

Combating Corruption via Guidelines Pertaining to Whistle-blowers Protection

Boussahia Sayeh

Echahid Cheikh Larbi Tebessi University, Tébessa, Algeria

sayeh.boussahia@univ-tebessa.dz



<https://orcid.org/0000-0003-3231-8956>

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Abstract:

Whistleblowers, who are usually employees, disclose illegal, unethical, unsafe, or fraudulent practices occurring within their organizations. The methods of protection for these individuals differ from one jurisdiction to another, with some governments offering robust and consistent safeguards, while others, such as France, Japan, and the UK, provide varying degrees of protection through their laws and regulations.

The existing whistleblower laws often fail to take a serious approach, leaving individuals vulnerable to retaliation. Thus, It is essential for countries to adopt best practices and implement effective strategies to ensure that whistleblowers are shielded from such retaliatory actions.

Keywords: whistleblower, corruption, guidelines, combat, protection.

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1. INTRODUCTION

The UN Convention against Transnational Organized Crime mandates that all signatory countries implement measures and tools to promote transparency, urging public officials to report instances of corruption to the appropriate authorities if they become aware of such cases during the performance of their duties.⁽¹⁾

Article 8 of the Convention against Inhuman or Degrading Treatment states: each Party ought to contemplate establishing appropriate provisions within its legal framework to prosecute individuals who, in good faith and based on reasonable grounds, report facts related to a criminal offense as defined by this Convention to the relevant authorities, in accordance with the "Convention against Inhuman or Degrading Treatment."⁽²⁾

The terms outlined in the aforementioned agreement have not been enforced in numerous nations. For instance, Egypt lacks legislation that criminalizes corruption broadly,⁽³⁾ and it also does not have any measures in place to safeguard public officials or individuals assigned with public responsibilities who may learn of or disclose offenses occurring during the execution of their duties..

While other instruments, including treaties like the UN Convention against Corruption, mandate the establishment of mechanisms to physically protect whistle-blowers, ⁽⁴⁾they also urge States Parties to consider the safeguarding of whistle-blowing and to engage in agreements and arrangements with other nations in this area, all while respecting the rights of the defense.⁽⁵⁾

Providing protection to whistleblowers is crucial for encouraging the reporting of misconduct, fraud, and corruption. Both public and private sectors must implement protective measures to facilitate a more robust environment that empowers them. This includes offering effective legal protections and establishing clear reporting procedures to ensure their safety and support.

Safeguarding whistleblowers in both public and private sectors from retaliation when they report suspected corruption or misconduct in good faith is crucial for combating corruption, promoting integrity and accountability, and creating a just business environment.⁽⁶⁾

In response to the situation outlined, numerous organizations and associations have swiftly developed fashionable practices and standards

aimed at protecting whistleblowers who report corruption violations in good faith or raise concerns about potential corrupt activities.

This includes the G20 nations, which have implemented regulations to safeguard whistleblowers, drawing on the initiatives of entities such as the OECD and the World Bank. These organizations compile existing whistleblower protection laws, create enforcement strategies, and recommend optimal legislative practices, while also providing guidelines and procedures to support the execution of these commitments..

Problematic: In what ways might the guidelines and procedures concerning whistleblowers protection in the fight against corruption?

2. Forms of whistleblower protection in different legislations

The provisions of transnational instruments have enhanced the international legal framework, enabling nations to implement robust legislation that protects whistleblowers. These instruments not only focus on combating corruption but also emphasize the importance of having laws in place ⁽⁷⁾ to safeguard whistleblowers as a crucial element in the fight against such practices.

The key elements include the United Nations Convention against Corruption, the Council of Europe's Civil and Criminal Law Conventions on Corruption, the Inter-American Convention against Corruption, the African Union Convention on Preventing and Combating Corruption, the 2009 OECD Recommendation regarding the fight against bribery of foreign public officials in international business transactions, and the 1998 OECD Recommendation aimed at enhancing ethical standards in public service.⁽⁸⁾

The Guidelines serve as a resource for creating, modifying, or enhancing whistleblower protection frameworks and provide direction for future legislation. They are not intended to serve as a standard or assessment of legal statutes but rather as examples of best practices and recommendations that nations may opt to adopt in order to effectively implement their legal systems, especially in the absence of consistent legislative measures to ensure robust protection.⁽⁹⁾

2.1 In USA

In the United States, various whistleblower laws tackle corruption at both the state and federal levels, as well as specific provisions in laws related to health, safety, and welfare.

