts, including under paragraph 1 (*b*): “ensuring that the public has effective access to information”; and (*d*) “respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption”.

Community groups and non-governmental organizations

Individuals may choose to contact a community group or a non-governmental organization (NGO) with information about wrongdoing, either because they are more familiar with them or because they are wary of going directly to the authorities. Civil society groups often work in their communities and develop specialist skills in advocating for various improvements for local populations, whether it is to improve access to education, health and water, or to protect civil rights and the environment. Increasingly, civil society groups are focusing on tackling corruption at local and national levels on the basis that corruption blocks the achievement of sustainable progress.

Some NGOs report information about wrongdoing directly to the authorities without naming their source; others collect information from a number of different sources, conduct their own research and then engage in advocacy on the basis of this work. While much of this work is well respected and effective, in some jurisdictions NGOs are unable to offer anything more than limited protection to reporting persons—usually by handling the information they receive sensitively.

⁶⁶ Commission of Inquiry into the Sponsorship Program (Gomery Commission), 2006, chapter VII: Audits and Investigations. Available from <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm>

Increasingly, however, civil society is harnessing new technologies in innovative ways in order to detect wrongdoing and protect reporting persons. Civil society is also creating hybrid organizations that combine investigative journalism skills with advocacy, and some identify the protection of whistleblowers as one of their main missions. This requires awareness of the legal system and specialized skills.

While civil society can play an important role in facilitating the flow of information and ensuring that it gets to the right place, it does not replace the work of competent authorities to conduct official investigations, bring cases to trial or initiate regulatory reforms as a core part of their duties. Law enforcement authorities, for instance, need to be provided with sufficient capacities, powers and resources to investigate wrongdoing and to protect reporting persons, which leads to reinforced trust in the justice system.

Media

Some research suggests that disclosing wrongdoing to the media can be more effective in prompting action to address the wrongdoing than reporting it internally (i.e. reporting suspected wrongdoing to one's employer).⁶⁷ Governments need to consider why this might be the case and what they can do to prompt an earlier and more effective response to reports of corruption or other suspected wrongdoing. The research findings can also be seen as reinforcing the importance of strengthening the effectiveness and trustworthiness of arrangements to handle reports that are made internally and to competent authorities.

Some authorities, particularly those working in the field of corruption, monitor the media for information about possible wrongdoing or risk, and use such information to initiate their own inquiries. Freedom of the press to report on matters of public interest, including corruption, is a vital public interest safeguard and States parties are encouraged to ensure that press freedom and the protection of journalists and their sources is assured in line with international standards.⁶⁸ For reporting persons, this is clearly a way to get important information addressed and be protected to some extent.

Some national laws allow, under certain circumstances, disclosures to be made to the media or otherwise externally whereby legal protections are granted to whistleblowers. These include the Protected Disclosures Act (2014) of Ireland, under the specific circumstances of article 10, the Law on the Protection of Public Officials Complaining about Violations of the Law (2004) of Romania and the Law on the Protection of Whistleblowers (2014) of Serbia. The Romanian law is notable because it allows disclosures to be made to the media without restriction.

Although Sweden currently has no dedicated whistleblower protection law, both its Constitution and its Freedom of the Press Act protect the right of public officials to

⁶⁷ One study showed that 44 per cent of those who reported directly to a competent authority or to the media thought that their organization had changed its practices as a result. The same study showed that only 27 per cent of those who reported suspected wrongdoing to their employer thought anything changed as a result. See Rothschild, J. and T. D. Miethe (1999). "Whistleblower Disclosures and Management Retaliation", *Work and Occupations*, 26(1), 107-128. Another suggested reporting wrongdoing directly to a regulator or to the media is more effective because it prompted the organization to properly investigate the matter and take other remedial actions. See Dworkin, T. M. and M. S. Baucus (1998). "Internal vs. External Whistleblower: A Comparison of Whistleblowing Processes". *Journal of Business Ethics*, 17(12), 1281-1298.

⁶⁸ The right of protection of sources emanates from the Universal Declaration of Human Rights and the International Covenant on Civil Political Rights (ICCPR). Article 19 (2) states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The article is a qualified right which only allows for restriction in certain limited cases when those are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

communicate directly to the media or otherwise externally as a mechanism of public transparency and accountability. This means that, subject to certain limited exceptions (e.g. related to aspects of national security), a public sector employer is prohibited from disciplining an employee for providing information to the media and has no right to inquire whether someone has been in touch with the media. Anyone who intentionally violates this prohibition on enquiries may be fined or sentenced to imprisonment for no more than one year. The system depends to a large extent on the Parliamentary Ombudsman and the Chancellor of Justice, who investigate cases of retaliation and any illegal investigations into media sources. While prosecutions are in fact rare, public employers who engage in such prohibited activities are “named and shamed” in published decisions. The constitutional principle applies to employees of municipal companies and of specific bodies listed in an annex to the Swedish Official Secrets Act.⁶⁹ In accordance with this constitutional protection, public sector employers can also be fined or sentenced to prison if they retaliate against a whistleblowing employee. The criminalization of retaliation is relatively new, and while there have been cases, none of them have led to convictions.⁷⁰ So, while several public authorities in Sweden have systems for whistleblowing, they can never circumvent the constitutional right to provide information to the media.

Human rights jurisprudence on freedom of opinion and expression provides further useful guidance to States parties when considering whistleblower protection.

(a) Human rights law

Article 13 of UNCAC reflects and supports international human rights instruments, particularly with regard to freedom of expression and access to information.⁷¹ These instruments include the Universal Declaration of Human Rights (UDHR), the Covenant on Civil and Political Rights (ICCPR), the United Nations Guiding Principles on Business and Human Rights, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, the United Nations Declaration on Human Rights Defenders, and other regional rights instruments, including the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

In recent years, the European Court of Human Rights (ECHR) has made a number of rulings⁷² in relation to reporting persons on the basis that their right to freedom of expression granted by article 10 of the European Union Charter of Fundamental Rights was interfered with.⁷³ It should be noted, though, that these cases have typically occurred

⁶⁹ Sweden (2009). Public Access to Information and Secrecy Act. Available from <http://www.government.se/content/1/c6/13/13/97/aa5c1d4c.pdf>

⁷⁰ Supreme Court judgement 29 October 2001, case number B619-01/NJA 2001 s. 673

⁷¹ For further information on this subject, see also: UNODC, *Reporting on Corruption – A Resource Tool for Governments and Journalists*.

⁷² See also *Sosinowska v. Poland* [no. 10247/09, 18 October 2011]; *Poyraz v. Turkey* [no. 15966/06, 7 December 2010]; *Kudeshkina v. Russia* [no. 29492/05, 26 February 2009]; *Marchenko v. Ukraine* [no. 4063/04, 19 February 2009].

⁷³ The European Court of Human Rights has held that “Article 10 of the Convention applies when the relations between employer and employee are governed by public law but also can apply to relations governed by private law [...]” and that “States have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals” (*Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000).

Article 10 is a qualified right that allows interference with an individual’s freedom of expression in certain circumstances and so long as: (a) it is prescribed by law; (b) the interference pursues a legitimate aim (such as protecting the reputation or rights of others, national security or territorial integrity, or preventing the disclosure of information received in confidence); and (c) the interference is only to the extent necessary and proportionate in a democratic society. It is established that the Court must look at “whether the ‘interference’ complained of corresponded to a ‘pressing social need’, whether it was ‘proportionate to the legitimate aim pursued’, whether the reasons given by the national authorities to justify it are ‘relevant and sufficient’ under Article 10. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts...” *Sunday Times (no. 1) v. the United Kingdom*, 26 April 1979, § 62, Series A, no. 30.

in relation to information that has been put in the public domain and that such disclosures are only protected in exceptional circumstances. In the context of reporting persons, this occurs most often when someone in a working relationship makes information public (typically via a journalist, but not always) that they believe will not be addressed any other way. The person is then sanctioned—dismissed or prosecuted—on the basis that they have breached their own obligations or that other important interests or rights have been breached or violated. These can include, inter alia, third-party rights to privacy and reputation, as well as the interests of employers or the State in keeping certain information confidential or secret.

Case example: Protection of a public official who leaked documents to the press

Mr. Iacob Guja was Head of the Press Department of the Prosecutor General's Office of Moldova. After proceedings against four policemen for mistreating suspects were dropped, Mr. Guja sent the press two letters about the case that revealed that the proceedings may have been dropped for improper motives. One of these letters was from a high-ranking official in the Parliament. Mr Guja was dismissed because the letters were held to be secret (though they were not marked as such) and because he did not consult superiors before passing them to the press.

Mr. Guja sought reinstatement, arguing, inter alia, that the letters were “not classified as secret in accordance with the law”, that he was not required to consult the heads of other departments before contacting the press, and that his dismissal breached his right to freedom of expression (para. 22). The Chisinau Court of Appeal dismissed the action and on appeal, the Supreme Court of Justice affirmed, explaining that “obtaining information through the abuse of one's position was not part of freedom of expression” (para. 25).

On appeal to the European Court of Human Rights, the Court stated (para. 72) that “... a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.”

The Court held that there had been a violation of article 10 and that, under the circumstances, external reporting, “even to a newspaper”, could be justified. It noted in particular: (a) the importance of the issues, which the public had a legitimate interest in being informed about and which fell within the scope of political debate (para. 88); and (b) that neither the law, nor the internal regulations of the Prosecutor General's Office contained any provision concerning the reporting of irregularities by employees, and there was no evidence to counter the applicant's argument that alternative channels (the top echelons of his office or the Parliament) would have been ineffective in the special circumstances of the case (paragraphs 80-84).

Source: *Guja v. Moldova*, European Court of Human Rights, 12 February 2008. Available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016#%7B%22itemid%22:%5B%22001-85016%22%7D>

In *Guja v. Moldova*, the ECHR identified six principles for determining whether an interference with rights under article 10 was “necessary in a democratic society”. These guiding principles have been applied in a number of cases since, including *Heinisch v.*

Germany,⁷⁴ which involved a private sector nurse who disclosed information about patient care by means of a criminal complaint and subsequently to the public. Another case is *Bucur and Toma v. Romania*,⁷⁵ which involved an employee with the Romanian Intelligence Service who disclosed information about serious irregularities in the records and justification for wiretaps conducted on several journalists, politicians and businessmen (Toma was a journalist whose phone was wiretapped).

The latest judgement of the ECHR with respect to the protection of whistleblowers was handed down in January 2015. The court ruled that Latvia had violated the article 10 rights of Andris Rubins, a Medical Professor at Riga Stradiņa University. The university abolished Rubins' academic department in 2010 after he reported allegations of mismanagement of university finances and a lack of checks and balances in management. Judges voted 5-2 in his favour, and awarded Rubins €10,280 in damages and costs.⁷⁶

Guiding Principles identified by the European Court of Human Rights

1. Whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure

In *Heinisch v. Germany*, the Court underlined some key considerations: Seeking previous internal clarification of allegations could not reasonably be expected of an employee if the latter had obtained knowledge of an offence that, if he or she failed to report it, would render him or her liable to criminal prosecution. In addition, prior internal clarification of a matter was not required if redress could not legitimately be expected. If, for instance, the employer failed to remedy an unlawful practice even though the employee had previously drawn his attention to that practice, the latter was no longer bound by a duty of loyalty towards his employer. The Court further noted that similar reasoning was reflected in the Parliamentary Assembly's guiding principles on the protection of whistleblowers, stipulating that where internal channels could not reasonably be expected to function properly, external whistleblowing should be protected.

2. The public interest in the disclosed information

The Court, in *Guja v. Moldova*, noted that "in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial

⁷⁴ *Heinisch v. Germany* [no. 28274/08, 21 July 2011]. Ms. Heinisch was a nurse working in a home for elderly people. She was dismissed when, after her management failed to act on her reports of serious deficiencies in patient care, she lodged a criminal complaint alleging fraud. The German court upheld her dismissal, holding that the criminal complaint amounted to a disproportionate reaction to the denial of her employer to recognize shortcomings and that she had breached her duty of loyalty towards her employer. In its judgement, the European Court of Human Rights recognized that employees have a duty of loyalty and stated, "consequently disclosure should be made in the first place to the person's superior or other competent authority. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public." The Court looked at this case in line with the principles established in *Guja* and concluded that article 10 had been violated.

⁷⁵ *Bucur and Toma v. Romania* [No. 40238/02, 13 June 2013]. The following is an edited version of the summary Available from <http://www.right2info.org/cases/r2i-bucur-and-toma-v.-romania>. In 1996, Mr. Bucur reported irregularities to his head of the department about records completed in pencil and which offered no justification for wiretapping the phones of several journalists, politicians and businessmen. He was reprimanded. He then contacted a Member of Parliament serving on the Parliamentary Commission for the Control of the SRI (para. 10) who advised him to go to the press. Mr. Bucur held a press conference and made public eleven audio cassettes—making headlines worldwide. He was charged and sentenced by a military court to two years in jail for theft and illegal disclosure of secret information or information relating to the privacy, honour and reputation of the SRI (para. 41). Finally, an appeal was lodged with the European Court of Human Rights. The Court acknowledged the legitimacy of the Government's professed aim—to prevent and punish offences related to national security (para. 82)—but found the interference was not "necessary" in a democratic society when the information disclosed was of such significant public importance (para. 120). The Court added that Bucur had legitimate grounds for believing that the information was true (para. 113), that the public interest in disclosing illegal SRI conduct outweighed the interest of maintaining public confidence in the SRI (para. 115), and that Bucur had acted in good faith (para. 118).

⁷⁶ Judgement, case of *Rubins v. Latvia*, European Court of Human Rights, Strasbourg, 13 January 2015. Available from <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-149204#%7B%22itemid%22%3A%22001-149204%22%7D>

authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”

3. The authenticity of the disclosed information

The Court, in *Guja v. Moldova*, reiterated that freedom of expression carries with it responsibilities, and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable. The Court, in *Bucur and Toma v. Romania*, bore in mind Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe and the need to protect whistleblowers on the basis that he or she had “reasonable grounds” to believe that the information disclosed was true.

4. Any detriment to the employer

Is public disclosure so important in a democratic society that it outweighs the detriment suffered by an employer? In both *Guja v. Moldova* and *Bucur and Toma v. Romania*, the employer was a public body, and the Court balanced the public interest in maintaining public confidence in these public bodies against the public interest in disclosing information on their wrongdoing, finding in favour of the public interest in disclosure.

5. Whether the disclosure is made in good faith

The Court, in *Guja v. Moldova*, stated that it is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it, and that no other, more discreet means of remedying the wrongdoing was available to him or her.

6. The severity of the sanction imposed on the person who made the disclosure and its consequences

The Court, in *Heinisch v. Germany*, for example, stated that the sanction could have a chilling effect on others working in the sector and this works “to the detriment of society as a whole and also has to be taken into consideration when assessing the proportionality of, and thus the justification for, the sanctions imposed on the applicant”.

Note: The order of the six principles is that used by the Court in the case of *Heinisch v. Germany* [see above, note 42].

Thus, it is important that States parties consider how to ensure that protection is extended to persons who report wrongdoing to the media or otherwise publically if it is justified and reasonable to do so given exceptional circumstances.⁷⁷ This recognizes that, in some instances, the public interest in the disclosure can outweigh the value in keeping it secret and will help ensure that States parties meet their obligations under international human rights law to protect freedom of expression, and under article 13(1)(d) of UNCAC, to respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption.

⁷⁷ In cases falling outside the field of national security, this was the approach taken in the United Kingdom under the Public Interest Disclosure Act, 1999 under section 43(G) “Disclosure in other cases.” See also the guidance note on the web page of the Office of the Public Sector Integrity Commissioner of Canada. Available from <http://www.psic.gc.ca/eng/wrongdoing#media>

(b) Protection of journalists' sources

While protecting reporting persons and protecting the right of journalists to protect their sources are different concepts, there are situations in which the two may overlap. It is increasingly considered good practice (and in some jurisdictions constitutionally required) to protect media disclosures as one of the channels for reporting wrongdoing. Many jurisdictions provide for such protection when the wrongdoing is not properly addressed by an organization or the competent authorities. Once a disclosure is made, a journalist should have the right and a duty to protect his or her sources in line with international human rights standards and jurisprudence. In a decision by the European Court of Human Rights, *Tillack v. Belgium*, the Court stressed that the right of journalists to protect their sources is not a “mere privilege to be granted or taken away” and that it is a fundamental component of the freedom of the press.⁷⁸ In a real sense, it is another tool in the armoury of the State to ensure that reporting persons and members of the public can engage safely in tackling corruption. In an era of economic globalization, quality investigative reporting on corruption is proving essential not only to alert the public to the dangers and wrongdoing, but in providing the basis for effective and swift action on the part of government and law enforcement.

