



International Bar Association
Legal Policy and Research Unit



GOVERNMENT
ACCOUNTABILITY
PROJECT



Are whistleblowing laws working?

A global study of whistleblower protection litigation

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A collaboration between Government Accountability Project and the International Bar Association

Government Accountability Project, founded in 1977 by the Institute for Policy Studies, is the international leader in whistleblower advocacy. Through litigating whistleblower cases, publicising concerns and developing legal reforms, Government Accountability Project's mission is to protect the public interest by promoting government and corporate accountability. Government Accountability Project's expertise ranges across issue areas, from government to private sector, with programmes in corporate and financial accountability, the environment and energy, the food system, national security and public health. Government Accountability Project has empowered over 8,000 whistleblowers with legal protection and advocacy expertise so the truth they tell makes a positive impact. The organisation works continuously to provide expertise and advocacy for stronger whistleblower rights, and has helped pass over 35 laws or policies ranging from Washington, DC to the United Nations. By working with whistleblowers, Government Accountability Project holds the powerful accountable and protects the public interest because the truth deserves a champion.

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Foreword

The European Union is founded on the values of fundamental rights, democracy and the rule of law. The adoption, on 23 October 2019, of Directive (EU) 2019/1937 on the protection of persons reporting on breaches of Union law, also known as the ‘Whistleblower Protection Directive’, was precisely an expression of the EU’s commitment to a well-functioning democratic system, safeguarding fundamental rights, including freedom of expression and based on the rule of law.

EU countries are required to transpose this directive into their national legal orders at the latest by the end of 2021. Its transposition will thus be a milestone, ensuring a comprehensive framework for the robust protection of whistleblowers based on common high standards applicable throughout the EU.

However, as we all know, laws do not operate in a vacuum. Setting high protection standards and laying down strong rights in the law is not the end of the story – rather, as the study carried out by Government Accountability Project and the International Bar Association compellingly reminds us, it is only the first step in a long journey. Even the most sophisticated protection regime can only be fully effective if the judicial and enforcement ‘ecosystem’ in which this regime is integrated supports such effectiveness.

This is precisely the ‘blind spot’ which this empirical study seeks to address by taking a closer look at the reality of legal protection in the majority of countries that have in place standalone laws on whistleblower protection. The meticulous collection and review of the data and case law, and the assessment, on this basis, of how these laws are actually implemented in practice, provide valuable insights into the various elements which, together, can form a comprehensive and coherent whole in which whistleblower protection laws can best ‘work’.

Distilling these findings into a set of recommended best practices – as well as lessons learned – this research is an important contribution in terms of supporting the actions of legislators and policy makers worldwide to design and develop normative, institutional and judicial frameworks that effectively protect whistleblowers in law – and in reality.

In this perspective, the findings of this research are also particularly timely to support and inspire current work at the EU and national level with a view to ensuring the proper transposition of the EU Whistleblower Protection Directive to maximise its effectiveness on the ground.

The Covid-19 pandemic has brought into stark relief the urgency of improving whistleblower protection with a view to addressing serious threats to the public interest and many of the current challenges to our democracies. The cross-fertilisation of ideas and the global conversation on how best to achieve this aim, to which this study contributes, are essential means to this end.

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These are the personal views of the author and do not necessarily reflect the official position of the Commission.

Letter from the President of the IBA

The horrors of the past year have offered a salient reminder of the importance of whistleblowing. From the Chinese doctor who first warned us of Covid-19, to the hundreds of medical staff across the globe who have called out supply shortages and mismanagement, our understanding of this ongoing pandemic has been informed by these brave truth-tellers. Unfortunately, too often, attempts have been made to silence such voices. China's Dr Li was ordered by police to 'stop making false comments'; many doctors, nurses and government employees have lost their jobs for speaking up.

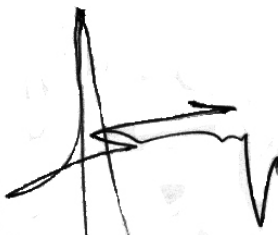
The concept of whistleblowing is as old as society itself. The ancient Greeks had a term for it: *parrhēsia*, or fearless speech. Antecedents to modern whistleblowing laws can be found in feudal England. Millennia later, the act of whistleblowing has lost none of its importance – as the Covid-19 pandemic has amply demonstrated.

To encourage this speaking up, and prevent whistleblowers from facing retaliation for their courage, in recent decades, governments have enacted standalone whistleblower protection laws. What began as a trickle in the late 1970s in the United States became a global flood by the mid-2010s. In 2019, the European Union passed a landmark whistleblower protection directive requiring all Member States to introduce best practice laws in the coming years. At the time of writing, just under 50 countries – a quarter of the globe – have dedicated whistleblowing statutes.

Do these laws work? How might they be improved? These are the central and urgent questions at the heart of this landmark report. The International Bar Association Legal Policy and Research Unit partnered with Government Accountability Project to review whistleblower protection jurisprudence in almost every country with standalone laws. That was no small task: this report encompasses research undertaken across 21 languages. I offer my heartfelt thanks to everyone who contributed to this significant collective undertaking.

In the four decades since whistleblowing laws first began to proliferate, they have continuously evolved as different societies saw first-hand what worked and what did not. We hope that this unprecedented empirical study will aid legislators, policy-makers and regulators in learning from their peers; we do not need to repeat each other's mistakes.

British philosopher John Stuart Mill once wrote: 'Bad men need nothing more to compass their ends, than that good men should look on and do nothing.' As global society seeks to recover from this devastating pandemic, address the climate crisis and improve prosperity among the disadvantaged, whistleblowing will be more essential than ever. It is our ambition that this report contributes, in a modest way, to better whistleblower protection laws – laws that empower and protect those that speak up.



Sternford Moyo
President, International Bar Association

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Abstract

Whistleblowers are individuals who challenge abuses of power that betray the public trust. Whistleblowing rights have become a global legal phenomenon. In 1978, no countries had national whistleblower laws; 48 do today, rising to over 62 once all Member States implement the landmark 2019 European Union Whistleblower Directive. However, too often rights that look impressive on paper are only a mirage of protection in practice. Either they do not make a difference, or in some cases, make whistleblowing more dangerous. As countries around the world seek to enact new whistleblower laws or update existing ones, it is important to know and act on lessons learned for turning these rights into reality.

There are three imperatives for advancing whistleblower protection: (1) to draft and enact comprehensive anti-retaliation laws that reflect global best practices by learning from and acting on mistakes or omissions in less sophisticated pioneer laws; (2) to turn paper rights into reality by ensuring laws are used and implemented as intended; and (3) to improve the development of and access to technologies that facilitate confidential reporting of misconduct to protect the privacy of whistleblowers and their families.

Whistleblowers can make a difference by improving institutional and collective wellbeing. Research by Stephen Stubben and Kyle Welch indicates that whistleblowers benefit businesses by saving them money. Higher volumes of internal whistleblowing are associated with fewer and lower amounts of government fines and material lawsuits.¹ But are whistleblower laws providing genuine protection for whistleblowers?

In this report, we examine the strength of national whistleblower laws on paper, comparing their provisions to global best practices. We then review their track records to assess whether they are in fact making a difference.

To test the effectiveness of whistleblower laws, we explored whether whistleblowers utilised the laws and the win-loss rates. The results, as detailed in the findings section, suggest that in many of the 37 countries we examined, the effectiveness of national whistleblower laws appears questionable due to a lack of public access to case decisions and data on settlement agreements, a lack of utilisation of the laws for disputes, a poor success rate for whistleblowers and meagre compensation for the few whistleblowers who prevail. On this basis we recommend that national governments: (1) publish case decisions online within searchable databases; (2) publish reports with consolidated national data on the impact of their whistleblower laws; (3) remove economic barriers for whistleblowers challenging retaliation; (4) include a requirement and process for the periodic review of the law's effectiveness in their legislation; and (5) prioritise public education and training to address bias and discrimination, as well as raise the public's awareness of their rights.

1 Stephen Stubben and Kyle Welch, 'Evidence on the Use and Efficacy of Internal Whistleblowing Systems' (2020) 58 *Journal of Accounting Research* 473.

Introduction

Whistleblowing is a relatively new term for a timeless phenomenon. As long as there has been organised society, those with power have been unable to resist the temptation to abuse it. Inevitably, those adversely affected have challenged abuses through weapons as revolutionaries, or through words as dissenters – now known as whistleblowers. Whistleblowers are at a unique crossroads of contradictory imperatives. On the one hand, they threaten organisational leaders who abuse power and often respond with an almost instinctual drive to destroy the threat. On the other hand, as eyewitnesses, whistleblowers are often an organisation's best early warning system against institutional liability or malfunction. Whistleblowers are essential for credible law enforcement campaigns against corruption. That is why towards the end of the 20th century whistleblower protection started to become a cornerstone of regional anti-corruption conventions, such as the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention (1997), which called for reporting mechanisms that ensure protection for whistleblowers. The imperatives of minimising institutional malfunctions and combating corruption explain why countries around the world are passing whistleblower laws at an increasingly rapid pace. However, the severe gap between rights and reality has created an unprecedented challenge for freedom of speech, employee protection and the prevention of crime.

