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Good Practice in Whistleblowing Protection Legislation (WPL)

Query:

"I am interested in good practices in law and practice for the protection of whistleblowers as provided for in UNCAC Art. 8.4, 32 and 33. Could you give some indications regarding model legislation or aspects to be considered for the development of whistle blower protection legislation? Further, do you know about good practices to implement such legislation especially from developing countries?"

Purpose:

I am working in Bangladesh on UNCAC implementation. One national priority is to develop sound legislation and mechanisms for whistle-blower protection. So far, they are non existent apart from money laundering offences.

Content:

Summary:

Whistleblowing protection is growingly recognised as a key factor to promote a culture of public accountability and integrity.

An increasing number of countries is adopting Whistleblowing Protection Legislation (WPL), to protect whistleblowers from both the private and public sector from occupational detriment such as dismissal, suspension, demotion, forced or refused transfers, ostracism, reprisals, threats, or petty harassment. Good practice WPL includes adopting comprehensive free standing laws that have a broad scope and coverage, provide adequate alternative channels of reporting both internally and externally, protect as far as possible the whistleblower's confidentiality and provide for legal remedies and compensation. As WPL is still in its infancy, little is known yet on its impact and the conditions of effective implementation.

The UK WPL is often referred to as an effective model of legislation, with early evidence of impact in promoting internal disclosure of wrongdoing. However, its replicability to the specific context of developing countries who do not always have an institutional framework in place that supports the rule of law and a culture of transparency and accountability remains questionable.

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Part 1: Best Practice Whistleblowing Protection Legislation (WLP)

Why Does Whistleblowing Protection Matter?

By revealing concealed information that is critically important to public good, whistleblowers provide an opportunity to address public interest concerns before harm is done. For example, Dr Yanyong's disclosure to the media of the spread of the SARS virus in 2003 raised awareness on the gravity and imminence of the public health threat. As dramatically shown in this case, failure to address concerns raised by whistleblowers may result in loss of lives, damage to reputation, and financial costs.

As employees are also more likely to detect misconduct, fraud and corruption in the course of their duties than outsiders, detection of wrongdoing heavily relies on insiders' tips and information[1]. Yet, employees have the least incentives to report wrongdoing and, if they do so, often do it at considerable costs for their careers, personal and professional lives. Inquiries into tragedies resulting in losses of lives often reveal that employees had known about health or safety risks, potential environmental problems, fraud, corruption, etc, but were too afraid to speak up out of fear of reprisals. In many countries, whistleblowing legislation is passed in response to such scandals or disasters. For examples, the US Sarbanes-Oxley act was adopted in the wake of the Enron scandal, while the UK Public Interest Disclosure Act 1998 (PIDA) was influenced by a series of enquiries into a rail crash, a ferry accident and the explosion of an oil platform. (Please see: http://www.corrupcion.unam.mx/documentos/investigaciones/banisar_paper.pdf).

[1] A study conducted to identify the most effective mechanisms for detecting corporate fraud looked at 200 reported fraud cases in large U.S. companies between 1996 and 2004. The study found that fraud detection primarily relies on several non-traditional players (employees, media, and industry regulators) rather than more obvious actors such as investors or auditors. (Please see: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891482)

About 50 countries have adopted national laws on WB in one form or the other to address this situation. For example, Australia, Canada, France, South Africa, United Kingdom and USA have passed comprehensive legislations to protect whistleblowers in the public sector and sometimes in the private sector. Although the scope of protection is limited to certain type of persons or offences, whistleblowing provisions have also be included in sectoral laws such as anti-corruption laws, competition laws, corporation laws, public servant laws, criminal codes, labour and employment laws, freedom of information acts, etc.

