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Whistleblower Protections: A Guide

International Bar Association
– Legal Policy & Research Unit and Legal Practice Division

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Foreword

Slowly but surely, the whistleblowing revolution is gaining momentum. Once the domain of ‘traitors’ and ‘snitches’, recent years have seen a growing recognition of the immense public value of whistleblowers and the misconduct they reveal. Across the world, the law is beginning to adapt and recognise the selfless sacrifices whistleblowers make when they illuminate misdeeds, which often leads to personal, financial and professional detriment. Legislation and regulation is being introduced to protect, reward and empower these heroic individuals.

Whistleblower laws have an ancient lineage. In 7th century Britain, whistleblowers could bring proceedings in the name of the Crown and share in any benefit awarded by the court. King Wihtred of Kent reportedly remarked: ‘if a freeman works during [the Sabbath], he shall forfeit his [profits], and the man who informs against him shall have half the fine, and [the profits] of the labour.’

Over a millennia later, the United States government introduced a similar law in the heat of the American Civil War. The *False Claims Act* of 1863 incentivised whistleblowers to report fraud against the government. This law would lay the groundwork for comprehensive whistleblower protections in the US, which remains the world leader in this field today.

Despite this history, an overwhelming number of jurisdictions continue to lag behind. These countries either have an absence of regulation governing this field, or have legislation on paper which is unenforceable in reality. Even where regulation is strong and the capacity for enforcement exists, an anti-whistleblower culture continues to neutralise the impact of whistleblower protection laws in many jurisdictions. For many years, the European Union has also lacked a coherent system to protect whistleblowers. Recent scandals have however shown the importance of introducing such a framework at the European level, as underlined by the European Parliament in October 2017.

This Report, prepared by a joint Working Group of the International Bar Association’s Legal Practice Division and Legal Policy and Research Unit, aims to provide guidance for regulators and organisations on the development and implementation of whistleblower protections. It brings together some of the world’s leading authorities on whistleblower law to offer a timely and insightful perspective on a topic of foremost importance. With the Working Group comprised of members with experience across every permanently-inhabited continents, it is able to offer a truly international perspective on a common challenge for the global community.

2018 may well be the year of the whistleblower. Recently introduced whistleblower protection schemes are beginning to have an impact in the likes of Holland, Ireland, France and Italy. Australia is on the cusp of landmark reform. The European Commission is set to introduce a proposal for a Union-wide protection. In regions where whistleblower protections are inadequate or unenforced, including across much of Latin American and Africa, the voice of reform among civil society stakeholders is beginning to be heard. In these interesting times, this report provides a valuable guide to whistleblower protections.

Virginie Rozière

Member of the European Parliament

April 2018

Executive summary

Organisations, be they government or private, rely on individuals, particularly employees, to bring to their attention information on actual or potential misconduct that may be occurring in the workplace. Whistleblowers can reveal information that would otherwise go undetected, and are therefore a vital source of human intelligence. Such information can often be critical to the organisation, ensuring it, among others, operates according to the law and to an appropriate standard, and protects the health and safety of its employees.

Numerous jurisdictions have recognised the increasing importance of protecting whistleblowers in recent years and have implemented various legal frameworks to do so. The three goals of whistleblower legislation are: (1) to encourage the reporting of misconduct; (2) to protect whistleblowers; and (3) to require investigation of allegations and remediation of any retaliation against whistleblowers.

Despite this, however, there remain many jurisdictions that afford little or no protection to whistleblowers and continue to perpetuate a culture of distrust and retaliation. Moreover, in those states that do afford legal protections to whistleblowers, there remain large gaps in the scope and application of the law that adversely limit their effective operation. Even in jurisdictions with robust whistleblower protection laws, lack of cultural acceptance can render the formal rights ineffective.

This report addresses these limitations, identifies the fundamental principles underpinning effective whistleblower regulations, and highlights the important role played by governments and organisations in protecting whistleblowers. In doing so, this report provides a commentary and offers guidance to:

- jurisdictions on the elements necessary to develop and improve legislative frameworks on whistleblower protection to make them more comprehensive, effective and robust; and
- organisations on the elements relevant to developing and implementing whistleblower protection policies and procedures.

The report recommends that whistleblowing be defined broadly to ensure various types of unlawful conduct are covered, and to encourage individuals to come forward without fear of reprisal.

The underlying purpose of whistleblower protection legislative frameworks is to provide a safety net for whistleblowers across all aspects of employment; although the human right to freedom of speech applies to all citizens, the focus of this report is on the rights of employees. It is advised that relevant legislation should apply as broadly as possible to encompass the public, private and not-for-profit sectors.

The report recognises the potential conflict between whistleblower laws and what is referred to as ‘the duty of loyalty’ in the context of employment. Jurisdictions should consider prohibiting employers from including terms in contracts of employment (so-called ‘gag clauses’) that prohibit employees from reporting concerns of misconduct or wrongdoing to relevant authorities, or carving out a ‘public interest’ exception to their application in cases of whistleblower reporting. In the absence of such laws, organisations are discouraged from including such ‘gag clauses’ in contracts of employment. Organisations, however, can and should impose an obligation on employees to report misconduct or wrongdoing under the terms of employment.

The contrasting opinions about confidentiality and anonymity of whistleblowers are discussed. While it is generally important to maintain the confidentiality of the reporting person's identity, in certain situations the recipient of the report may reasonably believe that disclosure of the reporter's identity is essential to the investigation. Currently, many whistleblowing laws provide a process of anonymous reporting for whistleblowers. However, comments from the Working Group responsible for this report, suggest that anonymous reporting may make it difficult to conduct an appropriate investigation, and difficult to guarantee confidentiality and protection.

The Working Group explored the tension between the need to protect whistleblowers from retaliation in the workplace and the need to protect organisations from the distraction and expense of defending against frivolous or misguided claims. Whistleblowers may struggle to achieve justice when they are required to establish that discriminatory action taken against them in the workplace is in retaliation to their reporting. To secure maximum protection for whistleblowers, the burden of proof can be reversed in whistleblower cases, requiring employers to prove that any negative action against the whistleblower is unrelated to their reporting. An alternative to this approach is to require the whistleblower to demonstrate initially that their claim includes certain basic elements, and then shift the burden of proof, requiring the employer to demonstrate that the action was based on legitimate reasons and not the whistleblower's protected conduct.

The report details different types of remedies that may be available to a whistleblower, including compensation, financial support, damages and financial rewards. At a minimum, whistleblower protection frameworks should provide for compensation for reporting persons who suffer detrimental actions – including not only unlawful termination but also harassment, demotion or any other form of discrimination – following the exposure of wrongdoing.

Other types of pecuniary remedies may be included in protective frameworks. The provision of legal assistance and financial support for whistleblowers can remove barriers to justice, while exemplary and punitive damages can deter retaliatory conduct. The offer of financial awards can encourage the reporting of wrongdoing. Similarly, leniency programmes offering total or partial reduction from penalties for organisations that deal effectively with retaliatory action can encourage positive behaviour. Potential criminal prosecution or punitive damages litigation against reporting persons for the fact of having reported wrongdoing have a greater chilling effect than termination of employment. Whistleblower protection legislation should provide for immunity from civil, administrative or criminal liability for the act of reporting.

The general consensus of the Working Group responsible for this report is that whistleblowing laws should allow organisations to develop and implement their own whistleblowing programmes. However, certain countries may also choose to provide detailed guidance to assist organisations with the enactment of whistleblowing laws if they do not have a strong culture of wrongdoing reporting. Indeed, they may enact legislation requiring the implementation of protected reporting frameworks (eg, France's Loi Sapin II, the Netherlands' House for Whistleblowers Act, Lithuania's Law on the Protection of Whistleblowers and Italy's Law on Whistleblowing).

Finally, the report underscores the importance of education programmes and awareness training to inform people about the benefits and protections available for reporting wrongdoing.

Acronyms

DOJ	US Department of Justice
G20	Group of Twenty
GDPR	EU's General Data Protection Regulation
OECD	Organisation for Economic Co-operation and Development
SEC	US Securities and Exchange Commission
UNODC	United Nations Office on Drugs and Crime

Introduction

Whistleblowing is not a new topic nor a new term. In the 1970s, Ralph Nader, an American civic activist, advocated organisational whistleblowing as a positive act by employees. Until then, most conceptions of whistleblowing were negative and connected with labels such as ‘snitch’ and ‘informant’. Even today, such connotations persist in certain contexts and certain countries. However, the stigma associated with whistleblowing has decreased in many countries due to recognition of the value of whistleblowing, and the need to protect whistleblowers has become more apparent to governments.

For example, in 2010, the Group of Twenty (G20) agreed that the Organisation for Economic Co-operation and Development (OECD) should draft a ‘compendium of best practices and guiding principles for whistleblower protection legislation’ as part of its Anti-Corruption Action Plan.¹ In 2015, the United Nations Office on Drugs and Crime (UNODC) released a *Resource Guide on Good Practices in the Protection of Reporting Persons* in the context of the UN Convention against Corruption (UNCAC).² In 2016, the OECD released a further report on *Committing to Effective Whistleblower Protection*³ (the ‘OECD Report’). Last year, the European Commission undertook a public consultation on a proposed initiative on ‘Horizontal or further sectorial European Union action on whistleblower protection’ with the President of the European Commission promising a bill to harmonise the whistleblower protections across the EU in the near future.⁴

As a result of such initiatives, some 34 governments have enacted national whistleblower protection laws, including Bolivia,⁵ Italy,⁶ the Netherlands,⁷ Ireland,⁸ Slovakia⁹ and Australia.¹⁰ However, in many cases – but certainly not all – the focus of whistleblower protection endeavours has been on corruption, terrorism and national security, or indeed limited to public sector employees. Despite the importance of reporting misconduct of any nature, by public and private employees alike, much of the debate around whistleblower protection has focused narrowly on corruption. This is reflected in the various international conventions on corruption¹¹ and the role of the whistleblower in revealing it.

Clearly, corruption is an important topic and one that requires close attention. However, misconduct occurs far more widely than in the sphere of corruption. Whistleblowing has been important

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- 1 See www.oecd.org/g20/summits/seoul/Annex3-G20-Anti-Corruption-Action-Plan.pdf accessed 18 September 2017. The resulting compendium is the G20 Anti-Corruption Action Plan Protection of Whistleblowers, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation* www.oecd.org/g20/topics/anti-corruption/48972967.pdf accessed 18 September 2017.
 - 2 See www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf accessed 18 September 2017.
 - 3 See www.oecd.org/corruption/committing-to-effective-whistleblower-protection-9789264252639-en.htm accessed 13 February 2018.
 - 4 For details, see http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254 accessed 18 September 2017.
 - 5 Law No 458 for Whistleblower and Witness Protection (Bolivia).
 - 6 Law No 190/2012 on the prevention and repression of corruption and irregularities in the public administration (Italy) (Legge No 190/2012 Disposizioni per la prevenzione e la repressione della corruzione e dell’illegalità nella pubblica amministrazione) and Law No 179/2017 on the Provisions for the protection of whistleblowers (Italy) (Legge No 179/2017 Disposizioni per la tutela degli autori di segnalazioni di rati o irregolarità di cui siano venuti a conoscenza nell’ambito di un rapporto di lavoro pubblico o private).
 - 7 House for Whistleblowers Act 2016 (Netherlands) (Wet Huis voor klokkenluiders) 2016.
 - 8 Protected Disclosures Act 2014 (Ireland).
 - 9 Act No 307/2014 Coll on Certain Measures Related to Reporting of Anti-Social Activities and on the Amendment and Supplements to Certain Acts (Slovakia) (Zákon č 307/2014 Z.z. Zákon o niektorých opatreniach súvisiacich s oznamovaním protispoločenskej činnosti a o zmene a doplnení niektorých zákonov).
 - 10 Public Interest Disclosure Act 2013 (Cth) and the proposed Treasury Laws Amendment (Whistleblowers) Bill 2017, which extends these protections to the corporate sector.
 - 11 For example, UN Office on Drugs and Crime, ‘United Nations Convention against Corruption’ Arts 8, 39 and the more recent focus of the OECD Anti-Bribery Convention Working Group (see www.oecd.org/corruption/oecd-anti-bribery-ministerial-2016.htm accessed 18 September 2017).

in exposing anti-competitive conduct,¹² environmental damage,¹³ poor labour standards,¹⁴ tax evasion¹⁵ and financial fraud.¹⁶ Indeed, the seminal Dodd–Frank Act in the US was introduced as a consequence of the financial crisis of 2007–2008.

Other governments continue to review and improve their legislative frameworks to protect whistleblowers. For example, in late 2017, Australia introduced robust private sector whistleblower protection draft laws into Parliament.¹⁷ These require organisations to develop and implement whistleblower protection policies and procedures. Italy enacted Law 179/2017 in November 2017, which reinforces public sector whistleblower protection and requires private companies to put protected reporting mechanisms in place. Regulatory authorities are also improving the methods for reporting illegal conduct. For example, the European Commission’s competition authority recently introduced anonymous reporting of potential cartel conduct.¹⁸ Finally, organisations in the public and private sectors are increasingly seeing the value and importance of developing and implementing robust whistleblower protection frameworks.

There is more to whistleblower protection than the development and implementation of laws and frameworks. These issues are explored in this report.

We use the terms ‘whistleblower’ and ‘whistleblowing’ throughout this report. In doing so, however, the Working Group recognises that other terms, such as reporting person and wrongdoing reporting, are used interchangeably with these terms and, in some cases, may be preferable. Our use of these terms in no way suggests they are preferable or more appropriate but is for the sake of expediency.

Structure of this report

This report covers the following:

Purpose of the report: the reasons why the Working Group conducted this work.

Whistleblower protection laws: a brief overview of some of the laws in place adopted to protect whistleblowers or reporting persons.

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- 12 See, eg, *Hays PLC v Office of Fair Trading* [2011] CAT 8, where six UK recruitment firms were fined a total of £39m for operating a cartel that fixed fees and boycotted a rival that had been exposed by a whistleblower employee. See also figures on the types of corporate misconduct reported by whistleblowers using internal mechanisms in OECD, ‘Committing to Effective Whistleblower Protection’ (OECD Publishing 2016) 122.
 - 13 The Volkswagen diesel emissions scandal was uncovered by a whistleblower, see *US v Volkswagen*, 16-CR-20394 Case No 2:16-cr-20394-SFC-APP (ED Mich). See also *United States of America v Princess Cruise Lines Ltd* 16-20897-CR-SEITZ, where a criminal penalty of US\$40m was imposed on Princess Cruise Lines for the deliberate dumping of contaminated oil waste off the coast of England, the practice of which was exposed by a whistleblower employed as an engineer.
 - 14 The systemic practice of 7-Eleven franchisees in Australia of forcing employees to return their wages in cash to avoid detection of underpayment was exposed by whistleblowers, see *Chahal Group Pty Ltd and Anor v 7-Eleven Stores Pty Ltd* [2017] NSWSC 532. See also Paul Karp, ‘7-Eleven workers beaten and forced to pay back wages, Senate inquiry hears’ *The Guardian* (Sydney, 5 February 2016) www.theguardian.com/australia-news/2016/feb/05/7-eleven-workers-beaten-and-forced-to-pay-back-wages-senate-inquiry-hears accessed 4 October 2017.
 - 15 Widespread tax evasion practices of multinational corporations operating in the EU, such as Google, have been exposed by whistleblowers, see House of Commons Committee of Public Accounts, ‘Tax Avoidance – Google: Ninth Report of Session 2013–14’ (House of Commons London, 13 June 2013). See also Gwyn Topham, ‘UK tax authorities pay record £605,000 to informants’ *The Guardian* (London, 15 June 2015) www.theguardian.com/politics/2015/jun/15/uk-tax-authorities-hmrc-record-informants accessed 3 October 2017.
 - 16 See, eg, *Patricia Williams v Wyndham Vacation Ownership Inc* CGC-12-526187 (Superior Court of California, San Francisco), in which a whistleblower revealed widescale financial fraud related to timeshare properties. The exposé of the Madoff Ponzi scheme, one of the biggest cases of financial fraud in the US, was a result of a whistleblower, see Andrew Clark, ‘The man who blew the whistle on Bernard Madoff’, *The Guardian* (New York, 24 March 2010) www.theguardian.com/business/2010/mar/24/bernard-madoff-whistleblower-harry-markopolos accessed 3 October 2017.
 - 17 See <https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017> accessed 28 November 2017.
 - 18 See <http://ec.europa.eu/competition/cartels/whistleblower/index.html> accessed 18 September 2017.

Key issues: an overview of the key issues relevant to robust whistleblower protection regulation and organisational frameworks identified in the course of undertaking this project.

Working Group: a list of IBA staff and members of the Working Group who contributed to the project and this report.

Acknowledgements: a list of other IBA staff, interns and members who contributed to the project and this report.

Appendix: an overview of the whistleblower protection legislation in some jurisdictions, provided by Working Group members.

Purpose of the report

The focus of our work is multifaceted. We have drawn on the work done by:

- various international organisations, such as the OECD and UNODC;
- academics, such as those involved in the International Whistleblower Research Network;
- non-governmental organisations, such as Public Concern at Work, Transparency International and the Government Accountability Project; and
- private sector organisations, such as Vodafone, Axa and the ING Group.

We have used this work to identify and highlight the core principles that underpin effective whistleblower protection regulation and effective whistleblower protection frameworks for organisations. These core principles were set out with two forms of audience in mind:

- governments, in terms of drafting and enacting whistleblower protection laws; and
- organisations, in terms of developing and implementing whistleblower protection frameworks, particularly where they may seek to expand the scope of conduct from that specific in the law.

These core principles can be used to develop, review, implement or analyse whistleblower protection frameworks or advise on any such frameworks.

In preparing this report, the Working Group is cognisant that many countries and organisations are at different stages in developing whistleblowing laws and practice. For example, the US has significantly more history and experience in regulating whistleblowing than most other jurisdictions. The Working Group is also cognisant that people in many countries, particularly those with histories of repression, still regard whistleblowing or reporting with suspicion. The Working Group has sought to factor these variations into this report or address them where possible. Finally, the Working Group is aware that while many countries have strong whistleblower protection laws in place, the implementation of these laws is wanting. It therefore has sought to identify possible options that users may wish to consider to overcome these obstacles.

Whistleblower protection laws

In preparing this report, the Working Group compiled an overview of whistleblower protection laws from the members' jurisdictions and/or regions. These are set out in the appendix to this report. Additional information on whistleblower protection laws and frameworks can be found in other studies, including the OECD's *Committing to Effective Whistleblower Protection* and the IBA's Anti-Corruption Committee's *Submission to the Australian Parliament Joint Review Committee on Corporations and Financial Services Inquiry into Whistleblower Protection Laws* of 10 February 2017.

The whistleblower protection laws in place that experts consider comprehensive are the United Kingdom's Public Interest Disclosure Act 1998,¹⁹ Ireland's Protected Disclosures Act 2014, South Korea's Act on the Protection of Public Interest Whistleblowers 2011, New Zealand's Protected Disclosures Act 2000 and Serbia's Zakon o zaštiti uzbunjiva a (Law on the Protection of Whistleblowers No 128/2014).

Key issues

Element 1: What is meant by whistleblowing?

Whistleblowing or wrongdoing reporting relates to the making of certain disclosures – internally via a dedicated and clearly communicated reporting mechanism or externally to appropriate authorities – of actual or potential (or 'reasonably anticipated') conduct that an individual reasonably believes to be unlawful. This can be in the public, private or not-for-profit sectors. There are many limbs to this description, which we explore in more detail in this report. However, this description provides the foundation of this report.

COMMENTARY

Many laws include an expanded definition of whistleblowing covering employees and related persons (including, in some instances, family members of reporting persons), to expose/report misconduct or wrongdoing to the relevant person within an organisation or the relevant external authority. What constitutes misconduct or wrongdoing is discussed in Element 4.

The preference is to define whistleblowing such that various types of wrongdoing are covered and to encourage reporting to the widest extent possible.