There are wide variations within the scope and quality of whistleblower rights, depending on whether they came from relatively primitive pioneer laws or more advanced successors. On balance, the scope and sophistication of whistleblower protection laws are expanding dramatically. For example, a comparatively new phenomenon in 42 national whistleblower laws (including all EU Member States covered by the EU Whistleblower Protection Directive) is to go beyond employment retaliation. Extending further than workplace harassment, the trend is to protect family members, those affected by misconduct or even any citizen who discloses protected information. With respect to retaliation tactics, the majority of national laws now go beyond workplace harassment, such as termination, to protect against reprisal tactics, such as civil or criminal prosecution. Nations covered by this study are identified in Appendix 1, and copies of the laws can be downloaded from Government Accountability Project's website.² Appendix 2 rates their compliance with global best practices. Appendix 3 lists nations with rights broader than the employment context, such as protection for all citizens who blow the whistle extending to their families, or immunity from civil or criminal liability. Appendix 4 lists those nations who have specifically legislated weaker anti-retaliation rights for national security or law enforcement whistleblowers. These lists do not include nations limited to sectoral whistleblower laws for limited issues or groups of employees.³

However, it is not all good news. A report by the OECD notes that whistleblower protection legislation in many countries has often been 'reactive and scandal-driven, instead of forward-looking'.⁴ In fact, the United Kingdom and the United States adopted several whistleblowing protection acts in the 1980s and 1990s, following corruption scandals or preventable disasters. Moreover, the substance of such laws is often more limited than first meets the eye. To illustrate, expanded protection against liability is not available in the US or 19 other national laws. Furthermore, in the national security context, 14 nations have legislated second-class rights or fail to provide sufficient protection for law enforcement or intelligence employees, as compared to other public (ie, governmental) employees. There is no EU authority to protect national security whistleblowers in Member States.

2 See www.whistleblower.org accessed 30 October 2020.

3 A few qualifiers are in order for this research. First, in some instances whistleblower laws do not cover best practice criteria because labour codes, civil procedure, remedies or other pre-existing national laws already provide those best practices. There are likely to be inaccuracies of omission or commission due to imperfect translation when English versions were not available. Special thanks are due to Mark Worth, Executive Director of Whistleblowing International and the European Centre for Whistleblower Rights and Co-Coordinator for the Southeast Europe Whistleblower Coalition, who supplied available English language translations.

4 OECD report www.oecd.org/corruption/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf accessed 30 October 2020.

Without incorporating best practices, protection set forth on paper can be false advertising, or become a trap, if in reality the law is structured to permit, or in practice systematically facilitates retaliation, instead of rejecting it. Some laws only offer 'rights' for whistleblowers who disclose misconduct to internal or external authorities, yet such authorities may well be more interested in protecting those abusing power. In other cases, national whistleblower laws do not provide for due process or any independent tribunal to enforce rights, which explains why such laws become vehicles to rubber stamp retaliation.

Rights on paper only are the beginning. A law with best practice provisions may be irrelevant if no one knows about it and no cases are filed. If enforcement is biased or outright hostile, whistleblowers trying to enforce paper rights can find themselves hammering the final nail in their own professional coffins.

As noted previously, this study examines rights on paper and rights in reality, the latter based on tracking the public record for whistleblower retaliation cases in 37 countries with national whistleblower protection laws enacted before 2018, to ascertain how effective they have been at providing meaningful protection. We hope that the analysis that follows provides the international community with insights that stakeholders can use to strengthen whistleblower laws, improve the systems that enforce them, advocate for greater transparency concerning whistleblower cases and encourage watchdogs worldwide to monitor cases for greater accountability.

Findings

Nations with national laws and their track records compared to 20 best practices are tabulated in Appendices 1–4. Statutes or policies with the best records include Australia, the EU Whistleblower Protection Directive and the US (16/20), Serbia and Ireland (15/20) and Namibia (14/20). Canada, Lebanon and Norway's laws are tied for the world's weakest whistleblower protection laws, only matching one out of 20 criteria.⁵

While an effective statute is the foundation for rights, it is only the first step in a long journey. Too many whistleblower laws have proven to be ineffective in practice. While they exist on paper, they are not being used – whistleblowers are either opting for alternative channels or remaining silent. In other nations, when used more frequently, the results too often rubber-stamp whatever retaliation is challenged. Because most countries had few whistleblower retaliation cases to analyse, the scope of our whistleblower retaliation cases research covered the date national laws went into effect until 2019, except for the UK and US, where analysis was restricted to a one-year period given the quantity of case law. This report illustrates five main trends:

1. There is a lack of access to case decisions and statistics on whistleblower disclosures, undermining analysis of their effectiveness.
2. Whistleblower laws are widely underutilised.
3. On balance, the majority of whistleblowers do not formally succeed in retaliation complaints. In nations where cases are arising with some frequency (30 or more cases), slightly less than 13 per cent of whistleblowers won formal, final decisions. When excluding procedural dismissals and only considering decisions on the merits, in high and medium-use countries, whistleblowers won roughly

⁵ As a qualifier for context, some nations, such as Norway and Sweden, already have strong employment rights in labour law, which provide analogous protections on a broader scale. Even for whistleblower statutes in isolation, the criteria reflect best practices, but are not equally significant. To illustrate, US rights are quite sophisticated and tied for first among raw best practices. However, US rights fail such fundamental criteria as court access for government whistleblowers, as well as protection for those outside the workplace and against non-workplace retaliation, like civil and criminal liability.

16 per cent of cases. With all 37 countries combined, the overall success rate was 21 per cent (80 merits wins out of 379 merits decisions).

4. Even when whistleblowers officially prevail, they often 'lose by winning' because of small financial awards, high costs and lengthy procedures for resolving retaliation cases.
5. More positively, the win-loss data understates the effectiveness of whistleblower laws because a significant portion of cases are relieved through settlements that would not occur in the absence of statutory protection.

Low volume of reported cases

Eighty-nine per cent of countries had fewer than 15 publicly reported whistleblower retaliation cases (33 out of the 37 countries in this study). Fifty-nine per cent had *no* reported whistleblower decisions at all (22 out of 37) [emphasis author's own]. This does not necessarily mean the law was irrelevant or unused. However, either there was no system to formally compile and publish decisions, or there were no reported results in existing public databases.⁶ Of the 33 countries with fewer than 15 cases, five had enacted their laws in 2017, while 22 countries enacted their laws after 2010.

One could infer that there is a correlation between the novelty of laws and the lack of implementation. However, measuring the 'maturity' of an efficient law should involve the consideration of other variables, such as how legal systems have reformed their flawed mechanisms throughout the years through amendments to the laws themselves or improvements in enforcement practices. Furthermore, structural barriers have meant that some laws older than ten years have not been any more effective than recent ones. Canada, for example, passed its whistleblower law in 2005. Because due process proceedings in the Public Servants Disclosure Protection Tribunal must be approved by the Public Sector Integrity Commissioner, who has consistently denied permission, there have been just two tribunal decisions.⁷ The whistleblowers lost both. Our research found no cases in Israel (which had limited public information on court decisions), despite it being one of the world's first countries to pass a whistleblower protection law, in 1997.

Two countries fell into the middle range of the number of case decisions, and both enacted their laws over a decade ago: Japan and South Africa. South Africa enacted the Protected Disclosures Act (PDA) in 2001 and had 33 case decisions. Japan's Whistleblower Protection Act (WPA) went into effect in 2006 and Japan had 30 final decisions in whistleblower retaliation cases.

The two nations with the largest quantity of whistleblower cases were the UK and US. Over a one-year period, the UK had 224 cases in England, Scotland and Wales, and four cases in Northern Ireland, which has a separate whistleblower law. Over a one-year period, the US had 100 cases under the WPA for federal government

6 The token record of participation strongly indicates that whistleblower laws are severely underutilised. It would be premature, however, to conclude that they are as dormant as reflected in the public record. To a significant degree, the vacuum of results reflects difficulties in attempting to compile them through formally reported decisions. In many instances, our research found more widespread use summarised in informal reports from government agencies. The lack of data also means there is no reliable record for the number of cases that provide relief through informal settlements, which can be the most common resolution. Our compilations are no substitute for a system of specific, traceable data on how the laws work in practice.