There is also strong international pressure to adopt whistleblowing laws, and WP requirements have been introduced in many international instruments, encouraging states parties to adopt measures to protect disclosures of wrongdoings. Most of these requirements relate to anti-corruption instruments, such as the Council of Europe Anti-Corruption Conventions, the Inter-American Convention Against Corruption, the African Union Convention on Corruption, the Anti-Corruption Initiative for Asia-Pacific, the OECD Guidelines, the Southern African Development Community (SADC) Protocol, the United Nation Convention Against Corruption (UNCAC), etc.

For example, Article 33 of the UNCAC requires states parties to adopt national laws to protect any person reporting corrupt practices in good faith and on reasonable grounds from any unjustified treatment.

Best practice legislation is starting to emerge with regard to who is covered, which public interest disclosures are protected, procedures for disclosure, the extent of protection, etc. The following section is mainly based on two recent papers that synthesise the state of knowledge on whistleblowing, "Whistleblowing: International Standards and Developments" (David Banisar) and "Whistleblower Laws: International Best Practice" (Paul Latimer and A.J. Brown). (For sources please see Part 4 "Further Reading")

Objectives of Whistleblowing Legislation

Employees have the best access to information on illegal or unethical practice and are usually the first to recognise wrong doings. The overarching goal of whistleblowing legislation is to provide employees with a safe alternative to silence, and to empower employees to report wrongdoing by providing adequate legal protection. A secondary benefit of WLP is to

encourage public and private organisations to adopt effective whistleblowing procedures and policies to foster a culture of transparency and accountability. More specifically, WLP has five major objectives:

- Supporting public interest disclosure by facilitating disclosure of wrongdoing;
- Protecting whistleblowers against potential retaliation;
- Ensuring that public interest disclosures are properly assessed, investigated and acted upon;
- Promoting a culture of transparency, integrity and accountability (symbolic value of the legislation);
- Preventing abuse and misuse of available protections for personal advantage or vendettas against the employer.

Definition of Whistleblowing

Whistleblowing generally refers to public interest disclosure by employees about wrongful acts, illegal or unethical conducts within their organisations.

Whistleblowing has many different dimensions and implications. As whistle blowing is not per se a technical term, there are no common legal definition of this phenomenon. However, a common understanding of the concept emerges from the various definitions that have been developed overtime. The UK's Committee on Standards in Public Life defines it as "*raising a concern about malpractice within an organisation*", while the International Labour Organisation refers to "*the reporting by employees of illegal, irregular, dangerous or unethical practices by employers*". Public Concern At Work (PCAW) and the Open Democracy Advice Centre (ODAC) speak of "*the options available to an employee to raise concerns about workplace wrongdoing (…), from raising the concern with managers, with those in charge of the organisation, with regulators or with the public*". (http://www.pcaw.co.uk/)

These definitions highlight a number of key characteristics of whistleblowing:

- It typically refers to the disclosure of wrongdoings connected to the workplace, whether perpetrated by the employer or other fellow employees;
- As opposed to personal grievance, there is often a public interest dimension[2] to whistleblowing, the wrongdoing often representing a direct threat for the security, health or safety of others;
- Wrongdoings can involve a breach of the law, unethical practices such as fraud, health/safety violations, and corruption and even in some cases, maladministration. They are typically liable to cause harm to persons outside the organisation they originate;
- Wrongdoings may be reported internally (through internal complaints channels) or externally (to law enforcement agencies, members of parliament, the media or other stakeholders).

Increasingly, the literature excludes from the definitions the whistleblower's moral standards, subjective or ethical motives to focus more on his/her reasons to believe – in good faith and on reasonable grounds - that there has been a wrongdoing.

Scope of Application

International standards limit whistleblowing protections to disclosures by employees of the public and/or private sector, as opposed to across the board protection to any member of the public. This is justified by the fact that although members of the public can also experience reprisals if identified as whistleblowers, employees require stronger legal protection as their institutional connection to their employer makes them especially vulnerable to retaliation. They are also more likely to access critical information worth blowing the whistle.

