Whistleblower protection:

International experiences, global initiatives and key concepts
Review Findings on Article 33 of UNCAC

- 70-75% of all reviewed countries receive a recommendation to consider strengthening whistleblower protection.

- Every second of them also raised technical assistance needs.
Implementation Review Mechanism (186 States Parties)


- Approx. 70% have no whistleblower legislation or are only partially in compliance. (Multiple countries have pending legislation)
- Gaps particularly in countries that have a duty to report but no corresponding protection.
- Often only measures relating to physical protection were cited.
- Aspects of significance which were identified: confidentiality, protection against liability and employment protection.
- Recommendations to strengthen included extension to private sector etc.
- Harmonized, dedicated legislation was sometimes recommended, even though no requirement by UNCAC
- Good practices: «Reversed burden of proof», broad employment protection including during application stage.
Overall Technical Assistance Needs

Chapter III: Criminalization and Law Enforcement
Technical Assistance Approach

Strategic programming and efficient use of resources for lasting results

Information from the Reviews

Follow-up research and EGM to produce knowledge products

Technical assistance (upon request) at country level and through regional platforms and peer learning

Collaboration with other organizations as well as civil society, advocacy and knowledge exchange (G20, CEPA etc.)

Sector specific assistance (e.g. sports)
Timeline from an international level anti-corruption perspective (non-exhaustive)

- UNODC
- UNCAC (2003)
- OAS Model Law (2013)
- CoE Recommendation (2014)
- OECD Recommendation on Foreign Bribery (2009)
- EU Directive
- G20 HLPs
- OECD Recommendation on Improving Ethical Conduct in the Public Service (1998)
- International Conventions - most notably Art. 9 of the CoE Civil Law Convention - Protection of Employees (1999)
- (Termination of Employment Convention (1982))
UNCAC & Whistleblower Protection

UNCAC
(International Convention of global level / Criminal Law focus)

Whistleblower Protection
(National laws, Good practices and recommendations)

- Catalytic effect of UNCAC
- Focused on fighting corruption but acknowledging the importance of reporting persons and the need to protect them not only if they are witnesses and require protection but also if they face other unjustified treatment.
KEY ELEMENTS FOR CONSIDERATION
(NON-EXCLUSIVE)
1) WHO IS A WHISTLEBLOWER?
Who is a whistleblower?

• No global definition or standard. Term not defined in any int. Convention
• **Sources:** National laws, academic definitions (e.g. Miceli and Near) and recommendations from various bodies.

• **Focus on the specific nature of information held by “insiders”** who has priviledged expertise and access to information which enables him to become aware of risks/wrongdoing early (helping to prevent damage and to provide valuable leads for investigators).

• Due to their employment situation they might face specific challenges (contractual confidentiality obligations, loyalty concerns) and retaliation (dismissal, demotion, etc.)

**Good practice:** Wide employment related definition
Collaborating offenders

Witnesses

Whistleblower

Police informants

Citizen, service users, Complainants?

Individual Grievance

Hackers?

Reporting: Who are the sources of information?

Importance to distinguish, even though some overlaps/double roles are possible. Dynamic discussion at global level.
2) HOW AND WHERE SHOULD A WHISTLEBLOWER REPORT?
Alternative reporting channels

Internal (within public or private organisation)
- To the direct supervisor/employer
- To a designated staff member (internal auditor or ombudsman)
(Might depend on the size of the public or private sector organisation)

Regulators/Law enforcement bodies (receiving reports from various sources)
- External reporting as an alternative. E.g. to regulators and law enforcement authorities (anti-corruption commission, environmental agencies etc.)

External/Public Reporting (General public, media)
- Either regulated directly in the law (Canada, Ireland etc.) or based on FoI and human rights. ECHR Jurisprudence
  - Where other channels did not or could not reasonably be expected to function properly
  - Balance of different interests etc.

Provide employees with information where to report!
3) WHICH PROTECTION AND WHO IS RESPONSIBLE?
First level of protection: Measures to prevent retaliation

Diligent handling of reports. More is needed than just a law!

• Make reporting easy (webpage, phone etc.) Provide guidance. Importance of the first response!

• Standardization/obligations to manage the information intake as well as expectation (forms, questions to ask during first contact and procedures)

• Procedures for the protection of the identity

• Establish clear policies & procedures - who is responsible for what? (Role of first recipient and investigator / inter-agency cooperation)

• Follow-up / Who keeps the whistleblower informed about progress?

• Data collection and intelligence

• Independent legal advice (NGOs, lawyers, other?)
Second level of protection: Support in case of retaliation

- “Reversal of the burden of proof” that the retaliation happened due to the whistleblowing
- Protection against civil or criminal liability
- Repeal of retaliatory measures and compensation for damages
- Interim relief
- Penalties for retaliation

- Rewards *(percentage of recovered amount or court penalty)*
- Physical protection *(Important distinction from witness protection)*
Who is responsible for which protective measures?

**Persons/authorities receiving or investigating reports?**

Should provide procedural protection (e.g. confidentiality measures during the investigation, follow-up).

**Specialised authority?**

A separate and independent unit in charge to provide protection. Powers of this entity? (e.g. order to employer to reinstate the person as interim measure during trial, provision of some financial support).

**Employment tribunal?**

Most common form of enforcement is through the employment tribunals if a whistleblower was retaliated in the workplace.
Conclusion

- Very dynamic topic!
- International debate accelerated by anti-corruption agenda
- Trend towards dedicated laws
- Implementation Gap
- More research needed
- Interesting years ahead! Will whistleblowing be at the agenda of future high-level events?
Thank you!

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