7 According to an interview with David W Hutton, Senior Fellow at Centre for Free Expression Whistleblowing Initiative, and Trustee of Whistleblowing International Network (WIN). Also, circumstantially evidenced by the low number of cases referred to court. For more information on why Canada's whistleblower law is ineffective see https://cfe.ryerson.ca/sites/default/files/whats_wrong_with_the_psdpa_0.pdf accessed 30 October 2020.

employees. There were also 35 cases under 15 other whistleblower protection laws. Four of these involved public sector whistleblowers, while the remainder were private sector cases.⁸

Very low success rate

In the UK, over a one-year period, whistleblowers won only 13.8 per cent of cases in England, Scotland and Wales (31 out of 224). In the US, over a one-year period, less than ten per cent of workers across the public and private sector prevailed when they attempted to defend their rights through whistleblowing proceedings. In the federal government alone, just seven out of 65, or 10.8 per cent, of whistleblowers prevailed on the merits with rulings whether agencies violated their WPA rights. When including procedural losses (35 procedural losses out of 100 WPA cases), only seven per cent of WPA complainants won favourable rulings (seven out of 100). In the smaller group of private sector cases, 31.2 per cent of those who filed due process complaints won decisions on the merits (five out of 16). Including procedural defeats, corporate employees won 17.2 per cent of complaints filed (five out of 29). South Africa had a 21.2 per cent success rate out of 33 cases (case decisions ranged from 2003–2019, a 17-year period). In Japan, whistleblowers won 4.5 per cent of claims (one out of 22).⁹

As referenced, to some degree, this data understates the value of the whistleblower laws that empower anti-retaliation litigation because claims often lead to settlement agreements. This can be especially true for those who file complaints seeking informal investigation at remedial agencies, such as the US Department of Labor Occupational Safety and Health Administration (OSHA) for private sector employees. For example, in fiscal year 2018, OSHA found illegal retaliation in less than three per cent of formal determinations. However, when complaint-based settlements are included, this figure rises to 19.6 per cent for whistleblowers obtaining relief.

In contrast to the low success rates in countries with higher volumes of reported cases, some countries with a lower number of reprisal claims have seen them succeed more often. In two countries, whistleblowers prevailed 100 per cent of the time: Norway with one case and Romania with six. Serbia had an 80 per cent success rate out of 15 final case decisions on the merits (case decisions ranged from 2017–2019; a three-year period). Obviously, the significance of these figures is limited by the small sample sizes.

Overview of the strength of national whistleblower laws

While whistleblower protection laws are increasingly popular, in many cases, the rights they offer are largely symbolic. This has proven to be counterproductive. Employees have risked retaliation, thinking they had genuine protection when, in reality, there was no prospect of maintaining their careers. With legal forums formally endorsing the retaliation, reprisal victims have been far more prejudiced than if no whistleblower protection law had been in place at all. In many cases, this was due to good faith trial and error mistakes or oversights when creating new rights. The evolution of whistleblower rights over the last three decades reveals numerous lessons learned. In some jurisdictions, legislative shortcomings have steadily been solved through amendments to correct mistakes and close loopholes.

The token laws might be considered ‘cardboard shields’ because anyone relying on them is likely to suffer professional consequences. Genuine whistleblower laws are ‘metal shields’, behind which whistleblowing is

8 This data understates total American activity under an ever-expanding base of over 60 whistleblower laws, but is sufficient to ascertain trends regarding the effectiveness of rights.

9 Although there were 30 case decisions, this figure excludes cases where the judge either ruled against or did not issue a final decision for a complaint filed under the WPA, but instead ruled the employer’s act of retaliation was an abuse of authority; which means that whistleblowers prevailed concerning the wrongful administrative action taken against them on different grounds than whistleblower retaliation. From that perspective, those who filed complaints under the whistleblower law received relief in 33 per cent of cases. Like settlements, the gap is another dimension to less visible benefits from whistleblower laws – sparking litigation where judgments provide relief despite not finding free speech violations.

still dangerous but an employee has a fighting chance to survive professionally. The below 'checklist' of 20 requirements for best practice whistleblower laws reflects four decades of Government Accountability Project's lessons learned on the difference, along with global insight from the International Bar Association (IBA). All the concepts exist in various statutes currently in force. These best practice standards are consistent with those from the Council of Europe, the OECD and Transparency International. They are based on a compilation of national laws from all countries with minimally credible dedicated whistleblower laws, which are preferable to a piecemeal or sectoral¹⁰ legislative framework.

Scope of coverage

The first cornerstone for any reform is that comprehensive legal protection is available. Loopholes that deny coverage when it is needed most, either for the public or for the harassment victim, compromise whistleblower protection rules. Seamless 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.

1. Broad whistleblowing disclosure rights with 'no loopholes'

Protected whistleblowing should cover any lawful disclosure that would be accepted as evidence of significant misconduct or would assist in carrying out legitimate compliance functions, without loopholes for formality, context or audience outside of specific legislative or military restrictions. This means that protection should cover employees in the public, private and non-governmental organisation (NGO) sectors.

The consistent standard is to reasonably believe the information is evidence of misconduct. Motives should not be a relevant factor, provided the whistleblower genuinely believes the information is true. Protection extends to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed. The worst offender here is a requirement to demonstrate 'good faith' for the disclosure rather than merely a genuine, objectively reasonable belief of misconduct. The good faith standard puts the whistleblower's motives on trial.

However, the current norm outside the US is to only protect immediate public disclosure under exceptional circumstances. The key criterion is that the freedom to blow the whistle publicly should be protected, if necessary, as the only way to prevent or address serious misconduct. When restricted, disclosures still should be protected if made to representatives of organisational leadership or to designated law enforcement or legislative offices. It also is necessary to specify that disclosures in the course of job duties are protected because most communication of protected information and subsequent retaliation is done through 'duty speech' responsibilities by those whose institutional role is blowing the whistle as part of organisational checks and balances.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 15.

¹⁰ Principle 24 from Transparency International's *International Principles for Whistleblowing Legislation*.

Non-US national laws:

- Australia¹¹ PIDA, sections 26 and 28, Corporations Act,¹² sections 1317AAC and AAD, Treasury Laws Amendment Act¹³ section 14ZZU;
- Bosnia WPA, Article 2(d);
- Croatia WPA, Article 14;
- Ireland PDA, sections 5 and 7–10;
- Japan WPA, Articles 1 and 3;
- Kenya WPA, section 4.15.3, Part VI.24.4;
- Kosovo WPA, Articles 13, 14 and 16–20;
- Latvia WPA, section 4;
- Moldova WPA, Article 7;
- Namibia WPA, sections 5.30 and 5.36;
- Papua New Guinea WPA, section 2;
- Serbia WPA, Articles 2, 5 and 19;
- South Africa PDA, sections 7–8;
- Tanzania WWPA, section II.5.2; and
- UK PIDA, sections 23 and 43(G).

US:

- Sarbanes-Oxley Act (SOX) (employees of publicly traded corporations), 18 USC 1514(a);
- National Defense Authorization Act (NDAA) (government contractor employees), 10 USC 2409(a) and 41 USC 4712(a); and
- WPA of 1989 (federal employees), 5 USC 2302(b)(8).

2. *Wide subject matter scope, with 'no loopholes'*

Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity that undermines the public welfare or institutional mission to corporate stakeholders, as well as any other information that assists in honouring those duties.

11 Appendix 1 contains the full titles for abbreviated national laws.

12 In 2019, Australia expanded corporate whistleblower rights through amendments to the Corporations Act 2001. References are also to provisions of that statute.

13 Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 2.¹⁴

Non-US national laws:

- Australia PIDA, sections 26–27 and 29;
- Bangladesh WPA, section 2(4);
- Belgium WPA, Article 2;
- Botswana WPA, section 3;
- Cayman Islands, WPA section 1.2 (definition of ‘improper conduct’);
- Croatia WPA, Article 3.1;
- Ghana WPA, section 1;
- Guyana WPA, section 2 (definition of ‘improper conduct’);
- Ireland PDA, sections 5 and 7;
- Kenya WPA, Part 1, section 2 (definition of ‘improper conduct’), and Part III generally;
- Kosovo WPA, Articles 3.1, 3.2, 5, 9.3 and 9.4;
- Latvia WPA, section 3;
- Lithuania WPA, Article 2, section 5 and Article 3, section 2 (definition of ‘infringement’);
- Malta PWA, section 1(2);
- Namibia WPA, section 1.2(1);
- the Netherlands WCA, Article 1.d.2;
- New Zealand PDA, sections 3(1) and 6(1);
- North Macedonia WPA, Article 2(6);
- Republic of Korea ACA, Article 2(1);
- Romania WPA, Article 5;
- Rwanda WPA, Article 2.1;
- Serbia WPA, Articles 2.1 and 13;
- South Africa PDA, section 1(1);
- Tanzania WWPA, section 4(1);
- Tunisia WPA, chapter 2;
- Uganda WPA, section 2; and

14 The directive does not cover national security whistleblowing because generally the EU does not have jurisdiction. But its scope qualifies for the issues over which it has authority. However, it does apply to reports of breaches of the procurement rules involving defence or security aspects where these are not otherwise covered. (See EU acts listed in Annex part I, A, 1.)