It is important to encourage the reporting of misconduct or wrongdoing, however defined. It helps organisations to prevent misconduct before it occurs or detect misconduct that is occurring before it becomes too entrenched.

Element 2: Definition of whistleblower

The whistleblower or reporting person need not be specifically defined. It is necessary, however, to identify clearly in whistleblower protection frameworks who can avail themselves of protections in

¹⁹ It can be argued that the UK Act requires updating; eg, it does not include any protection at the point of hiring, it has a vague public interest test, it allows for deductions from compensation and it provides limited access to justice.

the event that they choose to report misconduct or wrongdoing. The legislation should clearly describe to whom the protections afforded under the legislation apply. Such protections generally apply to persons who are ‘employees’ or ‘workers’ in a workplace, including contractors, consultants, interns and volunteers. For multinational companies, protections should be extended to foreign or expatriate workers.

In jurisdictions in which the concept of ‘whistleblowing’ is largely unknown, such a legal definition may be particularly useful.

COMMENTARY

A whistleblower is usually a person who has some ‘insider’ information of likely misconduct or wrongdoing. It does not generally include a third party or person external to the organisation; relevant legal protections are available to persons who make certain disclosures – internally to the organisation or externally to appropriate authorities – of information that evidences actual or potential conduct that they reasonably believe to be unlawful. Usually, such a person is an ‘employee’²⁰ or ‘worker’²¹ in a workplace.²² The terms can be defined broadly to include contractors,²³ consultants, interns, volunteers and so on.²⁴ In most cases, protections apply to individuals who make disclosures on defined matters to an appropriate authority reasonably believing the information provided to be true or likely to be true.²⁵ As such, many jurisdictions do not have a specific definition of ‘whistleblower’.²⁶

There is concern, however, as to whether this approach is sufficient for those jurisdictions with a poor culture of whistleblowing or where it is regarded with deep suspicion.²⁷ In these cases, there is the view that defining ‘whistleblower’ could provide guidance and assistance and potentially address such concerns. Further, it is important to be aware that in civil law systems, a term (eg, whistleblower) that is not expressly defined in a legal provision could be considered of no legal value and, consequently, could have no legal effect. The term ‘whistleblower’ itself, however, is quite difficult to translate, and the semantics constitute a barrier to effective protection.

A legal definition could avoid other problems, for example, the violation of the fundamental principle of legal certainty of criminal law, which applies under Italian constitutional law. In Italy, if a law does not clearly define a term, such provision could be declared void.²⁸

20 Protected Disclosures Act 2000 (South Africa).

21 Public Disclosure Act 2014 (Ireland).

22 See, generally, Public Interest Disclosure Act 2013 (Cth), Canada’s Public Servants Disclosure Protection Act 2005, (Canada), House for Whistleblowers Act (Wet Huis voor klokkenluiders) 2016 (Netherlands) the Public Interest Disclosure Act 1998 (UK) and US Sarbanes–Oxley Act 2002 (US).

23 In the definition of ‘employee’ in the Protected Disclosures Act 2000 (South Africa), the definition of a traditional employee expressly excludes an ‘independent contractor’ but does include ‘any other person who in any manner assists in carrying out or conducting the business of an employer’.

24 See, eg, s 806 Sarbanes–Oxley Act 2002 (amends Chapter 73 of Title 18 of the US Code by inserting s 1514A), which prohibits any ‘officer, employee, contractor, subcontractor, or agent’ of a publicly traded company from retaliating against ‘an employee’ for disclosing particular fraudulent or criminal activities.

25 See, eg, Labour Code & Anti-Discrimination Act (Czech Republic), Legislative Decree 231/2001, amended by Law No 179/2017 (Italy), the Netherlands’ House for Whistleblowers Act (Wet Huis voor klokkenluiders) 2016 and the Sarbanes–Oxley Act (US).

26 See, eg, House for Whistleblowers Act (Wet Huis voor klokkenluiders) 2016 (Netherlands), where the act speaks of an employee who has reasonable grounds for suspicion of malpractice, and defines the terms ‘employee’ and ‘suspected malpractice’. See ‘Integrity in practice: the reporting procedure’ by the Whistleblowing Authority, which is an English document laying out the new law step-by-step <https://huisvoorklokkenluiders.nl/wp-content/uploads/2017/02/HvK-Integrity-in-Practice-Reporting-Procedure.pdf> accessed 20 September 2017.

27 The Working Group identified Italy and Brazil as examples.

28 The same problems could occur with respect to the EU constitutional principles, which are similar to the Italian ones on the point of legal certainty of criminal law.

There have been distinctions made between inactive observers, potential whistleblowers, whistleblowers and those who assist or are associated with whistleblowers – each of whom can experience retaliation.²⁹ The Working Group discussed the efficacy of expanding the focus of the report to include these additional potential parties. However, the Working Group decided that to do so would unduly complicate the focus of the report and that the preference is to focus the report on whistleblowers only. In doing so, the Working Group is aware that, in some cases, retaliatory conduct can impact individuals who are not themselves whistleblowers and that support of them is also necessary.

Element 3: Why do whistleblowers/reporting persons need protection?

There are many examples – too many – of persons raising concerns of misconduct within an organisation, often merely in the form of honestly performing job duties, only to experience significant repercussions. Adverse action within a workplace can include victimisation,³⁰ demotion,³¹ retaliation,³² discrimination³³ and/or reprisals,³⁴ and/or dismissal.³⁵ Outside the workplace, repercussions can include defamation actions³⁶ and criminal prosecutions.³⁷

As a result, people who identify misconduct or wrongdoing may decide not to disclose the information for fear of the retaliation they may experience. Misconduct or wrongdoing that remains hidden is often perpetuated.

COMMENTARY

In most cases, empirical studies indicate that employees who bring information about actual or potential misconduct to the attention of their organisation do not experience retaliation.³⁸ Empirical studies also suggest that the biggest disincentive for potential whistleblowers to report actual or potential misconduct is the fear that no remedial action will be taken.³⁹

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- 29 Wim Vandekerckhove, senior academic at University of Greenwich, offered these distinctions at a whistleblowers expert meeting held at the European Commission, in which Jane Ellis, one of the authors of this report, also participated.
- 30 Brita Bjorkelo, 'Workplace Bullying after Whistleblowing: Future Research and Implications' (2013) 28 (3) *Journal of Managerial Psychology* 306; Inez Dussuyer, Anona Armstrong and Russell Smith, 'Research into Whistleblowing: Protection Against Victimisation' (2015) 10(3) *Journal of Business Systems, Governance & Ethics* 34; Denis Campbell and Matthew Weaver, 'NHS whistleblowers ignored, bullied and intimidated, inquiry finds' *The Guardian* (London, 11 February 2015) www.theguardian.com/society/2015/feb/11/nhs-whistleblowers-ignored-bullied-and-intimidated-review-finds accessed 3 October 2017.
- 31 See, eg, *Tipaldo v Lynn*, 2015 NY Slip Op 07698, (New York Court of Appeals), in which the plaintiff was demoted for reporting improper governmental activity.
- 32 See the Ethics Research Centre (ERC), '2016 Global Business Ethics Survey: Measuring Risk and Promoting Workplace Integrity' (Ethics and Compliance Initiative 2016) 18, 19.
- 33 Bruce Kaplan and Brian H Kleiner, 'New developments concerning discrimination for whistle blowing', (2000) 19(6/7) *Equal Opportunities International* 75.
- 34 See, eg, Josh Hicks 'OSC investigating alleged retaliation against 37 VA whistleblowers' *The Washington Post* (5 June 2014) www.washingtonpost.com/news/federal-eye/wp/2014/06/05/osc-investigating-alleged-retaliation-against-37-va-whistleblowers accessed 5 October 2017.
- 35 *Samad v Spicerhaart Group Services (t/a Felicity J Lord) & ors* UK Employment Tribunal Case: 3200006/2015 & 3200654/2015; *Patricia Williams v Wyndham Vacation Ownership Inc*, Wyndham Vacation Resorts CCG-12-526187 (Superior Court of California, San Francisco).
- 36 In *Aghimien v Fox* Case No 71A03-1602-CT-291 (Indiana Court of Appeals), the plaintiff whistleblower exposed two university professors of academic plagiarism. One academic was found to have plagiarised, while the other as co-author, was not. Cleared of plagiarism, the co-author brought a defamation suit against the whistleblower.
- 37 The whistleblowers involved in the Luxleaks received criminal convictions. See the original judgment, *Arrêt de la Cour d'appel dans le cadre de l'affaire dite 'LuxLeaks' du 15/03/2017* (La Justice, Grand Duché de Luxembourg, 15/03/2016). See also Annelies Vandendriessche, 'Luxemburg: Whistleblowers condemned in LuxLeaks Trial, Journalist Acquitted' *European Centre for Press & Media Freedom* (9 September 2016) <https://ecpmf.eu/news/legal/archive/luxemburg-whistleblowers-condemned-in-luxleaks-trial-journalist-acquitted> accessed 3 October 2017.
- 38 Personal communication with Cathy James, Senior Legal Consultant, Public Concern at Work and Professor David Lewis, Professor of Employment Law, Middlesex University and the head of the International Whistleblower Research Network.
- 39 Personal communication with Professor David Lewis, Professor of Employment Law, Middlesex University and the head of the International Whistleblower Research Network.

The fear of retaliation, however, is a significant disincentive to whistleblowers. The retaliation may not only involve barriers to the whistleblower's career advancement⁴⁰ but can also include ostracism by their peers.⁴¹ Retaliation from management and colleagues can take forms other than just a straightforward termination or demotion. The whistleblower may be excluded from social gatherings or emails, be given 'the silent treatment' or experience outright social rejection.⁴² Whistleblowers may also experience cyber-ostracism or bullying.⁴³

Ian Foxley, the UK whistleblower who exposed fraud at GPT Special Project Management (now a unit of Airbus) remarked that 'when you go through this process, four things get damaged: your home, health, work and wealth'.⁴⁴ For this reason, actionable retaliation, in some cases, has been defined more broadly than just concrete employment actions – to include actions that could dissuade a reasonable person from coming forward with a report of wrongdoing.

In some cases, the forms of victimisation may extend to or be targeted at members of the whistleblower's family.⁴⁵

Even in those jurisdictions that have whistleblower protection frameworks in place, persons reporting misconduct or wrongdoing may find themselves sued for defamation⁴⁶ or subjected to criminal prosecution for violation of, inter alia, commercial, professional or official secrecy provisions.⁴⁷ This indicates that the introduction of whistleblower protection laws is not, in and of itself, sufficient. Governments are encouraged to review existing laws to identify and address other avenues that those who want to retaliate against whistleblowers can use.

The OECD Report *Committing to Effective Whistleblower Protection* defines protection in this context as: 'Legal protection from discriminatory or disciplinary action for employees who disclose to the competent authorities in good faith and on reasonable grounds, wrongdoing of whatever kind in the context of their workplace.'⁴⁸

What proper whistleblower protection frameworks do *not* do is protect people who misuse the process to malign or defame innocent people. Natural justice applies both to the reporting person and the person who is the subject of the report. Here, it is important to remember that the person who is the subject of a whistleblower report is presumed innocent until proven guilty.

40 Frederick Lipman, *Whistleblowers: Incentives, Disincentives and protection Strategies* (John Wiley & Sons Inc, 2012). Whistleblowers are rarely re-employed in the same industry because they are considered to be disloyal employees and a potential liability for future employers, which makes a further career in the field virtually impossible. However, see Element 17 of this report for an alternative view.

41 A 2009 study by the Ethics Resource Centre in the US revealed that 62 per cent of whistleblowers who experience retaliation were excluded from decisions and work activity by their supervisor or management, 60 per cent received the cold shoulder from colleagues, 55 per cent were verbally abused by their supervisor or someone else in management, 48 per cent almost lost their jobs, 43 per cent were not given any promotions or raises, 42 per cent were abused by other employees, 27 per cent were relocated or reassigned, 18 per cent were demoted and four per cent experienced physical harm to person or property. See Ethics Resource Centre, '2009 National Business Ethics survey: retaliation: the cost to your company and its employees' (2010) Supplemental Research Brief; see also *ibid* 61, 62.

42 Kipling Williams, *Ostracism: The Power of Silence* (Guilford Press 2002) 191–196.

43 *Ibid* 162–188.

44 'Will Whistleblowers Pay the price of Barclays Case?' *Financial Times* (London, 27 July 2017) www.ft.com/content/35e50ad4-7160-11e7-93ff-99f383b09ff9 accessed 8 August 2017.

45 Howard Lee, 'MPA hangs whistle-blower out to dry?' *The Online Citizen* (Singapore, 20 October 2015) www.theonlinecitizen.com/2014/09/24/mpa-hangs-whistle-blower-out-to-dry accessed 4 October 2017.

46 For a detailed examination of this, see David Lewis, 'Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance Between the Rights of Whistleblowers, the Media and Alleged Wrongdoers?' (2017) 46(3) *Industrial Law Journal* 1.

47 See n 41 above.

48 OECD, 'Committing to Effective Whistleblower Protection' (OECD Publishing 2016) 18.

Element 4: What constitutes misconduct or wrongdoing?

The underlying misconduct that forms the basis of the whistleblower's disclosure can be defined to capture wrongdoing in various contexts. Wrongdoing is defined broadly to cover conduct that is reasonably perceived as actually or potentially unlawful. What constitutes the public interest is linked to actual or likely contraventions of the law.

Such misconduct or wrongdoing can include, but is not limited to:⁴⁹

- activity deemed illegal or unethical;
- a criminal offence (providing useful elements or information that clarifies facts in an investigation) that has been committed, is being committed or is likely to be committed;
- risk of or actual damage to the environment;
- poor work health and safety conditions;
- covering up such conduct or wrongdoing;
- misuse of funds or property by a government entity;
- unlawful corrupt conduct;
- fraudulent conduct;
- violations of specified laws, such as federal securities laws in the US;
- conduct that presents a danger in a high-risk area, such as healthcare or consumer product, railway or airline safety; and
- anti-competitive conduct.

COMMENTARY

In some countries, laws protecting whistleblowing include protections for reports of gross mismanagement or conduct that is unethical or immoral.

Minimising uncertainty is often the reason given for a more expansive approach to whistleblower protections. For example, some stakeholders have expressed the view that such protections should only apply to those who report breaches of the law.⁵⁰ Others believe that such protections need to extend beyond the law in the interests of ensuring that the law is not contravened or, in the context of an organisation's internal codes and policies, that breaches of these are brought to the attention of the appropriate person/department in the organisation.

Some have queried whether whistleblower protections should apply to those who report matters

⁴⁹ See, eg, Protected Disclosures Act 2014 (Ireland), s 5, which significantly extended the protected disclosures set out in the UK's Protected Disclosures Act 1998, s 43B. See also the Netherlands' House for Whistleblowers Act (Wet Huis voor klokkenluiders) 2016, which refers to public interest being at stake due to a violation of a law, public health hazard, threat to the safety of persons, threat to the environment or threat to the functioning of a public service or company as the result of an undue act or omission, or an allegation thereof.

⁵⁰ This was discussed at the expert group working hosted by the European Commission on 7 June 2017.

that constitute more ethical or moral concerns. The reasons for this broader approach include that conduct giving rise to ethical or moral concerns may be indicative of contraventions of the law, and that a broader definition provides more certainty to a person who believes that they have misconduct or wrongdoing to report.

Whistleblower protection laws can vary widely, with some specifying that a report must pertain to a violation of a specific law,⁵¹ others referencing violations of law or public policy generally⁵² and still others protecting reports on general waste or mismanagement.⁵³

Jurisdictions often introduce targeted whistleblower protection laws as a means by which to aid enforcement of a specific statute. In some cases, such laws offer very narrow and limited protection to employees.⁵⁴ In other cases, they can be quite expansive.⁵⁵ This inconsistency in approach and scope of protections creates considerable uncertainty for persons who identify what they reasonably consider to be a wrongdoing or misconduct. It can also create a legal labyrinth for whistleblowers employed by global corporations, who may be employed under the employment law of one jurisdiction, based in another jurisdiction and oversee projects in a third jurisdiction, that is, where the wrongdoing occurs. They are likely to have varied or, at worst, conflicting measures for protection, or indeed, criminalising violation of secrecy provisions between all three jurisdictions.

Taking into consideration an appropriate balance between the rights and certainties of employers and employees, the Working Group recommends that laws to protect whistleblowers should be limited in scope to reports of conduct an individual reasonably believes to be actually or potentially unlawful. The Working Group was concerned that extending protections to include, say, ethical or moral concerns can mean different things to different people, which can give rise to subjectivity and uncertainties as to the scope of the protections.

While the Working Group considers that laws should clearly define the subject matter of protected reporting, it remains open to organisations to provide broader internal protections in the context of their workplace. For example, an organisation may wish to encourage employees to report violations of internal policies or conduct that is unethical or immoral.

Element 5: Whistleblower laws versus duty of loyalty

The Working Group encourages jurisdictions to include a provision in their whistleblower protection laws prohibiting organisations from restricting employees' ability to expose misconduct or wrongdoing through employment contracts (eg, through so-called 'gag clauses').⁵⁶

51 See, eg, the Federal Railroad Safety Act, 49 USC s 20109; 29 CFR Part 1982.

52 See, eg, Law on the Protection of Whistleblowers No 128/2014 (Serbia).

53 See, eg, Protected Disclosures Act 2014 (Ireland).

54 For example, under New York's whistleblower protection statutes, merely disclosing the violation of a law is insufficient. It must also present a 'substantial and specific danger to public health or safety'. See NY Civ Serv Law s 75-b(2) (a); NY Lab Law s 740(2) (a). Ohio's private employee whistleblower protection statute protects employees who become aware of a violation of any state or federal statute, ordinance or regulation that the employee 'reasonably believes... is a criminal offence that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution...' See Ohio Rev Code Ann s 4113.52(A) (1) (a).

55 For example, they can cover violations of laws, gross waste of funds, abuse of authority or substantial and specific danger to public safety or health. In the US context, such laws include Connecticut: Conn Gen Stat ss 31-51m et seq; District of Columbia: DC Code s 1-615.51; Florida: Fla Stat s s 448.102 et seq; Fla Stat s s 112.3187 et seq; Hawaii: Haw Rev Stat ss 378-61 et seq; Idaho: Idaho Code Ann ss 6-2101 et seq; Illinois: 740 Ill Comp Stat 174/1 et seq; Indiana: Ind Code s 4-15-10-4 (public employees), Ind Code s 22-5-3-3 (employee of private employer under public contract), Ind Code s 36-1-8-8 (certain government employees); Iowa: Iowa Code s 70A.29; Kansas: Kan Stat Ann s 75-2973; Kentucky: Ky Rev Stat Ann s 61.102; Maine: Me Rev Stat tit 26, s 833.

56 See, eg, UK's Employment Rights Act 1996, s 43J.

Organisations are discouraged from including provisions into employees' contracts of employment that prohibit them from raising concerns of misconduct or wrongdoing with relevant authorities. Such provisions are essentially used to protect individuals within an organisation rather than protecting the organisation and its *raison d'être*.

COMMENTARY

In most workplaces, employees have a duty of loyalty to their employer. This may include a duty not to disclose information, even if it concerns misconduct or wrongdoing, about the organisation.⁵⁷ This duty is often reinforced through confidentiality clauses in employment contracts and an implied duty of fidelity, which requires honest, loyal and faithful service from the employee.⁵⁸ By contrast, the requirement to report wrongdoing is often relegated to voluntary codes of conduct. The implication is that the contractual obligation not to disclose information takes precedence.⁵⁹

Some legislators prohibit such provisions.⁶⁰ Further, regulators, at least in the US, are increasingly taking a dim view of such restrictions. In the context of severance agreements, for example, the Securities and Exchange Commission (SEC) has imposed fines on companies for including such provisions.⁶¹ This requirement is being extended to include current employment contracts.⁶²

The Working Group anticipates that regulators and legislators in other jurisdictions are likely to adopt similar approaches. As such, it would be prudent for organisations to anticipate this when reviewing current practice as part of developing or enhancing their whistleblower protection frameworks.

