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## The Dutch Whistleblowers Authority in an international perspective: a comparative study

Kim Loyens  
Wim Vandekerckhove

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# **The Dutch Whistleblowers Authority in an international perspective: a comparative study**

COMMISSIONED BY  
THE DUTCH WHISTLEBLOWERS AUTHORITY



**SCHOOL OF GOVERNANCE (USG), UTRECHT UNIVERSITY**

DR. KIM LOYENS

**WORK AND EMPLOYMENT RELATIONS UNIT (WERU), UNIVERSITY OF GREENWICH**

DR. WIM VANDEKERCKHOVE

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**ADVISORY EXPERTS**



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## **EXECUTIVE SUMMARY**

The Dutch Whistleblowers Authority (*Huis voor klokkenluiders*) was created in July 2016. After a year into its existence, it commissioned research into how its tasks and mandates compared to whistleblowing agencies in other countries. This report is the result of that research. The report presents an international comparison of institutions with advisory, psychosocial care, investigative and/or preventative tasks with regard to whistleblowing. The characteristics of the Dutch Whistleblowers Authority are the starting point of that comparison.

The research involved a comparison of the above dimensions in the Netherlands with those in ten other countries. A purposeful sampling technique was used. We first selected countries with designated whistleblowing legislation that were member states of the Council of Europe or belonged to the G20, striving for a mix of early-movers with established institutional frameworks around whistleblowing and late-movers with newly established whistleblowing legislation and undergoing institutional arrangements (like the Netherlands). We also included Israel in our sample. Although this country is not a Council of Europe member state nor part of the G20, its whistleblowing arrangement has – at first sight – similar characteristics to those of the Netherlands. Countries included in the sample are Australia, Belgium, France, Ireland, Israel, Norway, Republic of Korea, Serbia, UK, and USA.

For each of these countries, information was sought about reporting culture, legal context, and the institutional context. The legal context included how the whistleblowing legislation had emerged, the scope of wrongdoing in the whistleblowing legislation, and the scope of protected persons (target group) of the whistleblowing legislation. The institutional context included information about tasks and mandates of the agencies that implement the whistleblowing legislation, institutional characteristics of the agencies that perform any of the tasks similar to those of the Dutch Whistleblowers Authority, and mandates for the protection of whistleblowers.

The findings in this report were arrived at through analysis of policy and legislative documents, analysis of existing research reports about selected institutions and implementation of whistleblowing legislation, and interviews with representatives of whistleblowing institutions or whistleblowing experts (academics) from the selected countries. In total 17 telephone interviews and four face-to-face interviews were conducted. These respondents also reviewed the respective country summaries we developed based on these three data sources.

### ***General Findings***

Although people in the countries included in this research tend to acknowledge that protecting whistleblowers is for the betterment of society, whistleblowing remains far from easy and negative



connotations persist. There are various ways in which whistleblowing legislation interacts with culture. Civil society organisations play an important role in leveraging cultural change. In France, Ireland, Serbia, UK and USA these organisations perform a well organised watchdog function vis-a-vis whistleblowing arrangements. Much less of that was found in the Netherlands and in Norway; in the Netherlands, the Dutch Whistleblowers Authority has the mandate to leverage cultural change and might also take up some watchdog functions.

The Dutch whistleblowers legislation – that passed in 2016, and created the Dutch Whistleblowers Authority – combines two emerging trends in national whistleblowing arrangements: a) stand-alone whistleblowing legislation covering both public and private sector, and b) the installation of a government funded whistleblowing agency. The ‘cutting edge’ position is in the combination of these two trends. So far, the Netherlands and the Republic of Korea are the only countries where this exists. France is in the process of establishing this.

From the countries included in this research, the Netherlands was the only country where a government funded agency covering both public and private sector whistleblowing, combined the tasks of advice, psychosocial care, investigation of alleged wrongdoing and retaliation, and prevention. In other countries civil society organisations often combine advice, investigation and prevention. The perceived independence of these civil society organisations is of course different than that of the Dutch Whistleblowers Authority. As a government agency, the Dutch Whistleblowers Authority might be perceived as part of the system, and hence in reality less independent than in theory.

### ***Scope Findings***

The Dutch whistleblowers law covers both public and private sectors. Whilst this is also the case in most of the countries included in this research (except Belgium), most of these have different laws for the different sectors, whereas in the Netherlands this is achieved by one and the same law. In our view, the discrepancy between public and private sector whistleblowing legislation is most pronounced in Australia, Belgium and Israel. The advantage of having one law that covers both public and private sector whistleblowing is that protection measures and specifications are the same for both public and private sector whistleblowers.

The Dutch whistleblowers law uses a broad notion of worker, i.e., both contractual or other working relationship. In contrast to other countries (Serbia, Ireland, Norway, UK), these ‘other working relationships’ are not specified in the law. A number of countries have even refrained from making any restraints on who qualifies (France, Republic of Korea private sector, USA some laws). Serbia stands out in the sense that it provides protection also to persons associated with the whistleblower.



In four of the countries included in this research, the whistleblowing agency is part of the National Ombudsman. Like the Dutch Whistleblowers Authority, these report to Parliament. There are, however, important differences. In Australia, the Ombudsman only investigates wrongdoing; in France only retaliation. In Israel, different departments within the State Comptroller/Ombudsman investigate wrongdoing and retaliation respectively (and only in the public sector). Belgium and the Netherlands are the only countries in our study where investigation of both wrongdoing and retaliation is done by the same department (but in Belgium only in the public sector).

### ***Protection Findings***

It remains unclear how stringent the Dutch whistleblowing provisions understand the 3-tiered whistleblowing model (internal, regulator, wider): a) third tier whistleblowing (e.g., media) is not protected; b) there is no clear definition of or approach to ‘public interest’; c) it remains unclear what the consequences are for the whistleblower if they do not first raise concern internally or to a regulator before reporting to the Dutch Whistleblowers Authority. Also, in contrast to other countries included in this research, it remains unclear which types of retaliation whistleblowers are protected from. These create legal uncertainties.

The Netherlands was one of the weakest in our sample with regard to the ‘burden of proof’ reversal. This is awkward, as there is a wide international consensus that this is a minimum requirement of whistleblower protection legislation. A reversal of burden of proof puts the onus on the employer to provide evidence that detriments suffered by the whistleblower were imposed for other reasons than their whistleblowing.

### ***Institutional Tasks Findings***

The Dutch Whistleblowers Authority provides a significantly more extensive advice function than the other government agencies included in this research. The Dutch Whistleblowers Authority provides some legal advice as well as assisting the whistleblower with the identification of suitable recipients with whom whistleblowers can raise their concern, either inside their organisations or regulators. In other countries the advice function of government agencies is restricted to merely providing information (Australia, Belgium, Israel); assistance and legal support are generally provided by civil society organisations.

The Dutch Whistleblowers Authority has the means to provide psychosocial support for whistleblowers. Only two other countries included in this research provide government funded psychosocial support for whistleblowers. In Norway a programme at a psychosocial care clinic has been funded by the Ministry



of Health since 2012 but is now likely to be closed down. In Israel, on the other hand, psychosocial care for whistleblowers is becoming more important in an attempt to provide a more holistic approach. In other countries, such as Australia, UK and the Republic of Korea, civil society organisations have stepped in to fill that need.

Prevention is a common task for governmental whistleblowing agencies and the Dutch Whistleblowers Authority also performs this function. However, the recently established National Guardian Office in the UK is perhaps at the forefront with its ‘speak-up culture audits’ of health care organisations. In other countries, such a watchdog-like approach is taken by civil society organisations.

The legal competencies of the investigative agencies in the sample countries are comparable to those of the Dutch Whistleblowers Authority. In most countries, whistleblowers have to turn to court(s) to seek remedies against retaliation. This is also the case in the Netherlands. Agencies in France, Belgium, Israel and the Republic of Korea try to seek reconciliation between whistleblower and employer. However, mediation is currently not a formal task of the Dutch Whistleblowers Authority.

### ***Criteria in international guidelines and frameworks***

The report also presents findings from a screening of the Dutch Whistleblowers Act against the criteria set forth in the following guidelines and frameworks: Council of Europe Recommendation on the Protection of Whistleblowers (CM/Rec 2014/7) combined with Council of Europe Resolution 2171 (2017), Transparency International 2013 International Principles for Whistleblowing Legislation, UNODC 2015 Resource guide on good practices in the protection of reporting persons, OECD 2011 Study on whistleblower protection, BluePrint for Free Speech 2015 G20 whistleblower protection laws.

These frameworks differ in the emphasis they put on different dimensions of whistleblowing arrangements. Nevertheless, the European Directive on whistleblower protection will develop along these frameworks, given the initial proposal (Com(2018)218/973471). Whilst the screening method is not without limitations (e.g., only the Dutch whistleblowing provisions were screened) there were some findings that resonate throughout the frameworks used. Whilst the Dutch Whistleblowers Authority has made its mark in terms of advice to whistleblowers, it is – due to its short existence – still unclear how its investigations will provide clarity and security for whistleblowers and other stakeholders of whistleblowing concerns. However, in light of the frameworks used in this report, the law seems to be weak to strengthen protection. The lack of clarity with regard to the reversal of burden of proof is an obvious missed opportunity. A further shortcoming is the absence of stipulations with regard to wider disclosures beyond regulators or the Dutch Whistleblowers Authority, e.g., to the media.



### ***Reading Guidance***

Detailed research questions, research design and selection of countries are explained in Part I.

Part II presents the findings of the comparative study, which compares the institutional landscape around whistleblowing in the Netherlands with that of ten other countries. It is organised around the following dimensions: cultural and legal context, scope of wrongdoing and whistleblower, tasks and institutional characteristics of whistleblowing agencies, whistleblower protections and remedies. Part II also presents the findings of the assessment of the Dutch arrangements against the international frameworks.

Part III gives a summary for each country of our research.



## **PART I: CENTRAL QUESTIONS AND RESEARCH DESIGN**

### **1. INTRODUCTION**

On July 1st 2016, the Dutch Whistleblowers Authority was established. Its tasks are 1) to advise, inform, and provide legal support (but not including representation in court) to individuals who want to report work-related wrongdoing that may harm the public interest, 2) to provide psychosocial support to whistleblowers, 3) to investigate alleged wrongdoing reported by whistleblowers, 4) to investigate alleged retaliation against the whistleblower, and 5) to inform employers about the necessity of whistleblowing in the first place and provide support to employers when implementing integrity management to prevent organisational wrongdoing. The Dutch Whistleblowers Authority wanted to know how it compared to foreign institutions that combine advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing. Which institutions are comparable to the Dutch Whistleblowers Authority? What are their tasks and their legal mandate? How are they organised? And which lessons can be learned from these foreign institutions?

The School of Governance (USG) of Utrecht University received the request to conduct an international comparative research to gain more insight on this topic. Given its relevance for practice and research, the USG agreed to draft a research proposal in cooperation with the Work and Employment Relations Unit (WERU) of the University of Greenwich. The following paragraphs in part I discuss the research aims and (sub) questions (section 2), and the research design, including case selection and methods (section 3). In part II, the central research question will be answered, focusing on one or more sub questions in each paragraph. Part III gives a more detailed overview of the whistleblowing legislation and institutional landscape in the selected foreign countries, organised in the various sub questions as well.

### **2. RESEARCH AIMS AND QUESTIONS**

The recently established Dutch Whistleblowers Authority wants to understand how it compares to foreign institutes with similar tasks. This research project will thus include an international comparison of institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing. Characteristics of the Dutch Whistleblowers Authority will be the starting point of this comparison. In addition, this study aims to situate the Dutch Whistleblowers Authority Act within important international legal frameworks for whistleblower protection.



The **central research question** is:

*“How does the Dutch Whistleblowers Authority (Act) compare to foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing and to international frameworks for whistleblower protection?”*

In several discussions with representatives of the Dutch Whistleblowers Authority the following topics were selected for the international comparison:

- Reporting culture, including the perceived social acceptability of whistleblowing, and the role of civil society (e.g., labour unions) and professional organisations (e.g., NGOs);
- Legal context, including the extent to which whistleblowing legislation is implemented in practice and monitored;
- Scope of whistleblowing legislation, including the definition of wrongdoing that can be reported by whistleblowers;
- Target group of the whistleblowing legislation, including the definition of a whistleblower and sectors that are covered by the legislation;
- Tasks of agencies that implement the whistleblowing legislation, focusing on the five central tasks of the Dutch Whistleblowers Authority (advice, psychosocial support, investigation of alleged wrongdoing, investigation of alleged retaliation against the whistleblower, and prevention), including the question whether and how these tasks are combined in one agency, the legal competences these agencies have, and their case load;
- Institutional characteristics of the agencies that perform any of the tasks of the Dutch Whistleblowers Authority, including their financing and accountability mechanisms, staff, budget, unique characteristics of the Dutch Whistleblowers Authority and differences with selected institutions;
- Protection for whistleblowers, including legal provisions, how these are implemented in practice, and (dis)incentives for blowing the whistle;
- Extent to which the Dutch Whistleblowers Act meet the criteria of guidelines and recommendations formulated by important international organisations.



This list of topics results in the following sub questions, that will be answered in several sub paragraphs of part II.

## **A. Foreign institutions**

### **1. Cultural and legal context**

- i. How does the reporting culture in the Netherlands compare to that in the selected countries?*
- ii. To what extent is, in the selected countries, whistleblower protection imposed by national regulation, and what are the stipulated conditions?*
- iii. To what extent are, in the selected countries, whistleblowing regulations (including reporting and protection policies) implemented and monitored?*
- iv. What is the role of civil society organisations and professional bodies in the institutional framework of the selected countries, in comparison with the Netherlands?*

### **2. Definition of whistleblowing and target group**

- i. How does the definition of whistleblowing used by the Dutch Whistleblowers Authority compare to that of foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing?*
- ii. How does the target group of the Dutch Whistleblowers Authority compare to that of foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing?*

### **3. Tasks**

- i. How do the tasks (and the possible tensions between them) of the Dutch Whistleblowers Authority compare to those of foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks?*
- ii. How do the legal competences of the Dutch Whistleblowers Authority compare to those of foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks?*
- iii. How do the type and number of cases in the Dutch Whistleblowers Authority compare to those of foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing?*

### **4. Institutional arrangements**

- i. How are foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing financed?*
- ii. To what extent are foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing independent, and to whom are they accountable?*





- iii. *How do staff occupation and budget of the Dutch Whistleblowers Authority compare to those of foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing?*
- iv. *What are unique characteristics of the Dutch Whistleblowers Authority, compared to foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing?*
- v. *What are the most important differences between the Dutch Whistleblowers Authority and foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing?*

#### 5. Whistleblower protection and incentives

- i. *How does whistleblower protection in the Dutch Whistleblowers Authority (Act) compare to (legal) protection in the selected countries?*
- ii. *To what extent do foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing offer (financial or other types of) (dis-)incentives to whistleblowers, and under which conditions?*

### **B. International frameworks**

- 6. To what extent does the Dutch Whistleblowers Authority Act meet the criteria of guidelines and recommendations formulated by important international organisations, such as the Council of Europe, the OECD, the EU, Transparency International, and the UN?

## **3. RESEARCH DESIGN: CASE SELECTION AND DATA COLLECTION**

### **3.1. Selection of countries**

The sampling of foreign institutions to be compared to the Dutch Whistleblowers Authority was at the country level. We used a purposeful sampling technique (Patton 1990), selecting countries that have designated whistleblowing legislation within the Council of Europe and G20 countries. We strived for a mix of early-movers with established institutional frameworks around whistleblowing, and late-movers with newly established whistleblowing legislation that are thus (like the Netherlands) undergoing institutional rearrangements. During the study, we decided to not include two Council of Europe countries that were in the initial sample – Slovakia and Sweden – respectively because of non-cooperation with key stakeholders and the perception of key stakeholders that implementation of the law is problematic. Australia and Israel were added, because of their promising legal framework, and in the case of Israel also the high level of comparability with the Dutch Whistleblowers Authority. This resulted in the final sample shown in Table 1 below.

**Table 1. Final sample of countries included in this study**

Country	Whistleblowing legislation dates
<i>Council of Europe countries</i>	
UK	1998 (2013)
Belgium	2004; 2013
France	2004; 2016
Norway	2007
Serbia	2014
Ireland	2014
<del>Slovakia</del>	<del>2014</del>
<del>Sweden</del>	<del>2017</del>
<i>G20, but not CoE countries</i>	
USA**	1978 (2012); 2010
Republic of Korea**	2001 (2014); 2011 (2015)
Australia	2004; 2009; 2013
<i>Other countries</i>	
Israel	1997; 2008

\*\* The USA and the Republic of Korea score highest in the TI report on the G20, and are the only ones with oversight bodies for the whistleblowing legislation in both private and public sector.

### 3.2. Data collection and analysis

Data collection in this study was conducted in the period of June 2017 to February 2018, and done in a fourfold way:

- (1) Analysis of policy and legislative documents that describe the tasks and legal competences of the Dutch Whistleblowers Authority. To better understand how these tasks are performed in practice, interviews of 45-60 minutes each were conducted with four employees of the Agency, one of each department (i.e., Advice, Investigation, Prevention, Legal Department).
- (2) Analysis of policy and legislative documents in the selected countries, and (if available) of existing research reports about the selected institutions and implementation of whistleblowing legislation. In part III, for each country an overview of the most relevant documents is shown in footnote.
- (3) Telephone interviews with whistleblowing professionals, being high ranking officers working in the selected agencies, and academic experts who study whistleblowing in their country and who have been involved in recent legislative or institutional rearrangements. In total 17



telephone interviews were conducted of 30-60 minutes each. An interview protocol was used during the interviews consisting of topics linked to the research questions – like tasks, institutional arrangements, and whistleblower protection – while remaining open for additional topics that interviewees considered relevant to discuss. During the interviews notes were made, which were written out in full detail shortly after the interview. To avoid social desirability bias and because of the sensitivity of the topic, confidentiality of the respondents' identity was promised.

- (4) A comparative analysis was made between selected important international frameworks for whistleblowing protection and the Dutch whistleblowers legislation. The selected frameworks included:
- a. Council of Europe (2014). Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers;
  - b. Council of Europe (2017). Resolution 2171 (2017) Parliamentary scrutiny over corruption: parliamentary cooperation with the investigative media;
  - c. Transparency International (2013). International principles for whistleblowing legislation;
  - d. UNODC (2015). Resource guide on good practices in the protection of reporting persons;
  - e. OECD (2011). Study on whistleblower protection. Frameworks, compendium of best practices and guiding principles for legislation;
  - f. BluePrint for free speech (2015). Breaking the silence. Strengths & weaknesses in G20 whistleblower protection laws;
  - g. Initial proposal of the forthcoming EU Directive on whistleblower protection (Com(2018)218/973471).

The data were first summarized in Excel tables to structure the available information for each research question per country. The findings were regularly discussed by the two researchers to increase comparability of data collection and analysis. Then, the key elements of whistleblowing arrangements for each country were identified and visualized in infographics, and a preliminary comparison between agencies in the selected countries and the Dutch Whistleblowers Authority was made. Both the infographics and the preliminary comparative analysis were presented during a meeting with the commissioner. To increase the validity of the findings, member-checking was done by allowing the interviewees to comment on relevant parts of the draft report, after which a few revisions were made (e.g., providing further detail, and correcting omissions on our part). The draft report was thereafter discussed with three advisory experts and the commissioner, and finalized.



## **PART II. COMPARISON BETWEEN DUTCH WHISTLEBLOWERS AUTHORITY AND SELECTED COUNTRIES**

This part answers the central research question of this study. It describes, on the one hand, how the Dutch Whistleblowers Authority relates to foreign institutions with advisory, psychosocial care, investigative and/or preventive tasks concerning whistleblowing and, on the other, how the Dutch Whistleblowers Act relates to international frameworks for whistleblower protection. The various sections each focus on one or two sub questions that were introduced in part I. The first section, however, describes the Dutch Whistleblowers Authority (Act) in light of these sub questions: 1) cultural and legal context, 2) definition of whistleblowing in and target groups of legislation, 3) tasks and institutional characteristics, and 4) whistleblower protection and incentives. The second section analyzes the cultural and legal context of whistleblowing in the Netherlands in comparison to the ten selected countries (sub question A1). The third section focuses on the scope of the whistleblowing legislation (focusing on the type of wrongdoing that can be reported) and the target group of the whistleblower protection legislation (sub question A2). The fourth section compares the Dutch Whistleblowers Authority with institutions in the ten selected countries in terms of tasks, competences, accountability mechanisms, and if information was available also staff, type of reports and annual budget. It also describes the unique characteristics of the Dutch Whistleblowers Authority and most important differences with selected agencies (sub questions A3 and A4). In section five, available whistleblowing protection mechanisms are discussed, as well as incentives for or barriers against whistleblowing. Finally, section six compares the Dutch Whistleblowers Act with important international whistleblowing protection frameworks.



### 1. THE DUTCH WHISTLEBLOWERS AUTHORITY (ACT)

Figure 1<sup>1</sup> below summarizes the main characteristics of the Dutch Whistleblowers Authority (Act), which will be described in this part. Part III contains similar infographics for the selected countries, some of which will be shown in part II when comparing these countries to the Netherlands.

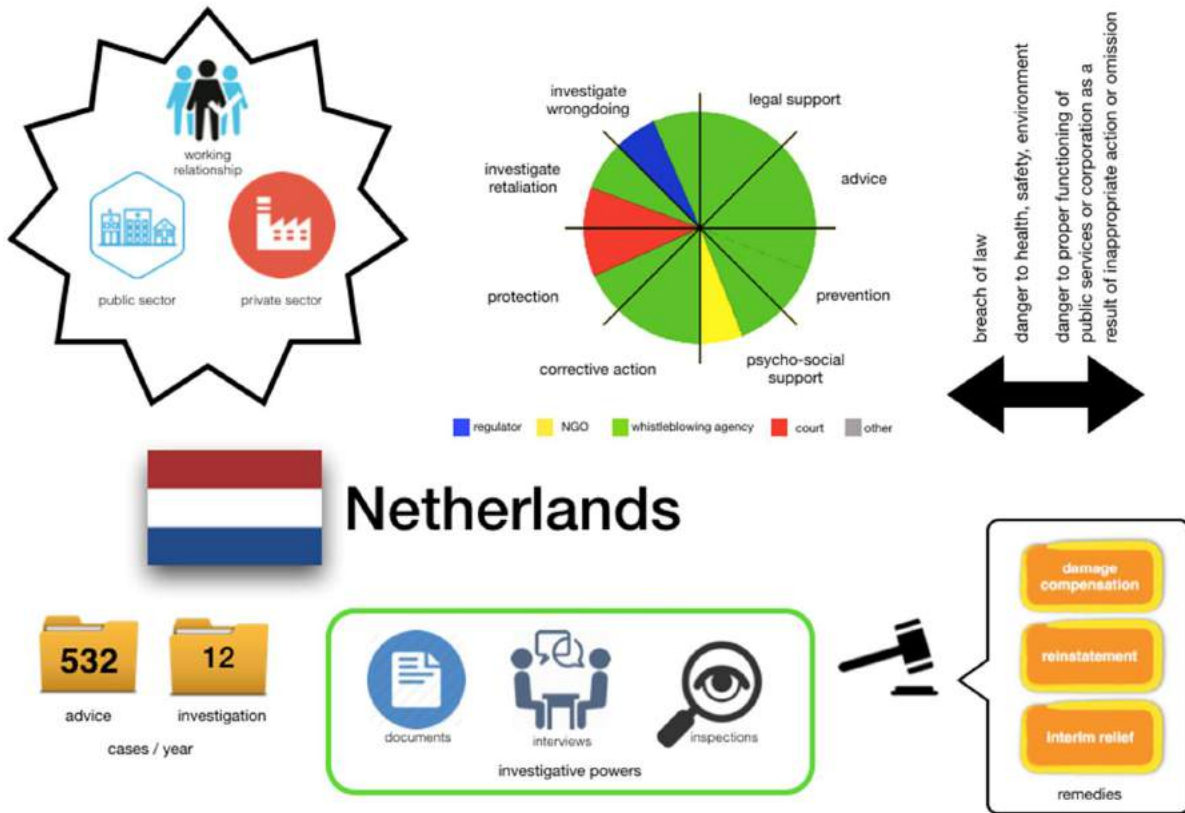


Figure 1: Infographics whistleblowing arrangements in the Netherlands<sup>2</sup>

<sup>1</sup> We relied on 4 local respondents (one of each department), conversations during meetings with the commissioner, and the following documents:

*Wet van 14 april 2016, houdende de oprichting van een Huis voor klokkenluiders (Wet Huis voor klokkenluiders).*

Huis voor Klokkenluiders (2016a). *Integriteit in de praktijk. De meldregeling.*

Huis voor klokkenluiders (2016b). *Jaarverslag 2016.*

Huis voor klokkenluiders (2017a). *Jaarverslag 2017.*

Huis voor klokkenluiders (2017b). *Resultaten en activiteiten Kennis & Preventie 1 juli 2016 – 31 oktober 2017.*

<sup>2</sup> The remedies shown in the infographics are not stipulated in the whistleblowing legislation. Rather, they already exist in labour law. The whistleblowing legislation amends labour law by adding reprisal related to whistleblowing



### 1.1. Cultural and legal context

The Dutch Whistleblowers Authority Act was enacted on July 1st 2016. With this new law the Dutch Whistleblowers Authority was established and all employers in the public and private sector with 50 employees or more have the obligation to install an internal reporting procedure concerning wrongdoing within the organisation that may harm the public interest. Given the cultural sensitivity concerning whistleblowing in the Netherlands – not unlike other West-European countries – this obligation is not obvious and implementation of reporting procedures is considered a difficult process. Some state that the law does not go far enough, because not only the reporting procedure, but an integrity management policy should have been made compulsory. One can indeed argue that a reporting procedure can be counterproductive if it is not embedded in an integrated integrity management policy.<sup>3</sup> Moreover, the obligation to install a reporting procedure is very difficult to enforce in practice.

Since the enactment of the law in 2016, whistleblowers can claim protection from retaliation on the condition that they followed the appropriate procedure. First they have to raise the concern internally, and only if the report is not dealt with properly within the organisation, they can report it externally to inspectorates or other supervisory bodies. If a proper response by the external channel also lacks or in the absence of an appropriate external channel, whistleblowers can report to the Dutch Whistleblowers Authority. In some cases, internal whistleblowing is not considered a reasonable option – for example in the case of immediate danger or when top management is involved in the wrongdoing – and whistleblowers can immediately report to an external channel. The law and explanatory documents are, however, not very clear about these exceptions, which leads to uncertainties for whistleblowers about whether they can skip internal reporting, for example in cases where middle management but not necessarily top management is involved in the wrongdoing.

### 1.2. Definition of whistleblowing and target groups

The Dutch Whistleblowers Act offers protection for ‘employees’ (*werknemers*) in the public and private sector who report presumed wrongdoing that may harm the public interest, and includes either 1) breaches of law, 2) danger to health, safety of people or the environment, or 3) improper acts or

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as a ground to claim these remedies. The case load shown is the number of contacts the department Advice had with whistleblowers in the first six months (532 in 2016), and the number of investigations that were started in that period (12 in 2016) (Huis voor Klokkenuiders, 2016b). In the infographic about tasks and institutions concerning whistleblowing, the police, public prosecutor and courts are not mentioned as actors involved in the investigation of wrongdoing, because their role (although obviously relevant in all countries) is not explicitly linked to the whistleblowing arrangements in the studied countries.

<sup>3</sup> The Confidential Integrity Adviser: Current Status and Future Prospects in the Netherlands <https://huisvoorklokkenuiders.nl/wp-content/uploads/2018/07/HvK-broch.vertrouwensp.-ENG-DEF.pdf>



omissions that endanger the functioning of a public agency or firm. Hence, only public concerns can be raised to the Dutch Whistleblowers Authority. While this raises the threshold for whistleblowers, it prevents the Dutch Whistleblowers Authority being confronted with a substantial case load consisting of reports of minor issues. Problematic in practice is, however, that the law nor explanatory documents provide a clear definition of ‘public interest’, which results in legal uncertainty for whistleblowers. Therefore the Dutch Whistleblowers Authority will develop a definition based on how they operate, which is a more inductive approach. While the Dutch law speaks of ‘employees’ (*werknemers*), this term is defined in a broad sense, including both a contractual and other working relationship. However, it does not specify or give examples of what this ‘other working relationship’ refers to precisely. The Dutch Whistleblowers Authority understands it to include persons who work for or have worked for an organisation/company, as well as freelancers, interns, volunteers, subcontracted employees and suppliers’ employees (Huis voor Klokkeluiders, 2016a).

### **1.3. Tasks and institutional characteristics**

The Dutch Whistleblowers Authority is an independent governing body that, according to the law, advises whistleblowers and investigates both wrongdoing that may harm public interest, as well as retaliation against those who have reported it. The advisory and investigatory tasks are performed in two departments respectively, between which at case level a ‘Chinese wall’ has been established. Whereas the law only mentions these tasks, the Dutch Whistleblowers Authority also has a prevention department and offers whistleblowers psychosocial support. These tasks were considered crucial for important stakeholders in the preparatory phase of the law. The agency is accountable to Parliament (through an annual report), and for its budget also to the Ministry of The Interior and Kingdom Relations. It has an annual budget of approximately 3 million euro. The combination of both investigative tasks (independent and objective investigation of wrongdoing and of retaliation claims) and advising and supporting whistleblowers at the same time certainly is a complicated issue. In the following, each of the tasks of the Dutch Whistleblowers Authority (including those not mentioned explicitly in the law), are described.

The advisory department consists of five advisors. They advise and inform individuals who want to report wrongdoing in their organisation, and provide legal advice in every step of the reporting procedure, while not representing whistleblowers in court. Their task may include providing information about the reporting procedure, inform whistleblowers about the possible consequences and risks of reporting, giving them advice with the decision whether or not to report, and offering practical help in writing letters to the employer. The advisors also assist those who are not genuine whistleblowers according to the law (e.g., because the wrongdoing they report does not harm the public



interest) by referring them to proper reporting channels. Whistleblowers who do meet the definition of the law are also offered psychosocial assistance by advisors of the agency, and by a psychologist paid by the Whistleblowers Authority. During the entire advisory process, the best interest of the whistleblower is at the centre and the whistleblower is in the lead; he can thus at any time decide to end the advisory trajectory. In the first six months, 532 individuals have contacted the Whistleblowers Authority for advice (70 genuine whistleblowers, and 183 reporters of whom at the end of the year was not sure yet if the reported was in the public interest) (Huis voor Klokkenluiders, 2016b), and in 2017 the agency received 471 requests for advice (39 genuine whistleblowers and 178 reporters of whom at the end of the year was not sure yet if the reported was in the public interest (Huis voor Klokkenluiders, 2017a).

The Investigative department consists of four investigators, and is responsible for two types of investigation. First, this department investigates the alleged wrongdoing if the investigator has determined that the public interest is indeed at stake. On the basis of the investigation, the Whistleblowers Authority can formulate recommendations, which can be followed-up. Second, they investigate retaliation claims. If the investigation indeed shows that retaliation has taken place as a result of the reporting act, whistleblowers can initiate a procedure to request compensating measures (as will be discussed in part 1.4 below). In performing these tasks, the investigators of the Whistleblowers Authority can use any of the following competences: investigate in the public domain, request police assistance, request information, request presence of employer, request employer to answer and hear witnesses. The department can also hire individuals with specific investigative expertise (for example in accountancy). In the second half of 2016, 12 investigation requests were made, of which 8 about alleged retaliation (Huis voor klokkenluiders, 2016b). In 2017, 19 investigation requests were received (Huis voor klokkenluiders, 2017a).

The prevention department consists of three employees. Their tasks include 1) direct contact with employers and professionals to inform them about integrity management to prevent organisational wrongdoing and the necessity of (a) whistleblowing (procedure) (e.g., in 2017 1430 questions of employers were answered, 36 presentations were given in the Netherlands and abroad, and 2 meetings were organised with trusted persons), 2) writing brochures and articles about integrity management and whistleblowing procedures, 3) developing instruments to measure organisational culture and integrity management efforts, and 4) conduct or issue research on various aspects of integrity management, and whistleblowing (e.g., 4 research projects in 2017). In all these tasks, the prevention department tries to emphasize the importance of a broad and coherent ethics management approach in which reporting procedures are embedded. The very specific name with the literal translation 'House for Whistleblowers', however, seems to imply that the agency only focuses on reporting procedures in the





strict sense. Therefore staff of this department constantly have to explain to employers that they can assist and inform them in more than only whistleblowing policy. The Dutch Whistleblowers Authority also employs a director and support staff, namely one legal advisor, one communication officer, one board secretary, and one general secretary.