- Zambia PIDA, sections 2(2) and 11.

US:

- NDAA, 10 USC section 2409(a)(1), 41 USC 4712(a)(1);
- SOX, 18 USC 1514A(a)(1); and
- WPA, 5 USC 2302(b)(8).

3. Right to refuse violating the law

This best practice protects individuals who reasonably believe that they are being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought. As a practical reality, in many organisations, an individual is defenceless when refusing to obey an order on the grounds that it is illegal. Inclusion of a right to refuse violating the law provision can stop *faits accomplis* by protecting those who 'walk the talk' and, in some cases, prevent the need for whistleblowing.

BEST PRACTICES

Non-US national laws:

- Kenya WPA, section 25(2)(b).

US:

- WPA, 5 USC 2302(b)(9)(d).

4. Protection against spillover retaliation at the workplace

The law should cover all common work-related scenarios that could have a chilling effect. This is necessary to shield those who assist or associate with the whistleblower who acts as the messenger for a disclosure. It 'takes a village' to blow the whistle responsibly and effectively. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken). or as 'assisting whistleblowers' (to guard against guilt by association), and individuals who are 'about to' make a disclosure (to preclude pre-emptive strikes to circumvent statutory protection.) They may be essential for the necessary preliminary steps to have a 'reasonable belief' and qualify for protection as a responsible whistleblowing disclosure. Since corroboration and supporting evidence are essential, these indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 4.

Non-US national laws:

- Australia PIDA, sections 13 and 57, Corporations Act, sections 13AAA(g) and (h);
- Croatia WPA, Article 13;
- Ireland PDA, section 13;
- Kosovo WPA, Articles 3.1.11, 3.1.12 and 8;
- Kenya WPA, section 1(2) (definition of 'whistleblower'), sections 24(2) and 25(2);

- Lithuania WPA, Article 10(3);
- Namibia WPA, sections 1 'definition of complainant', 5(3), 45(1) and 48(1)-2;
- New Zealand PDA, section 19A;
- North Macedonia WPA, Articles 8(1) and 9; and
- Serbia WPA, Article 6 (protection for associated persons).

US:

- SOX, 18 USC 1514A (and case law); and
- WPA 5 USC sections 2302(b)(8–9) (and case law).

5. Protection for those beyond the workplace

Regardless of the formal employment status, coverage for employment-related reprisals should extend to all who could be affected by secondary retaliation. Significantly, this includes protecting against threats or harassment of family members. The chilling effect of that retaliation can be more severe, as many view the duty to protect their families as overarching.

In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organisation's mission, such as contractors. What matters is the contribution they can make by bearing witness. The value of whistleblower laws is the evidence, not who provided it. If harassment could create a chilling effect that undermines an organisation's mission, the reprisal victim should have rights. This means that the mandate should also cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significantly, whistleblower protection should extend to all those who participate in or are affected by the organisation's activities. An increasing number of global statutes do not limit protection to employees, but rather protect 'any person' who discloses misconduct. A list of nations with rights for those outside the formal employment context is included in Appendix 3.¹⁵

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 4.

Non-US national laws:

- Australia PIDA, section 10(b), Corporations Act, section 1317AAA;
- France WPA, Article 6A;
- Ghana WPA, sections 1.1(3), 2, 12 and 17(c);
- Guyana WPA, section 22(1);
- Japan WPA, Article 2;
- Kosovo WPA, Articles 3.1.1, 3.1.2, 3.1.5 and 8;
- Latvia, section 13(1);

¹⁵ Appendix 3 also is relevant for criterion 7 on the full scope of retaliation tactics.

- Lithuania, Articles 2.6, 4, 8 and 10.3;
- Namibia WPA, sections 1, 5(3), 45(b) and 48;
- New Zealand PDA, section 19A;
- North Macedonia WPA, Articles 2(3), 2(7), 8 and 9;
- Republic of Korea ACA, Articles 2(4) and 11(1);
- Rwanda WPA, Article 2.5;
- Serbia WPA, Articles 2.2, 2.3, 2.7 and 6;
- Slovakia WPA, section 2(1)(a);
- Tanzania WWPA, sections 4(1) and 10;
- Uganda WPA, sections 2, 3 and 11; and
- Vietnam WPA, Articles 2.1 and 47.1.

6. Reliable identity protection

To maximise the flow of information necessary for accountability, reliable protected channels must be available for those who choose to protect their identities. Otherwise, there will be a severe chilling effect, as sponsors of whistleblower rights laws have repeatedly recognised. The concept covers both anonymous disclosures, in which no one knows the identity of the whistleblower, and confidential communications, in which identity must be safeguarded by the institutional audience. Anonymity requires a commitment to the best available anti-surveillance technologies to shield privacy. Confidentiality must go beyond a promise not to reveal a name without consent, which should be written. Confidentiality should also extend to restrictions on disclosure of 'identifying information'. Often when only a few are aware of certain facts, that information is easily traceable back to the source. Further, almost no whistleblower can be guaranteed absolute confidentiality because testimony or identification of the person may be mandatory for civil or criminal proceedings, or other essential purposes. When exposure is non-discretionary, a best practice confidentiality policy provides for timely advance notice to whistleblowers that their lawfully required exposure is imminent.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 16.

Non-US national laws:

- Albania WPA, Articles 15 and 17.2, sections 2–3;
- Australia PIDA, Provisions 20, 21 and 24, Corporations Act, sections 1317AG, 1317AAE, 14ZZB and 14ZZW;
- Bangladesh WPA, sections 5(1, 4–5);
- Belgium WPA, Article 8, section 1 and Article 9, section 1;
- Cayman Islands WPA, sections 2.9.4 and 6.33;
- Croatia WPA, Articles 9.4, 11 and 12;
- France WPA, Article 6D;

- Guyana WPA, sections 19 and 25;
- Ireland PDA, section 16;
- Jamaica PDA, section 24;
- Italy WPA, Article 1.3;
- Kenya WPA, sections 1.2 and 2.9.2, Parts 4.18.4, 5.22.2.a, VI.24.a and VI.28;
- Kosovo WPA, Articles 4.1.2, 7, 11 and 12;
- Latvia WPA, Articles 11 and 12;
- Lithuania WPA, Article 8, sections 1(2) and 8(2), and Article 9;
- Malaysia WPA, section 8;
- Malta PWA, Articles 6(1), 4 and 18(1);
- Namibia WPA, sections 1.1, 7.45 and 7.46; 3i and 3j;
- New Zealand PDA, section 19;
- North Macedonia WPA, Articles 3(3–4), 4(4), 5(3), 9(6) and 7;
- Peru, Articles 7 and 22–23;
- Republic of Korea ACA, Articles 12 and 30(1)(2);
- Serbia WPA, Articles 10, 14 and 18;
- Tanzania WWPA, sections 4(3) and 16;
- Tunisia WPA, chapter 22;
- Uganda WPA, sections 14 and 15;
- Vietnam WPA, Articles 8.3, 9.1.b, 47.2 and 56; and
- Zambia PIDA, sections 12 and 54.

US:

- NDAA, 10 USC 2409(b)(3) and 41 USC 4712(b)(3);
- SOX, 18 USC 1514A(b)(2); and
- WPA (US) 5 USC sections 1212(g) and 1213(h).

7. Protection against full scope of harassment

The forms of harassment a whistleblower can suffer are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of the whistleblowing, whether active (eg, termination) or passive (eg, a refusal to promote or a failure to provide training). Recommended, threatened and attempted actions can have the same distressing effect as actual retaliation. The prohibition must cover recommendations, as well as the official act of discrimination, to guard against managers who 'don't want to know' why subordinates have targeted employees. In non-employment contexts, laws should protect whistleblowers against a wide range of possible harassment, including violence and threats to property; provide immunity from civil liability, such as defamation claims or breach of contract lawsuits; and safeguard against the most chilling form of retaliation: criminal prosecution.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Articles 5.9 19, 21.2–3, 21.5 and 21.7 (liability shield).

