



# **CHECKMATE TO CORRUPTION: MAKING THE CASE FOR A WIDE-RANGING INITIATIVE ON WHISTLEBLOWER PROTECTION**



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# EXECUTIVE SUMMARY

This desk based research report makes a case for a wide-ranging initiative on whistleblower protection. It does this by providing argument, evidence, and examples for the following assertions:

1. The notion of 'whistleblower' is to be restricted to someone raising a concern about wrongdoing within a work relationship context, and has to include both standard as well as non-standard forms of employment.
2. Based on estimates in 13 countries, the number of workers who need whistleblower protection at some point is estimated at 7% of the workforce. This takes into account that not all whistleblowers face retaliation.
3. Whistleblowing is a protracted process rather than a one-off decision. Whistleblowers tend to raise their concern with different recipients throughout the process. The vast majority blows the whistle inside their organisation in a first instance before raising their concern with an enforcement agency or a regulator.
4. Whistleblowing to the media represent only the tip of the whistleblowing iceberg.
5. Forms of retaliation that whistleblowers suffer evolves as the whistleblowing process becomes more protracted, with most whistleblowers experiencing formal and informal reprisals before being dismissed.
6. Explicit support for whistleblower campaigns from labour union has only recently gained momentum. Further experimenting and strategising is required to extend union activity beyond traditional union topics (e.g. health & safety). Unions have a role in supporting the whistleblowing process through influencing policies and procedures at workplace, national, EU, and international levels, as well as supporting individual whistleblower cases throughout the process.
7. Whistleblowing arrangements are an important means of detecting fraud. Robust whistleblower protection can facilitate worker's effectiveness of stopping wrongdoing at an early stage through voicing their concern, before scandals erupt and stakeholders incur huge damage.
8. Key provisions of robust whistleblower protection legislation include: burden of proof, forum (independence of enforcement agencies), final relief, interim relief, corrective action, support services (education and outreach). The report provides a chart of all national whistleblower protection legislation and the Greens/EFA proposal for an EU directive on whistleblower's protection in public and private sectors for these 6 key provisions.
9. Although there are many examples of best practices on these 6 key provisions, the overall picture of whether and to what extent these key provisions are implemented in whistleblower legislation, is one of a mixed bag. This calls for a benchmarking initiative by an intergovernmental multi-stakeholder authoritative institution such as the ILO.





# 1. SETTING THE SCENE FOR WHISTLEBLOWER PROTECTION

This section clarifies the current understanding of key aspects of the whistleblowing phenomenon. More precisely who the whistleblower is, how many people are in need of whistleblower protection, forms and scope of retaliation against whistleblowers, the protracted process which whistleblowing is, and some points on collective action with regard to whistleblower protection.

## 1.1 WHO IS A WHISTLEBLOWER?

Anyone can as a citizen, a user of public services, a client, or a customer, make complaints or raise concerns about wrongdoing that affects the public interest or themselves. However, we speak of whistleblowing only when someone has concerns about wrongdoing in a working relationship context. The standard academic definition of whistleblowing is “the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action”.<sup>1</sup> The Council of Europe Recommendation on the protection of whistleblowers defines a whistleblower as “any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in public or private sector”<sup>2</sup>. This section provides reasons for restricting the term whistleblowing to a work relationship context.

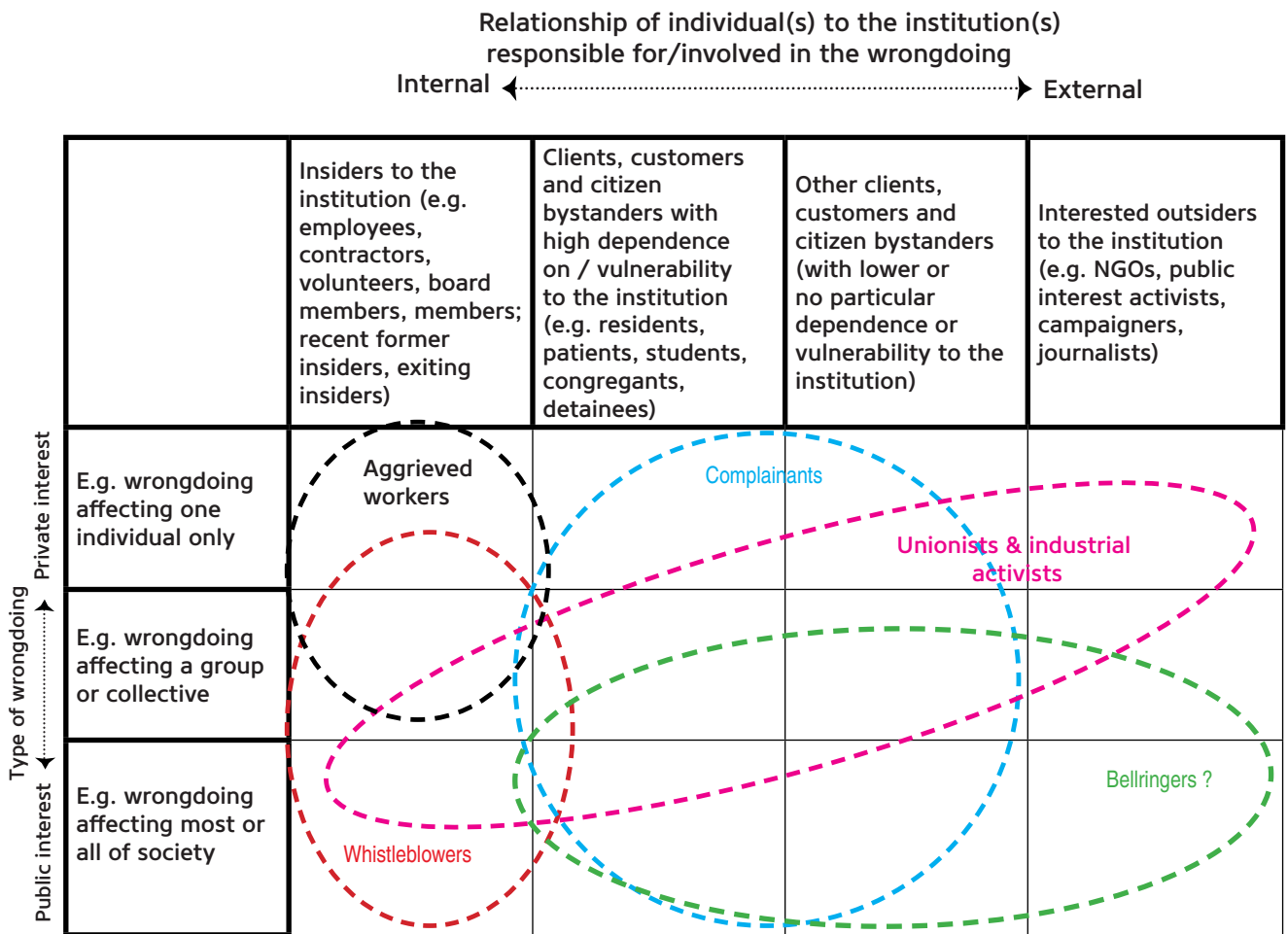
Experts distinguish between whistleblowers, aggrieved workers, complainants, and bellringers<sup>3</sup>. Whistleblowers are insiders to an institution (e.g. employees, contractors, volunteers, board members) in contrast to complainants or bellringers who might be clients, customers, citizen bystanders, NGOs, campaigners, or journalists. Hence, the specifics of whistleblowers is that they are people with inside knowledge about the wrongdoing that happens in an organisation.

A failure to distinguish someone who discloses wrongdoing as a worker from someone who makes a disclosure as a citizen, client, or customer makes it impossible to provide adequate protection for worker whistleblowers. It also makes it impossible to prescribe disclosure routes and channels that are appropriate for both.