“Corruption has evolved into a very sophisticated phenomenon. A local incident gains an international dimension as money moves across borders with a mere click of a button. Companies with an office in one country can be a cover for illicit operations around the globe, individuals can camouflage assets under many complex layers—the list is endless.”⁷⁹

States parties are advised to consult the UNODC guide *Reporting on Corruption: A Resource Tool for Governments and Journalists* for more information and to gain access to further resources on this important area in the fight against corruption.⁸⁰

C. Protections against unjustified treatment

1. Risks for reporting persons

Reporting persons of all types may put themselves in positions of significant personal and professional risk when they report corruption or cooperate with the authorities to tackle any form of malpractice. However, research also shows that individuals will take risks if they believe that it will make a difference⁸¹ and that making a difference is the crucial factor in determining whether or not they will engage with the system. In regard to workplace-related reporting in the private sector, one study revealed that the fear of retaliation, which could take the form of job loss, harassment by peers or restrictions on conditions and access in the workplace, is the main reason why potential informants choose to stay silent.⁸² Both aspects need to be taken seriously and should be addressed.

⁷⁸ *Tillack v. Belgium*, European Court of Human Rights, [No. 20477/05, 27 November 2007]

⁷⁹ UNODC (2014). *Reporting on Corruption: A Resource Tool for Governments and Journalists*, page 1. Available from <http://www.unodc.org/unodc/en/corruption/publications.html>

⁸⁰ *Ibid.*

⁸¹ For example, United States surveys of federal employees in the 1980s repeatedly found that fear of retaliation is only the second reason why some 500,000 employees choose not to blow the whistle. The primary reason is that they “do not think that anything would be done to correct the activity”. See T. Devine (2004), “Whistleblowing in the United States: The gap between vision and lessons learned”, in *Whistleblowing Around the World*, Dehn, G. and R. Calland (eds.), London, British Council, p. 81.

⁸² Miceli, M. P. and J. P. Near, “What makes whistleblowers effective?” *Human Relations*, 2002, vol. 55 (4); US National Business Ethics Survey, “Retaliation: The cost to your company and its employees”, 2009.

While not all those who report will suffer for doing so, experience shows that all too often individuals do face serious reprisals and victimization. This can have a severe impact on their lives and livelihoods and extend to family, friends and colleagues. When this occurs, it has a chilling effect on others who might otherwise have considered reporting but decide it is not worth the risk. States parties must therefore consider carefully what measures can be implemented in law and practice that will allow members of the public and those working within public services and in other organizations to speak up safely. Ensuring that reporting persons and those close to them are protected from physical harassment and other threats to their well-being is also important.

Research from the Columbia University Business School analysed empirical data from a laboratory experiment on the willingness to report lies and its consequences.⁸³ It found that as long as groups stayed fixed, enough individuals were willing to report lies such that lying was of no benefit. However, once groups were able to select their members, the situation changed. Individuals who reported lies were generally shunned, even by groups in which lying was absent. The researchers noted that:

This is an important finding because it implies that reporting dishonest actions is very costly, as reporters can be ostracized even from truthful organizations. This helps explain the dismal careers of employees who are whistleblowers and calls for caution when it comes to policies that reveal their identity. As discussed, avoiding those who report is consistent with [lying-averse] individuals who are generally honest but understand that they might be tempted to lie. [...] Honest individuals might prefer to leave instead of reporting others, or be fired before they have a chance to do so, which would lead to more dishonesty.

More research in this area, including on the public perception of reporting persons, the effect of changes in policy and legislation, and analysis of case examples, would be interesting and very useful for informing further reforms and decision-making.

Potential forms of unfair treatment or reprisal can include, but are not limited to:

- Coercion, intimidation or harassment of the reporting person or relatives
- Discrimination, disadvantage or unfair treatment
- Injury or other capital crime
- Damage to property
- Threat of reprisal
- Suspension, layoff or dismissal
- Demotion or loss of opportunity for promotion
- Transfer of duties, change of location of work, reduction in wages or change in working hours
- The imposition or administering of any discipline, reprimand or other penalty (including a financial penalty)
- Blacklisting (a sector- or industry-wide agreement, formal or informal, that prevents an individual from finding alternative employment)
- Prosecution under civil or criminal law for breach of secrecy, libel and defamation

⁸³ Ernesto Reuben and Matt Stephenson (2013). "Nobody likes a rat: On the willingness to report lies and the consequences thereof", *Journal of Economic Behavior & Organization*, 93 (2013), 384-391.

2. Overview and range of protections

The types of protection that individuals require will vary according to the seriousness of the information they have provided, to whom they report it and how well it is handled. Some of the measures set out here are also protections against actions that could be taken against the reporting person by those who are the subject of an investigation into wrongdoing as a way to divert attention from themselves.

The list below is not exhaustive nor does it consist only of measures that would be considered “protective” in a legal sense. Some are practical measures that have been shown to have a strong protective element, others are legal presumptions. The very fact that competent authorities are required to assess and follow up information reported to them, for example, can be perceived as a form of protection, as it shifts the burden of responsibility to pursue the matter from the shoulders of the reporting person to the competent authority. The Chief of the Office of the Whistleblower at the United States Securities and Exchange Commission also describes timely and regular feedback as an important aspect of “protection”.

Measures with a view to encouraging reports and providing protection when the disclosure is made include:

- A clear legislative and institutional framework.
- Alternative reporting channels.
- Access to information and impartial advice.
- Acceptance of anonymous reports.
- The guarantee of confidentiality.
- Public honour or benefit.
- Physical protection.
- Protection against civil or criminal liability.

Remedial measures taken once reprisal has occurred include:

- A change of supervisor or re-allocation of job duties within the workplace to ensure safety and well-being.
- Temporary or permanent transfer to a post of equal responsibility and remuneration.
- Free access to counselling or other health or social welfare service.
- Reinstatement to the former job.
- Restoring a cancelled permit, license or contract.
- Sanction, transfer or removal of any person found to have engaged in unfair treatment or retaliation.
- Presumption of good faith.
- Presumption of disadvantage (i.e., reverse burden of proof).
- Enforceable compensation for retaliation. (In Norway, for example, compensation may be claimed without regard to the fault of the employee.)
- Compensation for financial losses and loss of career expectation. (In the United Kingdom, there is no limit on financial compensation for unfair dismissal.)
- Award of damages for suffering or pain caused.

While more exceptional protections such as police protection are more likely to be associated with witness protection or criminal cases involving organized crime, they may be needed in cases of other types of wrongdoing and corruption. They might need to apply to a reporting person, a member of their family or other individuals, such as a colleague, not because their evidence is necessarily required for court, but rather because they are targets of serious retaliation (see below “Protection against threat of physical harm”, chapter II, section C.8).

3. Procedural protective measures to facilitate reporting

Ensuring that reporting mechanisms are accessible, safe and secure and that the information is handled professionally will help ensure that individuals do not suffer unjustly for reporting wrongdoing. It is what happens in practice that determines whether individuals develop confidence in the system and continue to engage with it or not.

A key issue is the importance of protecting the identity of the person who reports. In this context, those who handle reports from individuals need to understand the difference between confidentiality and anonymity.

Different types of reporting

Open reporting

Where an individual openly reports or discloses information or states that they do not endeavour to ensure or require their identity to be kept secret.

Confidential reporting

Where the name and identity of the individual who disclosed information is known by the recipient but will not be disclosed without the individual’s consent, unless required by law.

Anonymous reporting

Where a report or information is received but no one knows the source.

(a) Confidentiality

Safety and security in reporting are crucial elements of a system to protect reporting persons and will enable further communication and cooperation with the reporting person; getting this right from the beginning is vital and the protections in law need to be accompanied by adequate systems and procedures in practice.

Offering and guaranteeing confidentiality will reassure reporting persons and ensure that the focus remains on the substance of the disclosure rather than on the individual who made it. For fairness and to sustain trust, the limits of confidentiality should be clearly explained in advance. For example, it should be explained that a guarantee not to reveal someone’s identity without their consent does not stop others from guessing who the source of the information might be, or that it may be obvious who has reported a matter by virtue of the information reported itself.

An increasing number of laws to protect reporting persons now include an obligation on competent authorities and other responsible persons to keep the identity of those who

report wrongdoing to them confidential and to only reveal it with informed consent or by order of a court. According to sections 1 and 8 of the Malaysian Whistleblower Protection Act, for example, officers who receive a disclosure shall not disclose confidential information, which includes: “(a) information about the identity, occupation, residential address, work address or whereabouts of (i) a whistleblower; and (ii) a person against whom a whistleblower has made a disclosure of improper conduct; (b) information disclosed by a whistleblower; and (c) information that, if disclosed, may cause detriment to any person”.

Confidentiality is normally considered the first line of protection for reporting persons. If confidentiality is assured, then it is possible that no other protection mechanism will be needed. While it may require more work on the part of the authority, diligence with respect to procedures for handling the information and protecting the interests of the reporting person is essential. In most instances, the limits of a guarantee of confidentiality are only tested when it becomes clear that the matter cannot be properly resolved without the original source of the information being part of the process—for example, when the evidence of a reporting person may be necessary in order to proceed with a criminal investigation or prosecution. In such a case, informed consent or a court order should be pursued before any further action is taken. The fact that most individuals report wrongdoing in order for it to be addressed means that in many cases their cooperation can be secured with clear explanations as to why it is necessary and strong reassurances as to their own position.

In general, evidence from sources who do not wish their identity to be disclosed is not easily admissible in a criminal trial due to the fair trial rights of the persons accused. But even when the identity of a reporting person as a witness may need to be disclosed to the defence, the reporting person could be entitled to witness protection as required under article 32 of UNCAC. As mentioned earlier in this Guide, whistleblower protection and witness protection can overlap (see also chapter II, section C.4 on this issue). Such witness protection measures may include the protection of a reporting person’s identity during the course of a trial through technical means.⁸⁴

Efforts have been made to balance the rights of the accused against the interests and well-being of witnesses or victims. The European Court of Human Rights, in the case of *Doorson*, explained that:

Article 6 [of the European Convention on Human Rights] does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.⁸⁵

In *Doorson*, the Court also noted that even when “counterbalancing” procedures (e.g. the witness is questioned by an investigating judge in the presence of both counsels, although not in the presence of the defendant) are found to compensate sufficiently for

⁸⁴ UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organized crime*. Available from <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>

⁸⁵ The leading ECHR case in this area is *Doorson v. the Netherlands*, Judgement of 26 March 1996, application No. 20524/92, reports 1996–11, paras. 70 and 76. See also: UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, pages 31 et seq.

the handicaps under which the defence labours, a criminal conviction should not be based either solely or to a decisive extent on anonymous statements.

(b) Anonymous reporting

The principle of confidentiality should not be confused with anonymity, which means that no one knows the source of the information.

When the source of the information is not known to anyone, the practical effect, in the short term at least, is that the individual is not easily the target of reprisal. Article 13 (2) of UNCAC requires States parties, where appropriate, to provide access to members of the public to report to anti-corruption bodies, including anonymously. The recently enacted Public Interest Disclosure Act (2013) of Australia makes it clear that a public interest disclosure may be made orally or in writing and that it can be made anonymously. It also states that a disclosure may be made without the individual asserting that his or her disclosure is being made for the purposes of the law.⁸⁶

A positive aspect of these reporting systems is that persons who do not trust the systems or assume that their reports are handled with a lack of care, might still come forward if they have the possibility to report anonymously.

On the downside, anonymity does present some particular challenges in investigating wrongdoing, particularly because not knowing who the source of the information is makes it more difficult to assess the credibility of the information provided and may preclude the possibility of seeking further clarification. (New tools such as proxy e-mails that enable two-way communication help to address this point.) As a result, it may be harder for any authority to take action on the basis of anonymous information. There are also concerns that anonymous reporting might create more or personally motivated reports.

That said, many authorities have telephone hotlines for reporting wrongdoing, and some, such as Bosnia and Herzegovina, now have online reporting systems that allow for two-way communication. As an indication of the effectiveness of anonymous reports, the Ministry of Defence of Bosnia and Herzegovina said that in the four months from December 2013 to March 2014 it had received 28 anonymous reports of irregularities within the Ministry and armed forces. In 19 cases, the investigations were concluded, while 3 of them were found to be sufficiently proven to be forwarded for further action. One case that was forwarded to investigators concerned the acceptance of money in exchange for the admission to the armed forces. The 28 reports included abuse (8); personnel and recruitment irregularities (7); violation of internal procedures (4); corruption (3); financial and accounting irregularities (1); procurement irregularities (1); theft (1); hate speech (1); and other (2).⁸⁷

The Department of Citizen Services (Dirección General de Atención Ciudadana) of Mexico, for example, runs specialized offices and call centres and uses technological tools such as e-mails and website applications to receive reports of corruption.⁸⁸

⁸⁶ Australia (2013). Public Interest Disclosure Act, section 28. Available from <http://www.comlaw.gov.au/Details/C2013A00133>

⁸⁷ Omeragić, Daniel, "Etička linija MOBiH: Među prijavljenim i general Miložić," *Oslobodjenje*, 25 March 2014. Available from www.oslobodjenje.ba/vijesti/bih/eticka-linija-mobih-medju-prijavljenim-i-general-milozic

⁸⁸ Chevarria, F. and M. Silvestre (2013). Sistemas de denuncias y de protección de denunciantes de corrupción en América Latina y Europa, Documento de Trabajo nº 2. Serie: Análisis Área: Institucionalidad Democrática. Eurosocial: Madrid, page 37. Available from http://biblio.eurosocial-ii.eu/documents/10192/740630/DT_2_Sistemas_denuncias.pdf?version=1.0

Example: An anonymous hotline run by specialized prosecutors, Austria

In the spring of 2013, an online reporting platform for reporting corruption and related criminal offences was launched in Austria for a two-year trial period. It is managed by the Public Prosecutor's Office for White-Collar Crime and Corruption (WKStA). This web-based reporting system technically assures anonymity, as the authorities cannot trace any identifying data through the system, but two-way communication is possible.

The hotline is restricted to accepting reports of information related to criminal offences in the following areas: *(a)* corruption; *(b)* economic crime; *(c)* social fraud; *(d)* financial crime, *(e)* accounting fraud; *(f)* capital market crimes; and *(g)* money-laundering.

Within the first year of operation, 1,200 reports had been submitted, with the following results:

- Five per cent fell within the competence of WKStA.
- Thirty-two per cent fell within the remit of other public prosecution offices and were transferred.
- Twenty-six per cent were transferred to financial authorities; 29 per cent did not indicate further actions (i.e. the initiation of [criminal] proceedings); and 6 per cent reached the threshold for consideration.

There is, as yet, very little or no information available about how many such reports have led to full investigations or prosecutions.

Source: Presentation delivered by the Austrian Federal Bureau for Anti-Corruption (BAK) at the International Anti-Corruption Academy, Vienna, September 2014.

Experience shows, however, that even with technical anonymity individuals can unwittingly submit details that identify them as the reporting person. Care must be taken by the recipient authority to ensure that users understand the limits of the system. It is also important to recognize that not all reporting persons will want or need anonymity.

Thus, the issue of how to include anonymous reporting tools within a system for assisting and protecting reporting persons should be carefully considered and discussed fully with key stakeholders. Both kinds of reporting systems, confidential and anonymous, are already in use in many jurisdictions and are considered valuable tools for receiving information. How effective they are in protecting reporting persons is less well understood. In some parts of the world, anonymous reporting remains controversial and it is arguable that such reporting systems may, in the long run, undermine internal and external accountability.