#### **1.4. Whistleblowing protection and incentives**

The Dutch law provides that whistleblowers can request for an investigation of alleged retaliation. Moreover, whistleblower protection is guaranteed in the provision that the whistleblower's identity will not be made known to the employer without the whistleblower's agreement. What, however, weakens the position of whistleblowers in the Netherlands, is that the Dutch law did not introduce a reversal of burden of proof – although this is considered best practice by international organisations<sup>4</sup> – and in addition suffers from a lack of conceptual clarity. The latter results in legal uncertainty in at least three ways. First, a clear definition of 'public interest' is lacking, which results in whistleblowers being uncertain whether the wrongdoing they want to report is indeed considered a 'public interest' issue, and whether they are still protected if the decision is made that the issue does not harm the public interest. Second, for many whistleblowers it is unclear what the consequences are in terms of protection if whistleblowers do not follow procedure (e.g., because they thought there was an imminent danger while it was not the case, or not top management but only middle management was involved in the wrongdoing). Third, the law does not clearly stipulate what retaliation against whistleblowers means. For some it is unclear whether it only refers to formal labour aspects, such as dismissal and denial of promotion, or also to informal types of retaliation, such as lack of respect, unfair treatment or threat of reprisal. In practice, the Dutch Whistleblowers Authority focuses on both aspects.

Furthermore, the Dutch law, on the one hand, provides that the Whistleblowers Authority can formulate recommendations on the basis of an alleged retaliation investigation, but on the other hand does not specify what these may include. The remedies shown in the infographics above (see Figure 1) are not stipulated in the whistleblowing legislation, but already existed in labour law. These include damage compensation, reinstatement and interim relief. The Dutch whistleblowers law amends labour law by adding whistleblowing as one of the grounds on which these protections may be claimed. A different type of protection that advisors of the Whistleblowers Authority offer is trying to seek reconciliation between employee and employer, although this is not a formal task of the Agency. In those cases, the

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<sup>4</sup> OECD (2011). *Study on whistleblower protection. Frameworks, compendium of best practices and guiding principles for legislation*; UNODC (2015). *Resource guide on good practices in the protection of reporting persons*.



identity of the whistleblower is obviously known to the employer. Although this may hamper whistleblower protection, it could also result in finding a win-win solution for both parties, something a long judicial procedure often fails to do.



## 2. CULTURAL AND LEGAL CONTEXT

In none of the countries examined in this report was whistleblowing seen as something easy or straightforward. Whistleblowing often continues to have connotations of the disloyal employee or ‘rat’. References to whistleblowing being opposed to a ‘national culture’ are also often-heard comments. Nevertheless, in countries where survey data exist on attitudes to whistleblowing, the vast majority of the population believes that protecting whistleblowers is for the betterment of society.<sup>5</sup>

Our research suggests that, rather than merely depending on national culture, whistleblowing legislation may also influence attitudes and practices with regard to whistleblowing. Such legislation mandates new interventions from agencies and civil society (NGOs), triggers self-regulation, and generates new case law and jurisprudence with regard to employment disputes. However, adaptations also seem to occur; those with an interest in hiding wrongdoing find ways to either retaliate in more subtle ways than before, or in reacting quicker and harder.<sup>6</sup>

We found various ways in which whistleblowing legislation and culture seem to interact. In Serbia the whistleblowing legislation and the work of a prominent NGO appears to aid in building citizens’ trust in the state and the judiciary.<sup>7</sup> In Norway, however, whistleblowing might be getting even harder: research suggests an increase in retaliation and a decrease in effectiveness of whistleblowing to stop wrongdoing.<sup>8</sup> This is despite whistleblowing legislation with broad coverage of types of wrongdoing and an institutional and legal context characterized by inclusiveness and social justice. In the UK a more gradual shift seems noticeable. Despite its longstanding legislation (implemented in a decentralized way), whistleblowing scandals continue to emerge and agencies mandated to investigate wrongdoing have not succeeded in changing the perception that they are ineffective in responding to whistleblowers. Nevertheless, the gradual shifts in attitudes to whistleblowing are mixed, with on the one hand more awareness and less retaliation, but on the other hand a lower preparedness to blow the whistle.<sup>9</sup>

The implication is that in order to understand the interaction between culture and whistleblowing legislation we need to also consider the institutional landscape around whistleblowing. We present the

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<sup>5</sup> See country files of Australia, Ireland, Republic of Korea, and UK in Part III.

<sup>6</sup> Devine, T. (2016). *International Best Practices for Whistleblower Policies*. Government Accountability Project. PCAW (2013). *Whistleblowing - The inside story*. Public Concern at Work / University of Greenwich. PCAW (2015). *Is the law protecting whistleblowers?* Public Concern at Work.

<sup>7</sup> See Part III, country file for Serbia.

<sup>8</sup> See Part III, country file for Norway.

<sup>9</sup> See Part III, country file for UK.



specific role of institutions for different countries further on in this report but mention here a number of salient patterns.

Norway's culture has many similarities with that of the Netherlands. Both are deliberative and inclusive democracies. They also share consensus-driven politics and employment relations. Perhaps this is a reason why the Netherlands and Norway stand out from other countries in terms of the positive and supportive role labour unions have played with regard to whistleblowing legislation. This can lead to too much optimism with regard to particular legislative and institutional 'solutions'. However, this also implies a general preparedness to review and amend arrangements. At least for the Netherlands, such a trial-and-error trajectory with regard to whistleblower protection can be documented.<sup>10</sup>

Other countries, such as France, Ireland, UK and USA, can be characterized by more antagonistic politics and employment relations. In these countries we see stronger and better organised watchdog activities vis-a-vis whistleblowing arrangements.<sup>11</sup> NGOs set up particular services for whistleblowers, construct business models to professionalize these, yet remain critical observers of government agencies investigating wrongdoing, and of the courts with regard to whistleblower protection. So far, we have seen much less of that in Norway<sup>12</sup> or the Netherlands.

The Dutch whistleblowers legislation passed in 2016 confirms two emerging trends in national whistleblowing arrangements: one relates to the sectoral scope of the legislation and the other to the institutional implementation. With regard to sectoral scope, whilst some countries have included whistleblowing provisions in legislation specific to sectors (public sector, corporations) or types of wrongdoing (e.g., fraud, environment), stand-alone whistleblowing legislation covering both public and private sectors is certainly the trend.<sup>13</sup> The USA was the first country to have whistleblowing legislation but used a limited scope (public sector) and, possibly due to its federal structure, continued with a fragmented approach. This means that whistleblower protection is scattered across a patchwork of more than 60 laws in different states, at different levels, for different sectors (including the private sector), and for different purposes.<sup>14</sup> Australia also has a federal structure, and several pieces of whistleblowing

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<sup>10</sup> Vandekerckhove, W. (2006). *Whistleblowing and organizational social responsibility: A global assessment*. Ashgate.

<sup>11</sup> See Part III, country files for France, Ireland, UK and USA.

<sup>12</sup> See Part III, country file for Norway.

<sup>13</sup> Cf. country files in Part III.

See also Vandekerckhove, W., Phillips, A., Devine, T. & Myers, A. (2016). *Checkmate to corruption: Making the case for a wide-ranging initiative on whistleblower protection*. Public Services International.

<sup>14</sup> See Part III, country file for USA.



legislation exist there as well, even at the federal level covering public and private sector. However, discussions exploring a more unified stand-alone legislation with broad coverage are ongoing.<sup>15</sup> Ireland and France started out on the path of fragmented whistleblower protection but recently made an overhaul towards a unified stand-alone legislation.<sup>16</sup>

This brings us to the second emerging trend for which the Dutch legislation can be seen as cutting-edge, namely that of government funded whistleblowing agencies. We see this trend emanating from whistleblowing legislation with a scope limited to the public sector (e.g., Belgium and Israel)<sup>17</sup>. Public sector whistleblowing legislation tends to mandate the Ombudsman's Office to carry out case management for whistleblowing within the public sector, which can involve carrying out or coordinating investigation of wrongdoing and retaliation, offering protection, and making recommendations for corrective action. However, transposing this model to also include the private sector is legally and practically not straightforward. We provide a more detailed comparison in section three, but note here the Netherlands and the Republic of Korea are so far the only countries where this is being done. In the Republic of Korea, what was initially an anti-corruption commission has seen its mandate grow over the past two decades to deal with a somewhat broader range of wrongdoing reported by whistleblowers, through two pieces of legislation covering the public sector and private sector respectively.<sup>18</sup> Currently, the Netherlands is the only country that has a designated whistleblowing agency mandated through a single piece of stand-alone whistleblowing legislation covering both public and private sector. A similar scheme is about to be started in France.<sup>19</sup> Discussions in Norway explore options to provide whistleblowing related mandates to specific agencies.<sup>20</sup> In Australia the option of establishing a new agency is under consideration.<sup>21</sup> In the UK, the country with the longest experience of having stand-alone whistleblowing legislation covering both public and private sector, no central whistleblowing agency exists linked to that legislation. However, in 2016 a whistleblowing agency was created for the National Health Service (NHS), and a 'National Guardian' whistleblowing agency with broad sector coverage is contemplated in Scotland.<sup>22</sup>

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<sup>15</sup> See Part III, country file for Australia.

<sup>16</sup> See Part III, country files for Ireland and France.

<sup>17</sup> See Part III, country files for Belgium and Israel.

<sup>18</sup> See Part III, country file for Republic of Korea.

<sup>19</sup> See Part III, country file for France.

<sup>20</sup> See Part III, country file for Norway.

<sup>21</sup> See Part III, country file for Australia.

<sup>22</sup> See Part III, country file for UK.



### 3. DEFINITION OF WHISTLEBLOWING AND TARGET GROUPS

We looked at how whistleblowing legislation in the different countries delineated the types of wrongdoing that would qualify as whistleblowing (scope), as well as what restrictions are made in terms of working relationships with the organisation one blows the whistle on (target group).

#### 3.1. Scope

The Dutch Whistleblowers Act offers protection for whistleblowers who report presumed wrongdoing that may harm the public interest, and includes either 1) breaches of law, 2) danger to health, safety of people or the environment, or 3) improper acts or omissions that endanger the functioning of a public agency or firm. With regard to scope, we find in the selected countries a huge variation in wording. This is not surprising given that terms in different language do not always translate easily into English. We can, however, observe some patterns. One is that most whistleblowing legislation covers all three of the following categories of wrongdoing: 1) breaches of law, 2) danger to health or safety of people and the environment, and 3) integrity violations. In most countries<sup>23</sup> ‘breaches of law’ includes broader notions such as ‘miscarriage of justice’ (Ireland, UK), ‘perverting course of justice’ (Australia), ‘failure to comply with legal obligations’ (UK), or specific instances in addition to a general category, for example ‘corruption’ (Australia, Israel, Norway). The category ‘danger to health or safety of people, and the environment’ is a pretty standard notion. By far the greatest variation can be seen in the wording used to describe ‘integrity violations’. Some examples: ‘abuse of public trust’ (Australia), ‘shortcoming of public service duty’ (Belgium), ‘breaches of ethical codes’ (Norway), ‘gross mismanagement’ (Ireland, USA), ‘abuse of authority’ (Republic of Korea, USA), and ‘violation of administration’ (Israel).

There do not appear to be references to integrity or ethics in the whistleblowing legislation in the UK and France. There are, however, interesting additions to the core list, which make a number of countries stand out. For example, in France the legislation also covers failures to comply with ratified treaties or measures adopted by international organisations. In Ireland and the UK, attempts to cover-up any other listed type of wrongdoing also qualifies as a protected disclosure. In Serbia, violations of human rights is explicitly mentioned. In the Republic of Korea this is worded as ‘rights of people’. Norway explicitly mentions ‘harassment, bullying, discrimination, and negative culture’. The Irish legislation possibly includes the same, albeit in different wording: ‘oppressive, discriminatory or negligent act’.

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<sup>23</sup> See respective country files in Part III for the named countries in this section.



In countries that have separate whistleblowing legislation for public and private sectors, the scope of wrongdoing covered in the private sector law tends to be more narrow than that in the public sector law. Examples are Australia and the USA. A possible exception is the Republic of Korea.

Interesting is that in most countries no reference is made to the reported violation having to be ‘in the public interest’. Given the broad scope of wrongdoings, it is therefore noteworthy that the UK law includes a ‘public interest test’. This entails that at an Employment Tribunal hearing, the judge will have to consider whether the claimant had a ‘reasonable belief the disclosure was in the public interest’. This test was introduced in 2013 to avoid people using the whistleblowing legislation to claim unfair dismissal in relation to a personal grievance. The deliberation around delineating public interest from personal grievance resonates in a number of countries within Europe. Case law from the European Court of Human Rights has focused on process and motivation, whereas the recent case law in the UK tends to look at number of people affected by the wrongdoing, severeness of the wrongdoing, and deliberate intent of the wrongdoer. While such ‘public interest test’ is not included in the Dutch law, it does stipulate that only wrongdoing that may harm the public interest can be reported to the Dutch Whistleblowers Authority, which leaves the agency with the difficult task to assess whether or not reported wrongdoing meets this criterion and protection can be granted.

### **3.2. Target group**

The Dutch whistleblowers law covers both public and private sector. This is similar to nearly all countries examined in this report (see Figure 2 below and respective country files in Part III), albeit that in some countries different laws exist for different sectors. Belgium is an exception, where there only exists whistleblowing legislation for the public sector. Israel shows a huge discrepancy between public and private sector whistleblowing legislation, so much so that in this report we have regarded the Israeli legislation to cover the public sector only. In the Republic of Korea, USA, and Australia there is separate legislation for public and private sectors respectively. In this sense the Netherlands is comparable to France, Serbia, Ireland, Norway, and the UK: one law covering all sectors.

The Dutch whistleblowers law speaks of ‘employees’ (*werknemers*), which is defined in a broad sense, including both a contractual or other working relationship. While the Dutch law leaves open what this ‘other working relationship’ refers to precisely, legislation in a number of other countries (Serbia, Ireland, Norway, and UK) specifies various types of working relationships: internships, agency workers, contractors, etc. A number of countries have even refrained from making any restraints on who qualifies, i.e., anyone can be a whistleblower. This is the case in France. It is also the case in the Republic of Korea and the USA, but only in their private sector whistleblowing legislation. The general picture in the USA is, however, much more complicated, because every state in the USA has a variety



of whistleblowing statutes, which often limit who can blow the whistle. Serbia is the one standing out here, with the law providing whistleblower protection also for persons associated with the whistleblower (such as family, business partners, clients, supporting colleagues, etc.).

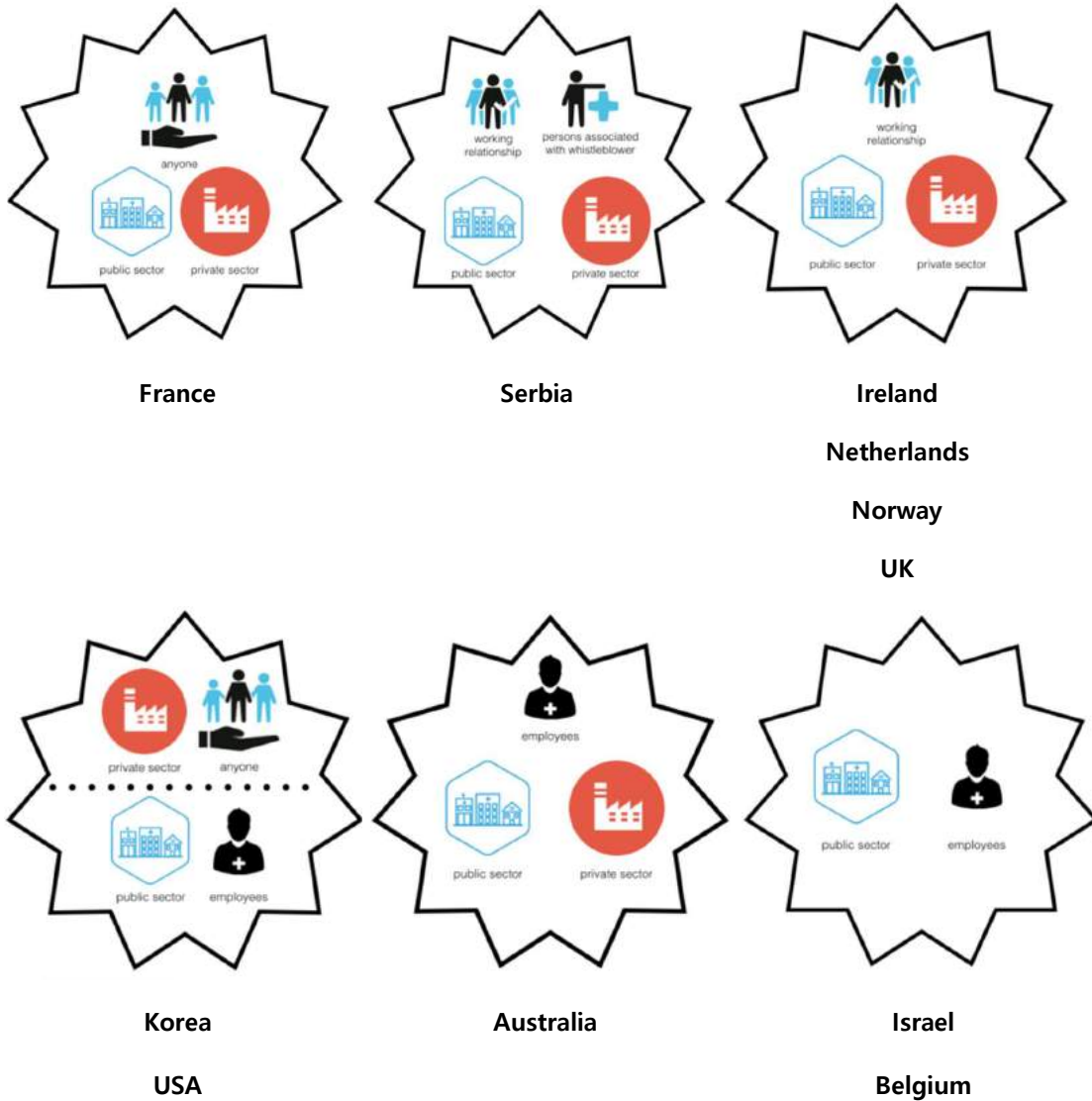


Figure 2. Groups covered by whistleblowing legislation – broadest to narrowest





#### **4. WHISTLEBLOWING AGENCIES: TASKS AND INSTITUTIONAL CHARACTERISTICS**

##### **4.1. (Rather) unique characteristics of the Dutch Whistleblowers Authority**

The comparative analysis between whistleblowing agencies in the selected countries and the Dutch Whistleblowers Authority shows that the Netherlands is the only country with 1) one single agency funded by the government, 2) which offers protection for whistleblowers in both the public and private sector, and that 3) combines the tasks of advice, psychosocial support, investigation of alleged wrongdoing, investigation of alleged retaliation, and prevention. While this combination of characteristics can be considered unique, some of the studied agencies are quite comparable to the Dutch Whistleblowers Authority because they are funded by government and combine four of the five tasks. Noteworthy is also that we only found two other countries in which government funds are available for specific psychosocial support for whistleblowers.

##### ***4.1.1. Combination of advice, psychosocial support, investigation, and/or prevention***

###### *Government agencies with various roles in whistleblowing protection*

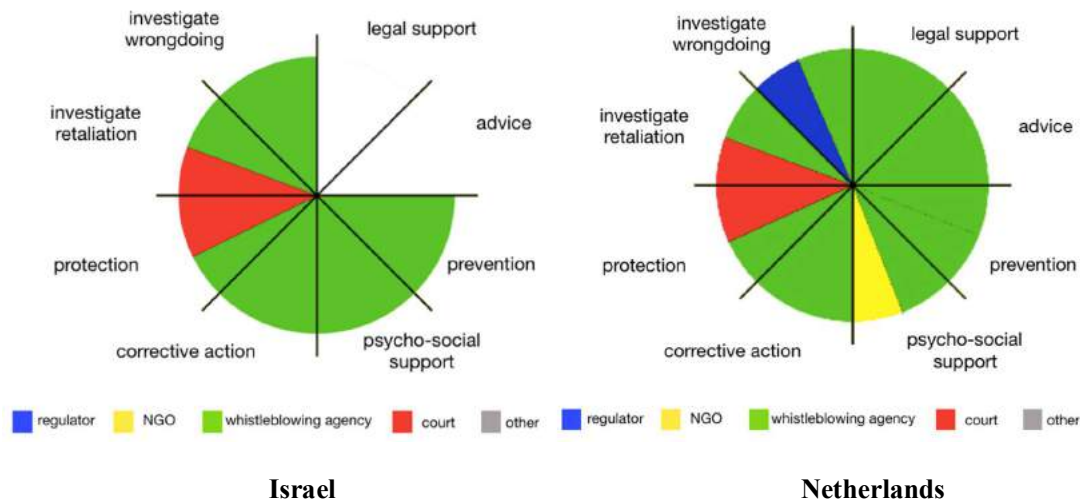
In our study, we found only two countries with government agencies that combine four of the five tasks of the Dutch Whistleblowers Authority, namely the State Comptroller in Israel (and the Ombudsman which is part of this agency) (as shown in Figure 3 below) and the Securities and Exchange Commission (SEC) in the USA. Agencies in both countries will be discussed separately below.

Like in the Netherlands, the Israeli agencies 1) investigate wrongdoing reported by whistleblowers, 2) investigate alleged retaliation against whistleblowers, 3) provide psychosocial support to whistleblowers, and 4) perform prevention tasks in terms of awareness raising via information dissemination campaigns. As for the latter, the prevention tasks of the Dutch Whistleblowers Authority are broader, because these include assistance to employers in implementing policy and operating as a knowledge center for whistleblowing policy and integrity management. Although advice to whistleblowers is not a formal part of the tasks of the Ombudsman or the State Comptroller, they do respond to questions and give information on the risks of whistleblowing for the whistleblower and available reporting channels. This is, however, only one of the three main tasks that are done by the Advice department of the Dutch Whistleblowers Authority, being 1) informing (possible) whistleblowers about the procedure and potential risks of being a whistleblower, 2) giving assistance to whistleblowers before and during the investigation, and 3) providing legal advice during the entire reporting procedure while not representing whistleblowers in court. Recently the Ombudsman in Israel is developing a more holistic approach to deal with whistleblowers by focusing on psychosocial support



as well; specifically a psychologist has been appointed to give support to whistleblowers and their families, which is comparable to what the psychologist of the Dutch Whistleblowers Authority does.<sup>24</sup> Being only accountable to Parliament, the Israeli agencies can be considered independent, which is comparable to the position of the Dutch Whistleblowers Authority being an independent governing body that is accountable to Parliament, and for its budget also accountable to the Ministry of The Interior and Kingdom Relations.

The most important differences between the Israeli and Dutch agencies are the target group and how investigations on wrongdoing and alleged retaliation are conducted. As for target group, the State Comptroller and Ombudsman in Israel are installed for public sector whistleblowers only. As for investigation, it is interesting that in Israel the decision was made to separate the investigation of the alleged wrongdoing (which is done by the State Comptroller) and the investigation of alleged retaliation (which is done by the Ombudsman), while in the Netherlands both types of investigation are done by the same Investigative department. Nevertheless, in practice there does not seem to be a huge difference between both countries, because in Israel the Ombudsman is part of the State Comptroller, and no ‘Chinese walls’ are installed between these two investigative departments but there is far reaching and easy information sharing that is not regulated with protocols.<sup>25</sup>



**Figure 3. Tasks of whistleblowing agency in Israel and the Netherlands**

<sup>24</sup> See Part III, country file for Israel.

<sup>25</sup> See Part III, country file for Israel.



The Securities and Exchange Commission (SEC) in the USA also combines four of the five tasks of the Dutch Whistleblowers Authority, being 1) advice to whistleblowers, 2) investigation of alleged wrongdoing, 3) investigation of alleged retaliation, and 4) prevention.<sup>26</sup> It does not provide psychosocial support like the Dutch and Israeli agencies discussed above. The SEC is the whistleblowing agency that implements the Dodd-Frank Act, which offers protection for all whistleblowers who report securities laws violations. Investigations of alleged wrongdoing are conducted by either one of the eleven regional offices or a speciality unit, sometimes in cooperation with enforcement agencies in the USA and abroad in criminal cases. For the investigation of alleged retaliation, advice and prevention, a specific department, the Office of the Whistleblower (OWB), has been established within the SEC. Interestingly, like in Israel, investigation of alleged wrongdoing and retaliation are done by separate departments within the SEC. The OWB monitors retaliation complaints and the SEC can take enforcement acts against agencies who violate the anti-retaliation provisions of the Dodd-Frank Act, which has been done only three times.<sup>27</sup> In addition, nine enforcement actions were taken, because employers prohibited employees to contact the SEC. As for the advisory task, the OWB has a hotline where whistleblowers or would-be whistleblowers, their attorneys and other citizens can ask information about the program, which covers like in Israel only one of the three main tasks of the Advice department of the Dutch Whistleblowers Authority. Most calls are about eligibility criteria for awards, confidentiality guarantees, investigative procedure(s) and the appropriateness of the SEC to handle a specific tip.<sup>28</sup> Prevention includes the promotion of public awareness concerning whistleblowing, by means of the OWB web page, media interviews, presentations, press releases and webinars, which is in the Netherlands done by the communication officers.

#### *Non-governmental organisations with various roles in whistleblowing protection*

In the other selected countries, the government agencies that are installed to deal with whistleblowing protection only perform one or two of the Dutch Whistleblowers Authority's tasks, as will be explained in part 4.2. However, non-governmental organisations (NGOs) in two of the selected countries, the USA and Serbia, have three of five tasks in common with the Dutch Whistleblowers Authority, being advice to whistleblowers, investigation (only of wrongdoing, and not of alleged retaliation) and prevention. As for NGOs, the (perceived) independence is of course different than that of the Dutch Whistleblowers Authority, and the government agencies in Israel and the USA discussed above. This

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<sup>26</sup> See Part III, country file for USA.

<sup>27</sup> SEC (2017). *Annual report to Congress. Whistleblower Program*. Securities and Exchange Commission.

<sup>28</sup> SEC (2017). *Annual report to Congress. Whistleblower Program*. Securities and Exchange Commission.

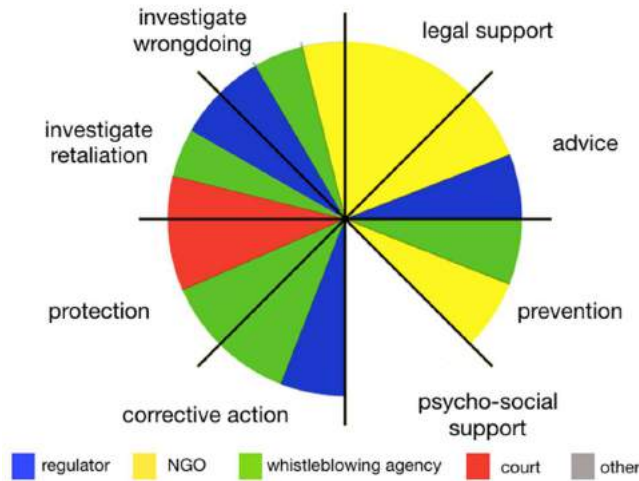


is particularly shown in the lack of independent investigation of wrongdoing. Notwithstanding the important difference in position, it is noteworthy to explain how these NGOs manage to combine their tasks.

In the USA, the Government Accountability Project (GAP) has been established in 1977 at the Institute for Policy Studies as a non-profit, non-partisan public interest law firm. It has an annual budget of approximately 3.1 million dollar (which is comparable to the budget of 3 million euro of the Dutch Whistleblowers Authority), which mainly comes from 10.000 individual donors and foundations such as the CS Fund, the Open Society Foundations and Rockefeller Family Fund. GAP gives informal and legal advice to whistleblowers, and represents a few of them in court.<sup>29</sup> The latter is not done by the Advice department of the Dutch Whistleblowers Authority. GAP tries to find an agreement between employee and employer, because that is considered to be in the best interest of the whistleblower. Although GAP aims to find win-win solutions for all parties, it is not always considered to be independent and fair by employers, being perceived as an institution for whistleblowers. GAP also employs investigative journalists who investigate the charges whistleblowers make. The results of these investigations are published in articles and reports that are published online. By doing so, the agency helps exposing wrongdoing by government agencies to the public. Unlike the Dutch Whistleblowers Authority, GAP does not investigate alleged retaliation against whistleblowers. The prevention tasks include actively promoting government and corporate accountability by keeping oversight on agencies to determine whether law on paper is implemented in practice. Their studies are presented to congress, and their findings often lead to revisions in whistleblowing protection laws. GAP also provides training for agencies involved in whistleblowing protection and policy advice to agencies about the implementation of the several whistleblowing protection laws. It thus operates as a knowledge centre for whistleblowing policy, like the Dutch Whistleblowers Authority. Figure 4 below shows the various tasks of the NGO GAP (in yellow) and also illustrates the fragmented institutional landscape in the United States, where there are different regulators (in blue) and specific whistleblowing agencies (in green) that play an important role in dealing with whistleblowing cases.

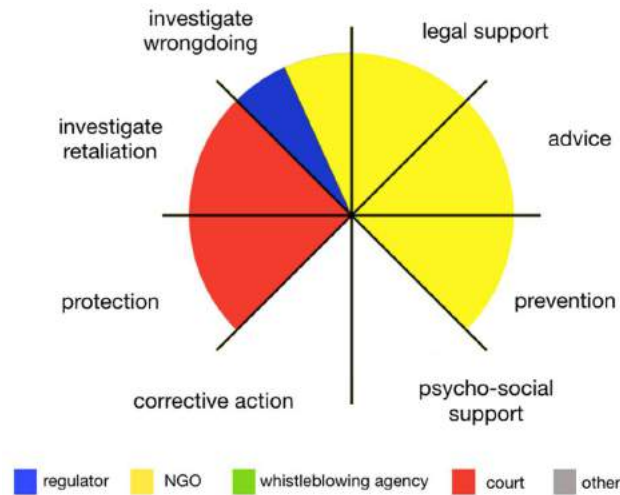
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<sup>29</sup> See Part III, country file for USA.



**Figure 4. Tasks of agencies involved in whistleblowing cases in the USA**

The situation in Serbia is quite different. There is also a strong whistleblowing NGO, Pistaljka (which is Serbian for ‘The Whistle’), established 7 years ago, whose tasks are similar to GAP. But the role of this NGO seems to be even more crucial for the successful implementation of the whistleblowing protection law, given that no governmental whistleblowing agencies have been installed in Serbia (as shown in Figure 5). Hence, protection can only be claimed in court.<sup>30</sup>



**Figure 5. Tasks of agencies involved in whistleblowing cases in Serbia**

<sup>30</sup> See Part III, country file for Serbia.



Pistaljka receives funding from several Western countries (including the Netherlands and the USA), the European Union, and to a smaller degree from Serbia. Hence, it is considered quite independent from the Serbian government. This perception may explain part of its success, given the lack of citizen trust in Serbian government agencies.<sup>31</sup> The threefold task of Pistaljka is 1) advising whistleblowers by providing information, legal counselling and representation in court (which the Dutch Whistleblowers Authority does not), 2) investigation of wrongdoing (but, unlike the Dutch Whistleblowers Authority, not alleged retaliation) by investigative journalists who publish their findings in reports and newspaper articles, and 3) training lawyers and judges to deal with whistleblowing cases and giving ad hoc advice to employers who asked them questions about the WBPA. As for the latter, the agency is considering to increase its role in prevention by focusing more on advising employers in ethics management and being a knowledge center on whistleblowing.

#### ***4.1.2. Specific psychosocial care for whistleblowers***

Only in two of the selected countries, government funds are available for specific psychosocial care for whistleblowers like in the Netherlands (where whistleblowers can receive free care from a psychologist). In Norway, there is a psychosocial care clinic, funded by the Ministry of Health, that since 2012 treats whistleblowers who have suffered retaliation.<sup>32</sup> The clinic has already helped more than 200 whistleblowers in the past six years but it is likely the program will be closed down. While the official reason is money-related, an interviewee explains that another reason could be that the government may feel uncomfortable to have such a clinic, because it may be perceived as a symptom of a culture that is against whistleblowers and freedom of speech. Also in Israel psychosocial care for whistleblowers is becoming more important. As explained above, the Ombudsman is developing a more holistic approach to whistleblower protection. An appointed psychologist gives support to both whistleblowers and their families.<sup>33</sup>

In most other countries, whistleblowers who need psychosocial support are referred to general employee assistance programs that are installed to help employees with various kinds of psychosocial needs, such as stress and the consequences of harassment or bullying, and which are thus not adapted to the particular needs of whistleblowers who have experienced retaliation. Therefore, in the UK and Australia, NGOs have stepped in to fill that need.<sup>34</sup> In the UK, a relatively new NGO,

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<sup>31</sup> See Part III, country file for Serbia.

