

Recommended draft principles for whistleblowing legislation

Whistleblowers can play an essential role in detecting fraud, mismanagement and corruption. Their actions help to save lives, protect human rights and safeguard the rule of law. To protect the public good, whistleblowers frequently take on high personal risks. They may face victimisation or dismissal from the workplace, their employer may sue (or threaten to sue) them for breach of confidentiality or libel, and they may be subject to criminal sanctions. In extreme cases, they face physical danger.

The whistleblower's right to speak up is closely related to freedom of expression, freedom of conscience and to the principles of transparency and accountability. It is increasingly acknowledged that effective protection of whistleblowers against retaliation will facilitate disclosure and encourage open and accountable workplaces. International conventions¹ commit the signatory countries to implementing appropriate legislation and ever more governments, companies and non-profit organisations are willing to put related regulations in place.

The principles take experience with existing whistleblowing legislation into account. They are meant to be guiding principles which should be adapted to individual countries' specific contexts and existing legal frameworks. These principles are still under review and any contribution to their further development is welcome.

These principles were developed by Transparency International with the support of experts and practitioners from around the world, namely:

- Canadians for Accountability
- Members of the secretariat of the Council of Europe's Parliamentary Assembly (PACE) and the Council's Group of States Against Corruption (GRECO)
- International Federation of Journalists (IFJ)
- Federal Accountability Initiative for Reform (Canada)
- Government Accountability Project (USA)
- Integrity Line (Switzerland)
- Representatives of the International Chamber of Commerce (Anti-Corruption Commission)
- National Whistleblowers Center (US)
- Open Democracy Advice Centre (South Africa)
- Project on Government Oversight (US)
- Public Concern at Work (UK)
- Risk Communication Concepts (Germany)
- Whistleblower Network (Germany)
- TI chapters from Bulgaria, Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia

The consultation took place in the context of the European Commission co-funded project "*Blowing the whistle harder – Enhancing Whistleblower Protection in the European Union*".

Definition

1. *Whistleblowing* – the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.

Guiding principles

2. *Disclosure of information* – whistleblowing legislation shall ensure and promote the disclosure of information in order to avert and sanction harm.
3. *Protection of the whistleblower* – the law shall establish robust and comprehensive protection for whistleblowers, securing their rights and ensuring a safe alternative to silence.

¹ E.g. The UN Convention against Corruption (UNCAC) (article 33), the Council of Europe Civil Law Convention on Corruption (article 9), the Inter-American Convention Against Corruption (article 3), the African Union Convention on Preventing and Combating Corruption (article 5), the Anti-Corruption Action Plan for Asia and the Pacific (pillar 3), the Southern African Development Community Protocol Against Corruption (article 4), etc.

Scope of application

4. *Broad subject matter* – the law shall apply to disclosures covering wrongdoing including, but not limited to, criminal offences, breaches of legal obligation, miscarriages of justice, danger to health, safety or the environment, and the cover-up of any of these.
5. *Broad coverage* – the law shall apply to all those at risk of retribution, including both public and private employees and those outside the traditional employee-employer relationship (e.g. consultants, contractors, trainees, volunteers, temporary workers, former employees, job seekers and others). For the purpose of protection, it shall also extend to attempted and suspected whistleblowers, those providing supporting information, and any individuals closely associated with the whistleblower.
6. *Requirement of good faith limited to honest belief* – the law shall apply to disclosures made in good faith, limited to an honestly held belief that the information offered at the time of the disclosure is true. The law shall stop short of protecting deliberately false disclosures, allowing them to be handled through the normal labour, civil and criminal law mechanisms.

Disclosure procedures

7. *Incentivise internal reporting* – the law shall encourage the establishment and use of internal whistleblowing systems, which are safe and easily accessible, ensure a thorough, timely and independent investigation of concerns and have adequate enforcement and follow-up mechanisms.²
8. *Ease of external reporting* – at all times, the law shall provide for easy external disclosure, including, among others, to regulatory bodies, legislators, professional media and civil society organisations. If there is a differentiated scale of care in accessing these channels³, it shall not be onerous and must provide a means for reporting on suspicion alone.
9. *National security* – where disclosure concerns matters of national security, additional procedural safeguards for reporting may be adopted in order to maximise the opportunity for successful internal follow-up and resolution, without unnecessary external exposure.
10. *Whistleblower participation* – the law shall recognise the whistleblower as an active and critical stakeholder to the complaint, informing him or her of any follow-up and outcomes of the disclosure and providing a meaningful opportunity to input into the process.
11. *Rewards systems* – depending on the local context, it shall be considered whether to include further mechanisms to encourage disclosure, such as a rewards system or a system based on *qui tam* which empowers the whistleblower to follow up their allegations.⁴

² For a guide to the establishment and operation of internal whistleblowing systems, see *PAS Code of practice for whistleblowing arrangements*, British Standards Institute and Public Concern at Work, 2008.