At the federal level alone, there are more than fifty such statutes. Among these, the Corporation and Criminal Accountability Act, the False

Claims Act, and the Whistleblower Protection Act of 1989 stand out as the three primary legislative measures.⁽¹⁰⁾

2.1.1 Whistleblower Protection Act of 1989

The Civil Service Reform Act of 1978 introduced safeguards for whistleblowers, which were updated more than ten years later and again two decades thereafter.⁽¹¹⁾

At first, federal employees facing various forms of retaliation were supposed to receive support from the Office of Special Counsel. However, this agency did not become operational until the enactment of the Whistleblower Protection Act in 1989, which created the Merit Systems Protection Board,⁽¹²⁾ aimed at protecting against retaliatory discrimination in promotions.

Despite this, the board proved to be largely ineffective and served primarily as a symbolic gesture, indicating that whistleblower protection was a policy that all government leaders publicly supported.

The legislation discussed earlier provides legal protections for American government employees who report suspicious activities, requiring that the individual making the report be either a current or former government worker or a recent candidate for public office. This law protects whistleblowers from any retaliatory actions by their employing organization.⁽¹³⁾

Following the introduction of the amendments, encouraging developments have begun to emerge; however, the application of the law still needs improvement. Public sector employees are required to disclose any violations to their employer before they can formally report them, creating a potential conflict of interest as the employer acts as both adjudicator and involved party, thereby compromising confidentiality. As a result, the onus of responsibility largely falls on the whistleblowers.

2.1.2 Corporate Law and Criminal Liability

The Sarbanes-Oxley Act is a U.S. legislation that requires corporations to authenticate and support their financial information using internal oversight mechanisms.⁽¹⁴⁾ Enacted in 2002, this law was introduced to combat corporate fraud and enhance accountability within businesses, serving as a legislative response to the unethical behaviors exhibited by certain companies.

The law requires enhanced financial transparency and unbiased auditing practices for publicly listed companies. According to Section 301, audit committees on boards of directors are tasked with establishing

procedures that allow for the confidential and anonymous submission of employee complaints concerning internal accounting practices or audit-related matters.

The legislation provides specific protections and support for whistleblowers, allowing employees the option to report issues not only to their supervisors but also to a federal law enforcement agency, a regulatory body, a member of Congress, or any congressional committee, as well as to individuals with supervisory authority over the employee.⁽¹⁵⁾

2.1.3 False Claims Act

This law was established to safeguard against fraudulent activities directed at the government. Enacted during the tumultuous times of Abraham Lincoln's presidency, it is considered the most robust whistleblower protection law in the country. In 1986, it underwent amendments to strengthen protections for whistleblowers, preventing harassment and retaliation. The legislation allows for anonymous reporting and has been embraced by numerous states throughout the United States..

According to this regulation, an employee has the right to resume their previous role and receive fair compensation if they face threats or coercion related to their job, particularly as a result of reporting or assisting in the recovery of funds that were unjustly obtained through fraud or avoidance tactics against the state.

The False Claims Act, commonly known as the Lincoln Act, is a federal law that makes individuals and organizations accountable for fraudulent activities associated with government programs. This act is the main legal instrument used by the federal government to fight against fraud.⁽¹⁶⁾

The legislation allows private citizens, such as real estate agents, to file lawsuits on behalf of the government, serving as whistleblowers, while providing protections against retaliation.⁽¹⁷⁾ This law serves as the primary tool for the U.S. government in combating fraud, enabling whistleblowers to pursue legal action against individuals who defraud the government and to recover damages and penalties on its behalf.⁽¹⁸⁾

2.2 In Australia

A significant observation in Australia is that, with the exception of the southern region, there is a lack of legislation regulating the private sector. Recent amendments to the Companies Act and the Labor Relations

Act offer whistleblower protections; however, these protections are limited to violations of those specific laws.⁽¹⁹⁾

The Australian Competition and Consumer Commission has implemented leniency provisions that permit reduced penalties and, in some instances, offer amnesty to individuals or organizations that breach the Trade Practices Act.