Some of the issues surrounding accountability and responsibility with regard to anonymity that need to be explored when setting up reporting systems are listed below:

- While the method of disclosure (e.g. via brown paper envelope or encrypted internet channel) may protect the identity of the source of the information, it does not mean that it cannot be deduced or guessed from the information itself.
- Information from anonymous sources is rarely admissible as evidence in courts (see below).
- Anonymous disclosures can result in someone else being suspected of making the disclosure and thereby suffering for it.
- Anonymous reporting systems have caused concern in terms of the fair collection of private data, in particular among European data protection authorities, and

has resulted in additional requirements being imposed on company hotlines, for example the inclusion of rules to limit the length of time such information can be retained.⁸⁹

- Research indicates that those receiving anonymous information attribute lower credibility to it and allocate fewer investigatory resources to it.⁹⁰
- Anonymous whistleblowing is still closely associated with anonymous informing (often on neighbours) that has occurred and occurs under totalitarian regimes, or with malicious informing on political opponents.
- Without advanced features in reporting systems, anonymity makes it impossible to liaise with the individual, to seek clarification or more information, to reassure them about their position or to give them feedback.⁹¹
- Anonymous reporting systems might still generate valuable information (investigative leads and corruption analysis).
- The use of proxy communications as a means of encouraging an anonymous whistleblower to come forward at a later date should the report be needed as evidence.

The issue of protecting the identity of a reporting person can also present itself in the context of internal disciplinary procedures with respect to natural justice principles of the right to a fair hearing for those alleged to have committed an act of corruption. In the United Kingdom, the case of *Linfood Cash and Carry Ltd v. Thompson* established early guidelines on how to maintain a fair balance between the rights of the witnesses and the persons alleged to have committed wrongdoing.⁹²

(c) Means of reporting

In many ways, the advent of new technologies, including computers, e-mail, SMS text messaging, smartphones and mobile applications, has changed the way individuals communicate with each other and with their governments at the local and national levels. Greater amounts of information and data can be exchanged at faster rates than ever before.

There are many examples of the ways new technology is facilitating reporting and helping to provide “safe spaces” for individuals to communicate directly with authorities. However, communication systems are like any other tool—they require those who implement

⁸⁹ Article 29 Working Party (2006). Opinion on European Union data protection rules on internal whistleblowing schemes, Article 29 Guidance on Whistleblowing Schemes (2006), WP117.

⁹⁰ Hunton, J. E. and J. M. Rose (2011). “Effects of Anonymous Whistleblowing and Perceived Reputation Threats on Investigations of Whistleblowing Allegations by Audit Committee Members”. *Journal of Management Studies* 48:1.

⁹¹ Stephenson, P. and Michael Levi (2012). The Protection of Whistleblowers: A study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest. Prepared for the Council of Europe, Committee on Judicial Cooperation, CDCJ(2012) 9FIN.

⁹² The Employment Appeals Tribunal in *Linfood Cash and Carry Ltd v. Thompson* [1989] IRLR 235 set out 10 steps to follow:

1. Reducing the information from a reporting person to one or more written statements;
2. Ensuring key information is included, dates and times of each incident observed, etc. as well as whether the individual has suffered at the hands of the accused;
3. Further investigation to confirm or deny information;
4. Tactful inquiries to establish the credibility of the informant;
5. Confirmation whether the reporting person is prepared to attend disciplinary hearing. If not and fear is genuine, then decision taken as to whether to continue;
6. If decided to continue, head of hearing should interview the reporting person and decide what weight to give information
7. Statements, redacted if necessary, to protect identities, available to the accused;
8. If accused raises relevant issues, these are put to the reporting person by head of investigation;
9. Full and careful notes taken of all proceedings;
10. Evidence from an investigating officer taken at a hearing should, where possible, be prepared in written form.

them to be properly trained to handle the information and to support the individuals providing the information fairly and professionally. If expectations of protection are not met or the information provided is not handled well, then trust and confidence in these systems, as in any other, will lessen and they will not be used by those they were intended for. In some parts of the world, however, populations do not have access to certain technologies or mobile phone networks, so other methods for facilitating reporting must be used.

Organizations such as the Hermes Centre for Transparency and Digital Human Rights and many others around the world (see the example below) are looking to technology and using open-source programmes such as GlobalLeaks to promote public engagement. Governments too are beginning to use such tools.⁹³ Among the dozens of organizations that use encryption-protected online reporting tools to allow anonymous transmission of information and documents are the Organised Crime and Corruption Reporting Project, the International Consortium of Investigative Journalists, 100Reporters, the Balkan Investigative Reporting Network, afriLeaks and Méxicoleaks.

Example: India

Janaagraha, a non-profit organization based in Bangalore set up in 2001, began using technology and crowd-sourcing to find out more about local corruption. As it states in its 2012-2013 Annual Report, what began as a “tongue-in-cheek” attempt to uncover the market price of corruption has today transformed into a globally-recognized innovation. Launched in 2010, “I Paid a Bribe” had already received 22,000 bribe reports from 493 cities in India by 2013. It has also begun to evolve from an anonymous “reporting” mechanism into an active tool of citizen engagement. In early 2013, it updated its privacy policy to allow its users to share their names if they choose to when submitting a report. Furthermore, the site is no longer redacting the names of officers and departments in reports in an effort to make the platform more transparent and provide the authorities an opportunity to take action and thus improve accountability in the public sector. The site is also starting to be tailored to respond to the needs of different audiences. A “Bribe Hotline” was introduced in 2013 that allows people to ask questions about government processes and receive answers from officers and heads of civil agencies.

Source: www.ipaidabribe.com

4. Workplace protections

While protection from unjustified treatment in the workplace typically relates to actions of an employer (i.e., a superior of the reporting person) this is not always the case. Thus, it is reasonable and sensible to extend employer responsibility to protect against the retaliatory actions of co-workers (as in the Netherlands and the United Kingdom).⁹⁴

⁹³ For a description of how GlobalLeaks open-source software is being used by public agencies, corporations as well as NGOs, see <http://logioshermes.org/home/projects-technologies/globaleaks/>

⁹⁴ For the Netherlands, see Stephenson and Levi (2012). *A study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest*, paragraph 3.35. Available from http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/CDCJ%282012%299E_Final.pdf.

For the United Kingdom, sections 17-20 of the Enterprise and Regulatory Reform Act 2013 amended the Public Interest Disclosure Act 1998. Section 19 introduced protection for whistleblowers from bullying or harassment by co-workers. See <http://www.legislation.gov.uk/ukpga/2013/24/part/2/crossheading/protected-disclosures/enacted>

It may also be reasonable to extend the employer's responsibility to retaliation as committed by third parties who are linked with the employer, as is the case in Luxembourg under its Law on Strengthening the Means to Fight Corruption (2011)⁹⁵ and in Ireland under its Protected Disclosures Act (2014).⁹⁶

Whether protective measures in law are effective in practice tends to depend on how well they are respected and embedded in organizational obligations and investigative authority rules and procedures, and how easy it is for reporting persons to enforce their rights. This requires both proactive and retrospective measures. Proactive measures include implementing robust organizational procedures and reporting systems and identifying and managing the risks to a reporting person from the first point of contact. Retrospective measures are those that “remedy” a harm caused—such as reinstatement or compensation—where protective measures failed to be properly applied or were not available.

For example, in Australian Federal and Capital Territory law there is an express legal requirement for all public sector bodies to have procedures to assess the risk that reprisals might be taken against persons who make disclosures.⁹⁷ In the United Kingdom, a specialized NGO, Public Concern at Work, set up a Commission to review the state of whistleblowing in the United Kingdom. The Commission recommended that the Government adopt a code of practice for all employers. This would not be a statutory code but rather one that would have to be taken into account by courts or tribunals when considering issues regarding a remedy for anyone who has suffered unfair treatment from their employer as a result of whistleblowing.⁹⁸

The right to refuse

The right of a person to refuse to obey an illegal order is a fairly well-established principle for public servants, entailing that they can and should report any issue or order that they believe conflicts with their duty to uphold the law, and that they should raise a concern if they believe fulfilling an order would be a breach of the law. However, in other contexts, such as in the private sector generally, an individual who refuses to obey an order on the basis that it would be illegal to proceed has little protection against being disciplined and so must take any such action at their own peril. Being able to refuse an order and seek a quick determination about the legality of the conduct from someone senior in the organization or a competent authority is a strong preventive tool against corruption and other wrongdoing that can prevent the activity from occurring in the first place.

⁹⁵ Luxembourg. Loi du 13 février 2011 renforçant les moyens de lutte contre la corruption et portant modification 1) du Code du Travail 2) de la loi modifiée du 16 avril 1979 fixant le statut des fonctionnaires de l'État 3) de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux 4) du Code d'instruction criminelle et 5) du Code pénal. Available from <http://www.legilux.public.lu/leg/a/archives/2011/0032/index.html>

⁹⁶ Ireland (2014). Protected Disclosures Act, section 12(1).

⁹⁷ Australian Commonwealth (2013). Public Interest Disclosure Act, section 59(1). See also *Public Interest Disclosure Act 2012 (ACT)*, section 33(2). See Brown, A. J. (2013). “Towards ‘ideal’ whistleblowing legislation? Some lessons from recent Australian experience”, *E-Journal of International and Comparative Labour Studies*, September/October, 2(3): 153-182.

⁹⁸ Public Concern at Work (2013). *The Whistleblowing Commission: Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK*. PCaW: London. The Commission was led by the Rt. Honourable Sir Anthony Hooper and included representatives from the business community, unions, the legal profession, the Church of England and individual whistleblowers. Available from <http://www.pcaw.org.uk/whistleblowing-commission>

Compensation

It might be unrealistic to expect an individual worker to resume working for a supervisor or employer or with co-workers who have engaged in retaliation against him or her. In such cases, individuals may need to be provided with the possibility of transfer to a different section or office in order for them to have any realistic chance of a fresh start.

The law in Slovenia, for example, provides that anyone who has been exposed to retaliation or adverse consequences can demand reimbursement from their employer. The Anti-Corruption Commission of Slovenia can offer assistance to the reporting person to establish the causal link between the report and any retaliatory measures and can demand that the employer immediately cease such activities or transfer the reporting employee to another equivalent work post.⁹⁹ Many dedicated anti-corruption and whistleblowing agencies have similar powers.

Even if an authority does not have the power to compensate an individual for any losses they have suffered, regulatory bodies can take enforcement action against an organization that fails to facilitate internal whistleblowing, or that tries to block or retaliate against a whistleblower.

Example: United States Office of Special Counsel

The United States Office of Special Counsel is an independent federal investigative and prosecutorial agency. It is given authority under four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The Office receives, investigates and prosecutes allegations of prohibited personnel practices, with an emphasis on protecting federal government whistleblowers. It seeks corrective action remedies (such as back pay and reinstatement) for injuries suffered by whistleblowers and other complainants and is authorized to file complaints with the Merit Systems Protection Board to seek disciplinary action against individuals who commit prohibited personnel practices. The Office also offers alternative dispute resolution, a form of mediation, to provide an opportunity for the parties to resolve the issues without going through a lengthy or costly investigation. Mediation is a voluntary process run by an independent mediator who has no formal decision-making powers. The power to make a final decision rests with the parties.

The Office of Special Counsel also provides a secure channel through its Disclosure Unit for federal workers to disclose information about various workplace improprieties, including a violation of law, rule or regulation, gross mismanagement and waste of funds, abuse of authority, or a substantial danger to public health or safety.

5. Protection against civil or criminal liability

The issue of defamation and libel can arise with respect to information that is reported to any third parties or, more typically, in the public domain. For this reason, States parties should consider regulating very clearly that individuals are protected for reporting to competent authorities, for example. Protecting individual rights to a fair trial and, in some cases, from reputational damage can qualify as a legitimate aim for restricting freedom of expression. However, it is important to ensure that reporting persons are not unfairly targeted for having reported information of suspected wrongdoing or corruption in accordance with the established system.

⁹⁹ Slovenia (2010). Integrity and Prevention of Corruption Act, section 25.

In order to remove any doubts in this regard, some jurisdictions have specifically implemented provisions in law to protect reporting persons from civil and criminal liability in relation to having made a protected disclosure. In Ireland, the law on defamation was amended to confer qualified privilege on a protected disclosure.¹⁰⁰ Furthermore, in the case of a prosecution for an offence relating to the prohibition or restriction on the disclosure of information, it is a defence for the accused person to show that the disclosure is, or is reasonably believed by the person to be, a protected disclosure.¹⁰¹

Example: Australia

The Public Interest Disclosures Act 2013 of Australia protects whistleblowers in the federal public sector and provides immunity from civil, criminal or administrative liability (including disciplinary action) for making the disclosure, and no contractual or other right or remedy can be exercised or enforced against anyone for having made such a disclosure. Those who make public interest disclosures have an absolute privilege in proceedings for defamation in respect of it, and no one can contract out of or terminate any contract on the basis of a public interest disclosure. There are exceptions, notably if someone makes a deliberately false or misleading statement or if their wider disclosure contravenes any publication restrictions, provided they knew about the restrictions and are unable to provide a good reason for making the disclosure in any case. The Act states, “To avoid doubt, whether the individual’s disclosure of his or her own conduct is a public interest disclosure does not affect his or her liability for the conduct.”

6. Prohibitions against interference and rules on “anti-gagging”

Concerns have been raised regarding provisions in compromise or settlement agreements in some jurisdictions that attempt to preclude employees or workers from making any disclosure about wrongdoing outside the working relationship. These may be viewed as particularly problematic in the area of anti-corruption. Part of the difficulty has been due to the vague wording that is used and the failure to explain that such clauses do not apply to information about wrongdoing or malpractice. The National Audit Office of the United Kingdom has stated that “with the public purse under sustained pressure and services increasingly delivered at arm’s length, it is important compromise agreements do not leave staff feeling gagged or reward the failure of either an employee or an organisation”.¹⁰²

Other examples of “gagging” clauses are found in contracts of employment and in some laws that restrain the right of individuals to disclose information about operational practices in a specific industry or sector. States parties need to be vigilant with respect to such provisions in order to ensure they do not undermine the capacity to tackle corruption effectively and to protect the public interest and reporting persons. The New Zealand law was amended in 2009 to deal with this issue. Section 23 states that the Act has effect despite any provision to the contrary in any agreement or contract and that any agreement of contract that requires an employee to withdraw or abandon a disclosure of information made under the Act is of no effect.¹⁰³

¹⁰⁰ Ireland (2014). Protected Disclosures Act, section 14.

¹⁰¹ Ireland (2014). Protected Disclosures Act, section 15.

¹⁰² Public Concern at Work (2013). *The Whistleblowing Commission: Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK*. PCaW: London. Available from <http://www.pcaw.org.uk/whistleblowing-commission>

¹⁰³ Section 23: substituted on 6 May 2009 by section 12 of the New Zealand Protected Disclosures Amendment Act 2009 (2009, No. 11).

Prohibiting interference with a potential disclosure is another important feature in some jurisdictions. Thus, under Norwegian law, those who are “intending” to report or disclose information are protected, despite the fact they have not yet done so.¹⁰⁴ In 2012, it was explicitly clarified in the United States Whistleblower Protection Enhancement Act that no forms of prior restraint could supersede its protections. Similarly, the same should apply to those wrongly identified as being the whistleblower or individual who reported the wrongdoing. If they suffer any retaliation, they should be protected and treated as someone who has complied with the procedures and the law.

Other countries with whistleblower laws that override confidentiality clauses include Ireland, Jamaica, Malta, the Republic of Korea and Zambia. The Protection of Public Interest Whistleblowers Act (2011) of the Republic of Korea states in article 14: “The provisions prohibiting or restricting public interest whistleblowing, etc. in a collective agreement, employment agreement, supply contract, etc. shall be deemed invalid.”