**Figure 1** gives an indicative guide to distinguish whistleblowers from complainants, witnesses, bellringers, and aggrieved workers based on two dimensions: the type of wrongdoing (public vs private interests) and the relationship of the individual to the organisation responsible or involved in the wrongdoing. Although the concepts overlap somewhat, whistleblowers are insiders to an organisation and raise concern about wrongdoing that affects groups or the public interest.

This makes Edward Snowden (NSA whistleblowing), Irène Frachon (Mediator affaire), and Alain Detour (Luxleaks whistleblowing) whistleblowers, but not Julian Assange (Wikileaks). Assange has no working

Figure 1.  
Distinguishing between whistleblowers, complainants, bellringers, and aggrieved workers



Source: Brown (2013: 162) <sup>4</sup>

relationship with the organisations Wikileaks publishes documents of. In this sense, Assange’s role is similar to the journalists who published the information provided to them by whistleblowers. Alain Detour on the other hand, was an employee of PricewaterhouseCoopers, whom he blew the whistle on. Irène Frachon was a doctor at the university hospital in Brest when she unveiled that a medicine widely commercialized in France was responsible for at least 500 deaths. Edward Snowden was not an employee of the NSA, but nevertheless had a working relationship with the NSA through being employed by Booz Allen Hamilton, a contractor of the NSA. Snowden performed work at an NSA facility in Hawaii.

The example of Snowden shows why the notion of ‘working relationship’ for the purposes of whistleblower protection needs to be understood to have a broader scope than the standard employer/employee relationship. Although there is no official definition of non-standard forms of employment (NSFE), the ILO included the following work relationships in its consideration of NSFE at its 2015 meeting of experts: formal and informal arrangements of 1) temporary employment, 2) temporary agency work and other contractual arrangements involving multiple parties, 3) ambiguous employment relationship, and 4) part-time work. <sup>5</sup>

The urgency of whistleblower protection stems from the power imbalance that people experience who raise a concern about wrongdoing within a working relationship. This power imbalance results far too often in retaliation against those who speak-up in the public interest. Whistleblower protection aims at restoring that balance. It follows that because the power imbalance is even greater in precarious work, it is crucial to understand the whistleblower working relationship to include NSFE.

Other working relationships that require a broad notion of ‘worker’ for the purposes of whistleblower protection are those of workers in audit bodies, the judiciary, and tax agencies. The wrongdoing they

come across is often not occurring within the premises of their legal employer. Moreover, they often have a professional responsibility and obligation to raise the issue and do so through a report, opinion, or resolution to prevent and warn about the wrongdoing, yet find themselves unwelcomed or retaliated against when they do.

An example of whistleblower protection legislation that does that is the recently enacted Irish Protected Disclosures Act 2014. The legislation in Ireland uses a broad notion of ‘worker’, and construes the notion of ‘employer’ accordingly for the purposes of whistleblower protection. Provisions in the whistleblower legislation in Serbia<sup>6</sup>, and new legislation in France<sup>7</sup> make a similar broad notion of ‘worker’ possible. Details of specific wording used in the Irish whistleblower legislation are provided in **Table 1**.

**Table 1. Broad notion of worker covered by the Irish Protected Disclosures Act 2014<sup>8</sup>**

Worker means an individual who-	Employer, in relation to a worker, means-
is an employee	the person with whom the worker entered into, or for whom the worker works or worked under, the contract of employment
entered into or works or worked under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertook to do or perform (whether personally or otherwise) any work or services for another party to the contract for the purposes of that party’s business	the person with whom the worker entered into, or works or worked under, the contract
works or worked for a person in circumstances in which: <ul style="list-style-type: none"> <li>the individual is introduced or supplied to do the work by a third person, and</li> <li>the terms on which the individual is engaged to do the work are or were in practice substantially determined not by the individual but by the person for whom the individual works or worked, by the third person or by both of them</li> </ul>	the person for whom the worker works or worked, or the person by whom the individual is or was introduced or supplied to do the work
is or was provided with work experience pursuant to a training course or programme or with training for employment (or with both) otherwise than: <ul style="list-style-type: none"> <li>under a contract of employment, or</li> <li>by an educational establishment on a course provided by the establishment</li> </ul>	the person who provides or provided the work experience or training
is or was a member of the Garda Síochána (police force)	the Commissioner of the Garda Síochána
is or was a civil servant	the person by whom the employee is (or, in a case where the employment has ceased, was) employed under a contract of employment; an individual in the service of a local authority shall be deemed to be employed by the local authority;
is or was a member of the Permanent Defence Force or the Reserve Defence Force	Minister for Defence

## 1.2 HOW MANY WORKERS NEED PROTECTION?

It would be a mistake to believe the few mediated whistleblower cases give an adequate understanding of the scope and size of the whistleblowing phenomenon. Only a minority of workers who raise a concern do so outside of their organisation, to a regulator or other enforcement agency (e.g. police or labour inspection). An even smaller minority of whistleblowers turns to the press. Research in Australia, the US, and Norway finds that less than 10% of whistleblowers ever went outside their own organisation<sup>9</sup>. As far as whistleblowing to the media is concerned, research in the UK and Australia suggests this happens in not more than 1% of whistleblowing cases<sup>10</sup>.

It is also a myth that the media always picks up on wrongdoing reported to them by whistleblowers. Whistleblowers often have a hard time getting journalists to be interested in the wrongdoing they disclose. Findings from the World Online Whistleblowing Survey shows that those who had been whistleblowers were the least likely group to believe whistleblowing to the media is a good idea. Many of these whistleblowers - a bigger proportion than those without whistleblower experience - considered that the whistle should never be blown to the media, suggesting that many whistleblowers have had bad experiences when going to the media, or found the route to be ineffective<sup>11</sup>.

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Hence, in terms of the size of the phenomenon, media whistleblowing is only the tip of the iceberg. In addition, media whistleblowers also give us an unrepresentative picture of how whistleblowers are retaliated against. We provide more detailed insights into forms of retaliation against whistleblowers in section 1.3. It suffices here to state that retaliation ranges from ostracism, changed job conditions, demotion, job loss, loss of income, destruction of property, assault and even murder<sup>12</sup>.

It is difficult to arrive at a precise notion of how many workers are whistleblowers at some stage, i.e. raise a concern about wrongdoing - illegal, illegitimate or unethical practices in their work context. Research is scarce and there is no truly global survey data that allows a systematic comparison across regions over time. Nevertheless, the available scarce data can give us an idea.

In the US, the 2013 National Business Ethics Survey, taken with a representative sample of private sector employees at all levels, found that 41% of workers said they had observed misconduct on the job. Of these, 63% reported what they saw. Not all of these are in need of whistleblower protection. However, of those who reported the wrongdoing they saw, 21% said they experienced retaliation. The report calculates that those in need of whistleblower protection<sup>13</sup> amount to 6.2 million American private sector workers.

The first Global Business Ethics Survey conducted with more than 10,000 workers in the private, public, and not-for-profit sectors in 13 countries<sup>14</sup> shows the following: 33% observed misconduct, of which 59% reported the misconduct, with 36% of these experiencing retaliation<sup>15</sup>. The implication of this is that 7% of the workforce is in need of whistleblower protection !

We know that workers start the whistleblowing process by reporting wrongdoing internally, and most often through the hierarchical line (cf. section 1.4 where we provide details of the whistleblowing recipients). Research on corruption in the banking sector finds that internal formal whistleblowing procedures typically stop with reporting to the immediate line manager. Many of the compliance officers interviewed in that research had no idea where else to go when their manager neglected their concern. The author of that research writes: 'There was little guidance on how to escalate complaints, and compliance personnel in this position often spent months, and sometimes years, trying to figure out what the appropriate actions were, and how to behave'.<sup>16</sup>

***7% of the workforce is in need of whistleblower protection !***

In other words, even where there is whistleblower protection available, it often remains unclear how to access it or how to escalate a concern without disqualifying oneself for protection. In some countries, advice centres have emerged in an attempt to close the access gap to whistleblower protection. The advice centre for whistleblowers in the Netherlands registered 324 requests for advice in 2013, and 390 in 2014.<sup>17</sup> An advice centre for whistleblowers in the UK (Public Concern at Work) handled calls from 1,824 whistleblowers in 2014.<sup>18</sup> Whilst these numbers are impressive as absolute numbers, they remain far removed from the 7% of the workforce needing whistleblower protection.