Public and Private sector disclosures

There are big variations across countries of whose disclosures are protected. Some legal regimes restrict protection to employees only, while others extend

[2] Some authors argue that the law should protect disclosure of any wrongdoing and not only those that have a public interest dimension.

protection to external consultants and contractors. Some countries such as the UK, New Zealand and South Africa have adopted a single disclosure regime for both the private and the public sectors while others limit protection to public servants or private employees. The Japanese whistleblower protection act for example only covers private sector employees, while the Canadian or Public Servants Disclosure Protection Act 2005 only applies to disclosures by members of the Canadian federal public service and to a number of federal Crown corporations. The general international trend in this regard seems to adopt specific legislation for the public and private sector.

As public sector functions can be outsourced to contractors, another issue is whether to protect contractors' disclosures. For example, the South African act excludes independent contractors from whistleblower protection, while the UK legislation protects contractors' disclosures. Experts recommend that a "no loophole" approach to WPL should also include applicants for employment, contracts and funding as well as those who are formerly employed, unemployed or blacklisted and their families.

A recently published U4 Brief on whistleblowing protection further recommends that protection should also be provided to individuals who have not done a protected disclosure but are mistakenly suspected to have done so as well as to individuals who have been required to assist with an internal or external process such as an inquiry or an audit as part of their duties.

Anonymous and confidential disclosures

Another issue relate to the treatment of anonymous whistleblower disclosures. Most legislations exclude anonymous disclosures while providing for the protection of the whistleblower's identity. Some laws even prohibit anonymous disclosures. Anonymous reports are difficult to corroborate, hard to investigate and often impossible to remedy, while casting suspicions on the whistleblower's unaccountability. Whistleblowing support groups such as the Public Concern At Work encourages public reporting of wrongdoing with the view to improving internal work culture, stressing that:

- Anonymity may provide a false sense of security, as are only a few number of people would typically be aware of the disclosed wrongdoing;
- Anonymous disclosures are harder to investigate;
- Anonymous disclosures may contribute to the deterioration of the social climate;
- It is easier to protect the whistleblower when his/her identity is known;
- Anonymous disclosures may be suspected to be malevolent act to discredit a person or an organisation.

Some critics argue that whistleblowing laws encourage employees to speak out and reveal their identity, leading them to believe mistakenly that they are protected, while they in fact become easier targets of reprisals than if the law didn't exist. In countries where the institutional environment is weak, anonymous disclosures may be the only reasonable option for whistleblowers. In countries such as Sierra Leone and Kenya for example, the Anti-Corruption Commissions run anonymous websites for reporting of fraud and corruption.

"Good faith" disclosures

In principle, the outcome, evidence and motive of the whistleblower should not be of major significance with regard to protected disclosures with the view to encourage reporting. Most recent legislation do not require or invite whistleblowers to prove that their allegations are true, and incriminating evidence should be obtained only by competent investigatory agencies to avoid involving the employee inappropriately and/or compromise the official investigation. Disclosers should be permitted to provide evidence, when it's available by legal means in the course of their work, but they should not be encouraged to act illegally or improperly to provide evidence.

Most laws and international treaties only require the whistleblower to report wrong doing in "good faith", in other words that disclosure is based on "*an honest belief on reasonable grounds*" at the time it was made. However, some experts believe that this requirement can however discourage disclosure as it focuses on the motives of the whistleblower rather than the reported act itself. Some countries such as Malaysia or Sierra Leone are even stricter with anti-corruption laws stipulating that filing of a false claim may result in penalties.

Type of Disclosures

The scope of protected disclosures can defeat the purpose of the legislation by minimising the types of wrongdoings covered by the WPL. By nature, sectoral laws limit protection to the conducts covered by the scope of the legislation. Comprehensive WPL usually adopt broader definitions of wrongdoing that apply to criminal acts, danger to health or safety and abuse of power. Most countries also set minimum standards on the level of importance of the wrongdoing before granting protection.

National laws may also include provisions that relate to national scandals, or country specific issues that initially led to the adoption of the law. For example, South Africa includes unfair discrimination as part of the offences covered by WPL. Some countries such as India or Canada also include maladministration as part of the behaviours covered by WPL.

