

## CHAPTER 12

# WHISTLEBLOWER PROTECTIONS

*[This chapter, subject to some additions and deletions, was written and updated by Victoria Luxford under Professor Ferguson's supervision. Section 7.3 was written by Jeremy Henderson.]*

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### 1. INTRODUCTION

Whistleblowing is one method of uncovering corruption in public and private sector organizations. Indeed, whistleblowing may be seen as “among the most effective ... means to expose and remedy corruption, fraud and other types of wrongdoing in the public and private sectors.”<sup>1</sup> Transparency International (TI) cites whistleblowing as one of the key triggers for effective corruption investigations.<sup>2</sup> Examples of prominent whistleblowers include Dr. Jiang Yanyong in China, who blew the whistle on the spread of the SARS virus contrary to explicit orders, and Allan Cutler in Canada, who “disclosed suspicions of fraud that led to the revealing of millions of misspent public funds in a sponsorship scandal, leading to the defeat of the Liberal party in the 2006 elections.”<sup>3</sup> Whistleblowers have thus played pivotal roles in promoting political accountability and protecting public health and safety.

However, the benefits of whistleblowing can only be reaped if effective legal regimes are in place to safeguard reporting persons from retaliation, and to ensure that the appropriate parties act upon the disclosures in a timely and efficient manner. In the past ten to fifteen

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<sup>1</sup> Simon Wolfe et al, “Whistleblower Protection Laws in G20 Countries: Priorities for Action” (September 2014) at 10, online: <<https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>>.

<sup>2</sup> Transparency International, “Whistleblower Protection and the UN Convention Against Corruption” (15 May 2013) at 2, online: <[http://www.transparency.org/whatwedo/publication/whistleblower\\_protection\\_and\\_the\\_un\\_convention\\_against\\_corruption](http://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption)>.

<sup>3</sup> David Banisar, “Whistleblowing: International Standards and Developments” in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (World Bank, Institute for Social Research, UNAM, 2011) at 6–7, online: <[http://ssrn.com/abstract\\_id=1753180](http://ssrn.com/abstract_id=1753180)>.

years, the need to enact and enforce whistleblowing laws has become one of the most prominent issues, nationally and internationally, in the global fight against corruption. The call for effective whistleblowing laws has gathered steam in international conventions against corruption, and several countries have responded by creating new whistleblower laws or improving their existing whistleblower laws.<sup>4</sup>

This chapter will set out international obligations concerning whistleblower protection, then identify best practices, and finally explore the current state of public sector whistleblower protection primarily in the US, UK and Canada.

## 2. WHAT IS WHISTLEBLOWING?

The most widely used academic definition of whistleblowing originated in an article by Miceli and Near in 1985. They defined “whistleblowing” as “the disclosure by organization members (former or current) of the illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.”<sup>5</sup> This definition focuses only on the act of disclosure, rather than on whistleblowing as a process that needs to be examined before, during and after disclosure. Many academics have now embraced broader conceptions of whistleblowing. Banisar, for example, “treats whistleblowing as a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms.”<sup>6</sup> In their study on public sector whistleblowing in Norway, Skiveness and Trygstad identify several problems with Miceli and Near’s narrow definition of whistleblowing, and they advocate for a bifurcated definition which recognizes whistleblowing as a process:

[W]e suggest a distinction between weak and strong whistle-blowing. We see the general definition of Miceli and Near as the first step in the whistle-blowing process, and we define this as ‘weak whistle-blowing’. ‘Strong whistle-blowing’ focuses on *process* and on cases where there is no

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<sup>4</sup> Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Edward Elgar, 2012) at 243.

<sup>5</sup> Janet P Miceli & Marcia P Near, “Organizational Dissidence: The Case of Whistle-Blowing” (1985) 4 *J Bus Ethics* 1 at 4. Reasons for adopting this definition are discussed by Rodney Smith, “The Role of Whistle-Blowing in Governing Well: Evidence from the Australian Public Sector” (2010) 50:6 *Am Rev Pub Admin* 704 at 708, and include maintaining consistency with how whistleblowing has been defined by governments (including its definition within legislation), maintaining consistency with other academic work, and using a definition “that allows for a wide range of propositions about whistle-blowing to be tested.”

<sup>6</sup> Banisar (2011) at 4.

improvement in, explanation for, or clarification of the reported misconduct from those who can do something about it.<sup>7</sup>

Thus, when whistleblowing is examined as a process it necessitates laws or policies that provide a clear description (1) of what types of perceived wrongdoing should be disclosed, (2) to whom such disclosures should be made initially and subsequently (if the initial disclosure does not prompt an investigation), (3) how and by whom the alleged wrongdoing should be investigated, (4) the mechanisms and procedures that are in place to encourage persons to disclose wrongdoing while protecting the whistleblower from any disciplinary action or adverse consequence for reporting the wrongdoing, and (5) the steps to be taken if adverse consequences are, or appear to be, imposed on the whistleblower.

The question of what laws and practices produce the best whistleblowing regime is not one that is susceptible to a single answer. Section 4 of this chapter will review some features of whistleblowing regimes that arguably lead to more successful results. As will be seen, to be effective whistleblower laws must be examined in the overall context of a country's legal and political sophistication, as well as its social and economic realities

### 3. INTERNATIONAL LEGAL FRAMEWORK

This section will briefly review existing regional and global treaties against corruption mandates in regard to whistleblowing laws for member States. As will be seen, the standards for whistleblowing laws contained within these international agreements are rather weak and lacking in detail.

#### 3.1 UNCAC

Article 33 of UNCAC provides for the protection of reporting persons (i.e., whistleblowers):

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<sup>7</sup> Marit Skivenes and Sissel C Trygstad, "When Whistle-Blowing Works: The Norwegian case" (2010) 63:7 *Human Relations* 1071 at 1077; the three problems that the authors identify with Miceli and Near's definition, in the context of their study, are "whistle-blowing concerns all forms of communication where critical voices are raised about wrongdoing in the presence of someone who can stop the misconduct ...[,] the definition rests on employees' assessments of illegitimate, immoral and/or illegal situations and can thus cover many types of misconduct ... [and] empirically, the definition does not seem to grasp how Norwegian employees and managers collaborate, nor how Norwegian working life is structured." See also Björn FASTERLING, "Whistleblower Protection: A Comparative Law Perspective" in AJ BROWN et al, eds, *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) at 334 for a critique of Miceli and Near's definition: the author argues that the "definition is problematic because rather than disclosing illegal, immoral or illegitimate practices, the whistleblower discloses information that he or she believes will provide evidence or at least a substantiated indication of illegal, immoral or illegitimate practice. The disclosure can under no circumstances be independent of the whistleblower's own subjective judgment."

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.<sup>8</sup>

This above Article is meant to cover individuals with “information that is not sufficiently detailed to constitute evidence in the legal sense of the word.”<sup>9</sup> However, Article 33 is optional, not mandatory. A State need only “consider” adopting “appropriate measures” to protect whistleblowers, and the provision only provides protection from “any unjustified treatment” to those who acted “in *good faith* and on *reasonable grounds*” [emphasis added]. Thus, a State Party is free to deliberate, and then simply decide not to adopt any reporting protections.<sup>10</sup> Even with its obvious weaknesses, the protections offered under this section represent an expansion of previously recognized protections, and the UN in supporting documents has encouraged ratifying States to enact robust whistleblowing regimes under Article 33:

The UN Office on Drugs and Crime’s “Anti-Corruption Toolkit” notes that Article 33 is an advancement from previous agreements such as the 2000 Convention against Transnational Organized Crime which only protects witnesses and experts. The Toolkit extensively covers whistleblowing and recommends legal and administrative measures for reporting and protection including compensation, the creation of hotlines, and limits on libel and confidentiality agreements.<sup>11</sup>

In comparison, Article 32 of UNCAC provides for mandatory protection of witnesses, experts, and victims: it dictates that states “shall take appropriate measures ... to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.”<sup>12</sup> Unfortunately, this mandatory protection does not protect whistleblowers from retaliation or intimidation unless they are “witnesses or victims” to the wrongdoing and they give “testimony” in the

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<sup>8</sup> *United Nations Convention Against Corruption* (UNCAC), 31 October 2003, art 33.

<sup>9</sup> United Nations Office on Drugs and Crime, “The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons” [UN Good Practices] (August 2015) at 6, online: <[https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)>.

<sup>10</sup> Björn FASTERLING & David Lewis, “Leaks, Legislation and Freedom of Speech: How Can the Law Effectively Promote Public-Interest Whistleblowing?” (2014) 153:1 *Intl Labour Rev* 71 at 76. The authors also suggest, at 76, that limiting protection in Article 33 to those who have “reasonable grounds” may be an unnecessary limitation of whistleblower protection: “It almost goes without saying that in some situations it will be difficult to distinguish between strong suspicions and reasonable grounds.”

<sup>11</sup> Banisar (2011) at 13.

<sup>12</sup> *United Nations Convention Against Corruption* (UNCAC), 31 October 2003, art 32.

prosecution of wrongdoers. Most potential whistleblowers do not fall into this narrow group. Moreover, the ultimate objectives of whistleblowing laws are not simply to assist in the prosecution of an alleged wrongdoer, but also to play a preventative role. As TI observed, “the ideal situation is where a whistleblower raises concerns in time so that action can be taken to prevent any offence.”<sup>13</sup>

Articles 32 and 33 are integral to the overall effectiveness of UNCAC. In fact, Arnone and Borlini argue that these provisions are essential to meeting all other objectives within UNCAC:

Articles 32 and 33 ... address the protection of witnesses, thereby complementing efforts regarding the prevention of public and private corruption, obstruction of justice, confiscation and recovery of criminal proceeds, as well as cooperation at the national and international levels. Even though the aim is far from easy to achieve, the underlying rationale is obvious: unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives of the Convention could be undermined.<sup>14</sup>

Without the protection offered in these provisions, countries attempting to operationalize UNCAC would be unnecessarily hobbled by difficulties in uncovering, investigating, and resolving corruption issues.

### 3.2 The OECD Convention

The OECD Convention itself does not specifically include provisions on whistleblowing. Nevertheless, various subsequent OECD instruments encourage the adoption of whistleblower protections. For example, in 1998 the OECD issued a *Recommendation on Improving Ethical Conduct in the Public Service*. That recommendation states that transparency and accountability in the decision-making process should be encouraged through “measures such as disclosure systems and recognition of the role of an active and independent media.”<sup>15</sup> The 2003 *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service* stipulates that States ought to “[p]rovide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused.”<sup>16</sup> The 2009 *Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* similarly recommends that member states

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<sup>13</sup> Transparency International (15 May 2013) at 6.

<sup>14</sup> Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar, 2014) at 429.

<sup>15</sup> Public Governance Committee, *Recommendation on Improving Ethical Conduct in the Public Service*, 23 April 1998, C(98)70/FINAL.

<sup>16</sup> OECD, “Recommendation on Guidelines for Managing Conflict of Interest in the Public Service” (June 2003) at 12, online: <<http://www.oecd.org/governance/ethics/2957360.pdf>>.

should put in place “easily accessible channels ... for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles.”<sup>17</sup> Recommendations such as these show a recognition of the important role that whistleblowers can play in reducing corruption in the public service and in business. Finally, the OECD’s CleanGovBiz “Toolkit on Whistleblower Protection” acknowledges that there is an increased risk of corruption where there is no protection of reporting, and it provides guidelines for implementation and suggestions for measuring effectiveness of legislation.<sup>18</sup> However, as Arnone and Borlini note, the whistleblower protections in OECD member states are far from uniform.<sup>19</sup>

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<sup>17</sup> Working Group on Bribery in International Business Transactions, “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions” (26 November 2009) at IX, online: <<http://www.oecd.org/daf/anti-bribery/44176910.pdf>>.

<sup>18</sup> CleanGovBiz, “Whistleblower Protection: Encouraging Reporting” (July 2012), online: <<http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>>. These suggestions will be discussed below in connection with best practices in whistleblower protection legislation.

<sup>19</sup> See Arnone & Borlini, (2014) at 424. They state:

Whistleblower protection is seen as a horizontal issue which confronts its Member States. In its Report the WGB has engaged rather frequently with the issue. For instance:

The Phase 3 report on the UK points out that the law does not apply to nationals working abroad on contracts made under a foreign law. The Phase 3 report on South Korea cited the enactment of the 2011 law as an important development, since the law extends protective measures to private-sector employees who report foreign bribery cases. The Phase 3 report on Japan noted the requirement for a review of its 2004 law after approximately five years. As the Act came into force in 2006, the review took place in March 2011. It was conducted by the Consumer Commission—made up of representatives from academia, the business community, the legal profession, media, etc. They concluded there was no need to amend the Act but that, due to the insufficiency of legislative information for the review, further research was recommended. The Phase 2 report on Chile notes the 2007 law establishing whistleblower protection in the public sector, encourages the authorities to expand it to state companies, and recommends that Chile enhance and promote the protection of private- and public-sector employees. According to the 2009 follow-up report of the recommendations of the Phase 2 report, this recommendation has been only partially implemented. See TI (2013:21).

### 3.3 Other Regional Conventions and Agreements

References to whistleblower protection can be found in a number of other regional conventions and agreements. For example, the first inter-governmental agreement to tackle whistleblower protection was the *Inter-American Convention against Corruption*. This Convention came into force on March 6, 1997, under the purview of the Organization of American States, a group of 35 member states in the Americas (including Canada and the US) formed in 1948.<sup>20</sup> The Convention suggests that signatories consider introducing or strengthening whistleblower protections within their own legal and institutional systems as a means of preventing corruption: Article III, section 8, provides that “state parties agree to consider the applicability of measures ... [and] systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems” [emphasis added].<sup>21</sup> The whistleblower provision is thus optional, not mandatory. The agreement emphasizes the role that each signatory’s domestic legal context would play in the creation and maintenance of an effective whistleblower protection scheme. However, apart from Canada, the US and Peru, Arnone and Borlini report that the other OAS

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For an in-depth illustration of the OECD follow-up mechanism see [Chapter 16 of *Corruption: Economic Analysis and International Law*]. Noticeably, this OECD anti-corruption initiative published guidance on whistleblower protection in 2012 (OECD, CleanGovBiz, 2012). Among other things, this document shows that “Australia, Canada, Ghana, Japan, South Korea, New Zealand, Romania, South Africa, the UK and the US are among the countries that have passed comprehensive and dedicated legislation to protect public sector whistle-blowers.” It also records that legal protection for whistleblowers grew from 44 percent to 66 percent in OECD countries between 2000 and 2009. The OECD report *Government at a Glance 2015* (OECD, 2015) at 121, online:

<<http://www.oecd.org/governance/govataglance.htm/>>, states that 88% of member countries have whistleblower protection laws. Out of 26 respondent countries to the OECD’s survey, all have protections in place for public sector employees, while eight do not for private sector employees. One third of respondents provide incentives to whistleblowers. See the report at 120-121 for more detailed data.

<sup>20</sup> Organization for American States, “Who We Are” (2015), online:

<[http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp)>. For information on signatories and ratification, see Department of International Law, “Signatories and Ratifications B-58: Inter-American Convention Against Corruption”, online: Organization of American States <<http://www.oas.org/juridico/english/sigs/b-58.html>>.

<sup>21</sup> *Inter-American Convention Against Corruption*, 29 March 1996, OAS Treaties Register B-58 art III, point 8. The full text of the Convention can be found at Department of International Law, “Inter-American Convention Against Corruption” (29 March 1996), online: Organization of American States <<http://www.oas.org/juridico/english/treaties/b-58.html>>.

Convention members have nonexistent, or weak, whistleblower laws.<sup>22</sup> Furthermore, a 2011 report of the Mechanism for Follow-up on the Implementation of the *Inter-American Convention against Corruption* indicated that the countries reviewed had not taken satisfactory steps to implement (or, in fact, to even *consider* implementing) whistleblower protections.<sup>23</sup>

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<sup>22</sup> Arnone & Borlini (2014) at note 9, state: “As detailed in Chapter 16 of this book, the Implementation of the Convention is overseen by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). The reports show that apart from Canada, the US and Peru, most OAS countries do not have specific whistleblower laws, but most have some protection for whistleblowers contained in criminal laws, procedural laws or labor laws. There is also a smaller group of countries without regulation on the subject. Reports frequently recommend measures of protection for whistleblowers where they are considered incomplete (e.g., Argentina, Brazil, Chile, Nicaragua, and Trinidad and Tobago). The latest reports on Bolivia and Paraguay call for the implementation of whistleblower systems, which have been enacted, but then left aside. The report finds that in Bolivia whistleblowers are often persecuted. On the other hand, Costa Rica argues that no whistleblower system is necessary as, surprisingly, there have never been any reprisals against whistleblowers. Notably, in 2010 the OAS agreed [to create] a model whistleblower law. This model law was updated and approved by the OAS Anti-Corruption Mechanism on 19 March 2013.” The model law in question can be found at Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, “Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses” (March 2013), online: Organization of American States <[http://www.oas.org/juridico/PDFs/model\\_law\\_reporting.pdf](http://www.oas.org/juridico/PDFs/model_law_reporting.pdf)>. However, there are problematic aspects of this model law. For example, firstly, the “law” appears to resemble an agreement (both stylistically and substantially) more than it does a model of legislation, and it is unclear how this “model” could easily be adopted by OAS countries that want to implement legislation. Secondly, the model law (at Article 8) imposes a positive obligation on “[a]ny person having knowledge of an act of corruption” to report to the appropriate authorities. It is unclear how such an obligation could be effectively introduced or enforced, especially if protection against reprisals continues to be weak or nonexistent. Finally, many of the provisions are vague, and it is unclear how the legislative goals will be met: Article 16, for example, states that “[p]rotection for persons reporting acts of corruption must safeguard their physical and psychological integrity and that of their family group, their property, and their working conditions, which could possibly be threatened as a result of their reporting an act of corruption.” While the model law goes on to suggest that this may involve legal advice, confidentiality, protection from dismissal, or even police protection, there is little indication of how such broad goals will be operationalized within OAS countries.

<sup>23</sup> Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, “Hemispheric Report: Third Round of Review” (15 September 2011), online: Organization of American States <[http://www.oas.org/juridico/PDFs/IIIinf\\_hemis\\_en.pdf](http://www.oas.org/juridico/PDFs/IIIinf_hemis_en.pdf)>. For example, the Report, at 47, suggested the following: “A: Adopt protective measures, aimed not only at the physical integrity of the whistleblower and their family, but also their employment situation. This measure was recommended to 24 of the countries that were reviewed in the Third Round; of these, 11 (46%) submitted no information on progress with respect to its implementation; 12 (50%) need to pay additional attention to it; and the remaining country (4%) has given it satisfactory consideration... D: Establish reporting mechanisms, such as anonymous reporting and identity-protected reporting. This measure was recommended to 18 of the countries that were reviewed in the Third Round; of these, nine (50%) submitted no information on progress with respect to its implementation and the remaining nine (50%) need to pay additional attention to it.”