Non-US national laws:

- Australia PIDA, sections 10(1)(a) and (2)(a), 13, 23, 57 and 78, Corporations Act, sections 1317AB(1)(a), 1317ADA, 14ZZX(1)(a) and 14ZZZAA;
- Bangladesh WPA, sections 5(1–2);
- Bosnia, Article 7(3);
- Botswana WPA, section 15;
- Cayman Islands WPA, section 1.2 (definition of ‘detrimental action’), sections 14(2) and 16;
- Ghana WPA, sections 12, 17 and 18;
- Guyana WPA, section 2 (definition of ‘detrimental action’), sections 17 and 24(1);
- Hungary, Article 11;
- Ireland PDA, sections 2, 3, 14 and 15;
- Italy WPA, Article 2.2.c;
- Jamaica PDA, sections 2, 15(2) and 16;
- Japan WPA, Article 5;
- Kenya WPA, sections 2, 10, 24(1)(b) and 28(4);
- Kosovo WPA, Articles 3.1.11, 7.1.3, 9.1 and 22;
- Latvia WPA, sections 13.1 and 15;
- Lebanon WPA, chapter III;
- Lithuania WPA, Articles 3.4, 8.1 and 15;
- Malaysia WPA, sections 7(1)(b), 9 and 10;
- Malta PWA, sections 1(2), 4(1) and 19;
- Namibia WPA, sections 5(1)(b), 5(2) and 47;
- New Zealand PDA, section 18;
- North Macedonia WPA, Article 8(1);
- Pakistan WPA, section 10;
- Peru WPA, Article 22;
- Republic of Korea ACA, Article 13 (police protection against threats of violence), Article 14(4) (civil liability), Article 15 and Article 33, sections 2.6, 4.3, 15 and 23;
- Rwanda WPA, Article 16;
- Serbia WPA, Articles 2.7 and 21;

- Tanzania WWPA, Part III.10;
- Tunisia WPA, chapters 2 and 19;
- Uganda WPA, sections 9.2, 10 and 11;
- Vietnam WPA, Article 47; and
- Zambia WPA, section 56.

8. Shielding whistleblower rights from gag orders

Any whistleblower law or policy must include a ban on ‘gag orders’ resulting from any rules, policies or nondisclosure agreements that would otherwise override rights in the whistleblower law and impose prior restraint on speech. This principle also covers supremacy of the whistleblower statutes over conflicting laws.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Articles 21–22 and 24.

Non-US national laws:

- Albania WPA, Article 17.4;
- Australia PIDA, sections 10(1)(b) and 10(2)(b), Corporations Act, sections 1317AB(1)(b) and ZZX(1)(b);
- Bangladesh WPA, section 3;
- Bosnia, Article 7(3);
- Cayman Islands, sections 2(d) (definition of ‘detrimental action’), 14(1) and 32;
- Botswana WPA, section 16;
- Croatia WPA, Article 5;
- Ghana WPA, section 19;
- Guyana WPA, sections 21 and 30;
- Ireland PDA, sections 12 and 14;
- Jamaica PDA, sections 15 and 20;
- Kosovo WPA, Article 6;
- Latvia WPA, section 10.8;
- Malaysia WPA, section 6(5);
- Malta PWA, sections 3 and 21;
- Moldova WPA, Article 9, section 6;
- Namibia WPA, section 7.50;
- New Zealand PDA, section 18(2);
- North Macedonia WPA, Article 12;
- Pakistan WPA, section 5;

- Papua New Guinea WPA, section 13;
- Republic of Korea ACA, Article 14(3);
- Serbia WPA, Articles 3 and 21;
- Slovakia WPA, Article 1 section 1(3);
- South Africa PDA, section 2(3);
- Tanzania WWPA, section 14;
- Tunisia WPA, chapter 23;
- Uganda WPA, sections 10, 12 and 13;
- UK PIDA section 43K; and
- Zambia PIDA, section 4.

US:

- NDAA, 10 USC 2409(c)(7), 41 USC 4712(c)(7);
- SOX, 18 USC 1514A(e); and
- WPA (US), 5 USC 2302(b)(13).

9. Providing essential support services for paper rights

Whistleblowers gain little protection from laws if they do not know of their existence. Further, many, if not most, unemployed whistleblowers cannot afford due process lawsuits. That means there must be remedial agencies that educate whistleblowers on how to act on their rights and provide free or no-cost informal remedies through investigations. An informal administrative remedy that does not impose due process burdens on the whistleblower is a prerequisite for compliance with this criterion. Whistleblower rights, along with duties to disclose illegality, should be posted prominently in any workplace. Training employees on their rights, employers on their responsibilities and judges or other decision-makers to understand the law's purpose and provisions are prerequisites for the rights to be meaningful. An ombudsman with sufficient access to documents and institutional officials can neutralise resource handicaps and cut through draining conflicts to provide expeditious corrective action. The US WPA includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on behalf of whistleblowers. Informal resources should be risk-free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help. Australia and a few other nations have adopted a leadership 'duty to prevent' retaliation, failure of which also violates the whistleblower law.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Articles 13 and 20.

Non-US national laws:

- Albania WPA, Article 21;
- Australia PIDA, sections 58–63, 74 and 78 (last provision provides the same anti-retaliation protection for all duties enforcing the law as for whistleblowers making a disclosure), Corporations Act, sections

1317AE(3) and 1317AI-AK;

- Ireland PIDA, section 21;
- Jamaica PDA, section 21;
- Kenya WPA, Parts IV and V;
- Kosovo WPA, Articles 4, 8.3, 16, 17 and 28;
- Latvia WPA, sections 5, 8, 9 and 10.8;
- Lithuania WPA, Article 5;
- Malta PWA, section 12(2);
- Namibia WPA sections 2, 4 and 7.51;
- the Netherlands WCA, Articles 2.3, 3;
- New Zealand PDA, sections 6B and 6C;
- Republic of Korea ACA, Article 4, Korean Independent Commission Against Corruption, First Annual Report (2002), at 139;
- Slovakia WPA, sections 10 and 13;
- Vietnam WPA, Articles 5 and 48; and
- Zambia PIDA, section 40(2)(b).

US:

- SOX, 18 USC 1514A(b)(2);
- NDAA, 10 USC 2409(b)(2), 41 USC 4712(b)(2); and
- WPA, 5 USC 1212-14.

FORUM

The setting to adjudicate a whistleblower's rights must be free from institutionalised conflict of interest and operate under due process rules that provide a fair day in court.

10. Right to a genuine day in court

This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by the illegality or abuse of power evidenced in the whistleblower's disclosure. The elements include timely decisions, a day in court with witnesses and the right to confront accusers, objective and balanced rules of procedure, and reasonable deadlines. Institutions' internal misconduct-reporting systems must be structured to provide autonomy and freedom from institutional conflicts of interest. Avoiding such conflicts of interest is particularly significant for the preliminary stages of mandatory informal or internal review(s) of harassment complaints as a prerequisite for court access. Those proceedings are inherently compromised by structural conflict of interest because the decision-maker will be the defendant in any subsequent court proceeding. Otherwise, instead of being remedial, such activities are vulnerable to becoming 'free discovery' and de facto investigations of the whistleblower, often hampering their eventual prospects of success in an independent due process forum.

BEST PRACTICES

EU:

- EU Directive, Article 21.

Non-US national laws:

- Albania WPA, Article 19.7;
- Australia PIDA, section 14; Corporations Act, section 1317 AE;
- Cayman Islands WPA, Parts 4.18–22 and 4.26;
- Croatia WPA, Articles 24–27;
- France WPA, Article 6F;
- Ghana WPA, section 15;
- Ireland PDA, sections 11–13, Schedule 2;
- Kenya WPA, section 31;
- Kosovo WPA, Articles 23 and 24.1;
- Lithuania WPA, Article 11, section 4;
- Malaysia WPA, section 15;
- Malta PWA, Article 7;
- Namibia WPA section 9.64, Part 10;
- New Zealand PDA, section 17;
- North Macedonia WPA, Articles 1 and 10;
- Papua New Guinea WPA, section 12;
- Republic of Korea ACA, Article 33;
- Romania WPA, Article 9;
- Serbia WPA, Articles 2, 23 and 30;
- South Africa PDA, section 4(1);
- Sweden WPA, section 11;
- Uganda WPA, sections 9.3–4;
- UK PIDA, Article 3; and
- Zambia PIDA, section 49.

US:

- NDAA, 10 USC 2409(c)(2), 41 USC 4712(c)(2); and

- SOX 18 USC 1514A(b).¹⁶

11. Option for alternative dispute resolution with an independent party of mutual consent

Third-party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labour management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a 'strike' process. It can provide an independent, fair resolution of whistleblower disputes. In the case of international organisations, such a model can circumvent the vexing issue of whether the organisation has waived its immunity from national legal systems. Alternative dispute resolution is contemplated as a normal option to resolve retaliation cases in the US WPA. Already common for the resolution of international trade disputes, this option could be valuable where judicial systems are weak or lack legitimacy.

