

### **Article 33: Protection of reporting persons**

*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.*

#### **I. Overview**

Article 33 is a non-mandatory provision. However, States Parties may wish to keep in mind that the provision complements the article dealing with the protection of witnesses and experts. Article 33 is intended to cover those individuals who may possess information which is not of such detail to constitute evidence in the legal sense of the word. Such information is likely to be available at a rather early stage of a case and is also likely to constitute an indication of wrongdoing. In corruption cases, because of their complexity, such indications have proved to be useful to alert competent authorities and permit them to make key decisions about whether to launch an investigation.

The Convention uses the term “reporting persons”. This was deemed to be sufficient to reflect the essence of the intended meaning: while making clear that there is a distinction between the persons referred to with this term and witnesses. It was also deemed preferable to the term “whistle-blowers” which is a colloquialism that cannot be accurately and precisely translated into many languages.

## II. Practical challenges and solutions

### *II.1. The policy framework*

In general terms, States Parties will need to develop a policy framework which will address:

- Who and which areas, activities, sectors, and entities are covered;
- Who may report;
- To whom the report would be addressed;
- What format would the report have and with what information;
- What constitutes unjustified treatments;
- What types of protection are to be offered to the source of the information;
- And what assurances would be foreseen to deal with malicious or vexatious allegations.

The practical issue regarding implementation of article 33 is to strike the appropriate balance between the rights of the target of the information or allegations and the necessity to protect reporting persons. This balance is to be found in the context of national law and the situation of each society. Correspondingly, the article allows substantial discretion which enables States Parties to adjust such measures to their national legal system.

### *II.2. Engaging public officials*

Engaging public officials would involve:

- Promoting comprehension of proper conduct – what is right and wrong, at what level, involving whom;

- Emphasizing the need to avoid misconduct; in particular, having the ability of identifying which conduct is wrong;
- Understanding the importance of speaking out; in particular, emphasizing the fact that it is the responsibility of all to report conduct that is wrong;
- Instilling confidence that:
  - Reporting should be regarded in a positive manner;
  - Effective and appropriate action will be taken;
  - The gains will outweigh the cost of reporting; and
  - Protection to the person making the report would be provided.

### *II.3. Engaging the public*

States Parties may wish to bear in mind the importance of promoting the willingness of the public to report corruption. Therefore, they may wish to consider protecting not only public officials, or employees of legal persons, but any person who reports a suspicion of corruption, irrespective of their status. States Parties may also wish to bear in mind that the protection of journalists is of particular importance in so far as they publish stories within the same criteria as stated by the article.

States Parties may wish to provide for “reporting” guidelines which advise the public which authority they should notify of a corruption suspicion and how they should do that. However, States Parties may bear in mind that until the level of confidence among the public reaches sufficiently high levels, reporting may occur outside established procedures.

#### *II.4. Reporting to whom?*

States Parties may wish to identify the competent authority or authorities to receive the reports, but also have the capacity to provide the necessary protection. States Parties will need to be aware that a minor report may be the first step in a complex corruption inquiry and thus reporting may become the responsibility of a number of agencies – all of whom will need to respect the State policy and procedures on protection.

Generally, it has been found useful that there should be at least two levels at which reporting persons can report their concerns. The first level should include entities within the organization for which the reporting person works, such as supervisors, heads of the organization or internal or external oversight bodies created specifically to deal with maladministration within the agency where he or she works.

Reporting persons should also be able to turn to another institution if their disclosures to a first-level institution have not produced appropriate results and, in particular, if the person or institution to which the information was disclosed:

- Decided not to investigate;
- Failed to complete the investigation within a reasonable period of time;
- Took no action regardless of the positive results of the investigation; or
- Failed to report back to the reporting person within a given period of time.

Reporting persons should also be given the option to address second-level institutions directly if they:

- Have reasonable cause to believe that they would be victimized if they raised the matter internally or with the prescribed first-level external body; or
- Have reason to fear a cover-up.

Second-level institutions could be an ombudsman, an anti-corruption agency, or an auditor general.

### *II.5. Criteria for reporting*

The article specifies the conditions for protection to be provided, i.e. that the report was made in good faith and was based on reasonable grounds.

Several items would need to be considered in the application of these criteria. The disclosure must be treated objectively and, even if it proves to be inaccurate, the law must apply as long as the reporting person acted in good faith. It must also apply irrespective of whether the information disclosed was confidential and even if the reporting person may have technically breached confidentiality laws.

Good faith should be presumed in favour of the person claiming protection, but where it is proved that the report was false and not in good faith, there should be appropriate remedies.

Since whistle-blowing can be a double-edged sword, it is necessary to protect the rights and reputation of those against whom reports are made against frivolous, vexatious and malicious allegations. In particular, the law should contain minimum measures to restore a damaged reputation. Criminal codes normally contain provisions penalizing those who knowingly come forward with false allegations. It should be made clear to reporting persons that those rules apply also to them if their allegations are not made in good faith. The burden of proof regarding good faith should not be on the reporting person.

Regarding the criterion of reasonable grounds, States Parties may wish to consider that the application of special protection measures should not be denied solely because the

report may have turned out to be incorrect ex post. Instead, States Parties may regard adopting an ex ante approach. Thus, they may question whether the reporting person had reason to believe that information existed to support a report. States Parties may refer to other existing reporting regulations with more general application or a guide to determine whether a report was based on reasonable grounds.

### *II.6. Protecting reporting persons*

Generally States Parties would need to consider how to determine the form of protection in relation to the identification of the reporting person, the threats such person may face, whether he/she may be asked to obtain more information, whether that person will be required as a witness, what financial or career prospects may be jeopardized and what redress or compensation may be afforded.

Reporting persons may be concerned that they may face a variety of unjustified treatment. Correspondingly, the tools to thwart such treatment are manifold. In general, the measures of protection should be commensurate to the danger, although care must be taken in cases where the reporting person is unaware of the seriousness of the report or of the possibility of subsequent inquiries becoming, as the report is investigated, disproportionate to the initial allegations.

States Parties may wish to consider the feasibility of ensuring anonymity to reporting persons.<sup>2</sup> Where the anonymity cannot be ensured, States Parties may consider

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<sup>2</sup> Of relevance here is the jurisprudence of the European Court of Human Rights, according to which the maintenance of the anonymity of the witness does not entail infringement of article 6 of the Convention on fair trial “if the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities” (e.g., questioning the anonymous witness in the presence of counsel by an investigating

whether criminalizing threats, intimidation or retaliation would be an effective way of providing protection to reporting persons.

States Parties may consider implementing provisions and procedures offering appropriate legal protection to reporting persons against the loss of employment, such as the possibility of judicial enforcement of continued employment or civil damages. Moreover, States Parties may bear in mind that reporting persons may face the risk of being professionally discriminated. Consequently, they should consider providing for legal remedies against such forms of reprisal. Measures to protect reporting persons from unfair dismissal must be compatible with the labour laws of the State concerned. In particular, where employers are able to dismiss employees without reason, affording appropriate protection to reporting persons may require exceptions.

Finally, States Parties may wish to consider libel law reform as an important aspect of anti-corruption legislation. This may be particularly relevant to the investigations and reports by journalists.

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judge who was aware of the witness' identity, even if the defence was not) (see *Doorson v. The Netherlands*, Judgement of 26 March 1996, Appl. No. 20524/92, Reports 1996-II, paras. 72-73).