On the other hand, at least one regional Convention “requires” state members to have whistleblowing laws. The Council of Europe, a human rights organization with 47 member states (of which 28 belong to the European Union), produced the *Council of Europe Civil Law Convention on Corruption*, which came into force on November 1, 2003.<sup>24</sup> Article 9 states: “Each Party *shall provide* in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities” [emphasis added].<sup>25</sup>

Another regional agreement is the *Anti-Corruption Action Plan for Asia and the Pacific*, which was created out of the joint efforts of the Asian Development Bank and the OECD. It was endorsed on November 30, 2001.<sup>26</sup> Pillar 3 of the Action Plan specifically identifies the protection of whistleblowers as a critical element in encouraging public participation in combating corruption.<sup>27</sup> However, the provisions of the Action Plan are not mandatory: under Implementation, the Action Plan states that “[i]n order to implement these three pillars of action, participating governments of the region concur with the attached Implementation Plan and will *endeavour to comply* with its terms” [emphasis added].<sup>28</sup>

Two final examples involve organizations of African countries. First, the African Union is made up of the majority of African states and was launched in 2002.<sup>29</sup> The Preamble to the 2003 *African Union Convention on Preventing and Combating Corruption* recognizes the serious detrimental effects that corruption has on the stability of African States, as well as people in Africa.<sup>30</sup> It recognizes the potential of whistleblowing as a corruption prevention

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<sup>24</sup> Council of Europe, “The Council of Europe in Brief” (2014), online: <<http://www.coe.int/en/web/about-us/who-we-are>>. For a list of signatories to the *Civil Law Convention on Corruption*, see Council of Europe, “Civil Law Convention on Corruption” (1 April 2015), online: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174>>.

<sup>25</sup> *Council of Europe Civil Law Convention on Corruption*, 4 November 1999, Eur TS 173 art 9. The full text of the Convention can be found at Council of Europe, “Civil Law Convention on Corruption” (4 November 1999), online: <<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>>.

<sup>26</sup> OECD, “3<sup>rd</sup> regional Anti-Corruption Conference for Asia and the Pacific”, online: <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/3rdregionalanti-corruptionconferenceforasiaandthepacific.htm>>.

<sup>27</sup> OECD, “The Anti-Corruption Action Plan for Asia and the Pacific” (30 November 2001) at Pillar 3, online: <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf>>. Countries endorsing the Action Plan can be found at 1.

<sup>28</sup> *Ibid* at 5.

<sup>29</sup> African Union, “AU in a Nutshell”, online: <<https://au.int/en/au-nutshell>>.

<sup>30</sup> *African Union Convention on Preventing and Combating Corruption*, (11 July 2003), 43 ILM 5 [AUCPCC]. The Preamble emphasizes the negative consequences of corruption in Africa: “Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples.” The full text of the Convention can be found online: <[https://www.au.int/en/sites/default/files/treaties/7786-file-african\\_union\\_convention\\_preventing\\_combating\\_corruption.pdf](https://www.au.int/en/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf)>.

mechanism, and seems to have a scope wide enough to encompass ordinary citizens within its protection. The language of these provisions is mandatory — “State Parties *undertake* to....”

5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.
7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.<sup>31</sup>

It should be noted that clause 5 on protection of informants and witnesses requires “legislative” measures, while clause 6 on protection of citizens who report corruption from fear of reprisals does not require “legislative” measures and is satisfied if a State implements some form of non-legislative protective measures. In addition, as Arnone and Borlini argue, clause 7 may act as a deterrent to truthful whistleblowers, since it is wide enough to punish honest whistleblowers who “reasonably” suspect corrupt behaviour, which on further investigation is not proven.<sup>32</sup> Finally, the effectiveness of the Convention is weakened by the fact that there is no credible enforcement or evaluation mechanism: each state simply self-reports on its Convention compliance.<sup>33</sup>

Second, the South African Development Community is composed of 15 member states in the southern region of Africa. The 2001 *Southern African Development Community Protocol Against*

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<sup>31</sup> *Ibid*, art 5. Arnone & Borlini, (2014) at 425, argue that, although the language is obligatory, “no particular penalizing scheme can be inferred for failure to comply with these requirements.”

<sup>32</sup> Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar, 2014) at 425-426.

<sup>33</sup> *AUCPCC*, (11 July 2003), 43 ILM 5 art 22(7). Kolawole Olaniyan, “The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal” (2004) 4 Afr Hum Rts LJ 74 at 76, states that “the Convention lacks any serious, effective or meaningful mechanism for holding states accountable for the obligations they assume under it, or for resolving disputes among state parties, including a potential claim by one party that another is failing to properly carry out its obligations.” However, Lucky Bryce Jato Jnr, “Africa’s Approach to the International War on Corruption: A Critical Appraisal of the *African Union Convention on Preventing and Combating Corruption*” (2010) 10 *Asper Rev Intl Bus & Trade L* 79 at 93-94, suggests that the Advisory Board (created pursuant to Article 22(1)) could, potentially, exert some influence over effectively reviewing and encouraging development of anti-corruption policies, through its power to create its own rules of procedure: “unlike the practice with most peer-review monitoring mechanisms, which rely to some extent on ‘country self-assessments based on a questionnaire’ and allow room for subjective and unreliable results, the AU Advisory Board receives annual reports on the progress made in the implementation of the *AU Convention* from the *independent* national anti-corruption authorities or agencies created pursuant to the *AU Convention* by the State Parties. In addition, given its mandate to ‘build partnerships,’ the AU Advisory Board may invite submissions from civil society and private sector organizations”.

*Corruption*, Article 4, encourages the creation and maintenance of “systems for protecting individuals who, in good faith, report acts of corruption.”<sup>34</sup> This provision, like that of the African Union Convention, contains mandatory language.<sup>35</sup> Furthermore, both of these documents contain strongly worded provisions denouncing individuals who make false reports.<sup>36</sup> This is problematic because it may have a chilling effect on information disclosures:

Such provision, the aim of which is to prevent a misuse of the Convention itself, might paradoxically well result in a general impasse of the investigation. What is more, in many countries the menace of such punishment is an effective deterrent to truthful whistleblowers who expose the guilty.<sup>37</sup>

The potential chilling effect of denouncing those who make false reports, coupled with the lack of oversight and monitoring of ratification and enforcement, makes it unlikely that these agreements will have any significant influence in causing member states to create effective whistleblower protection regimes.

## 4. “BEST PRACTICES” IN WHISTLEBLOWER PROTECTION LEGISLATION

### 4.1 Limitations of Best Practices

Various organizations and academics have developed suggestions for “best practices” and standards for whistleblower protection legislation. These best practices are suggestions as to how to most effectively draft whistleblower legislation and they provide ideas for countries attempting to develop or improve whistleblower legislation.<sup>38</sup> By way of an important introductory observation, Latimer and Brown note that effective whistleblower protection

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<sup>34</sup> *Southern African Development Community Protocol Against Corruption*, 14 August 2001 art 4 [SADCPAC]. The Protocol can be accessed at Southern African Development Community, “SADC Protocol Against Corruption” (14 August 2001), online: [http://www.sadc.int/files/7913/5292/8361/Protocol\\_Against\\_Corruption2001.pdf](http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf).

<sup>35</sup> *Ibid.*, art 4: “each State Party *undertakes* to adopt measures” [emphasis added].

<sup>36</sup> *Ibid.* Article 4(1)(f) of SADPAC suggests that there should be “laws that punish those who make false and malicious reports against innocent persons.” The AUCPCC, (11 July 2003), art 5, clause 7, has almost identical requirements.

<sup>37</sup> Arnone & Borlini (2014) at 426.

<sup>38</sup> The role of best practices was highlighted by Transparency International, which suggests that UNCAC implementation reviews ought to provide special guidance regarding the implementation of Article 33, which “should take into consideration material developed by other institutions such as the Transparency International (TI) ‘International Principles for Whistleblower Legislation’ as well as best-practice materials, guiding principles and model legislation produced by the Organisation for Economic Co-operation and Development (OECD), Organization of American States (OAS) and others”: Transparency International, (15 May 2013) at 5.

can only exist in a democratic society that values accountability and transparency; in other words, “[a] precondition for whistleblower laws is the rule of law, including an independent legal system and independent judiciary.”<sup>39</sup> This precondition will be met in varying degrees from country to country. In a similar vein, the efficacy of whistleblower protection will be dependent not only on what is found within the four corners of the applicable legislation, but more importantly how the appropriate bodies put legislative protections into practice.

It is also important to recognize that it is seldom, if ever, effective to simply transplant successful legislative regimes from one cultural setting to another<sup>40</sup> or from developed countries to developing countries.<sup>41</sup> Whistleblowing schemes in developed democracies may not be appropriate or effective in the “specific context of developing countries who do not always have an institutional framework in place that supports the rule of law and [where] a culture of transparency and accountability remains questionable.”<sup>42</sup> Thus, in discussing best practices, it is crucial to take into account the cultural and institutional environments of the countries that are considering the adoption of whistleblower protection legislation. If such contextual factors are not taken into account, the efficacy of whistleblower legislation will be seriously undermined.<sup>43</sup> Brown warns that best practices models should be examined with a careful eye on the legal, administrative, and political context of each country:

[T]he search for “ideal” or “model” laws is complicated by three problems: the diversity of legal approaches attempted by jurisdictions that have sought to prioritise whistleblower protection through special-purpose

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<sup>39</sup> Paul Latimer & AJ Brown, “Whistleblower Laws: International Best Practice” (2008) 31:3 UNSW LJ 766 at 769.

<sup>40</sup> For example, in Heungsik Park et al, “Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey, and the U.K.” (2008) 82 J Bus Ethics 929 at 937, the authors conclude that legislative and organizational responsiveness to cultural context may play a large role in the efficacy of whistleblower protection: “organizational systems for dealing with an employee’s response to wrongdoing should be based on an understanding of the impact of nationality and cultural orientation on employees’ preferred ways to blow the whistle. This has obvious implications for policy and practice, suggesting as it does that organizations seeking to improve the likelihood of employees reporting wrongdoing may need to tailor their policies and procedures to a country-specific context.” See also Wim Vandekerckhove et al, “Understandings of Whistleblowing: Dilemmas of Societal Culture” in AJ Brown et al, eds, *International Handbook on Whistleblowing Research* (Edward Elgar, 2014).

<sup>41</sup> For example, in Sajid Bashir et al, “Whistle-Blowing in Public Sector Organizations: Evidence from Pakistan” (2011) 41:3 Am Rev Pub Admin 285 at 286, the authors suggest that “studies in developed countries cannot be generalized and may not necessarily have any applicable lessons for organizations in developing countries such as Pakistan because of the absence of a robust legal system and the cultural dimensions of being a closely knit society where everyone is related to someone significant through common sect, cast, or creed.”

<sup>42</sup> Marie Chêne, “Good Practice in Whistleblowing Protection Legislation (WPL)” (1 July 2009) at 1, online: U4 Anti-Corruption Resource Centre <<http://www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/>>.

<sup>43</sup> *Ibid.* For example, the author, at 9, cites the impact of the use of informants in past authoritarian regimes as a factor that stigmatizes the actions of whistleblowers.

legislation (sometimes inaccurately called ‘stand-alone’); the frequent lack of evidence of the success of these approaches; and the lack of a common conceptual framework for understanding policy and legal approaches to whistleblowing across different legal systems, including those where whistleblower protection may be strong but not reflected in special-purpose legislation.

...[N]otwithstanding international interest, there is no single ‘ideal’ or ‘model’ law that can be readily developed or applied for most, let alone all countries. This is due to the diverse and intricate ways in which such mechanisms must rely on, and integrate with, a range of other regimes in any given jurisdiction.<sup>44</sup>

## 4.2 Sources for Best Practices

What should a good whistleblower law look like? There are various sources that one can turn to in order to try to extract the best aspects or elements of a “good” whistleblower law. Some of the leading sources for determining best practices in regard to designing a sound and effective legal regime for whistleblowers include the following:

1. David Banisar, “Whistleblowing: International Standards and Developments” in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (World Bank, Institute for Social Research, UNAM, 2011), online: <[http://ssrn.com/abstract\\_id=1753180](http://ssrn.com/abstract_id=1753180)>.
2. CleanGovBiz, “Whistleblower Protection: Encouraging Reporting” (July 2012), online: OECD <<http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>>.
3. Tom Devine & Shelley Walden, “International Best Practices for Whistleblower Policies” (13 March 2013), online: Government Accountability Project <[https://www.whistleblower.org/sites/default/files/pictures/Best\\_Practices\\_Document\\_for\\_website\\_March\\_13\\_2013.pdf](https://www.whistleblower.org/sites/default/files/pictures/Best_Practices_Document_for_website_March_13_2013.pdf)>.
4. Paul Latimer & AJ Brown, “Whistleblower Laws: International Best Practice” (2008) 31:3 UNSW LJ 766, online: <[http://papers.ssrn.com/abstract\\_id=1326766](http://papers.ssrn.com/abstract_id=1326766)>.
5. Transparency International, “Recommended Draft Principles for Whistleblowing Legislation” (2009), online: <[https://www.transparency.org/files/content/activity/2009\\_PrinciplesForWhistleblowingLegislation\\_EN.pdf](https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf)>.
6. Simon Wolfe et al., “Whistleblower Protection Laws in G20 Countries: Priorities for Action” (September 2014), online: <<https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>>.

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<sup>44</sup> AJ Brown, “Towards ‘Ideal’ Whistleblowing Legislation? Some Lessons from Recent Australian Experience” (2013) 2:3 E-J Intl & Comp Labour Stud 4 at 5 (and citing the work of Björn Fasterling (2014) at 334).

7. United Nations Office on Drugs and Crime, “The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons” (August 2015), online: [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf).

### 4.3 General Characteristics of Best Practices

While the scope and significance of the appropriate elements of best practices are open to reasonable dispute, academics and organizations tend to focus on five broad areas: (1) scope and clarity of legislation, (2) mechanisms for disclosure, (3) protection of identity, (4) protection against retaliation, and (5) remedies available for wronged whistleblowers. This chapter will briefly discuss each of these areas in turn.

#### 4.3.1 The Scope and Clarity of Legislation

The scope of whistleblower protection legislation, especially in regard to the range of people protected and the types of disclosures covered, is an area of central concern for organizations and academics. Banisar suggests that most legislation dedicated to whistleblower protection is too narrow, and that the efficacy of these laws is difficult to measure.<sup>45</sup> Best practices in whistleblowing legislation favour wide coverage; indeed, “in time there may be a case for whistleblowing laws to move to a full ‘no loopholes’ approach, targeting public sector and private sector whistleblowing with sector-blind principles and practices.”<sup>46</sup> Closing the “loopholes” in legislation involves increasing the range of people who fall within legislative protection. Transparency International, for example, suggests that legislative protections should apply to all whistleblowers, regardless of whether they work in the public or private sector.<sup>47</sup> In addition, members of the public may be a “useful” information source, and they may require protection from intimidation or reprisals.<sup>48</sup> According to Devine, Legal Director of the Government Accountability Project, “[s]eamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.”<sup>49</sup>

<sup>45</sup> Banisar (2011) at 2.

<sup>46</sup> Latimer & Brown (2008) at 775.

<sup>47</sup> Transparency International, (15 May 2013) at 13. See also Tom Devine, “International Best Practices for Whistleblower Statutes” in David Lewis & Wim Vandekerckhove, eds, *Developments in Whistleblowing Research* (International Whistleblowing Research Network, 2015) at 9, online: [http://www.track.unodc.org/Academia/Documents/151110\\_IWRN\\_ebook\\_2015.pdf](http://www.track.unodc.org/Academia/Documents/151110_IWRN_ebook_2015.pdf), wherein he notes that whistleblower protection should protect all citizens who have relevant disclosures regardless of their formal employment status. He cites broad US whistleblower protection laws (primarily in the criminal realm) as a good example of legislation affording protection to all those who take part in or are impacted by the activities of an organization: “[o]verarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings.”

<sup>48</sup> UN Good Practices (August 2015) at 9-10.

<sup>49</sup> Devine (2015) at 8.

Whistleblower protection also should provide protection against “spillover relation”; that is, it should protect those who are not whistleblowers, but who may be perceived as whistleblowers, have assisted whistleblowers, or are preparing to make a disclosure.<sup>50</sup> The UK’s *Public Interest Disclosure Act 1998 (PIDA)*,<sup>51</sup> which protects workers in the public and private sectors as well as those working as independent contractors, is seen as a model of expansive coverage.<sup>52</sup> In a 2013 Report, TI emphasizes *PIDA*’s broad coverage:

In 1998, the UK passed one of the most comprehensive whistleblower protection laws in the world: the Public Interest Disclosure Act. Known as *PIDA*, the law applies to the vast majority of workers across all sectors: government, private and non-profit. It covers a range of employment categories, including employees, contractors, trainees and UK workers based abroad.

...

Several countries have used *PIDA* as a template for their own laws and proposals, including Ireland, Japan and South Africa.<sup>53</sup>

In addition, the *types* of disclosures protected should be broad and should cover a wide range of wrongdoing; that is, “[p]rotected whistleblowing should cover “any” disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions.”<sup>54</sup> The substance of the disclosure should be paramount, rather than the form of the disclosure or the category within which the disclosure is made to fit.<sup>55</sup> Here, again, *PIDA* is seen as a leading example, despite its use of enumerated categories of wrongdoing rather than a completely open-ended approach:

Under *PIDA*, whistleblowers are able [to] disclose a very broad range of crimes and wrongdoing, including corruption, civil offences, miscarriages

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<sup>50</sup> *Ibid* at 9.

<sup>51</sup> *Public Interest Disclosure Act 1998 (UK)*, c 23 [*PIDA*].

<sup>52</sup> Mark Worth, “Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU” (2013) at 10, online: Transparency International <[https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU\\_Whistleblower\\_Report\\_final\\_web.pdf](https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU_Whistleblower_Report_final_web.pdf)>. The author notes, at 10, that *PIDA* “is widely considered to be the strongest [law] in Europe and among the best in the world.”

<sup>53</sup> *Ibid* at 83.

<sup>54</sup> Tom Devine & Shelley Walden, “International Best Practices for Whistleblower Policies” (13 March 2013) at 2, online: <[https://www.whistleblower.org/sites/default/files/pictures/Best\\_Practices\\_Document\\_for\\_website\\_March\\_13\\_2013.pdf](https://www.whistleblower.org/sites/default/files/pictures/Best_Practices_Document_for_website_March_13_2013.pdf)>. Similarly, Banisar suggests that “comprehensive whistleblowing laws generally have broad definitions of wrongdoing that apply to the revealing of information relating to criminal acts, to dangers to health or safety, and to abuses of power”: Banisar (2011), at 25.