It is crucial to understand, however, that these provisions do not cover every type of illegal or corrupt behavior in the private sector. Furthermore, Australia lacks effective whistleblower protection laws overall.⁽²⁰⁾

Currently, there is no overarching national legislation that safeguards whistleblowers, except for those who are public servants. The Public Service Act, specifically section 16, includes a non-reprisal clause; however, it lacks the specific protections that are present in various state laws.⁽²¹⁾ In 1996, an initial draft of a national whistleblower protection law was introduced in the Federal Parliament.

In Australia, robust protections for whistleblowers are provided by various government and state laws, including the Open Disclosure Act of 2013. The eligibility for protection under these laws depends on the specific requirements and the nature of the information disclosed.

It is important to note that not all disclosures are protected under Australian law, and federal whistleblowers may face imprisonment for revealing information related to sensitive topics such as immigration and national security.⁽²²⁾

2.2.1 Public Interest Disclosure Act

The Open Intrigued Divulgence Act of 2013 established a robust framework aimed at protecting whistleblowers in the Commonwealth public sector. This legislation serves as the foundation for the Commonwealth Government's Open Intrigued Divulgence Scheme, which allows employees to report any suspected misconduct occurring within the Australian public sector.

Following the release of a report by the House of Representatives Standing Committee on Legitimate and Protected Undertakings, entitled "Whistleblower Security: A Comprehensive Diagram for the Commonwealth Open Segment," legislation was enacted in response. The committee's investigation highlighted the crucial role of whistleblowers in upholding accountability, revealing that individuals who disclose information must be protected from retaliation.

The legislation provides protections for whistleblowers from retaliation and is relevant to public officials who disclose suspected illegal conduct, corruption, mismanagement, violations of public trust, fraud in scientific research, misappropriation of public resources, unreasonable health or safety risks, environmental threats, abuse of power, or actions that may lead to disciplinary action.⁽²³⁾

2.2.2 National Security Legislation Amendment Bill

The National Security Amendment Bill (No.1) of 2014 revised the current legislation regarding the criminalization of revealing details related to a “Private Intelligence Operation”⁽²⁴⁾

Australia has significantly advanced in protecting whistleblowers in the private sector, highlighted by the recent revisions to the Corporations Act and the introduction of the Treasury Laws Amendment (Enhancing Whistleblower Protection Act) in 2019.⁽²⁵⁾

The Companies Act has strengthened whistleblower protections by mandating that public companies, businesses with substantial ownership, and corporate trustees of pension funds implement a whistleblower policy by 2020. Furthermore, for the first time, whistleblowers in the private sector enjoy greater protections compared to their counterparts in the public sector.⁽²⁶⁾

Although there are legislative gaps in Australia, every state provides varying degrees of confidentiality for whistleblowers based on the nature of the information revealed.⁽²⁷⁾ Nonetheless, the tenets of natural justice require that any person accused of misconduct be made aware of the allegations leveled against them⁽²⁸⁾ and be afforded the chance to defend themselves.

The requirement may lead to the disclosure of the whistleblower's identity, potentially jeopardizing the investigation. This highlights a disconnect between the legal framework and its application, as confidentiality agreements are often violated during initial investigations.

2.2.3. Immigration Law

According to Section 42 of the Australian Border Force Act 2015, individuals who blow the whistle on matters related to an Australian immigration detention facility could be subjected to a two-year prison term. Nevertheless, Section 42(2)(c) outlines an exception for disclosures that are mandated or permitted by laws at the Commonwealth, State, or Territory level.⁽²⁹⁾

Concerns have been expressed about the relevance of an exemption from section 42(2)(c), which would enable whistleblowers to access the protections provided by the Public Interest Disclosure Act 2013. Although this exemption might be accessible, it is subject to several stipulations. Whistleblowers must initially raise their concerns through internal channels.

Whistleblowers are permitted to make external disclosures only when they have a reasonable belief that the investigation or response is inadequate or has been unduly delayed.⁽³⁰⁾

Additionally, any information deemed sensitive should remain confidential; disclosures must serve the public interest. Furthermore, disclosures should not pertain to matters that the Minister has already dealt with or intends to address..