Best practice is to promote and protect free expression with "no loopholes" and cover a wide variety of behaviours. In other words, protected disclosures should cover any wrongdoing, including disclosure of abuse of authority, violation of laws and ethical standards, danger to public health or safety, gross waste, illegality and mismanagement.

Disclosure Procedures

There are many avenues for reporting wrongdoing, from raising the concern with the direct manager, senior/higher level management, internal hotlines, outside agency or the media. There are three major categories of disclosure:

Internal disclosures

They are in theory the primary and most appropriate channel for reporting and the law should encourage organisation to set up appropriate reporting structures. In principle, a well run organisation has an interest to know about potential wrongdoing with the view to correcting it. People are also more likely to report wrongdoings within an organisation when there are appropriate and trusted structures in place that offer different reporting options for individuals and guarantee absolute confidentiality. Most recent laws also require organisations to adopt procedures or policies for an initial handling of disclosures.

External disclosure to an authorised body

External reporting is an alternative to internal reporting mechanisms. It usually requires that the whistleblower has exhausted internal disclosure or reasonably believe it would have resulted in retribution. External authorised bodies can include a wide variety of institutions, such as public protectors, the Auditor General, the Ombudsman, etc. Some countries such as the UK and South Africa also allow disclosures to outside legal advisors or union representatives. Most sectoral laws only authorise disclosures to a limited number of external bodies such as anti-corruption national commissions. Another alternative is to create a central agency for public interest disclosure such as Canada's Office of the Public Sector Integrity Commissioner. In some countries, such approach may not be the most appropriate as there is a higher risk of capture than where there are several protected reporting options.

External disclosure to the public

The final and most visible form of reporting is disclosure to the media. Most legislations deal with media disclosures as a last resort option, if a series of conditions have been satisfied. In many cases, media disclosures are protected where the matter concerns a significant and urgent danger to public health and safety, or where the whistleblower has made internal complaints to no avail. Some critics see this approach as too restrictive, undermining free speech and the critical role that the media can play in promoting public accountability and transparency. Some authors argue when WPL does not protect media reporting, this can be interpreted as an indication that WPL aims more at domesticating dissent rather than acting against wrongdoers. They further stress that disclosure to the media or members of parliament should be encouraged, respected and protected as a fundamental democratic corner stone.

Too prescriptive laws in this regard may undermine the very purpose of the law and encourage anonymous or informal releases, while unlimited disclosures may undermine efforts to promote internal resolution of problems and give the employer a chance to correct the wrongdoing. The general trend in this regard is to promote internal disclosure and resolution by reporting in the first instance to the managers, assuming that whistleblowing procedures are in place, such as encouraged by the UK PIDA. PIDA encourages this approach by making internal reporting the easiest way to obtain legal protection as well as by making more

likely that a subsequent disclosure of the same information to an outside body will be protected.

However, in some cases it may be impossible to disclose to direct employer and WPL must provide for other reporting channels, especially when there are no internal reporting procedures and policies in place within the organisation. Wider public disclosures (including to the media) are generally more readily protected where there are no or ineffective whistle blowing arrangements and other channels of reporting have been exhausted.

Nature and Extent of Protection

One of the major potential deterrents for reporting corruption or other wrongdoings is the fear of reprisals. The 2007 US National Business Ethics Survey conducted by the Ethics Resource Centre found that 36 % of the employees interviewed that did not report corruption did so because they feared retaliation. (Please see: https://www.ethics.org/research/nbes-order-form.asp?)

Retaliation can include a wide range of practices and disciplinary actions such as dismissal, suspension, demotion, denied promotions, forced or refused transfers, wage garnishment, etc. But reprisals can also take more subtle forms that may affect employment opportunities and working environment, such as awkward rosters, request for excessive documentation, petty harassment, harsh treatment by other employees and other forms of mobbing. Last but not least, whistleblowers may also experience various forms of victimisation or stigmatisation from the employer or other fellow employees for being a trouble maker, disloyal to the organisation.