<sup>55</sup> Latimer & Brown (2008) at 785.

of justice, dangers to public health or safety, dangers to the environment, and covering up of any of these.<sup>56</sup>

The sectoral approach, which offers protection to disclosures in certain areas (such as public health) but not others, has been criticized as unnecessarily narrow. According to the OECD's CleanGovBiz guidelines, "[t]he enactment of a comprehensive, dedicated law as the basis for providing whistleblower protection is generally considered the most effective legislative means of providing such protection."<sup>57</sup> A piecemeal approach, wherein protection to different types of whistleblowers is provided for in different pieces of legislation, may similarly result in loopholes and a less effective disclosure regime overall.<sup>58</sup> This was one of the major criticisms in a TI review of whistleblower protection in European countries, where "research found that whistleblowing legislation in the countries covered by this report is generally fragmented and weakly enforced."<sup>59</sup> The Report recommends that a "single, comprehensive legal framework" be provided for the protection of whistleblowers.<sup>60</sup> Generally speaking, there seems to be a consensus that dedicated legislation is to be preferred in a whistleblower protection regime, and that broad coverage (in terms of those protected and the types of wrongdoing that may be disclosed) is vitally important.

A related best practices concern is the need to provide clarity in whistleblowing laws and policies, regardless of the scope and framework of the legal regime. Clarity of the legislation is considered to be of paramount importance, and a review of whistleblower protection in G20 countries (the "September 2014 G20 Report") repeatedly emphasizes the need for "clear" laws.<sup>61</sup> The public may not understand the meaning of terms such as "the public interest," and therefore clarity may require setting out a more detailed list of the types of wrongdoing covered by the legislation.<sup>62</sup> Lack of clarity in legislation, whether related to the breadth of coverage or the manner of required disclosure, can have significant impacts on the overall efficacy of the legal regime. For example, TI discusses how confusion regarding Latvian laws made investigating and acting upon disclosures difficult, if not impossible:

In Latvia, the lack of a clear set of steps for receiving and responding to a disclosure has even been evidenced within the Ombudsman's Office, a government institution which oversees matters related to the protection of human rights and good governance. In 2007, nearly half of the

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<sup>56</sup> Worth (2013) at 83.

<sup>57</sup> CleanGovBiz (July 2012) at 6.

<sup>58</sup> *Ibid* at 9.

<sup>59</sup> Anja Osterhaus & Craig Fagan, "Alternative to Silence: Whistleblower Protection in 10 European Countries" (2009) at 3, online: Transparency International <<https://transparency.hu/wp-content/uploads/2016/04/TI-Alternative-to-Silence-report-ENG.pdf>>. The countries studied in the Report were Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia, and the Report found that the only country with a dedicated and comprehensive piece of legislation was Romania.

<sup>60</sup> *Ibid* at 4.

<sup>61</sup> Simon Wolfe et al (September 2014) at 2.

<sup>62</sup> UN Good Practices (August 2015) at 22.

Ombudsman's Office employees complained of alleged misconduct by the Office's director. The lack of clear reporting channels internally led to confusion about how to investigate and resolve the case. After pressure from non-governmental organisations, including the local TI chapter, the case was heard by a parliamentary body, which did not investigate the root of the claims. As a result, the case was ultimately dismissed.<sup>63</sup>

Whatever the preferred route, the prescribed mechanisms for disclosure ought not to be overly complicated or formalistic. As Banisar notes:

An overly prescriptive law which makes it difficult to disclose wrongdoing undermines the basic philosophy of promoting disclosure and encourages informal or anonymous releases. However, at the same time, a law that allows for unlimited disclosures will not encourage internal resolution and promote the development of a better internal culture of openness.<sup>64</sup>

#### 4.3.2 Mechanisms for Disclosure

Certain disclosure procedures have also been identified as preferable. Based in part on Australian studies, TI recommends that internal reporting (the first line of reporting should be to the appropriate authorities *within* the organization) be encouraged through the establishment and maintenance of internal systems of disclosure, which offer the benefits of ease and accessibility to potential whistleblowers.<sup>65</sup> Key to the efficacy of such internal mechanisms is ensuring "a thorough, timely and independent investigation of concerns ... [with] adequate enforcement and follow-up mechanisms."<sup>66</sup>

However, external means of disclosure should also be available and accessible, and it should be possible to disclose information to other bodies such as regulators or the media (albeit,

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<sup>63</sup> Osterhaus & Fagan (2009) at 11.

<sup>64</sup> Banisar (2011) at 26.

<sup>65</sup> Transparency International, "Recommended Draft Principles for Whistleblowing Legislation" (2009) at point 7, online: <[https://www.transparency.org/files/content/activity/2009\\_PrinciplesForWhistleblowingLegislation\\_EN.pdf](https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf)>.

<sup>66</sup> *Ibid.* Rodney Smith, "The Role of Whistle-Blowing in Governing Well: Evidence From the Australian Public Sector" (2010) 50:6 *Am Rev Pub Admin* 704 at 719, concludes that large-scale research into whistleblowing in the Australian public sector suggests that internal reporting is overwhelmingly popular amongst whistleblowers, even when there are external reporting agencies available: the study showed that "better outcomes ... were associated with public sector organizations that publicized good whistle-blowing procedures, had well-trained managers and specialist staff, and that offered specialist support for whistle-blowers." External agencies became important in the relatively small amount of cases in which reprisals occurred.

possibly along different tiers of disclosure).<sup>67</sup> This is because the circumstances of the particular case may make a certain avenue of disclosure more appropriate than another, and “a variety of channels need to be available to match the circumstances and to allow whistleblowers the choice of which channel they trust most to use.”<sup>68</sup> TI states that “[i]f there is a differentiated scale of care in accessing these channels, it shall not be onerous and must provide a means for reporting on suspicion alone.”<sup>69</sup> Similarly, Banisar recommends that internal disclosures should be encouraged and facilitated, but that “procedures should be straightforward and easily allow for outside organizations to seek the counsel of higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective.”<sup>70</sup> The September 2014 G20 Report likewise called for:

[C]lear rules for when whistleblowing to the media or other third parties is justified or necessitated by the circumstances... [and] clear rules for defining the internal disclosure procedures that can assist organisations to manage whistleblowing, rectify wrongdoing and prevent costly disputes, reputational damage and liability, in the manner best suited to their needs.<sup>71</sup>

The September 2014 G20 Report indicated that legislation in these areas needed to be more comprehensive. The stepped or tiered approach can be observed in *PIDA*:

*PIDA* uses a unique “tiered” system by which whistleblowers can make their disclosures and be legally protected from retaliation. Employees can disclose information to their employer, regulatory agencies, “external” individuals such as members of Parliament, or directly to the media. However, the standards for accuracy and urgency increase with each tier, so whistleblowers must heed this in order to be legally protected.<sup>72</sup>

In an article comparing the UK and US legislative regimes, Mendelsohn argues that a model law would be explicit in its preference for internal or external disclosure, and she suggests that internal reporting ought to be preferred. However, she also argues that while internal reporting should be afforded “almost automatic protection,” this does not mean that external

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<sup>67</sup> For example, in Paul Stephenson & Michael Levi, “The Protection of Whistleblowers: A Study on the Feasibility of a Legal Instrument on the Protection of Employees Who Make Disclosures in the Public Interest” (20 December 2012) at 5, online: Council of Europe <<http://rm.coe.int/doc/0900001680700282>>, the authors suggest that external routes (such as regulatory authorities and law enforcement) are required where internal reporting proves ineffective, and that “[g]oing to the press is – or should be – an option of last resort, albeit a vital one.” The authors, at 29, explicitly recommend “a ‘stepped approach,’ with different grounds required at each stage... [and] if at any stage there is not response, then it is clear the whistleblower can go to the next level.”

<sup>68</sup> OECD, “Committing to Effective Whistleblower Protection” (OECD, 2016) at 53, online: <<http://dx.doi.org/10.1787/9789264252639-en>>.

<sup>69</sup> Transparency International (2009) at point 8.

<sup>70</sup> Banisar, (2011) at 57. The OECD’s CleanGovBiz (July 2012) similarly advocates for the encouragement of internal reporting, with external reporting acting as a last resort.

<sup>71</sup> Simon Wolfe et al (September 2014) at 2.

<sup>72</sup> Worth (2013) at 83.

reporting should be subject to a multitude of preconditions.<sup>73</sup> Furthermore, Mendelsohn's model law would allow for disclosures to the media only when reporting through internal and external channels has proven to be ineffective.<sup>74</sup>

After a disclosure is made, it may be appropriate to keep the reporting person informed of the outcome of the disclosure. A recent Report by the United Nations Office on Drugs and Crime (UNODC) indicated that not only must all reports be assessed according to their merits, but also that those who disclose information should be informed of decisions made on the basis of their report (e.g., whether the matter will be investigated).<sup>75</sup> Similarly, Devine recommended that the corrective action process should be transparent, and that the reporting person who disclosed the issue "should be enfranchised to review and comment on the draft report resolving alleged misconduct, to assess whether there has been a good faith resolution."<sup>76</sup>

### 4.3.3 Protection of Identity

Protection of identity is an area in which there is disagreement as to the appropriate best practice. There is widespread recognition of the need for ensuring whistleblower confidentiality; indeed, Devine suggests that channels of disclosure must protect confidentiality in order to ensure that the flow of information is maximized, and this includes not only name protection but also the protection of identifying information.<sup>77</sup> If the identity of a whistleblower must be revealed (e.g., because of the need for testimony in a criminal proceeding), the whistleblower should be provided with "as much advance notice as possible."<sup>78</sup> However, while there is general agreement with respect to the need for whistleblower confidentiality, there is controversy over the role of anonymous reporting.

TI suggests that not only should the identity of a whistleblower be protected (i.e., kept confidential), but that legislation should also allow for anonymous disclosure.<sup>79</sup> Similarly, Banisar argues that anonymity may have a place in a model whistleblower protection law, despite the general exclusion of anonymous disclosures from current legislation: for example, "[a]nonymity may be ... useful (not to say essential) in some cases, such as in jurisdictions where the legal system is weak or there are concerns about physical harm or social ostracization."<sup>80</sup> The September 2014 G20 Report concluded that a central area of

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<sup>73</sup> Jenny Mendelsohn, "Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing" (2009) 8:4 Wash U Global Stud L Rev 723 at 743.

<sup>74</sup> *Ibid* at 744.

<sup>75</sup> UN Good Practices (August 2015) at 72.

<sup>76</sup> Devine (2015) at 14.

<sup>77</sup> *Ibid* at 10. See also OECD, (2016) at 64, wherein it is noted that "[i]t is important that confidentiality extends to all identifying information."

<sup>78</sup> *Ibid* at 10. See also OECD, (2016) at 65, wherein the authors discuss the possibility of imposing sanctions for the disclosure of a whistleblower's identity.

<sup>79</sup> Transparency International (2009) at point 12.

<sup>80</sup> Banisar (2011) at 34.

concern was the need for “clear rules that encourage whistleblowing by ensuring that anonymous disclosures can be made, and will be protected.”<sup>81</sup>

In contrast, Latimer and Brown suggest that anonymous disclosures should be used only as something of a “last resort,” given the perception that anonymity would discourage whistleblower accountability and might, in fact, encourage intentionally false reports.<sup>82</sup> Allowing anonymous disclosures might, therefore, increase the volume of disclosures so as to make reporting systems less effective and increase the difficulty of investigations.<sup>83</sup> Stephenson and Levi, in a Report commissioned by the Secretary General of the Council of Europe, similarly question the need for anonymous disclosures where confidentiality is protected:

Legal and social problems stem from anonymous disclosures: anonymous information is rarely admissible as evidence in courts. There have been cases where, because the whistleblower has remained anonymous, another worker has been suspected and sacked... research results indicate that auditors attribute lower credibility and allocate fewer investigatory resources when the whistleblowing report is received through an anonymous channel.<sup>84</sup>

It has been suggested that it may be possible to address some of the concerns with respect to anonymous reporting (such as difficulty in assessing credibility and in seeking clarification) through the use of technology such as proxy e-mails, which allow two-way communication.<sup>85</sup>

#### 4.3.4 Protection against Retaliation and Oversight of that Protection

Robust protection against retaliation is a cornerstone of effective whistleblower protection legislation. Effective protection from reprisal is required, as is a broad understanding of what reprisals might entail: “The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights.”<sup>86</sup> A key element in ensuring the protection of whistleblowers is educating public employees on their rights and protections under whistleblower legislation, because “[w]histleblowers are not protected by any law if they do not know it exists.”<sup>87</sup> Those in positions of power, who may be receiving protected disclosures or working with whistleblowers following disclosures, also need to be educated

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<sup>81</sup> Simon Wolfe et al (September 2014) at 20.

<sup>82</sup> Latimer & Brown (2008) at 774.

<sup>83</sup> OECD (2016) at 63.

<sup>84</sup> Stephenson & Levi (20 December 2012) at 32. The authors suggest, at 32, that anonymous reporting systems may be a first step in the whistleblowing process: “The whistle-blowers’ confidence may develop as the exchange progresses: if the intelligence is to be used effectively they will need to identify themselves to the authorities at some stage.”

<sup>85</sup> UN Good Practices (August 2015) at 50.

<sup>86</sup> Devine & Walden (13 March 2013) at 3. The authors also note, at 5, that whistleblowers must be protected from unconventional harassment, considering that “[t]he forms of harassment are limited only by the imagination.”

<sup>87</sup> *Ibid* at 6.

on their responsibilities under the law. In addition, it is important that protection against retaliation not be limited to a short period of time following the disclosure, as reprisals may occur months or even years after the initial disclosure.<sup>88</sup>

Protection within legislation is crucial, but in order to provide whistleblowers with effective shelter from retaliation the legislation must actually be put into practice. The Government Accountability Project, a US-based non-governmental organization, notes that whistleblower laws may actually prove to be counterproductive if they do not have any teeth:

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all.<sup>89</sup>

Adequate oversight is required to ensure that the legislation is doing the work that it was designed for, and this may be accomplished through independent bodies, an ombudsperson, sectoral bodies, or courts and tribunals.<sup>90</sup>

#### 4.3.5 Remedies and Rewards

When retaliation cannot be prevented and whistleblowers face reprisals, adequate and timely compensation is necessary. Compensation “must be comprehensive to cover all the direct, indirect and future consequences of the reprisal.”<sup>91</sup> This may include reinstatement, compensation for lost wages, awards for suffering, or a range of other reparations. It would be beneficial not to limit the amount of compensation, and “[c]ompensation should be broadly defined to cover all losses and seek to place the person back in an identical position as before the disclosure.”<sup>92</sup> An effective compensation scheme may require interim relief, given the high costs of time delays to whistleblowers seeking the remedies promised in the whistleblowing legislation.<sup>93</sup> In addition, it is important that whistleblower protection laws offer reporting persons a “realistic time frame” within which to assert their rights: Devine suggests a one year limitation period, in contrast to the 30-60 days contained in some pieces of legislation.<sup>94</sup>

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<sup>88</sup> OECD (2016) at 81.

<sup>89</sup> Devine & Walden (13 March 2013) at 1.

<sup>90</sup> Banisar (2011) at 38–43.

<sup>91</sup> Devine & Walden (13 March 2013) at 9.

<sup>92</sup> Banisar (2011) at 56.

<sup>93</sup> Devine & Walden (13 March 2013) at 9.

<sup>94</sup> Devine (2015) at 12.

There has been significant debate over the role that rewards should play in model whistleblower legislation. In the US, discussed in more detail in Section 5.2, various pieces of legislation allow whistleblowers to collect cash rewards when the government recovers money as a result of the information disclosed. The value of the information is thought to outweigh any questions regarding the morality of the motivations behind disclosure. However, these moral questions have not been so easily dismissed by everyone in the field. Public Concern at Work, a UK-based non-governmental organization, did not recommend the introduction of financial incentives into *PIDA* for reasons related both to the underlying philosophy of encouraging reporting in this way as well as concerns regarding the practical implications of rewarding whistleblowers in this manner. The 2013 Report stated:

The majority of respondents to our consultation (including whistleblowers) were not in favour of rewards. The reasons given were multiple and in summary were as follows:

- a) inconsistent with the culture and philosophy of the UK
- b) undermines the moral stance of a genuine whistleblower
- c) could lead to false or delayed reporting
- d) could undermine credibility of witnesses in future criminal or civil proceedings
- e) could result in the negative portrayal of whistleblowers
- f) would be inconsistent with current compensatory regime in the UK.

The provision of a reward may well incentivise those who would not normally speak out. However, it may also encourage individuals to raise a concern only when there is concrete proof and monetary reward. This could reduce the opportunity to detect malpractice early and prevent harm. Additionally, it is difficult to use the model in sectors other than the financial sector, such as care or health.

Rewards are not a substitute for strong legal protection. There is no reason why whistleblowers should not be recognised and rewarded in the workplace via remuneration structures, promotion or other recognition mechanisms including by society at large (e.g. the honours list).<sup>95</sup>

As a final point, whistleblower protection is untenable if it saddles a victim of retaliation with an unwieldy burden of proof. Thus, the “emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a “contributing factor” in challenged discrimination.”<sup>96</sup> It may be possible to go even further and craft legislation that

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<sup>95</sup> Public Concern at Work, “The Whistleblowing Commission: Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK” (November 2013) at 14, online: Public Concern at Work <[http://www.pcaw.org.uk/files/WBC\\_Report\\_Final.pdf](http://www.pcaw.org.uk/files/WBC_Report_Final.pdf)>.

<sup>96</sup> Devine & Walden (13 March 2013) at 7

presumes that a detrimental act against a whistleblowing employee is, in and of itself, sufficient to shift the burden of proof to the employer to show that the act was not retaliatory.<sup>97</sup> Furthermore, it is important to consider how evidentiary rules may unduly burden whistleblowers seeking remedies for reprisals.<sup>98</sup> Finally, if mounting a claim of alleged retaliation is expensive and requires the assistance of a lawyer or other institutional advocate (such as an ombudsperson), then such assistance should be built into the scheme.

## 5. WHISTLEBLOWER PROTECTION IN THE US: A PATCHWORK OF LEGISLATION

The US has a long history of whistleblower protection legislation. Section 5.1 will give an overview of the protections available to whistleblowers in the public sector, focusing on those working in the federal public sector, and the following sections will briefly outline some of the protections available to private sector whistleblowers.

### 5.1 Whistleblower Protection in the Public Sector

The first whistleblower law in the US arguably appeared as early as 1863, with the introduction of false claims legislation.<sup>99</sup> However, the modern approach to whistleblower protection began in 1968 with the landmark case *Pickering v Board of Education*, which recognized the application of the First Amendment to protection of disclosures made in the public interest.<sup>100</sup> This was followed by the *Civil Service Reform Act of 1978*,<sup>101</sup> which “sought to vindicate these constitutional rights, but it substituted statutory standards for the vague balancing test under First Amendment law.”<sup>102</sup> Unfortunately, the Office of Special Counsel and Merit Systems Protection Board, implemented by this legislation, did not prove to be very successful.<sup>103</sup> Today, the US has a plethora of laws on the local, state and federal levels that offer protection to whistleblowers. Although these laws purport to offer protection to

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<sup>97</sup> OECD, “G20 Anti-Corruption Action Plan Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation” (OECD, 2011), online: <<http://www.oecd.org/daf/anti-bribery/48972967.pdf>>, states at 25, that high burdens of proof have been “almost impossible to provide as long as the employer has not explicitly mentioned this as the reason for termination. For that reason, several legislations provide for a flexible approach to the burden of proof, assuming that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified on management grounds unrelated to the fact or consequences of the disclosure.”