Section 42 of the Australian Border Force Act 2015 has come under significant public and scholarly criticism⁽³¹⁾ due to concerns that it may deter whistleblowers and journalists from voicing their concerns. This situation has prompted a legal challenge in the High Court concerning the confidentiality provisions of the Border Force Act.

The protections afforded to whistleblowers in private enterprises are notably weaker than those available to government employees. Furthermore, essential regulations for businesses do not mandate the establishment of internal mechanisms to address such reports.

3. Forms on protection-related principles of whistleblowers

Legal regulations are being established to enhance the protection of whistleblowers,⁽³²⁾ indicating a growing commitment to their support. The formulation of precise and well-defined laws is an effective approach to guarantee this protection. By ensuring that these laws are clear and independent, it becomes easier for individuals to comprehend and adhere to them, thereby encouraging wider awareness and use of these protections.

For instance, a law aimed at combating corruption may prove ineffective without adequate protections for whistleblowers, as these safeguards encourage individuals to report misconduct.⁽³³⁾ This legal framework facilitates the swift identification of violations by providing robust legal backing and straightforward procedures for reporting concerns.

3.1 "bona fides" and "Reasonable grounds principles

A key requirement of most whistleblower protection statutes is that the information must be disclosed with “good faith” and based on “reasonable grounds”.⁽³⁴⁾ If an individual shares information under the

belief that it meets the criteria specified in the applicable law, they are afforded protection, even if their belief turns out to be mistaken.

To determine if good faith exists or if there is a hidden agenda—or to identify a 'dominant motive' in cases of mixed intentions—South African courts have established that 'good faith' is a factual inference. Consequently, the court is required to consider all relevant evidence concurrently.⁽³⁵⁾

Consequently, the onus of demonstrating honesty does not fall on the employee. It is the employers who must substantiate and defend any claims regarding a lack of integrity. This implies that employees can readily confirm and logically deduce that their actions may be interpreted as “evidence of misconduct as outlined by legal standards”, and individuals who deliberately provide false information should not receive any form of protection.⁽³⁶⁾

For example, In South Korea, the law clearly states that individuals who report corruption while being aware that their claims are untrue do not receive protection under this legislation, and certain laws may impose criminal penalties for making false reports or disclosures.⁽³⁷⁾

Another example, India's law on 'Disclosure and Protection of the Disclosing Party in the Public Interest' imposes penalties on individuals who make disclosures in bad faith, particularly if such disclosures are later proven to be false, incorrect, or misleading, with potential consequences including up to two years of imprisonment and a monetary fine.⁽³⁸⁾

Nonetheless, whistleblower protection legislation typically does not penalize individuals for making false reports and offers safeguards for disclosures resulting from genuine errors.

3.2 “Enclosure” or “Comprehensive Coverage” principle

This suggests that although most whistleblower protection laws do not extend to private sector employees, several countries, such as South Korea, South Africa, Japan, and the United Kingdom, have enacted legislation that safeguards both public and private sector workers, thereby expanding the range of individuals who are protected.

For instance, The recently enacted Whistleblower Protection Law in South Korea explicitly safeguards all individuals who report violations pertaining to the public interest.⁽³⁹⁾

The principle employs a “gap-free” strategy that addresses the legal deficiencies and limitations concerning the scope of protected individuals, thereby allowing for the inclusion of regular employees, civil servants,

consultants, contractors, temporary workers, former employees, and volunteers.

In Australia, the Public Service Act safeguards whistleblowers employed by or representing an institution, including external contractors. Similarly, legislation in the UK also offers protection for disclosures made by contractors.

Implementing the "no loophole" principle more comprehensively would extend protection to a broader range of individuals, including families, job seekers, the unemployed, and those listed on blacklists.

Certain categories of public sector employees, such as military personnel and intelligence operatives, are specifically excluded from the safeguards provided by various whistleblower protection statutes.