<sup>32</sup> See Part III, country file for Norway.

<sup>33</sup> See Part III, country file for Israel.

<sup>34</sup> See Part III, country files for UK and Australia.



WhistleblowersUK, provides psycho-social support to whistleblowers. While this NGO has professionalised over the past few years, it still runs mainly on volunteering. In Australia NGOs are in general quite weak, but there are self-help groups for whistleblowers, like for example Whistleblowers Australia, that provide psychosocial support. These organisations, however, often lack sufficient resources to assist whistleblowers in a professional way.

#### **4.2. Differences and similarities between Dutch Whistleblowers Authority and agencies in selected countries**

This section describes for each of the five general tasks of the Dutch Whistleblowers Authority, the main differences and similarities in the selected countries. Psychosocial support is not discussed, given that the few examples of specific psychosocial care for whistleblowers have already been described in 4.1 above. This section concludes with an overview of staff and case load in the studied whistleblowing agencies.

##### **4.2.1. Investigation of alleged wrongdoing and retaliation**

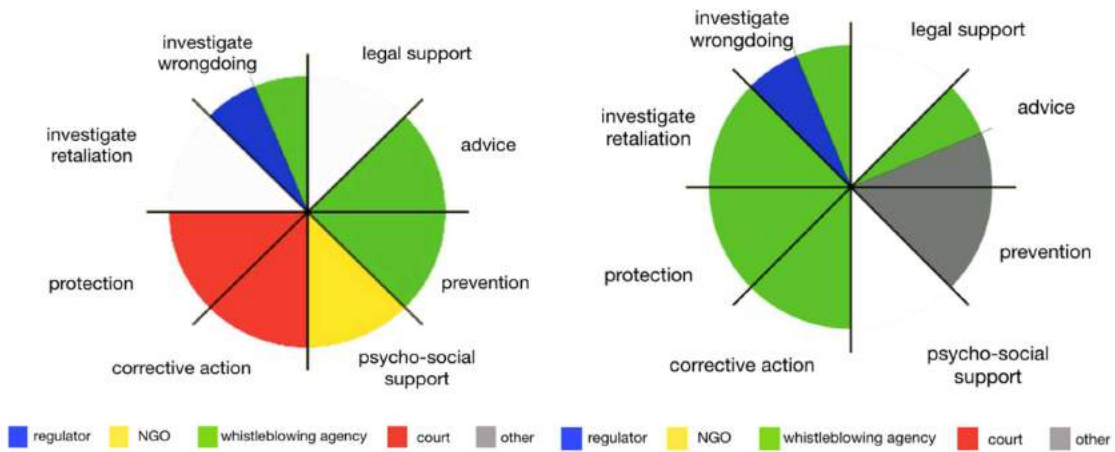
In four of the selected countries<sup>35</sup> (Australia<sup>36</sup>, Belgium, Israel and France) the whistleblowing agency is the Ombudsman. While these agencies are comparable to the Dutch Whistleblowers Authority in their independence, being only accountable to Parliament (albeit that the Dutch Whistleblowers Authority is in addition accountable to the Ministry of The Interior and Kingdom Relations for its budget), and investigatory competences (see below), they differ in target groups (only for public sector) (see also 2.2) and in whether they investigate alleged wrongdoing and/or retaliation against whistleblowers (see Figure 6).

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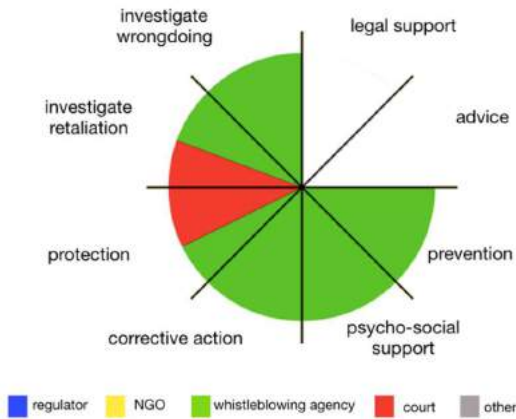
<sup>35</sup> See Part III, country files for Australia, Belgium, Israel and France.

<sup>36</sup> As for Australia, this study focused on the national level. Sometimes, state level institutions are mentioned as well, when they are considered good practices or significantly different than the national system. For Australia, the ombudsman is the whistleblowing agency at the national public sector level, and for three of the six state public sector schemes (Queensland, NSW and Tasmania); in one state (Victoria) it is the anti-corruption agency.

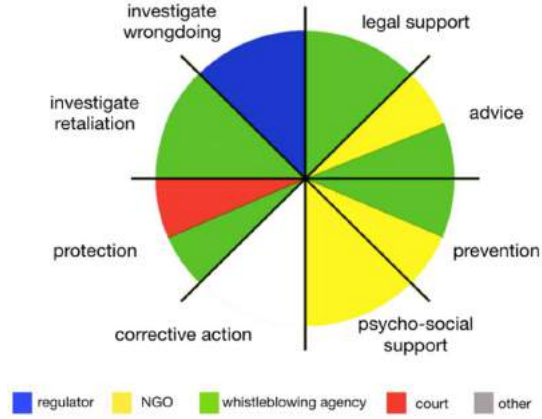




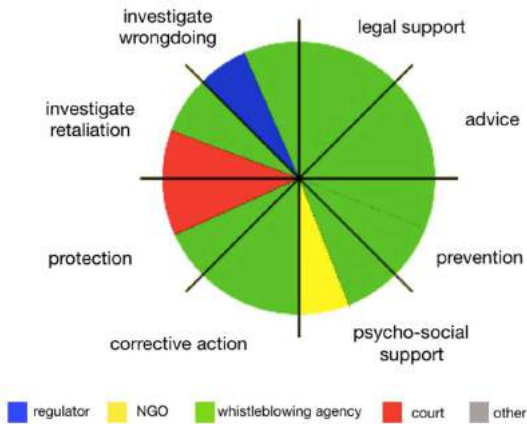
### Australia



### Belgium



### Israel



### France

### Netherlands

Figure 6. Comparison of tasks of Ombudsmen and Dutch Whistleblowers Authority (in green)





In Australia<sup>37</sup>, the Ombudsman only investigates reported wrongdoing, and in France<sup>38</sup>, the Ombudsman only investigates alleged retaliation. Following that in Israel<sup>39</sup>, the investigation of reported wrongdoing and alleged retaliation are conducted by different departments (between which no ‘Chinese walls’ are installed, as explained above) – as is the case in the SEC<sup>40</sup> – Belgium<sup>41</sup> is the only country in our study in which both the investigation of wrongdoing and retaliation are done within the same department, as in the Dutch Whistleblowers Authority. Based on their investigations, these Ombudsmen formulate recommendations to agencies, which the Dutch Whistleblowers Authority can do as well. These recommendations are often also sent to Ministers, which gives the recommendations authority.

Specific investigative agencies for whistleblowing cases in other countries are the Anti-Corruption and Civil Rights Commission (ACRC) in the Republic of Korea and the Office of Special Counsel (OSC) in the USA (in addition to the SEC which has already been discussed in 4.1.1). The ACRC has been installed for public and private employees who report.<sup>42</sup> Like the Australian Commonwealth Ombudsman it is mainly preoccupied with triaging the received whistleblower concerns and referring these to the appropriate regulators for investigation. It makes recommendations, based on these investigations, and does follow-ups, something the Dutch Whistleblowers Authority can do as well. Whistleblowers can request the ACRC to investigate retaliation. The investigative task of the OSC is limited to alleged retaliation against whistleblowers in the federal public sector.<sup>43</sup>

Overall, the legal competences of the investigative agencies mentioned above are comparable to the competences of the Dutch Whistleblowers Authority, and include access to all information available in

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<sup>37</sup> The Australian Commonwealth Ombudsman can conduct alleged wrongdoing investigations itself, or (as it often does) refer it to the department where the alleged wrongdoing is taking place for investigation. On its own current interpretation of the legislation, the Ombudsman cannot investigate retaliation against whistleblowers, and will only investigate whether agencies applied the procedural requirements of the PID Act in dealing with the disclosure. Whistleblowers who are retaliated against can often only go to court to claim compensation or corrective action.

<sup>38</sup> In France, the recent whistleblowing law (2016) gives authority to the Ombudsman. However, the executive decree implementing these new tasks for the ombudsperson had not been signed when at the time of writing this report (July 2018).

<sup>39</sup> As explained above, the Ombudsman is in Israel part the State Comptroller, and both have tasks concerning whistleblowing.

<sup>40</sup> See Part III, country file for USA.

<sup>41</sup> In Belgium, there is an Ombudsman at the Federal, Walloon and the Flemish level. The federal and Flemish level are both analyzed in this study, because both of them have responsibilities in whistleblowing cases brought on by public employees in the respective governments.

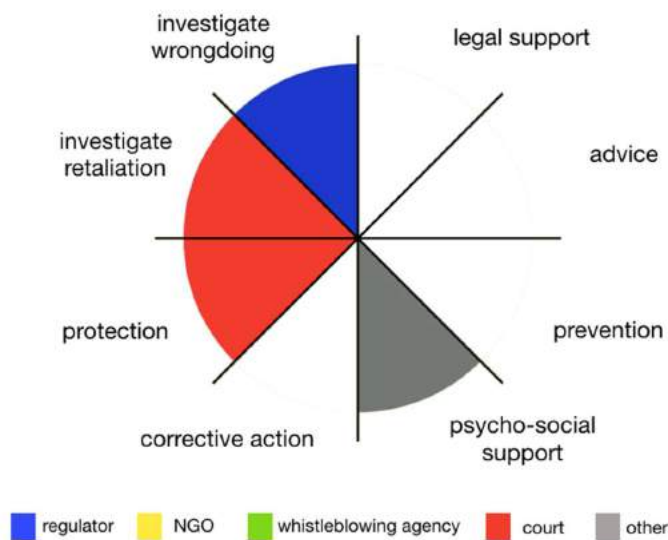
<sup>42</sup> See Part III, country file for Republic of Korea.

<sup>43</sup> See Part III, country file for USA.



documents (and sometimes also electronic devices), inspection and interviewing witnesses who in most countries are obligated to pro-actively provide information they have or are aware of. Agencies in which these witnesses are employed are often also required to make witnesses available to be interviewed by investigators. Some USA agencies have additional competences, such as the OSC that has subpoena powers and the SEC that can use surveillance tactics.

In Ireland and the UK no dedicated whistleblowing agency has been established.<sup>44</sup> In both countries the law does provide a list of prescribed persons that receive reports and investigate alleged wrongdoing. A recent audit (in 2015) by the National Audit Office in the UK, however, showed that staff working for these ‘prescribed person’ bodies often were unaware they were mandated as a recipient of whistleblower concerns. In Ireland, there is no information available as to how pro-active these regulating bodies have become with regard to whistleblowing since 2014. In countries where there is no investigative agency (Ireland, Israel private sector, Norway, Serbia) or only a weak one (Australia), whistleblower protection is only accessible through court. In the absence of NGOs who provide advice or legal support, like in Norway (see Figure 7), undergoing a court procedure is considered very difficult.



**Figure 7. Institutional landscape in Norway concerning whistleblowing**

Also in the USA, federal whistleblowers who believe they have experienced Prohibited Personnel Practices (PPP) – in which retaliation against whistleblowers is explicitly mentioned – can appeal to the

<sup>44</sup> See Part III, country files for Ireland and UK.



court-like government agency the Merit Systems Protection Board (MSPB), which however received severe criticisms from GAP and our interviewees.<sup>45</sup>

#### **4.2.2. Advice**

The three main tasks of the Advice department of the Dutch Whistleblowers Authority are 1) informing (possible) whistleblowers about the procedure and potential risks of being a whistleblower, 2) giving assistance to whistleblowers before and during the investigation (including practical help like writing letters to employers), and 3) providing legal advice during the reporting procedure while not representing whistleblowers in court. In the selected countries where whistleblowing agencies have an advisory task, it is often limited to the first of these three tasks, in which whistleblowers can get information about the procedure (Australia, Belgium, Israel) and/or would-be whistleblowers are advised about their decision to report (Belgium, Israel).<sup>46</sup> Hence, these services do not resemble the continuing support through the entire investigation provided by the Dutch Whistleblowers Authority. The comprehensive advice offered in the Netherlands can more easily be compared to the support and legal assistance by NGOs, although these organisations often also provide legal counseling and representation in court, which the Dutch Whistleblowers Authority does not.

The roles of GAP (USA) and Pistoljka (Serbia) were already discussed in 4.1.1 above. In Ireland, the UK and the Republic of Korea, there are also NGOs that advise (would-be) whistleblowers in different ways.<sup>47</sup> In Ireland, there are two ‘spin-off organisations’ of Transparency International (TI). First, the Transparency Legal Advice Centre (TLAC) provides advice about the whistleblowing legislation, as well as specific legal advice for whistleblowers who intend to take their case further, including 30 hours of free legal advice per whistleblower. TLAC has legal privilege. Second, Integrity@Work provides advice to whistleblowers on how best to raise concerns internally, as well as when and how to blow the whistle outside their organisation. Integrity@Work also takes up an advocacy role by monitoring whistleblower experiences. The role of these NGOs strengthens the judicial position of whistleblowers in Ireland (see Figure 8), which might make them less vulnerable than, for example, in Norway (see Figure 7). In the UK, the NGO ‘Public Concern at Work’ (since 1993) has legal privilege and gives free advice to whistleblowers with regard to raising concerns internally, when and how to blow the whistle externally, and PIDA. Also, the previously mentioned WhistleblowersUK provides advice to whistleblowers. Lastly, in the Republic of Korea, the People’s Solidarity for Participatory Democracy

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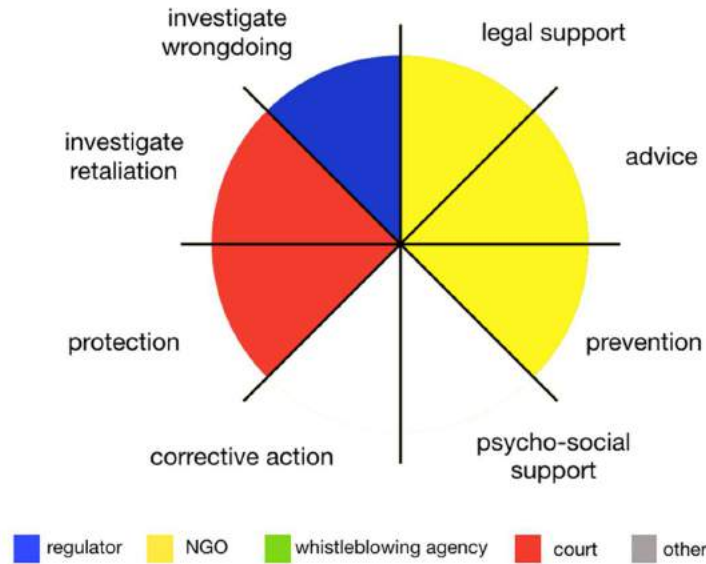
<sup>45</sup> See Part III, country file for USA.

<sup>46</sup> See Part III, country files for Australia, Belgium and Israel.

<sup>47</sup> See Part III, country files for Ireland, UK and Republic of Korea.



and the Horuragi Foundation coordinate information sharing among whistleblowers, organise social events with whistleblowers and their families, provide financial aid (living expenses to ten whistleblowers), and legal aid (through lawyers who work on a voluntary basis).



**Figure 8. Institutional landscape in Ireland concerning whistleblowing**

#### 4.2.3. Prevention

The tasks of the Prevention department of the Dutch Whistleblowers Authority include 1) direct contact with employers and professionals to inform them about integrity management to prevent organisational wrongdoing and about internal reporting procedures, 2) writing brochures and manuals about integrity management and reporting procedures, 3) developing instruments to measure organisational culture and integrity management efforts, and 4) conduct or fund research on various aspects of integrity management, and internal reporting in particular. The Prevention department follows an integral strategy, emphasizing the need to incorporate reporting procedures in a broad integrity management framework.<sup>48</sup> In four of the selected countries (UK, USA, Republic of Korea and Australia), governmental whistleblowing agencies have a somewhat comparable prevention task, in addition to their investigative and/or advisory tasks.<sup>49</sup> The scope of this prevention task is different in the four countries. In 2016, a whistleblowing agency specifically for the National Health Service (NHS) – ‘the

<sup>48</sup> See for instance (p.10): [https://huisvoorklokkenluiers.nl/wp-content/uploads/2018/07/HvK\\_Integrity-in-practice\\_Culture.pdf](https://huisvoorklokkenluiers.nl/wp-content/uploads/2018/07/HvK_Integrity-in-practice_Culture.pdf)

<sup>49</sup> See Part III, country files for Australia, Republic of Korea, UK, and USA.



National Guardian Office for the NHS' – was established in the UK. This was in response to two subsequent review reports led by Sir Robert Francis about whistleblowing culture in the NHS. The main function of this agency is enhancing and monitoring whistleblowing culture (which they refer to as speak-up culture) in the NHS Trusts. It provides awareness raising and training, and supports inter-visit between Guardians at Trust level. It analyzes speak-up culture in specific Trusts and publishes these evaluations in culture review reports, which include recommendations and requirements with a set deadline. The National Guardian is appointed by the health minister and publicly financed through the Care Quality Commission (CQC), which is a regulator for the health sector. Some see this as a reason to question its independence. There are huge expectations within the whistleblowing community with regard to the National Guardian for the NHS, and many have already expressed their disappointment.

Government agencies in the other three countries also have prevention tasks, but these are not as comprehensive as those of the NHS Guardian. The Office of Special Counsel (OSC) in the USA trains agencies in implementing whistleblowing legislation and their responsibilities in it. The Australian Commonwealth Ombudsman organises programs to educate public officials in dealing with the PID Act, and to raise awareness among agencies and officials about the importance of whistleblowing protection. In the Republic of Korea, the ACRC organises initiatives to raise awareness and training with regard to anti-corruption and whistleblowing.

While in other countries (such as Belgium), the governmental whistleblowing agencies are not involved in prevention, there often are other government agencies with a focus on ethics management (and thus not whistleblowing specifically) that perform comparable tasks. The Belgian federal government, for example, has a Bureau for Public Service Ethics and Deontology that 1) organises workshops, trainings (e.g., for trusted persons) and seminars on integrity management in federal departments, 2) functions as a knowledge center by collecting good practices of ethics management and informing departments about it, and 3) provides policy advice to the federal government based on developments abroad (e.g., OECD, UN, Council of Europe) and to specific departments (often in the Federal Service of Finances). In Flanders, the integrity coordinator and the Virtual Bureau (consisting of different stakeholders in the Flemish government) have comparable tasks.<sup>50</sup> In the Netherlands, the Bureau of Integrity Promotion Public Sector (*Bureau Integriteitsbevordering Openbare Sector* or *BIOS*<sup>51</sup>) did some of these tasks in the past, but has in 2016 been integrated within the Dutch Whistleblowers Authority.

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<sup>50</sup> See Part III, country file for Belgium.

<sup>51</sup> See: <http://www.integriteitoverheid.nl>



Also NGOs often play an important role in such prevention tasks. The previously described NGOs GAP in the USA and Pistaljka in Serbia (see 3.1.1) consider training, providing advice to agencies and operating as a knowledge center an important part of their work. Integrity@Work in Ireland also provides training and advice to organisations on how to operate internal whistleblowing arrangements, as well as Public Concern at Work in the UK.

#### **4.2.4. Staff and case load**

While the comparison between the Dutch Whistleblowers Authority and selected foreign agencies in the previous paragraphs focused on tasks and their level of independence, this section looks at the number of people these agencies employ and the case load they deal with. It is important to analyze whether the studied agencies are comparable to the Dutch Whistleblowers Authority in personnel capacity to determine whether experiences in these agencies are useful for the Netherlands.

Table 2 gives an overview of the staff members (in FTE) employed in specific whistleblowing agencies (either government or NGO) of which relevant information was available<sup>52</sup>, and does thus not include other actors that have a more general task in for example promoting ethics management. The table shows that in terms of FTE, the Netherlands is most comparable to the NGO Pistaljka in Serbia. In most other countries where the whistleblowing agency is a government agency (Belgium, France and Israel) less than half the amount of employees deal with whistleblowing cases. An important remark for countries where the whistleblowing agency is the Ombudsman (Belgium, France and Israel) is that it is reserved for public employees only, whereas the Dutch Whistleblowers Authority deals with public and private whistleblowing cases.

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<sup>52</sup> See Part III, country files for Belgium, France, Israel, Serbia and USA.

**Table 2. Staff (FTE) in whistleblowing agencies in Netherlands and selected<sup>53</sup> countries**

	<b>Staff for advice, investigation, prevention and/or psychosocial support</b>
<i>Belgium: Flemish Ombudsman</i>	< 1 FTE for advice and investigation <sup>54</sup>
<i>Belgium: federal Ombudsman</i>	3 FTE for advice and investigation
<i>France: Ombudsman</i>	4 FTE planned for advice and investigation
<i>Netherlands</i>	5 FTE for advice; 4 FTE for investigation; 3 FTE for prevention; 1 FTE for psychosocial support
<i>Israel</i>	6 FTE for advice and investigation (State Comptroller & Ombudsman); 1 FTE for psychosocial support (Ombudsman)
<i>Serbia: NGO Pitaljka</i>	7 FTE for advice and psychosocial support; 7 FTE for investigation and prevention
<i>USA: NGO GAP<sup>55</sup></i>	23 FTE for advice, investigation and prevention

In addition to personnel capacity, it is important to compare the case load of the various agencies, which is shown in Table 3 below. Focus is on reports that were sent to an investigative department. The numbers do thus not include all the whistleblowers with whom the agency has been in contact, given the difficulty to compare such numbers that include both brief calls for information and long conversations with whistleblowers who ask advice about their decision to report. The table particularly shows how many reports are received, and how many investigations are started on average a year, or (for the Netherlands) in 2017.

The table shows huge differences between countries like the USA, the UK and the Republic of Korea with a few thousands reports to investigative agencies, on the one hand, and other countries like Belgium and the Netherlands with less than 25 reports a year, and Israel and Australia with 60-65 reports a year. Taking into account that in Australia state governments deal with large areas of public administration like public health, it is striking that the Commonwealth Ombudsman only received 60 reports, of which most are referred to other agencies for investigation. Most federal public sector whistleblowers in Australia report directly to their own agencies, which may also be true elsewhere, but

<sup>53</sup> Only those countries are shown in which we have information about staff that is particularly available for whistleblowing cases.

<sup>54</sup> An important remark is that most wrongdoing investigations in the Flemish government are conducted by Audit Flanders. The case load of this agency is, however, not included in this table, because those who report to this Internal Audit Agency are not considered whistleblowers under the Flemish legislation. See part III, country file for Belgium.

<sup>55</sup> GAP: Government Accountability Project (NGO, available for all types of USA whistleblowers)



it is a concern that the outcomes of these are unknown. In the Republic of Korea, there is a clear difference between public and private sector reports that were referred to investigative agencies (namely 4.7% versus 62%), for which we have no explanation.

**Table 3. Reports of wrongdoing received and investigations (yearly average or 2017) by whistleblowing agencies in the Netherlands and selected countries**

	Reports received	Investigation (including unfinished)
<i>Australia</i>		
• <i>All Commonwealth agencies</i>	684	<i>No information available</i>
• <i>Federal Ombudsman</i>	60	17 (own investigation) 23 (referred to reporter's agency)
<i>Belgium (Flanders)</i>	5	2
<i>Belgium (federal)</i>	21	8
<i>Israel</i>	65	29
<i>Netherlands</i> <sup>56</sup>	19	7
<i>Republic of Korea</i>	3.758 (public sector) 2.611 (private sector)	126 (referred to investigative agencies) 1.592 (referred to investigative agencies)
<i>UK</i>		
• <i>Care Quality Commission</i>	7.433	<i>No information available</i>
• <i>FCA</i> <sup>57</sup>	900	
<i>US</i>		
• <i>SEC</i> <sup>58</sup>	3.142	<i>No information available</i>
• <i>GAP</i> <sup>59</sup>	258	

<sup>56</sup> For the Netherlands, the (requests for) investigations in 2017 are shown, because the agency was established mid-2016.

<sup>57</sup> FCA: Financial Conduct Authority

<sup>58</sup> SEC: Securities Exchange Commission

<sup>59</sup> GAP: Government Accountability Project





## 5. WHISTLEBLOWER PROTECTION AND INCENTIVES

This section compares the protection provided by the Dutch Whistleblowers Authority and Act with the protection offered in the selected countries. Various aspects of protection will be discussed. First, the scope of protection is analyzed, both in terms of type(s) of reporting and type(s) of retaliation. Second, procedural aspects of protection are discussed, focusing on confidentiality of the whistleblower's identity and burden of proof. The third paragraph describes the remedies that are available when retaliation has occurred, and possible disciplinary actions that can be taken against those who have retaliated against whistleblowers. Lastly, alternative ways of protection, such as mediation and financial rewards are discussed.

### 5.1. Scope of protection

The Dutch whistleblower protection law offers protection for whistleblowers who have reported wrongdoings in the public interest and followed the proper reporting procedure, which implies first internal reporting (first tier), then external reporting to the authorized agency (if there is any) (second tier), and only if no appropriate action has been taken can the whistleblower report to the Dutch Whistleblowers Authority. Only in situations in which internal reporting is not reasonable (e.g., imminent danger or management involved in wrongdoing), immediate external reporting is considered acceptable. This part of the law is considered unclear and therefore creates legal uncertainty for whistleblowers. As discussed above, the lack of clarity is shown in the absence of 1) a clear definition of 'public interest', and 2) consequences for protection if whistleblowers do not follow procedure (e.g., because they thought there was an imminent danger while it was not the case, or not top management but only middle management was involved in the wrongdoing). While the 3-tiered model of protected disclosures (internal, regulator, wider) is one of the crucial dimensions in the Council of Europe Recommendation from 2014, the Netherlands is the only country in our sample that has post-2014 legislation that does not protect whistleblowing at the third tier (e.g., to the media). Whistleblowing to the media is – under certain conditions – a protected disclosure in Australia, France, Ireland, Norway, Serbia, the UK and the USA<sup>60</sup>, but not in the Netherlands. Only in Belgium, the scope of protection is smaller, because only external reporting to the Ombudsman is included in the law (and thus not internal reporting or external reporting to regulators). Moreover, protection can only be granted if the (federal or Flemish) Ombudsman finds the report admissible. In Ireland, on the other hand, a disclosure is assumed to be a protected disclosure until proven otherwise. The 'good faith' test in the Australian

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<sup>60</sup> Although whistleblowers are in the USA formally protected for whistleblowing to the media, in practice they are virtually unprotected according to one of our interviewees.



Corporations Act (private sector; as distinct from the public sector law being discussed above, which has no such test), and the French law – implying that disclosures have to be made in a disinterested manner – is considered to be an important barrier for whistleblowers. In Australia it is currently proposed to be removed.

While the Dutch law – like the Norwegian law – does not give a clear definition of the type(s) of retaliation or other actions (e.g., disciplinary measure) from which whistleblowers are protected, the legislation in most of the selected countries does. There is, however, a huge difference in the scope and the level of precision in which both retaliation and other actions are described, as shown in Table 4 below. Though the Australian Corporations Act (private sector) offers only protection for dismissal and legal liability, most other laws are broader (including also denial of bonus/promotion) and in some laws discrimination and harassment are explicitly mentioned (e.g., Public Interest Disclosure and Fair Work Acts in Australia; Ireland; Republic of Korea). The Serbian, Korean and federal law in Belgium stand out for being very specific about the areas in which damaging action may occur, which are in Belgium and Serbia indicative but not exhaustive. Probably to avoid using a list that is perceived as being exhaustive, legislation for public whistleblowers in the USA contains a more general definition of retaliation, as part of the Prohibited Personnel Practices.

**Table 4. Type(s) of retaliation whistleblowers are protected from in the selected countries**

Country	Types of retaliation from which whistleblowers are protected
<i>Australia</i>	<p><u>PID Act</u>: protection from <b>legal liability</b>, <b>contractual remedies</b>, privilege from defamation, <b>reprisals</b> (including dismissal, alteration of position, discrimination)</p> <p><u>Fair Work (Registered Organisations) Act</u>: protection from <b>liability</b>, <b>contractual remedies</b>, <b>privilege from defamation</b>, <b>reprisals</b> (including dismissal, injury, alteration of position, discrimination, harassment, harm like psychological harm, damage to property or reputation)</p> <p><u>Corporations Act</u>: protection from <b>legal liability</b>, <b>contract termination</b></p>
<i>Belgium</i>	<p><u>Flemish law</u>: protection from <b>disciplinary sanction</b> linked to whistleblower, threat of <b>dismissal</b> or not receiving a <b>bonus or promotion</b></p> <p><u>Federal law</u>: protection from <b>retaliatory actions</b>, which include (threat of) dismissal, not extending a temporary contract or denying expected tenure; (not granting the permission for) translocation; disciplinary measure; measure of internal order; denying pay raise; denying chances of promotion; denying facilities other employees have; not granting leave; negative evaluation</p>
<i>Ireland</i>	<p>Protection against <b>dismissal</b>, <b>penalisation</b> (including suspension, lay-off or dismissal; demotion or loss of opportunity for promotion; transfer of duties, change of location of place work, reduction in wages or change in working hours; the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty); unfair treatment; coercion, intimidation or harassment; discrimination, disadvantage or unfair treatment; injury, damage or loss; threat of reprisal), provides <b>immunity from civil liability</b></p>
<i>Korea</i>	<p>Private sector law: <b>disadvantageous measures</b> are measures falling under any of the following items: (a) Dismissal, release from office, discharge, or other disadvantageous measures against a person's social position equivalent to the loss of social position; (b) Disciplinary punishment, suspension from office, curtailment of salary, demotion, restrictions on advancement, or other unfair personnel measures; (c) Transference of position, transference of office, withholding duties, reassignment of duties, or other personnel measures against the intention of the person himself/herself; (d) Discrimination in performance evaluation, colleague evaluation, etc., and discriminative payment of wages, bonuses, etc. attendant thereon; (e) Cancellation of opportunities for self-development, such as education or training, restrictions on or removal of available resources, such as budgets or human resources, suspension of the use of or cancellation of qualifications for dealing with security information or classified information, or other discrimination or measures that have a negative effect on the working conditions, etc.; (f) Preparation of a list of persons subject to surveillance, or disclosure of such a list, bullying, violence or threatening language, or other acts that cause physical or mental harm; (g) An unjust inspection or investigation of duties, or disclosure of the result thereof; (h) Cancellation of approval or a permit, or other acts that give administrative disadvantage; (i) Cancellation of a commodity or service contract, or other measures that give economic disadvantage.</p>



Country	Types of retaliation from which whistleblowers are protected
<i>Serbia</i>	<b>Damaging action</b> is any action/omission in relation to whistleblowers which violates or infringes their rights or disadvantages them; this could occur in the following areas: hiring procedure: obtaining the status of an intern or volunteer; work outside of formal employment; education, training, or professional development; promotion at work, being evaluated, obtaining or losing a professional title; disciplinary measures and penalties; working conditions; termination of employment; salary and other forms of remuneration; share in the profits of the employer; disbursement of bonuses or incentivizing severance payments; allocation of duties or transfer to other positions; failing to take measures to provide protection from harassment by other persons; mandatory medical examinations or examinations to establish fitness for work
<i>UK</i>	PIDA is implemented through employment law, so the technical terms ‘ <b>unfair dismissal</b> ’ and ‘ <b>detriment short of dismissal</b> ’ are relevant. The latter is any negative treatment of an employee that has a significant negative physical or economic impact on them, and that results at least in part from them trying to exercise statutory employment rights, e.g., taking maternity leave, or making a protected disclosure.
<i>USA</i>	In the Prohibited Personnel Practices (PPP) <b>retaliation</b> against whistleblowers is defined as taking, failing to take, or threatening to take a personnel action because of an employee’s whistleblowing



## 5.2. Procedural aspects of protection

Two procedural aspects are very important in the protection of whistleblowers: confidentiality of the whistleblower's identity and the reversed burden of proof in alleged retaliation investigations. While the Dutch law does include the provision that the whistleblower's identity will not be made known to the employer without the whistleblower's agreement, the burden of proof lies with the whistleblower and thus weakens their position.