7. Personal liability for acts of retaliation

Personal liability for retaliation can also be an effective way to deter repeat violations of the rights of those who speak up in the public interest.¹⁰⁵ The Organization of American States Model Law Protecting Freedom of Expression against Corruption recommends extending liability to those who fail, in bad faith, to provide whistleblower protection.¹⁰⁶ Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination.¹⁰⁷ An interesting development in the context of whistleblower protection is the right of action in tort in common law systems. This is included in the Protected Disclosure Act of Ireland, which provides that if a person retaliates against someone because they or someone else made a protected disclosure, the individual who is retaliated against can bring a suit against that person for relief.¹⁰⁸

Countries also ensure criminal liability for persons who commit acts of retaliation. UNCAC requires States parties to make obstruction of justice a criminal offence under its article 25 and most jurisdictions have criminalized harming or threatening to harm anyone who is a witness in a criminal proceeding or otherwise attempting to stop or pervert the course of justice. This is another tool in the protection of reporting persons. Though these measures exist in many States, there is little information available about their effectiveness with respect to reporting persons. In Hungary and the United States, individuals can be held criminally liable for retaliating against a reporting person in circumstances where it could be considered as an act associated with the obstruction of justice.

In the United States it is a criminal offence punishable by a fine or imprisonment to retaliate against anyone who provides information about the commission or suspected commission of an offence to a law enforcement body.¹⁰⁹ The Sarbanes-Oxley Act specifically prohibits interference with a whistleblower, and the penalties have been increased

¹⁰⁴ See Stephenson and Levi (2012), paragraph 3.28: “One innovative feature of Norwegian law is that it also protects employees who ‘signal’ that they will notify suspicions of misconduct, for example by copying documents or by stating that they will notify unless the unlawful practice is changed. In this way, Norwegian law covers the stage before any disclosure is actually made. Also, the Act requires undertakings (in both private and public sector) to implement procedures that facilitate reporting.”

¹⁰⁵ This could be for punitive damages.

¹⁰⁶ Organization of American States (2004). Model Law Protecting Freedom of Expression against Corruption. Available from http://www.oas.org/juridico/english/model_law_whistle.htm

¹⁰⁷ Devine, T. (2013). “The Whistleblower Protection Act Burdens of Proof: Ground rules for Credible Free Speech Rights” 2 *E-Journal of International and Comparative Labour Studies* 137 (Sept.-Oct. 2013).

¹⁰⁸ Ireland Protected Disclosure Act (2013), section 13.

¹⁰⁹ See United States Criminal Code, 18 USC 1513.

from one year to ten years imprisonment since the law was enacted. Australian whistleblower laws have long made it a criminal offence to retaliate against a whistleblower or anyone associated with them.

In Australia it is also an offence for a public official to reveal the identity of someone who has made a public interest disclosure. The offence carries a penalty of up to six months in jail¹¹⁰ and the disclosure of the identity of anyone under special protection in the Republic of Korea carries a penalty of up to three years imprisonment. Similar examples exist in other countries, such as Malaysia.

8. Protections against threat of physical harm

Protection against the threat of physical harm is most likely to arise in cases where individuals report information related to organized crime, and a link to organized crime might exist in some corruption cases. People may also fear physical harm when the information relates to allegations of grand corruption, and physical intimidation can occur in other contexts as well.

Case study: Michael Woodford, former CEO of Olympus

Michael Woodford had a 30-year career with Olympus, having first joined as a salesman in 1980. He rose through the ranks to become Executive Managing Director in Europe and President and Chief Operating Officer in early 2011. Mr. Woodford was one of only four non-Japanese persons to run a large Japanese company. Mr. Woodford first learned about alleged financial irregularities at Olympus from an article in a Japanese magazine, FACTA. The claims appeared to be well sourced. After making his own inquiries, Mr. Woodford began seeking answers from his co-directors at Olympus about questionable fees in excess of US\$ 1 billion. He described how, only two weeks after being appointed CEO and after persisting in his questions, in a Board meeting in which he was not allowed to speak, he was ordered to vacate his Tokyo flat, return his laptops and telephones and take the bus to the airport.

Amid fears for his safety and that of his family because of concerns about possible links between the excess payments and organized crime in Japan, Mr. Woodford sought and received advice and guidance from the organized crime unit of the London Metropolitan Police Service when he returned to the United Kingdom. After going public with the information, Olympus originally claimed that, as its first non-Japanese chief executive, Mr. Woodford had failed to understand its management style, but was later forced to admit that the payments he had questioned were part of a US\$ 1.7 billion accounting fraud to hide losses on historic investments.

In the end, the scandal led to the resignation of the entire Olympus Board and the arrests of several senior executives, including the previous CEO and chairman, and the company's former auditor and bankers. Michael Woodford emerged as one of the most highly placed executives ever to turn whistleblower and the irregularities he helped to expose developed into one of the largest and longest-lasting loss-concealing financial scandals in the history of corporate Japan. He stated:

"I was the president of a large multinational corporation, which made it much more likely that people would actually listen to me, but the real concern is how you make it easier to come forward in reporting wrong-doing for, say, a junior management accountant with three children and a big mortgage... Many of the world's largest

¹¹⁰ Australia (2013). Public Interest Disclosure Act, section 20. Available from <http://www.comlaw.gov.au/Details/C2013A00133>

companies now employ me—to advise them on how not to let the same thing happen in their corporation. That is interesting to me, as I want to bring about change. They have to demonstrate that they have a whistle-blower line that is both independent of the executives and is known about by the people who work for the organisation.”

Note: Mr. Woodford made a claim for discrimination and a claim for unfair dismissal under the United Kingdom Public Interest Disclosure Act and reached a settlement with Olympus believed to be approximately £10 million.

Source: Japan Today (03/03/2014). Japan: Business as usual, but not for Olympus whistleblower Michael Woodford. Available from <http://www.japantoday.com/category/executive-impact/view/japan-business-as-usual-but-not-for-olympus-whistleblower-michael-woodford>; The Independent (06/09/2012). Whistleblower Woodford settles for £10m after his Olympus sacking. Available from <http://www.independent.co.uk/news/business/news/whistleblower-woodford-settles-for-10m-after-his-olympus-sacking-7831972.htm>; The Independent (09/06/2012). Whistleblower Michael Woodford settles with Olympus. Available from <http://www.telegraph.co.uk/finance/financial-crime/9298027/Whistleblower-Michael-Woodford-settles-with-Olympus.html>; The Guardian (23/11/2012).

Competent authorities need to consider how protection against threat and physical harm can be provided. Police or special investigative units dealing with corruption could be contacted directly by any other authority dealing with the whistleblower and such units are likely to be able to assist or advise on the best course of action.

To formalize such protection, the Republic of Korea included a provision in its Protection of Public Interest Whistleblowers Act (2011) which states that whistleblowers and their relatives and cohabitants may receive personal protection from the police if they have faced or are likely to face serious physical danger. This is a very interesting approach that acknowledges and pre-emptively addresses the risks some whistleblowers may face.

Another alternative is the broadening of the scope of witness protection laws to allow for the protection of other persons who have provided information or who may require protection.¹¹¹

Example: Protective measures according to the responsible entity, Chile

The Office of the Attorney General of Chile organized a special division to help victims and witnesses in all regions of the country and protection was extended to persons who report acts of corruption.

The Chilean system provides different protective measures depending on the nature of the responsible entity and the level of protection that the protected person actually needs.

Certain autonomous measures are delivered by the Office of the Attorney General, such as police protection, mechanisms for emergency calls, change of address, change of telephone number and protection of the reporter’s residence, among others.

Moreover, certain measures are delivered by the Criminal Court, such as preventive imprisonment, prohibition against visiting specific places or people, change of identity, as well as different mechanisms during the trial (identity protection, privacy and limitation of audiences, prevention of access by specific persons to the audiences, etc.).

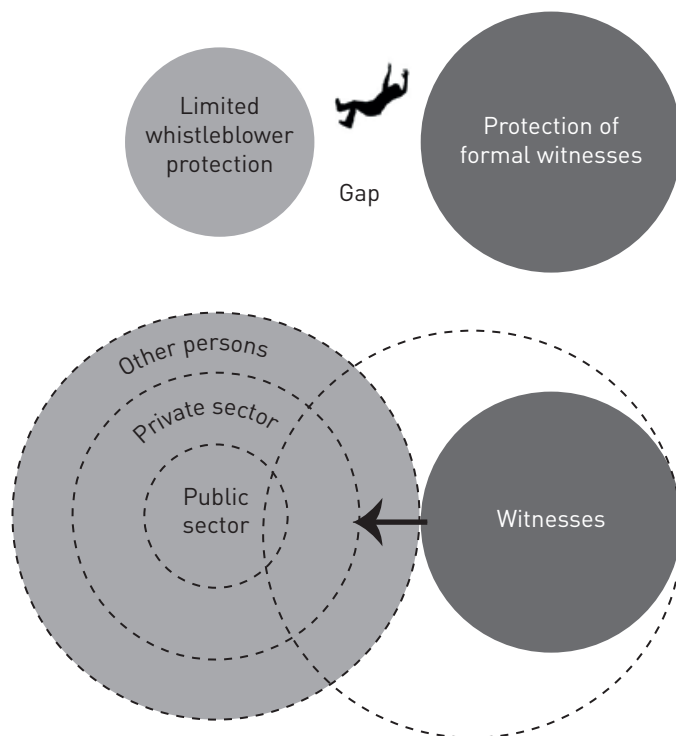
Source: Chevarria, F. and M. Silvestre (2013). Sistemas de denuncias y de protección de denunciantes de corrupción en América Latina y Europa, Documento de Trabajo nº 2, Serie: Análisis Área: Institucionalidad Democrática. Eurisocial: Madrid, page 51. Available from http://biblio.eurosocial-ii.eu/documents/10192/740630/DT_2_Sistemas_denuncias.pdf?version=1.0

¹¹¹ See, for example, article 2 of the Witness Protection Act (2009) of Malaysia. Available from <http://www.agc.gov.my/Akta/Vol.%2014/Act%20696%20-%20Witness%20Protection%20Act%202009.pdf>

No matter how access to protection from threats of physical harm is regulated, the strong interlinkage of systems that protect reporting persons and systems for the protection of witnesses and victims is evident (see also chapter II, section A and below).

As already noted, many countries have criminalized the obstruction of justice in line with article 25 of UNCAC. Accordingly, it can be a criminal offence if a person threatens, intimidates or otherwise influences (e.g. through bribery) a person who has reported corruption or who will provide testimony as a witness in regard to corruption.

Figure IV. Reporting persons: mind the gap



Protection for any reporting person

Consider protection for any reporting person [...] against unjustified treatment (including public and private sector workplace whistleblowers).

Extended witness protection

In principle, such protection is focused on criminal proceedings and protective measures related to such proceedings (procedural and physical safety).

The *Legislative Guide* recommends making provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of a corruption offence, regardless of whether the information is produced as evidence or not.

9. Witness protection and protection for cooperating offenders

Witness assistance and witness protection programmes are vital components of a comprehensive criminal justice system in accordance with UNCAC. Under both UNCAC

and the United Nations Convention against Transnational Organized Crime,¹¹² States parties are required to take appropriate measures to protect witnesses to corruption offences.

There will be times when reporting persons will become involved in a criminal investigation and in such cases, article 32 of UNCAC, on the protection of witnesses, will become relevant. Someone who originally raises a concern about wrongdoing or corruption in the context of the workplace, for example, may give testimony in a court hearing as part of criminal or civil proceedings. If they are seriously worried about their physical safety or need to be protected from intimidation, then assistance and protective measures should be available to them. In any event, it will be important that all the options are explored and clearly explained. The UNODC publication *Good practices for the protection of witnesses in criminal proceedings involving organized crime* is a useful and valuable tool for all those involved in the assistance and protection of witnesses.¹¹³

Witness protection should also be available to a cooperating offender, meaning a person who participated in an offence and who supplies useful information to a competent authority for investigative and evidentiary purposes (see article 37 of UNCAC). A cooperating offender, for example, might have initially participated in the commission of an offence, but might then have decided to withdraw and is now seeking an “exit”. Measures that could be considered to encourage such persons to report and to provide relevant insider knowledge to support the investigation and prosecution of offences include the mitigation of the punishment or the granting of immunity for some or all offences committed. Such regulations should be formulated in a way that leaves room for prosecutorial or judicial discretion, depending on factors such as the timing of the report, the quality of the information provided or the level of cooperation provided to detect criminal activity or recover proceeds of crime.

The first step in determining which protective measures are required for witnesses is the assessment of the risk that the individual faces. Many States parties will already be familiar with the need to support witnesses who may be vulnerable or at risk of intimidation but who fall short of needing access to a full witness protection programme. There are a number of other security measures that States could make available, including providing advice about safety, arranging for police patrols or escorts, a temporary change of residence where necessary, and moderate financial assistance.¹¹⁴ In certain circumstances, the identity of a reporting person who provides testimony or evidence in a trial can be protected by allowing them to testify behind a screen, by video link or by using voice or face distortion. The use of such measures is generally made on a case-by-case basis in which they must be deemed appropriate by a judge and must not infringe on the right to a fair trial.

In most jurisdictions, witnesses must be under serious threat of physical harm in order to be admitted to a witness protection programme. In such instances, the type of witness they may be—whether an informer, a cooperating offender, a victim or a reporting person—is of less importance.¹¹⁵ Full witness protection programmes involve fairly extreme measures, such as a change of identity and relocation and, as such, the conditions for entry into such programmes tend to be very strict. Generally, witness protection programmes tend to be considered a solution of last resort once other available means of witness protection are exhausted or appear to be insufficient.

¹¹² United Nations Convention against Transnational Organized Crime, article 24.

¹¹³ UNODC (2008). *Good practices for the protection of witnesses in criminal proceedings involving organized crime*. Available from <https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>

¹¹⁴ Ibid, pages 21 and 27.

¹¹⁵ Ibid, page 61.

Witness assistance measures are not intended to protect witnesses from physical harm but rather are designed to ensure the prosecution process is effective. Nonetheless, they are among those measures that can have a protective element, as they help alleviate some of the stress and strain of participating in a courtroom process.¹¹⁶

In some countries where the legal status under criminal law must be specified, victims and witnesses of a crime will have access to assistance or protections available, but those who report information relevant to a crime (but who will not testify in court) will not. Because reporting persons can face serious reprisals or harassment, it is important that States parties consider extending protection to reporting persons.

Example: Conditions to provide protection to reporting persons, Organization of American States Model Law

Considering the experiences of countries such as Mexico and Peru, in the Organization of American States Model Law it is suggested that the relevance and pertinence of the information provided by reporting persons should be assessed. Such an evaluation is a condition for the provision of any measure of protection to reporting persons in order to evaluate the utility of that information during the criminal trial. The evaluation would serve to:

- Prevent the continuation, existence or completion of the act of corruption, or to substantially reduce the magnitude or consequences of its execution.
- Prevent or neutralize future acts of corruption.
- Identify the circumstances in which the act of corruption was planned and carried out, or the circumstances in which it is being planned or carried out.
- Identify the perpetrators and accessories of an act of corruption that has been or is about to be committed, or the members of a criminal organization and its operations, in order to dismantle or weaken it or arrest one or more of its members.
- Ascertain the whereabouts or destination of the instruments, goods, effects and proceeds of the act of corruption, and to reveal the sources of funding of criminal organizations.
- Hand over to the authorities criminal instruments, effects, proceeds or goods produced by acts of corruption.
- Contribute, in the judgement of the competent official, evidence for further pursuit of the investigation.

10. Right to petition and right of appeal

The law should allow reporting persons who suffer retaliation to seek support and assistance from a competent authority and, where necessary, claim relief from a tribunal or court. Mediation can also be offered in some circumstances to provide an opportunity for parties—particularly those in working relationships—to resolve their dispute without a lengthy investigation or a costly court process. However, mediation must be voluntary, and if no agreement is reached, the right to corrective action, petition or appeal must be preserved.

¹¹⁶ Ibid., page 28. The UNODC guide on the protection of witnesses describes the services provided by Victim Support of the United Kingdom, a national charity that is independent of the investigation and prosecution services. It provides information and assistance to witnesses as well as victims of crime. See <https://www.victimsupport.org.uk/> for more information.

Example: Forum and remedies, Ghana

The 2006 Whistleblowers Act (Act 720) of Ghana allows anyone who honestly and reasonably believes that they have been subjected to victimization or learns that they are likely to be victimized because they have made a disclosure, may in the first instance make a complaint to the Commission on Human Rights and Administrative Justice, whose order in this regard shall be of the same effect as a judgement or an order of the High Court and is enforceable in the same manner as a judgement or an order of the High Court.