The before mentioned study reviewing 200 fraud cases in the US between 1996 an 2004 confirms that employees' fears of reprisals are justified to a large extent. In 82 % of the cases where the employee was named, employees reported that they were fired, quit under duress or had significantly altered responsibilities as a result of bringing the fraud to light. Many of them further stated that if they had to do it over again, they wouldn't.

Civil and criminal indemnity

There are significant legal obstacles to public disclosure of information. (Please see "Whistleblowing: International standards and Developments" for a comprehensive account of the legal risks involved).

In many contracts of employment, legal barriers include confidentiality clauses or duty of loyalty, under which an employee should not harm the employer's interests in any way. Many public service acts therefore stipulate that public servants are not allowed to disclose any confidential information or information collected in the course of their professional duties. Violation of duties of loyalty and confidentiality can potentially lead to disciplinary actions, including dismissals or suspensions. If the employee reports a wrongdoing directly to the press or any third party, such behaviour can also constitute a breach of the employee's obligations and justify termination or liability for damages.

Most countries also have secrecy laws prohibiting disclosure of state and military secrets, whether by insiders or outsiders such as journalists. A 2007 OSCE review found that nearly half of their state members imposed legal liability on journalists who obtained or published classified information. (Please see: http://www.osce.org/documents/rfm/2007/05/24250_en.pdf)

Libel and defamation laws can also be used to deter disclosures, especially in countries where the judiciary is not independent, justice decisions can be influenced and court systems can be used to control opposition.

Best practice should protect whistleblowers from civil and criminal liability if they make a protected disclosure. In particular, this includes relieving whistleblowers from civil liability for defamation or breach of confidentiality and statutory secrecy provisions. Some WPL provide absolute privilege to whistleblowers against defamation but not all of them override the duty of confidentiality. Whistleblowers should also be protected against sanction for misguided reporting.

Protection of employment status

As whistleblowing usually comes at very high professional costs, one of the most important protections to provide relates to the conditions of employment. Whistleblowers should be protected from dismissals, suspensions, disciplinary and other forms of workplace sanctions and discriminations. Protection should be broad enough to cover any retaliation means, including more subtle forms of discriminations and petty harassment. The South African act for example

provides an extensive list of prohibited harms. As in some cases of retaliation, the only safe option maybe relocation and WPL best practice should include entitlement to relocate.

The law should also provide effective avenues for restitution and legal redress for any detriment suffered as a result of the disclosure. Whistleblowers should be entitled to sue the person or body responsible for detriment. Legal remedies can include injunctions to return to employment or transfer to comparable jobs. If the whistleblower suffered harms that can not be remedied by injunctions, the law should also provide for adequate compensation, covering all losses.

Burden of proof

An important issue in WPL relates to the burden of proof. It is obviously very difficult for the employee to prove the fact that retaliation was a result of making the disclosure, especially as many forms of reprisals maybe very subtle and difficult to establish. Best practice in this regard involves reversing the burden of proof for claims of retaliation. It should be assumed that retaliation has occurred where disciplinary action can not clearly be justified on management grounds unrelated to the fact of disclosure. The South African legislation stipulates that dismissal after whistleblowing is deemed to be "automatically unfair dismissal".

It is however important to note that the employer's right should be protected as much as the whistleblower's with regard to the right of the defence and to a fair trial.

Mandatory Reporting

Another issue with regard to WPL relates to making reporting of wrongdoing mandatory. The recently published U4 Brief "Making whistleblower protection work: Elements of an effective approach" argues that aid and all other public organisations should encourage staff to report misconduct as part of their legal and professional duties, with WPL supporting the implementation of such strategy. Many public institutions have already adopted such an approach in codes of conduct for public officials. The Council of Europe code of conduct for example stipulates that public officials should report to competent authorities if they are aware of breaches of the code by other officials, while the organisation should ensure that employees suffer no prejudice for reporting wrongdoing. Increasingly, a duty to disclose any wrongdoing is being introduced in sectors such as public sector, banking or accounting, while there are also mandatory reporting requirements in many areas of public concern such as child abuse or anti-terror legislation.