As for confidentiality, Belgium and the Republic of Korea have the same provision as the Dutch law, but some other laws have stronger guarantees for the confidentiality of the whistleblower, because 1) the confidentiality clause applies to any person working in an agency that receives reports (Norway), 2) revealing the whistleblower's identity is an offence (Australia, France) or 3) confidentiality even holds in court (Australian PID Act, Serbia).

The reversed burden of proof in alleged retaliation investigations is considered a best practice by international organisations.<sup>61</sup> It must be noted that the Dutch law is – like Israel and the UK – an exception in that it does not introduce a reversal of burden of proof. In Australia, the USA and Norway, the burden of proof lies (in USA and Norway partly) with the employee, but the position of whistleblowers in these countries is still stronger than in the Netherlands.

- In Australia, the employee only has to prove that whistleblowing was any of the reasons for the reprisal, which is easier than proving it was the substantial reason for the reprisal.
- In the USA, the whistleblower similarly needs to show that whistleblowing was a “contributing factor in the personnel action threatened, taken, or not taken” against him<sup>62</sup>, but the agency needs to demonstrate “by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing”, which is more difficult to achieve than the former.<sup>63</sup>

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<sup>61</sup> OECD (2011). *Study on whistleblower protection. Frameworks, compendium of best practices and guiding principles for legislation*; UNODC (2015). *Resource guide on good practices in the protection of reporting persons*.

<sup>62</sup> “You [whistleblower] may demonstrate that whistleblowing was a contributing factor by showing that the official taking the action knew about the whistleblowing and that the action occurred within a time period such that a reasonable person would conclude that the whistleblowing was a contributing factor in the personnel action.” (<https://www.mspb.gov>)

<sup>63</sup> See: <https://www.mspb.gov>; Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act.



- In Norway, there is a divided burden of proof in which the employee needs to prove that there was an act of retaliation (which is easy in the case of dismissal, but not in the case of harassment or bullying because there may be no witnesses available), and the employer needs to prove that the action against the employee was not linked to whistleblowing.

In Belgium, Ireland, France and the Republic of Korea burden of proof lies entirely with the employer, who must give proof that the actions were not linked to the act of whistleblowing. This means in practice that the employer needs to prove that there was a legitimate reason for the actions. While this is also the case in Serbia, the whistleblower has to make it probable that retaliation is the result of whistleblowing. Perhaps the Irish legislation tops the list. Under its legislation, a disclosure is assumed to qualify as a protected disclosure, unless it is proven not to be. This means that burden of proof is reversed on all qualifying dimensions.

### **5.3. Remedies and disciplinary measures in case of retaliation**

While the Dutch law provides that the Whistleblowers Authority can formulate recommendations on the basis of an alleged retaliation investigation, it does not specify what these may include. Legislation in the selected countries does refer to specific remedies which are available for whistleblowers or disciplinary measures that can be taken against those who have retaliated against them. Table 5 shows the remedies available for whistleblowers and the agencies that can provide them. In most countries, reinstatement and compensation for damages are provided. Interestingly, the Flemish Ombudsman can provide the remedy of voluntary transfer, which is – according to an interviewee – often considered more preferable for the whistleblower than remaining in his previous job. Although it sounds promising, it is not always easy to implement in practice, given the specificity of task description and expertise of Flemish government employees. In most countries, whistleblowers need to go to court to claim these remedies, which often results in a long procedure that may take several years. For that reason, the option of interim relief, implying that the current situation will remain the same until a case is decided (e.g., the dismissed whistleblower can stay in his position), that is available in France, Ireland, Serbia, UK and the USA, offers a strong protection for whistleblowers who may otherwise remain unemployed during the entire court procedure; an interviewee states that “it stops the bleeding for whistleblowers”. As for compensation, the WPEA in the USA follows the principle to ‘make whole’ damages, because it includes both direct processing and attorney costs, and compensation for emotional distress, unfairly unassigned bonuses or raises, and in the Republic of Korea a relief fund is available to compensate whistleblowers for the costs that they made. In some countries, disciplinary actions can be taken against those who retaliated against whistleblowers (France, Belgium, Israel and USA), which has in the USA recently led to a paradigm shift among employers from ‘nothing to lose’ to ‘retaliation is risky’.

**Table 5. Remedies for whistleblowers and agencies where they can be claimed**

	<b>Remedies for whistleblowers</b>	<b>Which agency?</b>
<i>Australia</i>	Public sector: apologies, reinstatement, injunction & compensation Corporations Act: compensation for reprisals that are criminal offenses Fair Work (Registered Organisations) Act: compensation, injunction, apologies and reinstatement	Court or Fair Work Commission Court Court
<i>Belgium (Flanders)</i>	Reinstatement, annulation of disciplinary measures, voluntary transfer, mediation	Whistleblowing agency (Ombudsman)
<i>France</i>	Mediation, damage compensation, reinstatement, interim relief	Court & whistleblowing agency (Ombudsman)
<i>Ireland</i>	Damage compensation, reinstatement, interim relief	Court
<i>Israel</i>	Reinstatement, corrective action, mediation	Court
<i>Norway</i>	Damage compensation, right to remain in post	Court
<i>Republic of Korea</i>	Reinstatement, damage compensation, annulation of disciplinary measures, financial rewards, mediation	Court
<i>Serbia</i>	Interim relief, reinstatement, damage compensation	Court
<i>UK</i>	Damage compensation, interim relief	Court (Employment Appeals Tribunal)
<i>USA</i>	WPA: corrective action, 'make whole damage', mediation, interim relief Dodd-Frank Act: damage compensation, financial rewards reinstatement	Whistleblowing agency, court & MSPB (only federal employees)

#### **5.4. Alternative ways of protection**

While the remedies and disciplinary actions that were discussed above can only offer protection for whistleblowers after alleged retaliation has been investigated and established, there are other ways in which whistleblowers can, at an earlier stage, find relief. Many interviewees in this study emphasized the importance of investing in such alternative ways of protection. Mediation and financial rewards are two examples that were often referred to. First, the Dutch Whistleblowers Authority sometimes try to seek reconciliation between employee and employer, although this is not a formal task of the Agency. Also in the Republic of Korea, Belgium (Flanders), Israel and France, either the ACRC (Republic of Korea) or the Ombudsman (other countries) mediate in employee-employer conflicts. Second, the



Dutch whistleblower protection law does not offer the possibility to grant awards to whistleblowers. Two interviewees explained that in their view rewards for whistleblowers offer an important protection after retaliation, and are particularly important for those whistleblowers who have been fired and are in a very vulnerable position during the long court procedures to claim whistleblower protection. In the selected countries, financial rewards are only provided in the USA<sup>64</sup> (e.g., Dodd-Frank Act) and the Republic of Korea<sup>65</sup>. In most of the selected countries, giving financial rewards is not considered appropriate (e.g., no cultural acceptance of rewarding whistleblowers) or feasible (e.g., no additional funds). The Financial Conduct Authority in the UK has, however, announced a review of its position on this. In Australia, a parliamentary committee has recommended a reward scheme.

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<sup>64</sup> In the USA, monetary awards can be granted to whistleblowers who have voluntarily provided original information that has led to an enforcement action that exceeds 1 million dollar. The reward varies between 10-30% of the monetary sanctions collected by the SEC, and whistleblowers need to contact the SEC to make a reward request. The SEC has discretion to decide whether or not the whistleblower is entitled to receive a reward.

<sup>65</sup> In the Republic of Korea, between 2012 and 2016 a total of 6.088 cases were managed: 614 were dismissed, 1.479 were concluded without reward, and 3.995 cases with reward. The total amount paid in rewards was KWR 2.63 billion. Estimated benefits incurred from these cases was KWR 13.9 billion.





## 6. DUTCH WHISTLEBLOWING PROVISIONS AND INTERNATIONAL LEGAL FRAMEWORKS

In addition to comparing the Dutch Whistleblowers Authority with government agencies and NGOs in other countries, and comparing the Dutch legislation to that of other countries, we also looked at how the Dutch whistleblowing provisions (i.e., both legislation and institutions) would hold vis-a-vis international frameworks, irrespective of what happens in other countries. To that end, we scored the Dutch whistleblowing provisions against the criteria used in six different frameworks. In what follows we explain for each framework why the Dutch provisions failed to score particular criteria, after which we give an overall evaluation of its strengths and weaknesses with regard to the international frameworks. It is important to note the method used here has a number of limitations: 1) we only did the screening for the Dutch whistleblowing provisions, and not for those in the other countries, thus, our screening does not allow any evaluation of the Netherlands in relation to the other countries; 2) the scoring is internally consistent but not externally validated, which means that we used the same scoring rules across the frameworks but we relied on our own expertise and knowledge to give a scoring; 3) for a number of criteria in the frameworks there was no clear information yet (e.g., case law) – in these cases we gave a low score because there was no evidence yet that the provisions would uphold the principle. Hence it is useful to understand the scoring as ‘probably too pessimistic’, and furthermore it is expected that other countries also will have a far from perfect score.

We nevertheless believe this screening exercise can be useful in light of the forthcoming EU Directive on whistleblower protection. The initial proposal of that Directive (Com(2018)218/973471) entails most of the principles on which the frameworks used for our screening are based. In addition, we expect the final wording of the EU Directive to remain within the principles of these frameworks.

The set of 33 criteria in Table 6 are comprised of the principles set forth in the Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers<sup>66</sup>, and the point of attention stipulated in the Resolution 2171 (2017) Parliamentary scrutiny over corruption: parliamentary cooperation with the investigative media.<sup>67</sup>

- We scored a criterion as 1 where the whistleblowing law included such provisions, or where this has proven to be the practice in the Netherlands (e.g., criterion 15).

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<sup>66</sup> Council of Europe (2014). *Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers.*

<sup>67</sup> Council of Europe (2017). *Resolution 2171. Parliamentary scrutiny over corruption: parliamentary cooperation with the investigative media.*



- We **gave a score of 0** for criteria 20-25 and 31-32 because such protections are not explicitly in the whistleblowing law, and there is no case law yet that suggests how courts will use information from the Dutch Whistleblowers Authority (advice given to whistleblower, or findings from investigations) to determine protection. We scored criterion 13 as 0 because the law remains awkwardly silent on whistleblowing to the media, even as a last resort.
- A **score of .5** was given on criterion 3: Art 1.h provides this but not at pre-contract stage. A score of .5 was given on criterion 4 as in the case of national security whistleblowing, the Dutch Whistleblowers Authority can only provide advice to a whistleblower. The law does not stipulate who can investigate such concerns.

**Table 6. Dutch whistleblowing provisions scores for Council of Europe criteria**

	<b>Short criterion</b>	<b>Score</b>
1	National framework should establish rules to protect rights and interest of whistleblowers	1
2	Scope of 'public interest'	1
	Wide understanding of working relationships	1
3	Covers individuals whose work-based relationship has ended, or those during a pre-contractual negotiation stage	0.5
4	Special scheme or rules applying to information relating to national security	0.5
5	Without prejudice to rules for the protection of legal and other professional privilege	1
6	Comprehensive and coherent approach to facilitating whistleblowing	1
7	Restrictions and exceptions should be no more than necessary	1
8	Ensure effective mechanisms for acting on public interest disclosures	1
9	Protection and remedies under rules of general law for those prejudiced by whistleblowing are retained	1
10	Employers cannot call on legal or contractual obligations to prevent or penalise someone from making a public interest disclosure	1
11	Foster an environment that encourages disclosure in an open matter	1
12	Clear channels are in place	1
13	Three tiers for whistleblowing	0
14	Encouragement for employers to put in place internal procedures	1
15	Workers to be consulted on internal procedures	1
16	Encouragement of internal whistleblowing or to regulatory bodies to be encouraged as general rule	1
17	Whistleblowers entitled to confidentiality	1
18	Prompt investigation	1
19	Whistleblower should be informed of action taken	1
20	Protection against retaliation of any form	0
21	Protection not to be lost on mistaken disclosures only	0
22	Entitlement to raise the fact that disclosure was made in accordance with national framework	0
23	Passing-by internal procedure may be taken into consideration when deciding on remedies	0
24	Burden of proof in detriment considerations is on employer	0
25	Interim relief should be available	0
26	National framework should be promoted widely	1
27	Confidential advice should be available (preferably free of charge)	1
28	Periodic assessments of the effectiveness of the national framework	1
29	Broad definition	1
30	Right to blow the whistle	1
31	Waive criminal liability	0
32	Penalise retaliation	0
33	Additional national channel with enquiry authority	1
	<b>73%</b>	<b>24</b>



The set of criteria in Table 7 are those set forth by the 2013 Transparency International guidelines for whistleblowing legislation.

- We **scored a criterion as 1** where the whistleblowing law included such provisions, or where this has proven to be the practice in the Netherlands (e.g., for criterion 25 we took composition of the board of the Dutch Whistleblowers Authority in consideration; for criteria 10 and 11 we assumed this to be general practice under Dutch law).
- Scores for 7, 16, 18, and 19 are consistent with reasons given for Table 7. With regard to criterion 23, we gave a **scoring of .5** because although there is dedicated legislation, it mainly establishes the Dutch Whistleblowers Authority yet relies on existing labour law for protection measures. This is also the reason why we gave a score of 0 for criterion 5.
- Criteria 20 and 28 **scored 0** because there is no case law yet which shows how the work of the Dutch Whistleblowers Authority is interpreted by the courts. Criteria 8, 13, and 22 scored 0 because there is no mention of either knowingly false reports, protection of family members, or rewards. Criterion 12 scored 0 because this does not seem possible within the Dutch provisions.

**Table 7. Dutch whistleblowing provisions scores for Transparency International criteria**

	<b>Short criterion</b>	<b>Score</b>
1	Scope of policy (public and private; safe and effective)	1
2	Broad definition of whistleblowing	1
3	Broad definition of whistleblower	1
4	Reasonable belief	1
5	Broad notion of retaliation	0
6	Confidentiality	1
7	Burden of proof on employer	0
8	Knowingly false not protected	0
9	Waiver of liability	1
10	Right to refuse participation in wrongdoing	1
11	Overrides loyalty oaths and gagging orders	1
12	Anonymity	0
13	Personal protection +family	0
14	Requirements for internal arrangements	1
15	2nd tier recipients	1
16	3rd tier recipients	0
17	Range of channels and advice	1
18	Special procedures for national security	0.5
19	Full range of remedies	0
20	Day in court	0
21	Whistleblower participation	1
22	Reward systems	0
23	Dedicated legislation	0.5
24	Publication of data	1
25	Involving multiple actors in review	1
26	Training	1
27	Independent authority	1
28	Penalty for retaliation and interference	0
29	Follow-up and reforms	1
	<b>62%</b>	<b>18</b>



The criteria in Table 8 are those set forth in the UNODC 2015 Recourse guide on good practices in the protection of reporting persons.

- We gave criterion 2 a **score of 0** because the Dutch whistleblowers law does not specify protection measures and it remains unclear how general labour law can provide for specific dynamics of whistleblowing. We also gave a score of 0 for criterion 10 as there is no case analysis available yet.
- In line with this, yet acknowledging the Dutch Whistleblowers Authority's potential to carry out investigations, and audit organisation's internal speak-up arrangements, we scored criteria 3 and 8 with a **.5 score**. We also gave criterion 12 a score of .5 because timely advice can turn out as a pro-active measure of protection.

**Table 8. Dutch whistleblowing provision scores for UNODC criteria**

	<b>Short criterion</b>	<b>Score</b>
1	Broad definition of whistleblower	1
2	Protective measures matching needs of whistleblower	0
3	Safe in law and clear in practice	0.5
4	Review of legal framework and institutional arrangements	1
5	Stakeholder consultation	1
6	Broad scope of protected disclosures	1
7	Range of channels	1
8	Protection of whistleblowers	0.5
9	Consider new technology and traditional communication methods to facilitate reporting	1
10	Protections include legal, procedural and organisational measures	0
11	Provide access to advice	1
12	Measures are both proactive and retrospective	0.5
13	Seek innovative ways to encourage reporting and make it more acceptable (honouring, thanking, rewarding)	1
14	Ensure authorities have appropriate mandate to receive, investigate and protect	1
15	Staff of competent authorities are trained	1
16	Authorities are protected from undue influence	1
17	Create an oversight authority	1
18	Periodically review	1
	<b>80%</b>	<b>14.5</b>



The criteria in Table 9 are those set forth in the OECD 2011 compendium of best practices and guidelines for whistleblowing legislation.

- We **scored** criteria 1 and 4 as **.5**, consistent with previous scoring.
- Criteria 3, 12, 13, 21 and 23 were **scored 0**, also consistent with previous scoring. Criteria 26 and 27 received a score of 0 as there is no case law available yet interpreting the Dutch whistleblowers legislation or the work of the Dutch Whistleblowers Authority. Criteria 14 and 15 are scored as 0 because the Dutch whistleblowers law remains silent on these, thereby creating legal uncertainty for those who raise a concern with reasonable belief that the information they have points to a wrongdoing but are mistaken, or for those who claim protection from retaliation against a whistleblower other than them, i.e., where the person retaliating makes a mistake in ‘guessing’ who the whistleblower is. These cases are not hypothetical. They happen. We scored criterion 19 as 0 because again, this is not mentioned in the Dutch whistleblowers law.



**Table 9. Dutch whistleblowing provision scores for OECD criteria**

	<b>Short criterion</b>	<b>Score</b>
1	Dedicated legislation	0.5
2	Requirement or strong encouragement for internal measures	1
3	Clear definition of scope of protected disclosures	0
4	National defense alternative channel	0.5
5	Broad definition of whistleblowers	1
6	Reasonable belief	1
7	Due process (e.g., confidentiality)	1
8	Protection from discriminatory or retaliatory personnel action	0.5
9	Protection from failure to take personnel actions (e.g., reinstatement, promotion)	0.5
10	Protection from harassment and threats	0.5
11	Protection against criminal and civil liability for whistleblowing	1
12	Availability of anonymous reporting	0
13	Burden of proof	0
14	Mistaken whistleblowing	0
15	Protection against mistaken retaliation	0
16	Internal + External disclosures	1
17	Establishing internal channels in public sector	1
18	Encouragement for companies to establish internal channels	1
19	Protection for disclosures directly to law enforcement authorities	0.5
20	Specific channels for national security or state secrets	1
21	Allows whistleblowing to media and civil society	0
22	Incentives to raise (through quick process, follow-up, etc.)	1
23	Positive reinforcements (incl. financial)	0
24	Info, advice and feedback to whistleblower	1
25	Appointment of an accountable whistleblower complaints body (investig + prosecuting)	1
26	Genuine day in court	0
27	Penalties for retaliation	0
28	Providing advice and monitor framework	1
29	Raise awareness	1
30	Training in public sector	1
31	Requirement that employers inform employees of their rights	1
	<b>61%</b>	<b>19</b>



The criteria in Table 10 are those set forth in an analysis of whistleblowing provisions in the G20 countries, made and published by Blueprint in 2015. The scoring rationale is consistent with previous scorings.

**Table 10. Dutch whistleblowing provision scores for Blueprint criteria**

	<b>Short criterion</b>	<b>Score</b>
1	Broad coverage of organisations	1
2	Broad definition of reportable wrongdoing	1
3	Broad definition of whistleblowers	1
4	Range of internal/ regulatory reporting channels	1
5	External reporting channels (third party/ public)	0
6	Thresholds for protection	0
7	Provision and protection for anonymous reporting	0
8	Confidentiality protected	1
9	Internal disclosures procedures required	1
10	Broad protections against retaliation	0
11	Comprehensive remedies for retaliation	0
12	Sanctions for retaliators	0
13	Oversight authority	1
14	Transparent use of legislation	1
	<b>57%</b>	<b>8</b>

What can we learn from this scoring exercise? The scorings presented in these tables depend on our own interpretations of the framework criteria and of the Dutch whistleblowing provisions. The scorings might be undervalued given that there are no indications yet of how the work of the Dutch Whistleblowers Authority might affect cases brought before the court or indeed the positive effect the Dutch Whistleblowers Authority might have before whistleblowers have to take their case to court.

A number of these scores might be improved when cases become available. However, this will depend not only on what the Dutch Whistleblowers Authority does, but also on case law from courts. The Dutch whistleblowers legislation makes only a limited number of amendments to labour law, otherwise assuming labour law is strong enough to work for the specific dynamics of whistleblower retaliation. One can question the validity of that assumption. The international frameworks, for example, include the criterion of reversing the burden of proof with regard to retaliation. Yet Dutch law makers did not find it necessary to specify this in the whistleblowing legislation.

However, it cannot be denied that the scorings are varied. Table 11 gives an overview of how the Dutch provision scores against these frameworks. On the one hand, the frameworks differ in the emphasis they



put on scope, strength and clarity of the protections. The Dutch law is mainly focused on advice and investigation rather than on protection. Whilst it has made its mark in terms of advice to whistleblowers, it is yet unclear how its investigations will provide clarity and security for whistleblowers and other stakeholders of whistleblowing concerns. In light of the frameworks used here, the weakness of the law remains its failure to strengthen protection. For most frameworks, the lack of clarity with regard to the reversal of burden of proof is an obvious missed opportunity. A further shortcoming is the absence of stipulations with regard to wider disclosures beyond regulators or the Dutch Whistleblowers Authority, e.g., to the media. In our opinion, the framework that carries the highest urgency is that of the OECD. This is the framework that – given OECD’s regular evaluation rounds – has some teeth, and on which the Dutch whistleblowing provisions score rather low.

We are under the impression that Dutch policy makers assume the Dutch labour law is robust enough, and courts have sufficient expertise to offer whistleblowers protection. It remains to be seen whether these assumptions hold. Depending on forthcoming court rulings, a score of 79% might be reached on the OECD criteria, if court rulings would allow the maximum score for criteria 8-10 (protection criteria), 13 (burden of proof), 14-15 (mistaken whistleblowing), and 26 (genuine day in court). This would also increase the scorings on the TI criteria to 72%, and on the Blueprint criteria to 78%. Although such an increase does not necessarily require a legislative amendment or a change to organisational mandates, it is worrying we have not seen these court cases yet, nor have we seen the Dutch Whistleblowers Authority play a significant role here.

If in addition, the national framework in the Netherlands would provide for whistleblower protection at the third tier (wider society including media), and legislation would provide for sanctions to those who retaliate against whistleblowers, the OECD score would further climb to 85%, the TI to 79%, and the Blueprint score to 93%. These additional increases do, however, imply significant legislative changes.

**Table 11. Scoring the Dutch whistleblowing provisions against international frameworks**

Framework	# criteria	Score
Council of Europe Recommendation 2014, expanded by the Parliamentary Resolution 2171	33	73%
Transparency International principles for whistleblowing legislation 2013	29	62%
United Nations Office on Drugs and Crime, good practices in the protection of reporting persons (2015)	18	80%
OECD 2011, guiding principles for whistleblowing legislation	31	61%
Blueprint 2015, G20 study on whistleblower protection	14	57%



## **PART III: WHISTLEBLOWING ARRANGEMENTS IN SELECTED COUNTRIES**

### **1. INTRODUCTION AND A NOTE ON INFOGRAPHICS**

This part describes the whistleblowing legislation and institutional landscape in the studied countries, focusing on several sub questions in each section. First, the cultural and legal context are described, after which the scope of the whistleblowing legislation is discussed with respect to type of wrongdoing that can be reported by whom (target group). The third part describes the relevant agencies and their tasks, and the final part focuses on whistleblowing protection mechanisms. For each of the countries infographics have been drawn. These infographics provide a visual aid to our discussion of the various dimensions of whistleblowing provisions. We readily acknowledge that these infographics imply a simplification of the uniqueness of provisions in each country. As such they offer a quick guide only. Some additional information is needed to understand these infographics:

- The pointed star shows the groups covered by the whistleblowing legislation: public and private sectors, employees, all working relationships, associated persons, or anyone.
- The circle diagram gives an indication of how services and tasks in relation to whistleblowing are institutionalized. Legal support, advice, training, psycho-social support are on the right hand side. Investigating wrongdoing, investigating retaliation, protection, and corrective action are on the left. Some of these services or tasks are performed by more than one type of organisation. Blue stands for regulator or enforcement agency. Red is where one needs to bring a case to court. Green stands for a whistleblowing agency, by which we mean an organisation especially created through legislation to provide services in relation to whistleblowing, or an existing government agency that is explicitly mandated through whistleblowing legislation to do so. Yellow stands for a non-governmental organisation (NGO). These are non-profit private initiatives. They may receive project-based or temporary partial funding from a government or from intergovernmental bodies. We have used grey for initiatives that do not fit either of the other categories.
- The investigative powers in the green box are those of the whistleblowing agency. In countries without whistleblowing agency, this is indicated in a blue box, in reference to regulators and enforcement agencies.
- The scope of wrongdoing covered by the whistleblowing legislation is provided in wording and represented by a black two-pointed arrow. The thickness of the arrow indicates our evaluation of the breadth of that scope.



- The black ‘remedies’ box presents some key remedies provided by the whistleblowing legislation, and whether these can be provided either by the whistleblowing agency (house) or through the court (hammer).
- Where we had these data we also provide an infographic depicting the number of known whistleblowing cases per annum and their breakdown.



## 2. AUSTRALIA<sup>68</sup>

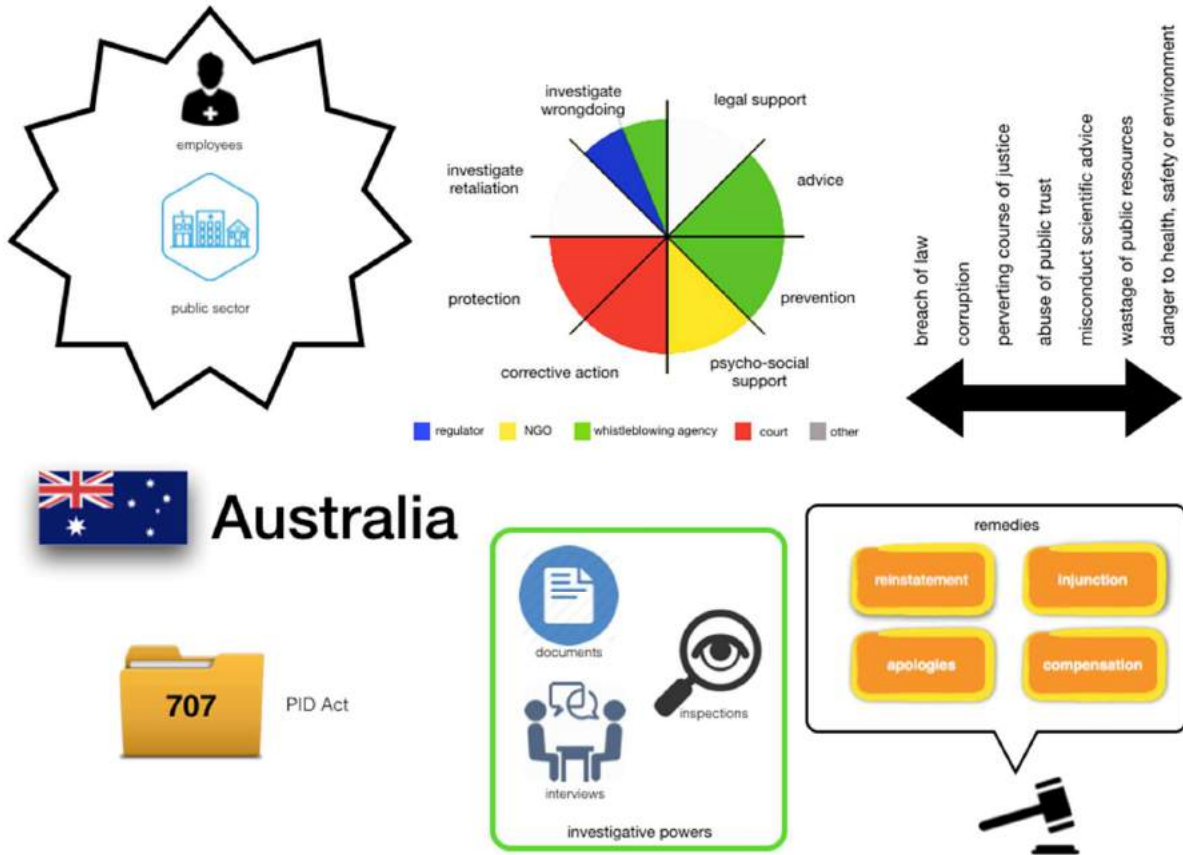


Figure 9: Infographics public sector whistleblowing arrangements in Australia<sup>69</sup>

<sup>68</sup> Given that for the private sector, no whistleblowing agency has been installed in Australia, the infographic showing the tasks of various institutions only applies to the Commonwealth Ombudsman, which is the whistleblowing agency for the Commonwealth public sector.

<sup>69</sup> We relied on 1 local respondent and the following documents:

Commonwealth Ombudsman (2017). *Annual Report 2016-2017*.

House of Representatives / The Senate (2017). *Exposure draft: Treasury Laws Amendment (Whistleblowers) Bill 2017*. Accessed on 22-01-18: [https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/supporting\\_documents/Exposure%20Draft.pdf](https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/supporting_documents/Exposure%20Draft.pdf)

Moss (2016). *Review of the Public Interest Disclosure Act 2013*. An independent statutory review conducted by Mr. Philip Moss A.M.

Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*.

Parliament of Australia (2017). *Treasure Laws Amendment (Whistleblowers) Bill 2017*. Accessed on 22-01-18: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=s1120](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1120)



## 2.1. Cultural and legal context

Given the complexity of the Australian government system with different whistleblowing arrangements in various states, in this study we focus on the federal legislation, being the Public Interest Disclosure Act or PID Act (2013) for public employees, the Fair Work (Registered Organisations) Act (2009) for employees or members of registered organisations (chiefly unions), and the Corporations Act (2004) for most private sector employees. An interviewee explains that while the legislation for public employees at the least looks good on paper, there is particularly no good protection for private sector employees. Therefore an expert advisory panel was appointed in October 2017 to assess the draft legislation ‘Treasury laws Amendment (Whistleblowers) Bill 2017’ against the recent report of the Parliamentary Joint Committee on Corporations and Financial Services about whistleblower protection offered by the three laws mentioned above. This report criticizes the fragmented and inconsistent nature of the legal framework in Australia “not only between various pieces of Commonwealth public and private sector whistleblower legislation, but also across the various pieces of legislation that apply to different parts of the private sector”.<sup>70</sup> Particularly for the PID Act, Philip Moss conducted a critical review showing that problems in the public sector are mostly linked to the machinery, the institutions that need to implement the law.<sup>71</sup>

Comparative research in various countries shows that there is a lot of cultural acceptance of whistleblowing in Australia. Many people perceive whistleblowing as positive, which is according to an interviewee probably linked to egalitarian views in Australia in the sense of people who blow the whistle 1) should not suffer from it, 2) are doing the right thing, and 3) are in a position they themselves could also be in. While the Moss Review (in 2016) states that a pro-disclosure culture has yet to be established within many public agencies, it has already changed in a positive way since the installation of the PID Act. The role of Australian unions in whistleblowing varies. In the public sector, unions are considered to be alert to members’ needs and to represent whistleblowers who suffered retaliation. They also investigate allegations against people made by whistleblowers. These unions often work in a professional way with ‘Chinese walls’ between their advisory role to whistleblowers and their investigative role to people against whom allegations have been made by whistleblowers. Some other unions, however, are not very much involved in whistleblowing, but systematic research about this topic still needs to be conducted.

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<sup>70</sup> Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*: ix

<sup>71</sup> Moss (2016). *Review of the Public Interest Disclosure Act 2013*. An independent statutory review conducted by Mr. Philip Moss A.M.



## 2.2. Definition of whistleblowing and target groups

The three whistleblowing protection laws provide protection to different target groups, and have different scopes in terms of the type of wrongdoing that can be reported as well as the type of whistleblowing that is covered in the legislation (e.g., internal or external reporting). The PID Act only protects public employees, both current or former, including employees of contractors and subcontractors. The Fair Work Act also protects current and former officers, but only those employees of registered organisations (chiefly trade unions, and only in relation to those organisations' wrongdoing), as well as its contractors. As for the private sector in general, the protection (in the Corporations Act) is limited to current officers and employees of companies and their contractors. The scope of wrongdoing that can be reported is broadest in the PID Act, and the scope of the Fair Work Act is broader than that of the Corporations Act (see Table 12 below).