Upon receipt of such a complaint, the Commission shall conduct an enquiry and may make an interim order. After hearing the parties and other persons, as considered necessary, the Commission may make any order that is considered just in the circumstances, including: (a) reinstatement; (b) reversal of a transfer or the transfer of the whistleblower to another establishment; or (c) an order for payment of a reward from a fund established under the Act for that purpose.

Furthermore, a whistleblower who has been subjected to victimization may also bring an action before the High Court to claim damages for breach of contract or for another relief or remedy to which the whistleblower may be entitled after a complaint has first been submitted to the Commission.

In practice, the procedure for dispute resolution should be as swift and simple as possible. In South Africa, for instance, the fact that procedures for resolving disputes in whistleblowing cases are court-based has been criticized as having made the process expensive and inaccessible. Some observers have stated that this “allows for delaying tactics by employers which amount to an abuse of process”.¹¹⁷

The use of labour courts or employment tribunals may be preferable to the use of the ordinary civil courts in the first instance. In some jurisdictions, a public agency is charged with assisting the whistleblower (if he or she so wishes) in bringing his or her case—as is the case in Slovenia and the United States—and this can be highly effective.

However, while specialized boards or forums have the advantage of allowing for expertise and accumulated knowledge, it is important that the right to appeal to a tribunal or a higher court is preserved. Normal access to courts of appeal was not available under the United States Whistleblower Protection Act (which covers federal employees), for example. This was recognized by United States lawmakers as causing serious problems for whistleblowers seeking redress, and the right to appeal was included on a pilot basis in the Whistleblower Protection Enhancement Act of 2012. The system employed by United States Department of Labor for adjudicating corporate whistleblower retaliation claims has also experienced significant delays, and every corporate whistleblower law passed since the Sarbanes-Oxley law was enacted in 2004 in response to the collapse of Enron has included the right for claimants to bring proceedings before a federal court if there is no administrative ruling within 180 days.

11. Interim/administrative relief

In order for protective measures to be seen as credible, consideration should be given to allowing for interim relief while proceedings are under way. Interim relief is

¹¹⁷ Martin, P. (2010). *The Status of Whistleblowing in South Africa, Taking Stock*, Open Democracy Advice Centre: Cape Town, page 9. Available from http://openjournalismworkshop.files.wordpress.com/2013/03/odac_whistleblowing_report_web.pdf

particularly important for reporting persons in the workplace because it can help preserve the working relationship and prevent it from breaking down completely. Interim relief could include any measure necessary to preserve the position of the individual until a full hearing is possible, such as reinstatement in a similar position (e.g. if necessary, under a different supervisor or in a different part of the company) or any other action to undo or at least minimize the effects of the retaliation as swiftly as possible. Given the length of some proceedings, without such measures, an individual may not be able to maintain himself or herself professionally or financially until the final outcome of a legal or administrative proceeding. Schedule 1 of the Protected Disclosure Act 2014 of Ireland¹¹⁸ provides for an example of interim measures that can be taken pending the determination of a claim of unjust dismissal from employment.

If, however, the effects of the retaliatory measures cannot reasonably be undone, then appropriate financial compensation should follow. In view of the possibility that a workplace whistleblower can be employed at any level in an organization and might lose his or her job as a result of a disclosure, compensation should reflect actual financial losses and not be arbitrarily limited. In cases where the employer is unable to pay compensation, some jurisdictions have taken steps to establish a public fund from which such compensation orders can be paid, such as is the case in the Republic of Korea.

12. Burden of proof

A system that requires an employee to demonstrate that the reason he or she has been treated unfairly is because he or she has reported wrongdoing places an onus on the individual that can be very difficult to meet. While most systems require that a reporting person present a *prima facie* case showing that he or she raised a concern and suffered a detriment (harassment, lack of promotion, demotion, dismissal, etc.), the individual may not be in a position to prove the reason for his or her employer's action. Indeed, it may often be only the employer or other retaliating individual who is in a position to prove to a high standard that the detriment was for an entirely unrelated reason and that it was fair under the circumstances.

It is for this reason that many countries have adopted what is often referred to as a "reverse burden of proof", whereby the law requires the employer to show that the reporting person was treated in a particular way for a valid reason once the reporting person has established that he or she has suffered a detriment. In most cases, however, it is not in fact an actual reversal of the burden of proof, but rather the standard burden of proof in combination with other legal provisions, for example the prohibition in law against taking any detrimental action against a person for having reported alleged wrongdoing. Based on such a law, an employee, if dismissed after making a report, would only need to establish that he or she had been fired, that he or she reported wrongdoing and that there was a likely correlation between these incidents (*prima facie* case of retaliation). It would then be up to the employer to prove that the act was not a detrimental one and that the same action would nevertheless have been taken against the employee for reasons independent of the act of whistleblowing.

Such regulations are found in whistleblowing and corruption reporting laws in Croatia, France, Luxembourg, New Zealand, Norway, the Republic of Korea, Slovenia,

¹¹⁸ <http://www.per.gov.ie/protected-disclosures-i-e-whistleblowing/>

South Africa, the United Kingdom and the United States¹¹⁹ and this approach is recommended by both the Council of Europe¹²⁰ and the G20.¹²¹

Another example of managing the burden of proof is found in the Whistleblower Protection Act of Malaysia. It uses an assumption: “[A] person is deemed to take detrimental action against a whistleblower or any person related to or associated with the whistleblower if the person takes or threatens to take the detrimental action because a whistleblower has made a disclosure of improper conduct; or the person believes that a whistleblower has made or intends to make a disclosure of improper conduct.”

D. Other measures to facilitate reporting

1. Reporting duties?

It should be understood that “facilitating” reporting is not the same as imposing a duty to report. In most countries, duties to report are applied to specific roles, office holders and professions, for example, police officers, doctors, civil servants, lawyers and accountants. There can also be statutory obligations on certain categories of employees to report on specific matters, for example to report suspected child abuse or neglect in health or social care, or to report suspicions of money-laundering in the financial sector. A failure to fulfil such a duty can have serious professional consequences, including suspension, being banned from holding a similar position in the future or being barred from practising one’s profession. Such duties to report tend to be limited, either by profession (e.g. the sensitive and responsible nature of the specific role in society) or by the nature of the category of information that is required (e.g. its value and importance to society).

While imposing a duty to report wrongdoing or misconduct on all workers may seem an attractive option, there are also arguments against such an approach, including that it can encourage overreporting and allow for scapegoating. It can lead organizations to focus on who did not speak up rather than on the information that was reported, or on the effectiveness of their reporting or whistleblowing arrangements.¹²² This does not mean that there is no expectation on staff to report wrongdoing, but only that general duties to report could be difficult to enforce or counterproductive in some circumstances.

Moreover, it is important to recognize that even those who do have a duty to report may be the target of serious retaliation.

¹¹⁹ The United States standard refines the concept in two ways. It sets a low threshold for the employee’s burden of establishing a basic, or prima facie case, that whistleblowing was “a contributing factor” of the challenged action, which means that illegality was “in any way” connected to the decision. In contrast, there is a high standard for the employer’s reverse burden, which must be proved by “clear and convincing evidence”—some 70 to 80 per cent of the record. See Tom Devine (2013). “The Whistleblower Protection Act Burdens of Proof: Ground rules for Credible Free Speech Rights” *2 E-Journal of International and Comparative Labor Studies* 137 (Sept.-Oct. 2013).

¹²⁰ Parliamentary Assembly, Resolution 1729 (2010), Protection of “Whistleblowers”, para. 6.3. Available from <http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm>

¹²¹ G20 compendium of best practices and guiding principles for legislation on the protection of whistleblowers. Available from [http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/G20%20COMPENDIUM%20OF%20BEST%20PRACTICES%20AND%20GUIDING%20PRINCIPLES%20FOR%20LEGISLATION%20\(3\).pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/G20%20COMPENDIUM%20OF%20BEST%20PRACTICES%20AND%20GUIDING%20PRINCIPLES%20FOR%20LEGISLATION%20(3).pdf)

¹²² Public Concern at Work (2013). Whistleblowing Commission, Code of Practice for effective whistleblowing arrangements, page 13. Available from <http://www.pcaw.org.uk/whistleblowing-commission>

Case study: South Africa – internal auditors and corruption

Internal auditors occupy a unique and important position when it comes to preventing corruption. Not only are they employed to put in place measures to strengthen the governance mechanisms of companies, but they can act as whistleblowers when they discover corrupt activities.

Auditors are professionally and legally obliged to report suspect activity. This is the very function they are employed to perform. The Auditing Profession Act of South Africa makes it an offence for an auditor not to report a “reportable irregularity”, which includes any instance of fraud or breach of fiduciary duty.

Auditors may also face criminal sanctions in terms of the Financial Intelligence Centre Act and the Prevention and Combating of Corrupt Activities Act should they fail to report a wide variety of unlawful or even suspicious activities or transactions.

It is therefore essential that internal auditors are able to expose corruption wherever they find it without the fear of professional or even personal repercussions. Unfortunately, this is not always the case in practice. The Internal Audit Association of South Africa has reported that auditors conducting audits on municipalities have, at times, faced intimidation and demands that irregularities be covered up.

In 2013, forensic auditor Lawrence Moepi was gunned down in the parking lot of his Houghton firm. At the time of his death, he was involved in a number of highly sensitive forensic investigations and some commentators have suggested that his death may have been linked to his role in uncovering corruption.

The main law in South Africa that protects whistleblowers against victimization, reprisals and discrimination is the Protected Disclosures Act 26 of 2000. This legislation protects those in both the public and private sectors who disclose criminal and other irregular conduct in the workplace. It also requires employers to ensure that there are measures in place to protect whistleblowers from being victimized or dismissed as a result of their disclosure.

The scope of the act is narrow and the protection applies only to employees. It therefore only covers internal auditors who are employed by the company and does not extend to independent contractors or volunteers.

However, the Companies Act does provide important additional safeguards. Section 159 provides protection to a broad range of people connected to a company. A disclosure to a company by an employee or a supplier of goods or services is covered by this provision.

Source: Reproduced from Business Day (BDLive), 16 March 2014, Corruption Watch: Help for auditors who report crime. Available from <http://www.bdlive.co.za/businessimes/2014/03/16/corruption-watch-help-for-auditors-who-report-crime>. See also Jane Duncan (06/11/2013) *The Auditor and the hitmen*. Available from <http://sacsis.org.za/site/article/1833>

States parties should refresh their commitment to and understanding of the scope and role of duties to report corruption and the protections attached to them when considering any reform or addition to the law on protecting reporting persons who encounter corruption during the course of their work.

2. Incentives for reporting: honours and rewards

Honours

National governments around the world confer honours on individuals whose actions contribute significantly to the common good of the country; some courts and law

enforcement bodies also honour or reward individuals who put themselves at risk to protect or serve the interests of others. Individuals who report wrongdoing, corruption or risk and thereby protect the public interest should be considered among those deserving of public honour. Such recognition would help to normalize their actions as part of “good citizenship”. Indonesian law, for example, grants “tokens of appreciation” to whistleblowers who have assisted in efforts to prevent and combat corruption.¹²³

Bounties or rewards

A number of countries have adopted systems that provide monetary rewards to persons who report information that leads to successful actions. One well-known example of such a system is the one employed by the Securities and Exchange Commission of the United States under the Dodd-Frank Act, which offers monetary compensation in exchange for information on violations of securities law in order to encourage whistleblowers to come forward. Some commentators have suggested that this model shifts the purpose of the reporting away from the public interest to the personal gain of the whistleblowers. In 2014, the United States Office of the Whistleblower received 3,620 whistleblower tip-offs, an increase of more than 20 per cent over the previous two years. The law prohibits retaliation by employers against employees who provide the Commission with “original information” (i.e. information that is not publically available or already known to the Commission) about possible securities violations. Any person who voluntarily provides the Commission with original information about a violation of federal securities law that has occurred, is occurring, or is about to occur, is eligible for a whistleblower award. The amount of the award is determined based on the amount of the money collected by the Commission as a result of the proceedings initiated on the basis of the information provided and also takes into consideration the quality of the information.¹²⁴ Since the inception of the whistleblower programme, the Commission has authorized awards to 14 whistleblowers, and in September 2014, it authorized an award of more than US\$ 30 million to a whistleblower who provided key original information that led to a successful enforcement action.¹²⁵

Under the Whistleblower Protection Act (2010) of Malaysia, whistleblowers may receive rewards, as the Government deems fit, for disclosures that lead to prosecutions or the detection of cases of wrongdoing.

Notwithstanding the fact that incentive systems for whistleblowing are fairly well established in the United States and exist in other countries such as the Republic of Korea, they have not been readily adopted in all parts of the world. Critics see the model as a commercial transaction involving communications—more of an information market that is largely independent of the freedom of expression or the public interest. In any event, if a State considers the introduction of a reward system, it should be seen as complementary to ensuring whistleblower protection.

¹²³ Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption, article 42.

¹²⁴ Under the Securities and Exchange Commission (SEC) programme, eligible whistleblowers are entitled to an award of 10-30 per cent of the monetary sanctions collected in actions brought by the SEC and related actions brought by other regulatory and law enforcement authorities. For any award to be triggered, however, SEC action based on the whistleblower information must result in monetary sanctions in excess of US\$ 1 million. The SEC award scheme also applies to non-citizens of the United States.

¹²⁵ United States Securities and Exchange Commission, 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program. Available from <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>

If a State is considering the creation of incentive systems and has legal provisions which specify that disclosures made for personal gain are not protected, it would be advisable to clarify that personal gain would not include any rewards or other incentives provided for in any law. Such an exception has been expressly included under the Public Interest Disclosure Act (2010) of Zambia.¹²⁶

“Qui tam” measures

“Qui tam” legislation represents a distinct and separate branch of whistleblower law, which, in the United States in particular, has enabled policing of government expenditures that involve the private sector. This regulatory model is different from bounty or reward systems which offer monetary compensation for information, but which tend to leave the reporting person in the role of a passive observer in the process.¹²⁷

The United States False Claims Act has been said to be one of the most successful whistleblowing laws in the world. While its scope is limited to fraud and corruption in relation to government contracts, it is one of the rare examples of a law that puts resources directly in the hands of individuals, who can then take the initiative to bring a civil action against powerful wrongdoers. In this type of action, a private party, called a “relator”, brings an action on the Government’s behalf. If the Government takes control of the action, the relator receives 15-20 per cent of any award imposed; if the relator proceeds alone, the percentage increases to 25-30 per cent. In either instance, the relator is responsible for his or her own legal fees,¹²⁸ although the Government, not the relator, is considered the real plaintiff. In 1986, before the law was modernized, the United States Department of Justice collected US\$ 26 million in civil fraud recoveries. In the 25 years since, some US\$ 45 billion has been recovered.¹²⁹ Observers have pointed out that the False Claims Act also levels the playing field to some degree by providing an incentive for skilled lawyers to take on whistleblower cases, as they can be highly lucrative if successful.

E. The handling of reports and cooperation

Handling reports professionally, assessing the information on its merits and taking the appropriate action to address any wrongdoing is fundamental to building trust and confidence. This is one of the most important aspects of the protection of reporting persons. When done properly, the risk to an individual’s position and the need for him or her to be involved further will be minimized. Where an individual’s continued involvement is deemed necessary—because their evidence is essential to proving the wrongdoing in a court of law, for example—responding sensibly and appropriately to any concerns they have about their own safety or the safety of those close to them will be key to securing their cooperation.

¹²⁶ Zambia Public Interest Disclosure Act (2010), article 22: a protected disclosure is made in good faith by an employee ... “who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law”.

¹²⁷ Hutton, David (2011). *Shooting the Messenger*. Canada: Parkland Institute. Available from http://parklandinstitute.ca/research/summary/shooting_the_messenger

¹²⁸ Vaughn, R. (2012). *The Successes and Failures of Whistleblower Laws*. Edward Elgar Publishing: United States, page 131.