Element 6: Coverage

Whistleblower protection laws serve a number of important purposes, including to:

- provide a legal safety net for whistleblowers across all aspects of employment;
- detect and deter illegal conduct;
- foster organisational cultures that value and encourage the whistleblower's disclosures; and
- help employers to learn of inappropriate conduct so that they can conduct a full investigation and take any remedial action that is warranted.

As such, whistleblower protection legal frameworks should not be sector-specific (subject to some qualifications), and should apply to the public, private and not-for-profit sectors.

57 According to conducted by the University of Notre Dame and Labaton Sucharow, there remains a '... proliferation of secrecy policies and agreements that attempt to silence reports of wrongdoing ...' See *The Street, The Bull and The Crisis: A Survey of the UK & UK Financial Services Industry* (May 2015) www.labaton.com/en/about/press/loader.cfm?CFID=9062977d-1d25-402b-9465-c2f7d5b2ded4&CFTOKEN=0&csModule=security/getfile&pageid=59208 accessed 24 January 2018.

58 See n 40 above at 58.

59 David Lewis, 'Whistleblowers and Job Security' (1995) 58 *Modern Law Review* 208, 210.

60 See, eg, 5 USC Government Organization and Employees s 2302 Prohibited Personnel Practices, specifically s 2302(b) (13).

61 See, eg, the settlement the SEC reached with SandRidge Energy Inc in 2016 for doing precisely www.sec.gov/news/pressrelease/2016-270.html accessed 20 September 2017.

62 See, eg, 'SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements – Agency Announces First Whistleblower Protection Case Involving Restrictive Language': www.sec.gov/news/pressrelease/2015-54.html accessed 9 October 2017.

The overarching concern and focus of whistleblower protection laws is to:

- protect organisations – public, private and not-for-profit – against liability, internal fraud and threats to their credibility/legitimacy;
- encourage disclosures by providing an environment in which whistleblowers can speak without fear, be it through channels that are confidential or potentially anonymous;
- facilitate the improvement of work practices;
- detect and deter misconduct and/or wrongdoing;
- strengthen accountability;
- set out escalation processes that whistleblowers can follow if their reporting is not acted upon appropriately;
- preserve natural justice for the person who is the subject of any such report; and
- prescribe consequences for contraventions of whistleblower protections.

Laws and policies should address various aspects of whistleblowing or conduct that discourages it, such as:

- a ‘gagging’ or confidentiality clause in an employment or settlement agreement;
- identifying the kind of sensitive information that is specifically prohibited by the law from disclosure;
- describing the process from making a call, reporting online or in person, or signing a statement;
- when to afford protection – from when the reporting occurs or when the information reported is found to be accurate;
- the use of defamation or criminal laws to retaliate against a whistleblower;
- the standards used to assess the validity of information reported;
- presumption of innocence of the person/people against whom the allegations are made;
- when protection should *not* be afforded to the person reporting (distinguishing between a person who knowingly provided false information – and therefore is not entitled to protection – from a person who mistakenly did so);
- the extent of immunity afforded;
- when that immunity can/must be compromised by law; and
- a shift of focus from the intent of the whistleblower (ie, good faith requirements), to the subject matter of the report (ie, reasonable belief of misconduct).

Whistleblower protection laws in most European countries are not as developed as those in the US. The Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1729 on the

protection of ‘whistleblowers’.⁶³ The resolution recognises that most EU Member States do not have comprehensive whistleblower protection laws and invites them to review their legislation, to make it more comprehensive and cover both public and private sector employees. Countries that do not have whistleblower protection laws, or where such laws are inadequate, are well placed to introduce a law that applies across sectors and industries.

Countries such as the US have an established history of whistleblower protection laws, which are truly enforceable. Some of these laws are well known and referred to frequently in the press.⁶⁴ Others, however, are less well known and are extremely sector-specific.⁶⁵ Given the extensive history of whistleblower protection laws in the US, it is highly unlikely that it would be possible, efficient or indeed appropriate for the US to move to a law that has a more generic application. On the other hand, for countries embarking on the complex process of drafting comprehensive public and private sector whistleblower protection legislation, a dedicated, standalone law (in line with UK, Irish, New Zealand, Korean, Lithuanian, Japanese and Serbian models) is considered best practice.

Element 7: Reporting misconduct

The Working Group believes that individuals ought not be compelled by law to report suspected misconduct or wrongdoing to external authorities. However, if the following are all true, authorities in some jurisdictions may consider the nondisclosure of that information as ‘unlawful concealment’:⁶⁶

- the suspected misconduct or wrongdoing is potentially a serious crime, for example, cartel conduct, money laundering, terrorism or corruption;
- a person is aware that such conduct has occurred or is likely to occur; and
- that person does not bring the matter to the attention of the authorities.

An organisation is free to insist that its employees, under the terms of employment, report any suspect misconduct or wrongdoing through an internally prescribed process.

COMMENTARY

If a jurisdiction has laws in place that oblige individuals to bring actual or suspected misconduct or wrongdoing to the attention of authorities, then such individuals are entitled to the most robust form of protection available to the jurisdiction.⁶⁷ This can be both whistleblower protection and witness protection, depending on the ultimate involvement of the reporting persons in subsequent criminal procedures and/or their protection needs.

Imposing a statutory obligation on individuals to report suspected or actual misconduct or wrongdoing has its risks. While it is likely to result in valuable information being provided to

63 See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en> accessed 30 November 2017.

64 For example, the Dodd–Frank Act and the Sarbanes–Oxley Act.

65 For example, the Seaman’s Protection Act 46 USC 2114, the Affordable Care Act 29 USC 218C and the Wendell H Ford Aviation Investment and Reform Act for the 21st Century 49 USC 42121.

66 For example, in the US and Brazil, there is no obligation to report, but failure to do so may constitute unlawful concealment.

67 For example, under Singapore law a person is afforded anonymity when reporting acts of corruption, drug trafficking or terrorist activities but is also legally obliged to report if they know or have reasonable grounds that such conduct has occurred or is likely to occur. See the Prevention of Corruption Act (Cap 241), the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) and the Terrorism (Suppression of Financing) Act (Cap 325).

authorities, it may also put those individuals who report it in danger, particularly if the protections in place are inadequate.

Organisations can require employees who become aware of matters that constitute misconduct or wrongdoing relevant to the organisation to inform the organisation of that misconduct or wrongdoing. If, however, an organisation does require its employees to do this, then employees are entitled to expect robust levels of protection.

Element 8: To whom should one disclose?

Whistleblower protection laws usually identify the external authorities to which information of actual or potential unlawful conduct can be provided. It is typically then the responsibility of the relevant authority as to how individuals make the report.

Laws may also require organisations to develop and implement internal whistleblower protection policies and procedures.⁶⁸ Others adopt a tiered approach to reporting, such that reporting to the media can be protected under limited circumstances, and only once all other internal and external reporting to designated authorities has been exhausted.⁶⁹

There is not one perfect reporting framework that an organisation or an external authority can adopt. Much depends on the size, sector and governance structure of the organisation. What is critical is that the person responsible for managing or overseeing whistleblower protection within an organisation is senior and independent. In an external authority or investigative agency, it may be a specific department that is responsible for receiving and monitoring reports.

It is also important to ensure there is more than one means by which a person can report misconduct or wrongdoing; that is, in addition to a person to whom someone can report, it is prudent to have a ‘hotline’ – either internal or one operated by a third party – and/or means by which someone can report anonymously (see Element 10) such as a web platform through which persons can make reports (subject to compliance with data protection laws – see Element 12).

COMMENTARY

Regulatory authorities and investigative agencies are encouraged to make it clear as to how someone can report misconduct or wrongdoing to the authority. In many cases, authorities, such as competition authorities, encourage the reporting of misconduct or wrongdoing directly to them via designated channels. However, not all authorities or investigative agencies are clear as to how a person can do this. It is incumbent on all such authorities and agencies to make it clear how someone can bring information on actual or potential misconduct or wrongdoing to their attention.

For organisations that develop/enhance whistleblower protection policies and procedures, a key question that they need to address is: who is best placed to be the recipient of such potential disclosures?

68 For example, Australia’s proposed Treasury Laws Amendment (Whistleblowers) Bill 2017 and Law on the Protection of Whistleblowers No 128/2014 (Serbia).

69 For example, House for Whistleblowers Act 2016, (the Netherlands), Protected Disclosures Act 2014 (Ireland) and Protected Disclosures Act 2000 (New Zealand).

The purpose behind this question is to draw out complexities that may arise as part of the reporting procedure. For an organisation's whistleblower framework to be credible, it is preferable that the person responsible for whistleblower protection be an independent member of the senior management team who reports regularly to the board or a committee (eg, risk management committee) of the board.

To minimise any risk of the process being compromised, however, it is essential that an organisation adopts more than one means by which someone can report misconduct or wrongdoing. For example, it may be that an organisation has a clear reporting line for whistleblowers within the organisation. What option is available to an employee who comes across information that potentially implicates members of the senior management team and potentially some board members? In this type of situation, the reporting person may wish to disclose the information using an anonymous hotline (anonymity is discussed in Element 10) or some other means. If these alternative means are not available, then the only option available to the reporting person is to go to a regulatory authority, which may be the preferable course of action but ought not to be the only one available.

All communications relevant to the disclosure of information about the actual or potential misconduct need to be protected, including any identifying information of the reporting person or subject of the report.

Element 9: Good faith/reasonableness

The Working Group is of the view that the focus of whistleblower protection frameworks should be on whether a person *reasonably believes* that the information he or she is reporting is true or likely to be true.⁷⁰

Requiring good intentions or 'good faith' before protection is granted places an unnecessary burden on a reporting person and provides discretion to authorities or the courts that is too general and unspecific. This approach can lead to the whistleblower's motives in reporting being explored rather than misconduct reported. This can result in a lack of certainty on when protection is available, and can discourage people from reporting misconduct.

COMMENTARY

Many laws include a requirement that a person reporting misconduct can only avail themselves of protection if they have made such a disclosure in 'good faith'.⁷¹ Under some statutory frameworks, 'good faith' is interpreted as requiring that the person reasonably believes that the information they are reporting is true.⁷² Under other statutory frameworks, this is interpreted as requiring the person reporting to be motivated by pure altruistic motives. For example, a person who is motivated by a personal vendetta against the person who is the subject of the report could not avail themselves of the protections, even if the information contained in the report is true.

⁷⁰ For example, Protected Disclosures Act 2000 (New Zealand) s 6.

⁷¹ For example, Public Interest Disclosure Act 1998 (UK), s 43C until this requirement was removed by the Enterprise and Regulatory Reform Act 2013 with effect from 25 June 2013, and Law No 571/2004 (Romania) on the protection of staff of public institutions and other such entities who announce breaches of the law.

⁷² See, eg, Protected Disclosures Act 2000 (New Zealand), s 6.

It became clear during the course of the Working Group's work that there were different views as to what is meant by 'good faith', which caused confusion. The term is often not defined in legislation but relies on judicial interpretation. This lack of clarity provides authorities with too much discretion, and is likely to discourage people from reporting misconduct.

The OECD Report states that there is a need to find the right balance between discouraging abuse of whistleblower protection systems and encouraging people who have information to disclose to come forward. The OECD Report notes that there are jurisdictions that distinguish between 'good faith' and 'bad faith', with 'bad faith' having the consequence of potentially losing the requisite protections. It also states that 'the whistleblower should be protected from retributions as by submitting a protected disclosure they declare to be doing so in good faith. The onus should not be on the whistleblower to prove the intent of their actions.'

The Working Group agrees with this, and recommends the avoidance of 'good faith' requirements. An inquiry into the whistleblower's motives in lodging the complaint is almost always irrelevant and detracts from the misconduct reported.

Element 10: Anonymity

Whistleblower laws should encourage the adoption of anonymous reporting mechanisms, taking into consideration regulatory frameworks in relation to personal data. How that process works is up to the organisation/jurisdiction. However, it should be sufficiently robust such that it is not possible to identify the person reporting.

COMMENTARY

Anonymous reporting is often the only way information on a particular situation can be secured. It can be particularly important in contexts in which there are risks to a person's safety in reporting wrongdoing.

Anonymous disclosures are important if individuals do not trust an organisation (discussed in Element 16) and/or its whistleblower protection framework.⁷³ There are increasingly sophisticated ways through which persons can anonymously report alleged or actual misconduct, or wrongdoing. For example, it is possible to do so through a lawyer,⁷⁴ through an external service provider that enables anonymous reporting and follow-up and feedback through a case numbering system⁷⁵ or through encryption technology.

Anonymous reporting, however, is not entirely satisfactory. It can make it difficult to obtain additional information from the reporting person that might be essential to conduct an appropriate investigation and/or to understand and remediate the misconduct or wrongdoing. It may be used to bring false or vindictive allegations against another person. Anonymity may be difficult to exercise in practice, particularly when the reporting person may be identified by the circumstances or subject matter of the report, or in the context of small companies or jurisdictions. Where a report is

73 The OECD notes that there are legitimate reasons why anonymous reporting may be preferable. See n 3 above, 62.

74 For example, the US Securities and Exchange Commission (SEC) Whistleblower Program.

75 For example, Austrian Ministry of Justice. The European Commission Competition Authority also uses this system. See <http://ec.europa.eu/competition/cartels/whistleblower/index.html> accessed 13 February 2018.

anonymous, it may be more difficult to guarantee confidentiality and protection.⁷⁶ Finally, managing anonymous reporting can have implications under data protection laws in some countries (discussed in Element 12).

Given the difficulties potentially raised by anonymous reporting, whistleblowers can be encouraged to identify themselves, even if not required to do so. Further, in some cases, an organisation or enforcement authority may consider the fact that a report was made anonymously when evaluating its veracity.

Element 11: Confidentiality

The identity of the person who has reported alleged or actual misconduct or wrongdoing and of the person who is or persons who are the subject of the report must be treated as confidential.

The former is a usual requirement under whistleblower protection laws. In the interests of natural justice, the Working Group encourages jurisdictions from extending confidentiality to include the latter. In some jurisdictions, even the information disclosed must be kept confidential.

COMMENTARY

Whistleblower protection laws generally require the identity of the reporting person to be treated as confidential⁷⁷ and for there to be consequences if this requirement is contravened.⁷⁸ In some cases, this extends to ensuring that whistleblower reports are exempt from freedom of information requests.⁷⁹

Appropriate procedures must be established and implemented to ensure the identity of any reporting person and reported person are kept confidential, and disclosures are made only when necessary:

- in the interest of conducting a thorough investigation; and
- after first providing notice to the relevant party of the need to disclose.

This applies both within organisations and with regulatory authorities and other investigative agencies.

Confidentiality must be maintained to the extent reasonably possible while any preliminary investigation is being conducted to determine the veracity of the information reported. In doing so, it is important not to overlook the natural justice of the person who is the subject of the report. The person who is identified in any such report must be presumed innocent unless and until established otherwise.

In some cases, confidentiality may be wholly or partially conditional upon the reporting person's request.⁸⁰ Or, it may be that the person who is the recipient of the report reasonably believes that

76 For example, an anonymous report may provide insufficient information to conduct an in-depth investigation and, in conducting such an investigation, may inadvertently provide information that reveals the identity of the reporting person.

77 See, eg, the OECD, *Good Practice Guidance on Internal Controls, Ethics and Compliance* (2010); Council of Europe, *Whistleblower Protection Recommendation*, principle 18; and *Protected Disclosures Act 2000* (New Zealand).

78 For example, *Act on the Protection of Public Interest Whistleblowers 2011* (South Korea), which provides that the disclosure of a whistleblower's identity, or facts that infer it, is punishable by three years' imprisonment or a fine of KRW 30m (almost £20,000) (Art 30(1)). France's *Sapin II* requires strict confidentiality of the identity of the reporting persons, persons the object of the report and the information collected by all recipients of the report; disclosure of confidential information is punishable by two years' imprisonment and a €30,000 fine.

79 For example, *Protected Disclosures Act 2000* (New Zealand).

80 For example, *Protected Disclosures Act 2000* (New Zealand) and *Protected Disclosures Act 2014* (Ireland).

disclosure of the relevant information is essential to the investigation; to report a serious crime; or to prevent serious risk to public health or public safety, or the environment, having regard to the principles of natural justice.

Confidentiality is usually not extended to the person who is the subject of the whistleblower's report. However, under the EU's General Data Protection Regulation (GDPR) and the EU Data Protection Directive (2016/680), persons who are the subject of whistleblower reports may have data protection rights, which require the revealing of the identity of the reporting person or the content of the report. This is discussed further in Element 12. The Working Group is of the view that the identity of the person who is the subject of a whistleblower report should also, to the extent reasonably possible in the context of a thorough investigation, be kept confidential in the interests of natural justice.

*Element 12: Data protection*⁸¹

Whistleblower protection frameworks require the processing of personal data; that is, information on the reporting person – if not anonymous – and the person who is the subject of the report is collected, processed and stored.

The Working Group encourages legislators to have regard to data protection laws when drafting or amending whistleblower protection laws. This is to ensure that compliance with one law does not inadvertently result in the contravention of another law.

Organisations need to be aware of their obligations under both whistleblower protection laws and data protection laws when developing whistleblower protection frameworks. This is because some countries may impose legal restrictions on how use of personal data is managed that can have an impact on internal private sector whistleblowing procedures.

COMMENTARY

The OECD/G20 *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation* notes that data protection laws in some countries may impose legal restrictions on internal private sector whistleblowing procedures. For example, data protection authorities in France and Greece have sanctioned companies for the violation of national data protection laws in the context of their internal reporting procedures.⁸²

The EU's GDPR and the EU Data Protection Directive (2016/680)⁸³ apply across all EU member countries from 25 May 2018. The principle underpinning the GDPR is that personal data should be collected and used fairly. As company whistleblower reporting mechanisms rely on the processing of personal data – both of the reporting person and the subject of the report – the establishment of such reporting mechanisms by companies headquartered or operating in Europe will be subject to this strengthened data protection framework.

If companies' internal reporting mechanisms and subsequent internal investigation procedures

81 Data protection laws and their intersection with whistleblower protection laws is the subject of considerable discussion and debate, which is beyond the scope of this particular project. This issue may be explored in more detail in the future.

82 8 December 2009 Decision of the French Cour de Cassation; 31 March 2008 Decision of the Hellenic Data Protection Authority.

83 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 http://ec.europa.eu/justice/data-protection/reform/files/directive_oj_en.pdf accessed 1 December 2017.

violate GDPR provisions on data processing, data subjects' rights (ie, the subject of the whistleblower report) or transfer personal data to third countries or international organisations, companies could be liable to pay administrative fines amounting to the greater of €20m or four per cent of total worldwide annual turnover.⁸⁴ This could be a significant deterrent for companies considering whether to implement protected internal reporting channels, whether or not they are in the EU.

In the field of anti-money laundering (AML), Article 41 of the EU AML Directive provides important exceptions to the previous EU Data Protection Directive in the context of the processing of personal data by reporting entities for the purposes of preventing money laundering and terrorist financing. The directive requires EU members to adopt legislative measures restricting, in whole or in part, the data subject's right of access to personal data relating to them to the extent that such partial or complete restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the legitimate interests of the person concerned to:

- enable the obliged entity or competent national authority to fulfil its tasks properly for the purposes of this directive; or
- avoid obstructing official or legal inquiries, analyses, investigations or procedures for the purposes of this directive and to ensure that the prevention, investigation and detection of money laundering and terrorist financing is not jeopardised.

Element 13: The burden of proof

There are different possible approaches to allocating the burden of proof in a whistleblower case. In structuring the legal framework, competing considerations include: (1) The difficulties inherent in bringing, prosecuting and proving an individual whistleblower's claim against an organisation; (2) the discretion employers have in selecting and disciplining their employees; and (3) the need to identify and, to the extent possible, avoid frivolous lawsuits.

The Working Group explored two approaches to the burden of proof. In the first, the burden of proof is reversed in the following situations:

1. the employer must prove that it would have taken the disadvantageous action against the employee regardless of the whistleblowing activity;⁸⁵ and
2. the disclosure is protected unless it can be established that certain criteria are not met.⁸⁶

This is subject to the natural justice of the person who is the subject of the report not being compromised unreasonably.