However, this approach is not promoted by all stakeholders as best practice. The Bristish Standard Institute for example recommends against requiring employees to blow the whistle, arguing that this strategy is unlikely to increase confidence in reporting requirements or foster a culture of transparency and openness.

Rewarding Whistleblowing

Another issue which is often debated within the framework of whistleblowing is whether employees should be rewarded for blowing the whistle. In the US, the qui tam provision of the False Claims Act allows private individuals to bring civil cases against entities who have submitted false claims to the government. The whistleblower who brings the case to the government's attention (and their lawyers) can win a substantial portion (15-30%) of the final settlement or judgment – an average of US$ 46 million, according to the above mentioned study – assuming that the misconduct disclosed is proven, followed up and successfully prosecuted. The above mentioned study investigating 200 cases of corporate fraud in the US indicates that these types of monetary incentives had a significant impact on the propensity to report. In South Korea, the Anti-Corruption Act allows for individuals reporting corruption to recover up to 20% of the recovered fraud proceeds.

However, many experts are sceptical with regard to providing monetary incentives to whistleblowers, arguing that such provisions may detract from the public interest principles of the legislation and pervert the whistleblower's motives to report.

Part 2: Good Practice in Implementing Whistleblowing Protection Legislation

The adoption of WPL is a relatively recent trend and very few countries have carried out in-depth reviews of their legislation or assessed their level of implementation. David Banisar concludes his review of WPL by noting that experience with implementation has been mixed so far, and WPL does not seem to work as well as anticipated. While the UK PIDA is credited to be one of the most successful legislations in terms of awareness of the law as well as system of oversight

and appeals, cases of reprisals and discrimination against whistleblowers continue to be reported in the UK. However, some progress has been recorded with greater acceptance and recognition of whistleblowers, and an increased number of companies adopting whistleblowing procedures. It is critical to determine to what extent such model legislation can be replicated to the specific challenges developing countries face.

Factors Influencing WPL Implementation

Legal Process Related Obstacles to Effective Implementation

There are many law related factors that can impede effective implementation of WPL. As a first condition, victims of retaliation need to be aware of the relevant laws to determine deadlines and means of complaining. In many countries, low levels of awareness of the law make it difficult for whistleblowers to seek legal redress. In the US for example, effective protection is hampered by the patchwork of laws governing whistleblowing, according to the subject matter and the state in which it arises, with varying deadlines (some deadlines are as short as 10 days), depending on the nature of the offence or the competent jurisdiction.

In some cases, WPL are not comprehensive enough to cover specific offences or are relatively recent, coming to play after disclosures have been made and reprisals have begun. When retaliation has occurred, it is also often a very challenging task to provide clear cut evidence of reprisals, especially with regard to minor forms of discrimination or petty harassment. Responsible companies can afford expensive legal advise, while employees are usually in a more vulnerable position, pursuing the case alone, with fewer resources and no organisational back up.

Some WPL deal with retaliation as a matter arising in the employer/employee relationship rather than as a criminal offence. The UK PIDA's experience in this regard seems to indicate that the resolution of cases by relevant tribunals has proven more effective than when brought in jurisdictions where criminalisation applies.