¹²⁹ <http://www.taf.org/TAF-testimony-Burns-1-2014-WV%20Final.pdf>

Whether the legal measures are deemed to be successful or not will depend in large part on how the information individuals report is handled and whether any wrongdoing is properly addressed or not. It is, therefore, essential to ensure that the systems that competent authorities implement for handling information received from reporting persons meet standards of quality and fairness and that those responsible for such tasks are skilled and properly trained. Effective inter-agency cooperation is also necessary in order to assure that the protection standards are maintained in the transfer of information from one institution to another.

Recognizing that many valid whistleblower reports remain dormant, the Council of Europe stated that courts might be empowered to sanction, fine or penalize an employer or other responsible person for failing to conduct a prompt and adequate investigation.¹³⁰

States, competent authorities and employers have a duty of care to those who engage with them to tackle corruption and other wrongdoing. The present section sets out some of the key elements that should be considered in order to ensure that reports of corruption or other wrongdoing are handled properly. Many of these elements will be familiar as basic principles of a fair investigation and a fair hearing.

1. Clear procedures for the initial report and for the request for protective measures

Clear arrangements for reporting wrongdoing or malpractice are important for guiding staff and other reporting persons on what to report, when to report it, who to report it to, etc. However, many organizations do not adequately consider what processes need to be in place to address and investigate in a timely manner a report about corruption or wrongdoing once it is made. While some form of investigation is already part of the mandate of many competent authorities, others may have limited experience in handling direct reports, and for some, it will be new territory.

To remedy these issues, many national laws passed in recent years include specific, step-by-step procedures for how authorities and regulators should follow up on valid whistleblower disclosures.

The Protected Disclosures Act (2011) of Jamaica requires recipients of disclosures to determine whether an investigation is needed and, if so, to investigate the disclosure. The recipient is required to investigate the matter fairly, provide updates to the whistleblower at least every 30 days, report findings to the whistleblower and to other people and organizations as appropriate, recommend corrective actions, take steps to remedy improper conduct, provide redress, take disciplinary actions and reduce the opportunity for the misconduct to reoccur.

Similar procedures and requirements are, for instance, written into the Public Interest Disclosure Act (2013) of Australia, the Protection of Public Interest Whistleblowers Act (2011) of the Republic of Korea and the Whistleblower Protection Act (2010) of Malaysia.

¹³⁰ Council of Europe (2014). Explanatory Memorandum to the Recommendation on the Protection of Whistleblowers.

Whatever authority or body is receiving the information, certain standards seem paramount when handling reports. These include principles of natural justice (procedural fairness) in relation to confidentiality, rules of evidence, standards of proof, legal and policy compliance, and health and safety regulations.¹³¹

When an organization is conducting an internal investigation, for example, the purpose is to find out what happened and what action is needed to protect the public, staff or the organization from loss or harm. Whether triggered by a report from a member of staff or by a member of the public, the purpose of an internal investigation must be to establish the facts; it is neither a trial nor a tribunal.

At the level of competent authorities, consideration should be given to developing systems that simplify the process for persons who report but that are also properly tailored to the regulatory or oversight systems in place. This could include a system for redirecting information when the authority that first receives a report is not the appropriate body to address it. When that happens, the reporting person should be kept informed, their confidentiality should continue to be guaranteed and they should still be protected by law for the original disclosure.

In the case of competent authorities, their websites and other informational materials should detail how the public can get in touch and how any information reported will be handled. They should be clear as to when a response will be provided, what types of protective measures are available and the basis on which they apply.

Example: Office of the Whistleblower, United States Securities and Exchange Commission

The Office of the Whistleblower of the United States Securities and Exchange Commission (SEC) was established in 2010. It is responsible for the administration of the SEC whistleblower programme and, in particular, for seeking information and assistance from whistleblowers who know of possible securities law violations, for protecting them for cooperating with the SEC and for providing them with financial rewards in certain circumstances.

In addition to providing a link to the rules of the SEC whistleblowing programme, the SEC website also provides answers to questions individuals might have about the programme and, specifically, what will happen if they make a report. Here is a list of the questions that are currently answered on the website:

- What is the SEC Whistleblower Programme?
- Who is an eligible whistleblower?
- What does it mean to “voluntarily” provide information?
- What is “original information”?
- How might my information “lead to” a successful SEC action?
- I work at a company with an internal compliance process. Can I report internally and still be eligible for a whistleblower award?
- I provided information to the SEC before the enactment of Dodd-Frank on July 21, 2010. Am I eligible for an award?

¹³¹ Guidance on conducting internal investigations can be found at the website of the Independent Commission against Corruption, New South Wales, Australia. See <http://www.icac.nsw.gov.au/preventing-corruption/responding-to-corrupt-conduct/internal-investigations/1535>

- How do I submit information under the SEC Whistleblower Programme?
- Can I submit my information anonymously?
- Will the SEC keep my identity confidential?
- How will I learn about the opportunity to apply for an award?
- How do I apply for an award?
- What factors does the SEC consider in determining the amount of the award?
- Can I appeal the SEC's award decision?
- What rights do I have if my employer retaliates against me for submitting information to the SEC?

The Office of the Whistleblower also runs a public hotline to answer questions from whistleblowers or their counsel concerning the whistleblower programme, including how to go about submitting information to the agency. In 2014, the Office returned over 2,731 calls from members of the public.

Source: United States Securities and Exchange Commission, 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program. Available from <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>

It is equally important that States parties consider and regulate how a request for protective measures is made, for instance in cases where a person has been the victim of retaliatory action. The Protection of Public Interest Whistleblowers Act of the Republic of Korea states in its article 17 that “the request for protective measures shall be made within three months from the date the disadvantageous measures were taken [...]”. Further details on the method and procedures to be followed are provided for by presidential decree.

2. Competent authority to receive complaints about reprisals: same or separate?

Consideration should be given as to whether and how to separate the function of investigating the substance of a disclosure and any complaints of reprisals against the reporting person. Doing so at an early stage can help delineate the different skill sets and specializations that may be required of the respective staff.

Functional separation between these two tasks helps to ensure that those who are properly trained can focus on their area of expertise and build specialist knowledge, including in matters of reprisals, and that there is no perceived conflict of interest between how the information is handled and how the reporting person is treated. The Office of Special Counsel¹³² of the United States or the Anti-Corruption and Civil Rights Commission (ACRC) of the Republic of Korea (as described in chapter II, B.2) separate, to some extent, the investigation of the wrongdoing from the investigation into any reprisals taken against the individual reporter—though they are the main point of contact for both issues.

The Office of Special Counsel has the authority to investigate and prosecute violations of the rules protecting federal workers against retaliation for whistleblowing (under the Whistleblower Protection Act). It also plays a key oversight role in reviewing government investigations of potential misconduct. Based on a complaint by a whistleblower, the

¹³² See the website for the Office of the Special Counsel: <https://osc.gov>

Office may require an agency to investigate the alleged wrongdoing, even if it is reluctant to do so. Whistleblowers are invited by the Office of Special Counsel to comment on the quality of the agency investigation and the corrective actions prescribed—based on the view that whistleblowers themselves are most often experts in their own right on the subject matter of their concerns. The Office also maintains a dialogue with the investigating agency to make sure that the actions taken are reasonable and that they address the concerns raised by the whistleblowers.

In New Zealand, reports of wrongdoing and complaints of retaliation are handled by separate bodies. Protected disclosures may be made to competent authorities, including the New Zealand Ombudsman's Office, but the application of the anti-victimization provisions of the Human Rights Act 1993 that are applicable to whistleblowers is overseen by the Human Rights Commission. This approach also reduces the risk of perceived bias against a whistleblower because the assessment of their claim of retaliation is clearly separated from and therefore not influenced by the investigation into the report of suspected malpractice, particularly if no wrongdoing is found.

So while much will depend on the existing legal and institutional context, States parties will need to consider whether competent authorities should have the mandate both to investigate reports of wrongdoing and corruption and to protect the individuals who report to them. This is particularly relevant as more attention is being paid worldwide to the role of competent authorities in investigating wrongdoing and holding the services or companies they oversee to account for any malpractice that is reported.

Finally, most competent authorities are not able to investigate every single report that comes to their attention. They simply do not have the resources to do so and must prioritize the issues. They have to decide whether or not to investigate, based on a range of factors, which include the following:

- Does the competent authority have jurisdiction?
- Does another agency have jurisdiction and, if so, is it more appropriate that it investigates?
- How old is the complaint? Will it be possible to gather sufficient and credible evidence if a significant amount of time has passed?
- Would it be in the public interest to investigate?
- Are there significant consequences for the complainant or others?
- Does the complaint raise systemic issues?
- Would an investigation be a wise use of resources?¹³³

The competent authority has to be able to set out clear reasons why it will or will not investigate a particular report. It should also provide this feedback to the reporting person and keep records of these steps. If more information is gathered, perhaps due to a separate report of information from someone else, investigations can be reopened or started. The main issue is to ensure that the information is assessed on its merits.

Where information needs to be shared between authorities, appropriate safeguards should be put in place. In 2009, the Protected Disclosures Act of New Zealand was amended to respond to some weaknesses in this regard. The amendments allow for information

¹³³ There are a number of guides and information sources about conducting investigations available online. See, for example, the website of the Independent Commission against Corruption of New South Wales, Australia and the Investigation Guide developed by the Asia-Pacific Region on human rights investigations (Asia-Pacific, 2012). Available from <http://www.icac.nsw.gov.au/>

to be transferred between authorities; they require that the reporting person be informed of any such transfer, and ensure that, in such circumstances, the transferred information still qualifies as a protected disclosure.¹³⁴

The Anti-Corruption and Civil Rights Commission of the Republic of Korea provides a different model in that it oversees the investigations of all other authorities, therefore its remit automatically allows it to communicate between agencies and to retain the power to protect the reporting persons within that framework.

The Sistema Nacional de Atención de Denuncias of Peru (see chapter I, section C.2) is set up in such a way that information from a single source (i.e. from a reporting person) can be examined in light of other information in the system. This is part of a process of verification and corroboration of reports coming into the system, but it is also a method by which information received can be linked to existing data or information that is gathered from other sources.

3. Duties and obligations

All reports should be assessed on their merits and those who report should be kept informed of decisions made, for example as to whether the matter will be investigated or not, or whether the matter falls within the remit of another body. In the public sector, obligations to investigate fairly and properly and to report on the outcomes may be included in laws to protect public interest disclosures. For example, the Public Interest Disclosure Act of Australia puts the obligation to investigate on the “principal officer” of the public agency, with time limits for reporting the outcome or any decision not to investigate. A complaint about a decision or the conduct of the investigation can be made to the Ombudsman.¹³⁵

While it is more difficult to enforce an obligation to investigate all reports within a workplace,¹³⁶ there is little difficulty in ensuring that competent authorities set up mechanisms, log information and review all disclosures with a view to assessing whether there is a prima facie case of malpractice or not.

In order to maintain public confidence in their reporting systems, competent authorities typically have a duty to ensure that a range of information about its reporting system and its operation is reported annually and made publicly available. Efforts should be made to publish as much information as is appropriate while taking care to protect the confidentiality of reporting persons or the private data of other parties. The type of information that can be made available includes the number of reports made, the types of issues reported, the number of reports that led to further investigations and the number that resulted in any action taken, as well as general information and statistics about the type of sanctions. Information about the number and type of measures that were applied to protect reporting persons should also be included.

¹³⁴ New Zealand (2000). Protected Disclosures Act, section 16.

¹³⁵ Australia (2013). Public Interest Disclosure Act, sections 47-50.

¹³⁶ One example is found in the United Kingdom Code of Corporate Governance Code C.3.5., which states: “The audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee’s objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action.” Available from <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf>

Excerpt of an interview with Bertrand de Speville, former Head of the Hong Kong Anti-Corruption Agency

“First of all, if a citizen has screwed up his courage to come and tell you something, if you treat him or his complaint as insignificant, he will never come to you again. You’ve lost him and you’ve probably lost all his friends as well. You can’t win this fight unless you get good information from the community. [...]

The second reason is that experienced investigators tell you that what at first appears to be a minor matter, when they start to look at it turns out to be a much more significant matter. You’re being shown just the end of the ball of wool. [...] When [investigators] start to tug on it they can end up with a huge affair.

The third reason is perhaps the most important—namely that if the anti-corruption body is seen to be picking and choosing what to investigate and what not to investigate, very quickly it will lose the public’s trust for being impartial and independent.

The fourth reason is—there is a kind of ethical side to it, it is not right ... that an anti-corruption body should be sending out the message to the community that some corruption matters and other corruption does not. There isn’t room for double standards. [...]

The fifth reason is that we know from bitter experience—that even a small act of bribery can have disastrous consequences. You only have to think of the fields of security or public health to realize the butterfly effect.”

Source: Princeton University (2013). Interview with Bertrand de Speville: Innovations for Successful Societies Oral History Programme: Bobst Center for Peace and Justice. Available from http://successful-societies.princeton.edu/sites/successfulsocieties/files/interviews/transcripts/3552/bertrand_despeville.pdf

The following is an overview of many of the duties and obligations that currently apply to competent authorities in relation to assisting and protecting reporting persons:

- To maintain confidentiality of identity of reporting persons.
- To implement a clear procedure for handling reports and providing feedback to reporting persons:
 - Including time limits for initial assessment.
 - To agree on and conform to a regular system of feedback in cases that are taken forward.
- To include in regular and publicly available reports:
 - The number and type of concerns received.
 - The number of enforcement actions triggered or contributed to by reporting persons (separating out different categories of reporting persons wherever possible).
 - The number and type of complaints regarding the decision to investigate or how the investigation is to be carried out.
 - The number of cases of detriment to the reporting person handled by the authority and cases taken to court for unfair treatment.
 - The number of organizations (regulated sectors) that have failed to implement effective whistleblowing arrangements.
 - Action taken to promote or enforce arrangements.

F. Provision of help and advice

While legal protections for reporting will go a long way towards reassuring those who come across suspected corruption or other reportable wrongdoing that it is safe and acceptable for them to report it, questions about how such rules apply in individual circumstances will always remain. At times, people will be unsure about whether, how or to whom to raise their concerns. They may be unsure as to the nature of what they have seen or whether such information will be welcomed by their employers or the competent authorities. They may be aware of how others were treated when they raised similar concerns and be worried about their own situation.

Many issues can be resolved if information and advice are available at an early stage. Trade unions, internal contact points such as ethics officers in the workplace are good sources of information. It is more challenging to provide access to impartial advice.

Information and advice

Access to information and advice at an early stage can help resolve questions or issues that, if left unaddressed, can stop individuals from responsibly reporting their concerns. They may not be sure whether the information they have is relevant or who they should approach. Access to guidance helps individuals understand what the law means in practical terms and what the risks and opportunities are for reporting. In some cases, the competent authority makes it clear that an adviser can make the first approach, as is the case in the Republic of Korea.¹³⁷

While competent authorities can provide information on how they will handle information reported to them and can clarify what the law means, they are not in a position to give impartial or individual legal advice. Some States parties have considered how access to such advice can be provided. For example, the Anti-Corruption and Civil Rights Commission of the Republic of Korea can request the Korean Bar Association to provide litigation and legal counselling under legal aid. The Netherlands is one of the few jurisdictions where the Government has directly provided resources to a legal advice centre dedicated to advising whistleblowers.

Example: The Netherlands – Government-funded Advice Centre for Whistleblowers

In order to assist and facilitate potential whistleblowers in making reports of malpractice or wrongdoing, the Government of the Netherlands and social partners (including employer and employee representative organizations) decided that advice and cost-free support was needed for potential whistleblowers. The “Adviespunt Klokkenuiders” (Advice Centre for Whistleblowers) was opened in October 2012 and was evaluated in mid-2014. The evaluation found that the Advice Centre had obtained a strong position in the field and a law to ensure its continued existence was recommended.

The Advice Centre is incorporated and funded by the Ministry of Interior Relations and the Ministry for Social Affairs and Employment, but is independent of them. It consists of a three-member committee—representing the private sector, the public sector and the trade unions—and a small staff including a director, three senior legal counsels, a part-time communication consultant, an office secretary and an administrative assistant. The Annual Report of the Centre and other material is available in English from its website (www.adviespuntklokkenuiders.nl).

¹³⁷ Republic of Korea, Act on Anti-Corruption (as amended in 2012), section 39.