In other countries, distinct whistleblower protection regulations may be in place for public sector workers engaged in sensitive roles. For example, individuals employed by U.S. federal intelligence agencies receive certain protections under the U.S. Intelligence Community Whistleblower Protection Act.⁽⁴⁰⁾

3.3 Protected Disclosure Issue

One of the primary goals of whistleblower protection laws is to promote and support the reporting of activities that are deemed unlawful, unethical, or hazardous.

Consequently, whistleblower protection laws must clearly define the scope of disclosures that are eligible for protection.

In Japan, there are clear definitions regarding violations of food, health, safety, and environmental laws.⁽⁴¹⁾ Additionally, individuals who disclose instances of bribery involving foreign public officials, as outlined in the Unfair Competition Act, are afforded protection under the whistleblower provisions of the same Act.

It would be more effective to establish the scope of protected items by employing a no-loophole strategy.

To enhance clarity and ensure legal certainty, it is advisable to explicitly reference corruption offenses in all legislation related to whistleblower protection mechanisms aimed at combating corruption.

For instance, in South African administrative law, it is clearly stipulated that an administrative investigation is required whenever a criminal offense occurs..

Safeguarding whistleblowers is crucial when they report corrupt activities that, while not necessarily classified as criminal offenses, could still be investigated administratively.

Certain nations establish a minimum standard of misconduct that must be met for whistleblower protections to take effect, along with offering training programs.⁽⁴⁵⁾

For example, in the United States, legal protections exist for disclosures that involve significant issues such as gross mismanagement and substantial waste of funds. To qualify as “serious”, these disclosures must present one or more disputable points. According to US law, disclosures deemed “frivolous” do not receive the same level of protection.

The Australian Code stipulates that there is no requirement to pursue investigations into whistleblowing that is deemed to be “frivolous or malicious”.

4. CONCLUSION

The established best practices and guidelines offer recommendations and frameworks for conducting comparative legislative research on whistleblowing, addressing research inquiries regarding the policy goals typically sought by whistleblowing laws, with the aim of balancing the rights and responsibilities of whistleblowers.

They restrict all types of corruption and the avenues to address it, emphasize the need for more efficient regulation of expression and reporting in line with established legal standards, and focus on safeguarding the individual rights of whistleblowers.

The effective protection of whistleblowers is limited by several factors, including a lack of adherence to internal procedures, insufficient oversight, the presence of policies that allow for ongoing retaliation against whistleblowers, and an inadequately robust legal framework.

To ensure comprehensive and effective safeguarding of whistleblowers and all individuals entitled to protection, it is essential to highlight the best practices within national legislation, thus preserving the public interest.

An initial approach might involve broadly defining the term “whistleblower” along with the contents of the report. It is essential to consider the private sector, despite the fact that legal protections for reporting misconduct are generally more prevalent in the public sector.

To establish what constitutes wrongdoing, it is essential for the legal framework to explicitly outline protected disclosures and identify behaviors that are deemed as corruption, abuse of power, mismanagement, breaches of legal hierarchy, and threats to public health or safety.

Disclosure procedures should strike a careful balance between strictness and flexibility to effectively address and resolve internal whistleblower protection concerns.

It is essential to establish policies and best practices that safeguard whistleblowers and their families from retaliation, as well as to ensure their anonymity and the protection of any evidence or information pertinent to investigations. Many countries have already adopted these principles into their legal frameworks.

Findings

- The best practices and guidelines should not be seen as a critique of or substitute for existing laws.
- These guidelines do not serve as a replacement for legal statutes or their associated regulatory frameworks.
- Given the variations in whistleblower laws, the guidelines aim to establish a cohesive approach to their implementation.
- The guidelines seek to pinpoint similarities among different laws to work towards a standardized whistleblower protection framework.
- They can also address current gaps in the protection of whistleblowers.
- The legal provisions for whistleblower protection are overarching in scope.

Recommendations

- National laws should refer to the Guidelines when establishing, modifying, or enhancing whistleblower protection systems.
- The Guidelines are essential for countries as they encompass various subjects applicable to both public and private sector whistleblower protection initiatives.
- Beyond these core principles, effective practices can offer detailed and technical advice.
- Promote the enactment of whistleblower protection laws through

public education, outreach, training, and regular evaluations of the effectiveness of the protection framework.

- The law must clearly define its scope, coverage, and the individuals it protects.

5. Endnotes

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