In the second, the whistleblower bears an initial burden to make a basic, prima facie claim showing that their case satisfies certain elements. From there, the burden shifts to the employer, requiring them to show that they would have taken the adverse employment action even in the absence of the

84 GDPR (Regulation 2016/679), Art 83(5).

85 See n 3 above at 81–82.

86 Discussion at the whistleblower experts group workshop hosted by the European Commission. The usual approach is that the reporting person is not protected unless the suspected malpractice reported meets the definition and is thus in the public interest. See, eg, House for Whistleblowers Act (Wet Huis voor klokkenluiders) 2016 (the Netherlands).

whistleblowing activity.

COMMENTARY

People may be discouraged from reporting misconduct or wrongdoing, which they reasonably suspect to be true, because they fear the consequences of doing so. Assuming that the identity of the reporting person becomes known (confidentiality is discussed in more detail below), that person's employer or colleagues may subject him or her to marginalisation, suspension, demotion, dismissal and/or effective dismissal.⁸⁷

Where laws are unclear, reporting persons may find it difficult to achieve justice, particularly when they bear the sole burden of establishing that the action taken against them is in retaliation for their reporting. For example, in the UK, there is a different burden depending on whether dismissal or something short of dismissal is alleged. And there is some blurring of protections available to a whistleblower, depending on whether they are under the whistleblower or employment, equal opportunity and discrimination laws.⁸⁸

In its discussion of the burdens and standards of proof in whistleblower laws, the Working Group acknowledged that employers can commit significant time, and potentially legal costs, to investigate the legitimacy of allegations of misconduct or wrongdoing brought by reporting persons. Such claims can also result in uncapped compensation and damage to the company's reputation. However, the Working Group also recognises that organisations are typically in a stronger position compared with reporting persons, and reporting persons can experience life-changing events when organisations exercise such power.

Some members of the Working Group concluded that the reversal of the burden of proof is optimal in this context, comparing the experience of whistleblowers to that of persons experiencing discrimination and drawing on the EU's legal paradigm for discrimination cases. According to a detailed report issued by the European Commission, which examines the reversing of the burden of proof in the context of gender and racial discrimination in proceedings before civil and labour courts,⁸⁹ the burden of proof is on the employer to show that any reprisal suffered by the complainant is not connected with their race or gender. The Greens/European Free Alliance Transparency Initiative proposes that the EU adopt a similar approach to whistleblower protection.⁹⁰

The approach by the Court of Justice of the EU, and by civil and labour courts in the EU, provides a clear precedence that the reversal of the burden of proof can function and appropriately serve the interests of aggrieved individuals in certain limited circumstances.

87 See, eg, Brita Bjorkelo, 'Workplace Bullying after Whistleblowing: Future Research and Implications' (2013) 28(3) *Journal of Managerial Psychology* 306; Denis Campbell and Matthew Weaver, 'NHS whistleblowers ignored, bullied and intimidated, inquiry finds' *The Guardian* (London, 11 February 2015) www.theguardian.com/society/2015/feb/11/nhs-whistleblowers-ignored-bullied-and-intimidated-review-finds accessed 3 October 2017; ERC, '2016 Global Business Ethics Survey: Measuring Risk and Promoting Workplace Integrity' (Ethics and Compliance Initiative 2016); Josh Hicks, 'OSC investigating alleged retaliation against 37 VA whistleblowers' *The Washington Post* (Washington, DC, 5 June 2014) www.washingtonpost.com/news/federal-eye/wp/2014/06/05/osc-investigating-alleged-retaliation-against-37-va-whistleblowers/?utm_term=.fa7b61c49b80 accessed 5 October 2017.

88 Public Interest Disclosure Act 1998 (UK); Employment Rights Act 1996 (UK); Equality Act 2010 (UK).

89 Directorate-General for Justice and Consumers, European Commission, *Reversing the burden of proof: Practical dilemmas at the European and national level* (2014) at: http://ec.europa.eu/justice/discrimination/files/burden_of_proof_en.pdf accessed 20 September 2017.

90 See www.greensefa.eu/legacy/fileadmin/dam/Images/Transparency_campaign/Summary_of_the_draft_WhistleBlower_directive.pdf accessed 9 October 2017. See www.greens-efa.eu/legacy/fileadmin/dam/Images/Transparency_campaign/Summary_of_the_draft_WhistleBlower_directive.pdf accessed 9 October 2017.

Accordingly, many members of the Working Group agreed that the employer should bear the burden of proof to show that any such negative or punitive action against the whistleblower is unrelated to their reporting.⁹¹ These members also agreed that any disclosure made by a reporting person is protected unless and until it is established that the requisite criteria are not met. For example, it is established that a reasonable person in a similar situation to the reporting person could not have been satisfied that the conduct reported was reasonably true.

Other members of the Working Group felt more comfortable with the US-style burden-shifting scheme, whereby the whistleblower-complainant is required to meet an initial burden of showing that their claim contains certain required elements. For example, under the Sarbanes–Oxley Act, a complainant must establish a prima facie case by showing the following:

- the employee engaged in protected activity;
- the respondent knew or suspected that the employee engaged in protected activity;
- the employee suffered an unfavourable (adverse) personnel action; and
- circumstances exist to suggest that the protected activity was a contributing factor to the unfavourable action.

Once the individual establishes this initial, prima facie case, the burden shifts to the employer to show that it would have taken the same adverse action against a complainant absent their protected activity. Within this basic structure, it is also possible to tip the scales by imposing greater and lesser standards of proof (eg, clear and convincing evidence) on the parties.

For either approach, it is evident that clear processes should be in place to investigate reporting of misconduct or wrongdoing. The factual bases of such reports must be determined as quickly as possible for the benefit of both the person reporting and the person who is the subject of the report.

Element 14: Compensation/financial support/damages/reward

Compensate: Whistleblower protection frameworks should include means by which to compensate persons who reported misconduct or wrongdoing and who subsequently suffered reprisals. One approach is to establish a statutory body or enforcement agency which is responsible for receiving (at no cost to the whistleblower), assessing and even adjudicating compensation claims.

Financial support: Some jurisdictions offer financial support to reporting persons who are experiencing retaliation as a form of interim relief⁹² as they pursue a compensation claim in court or to support them in the period before a decision is reached in a claim already instituted.

Damages: Jurisdictions may also wish to encourage organisations to adopt rigorous whistleblower protection frameworks. This can be done by jurisdictions including in their whistleblower protection laws the means by which courts can award exemplary damages against an organisation that has no whistleblower framework in place and/or has engaged in reprisals.

Reward: Jurisdictions may wish to encourage persons to report actual or potential misconduct or

⁹¹ See n 3 above at 81–82.

⁹² See, eg, Law on the Protection of Whistleblowers No 128/2014 (Serbia).

wrongdoing that they reasonably believe to be true by offering an incentive as a reward for doing so.

COMMENTARY

Compensation

Persons who report alleged or actual misconduct or wrongdoing contribute significantly to the protection of the integrity of our public and private institutions. Most practitioners and commentators agree that reporting persons who suffer detrimental actions following exposure of wrongdoing should be compensated.⁹³

In some cases, adverse actions in the workplace, in some cases, come in the form of unlawful termination of a whistleblower's employment following the exposure of wrongdoing in an organisation. When this occurs, many reporting persons find it difficult to obtain employment in the same industry, or at all.⁹⁴ Even if compensation is possible, the reporting person must come before a competent court while bearing the procedural risks of funding and losing an unlawful termination case.

A significant number of countries make provision for compensation for reporting persons in the public sector who have suffered adverse actions, including unlawful termination. They include Australia,⁹⁵ Canada,⁹⁶ South Africa,⁹⁷ South Korea⁹⁸ and the US.⁹⁹

A reporting person, however, can face severe personal and professional repercussions for making a disclosure that may not result in unlawful termination. This can take the form of harassment, demotion or other forms of discrimination in the workplace environment.

Those countries with whistleblower protection frameworks consider questions of unlawful termination together with other forms of harassment in matters of compensation. Practically, however, the possibility of compensation for other forms of discrimination, including pain and harassment, can be difficult to obtain because there are likely to be difficulties in quantifying the

93 Transparency International Australia, 'Final Report of Whistleblower Protection in G20 Countries; Priorities for Action' (2014) <https://blueprintforreespeech.net/wp-content/uploads/2015/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf> accessed 9 August 2017.

94 See n 40 above.

95 Public Interest Disclosure Act 2013 (Australia), s 14 provides that the Federal Court can make an order requiring an employer to compensate an applicant for loss, damage or injury for an adverse action suffered as a consequence of whistleblowing.

96 Public Servant Disclosure Protection Act 2007 (Canada), s 21.7(1) provides that the Public Servant Disclosure Protection Tribunal can grant a number of remedies as compensation for reprisal action including unlawful termination. These remedies include payment of all remuneration entitled to by the complainant but for the reprisal action of the employer, amount equal to any expenses and any other financial losses incurred by the complainant as result of the reprisal and amount not more than CAD 10,000 for any pain and suffering that complainant experienced as a result of the reprisal.

97 Protected Disclosure Act 2000 (South Africa), s4(2) provides that any dismissal made as a consequence of making a protected disclosure under the act shall automatically qualify as unfair dismissal under the Labour Relations Act 1995 (South Africa); ss 193–195 of that act make provision for just and equitable compensation for all injuries suffered as a result of unlawful dismissal.

98 Act on the Protection of Public Interest Whistleblowers 2011 (South Korea), Art 27 mandates the Anti-Corruption and Civil Rights Commission to pay relief money for expenses as result of change of the whistleblower's occupation, for physical and psychological injuries suffered, for litigation procedure to reinstate their original state of life and for losses in wages during the period the disadvantageous measures were in effect.

99 The US offers the most comprehensive law that offers compensation for unlawful termination as it relates to reporting persons: s 21f of the Securities and Exchange Act of 1934 (US), which was introduced by the Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US) (other legislation includes the Whistleblower Protection Act 1989 (US), the Sarbanes–Oxley Act 2002 (US) 2000 and the False Claim Act 1863 (US)). Aspects of compensation in the act include double repayment of back pay otherwise owed to the reporting person with interest and compensation for litigation costs, expert witness fees and reasonable lawyer fees following a successful anti-retaliatory claim. There are also anti-retaliatory provisions that provide for compensation in some federal statutes and in as many as 40 US states (see David Aron, "Internal" Business Practices?: The Limits of Whistleblower Protection for Employees Who Oppose or Expose Fraud in the Private Sector' (2010) 25(2) ABA Journal of Labour and Employment 277).

actual loss suffered in those circumstances. Even in countries that consider compensation for unlawful termination together with other forms of discrimination, there is sometimes a tendency to consider only the former for the purposes of compensation and disregard the latter.¹⁰⁰

The challenge therefore is to ensure that compensation is not just available to reporting persons who lose their jobs but also if they suffer discrimination/harassment, their careers may be tarnished and lives disturbed, and this carries with it emotional and psychological despair. An effective whistleblower protection framework should reflect this point appropriately.

For compensation schemes to be effective and far-reaching, they must operate in clinical isolation of the regulator/corporation that seeks to rely on the reporting person's disclosures. It is the Working Group's view that whistleblower protection frameworks should include a system of compensation administered by an independent statutory office-holder, court system or quasi-judicial administrative process, and through which both parties provide information related to the assessment of economic and emotional damages.

While significant success has been achieved in compensating whistleblowers in the public sector in various countries, much less has been done in the private and not-for-profit sectors.¹⁰¹ With the exception of a few countries, there is generally a lack of adequate protection for whistleblowers in the private sector as it relates to unlawful termination for whistleblowing.¹⁰² It is also possible that some countries leave questions of private sector disclosure as a matter to be managed by a company's internal processes – with no escalation mechanism – and this can adversely affect how matters of compensation are resolved in a company, because it may be pushed to act as both judge and jury.

Financial support

Some members of the Working Group felt that it was important to provide some form of financial support to reporting persons who are experiencing retaliation as a form of interim relief as they pursue a compensation claim in court or to support them in the period before a decision is reached in a claim already instituted.

Most whistleblowers without legal aid or other forms of financial assistance are unlikely to be able to bring a compensation claim in court either for unlawful termination or discrimination/harassment. Claims can be brought free of charge in some jurisdictions, and charities such as the Government Accountability Project¹⁰³ in the US and Public Concern at Work¹⁰⁴ in the UK can assist employees who are concerned about wrongdoing, fraud or misconduct at work. However, such organisations are unable to provide financial support to those who have to resort to the legal system.

According to Public Concern at Work, drastic legal aid cuts in the UK have meant that only 44 per cent

100 For example, in the South African case of *Tshishonga v Minister of Justice* [2006] ZALC 104, the court acknowledged that the applicant did suffer other forms of harassment, discrimination and public humiliation for the 'greater good of the department and society'. However, it was not compelled to award compensation except for loss of 12 months of remuneration.

101 Law on the Protection of Whistleblowers Act, No 128/2014 (Serbia) makes no distinction between the sectors.

102 International Bar Association Anti-Corruption Committee, Submission to the Australian Parliament Joint Committee on Corporations and Financial Services Inquiry into Whistleblower Protection Laws (10 February 2017)..

103 Information of which can be found at www.whistleblower.org accessed 14 February 2018.

104 Information of which can be found at www.pcaw.org.uk accessed 14 February 2018.

of whistleblowing claimants have access to legal representation.¹⁰⁵ Further, only 32 per cent of

whistleblowers who represented themselves won their cases, compared with 44 per cent of those with legal representation.¹⁰⁶

As regards other forms of interim reliefs, UK legislation uniquely provides for interim relief, through which a whistleblower can retain their job and continue to receive remuneration as an unfair dismissal claim proceeds.¹⁰⁷ This can help to financially support the whistleblower and can cushion the financial burden of maintaining a claim in court compared with the other situation of being out of work and out of legal assistance through legal aid. Practically, however, only about seven per cent of whistleblowers are successful in interim relief hearings, and claims for interim relief must be brought within seven days. By contrast, in the US, the whistleblower agency Office of Special Counsel consistently receives approval for over 90 per cent of its stay petitions to an administrative board.¹⁰⁸

It is important that the paucity of funds for lawyer fees does not constitute a barrier to justice for potential whistleblowers. For jurisdictions in which legal aid for civil cases is not available or does not include whistleblowers, whistleblower protection frameworks could include protection funds to cover this shortfall.

Exemplary or punitive damages

Punitive damages go beyond performing a compensatory function to providing an extra measure of deterrence to forestall similar unwanted actions.¹⁰⁹ In the context of unlawful termination, the doctrine of punitive damages recognises that the ‘imposition on the employer of that small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of [the] state’.¹¹⁰ As such, the court therefore enlarges the employer’s accountability by imposing an extra layer of responsibility to punish it for its oppressive conduct and to deter it and others from committing such acts in the future.

Only a few jurisdictions provide for the imposition of punitive damages in whistleblower retaliation cases. Practically, however, the payment of punitive damages are rare and small (usually in the range £5,000–£7,000).¹¹¹ Australia’s Fair Work (Registered Organisations) Amendment Act 2016 provides that the Federal Court, on the application of a whistleblower, may make an order requiring the respondent to pay exemplary damages if the court is satisfied that the respondent took, threatened or is threatening to take a reprisal action against a person who has made a protected disclosure.¹¹² While some commentators have welcomed this new development, it remains unclear as to how exemplary

105 Public Concern at Work, ‘Whistleblowing: Time for Change’ www.pcaw.org.uk/content/6-campaigns/2-time-for-change-review/pcaw_5yr-review_final.pdf?1480418791 accessed 8 August 2017.

106 *Ibid.*

107 Public Interest Disclosure Act 1998 (UK), s 9 and Employment Rights Act (UK), s 128.

108 Information provided by Tom Devine, Legal Director, Government Accountability Project.

109 This principle has been recognised in a long line of US cases. See *Hansen v Harrah’s* 675 P.2d 394 (Nev 1984) at 397; *Harless v First Nat’l Bank in Fairmont*, 289 SE 2d 692 (W Va 1982) at 697, 703. See also Jane P Mallor, ‘Punitive Damages for Wrongful Discharge of at Will Employees’ 1985 26(3) *William & Mary Law Review* 449.

110 The Illinois Supreme Court in *Kelsay v Motorola Inc* 384 NE 2d (Ill 1978) at 359.

111 Linklaters, *Guide to Managing Whistleblowers at Work*, http://content.linklaters.com/pdfs/mkt/london/GC1442_Whistleblowing_4pp_Final_SCREEN.pdf accessed 17 August 2017 and www.linklaters.com/pdfs/mkt/london/GC1442_Whistleblowing_4pp_Final_SCREEN.pdf accessed 17 August 2017. See, eg, *Holden v Connex South Eastern Ltd* [2002] ET 2301550/00.

112 S 3337BB(1).

damages will work in Australia.¹¹³

The major federal laws of the US do not provide for punitive damages for whistleblowers.¹¹⁴ It is possible to obtain punitive damages under the common law in some states that have recognised the public policy exception to the *employment at will doctrine*,¹¹⁵ if a tort action is instituted¹¹⁶ or when a whistleblower protection statute permits the imposition of any other discretionary relief.¹¹⁷ State courts, however, are often reluctant to erode employer autonomy and, as such, do not always offer this type of redress to whistleblowers. In some cases, courts have held that employer retaliation is not a clear public policy such that it precludes the application of the *at will doctrine*.¹¹⁸

Financial incentive/reward

A final aspect of consideration is the practice of paying financial rewards to whistleblowers irrespective of whether they have suffered any retaliatory actions, but subject to certain conditions being satisfied.

The question as to whether whistleblowers should be rewarded when they have not suffered detrimental action has been controversial and has represented a sharp contrast between practice in Europe and the US. Opponents of the practice contend that the motivation to blow the whistle should not be based on the expectation of receiving a monetary reward but by citizens who wish to protect the public from harm. For example, UK authorities believe that encouraging a culture that rewards greed risks creating an unnecessary ‘moral hazard’. This is particularly so where there has been no empirical study to establish that financial encouragement of whistleblowers is directly proportional to the quantity or quality of disclosures.¹¹⁹ There is also research that suggests that most persons who report alleged or actual misconduct or wrongdoing are motivated to do so because they believe it is the right thing to do rather than the expectation of any reward.¹²⁰ There are also suggestions that a bounty culture can result in more frequent and intense retaliation.¹²¹

US authorities, however, have been strong advocates of the benefits of financial rewards for whistleblowers. Indeed, the US leads in developing whistleblower frameworks that significantly reward whistleblowers for disclosure that has led to the recovery of government funds.¹²² In 2017, after more than five years of operation, the SEC Whistleblower Program has paid out more than US\$160m to 46 individuals and has recovered more than US\$584m in financial sanctions against

113 IBA Anti-Corruption Committee Submission see n 102 above at 37.

114 For example, the False Claims Act 1863 (US), the Sarbanes–Oxley Act 2002 (US) and the Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US).

115 The doctrine that an employee is terminable at any time for any reason or no reason.

116 Elleta Sangrey Callahan and Terry Morehead Dworkin, ‘The State of Whistleblower Protection’ (2000) 38(1) *American Business Law Journal* 99.

117 Stephen Kohn, *Concept and Procedure in Whistleblower Law* (Quorum Books 2001).

118 *Dean v Consolidated Equities Realty*, LLC914 NE 2d 1109 (Ohio Ct App 2009); *Kratzer v Welsh Companies* 771 NW 2d 14 (Minn 2009); *Lamson v Crater Lake Motors, Inc* 216 P.3d 852 (Or 2009). For a contrasting decision, see *Sami Mitri v Walgreen Company* Case No 1:10-CV-00538 AWI SKO (ED Cal 3 December 2014), in which the District Court of California affirmed a punitive award of US\$1.155m dollars in favour of the whistleblower in a wrongful termination in violation of public policy case. The court was of the view that, given the high reprehensibility of the defendant’s conduct, this was justified.