## 1.3 RETALIATION AGAINST WHISTLEBLOWERS

***A series of studies in the US public sector suggests between 16% and 38% of employees who blow the whistle suffer retaliation.***

Protecting workers when they blow the whistle requires specific legislation. This is because the dynamics of retaliation against whistleblowers can be complex. Studies of whistleblower retaliation suggest that many, but not all whistleblowers suffer retaliation<sup>19</sup>. A series of studies in the US public sector suggests between 16% and 38% of employees who blow the whistle suffer retaliation. Similar percentages of whistleblower retaliation were found

in an Australian study of public sector whistleblowing. In the UK, studies using data from a whistleblowing helpline suggest that across sectors, 35-40% of whistleblowers suffer<sup>20</sup>. A study in Norway found retaliation rates to be between 7-18%<sup>21</sup>. This is explained by strong legislation and very high unionisation rates in Norway. A study of American private sector auditors who reported wrongdoing showed only 6% experienced retaliation, which was explained by specific professional regulation and policies to disclose wrongdoing<sup>22</sup>. Hence, a national framework that includes specific and robust whistleblower protection legislation can make a difference.

Whistleblowers can experience various forms of retaliation: ostracism, changed job conditions, demotion, job loss, loss of income, destruction of property, assault and even murder<sup>23</sup>. It is important to be aware that whistleblowing is not a one-off event. Research shows that whistleblowing starts with raising concerns inside the organisation where the wrongdoing occurs<sup>24</sup>. But whistleblowers often have to make numerous attempts to raise their concern before that voice is heard. Some of them have to escalate their whistleblowing to a regulator or other external bodies.

It is in this sense that whistleblowing is a protracted process of different whistleblowing attempts. A study in the UK<sup>25</sup> provides insights into how the retaliation against whistleblowers changes throughout the whistleblowing process:

- Formal reprisals such as demotion, relocation, or reassigning job responsibilities are the most common type of retaliation at each attempt. The second most common type of retaliation is job loss.
- There is a pattern of increasing retaliation as the whistleblower needs to make further attempts to get their concern heard. However, those who blew the whistle externally to a regulator experienced less dismissal but more formal retaliation.
- Those who blew the whistle to an NGO, union, or professional body experienced more dismissal when they did so before going to a regulator.

The study was done in the UK and in this context the findings might not be that surprising. Whistleblower protection legislation - the UK Public Interest Disclosure Act - protects whistleblowers who raise a concern with 'prescribed persons' or regulators. Hence employers become more cautious when employees blow the whistle to a regulator. The overall findings of the UK study are that when the process is no longer purely dependent on interactions between the whistleblower and his or her organisation - i.e. when an external institution like a regulator or an enforcement agency takes control of the whistleblowing process - the safety and effectiveness of the whistleblower can take a turn for the better. This however requires sound and specific whistleblower protection.

## 1.4 EFFECTIVE WHISTLEBLOWING REQUIRES CHANNELS TO ESCALATE A CONCERN

Research shows that two reasons why workers refrain from blowing the whistle are fear of retaliation, and a perception that blowing the whistle will be futile and ineffective to stop the wrongdoing<sup>26</sup>. Both dimensions are related. Whistleblowing is a protracted process rather than a one-off event. In this section, we provide insights from research into how the whistleblowing process unfolds over different recipients. After that we describe the 3-tiered model adopted in the Council of Europe Recommendation on Whistleblower Protection, which provides an ideal framework for designing successive channels to escalate a concern. Our assertion is that robust whistleblower protection throughout the different levels of whistleblowing (internal - external - media) can provide the condition for making whistleblowing effective in correcting wrongdoing.

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Research shows that workers prefer to report wrongdoing inside their organisation<sup>27</sup>. If no clear channels are in place, reporting internally can be highly problematic. In the absence of whistleblower arrangements, workers are then obliged to voice their concern following hierarchical steps. Internal whistleblowing arrangements are designed to sidestep the hierarchical line in order to legitimate worker voice about wrongdoing in which their managers are allegedly implied or when workers fear their managers might neglect or have neglected their reports.

There are a number of reasons why whistleblowers might be unable to report wrongdoing inside their organisation. If the whistleblower has reason to believe that top managers are involved in the wrongdoing, we cannot expect the whistleblower to report the concern inside their organisation. If the whistleblower has reported the wrongdoing internally and is experiencing retaliation for doing so, it is highly unlikely that further internal whistleblowing will be successful in stopping the wrongdoing, and whistleblowers need to report externally. It is also possible that a whistleblower has good reasons to believe an internal report will be neglected and will result in retaliation. Previous cases of internal whistleblowing in the organisation can be the basis of such a reasonable belief. For example, Edward Snowden knew how previous whistleblowers in the NSA suffered after they reported internally. Hence, in the above circumstances whistleblowers are in effect unable to report wrongdoing internally, and successful whistleblowing must rely on blowing the

whistle externally. A worker performs an act of trust when he or she reports a concern about wrongdoing. Not responding to a report betrays that trust. The whistleblower will then perceive the organisation as unable or unwilling to take the report seriously, and will have reason to blow the whistle outside of the organisation.

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Data from two surveys of Australian public sector workers captured the sequence of reporting<sup>28</sup>. One survey asked respondents to indicate with whom they raised their concern the first time, second time, etc. The other survey asked respondents to indicate with whom they raised first, and list all subsequent recipients with indicating the sequence. Findings show that 97% of whistleblowing starts as voicing a concern internally, and 90% remains internal. It is also clear that line managers and senior management are generally the first two ports of call, with the number of whistleblowing attempts averaging at 1.9 and 4.3 in the respective surveys.

Data from a survey of NHS Trusts in the UK shows that internally more than half of the Trust employees raise their concern first with their line manager either informally (52.3%) or in writing (7.3%). The first external recipient of concerns is their trade union (38%), followed closely by professional body (35%)<sup>29</sup>. The study does not give further specification about internal or external paths. However, it does show that those who followed their organisation's whistleblowing procedure were more likely to proceed to raise their concern externally when internal recipients showed to be ineffective or resulted in retaliation.

Data from the Public Concern at Work advice line showed that of a sample of 868 cases, a concern had been raised only once in 384 cases (44.2%), twice in 342 cases (39.5%), three times in 120 cases (13.8%), and four times in 22 cases (2.5%)<sup>30</sup>. **Table 2** gives an overview of internal, external, and union recipients in the whistleblowing process of these cases, excluding 'other'.

**Table 2. Internal and external whistleblowing**

	Internal	External	Union	Total
first attempt	778 (89.6%)	75 (8.6%)	15 (1.7%)	868 (100.0%)
second attempt	350 (72.3%)	115 (23.8%)	19 (3.9%)	484 (100.0%)
third attempt	85 (59.9%)	51 (35.9%)	6 (4.2%)	142 (100.0%)
fourth attempt	10 (45.5%)	11 (50.0%)	1 (4.5%)	22 (100.0%)

Whilst there is a substantial decrease in the number of whistleblowers who went on to raise a third time, it must be noted that of those who raised a concern a third time about 60% still did so with an internal recipient. Even at the fourth instance, an equal number of whistleblowers went internally or to a union (45.5% and 4.5% respectively) as to an external recipient (50%).