BEST PRACTICES

US:

- WPA (labor management provisions), 5 USC 7121.

BURDENS AND TIMEFRAMES

The rules to prevail typically are determinative: they are the tests whistleblowers must pass to prove that illegal retaliation violated their rights. How a particular jurisdiction sets the evidential burdens and timeframes therefore will have a significant role in the efficacy of a whistleblower protection regime.

12. Realistic standards to prove the violation of rights

The US WPA of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The legal test adopted by the US in 1989, described below, has been adopted within international law, as well as generic professional standards for intergovernmental organisations (IGOs) such as the United Nations. In 2019, the EU Whistleblower Protection Directive created an even more employee-friendly burden of proof mechanism.

This US and IGO standard is that a whistleblower establishes a prima facie case of violation by showing, through a preponderance of the evidence, that protected conduct was a 'contributing factor' in the challenged detrimental action or decision. This essentially is a relevance test, satisfied if whistleblowing affected a decision 'in any way'. The discrimination does not have to involve retaliation, but only need occur 'because of' the whistleblowing. Once a prima facie case is made, the burden of proof shifts to the organisation to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the US government changed the burden of proof in its whistleblower laws, the rate of success on the merits increased from between one and five per cent annually to a range of ten to 30 per cent depending on the Orphan.¹⁷

The most advanced version of the burdens of proof is in the EU Whistleblower Protection Directive. Article 21, section 5 provides that after a presumption of retaliation, the employer can prevail by 'proving that this measure was based on duly justified grounds'. The recital provides specific guidance for national laws on how to interpret this. It states, at paragraph 93, that after the whistleblower has proven a prima facie case, the 'burden of proof

¹⁶ The referenced statutes providing full court access are corporate whistleblower protection laws. Because the WPA for federal government workers is limited to administrative remedies, the US did not receive credit for this criterion in Appendix 3.

¹⁷ There could, of course, be other factors that have also contributed to this rise.

should shift to the person who took the detrimental action, who should then demonstrate that the action was not linked in any way to the reporting or the public disclosure’.

Many nations that adjudicate whistleblower disputes under labour laws have analogous presumptions and track records. There is no alternative, however, to committing to one of these proven formulas to determine the tests whistleblowers must pass to win a ruling that their rights were violated.

Some nations’ legal systems do not have specific concepts such as ‘clear and convincing’ evidence, and this standard is evolving. As a result, nations receive credit if their laws have a reverse burden of proof.

It is also worth noting that the standard for proving legitimate whistleblowing in some jurisdictions is made more complicated by overlapping law, particularly in the sphere of employment. In England and Wales, for example, it is possible to win a whistleblowing claim but to lose a parallel claim of automatic unfair dismissal due to the high threshold of the latter. Similarly, whilst most whistleblowing claims in England and Wales are brought alongside a discrimination claim, the difficulties in proving discrimination often result in the whistleblowing claim also failing.¹⁸

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 21.5 (presumption of retaliation after establishing protected speech, and reverse burden to prove that whistleblowing did not affect the action ‘in any way’).

Non-US national laws:

- Albania WPA, Article 19.4;
- Australia PIDA, section 23; Corporations Act sections 1317AD(2B) and 14ZZZ(2B);
- Bosnia WPA, Article 8(3);
- Croatia WPA, Article 28;
- France WPA, Article 6E;
- Guyana WPA, section 23;
- Italy WPA, Article 7;
- Jamaica PDA, section 17;
- Kenya WPA, sections 2 (definition of ‘clear and convincing evidence’) and 27;
- Kosovo WPA, Articles 9.2 and 25;
- Latvia WPA, sections 13(3–4);
- Lithuania WPA, Article 10, section 4;
- Namibia WPA, section 7.48(3-4);
- North Macedonia WPA, Articles 2(1) and 11;
- Norway Work Act, section 2:4.3;

18 All Party Parliamentary Group (APPG) for Whistleblowing report *Making whistleblowing work for society* (2020) 3 https://a02f9c2f-03a1-4206-859b-ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf accessed 16 November 2020.

- Pakistan WPA, Article 10(3);
- Serbia WPA, Articles 5.3 and 29;
- Slovakia WPA, section 7(5); and

US:

- NDAA, 10 USC 2409(c)(6), 41 USC 4712(c)(6);
- SOX, 18 USC 1514(b)(2)(c); and
- WPA, 5 USC 1214(b)(2)(4) and 1221(e).

13. Realistic time frame to act on rights

Although some laws require employees to act within 30–60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Six months is the minimum functional statute of limitations. A one-year statute of limitations, which is often consistent with common law rights, is preferable. Some jurisdictions even offer three years.¹⁹

BEST PRACTICES

Non-US national laws:

- Croatia WPA, Article 24.2;
- Ireland PDA, section 24, Schedule 2(6);
- Israel PEL, section 5(a);
- Kosovo WPA Article 24.2;
- Serbia WPA, Article 23; and
- Zambia PIDA, section 42(2).

US:

- NDAA 10 USC 2409(b)(4), 41 USC 4712(b)(4);
- SOX, 18 USC 1514A(b)(1)(B); and
- WPA, 5 USC 1214(a)(6)(A)(iii).

RELIEF FOR WHISTLEBLOWERS WHO WIN

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by: (1) helping the victim to obtain adequate redress; and (2) holding the wrongdoer accountable.

14. Compensation with 'no loopholes'

If a whistleblower prevails, relief must be sufficiently comprehensive to cover all the direct, indirect and future consequences of the reprisal (they should be 'made whole'). Otherwise, the whistleblower may 'lose by winning'.

¹⁹ A qualifier for this data is that statutes may provide jurisdiction in tribunals without repeating the relevant statute of limitations for the forum.

Made whole relief may include the payment of damages for medical bills, indirect financial consequences and intangibles, such as pain and suffering, emotional distress or loss of reputation. In non-employment contexts, it could require relocation, identity protection or withdrawal of litigation against the individual.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 21.8.

Non-US national laws:

- Australia PIDA, sections 14 and 16, Corporations Act, sections 1317AD, 1317AE, 1417ZZA and 1417ZZZ;
- Bosnia WPA, Article 2(f);
- Cayman Islands WPA, sections 21–23;
- Croatia WPA, Article 26;
- France WPA, Article 6E, 6FA;
- Guyana WPA, section 22;
- Ireland PDA, sections 11, 13;
- Latvia WPA, section 10;
- Lithuania WPA, Article 11, sections 5–6, Article 13;
- Malta PWA, Articles 7, 8;
- Moldova WPA, Article 14(d–e);
- Namibia WPA, Parts 10.68–9 and 10.71–2;
- New Zealand PDA, section 17;
- North Macedonia WPA, Articles 10(2) and 13;
- Republic of Korea ACA, Articles 13, 20–22, 27;
- Serbia WPA, Articles 22 and 26;
- Slovakia WPA, sections 7–10 and 13;
- Tunisia WPA, chapter 25;
- UK PIDA, Article 4;
- Vietnam WPA, Articles 57 and 58; and
- Zambia PIDA, section 13.4.

US:

- NDAA, 10 USC 2409(c)(2), 41 USC 4712(c)(2);
- SOX, 18 USC 1514A(b)(2); and
- WPA 5 USC 1221(g)(1).

15. Interim relief

Anti-reprisal mechanisms that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be no more than an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must therefore be available following a preliminary determination. Timely provision of interim relief also prevents unnecessary protracted litigation. Without it, employers have little to lose by dragging out lawsuits and appeals indefinitely. Until a contrary final decision is issued, harassment or delays by employers can succeed both in depriving the whistleblower of income and in sustaining a chilling effect in the workplace. Employers may augment the chilling effects by purging whistleblowers to set an example. If the whistleblower is reinstated while the substantive case proceeds, the employer's best interest is more likely to 'stop the bleeding' by resolving the dispute on fair terms. Few other criteria have more impact on whether a whistleblower law makes a difference in reality than the effectiveness of interim relief.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 21.6.

Non-US national laws:

- Australia PIDA, section 15, Corporations Act, sections 1317AE(c) and 14ZZA(c);
- Bosnia WPA, Article 8;
- Cayman Islands WPA, Part 4, sections 24–25;
- Croatia WPA, Articles 29–30;
- France WPA, Article 6F;
- Guyana WPA, section 22;
- Ireland PDA, section 11, Schedule 1;
- Kenya WPA, sections 29–31;
- Latvia WPA, section 10(5);
- Malaysia WPA, sections 15(1) and 17;
- Malta PWA, Article 7;
- Namibia WPA Parts 2.7(f) and 10.69.2(d);
- New Zealand PDA, section 17;
- North Macedonia WPA, Article 10(2);
- Pakistan WPA, Articles 13 and 17–18;
- Serbia WPA, Articles 32–35;
- Slovakia WPA, sections 4–7 and 12;
- UK PIDA Article 9;
- Vietnam WPA, Article 57.1.a; and
- Zambia PIDA, sections 52–53.