119 UK Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee, ‘Financial Incentives for Whistleblowers’ available at www.bankofengland.co.uk/pru/Documents/contact/financialincentivesforwhistleblowers.pdf accessed 10 August 2017.

120 Whistleblowers expert meeting held on 7 June 2017 by the European Commission, attended by one of the authors, by invitation. Compare this with the findings set out in *The Street, The Bull and The Crisis: A Survey of the UK & UK Financial Services Industry*, see n 57 above.

121 Information provided by Tom Devine, Legal Director, Government Accountability Project.

122 See, eg, the Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US) and the False Claims Act 1863 (US).

defaulting companies.¹²³ When compared with the total number of disclosures made, however, the odds of a whistleblower receiving a bounty are very remote.

In December 2016, the Nigerian Federal Ministry of Finance unveiled its whistleblowing policy relating to the violation of financial regulations, mismanagement of public funds and assets, financial malpractice/fraud and government theft wherein whistleblowers are paid between 2.5–5 per cent of whatever is recovered by the government.¹²⁴ The Nigerian government estimates that it has recovered more than US\$180m as of April 2017 and has received more than 2,000 tips.¹²⁵ Under South Korea's Act on the Protection of Public Interest Whistleblowers, the government can pay rewards if the disclosure directly results in the recovery or increase in the income of the government or state agency.¹²⁶

Proponents of financial rewards believe that there has to be a shift from the motivation of the whistleblower to the value of the information reported, which means regulators should be able to offer whistleblowers significant rewards for valuable information.

From what we have been able to determine, jurisdictions that have a framework for reward/incentive experience a rise in the quality and quantity of disclosures. For example, in the 2016–2017 fiscal year, the whistleblower cases probed by the UK Financial Conduct Authority fell from 1,340 to 900, while over the same period, the number of cases investigated by the US SEC rose by 16 per cent.¹²⁷ The amount of revenue returned to government accounts in a short period of time in the US and Nigeria suggests that there may be some value in an incentive system for both the government and whistleblowers.

As a final observation, however, in the first six months of operation the Dutch House of Whistleblowers, which provides no financial incentives or rewards, received 532 requests for advice. By contrast, the US SEC's Office of the Whistleblower, which does provide financial incentives and rewards, received 334 tips in its first year of operation (2011).

Element 15: Leniency programmes

The Working Group is of the view that legislators should consider offering leniency to reporting persons subject to the extent to which a reporting person was involved in the conduct reported.

123 2017 Annual Report to Congress on the Dodd–Frank Whistleblower Program available at www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf accessed 30 November 2017. Whistleblowers can also obtain large financial rewards if bring they bring a *qui tam* action under the US False Claims Act. The act allows persons with evidence of fraud against the Federal Government to sue the wrongdoer under seal on behalf of the Government. If the whistleblower is successful, they can receive between 15–30 per cent of the money that the Government recovers. In the 2016 fiscal year, the US Department of Justice (DOJ) recovered US\$2.9bn through lawsuits filed under the *qui tam* provisions and paid out US\$519m to the individuals who exposed the fraud to Government programmes (see US DOJ, 'Justice Department Recovers \$4.6 Billion from False Claims Act Cases in Fiscal Year 2016: Third Highest Annual Recovery in FCA History' www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016 accessed 8 August 2017).

124 Ministry of Finance of the Federal Republic of Nigeria, 'FMF Whistleblowing; Frequently asked Questions' https://whistle.finance.gov.ng/_catalogs/masterpage/MOFWhistle/assets/FMF%20WHISTLEBLOWING%20FREQUENTLY%20ASKED%20QUESTIONS.pdf accessed 9 August 2017.

125 Soni Daniel, 'Whistleblower: FG Nets N73 Billion in 4 months' *Vanguard Nigeria Newspaper* (Lagos, 16 April 2017) www.vanguardngr.com/2017/04/whistleblower-fg-nets-n73-billion-4-months accessed 9 August 2017.

126 Art 26.

127 See n 44 above.

The grant of leniency is designed to act as an incentive for whistleblowing. It involves affording beneficial treatment (usually in the form of total immunity or a partial reduction from penalties that would otherwise be applicable) to a whistleblower who, having breached the law, comes forward to report the wrongdoing and voluntarily supplies information or evidence that helps authorities take action against other wrongdoers.

There is currently no leniency programme available in the whistleblowing laws of most jurisdictions, save for one specific type of whistleblowing: cartel reporting.¹²⁸ Most of the current literature on leniency has focused on established antitrust jurisdictions, particularly the US and EU.

As with many forms of misconduct or wrongdoing, it can be very difficult for competition authorities to detect cartels and deter companies from engaging in such practices. The option of leniency is used as an effective way to break cartels from the inside by preying on the mistrust among cartel members and the fear of being caught.

Leniency programmes can be available to individuals and/or corporations.¹²⁹ If the company qualifies for corporate leniency, then all directors, officers and employees receive the same leniency; if the company does not qualify, then the employees may be able to avail themselves of leniency if they applied as individuals. For example, the Department of Justice (DOJ) in the US guarantees full amnesty (immunity) to the first informant who comes forward with information about a cartel that is not already under investigation. See also the European Commission Competition Authority¹³⁰ and the Australian Competition and Consumer Commission.¹³¹ The US amnesty also allows the grant of amnesty for the first whistleblower that cooperates with the DOJ when an investigation is already underway, although only subject to certain conditions and provides immunity from criminal prosecution to individuals.

Element 16: Encouraging implementation

It is a common lament that even where a jurisdiction has robust whistleblower protection laws in place, the implementation by organisations of their obligations under, and the enforcement by regulators of, those laws is woeful.

There are two ways to encourage organisations to implement effective and robust whistleblower protection programmes, where there are no laws obliging organisations to establish whistleblower procedures:¹³²

- investigative and prosecutorial authorities and courts can have regard to those programmes and their implementation when assessing whether an organisation has contravened a law or whether it

128 Brazil is the only country to have extended the grant of leniency from antitrust law to anti-corruption law: see Denis Alves Guimaraes, 'Interface between the Brazilian Antitrust, Anti-Corruption, and Criminal Organization Laws: The Leniency Agreements (Short Version)' (2017) Agreements in Brazilian Antitrust Law (Law No 12,529/11): five years Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade.

129 See, eg, US DOJ, 'Leniency Program', www.justice.gov/atr/leniency-program accessed 13 February 2018; see in particular, the Corporate Leniency Policy (10 August 1993) at www.justice.gov/atr/file/810281/download accessed 13 February 2018 and the Individual Leniency Policy (10 August 1994) www.justice.gov/atr/individual-lenieny-policy accessed 13 February 2018.

130 See <http://ec.europa.eu/competition/cartels/leniency/leniency.html> accessed 20 September 2017.

131 See www.australiancompetitionlaw.org/guidelines/2014immunity.html accessed 20 September 2017. This is currently subject to review.

132 For example, as is proposed in Australia's Treasury Laws Amendment (Whistleblowers) Bill 2017.

has put in place appropriate procedures to prevent the commission of an offence;¹³³ and

- organisations, particularly publicly listed companies (under relevant listing rules) and public institutions, can be encouraged to publicly disclose details of their whistleblower protection programmes and, if they choose not to do so, provide reasons publicly as to why not.¹³⁴

A combination of these two approaches is likely to be the most effective means by which to encourage organisations to develop and implement such programmes.

COMMENTARY

Transparent oversight of an organisation's whistleblower framework can help to encourage organisations to put in place appropriate measures to protect whistleblowers while providing a safe environment to report fraud and other wrongdoing.

In the experience of some members of the Working Group, many organisations tend to develop and adopt whistleblower or reporting frameworks only when they are obliged to do so. Further, even if organisations develop and adopt such frameworks, their implementation of them is often wanting.

Sub-element 16a: Implementation

Organisations are encouraged to be more proactive in their development, adoption and implementation of their whistleblower protection frameworks. Specifically, organisations are encouraged to develop very robust frameworks and ones that meet their requirements, taking into consideration the nature of their work and locations in which they operate. Such frameworks should have clear reporting lines, and all staff should be informed of the framework, how it applies, reporting lines and responsibilities.

Some jurisdictions have required that frameworks be structured and applied in a particular way. Organisations need to ensure that the framework they adopt meets any such requirement, but at the same time, also ensure that it does not breach any other possible law (eg, data protection laws in Europe, as discussed in Element 12).

COMMENTARY

In the experience of some of the Working Group, organisations tend to adopt and implement frameworks, such as whistleblower protection, only when they have experienced investigation by regulatory authorities or other investigative agencies and/or actual or potential legal proceedings. This often leads to organisations reacting to demands of regulatory authorities/investigative agencies and/or having a whistleblower programme imposed on them. This can be a very costly and time-consuming exercise. As such, it is in the interests of organisations to develop and adopt whistleblower protection frameworks as part of policy development. Such frameworks are instrumental in, among

133 For example, see the US Federal Sentencing Guidelines www.ussc.gov/guidelines/guidelines-archive/2015-guidelines-manual accessed 14 August 2017.

134 For example, see the approach adopted by the ASX Corporate Governance Council to encourage companies to adopt codes of ethics in its *Corporate Governance Principles and Recommendations* (3rd edn, 2014) www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf accessed 21 September 2017.

other things, bringing fraud and misconduct to the attention of the organisation.¹³⁵

Other members of the Working Group indicated that many organisations, even in the absence of actual or threatened litigation or prosecution, have proactively implemented robust and multifaceted whistleblower programmes. These organisations understand the benefit of encouraging employees to come forward with concerns regarding possible misconduct, and strive to achieve a workplace culture in which they feel comfortable doing so.

The Working Group encourages organisations to consider the following questions, among others, when developing a whistleblower protection framework:

- What is the nature of information that the organisation wants brought to its attention? For example, will it be limited to actual or potential breaches of the law or will it include actual or potential breaches of the organisation's code of conduct and other policies?
- Who is ultimately responsible for overseeing the implementation and application of the framework?
- How should the reporting procedures work in the structure of the organisation?
- How many escalation layers should there be?
- Does the framework specify appropriate external recipients of concerns if a whistleblower is not satisfied with the internal response?
- How can they ensure information of the reporting person and the person who is the subject of the report is confidential and protected?
- How does the organisation provide feedback to a whistleblower about their concerns? Does the organisation make the results transparent?
- What training can they provide to managers and other professionals who will receive complaints?
- How can the organisation help to promote a workplace culture that encourages and protects disclosures of possible misconduct?
- What process is followed to investigate any reports of misconduct or wrongdoing?
- How can the organisation support people working in remote offices or decentralised working environments?
- How frequently should the framework and its application be reviewed? How should the results of the review be disseminated?
- What is the organisation prepared to do if the identity of the reporting person is revealed and the person is subject to retaliation, particularly when the conduct reported relates to a breach of the organisation's code of conduct or another policy – which may not be subject to legal protection?

While there is no one-size-fits-all whistleblower protection template available, organisations can obtain

¹³⁵ See, eg, the findings of PwC in its *Adjusting the Lens on Economic Crime: Preparation brings opportunity back into focus* Global Economic Crime Survey 2016 www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf accessed 24 January 2018.

guidance from publications, such as the US Sentencing Guidelines, the British Standards Institution Code of Practice on Whistleblowing Arrangements and the work undertaken by the OECD.

Further, the Working Group recognised that, in many countries, there is no culture or practice of reporting wrongdoing. As such, as countries do introduce whistleblower protection laws, there needs to be more detailed guidance provided as to what that means for organisations and what they need to do to implement such frameworks. Awareness-raising and communications strategies must also be put in place to encourage cultural change and instil faith in the protected reporting system (see Element 17).

Sub-element 16b: Corporate culture and leadership

Trust in government and organisations, and the executive of both, is essential if the development and implementation of a whistleblower protection framework is to be effective.

COMMENTARY

If an organisation is genuine about wanting to have misconduct and wrongdoing brought to its attention, then it is incumbent on it to review the organisation and the employees' views of it, and assess the efficacy of its corporate culture as part of this process. There is no one right way regarding how an organisation can improve its cultural environment to encourage the reporting of misconduct and wrongdoing – although there are many organisations that promote themselves as experts on this point. Experience suggests, however, that three tactics have been reasonably effective:

1. visible leadership by the head of the organisation in high-profile campaigns;
2. hands-on training for all management and employees on relevant rights and responsibilities, with the participation of senior leaders of the organisation; and
3. non-financial reinforcement for senior leadership, such as an award for the recognition of a contribution to the programme.¹³⁶

Is there a nexus between trust in an organisation and the effectiveness of a whistleblowing programme? There is much literature on the importance of trust in organisations and the importance of effective whistleblower programmes. However, there is little discussion across the two topics. It seems apparent, however, that there is a substantial degree of overlap. If employees do not trust the organisation or those who are in senior roles in it, they will not trust the whistleblower protection framework.

What applies to organisations also applies to governments. While some jurisdictions have excellent whistleblower protection laws in place, their application is often woeful; that is, political, social and cultural acceptance of them remains limited. To a certain extent, this links back to the various social and cultural reasons underpinning the point above. However, it also indicates that there is much to do on overcoming what seems to be an automatic reaction by governments and organisations of denial and fear to 'bad news'. This seems to occur regardless of the jurisdiction. While the US certainly has more sophisticated laws and incentives for individuals to report misconduct, it too

¹³⁶ Information provided by Tom Devine, Legal Director, Government Accountability Project.

experiences occurrences of whistleblowers (however called) being reluctant to report for fear of retaliation, or that the misconduct reported will not be rectified. Further, anecdotal evidence suggests that reporting of ‘bad news’ within an organisation often leads to attempts to cover it up rather than addressing the problem.

Element 17: Education/awareness-raising

Education programmes on the importance of reporting concerns of misconduct and wrongdoing, and protecting the rights of those who do so, are essential. This applies both within organisations and among the broader public.

Education programmes within organisations are included as part of the implementation of its whistleblower protection framework. Among the broader public, such education programmes should start in schools and be conducted in more detail in business organisational and ethics classes.

COMMENTARY

Overall, it boils down to one issue: the cultural perception of whistleblowing. To successfully implement an effective whistleblowing system, the culture and language surrounding whistleblowing needs to change.

One of the biggest obstacles to implementing an effective whistleblowing system in any organisation or jurisdiction is the cultural perception of whistleblowers. It is embedded in many cultures – some more so than others – that ‘snitching’ or ‘tattletaling’ should be frowned upon, be it at home, in the schoolyard or in the workplace. This occurs even in those jurisdictions where whistleblowing laws are relatively well-established, for example, the US. This is because even in jurisdictions where whistleblowing is not uncommon, retaliation against whistleblowers occurs frequently.¹³⁷

Education programmes such as these are even more important in those countries where there is deep suspicion of whistleblowers or where there is a significant lack of trust in public organisations. In these cases, it is important to tailor education programmes on whistleblowing and whistleblower protection to address the particular historical, social and political context of the jurisdiction.

However, reporting is not just stifled by cultural or societal experiences. Of interest is a recent study conducted by Transparency International-Ireland (TII), which provides some revealing information. In that study, TII surveyed a range of employers and employees regarding their attitudes to known whistleblowers. According to the responses from employers, some 57 per cent strongly agreed to the suggestion that they would employ someone who had blown the whistle on wrongdoing in a previous job. By contrast, only some 36 per cent of employees – potential colleagues – strongly agreed to the suggestion that they would be happy to work alongside someone who had been a whistleblower in the past.¹³⁸ This suggests that employees, not employers, are more concerned as to what information a whistleblower may disclose.

¹³⁷ See, eg, Peter Yeoh ‘Whistleblowing: Motivations, corporate self-regulation and the law’ (2014) 56(6) *International Journal of Law and Management* 459. The author finds that, despite the rates of whistleblowing and the protections afforded under the respective laws of the UK and US, whistleblowers in those jurisdictions are nevertheless commonly subject to retaliation in the workplace. See also n 40 above.

¹³⁸ Transparency International Ireland, ‘Speak Up Report 2017’ 2017 https://transparency.ie/sites/default/files/17.12.13_speak_up_report_ie_final.pdf accessed 13 February 2018. See also n 40 above.

Element 18: Whistleblower protection authority

A central whistleblowing authority or agency has its attractions. For example, such an authority could provide advice to employers and potential and actual whistleblowers, and publish best practice guidelines. However, having such benefits is unlikely to provide the most efficient means of providing information of alleged or actual misconduct or wrongdoing. As such, people who want to disclose alleged or actual misconduct or wrongdoing occurring in their organisation to external authorities are encouraged to do so to the relevant authority. For example, if an employee comes across information that leads to them suspecting on reasonable grounds that their organisation is engaging in cartel conduct, then the relevant competition authority needs to know this.¹³⁹

COMMENTARY

There are some attractions to having a central whistleblowing agency. On the one hand, a single organisation as a one-stop shop for whistleblowing reporting, investigation and protection would be less costly to operate, easier to monitor, easier to ensure consistency of approach in investigating allegations and providing protection against retaliation and, finally, be more visible for the public (ie, people would know exactly where to report). On the other hand, the potential misconduct or wrongdoing reported can be very sector-specific, and a proper investigation into the allegation would require expertise in the subject matter, usually only found in a regulatory body that already monitors that sector. Further, allowing both the whistleblowing agency and relevant regulatory authority to investigate wrongdoing would amount to unnecessary duplication, a significant risk of inconsistent findings from concurrent investigations and a waste of resources. Finally, a single whistleblowing agency can only be effective when it is independent, adequately resourced and there is an absence of any conflict of interest, and where confidence in the government is strong.

Provided a jurisdiction does the following, it is irrelevant if there is one or several authorities to whom whistleblowers can turn:

- legislates robust and comprehensive whistleblower protection laws;
- establishes procedures to encourage organisations to develop and implement policies and procedures;
- educates its population on the laws, their rights under the laws and appropriate expectations; and
- ensures these laws are complied with through enforcement.

¹³⁹ This assumes that all internal processes are exhausted or the individual is concerned that senior management is involved in the misconduct or wrongdoing.

Working Group

Jane Ellis *IBA Legal Policy & Research Unit, United Kingdom (Chair)*

Philip Berkowitz *United States (Vice-Chair)*

Leah Ambler *OECD, France*

Wilson Ang *Singapore*

Fabio Cagnola *Italy*

Francesco Capitta *Italy*

Filippo Ferri *Italy*

Jitka Logesová *Czech Republic*

Johan Lubbe *United States*

Amy Mendenhall *United States*

Martijn Scheltema *Netherlands*

Lindsay Sykes *Bolivia*

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- Professor David Lewis, Professor of Employment Law, Middlesex University and the head of the International Whistleblowing Research Network (United Kingdom)
- Tom Devine, Legal Director, Government Accountability Project (United States)
- Associate Professor Kath Hall, ANU College of Law, Australian National University (Australia)

Appendix

Information in this Appendix is based on the laws of the relevant country as at January 2018. No responsibility is accepted where legislative reform has resulted in this information being out of date.

Whistleblowing in the tax sector

While whistleblower protections in some jurisdictions may extend to those who report tax-related misconduct, whistleblower protection is not a subject with which many tax professionals are familiar. One of the Working Group members attended a whistleblower protection workshop that was also attended by representatives of a tax organisation, who indicated that they were unfamiliar with the topic and its focus. A review of whistleblower protection work in the tax sector conducted by Francesco Capitta of Macchi di Cellere Gangemi in Rome, Italy and Co-Chair of the IBA Taxes Committee revealed that, overall, there is little to no serious or focused work of government agencies or international organisations on whistleblower protection and tax misconduct. Some jurisdictions, however, do have programmes that grant awards to individuals who report tax violations. These are below.