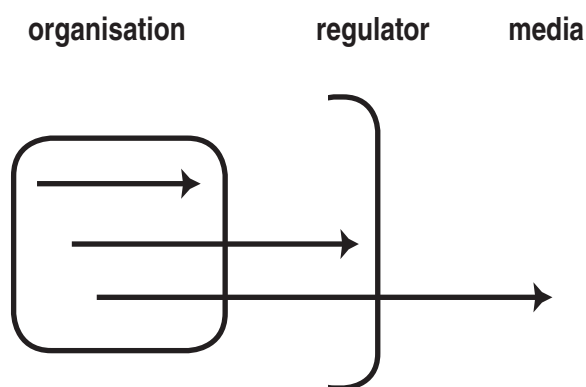
Hence, not only do whistleblowers tend to raise their concern internally before they do so externally, but they tend to raise internally more than once before going external, if they go external at all. In the sample of 868 cases, a concern was raised 1,516 times, 80.7% of which was internal, 16.6% external, and 2.7% to a union representative. Whilst the number of those making external disclosures increases as the whistleblowing process becomes more protracted, it never surpasses the amount of those willing to make internal disclosures.

***Whistleblowers tend to raise their concern internally before they do so externally, but they tend to raise internally more than once before going external, if they go external at all.***

Interview research with 200 whistleblowers in the US<sup>31</sup> found that workers typically raised their concern to their line manager and then to senior management, each time believing the recipient would step in to correct the situation. Only after voicing their concern internally twice did they consider going to authorities outside the organisation. Whistleblowers almost never accurately anticipated the consequences of voicing their concern. Nevertheless, one of the most important findings of this research is that:

“[it] is management’s response that shapes the potential whistle-blower’s subsequent actions. Specifically, our interviews revealed a common pattern in which management’s efforts to discredit or retaliate against the claimant become the major catalyst for the political transformation of the concerned employee into a ‘persistent resister’<sup>32</sup>”.

The Council of Europe Recommendation on the Protection of Whistleblowers clearly stipulates a three-tiered approach as best practice. The rationale of the three-tiered approach to whistleblowing is that whilst wrongdoing is best dealt with as early as possible and at the lowest possible level, there might be however cases where organisations, or even regulatory bodies, are not able or not willing to correct their own wrongdoing. In these cases, it is in the public interest that these concerns are escalated to a further level. The model is explained in the research literature<sup>33</sup>, and is based on an analysis of legislative developments in the 1990s in Australia and the UK. By distinguishing one internal and two external tiers (to a regulator and public), the three-tiered model (Figure 2) maintains a balance between on the one hand the public disclosure of information about organisational wrongdoing (i.e. the public’s right to know) and on the other hand the organisational interests in keeping such information out of the public realm.



**Figure 2. the 3-tiered approach to whistleblowing**

In its first tier, which is internal, the information does not leave the organisation. Workers raise their concerns with supervisors, top management, board members, or other designated persons (ethics officer, compliance manager, auditor, or internal hotline).

In the second tier, the whistleblower raises his/her concern externally, to an agent acting on behalf of the wider society. This includes regulators and enforcement agencies. This second tier is only accessed when first tier whistleblowing is unsuccessful, or in other words, when the organisation fails to correct the wrongdoing for which it carries responsibility, fails to deal adequately with the concern being raised and the person raising it, or when the whistleblower has grounds to believe raising concern internally will lead to reprisal or cover-up. Hence, the second tier is an external one, but the public would not know the whistle had been blown to that external recipient. Still, this second tier recipient is expected to investigate and take action towards the organisation where the wrongdoing occurred. At this stage, the content of the concern the whistleblower raises will not only include information about the wrongdoing, but also about the organisation’s failure to deal with the internal whistleblowing in a correct way.

***Prescribing channels for whistleblowers to escalate public interest disclosures is absolutely necessary, both for mandating specific institutions to take over investigations from other bodies when whistleblowers signal cover-up or retaliation, as well as for ensuring protection for whistleblowers when they need to escalate their concern.***

The third tier is also external, but what distinguishes it from the second tier is that third tier whistleblowing involves recipients that imply the information and allegation the whistleblower exposes becomes known to the wide public, i.e. whistleblowing to the media. As with the content of the concern of the whistleblower raised at the second tier, third tier whistleblowing concerns will include information about the wrongdoing, about the organisation's failure to deal with internal whistleblowing in a correct way, and about a regulator or other second tier recipient not taking the concern seriously. In this sense, third tier recipients function as watchdogs over second tier recipients' failure to take their deterring or rectifying duties seriously. In short, the principle of the three-tiered model is not that organisations become directly accountable to the wider society for their practices, but that they are held accountable for dealing adequately with concerns being raised with them and the workers raising them. In this sense the media plays an important role as a potential final recipient of public interest disclosures.

Specifying escalation routes for whistleblowing in legislation creates accountability for internal whistleblowing arrangements. It is in this way that whistleblowing legislation can be a driver of institutional reform. Prescribing channels for whistleblowers to escalate public interest disclosures is absolutely necessary, both for mandating specific institutions to take over investigations from other bodies when whistleblowers signal cover-up or retaliation, as well as for ensuring protection for whistleblowers when they need to escalate their concern.

## **1.5 COLLECTIVE ACTION FOR WHISTLEBLOWER PROTECTION**

It appears that labour union support for whistleblower protection campaigns and legislation has only recently emerged, with the ETUC one of the vocal representatives of that new momentum triggered by the Trade Secrets Directive at European level. But not only, there is also the campaign led by Eurocadres with the support of more than 40 trade unions and other non-governmental organisations<sup>34</sup>, and the campaign for an ILO standard initiated by the Unión Internacional de Trabajadores de Organismos de Control (UITOC, then ULATOC) in 2009. It seems that in some countries unions have tended to see organisational whistleblowing policies as an icon of Anglo-Saxon models of transparency, which they fear hinder their union mission as representatives of the employees<sup>35</sup>.

However, research suggests that three countries saw union campaigning in favour of whistleblower protection since the end of the 1990s: Canada, the Netherlands, and Norway<sup>36</sup>. In Canada this was in the context of whistleblower protection for public officials. In Norway high unionisation rates and the strong institutionalisation of industrial dialogue has facilitated representation and protection of internal whistleblowers more appropriately than elsewhere. In the Netherlands, the FNV - a union federation with a social movement union profile - has been at the forefront of supporting the move towards whistleblower protection since the end of the 1990s. It has used this as a way to mobilise workers around social issues beyond those typically negotiated in collective agreements.

***Trade unions have an important part to play in successful whistleblowing, and that this requires them to engage in particular ways in the whistle-blowing process.***

Historically, workers have joined trade unions in order to obtain some collective power. More recently, they have had additional reasons for doing so, for example, to access individual representation at disciplinary and grievance hearings and to utilise legal, financial and insurance services. Lewis and Vandekerckhove<sup>37</sup> argue that trade unions have an important part to play in successful whistleblowing, and that this requires them to engage in particular ways in the whistle-blowing process.

Trade unions have extensive experience of protecting their officials and members from victimisation, whether this takes the form of general bullying or harassment or targeted reprisals for engaging in safety awareness activities or other union activities. However, the UK whistleblower legislation (Part IVA ERA 1996) allows workers to raise concerns about a wide range of alleged wrongdoing that may or may not impact on the workplace, for example, about the improper behaviour of contractors or suppliers, environmental damage or miscarriages of justice.



Given the factors known to inhibit potential whistleblowing - fear of retaliation and futility of speaking up - unions do not only need to provide members with clear advice about how to speak up and the consequences of doing so, but unions also need to assure their members that they will exert pressure to ensure that allegations are investigated and corrective action is taken where appropriate. This will be familiar territory in relation to cases of bullying and harassment and other health and safety issues but perhaps more difficult to achieve in relation to financial or environmental by the employer.