Enforcement and Oversight Mechanisms in Place

Effective implementation also depends on the institutions in place to ensure enforcement. In Australia for example, many disclosures had been made under the various whistleblowing acts, but there was not a single prosecution as of 2003, as the agencies responsible for implementing the laws often did not see their role as initiating prosecutions.[3]

Most comprehensive laws usually appoint a public body with some oversight role to assist whistleblowers with legal advice, receive and investigate complaints of wrongdoing. In Canada, for example, the Public Sector Integrity Commissioner receives complaints, investigates wrongdoing and reports of reprisals, and issues recommendations. In the US, the Office of the Special Counsel has been established as an independent federal investigative and prosecutorial agency. However, enforcement of the legislation seems to face major implementation challenges, as indicated by several reviews conducted by the Congress and the General Accounting Office. Over a period of seven years, 96% of whistleblowing cases were backlogged, and many had been dismissed for lack of information. Other countries have preferred to rely on a number of existing institutions such as the Ombudsman, courts and tribunals or national Anti-Corruption Commissions.

While it is recommendable to appoint an oversight body to receive, investigate and manage whistleblowing cases, this approach may duplicate existing complaints handling arrangements already in place and require establishing appropriate mechanisms to adress coordination challenges. Establishing a single oversight body also involves higher capture risks that may undermine the independence of oversight. Best practice in this regard suggests that the oversight agency should not have exclusive jurisdiction over whistleblowing related matters.

More generally, to promote effective implementation of WPL, the law should:

- Promote awareness raising measures targeting both employees and the general public to support cultural shift in attitudes towards whistleblowing;
- Establish a monitoring and review mechanisms to assess progress in implementation or lack of thereof.

[3] See "Illusions of whistleblower protection": http://www.uow.edu.au/~bmartin/pubs/03utslr.html

Institutional, Economic and Cultural Environment

Whistleblowing protection laws can not be detached from the local practices, as well as cultural and institutional environment in which they are implemented. A 2005 paper (Please see: Part 4 Further Reading) on the replicability of WPL to the African context challenges the replicability of whistleblower concepts into the developing world.

The prerequisite for effective whistleblowing protection is a legal and institutional environment that supports democratic values of transparency, accountability and the rule of law. The best WPL are unlikely to make a difference in countries which have a bad record on protecting the freedom of information, freedom of expression and anti-corruption. The implementation of WPL also implies a strong and independent judiciary that have the resource, capacity and independence to effectively prosecute whistleblowing related offences. This is not often the case in developing countries.

The economic context is also likely to have an impact on the propensity of employees to report wrongdoing. Where unemployment rates are very high, legal protections may not provide sufficient guarantees for employees to overcome the fear of reprisals and put their job at risk by reporting misconduct.

The local cultural environment can also play an important role in promoting whistleblowing or not. In many countries, there are mixed representations of whistleblowers who are either perceived as heroes or traitors. In countries emerging from civil war, conflicts or authoritarian regimes such as South Africa, there is often a stigma attached to reporting others' actions, inherited from the use and abuse of informants during the previous regime. In other countries such as France, whistleblowing is strongly condemned as an act of denunciation and betrayal. Whistleblowers can also be easily associated with informers who are usually involved in unethical behaviours and receive favours or remuneration for disclosure, using disclosure as a way to reduce liability either voluntarily or through coercion. At another level, the internal culture of the organisation can also stigmatise the act of reporting, as an act of treason and betrayal.

The introduction of whistleblowing legislation can therefore only be effective when it is tailored to the specific circumstances of the country and takes into account the various country specific factors influencing the propensity to report. Broad consultation at the law development stage may be advisable with the view to meeting the legitimate concerns and interests of the various stakeholders.

The Role of Civil Society

Civil society can play a supportive role in promoting effective implementation of whistleblowing laws. Civil society groups offer legal advice to employees on whether and how to blow the whistle and accompany them along the process. They can also contribute to address resistance to WPL through awareness raising, training and advocacy on issues of accountability, transparency and integrity. For example, Public Concern at Work (PCaW) in the UK has played an important role in putting whistleblowing on the governance agenda and in developing legislation in the UK and in South Africa.