<sup>98</sup> FASTERLING (2014) at 336. The author argues, at 336, that “research should take burden of evidence rules into account when evaluating remedies.”

<sup>99</sup> VAUGHN (2012) at 4.

<sup>100</sup> *Pickering v Board of Education*, 391 US 563 (1968).

<sup>101</sup> *Civil Service Reform Act of 1978*, Pub L No 95-454, 92 Stat 1111.

<sup>102</sup> VAUGHN (2012) at 5.

<sup>103</sup> Terry Morehead Dworkin, “US Whistleblowing: A Decade of Progress?” in David B Lewis, ed, *A Global Approach to Public Interest Disclosure* (Edward Elgar, 2010) at 46.

whistleblowers in both the public and the private sector, there are problems “due to increased implementation difficulties, inefficiencies and regulatory burdens entailed in having multiple laws that have evolved in *ad hoc* ways over time.”<sup>104</sup> A comprehensive, dedicated piece of legislation, such as *PIDA*, that covers both the public and the private sector at the federal level, with similar models at the state level, would be preferable in this sense. It would make it easier for whistleblowers to learn and understand their rights under the legislation, and it would likely decrease implementation and regulatory difficulties.

The legislation that is most relevant to disclosures in the federal public sector is the 1989 *Whistleblower Protection Act (WPA)*<sup>105</sup> (amended in 2012 by the *Whistleblower Protection Enhancement Act (WPEA)*).<sup>106</sup> The *Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s. 743* underscores the important role of public sector whistleblowers, and explicitly recognizes the need for strong whistleblower protection legislation:

The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government. Whistleblowers play a critical role in keeping our government honest and efficient. Moreover, in a post-9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation’s airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment.

...

S. 743 would address... problems by restoring the original congressional intent of the WPA to adequately protect whistleblowers, by strengthening the WPA, and by creating new whistleblower protections for intelligence employees and new protections for employees whose security clearance is withdrawn in retaliation for having made legitimate whistleblower disclosures.<sup>107</sup>

Under the *WPA*, the employer bears the burden of showing that the detriment faced by an employee was not connected to their whistleblowing:

The employee only has to establish that he – 1. disclosed conduct that meets a specific category of wrongdoing set forth in the law; 2. made the disclosure

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<sup>104</sup> Simon Wolfe et al (September 2014) at 63–64.

<sup>105</sup> *Whistleblower Protection Act of 1989*, Pub L No 101-12, 103 Stat 16 [*WPA*]. For further analysis, see Stephenson & Levi, (20 December 2012) at 22, note that the *WPA* was introduced following the 1986 Challenger space shuttle disaster.

<sup>106</sup> *Whistleblower Protection Enhancement Act of 2012*, Pub L No 112-199, 126 Stat 1465 [*WPEA*].

<sup>107</sup> US, Committee on Homeland Security and Governmental Affairs, 112th Cong, *The Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s. 743* (US Government Printing Office, 2012) at 1, online: <[http://fas.org/irp/congress/2012\\_rpt/wpea.pdf](http://fas.org/irp/congress/2012_rpt/wpea.pdf)>.

to the right type of party; 3. made a report that is either outside of the employee's course of duties or communicated outside the normal channels; 4. made the report to someone other than the wrongdoing; 5. had a reasonable belief of wrongdoing; 6. suffered a personnel action. If the employee establishes these elements, the burden shifts to the employer to establish that it would have taken the same action in absence of the whistleblowing.<sup>108</sup>

In 2011, the Merit Systems Protection Board released a Report that compared survey data of federal employees from 1992 with data from 2010. In regard to the rate of disclosures, the Report stated:

While observing wrongdoing is the first step in the whistleblowing process, not everyone who sees wrongdoing chooses to tell anyone else what they have observed. To blow the whistle, someone has to make some noise. In 2010, respondents were slightly less likely to report that they did not tell anyone about the wrongdoing that they observed compared with survey data from 1992, but in both years, a strong majority of employees told someone ... [T]he percentage of respondents who told no one what they observed dropped from 40 percent in 1992 to 34 percent in 2010. In 2010, family, friends, and coworkers were less likely to be told about the wrongdoing than they were in 1992. However, this did not correspond to substantially more people reporting wrongdoing to management. Instead, it seems that venting to equally powerless people dropped, but the willingness of respondents to take action that could lead to change was not substantially changed.<sup>109</sup>

The Report went on to conclude:

We have seen some progress in the Federal Government with respect to effectively utilizing Federal employees to reduce or prevent fraud, waste, and abuse. Since 1992, the percentage of employees who perceive any wrongdoing has decreased, and for those who perceive wrongdoing, the frequency with which they observe the wrongdoing has also decreased. Additionally, in comparison to 1992, respondents in 2010 were slightly more likely to report the wrongdoing and less likely to think they have been identified as the source of the report.<sup>110</sup>

The WPEA reinforced the WPA by closing loopholes in the legislation, increasing the scope of protected wrongdoing and shielding "whistleblower rights against contradictory agency

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<sup>108</sup> Stephenson & Levi (20 December 2012) at 22.

<sup>109</sup> US Merit Systems Protection Board, "Blowing the Whistle: Barriers to Federal Employees Making Disclosures" (November 2011) at 8, online: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475>.

<sup>110</sup> *Ibid* at 27.

non-disclosure rules through an “anti-gag” provision.”<sup>111</sup> The September 2014 G20 Report states that in recent years there has been a positive increase in the favourable resolution of whistleblower retaliation cases: “From 2007 to 2012, the number of new disclosures reported by federal employees increased from 482 to 1,148, and the number of whistleblower retaliation cases that were favorably resolved rose from 50 to 223.”<sup>112</sup> While these numbers indicate positive movement in terms of increased disclosures, it is impossible to determine whether the percentage of favourable resolutions of reprisal claims has increased as well without knowing the total number of reprisal claims. A 2015 study concludes that the *WPEA*, on paper, shows some potential, but that it is an open question whether it will translate to more robust whistleblower protection in practice:

It remains to be seen if the clarifications in the *WPEA* regarding disclosures will, in fact, clarify what is and is not a covered disclosure. It is also uncertain whether the courts will broaden their interpretation of the protections for whistleblowers under the *WPEA*. The expanded jurisdiction written into the Act is really a 2-year experiment to test that notion. The cancelling of the 1999 precedent that translates “reasonable belief” to require irrefutable proof is another issue that may be subject to narrowing by the courts.

There seems to be inherent confusion in the *WPEA* regarding the dictate that whistleblowers cannot claim protections for disclosing valid policy decision, but can claim protections for disclosing the consequences of a policy decision. Furthermore, the Act creates specific legal protections for scientific freedom, providing *WPA* rights to employees who challenge censorship, and makes it an abuse of authority to punish disclosures about scientific censorship. This begs the question: when is it censorship and when is it a valid policy decision to maintain the need for information to be classified due to national security or some other compelling reason. The main point here is that the *WPEA* may not have actually enhanced any protections or clarified the various aspects of whistleblower protections—again, time will tell.<sup>113</sup>

A February 2015 Report from the US Merit Systems Protection Board, indicates that the increased protections offered by *WPEA* have led to a strain on available resources. The Report states:

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<sup>111</sup> Simon Wolfe et al (September 2014) at 64.

<sup>112</sup> *Ibid.*

<sup>113</sup> Shelley L Peffer et al, “Whistle Where You Work? The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Whistleblower Protection Enhancement Act of 2012” (2015) 35:1 *Rev Pub Personnel Admin* 70 at 78–79. The study concludes, at 78, that the *WPA* “failed in its basic purpose—protecting employees.” However, the study also highlights weaknesses of the *WPEA*, such as the lack of protection for national security workers and government contractors.

The WPEA provided additional rights to whistleblowers and those who engage in other protected activity in the Federal Government. The law expanded the scope of protected disclosures, broadened MSPB's whistleblower jurisdiction, expanded options for granting corrective action, and permitted review of MSPB decisions by multiple Federal Courts of Appeals. These changes have increased the number of whistleblower cases filed with MSPB and increased the complexity of MSPB's processing of whistleblower cases. The changes also may lead to more and lengthier hearings in whistleblower cases and more addendum appeals (e.g., claims for compensatory and other damages or for attorney's fees) for whistleblower cases. The WPEA also requires MSPB to track and report more detailed information about whistleblower cases in its performance reports. MSPB needs additional permanent resources to enable it to meet the requirements of the WPEA.<sup>114</sup>

The February 2016 Annual Performance Results and Annual Performance Plan report from the US Merit Systems Protection Board, provided an update on these concerns, stating:

Many whistleblower cases are being resolved formally or informally at the Office of Special Counsel. The more complex and contentious cases that remain unresolved are often the cases filed with MSPB. Thus, based on what we have seen so far, we still anticipate that the WPEA may lead to more and lengthier hearings in these cases and more addendum appeals.<sup>115</sup>

This report also provides recent data on the whistleblower appeals, from October 1, 2014 to September 30, 2015. During this time period, the Merit Systems Review Board received 583 initial appeals against reprisals from whistleblowers at its regional and field offices. Of these, 393 were individual right of action appeals (where "the individual is subject to a personnel action and claims that the action was taken in reprisal for whistleblowing, but the personnel action itself is not one that is directly appealable to the Board") and 190 were otherwise appealable actions (where the "appeal involves a personnel action that is directly appealable to the Board, such as a removal, demotion, or suspension of more than 14 days").<sup>116</sup> In cases involving individual rights of appeal, "the individual can appeal the claim of reprisal to the Board only if he or she files a complaint with OSC first, and OSC does not seek corrective action on the individual's behalf."<sup>117</sup> Of the 359 total individual right of action appeals

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<sup>114</sup> US Merit Systems Protection Board, "Annual Performance Report for FY 2014 and Annual Performance Report for FY 2015 (Final) and FY 2016 (Proposed)" (2 Feb 2015) at 1–2, online: <<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1133484&version=1137981&application=ACROBAT>>.

<sup>115</sup> US Merit Systems Protection Board, "Annual Performance Results for FY 2014 and Annual Performance Plan for FY 2016 (Final) and FY 2017 (Proposed)" (9 Feb 2016) at 38, online: <<http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1268947&version=1274024&application=ACROBAT>>.

<sup>116</sup> *Ibid* at 45.

<sup>117</sup> *Ibid*.

decided in regional and field offices, a 157 were dismissed for reasons including lack of jurisdiction and timeliness, 24 were dismissed for failing to exhaust (that is, seek corrective action) at OSC, 36 were withdrawn, 57 were adjudicated on the merits (with corrective action granted in 14 cases), and 85 were settled.<sup>118</sup> Of the 203 otherwise appealable action cases decided, 100 claims were dismissed, 56 were adjudicated on the merits (with corrective action granted in 3 cases) and 47 were settled.<sup>119</sup> These decisions can be appealed through filing petitions for review.<sup>120</sup>

## 5.2 Encouraging Whistleblowing through Rewards: The *False Claims Act*

The *False Claims Act (FCA)*<sup>121</sup> offers a unique understanding of how to encourage whistleblowing, as it allows private citizens to make claims on behalf of the government (*qui tam* actions) in cases of contract fraud; this has allowed the US government to recover \$35 billion in public funds since 1986 (as of 2014).<sup>122</sup> The *FCA* represents a prioritization of information rather than so-called ethical motives, and offers a different kind of remedy to wronged whistleblowers:

The *FCA* is much more effective than merely protecting the whistleblower from retaliation or even giving the whistleblower a private cause of action for retaliation .... It is arguably the most protective of whistleblowers because a successful whistleblower recovers enough to withstand losing a job or suffering a stalled career .... The law values information over motive, and blowing the whistle to gain a large recovery is fine as long as the information is novel and leads to successful prosecution.<sup>123</sup>

The ethical concern surrounding a whistleblower's motives has diminished in light of the *FCA*'s positive outcomes:

The concern that whistleblowers might be motivated by gain rather than a desire to help is... no longer a major ethical consideration. The desire by the government to recover money and correct wrongdoing now trumps concerns regarding whistleblower motive. A "pure" motive is seen as secondary to the public good created by whistleblowers, regardless of motive.<sup>124</sup>

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<sup>118</sup> *Ibid* at 46–47.

<sup>119</sup> *Ibid* at 45–46.

<sup>120</sup> *Ibid* at 47.

<sup>121</sup> *False Claims Act*, 31 USC §3729–3733.

<sup>122</sup> Simon Wolfe et al (September 2014) at 64.

<sup>123</sup> Dworkin (2010) at 44.

<sup>124</sup> Terry Morehead Dworkin & AJ Brown, "The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws" (2013) 11:2 Seattle J Soc Just 653 at 668.

Some whistleblowers under the *FCA* have received large sums of money: “*FCA* settlements and judgments have totaled over \$17 billion and virtually all whistleblowers have recovered \$1 million or more – even though the majority of suits are settled.”<sup>125</sup> For example, in August 2015, a former sales representative for NuVasive, a medical device producer, was awarded \$2.2 million under the *FCA* in relation to kickbacks paid by the company to doctors. A Wisconsin pharmacist was awarded \$4.3 million in 2015 after she blew the whistle on PharMerica. She was fired after reporting that her employer was dispensing dangerous drugs without a prescription.<sup>126</sup> In an even larger settlement, a former sales representative for Endo Pharmaceuticals Inc. received a \$33.6 million award after blowing the whistle on the company. She served as an undercover informant for the FBI for five years and waited nine years between her first complaint and the 2014 settlement.<sup>127</sup> In addition, it has been argued that US legislation such as the *FCA* “leads the way” when it comes to the protection of whistleblowers that are based in a different jurisdiction.<sup>128</sup>

Long time delays between blowing the whistle and receiving recovery amounts can put whistleblowers in disadvantageous financial situations.<sup>129</sup> For example, in the Endo Pharmaceuticals case mentioned above, nine years passed between the whistleblower’s first complaint and the settlement.<sup>130</sup> Despite this, many states have introduced similar legislation with varying amounts of recovery awarded to the *qui tam* plaintiff.<sup>131</sup> The state-level legislation has seen similar levels of success as the federal legislation.<sup>132</sup> The debate surrounding the morality of offering rewards was discussed, above, in Section 4.3.5. The US is mostly alone among the three countries discussed in this chapter in offering rewards. Generally speaking, the ethical or public service motive for whistleblowing in Canada and the UK is still favoured over motives related to private gain. The same may be said for Canada, with one exception: whistleblower rewards were created under the Ontario Securities Commission in 2016.

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<sup>125</sup> Dworkin (2010) at 44.

<sup>126</sup> Richard L Cassin, “PharMerica Whistleblower Collects \$4.3 Million”, *The FCPA Blog* (21 May 2015), online: <<http://www.fcpablog.com/blog/2015/5/21/pharmerica-whistleblower-collects-43-million.html>>.

<sup>127</sup> Richard L Cassin, “Jackpot: Pharma Whistleblower Awarded \$33 Million”, *The FCPA Blog* (17 July 2015), online: <<http://www.fcpablog.com/blog/2015/7/17/jackpot-pharma-whistleblower-awarded-33-million.html>>. See also Richard L Cassin, “Three SEC Whistleblowers Split \$7 Million Award”, *The FCPA Blog* (23 January 2017), online: <<http://www.fcpablog.com/blog/2017/1/23/three-sec-whistleblowers-split-7-million-award.html>>.

<sup>128</sup> Richard Hyde & Ashley Savage, “Whistleblowing Without Borders: The Risks and Rewards of Transnational Whistleblowing Networks” in David Lewis & Wim Vandekerckhove, eds, *Developments in Whistleblowing Research* (International Whistleblowing Research Network, 2015) at 24, online: <[http://www.track.unodc.org/Academia/Documents/151110\\_IWRN\\_ebook\\_2015.pdf](http://www.track.unodc.org/Academia/Documents/151110_IWRN_ebook_2015.pdf)>.

<sup>129</sup> *Ibid.*

<sup>130</sup> Richard L Cassin, “Jackpot: Pharma Whistleblower Awarded \$33 Million”, *The FCPA Blog* (17 July 2015), online: <<http://www.fcpablog.com/blog/2015/7/17/jackpot-pharma-whistleblower-awarded-33-million.html>>.

<sup>131</sup> Hyde & Savage (2015) at 45.

<sup>132</sup> Dworkin & Brown (2013) at 668.

### 5.3 A Brief Discussion of Federal Whistleblowing Protection in the Private Sector

In addition to the protections for public sector employees discussed above, the US is home to legislation protecting workers in the private sector. Two of these, the *Sarbanes-Oxley Act of 2002 (SOX)*<sup>133</sup> and the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)*,<sup>134</sup> operate on the federal level. SOX was introduced in response to a number of scandals:

Beginning in 2001, companies such as Enron, WorldCom, Global Crossing and Tyco became familiar names as accounting fraud and other business abuses became public .... Publicized abuses extended beyond accounting fraud, as reflected by Enron's manipulation of the energy markets in California, manipulation that stole millions of dollars from ratepayers and precipitated a crisis in that state .... Employees of these companies were aware of fraud and other abuses, but failed to come forward from fear of retaliation or found their warnings ignored. Some who came forward faced harassment. In response to the public outcry and the disclosed weaknesses in laws regulating corporate conduct, Congress enacted and George W. Bush signed the Sarbanes-Oxley Act of 2002.<sup>135</sup>

SOX applies to companies traded publicly, and it "calls for companies to establish a code of ethics and whistleblowing procedures."<sup>136</sup> This has international ramifications, as all countries traded publicly in the US must comply with the requirements of SOX. One of these requirements is that companies should have mechanisms allowing for anonymous disclosures, which many companies have complied with through the use of independent telephone hotlines.<sup>137</sup> This method of reporting has proven problematic in respect to difficulties maintaining anonymity and delays in following up on disclosures.<sup>138</sup>

In 2008, the global financial crisis prompted the enactment of the *Dodd-Frank Act*. Under section 922 of the *Act*, whistleblowers are entitled to a reward if they provide information for SEC enforcement actions that lead to sanctions exceeding \$1 million, including enforcement actions for *Foreign Corrupt Practices Act [FCPA]* violations. Section 922 also protects those who provide information to the SEC from retaliation from employers. Disclosures "must rest upon a reasonable belief that the information relates to the violation of any consumer financial protection contained in the Dodd-Frank Act or any rule, order, standard, or prohibition prescribed or enforced by the Bureau [of Consumer Financial Protection]."<sup>139</sup> Awards under this legislation have been large; for example, an award of over

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<sup>133</sup> *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745.

<sup>134</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111-203, 124 Stat 1376.

<sup>135</sup> Vaughn (2012) at 150.

<sup>136</sup> Dworkin (2010) at 37.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> Vaughn (2012) at 156.