US:

- WPA 5 USC 1214(b)(1), 1221(c).

16. Coverage for legal fees and costs

Legal fees and reimbursement of litigation costs should be available for whistleblowers who prevail. Otherwise, they could not afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organisations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that retaliation lawsuits were irrelevant to the ultimate outcomes. Affected individuals can be ruined by that type of victory because attorney fees often reach sums more than an annual salary. The provision of legal aid for whistleblowing reprisal cases, which makes costs provisions less critical, is commendable and qualifies to satisfy this criterion. Some nations have also introduced statutory protection that prevents whistleblowers from being subject to adverse costs orders when their claims are unsuccessful.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 20.1.c (provision of legal aid).

Non-US national laws:

- Australia PIDA, section 18;
- Bosnia 2017 Law on Protection for People Who Report Corruption;²⁰
- Cayman Islands WPA, section 27;
- Ghana WPA, section 16;
- Hungary WPA, Article 17;
- Latvia WPA, sections 8(7), 10(3) and 14;
- Lithuania WPA, Article 8, section 1(6), Article 14;
- New Zealand PDA, section 17;
- Republic of Korea, Article 27(3);
- Slovakia WPA, section 20;
- Tunisia WPA, chapter 25.

US:

- NDAA, 10 USC 2409(c)(4), 41 USC 4712(c)(1)(5);
- SOX (US publicly traded corporations), 18 USC 1514A(c)(2)(C); and
- WPA (US federal government), 5 USC 1221(g)(2-3).

17. Transfer option

Often, it is unrealistic to expect whistleblowers to go back to work for bosses who they have just defeated in

²⁰ See <https://see-whistleblowing.org/split-decisions> accessed 30 October 2020 (translation of statutory text not available).

a lawsuit. Those who prevail should have the ability to transfer internally, where feasible, to ensure a realistic chance of a fresh start. This option often prevents repetitive reprisals that render newly created institutional rights ineffectual.

Non-US national laws:

- Albania WPA, Article 18.3;
- Bosnia WPA, Article 18.3;
- Cayman Islands WPA, section 29;
- Ghana WPA, section 14;
- Malaysia WPA, section 19;
- Moldova WPA, Article 14(a);
- Namibia WPA, section 10.69, 73;
- Republic of Korea ACA, Articles 16 and 27;
- Serbia WPA, Articles 2 (definition 7), 21 and 26;
- South Africa PDA, section 4(3-4);
- Tanzania WWPA, section 12;
- Tunisia WPA, chapter 25;
- Vietnam WPA, Article 57.1.c; and
- Zambia PIDA, sections 13(4)(c) and 13(5).

US:

- WPA 5 USC 3352.

18. Personal accountability for reprisals

To deter repetitive violations, those responsible for whistleblower reprisals should be held accountable. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they will not get away with it, and they may be likely to be rewarded for trying. The most effective option to prevent retaliation is personal liability for those found responsible for violations.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 23.

Non-US national laws:

- Albania WPA, Article 23;
- Australia PIDA, sections 14 and 19, Corporations Act, sections 1317AE, 1317G(1G), 14ZZA, 14ZZY and 14ZZZ;

- Bangladesh WPA, section 9;
- Botswana WPA, sections 18–22;
- Cayman Islands WPA, Part 4, sections 19 and 22-3;
- Croatia WPA, Articles 312 and 34-5;
- France WPA, Article 6FC;
- Guyana WPA, section 24(2);
- Ireland PDA, sections 13 and 16(3);
- Israel, Protection of Workers (Disclosure of Offenses and Harm to Integrity or to Proper Administration) Law (Amendment No 2), 5768-2008;²¹
- Italy WPA, section 6;
- Jamaica PDA, section 23;
- Kosovo WPA, Article 27;
- Moldova, Article 18;
- North Macedonia WPA, Articles 9(5), 16-21;
- Pakistan WPA, Articles 17–18;
- Republic of Korea ACA, Articles 20(4) and 30-1;
- Romania WPA, Article 9;
- Rwanda WPA, Article 19;
- Serbia WPA, Article 37–8;
- Slovakia WPA, section 18;
- Uganda WPA, section 16;
- Vietnam WPA, Article 57.1.d; and
- Zambia PIDA, sections 42(1), 46 and 50.

US:

- SOX, 18 USC 1514A(a) and (c); and
- WPA, 5 USC 1215.

MAKING A DIFFERENCE

Whistleblowers will risk retaliation if they think that speaking up will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public: positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures primarily enact whistleblower laws to make a difference for society.

19. Credible internal corrective action process

²¹ See www.loc.gov/law/foreign-news/article/israel-whistleblowers-protection accessed 30 October 2020.

Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the aim of whistleblowing through an internal system is to provide organisations with an opportunity to address internal failings before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised in the process, receive progress reports, contribute to the record and assess whether there has been a good faith resolution. While whistleblowers are reporting parties rather than investigators or finders of fact, they are typically the most knowledgeable and concerned witnesses in the process. The entire package then should be in the public record. As experience under the US WPA illustrates, whistleblowers' evaluation comments often lead to significant improvements and change conclusions, as well as calling bluffs on the public record about the report's official 'final word'. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the organisation's website.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Articles 8–12.

Non-US national laws:

- Australia PIDA, sections 9–12, 18–19, 43–54 and 74;
- Belgium WPA, Articles 12 and 14;
- Croatia WPA, Articles 17–21;
- Guyana WPA, sections 4–6 and 12–16;
- Ireland PDA, Schedule 3, section 18;
- Jamaica PDA, sections 18 and 19, Third Schedule;
- Japan WPA, Article 9;
- Kenya WPA, sections 7.1-3, 8.2.b, 9, 22.1-2 and 33;
- Kosovo WPA, Articles 16–18;
- Latvia WPA, section 7;
- Malaysia WPA, sections 12–13;
- Namibia WPA Parts 5.32-6 and 6.37-43;
- New Zealand PDA, section 15;
- North Macedonia WPA, Articles 4 and 5;
- Republic of Korea ACA, Articles 6–10 and 30;
- Serbia WPA, Articles 14, 15 and 18;
- Slovakia WPA, sections 11–12;

- Vietnam WPA, Articles 9.1.c, 11.2.d and 40 and
- Zambia PIDA, section 58.

US:

- WPA, 5 USC 1213.

20. Transparency and review

The above criteria are useful in evaluating whistleblower laws on paper. Having a law on paper, all too often, is insufficient for a range of reasons. As this study indicates, predominantly, whistleblowers do not get satisfaction or laws remain dormant. Accordingly, maximum transparency and mechanisms that facilitate regular review are recommended. Every whistleblower law should include a formal review process that tracks how many use the new anti-retaliation rights, whether they have proven effective empirically and what changes should be enacted based on lessons learned. It is essential to include a scheduled process to act on these lessons through legislative review.

BEST PRACTICES

EU:

- EU Whistleblower Protection Directive, Article 27.

Non-US national laws:

- Albania WPA, Article 22;
- Australia PIDA, section 82A, Corporations Act, section 1317AK;
- Canada PSDPA, Article 54;
- Cayman Islands, Part 6, section 41;
- Ireland PDA, section 2;
- Jamaica PDA, sections 21 and 27;
- Japan WPA, Supplemental Provisions, Article 2.

The effectiveness of whistleblower laws in reality

Methodology

RESEARCH QUESTIONS

The basis for this study is a systematic examination of publicly available decisions on claims brought under respective national whistleblower laws. Our primary research questions are:

1. Are whistleblowers making disclosures? If so, using what channel?
2. Are whistleblowers utilising the law by bringing retaliation claims in an appropriate forum?
3. Are whistleblower retaliation claims against employers being upheld?
4. Are whistleblowers receiving remedies, such as injunctive relief, back pay, reinstatement and compensation?

RESEARCH METHODS

From 2018–2020, we analysed whistleblower retaliation cases in 37 countries with whistleblower laws.²² This represented every country with a standalone anti-retaliation whistleblower law enacted prior to 2018. The group of countries required analysing cases in 21 languages. In order to do so, we relied on numerous legal researchers from around the world, who found and analysed case law.

Researchers primarily ran searches on court and/or government agency websites to find case decisions. When the researchers did not find decisions on court websites, they made additional efforts to find cases, including open internet searches for public literature on whistleblower cases, contacting respective courts' clerks, contacting government agencies handling the cases, or contacting national and international watchdog organisations or law firms who monitor them. Analysis relied solely on cases and excluded requests for protection, as this ensured that all the facts could be considered, as well as final outcomes.