Source	Author	Jurisdiction	Summary	URL
Government of Canada website	Canada Revenue Agency (CRA)	Canada	<p>The Offshore Tax Informant Program (OTIP) allows the CRA to make financial awards to individuals who provide information related to major international tax non-compliance that leads to the collection of taxes owing.</p> <p>The CRA will protect the identity of an informant to the fullest extent possible as required by law.</p> <p>There are some circumstances, such as when the informant is required as an essential witness in a court proceeding, where it may not be possible to proceed without revealing the informant's identity. The CRA will advise the informant before it decides whether to proceed in such cases.</p>	www.cra-arc.gc.ca/gncy/cmplnc/otip-pdife/cnfdntly-eng.html
Government of United Kingdom website	HM Revenue & Customs	UK	Possibility to report tax evasion online or by phone.	www.gov.uk/government/organisations/hm-revenue-customs/contact/reporting-tax-evasion

Source	Author	Jurisdiction	Summary	URL
Government of United States regulations	Internal Revenue Service (IRS)	USA	<p>Detailed regulations about the whistleblower award programme introduced in 2006.</p> <p>The regulations provide guidance on submitting information regarding underpayments of tax or violations of the internal revenue laws and filing claims for award, as well as on the administrative proceedings applicable to claims for award under section 7623.</p> <p>The regulations also provide guidance on the determination and payment of awards, and provide definitions of key terms used in section 7623. Finally, the regulations confirm that the director, officers, and employees of the Whistleblower Office are authorised to disclose return information to the extent necessary to conduct whistleblower administrative proceedings. The regulations provide needed guidance to the general public as well as officers and employees of the IRS who review claims under section 7623.</p> <p>As regards confidentiality of whistleblowers, section 7623 does not provide any protections regarding the identification of whistleblowers. The treasury and IRS, however, are very sensitive to the legitimate concerns whistleblowers have with protecting their identities. In the Administration's Fiscal Year 2014 and 2015 Revenue Proposals, the Treasury recommended amending section 7623 to explicitly protect whistleblowers from retaliatory actions, consistent with the protections currently available to whistleblowers under the False Claims Act. Moreover, existing Treasury Regulation section 301.7623-1(e) provides that '[n]o unauthorised person will be advised of the identity of an informant.' The proposed regulations reaffirmed the commitment of Treasury and IRS to safeguard the identity of whistleblowers who submit information under section 7623. Under the proposed rules, the IRS reaffirmed that it will use its best efforts to: (1) prevent the disclosure of a whistleblower's identity; and (2) notify a whistleblower prior to any disclosure.</p> <p>The informant privilege allows the government to withhold the identity of a person that provides information about violations of law to those charged with enforcing the law. The informant privilege is held by the government, not the informant, and is not an absolute privilege. There may be instances in which, after careful deliberation and high-level IRS approval, the disclosure of the identity of a whistleblower may be determined to be in the best interests of the government. Nonetheless, in such cases, the IRS first carefully considers and weighs the potential risks to the whistleblower, and the government's need for the disclosure, and looks for alternative solutions. The final regulations reflect the determination of the Treasury and IRS that preventing the disclosure of whistleblower information is of critical importance not only to whistleblowers, but also to the IRS's whistleblower programme. The IRS has implemented a multi-level review process to ensure that the identities of whistleblowers are disclosed only after careful consideration. The IRS will continue to use its best efforts to prevent disclosures and provide notification prior to any disclosure. The IRS recognises, however, that despite its best efforts, it may not always be possible to provide such notification. In some instances, whistleblowers have consented to the disclosure of their identities in the hope that the IRS will proceed with a tax case more quickly. Even when a whistleblower consents to disclosure, however, disclosing the whistleblower's identity may not be in the government's best interest. Moreover, a whistleblower cannot unilaterally opt out of the informant privilege because the privilege is held by the government. Finally, it is the longstanding practice of the IRS to justify tax adjustments through information obtained independently of the whistleblower. This enables the IRS to better defend tax adjustments in court and supports the IRS's sound administration of the tax case. As such, the IRS will act on specific and credible information regarding tax compliance issues when that information can be corroborated, as part of a balanced tax enforcement programme, and will not forgo this process at the whistleblower's request to expedite a potential award.</p>	www.gpo.gov/fdsys/pkg/FR-2014-08-12/pdf/2014-18858.pdf

Source	Author	Jurisdiction	Summary	URL
Government memorandum	Department of the Treasury	USA	Review of the operating guidelines and procedures of the Whistleblower Office. In particular, 'It is imperative that throughout the audit, the audit team strive to protect both the identity as well as the existence of the whistleblower from both the taxpayer and from others who do not have a "need to know" based upon the performance of their official duties. All whistleblower information must be segregated from the regular examination workpapers and regular administrative file and must be given Special Security level SP-2 protection for all informant documents. There should be no mention or discussion of the whistleblower in the regular examination activity log, workpapers (e.g., emails, letters, and intra-agency correspondence) or case file'.	www.irs.gov/pub/whistleblower/IRS%20Whistleblower%20Program%20Memorandum%20(signed%20by%20DCSE).pdf
Government report	IRS	USA	The report illustrates the results of the IRS Whistleblower Program in fiscal year 2016.	www.irs.gov/pub/whistleblower/fy16_wo_annual_report_final.pdf

Bolivia

Whistleblower protection laws in many South American jurisdictions are limited and/or not enforced adequately. Lindsay Sykes of Ferrere in Santa Cruz, Bolivia and an officer of the IBA Anti-Corruption Committee provided a summary of laws that apply to some persons who report misconduct in certain circumstances in Bolivia, Ecuador, Paraguay and Uruguay. Bolivia is below.

What is a whistleblower?	Source	Protections and remedies
<p>There is no express definition for whistleblowers in Bolivian law. However, Law 458 for Whistleblower and Witness Protection defines a 'protected person' as any public official, former public official or particular person that is granted protective measures for having executed a protected activity.</p> <p>Protected activities established by the law are as follows: (1) manifesting the alleged commission of a crime; (2) revealing information or evidence conducive to an investigation; (3) intervening as a witness, expert or technical adviser; or (4) other forms of direct/indirect participation.</p> <p>Activities (1) and (2) are applicable to whistleblowers.</p>	Article 2 Law 458 for Whistleblower and Witness Protection	<p>Bolivian law provides the following protections for whistleblowers:</p> <ul style="list-style-type: none"> • protection of identity and personal data; • preservation of labour rights; • police protection in connection with personal mobility and domicile; • government use of technology in order to preserve the confidentiality of the whistleblower's identity; • lodging in safe houses; • psychological care; • separation from other prisoners; and • others, as needed, to guarantee personal safety.

Czech Republic

Whistleblower protection laws in many Eastern European jurisdictions are limited and/or not enforced adequately. Jitka Logesova of Kinstellar in Prague, Czech Republic and an officer of the IBA Anti-Corruption Committee, and her colleague Kristyna Del Maschio provided a summary of laws that apply to some persons who report misconduct in certain circumstances in the Czech Republic, Hungary, Kazakhstan, Romania and the Slovak Republic. The Czech Republic is below.

There is no comprehensive law on whistleblowing in the Czech Republic and the courts do not acknowledge the rights of whistleblowers as such. The only way a whistleblowing matter might

arrive before the courts and be subject to judicial proceedings would be within the legal defence of a former employee who had been made redundant as a result of whistleblowing, whereby such a defence would have to take the form of a legal action for unlawful termination of the employment contract. Nevertheless, there are various provisions within the Czech legal system that, to varying degrees, relate to whistleblowing and can sometimes provide a certain level of protection. Also, due to a recent introduction of criminal liability of corporates in 2012, a large portion of Czech companies implement their own compliance policies. These typically contain internal measures governing whistleblowing in various forms, for example, hotlines, secured applications on the organisation's intranet or appointing an authorised person, usually working in internal audit, to deal with reports on misconduct.

What is a whistleblower?	Source	Protections and remedies
<p>'Whistleblower' is not defined, but persons reporting violations of specific financial laws and regulations must be accorded protection. Specifically, the Act on Banks, among other things, requires banks and the Czech National Bank (CNB) to implement an effective whistleblowing mechanism and sets forth the minimum requirements for that mechanism.</p>	<p>Act No 21/1992, Coll, on Banks, Act No 87/1995 Coll, on Savings and Credit Cooperatives and Act No 256/2004 Coll, Capital Market Undertakings Act (Financial Acts)</p>	<p>The Act on Banks requires that the whistleblowing system must:</p> <ul style="list-style-type: none"> • ensure protection of whistleblowers (if it involves a bank employee, the mechanism must provide for protection against discrimination or any other unjustified action against the employee); • ensure protection of personal data of the whistleblowers as well as of the persons who are being reported; and • stipulate the procedure for reporting allegations and for their subsequent evaluation by the CNB.
<p>The Criminal Code stipulates an obligation to report certain crimes (eg, bribery) to criminal authorities in the event that an individual has learned from a credible source that such a crime has been committed. Anyone can also report a mere suspicion of wrongdoing (also on an anonymous basis) because criminal authorities are obliged to investigate any credible report of possible criminal behaviour.</p>	<p>Act No 40/2009, Coll, the Criminal Code</p>	<p>The Criminal Code does not provide for any protection to those who report such a crime, which may be the reason that employees often prefer to remain silent when they become aware of misconduct at the workplace.</p>
<p>Companies may be held criminally liable for certain offences committed by their directors and/or employees</p>	<p>Act No 418/2011, Coll, on Corporate Criminal Liability</p>	<p>Companies may avoid criminal liability or reduce sanctions if they have measures in place to prevent, identify and/or report misconduct in a timely manner. Even in the absence of specific legislation that would elaborate on the term 'measures in place', the adoption of an internal reporting systems is an important part of such measures. As a result, compliance programmes (including whistleblowing systems) are becoming more and more widespread among Czech companies.</p>
<p>Employers must treat employees equally and cannot discriminate against them. Under the Labour Code, employers can only dismiss employees for specified reasons (eg, organisational change and underperformance). Whistleblowing as such cannot be a reason for dismissal. However, this is often bypassed.</p>	<p>Act No 262/2006, Coll, the Labour Code/Act No 198/2009, Coll, Anti-Discrimination Act</p>	<p>These laws do not consider persecution of those who, in good faith, reported certain wrongdoing to be a form of discrimination. As a result, the enforcement mechanisms available under them – for example, legal action seeking judicial restraint and compensation for damage – would not apply.</p>
<p>Complaints can be filed with the Ombudsman's office. If the Ombudsman substantiates the complaint, they might deliver a decision of a recommendatory nature.</p>	<p>Act No 349/1999, Coll, The Ombudsman Act</p>	<p>Even though employees can report misconduct to the Ombudsman, no provisions in the Ombudsman Act would provide subsequent protection to them.</p>
<p>Reporting suspected unlawful conduct in public office.</p>	<p>Act No 234/2014, Coll, on Public Service, the Government adopted Government Regulation No 145/2015, Coll</p>	<p>Its primary objective is to set up reporting mechanisms, as well as protection for public employees who report certain types of misconduct in the public sector. The regulation requires each administrative body to establish a position responsible for receiving and investigating announcements and dedicated postal and email addresses for announcements, which must be checked by the responsible employee on a daily basis.</p>

Ecuador

Whistleblower protection laws in many South American jurisdictions are limited and/or not enforced adequately. Lindsay Sykes of Ferrere in Santa Cruz, Bolivia and an officer of the IBA Anti-Corruption Committee provided a summary of laws that apply to some persons who report misconduct in certain circumstances in Bolivia, Ecuador, Paraguay and Uruguay. Ecuador is below.

What is a whistleblower?	Source	Protections and remedies
Any person providing the public prosecutor or personnel of the specialised integral system for investigation, legal medicine and forensic science with antecedents regarding: (1) the preparation or the commission of an infraction; or (2) whom participated in such an infraction.	Article 495, Criminal Code	Whistleblowers are generally provided confidentiality for their personal data and identity.

Hungary

Whistleblower protection laws in many Eastern European jurisdictions are limited and/or not enforced adequately. Jitka Logesova of Kinstellar in Prague, Czech Republic and an officer of the IBA Anti-Corruption Committee, and her colleague Kristyna Del Maschio provided a summary of laws that apply to some persons who report misconduct in certain circumstances in the Czech Republic, Hungary, Kazakhstan, Romania and the Slovak Republic. Hungary is below.

While there are some positive examples, a well-developed and effective whistleblowing system is still relatively uncommon in Hungary. Most reports are made directly to local or regional company management via email or in person. Even when a company has a whistleblower compliance framework in place, it is often ineffective or unknown to employees. Companies that have well-functioning whistleblower systems in place are usually subsidiaries of EU or US-based corporations operating in Hungary.

What is a whistleblower?	Source	Protections and remedies
<p>'Whistleblower' is not defined. The relevant legislation differentiates between two types of announcements: complaints and announcements of public concerns. Complaints serve solely to eliminate harm to individual rights or interests, not subject to any other procedure, such as judicial or administrative proceedings. An announcement of public concern raises attention to a condition that should be remedied or eliminated for the benefit of the community or the whole society. Anyone may file a concern or announcement of public concern to the appropriate authority.</p>	<p>Act 165 of 2013 on complaints and announcements of public concern (the 'Whistleblower Act')</p>	<p><i>Right to be notified</i></p> <p>The person who is the subject of a report of misconduct must be informed of the allegations made against them (except for information relating to the whistleblower). However, this can be delayed if there is a belief that to do so could jeopardise the investigation. They must also be informed of their data privacy rights (according to Act 112 of 2011 on Informational Self-determination and Freedom of Information [the 'Data Protection Act']) and available remedies once the investigation commences.</p> <p><i>Confidentiality</i></p> <p>The whistleblower is expected to provide their details but may request to remain anonymous. However, if the investigation reveals that the whistleblower was acting in 'bad faith', then that protection is withdrawn. In that case the individual can be liable under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection and their personal details can be referred to competent authorities.</p> <p><i>Access to the announcement of public concern</i></p> <p>A short extract of the report is published through the protected electronic system to the appropriate authority, if it is necessary – without any data relating to any person, company or other organisation – describing the main details of the case and its status.</p> <p><i>Right to fair trial</i></p> <p>In line with the constitutional right to fair trial, the subject of whistleblowing shall have the right to explain their point of view and to prove their statements, even by way of an attorney at law.</p> <p><i>Right to restitution and damages</i></p> <p>Although the Whistleblowing Act does not contain specific penalties for non-compliance, whistleblowing hotlines are subject to general data protection regulations which are set forth in the Data Protection Act. The processing of sensitive personal data (eg, data relating to health and religious views) as part of the operation of hotlines is prohibited by the law.</p> <p>The subject of whistleblowing may enforce claims for restitution (according to Act 5 of 2013 on the Civil Code) if their rights relating to personal reputation are harmed. If the subject suffers any damage arising from the unlawful processing of their personal data, then they may also claim damages. Finally, the Data Protection Authority can impose a sanction for any infringement of data protection rules in the context of the operation of a whistleblowing hotline.</p>

What is a whistleblower?	Source	Protections and remedies
<p>Any person can report misconduct of a financial nature to the National Bank of Hungary (NBH) concerning any person or organisation supervised by the NBH, including credit institutions, financial enterprises, capital market issuers and investment funds.</p>	<p>Act 130 of 2013 on the NBH</p>	<p>The NBH shall investigate all reports (anonymous or not) within 15 days of receipt if a report contains information showing probable cause for alleging any infringement of the laws and regulations (other than consumer protection regulations) governing the activities of the subject of the whistleblowing announcement. The NBH shall notify the whistleblower of the proceedings and further actions and its reasons. The NBH provides four ways to report: personal meeting, telephone, email and online form. The provided data shall be handled according to the Whistleblower Act. The NBH shall investigate the whistleblowing announcement and it is authorised to open a supervisory process while the whistleblower may remain anonymous.</p> <p>The NBH cooperates with the European Securities and Markets Authority (ESMA). A person can make a whistleblowing announcement to the ESMA via a downloadable form, although the ESMA whistleblowing procedure and data protection policies are not clearly set out on its website.</p>

In addition, the National Tax and Customs Office (NTCO) in Hungary provides the means by which whistleblowers can make a public interest disclosure by phone, personally, by email or via a form on the NTCO website. In its informational material, NTCO mentions that cases such as concealment of income, fictive invoicing and the omission of issuing invoice should be considered as a reason to investigate a public interest disclosure.

Finally, reports can also be made to the Hungarian Competition Authority (HCA) in cases that belong to the competence of the HCA. The HCA initiates proceedings *ex officio*. This means that the whistleblower has no client status. Further, the proceedings do not rely on the submitted material, thus protecting the identity of the whistleblower.

Italy

Whistleblower protection laws in Italy were strengthened with the Italian Parliament's passing of new laws in October 2017. The law strengthens the existing scheme and extends protections beyond the public sector to the private sector. Specifically the law clarifies how and to whom an employee ought to report misconduct, the measures an employer must adopt to protect a whistleblower, the sanctions to which an employer will be subject if it retaliates or discriminates against a whistleblower and the extent to which a whistleblower is able to reveal confidential information. Filippo Ferri and Fabio Cagnola, both of Cagnola & Associati Studio Legale in Milano, Italy and officers of the IBA Business Crime Committee, provided the information below.

What is a whistleblower?	Source	Protections and remedies	Other Information
<p>The civil servant who reports to the Judicial Authority, to the Corte dei Conti (Court of Auditors), National Anti-Corruption Authority or their senior manager unlawful behaviours of which they have become aware in relation to their public employment.</p> <p>On 15 October 2017, the Italian Parliament approved the first law on whistleblowing in Italian history.</p> <p>The previous version of the draft law provided for a whistleblower's definition containing a specific reference to the civil servants who report in good faith: the law just entered into force does not contain such a reference any longer. Hence, the definition of whistleblower in the public sector is not related any longer to the person who reports 'in good faith'.</p> <p>All the other provisions relevant to 'good faith' have been deleted from the final text of the new law.</p>	<p>Section 54-bis Legislative Decree 165/2001 amended by Law No 179/2017 (Provisions for the protection of whistleblowers), which entered into force on 29 December 2017</p>	<p>Specific provisions for the protection of the secrecy of whistleblower's identity, both throughout the disciplinary procedures and in accessing the relevant administrative records, such as not to expose them to the greatest possible extent to any retaliation whatsoever by the persons to whom the complaint relates:</p> <ul style="list-style-type: none"> • during the disciplinary procedure issued against the person who has committed the unlawful act, in no way shall the whistleblower's identity be revealed without their consent (an exception would occur in case the former disciplinary notice is totally or partially grounded on the whistleblower's complaint and the knowledge of the latter's identity is of the essence for exercising the right to defence); and • the whistleblower's complaint is not subject to the access foreseen in general for administrative records. 	<p>Section 54-bis of Legislative Decree No 165/2001 sets forth that:</p> <p>'1. Beyond the cases of liability by way of slander or defamation, or by any such way pursuant to section 2043 of the Civil Code, the civil servants who reports to the Courts, to the Court of Auditors, to the National Anticorruption Authority or to his/her senior manager unlawful behaviours of which he/has become aware in relation to his/her employment, shall in no way be punished, dismissed or undergo any administrative measure, either direct or indirect, having an impact on the works conditions for reasons directly or indirectly linked with the complaint.</p> <p>2. Within the scope of the disciplinary procedure, the identity of the person bringing the complaint shall in no way be revealed without his/her consent, provided that the formal notice of the disciplinary charge is grounded on stand-alone and further checks with respect to the complaint. Should the formal notice be grounded, either totally or partially, on the complaint, the identity may be revealed if the respective knowledge is of the essence for defending the person accused.</p> <p>3. The party concerned or the trade unions with greater representativeness within the public authority in which the discriminatory measures have been put in place, shall report to the Public Service Department the adoption of any such discriminatory measures for any and all steps falling within the respective scope of authority.</p> <p>4. The complaint shall not be subject to the access provided for under section 22 et seq. of Law n. 241 of 7 August 1990, as amended'.</p>
<p>People listed in section 5 paragraph 1, letters (a) and (b) (people covering a senior position or people subject to the supervision of others) who report unlawful behaviours, relevant following Legislative Decree 231/2001, or violations of the organisational and management model that they became aware in light of their employment.</p> <p>The new law does not contain any reference to the concept of 'good faith'. Nevertheless, the legal provision that just came into force sets for the 'detailed report of unlawful behaviours, based on precise and converging factual elements'.</p>	<p>Section 6 of the Legislative Decree 231/2001, amended by Law No 179/2017 (Provisions for the protection of whistleblowers), entered into force on 29 December 2017</p>	<ul style="list-style-type: none"> • Suitable measures in order to protect the identity of the whistleblowers and to maintain the confidentiality of the information; • ban of reprisal or discriminatory acts for reasons related, directly or indirectly, to the report; • sanctions against those who violate the confidentiality or those who carry out reprisal or discriminatory acts against the whistleblowers; • voidance of reprisal or discriminatory layoff; and • report to the Italian National Work Inspectorate of the adoption of discriminatory measures against the whistleblowers. 	