**Table 12. Scope of wrongdoing that can be reported under three different laws**

Whistleblowing law	Scope of wrongdoing that can be reported
<i>PID Act (2013)</i>	Disclosures about the public sector, including: <ul style="list-style-type: none"> <li>• contraventions of Commonwealth, state, territory or foreign laws;</li> <li>• corruption or perverting course of justice;</li> <li>• abuse of public trust;</li> <li>• fabrication or misconduct relation to scientific advice;</li> <li>• wastage of public resources;</li> <li>• danger to health, safety or environment.</li> </ul>
<i>Fair Work Act (2009)</i>	Disclosures about registered companies: <ul style="list-style-type: none"> <li>• Contraventions of FWRO Act, Fair Work Act or the Competition and Consumer Act 2010;</li> <li>• offence against a law of the Commonwealth.</li> </ul>
<i>Corporations Act (2004)</i>	Disclosures about companies, about the contravention of a provision of the corporations legislation

The PID Act has the highest coverage for the types of whistleblowing that are covered, including protection for both internal reporting (to supervisor etc.), regulatory reporting (regulators, ombudsman, IGIS) and public reporting (to any person other than foreign public official with exception of intelligence), as well as for anonymous reporting. The Fair Work (Registered Organisations) Act only





covers protection for regulatory reporting, and for anonymous reporting. The Corporations Act only covers internal and regulatory reporting, and not anonymous reporting (although this is proposed to be reformed).

### **2.3. Whistleblowing agencies: tasks and institutional characteristics**

For the various laws, different agencies are installed, which will be described below. The first part will focus on whistleblowing agencies for public sector employees, mainly at the federal level but some examples at the state level will be referred to as well. Given the fragmented institutional landscape, whistleblowers in the public sector are being repeatedly referred from one body to another because it is not always clear which agency is authorized.<sup>72</sup> The second part focuses on institutions for private sector employees.

#### **2.3.1. Whistleblowing agencies for public sector employees**

##### *Investigation of wrongdoing and retaliation*

The Commonwealth Ombudsman, which is only accountable to Parliament, is the oversight body in the implementation of the PID Act. The Ombudsman can investigate reported wrongdoing, by using investigative competences like requiring a person or an agency to provide documents or other written records relevant to an investigation, requiring a person to attend a specified place and answer questions, examining witnesses on oath or affirmation and visiting agency premises to inspect documents. Whistleblowers can, however, also report to other agencies, and the Ombudsman often refers investigations back to the agencies reported about. The Ombudsman must be informed by these agencies of decisions not to investigate and may extend time limits for such investigations.<sup>73</sup> The Ombudsman can then investigate the administrative actions of these agencies, and if the conclusion is made that an agency has erred, the Ombudsman can make recommendations which are reported to the Prime Minister and to the Parliament if they are not implemented. Reports about fraud, criminal offenses or corruption are not within the jurisdiction of the Commonwealth Ombudsman. In such cases, the Ombudsman helps people to find their way in the system and refer the report to other agencies that do investigate this type of wrongdoing.

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<sup>72</sup> Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*.

<sup>73</sup> In 2016-2017, 684 disclosures were made to all Commonwealth agencies of which only 60 directly to the Ombudsman. Of these 60 disclosures, only 40 PID's were accepted and 23 of those were referred to the Agency concerned to be investigated. Furthermore, the Ombudsman received 34 complaints about how PID's were dealt with in agencies, and finalized 44 complaint investigations (Annual report Ombudsman, 2017).



Given the lack of investigative power the Ombudsman has been given and the lack of experience in employer-employee disputes, the parliamentary report raises the concern that whistleblowing protection should be taken away from the Commonwealth Ombudsman, and be moved to a new Whistleblower Protection Authority.<sup>74</sup> Moss (in 2016) suggests that other investigative agencies should be included in the PID Act, like the Merit Protection Commissioner and the Australian Public Service Commissioner. His review also criticizes the decentralized approach in the investigation of wrongdoing, implying that “the Principal Officer and Authorised Officer within each agency [are held] responsible for receiving, assessing, allocating, investigating and responding to each disclosure”, while some states have a centralized approach, which ensures consistent investigation of PID’s.<sup>75</sup> Another investigative agency under the PID Act is the Inspector-General of Intelligence and Security, which receives PID’s and can allocate a disclosure investigation to the agency that is reported about or conduct it itself.

The Ombudsman does not investigate retaliation against whistleblowers, but only investigates whether agencies applied the procedural requirements of the PID Act in dealing with the disclosure. Due to lack of legal clarity, there is a misconception about this among whistleblowers; most reporters falsely believe that an independent agency will investigate their retaliation complaint, while the Ombudsman in fact only returns it to the agency in which it took place.<sup>76</sup> Whistleblowers who are retaliated against can often only go to court to claim compensation or corrective action. At state level, anti-corruption agencies (e.g., The NSW Independent Commission of Corruption) also deal with retaliation cases by investigating them as criminal cases. No such cases have ever been won by whistleblowers, because it is difficult to persuade a court that the act of whistleblowing really led to retaliation.

#### *Advisory tasks*

The Ombudsman has an advisory task that is primarily aimed at public sector agencies and governments; it includes advice on processes that can be implemented concerning whistleblowing. Individual whistleblowers are not given support or counsel, but can ask for information about where to report wrongdoing. In addition, the Ombudsman organises programs to educate public officials in dealing with the PID Act and to raise awareness on the importance of whistleblowing protection among agencies and officials.<sup>77</sup>

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<sup>74</sup> Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*.

<sup>75</sup> Moss (2016). *Review of the Public Interest Disclosure Act 2013*. An independent statutory review conducted by Mr. Philip Moss A.M: 26.

<sup>76</sup> Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*.

<sup>77</sup> Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*.



At the state level, some agencies give advice and provide legal counselling to whistleblowers. There are important differences between states in the level of expertise in dealing with whistleblowing cases. Especially in NSW and Queensland, useful expertise has been developed. The NSW Ombudsman, for example, provides support and some legal counsel to whistleblowers, unlike the federal Ombudsman.

### *Psychosocial care*

There is no specific psychosocial care system for whistleblowers in Australia. Whistleblowers can get assistance from employer assistance services in the context of a workers' compensation claim, which is a general system of rehabilitation and support, which is often used in the case of bullying and stress. It focuses on individual injured persons, and does not meet specific needs whistleblowers have. An interviewee explains that whistleblowers have to 'play the victim' if they want this kind of support. In addition, whistleblowers sometimes get support from unions. NGOs are generally quite weak in Australia, but there are a few self-help groups for whistleblowers (e.g., Whistleblowers Australia). These NGOs, however, often do not have sufficient resources for assisting whistleblowers in a professional way.

### **2.3.2. Whistleblowing agencies for private sector employees**

Under the Fair Work (Registered Organisations) Act, the Registered Organisations Commission can conduct wrongdoing and retaliation investigations. The Parliamentary Joint Committee states that for this commission "[i]t is unclear whether tribunal function is available or whether matters can only be pursued through the courts".<sup>78</sup> The Fair Work Commission is the national workplace relations tribunal in Australia, to which whistleblowers can also take their case of alleged reprisal. However, the Parliamentary Joint Committee (in 2017) found that no whistleblower who has done so, or who has taken the case to court, has been successful yet. This can, according to the Parliamentary Joint Committee, be explained by "a manifest and systemic power imbalance in the Fair Work Commission or court process between the resources available to an individual and the resources available to a taxpayer-funded public sector agency or department".<sup>79</sup>

Under the Corporations Act, the Australian Securities and Investments Commission (ASIC) also has investigative powers. Built on the SEC model (see below), it has established an Office of the Whistleblower to advise whistleblowers and improve ASIC's relationship with them, but it has no powers to offer real protection. An interviewee states the agency has a bad reputation for not

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<sup>78</sup> Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*: 51.

<sup>79</sup> Parliamentary Joint Committee on Corporations and Financial Services (2017). *Whistleblower Protections*: 155.



communicating properly with its own whistleblowers, and that it lacks additional resources to provide protection to whistleblowers. In 2015-2016, 146 disclosures were made to ASIC, of which 80% led to no further action, either because of insufficient evidence (36%) or other investigations being underway (35%).

The Parliamentary Joint Committee concludes that there is a huge gap in whistleblower protection for the Australian private sector. The current discussion is whether an existing agency (e.g., Fair work agency) should be given powers to investigate and protect whistleblowers or a new independent agency should be installed which works closely with existing agencies. However, due to budgetary constraints, there is a lot of opposition against the idea of installing new institutions.

## **2.4. Whistleblower protection and incentives**

### ***2.4.1. Whistleblower protection in the public sector***

Under the PID Act, protection for the whistleblower includes protection from legal liability, contractual remedies, and privilege from defamation, as well as protection from reprisals, such as dismissal, alteration of position and discrimination. Retaliation against a whistleblower is an offense, for which there are no civil penalties but the retaliator can be held liable. Whistleblowers who have been retaliated are pushed back to the general grievance system of the agency concerned, which can conduct a code of conduct investigation. In theory, whistleblowers who were retaliated against can also go to court or to an employment appeal trial, but there is not much evidence that people actually do that. It is not clear why that is the case. The PID Act provides a broad set of remedies for whistleblowers who have been the victim of reprisals, including compensation (which a court can require from both individual reprisors and organisations), injunctions, apologies and reinstatement. This broad protection can, however, “have an adverse effect upon best practice conflict-management solutions that emphasise alternative dispute resolutions or merits review processes, rather than formal investigation”.<sup>80</sup> Moreover, an interviewee explains that more emphasis should be put on employers’ responsibilities for proactive protection by for example the installation of procedures that encourage safe whistleblowing.

An important downside of the legal protection is that the burden of proof lies with the employee. In the federal PID Act, and in civil compensation arrangements in some Australian states, the employee has to prove that whistleblowing was any of the reasons for the reprisal. However, in NSW the court has to be convinced by the employee that whistleblowing was the substantial reason for retaliation, which is

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<sup>80</sup> Moss (2016). *Review of the Public Interest Disclosure Act 2013*. An independent statutory review conducted by Mr. Philip Moss A.M: 30.



very hard. The Parliamentary Joint Committee (in 2017) even concludes that it is nearly impossible to protect whistleblowers from reprisals. Improving retaliation investigations (see above) and reversing the burden of proof to the employer, who would then have to prove that the reprisal was unrelated to the reporting act, would provide more protection for the whistleblower. This reversed onus of proof is considered a best practice by international organisations (OECD in 2011; UNODC in 2015). Positive in the PID Act is the guaranteed confidentiality of the whistleblower's identity, even in courts.

#### ***2.4.2. Whistleblower protection in the private sector***

For the private sector, legal protection for whistleblowers is weaker and unclear. The Corporations Act offers protection from legal liability and contract termination, and compensation is only granted for reprisals that are criminal offenses. The Fair Work (Registered Organisations) Act provides broader protection for the whistleblower, including protection from liability, contractual remedies, and privilege from defamation, as well as protection from reprisals, such as dismissal, injury, alteration of position, discrimination, harassment, harm like psychological harm and damage to property or reputation. Remedies include compensation, injunction, apologies and reinstatement. Like in the public sector, burden of proof lies with the employee in both laws.

A serious problem in the Corporations Act is the 'good faith test' in which the whistleblower's motive is under scrutiny, while the committee consider motives irrelevant in whistleblowing cases. This test was "originally inserted as a safeguard against vexatious claims" (Parliamentary Joint Committee, 2017: 74). The additional requirement that the whistleblower has reasonable grounds to suspect the wrongdoing occurred is considered a sufficient safeguard against false reports. Positive is also that revealing the identity of a whistleblower is an offense under the Corporations Act, which is unfortunately not the case in the Fair Work Act.



### 3. BELGIUM

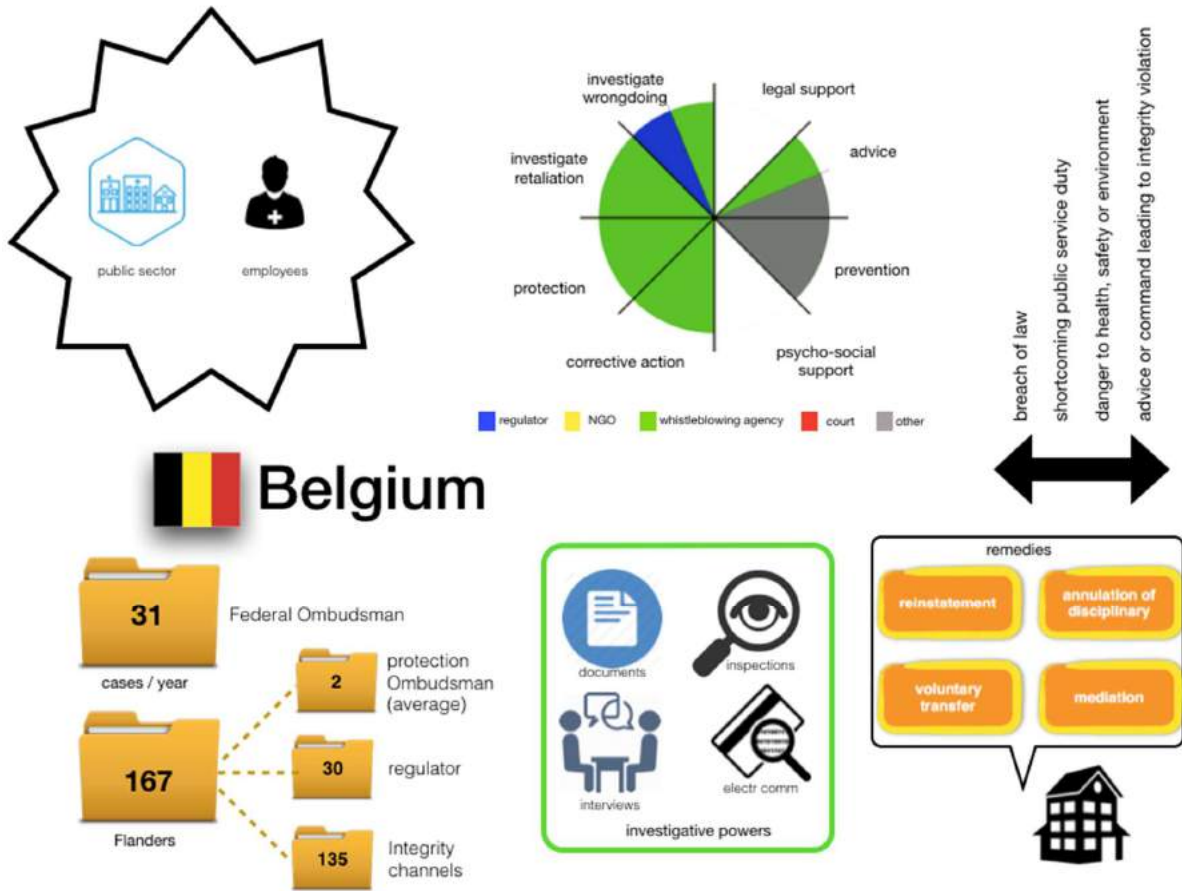


Figure 10. Infographics Belgian federal and Flemish public sector whistleblowing arrangements<sup>81</sup>

<sup>81</sup> We relied on 3 local respondents and the following documents:

Audit Vlaanderen (2016). *Jaarverslag van Audit Vlaanderen 2016*. Auditcomité van de lokale besturen  
Auditcomité van de Vlaamse administratie.

Belgisch Staatsblad (2013). *Wet van 15 september 2013 betreffende de melding van een veronderstelde integriteitsschending in de federale administratieve overheden door haar personeelsleden*. Gepubliceerd op 04.10.2013.

Belgisch Staatsblad (2014). *Koninklijk besluit van 9 oktober 2014 tot uitvoering van artikel 3, § 2 van de wet van 15 september 2013 betreffende de melding van een veronderstelde integriteitsschending in de federale administratieve overheden door haar personeelsleden*. Gepubliceerd op 12.11.2014.

Belgisch Staatsblad (2014). *Huishoudelijk reglement van de Vlaamse Ombudsdienst*. Gepubliceerd op 14.08.2014.

Federale Ombudsman (2016). *Jaarverslag 2016 van de federale Ombudsman*.



### 3.1. Cultural and legal context

Blowing the whistle is considered difficult in Belgium. Currently, only Flemish and federal public employees are protected by a specific whistleblowing protection law (respectively since 2004 and 2013); public employees have the duty to report criminal offenses (Criminal Proceedings, art. 29), and non-compliance can lead to a disciplinary sanction. Both within Flemish and federal government agencies, public managers are said to not encourage whistleblowing (e.g., speech Flemish Ombudsman in October 2016, and our interviews with employees of Flemish and federal whistleblowing agencies). Interviewees in whistleblowing agencies state that the number of public employees who blow the whistle is rather low, for which they have no clear explanation. As for the federal government, trade unions were not involved in drafting the whistleblowing protection law, but they were informed about it shortly after during a workshop by the Bureau. Many trade union representatives have successfully taken the role of trusted person. In the Flemish government, trade unions are involved when changes are made in the ethics code, but not often directly involved in specific whistleblowing cases. Whereas most trade union representatives appreciate the additional protection the whistleblowing protection law offers for employees who want to report wrongdoing, some are not yet convinced about the necessity of such a legal framework. In 2013, the Flemish whistleblowing protection law has been revised. Changes were based on experiences of the ombudsman, Audit Flanders and the integrity coordinator of the Flemish government with the implementation of the law. The federal law will probably be revised soon as well.

### 3.2. Definition of whistleblowing and target groups

Both the federal and Flemish whistleblowing law offer protection for public employees within the respective government agencies. Hence it does not include protection for employees of private organisations that implement public policy as a result of privatization. At the federal level, protection is in addition provided for employees who are involved in the investigation and employees who advise the whistleblower. The suggestion to apply the federal law to employees of the federal Police has been

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Vlaamse Ombudsdienst (2011). *Nota met aanbevelingen van de Vlaamse ombudsman over de klokkenluidersregeling.*

Vlaamse Ombudsdienst (2016). *Vlaams ombudsman over klokkenluiden en spreekrecht van ambtenaren.* Studiemiddag, georganiseerd naar aanleiding van de recente oprichting van het Huis voor Klokkenluiders, Den Haag.

Vlaamse Ombudsdienst (2016). *Jaarverslag van de Vlaamse Ombudsdienst 2016.*

Vlaamse Regering en Vlaamse Ombudsdienst (2014). *Protocol tot regeling van de bescherming van klokkenluiders.*





withdrawn. While local employees can report integrity violations to Audit Flanders (since 2014), they cannot report to the Flemish ombudsman, and can thus not be identified as genuine whistleblowers under the Flemish law.

Both laws have a broad definition of whistleblowing. At the federal level, employees can report on breaches of laws and other regulations (which is considered too broad and therefore unworkable in practice); dangers to health, safety or environment; shortcomings of public service duty; and advice or command leading to an integrity violation (Federal Whistleblowing Law, art. 2, 3<sup>rd</sup> paragraph). Also the Flemish law covers a broad array of topics on which employees can blow the whistle, although less clearly described than in the federal law, including negligence, abuses and offenses within the department one is employed (Decree of Ombudsman, art. 3, 2<sup>nd</sup> paragraph). The interviewees state that a broad definition of whistleblowing – thereby following both a legalistic approach (including violation of laws, decrees and regulations) and a value-based approach (including integrity violations as endangering health, safety of persons and environment) (Vande Walle & Hubeau, 2017: 242) – is preferable over a narrow definition, because it 1) lowers the threshold for reporting, 2) shows the importance of various types of integrity violations, and 3) allows employees of the ombudsman's office to make their own interpretation of the type of investigations they prefer to investigate. At both levels, bullying and discrimination are not included in the whistleblowing protection legislation, but regulated in separate regulations.

### **3.3. Whistleblowing agencies: tasks and institutional characteristics**

Both at the Flemish and federal government level, several agencies are involved in advisory, investigatory and policy tasks concerning whistleblowing (protection). This part will describe for both government levels, the specific tasks and institutional characteristics of these agencies, and if the information is available the type and number of cases they deal with. In addition, the most important challenges these agencies face will be identified.

#### ***3.3.1. Whistleblowing agencies in the Flemish government***

In the Flemish government, the Ombudsman has a central role in the identification and protection of whistleblowers and the investigation of wrongdoing they report. However, other agencies also play an important role (although not always formally regulated) in advising and supporting (potential) whistleblowers, investigating wrongdoing and formulating policy recommendations to departments. This sometimes leads to coordination problems between these various agencies (notwithstanding cooperation attempts in information-sharing and referral of case files), and employees not always being familiar with the role of each actor in the process.





### *Flemish Ombudsman*

The Flemish Ombudsman is the formal actor in whistleblowing protection and investigation, which seems to be a logical option given its independence, only being accountable to the Flemish parliament. While in practice Audit Flanders has a more important role in the investigation of wrongdoing reported by Flemish employees than the Ombudsman (as will be described below), this agency cannot offer protection for reporters as the Ombudsman can. The formal procedure is that Flemish public employees report internally first – either to their supervisor or to Audit Flanders if reporting to their supervisor is considered too difficult – and if no sufficient action is taken by the supervisor, they can report externally to the Flemish Ombudsman that can grant them a formal whistleblower status and offer protection. Some potential whistleblowers are in this phase advised to not become a whistleblower. On average the agency yearly receives four to six employee reports, of which on average two whistleblowers are protected (in total 20 whistleblowers were protected between 2006 and October 2016). If the protection procedure is not used, the Ombudsman can initiate a mediation procedure, or refer the employee to court or to other Flemish departments for conflict resolution and/or psychosocial care. Given that the Ombudsman's central goal is reconciliation between employer and employee, which is considered the best protection for the employee on the long term, the identity of the whistleblower is often made known to the involved department (with the consent of the reporter)<sup>82</sup> (Vande Walle & Hubeau, 2017).

The Ombudsman can conduct an investigation of wrongdoing, and has determined criteria on the basis of which the agency starts such an investigation, like the probability of reconciliation (which it can assess based on years of experience with whistleblowing and citizen complaint investigations) and extent to which the wrongdoing is more than an incident or personal issue.<sup>83</sup> The agency can also investigate possible retaliation whistleblowers experience. These two types of investigations are conducted simultaneously and intertwined. Investigations are done by 12 employees who are specialized in wrongdoing investigations, but less than one FTE is particularly used for whistleblowing cases. The other 300-400 cases are based on the 8.700 citizen reports the Ombudsman receives yearly. The investigators' legal competences include access to documents and information, request information of employees which must be provided, and request assistance of experts (Flemish Ombudsman law, art. 15). The Ombudsman can request the assistance of Audit Flanders, an agency with 17 years of experience in forensic auditing (see below).

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<sup>82</sup> Only since 2013 the Ombudsman can decide to keep the name of the whistleblower confidential for the head of department in which the investigation is conducted. This, however, complicates attempts for mediation between employer and employee.

<sup>83</sup> See: [http://www.vlaamseombudsdienst.be/ombs/nl/dienst/onze\\_werkwijze.html](http://www.vlaamseombudsdienst.be/ombs/nl/dienst/onze_werkwijze.html)



The Ombudsman informs the whistleblower if the case is considered inadmissible or unfounded. In the case of a judicial investigation, the Ombudsman only conducts a brief investigation in order to protect the involved employee. If wrongdoing is discovered, the Ombudsman can formulate recommendations to department heads, which may include requests to redraw wrongful measures taken against whistleblowers and requests to implement integrity policy measures. Non-compliance may lead to Ministers being informed.

#### *Integrity coordinator*

The integrity coordinator is often<sup>84</sup> the first person potential whistleblowers in the Flemish government turn to for advice, to report wrongdoing (15 reports a year) or to request information about the whistleblowing law and procedure (20 information requests a year). In conversations with potential whistleblowers, this person emphasizes her position (e.g., no professional confidentiality), and explains how the whistleblowing procedure operates in practice to manage the reporter's expectations (e.g., long procedure, which not always results in improved working conditions). Then she refers occupational health and well-being issues to the Department of Prevention and Protection and integrity concerns to Audit Flanders. Although this role as a contact person is important for potential whistleblowers, the central task of the coordinator is drafting policy recommendations concerning preventive ethics management, primarily for the Flemish government, but more and more also for local government departments (although that is officially not part of her role). In this role, the integrity coordinator participates in the Virtual Bureau Integrity<sup>85</sup>, founded in 2012, with members from for example Audit Flanders, Diversity Department, and the Department of Prevention and Protection. While the Ombudsman is no member of this integrity-hub initiative, the Bureau can refer cases to the Ombudsman.

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<sup>84</sup> Some potential whistleblowers report to Audit Flanders or the Flemish Ombudsman without consulting the integrity coordinator.

<sup>85</sup> More information: <https://overheid.vlaanderen.be/virtueel-bureau-integriteit>



### *Audit Flanders*

Audit Flanders is (since 2001<sup>86</sup>) the internal audit agency for Flemish and (since 2014) local government departments. It is part of the Ministry of Chancellery and Government, but does not have to give account to Ministers<sup>87</sup>, and is thus quite independent from the departments it investigates, which are part of other ministries. Audit Flanders has 45 employees of whom nine forensic auditors who are experienced in and trained to conduct investigations of wrongdoing. Most audits are planned on the basis of risk analyses (80%), while a smaller part is incident or complaint driven (20%), e.g., based on employee reports. Their legal competences include access to all relevant information and documents (both hard copy and electronically); access to buildings, rooms and installations in which Flemish or local government tasks are performed; request information from all personnel members which must be provided. They deal with 20-30 reports from Flemish employees a year and about 50 from local employees. As for Flemish employees, these reporters are either formally identified and protected whistleblowers (in the case the Ombudsman has requested the assistance of Audit Flanders) or not. After a pre-investigation in which Audit Flanders assesses the reliability of the information obtained during an intake with the reporter and other sources that can be consulted, Audit Flanders may conduct a forensic audit. During the investigation, strict measures of confidentiality are taken (e.g., only the investigator knows the reporter's identity, no information about the reporter is mentioned in the audit report), to make sure that the employee remains anonymous within his department and the Flemish government. In the exceptional case that the identity of the reporter is already known, Audit Flanders will advise the employee to contact the Ombudsman to request the whistleblowing statute. Anonymous reports are also dealt with, although most of these reports are not sufficiently documented to start a forensic audit. If wrongdoing is discovered, Audit Flanders formulates recommendations for the departments in which it occurred as part of the audit report. Although the internal audit agency cannot strictly enforce these recommendations, they are most often taken seriously by managers of these departments because the audit report about Flemish departments is also sent to their Minister and Minister-President, and compliance with these recommendations is taken into account in the evaluation procedure of managers within Flemish departments.

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<sup>86</sup> The Agency Audit Flanders was officially established in 2014, but this agency was preceded by the Agency of Internal Audit of the Flemish Administration, which was founded in 2001. Most auditors within Audit Flanders have approximately 15 years of audit experience.

<sup>87</sup> Because of logistic and budget reasons, Audit Flanders is in administrative terms part of the Ministry of Chancellery and Government, but only has to give account to two audit committees (one for the Flemish government and one for the local government), that for the most part consists of independent experts.



### *Other relevant actors in Flemish government*

Other actors that play a role in advising or protecting whistleblowers in the Flemish government are the following:

- Contact persons integrity in every department who inform potential reporters about procedures and agencies involved. In 2017, a professionalization trajectory has started to make them more familiar with integrity initiatives and the whistleblowing procedure.
- Reporting channel ‘Spreekbuis’<sup>88</sup> where employees can ask information about or report concerns on well-being at work and integrity<sup>89</sup>, after which questions are dispatched to the correct department. This reporting channel receives on average 90-100 calls (including 40 information requests and 50 reports of wrongdoing).
- Employee Assistance Program, which offers psychosocial assistance to all employees of the Flemish government, and thus not specifically for whistleblowers.
- Agency of government personnel<sup>90</sup>, which is since 2015 responsible for all HR topics including integrity management (e.g., ad hoc policy advice, organisation workshops and training).

### **3.3.2. Whistleblowing agencies in the federal government**

At the federal level, two agencies play an important role in dealing with whistleblowing cases, being the federal Ombudsman and the Bureau for Public Service Ethics and Deontology. In 2016 a draft Royal Decree has been approved to install a Federal Internal Audit (FIA) agency for the entire federal government in Belgium, which also exists at the Flemish government (see above). Although the FIA is already operational, it does not deal with whistleblowing cases yet.

#### *Federal Ombudsman*

Like in the Flemish government, internal reporting (to supervisor or trusted person) is the preferred first step for whistleblowers, but whistleblowers can also immediately report wrongdoing externally to the Center of Integrity, which is a department of the federal Ombudsman, an independent agency which is only accountable to Parliament. The formal procedure is that reporters submit a pre-advice request to the Ombudsman (some of whom have already discussed it with a trusted person) containing indications that an integrity violation occurred or will probably soon occur. In practice, a formal pre-advice request

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<sup>88</sup> More information: <https://overheid.vlaanderen.be/spreekbuis>

<sup>89</sup> An interviewee explained that ‘Spreekbuis’ is more experienced in dealing with well-being at work issues than in concerns about integrity.

<sup>90</sup> More information: <https://overheid.vlaanderen.be/agentschap-overheidspersoneel>



is often preceded by a reporter's informal request for advice or information about the whistleblowing procedure. When a formal pre-advice request results in a negative advice, the case will be considered inadmissible and no investigation will be initiated by the Ombudsman. When the advice is positive, the Centre of Integrity (CINT) of the Ombudsman is obligated to investigate the wrongdoing. CINT employs three investigators whose competences include the following: request information from all departments which are obliged to provide it; observation; interviews with witnesses; analysis of digital media. If criminal offense are reported or discovered (such as corruption), the case file is referred to the police. Results of the investigation and (policy) recommendations – which can be formulated even if no wrongdoing was found – are reported in the annual report of Ombudsman and communicated to the agency. Although compliance with these recommendations cannot be legally enforced, departments generally comply with the Ombudsman's advice because of the follow-up by the Ombudsman, and Ministers being informed.

In addition to the wrongdoing investigation, the Ombudsman can conduct a retaliation investigation, in which the burden of proof is on the defendant. We found no indications that any such investigation has already been done by the federal Ombudsman.

In 2016, the CINT dealt with 31 cases, including 10 information requests. Of the 21 reports of wrongdoing, 16 have resulted in a formal pre-advice request (11 of which were considered inadmissible). Compared to previous years, the number of information requests has decreased (probably because other sources of information, like trusted persons, are considered more effective), and a serious increase of pre-advice requests. The Centre has conducted eight investigations in 2016 of which six were finalized (in four wrongdoing was discovered), which is relatively high compared to previous years (two investigations in 2015 and none in 2014).

The information task, the pre-advice and the investigative tasks of CINT are conducted by the same people, which entail the risk of conflict of interest. However, because the advisory task (which only concerns the informal or formal pre-advice) ends when an investigation starts – and both tasks are thus not performed simultaneously – the risk is considered minimal. Moreover, most advice is given by trusted persons and the Bureau for Public Service Ethics and Deontology, which will be discussed below.

#### *Bureau for Public Service Ethics and Deontology*

Before reporting to the federal Ombudsman, federal employees can also request advice and information at the Federal Bureau for Public Service Ethics and Deontology, which is a department of three employees in the Federal Service of Policy and Support. When informal advice is requested, the Bureau explains the pros and cons of reporting, expected success, and refers bullying or discrimination concerns



to other reporting channels. This is important to determine whether the reporter is sure about his decision to be a whistleblower and to check whether other solutions are possible or necessary. In the informal phase, a potential reporter is sometimes referred to the prevention advisor for psychosocial assistance.

The main goal of the Bureau is the prevention of integrity violations, which they aim to achieve by the following activities:

- Organising workshops, trainings (e.g., for trusted persons) and seminars on integrity management in federal departments;
- Assisting trusted persons (e.g., network meetings);
- Functioning as a knowledge centre by collecting good practices of ethics management and informing departments about it;
- Providing policy advice to the federal government based on developments abroad (e.g., OECD, UN, CoE) and to specific departments (often in the Federal Service of Finances).

### **3.4. Whistleblower protection and incentives**

#### ***3.4.1. Flemish whistleblower protection***

Flemish government employees are protected when they have obtained the whistleblower status of the Flemish Ombudsman. During the protection period (which ends two years after the investigative report is published), the whistleblower can only be subjected to a disciplinary sanction or another measure if these are not related to the reporting of the wrongdoing. Ongoing disciplinary procedures are suspended until the Ombudsman has determined that there is no relationship with the act of reporting.<sup>91</sup> If the reporter has convinced the Ombudsman that such measures, like threat of dismissal or not receiving a bonus or promotion, were related to the whistleblowing, the Ombudsman will conduct a retaliation investigation in which the burden of proof is on the employer. If the Ombudsman establishes a relation between the measure and the act of reporting, he can request the department head to withdraw the measure. Employees can also be voluntarily transferred to another department, which sounds promising but not always easy to implement in practice (given the specificity of task description and expertise of Flemish employees). Obviously, this protection is merely a judicial safety net, which is only necessary when the identity of the reporter is known. Audit Flanders argues that reporters' best protection is their confidentiality in their department, which is the main reason for the far reaching confidentiality measures it takes towards reporters. The agency therefore operates according to the principle 'The

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<sup>91</sup> See: <https://overheid.vlaanderen.be/klokkenluidersregeling>



message is more important than the messenger'. As explained above, both the Ombudsman and Audit Flanders can formulate recommendations to prevent future wrongdoing, which cannot be enforced but are generally complied with because Ministers are informed about these recommendations.