\$30 million was approved in 2014 and awarded in 2015, with additional payments subsequently approved with respect to related actions.<sup>140</sup> Although some commentators, such as Martin,<sup>141</sup> predict that the Dodd-Frank act will increase the number of *FCPA* investigations, Koehler predicts that its impact on *FCPA* enforcement will be negligible.<sup>142</sup> As of January 2015, no whistleblower awards have been made under the *Dodd-Frank Act* in connection with the *FCPA*.<sup>143</sup> According to the SEC's report for the fiscal year of 2015, out of a total of 3923 tips, 186 (nearly 5%) related to the *FCPA*.<sup>144</sup>

In addition to these pieces of legislation, a number of other laws in the US protect whistleblowers in the private sector.<sup>145</sup> Vaughn argues that private sector whistleblower legislation in the US has both positive and negative aspects:

Relief under recent whistleblower laws is extensive, including reinstatement, back pay, compensatory damages, attorney fees and litigation costs, and specifically includes expert witness fees. The similarity between recent laws illustrates the application of a common model for their content. This similarity offers some advantages by tying them together and creating a body of federal private-sector whistleblower laws. For example, this similarity could empower some future reform such as a uniform federal law applying blanket protection to all private-sector whistleblowers. The similarity, however, has some disadvantages. Because the pedigree of these common elements rests on aspects of the Whistleblower Protection Act of 1989, applicable to federal employees, and of the Sarbanes-Oxley Act, these laws may be limited by restrictive interpretations of relevant statutory terms by the Federal Circuit in relation to the Whistleblower Protection Act and by the Department of Labor in relation to the Sarbanes-Oxley Act.<sup>146</sup>

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<sup>140</sup> US Securities and Exchange Commission, "2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program" (16 November 2015) at 10, online:

<<https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>>.

<sup>141</sup> Tim Martin, *International Bribery Law and Compliance Standards* (Independent Petroleum Association of America, 2013) at 21, online: <[http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA\\_BriberyLawPrimer\\_v10.pdf](http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA_BriberyLawPrimer_v10.pdf)>.

<sup>142</sup> Mike Koehler, "Potpourri" (24 November 2014), *FCPA Professor* (blog), online: <<http://www.fcpaprofessor.com/potpourri-13>>.

<sup>143</sup> *Ibid.*

<sup>144</sup> US Securities and Exchange Commission, (16 November 2015) at 21, 28.

<sup>145</sup> Vaughn, (2012), at 152, states that "[t]he whistleblower provision of SOX heralded a decade of congressional enactment of private-sector whistleblower laws." In addition, the author at 154–155 calls attention to the *American Recovery and Reinvestment Act*, which distributes funds to governments on the local and state level (and, through them, to private contractors) for use on public projects; under this legislation, "[e]mployees may disclose gross management, waste, fraud, and abuse of stimulus funds."

<sup>146</sup> *Ibid* at 159.

## 6. WHISTLEBLOWER PROTECTION IN THE UK: *PUBLIC INTEREST DISCLOSURE ACT 1998*

In the UK, whistleblowers are protected by *PIDA*. The passage of this legislation was preceded by a number of serious disasters that may have been prevented if employees had come forward with information; this “has been confirmed by the findings of the official inquiries ... which found that staff had been aware of dangers but had not mentioned them for fear of retaliation, or had raised concerns and then been dismissed or led to resign.”<sup>147</sup> For example, in 1987 a ship sank, killing 193 people, because its bow doors had been opened while sailing. Employees had raised concerns on five occasions about the risk that this caused, but the warnings were not heeded by management.<sup>148</sup> Prior to such tragedies and the subsequent introduction of *PIDA*, the cultural attitude in the UK strongly favoured loyalty to an employer and contractual obligations over disclosure of employment-related issues.<sup>149</sup> The common law did not provide much in way of whistleblower protection, and what protection existed was superseded in many cases by the “implied duties of the employment relationship, which explicitly barred British employees from publicly discussing private employment matters.”<sup>150</sup> Now, many years since the introduction of *PIDA*, whistleblowers in the UK are viewed more positively by individuals and by the media.<sup>151</sup>

As already noted, *PIDA* has been lauded as one of the most comprehensive pieces of whistleblower protection legislation in the world, and is often cited as a “model” law due to its comprehensive coverage and tiered disclosure system.<sup>152</sup> In Vandekerckhove’s examination of European whistleblower protection, for example, *PIDA* was used as a model against which various European laws were measured.<sup>153</sup> This is because *PIDA*’s “three-tiered model” of disclosure aptly captures a preference for internal disclosure, while still accounting for the necessity of external disclosure in some situations. In doing so, it provides protection for both internal and external whistleblowing against a sliding scale of requirements:

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<sup>147</sup> Lucy Vickers, “Whistling in the Wind? The Public Interest Disclosure Act 1998” (2000) 20:3 LS 428 at 429.

<sup>148</sup> Public Concern at Work (November 2013) at 7.

<sup>149</sup> Vickers (2000) at 429.

<sup>150</sup> Mendelsohn (2009) at 734.

<sup>151</sup> Public Concern at Work (November 2013) at 9.

<sup>152</sup> Thad M Guyer & Nikolas F Petersen, “The Current State of Whistleblower Law in Europe: A Report by the Government Accountability Project” (2013) at 12, online: Government Accountability Project <<http://whistleblower.org/sites/default/files/TheCurrentStateofWhistleblowerLawinEurope.pdf>>, for example, states that the UK “is clearly the leader in whistleblower protection in Europe. The UK was one of the first European states to legislate on the protection of ‘whistleblowers’ and its law was even described as ‘the most far-reaching whistleblower law in the world.’”

<sup>153</sup> Wim Vandekerckhove, “European Whistleblower Protection: Tiers or Tears?” in David B Lewis, ed, *A Global Approach to Public Interest Disclosure* (Edward Elgar, 2010).

This legislation offers protection for internally raising concerns within and outside of the hierarchical line. It also offers protection for blowing the whistle to a prescribed regulator if the internal route failed. Finally, if that too was unsuccessful, wider disclosures are protected as well.<sup>154</sup>

*PIDA*'s three-tiered model thus offers a balance between the interests of the employer in maintaining confidentiality, and the interests of the public in having employees disclose information related to workplace malpractice or corruption.<sup>155</sup> When a worker makes an internal disclosure, there is a presumption of legislative protection against reprisal as long as the worker has acted in good faith.<sup>156</sup> However, there are more requirements in order to receive protection under *PIDA* when disclosure is made to an external regulator or to the media. In order to make a disclosure to an external source, it must be the case that the whistleblower "reasonably believes that the information disclosed, and any allegation contained in it, are substantially true."<sup>157</sup> The whistleblower must not have acted for the purposes of personal gain, and it must have been reasonable to make the disclosure.<sup>158</sup> *PIDA* thus imposes increasingly onerous requirements (especially in terms of level of knowledge and reasonableness of belief) the further that the whistleblower gets from internal disclosure. The Canadian *Public Servants Disclosure Protection Act (PSDPA)*, discussed below in Section 7.2, also has differing requirements depending on the recipient of the disclosure, but they are not as onerous. For example, disclosure to the public under the *PSDPA* is governed by section 16:

- 16.** (1) A disclosure that a public servant may make under sections 12 to 14 may be made to the public if there is not sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that
- (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
  - (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.<sup>159</sup>

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<sup>154</sup> *Ibid* at 17.

<sup>155</sup> Mendelsohn (2009) at 738.

<sup>156</sup> *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 43C.

<sup>157</sup> *Ibid* s 43G(1)(b).

<sup>158</sup> *Ibid* s 43G(1)(c) and (e).

<sup>159</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 16.

The requirements for similar disclosure under *PIDA* are lengthier, to say the least:

**43G.** (1) A qualifying disclosure is made in accordance with this section if—

- (a) the worker makes the disclosure in good faith,
- (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
- (c) he does not make the disclosure for purposes of personal gain,
- (d) any of the conditions in subsection (2) is met, and
- (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

- (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
- (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
- (c) that the worker has previously made a disclosure of substantially the same information—
  - (i) to his employer, or
  - (ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

- (a) the identity of the person to whom the disclosure is made,
- (b) the seriousness of the relevant failure,
- (c) whether the relevant failure is continuing or is likely to occur in the future,
- (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
- (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

- (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.<sup>160</sup>

Thus, while *PIDA* may benefit from greater clarity in its requirements (as compared to *PSDPA*), it imposes a very heavy burden on a whistleblower who makes a disclosure to a source beyond an employer, legal advisor, Minister of the Crown, or other prescribed person.

*PIDA*'s coverage is exceptionally expansive: it protects employees in both the public and private sectors, and it is broad enough to capture private contractors.<sup>161</sup> In addition, the legislation covers a wide range of wrongdoing under the purview of a protected disclosure: a disclosure qualifies as protected where the person who makes the disclosure reasonably believes that a criminal offence has been or is likely to be committed, there has been a failure to comply with legal obligations, there has been or is likely to be a miscarriage of justice, there is a risk to health, safety, or the environment, or information relevant to one of these areas faces deliberate concealment.<sup>162</sup> However, critics have suggested that there are downsides to having an exhaustive list of wrongdoing. Instead, *PIDA*'s reach could be broadened by conferring some discretion on the courts: "PIDA might have provided better protection if it had included a list of matters automatically covered together with a final catch-all provision covering matters that, in the opinion of the court, are in the public interest."<sup>163</sup> The types of reprisals that whistleblowers are protected against are similarly broad, with the legislation stating "[a] worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by this employer done on the ground that the worker has made a protected disclosure."<sup>164</sup> If a worker experiences reprisal, claims are made directly to the UK Employment Tribunal, rather than to a specialized body.<sup>165</sup> Remedies for reprisal include reinstatement, unlimited compensation, or reengagement.<sup>166</sup> *PIDA*'s track record, in practice, can be summarized as follows:

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<sup>160</sup> *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 43G.

<sup>161</sup> Simon Wolfe et al (September 2014) at 60.

<sup>162</sup> *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 43B.

<sup>163</sup> Vickers, (2000) at 434. Similarly, a recent Report put forward by Public Concern at Work, (November 2013) at 17, suggests that *PIDA* ought to be amended to include a "non-exhaustive list of the categories of wrongdoing, including gross waste or mismanagement of funds and serious misuse or abuse of authority."

<sup>164</sup> *Public Interest Disclosure Act 1998* (UK), c 23 [*PIDA*], s 47B(1).

<sup>165</sup> Guyer & Petersen (2013) at 13.

<sup>166</sup> Vickers (2000) at 432.

In the first ten years of PIDA's operation, the number of claims made under it annually increased from 157 in 1999 to 1761 in 2009. This is still a small proportion (under 1%) of all claims made to Employment Tribunals. Over 70% of these claims were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won. There is only partial information on awards: in the known cases, the average compensation was £113,000 (the largest single award was over £3.8m) and the total known compensation was £9.5m.<sup>167</sup>

Despite the broad scope of *PIDA* and its excellent reputation, a recent review of the legislation by the non-profit Public Concern at Work identified a number of opportunities for improvement.<sup>168</sup> Among these recommendations were the implementation of a Code of Practice, and the simplification of the legislative language. A Code of Practice would help to clarify the rights of whistleblowers and the appropriate procedural steps that whistleblowers should take when disclosing information internally:

Such a code of practice must clearly set out principles enabling workers to raise concerns about a danger, risk, malpractice or wrongdoing that affects others without fear of adverse consequences. Any such arrangements must be proportionate to the size of the organisation and the nature of the risks faced. A code of practice should set out the requirements for arrangements covering the raising and handling of whistleblowing concerns and should include a written procedure for the raising of concerns. This procedure should include: clear assurances about protection from reprisal; that confidentiality will be maintained where requested; and should identify appropriate mechanisms for the raising of concerns, as well as, identifying specific individuals with the responsibility for the arrangements.<sup>169</sup>

Public Concern at Work called for more research to be done by the government regarding the possibility of creating an ombudsman or similar independent agency. Such an agency may be able to raise public awareness, conduct investigations into alleged reprisals and conduct strategic litigation, among other things.<sup>170</sup>

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<sup>167</sup> Stephenson & Levi (20 December 2012) at 20.

<sup>168</sup> Public Concern at Work (November 2013). See also David Lewis, "Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?" (2008) 82 *J of Bus Ethics* 497 at 504 for a number of recommendations for reform.

<sup>169</sup> Public Concern at Work (November 2013) at 13.

<sup>170</sup> *Ibid* at 25.

## 7. WHISTLEBLOWER PROTECTION IN CANADA

### 7.1 The Development of the Common Law Defence

Prior to the introduction of dedicated whistleblower legislation, whistleblowers had to rely on protection provided by common law; in the employer-employee context, it was necessary to balance the duty an employee owed to their employer and an employee's right to freedom of expression. Slowly the balance began to shift, at least in theory, from prioritizing the duty of loyalty to one's employer, to protecting reasonable, good faith disclosures of alleged wrongdoing in the employer's organization. In *British Columbia v BCGEU*, arbitrator J.M. Weiler considered a matter wherein employees, who had taken an oath of office, publicly disclosed information that was critical of their public sector employer.<sup>171</sup> The arbitrator considered past decisions in the public sector context, and determined:

These awards do not go so far as to prevent an employee, at the risk of losing his job, from making *any* public statements that are critical of his employer. An absolute "gag rule" would seem to be counter productive to the employer for it would inhibit any dissent within the organization. Employee dissidents can be a valuable resource for the decision-makers in the enterprise.<sup>172</sup>

However, Weiler went on to note that public criticism of this sort (that is, "going public") should be something of a last resort after internal processes have been exhausted.<sup>173</sup> This decision recognized that the disclosure of information may, in fact, benefit the public sector employer: "Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing."<sup>174</sup>

A few years later, in *Fraser v Public Service Staff Relations Board*, the Supreme Court of Canada considered a case wherein the appellant faced disciplinary measures and eventually lost his position at the Department of Revenue Canada after criticizing governmental policy (specifically, metric conversion) in a letter to the editor published in a newspaper. The Court outlined three contexts in which it would be possible for a public servant to act against their duty of loyalty:

As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada,

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<sup>171</sup> *British Columbia (Attorney General) v BCGEU*, [1981] BCCA 9, 1981 CarswellBC 1176 (WL) [BCGEU].

<sup>172</sup> *Ibid* at para 39.

<sup>173</sup> *Ibid* at para 42.

<sup>174</sup> *Ibid* at para 43.

not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances, a public servant may actively and publicly express opposition to the policies of a government. **This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.** But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government [emphasis added].<sup>175</sup>

Following this decision, different factors were identified within the jurisprudence as relevant considerations when determining if a public servant's conduct fit within one of the categories enumerated by the Supreme Court.<sup>176</sup>

After the introduction of the *Canadian Charter of Rights and Freedoms*, and the enshrinement of freedom of expression therein, the Federal Court stated that "[t]he common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the *Charter*, and therefore constitutes a reasonable limit within the meaning of section 1 of the *Charter*."<sup>177</sup>

## 7.2 Federal Legislation: The *Public Servants Disclosure Protection Act*

This section focuses on federal whistleblower legislation. A description of provincial whistleblower laws is beyond the scope of this chapter. It should be noted, however, that a number of provinces have developed legislation to protect provincial public sector employees. This provincial whistleblower protection legislation falls under three general categories: the labour board and ombudsman model (present in Manitoba, New Brunswick, and Nova Scotia), the labour board and integrity commissioner model (present in Ontario and Quebec), and the integrated model exclusive to the integrity commissioner (present in Saskatchewan and Alberta).<sup>178</sup> In Quebec, in its *Rapport de la Commission d'enquête sur l'octroi*

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<sup>175</sup> *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 1985 CarswellNat 145 at para 46 (WL).

<sup>176</sup> "The Basics of Whistleblowing and Reprisal" (February 2012) at 5, online: Public Servants Disclosure Protection Tribunal Canada <<http://www.psdpt-tpfd.gc.ca/ResourceCentre/ArticlesAnalyses/BasicsWhistleblowing-eng.html>>.

<sup>177</sup> *Haydon v R*, [2001] 2 FC 82, 2000 CarswellNat 2024 at para 89 (WL).

<sup>178</sup> "A Comparison of Disclosure Regimes in Canada" (October 2013) at 2, online: Public Servants Disclosure Protection Tribunal Canada <<http://www.psdpt-tpfd.gc.ca/ResourceCentre/ArticlesAnalyses/DisclosureRegimes-eng.html>>.

*et la gestion des contrats publics dans l'industrie de la construction*, the Charbonneau Commission recommended improving the support and protection of whistleblowers by protecting confidentiality regardless of the method of reporting, providing support to whistleblowers, and offering financial support if necessary.<sup>179</sup> The Commission recognized that wrongdoing can be difficult to detect without the assistance of *lanceurs d'alerte*, and that people may not report wrongdoing due to a fear of reprisals.<sup>180</sup> The Commission noted the limitations of current whistleblower protections, which are limited in scope and may be difficult to understand, and advocated for a more general system of whistleblower protection.<sup>181</sup> Several of these concerns were addressed in *An Act to Facilitate the Disclosure of Wrongdoings related to Public Bodies*, which came into force on May 1, 2017.

Federal public sector employees have been governed by the *Public Servants Disclosure Protection Act (PSDPA)* since it came into force on April 15, 2007.<sup>182</sup> The PSDPA reflects the principles that have developed through the case law, but offers a more structured and robust approach to the protection of reporting persons; in other words, the legislation “maintains the integrity of the “whistleblower” defence from the jurisprudence and builds upon it.”<sup>183</sup> The Preamble sets out the guiding values underlying the legislation:

Recognizing that

the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;

it is in the public interest to maintain and enhance public confidence in the integrity of public servants;

confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings, and by establishing a code of conduct for the public sector;

public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and that this Act strives to achieve an appropriate balance between those two important principles;

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<sup>179</sup> France Charbonneau & Renaud Lachance, “Stratagèmes, causes, conséquences et recommandations” in *Rapport final de la Commission d’enquête sur l’octroi et la gestion des contrats publics dans l’industrie de la construction* (November 2015) at 111, online: Gouvernement du Québec <[https://www.ceic.gouv.qc.ca/fileadmin/Fichiers\\_client/fichiers/Rapport\\_final/Rapport\\_final\\_CEIC\\_Tome-3\\_c.pdf](https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Tome-3_c.pdf)>. [only available in French]

<sup>180</sup> *Ibid* at 109.

<sup>181</sup> *Ibid* at 110-111.

<sup>182</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46.

<sup>183</sup> *El-Helou v Courts Administration Service*, 2011 PT 01 at para 45 [*El-Helou No. 1*].

the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct<sup>184</sup>

The *PSDPA* dictates the parameters of what qualifies as a protected disclosure.<sup>185</sup> This means that if a public sector worker “blows the whistle” on issues that are outside of the purview of a protected disclosure, he or she will not have recourse to the legislation. Section 8 of the legislation enumerates the “wrongdoings” for which disclosure is protected, including contravention of legislation, misuse of public funds, gross mismanagement, acts or omissions creating “substantial and specific” danger to health and safety of people or the environment, breach of codes of conduct established under the *PSDPA* and counseling a person to commit one of these wrongdoings.<sup>186</sup> This definition signifies a legislative attempt to itemize the kinds of conduct that would be considered corrupt or undesirable within a public sector institution, and the provision makes it clear that not just *any* disclosure will trigger legislative protection. This is problematic, as whistleblowers must (1) have enough knowledge of the legislative protection to know whether the wrongdoing of which they have knowledge falls within the purview of the legislation and (2) have enough knowledge of the wrongdoing *itself* to know if it falls within one of these categories. Thus, this approach is overly restrictive, and the legislation would be improved by a broader or open-ended understanding of wrongdoing.