One implication is that it is important for unions to acquire the status of designated external recipients under an agreed procedure. Another implication is that some contractual and legislative changes would be needed to enable unions both to protect their members as well as ensure that wrongdoing is rectified - i.e. workers will acquire rights through terms incorporated into individual contracts of employment from collectively agreed whistleblowing arrangements. Whistleblowing policies and procedures might an innovative regime for union to experiment with, just like they have started doing this for NSFE and 'gig economy' jobs.

Unions could also play a role in campaigning at a national or international level, e.g. for whistleblower protection or for creating a positive public perception of whistleblowers. Although in the UK, the TUC is listed as a draft committee member for both British Standards Institute PAS1998:2008 and the Whistleblowing Code of Practice, there is no union explicitly campaigning in favour of whistleblowers.

***Unions also need to assure their members that they will exert pressure to ensure that allegations are investigated and corrective action is taken where appropriate.***



# 2. WHAT IS THE ROLE OF WHISTLEBLOWER PROTECTION IN ANTI-CORRUPTION AND GOOD GOVERNANCE?

This section discusses why ‘insider knowledge’ from whistleblowers is important in the fight against corruption and other wrongdoing. Whilst to our knowledge there is no research available that allows a precise analysis to answer that question, we provide three avenues for arguing how whistleblower protection contributes to attempts to fight fraud and corruption, and helps to build good governance.

## 2.1 COST-BENEFIT OF WHISTLEBLOWER PROVISIONS IN ANTI-FRAUD

Research conducted by Griffith University<sup>38</sup> in the Australian public sector shows the importance of internal whistleblowing. A majority of the 750 managers and integrity officers from 14 Australian public sector agencies indicated that whistleblowing by employees was a more important way in which wrongdoing was brought to light than direct observation, routine controls, internal audits, external investigation, and external complaints. A recent Global Fraud Report<sup>39</sup> showed that in 32% of cases where fraud was uncovered, an employee had blown the whistle to provide information that facilitated an investigation. In cases where a senior or middle manager was a fraudster, that was 41%. This shows that employees can be a key asset in a robust anti-fraud system. Whistleblowers were the single most effective way to uncover fraud (41%), followed by 31% through external audit and 25% through internal audit.

***Whistleblowing by employees was a more important way in which wrongdoing was brought to light than direct observation, routine controls, internal audits, external investigation, and external complaints.***

A comparison between regions underlines the importance of whistleblowing arrangements. The average percentage of fraud uncovered by whistleblowers, across countries and across sectors is 41%<sup>40</sup>. In the US, 48% of cases where fraud was uncovered were facilitated by employees making whistleblower disclosures. In the Gulf region that was only 20%. The authors of the Kroll report attribute this difference in anti-fraud effectiveness to a lack of internal whistleblowing systems and a lack of federal laws providing adequate protection in the Gulf region, in stark contrast to the US.

Obviously, whistleblowing legislation and policies also carry a cost. However, a study of US whistleblower programs shows that the benefits outweigh the costs<sup>41</sup>. The involvement of whistleblowers in uncovering fraud and other wrongdoing implies longer regulatory proceedings. Hence the increased costs. However, whistleblower involvement helps regulators to build stronger cases. The benefits of stronger cases are a higher success rate in proceedings, and higher monetary penalties. Hence, a specific whistleblowing framework for employees who can disclose inside knowledge or organisational wrongdoing is a necessary element of an anti-corruption system.

In the UK, the Financial Conduct Authority (FCA) was created as a financial regulator in 2013. It was the successor of the Financial Services Authority (FSA). One of the differences is that the FCA has a designated team for receiving and following up on whistleblower reports. In 2013, the FCA opened 72% more investigations (254 cases compared to 148) based on whistleblower information than the FSA did the year before<sup>42</sup>.

In the US, research finds that whistleblowers helped to recover more than \$1bn in 2003 alone. The same research estimates that between 1997 and 2001, the ratio of benefits to costs of whistleblower provisions is between 14/1 and 52/1, with a mean of 33/1<sup>43</sup>.

## 2.2 BROADER CONSIDERATIONS

Broader consideration than purely monetary cost/benefit analyses also point to benefits to society of whistleblower arrangements. Braithwaite, a well-known scholar on regulatory institutions, argues that in a context of regulatory capitalism tax advice can shift from a 'market in virtue' (where consultants provide tax advice in line with the spirit of tax regulation) to 'markets in vice' (where they design structures for tax avoidance and evasion). Policy makers need to develop a regulatory framework that will make the market in virtue more dominant (more demanded) than the market in vice. This requires toughened enforcement capabilities for drawing out insider information about looming problems. What works best in this regard are 'suites of strategies integrated within a regulatory architecture that allows them to be mutually reinforcing most of the time'<sup>44</sup>.

***Punitive justice holds offenders responsible for the past, whereas restorative justice persuades offenders to put things right into the future.***

What Braithwaite proposes is to combine whistleblower arrangements at the level of enforcement agencies to be combined with an opportunity for restorative justice at the level of the organisation. Punitive justice holds offenders responsible for the past, whereas restorative justice persuades offenders to put things right into the future. The restorative justice entails organisations engaging with their stakeholders to correct their own wrongdoing at an early stage. Braithwaite's proposal is in line with the 3-tiered model we presented in section 1.4. In Braithwaite's words, one way

to prevent arrangements that encourage whistleblower to report wrongdoing to a regulator from crowding out restorative justice is to 'give incentives to tax cheats to beat their whistleblower to the tax authority, the environmental criminal to beat their whistleblower to the environmental regulator'<sup>45</sup>. Organisations need to be incentivised to pick up internal whistleblowers before they go outside.

Such incentives will however require provisions to protect whistleblower from retaliation not only when they report to a regulator, but also when they raise a concern within their organisation. In this sense, robust whistleblower protection will deter organisations from neglecting or retaliating against their own whistleblower. If not, regulators will be welcoming the insider information whistleblowers bring.

## 2.3 ADEQUATE RESPONSES TO WHISTLEBLOWERS PREVENT DAMAGE

In this section we present brief description of cases where damage could have been prevented had organisations taken early whistleblowing seriously. These cases reinforce our assertion that if robust whistleblower protection can provide an incentive for organisations to correct their own wrongdoing at an early stage, such provisions work in the interest of all stakeholders.

### **Beech Nut case<sup>46</sup>**

Employees of a babyhood company discovered that one of the products sold as '100% pure' and marketed as 'all natural' actually contained super water instead of apple concentrate. This had happened as a result of a mistake rather than a fraud. They reported this to management, who approached the issue as a cost calculation rather than an issue of responsibility to consumers and the nation's system of food production and distribution. Management calculated the cost of destroying unused inventory and recalling products at \$3.5 million, and decided to continue to sell the product and cover up this mistake. By doing so, they turned a mistake into a fraud. This triggered some employees to raise their concern further with a regulator. Criminal and civil legal action was taken against the company and its executives, resulting in a financial cost of \$25 million. The net cost of not taking whistleblowers seriously early on was in this case \$21.5 million, more than 6 times what it would have costed to correct the wrongdoing at the first whistleblowing.

## AIB case<sup>47</sup>

In 2001, a leading internal auditor of a bank heard anecdotes of branch managers overcharging business clients for giving advice to them. The auditor and his team conducted an audit and found that €65 million had been wrongly billed to business clients. He sent his report to the bank's senior management, and received assurance that the practice would be stopped and that clients would be refunded. Three months later, none of the refunding had happened. Meanwhile, management had mounted a restructuring that would see the audit department demoted. Again, he wrote a memo to senior management and the Chairman of the bank about unduly delayed refunding and about how a weakened audit department would brake Basel guidelines and would be disastrous for the bank's compliance functions. Some time later, and after blowing the whistle internally twice, he was removed as head of internal audit. Eventually a regulator stepped in and ordered the refunding of the clients, in addition to a €2 million fine.