#### ***3.4.2. Federal whistleblower protection***

The federal whistleblower law provides employees who have reported wrongdoing to the federal Ombudsman protection against retaliatory actions linked to the act of whistleblowing, if their report has been considered admissible. Retaliatory actions are defined very precisely in the law, but this list is not exhaustive:

- (threat of) dismissal, not extending a temporary contract or denying expected tenure;
- (not granting the permission for) translocation;
- disciplinary measure;
- measure of internal order;
- denying pay raise;
- denying chances of promotion;
- denying facilities other employees have;
- not granting leave;
- negative evaluation.

During the protection period, the reporter can bring charges against the federal department at the Ombudsman. The burden on proof is on the defendant, implying that the involved department must give proof that the actions were not linked to the act of whistleblowing. The protection period starts at the pre-advice request, and ends two years after the investigation has been finalized. During this period, the identity of the reporter is held confidentially, unless the reporter agrees that it is an 'open report'. Because this period is considered too short in practice, it will probably be changed in the revised law. Although the protection looks quite good on paper, it is not clear whether it also offers protection in practice. No information could be found about the existence of retaliatory actions, because no such investigation has already been conducted. This obviously does not necessarily mean that federal whistleblowers are never the victim of retaliation.



#### 4. FRANCE

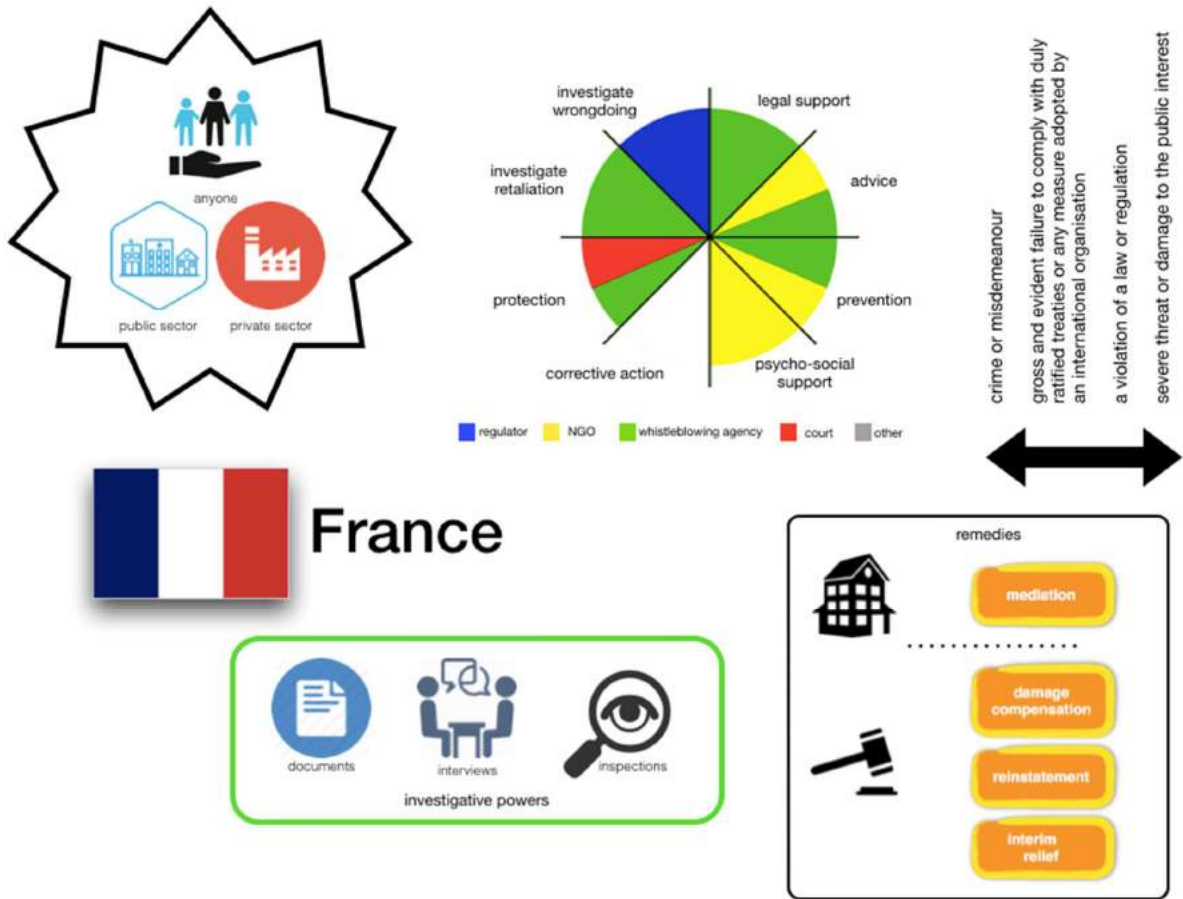


Figure 11. Infographics whistleblowing arrangements in France<sup>92</sup>

<sup>92</sup> We relied on 3 local respondents and the following documents:

Conseil d’Etat (2016). Le droit d’alerte: signaler, traiter, protéger. *Les études du Conseil d’Etat*. Conseil d’Etat.

DG Growth (2017). *Estimating the economic benefits of whistleblower protection in public procurement*. European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économiques*. Loi nr 2016-1691, 9 décembre 2016.

*Proposition de loi organique relative à la compétence du Défenseur des Droits pour l’orientation et la protection des lanceurs d’alerte*. Texte adopté nr 831, Assemblée Nationale, 8 novembre 2016.

Wolfe, S., Worth, M., Dreyfus, S. & Brown, A.J. (2015). *Breaking the silence. Strengths & weaknesses in G20 whistleblower protection laws*. Blueprint for Free Speech / University of Melbourne / Griffith University / Transparency International Australia.





#### **4.1. Cultural and legal context**

The attitude in France – at least of its policy makers – with regard to whistleblowing seems to have changed dramatically over the past two decades. When the Sarbanes-Oxley Act was passed in the USA, requiring all subsidiaries of companies publicly noted in the USA to have ‘confidential, anonymous hotlines’, the French CNIL (national agency for privacy and data protection) was vehemently against anonymous whistleblowing.

However, in 2004 a very limited whistleblower protection provision was included in the anti-corruption legislation. The following years, similar provisions with limited scope were added to other pieces of legislation in response to scandals in different sectors. This meant that by 2014, France’s whistleblower protection was scattered across many different pieces of legislation, each narrow in scope for specific sectors or specific types of wrongdoing (e.g., science, environment, health, corruption).

The Luxleaks case, in which a French citizen Alain Deltour is the whistleblower, galvanised the momentum for a legislative make-over in France on whistleblowing. Three NGOs (Transparency International France, *Fondation Sciences Citoyennes*, and Anticor) were driving forces behind this make-over. Based on the Luxleaks and other major whistleblower cases in France, these NGOs drafted a law proposal that – had it been in force when the whistleblowing happened – would have protected the whistleblowers in those high-profile cases. Their law proposal was not upheld, but elements were taken over in the bill that was eventually successful.

The Sapin II whistleblower legislation was passed in Parliament on 8 November 2016. With Sapin II, whistleblower protection is concentrated into one piece of legislation with a broad scope. It is nevertheless still ‘early days’ to see how effective the implementation of the new legislation is.

#### **4.2. Definition of whistleblowing and target groups**

According to the legislation, a whistleblower is a physical person that discloses or reports, in a disinterested manner, 1) a crime or misdemeanour, 2) a gross and evident failure to comply with duly ratified treaties or any measure adopted by an international organisation, 3) a violation of a law or regulation, 4) or a severe threat or damage to the public interest, of which he or she became personally aware.

The intention was for the whistleblowing legislation to cover both public and private sector, and to maintain a very broad scope as to types of working relationships it covered. According to the letter of the law it even applies to those who do not have any working relationship to the organisation they blow the whistle on.



### **4.3. Whistleblowing agencies: tasks and institutional characteristics**

The provision of help and advice to whistleblowers is incorporated into the law that established the ombudsperson – Défenseur des Droits – and expands the mandate of the ombudsperson to also include the investigation of retaliation against whistleblowers, and a ‘mission d’orientation’ which entails advising whistleblowers on which agency or regulator to raise their concern with. However, the executive decree implementing these new tasks for the ombudsperson had not been signed when at the time of writing this report (July 2018).

In France, the ombudsperson was established in 2008 and reports to Parliament. It is publicly funded. Its budget is €27 million per year. No additional funding will be allocated for the additional tasks in relation to whistleblowing, whilst the expected cost of these tasks is €2.8 million per year. Four FTE would be dedicated to these whistleblowing related tasks: 1 senior functionary, two lawyers, and one assistant. It is expected the ombudsperson will manage 400 incoming cases per year.

Since 2008, the ombudsperson has a mandate for four pillars of issues: citizen/state interactions, deontology of army and police, children rights, and discrimination. The ombudsperson did not want to add a fifth pillar to that. Hence, tasks in relation to whistleblowing are inscribed into the discrimination / unequal treatment pillar, in order to maintain the impartiality of the ombudsperson. However, the ombudsperson is entitled to side with someone in front of the court.

We noted earlier that it is ‘early days’ to assert the effectiveness of the new policy. No doubt the NGOs that drove the momentum will remain vigilant as to the functioning of the ombudsperson as well as regulators under the new scheme. These NGOs continue to provide advice and support for whistleblower, albeit on an ad hoc basis.

### **4.4. Whistleblowing protection and incentives**

The Sapin II whistleblower legislation was passed in Parliament on 8 November 2016. In December 2016 the Constitutional Court overruled one aspect, namely the financial support for whistleblowers. Nevertheless, the legislation does entail a number of strong elements. One of these is that organisations of more than 50 employees are required to have internal whistleblowing arrangements. There is robust confidentiality protection for whistleblowers in the sense that breaches of such confidentiality carry a sanction. Retaliation against a whistleblower also carries a sanction (personal liability).

There are also a number of limitations to the scope of protection. The legislation prescribes a 3-tiered route to qualify for protection: internal, regulator, public. Note that there is also a ‘good faith’ requirement – disclosures have to be made in a disinterested manner.



The ombudsperson has no binding sanctioning nor subpoena powers. It can, however, investigate based on requests to receive all information or relevant documents, and conduct on-site verifications. It can work to resolve a conflict by mutual agreement, by making recommendations, or through mediation. The ombudsperson can also file a brief in support of a civil or criminal proceeding, request disciplinary action against an office, or recommend that sanctions be taken against a wrongdoer. It can publish its report and recommendations. Although the courts are not obliged to follow the ombudsperson's recommendations, the ombudsperson has a strong reputation. Its opinion is deemed as important.



## 5. IRELAND

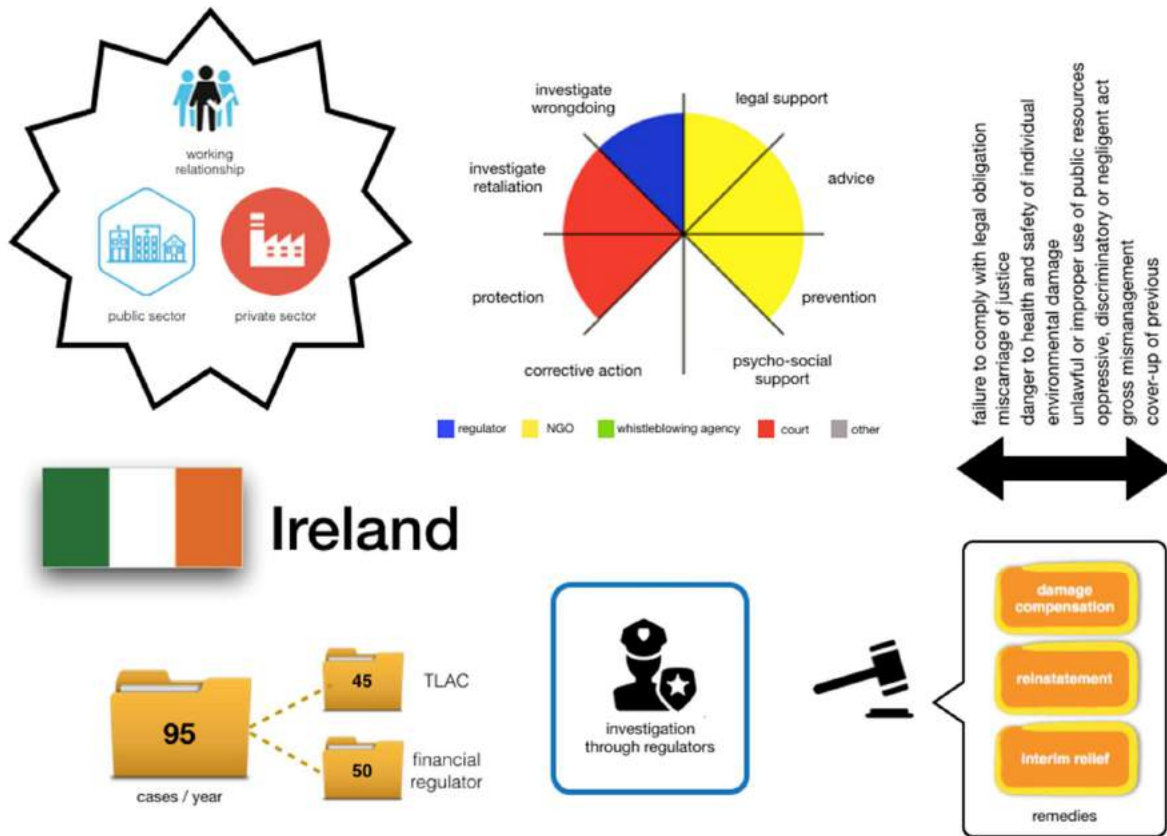


Figure 12. Infographics whistleblowing arrangements in Ireland<sup>93</sup>

### 5.1. Cultural and legal context

According to a recent survey (2017) the attitude of employers towards whistleblowing is extremely positive: 95% agrees it is in the interest of an organisation or industry sector for people to speak up, and

<sup>93</sup> We relied on 1 local respondent and the following documents:

Employment Rights Ireland (2017). *Employees getting interim relief orders under the Protected Disclosures Act 2014*. Accessed on 03-07-2018t: <https://employmentrightsireland.com/category/whistleblowing>.

Doherty, M., & Ryan, D. (2016). Whistleblowing: National Report for Ireland. In *Whistleblowing-A Comparative Study* (pp. 181-186). Springer.

*Protected Disclosures Act 2014*. Act of the Oireachtas 14-2014.

Transparency International Ireland (2017). *Speak Up report 2017*. TI Ireland.

Vandekerckhove, W. (2006). *Whistleblowing and organizational social responsibility: A global assessment*. Ashgate.



64% still encourage this where disclosure might harm the reputation of their organisation. Nevertheless, it took Ireland 16 years to enact whistleblowing legislation. Law proposals have been on and off the table since whistleblowing legislation was passed in the UK. The initial proposals mirrored the approach of the UK's Public Interest Disclosure Act. Subsequently, a more scattered approach was explored with proposals to include whistleblowing provisions in laws relating to specific sectors or types of wrongdoing. But it was Transparency International Ireland that created a political momentum for a unified and broad piece of whistleblowing legislation around a fraud scandal in the police force. This legislation was passed in 2014. It does take up elements of the UK PIDA (e.g., three tiers, and a list of 'prescribed persons' at the regulatory tier), but is far more progressive in terms of burden of proof and scope of working relations covered.

## **5.2. Definition of whistleblowing and target groups**

The legislation covers both public and private sector, and any kind of working relationship. An interesting feature of the legislation is that it prescribes who would be regarded as 'employer' for various kind of working relationships (e.g., agency workers or subcontracted workers).

Whistleblower disclosures are protected when they are about: 1) failure to comply with a legal obligation, 2) miscarriage of justice, 3) danger to health and safety of individual, 4) environmental damage, 5) unlawful or improper use of funds or resources of a public body, 6) oppressive, discriminatory or grossly negligent act or omission by or on behalf of a public body, or gross mismanagement, 7) cover-up of the previous.

## **5.3. Whistleblowing agencies: tasks and institutional characteristics**

The Irish whistleblowing legislation does not create a new whistleblowing agency, nor does it give specific mandates in relation to whistleblowing to an existing one. It does provide a list of 'prescribed persons' as second tier recipients. These and other public bodies are required to publish the number of protected disclosures made to them, as well as the actions taken in response to these disclosures, in their annual report.

Whistleblower protection is to be sought through court. Prescribed persons are mandated to receive whistleblower concern and investigate the alleged wrongdoing. There is no information available as to how pro-active these regulators have become with regard to whistleblowing since 2014.

Transparency International Ireland performs watchdog function on the effectiveness of the implementation of the legislation. It has also created two 'spin-off' organisations to provide specific services in relation to whistleblowing: the Transparency Legal Advice Centre (TLAC) and Integrity@Work.



TLAC provides advice about the whistleblowing legislation as well as specific legal advice for whistleblowers who intend to take their case further (30 hours of free legal advice per whistleblower). TLAC has legal privilege. TLAC's core funding is provided by Transparency International Ireland, and receives additional funding from the Department of Public Expenditure and Reform (DPER). Further funds have been granted by the Public Interest Law Support Fund.

Integrity@Work provides training and advice to organisations on how to operate internal whistleblowing arrangements, and provides advice to whistleblowers on how best to raise concerns internally, as well as when and how to blow the whistle outside their organisation. Integrity@Work also takes up an advocacy role by monitoring whistleblower experiences. It does not do mediation. Integrity@Work runs on a membership scheme model. Depending on their size, member organisations pay €500 - €5.000 per annum. In the start-up phase, Integrity@Work also received a grant from the Ministry of Public Expenditure and Reform. Its current budget is €500.000, but it would need a €1 million per year budget to remain sustainable.

TLAC managed 45 whistleblower cases in 2016. The financial regulator (Central Bank of Ireland) managed 49 cases in 2015, 50 in 2016, and 40 in the first five months of 2017.

#### **5.4. Whistleblowing protection and incentives**

Public bodies are required to have internal whistleblowing arrangements. Protection has to be sought through court, and the legislation includes specific provisions to make interim relief a realistic possibility. The law stipulates that disclosures will be regarded as protected disclosures under the legislation unless proven differently. Hence, the reversal of burden of proof is explicit and applies not only to retaliation, but also to appropriateness of whistleblowing recipient, type of wrongdoing, and public interest. The legislation prescribes a three tiered model. A 'reasonable belief' test applies to all considerations.

The law foresees protection against dismissal and penalisation, and provides immunity from civil liability. Penalisation includes:

- suspension, lay-off or dismissal;
- demotion or loss of opportunity for promotion;
- transfer of duties, change of location of place work, reduction in wages or change in working hours;
- the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty);
- unfair treatment;



- coercion, intimidation or harassment;
- discrimination, disadvantage or unfair treatment;
- injury, damage or loss;
- threat of reprisal.

The legislation is currently undergoing a review process, as foreseen in the legislation. Meanwhile, a landmark police whistleblowing case is in the courts.



## 6. ISRAEL

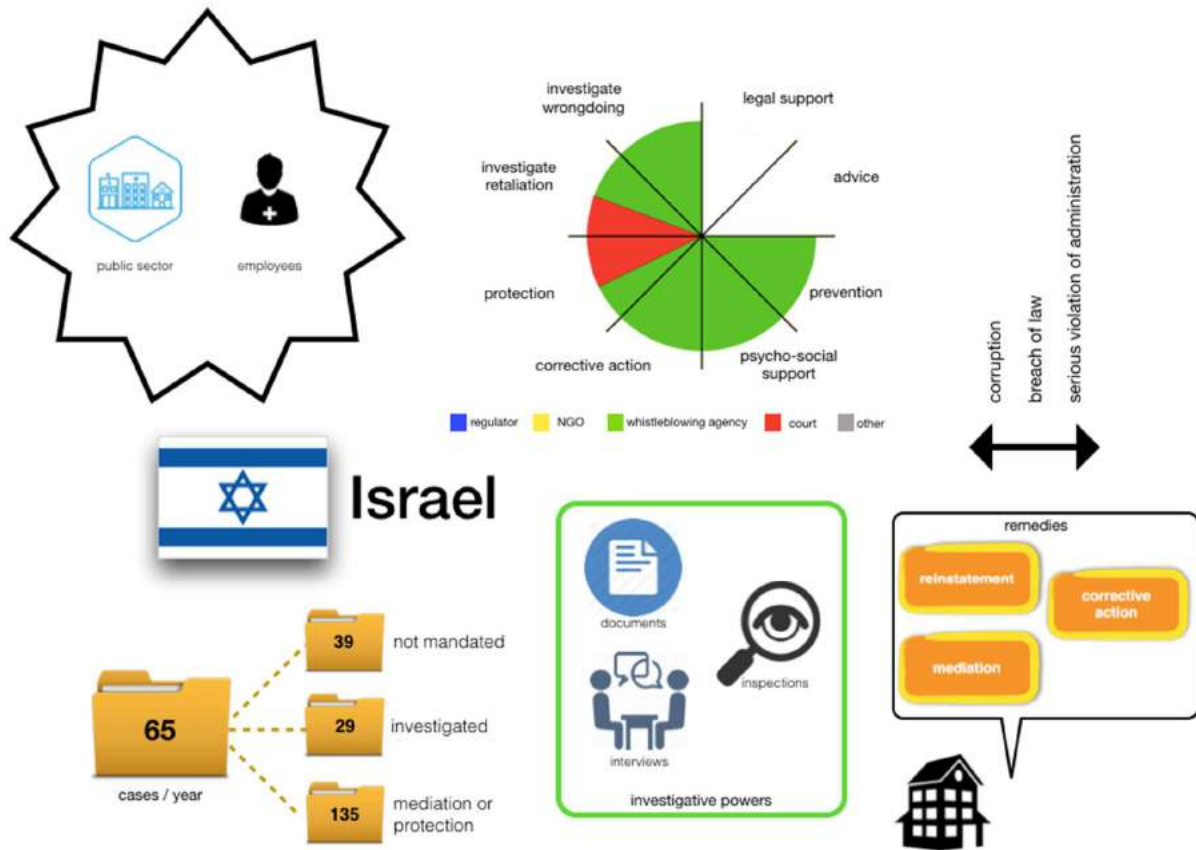


Figure 13. Infographics whistleblowing arrangements in Israel<sup>94</sup>

<sup>94</sup> We relied on 1 local respondent and the website of The State Comptroller and Ombudsman of Israel. In particular:

<http://www.mevaker.gov.il/En/About/PublishingImages/FactsandFigures.jpg>

<http://www.mevaker.gov.il/En/About/Pages/officeStructure.aspx>

<http://www.mevaker.gov.il/En/Ombudsman/NTZAbout/Pages/NTZDefense.aspx>

<http://www.mevaker.gov.il/En/Ombudsman/Pages/NTZhandlingcomplaints.aspx>

Also on:

*State Comptroller Law*. Knesset 5718-1958 [Consolidated Version]





## **6.1. Cultural and legal context**

It would appear that the public in Israel is generally aware of whistleblowing, as cases as well as the mandated whistleblowing agency are regularly in the press. It is also the impression of our respondent that lawyers know about the law and the ombudsperson.

In 1981, the State Comptroller Law was amended, granting authority to the Ombudsman to protect persons who had exposed acts of corruption. In 2014, the Ombudsman's authority was broadened, allowing him/her, in addition, to protect persons who had notified about a serious breach of law or a serious violation of proper administration in their place of employment, as well as persons who had assisted a whistleblower.

Some protections of whistleblowers in the public and private sector were inscribed into labour law in 1997, i.e., *Protection of Employees (Exposure of Offenses, of Unethical Conduct and of Improper Administration) Law*. In July 2008, Parliament passed the *Protection of Workers (Disclosure of Offenses and Harm to Integrity or to Proper Administration) Law*. This legislation covers the public sector, and amends sections 45A – 45C of the State Comptroller Law to mandate the State Comptroller and Ombudsman for investigating retaliation against whistleblowers.

## **6.2. Definition of whistleblowing and target groups**

The public sector law covers whistleblowing about 1) corruption, 2) serious breach of law, and 3) serious violation of proper administration. It covers public sector employees, including those at municipality level.

The private sector legislation covers employees who report to authorities wrongdoing under the responsibility of their employer that is either 1) a violation of the law, 2) unethical conduct, and 3) improper administration.

## **6.3. Whistleblowing agencies: tasks and institutional characteristics**

### **6.3.1. Private sector**

For private sector whistleblower protection, regional labour courts have jurisdiction. They can award compensation for dismissal or issue an injunction against dismissal. We were not able to obtain data on the effectiveness of this legislation or institutional performance.

### **6.3.2. Public sector**

For public sector whistleblowing, the 1981 amendment of the State Comptroller law gave a mandate to the State Comptroller and the Ombudsman to function as a whistleblowing agency. In Israel, the



Ombudsman is part of the State Comptroller. The head of the agency (The State Comptroller and Ombudsman) is appointed by Parliament and can only be impeached by a 75% majority. Together they perform a number of tasks related to whistleblowing. Sometimes State Comptroller officials investigate the alleged wrongdoing. However, they cannot file criminal complaints themselves. Section 14c of the State Comptroller Law states: “Where a suspected criminal act has been uncovered during an audit, the Comptroller shall bring the matter to the knowledge of the Attorney General; a suspected violation of civil service disciplinary regulations may likewise be referred to the Attorney General; the Attorney General shall notify the Comptroller and the Committee, within six months after the matter was brought before him, of the manner in which he has dealt with the subject”. Once a matter has been referred to the Attorney General, the Comptroller’s investigation ceases.

The Ombudsman officials investigate retaliation against whistleblowers and provide protection. In practice, often a meeting with the whistleblower will be carried out by people from the Ombudsman and the State Comptroller at the same time. There is a far reaching and easy information sharing between the Ombudsman and the State Comptroller. No protocols are installed for this. Sometimes the State Comptroller officials refer those who give them information and suffer from retaliation to the Ombudsman.

Giving advice to whistleblowers is not part of the tasks of the Ombudsman or the State Comptroller. However, they do respond to questions and give information on risks and available channels. The prevention tasks of these agencies consist of awareness raising via information dissemination campaigns.

The State Comptroller and Ombudsman would want to broaden its authority in two respects. First, they would like to be able to be more pro-active in terms of protecting gate-keepers who perform whistleblowing related activities as part of their job roles. Currently, special protection is provided for internal auditors carrying out their duties, but no special protection is provided for other gate-keepers such as treasurers or legal advisors. The idea is to provide protection for gate-keepers who were victimized as a result of their fulfilling their functions, not because they were whistleblowers. Second, they deem that being able to make use of a personal liability of the person retaliating against a whistleblower would strengthen the work of the State Comptroller and Ombudsman.

Recently the Ombudsman is developing a more holistic approach to whistleblower protection, i.e., a psychologist has been appointed to give support to whistleblowers and their families. The Ombudsman has also initiated an amendment to the Legal Aid Law, which would enable whistleblowers to receive legal aid without the requirement of establishing financial need.



#### **6.4. Whistleblowing protection and incentives**

We were not able to obtain data on how the regional labour courts perform in terms of offering private sector whistleblower protection. With regard to public sector whistleblower protection provided by the Ombudsman, 51 protection orders were made between 2013 and 2016. In 2016, 65 cases were completed. Of these 65 cases, 36 could not be investigated due to lack of authority (alleged wrongdoing occurred in a non-audited body), or because legal proceedings were ongoing. In a total of 29 cases investigations were carried out, and in 22 of these relief was granted either through a protection order or through mediation.

The Ombudsman can issue an order to protect a whistleblower. Protection orders are binding and its breach may be a criminal or disciplinary offense.

Under the legislation, a condition for protection is following the proper procedure, i.e., one needs special circumstances to qualify for protection whilst not following the proper procedure. However, 'proper procedures' does not necessarily mean that concerns need to be raised within one's organization first.



## 7. NORWAY

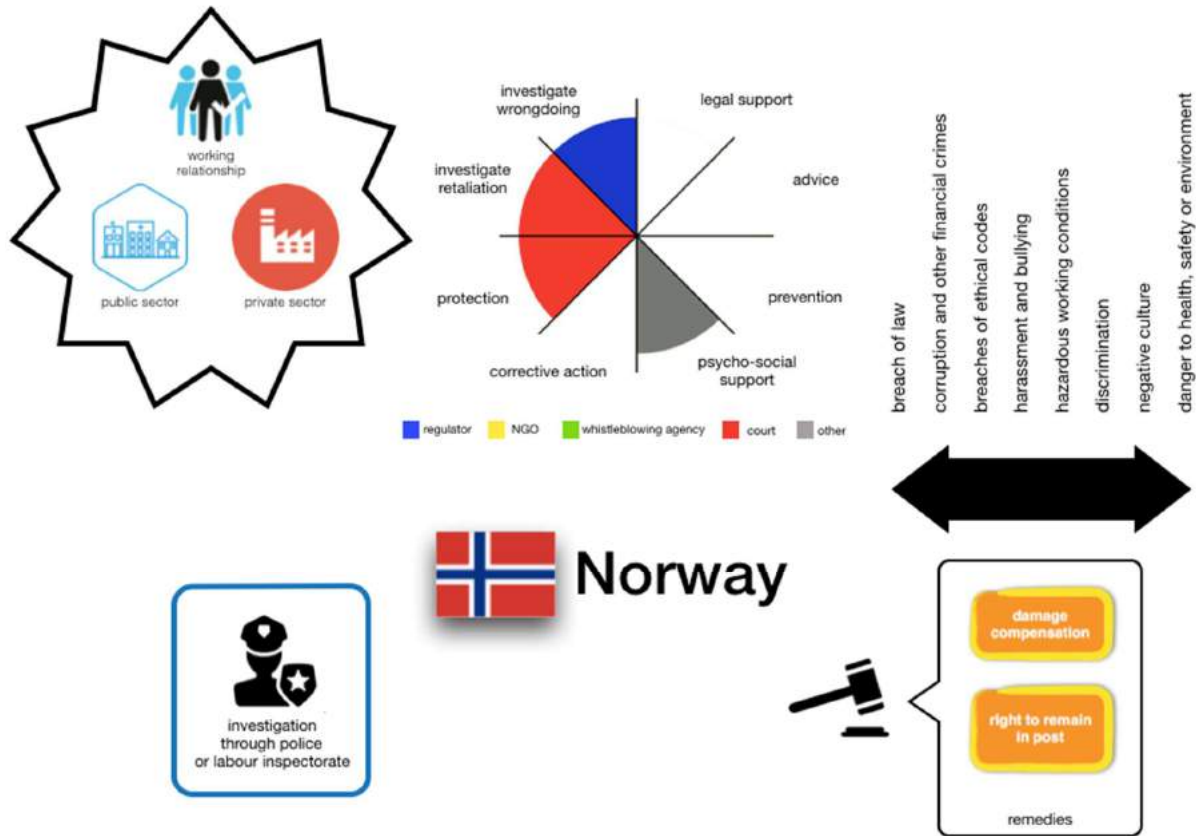


Figure 14. Infographics whistleblowing arrangements in Norway<sup>95</sup>

### 7.1. Cultural and legal context

In Norway, there is a strong protection of freedom of speech, both in the Constitution and the Working Environment Act (WEA). The WEA contains specific sections on whistleblowing since 2007, which have recently been put together in one chapter. Currently a legislative committee is discussing recommendations to revise the WEA. The members represent very different interests, and include

<sup>95</sup> We relied on 1 local respondent, a number of published scientific articles (as shown in the reference list), and the following documents:

Blueprint for free speech. *Norway – Whistleblowing Protection*. Accessed on 22-01-18: <https://blueprintforfreespeech.net/document/norway>

The Norwegian Labour Inspection Authority (2017). *Working Environment Act. English translation of 'arbeidsmiljøven'*.