Other important sources of information and advice in relation to reporting persons include ethics officers and trade unions. Ombudsman services also provide information to people inside and outside the workplace. A number of civil society organizations and groups provide legal advice, information and support to whistleblowers. Those providing direct support to whistleblowers include, among others, the Government Accountability Project (United States), Public Concern at Work (United Kingdom), Open Democracy Advice Centre (South Africa), Canadians for Accountability, Whistleblower-Netzwerk (Germany) and Whistleblowers Australia. In the area of corruption in particular, country chapters of Transparency International (TI) are setting up Advocacy and Legal Advice Centres (ALACs). These are now operational in 60 countries, including in Ireland, the Russian Federation and in many parts of Latin America—in Guatemala and Honduras, for example—and provide information and advice to individuals wishing to report corruption.¹³⁸ There are also organizations with an international focus, such as Blueprint for Free Speech,¹³⁹ and emerging networks with a focus on supporting local capacity to counsel and defend whistleblowers, such as the Whistleblowing International Network.

¹³⁸ For a list of TI ALACs, see <http://www.transparency.org/getinvolved/report>

¹³⁹ See Government Accountability Project, www.whistleblower.org; Public Concern at Work, www.pcaw.org.uk; Open Democracy Advice Centre, www.opendemocracy.org.za; Canadians for Accountability, canadians4accountability.org; Whistleblower-Netzwerk, www.whistleblower-net.de; Whistleblowers Australia, www.whistleblowers.org.au; Blueprint for Free Speech, <https://blueprintforfreespeech.net>. For information about other non-governmental bodies working in this field, see the Whistleblowing International Network at www.whistleblowingnetwork.org



Implementation

A. Training and specialization

Internal reporting units and designated agencies, such as anti-corruption agencies or police units, are the key points of contact for reporting persons. If such units and agencies are doing their job correctly, reporting persons will face less stress and anxiety and will be more likely to report.

States parties need to consider how to allocate competencies and how to set up an institutional framework to facilitate their work. One possibility is to designate a lead authority that receives and investigates reports, and ensures that they are directed to the right authority where necessary. Another possibility is to designate an oversight authority responsible for ensuring the rules on protecting reporting persons are correctly implemented by other authorities and for monitoring their effectiveness over time. In some jurisdictions, the role of the Ombudsman may be well suited to take on this responsibility. In the Netherlands, for example, some have called for the establishment of a single body to deal with whistleblowing. However, a “lead” institution does not mean that reporting persons should lose protection if they report to another competent body, particularly as experience has shown that limiting protection in this way undermines the credibility and efficacy of the system as a whole.

In many jurisdictions, there are a number of competent authorities who regulate particular sectors or industries. Many already receive information from reporting persons, but may not be aware of the need to handle such reports differently than is done through their normal public complaints systems. A failure to distinguish between complaints and reports can mean that important information about corruption will not be identified.

In some countries, independent bodies with specialized law enforcement powers have been set up to deal specifically with corruption. While there may be advantages to a single point of contact in terms of clarity for reporting persons, two potential disadvantages are mentioned here. The first is the risk, as stated earlier, that a single body is given a monopoly of power. In such cases, clear lines of public accountability will need to be attached in order to ensure that the body operates effectively. The other disadvantage is not related so much to the risk of abuse or bottleneck, but rather to the perception of its role. Public expectation in terms of performance may be much higher for a single

institution than the reality of what it can actually achieve. Further, the creation of a single point of contact may undermine the ability, capacity or indeed commitment of any other institutions or bodies to take responsibility for tackling corruption and other wrongdoing or risk.

States parties will necessarily need to consider the resource implications of any measures they put in place. The resources needed for an effective system may seem substantial at the outset, but the overall savings in preventing waste and damage may be significant. Successful prosecutions may also allow for the recovery of significant amounts of money.

Training is of vital importance and will be required for those involved with internal arrangements, in government for example, as well as for competent authorities. Training needs to address a number of topics, including:

- The legal framework
- Maintaining confidentiality
- Distinguishing the needs of different sources of information
- Ensuring feedback and reassurance
- Record-keeping and safeguards to ensure against leaks
- Matters of internal and external accountabilities

B. Promotion and awareness

Laws to protect reporting persons must be supported by effective awareness-raising, communication, training and evaluation efforts with all stakeholders. Public and private sector employees and employers need to know their rights and responsibilities with regard to reporting and investigating wrongdoing. Employees and those who work with organizations need to know what arrangements are in place, their right to report directly to a competent authority, how to obtain confidential advice, and what protection will be available to them, as well as the limits to that protection. Those who might be tempted to retaliate against reporting persons—whether in the workplace or outside it—need to be made aware of the penalties and sanctions that can be taken against them.

A national assessment undertaken at the start of any programme of reform will aid States parties in promoting awareness of new measures once they are put in place. A public awareness campaign is one way to promote cultural perceptions of whistleblowers as people acting for the public good and out of loyalty to their organization, profession and to society, rather than as traitors or informers.

This is why it is a matter of basic principle that protection for reporting persons builds on the freedom of expression and right to information (as detailed in chapter II) as understood under UNCAC (article 13(1)). In many countries, civil society organizations that specialize in whistleblowing and related fields will assist in promoting the idea of protecting reporting persons. The African Union Convention against Corruption, for example, requires States parties to “adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media and the promotion of an enabling environment for the respect of ethics”.¹⁴⁰

¹⁴⁰ Article 5(8), African Union Convention against Corruption.

Examples: Educating the public

Ghana

The Ghana Anti-Corruption Coalition have launched “Speak up”, an anti-corruption campaign aimed at educating Ghanaians on the anti-corruption laws of Ghana, especially the 2006 Whistleblowers Act (Act 720). The Coalition is collaborating with the Global Media Alliance, specifically ETV Ghana and two radio programmes.

The “Speak up” project is aimed at encouraging Ghanaians to stand and speak against of all sorts of corruption, particularly in the education and health sectors. It is designed to be a purely interactive project where the public can submit comments and questions on the Whistleblower Act and corruption generally by calling into the show, sending text messages to the short-code 1721 on all networks, and 1821 on Airtel, as well as by engaging on the project’s official Facebook page.

Montenegro

The Directorate for Anti-Corruption Initiative (DACI) of Montenegro has carried out many public awareness campaigns in recent years. The DACI’s “Not a Cent for a Bribe” campaign, which began in 2012, uses leaflets with hotline numbers, billboards, TV broadcasts, posters, leaflets and audio spots, as well as “zero currency banknotes” to discourage bribery. As part of its “Corruption is not an option” campaign, the Customs Administration distributed 20,000 flyers. Other DACI campaigns include “Open Your Eyes Wide – Report Corruption”, “Remove the Virus – Report Corruption”, “Reporting Corruption = Good Decision” and “Report Corruption – There Is Always a Way”.

Source: “Izveštaj o broju prijave o korupciji za period jul-decembar 2013. Godine,” (“A report on the number of reports of corruption for the period July-December 2013”), Directorate for Anti-Corruption Initiative of Montenegro, January 2014. “Campaign ‘Not a Cent for Bribe’ continued,” Directorate for Anti-Corruption Initiative, 23 July 2014. Available from antikorupcija.me/en/index.php?option=comcontent&view=article&id=277:campaign-not-a-cent-for-bribe-continued&catid=42:daci-news&Itemid=291

C. Cross-border cooperation

States parties should also consider issues that may arise in cross-border reporting, whereby persons in one State report to the authorities in another State. This has happened in practice, for instance, in cases where bank employees in Switzerland and Liechtenstein leaked information—sometimes for reward—to foreign tax authorities. The United Kingdom Public Interest Disclosure Act, for example, applies to workers with employment contracts, regardless of the geographical location of the malpractice and regardless of whether the breach of a legal obligation arises under United Kingdom law or the applicable law of another country. This approach is also adopted by Ireland in its Protected Disclosures Act and can help to ensure a more complete and coherent coverage of cross-border cases.

Though the regulatory authorities to whom disclosures may be made are domestic, they could be expected to pass on to foreign authorities any information relating to illegal acts abroad. Additional care might be required when sharing such information, including protecting the identity of the reporting person, and authorities might ask for reliable guarantees as to the confidentiality of information and the safety and protection of that person from retaliation in the receiving country. Some foreign bribery cases, for example, have highlighted the gaps in whistleblower protection in international contexts and would require follow-up action.¹⁴¹

¹⁴¹ See, for example, the United Kingdom case of *Foxley v. GPT Project Management Ltd.*, Employment Tribunal No. 22008793/2011 (12 August 2011). A summary of the key problems is available in the OECD UK Phase 3 Report, paras. 197-203. Available from <http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>

D. Monitoring and evaluation

It is important for States parties to monitor the effectiveness of reforms or initiatives that have been put in place. The consultation at the initial assessment stage prior to making reforms helps create an important baseline from which to evaluate any new measures that are implemented.¹⁴² Ongoing analysis of relevant case law or court rulings can also be a very useful source of information. Most laws, including many of the examples showcased in this Resource Guide, are still relatively new and there is not yet much experience in regard to their implementation.

Duties on competent authorities to report on their activities will ensure that data is available for effective monitoring. These, along with other indicators listed below, should help States parties to gain a fuller appreciation of how the system is working and whether any improvements or changes are required.

Indicators of effectiveness

In its recent report on whistleblower protection and the United Nations Convention against Corruption, Transparency International set out a list of questions that States parties and practitioners can use to evaluate the effectiveness of laws and mechanisms in place to support whistleblowing.¹⁴³ The following list is based on that list and has been adapted to apply to reporting persons generally (i.e. beyond workplace whistleblowers):

- What measures are taken to ensure the law is well known?
- Are there any published studies on its impact—including independent research and studies?
- Are there examples of notable corruption cases uncovered by reporting persons and workplace whistleblowers?
- Are there examples of notable corruption cases where there were no early reports? What stopped individuals from speaking up earlier?
- How many reports from individuals have public bodies received?
- How many calls for information and guidance on reporting have been made to competent authorities? How much activity is there on the authority's website, particularly visits to pages regarding reporting and protections?
- How many cases occurred where protection was sought against reprisals?
- What are the number and amounts of compensation awards?
- What examples are there of organizational policies and procedures that have been implemented?
- What are the views of civil society on its impact?

In terms of workplace protections for reporting persons, the comprehensiveness and strengths of different legal provisions were reviewed across the European Union by Transparency International in 2013¹⁴⁴ and across the G20 countries by the Organisation

¹⁴² OECD (forthcoming). *Revisiting Whistleblower Protection in OECD Countries: from Commitments to Effective Protection*, OECD Publishing, Paris.

¹⁴³ Transparency International (2013). *Whistleblower Protection and the UN Convention Against Corruption*. Berlin. Available from http://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption

¹⁴⁴ Worth, M. (2013). *Whistleblowing in Europe, Legal Protections for Whistleblowers in the EU*, Transparency International. Available from http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu

for Economic Co-operation and Development (OECD) in 2011.¹⁴⁵ Follow-up on the G20 action plan was addressed in a report prepared by a consortium of researchers and NGOs in 2014 that assessed the comprehensiveness of G20 countries' whistleblower protection rules using 14 key criteria.¹⁴⁶ While there is no single global benchmark for the evaluation of such laws, the criteria used for comparing the content of whistleblower protection laws in these studies should assist States parties when considering protections for reporting persons more generally.

The Council of Europe Recommendation on the Protection of Whistleblowers provides a set of guiding principles that may assist States parties in considering how robust their national, institutional and legal frameworks are for assisting and protecting reporting persons in the context of the workplace.

Table 1. Evaluation criteria based on Council of Europe Principles

Definitions	
	Definition of whistleblower
	Definition of public interest report or disclosure
	Definition of reporting
	Definition of disclosure
Material scope	
1	National framework should establish rules to protect rights and interests of whistleblowers
2	Scope of public interest
Personal scope	
3	Wide understanding of working relationships
4	Covers individuals whose work-based relationship has ended, as well as those in the pre-contractual negotiation stage
5	Rules applying to information relating to national security in keeping with European Court of Human Rights jurisprudence
6	Without prejudice to rules for the protection of legal and other professional privilege
Normative framework	
7	Comprehensive and coherent approach to facilitating whistleblowing
8	Restrictions and exceptions should be no more than necessary
9	Ensure effective mechanisms for acting on public interest reports and disclosures
10	Protection and remedies under rules of general law for those prejudiced by whistleblowing are retained
11	Employers cannot call on legal or contractual obligations to prevent someone from making a public interest disclosure or to penalize them for doing so

¹⁴⁵ OECD (2011). *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*. Available from <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

¹⁴⁶ Wolfe, S., M. Worth, S. Dreyfus and A. J. Brown (2014). *Whistleblower Protection Laws in G20 Countries: Priorities for Action, Blueprint for Free Speech*, Griffith University, University of Melbourne, Transparency International Australia. Available from <https://blueprintforfreespeech.net>

Channels for reporting and disclosures	
12	Measures foster an environment that encourages disclosure in an open manner
13	Clear channels for reporting are in place
14	Tiers for reporting include wider public accountability, such as media
15	Employers are encouraged to put in place internal procedures
16	Workers to be consulted on internal procedures
17	Internal reporting and disclosures to regulatory bodies to be encouraged as a general rule
Confidentiality	
18	Reporting persons are entitled to confidentiality
Acting on reporting and disclosure	
19	Reports should be promptly investigated
20	Reporting persons should be informed of action taken
Protection against retaliation	
21	Protection should be against retaliation in any form
22	Protection is retained even where a reporting person reasonably but mistakenly believed that a specific malpractice was occurring
23	Entitlement to raise the fact that disclosure was made in accordance with national framework
24	The bypassing of internal arrangements may be taken into consideration when deciding on remedies
25	Burden of proof is on employer in claims for victimization or reprisal
26	Interim relief should be available
Advice, awareness and assessment	
27	National framework should be promoted widely
28	Confidential advice should be available (preferably free of charge)
29	Periodic assessments of the effectiveness of the national framework

Source: 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). Available from <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

See also: Council of Europe Technical Paper (2014) Expert opinion on the draft "Law on Protection of Whistleblowers" by Paul Stephenson and Wim Vandekerckhove. Page 22-25. http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/PACS-Serbia/Technical%20Paper/TP8%202014%20PACS%20Expert%20Opinion-draft%20Law-Protection-Whistleblowers_EN.pdf

The question of whether protections are effective will depend on how well they are implemented by organizations and competent authorities. In some countries, formal standards exist for such procedures and can be used for the purposes of evaluation and benchmarking; for example, Standards Australia developed a standard for whistleblower

protection programmes in the private sector in 2003¹⁴⁷ and the British Standards Institute created a code of practice for internal whistleblowing arrangements in 2008.¹⁴⁸ In the United Kingdom, the National Audit Office evaluates public agencies procedures¹⁴⁹ and in Australia, such standards have been used to evaluate the procedures of many public agencies by independent, government-funded researchers.¹⁵⁰ However, the development of new criteria and research for more consistent monitoring and evaluation of organizational performance in whistleblower protection is an area in which further research is still needed.

In the context of UNCAC, evaluations should take into account the measures put in place for different types of reporting persons (see figures I and II). Being able to disaggregate the data would be helpful in order to verify where the vast majority of information is coming from, what protections have been required and whether any changes in the system are needed.

While the goal is to protect individuals from reprisals and render the need to make a legal claim for compensation or other types of remedy unnecessary, it is also important to track the legal claims that are brought. If very few of the claims of victimization or reprisals for reporting are decided in favour of the reporting person, that should be investigated fully, as it is likely to discourage future reporting and workplace whistleblowing. To enable such research and analysis, States should make the relevant judgements available. In the United Kingdom, a non-governmental organization is monitoring the implementation of the Public Interest Disclosure Act and relevant judgements.¹⁵¹ Researchers from academic institutions might also conduct useful assessments.

Conducting wider public surveys on how those who report wrongdoing, corruption or risks are perceived will also provide helpful indicators of the impact of the law on improving the social and cultural conditions in which individuals cooperate with the authorities.