The *PSDPA* covers those working in the federal public sector, but it does not extend to protect disclosures by those working in the Canadian Forces, the Communications Security Establishment, or the Canadian Security Intelligence Service.<sup>187</sup> However, these excluded groups are required to create internal disclosure mechanisms under section 52 of the *PSDPA*, which states:

As soon as possible after the coming into force of this section, the person responsible for each organization that is excluded from the definition of “public sector” in section 2 must establish procedures, applicable to that organization, for the disclosure of wrongdoings, including the protection of

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<sup>184</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, Preamble.

<sup>185</sup> Legislation often uses terms such as “protected disclosure” rather than the colloquial “whistleblowing.” One reason for this may be, as suggested in David Lewis, AJ Brown & Richard Moberly, “Whistleblowing, Its Importance and the State of the Research” in AJ Brown et al, eds, *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) at 3, that the term whistleblower has “negative historical connotations, in many settings, alongside or overwhelming any positive ones, particularly in countries where oppressive governments have encouraged citizens to denounce the activities of political opponents.”

<sup>186</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 8.

<sup>187</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 2(1).

persons who disclose the wrongdoings. Those procedures must, in the opinion of the Treasury Board, be similar to those set out in this Act.<sup>188</sup>

Again, only those disclosures that qualify will warrant the protection of the legislation.

The *PSDPA* also outlines the appropriate methods of disclosure. Section 12 provides for internal disclosure, s. 13 allows external disclosure to the Commissioner, and s. 16(1) provides for limited circumstances under which the disclosure may be made to the public. This system was summarized by the Public Servants Disclosure Protection Tribunal in their first interlocutory decision, *El-Helou v Courts Administration Service (El-Helou No. 1)*, as follows:

The Act creates a much broader system for disclosure protection within the public service at several junctures and at different levels: internally to a supervisor or the departmental Senior Officer (section 12) of a department or agency; externally to the Commissioner (section 13); or where there is not sufficient time to disclose a serious offence under Canadian legislation or an imminent risk of a substantial and specific danger, the disclosure may be made to the public (subsection 16(1)).<sup>189</sup>

This tiered system of disclosure attempts to operationalize the best practices principles discussed, above, in Section 4.3.2. Internal disclosure is prioritized, but procedures and requirements are in place for disclosures externally and to the media.

Section 19 prohibits reprisals against public servants, and section 19.1 lays out the process through which a public service employee can complain about an alleged reprisal. “Reprisal” is a defined term within section 2 of the *PSDPA* to include actions such as disciplinary measures, demotion, employment termination, or “any measure that adversely affects the employment or working conditions of the public servant.”<sup>190</sup> The *PSDPA* relies on a central agency, the Office of the Public Sector Integrity Commissioner appointed under section 39, to “receive reports from public servants of wrongdoing, to investigate them and to make recommendations to correct them.”<sup>191</sup> The *PSDPA* also mandated the creation of the Public Servants Disclosure Protection Tribunal to adjudicate claims of reprisals that the Commissioner deems appropriate; arguably, “[t]he existence of an independent tribunal with quasi-judicial powers to adjudicate reprisals is reflective of Parliament’s intention of emphasizing and addressing the gravity of retaliation against individuals who come forward to report suspected wrongdoing.”<sup>192</sup> Section 21.7 lays out the potential remedies that

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<sup>188</sup> *Ibid*, s 52. Section 53 also provides some limited and discretionary protection to these groups: “The Governor in Council may, by order, direct that any provision of this Act applies, with any modifications that may be specified in the order, in respect of any organization that is excluded from the definition of ‘public sector’ in section 2.”

<sup>189</sup> *El-Helou v Courts Administration Service*, 2011 PT 01 at para 47 [El-Helou No. 1].

<sup>190</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 2.

<sup>191</sup> Latimer & Brown (2008) at 779.

<sup>192</sup> OECD (2016) at 152.

the Tribunal is able to order. Remedies include reinstating the whistleblower's employment, rescinding measures taken by the employer and paying compensation to the complainant.<sup>193</sup> However, it is problematic that these remedies represent a closed list; in other words, the Tribunal has limited power to respond to the specific circumstances of the case, and must find an appropriate remedy from within the list. Furthermore, the remedies listed focus on rescinding detrimental actions, reinstating an employee, or paying compensation. If the reprisal faced by the complainant cannot be easily reduced to a dollar value (if, for example, the employee has been harassed or has missed opportunities for promotion), then it is unclear how the Tribunal could fashion an appropriate remedy.

In *El-Helou No. 1*, the Tribunal affirmed the potential strength of this legislation: "The Tribunal recognizes that it must play its role to ensure that this new legislative scheme not be 'enfeebled'."<sup>194</sup> This approach was developed in *El-Helou v Courts Administration Service (El-Helou No. 3)*, where the Tribunal noted that the goal of the legislation and of the adjudicative function of the Tribunal ought to be on the substantive content of the disclosure and the alleged reprisal, and not on the possible procedural defects of an Application. The Tribunal highlighted the principles of natural justice:

It is in this context that an examination of the Act must be conducted. In considering the Act as a whole and the part of the Act pertaining to complaints of reprisal, it becomes clear that **Parliament focussed on the substance of the complaint**, and not on who may or may not have been identified as potential respondents in the original complaint. In addition, as discussed below, the processes for reprisal complaints demonstrate Parliament's intention to ensure that notice be provided to potential respondents, whether or not they were named in a complaint. This requirement of notice ought not to be considered as merely a procedural formality, but rather, as an important step in ensuring fairness to all of those affected by an investigation and, possibly, an Application before the Tribunal. In the course of an investigation, other parties might be identified and Parliament wanted to ensure that the principles of natural justice could be addressed as a complaint progressed [emphasis added].<sup>195</sup>

In line with this approach, the Tribunal in *El-Helou v Courts Administration Service (El-Helou No. 4)* recognized that it may be appropriate to adopt more relaxed standards regarding the admission of evidence. This represents the Tribunal's desire to deal with the substance of the reprisal, rather than evidentiary or procedural issues that may prevent a complainant from accessing justice. The Tribunal stated:

In addition, there is flexibility in the Act as to how the Tribunal admits evidence, which strongly suggests that opinion evidence and hearsay could be subject to more relaxed standards. Nonetheless, **the Tribunal would**

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<sup>193</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 21.7.

<sup>194</sup> *El-Helou v Courts Administration Service*, 2011 PT 01 at para 49 [*El-Helou No. 1*].

<sup>195</sup> *El-Helou v Courts Administration Service*, 2011 PT 03 at para 29 [*El-Helou No. 3*].

**need to ensure fairness in its proceedings for all the parties, and adopt a focused approach to its proceedings and the tendering of evidence.** In this manner, it can assure that its time and resources are utilized judiciously.

The Tribunal recognizes that it must weigh evidence carefully, given the serious consequences of the proceedings. Nevertheless, the provisions of the Act pertaining to a more flexible approach to the admissibility of evidence guide the Tribunal, and suggest that **a formalistic approach ought not to be adopted.** This general stance is also supported by Supreme Court of Canada jurisprudence. Given the requirements of a hearing and the mandate of the Tribunal, it must be cautious in any request that asks that it rule in an anticipatory fashion on the admissibility of evidence [emphasis added].<sup>196</sup>

The Federal Court and the Federal Court of Appeal have begun to grapple with certain sections of the *PSDPA* through judicial reviews of decisions made under the legislation. For example, in *Agnaou v Canada (Attorney General)*, the Federal Court of Appeal allowed the appeal of a whistleblower against a decision of the Deputy Public Sector Integrity Commissioner and declared his complaint of reprisal to be admissible.<sup>197</sup> In reaching its decision, the Court commented on the purpose of the *PSDPA* and the role of the Commissioner within the scheme set out in the legislation, stating:

The Commissioner clearly has very broad discretion to decide not to deal with a disclosure or not to investigate under section 24 of the Act. This stems not only from the grammatical and ordinary sense of the terms used, but also from the context, such as the type of reasons that the Commissioner may rely on to justify his decision. For example, under paragraph 24(1)(b), the Commissioner may decide not to commence an investigation because the subject-matter of the disclosure or the investigation is not sufficiently important, and under paragraph 24(1)(f), he or she may decide that there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation. This suggests a considered analysis rather than a summary review. The Act sets no time limit for deciding this question, or for filing a disclosure after a wrongdoing has been committed.

It is also clear that although the person making a disclosure has a certain interest in the case, the purpose of the Act is to denounce and punish wrongdoings in the public sector and, ultimately, build public confidence in the integrity of federal public servants. The public interest comes first, and it is the Commissioner's responsibility to protect it. This explains why, for example, the Commissioner may decide that the subject-matter of the disclosure is not sufficiently important; conversely, he or she may expand an investigation and consider wrongdoings uncovered in the course of that

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<sup>196</sup> *El-Helou v Courts Administration Service*, 2011 PT 04 at paras 73-74 [*El-Helou No. 4*].

<sup>197</sup> *Agnaou v Canada (Attorney General)*, 2015 FCA 29.

investigation without the need for any disclosure to have been made (section 33 of the Act).

The role of the Commissioner is crucial. The Commissioner is the sole decision-maker throughout the process. He or she has the power not only to refuse to investigate, but also to recommend disciplinary action against public servants who engage in wrongdoings. Among other things, the Commissioner may also report on “any matter that arises out of an investigation to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council” (section 37 of the Act).<sup>198</sup>

The Court also highlighted the differences between the Commissioner’s discretion in deciding whether to deal with the subject matter of disclosures, as discussed above, and the Commissioner’s discretion with respect to complaints of reprisals. The Court stated:

Parliament has established a very different process for reprisal complaints. In fact, this process is similar to the one provided for in the CHRA. There too, the public interest is a major concern. The disclosure of wrongdoings must be promoted while protecting the persons making disclosures and other persons taking part in an investigation into wrongdoings. However, as is often the case for complaints filed under the CHRA, reprisals complained of have a direct impact on the careers and working conditions of the public servants involved. The Act provides that a specific tribunal shall be established to deal with such matters, and that the Tribunal will be able to grant remedies to complainants, as well as impose disciplinary action against public servants who commit wrongdoings, where the Commissioner recommends it.

In the process applicable to these complaints, the role of the Commissioner is similar to that of the Commission. Like the Commission, he or she handles complaints and ensures that they are dealt with appropriately. To do so, the Commission reviews complaints at two stages in the process before deciding whether an application to the Tribunal is warranted to protect the public servants making disclosures.

...

Like Justice Rothstein (then of the Federal Court) in *Canada Post Corporation*, who had before him a decision dismissing a complaint under section 41 of the CHRA, I find that at the admissibility stage, the Commissioner must not summarily dismiss a reprisal complaint unless it is plain and obvious that it cannot be dealt with for one of the reasons described in subsection 19.1(3) of the Act. This interpretation respects Parliament’s intention that complaints be dealt with in a particularly expeditious manner (within

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<sup>198</sup> *Ibid* at paras 59-61.

15 days) at this first stage in the process. It is also consistent with the principle generally applied when a proceeding is summarily dismissed, thereby depriving the complainant of his or her right to a remedy. Finally, a cursory review of the complaint at this preliminary stage also avoids duplicating the investigation and repeating the exercise set out in subsection 20.4(3) of the Act.<sup>199</sup>

In *Therrien v Canada (Attorney General)*, the Federal Court dismissed an application for judicial review of the Commissioner's decision not to investigate allegations of wrongdoing.<sup>200</sup> In this case, the whistleblower made disclosures both internally and publicly regarding alleged pressures by Service Canada to deny or limit claims for Employment Insurance; her employment was ultimately terminated, and her reliability status was revoked.<sup>201</sup> The Court upheld the Commissioner's decision not to investigate the complaints because they were already the subject of a grievance process, and under s. 19.3(2) the Commissioner is directed not to deal with such complaints.<sup>202</sup>

In *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, the Federal Court considered s. 23(1) for the first time.<sup>203</sup> This section indicates that the Commissioner cannot deal with a disclosure if the subject-matter of that disclosure is already being dealt with by "a person or body acting under another Act of Parliament."<sup>204</sup> In reaching its conclusion, the Court emphasized the need to consider the entirety of the Act and the context of the legislation, stating:

The parties have focused on the phrases in subsection 23(1) but not necessarily in the context of the *PSDPA*. Given the importance of whistleblower legislation to "denounce and punish wrongdoings in the public sector" the phrase "dealing with" must take its meaning from this context. The phrase cannot be interpreted so broadly as to frustrate the scheme and purpose of the legislation. Simply bringing the wrongdoing to the attention of the CEO is but one aspect of the purpose of an investigation. Public exposure is mandatory whenever an investigation leads to a finding of wrongdoing.

The legislation addresses wrongdoings of an order of magnitude that could shake public confidence if not reported and corrected. When the Commissioner is "dealing with" an allegation of wrongdoing, it is something that, if proven, involves a serious threat to the integrity of the public service. That is why, before an investigation is commenced, there is

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<sup>199</sup> *Ibid* at paras 62-63, 66.

<sup>200</sup> *Therrien v Canada (Attorney General)*, 2015 FC 1351.

<sup>201</sup> *Ibid* at paras 3-5.

<sup>202</sup> *Ibid* at para 18.

<sup>203</sup> *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886.

<sup>204</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 23(1).

a period of analysis to determine there is some merit to the disclosure. That is also why the investigators are separate from the analysts.

The focus of the disclosure provision of the *PSDPA* is to uncover past wrongs, bring them to light in public and put in place corrections to prevent recurrence.

...

The *PSDPA* is remedial legislation. As such, section 12 of the Interpretation Act, RSC 1985, c.I-21 requires it to be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”. Parliament cannot have intended that subsection 23(1) be read so broadly that a procedure undertaken months after the Commissioner begins to deal with a disclosure, led by another body for a different purpose, headed toward the qualitatively different outcome of a private report, regardless of the finding, and examining only recent, very different, evidence should be sufficient to prevent the Commissioner from determining whether a serious past allegation of wrongdoing occurred and, if so, exposing it.<sup>205</sup>

The Court ultimately found that the Commissioner made a reasonable decision in not ending the investigation into the alleged wrongdoing when informed that Transport Canada was dealing with the same incidents (that is, the actions of the Ottawa Air Section of the RCMP Air Services Branch in making false log entries).

A final example is *Gupta v Canada (Attorney General)*, wherein the Federal Court of Appeal considered a judicial review of the Commissioner’s decision not to investigate a whistleblower’s allegations that he faced reprisals and the threat of reprisals following a disclosure of wrongdoing.<sup>206</sup> The Court dismissed the whistleblower’s appeal, finding that the Commissioner was reasonable in deciding that some of the appellant’s allegations of reprisals were out of time according to s. 19.1(2) of the *PSDPA* and in deciding not to grant an extension of time; in addition, the Court found it was reasonable to conclude that some of the allegations did not meet the definition of reprisals under the legislation.<sup>207</sup> When considering the limitation period in the *PSDPA*, the Court stated:

The language of this subsection is clear – the sole criterion to determine whether a complaint is filed on time is one of knowledge or imputed knowledge of specific incidents of reprisal. The allegation that the most recent act of reprisal is part of an ongoing chain of reprisals does not bring the earlier events into the 60-day time limit.<sup>208</sup>

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<sup>205</sup> *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 at paras 105-107, 113.

<sup>206</sup> *Gupta v Canada (Attorney General)*, 2016 FCA 50.

<sup>207</sup> *Ibid* at para 2.

<sup>208</sup> *Ibid* at para 5.

However, the Court did acknowledge that a victim of reprisal who is “reasonably confused or unaware of the nature of the conduct against her or him” would not be captured by the limitations period, as the 60-day period begins when the victim “ought to have known” about a reprisal.<sup>209</sup> In addition, a victim may be able to make a compelling case for the extension of time to file a complaint if the reprisals were a sequence of connected events; in this case, those were not the facts.<sup>210</sup>

The *PSDPA* is overdue for the five year review mandated under s. 54.<sup>211</sup> Such a report would provide crucial information on the effectiveness, in practice, of the legislation, and it is therefore crucially important that this legislatively-mandated review be conducted. A 2011 Report that examined the legislation’s effectiveness in its first three years by the Federal Accountability Initiative for Reform (FAIR),<sup>212</sup> a Canadian non-governmental organization, was scathing in its review of the federal legislation:

When FAIR testified to Parliament we predicted that the legislation would fail, but we could not have imagined how badly. A combination of flawed legislation and improper administration created a system that in three years uncovered not a single finding of wrongdoing and protected not a single whistleblower from reprisals. The Commissioner appointed to protect government whistleblowers resigned in disgrace following a report by the Auditor General condemning her behaviour. The credibility of the entire system is currently in tatters: it needs a complete overhaul.

...

The basic approach of the Act – creating a complete new quasi-judicial process just for whistleblowers – is misguided and suspect, creating a secretive, unaccountable regime, hermetically sealed off from our courts and from the media. Experience has shown that watchdog agencies constituted like this are invariably protective of the establishment and indifferent or even hostile to whistleblowers.

...

The text of the law is a bloated, unwieldy mess. It creates a labyrinth of complex provisions, full of ambiguities, exceptions and repetition, which almost no-one can claim to understand fully. It stands in stark contrast to

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<sup>209</sup> *Ibid* at para 7.

<sup>210</sup> *Ibid* at para 8.

<sup>211</sup> *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 54.

<sup>212</sup> The website for the Federal Accountability Initiative for Reform has been inactive since Executive Director David Hutton stepped down. The website included “3,000 pages of valuable whistleblower resource material ... [including] original reference works such as ‘The Whistleblower Ordeal’ and ‘How Wrongdoers Operate’.” See Allan Cutler, Sean Bruyey & Ian Bron, “Adieu to a Friend, Ally in Accountability Wars” (22 July 2014), online: Canadians for Accountability <<http://canadians4accountability.org/2014/07/22/adieu-to-a-friend-ally-in-accountability-wars/>>.

the brevity, simplicity and clarity that we find in whistleblower legislation that has proven to be effective.<sup>213</sup>

FAIR identifies the narrow scope of the law (applying only to workers in the federal public sector), restriction of reporting avenues and exclusion from the courts, restrictions contained in the definition of wrongdoing, weak provisions for the investigation and correction of wrongdoing, and likelihood of complaint rejection as among the failures of the *PSDPA*.<sup>214</sup> However, given the relative youth of the legislation at the time of this review, more up-to-date studies are required to determine if the *PSDPA* has outgrown any of these potential weaknesses. In addition, it is possible to interpret the lack of any finding of wrongdoing differently; that is, it could be interpreted as a sign that little wrongdoing has actually occurred. In a 2010 article, for example, Saunders and Thibault state:

There are so few real cases of wrongdoing that the public sector as a whole remains woefully unpracticed in working through an actual disclosure. Indeed, in the first two years after Canada's latest whistleblower legislation came into effect, not a single case of wrongdoing was uncovered. In the absence of practice, there are no lessons learned, no "sharpening of the saw" that normalizes the act of disclosure.