What is a whistleblower?	Source	Protections and remedies	Other Information
Employees from banks and holding companies – and whoever works on the basis of job relationships requiring their inclusion in the business organisation, even if different from the employer-employee one – who report facts that can constitute violations of provisions relevant to the bank activity.	Section 18 Legislative Decree 72/2015. Introduction of section 52-bis after Legislative Decree 285/1993	Establishment of a specific provision for the report: <ul style="list-style-type: none"> • legal guarantee of the personal data confidentiality of the whistleblower and of the alleged responsible of the violation reported; • adequate protection of the whistleblower; and • legal guarantee of a specific channel for the report. 	
Employees from banks and holding companies – and whoever works on the basis of job relationships requiring their inclusion in the business organisation, even if different from the employer-employee one – who report facts that can constitute violations of provisions on the bank activity.	Section 18 paragraph 5 Legislative Decree 72/2015 Introduction of section 52-ter after section 52-bis of Legislative Decree 285/1993	<ul style="list-style-type: none"> • Report of the violation to the Bank of Italy; • Bank of Italy could decide conditions, limits and procedure for the report's reception; and • Bank of Italy utilises the received information for surveillance activities. 	

Kazakhstan

Whistleblower protection laws in many Eastern European jurisdictions are limited and/or not adequately enforced. Jitka Logesova of Kinstellar in Prague, Czech Republic and an officer of the IBA Anti-Corruption Committee, and her colleague Kristyna Del Maschio provided a summary of laws that apply to some persons who report misconduct in certain circumstances in the Czech Republic, Hungary, Kazakhstan, Romania and the Slovak Republic. Kazakhstan is below.

Kazakhstan legislation does not specifically regulate whistleblowing, although there some provisions on whistleblowing protection in the Kazakhstan anti-corruption, anti-terrorism, criminal, administrative and competition laws. Likewise, there is no specific regulation in Kazakhstan encouraging or requiring private sector organisations to prepare, publish and implement internal whistleblowing procedures. As with other jurisdictions in Eastern Europe, those companies that do have well-functioning whistleblower systems in place are usually subsidiaries of EU or US-based corporations operating in Kazakhstan.

As part of its anti-corruption measures, Kazakhstan has adopted the international practice of encouraging whistleblowers to report concerns about corruption. However, the overall development of whistleblower protections and their practical implementation in Kazakhstan's corporate, public and not-for profit sectors are inadequate.

What is a whistleblower?	Source	Protections and remedies
<p>'Whistleblower' is not defined. However, protections apply to persons who report corrupt practices or otherwise assist in tackling corruption.</p> <p>Whistleblowers can inform management of private companies or government authorities of corrupt activities. They may also inform the National Anti-Corruption Bureau of the Agency of the Republic of Kazakhstan on the Civil Service Affairs and Fighting Corruption (the 'Bureau') reporting acts of corruption.</p> <p>Anonymous information is not considered unless it contains the information on a planned or committed crime or threat to the state or public security. In the latter case, the information must be forwarded to the competent law enforcement agencies.</p>	<p>Law of the Republic of Kazakhstan No 410-V 'On Fighting Corruption' dated 18 November 2015, Articles 23(1) and 24 (the 'Anti-Corruption Law')</p> <p>Law of the Republic of Kazakhstan No 72-II 'On Government Protection of Persons Participating in Criminal Procedure' dated 5 July 2000, Article 7 (the 'Government Protection Law')</p>	<p>The information about the whistleblower is considered a state secret and its unauthorised disclosure may result in potential criminal liability. In addition, the whistleblower may be eligible to the protection given to witnesses under the Government Protection Law. Such protection may include, among other things, provision of personal guard, guarding residence and other property, temporary relocation to a safe place, providing for confidentiality of information about the protected person, change of documents and appearance modification.</p>
<p>Individuals who have conclusive knowledge of a planned or committed gravest crime must report such knowledge. A person who fails to do so can be subject to a penalty of a fine, corrective labour or imprisonment. This does not apply to the spouse or a close relative of a person who committed a crime, or a member of the clergy.</p>	<p>Criminal Code of the Republic of Kazakhstan No 226-V dated 3 July 2014, Article 434</p>	<p>Voluntary whistleblowing by a person involved in the preparation or commission of a crime or administrative violation is viewed as a mitigating factor. However, such whistleblowing does not necessarily lead to the release of that person from criminal or administrative liability.</p>
<p>An individual is encouraged to report information about anti-competitive conduct to the Antimonopoly Agency.</p>	<p>Code of the Republic of Kazakhstan on Administrative Offences No 235-V dated 5 July 2014, Article 159</p>	<p>The law releases a whistleblower from administrative liability for anti-competitive agreements or anti-competitive coordinated actions subject to them:</p> <ul style="list-style-type: none"> • informing the Antimonopoly Agency about anti-competitive agreements or anti-competitive coordinated actions provided that the Antimonopoly Agency has not received this information from other sources; • immediately withdrawing from the anti-competitive agreements or anti-competitive coordinated actions; • providing full information on the anti-competitive agreements or anti-competitive coordinated actions during the entire length of investigation; and • voluntarily compensating the harm caused to customers as a result of the anti-competitive agreements or anti-competitive coordinated actions.

Paraguay

Whistleblower protection laws in many South American jurisdictions are limited and/or not enforced adequately, often taking the form of witness protection as opposed to whistleblower protection specifically. Lindsay Sykes of Ferrere in Santa Cruz, Bolivia and an officer of the IBA Anti-Corruption Committee provided a summary of regulation that applies to some persons who report misconduct in certain circumstances in Bolivia, Ecuador, Paraguay and Uruguay. Paraguay is below.

What is a whistleblower?	Source	Protections and remedies
<p>The author or participant of a criminal conduct who has been indicted, prosecuted or sentenced [for such crime,] and becomes a witness to a [related] criminal case, providing useful elements to: (1) clarify the facts under investigation or to be investigated by the Attorney General's Office (Ministerio Publico); (2) stop the commission of crimes; (3) break up criminal organisations; or (4) identify assets or sources of financing of criminal organisations.</p> <p>The protections provided by Instructive Order 7/2014 only apply to those who engage in criminal conduct, but later provide the assistance mentioned above.</p>	<p>Article 5 Instructive Order 7/2014 from the Attorney General's Office (Fiscalia General del Estado)</p>	<p>Whistleblowers are generally provided confidentiality regarding their identity and protection for their physical integrity. Moreover, it is worth pointing out that under Article 196 of the Criminal Code, in cases of money laundering, people who inform the authorities in these cases before they are totally or partially discovered can be exempted from punishment for the offence. Moreover, if the information provided by a whistleblower helps to solve a money laundering case, then the whistleblower may be exempted from penalty, or the penalty may be reduced by the court.</p>

Romania

Whistleblower protection laws in many Eastern European jurisdictions are limited and/or not enforced adequately. Jitka Logesova of Kinstellar in Prague, Czech Republic and an officer of the IBA Anti-Corruption Committee, and her colleague Kristyna Del Maschio provided a summary of laws that apply to some persons who report misconduct in certain circumstances in the Czech Republic, Hungary, Kazakhstan, Romania and the Slovak Republic. Romania is below.

Romania has a specific law on the protection of staff in public institutions who report breaches of the law. No similar specific legislation has been enacted for staff in the private sector.

The whistleblowing policies adopted by the Romanian public authorities and institutions usually provide the same rules as those provided by the law. However, as regards the procedure established by each authority that has made available the whistleblowing policy, some of the authorities have appointed different bodies/persons in charge with receiving notification from the whistleblower (eg, the City Hall of Roman). Moreover, a part of the public authorities recommended that the notification not to be anonymous, given the other protective measures provided.

As regards the private sector, no such specific legislation has been enacted so far. Nevertheless, there are various pieces of legislation that protect employees of private companies against actions taken against them for whistleblowing (eg, Law No 53/2003 on the Romanian Labour Code (the 'Romanian Labour Code'); Law No 286/2009, the Romanian Criminal Code; and Law No 287/2009,

the Romanian Civil Code).

What is a whistleblower?	Source	Protections and remedies
<p>'Whistleblower' means the person making a notification in good faith of any action entailing any infringement of the law, professional ethics or principles of good administration, efficiency, effectiveness, economy and transparency, and who is employed by one of the public authorities or institutions or by the other establishments provided by Article 2 (public authorities and institutions of the central public administration; local public administration; Parliament; Presidential Administration Apparatus; Government apparatus; autonomous administrative authorities; cultural, educational, health and social assistance public institutions; national companies; and autonomous administrations of national and local interest, as well as national state capital companies).</p>	<p>Law No 571 / 2004, Article 3 b)</p>	<p>Before the disciplinary committee or other similar bodies, whistleblowers benefit from protection as follows:</p> <ul style="list-style-type: none"> • whistleblowers benefit from the presumption of good faith, until proven otherwise; and • upon the request of the whistleblower under disciplinary investigation following a whistleblowing act, disciplinary committees or other similar bodies within the public institutions or other such establishments shall invite the press and a representative of the trade union or of the professional association. The announcement shall be made in the form of a press release on the webpage of the public institution or other such establishment at least three working days before the date of the meeting, otherwise the report and disciplinary sanction applied can be declared null and void. <p>If the person incriminated by the whistleblowing: (1) is the direct or indirect superior; or (2) has control or inspection and evaluation responsibilities over the whistleblower, then the disciplinary committee or other similar body shall ensure the protection of the whistleblower by not disclosing their identity.</p> <p>In job-related litigation or litigation regarding work relationships, the court can decide on the annulment of the disciplinary or administrative sanction applied to a whistleblower if the sanction was applied as a consequence of whistleblowing made in good faith. The court shall check the weight and appropriateness of the sanction applied to the whistleblower for a disciplinary offence by comparing it with the sanctioning practice or with other similar cases within the same public institution and other such establishment in order to eliminate the possibility of subsequent and indirect sanctioning/punishment of whistleblowing acts.</p>

Singapore

In Singapore, there is no overarching legislation on whistleblowing. There are, however, some laws that exist to protect the identity of whistleblowers in specific situations. For example, in the context of corruption, section 36 of the Prevention of Corruption Act (Cap 241) affords anonymity to whistleblowers. Whistleblowers likewise are afforded anonymity when making disclosures required by the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) or the Terrorism (Suppression of Financing Act) (Cap 325). Wilson Ang and Mathias Goh of Norton Rose Fulbright, Singapore and law firm member of the IBA compiled a summary of the relevant laws.

Certain government agencies may also offer to protect and incentivise whistleblowers who disclose information. For example, the Competition Commission of Singapore operates a reward scheme and undertakes to keep the identity, and any information that may lead to identification, of the whistleblower strictly confidential. Apart from these, there is no express provision under Singapore law to protect the whistleblower or reduce the sentence of whistleblowers who have participated in the illegal activity they have reported. In the context of criminal proceedings, the Singapore court will exercise its discretion in determining whether the act of whistleblowing should result in a reduced fine or sentence for the whistleblower. The exercise of discretion will depend, in part, on the motivation of the whistleblower.

What is a whistleblower?	Source	Protections and remedies	Other information
A person is obliged to report conduct in circumstances where a person knows or has reasonable grounds to suspect that any property, in whole or in part, directly or indirectly, represents the proceeds of, was used in connection with, or is intended to be used in connection with any act that may constitute drug trafficking or criminal conduct.	Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) (the 'CDSA'), section 39	Anonymity is provided. However, the right to anonymity may be revoked if: <ul style="list-style-type: none"> the courts believe that justice cannot be done without revealing the identity of the informer; and if the informer did not believe that the statement they were making was true or if the informer actually knew that the statement was false. 	The reporting obligation applies in circumstances in which the information or matter on which the knowledge or suspicion is based came to the person's attention in the course of his or her trade, profession, business or employment. Any person who fails to discharge the reporting obligation shall be guilty of an offence and shall be liable on conviction to a fine not exceeding SGD 20,000.
Every person in Singapore and every citizen of Singapore outside Singapore is obliged to inform the Commissioner of the Police if they have: (1) in their possession, custody or control of any property belonging to any terrorist or terrorist entity; or (2) information about any transaction or proposed transaction in respect of any property belonging to any terrorist or terrorist entity.	Terrorism (Suppression of Financing Act) (Cap 325) (TSFA), section 8(1)	Anonymity is provided. However, the right to anonymity may be revoked if: <ul style="list-style-type: none"> the courts believe that justice cannot be done without revealing the identity of the informer; and if the informer did not believe that the statement they were making was true or if the informer actually knew that the statement was false. S 8(4) of the TSFA provides that it shall be a defence for a person charged with an offence under section 8(1) of the TSFA to prove that they had a reasonable excuse for not informing the Commissioner of Police.	If any person fails to discharge the reporting obligations described in the TSFA, that person shall be guilty of an offence and shall be liable on conviction to a fine not exceeding SGD 50,000 or to imprisonment for a term not exceeding five years or to both.
A person in Singapore is obliged to disclose immediately to a police officer information that person knows or believes may be of material assistance in: (1) preventing the commission by another person of a terrorism financing offence; or (2) securing the apprehension, prosecution or conviction of another person, in Singapore, for an offence involving the commission, preparation or instigation of a terrorism financing offence.	The TSFA, section 10(1)	Anonymity is provided. However, the right to anonymity may be revoked if: <ul style="list-style-type: none"> the courts believe that justice cannot be done without revealing the identity of the informer; and if the informer did not believe that the statement they were making was true or if the informer actually knew that the statement was false. S 10(2) of the TSFA provides that it shall be a defence for a person charged with an offence under section 10(1) of the TSFA to prove that he had a reasonable excuse for not making the disclosure.	If any person fails to discharge the reporting obligations described in the TSFA, that person shall be guilty of an offence and shall be liable on conviction to a fine not exceeding SGD 50,000 or to imprisonment for a term not exceeding five years or to both.
Company auditors	Companies Act, section 208	Protection from defamation for any statement made in the course of their duties, provided that such statements are made without any malice on the part of the auditor.	

The Slovak Republic

Whistleblower protection laws in many Eastern European jurisdictions are limited and/or not enforced adequately. Jitka Logesova of Kinstellar in Prague, Czech Republic and an officer of the IBA Anti-Corruption Committee, and her colleague Kristyna Del Maschio provided a summary of laws that apply to some persons who report misconduct in certain circumstances in the Czech Republic, Hungary, Kazakhstan, Romania and the Slovak Republic. The Slovak Republic is below.

The long non-existence of a specific legal mechanism within the legal order of the Slovak Republic does not imply that situations do not occur where employees are exposed to victimisation as a form of retaliation for notifying corrupt practices at the workplace.

The Slovak Republic's labour laws in both private and public sector, the Complaints Act and criminal laws already provided for the protection of whistleblowers in various legal instruments. However, reporting of unlawful practices was never a strength of the Slovak society. The existing laws became insufficient, namely due to the obligations of the Slovak Republic arising from its membership of international organisations that turned their focus on combatting corruption and bribery by raising protection of whistleblowers. In this context, the Act No 307/2014 Coll on Certain Measures Related to Reporting of Anti-social Activities became the first complex regulation of whistleblowing protection in the country, effective as of 1 January 2015. The Slovak Republic is one of the few countries that has adopted a specific instrument not only for the purposes of guaranteeing protection of whistleblowers from retaliation, but also obliging subjects from both public and private sectors to create conditions for accepting and investigating complaints filed by their employees.

What is a whistleblower?	Source	Protections and remedies
<p>Under these provisions, a whistleblower is an employee (or their 'close person' – a relative in the direct line of descent; a sibling or a spouse; other persons within a family or similar relationship shall be considered as close persons if a harm suffered by one of them is reasonably felt by the other) who, honestly convinced of the veracity of their statements/reports, in good faith provides information that may contribute significantly to the elimination of anti-social activities and which they learned about in during the course of his or her employment.</p>	<p>Act No 307/2014 Coll on Certain Measures Related to Reporting of Anti-social Activities, (the 'Whistleblowing Act') section 2 para 1</p>	<p>The protection of whistleblowers under the Whistleblowing Act is as follows:</p> <ul style="list-style-type: none"> • If the employee reports non-serious anti-social activities under an internal reporting system, then any legal acts against them by the employer may be suspended by the Labour Inspectorate if there are grounds to believe that such acts are related to the employee's submission of the report. This standard of protection is temporary and subject to an application for interim measures. • If the employee reports serious antisocial activity (criminal or administrative offences defined above), then the employee may apply for protection to the relevant body. If protection is granted, then the employer cannot take certain legal action against the employee without prior consent of the Labour Inspectorate (or of the employee themselves). The employer must then justify the proposed legal act and prove the absence of a causal link between such an act and the employee's submission of the report. The Whistleblowing Act entitles successful whistleblowers to demand a reward, or rather a 'bounty', which the Ministry of Justice can award up to 50-fold of the minimum wage in the Slovak Republic. However, such an award is non-claimable, and the decision of the ministry cannot be reviewed in court. This right does not extend to the employee's close persons.
<p>An employee can file a complaint, claim or a proposal for the instigation of criminal proceedings against another employee or employer.</p>	<p>Act No 301/2001 Coll the Labour Code, section 13(3). See also section 13(7) and Act No 365/2004 Coll on Equal Treatment and Protection against Discrimination</p>	<p>An employee is protected from persecution or sanction in the workplace for filing a complaint, claim or a proposal for instigation of criminal proceedings against an employee or employer.</p> <p>Such an employee has, according to section 13(7), the option of seeking judicial protection within the means of submitting an anti-discrimination claim, if they consider that their rights and interests were negatively affected.</p>
<p>Natural and legal persons can submit complaints using a general procedural instrument to public bodies, which must be addressed. The subject matter of a complaint is defined as pointing out specific faults, namely violations of law, the removal of which is, in the competence of the public body, addressed with the complaint.</p>	<p>Act No 9/2010 Coll, Complaints Act, section 3(1)</p>	<p>The protections and remedies under the complaints are regarded as ineffective because there are possible conflicts of interest between the person making the complaint and the person whose practice forms its subject, there is no anonymity and relatively low enforceability of remedies pursued by the investigating body.</p>
<p>A person 'who obtains trustworthy information about the commission of a felony by another person is obliged to report such felony or criminal offence without delay to a body involved in the criminal proceedings'.</p>	<p>Act No 300/2005 Coll, the Criminal Code, as amended</p>	<p>Failure to report a felony or criminal offence can result in prosecution and imprisonment of up to three years.</p>

The Netherlands

On 1 July 2016, a new law regarding whistleblowers came into force in the Netherlands, known as the House for Whistleblowers Act (Wet Huis voor klokkenluiders); see ‘Integrity in practice: the reporting procedure’ by the Whistleblowing Authority, which is an English document that lays out the new law step-by-step. The document can be accessed at: <http://expertgroepklokkenluiders.nl/wp/wp-content/uploads/201702-HvK-Integrity-in-Practice-Reporting-Procedure.pdf>. Martijn Willem Scheltema of Pels Rijcken & Droogleever Fortuijn in The Hague, the Netherlands and Chair of the IBA Corporate Social Responsibility Committee, and his colleagues Ruben Van Arkel, Claire Huijts and Erika Wies provided a summary of this law below.