The South Africa Case

Legal Process

In South Africa, the Protected Disclosure Act (PDA) was passed in 2000. Whistleblower protection was originally a section of the Open Democracy Bill. Based on recommendations made by the Institute of Security Studies (ISS) and the comparative experience of Australia and the UK, it was finally decided to pass it as free standing law in order to give it additional visibility and make it easier to promote. A draft bill was prepared with the support of PCaW, extensively drawing on the UK Public Interest Disclosure Act. The experience of South Africa is exemplary for the involvement of civil society in the design of the law, which was able to influence the scope and content of WPL.

The South African legislation goes further than the American and Australian laws by making provisions for procedures to protect employees both in public and private sector from occupational detriment who disclose information of unlawful or corrupt behaviour. Disclosures have to be made according to the specific procedures, including to a legal representative, to an employer, to a minister or provincial member of the executive council or to a specified person or body (such as the public protector of auditor general). The act is not retroactive, and whisleblowers suffering occupational detriment for disclosing before 2000 are not protected.

Evidence of Impact

Early evidence of impact of the PDA – by looking at various criteria such as level of disclosure, reported cases of reprisals, the introduction of whistleblowing procedures within organisation, staff awareness of the law, etc. – includes:

- While there has been a steady increase of reports made to the anti-corruption hotline, there have been very few cases of reprisal brought before the courts, which is partly attributed to the lack of legal assistance for cases brought under the Labour Courts.
- There are indications that private sector organisations are increasingly introducing reporting procedures. Studies conducted by KPMG indicate that the rate of organisations having a policy in place has risen from 24 % to 41 % between 2001 and 2005.
- A 2007 study by ODAC found that only 31 % of the respondents had heard of the PDA.
- In spite of legal protection offered by the PDA, 60% of the individuals reporting corruption were unwilling to disclose their identity to the hotline run by the Public Service Commission.
- There is still cultural resistance to whistleblowing. According to ODAC studies, while 70% of the population supports WPL, 30 % still perceive whistleblowers as "troublemakers".

(Please see: "Whistleblowing: International standards and developments")

From the literature review on WPL it emerges that while the introduction of WPL is a growing trend worldwide, little is known yet on the effectiveness of existing legislation and what works and doesn't work in practice to promote a whistleblowing culture in specific contexts. More research is needed to assess the conditions of effective implementation in developing countries.

Part 4: Further Reading

Whistleblowing: International standards and developments (2006, revised 2009)

This study reviews the experience with WPL across the world, looking at emerging international standards and latest developments and laying the foundation for assessing their effectiveness.
http://www.corrupcion.unam.mx/documentos/investigaciones/banisar_paper.pdf

Whistleblower laws: International best practice (2009)

This paper provides an analysis of WPL legislation across the world, and identifies several emerging issues for consideration.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326766

Whistleblowing around the world: Law, culture and practice (2004)

This ODAC and PCaW publication examines American, Australian, British, Japanese and South African legislation. It looks at what encourages and discourages legitimate whistleblowing in different cultures and evaluates the different policy models. It considers the roles of employers, the state, the media, the law and civil society and offers practical advice.
http://www.pcaw.co.uk/law/wbaroundtheworld.htm

Making whistleblower protection work: Elements of an effective approach (2009)

Effective whistleblower protection (WBP) is seen as an essential management strategy for strengthening accountability, responsibility, and good governance. This U4 Brief argues that aid organisations and all other public organisations need to encourage staff to regard whistleblowing as their legal and professional duty, and to report misconduct and corruption to a proper authority so it can be dealt with.
http://www.cmi.no/publications/file/?3197=making-whistleblower-protection-work

Whistleblower protection: Is Africa ready? (2005)

This article critically examines propositions driving the exportation of Western whistleblower concepts into the developing world. Specifically it attacks the prevailing view that public interest disclosure is somehow a culture-free, or at least a culture-muted phenomenon, governed by a set of rules and conventions detached from local histories and practices. The article concludes that this exportation is in the spirit of neo-colonialism and issues a note of warning about the dangers of dispersing western conceived forms of corruption reporting to Africa.
http://espace.library.uq.edu.au/view/UQ:74712