World Law Group (2016). *Global Guide to Whistleblowing Programs 2016* (Chapter on Norway).



labour union representatives, employers, lawyers, and a professor in organisational psychology, which illustrates the recognition that different disciplines are needed to install a balanced whistleblowing procedure. The direct cause for the installation of this committee was a number of big whistleblowing cases in the Norwegian Police, which showed important weaknesses in the legislative framework and particularly in how whistleblowers are protected in practice. Research by the Fafo Institute of Labour and Social Research in Oslo (since 2010) shows that whistleblowing has become more difficult. In three large surveys they found that whistleblowers receive more negative reactions and are more often the victim of bullying than non-reporters, that there is a decrease of the willingness to report because of fear of reprisals, and that reporting has become less effective (Bjørkelo, 2017; Fafo, 2016). Their findings are, however, inconsistent. While some quantitative self-reports show that “most employees are not retaliated against and are effective” (and that ‘only’ one in four is retaliated against), and qualitative in-depth research shows less promising results, like “the impact of job loss, the stigma of association of even being seen as a friend or an associate of a current or previous employee that has reported about wrongdoing at work” (Bjørkelo, 2017: 8). In practice, an interviewee explains, more serious retaliation seems to occur in the public compared to the private sector, but no research to substantiate that claim is available yet. A possible reason could be that public sector organisations have more resources to work against whistleblowers, while in the private sector there is no time for retaliation and ‘buying silence’ may be a common practice.

At the same time, Norway is known as an egalitarian country with strong unions and a structured labour market model (Bjørkelo, 2017: 10), in which organisational justice and work ethic and loyalty are considered very important (Skiveness & Trygstad, 2017; Lewis & Trygstad, 2009) and work-related issues can in general be discussed openly. Nevertheless, recent studies have shown that many Norwegian employees have (on their employer’s request) signed an agreement which restricts their options to publicly express opinions about their employer, which in some cases even violate section 100 of the Constitution (Trygstad et al., 2017). A summarizing report of Fafo (2016) explains the tension between the use of terms, such as ‘muzzle’ and ‘culture of fear’, in connection to specific parts of the Norwegian labour market and the freedom of speech “which has formally never been greater”.

While labour unions have a strong position in Norway, their involvement and expertise in whistleblowing varies. Trygstad et al. (2017: 31) argue that they are “normally advocates of an open culture in order to safeguard co-decision and a healthy working environment.” They can represent whistleblowers, receive reports and protect reporters from retaliation (Trygstad et al., 2017). Some labour unions, such as within the police, are very well organised and have a high level of competence concerning whistleblowing matters, but not all unions have focused upon it or are sufficiently prepared for it because they lack resources and competences (particularly in some industries in the private sector).



Nevertheless, research in Norway shows that employee representatives and those who are represented by them can more effectively blow the whistle and have a lower risk of being retaliated than reporters who are not (Skiveness & Trygstad, 2017). Labour unions are thus quite positive about WEA protection for employees. Employers, on the other hand, and many employers' representatives are against it (Trygstad, 2017). In their view, it not only goes against "the democratic tradition that characterized Norwegian life" (Trygstad et al., 2017: 22), but it is also "at odds with two key principles: the managerial prerogative and the duty of loyalty" (Trygstad et al., 2017: 22).

## **7.2. Definition of whistleblowing and target groups**

The WEA protects current (thus not former) employees<sup>96</sup> in the public and private sector (and since recently also temporary and subcontracted workers) who blow the whistle internally or externally (even to the media) about 'censurable conditions', which include "situations that are of a certain severity, inter alia, legal offenses such as corruption and other types of financial crime, breaches of the company's ethic codes, hazardous working conditions, discrimination and harassment"<sup>97</sup>, but also "negative culture, corruption, illegality and unethical or harmful incidents" (Lewis & Trygstad, 2009: 382). Given that censurable conditions should be in the general interest, protection is not meant for the expression of "personal ideas and experiences, feelings and thoughts that are not of general interest [or] situations where an employee disagrees with the employer's decisions" (World Law Group, 2016: 125). The scope of the whistleblowing law is thus very broad, but the precise definition of 'censurable conditions' (e.g., whether or not the general interest is at stake) is considered unclear in practice. Therefore the legislative committee is considering to suggest a public interest test for whistleblowing. To be granted protection, whistleblowers, have to follow the 'appropriate procedure', which according to the Preparatory Papers implies that the whistleblower first reports internally, unless this is considered unworkable like in the case of a criminal or serious event and the fear of retaliation or destruction of evidence (Lewis & Trygstad, 2009). Employers need to encourage reporting of censurable conditions by installing procedures for notification, processing and follow-up of notifications (WEA).

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<sup>96</sup> An employee is according to the WEA anyone who performs work in the service of another (WEA). Moreover, the following persons who are not employees are regarded as employees in the law: "students at educational or research institutes; national servicemen; persons performing civilian national service and Civil Defence servicemen; inmates in correctional institutions; patients in health institutions, rehabilitation institutions and the like; persons who for training purposes or in connection with work-oriented measures are placed in undertakings without being employees; persons who without being employees participate in labour market schemes" (WEA), which gives the law a very wide scope. Interns and former employees are, however, not included in the legislation. Neither are employees in shipping, hunting, and fishing or military aviation.

<sup>97</sup> World Law Group (2016): 125.



### **7.3. Whistleblowing agencies: tasks and institutional characteristics**

Although there are some good examples in Norway of how the private sector deals with whistleblowers – in terms of providing safe, anonymous internal whistleblowing channels – there is no agency that coordinates the implementation of the whistleblowing legislation. There is neither a central agency where whistleblowers are advised about the decision to report or can obtain legal support. There is also no central agency that investigates wrongdoing that is reported. The only two institutions that are available for whistleblowers are courts, where protection against reprisal can be claimed, and a psychosocial care clinic, funded by the Ministry of Health, that since 2012 treats whistleblowers who have suffered retaliation. There are no figures available for the number of whistleblowers who have gone to court. The clinic has already helped more than 200 whistleblowers in the past six years. Nevertheless chances are it will be closed down. While the official reason is money-related, an interviewee explains that another reason could be that the government may feel uncomfortable to have such a clinic, because it seems to be a symptom of a culture that is against whistleblowers and freedom of speech.

The legislative committee considers to advise the involvement of two different agencies for advisory and investigatory tasks. The Labour Inspection could be given a formal role in whistleblowing, given its experience in dealing with employer-employee disputes. In that case, an interviewee argues, the agency should be given more tools for mediation and for encouraging employers to fulfill the requirements concerning internal whistleblowing in the law. For the investigation of wrongdoing in the public sector, the committee is discussing the possibility to making the Ombudsman responsible for dealing with whistleblower cases in addition to citizen complaints. Given its focus on administrative investigations, the Ombudsman would have to obtain specific investigatory expertise.

### **7.4. Whistleblower protection and incentives**

In Norway, retaliation against whistleblowers is prohibited by law. This applies to all types of whistleblowing (both internally and externally, including going public). Whistleblowers can go to court in the case of perceived retaliation. Because of a divided burden of proof, the employee needs to prove that there was an act of retaliation, while the employer needs to prove that the action against the employee was not linked to whistleblowing. The English translation of the WEA formulates it as such: “If the employee submits information that gives reason that retaliation in breach of the first or second sentence has taken place, it shall be assumed that such retaliation has taken place unless the employer or hirer substantiates otherwise,” which shows that this principle is very much in favor of whistleblowers’ interests. When retaliation has been established, compensation can be granted by the court, if it is considered reasonable, “irrespective of the fault of the employer” (Trygstad et al., 2017:



21). The legislative committee considers two important revisions in this respect. First, it will probably advise a burden of proof that lies entirely on the employer, because documenting the act of retaliation is easy in some cases, such as job loss, but not in other, like harassment or bullying because there may be no witnesses available. For this reason, it is often considered too difficult for whistleblowers to win a case in court (Bjørkelo, 2017). Second, given the long duration of these court procedures, which are particularly hard for whistleblowers, the committee is considering to advise other resolution mechanisms besides court.

In addition to court protection, the confidentiality clause that has been added to the WEA recently for “any person who performs work or services for the body receiving such notification” (while before the duty of confidentiality only applied to the Labour Inspection) can be considered a protective measure for whistleblowers.





## 8. REPUBLIC OF KOREA

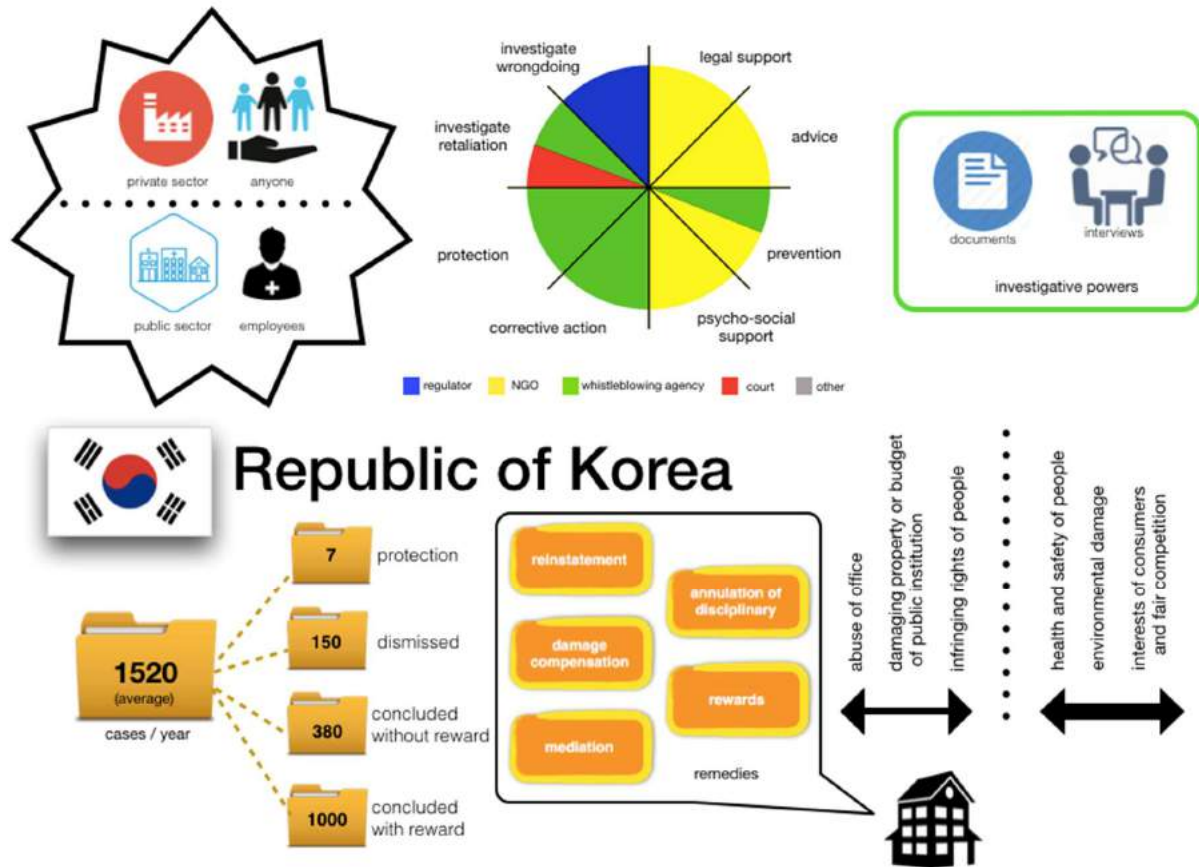


Figure 15. Infographics whistleblowing arrangements in Republic of Korea<sup>98</sup>

### 8.1. Cultural and legal context

The Republic of Korea has been intensifying its anti-corruption efforts since the end of the 1990s, in an attempt to break the influence of the *chaebol* – diversified conglomerates that maintained close

<sup>98</sup> We relied on 1 local respondent and the following documents:

*Act on the prevention of corruption and the establishment and management of the anti-corruption and civil rights commission.* Act nr 12844, 19 November 2014.

*Protection of public interest reporters act.* Act nr 13443, 24 July 2015.

ACRC (2017). *ACRC Annual report 2016*. Anti-Corruption & Civil Rights Commission.

Sang-Hun, C. (2016). South Korea’s whistle-blowers sound off at their own risk. *New York Times*. Accessed on 03-07-2018: <https://www.nytimes.com/2016/11/09/business/international/south-korea-whistle-blower-corruption.html>



relationships with politicians. During the 1990s there were more than 30 mediated whistleblowing cases from different sectors including the military, police, private schools, Bank of Korea, aviation, government contracts, etc. A survey with a small sample of public officials carried out in 1999 (before whistleblowing legislation was enacted) showed that although many felt that whistleblowing created mistrust within an organisation, the majority nevertheless indicated they would blow the whistle if they uncovered corruption.

Legislation related to the protection of whistleblowing dates back to 2001, but there have been a number of changes since. Currently two pieces of legislation are important: for the public sector this is the Act on the *Prevention of Corruption and the Establishment of the Anti-Corruption and Civil Rights Commission* (ACRC) (Act 12844 initially passed in 2001, amended a number of times, most recent amendment in 2014), and for the private sector the *Protection of Public Interest Reporters Act* (Act 13443 initially passed in 2011, amended in 2015).

## **8.2. Definition of whistleblowing and target groups**

The private sector whistleblowing legislation covers anyone who makes a report to an investigative agency, the ACRC, or anyone else deemed necessary to prevent or stop the wrongdoing, about conducts detrimental to 1) the health and safety of the people, 2) the environment, and 3) the interests of consumers and fair competition.

The legislation for the public sector covers anyone who reports an act of corruption to ACRC about: 1) an act of any public official abusing his/her position or authority or violating statutes in connection with his/her duties to seek gains for himself/herself or any third party, 2) an act of inflicting damages on the property of any public institution in violation of statutes, in the process of executing the budget of the relevant public institution, acquiring, managing, or disposing of the property of the relevant public institution, or entering into and executing a contract to which the relevant public institution is a part, and 3) the act of coercing, urging, proposing and inducing any act referred to previously or covering it up.

## **8.3. Whistleblowing agencies: tasks and institutional characteristics**

### **8.3.1. ACRC**

The ACRC is mandated as the whistleblowing agency through the two mentioned pieces of legislation (Acts 12844 and 13443). The ACRC is established under the prime minister, and also comprises of 25 local ombudsmen.



The ACRC is mandated to receive concerns, making recommendations and do follow-up, mediate conflicts. It is also mandated to carry out prevention and awareness raising and training with regard to anti-corruption and whistleblowing. In practice the ACRC does not provide advice but is mainly preoccupied with triaging the received whistleblower concerns and referring these to the appropriate regulators for investigation. These regulators must send their findings back to the ACRC, which then makes a recommendation.

There is a perception that the ACRC uses its mandate too narrowly, and generally lacks power. The ACRC lacks statutory authority to directly investigate corruption and retaliation that a whistleblower reported. It refers these reports to the agencies designated by the law for investigation. The ACRC is perceived as bureaucratic and slow. Although there is a time limit of 60 days between the receipt of a whistleblower concern and a recommendation, very often reasons are found to prolong that.

Nevertheless, according to the law the ACRC can request documents, interview people, and carry out on-site verifications. It can also request cooperation of administrative agencies (e.g., the National Human Rights Commission or corporations) that aim to remedy any violation of civil rights and enhancement of social justice and public interests.

### **8.3.2. NGOs**

A number of NGOs function as watchdog vis-a-vis the ACRC and regulators, and also provide services to whistleblowers on a professional basis. The two most important NGOs are the People's Solidarity for Participatory Democracy and the Horuragi Foundation. They coordinate information sharing among whistleblowers, organise social events with whistleblowers and their families, and provide financial aid (living expenses to whistleblowers). These two NGOs also provide legal aid to whistleblowers (through three and five lawyers respectively, who work on a voluntary basis).

## **8.4. Whistleblowing protection and incentives**

Under the public sector legislation, the ACRC received 3.758 reports in 2016. Between 2002 and 2016 it received 40.517 reports. It had closed 40.366 by the end of 2016. Of these, 1.891 cases were referred to investigative agencies (4.7%).

Of the 1.891 cases that were sent for investigation, findings were received for 1.470 cases, which led to 1.053 cases where acts of corruption were confirmed (71.6%). Of the 1.891 cases sent to regulators, a bit more than half came from whistleblowers (i.e., public sector workers). Of the whistleblower reports, 74.2% led to confirmed corruption offences, allowing the recovery of 82.1% (KWR 625 billion) of the total recoverable amount.



Under the private sector legislation, the ACRC received 2.611 reports in 2016: 937 health, 377 safety, 149 consumer interests, 69 fair competition, 847 other. Around 62% are referred for investigation.

Whistleblowers can request the ACRC to investigate retaliation. The ACRC can make a decision on reinstatement, cancellation of retaliatory decisions, and damages to be paid to the whistleblower. There is a fine for not complying with such orders. There is a relief fund to compensate whistleblowers for the costs that they made.

In terms of protection under the public sector legislation, between 2008 and 2016 the ACRC received 130 requests for guarantee of employment. In 43 cases (33%) an employment guarantee was given. A total of KWR 35.5 million was imposed in penalties on 8 cases in which whistleblower protection regulations had been violated. There were also 19 requests for physical protection, and 16 requests with regard to breach of confidentiality.

Under the private sector legislation, between 2011 and 2016 a total of 87 requests for whistleblower protection had been made to the ACRC. By 2016, 80 cases had been closed and 7 were ongoing. For the year 2016 this means: 12 asked for protective measures (5 were approved), 2 asked for physical protection (1 was approved), 4 asked for protection of confidentiality (1 was approved), and 2 asked for prohibition of disadvantageous measures.

Apart from a relief fund, the ACRC also provides financial rewards. Between 2012 and 2016 a total of 6.088 cases were managed: 614 were dismissed, 1.479 were concluded without reward, and 3.995 cases with reward. The total amount paid in rewards was KWR 2.63 billion. Estimated benefits incurred from these cases was KWR 13.9 billion.



## 9. SERBIA

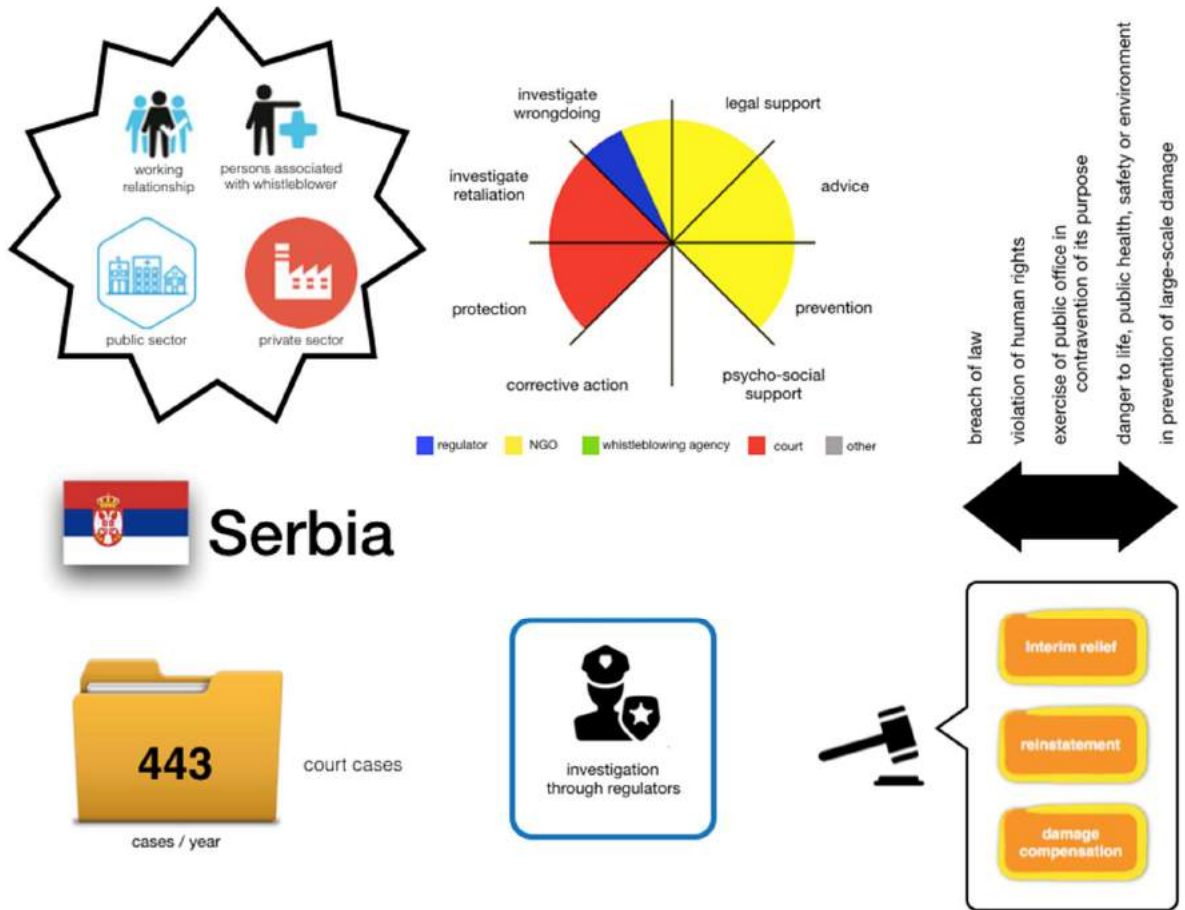


Figure 16. Infographics whistleblowing arrangements in Serbia<sup>99</sup>

### 9.1. Cultural and legal context

The Serbian government adopted the Whistleblower Protection Act (WBPA) in 2014, that became applicable in June 2015. It was drafted by a multidisciplinary working group, with members of the

<sup>99</sup> We relied on 2 local respondents and the following documents:

Jahic, D. & Stojanovic, M. (2017). *Justice Delayed – Justice Denied?* Accessed on 22-01-18: <https://see-whistleblowing.org/justice-delayed-justice-denied>

English translation WBPA (2014). *Law on the Protection of Whistleblowers*.

Schoenherr (2015). *Serbia: Long-anticipated Act on Protection of Whistleblowers is finally adopted*. Accessed on 22-01-18: <https://www.schoenherr.eu/publications/publications-detail/serbia-long-anticipated-act-on-protection-of-whistleblowers-is-finally-adopted>



judiciary, NGOs (from Serbia and abroad), governmental institutions, trade unions, and whistleblowers. It is consistent with international best practices (Devine, 2016), given its broad scope and many different aspects of protection it provides. Protection is granted for internal and external reporting, which can be done simultaneously, and external reporting also includes reports to the public (e.g., media).

However, implementation of the WBPA is challenging, because in Serbia, an interviewee explained, citizens tend to have a general mistrust towards government. People are not used to seeking protection from public institutions.<sup>100</sup> This can partly be explained by the judicial system having been controlled by the executive in the past; the system seemed to focus on protecting the state from citizens instead of citizens from the state. Although a separation of power has been institutionalized, citizens still need to learn to trust the courts. Initiatives like the WBPA and articles published by the NGO Pistaljka – which means ‘The whistle’ in Serbian – (see below) about its implementation are said to have increased citizens’ trust. Also towards labour unions there seems to be a general mistrust, probably because these were likewise influenced by the executive in the past, and because their role was never to protect employees. Although they were involved in drafting the law, an interviewee explains that labour unions not having a role in the implementation of the law is a missed opportunity to reestablish trust of citizens in the Serbian government. Pistaljka works on restoring the power of trade unions in Serbia.

## **9.2. Definition of whistleblowing and target groups**

The WBPA provides protection for whistleblowers who are employed in the public and private sector. Employment is defined broadly, including full time employment, work outside employment, volunteering, official duty and factual work performed for an employer. The protection is, in addition, also granted to the following individuals who have been exposed to adverse action, 1) whistleblowers’ affiliates, 2) individuals who were mistakenly marked as whistleblowers, 3) individuals who have disclosed information while performing official duties, and 4) individuals who have requested to be provided with the information that has been disclosed. The type of wrongdoing that can be reported is also quite broad (albeit not as broad as in Norway where for example negative culture can also be reported, see above), including the infringement of legislation, violation of human rights, exercise of public authority in contravention of the purpose it was granted, danger to life, public health, safety, and the environment, or disclosures with the aim to prevent large-scale damage.

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<sup>100</sup> See for example: <https://see-whistleblowing.org/justice-delayed-justice-denied>



### **9.3. Whistleblowing agencies: tasks and institutional characteristics**

With the installation of the WBPA in Serbia, no specific whistleblowing agency has been established. An interviewee explains that by referring to the austerity policy. The implementation of the law was not supposed to cost any extra money for the Ministry of Justice. This policy also explains why the right of psychosocial assistance could not be included in the law. The main actors involved in whistleblowing cases are courts, the NGO Pistaljka and other agencies which are to a smaller extent involved in whistleblowing cases. Each of these will be briefly described below.

#### **9.3.1. Courts**

Whistleblowers can go to court in the case of alleged retaliation. Although courts can investigate both the wrongdoing and the reprisal, they focus on the latter. In theory, courts have to deal with these cases within eight days, but that is not considered feasible in practice. On average a case is dealt with in 20-25 days, which is considered acceptable. Since the installation of the law, 443 whistleblowing cases have been dealt with in Serbian courts, as registered by the Supreme Court. Court statistics show that the number of cases in basic and high courts has dropped in 2017<sup>101</sup>, which an interviewee explains by some whistleblowing cases being labelled as general labour disputes. Among these cases, there were two cases in which persons associated with whistleblowers were protected, being a spouse of a whistleblower and a friend/colleague of a whistleblower) and one case in which a nurse who asked for information about a whistleblowing case was protected after she experienced retaliation. The expectation is that the number of cases will increase because more and more lawyers tend to give their clients the advice to file a whistleblowing retaliation suit to court.

#### **9.3.2. Pistaljka**

Implementation of the law has been given an important boost by initiatives of Pistaljka, several interviewees explain. Pistaljka is an NGO that started seven years ago by journalists who blew the whistle because the government was controlling newspapers. This NGO – which has been granted funding from several Western countries (including the Netherlands and the USA), the European Union, and to a smaller degree from Serbia – has an important role in giving advice to whistleblowers, investigating wrongdoing, prevention and training. Focus of Pistaljka is on giving advice to whistleblowers. The seven lawyers of Pistaljka provide free legal advice and represent whistleblowers in court. Individuals can call the helpline of Pistaljka if they consider to file a law suit or have done so. The lawyers often have long conversations (4-5 hours) with whistleblowers to understand what they

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<sup>101</sup> See: <https://see-whistleblowing.org/justice-delayed-justice-denied>





want to achieve by blowing the whistle, and to gain their trust which is considered very important. The NGO employs seven investigative journalists who investigate wrongdoing on the basis of tips from whistleblowers or other sources of information about alleged wrongdoing in organisations. To not expose the identity of the whistleblower, they start their investigation on the basis of a general information request in the respective organisation. If wrongdoing is discovered, they publish articles about it. An interviewee explains that in particular cases their investigatory and advisory tasks conflict (e.g., if the public prosecutor does not want information given to lawyers being published), the agency gives priority to its advisory task, because finding the perpetrator is considered more important than publishing articles.

Pistaljka also has an important role in training lawyers and judges to deal with whistleblowing cases, which was shown to be necessary after start-up problems in the beginning (e.g., judges who did not understand the idea of reversed burden of proof). Judges even need a certificate to treat such cases, which they receive after having been trained by this NGO. The commitment of the president of the Supreme Court in these trainings is, according to an interviewee, very important for their success. These trainings have helped to overcome initial resistance among judges to take whistleblowing cases and start-up problems with strange rulings due to a lack of legislative knowledge and experience with whistleblowing cases among judges. The prevention task of Pistaljka furthermore includes giving ad hoc advice to employers who asked them questions about the WBPA, but the agency is considering to increase its role in prevention by advising employers in ethics management and being a knowledge center on whistleblowing.

### **9.3.3. *Other agencies involved in whistleblowing***

The Serbian anti-corruption agency has a limited role in the investigation of wrongdoing reported by full-time employees in the public sector, but they only have a narrow task, dealing with corruption cases only. Under an earlier by-law, this agency was to provide some protection for these whistleblowers, but it did not work well in practice, mainly because there were no legal instruments for guaranteeing protection and the lack of communication by the agency to whistleblowers about its tasks. Moreover, the law considered unconstitutional and therefore abolished. The agency did not want to be involved in the working group drafting the new law.

The Labour Inspectorate in Serbia can fine employers for not having a whistleblowing policy, but has no role in investigating whistleblowing cases or providing advice. Nevertheless, an interviewee explains that it is worth exploring a larger role for the Labour Inspectorate in dealing with whistleblowing cases, because it is responsible for all employers in all sectors, and can more easily enforce measures than other agencies.





#### 9.4. Whistleblower protection and incentives

The WBPA defines ‘damaging action’ in a very broad way, implying any action or omission in relation to whistleblowers which violates or infringes the right of a whistleblower or persons entitled to protection as a whistleblower, or which puts such persons at a disadvantage. In addition, very specific areas are identified in which people could be disadvantaged as a result of whistleblowing or being associated with a whistleblowing, but this list is not exhaustive:

- hiring procedure;
- obtaining the status of an intern or volunteer;
- work outside of formal employment;
- education, training, or professional development;
- promotion at work, being evaluated, obtaining or losing a professional title;
- disciplinary measures and penalties;
- working conditions;
- termination of employment;
- salary and other forms of remuneration;
- share in the profits of the employer;
- disbursement of bonuses or incentivizing severance payments;
- allocation of duties or transfer to other positions;
- failing to take measures to provide protection from harassment by other persons;
- mandatory medical examinations or examinations to establish fitness for work.

The burden of proof is on the defendant; a whistleblower only has to make it probable that retaliation is the result of whistleblowing, which is conform international best practices. Even though protection can only be provided after a law suit in court, there is attention for prevention as well, because employers can be given a fine if they don’t have an internal whistleblowing procedure. Moreover, the whistleblower’s identity is (as far as possible) protected during the court procedure as to prevent reprisals. Remedies for reprisals against whistleblower include reinstatement, as well as compensation for damages of honour, reputation and even endured fear. Experiences of whistleblowers are positive, and more and more they are being supported within their organisation after being reinstated. The option of interim relief, which implies that the current situation will remain the same until a case is decided (e.g., dismissed whistleblower can stay in his position) – also strengthens the protection of whistleblowers. An interviewee explains that “it stops the bleeding” for whistleblowers. In the first six months after installation of the law already 26 people were protected in this way.



However, some elements limit the offered protection. First, because the key element of the law is protection from retaliation and not investigation, the protection is only limited, because real protection implies that the perpetrators are found and stopped. Second, the overly wide definition of ‘classified information’ limits protection. If employers consider something classified, a whistleblower cannot report on it. An interviewee argues that ‘classified information’ should be narrowed to national security issues.



## 10. UNITED KINGDOM

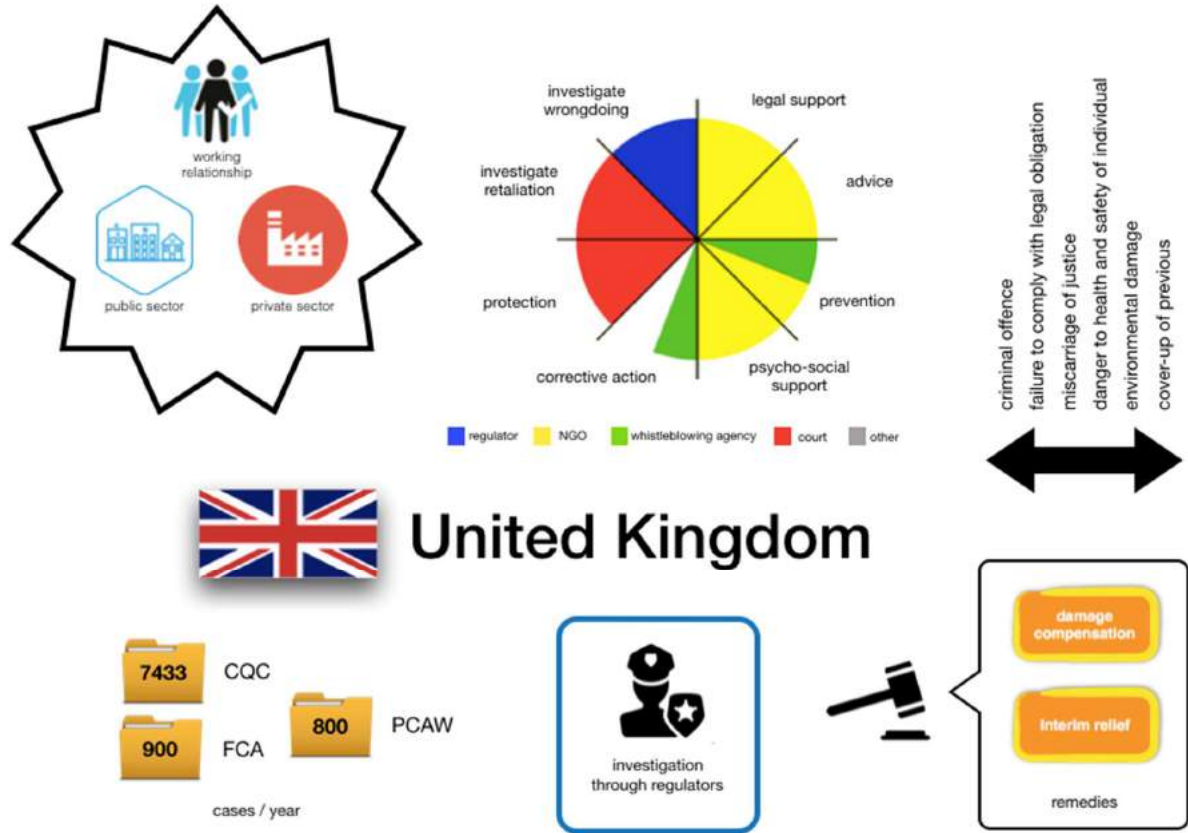


Figure 17. Infographics whistleblowing arrangements in United Kingdom<sup>102</sup>

<sup>102</sup> We relied on 2 local respondents and the following documents:

CQC (2017). *Annual report and accounts 2016/17*. Care Quality Commission.