What is a whistleblower?	Source	Protections and remedies	Other information
<p>The House for Whistleblowers Act does not define 'whistleblower'. Instead, the act speaks of an employee who has reasonable grounds for suspicion of malpractice. The act has defined the terms 'employee' and 'suspected malpractice':</p> <p>'Employee: a person who is pursuing or has pursued an activity based on an employment contract under private law or an appointment under public law or a person who is pursuing or has pursued an activity based on any other form of employment than an employment contract under private law or an appointment under public law' (Article 1, under h of the House for Whistleblowers Act)</p> <p>'Suspected malpractice: the suspicion of an employee, that malpractice is being committed within the current or prior organisation of employment or any other organisation, with which the employee has been in contact through the pursuit of activities of employment, in the case that:</p> <ul style="list-style-type: none"> • the suspicion is based on reasonable grounds, that are the result of knowledge obtained by the employee at the organisation of employment or of knowledge obtained by the employee through the pursuit of activities of employment at a different company or organisation; and • the public interest is at stake due to the violation of a law, a public health hazard, a threat to the safety of persons, a threat to the environment, a threat to the functioning of the public service or a company as the result of an undue act or omission;' (Article 1, under d of the House for Whistleblowers Act). 	<p>Wet Huis voor klokkenluiders 2016 or the House for Whistleblowers Act 2016 (the 'Act')</p>	<p>The Act mainly deals with procedural remedies for whistleblowers, rather than substantive remedies. According to the Act, a whistleblower first has to report the suspected malpractice at the organisation of employment (internal procedure), before they can file a report at a different organisation (external procedure). However, the employee can skip the internal reporting procedure, and thus report externally instead, if doing so cannot reasonably be demanded of them (Article 6, subsection 1 and under e). Article 2 of the Act obligates the employer with at least 50 employees to establish an internal procedure.</p>	<p>The article lays down the minimum requirements internal procedures must address:</p> <ul style="list-style-type: none"> • the manner in which the report will be handled; • a definition of 'suspected malpractice' that is in accordance with the definition in the Act; • pointing out the officer to whom the suspected malpractice can be reported; • the obligation of the employer to handle the report in a confidential manner, in case the employee has requested confidentiality; and • the possibility for the employee to seek advice from an adviser on the suspected malpractice in a confidential manner. <p>The Act has created a Whistleblowers Authority (Huis voor klokkenluiders; Article 3, subsection 1 of the Act). The Whistleblowers Authority opened its doors on the same day that the Act came into force: 1 July 2016. It has two departments: advice and investigation. According to Article 3k of the Act, an employee can seek advice, information or assistance regarding suspected malpractice at the advice department of the Whistleblowers Authority. The advice procedure is confidential and the results will not be disclosed to the investigation department of the House unless the employee has explicitly given their consent (Article 3k, subsections 3 and 4 of the Act).</p>

What is a whistleblower?	Source	Protections and remedies	Other information
<p>'In the event that an employee reports a suspected malpractice with due care and in good faith, the employer may not adversely affect the employee, both during and after the processing of the report by the employer or authorised institution, because of the reported suspected malpractice as defined in Article 1, under d of the House for Whistleblowers Act.'</p>	<p>Article 7:658c added to the Dutch Civil Code by the Act</p>	<p>The article has a general scope and covers all adverse effects due to a reported suspected malpractice. The parliamentary history states that the adverse effects include, but are not limited to, dismissal of the employee, a transfer of the employee without the employee's consent and withholding salary increases. The protection provided by the article can be invoked both during an internal or external procedure.</p> <p>The article states a broad timeframe with the phrase 'both during and after the processing of the report by the employer or authorised institution'. Thus, even after the investigation department of the Whistleblowers Authority has concluded the investigation, the whistleblower is able to invoke Article 7:658c DCC. The complete duration during which the remedy is available to the whistleblower is currently still uncertain and must be determined by jurisprudence.</p>	<p>The employee can only invoke the article if there is a suspected malpractice based on reasonable grounds and the employee reported the suspected malpractice with due care, both in the procedural and substantive sense, and in good faith. According to the parliamentary history, an example of handling the procedural aspects with due care would be if:</p> <ul style="list-style-type: none"> • the whistleblower has reported the suspected malpractice internally first (unless that could not reasonably be demanded of them or if that would be contrary to public interest); and • they have disclosed the suspected malpractice in an appropriate and commensurate manner. <p>Thus, if the whistleblower has wrongfully disclosed the suspected malpractice externally, without or before commencing the internal procedure, they will not be afforded protection under this article.</p> <p>An example of handling the substantive aspects with due care would be if:</p> <ul style="list-style-type: none"> • the whistleblower has based the suspected malpractice on accurate facts; • the public interest is (possibly) at stake by disclosing the suspected malpractice (internally or otherwise); and • the importance of external disclosure due to the public interest prevails over the employer's interest regarding confidentiality.

United States

The US has a well-established history of whistleblower protection laws, which are truly enforceable. Some of these laws are well known and referred to frequently in the press, such as the Dodd–Frank Act and Sarbanes–Oxley Act. Others, however, are less well known and are extremely sector-specific, such as the Seaman’s Protection Act 46 USC 2114 and the Wendell H Ford Aviation Investment and Reform Act for the 21st Century 49 USC 42121. Philip Berkowitz of Littler Mendelson in New York, United States and Co-Chair of the IBA Diversity and Equality Committee, and his colleague Amy Mendenhall provided the information below.

What is a whistleblower?	Source	Protections and remedies	Other information
<p>A whistleblower is defined as an individual who, pursuant to the procedures set forth by the Securities and Exchange Commission (SEC), reports information that ‘relates to a possible violation of [f]ederal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing or is about to occur.’ The individual reporting must have a ‘reasonable belief’ that the information reported relates to a violation of the securities laws. A whistleblower must be an individual, not a company or other entity.</p>	<p>The Dodd–Frank Act, 15 USC section 78u - 6(a)(6); see also the SEC’s Final Rule implementing the Dodd–Frank Act, 17 CFR 240.21F-2</p>	<p>Whistleblowers who allege discharge or other discrimination in violation of the Dodd–Frank Act may be eligible for:</p> <ul style="list-style-type: none"> • reinstatement with the same seniority status as the individual would have had, but for the discrimination; • two times the amount of back pay otherwise owed to the individual, with interest; and • compensation for litigation costs, expert witness fees and reasonable attorney fees. <p>Whistleblowers who voluntarily provide original information that leads to the successful enforcement of a covered judicial or administrative action may also be entitled to a bounty award. Individuals in compliance-related roles (eg, in-house attorneys, officers and directors, and auditors) may not be eligible for a bounty award, depending on the circumstances under which they acquired and disclosed the information. Individuals who participated in the wrongdoing can be eligible for whistleblower bounty awards, though the reward will be decreased by amounts attributable to the whistleblower’s own conduct. An individual who does not qualify for a bounty award may still be protected from retaliation.</p>	<p>Although the SEC may have anticipated employees to be the primary source of its tips, a whistleblower need not be an employee. For example, in January 2016, it awarded US\$700,000 to a ‘company outsider’ who conducted an analysis that led to a successful SEC enforcement action. The SEC’s statement by Chief of the Office of Whistleblower noted that ‘[t]he voluntary submission of high-quality analysis by industry experts can be every bit as valuable as first-hand knowledge of wrongdoing by company insiders.’ Courts have disagreed about whether, to be considered a ‘whistleblower’ for purposes of the Dodd–Frank Act, the individual must report their complaint to the SEC, as opposed to just reporting internally at the company.</p>
	<p>Sarbanes–Oxley Act (‘SOX’) [18 USC section 1514A] and regulations</p>	<p>If an employee prevails on their claim under SOX, they are entitled to ‘all relief necessary to make the employee whole’. This includes:</p> <ul style="list-style-type: none"> • reinstatement with the seniority that the employee would have had but for the discrimination/retaliation; • back pay, with interest; and • compensation for any special damages sustained as a result of the discrimination/retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. <p>Punitive damages are not available under SOX. Some courts and agency judges have also held that damages to reputation are available, reasoning that those damages are necessary to ‘make the employee whole’. All of the federal courts of appeal that have addressed the issue have found that emotional distress damages are available under SOX.</p>	<p>Occupational Safety and Health Administration Directorate of Whistleblower Protection Programs – Whistleblower Statutes Desk Aid</p> <p>OSHA Whistleblower Investigations Manual – Annotated</p>

What is a whistleblower?	Source	Protections and remedies	Other information
<p>A whistleblower is defined as an individual (or two or more individuals acting jointly) who provides information relating to a violation of the Commodity Exchange Act to the Commodity Futures Trading Commission, in the manner established by 17 CFR section 165.3.</p>	<p>Commodity Exchange Act [7 USC section 26] and implementing regulations [17 CFR section 165.3].</p>	<p>Relief available in a case alleging retaliation against the whistleblower includes:</p> <ul style="list-style-type: none"> • reinstatement with the same seniority status that the individual would have had, but for the discrimination; • the amount of back pay owed to the individual, with interest; and • compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees and reasonable attorney's fees. <p>Some whistleblowers may be eligible to receive a monetary bounty award available to those who provide a voluntary submission to the commission that contains original information and leads to the successful resolution of a qualifying enforcement action. In order to be eligible, the whistleblower must:</p> <ul style="list-style-type: none"> • have given the commission original information and be the original source of the information; • provide the commission, on request, with certain additional information; and • enter into a confidentiality agreement, if requested by the commission. <p>Certain individuals are ineligible for an award, including employees of certain government agencies, law enforcement agencies, registered entities, registered futures associations, self-regulatory organisations and law enforcement organisations.</p> <p>Qualifying as a whistleblower does not render a person immune from prosecution for their own conduct with regard to the violations at issue. However, individuals who engage in culpable conduct may still be eligible to receive a bounty award.</p>	<p>US Commodity Futures Trading Commission website</p>

What is a whistleblower?	Source	Protections and remedies	Other information
<p>There is not a specific statutory definition of whistleblower, but there are protections and monetary benefits available to whistleblowers. Generally speaking, the federal False Claims Act (FCA) prohibits making false or fraudulent claims to get the federal government to pay for goods or services and allows private individuals, including employees, to file a claim that an organisation has committed fraud against the federal government, including in federal contracting. In a <i>qui tam</i> action under the FCA, a private citizen (or 'relator') files a civil action on behalf of the government to recover money paid by the government to a wrongdoer based on false or fraudulent claims. The FCA incentivises individuals to bring such actions by giving them a substantial portion of the government's recovery. The justification for this private right of action is to 'reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud'. The individual need not have been personally harmed by the wrongdoer's conduct.</p>	<p>Federal False Claims Act [31 USC sections 3729–3733]</p>	<p>Protections from retaliation: Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor or agent is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor or agent on behalf of the employee, contractor or agent or associated others in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter [31 USC section 3730(h)].</p> <p>Monetary rewards for <i>qui tam</i> plaintiffs: If the government intervenes in the action, the <i>qui tam</i> plaintiff is entitled to 15–25 per cent of the recovery, plus reasonable expenses and attorney fees. If the government does not intervene, the <i>qui tam</i> plaintiff is entitled to 25–30 per cent of the recovery, plus reasonable expenses and attorneys' fees, 29 USC section 3730(d). The court can reduce the plaintiff's recovery if the court finds that the plaintiff planned and initiated the FCA violation. The court takes into account that individual's role in advancing the case in litigation and any relevant circumstances relating to the violation. If the plaintiff is convicted of criminal conduct relating to the violation, he or she will be dismissed from the civil action and cannot receive any monetary award.</p>	<p>US Department of Justice Website – Federal Foreign Corrupt Practices Act</p>
<p>The law does not provide whistleblower protections or define 'whistleblower', but it does offer awards to whistleblowers who report a serious federal tax violation.</p>	<p>Internal Revenue Service Whistleblower [IRC Section 7623(a) and (b)]</p>	<p>If the taxes, penalties, interest and other amounts in dispute exceed US\$2m, and a few other qualifications are met, then the IRS will pay 15–30 per cent of the amount collected. If the case deals with an individual, then their annual gross incomes must be more than US\$200,000. If the whistleblower disagrees with the outcome of the claim, then he or she can appeal to the Tax Court. These rules are found at Internal Revenue Code IRC Section 7623(b) – Whistleblower Rules.</p> <p>The IRS also has an award programme for other whistleblowers – generally those who do not meet the dollar threshold of US\$2m in dispute or cases involving individual taxpayers with gross incomes of less than US\$200,000. The awards through this programme are less, with a maximum award of 15 per cent up to US\$10m. In addition, the awards are discretionary and the informant cannot dispute the outcome of the claim in the Tax Court. The rules for these cases are found at Internal Revenue Code IRC Section 7623(a).</p>	

What is a whistleblower?	Source	Protections and remedies	Other information
The law does not include a definition of 'whistleblower' per se, but it does provide whistleblowing protections. The law protects employees from retaliation for exercising a variety of rights guaranteed under the Occupational Safety and Health Act (OSHA), such as filing a safety and health complaint with the Occupational Safety and Health Administration or their employers, or participating in an inspection.	Section 11(c) of the OSHA, 29 USC section 660; 29 CFR Part 1977	Employee rights include filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, reporting an injury and raising a safety or health complaint with the employer. Potential remedies include back pay, and compensatory and punitive damages.	The following resources provide additional information for many of the categories below: Occupational Safety and Health Administration Directorate of Whistleblower Protection Programs – Whistleblower Statutes Desk Aid OSHA Whistleblower Investigations Manual – Annotated
The law does not include a definition of 'whistleblower' per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems.	Asbestos Hazard Emergency Response Act, 15 USC section 2651; 29 CFR Part 1977	Employees can file a complaint with the Occupational Safety and Health Administration. Potential remedies include back pay, and compensatory and punitive damages.	
The law does not include a definition of 'whistleblower' per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the act	International Safe Container Act, 46 USC section 80507; 29 CFR Part 1977	Employees can file a complaint with the Occupational Safety and Health Administration. Potential remedies include back pay, and compensatory and punitive damages.	
The law does not include a definition of 'whistleblower' per se, but it does provide whistleblowing protections. The law protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, and so on.	Surface Transportation Assistance Act, 49 USC section 31105; 29 CFR Part 1978	Employees can file a complaint with the Occupational Safety and Health Administration. Potential remedies include back pay, preliminary reinstatement to employment, and compensatory and punitive damages.	
The law does not include a definition of 'whistleblower' per se, but it does provide whistleblowing protections. The law protects employees from retaliation for, among other things, reporting violations of the act, which requires that all drinking water systems assure that their water is potable as determined by the Environmental Protection Agency.	Safe Drinking Water Act, 42 USC section 300j- 9(i); 29 CFR Part 24	Employees can file a complaint with the Occupational Safety and Health Administration. Potential remedies include back pay, and compensatory and punitive damages.	
The law does not include a definition of 'whistleblower' per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act.	Federal Water Pollution Control Act, 33 USC section 1367; 29 CFR Part 24	Employees can file a complaint with the Occupational Safety and Health Administration. Potential remedies include back pay and compensatory damages.	

What is a whistleblower?	Source	Protections and remedies	Other information
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the US and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning and Community Right to Know Act (EPCRA).</p>	<p>Toxic Substances Control Act, 15 USC section 2622; 29 CFR Part 24</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration.</p> <p>Potential remedies include back pay, and compensatory and punitive damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act</p>	<p>Solid Waste Disposal Act, 42 USC section 6971; 29 CFR Part 24</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration.</p> <p>Potential remedies include back pay and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting violations of the act, which provides for the development and enforcement of standards regarding air quality and air pollution.</p>	<p>CAA, 42 USC section 7622; 29 CFR Part 24</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration.</p> <p>Potential remedies include back pay and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The statute protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. The act also protects employees who report violations related to the clean-up of uncontrolled or abandoned hazardous waste sites.</p>	<p>Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC section 9610; 29 CFR Part 24</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration.</p> <p>Potential remedies include back pay and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects certain employees in the nuclear industry from retaliation for reporting violations of the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission, and employees of contractors working with the Department of Energy under a contract pursuant to the Atomic Energy Act.</p>	<p>Energy Reorganization Act, 42 USC section 5851; 29 CFR Part 24</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay and compensatory damages.</p>	

What is a whistleblower?	Source	Protections and remedies	Other information
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a workplace injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition.</p>	<p>Federal Railroad Safety Act, 49 USC section 20109; 29 CFR Part 1982</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects seamen from retaliation for reporting to the Coast Guard or another federal agency a violation of a maritime safety law or regulation. Among other things, the act also protects seamen from retaliation for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public.</p>	<p>Seaman’s Protection Act, 46 USC section 2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, PL 111-281</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees of air carriers and contractors and subcontractors of air carriers from retaliation for, among other things, reporting violations of laws related to aviation safety.</p>	<p>Wendell H Ford Aviation Investment and Reform Act for the 21st Century, 49 USC section 42121; 29 CFR Part 1979</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration.</p> <p>Potential remedies include back pay, compensatory damages and preliminary reinstatement.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting violations of federal laws related to pipeline safety and security or for refusing to violate such laws.</p>	<p>Pipeline Safety Improvement Act, 49 USC section 60129; 29 CFR Part 1981</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration.</p> <p>Potential remedies include back pay, compensatory damages and preliminary reinstatement.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees of food manufacturers, distributors, packers and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the act. Employees are also protected from retaliation for refusing to participate in a practice that violates the act.</p>	<p>FDA Food Safety Modernization Act (FSMA), 21 USC section 399d</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay, preliminary reinstatement and compensatory damages.</p>	

What is a whistleblower?	Source	Protections and remedies	Other information
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects transit employees from retaliation for reporting a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The act also protects public transit employees from retaliation for refusing to work when confronted by a hazardous safety or security condition, or refusing to violate a federal law related to public transportation safety.</p>	<p>National Transit Systems Security Act, 6 USC section 1142; 29 CFR Part 1982</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay, preliminary reinstatement and compensatory and punitive damages (capped at US\$250,000).</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting violations of any provision of title I of the Affordable Care Act, including but not limited to discrimination based on an individual’s receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer’s failure to rebate a portion of an excess premium.</p>	<p>Affordable Care Act, 29 USC section 218C</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay, preliminary reinstatement and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees from retaliation for reporting to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Product Safety Commission (CPSC). The Consumer Product Safety Improvement Act covers employees of consumer product manufacturers, importers, distributors, retailers, and private labellers.</p>	<p>Consumer Product Safety Improvement Act, 15 USC section 2087; 29 CFR Part 1983</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay, preliminary reinstatement and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees performing tasks related to consumer financial products or services from retaliation for reporting reasonably perceived violations of any provision of title X of the Dodd–Frank Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard or prohibition prescribed by the bureau.</p>	<p>Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, 12 USC section 5567; 29 CFR 1985</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay, preliminary reinstatement and compensatory damages.</p>	

What is a whistleblower?	Source	Protections and remedies	Other information
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees of food manufacturers, distributors, packers and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the act. Employees are also protected from retaliation for refusing to participate in a practice that violates the act.</p>	<p>FSMA, 21 USC section 399d</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay, preliminary reinstatement and compensatory damages.</p>	
<p>The law does not include a definition of ‘whistleblower’ per se, but it does provide whistleblowing protections. The law protects employees from retaliation by motor vehicle manufacturers, part suppliers, and dealerships for providing information to the employer or the US Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA), or for engaging in related protected activities as set forth in the provision.</p>	<p>Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (2012) [49 USC section 30171]</p>	<p>Employees can file a complaint with the Occupational Safety and Health Administration and ultimately pursue a claim in federal court.</p> <p>Potential remedies include back pay, preliminary reinstatement and compensatory damages.</p>	

Uruguay

Whistleblower protection laws in many South American jurisdictions are limited and/or not enforced adequately. Lindsay Sykes of Ferrere in Santa Cruz, Bolivia and an officer of the IBA Anti-Corruption Committee provided a summary of laws that apply to some persons who report misconduct in certain circumstances in Bolivia, Ecuador, Paraguay and Uruguay. Uruguay is below.

What is a whistleblower?	Source	Protections and remedies
n/a	n/a	Whistleblowers are generally provided confidentiality regarding their identity and personal data.