³ For example, see Public Interest Disclosure Act (UK).

⁴ Under *Qui Tam*, a citizen can sue on behalf of the government. Such a provision is used in the US False Claims Act.

Protection

12. *Protection of identity* – the law shall ensure that the identity of the whistleblower may not be disclosed without the individual's consent, and shall provide for anonymous disclosure.
13. *Protection against retribution* – the law shall protect the whistleblower against any disadvantage suffered as a result of whistleblowing. This shall extend to all types of harm, including dismissal, job sanctions, punitive transfers, harassment, loss of status and benefits, and the like.
14. *Reversed burden of proof* – it shall be up to the employer to establish that any measures taken to the detriment of a whistleblower were motivated by reasons other than the latter's disclosure. This onus may revert after a sufficient period of time has elapsed.
15. *Waiver of liability* – any disclosure made within the scope of the law shall enjoy immunity from disciplinary proceedings and liability under criminal, civil and administrative laws, including libel, slander laws and (official) secrets acts.
16. *No sanctions for misguided reporting* – the law shall protect any disclosure that is made in honest error.
17. *Right to refuse* – the law shall allow the whistleblower to decline participation in suspected wrongdoing without any sanction or disadvantage as a result.
18. *No circumvention* – the law shall invalidate any private rule or agreement to the extent that it obstructs the effects of whistleblower legislation.

Enforcement

19. *Whistleblower complaints authority* – the law may create an independent body (or appoint an existing one) to receive and investigate complaints of retaliation and/or improper investigation. This may include the power to issue binding recommendations of first instance and, where appropriate, to pass on the information to relevant prosecutorial and regulatory authorities.
20. *Genuine day in court* – any whistleblower who believes he or she has suffered injury to his or her rights shall be entitled to a fair hearing before an impartial forum with full right of appeal.
21. *Full range of remedies* – the law shall provide for a full range of remedies with focus on recovery of losses and making the complainant whole. Among others, this shall include interim and injunctive relief, compensation for any pain and suffering incurred, compensation for loss of past, present and future earnings and status, mediation and reasonable attorney fees. The law shall also consider establishing a fund for compensation in cases of respondent insolvency.
22. *Penalty for retaliation and interference* – any act of reprisal or interference with the whistleblower's disclosure shall itself be considered misconduct and be subject to discipline and personal liability.

Legislative structure, operation and review

23. *Dedicated legislation* – in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach.
24. *Whistleblowing body* – the law shall create or appoint a public body to provide general public advice on all matters related to whistleblowing, to monitor and review periodically the operation of the whistleblowing framework, and to promote public awareness-building measures with a view to the full use of whistleblowing provisions and broader cultural acceptance of such actions.
25. *Publication of data* – the law shall mandate public and private bodies of sufficient size to publish disclosures (duly made anonymous) and to report on detriment, proceedings and their outcomes, including compensation and recoveries, on a regular basis.
26. *Involvement of multiple actors* – it is critical that the design and periodic review of any whistleblowing legislation involves key stakeholders, including trades unions, business associations and civil society organisations.
27. *Protection of media sources* – nothing in the law shall detract from journalists' rights to protect their sources, even in case of erroneous or bad faith disclosures.

Transparency International is the global civil society organisation leading the fight against corruption. Through more than 90 chapters worldwide and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it. www.transparency.org

Contact:

Transparency International Secretariat
Anja Osterhaus
Alt Moabit 96, 10559 Berlin, Germany
Tel: 49-30-3438 20-722, Fax: 49-30-3470 3912
e-mail: aosterhaus@transparency.org

© 2009 Transparency International. All rights Reserved.

November 2009



Prevention of and Fight Against Crime 2007
With financial support from the Prevention of and Fight Against Crime Programme
European Commission, Directorate-General Justice, Freedom and Security