...

The limited volume of disclosures since the introduction of stronger mechanisms could mean one of two things. It could mean that the legislation has deterred wrongdoers who are convinced that the code of silence, which still lingers within the public service, will not hold in the face of disclosure protection. Alternatively, it could mean that there really are not many instances of wrongdoing to expose.<sup>215</sup>

The September 2014 G20 Report echoes many of FAIR's negative findings, albeit in less colourful language. The Report notes that:

As of May 2014 there were four active cases before the Public Servants Disclosure Protection Tribunal, where retaliation victims can seek remedies and compensation. Three of the cases involve long-term employees of Blue Water Bridge Canada [a Crown corporation subsequently renamed Federal Bridge Corporation Limited] who were all fired on 19 March 2013, including the vice president for operations. The PSIC says the former CEO misused public money and violated the code of ethics when he gave two managers severance payments worth \$650,000.

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<sup>213</sup> FAIR, "What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the *Public Servants Disclosure Protection Act (PSDPA)*" (24 February 2011) at 2.

<sup>214</sup> *Ibid* at 5–13.

<sup>215</sup> Kelly L Saunders & Joanne Thibault, "The Road to Disclosure Legislation in Canada: Protecting Federal Whistleblowers?" (2010) 12:2 *Pub Integrity* 143 at 156.

In five of six cases that the Integrity Commissioner has referred to the Tribunal, he has declined to ask the Tribunal to sanction those responsible for the reprisals. **In the one case in which the Commissioner called for sanctions, he has since reversed himself and now says there were no reprisals.** The whistleblower's lawyer has initiated a judicial review to contest this reversal.

In April 2014 Canada's Auditor General found "gross mismanagement" in the handling of two PSIC cases. The audit criticized 'buck-passing' by top managers, slow handling of cases, the loss of a confidential file, poor handling of conflicts of interest, and the inadvertent identification of a whistleblower to the alleged wrongdoer [emphasis added].<sup>216</sup>

A review of UNCAC implementation by TI, conducted in October 2013, emphasizes the critical need for a review of the Canadian legislation.<sup>217</sup> The review notes that the *PSDPA* does not make public interest the foremost concern in the protection of whistleblowers, and instead emphasizes the balance of rights between duty to one's employer and an employee's freedom of expression.<sup>218</sup> Furthermore, the Transparency International review notes that access to justice issues are implicated in Canada's statutory regime:

Whistleblowers often have to bear their own legal costs, while accused wrongdoers will typically have access to the financial and legal resources of the organization. The review also raises questions about the implementation of the *PSDPA*, raising concerns regarding the Commissioner's power to adequately investigate claims of reprisal, the first Commissioner's failure to investigate allegations of reprisals against

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<sup>216</sup> Simon Wolfe et al (September 2014) at 29.

<sup>217</sup> Transparency International Canada, "UNCAC Implementation Review Civil Society Organization Report" (October 2013) at 15.

<sup>218</sup> *Ibid.*

her own staff, and statistics that show few inquiries by whistleblowers receive full investigations.<sup>219</sup>

In 2015, research into the whistleblowing culture in the federal public sector in Canada found that when focus group participants were shown a short informative video about information disclosure, the “most frequently identified aspect of the video to which participants reacted negatively or which created some degree of concern was the prospect of appearing before a tribunal of judges in the case of reprisals.”<sup>220</sup>

The 2014-2015 Annual Report produced by the Treasury Board of Canada, in compliance with s. 38.1 of the *PSDPA*, “includes information on disclosures made according to internal procedures established under the Act, as reported to the Office of the Chief Human Resources Officer (OCHRO) by the senior officers for disclosures or the chief executives of public sector organizations.”<sup>221</sup> Yet, the Annual Report does **not** discuss claims of reprisals, or disclosures made of the Office of the Public Sector Integrity Commissioner of Canada.<sup>222</sup> The report contains information regarding disclosures received under the *PSDPA*—which organizations received disclosures, and how these disclosures were acted upon, covering the

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<sup>219</sup> *Ibid* at 16–18. Regarding investigatory powers, the review states at 16 that “[u]nder the *PSDPA*, the Integrity Commissioner has full powers under Part II of the *Inquiries Act* to investigate disclosures of wrongdoing [s 29]. However, when investigating complaints of reprisals against a whistleblower, the Commissioner is not given comparable powers [ss 19.7-19.9].” In regard to the first Commissioner’s tenure, the Report states at 17–18:

In 2010, the Auditor General reported that the first Public Sector Integrity Commissioner, Christiane Ouimet, failed to finalize or implement operational guidance to enable investigations to be conducted. The Commissioner’s Office failed to robustly investigate complaints: from 2007 to 2010, the Commissioner’s Office received 228 disclosures of wrongdoings or complaints; out of these only seven received a formal investigation of the 86 closed operational files, in “many cases” the decision to not formally investigate or otherwise dismiss disclosures of wrongdoing and complaints was not supported by the material in the Commissioner’s file. In addition, the Auditor General’s investigation found that the Commissioner had engaged in retaliatory action against employees whom the Commissioner believed had complained about her. A new Commissioner was appointed in December 2011.

The review notes, at 18, that between 2007-2013 the Commissioner “[r]eceived 1365 inquiries and 434 disclosures; Began 55 investigations; Completed 34 investigations; Found 5 instances of wrongdoing; and Sanctioned 0 wrongdoers” [emphasis removed].

<sup>220</sup> Phoenix SPI, “Exploring the Culture of Whistleblowing in the Federal Public Sector” (December 2015) at 21, online: <[http://epe.lac-bac.gc.ca/100/200/301/pwgsctpsgc/por-ef/office\\_public\\_sector\\_integrity\\_commissioner/2016/2015-12-e/report.pdf](http://epe.lac-bac.gc.ca/100/200/301/pwgsctpsgc/por-ef/office_public_sector_integrity_commissioner/2016/2015-12-e/report.pdf)>.

<sup>221</sup> Treasury Board of Canada Secretariat, *Annual Report on the Public Servants Disclosure Protection Act 2014-15*, Catalogue No BT1-18/2015E-PDF (Ottawa: Treasury Board of Canada, 2015) at 1 [*Annual Report*]. The full text is available online at *Annual Report on the Public Servants Disclosure Protection Act 2014-15* (26 January 2016), online: Treasury Board of Canada <<https://www.tbs-sct.gc.ca/psm-fpfm/ve/psdp-pfdar/psdpa-pfdar-1415-eng.pdf>>.

<sup>222</sup> *Ibid* at 1.

146 active federal organizations that are governed by the *PSDPA*.<sup>223</sup> In 2014-2015 there were 200 internal disclosures made in 36 organizations, compared to 194 disclosures in 2013-2014 and 207 disclosures in 2012-2013.<sup>224</sup> In response to these disclosures, organizations carried out 78 investigations and found wrongdoing in 13 cases; 8 organizations reported that they had taken corrective measures in response to disclosures.<sup>225</sup> The Annual Report does not contain information in regard to the specific investigations or findings of wrongdoing by organizations; however, the statistics may not reflect the actual number of individual whistleblowers making internal disclosures, as “[s]ometimes a disclosure will contain several allegations of wrongdoing ... the report captures the number of potential incidents of wrongdoing to be investigated, which is a higher number than the number of public servants making disclosures.”<sup>226</sup> When organizations did not act on disclosures of wrongdoing, they reported that it was generally because “[t]he individual making the disclosure was referred to another, more appropriate, recourse mechanism because of the nature of the allegation(s); and [t]he disclosure did not meet the definition of wrongdoing under section 8 of the Act.”<sup>227</sup> In the 2013-2014 Annual Report, it was noted that there has been improvement in the areas of education and awareness:

Based on information submitted by organizations, an increase in awareness activities and efforts has been observed for this reporting period. **Organizations are becoming more and more active in promoting the PSDPA.** They do so in different ways, such as awareness sessions intended for employees, managers and executives. In addition, written information is made available through emails to employees, internal websites, pamphlets and posters. Some organizations invite speakers, such as the Public Sector Integrity Commissioner, to give presentations to employees on the PSDPA. Many organizations also reported that a section of their organizational code of conduct is dedicated to disclosures under the PSDPA [emphasis added].<sup>228</sup>

It is difficult to determine what these numbers tell us about the success or failure of the *PSDPA*, beyond the fact that individuals are making internal disclosures of wrongdoing. Without data as to the number of individuals who *perceive* wrongdoing in the workplace, it is impossible to determine whether a high percentage of public sector workers actually blow the whistle on wrongdoing. The number of disclosures received under the *PSDPA* has

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<sup>223</sup> *Ibid* at 2.

<sup>224</sup> *Ibid*.

<sup>225</sup> *Ibid* at 2.

<sup>226</sup> *Ibid* at 3.

<sup>227</sup> *Ibid*.

<sup>228</sup> Treasury Board of Canada Secretariat, *Annual Report on the Public Servants Disclosure Protection Act 2013-14*, Catalogue No BT1-18/2014E-PDF (Ottawa: Treasury Board of Canada, 2014) at 1 [*Annual Report*]. The full text is available online at *Annual Report on the Public Servants Disclosure Protection Act 2013-2014* (27 August 2014), online: Treasury Board of Canada <<https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/disclosure-protection/annual-report-public-servants-disclosure-protection-act-2013-2014.html>>.

ranged from a high of 291 in 2010-2011 to a low of 181 in 2008-2009.<sup>229</sup> These numbers may indicate that fewer public sector workers disclose wrongdoing in some years, or the numbers may demonstrate that less wrongdoing has occurred in those years.

Information on reprisals, and further information on disclosures of wrongdoing, is reported by the Office of the Public Sector Integrity Commissioner of Canada, and the recent numbers seem to indicate a positive trend when compared to the early years of the regime:

The number of investigations launched has grown significantly since 2007. In 2013-2014, the Office investigated 23 cases (wrongdoing and reprisal). Understandably, not all investigations result in founded cases of wrongdoing or reprisal complaints being referred to the Public Servants Disclosure Protection Tribunal. All allegations of misconduct are however taken extremely seriously by PSIC staff and the Commissioner, and dealt with as expeditiously and fairly as possible.

As of December 2014, the Office tabled 11 cases of founded wrongdoing before Parliament.

The Office referred seven cases of reprisals to the Public Servants Disclosure Protection Tribunal since 2011-2012.

In 2012-2013 and in December 2014, the Office also had two successful conciliations to bring about the settlement of cases, as agreed to by both parties.<sup>230</sup>

### 7.3 Securities Regulation in Canada: The Ontario Securities Commission Whistleblower Program

On July 14, 2016, the Ontario Securities Commission (OSC) launched a new enforcement initiative called the Office of the Whistleblower. This program is the first paid whistleblower program by a securities regulator in Canada, and largely resembles the Whistleblower Program of the United States Securities and Exchange Commission (SEC).<sup>231</sup> The Whistleblower Program allows eligible whistleblowers to report information regarding possible violations of Ontario securities law anonymously and, if the information results in

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<sup>229</sup> *Ibid* at 2.

<sup>230</sup> "Results" (9 August 2016), online: Office of the Public Sector Integrity Commissioner of Canada <<http://www.psic.gc.ca/eng/results>>.

<sup>231</sup> Briefly described in Section 5.3 of this chapter. See, generally, "Frequently Asked Questions" (21 July 2010), online: US Securities and Exchange Commission – Office of the Whistleblower <<https://www.sec.gov/about/offices/owb/owb-faq.shtml>>. The SEC Whistleblower Program was launched following the passage of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, [*Dodd-Frank Act*] in July 2010. See also Steve Szentesi, "The Time Has Come to Reward Competition Act Whistleblowers", *Canadian Lawyer* (23 January 2017), online: <<http://www.canadianlawyermag.com/6309/The-time-has-come-to-reward-Competition-Act-whistleblowers.html>>.

an enforcement action, receive an award of up to \$5 million.<sup>232</sup> This section describes in detail the features of the OSC Whistleblower Program, drawing attention to those features that elicited commentary prior to and following the launch of the initiative. This section will also compare features of the OSC and SEC whistleblower programs, drawing attention to significant differences between their eligibility criteria and award determination structures.

### 7.3.1 Confidentiality

The OSC Whistleblower Program allows individuals to submit information related to potential violations of Ontario securities law to the Commission online or by mail. Anonymous submissions may be made through the program by retaining a lawyer who submits information on a whistleblower's behalf.<sup>233</sup> Before the OSC can submit an award to an anonymous whistleblower, the whistleblower will generally be required to provide their identity to the Commission to confirm that they are eligible to receive an award.<sup>234</sup> While the OSC policy includes a general commitment to make all reasonable efforts to keep a whistleblower's identity (and any potentially identifying information) confidential, there are specific exceptions. For example, during certain administrative proceedings under section 127 of the *Securities Act* (e.g., an order to terminate registration), disclosure of the whistleblower's identity may be required to allow the respondent an opportunity to make full answer and defence.<sup>235</sup>

The OSC Whistleblower Program also outlines the Commission's general policy of responding to requests for information relating to a whistleblower's identity (or other possibly identifying information) under the *Freedom of Information and Protection of Privacy Act* (FIPPA).<sup>236</sup> While the Commission takes the position that information requests with respect to identifying information should be denied because specific FIPPA provisions protect such information, the ultimate decision to disclose in this context is made by the Information and Privacy Commissioner of Ontario or a court of competent jurisdiction.<sup>237</sup>

Taken together, the Commission's policies regarding the confidentiality of whistleblowers speak to the limits of whistleblower initiatives generally. A dedication to reasonable efforts to maintain confidentiality is important, but due to the nature of administrative law and

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<sup>232</sup> "OSC Launches Office of the Whistleblower" (14 July 2016), online: Ontario Securities Commission <[http://www.osc.gov.on.ca/en/NewsEvents\\_nr\\_20160714\\_osc-launches-whistleblower.htm](http://www.osc.gov.on.ca/en/NewsEvents_nr_20160714_osc-launches-whistleblower.htm)>.

<sup>233</sup> Ontario Securities Commission, "OSC Policy 15-601: Whistleblower Program" (14 July 2016), online: <[http://www.osc.gov.on.ca/documents/en/Securities-Category1/20160714\\_15-601\\_policy-whistleblower-program.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category1/20160714_15-601_policy-whistleblower-program.pdf)> ("Policy Document"), s 3.

<sup>234</sup> *Ibid*, s 4.

<sup>235</sup> *Ibid*, s 11(a).

<sup>236</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31.

<sup>237</sup> *Ibid*, s 12. The OSC cites two specific FIPPA provisions in support of its position that identifying information with respect to whistleblowers should be protected from disclosure under the FIPPA: section 14(1)(d) (protection of confidential sources of information in a law enforcement context) and section 21(3)(b) (protection of personal information compiled as part of an investigation into possible violations of the law).

freedom of information legislation, confidentiality is far from guaranteed in all circumstances. In other words, despite the protections afforded by the OSC Whistleblower Program, whistleblowers are taking some risk of having their identities ultimately disclosed as a result of the information they submit to the Commission. Whether this risk of disclosure will dissuade would-be whistleblowers from making submissions is yet to be seen.

### 7.3.2 Eligibility Criteria for Whistleblower Awards

The OSC Whistleblower Program sets out criteria that both information and whistleblowers must fulfill before the Commission will consider issuing an award.

The criteria that information received from whistleblowers must meet in order to be award-eligible are designed to ensure that awards are only given for novel information that leads to an enforcement action. The information must relate to a serious violation of Ontario securities law, be original information, be voluntarily submitted, be “of high quality and contain sufficient timely, specific and credible facts” relating to an alleged violation of securities law, and be “of meaningful assistance to Commission Staff in investigating the matter and obtaining an award-eligible outcome.”<sup>238</sup> To be eligible for a whistleblower award, all of these criteria must be met.<sup>239</sup> Consequently, if, for example, a whistleblower voluntarily provides original information related to a violation that is not of meaningful assistance to the Commission in its investigation, the information will not be eligible for a reward. Simply put, these conditions restrict the availability of whistleblower awards to information that has a direct and tangible impact on an investigation or proceedings.

Section 14(3) of the Policy Document lists disqualifying criteria that will render a piece of information ineligible for a whistleblower award. These criteria reflect several policy goals underlying the OSC Whistleblower Program. If information is misleading, untrue, speculative, insufficiently specific, public or not related to a violation of Ontario securities law, it is ineligible for a whistleblower award. These requirements reflect the purpose of the program, which is to obtain high-quality information regarding potential violations of securities law. Further, information subject to solicitor client privilege is ineligible for a whistleblower award, given the broad systemic interest in maintaining solicitor client privilege. Lastly, information obtained by a means that constitutes a criminal offence will be ineligible for an award, as the Commission does not want to encourage or be complicit in theft, fraud or other illegal means of acquiring information. These common-sense disqualifying criteria ensure that whistleblowers are encouraged to submit only information that is legally obtained and can be sufficiently relied upon to advance an investigation or proceedings.

Section 15 of the Policy Document describes categories of individuals who would “generally be considered ineligible for a whistleblower award.”<sup>240</sup> Many of these categories refer to roles that render a person ineligible for an award, such as counsel for the subject of the

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<sup>238</sup> *Ibid*, s 14(1).

<sup>239</sup> *Ibid*, s 14(2).

<sup>240</sup> *Ibid*, s 15(1).

whistleblowing submission or an employee of the Commission or a self-regulatory body. Other provisions disqualify a whistleblower from award eligibility on the basis of their conduct as a whistleblower. For example, section 15(1)(a) excludes individuals from eligibility if they “without good reason refused a request for additional information from Commission Staff.”<sup>241</sup>

It should be noted that awards would generally not be given to “those who obtained or provided the information in circumstances which would bring the administration of the [Whistleblower Program] into disrepute.”<sup>242</sup> This general language removes the incentive for individuals to engage in disputable activities in pursuit of a financial award, and limits eligibility of awards to those who voluntarily submit original, high-quality information without resorting to illegal means to acquire that information.

While individuals who fall into the categories listed under section 15(1) of the policy will generally be ineligible to receive a whistleblower award, section 15(2) recognizes limited exceptions regarding certain categories. Per section 15(2), a whistleblower who would generally be ineligible under sections 15(1)(d)-(h) may be eligible for awards under certain circumstances. These categories describe individuals who are generally ineligible because of their relationship with the subject of the whistleblower submission.<sup>243</sup> If a whistleblower who falls into these categories has a reasonable basis to believe that disclosure is necessary to prevent future or continuing substantial injury to the financial interests of the entity or investors, they may be eligible for an award. Further, if one of the excluded whistleblowers has a reasonable basis to believe the subject of the submission is engaged in conduct that will impede investigations, they may be eligible for a whistleblower award.

