



Whistle blowers Protection

Who is a whistleblower? What is whistleblowing?

- A **whistleblower** is a person who, in good faith, reports cases of maladministration, alleges misconduct or other illicit behaviour. The misconduct may be classified in many ways.

It can constitute:

- ✓ a violation of a law, rule regulation (administrative or penal)
- ✓ a direct threat to public interest or a substantial mismanagement of public resources, such as fraud, health or safety violations.
- ✓ corrupt conducts (covered by the UNCAC)

WB definition under UNCAC

- Under art 33 a Whistleblower is:
“any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the United Convention against Corruption”.

Legal Framework

- United Nations Convention against Corruption (UNCAC). Relevant Provisions:
 - art. 8 par 4 Code of conduct for public officials
 - art.13 Participation of society
 - art. 32 Protection of witnesses, experts and victims
 - art. 33 Protection of reporting persons
 - artt. 37, 38, 39 Cooperation (Law enforcement authorities, national authorities, private sector)

Content of the UNCAC obligations for MS

- Establish measures and systems to facilitate the reporting by public officials of act of corruption to appropriate authorities (art 8 par 4)
- Provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning Convention offences (art 32)
- **Provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any fact concerning Convention offences (art 33)**

Legislative guide for the implementation of the UNCAC

- Summary of the main mandatory requirements (obligation to take legislative measures):
 - Provide effective protection for witnesses and experts (art 32) through:
 - physical protection
 - domestic or foreign relocation
 - allowing non-disclosure of identity or whereabouts of informers/witnesses
 - special arrangements for giving evidence
 - Establish appropriate procedures to provide access to compensation and restitution for victims of offences
 - Provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law;
 - Consider relocation agreements with other States;
 - Consider measures protecting persons who report acts related to corruption offences in good faith to competent authorities.

Legislative guide to the UNCAC

- Summary of the optional requirements: obligations for MS to consider:
 - Incorporate into national legal systems appropriate measures to provide WB protection (art 33) through
 - career protection
 - psychological support
 - institutional recognition of reporting
 - transfer within the same organization
 - relocation to a different organization

Conference of the States Parties to the UNCAC

- Second Session of the COP , Bali, Indonesia, 2008

Chapter V Operative Paragraph 12, Protecting WB, activists and Investigators proposed by the Coalition of Civil Society Friends of Uncac (see

<http://www.uncaccoalition.org/index.php>) and adopted under art.13 UNCAC:

“ We call on governments to guarantee the security of WB.. and call on this COP to include artt. 13, 32, 33 in the self assessment checklist and start the process of developing a mechanism of reporting cases of harassment, drawing on the experience of the UN Conventions”.

Source <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session2.html>

UN Handbook on practical anti corruption measures for prosecutors and investigators

- Chapter VIII Protection of reporting persons
(http://www.unodc.org/pdf/corruption/publications_handbook_prosecutors.pdf)
 - Tool to guarantee an effective WB protection: adoption of ad hoc legislative measures by SM in their domestic systems and implementation of them
 - Purpose of the legal protection: promote a culture of transparency and accountability encouraging people to report crime, civil offences (including negligence and breaches of administrative law), miscarriages of justice and health and environmental threats by safeguarding them against reprisal.

A law to protect WB

- Should provide for at least two levels at which WB can report their concerns
 - First Level: should include entities within the organization for which the WB works, such as supervisors, heads of the organization, internal or external oversight bodies.
 - Second Level: should include higher institutions, such as Ombudsman, an anti-corruption agency, an Auditor General or a member of the Legislature

For a discussion see also WB protection of Persons who report corruption
Anti corruption toolkit http://www.unodc.org/unodc/en/corruption_toolkit.html
<http://www.transparency.org/sourcebook/25.html>

A law to protect WB

- When turn into a second level of Institution protection?
 1. WB disclosures at a 1° level have not produced appropriated results
 2. The person or the institution to which the information was disclosed:
 - a) decided not to investigate
 - b) failed to complete the investigation in a reasonable time
 - c) took no action regardless of the positive results of the investigationfailed to report back to the WB within a given time
 3. The WB have reasonable cause to believe that they would be victimized if the matter is raised with the prescribed first level external body or reasonably fear a cover-up

Countries experience

- Australia WB Protection Act 1994 amended by WBPA in 2001 (Act No. 36/2001).

Purposes of this Act:

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies
- to provide protection for persons who make those disclosures and persons who may suffer reprisals relation to those disclosures
- to provide for the matters disclosed to be properly investigated and dealt with.

- **Who can make a disclosure about improper conduct?**

- A natural person who believes on reasonable grounds that a public officer or public body

- (a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or

- (b) has taken, is taking or proposes to take detrimental action may disclose that improper conduct or detrimental action

- **To whom can a disclosure be made?**

- A disclosure may be made to

- (a) the Ombudsman; or

- (b) if the disclosure relates to a member, officer or employee of a public body, that public body.

- **Australia Act main important points**
 - ✓ **WB Guarantee of Confidentiality:** a person may make a disclosure anonymously and confidentiality can be maintained also on the content of their disclosures.
 - ✓ **WB Immunity from liability:** A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the protected disclosure.
 - ✓ **WB Protection from reprisal:** A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the protected disclosure.

Australia as an example of 2° level WB protection system

- Key Role played by some important 2° level institutions bodies such as:
 - The Ombudsman as indicated in the WB Protection Act 2001
 - The ICAC (Independent Commission against Corruption) of New South Wales

Other Relevant Laws to protect WB

- USA WB protection Act 1989 converted in the WB Protection Enhancement Act 2007 (which amended title V of the Us Code)
<http://oversight.house.gov>
- Canadian WB Protection Act 2006 (The Public Interest Disclosure Protection Act). See
<http://web2.gov.mb.ca/laws/statutes/ccsm/p217e.php>
- UK Public Interest Disclosure Act 1998 and UK Code of Practise. See <http://www.opsi.gov.uk/acts>

Countries experience. Other examples of 2° level protection

- AIHRC (Afghanistan Independent Human Rights Commission)
See web page http://www.aihrc.org.af/index_eng.htm
- US Office of Special Counsel' Disclosure Unit
See web page <http://www.osc.gov/wbdisc.htm>
- EEOC (Equal Employment Opportunity Commission)
See web page <http://www.eeoc.gov/>

Other important international instruments

- AU (African Union Convention on Preventing and Combating Corruption, art 5 paragraphs 5 and 6).
Binds State to adopt legislative and other measures to protect informants and witnesses in corruption and related offences and to adopt measure to ensure citizens report instances of corruption without for of consequent reprisals
- CoE Crim (Council of Europe Criminal Law Convention on Corruption, art. 22)
Binds States to provide effective and appropriate protection for those who report criminal offences established by the Convention or cooperate with the investigating or prosecuting authorities
- CoE Civ (Council of European Civil Law Convention on Corruption, art. 22)
Enforces States to provide appropriate protection against any unjustified sanction for employers having reasonable grounds to suspect corruption and reporting in good faith their suspicion to competent authorities
- OAS (Inter-american Convention against Corruption, art 3 paragraph 8)
Binds States to create, maintain and strengthen systems for protecting public servants and private citizens, who, in good faith reports act of corruption, including protection of their identities.

Source www.u4.no (The U4 Anti-Corruption Resource Centre assists donor practitioners in more effectively addressing corruption challenges through their development support)



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