FCA (2015). *Whistleblowing in deposit-takers, PRA-designated investment firms and insurers. Policy Statement PS15/24*. Financial Conduct Authority.

FCA (2017). *Annual report and accounts 2016/17*. Financial Conduct Authority.

NAO (2015). *The role of prescribed persons. Report by the Comptroller and Auditor General*. National Audit Office.

National Guardian (2017). *Southport and Ormskirk Hospital NHS Trust. A case review of speaking up processes, policies and culture*. National Guardian's Office.

PCAW (2015). *Is the law protecting whistleblowers?* Public Concern at Work.

PCAW (2013). *Whistleblowing - The inside story*. Public Concern at Work / University of Greenwich.



### **10.1. Cultural and legal context**

Research carried out by University of Greenwich in 2012 found that the public's attitudes towards whistleblowing were comparable to those of Australia. Public Concern at Work's biannual survey in 2015 saw a 7% drop in negative outcomes for whistleblowers. They also found 81% of the population willing to raise a concern (slightly downward trend) and 59% had actually raised a concern (also slightly downward trend). The awareness of the whistleblowing legislation was 33% (slightly upward trend).

The most well-known whistleblower cases in the UK involve the National Health Service, or the financial services sector.

The UK Parliament passed the Public Interest Disclosure Act in 1998. This whistleblowing legislation was implemented through the Employment Relations Act in 1999. In 2013 it was amended to remove a 'good faith' test, and substitute this for a 'public interest test'. This test was introduced to prevent the whistleblowing legislation to be used for personal grievances about one's own employment contract. In 2017, in *Chesterton Global Limited -v- Nurmohamed*, the Court of Appeal sided with the Employment Tribunal and the Employment Appeal Tribunal. This is considered a landmark case with regard to the new 'public interest test'. The Court of Appeal ruled that N, an office manager of an estate agent, in his disclosure of C's deliberate manipulation of his account to justify decisions over pay, to the detriment of himself and of more than 100 other office managers, had indeed acted with the reasonable belief that this disclosure was in the public interest. The Court of Appeal did, however, not agree with the argument made earlier that a disclosure is automatically in the public interest when more than one person is harmed. Instead, the Court of Appeal considers that four factors are important: 1) number of affected employees, 2) nature of the interest affected (directly vs. indirectly affected, and important interest vs. trivial wrongdoing), 3) nature of the wrongdoing (deliberate vs. inadvertently), and 4) identity of the wrongdoer (size and prominence of the employer).

Nevertheless, the law remains focused on retaliation only. In fact, PIDA can only compensate a worker for retaliation, rather than proactively stopping it at source.

### **10.2. Definition of whistleblowing and target groups**

Whistleblowing is the disclosure of information about: 1) criminal offence, 2) failure to comply with legal obligation, 3) miscarriage of justice, 4) health and safety of individuals, 5) environmental damage, and 6) cover-up of previous.

The legislation covers both public and private sector workers (wider than employees). Within the National Health Service, student nurses are also covered by PIDA.



There are no requirements for organisations to have internal whistleblowing policies, except for organisations regulated by the Financial Conduct Authority and organisations within the National Health Service. The law does not provide for sanctions against those who retaliate, nor for breaches of confidentiality.

### **10.3. Whistleblowing agencies: tasks and institutional characteristics**

The law does not create a dedicated whistleblowing agency. It does provide for a list of prescribed persons as second tier recipients (mainly regulators, but MPs were added to the list in 2013). The law uses the 3-tiered model and requires the whistleblowers to have good reasons to jump levels, but in some cases courts have ruled that whistleblowing to a media outlet or a campaigning group was reasonable, and hence a protected disclosure.

#### ***10.3.1. Employment Tribunals***

Protection must be sought through Employment Tribunals. However, these will only consider the concern about wrongdoing in a technical sense, i.e., to test whether it qualifies as a public interest disclosure, for the purpose of post detriment compensation. For whistleblowers who win their case in an Employment Tribunal, this does not mean that the wrongdoing they disclosed will be investigated or corrected. Investigation of the alleged wrongdoing is a matter for the regulators. In 2015 the National Audit Office did an audit of the bodies named as prescribed persons under PIDA. The results were appalling. Staff working for these ‘prescribed person’ bodies often were unaware they were mandated as a recipient of whistleblower concerns. As a result of this report, regulators have to publish the number of cases brought by whistleblowers in their annual reports.

#### ***10.3.2. NGOs***

A number of NGOs provide advice and support for whistleblowers, as well as perform a watchdog function vis-a-vis regulators (especially in the health sector) and Employment Tribunals. Of those who do so on a professional basis, the longest standing one is Public Concern at Work (since 2003), which has legal privilege and gives free advice to whistleblowers with regard to raising concerns internally, when and how to blow the whistle externally, and PIDA. Public Concern at Work also advises organisations on internal whistleblowing arrangements, provides training. Public Concern at Work is funded through contracts with employers and professional bodies, who receive training and promotion packages to announce Public Concern at Work internally as advisors to employees who want to raise a concern. Public Concern at Work finds that whistleblowers seek advice too late, when they already start to experience reprisals. A relatively new NGO is WhistleblowersUK, who provide advice and psycho-



social support to whistleblowers. WhistleblowersUK has considerably professionalized over the past few years, but still runs mainly on volunteering.

### ***10.3.3. Whistleblowing agency for NHS***

A whistleblowing agency specifically for the National Health Service (NHS) was created in 2016, in response to two subsequent review reports led by Sir Robert Francis about whistleblowing culture in the NHS. This agency is called the National Guardian for the NHS. In addition, each NHS Trust is required to have its own Speak-Up Guardian. The whistleblower community has huge expectations with regard to the National Guardian for the NHS, and many have already expressed their disappointment. However, the National Guardian sees its function as enhancing and monitoring whistleblowing culture (their preferred term is speak-up) in the NHS Trusts. It provides awareness raising and training, and supports inter-vision between Guardians at Trust level. It has also started to publish review reports of speak-up cultures in specific Trusts. These reports include recommendations and requirements with a set deadline. The National Guardian is appointed by the health minister and publicly financed through the Care Quality Commission (CQC), which is a regulator for the health sector. Some see this as a reason to question its independence.

### ***10.3.4. Regulators***

Regulators in general are often perceived to have their hand tied in the sense that they cannot offer protection, and rarely start an investigation based on whistleblower disclosures alone. This creates the impression that regulators are unresponsive.

## **10.4. Whistleblowing protection and incentives**

Whistleblowers may receive compensation for damages through Employment Tribunals. There is currently no reward scheme for whistleblowers but the Financial Conduct Authority has announced a review of its position on this.

On average, Public Concern at Work has interactions with 800 whistleblowers a year. The Care Quality Commission (health care sector regulator) received 7.433 whistleblower concerns in 2016, which is 10% of all matters raised with that regulator. The Financial Conduct Authority received 900 whistleblower concerns in 2016 (in 2014 a peak was noted of 1.340 concerns). Of these 1.5% contributed directly to immediate FCA action, 34% was of significant value, 55% was of possible value but not currently actionable.

In terms of protection, of 2.969 ET judgements on whistleblower cases between 2011 and 2013, 1.107 (37%) won their case. Of all PIDA claims disposed with the Employment Tribunal, around 70% are



withdrawn or settled before they are heard. Between 2013 and 2016 a fee had to be paid in order to bring a case at Employment Tribunal. This caused PIDA claims to fall by 73%. Since 2017 this is no longer the case. Research updating the figures on Employment Tribunal judgements on whistleblower cases is currently being carried out by the University of Greenwich.



### 11. UNITED STATES OF AMERICA

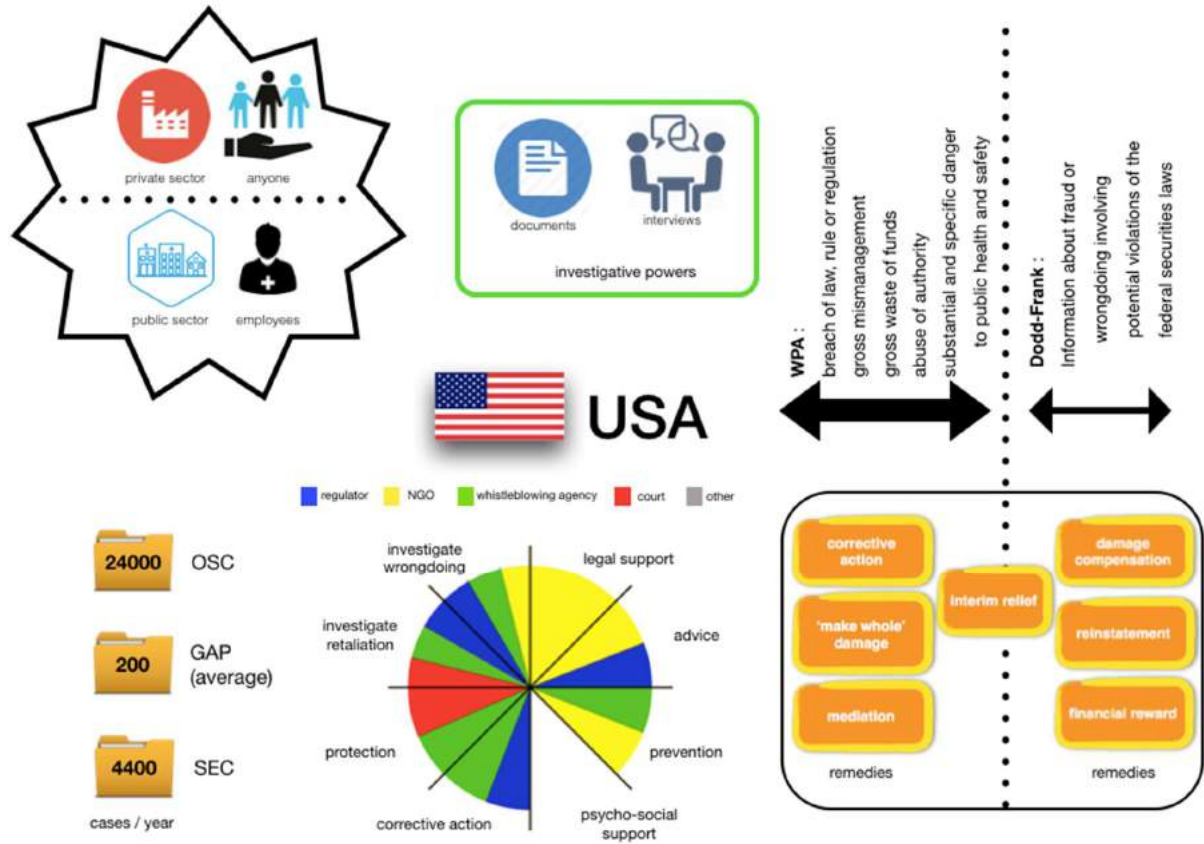


Figure 18. Infographics whistleblowing arrangements in USA<sup>103</sup>

<sup>103</sup> We relied on 2 local respondents, published scientific articles (as shown in the reference list), and the following documents:

Devine, T. (2009). *Testimony of Thomas Devine*. Government Accountability Project before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Senate Committee on Homeland Security and Governmental Affairs, on S. 372 The Whistleblower Protection Enhancement Act of 2009.

Devine, T. (2016). *International Best Practices for Whistleblower Policies*. Government Accountability Project.

Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act.

Dodd-Frank Act (2010). *Subtitle B—Increasing Regulatory Enforcement and Remedies. Sec. 922. Whistleblower Protection.*

Government Accountability Project (2016). *Why Whistleblowers Wait: Recommendations to Improve the Dodd-Frank Law’s SEC Whistleblower Awards Program.*





### 11.1. Cultural and legal context

The past decades have seen an increase in acceptance of whistleblowing in the American society in general, as among managers in the public sector. An interviewee speaks of a cultural revolution, which has resulted in high political support for whistleblowers. It is, according to this interviewee, even considered political suicide to oppose whistleblowing. Whistleblowing protection legislation in the USA is fragmented, but inclusive. There is a patchwork of 50 laws for employees in the private sector and ten laws for federal public sector employees, and other specific regulations for states and local level public employees. This results in an incoherent and complex legal framework for which specialist lawyers are needed to represent whistleblowers. An interviewee explains that the positive side of this is that whistleblowers often have different agencies they can go to in the case of reprisal; they thus have different options to seek relief.

While the protection offered in most laws looks good on paper, their success in practice has, according to Tom Devine of the whistleblower protection organisation Government Accountability Project (GAP) “failed to provide more than anecdotal success.”<sup>104</sup> Nevertheless, GAP also claims that whistleblowers have never had more impact than ever in the history of the USA, in domains like climate change, civil fraud in government contracting and the prevention of terrorist attacks after 9/11, etc. This study focuses on the WPEA or Whistleblower Protection Enhancement Act (2012) for federal public employees, which is an amendment of the WPA or Whistleblower Protection Act (1989), and the Dodd-Frank Act (2010) for everyone who reports to the Securities and Exchange Commission (SEC). These laws were selected because of the comparability of the agencies implementing it with the Dutch Whistleblowers Authority.

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Government Accountability Project (2012). *House passes Whistleblower Protection Enhancement Act (S. 743)*. Accessed on 22-01-18: <https://www.whistleblower.org/press/house-passes-federal-whistleblower-protections-wpea-s-743>.

Office of Compliance Inspections and Examinations (2016). *Examining whistleblower rule compliance*.

OSC (2017). *Annual report to Congress for fiscal year 2016*. Office of Special Counsel.

SEC (2017). *Annual report to Congress. Whistleblower Program*. Securities and Exchange Commission.

SEC (2017). *Agency Financial Report*. Securities and Exchange Commission.

<sup>104</sup> Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act: 23.



## 11.2. Definition of whistleblowing and target groups

The WPEA protects all federal employees, former employees, and applicants for employment who claim that they have been subjected to personnel actions because they made whistleblowing disclosures. However, protection is absent or weak for intelligence agency employees, military, congress and employees in the judiciary. The Dodd-Frank act protects all individuals who report (possible) violations of federal securities laws to the SEC.

The WPEA has a broad scope in terms of types of wrongdoing that can be reported, including (1) any violation of any law, rule, or regulation; or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety (section 102, WPEA). Under the WPEA, federal employees are protected if they report such types of wrongdoing to an agency supervisor (internal reporting: first tier), to the Office of Special Counsel and the Inspector General (external reporting: second tier), but also to other organisations like a congressional committee or the media<sup>105</sup> (external reporting: third tier).

Under the Dodd-Frank Act, protection is limited for reporting wrongdoing to the SEC that concerns possible violations of the federal securities laws. According to the website of the Office of the Whistleblower<sup>106</sup> these violations for example include:

- Ponzi scheme, Pyramid Scheme, or a High-Yield Investment Program;
- Theft or misappropriation of funds or securities;
- Manipulation of a security's price or volume;
- Insider trading;
- Fraudulent or unregistered securities offering;
- False or misleading statements about a company (including false or misleading SEC reports or financial statements);
- Abusive naked short selling;
- Bribery of, or improper payments to, foreign officials;
- Fraudulent conduct associated with municipal securities transactions or public pension plans;
- Other fraudulent conduct involving securities.

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<sup>105</sup> In the case of third tier reporting under the WPEA, the disclosure should not be “specifically prohibited by law and the information does not have to be kept secret in the interest of national defense or foreign affairs” (<https://www.nrc.gov/insp-gen/whistleblower.html>)

<sup>106</sup> See: <https://www.sec.gov/whistleblower/frequently-asked-questions#faq-2>



### 11.3. Whistleblowing agencies: tasks and institutional characteristics

Several agencies are in the USA involved in whistleblowing protection and investigation. This part first describes agencies that have an important role in the implementation of on the one hand the WPEA, being the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB), and on the other the Dodd-Frank Act, being the Securities Exchange Commission (SEC). Then the NGO Government Accountability Project (GAP) will be described, which has the overall mission to protect employees who blow the whistle.

#### 11.3.1. Office of Special Counsel (OSC)

The OSC employs 155 FTE employees who are personnel management specialists, investigators or attorneys and has a budget of approx. 25.000.000 dollar a year. The agency is authorized to investigate and prosecute alleged reprisals against whistleblowers in the federal public sector. During this investigation federal employees must cooperate and provide testimony, information, and documents. Their agencies must make employees available to testify, on official time, and to provide information, which is protected from disclosure under the Freedom of Information Act, and will thus remain confidential.<sup>107</sup> If necessary, the OSC may issue subpoenas for documents or the attendance and testimony of employees. During an investigation, the OSC may also require employees and others to testify under oath, sign written statements, or respond formally to written questions. Based on their investigation the agency can seek corrective action, which is an action that corrects what happened to the employee or applicant<sup>108</sup>, and monitor implementation of corrective action commitments. It can also take disciplinary action, which is an action that penalizes the federal official(s) who committed the reprisal<sup>109</sup>. Interestingly, most of these actions are taken in an informal, rather than a formal way. In

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<sup>107</sup> Only in a limited number of cases where the OSC determines that a violation has occurred, the OSC may include the information gathered in an investigation in a report to the investigated agency, the MSPB, or the Office of Personnel Management.

<sup>108</sup> “Corrective action typically means that OSC seeks to place an employee or applicant in the position he or she would have occupied if no wrongdoing occurred. For example, an employee suspended for prohibited reasons would receive his or her back pay and related benefits, with interest, and a clean record. Corrective action can also include attorneys’ fees, as well as other reasonable and foreseeable costs. The law requires that OSC give the federal agency the opportunity to correct a PPP before filing a complaint with the MSPB.” (<https://osc.gov/Pages/ppp-ourprocess.aspx>)

<sup>109</sup> “OSC also has the authority to request that the MSPB discipline federal officials who committed PPPs. The law allows the Special Counsel to decide which cases are most appropriate for disciplinary action. Penalties for committing a PPP include removal, reduction in grade (demotion), debarment from federal employment for up to five years, suspension, reprimand, a fine of up to \$1,000, or some combination of these penalties. Federal officials accused of committing a PPP in a disciplinary case have certain rights which can be found at 5 C.F.R. Part 1201, Subpart D.” (<https://osc.gov/Pages/ppp-ourprocess.aspx>)



2016, the OSC has taken corrective actions against prohibited personnel practices in 216 cases (mostly informal), which included 174 whistleblower complaints. On average 5,5% of whistleblowers who file a complaint for alleged reprisal, obtain some corrective action, which seems rather low but is high compared to remedial agencies in the private sector and the military remedial agencies.<sup>110</sup> Since 2011, the agency has taken 84 informal and 3 formal disciplinary actions.

The OSC does not investigate the wrongdoing, but refers the report to the organisation that needs to conduct this investigation, which is the head of the department that is involved. This is, however, challenging in practice, because of lack of cooperation or even obstruction by these agencies, and passive resistance through long delays (while reports should be turned in within 60 days, these agencies take on average 387 days).<sup>111</sup> The mediation unit of the OSC can also seek reconciliation between employee and employer, and has according to GAP been very successful in doing so with 80% success rate, compared to an average of 25-30% in private sector lawsuits.<sup>112</sup> There is a ‘Chinese wall’ between the mediation unit and the investigative unit, implying that they are not allowed to discuss specific cases.

The OSC also trains agencies in implementing the legislation and their responsibilities in it. While the agency’s trainings had a bad reputation in the past, given that “agency leaders [were taught] how to fire whistleblowers with impunity, even tutoring federal managers when necessary” (Devine, 1999: 534), it is now said to have “displayed unqualified commitment to the WPEA’s goals”.<sup>113</sup>

### ***11.3.2. Merit Systems Protection Board (MSPB)***

Federal public employees who believe they have experienced Prohibited Personnel Practices (PPP) have the right to appeal to the Merit Systems Protection Board (MSPB), which is an independent government agency that functions like a court. It has authority to investigate allegations of PPP and determine whether corrective action is needed. Reprisal against whistleblowers is explicitly included in these

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<sup>110</sup> Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act.

<sup>111</sup> Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act.

<sup>112</sup> Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act.

<sup>113</sup> Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act: 6.



PPP's.<sup>114</sup> Federal public sector whistleblowers who experienced reprisals first have to seek corrective action from the OSC (see above), and if the OSC does not seek corrective action on their behalf, they can appeal to the Board. After acceptance of the case, an administrative judge will be appointed. Then the agency which is accused of the PPP is sent the request to explain its reason for taking the PPP and document it. When the MSPB has received this information, the parties are asked to file their pleadings, which is most often followed by one or more status hearings during which parties are encouraged to settle their dispute. If no settlement can be achieved, the administrative judge may decide to have a formal hearing after which the decision will be taken or can immediately take a decision based on the available information. If this initial decision is contested by one of the parties, a petition for review may be filed, after which three board members will hear the case and make a final decision.<sup>115</sup> Based on the investigation, an administrative judge of the MSPB can take corrective action or disciplinary action against the individual who committed the PPP, ranging from reprimand to removal, debarment from federal employment for up to five years, or an assessment of a civil penalty up to 1.000 dollar. The OSC may also ask the MSPB to take correction or disciplinary action if it is unable to do so itself. It can thus be considered a punitive system, where there is no room for advising agencies to deal with whistleblowers differently. However, the MSPB has a Mediation Appeals Program (MAP) with trained mediators, which offers an alternative to the formal appeal procedure described above. Mediators facilitate a discussion between the parties and help them resolve the dispute and settle the case. In such cases, not the administrative judge but the parties control the result of the case.<sup>116</sup>

Although several revisions have already been made to how the MSPB operates, it still receives severe criticism from the NGO GAP (see below), which both the interviewees confirmed. The administrative judges are said to show hostility towards the WPEA, which can be illustrated by the 95-98% rulings against whistleblowers, and to lack expertise. Further, MSPB judges are said to being prone to informal

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<sup>114</sup> “Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority [...] take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” (<https://www.mspb.gov/ppp/ppp.htm>)

<sup>115</sup> See: <https://www.mspb.org/Procedures-once-an-MSPB-appeal-is-filed.html>

<sup>116</sup> See: <https://www.mspb.gov/appeals/mediationappeals.htm>



political pressure. Cases are also often decided on technical procedural grounds, and not on substantive claims made by the parties, and because of long delays final decisions are only being taken after three to six years, during which whistleblowers are very vulnerable, especially those who have been fired because of whistleblowing and have no income during this period.<sup>117</sup>

### ***11.3.3. Securities Exchange Commission (SEC)***

The Securities Exchange Commission (SEC) employs 4.794 FTE and implements the Dodd-Frank Act by screening and investigating tips about corruption and securities laws violations. If a whistleblower reports to the SEC, the Office of Market Intelligence first examines the tip to filter out high-quality information that warrant the investment of SEC resources (approx. 1.6 billion dollar a year). If an investigation is considered necessary, the complaint will be referred to either one of the eleven regional offices of the SEC or by a speciality unit.<sup>118</sup> SEC investigative personnel can interview witnesses, examine brokerage records, review trading data, and may issue subpoenas. Additional evidence is collected by surveillance activities, and other sources, like media reports. The SEC can also work together with enforcement agencies in the USA and abroad in criminal cases. The findings of the investigation are presented to the Commission for review, after which it can be filed in federal court or lead to an administrative action. If these acts lead to over a million dollar fine, the whistleblower can claim a reward, which is paid by the Investor Protection Fund. However, often the ESC and involved agency reach a settlement to avoid trial. The SEC has received over 22.000 tips between 2011 and 2017, of which 4.400 in 2017 (which is an increase of nearly 50% since 2012). In the same period 160 million dollar award has been granted to 46 individuals (of which 50 million dollar to 12 individuals in 2017). Hence, not many whistleblowers actually receive a reward from the SEC, which may lead to disappointment and frustration.

The SEC focuses on investigating wrongdoing, but sometimes also investigates alleged retaliation. The Office of the Whistleblower (OWB) monitors such complaints and the ESC can take enforcement acts against agencies who violate the anti-retaliation provisions of the Dodd-Frank Act (SEC, 2017). In total, the SEC has only taken three anti-retaliation enforcement actions and nine enforcement actions because

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<sup>117</sup> Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act.

<sup>118</sup> See: <https://www.sec.gov>



employers prohibited employees to contact the SEC. Whistleblowers can also file a retaliation complaint in federal court.<sup>119</sup>

The OWB has a hotline where whistleblowers or would-be whistleblowers, their attorneys or other citizens can ask information about the program.<sup>120</sup> The hotline is operated by OWB attorneys and questions are answered within three business days. In 2017, the hotline received 3.200 phone calls, and since May 2011 over 18.600 phone calls have been made. Most calls relate to eligibility criteria for awards, confidentiality guarantees, investigative procedure and the appropriateness of the SEC to handle a specific tip (SEC, 2017). The OWB also tries to promote public awareness concerning whistleblowers, by means of their web page, media interviews, presentations, press releases and webinars.

#### ***11.3.4. Government Accountability Project (GAP)***

The Government Accountability Project (GAP) is a non-profit, non-partisan public interest law firm, established in 1977 at the Institute for Policy Studies. It employs 23 staff members, including investigators, policy analysts, consultants, etc. The agency has an annual budget of approximately 3.1 million dollar, mainly coming from 10.000 individual donors and foundations such as the CS Fund, the Open Society Foundations and Rockefeller Family Fund. It assists whistleblowers, investigates and exposes wrongdoing by writing reports about their investigations, and it operates as a knowledge centre for whistleblowing policy. Each of these tasks will be described briefly below. First, GAP gives informal and legal advice to whistleblowers, and represents them in court. Since 1977, GAP has helped whistleblowers in more than 8.000 cases in total. Because the agency cannot represent everyone with the current resources, GAP has to be selective about the kind of cases it takes. In many cases, GAP tries to find an agreement between employee and employer, because that is in the best interest of the whistleblower. Although GAP aims to find win-win solutions for all parties, it is not always considered to be independent and fair by employers, being perceived as an institution for whistleblowers. Second, the investigative journalists that GAP employs investigate the charges whistleblowers make. The results of these investigations are published in articles and reports that are published online. By doing so, the agency helps to expose wrongdoing by government agencies to the public. Third, GAP actively promotes government and corporate accountability by keeping oversight on agencies to determine whether law on paper is implemented in practice. Their studies are presented to congress, and their findings often lead to revisions in whistleblowing protection laws. GAP also provides training for

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<sup>119</sup> See: <https://www.sec.gov/whistleblower/retaliation>

<sup>120</sup> See: <https://www.sec.gov>





agencies involved in whistleblowing protection and policy advice to agencies about the implementation of the several whistleblower protection laws.

#### 11.4. Whistleblower protection and incentives

Given the various revisions through the past decades, the WPEA offers strong protection for federal public sector employees who blow the whistle. Four strong points will be described briefly. First, as for burden of proof the whistleblower only needs to show that whistleblowing was a “contributing factor in the personnel action threatened, taken, or not taken” against him<sup>121</sup>, while the agency needs to demonstrate “by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing”, which is more difficult to achieve than the former.<sup>122</sup> Second, protection for whistleblowers is guaranteed by the option for both corrective action (in terms of for example reemployment with the agency, back pay for the months of unemployment, and compensatory damages for emotional distress), and disciplinary action against the reprising individual, which has according to an interviewee recently led to a paradigm shift among employers from ‘nothing to lose’ to ‘retaliation is risky’. Third, like most USA whistleblowing protection laws, the corrective action provisions in the WPEA follow the principle to ‘make whole’ damages, because it includes both direct processing and attorney costs, and compensation for emotional distress, lost bonuses or raises.<sup>123</sup> Fourth, the WPEA offers protection of the whistleblower’s identity during investigations. Exceptions are administrative or court proceeding and information sharing between agencies for investigative purposes.

The SEC can also take legal action against employers who have retaliated against whistleblowers, but only rarely does so as explained above. Whistleblowers can also go to court to seek double back pay (with interest) – which goes beyond the ‘make whole’ principle – reinstatement, reasonable attorneys’ fees, and reimbursement for certain costs in connection with the litigation. Additionally, the SEC prohibits actions that prevent individuals from reporting to the SEC. Whistleblowers are not only protected and facilitated in such ways to blow the whistle, but can also be rewarded for doing so.

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<sup>121</sup> “You [whistleblower] may demonstrate that whistleblowing was a contributing factor by showing that the official taking the action knew about the whistleblowing and that the action occurred within a time period such that a reasonable person would conclude that the whistleblowing was a contributing factor in the personnel action.” (<https://www.mspb.gov>)

<sup>122</sup> See: <https://www.mspb.gov>; Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act.

<sup>123</sup> Government Accountability Project (2016). *Why Whistleblowers Wait: Recommendations to Improve the Dodd-Frank Law’s SEC Whistleblower Awards Program*.





Monetary awards can be granted to whistleblowers who have voluntarily provided original information that has led to an enforcement action that exceeds 1 million dollar. The reward varies between 10-30% of the monetary sanctions collected by the SEC, and whistleblowers need to contact the SEC to make a reward request.<sup>124</sup> The SEC has discretion to decide whether or not the whistleblower is entitled to receive a reward.

Notwithstanding good protection on paper, whistleblowing protection is still challenging in the USA according to interviewees. First, GAP has exposed government agencies that give whistleblowing protection agencies the whistleblower treatment if they eagerly try to protect whistleblowers, which results in whistleblower protection agencies not being willing to protect whistleblowers as they should. Although the situation seems to have improved, it is important that the implementation of the whistleblowing protection legislation is monitored regularly. Second, solid legislative protection seems to give (potential) whistleblowers a false sense of safety, which leads to them being more vulnerable for reprisals than before. Warning potential whistleblowers for reprisals is thus important. Third, the solid legislation seems to have also led to “more aggressive, creative corporate tactics to silence whistleblowers”<sup>125</sup>, like unlawful gag orders that are difficult to tackle in practice or put employees under retaliatory investigation which is often followed by a prosecution referral, which are not considered PPPs under current legislation. Such measures are aimed at scaring employees into silence. Devine therefore concludes: “It is because whistleblowers rightly are viewed as greater threats to abuses of power than ever before, and therefore must be silenced in a manner that stops others from speaking out.”<sup>126</sup>

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<sup>124</sup> See: <https://www.sec.gov>

<sup>125</sup> Government Accountability Project (2016). *Why Whistleblowers Wait: Recommendations to Improve the Dodd-Frank Law's SEC Whistleblower Awards Program*.

<sup>126</sup> Devine, T. (2017). *Corrected testimony of Thomas Devine*. Government Accountability Project before the House Oversight and Government Reform Committee, Subcommittee on Federal Workforce, U.S. Postal Service and the Census on Whistleblower protection since passage of the whistleblower protection enhancement Act: 13.



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<https://osc.gov>

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<https://see-whistleblowing.org/justice-delayed-justice-denied>

<https://www.mspb.gov>

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## **ADVISORY EXPERTS**

**Prof. Dr. Mark Bovens** is Professor of Public Administration at the School of Governance (USG) of the Utrecht University, and member of the Dutch Scientific Council for Government Policy (WRR) in The Hague. His present research interests include accountability and governance, citizenship and democracy; meritocracy and education gaps in politics and society; success and failure of public governance; trust in government. He has also studied whistleblowing policies in a Dutch and EU context.

**Prof. Dr. Judith van Erp** is Professor of Public Institutions at the Faculty of Law, Economics and Governance of the Utrecht University. Her research addresses corporate compliance and corporate crime. She has published on various public and private modes of regulation and governance of corporate behaviour and their intersection, and in particular, on the role of the media and ‘naming and shaming’ in governing corporate crime.

**Dr. Gudrun Vande Walle** is Forensic Auditor of the Centre for Integrity of the federal Ombudsman in Belgium. She has published on whistleblowing, anti-corruption and anti-fraud in public administration and in the private sector.