## Canada case

In Canada, a civil servant disclosed suspicions of fraud to his supervisor and to his trade union that helped to reveal millions of misspent public funds in a sponsorship scandal that extended to the top of the governing political party. Allan Cutler first attempted to bring concerns about bid-rigging and political interference to the attention of senior management at the Department of Public Works and Government Services Canada in 1995. Eventually his disclosures were substantiated by the Auditor General, whose 2004 report revealed up to \$100 million of a \$250 million sponsorship program awarded to governing Liberal party-friendly advertising firms and Crown corporations for little or no work. Shortly after, a full-fledged public inquiry was established by the Prime Minister. The Gomery Commission Report in turn led to the dismissals of many public officials, the criminal conviction and jailing of the senior bureaucrat in charge of programme and further criminal charges being brought against corporate executives as late as 2008. The cost to the taxpayers of Canada was enormous both due to the scale of the corruption, and the aftermath of the scandal. All avoidable if Allan Cutler's early warning had been heeded.



# 3. INTERNATIONAL BEST PRACTICES FOR WHISTLEBLOWER POLICIES

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Workers have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on ‘paper tiger’ whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. Review of the track records for these and prior laws over the last three decades has revealed numerous lessons learned, which have steadily been solved on the U.S. federal level through amendments to correct mistakes and close loopholes.

In reality, token laws are ‘cardboard shields’, because anyone relying on them is sure to die professionally. Genuine whistleblower laws are ‘metal shields’, behind which an employee’s career has a fighting chance to survive. Based on 37 years of lessons learned at the Government Accountability Project, six ‘best practice’ standards were accepted. All the minimum concepts exist in various employee protection statutes currently on the books. These ‘best practices’ standards are based on a compilation of national laws from the 33 nations with minimally credible dedicated whistleblower laws covering the national labor force, as well as Intergovernmental Organization policies, including those at the United Nations, World Bank, African Development Bank, Asian Development Bank, and Inter-American Development Bank.

***Token laws are “cardboard shields,” because anyone relying on them is sure to die professionally. Genuine whistleblower laws are “metal shields,” behind which an employee’s career has a fighting chance to survive.***

The next section provides a chart explaining the best practices, and the section after that provides referencing credit for nations whose whistleblower laws make a credible effort to implement them. Compliance by the Greens/EFA proposal for an EU Directive on whistleblower’s protection in public and private sectors<sup>48</sup> with each best practice is included as well. Assuming that whistleblower laws are available when and where needed, it also may be useful to spotlight a handful of best practices that may appear technical but can make a critical difference in the law’s impact. As a result, an overview of differences between whistleblower policies in terms of the following six best practice standards for all 33 nations with national laws, as well as the Greens/EFA proposal for an EU Directive, is visually presented in the form of a table and a chart.

## 3.1 SIX BEST PRACTICE STANDARDS

**Burden of proof:** Because they establish the rules of the game for how much evidenced it takes to prove a violation, this best practice is essential for the whistleblower to have a fair chance to win. The core best practice principle is a reverse burden of proof, requiring the employer to present extra evidence of innocent motives whenever a lawful whistleblower demonstrates that retaliation was an issue to any degree.

**Forum:** The enforcement agency or forum determines whether an unbiased authority will decide if a whistleblower’s rights were violated. The key criterion for a best practice is the right to due employment disputes.

**Final Relief:** Some laws merely cancel any illegal retaliation that is proved. However, unless the whistleblower is made whole for all the direct and in direct effects, the victim of illegal retaliation may

still “lose by winning.” This means the relief must include not only reinstatement and lost pay, but also nontangible consequences such as pain and suffering, lost opportunities and reputation, indirect financial consequences, expenses from retaliation and expenses from asserting legal rights.

*Interim Relief:* When temporary relief is granted until the case concludes, the employer no longer has an incentive to prolong conflict, even when it knows ultimate defeat is likely. For unemployed whistleblowers, delay can mean they are financially ruined before they have a chance to win. As a result, no single factor in a whistleblower law can make a difference more than this best practice criterion.

*Corrective action:* Studies consistently confirm that cynicism, the belief that challenging misconduct will not make a difference, has a greater chilling effect on would-be whistleblowers than fear of retaliation. The core principle for the best practice is a choice of responsible institutions with a mandatory duty and procedures to act on the evidence and communicate with the whistleblower. The most effective systems also enfranchise the whistleblower to comment on the report’s adequacy. One nation, Serbia, even provides the whistleblower access to the investigative file.

*Training and outreach:* Based on experience, this usually-ignored core of the support services best practice is equalled only by temporary relief in its impact. As a rule, neither managers nor employees are aware of whistleblowing rights and responsibilities. Similarly, judges and decision-makers make years of wildly inconsistent rulings due to lack of initial training. To illustrate the standard for best practice, Serbia’s law required judges to be certified before hearing a whistleblower case. It is not a coincidence that after the first year, the rulings were consistent and favourable for reprisal victims. It is a wise investment to require outreach and education for all who are affected by the law or have responsibilities to implement it.

## 3.2 EVALUATING WHISTLEBLOWER LEGISLATION

For the above six best practices, each nation and the Greens/EFA proposal for an EU Directive will be evaluated on a 1-3 scale.

- “1” means an in-depth effort to fully achieve the best practice
- “2” means the best practice was respected in principle, although in detail the compliance is incomplete.
- “3” means the best practice was not covered in the whistleblower law<sup>49</sup>, too vague to be meaningful, or the relevant provision was counterproductive.



**Table 3. Rating for 6 best practice standards**

Ratings for 6 best practice standards						
Country	B/P	Forums	Relief - Final	Relief - Interim	Corrective action	Training/ Outreach
Albania	2	3	2	3	2	3
Australia	2	1	1	1	1	2
Belgium	2	3	2	2	1	3
Bosnia	2	3	2	3	3	3
Canada	3	3	1	3	3	3
Great Britain	3	2	1	1	3	3
Ghana	3	1	1	2	2	3
Hungary	3	3	2	3	2	2
India	2	2	2	2	2	3
Ireland	2	1	1	1	2	3
Israel	3	2	1	3	3	3
Jamaica	2	2	1	3	1	1
Japan	3	3	3	3	3	3
Korea	2	2	1	1	1	3
Kosovo	3	2	2	3	2	3
Liberia	2	1	1	3	2	2
Luxemburg	2	1	2	1	2	3
Malaysia	2	1	1	1	1	3
Malta	3	1	1	1	2	3
Macedonia	3	1	2	1	2	3
Netherlands	3	1	2	3	1	1
Norway	2	1	2	3	2	3
Peru	3	2	2	3	3	3
Rumania	3	1	2	3	3	3
Serbia	1	2	2	1	1	1
Slovakia	2	2	2	1	2	2
Slovenia	2	2	2	3	2	2
South Africa	3	1	2	2	3	3
Uganda	3	1	1	3	2	3
United States	1	1	2	2	1	2
Zambia	3	1	1	1	2	3
Proposal EU Directive	1	1	2	3	1	2