¹⁴⁷ See AS 8004-2003. Available from <http://infostore.saiglobal.com/store/Details.aspx?ProductID=323803>

¹⁴⁸ British Standards (2008). Publicly Available Specification: Whistleblowing Arrangements Code of Practice, 1998:2008. Available from <http://pcaw.org.uk/bsi> and <http://shop.bsigroup.com/forms/PASs/PAS-1998/>

¹⁴⁹ National Audit Office (March, 2014). Making a whistleblowing policy work: Report by the Comptroller and Auditor General, HC 1152: London. Available from <http://www.nao.org.uk/wp-content/uploads/2015/03/Making-a-whistleblowing-policy-work.pdf>

¹⁵⁰ Brown, A. J., P. Roberts and J. Olsen (2011). Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations. Australia and New Zealand School of Government (ANZSOG): Australia. Available from http://press.anu.edu.au/titles/australia-and-new-zealand-school-of-government-anzsog-2/whistling_citation/

¹⁵¹ Is the law protecting whistleblowers? A review of PIDA claims 2011-2013. Available from <http://www.pcaw.org.uk/files/PIDA%20REPORT%20FINAL.pdf>

IV.



Conclusion and overview of key learning points

National anti-corruption efforts are only effective as long as they have the support and confidence of the public. The laws and measures that States parties implement to protect reporting persons need to be seen as legitimate by society at large. This means they must be aligned with the needs of the reporting person and be properly tailored to fit national circumstances. Competent authorities with balanced and clear mandates and the appropriate powers and resources to handle information properly and to proactively protect reporting persons are essential to the success of any anti-corruption system that relies on public engagement. Measures to protect reporting persons should be designed to overcome the barriers that are put in the way of open and safe communication, particularly when it comes to corruption and wrongdoing that affects the public's welfare and interests.

States parties are cautioned against assuming there is one ideal solution or a single approach that will work in all circumstances or that will continue to be effective over time. This Guide has taken a broad but purposive approach and it is hoped that States parties will conduct their own research and analysis using the information provided throughout. A thorough review of the national context will help States parties in their considerations of how best to implement measures to facilitate reporting and protect those who use them. Given that there are common challenges facing all jurisdictions and legal principles that can be universally applied, it is essential that States parties examine those carefully and consult fully to ensure the measures they implement are properly adapted to their national contexts.

Those who engage in corrupt conduct take advantage of the weaknesses of systems—whether such systems are political, economic, social or cultural—and they adapt when gaps are closed or new vulnerabilities are exposed. States parties must be ready to regularly evaluate the arrangements and measures they put in place to determine whether they are strong and flexible enough to adapt to changing circumstances or whether a new approach is needed.

Most importantly, corruption flourishes when those who engage in it believe they can rely on the silence of those around them—a silence that can be all too often reinforced by a lack of transparency, limited public access to information and weak public oversight. Laws that simply try to manage and control information will not break the silence, nor

will they meet international good practice standards, nor enable the prevention and combating of corruption. As a matter of public engagement, the protection of reporting persons needs to be framed and understood within a broad public accountability and human rights framework. Taking a robust approach to this issue as a matter of law, policy and protecting the public interest will help States parties, authorities and organizations in all sectors to detect and prosecute wrongdoers and, importantly, will help prevent corruption from taking root in the first place—for the benefit of all. When considering the establishment or reform of laws and systems to protect reporting persons, States parties should keep in mind the following key points presented in this Guide:

Introduction

- UNCAC defines “reporting persons” broadly; it includes persons working in the public or private sectors and members of the public, as well as witnesses, experts and victims.
- Protective measures need to match the needs and circumstances of the reporting person.
- Reporting is “facilitated” by making it safe in law and clear in practice.

Chapter I. National assessment

- Review the existing legal framework and institutional arrangements in order to strengthen existing good practice and identify gaps.
- Consult broadly with relevant government, business, union, legal and civil society representatives to plan sensible and sustainable reforms.

Chapter II. Facilitating reports and protecting reporting persons

- Protect a broad range of reportable information—any matter of wrongdoing or harm to the public interest, including where information is classified as secret or otherwise deemed confidential, in order to:
 - Prevent corruption;
 - Shift the burden of risk away from the reporting person; and
 - Maintain public accountability of the State and corporate activities.
- Ensure a sensible range of effective and alternative channels for reporting in order to provide a safe alternative to silence and prevent bottlenecks or breaking points in the system.
- Protect those who disclose information about wrongdoing in the public domain, in keeping with the principles of democratic accountability and human rights.
- Consider how best to use new technology and traditional communication methods to facilitate reporting.
- Protections should include legal, procedural and organizational measures.
- Consider how to provide reporting persons with access to advice.
- Measures should be proactive in order to prevent unfair treatment, harm or retaliation against a reporting person and should be retrospective in order to provide a remedy for any damage or harm caused as a result of making a report.
- Consider innovative ways to encourage reporting and make it more socially acceptable to report wrongdoing (e.g. thanking, honouring and rewarding).

Chapter III. Implementation

- Ensure that competent authorities have the appropriate mandate, capacity, resources and powers to receive reports, investigate wrongdoing and protect reporting persons.
- Ensure that staff of competent authorities have the appropriate training and specialized skills to handle reports and protect reporting persons.
- Ensure that competent authorities are protected from undue influence and can carry out their functions impartially.
- Consider creating or designating a lead or oversight authority to ensure the rules on protecting reporting persons are properly implemented and monitored over time.
- Periodically review and evaluate the effectiveness of the legal and institutional arrangements in place to protect reporting persons and ensure they retain public confidence.



Resources

There are a number of tools available to help member States and other interested parties consider how best to encourage and protect reporting persons and workplace whistleblowers within their national systems and contexts. Below is a selection of some of the available resources, organized by general subject area; at the end is a list of websites where more information can be found.

International guidance on the protection of whistleblowers/reporting persons

- United States Government Accountability Project (2013). *International Best Practices for Whistleblower Policies*. GAP: Washington, D.C. Available from http://www.whistleblower.org/sites/default/files/Best_Practices_Document_for_website_revised_April_12_2013.pdf
- Organisation for Economic Co-operation and Development (OECD) (2010). *G20 Anti-Corruption Action Plan (Action Point 7: Protection of Whistleblowers)*. Available from www.oecd.org/daf/anti.../G20_Anti-Corruption_Action_Plan.pdf
- OECD (2011). *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*. OECD: Paris. Available from <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>
- OECD (2012). *Whistleblower protection: encouraging reporting*. CleanGovBiz Initiative. OECD: Paris. Available from www.oecd.org/cleangovbiz/toolkit/50042935.pdf
- Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to Member States on the protection of whistleblowers. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>
- Council of Europe (2014). *Explanatory Memorandum to the Recommendation on the Protection of Whistleblowers*. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2170183&Site=CM>
- Council of Europe Resolution 2060 (2015) of the Parliamentary Assembly on Improving the Protection of Whistleblowers. Available from <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21931&lang=en>
- Transparency International (2013). *Whistleblower Protection and the UN Convention against Corruption*, Berlin. Available from <http://www.transparency.org/>

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- Transparency International (2013). *International Principles for Whistleblower Legislation*. Available from http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation
- Organization of American States (2013). *Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses*. Washington, D.C. Available from http://www.oas.org/juridico/english/draft_model_reporting.pdf

Right to information, open government and whistleblower protection

- Global Principles on National Security and the Right to Information (The Tshwane Principles) (2012). Available from <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>
- See Principles 37-43 with regard to whistleblower protection and classified information.
- Open Government Guide (online resource). Available from <http://www.opengov-guide.com/topics/whistleblower-protection/>

Private sector rules with international reach

- United States (2012). An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes (also known as the Sarbanes-Oxley Act).
- United States (2010). Dodd-Frank Wall Street Reform and Consumer Protection Act (also known as the Dodd-Frank Act).
- United Kingdom (2010). Bribery Act 2010 (c. 23).

Protection of data and whistleblowers/reporting persons

- Article 29 Working Party (2006). *Opinion on European Union data protection rules on internal whistleblowing schemes, Article 29 Guidance on Whistleblowing Schemes (2006) WP117*. Available from http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf

Protection of sources

- UNODC. *Reporting on Corruption: a Resource Tool for Governments and Journalists*. Available from http://www.unodc.org/documents/corruption/Publications/2014/13-87497_Ebook.pdf

Witness protection

- UNODC (2008). *Good practices for the protection of witnesses in criminal proceedings involving organized crime*. United Nations: Vienna. Available from http://www.unodc.org/documents/southeastasiaandpacific/Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf

Guidance for individuals

- Devine, T. and T. Maassarani (2011). *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth*. Brett-Koehler: California.
- Devine, T. (1977). *The Whistleblower's Survival Guide: Courage Without Martyrdom*. Fund for Constitutional Government: Washington, D.C.
- Ghana Anti-Corruption Coalition (2010). *A Guide to Whistleblowing in Ghana*. Available from <http://wacmn.gaccgh.org/downloads/files/A%20Guide%20to%20Whistleblowing%20in%20Ghana1.pdf>
- Kohn, S. (2011). *The Whistleblower's Handbook: A Step-by-step Guide to Doing What's Right and Protecting Yourself*. Lyons Press: United States.
- Transparency International France (2014). *Guide pratique à l'usage du lanceur d'alerte*. Available from http://www.agircontrelacorruption.fr/wp-content/uploads/2014/12/GP-a%CC%80-lusage-du-lanceur-dalerte-franc%CC%A7ais-v.5_pages.pdf
- Transparency International Ireland (2014). *Speak Up Safely, Transparency International Ireland's Guide to Whistleblowing and Making a Protected Disclosure*. Available from http://transparency.ie/sites/default/files/14.12.02_Speak_Up_Safely_Final.pdf

Internal reporting/whistleblower arrangements

- British Standards (2008). *Publicly Available Specification: Whistleblowing Arrangements Code of Practice, 1998:2008*. Available from <http://pcaw.org.uk/bsi> and <http://shop.bsigroup.com/forms/PASs/PAS-1998/>
- Stichting Van de Arbeid (2010). *Statement on Dealing with Suspected Malpractices in Companies*. Publication No. 1/10, 3 March 2010 (translation updated August 2012). Available from http://www.stvda.nl/en/~media/Files/Stvda/Talen/Engels/2012/20120829_EN.ashx
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- UNODC (2013). *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*. Available from http://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf
- Whistleblowing Commission (2013). *Code of Practice, United Kingdom*. Available from http://www.pcaw.org.uk/files/PCaW_COP_FINAL.pdf
- *Anti-Corruption Ethics Compliance Handbook*, a joint publication of OECD, UNODC and the World Bank, pages 60 et seq. Available from <http://www.unodc.org/documents/corruption/Publications/2013/Anti-CorruptionEthicsCompliance-Handbook.pdf>
- UNODC (2013). *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*, page 82 et seq. Available from http://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf

Material from competent authorities (some examples)

- European Union Ombudsman (2015). *Decision of the European Ombudsman on internal rules concerning disclosure in the public interest (“whistleblowing”)*.

Available from <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59102/html.bookmark>

- Hong Kong Independent Commission Against Corruption (online resource). Guide to Reporting Corruption. Available from http://www.icac.org.hk/en/report_corruption/grc/
- New Zealand Office of the Ombudsman (2012). New Zealand Making a Protected Disclosure – blowing the whistle). Available from <http://www.ombudsman.parliament.nz/resources-and-publications/guides/good-administration-guides>
- United States Office of the Special Counsel (online resource). Disclosure of Wrongdoing and FAQs. Available from <https://osc.gov/Pages/DOW.aspx>
- United States Securities and Exchange Commission (2014). SEC Whistleblower Practice Guide, Navigating the SEC Whistleblower Program and the Rules and Procedures that can lead to Financial Rewards for Reporting Security Violations. Available from <http://www.kmblegal.com/wp-content/uploads/SEC-Whistleblower-Practice-Guide.pdf?730971>

Selected research/studies

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, D.C. Available from SSRN: <http://ssrn.com/abstract=1753180>

Brown, A. J., P. Roberts and J. Olsen (2011). *Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations*. Australia and New Zealand School of Government (ANZSOG): Australia. Available from http://press.anu.edu.au/titles/australia-and-new-zealand-school-of-government-anzsog-2/whistling_citation/

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Selected websites

Adviespunt Klokkenluiders (the Netherlands): <http://www.adviespuntklokkenluiders.nl/>

Blueprint for Free Speech (Australia): <https://blueprintforfreespeech.net/>

Government Accountability Project (United States): <http://www.whistleblower.org/>

Whistleblower Netzwerk E.V. (Germany): <http://www.whistleblower-net.de/>

Open Democracy Advice Centre (South Africa): <http://www.opendemocracy.org.za/>

Public Concern at Work (United Kingdom): <http://www.pcaw.org.uk>

Whistleblowing International Network: <http://www.whistleblowingnetwork.org>



Annex. International standards

United Nations Convention against Corruption (UNCAC)^a

Articles on the protection of reporting persons and other relevant provisions that contribute to or are linked with the subject of reporting persons

Article 33. Protection of reporting persons

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

Article 8. Codes of conduct for public officials

[...]

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

^a<http://www.unodc.org/unodc/en/treaties/CAC/index.html#UNCACfulltext>

Article 13. Participation of society

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

[...]

(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

- (i) For respect of the rights or reputations of others;
- (ii) For the protection of national security or ordre public or of public health or morals.

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

Article 32. Protection of witnesses, experts and victims

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 37. Cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.
2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.
3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.
4. Protection of such persons shall be, *mutatis mutandis*, as provided for in article 32 of this Convention.
5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

Article 38. Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

- (a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or
- (b) Providing, upon request, to the latter authorities all necessary information.

Article 39. Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.
2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

Snapshot of further international standards on the protection of reporting persons

Organization of American States (OAS) Inter-American Convention against Corruption^b

Article III. Preventive measures

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

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

In addition: OAS Model laws on protecting whistleblowers and witnesses (2004 and 2013)^c

Council of Europe Criminal Law Convention on Corruption^d

Article 22. Protection of collaborators of justice and witnesses

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

- (a) Those who report the criminal offences established in accordance with articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;
- (b) Witnesses who give testimony concerning these offences.

Council of Europe Civil Law Convention on Corruption

Article 9. Protection of employees

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

In addition: Recommendation on the Protection of Whistleblowers (2014)^e

^bThe Inter-American Convention against Corruption was ratified by 29 countries in Latin and South America including the United States and Canada. Available from <http://www.oas.org/juridico/english/treaties/b-58.html>

^cModel Law Protecting Freedom of Expression against Corruption (2004), available from http://www.oas.org/juridico/english/model_law_whistle.htm; Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers And Witnesses (2013), available from http://www.oas.org/juridico/english/law_reporting.htm

^dThe Council of Europe has 47 member States, and its anti-corruption evaluation mechanism, the Group of States against Corruption (GRECO), was established under an enlarged partial agreement that allows it to extend membership outside the Council of Europe and has 49 members. GRECO monitors the application of the Civil Law Convention against Corruption (1999). See <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm> as well as the Criminal Law Convention against Corruption (1999), <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>

^eCouncil of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Available from <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>

African Union Convention on Preventing and Combating Corruption^f

Article 5. *Legislative and other measures*

For the purposes set forth in article 2 of this Convention, State parties undertake to: [...]

5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.

Southern African Development Community Protocol against Corruption^g

Article 4. *Preventative measures*

1. For the purposes set forth in article 2 of this Protocol, each State Party undertakes to adopt measures, which will create, maintain and strengthen: [...]

(e) Systems for protecting individuals who, in good faith, report acts of corruption;

Economic Community of West African States Protocol on the Fight against Corruption

Article 5. *Preventive measures*

In order to realise the objectives set out in article 2 above, each State Party shall take measures to establish and consolidate: [...]

(c) Laws and other measures deemed necessary to ensure effective and adequate protection of persons who, acting in good faith, provide information on acts of corruption.

^fThirty-one African states ratified this Convention, which requires them to adopt measures “to ensure citizens report instances of corruption without fear of consequent reprisal”. Available from <http://www.au.int/en/content/african-union-convention-preventing-and-combating-corruption>

^gThis Protocol commits 13 African countries to protecting individuals who report acts of corruption. Available from <http://www.sadc.int/documents-publications/show/>





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