One unique and controversial feature of the OSC’s whistleblower eligibility criteria is the lack of a requirement that whistleblowers avail themselves of internal reporting and compliance systems before contacting the OSC Program. While the Commission “encourages whistleblowers who are employees to report potential violations ... through an internal compliance and reporting mechanism,” this action is not a prerequisite to award eligibility. The decision not to require whistleblowers to report potential violations internally reflects the Commission’s belief that “there may be circumstances in which a whistleblower may appropriately wish not to report” to an internal compliance mechanism.<sup>244</sup>

The decision to not include an internal reporting requirement has been criticized by the financial sector, which fears that the OSC Program (and the enticement of financial rewards)

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<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*, s 15(1)(o).

<sup>243</sup> These provisions exclude the following categories, respectively, from award eligibility subject to the exceptions under s 15(2) of the Ontario Securities Commission, “OSC Policy 15-601: Whistleblower Program” (14 July 2016): d) legal counsel for the subject employer, e) providers of auditing/external assurance services to the subject of the submission, f) investigators or inquiry participants, g) directors or officers of the subject of the submission, and h) Chief Compliance Officers (or functional equivalents) for the subject of the submission.

<sup>244</sup> Ontario Securities Commission (14 July 2016), s 16(1).

could undermine the sector's internal compliance and reporting programs. Critics, in particular issuers, have concerns that the OSC Program is structured such that employees will be tempted to bypass internal compliance systems in pursuit of a financial award.<sup>245</sup> These critics point to the US Securities and Exchange Commission (SEC) Whistleblower Program, which requires a period of time to elapse following the internal reporting of information before a whistleblower will be eligible for a SEC whistleblower award.<sup>246</sup> Some fear that the lack of an internal reporting requirement will “disqualify registrants and reporting issuers from being able to self-identify, self-remediate and self-report in order to qualify for credit for cooperation.”<sup>247</sup> While the OSC has attempted to assuage these concerns by considering participation in internal compliance processes as a factor that may increase an award's amount, it is unclear that this satisfies the concerns of issuers.

Another element of whistleblower award eligibility that is regarded as controversial is the issue of culpable whistleblower eligibility. The OSC program does not disqualify whistleblowers from awards on the basis of their unclean hands, but rather lists culpability as a factor that can decrease the amount of the award offered.<sup>248</sup> For the purposes of calculating that the \$1 million threshold of “award eligible outcomes” has been met, any voluntary payments by or payments ordered against entities whose liability is “based substantially” on the conduct of the whistleblower will not be taken into account. Likewise, any portion of sanctions that are awarded against a whistleblower will be subtracted from the award that he or she is otherwise eligible to receive.

For the purpose of comparison, consider the position of the SEC with respect to culpable whistleblowers. Under the SEC Whistleblower Program, whistleblowers are precluded from award eligibility if they have been convicted of a securities-related criminal offence.<sup>249</sup> While the OSC regime does not absolutely preclude this class of whistleblower from receiving an award, it does limit the circumstances in which an individual can benefit from their own complicity. As described above, culpability will have an impact on both the determination of an “award eligible income” and the amount of any award given. Further, the submission of information by the whistleblower to the Commission does not preclude the possibility of action being taken against the whistleblower.<sup>250</sup> Together, these measures ensure that the program does not unduly restrict the Commission with respect to the actions it can take against culpable whistleblowers. Rather, it allows Commission staff to evaluate cases as they arise and

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<sup>245</sup> John Tuzyk & Liam Churchill, “Issuers Apprehensive of OSC's Proposed Whistleblower Program” (August 07 2015), online: Blakes, Cassels & Graydon LLP <<http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2161>>.

<sup>246</sup> *Ibid.*

<sup>247</sup> Jordan Deering and Linda Fuerst, “OSC Releases Further Changes to Proposed Whistleblower Program” (October 2015), online: Norton Rose Fulbright LLP <<http://www.nortonrosefulbright.com/knowledge/publications/133609/osc-releases-further-changes-to-proposed-whistleblower-program>>.

<sup>248</sup> Ontario Securities Commission (14 July 2016), s 17.

<sup>249</sup> Jennifer M Pacella, “Bounties for Bad Behavior: Rewarding Culpable Whistleblowers under the Dodd-Frank Act and Internal Revenue Code” (2015) 17 U Pa J Bus L 345 at 355.

<sup>250</sup> Ontario Securities Commission (14 July 2016), s 17.

make an appropriate determination regarding award eligibility and other enforcement actions in the circumstances.

### 7.3.3 Whistleblower Award Formula

An award eligible outcome can only occur when an order made under section 127 of the *Securities Act* or section 60 of the *Commodities Futures Act* requires the guilty party to pay more than \$1 million in voluntary payments to the Commission or in financial sanctions imposed by the Commission. If an eligible outcome results from a submission of income from an eligible whistleblower, an award of between 5% and 15% can be paid.<sup>251</sup> If the sanctions imposed and/or voluntary payments made amount to over \$10 million dollars, the maximum that will be awarded is generally \$1.5 million.<sup>252</sup> However, if over \$10 million dollars is, in fact, collected, the whistleblower may receive an award between 5% and 15% of the total, to a maximum of \$5 million.<sup>253</sup>

The fact that most awards under the OSC Whistleblower Program are not contingent on the actual collection of monetary sanctions has drawn ire regarding where the cost of the program will ultimately fall. The OSC program allows for the possibility of a whistleblower receiving an award of up to \$1.5 million without any money actually being collected by the Commission. Commentators have, again, drawn a comparison to the SEC Whistleblower Program, which requires tips to result in the collection of monetary sanctions before a whistleblower is eligible for an award. By not tying awards to collection, some commentators fear that the Program's costs will ultimately be borne by compliant issuers (and, ultimately, their shareholders) through increased fees.<sup>254</sup> Whether these concerns will materialize remains to be seen, but it should be noted that any awards greater than \$1.5 million are contingent on collection of funds. Further, given the modest caps (discussed below) on the maximum awards available, the risk that the Whistleblower Program will pass costs onto issuers and investors is necessarily limited.

Section 25 of the Policy Document outlines the factors that ought to be considered by the Commission in determining the award amount. Factors that may increase the amount of a whistleblower award include: the timeliness of the report, the significance of the information provided, the degree of assistance provided, the impact of the information on the investigation/proceeding, efforts to remediate harm caused, whether the whistleblower participated in internal compliance systems, unique hardships experienced by the whistleblower, and contributions made to the Commission's mandate.<sup>255</sup> Factors that may decrease the amount of a whistleblower award include: any erroneous or incomplete information, the whistleblower's culpability, any unreasonable delay in reporting, refusing

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<sup>251</sup> *Ibid*, s 18(1).

<sup>252</sup> *Ibid*, s 18(4).

<sup>253</sup> *Ibid*, s 18(5).

<sup>254</sup> Cristian Blidariu, et al, "OSC Proposes Large Financial Awards for Whistleblowers" (February 04 2015), online: Canadian Securities Regulatory Monitor <<http://www.securitiesregulationcanada.com/2015/02/osc-proposes-large-financial-awards-for-whistleblowers/>>.

<sup>255</sup> Ontario Securities Commission (14 July 2016) s 25(2).

to assist the Commission or interfering with its investigation, and interfering with internal compliance mechanisms.<sup>256</sup> This broad range of factors allows Commission staff to tailor whistleblower awards such that they are appropriate in all of the circumstances of a particular case and justly compensate a whistleblower who provides actionable information to the Commission.

The OSC Whistleblower Program range of 5% to 15% of imposed sanctions (and the \$1.5 million cap if sanctions are not collected) is relatively low compared to the SEC Whistleblower Program, which offers awards in the range of 10% to 30% of monetary sanctions collected. While this higher range can be attributed, in part, to the requirement of collection under the SEC regime, the OSC Program's financial incentives are arguably relatively modest. Further, the caps on award amounts under the OSC Program forestall excessively large payments being made, whereas the SEC Program (which does not include an award cap) is structured in a way that allows very large payments to be made in the event of a large financial penalty being collected.<sup>257</sup>

### 7.3.4 Anti-Reprisal Provisions

Coincident with the introduction of the OSC Whistleblower Program, the *Securities Act* (Ontario) was amended to introduce new anti-reprisal provisions for employees who provide information or cooperate with the Commission or other specified regulatory bodies. Part XXI.2 of the *Securities Act*, brought into force on 28 June 2016, consists of two major components: anti-reprisal protections and contract voiding provisions.<sup>258</sup>

First, Part XXI.2 prohibits reprisals against employees by employers in certain circumstances. Section 125.5(2) defines a reprisal, for the purposes of this Part, as “any measure taken against an employee that adversely affects his or her employment.” The section further includes a non-exhaustive list of reprisals, including termination of employment, demotion, disciplining, or suspending of an employee, imposition of penalties on the employee, threat of any of the above reprisals, or intimidation or coercion of an employee in relation to their employment.

The anti-reprisal provisions at ss. 121.5(1)-(2) protect employees who provide information regarding potential violations of Ontario securities law, seek advice about providing such information, or express an intention to provide such information. The information can refer to activity that has occurred, is ongoing, or is “about to occur” and the employee's belief of

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<sup>256</sup> *Ibid*, s 25(3).

<sup>257</sup> US Securities and Exchange Commission, “2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program” (November 2016) at 10, online: <<https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf>>. The largest award amount given by the SEC whistleblower program at the time of the 2016 Annual Report was USD 30 million, approximately 8 times the maximum possible award of CAD 5 million under the OSC program.

<sup>258</sup> These amendments to the *Securities Act* were enacted under the *Jobs for Today and Tomorrow Act (Budget Measures)*, SO 2016, c 5 – Bill 173, schedule 26.

a violation must be reasonable. Further, these provisions are not limited to information provided to the Commission itself, but also information provided to the employer, a law enforcement agency, or a “recognized self-regulatory organization.”<sup>259</sup> In other words, the reach of Part XXI.2 goes beyond participants in the OSC Whistleblower Program and protects employees more generally from reprisals by their employers.

The second major feature of Part XXI.2, the contract voiding provision, is found in s. 121.5(3). This subsection dictates that a provision of an agreement (including confidentiality agreements) between employers and employees is “void to the extent that it precludes or purports to preclude” the employee from providing information, cooperating with, or testifying before the Commission or a recognized self-regulatory organization. In other words, s. 121.5(3) prohibits employers from requiring their employees to give up their right to provide information regarding potential misconduct to regulatory bodies, including the Commission. The specific inclusion of confidentiality agreements in this section highlights a legislative commitment to prioritize the disclosure of information about potential violations of securities law by employees.

### 7.3.5 The Future of Whistleblower Awards

Evaluations of the effectiveness of the OSC Whistleblower Program are premature, as the agency has yet to announce an award. While the program is clearly still in its nascent stages, regulators appear hopeful that the increased protection and potential for financial compensation available to potential whistleblowers will promote increased transparency for investors and a culture of accountability within Ontario’s financial sector. As of September 2016, OSC Chair and CEO Maureen Jensen stated that the Whistleblower Program has resulted in more than 30 tips that the Commission is investigating.<sup>260</sup> Given its first-in-the-nation status, the success of the OSC program could potentially drive the expansion of paid whistleblower protection regimes in Canada, both within the financial sector and beyond it.<sup>261</sup>

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<sup>259</sup> The *Securities Act*, section 21.1, allows the Commission to recognize self-regulatory organizations (SROs) when “it is satisfied that to do so would be in the public interest”. There are currently two SROs recognized by the Commission: The Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA), see: [http://www.osc.gov.on.ca/en/Marketplaces\\_sro\\_index.htm](http://www.osc.gov.on.ca/en/Marketplaces_sro_index.htm).

<sup>260</sup> The Canadian Press, “OSC Boss ‘Worried’ about Non-Standard Reporting, Touts Whistleblower Program”, *The Toronto Star* (September 27 2016), online: <https://www.thestar.com/news/canada/2016/09/27/osc-boss-praises-whistleblower-program.html>.

<sup>261</sup> It should be noted that the *Autorité des marchés financiers* (AMF), which regulates securities in Quebec, also launched a whistleblowing program in 2016. The AMF’s regime does not, however, offer rewards to whistleblowers, citing “a review of various whistleblower programs around the world, including in the United Kingdom and Australia”, which did not convince the AMF of the effectiveness of financial incentives. See *Autorité des Marchés Financiers*, “AMF Launches Whistleblower Program” (June 20 2016), online: <https://www.lautorite.qc.ca/en/press-releases-2016-pro.html> 2016\_amf-launches-whistleblower-program20-06-2016-00-0.html.

## 8. CONCLUSION: WHERE DO WE GO FROM HERE?

An overview of best practices in whistleblower protection and legislation in the US, UK and Canada prompts an important question: what constitutes “success” in whistleblower protection? Best practices are a measure against which we may judge the scope and comprehensiveness of legislation, but it is impossible to draw conclusions about the true efficacy of whistleblower protection legislation without data as to how the legislation is being enforced. In this sense, best practices are of limited use in determining the efficacy of whistleblower protection, and enacting a law that reflects best practices on paper may not accurately reflect whether whistleblowers are adequately protected in practice.

There is a critical need for research and analysis as to how the law is actually being applied. This has been noted by critics such as Lewis, Brown and Moberly, who call attention to academia’s focus on the whistleblower as an individual rather than on the institutional response to disclosure:

The vast bulk of whistleblowing research to date has focused on whistleblowers: what makes them report, what they report, how many and how often whistleblowers come forward, and what happens to them. But to understand whistleblowing in context, and especially how whistleblowing can be made more effective, it must be recognized that whistleblower and non-whistleblower behavior, characteristics and outcomes are only one part of the puzzle. Increasingly important is the behavior of those who receive whistleblowing disclosures, and what they do about them. Indeed, while the study of whistleblower behavior and outcomes may remain a necessary and often fascinating focus, from a public policy perspective it is the response to disclosures which is actually the more important field of study – but which is in its relative infancy.<sup>262</sup>

Furthermore, the authors emphasize the need for research that will shed light on the extent that whistleblower legislation is being effectively utilized:

Most researchers, policy makers and managers know that legislation, in and of itself, is a blunt instrument for influencing organizational and behavioral change. The question of whether such legislative objectives are being implemented, or what strategies for whistleblower support and protection would be best supported and promoted by legal regimes, depends on knowledge of what actions are actually being taken by organizations and regulators to support whistleblowers in practice. Moreover, these questions depend on how whistleblowers are supported by managers and regulators

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<sup>262</sup> Lewis, Brown & Moberly (2014) at 19.

in a proactive sense, once the disclosure is made, and not simply in reaction to any detrimental outcomes they may begin to suffer.<sup>263</sup>

“Successful” whistleblower laws will help to prevent and resolve wrongdoing by encouraging those who witness wrongdoing to disclose information, while also protecting whistleblowers from reprisals in any form. This is what whistleblower protection legislation in the US, UK and Canada purports to do; however, the words of the legislation alone cannot give us a complete picture of the effectiveness of whistleblower protection in these countries. In all three countries, there is a dearth of research regarding the implementation and operation of these whistleblower regimes, and this makes it difficult to accurately evaluate these laws. Regular reviews of the legislation are required to determine the impact that the laws have had on encouraging reporting and protecting whistleblowers (such as the overdue review of *PSDPA*, discussed above in Section 7.2). Ideally, such reviews would be conducted by neutral third party observers.

One potential measure of success is the impact that whistleblower legislation has on encouraging public sector employees who witness wrongdoing to disclose this information. Research methods such as surveys can help us to understand how many employees witness wrongdoing, and of these how many actually submit reports. Changes in reporting rates may help us to evaluate the impact of legislation on information disclosure. Such data has been collected in the US by the Merit Systems Protection Board, discussed above in Section 5.1. Another example of a large-scale survey was conducted in Australia: it suggests that 71% of Australian public sector workers observed one of the enumerated types of wrongdoing.<sup>264</sup> Of those respondents who observed wrongdoing, “[t]hose who reported the wrongdoing amounted to 39 per cent ... or 28 per cent of all respondents. As shown, almost all these respondents also regarded the wrongdoing that they reported as being at least somewhat serious; very few said they had reported matters they regarded as trivial.”<sup>265</sup> Similar survey data of Canadian public sector employees might help to gauge awareness of the protections offered in the *PSDPA* as well as rates of reporting among those who witness wrongdoing, and qualitative focus group research conducted in 2015 is a good first step in this regard.<sup>266</sup>

Careful attention also needs to be paid to access to justice issues; that is, are the systems that are being set up in the legislation actually protecting whistleblowers, and are they *accessible* to those who have faced retaliation as a result of disclosing information? In Canada, the track record of the Public Servants Disclosure Protection Tribunal is ambiguous, at best, in regard to the success of the *PSDPA* in protecting whistleblowers from reprisals. Of the only seven reprisal cases listed on the Tribunal website, five were settled between the parties or through mediation, and one appears to be in limbo with a number of interlocutory decisions but no

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<sup>263</sup> *Ibid* at 31.

<sup>264</sup> AJ Brown, Evalynn Mazurski & Jane Olsen, “The Incidence and Significance of Whistleblowing” in AJ Brown, ed, *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (ANU E Press, 2008) at 28, online: [http://epress.anu.edu.au/whistleblowing\\_citation.html](http://epress.anu.edu.au/whistleblowing_citation.html).

<sup>265</sup> *Ibid* at 31.

<sup>266</sup> Phoenix SPI (December 2015) at 21.

outcome.<sup>267</sup> This means that the Tribunal has yet to actually make a decision, let alone one with the practical effect of protecting a whistleblower. In the UK, as mentioned above in Section 6, claims that are adjudicated by the Employment Tribunals have a far from even chance of being successful: “Over 70% [of claims made in *PIDA*’s first ten years]... were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won.”<sup>268</sup> Thus, settlements are common in both the UK and Canada. It is difficult to assess whether the outcomes of these settlements represent successes or failures for the whistleblowers who have faced reprisals; it may be, in fact, that public sector employers readily accede to settlements where complainants have strong reprisal cases. Therefore, more in-depth research is required to understand these outcomes and what these numbers tell us regarding the efficacy of whistleblower protection laws.

Overall, while more and different types of research are needed to adequately evaluate whistleblower protections, it is clear that there has been positive movement in the recognition and protection of whistleblowers in the past ten to fifteen years. Internationally, agreements and conventions such as UNCAC place whistleblower protection at the forefront of the global fight against corruption. In Canada, the *PSDPA* represents the country’s first legislative effort to protect federal public sector whistleblowers, and a plethora of other laws have been introduced worldwide in response to the global movement against corruption. In order to ensure that this global legislative movement fulfills its potential, these laws must be utilized by whistleblowers and their protections must be enforced by the relevant institutions and authorities.

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<sup>267</sup> Public Servants Disclosure Protection Tribunal, “Decisions & Orders”, online: <<http://www.psdpt-tpfd.gc.ca/Cases/DecisionsOrders-eng.html>>. It should also be noted that some of these interlocutory decisions have been appealed to the Federal Court; see, for example, *El-Helou v Canada (Courts Administration Service)*, 2012 FC 1111, and *El-Helou v Canada (Courts Administration Service)*, 2015 FC 685.

<sup>268</sup> Stephenson & Levi (20 December 2012) at 20.