## BEST PRACTICES RATING

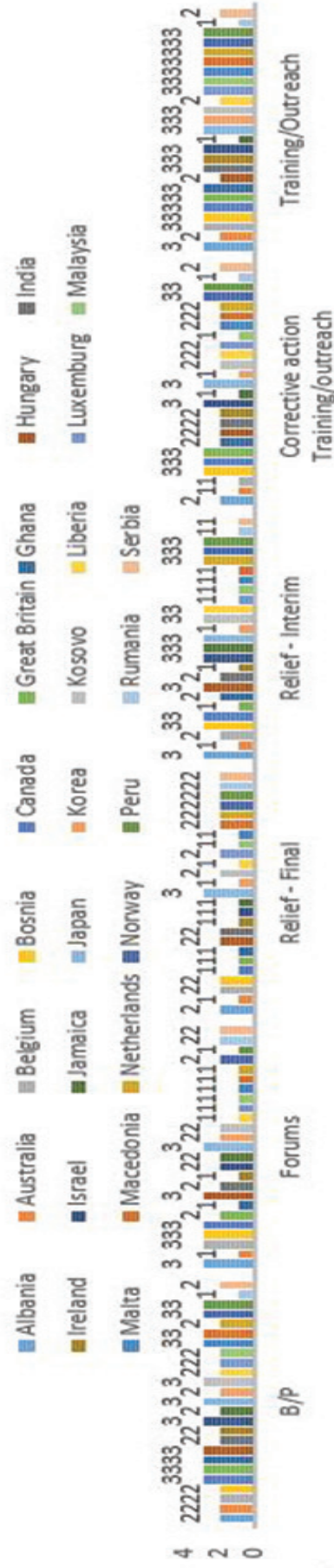


Figure 3. Best practices rating chart

# 4. THE IMPORTANCE OF THE INTERNATIONAL LABOUR ORGANISATION AND WHISTLEBLOWER PROTECTION

As set out earlier in this report whistleblowing is accepted worldwide as a key element in the fight against corruption and tackling gross mismanagement in the public and private sectors. It is also increasingly viewed as an essential aspect of freedom of expression, particularly with respect to the public's right to know and access to information, as well as freedom of conscience<sup>50</sup>. However, most, if not all, of the whistleblower laws that have and continue to be adopted around the world focus on the protection of workers and those in working relationships. This section further discusses how whistleblowing is at the nexus of public interest, labour unions, and the ILO.

## 4.1 CONNECTING PUBLIC INTEREST AND LABOUR LAW

The activities of organizations – in the public and private sectors – affects people in real and direct ways, in the public services provided and in the products sold. No matter what systems are put in place, things can go wrong. Whistleblowing is primarily about communication; whistleblower protection can therefore be seen as ensuring that information channels are not blocked or improperly diverted. Inside organizations, whistleblowing can act as an early warning system but, importantly, whistleblowing is also a matter of public responsibility. It saves lives and livelihoods.

Some of the conceptual confusion around whistleblowing protection stems from the range of public interest information that may form the basis of a whistleblowing disclosure; it may concern health and safety, environment, or gross mismanagement of public funds in any area of government. All are issues that unions around the world have been at the forefront of fighting for in terms of better protections for their members, families and communities. However, the fact that whistleblowing interacts with several different areas of law and policy is also one of the reasons governments claim not to know or are genuinely uncertain about where whistleblower protection fits within government. Where it has been most successful is when the focus has been on workers' rights to be protected.

Legal and policy protections for whistleblowers are firmly rooted in labour and employment law. In the US, civil service reform in the 1970s provided the early context for implementing whistleblower protection across the federal sector - linking whistleblower protection to public accountability.

The International Labour Convention on Termination of Employment of 1982 (Articles 4 and 5) was one of the first international instruments to include whistleblower protection by providing that filing a complaint or participating in proceedings against an employer are not valid reasons for dismissal. The Convention also made it clear in Article 9 that the burden for proving the reason for dismissal should rest on the employer where possible and in the case of protecting whistleblowers this reverse burden of proof has been essential.

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Most of the work done since 1982 at the regional level<sup>51</sup> built on these early ILO measures and did so primarily through the lens of fighting corruption. Article 33 of the United Nations Convention against Corruption (UNCAC, 2003), for example, provides that: “Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.” Further, Article 8 encourages State parties to consider “establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.” One of the reasons for the UNODC to publish a resource guide on best practices in 2015 (discussed briefly below) is because UNCAC did not use the term whistleblower nor elaborate on the specific need to protect workers in law, including public officials.

A focus on Europe provides a good example of how this anti-corruption agenda has played out, starting with the work of the Council of Europe on whistleblower protection within the anti-corruption agenda in the late 1990s. More recently, the Council of Europe has emphasized whistleblowing within a democratic and human rights framework, a framework unions know well. Both approaches overlap.

In 1999, the Council of Europe adopted two conventions, the Civil Law Convention Against Corruption (ETS, No.174) and the Criminal Law Convention Against Corruption. Article 9 of the Civil Law Convention provided for the right for civil servants to report wrongdoing and be protected - each party is required to “provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”

However, this did not mean that the impact of whistleblowing in other key areas were ignored at the European level. In fact the European Parliament’s mid-term review of the EU strategy 2007-2012 on health and safety at work called for an EU ‘directive protecting individuals who legitimately warn of OHS [Occupational Health and Safety] unacknowledged risks, notably by notifying the appropriate labour inspectorate’. The European Court of Human Rights has made some significant rulings with regards to whistleblowing setting out key principles to apply when considering Article 10 rights - right to freedom of expression - in particular. Many of the cases concern public servants who disclosed information about wrongdoing they discovered within their service.

One of the leading cases heard by the European Court of Human Rights is that of *Guja v. Moldova* [no. 14277/04, 12 February 2008]. The Court found a violation of Article 10 because the applicant had been dismissed for disclosing information that was truthful and of legitimate interest to the public. The Court took and continues to take a fairly progressive position in its developing jurisprudence on whistleblower protection in favour of freedom of expression as an essential foundation of a democratic society - even with respect to the disclosure of potentially classified or secret information:

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

The Court has confirmed in this and a series of other cases that the protection of Article 10 extends to the workplace in general, and to public servants in particular. It also takes into account, as one of the factors to be considered, whether there are safe alternative channels for disclosing the information without removing the right to disclose information publicly where necessary in a free and democratic society. This again, is an area that the ILO could provide strong guidance.

The former Council of Europe Human Rights Commissioner, Thomas Hammarberg, stated in 2009 that whistleblowing (along with a free media and independent judiciary) are vital to protecting human rights. The Parliamentary Assembly of the Council of Europe (PACE) recommended a cross-sectoral approach covering 'warnings against various types of unlawful acts, including all serious human rights violations.' This led in 2014 to the Council of Europe adopting a Recommendation on the Protection of Whistleblowers - the first legal instrument to set out clear guidance to member States with respect to providing for a legal and institutional framework for protection whistleblowers. It emphasized the importance of protecting of a wide range of workers.

The Explanatory Memorandum to the Council of Europe Recommendation explains that Principles 3 and 4 take a broad and purposive approach to the range of individuals who might come across wrongdoing in the workplace or through their work-related activities:

"From the perspective of protecting the public interest, these are all individuals who by virtue of a de facto working relationship (paid or unpaid) are in a privileged position vis-à-vis access to information and may witness or identify when something is going wrong at a very early stage – whether it involves deliberate wrongdoing or not. This would include temporary and part-time workers as well as trainees and volunteers. In certain contexts and within an appropriate legal framework, member States might also wish to extend protection to consultants, freelance and self-employed persons, and sub-contractors; the underlying reasons for recommending protection to whistleblowers being their position of economic vulnerability vis-à-vis the person on whom they depend for work. (para. 45)"

The changing nature of work has had a huge impact on unions and this has been equally true in the area of whistleblower protection.

The Explanatory Memorandum situates the role of unions within Principle 15 on alternative protected disclosure channels and Principle 28 on access to independent advice. These are both vital ways in which unions already interact with their members. However, there remains confusion about how unions should engage with this issue.

This came up in a recent survey by a Polish organisation, the Stefan Batory Foundation<sup>52</sup>. The Report summarized the results of a survey of trade union and employer organisations on how whistleblowers are viewed in the country. While the Polish government has argued that no new laws are required because relevant labour law antidiscrimination provisions are in force and employees can rely on the support from trade unions, trade unions representatives interviewed were not clear on how to identify who was a whistleblower and what constituted whistleblowing. This tended to make them view whistleblowers with some suspicion. The unions did say that the role of employees trying to protect the public interest should be strengthened by giving more powers to trade unions and social labour inspectors. While both unions and employer representatives were cautious about the need to adopt new regulations, they did concede that existing legal and institutional frameworks intended to protect employees were far from satisfactory.

As in Poland, in many parts of the world there is little awareness about how strong whistleblower protection would protect unions' interests as well as the wider public interests. Unfortunately, this can play into the hands of the few organisations who may wish to avoid strong inspection or enforcement of rules, and importantly it can play into the hands of corrupt individuals, some in senior positions.

The ILO can play a key role in emphasizing the need for unions and employers to be engaged from the outset, advocating for whistleblower protection and being consulted at an early stage on what is needed and how legal provisions should work. The isolation of individual whistleblowers creates vulnerability - which unions as collective action bodies can address. The issue of individual vulnerability is serious generally for the public interest but it becomes even more serious when it is clear that disclosures properly communicated and heeded could save tax payers millions of dollars, and protect the jobs of those innocently caught up in the aftermath of a scandal or disaster when a problem is not addressed.

There has been some though not strong enough acknowledgement of the importance of unions and employers in the protection of whistleblower at the wider international level. As mentioned earlier the UNODC published a Guide on Best Practices in the Protection of Reporting persons in 2015. It improves on the work done by the Council of Europe with respect to the role of unions in that it makes it clear that there should be consultation on any legislative project to protect whistleblowers. The Guide recommends in its checklist (p.87) that as part of a national assessment, member States should a) review

the existing legal framework and institutional arrangements in order to strengthen existing good practice and identify gaps and b) consult broadly with relevant government, business, union, legal and civil society representatives to plan sensible and sustainable reforms. However, there is little detail on their specific role and importantly how to raise awareness on the importance of whistleblower protection in their work.

## 4.2 UNIONS - A VITAL PARTNERSHIP

Two of the most progressive laws to be passed in recent years are rooted in public service reform and employment law. In Ireland, the current Labour Party leader, Brendan Howlin, guided the Protected Disclosure Act 2014 onto the statute books when he was Minister for Public Expenditure and Reform. Hailed by the Irish Congress of Trade Unions (ICTU) as a “major step forward” and by the Services, Industrial, Professional and Technical Union (SIPTU) as “one of the most important pieces of employment legislation,” the law covers and protects employees, contractors, agency workers and people gaining work experience.

In Serbia, the Ministry of Justice started the formal process of drafting a law on workplace whistleblowing in 2013, and in keeping with the multidisciplinary approach recommended by the Council of Europe and the United Nations, it set up a working group of more than 20 key representatives from the relevant ministries; judges from all court levels, including the Deputy President of the Supreme Court; representatives of the major unions and employers associations, including the chambers of commerce; as well as civil society representatives. The Serbian MoJ also conducted wide public consultations.

The Serbian Whistleblower Protection Act, 2015, like the Irish law, takes the best of the international standards available but in working with the unions and other key players it has adopted a law that is ambitious as it is realistically grounded in national law and traditions. The active engagement of unions and employee representatives from an early stage not only means they understand exactly how the law is meant to work, it helps ensure better and earlier protection for workers without necessarily requiring judicial recourse. The unions in both Ireland and Serbia are in a strong position to monitor the law over time and to lead the call for reforms where necessary.

In some parts of the world, unions have been very active in helping create workplace conditions that are conducive to whistleblowing and the protection of whistleblowers. The *RED DE TRABAJADORES de Control Público, Fiscalización, Recaudación y Justicia of Argentina* is one of them<sup>53</sup>. Since its creation in 2014 the RED has been working on capacity building, representation of workers whistleblowers, and as a depository of complaints, among other things.

In the Netherlands, the Ministry of Social Affairs and Employment commissioned a study and found that both employers and employees wanted a code of conduct to help them put in place the necessary reporting arrangements. The Labour Foundation – a consultative body of employer and employee representatives - was asked to work on this project and the result was a Statement on Dealing with Suspected Malpractices in Companies<sup>54</sup>.

Essentially this was a Code of Practice between the unions and employers to guide the conduct of employers and encourage responsible use of arrangements and policies by employees. Their efforts built on existing common values of service and conduct across all workplaces, and so were not seen as limited only to the private sector. The exercise also clarified that employers and heads of services in all sectors should endeavour to ensure that there is adequate training for those charged with responsibility under any whistleblowing or reporting arrangements on how to handle reports and individuals fairly, and to ensure the arrangements are clearly explained to all staff members and working partners (e.g. volunteers, contractors, etc.). This excerpt from the Introduction explains the reasoning behind the Labour Foundation’s involvement:

“The Labour Foundation is happy to comply with this request [from the Ministry of Social Affairs]. In its view, it is important to lay down conditions enabling employees to bring any malpractice within their companies to light without putting themselves at risk, giving their employers an opportunity to rectify it. Not only is this safer for the employees involved, but it is also in the interests of companies since management should be made aware of suspected malpractice as soon as possible so that it can take steps against them.

In addition, it may be possible to resolve the situation before the employee is forced to resort to whistleblowing [i.e. outside the company.] The Foundation's statement is intended as an initial step towards creating company or industry-level guidelines for reporting suspected malpractice."

## 4.3 THE VITAL ROLE OF THE ILO

Active union involvement in calling for better and stronger whistleblower protection is increasing outside the US - where it has traditionally been the strongest - and in Europe most clearly. See for example the initiatives mentioned in section 1.5. Others also voiced concerns about rules such as those set out in the EU Directive on Trade Secrets that establish private ownership rights over increasing swathes of information, with little open public debate or public interest safeguards, including protections for whistleblowers and journalists.

The need for strong standard setting and forwarding looking guidance specifically for union and labour engagement is clear. The risk is that by failing to do so, whistleblowers are rendered even more vulnerable to being isolated and discredited, and their important messages of serious wrongdoing or risk of harm to the public interest will be missed. There is also the concern that without strong labour support in specific whistleblower cases, and laws that protect such individuals, the chilling effect on the work environment will be such that other workers who might otherwise have come forward with serious concerns will be too afraid to do so.

Increasingly around the world the space for civil society and unions to advocate in the public interest is being contested and challenged. This can help explain the increasing awareness of the importance of protecting a free and independent media; investigative journalism that can probe into serious concerns as a pillar of a free society that can hold power to account. In parts of the world where corruption is rife and public institutions are weak, the public interest in protecting journalists and protecting whistleblowers are converging more clearly than ever. The same is true of unions. The role of unions and employee representatives in protecting the interests of workers, the environment and the public purse converges with interest of protecting individuals who are close to the problem and can more easily identify it.

The ILO set the stage for stronger whistleblower protection around the world in 1982, strong labour rules and rights in protecting the environment, workers and human rights are needed more than ever. The ILO has an opportunity to set a new pace and higher standards so that workers around the world can defend the public interest with confidence for many years to come.





# 5. CONCLUSION

Whistleblowing is a protracted process that involves workers raising a concern about wrongdoing a number of times with different recipients internal and external to the organisation where the wrongdoing occurs, in an attempt to get the wrongdoing stopped. The notion of 'whistleblower' applies to the context of working relationships, including both standard as well as non-standard forms of employment.

Although whistleblowing arrangements bear a cost, their benefits in terms of detecting fraud or stopping wrongdoing at an early stage outweigh these costs. Nevertheless, people who do speak up often experience retaliation. The number of workers in need of whistleblower protection is estimated at 7% of the workforce.

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. Based on experience in representing whistleblowers who call of legislation to protect them in court, this report regards the 6 most important aspects to be burden of proof, forum (independence of enforcement agencies), final relief, interim relief, corrective action, support services (education and outreach).

Although the report identified many examples of best practices on these 6 key provisions, the overall picture of whether and to what extent these key provisions are implemented in whistleblower legislation around the world, shows huge variation. This calls for a benchmarking initiative by an intergovernmental multi-stakeholder authoritative institution such as the ILO.

# ENDNOTES

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