Researchers sought information on how many whistleblower disclosures went to internal (employer), external (government agencies or persons designated to receive disclosures) or public (media) channels.

Researchers also sought information on whistleblower retaliation cases from published final decisions and other sources on available recorded data. They included case names; gender; date of the decision and length of time from origination; whether the whistleblower was from the public or private sector; type of alleged retaliation; whether the whistleblower won or lost and if it was on procedural or substantive grounds; and what type of remedy was provided.

For most countries, we searched for and analysed whistleblower retaliation cases starting from the year the country enacted the law to 2018 because there were few available cases. However, in the UK and US, in only a one-year time period, there were hundreds of cases to analyse; therefore, we limited our analysis of these two jurisdictions to a one-year timespan. For the UK, we only looked at final case decisions from 2018. For the US, it

22 Comprehensive data is limited to the track record for challenges to employment retaliation. As discussed above, some countries have laws that include protection from civil and criminal liability for the protected whistleblower or public interest speech. Eg, our report notes seven whistleblower defence cases overall (in France, Italy, Kosovo, New Zealand and Uganda). In total, four out of seven whistleblower defence cases were successful (57 per cent). Overall, however, there is insufficient transparency for data to illustrate how well criminal and civil liability shields work in reality.

was necessary to adopt a hybrid approach by analysing corporate whistleblower cases in 2018, and, for federal employees with the Merit Systems Protection Board (MSPB), analysing cases in 2016 when the board last had quorum.

Assumptions

We assumed that in countries where there was no data available about the number of cases, there were instances of whistleblower retaliation complaints despite the lack of formal public records. We also assumed that if whistleblowers were not bringing retaliation cases, in many instances, it was for reasons *other than* the absence of retaliation [emphasis author's own]. For example, victims of reprisals may lack confidence that their rights can be vindicated or may lack resources, or such victims may fear worse retaliation if they defend themselves. Given that our researchers did not have access to full court documents, such as the complainants' briefs, we assumed, for the purposes of this study, that the facts stated in the decisions were an accurate portrayal of the whistleblower's claims (or defence when applicable). However, there may be some inaccuracies resulting from judicial²³ errors, oversights or misrepresentations in the final dispositions of cases we were able to access. We also assumed that informal settlements were taking place despite the lack of publicised data pertaining to their existence.

23 The word 'judicial' is used here as shorthand: final decisions were rendered by an array of decision-maker types including the judiciary, tribunals and commissions responsible for enforcing the whistleblower law.

Case studies

Americas

CANADA

In November 2005, the Government of Canada enacted the Public Servants Disclosure Protection Act, SC, 2005 c 46.²⁴ Our research found eight whistleblower retaliation cases on the Public Servants Disclosure Protection Tribunal's online database. In the eight cases, three complaints were from the same case and controversy; all three complainants settled. Only two out of eight cases received a decision on the merits. In both instances, the tribunal ruled against the whistleblower. In one of the decided cases before the tribunal, it took 580 days from the time the tribunal complaint was filed until the tribunal reached a decision. When counting from the initial stage reprisal complaint to the ultimate decision, this time delay stretched to 2,398 days before resolution. In the other decided case, it took 833 days at the tribunal before a decision was rendered, and 2,501 days overall. Five cases settled in mediation and the parties withdrew, representing the settlement of three controversies overall. The tribunal suspended one case (filed in 2011) while pending a decision in federal court proceedings that are still ongoing. It is noteworthy that only eight whistleblowers representing six controversies were allowed to bring reprisal claims before the tribunal between 2005 and January 2020, when 358 complaints were submitted to the Integrity Commissioner's Office in that window.²⁵ As the Integrity Commissioner must approve whistleblowers' requests to commence tribunal proceedings, this minimal track record indicates that the commissioner is acting as a barrier to those seeking to enforce their legal rights.

A 2017 report from Ryerson University's Centre for Free Expression, *What's Wrong with Canada's Federal Whistleblowing System*, provides an in-depth analysis of the systemic issues hampering the law's effectiveness.²⁶ It is positive that five whistleblowers (representing three controversies) received relief through settlement agreements, and that this information is publicly available. On the other hand, it is concerning that the law is nearly entirely dormant. Of the two cases ultimately determined on the merits, the whistleblower was unsuccessful in both, while each took an extended period of time. It takes tenacity and financial resources for any whistleblower to sustain a reprisal dispute for over six years, only to lose.

JAMAICA

The Government of Jamaica enacted the Protected Disclosures Act 2011 in August 2012.²⁷ Our research did not find any formally reported whistleblower disclosures or retaliation cases brought under this law on any court or government databases.

PERU

In June 2010, the Government of Peru enacted a whistleblower protection law (Law No 29542)²⁸ and the related Regulation Supreme Decree No 038-2011-PCM.²⁹ Peru's law provides protection to those whose complaints concern acts committed by public officials within the framework of a public entity. In January 2017, Peru also

24 See <https://laws-lois.justice.gc.ca/eng/acts/p-31.9> accessed 30 October 2020.

25 Interview with David Hutton.

26 See https://cfe.ryerson.ca/sites/default/files/whats_wrong_with_the_psdpa_0.pdf accessed 30 October 2020.

27 See https://japarliament.gov.jm/attachments/341_The%20Protected%20Disclosures%20Act,%202011.pdf accessed 30 October 2020.

28 See www.oas.org/juridico/PDFs/mesicic4_per_ley29542.pdf accessed 30 October 2020.

29 See www.oas.org/juridico/PDFs/mesicic4_per_ds038.pdf accessed 30 October 2020.

enacted an anti-corruption law (Legislative Decree No 1327)³⁰ and the related Regulation Supreme Decree No 010-2017-JUS,³¹ which together protect disclosures concerning criminal corruption offences.

Our research found that there are no formal public information records for whistleblower retaliation cases or disclosures. However, concerning Law No 29542, the National Institute of Statistics and Informatics (Instituto Nacional de Estadística e Informática or INEI) developed a study on complaints filed before the Comptroller General of the Republic.³² The INEI report referenced information regarding whistleblower complaints that were submitted to the Comptroller's Office but were dismissed due to the lack of compliance with the law's requirements. The INEI report disclosed 47 whistleblower cases that were thrown out. While the case data presented in the INEI report shows only cases that illustrate the most common mistakes when filing a complaint, it does indicate that whistleblower cases are being brought under Law No 29542. There is, however, a lack of adequate transparency concerning the details of their resolution. As such, we cannot meaningfully assess the effectiveness of Peru's whistleblower law for this study.

US

Introduction

The US was the first country to enact a whistleblower protection law. In 1970, President Richard Nixon signed the first whistleblower act into law, through witness protection in the Occupational Safety and Health Act.³³ In 1978, Congress passed the Civil Service Reform Act, which protects whistleblowing in federal agencies.³⁴ Since then, the federal government enacted approximately 60 whistleblower laws, all of them varying in standards and effectiveness. In terms of retaliation complaints, the volume of final decisions from judges or administrative judges in public sector retaliation cases was 3.5 times higher than the private sector. Overall, over a one-year period, less than ten per cent of workers across the public and private sector prevailed when they attempted to defend their rights through whistleblowing proceedings. In the federal government alone, just 10.8 per cent (seven out of 65) whistleblowers prevailed on the merits with rulings that agencies violated their WPA rights. In the private sector, 31.2 per cent of whistleblowers who filed due process complaints won decisions on the merits (five out of 16). However, if including settlements among the cases that were substantiated, the percentage of whistleblower victories was much more significant, although we were only able to obtain settlement information from the Department of Labor's report.

Remedial administrative agencies

Beyond the analysis of court cases, the track records of federal administrative agencies that handle whistleblower disclosures and retaliation complaints are contributing indicators of the effectiveness of US whistleblower laws. We examined the external federal administrative agencies in the US that public and private sector whistleblowers utilise most frequently for reporting whistleblower disclosures and retaliation complaints. Thus, the national data is anecdotal and not exhaustive of all whistleblowing. Overall, federal agencies did not consistently report compensatory damages awarded and cases relieved through settlement agreements. Our findings show that, generally, few whistleblower cases are referred for investigation and few are substantiated. Detailed track records

30 See <https://busquedas.elperuano.pe/download/url/decreto-legislativo-que-establece-medidas-de-proteccion-para-decreto-legislativo-n-1327-1471010-6> accessed 30 October 2020.

31 See https://cdn.www.gob.pe/uploads/document/file/18864/DS_N_010_2017_JUS.pdf accessed 30 October 2020.

32 See www.inei.gob.pe/media/MenuRecursivo/noticias/Directriz_Atencion_Denuncias_Ciudadanas_por_el_Sistema_Nacional_Control.pdf accessed 30 October 2020.

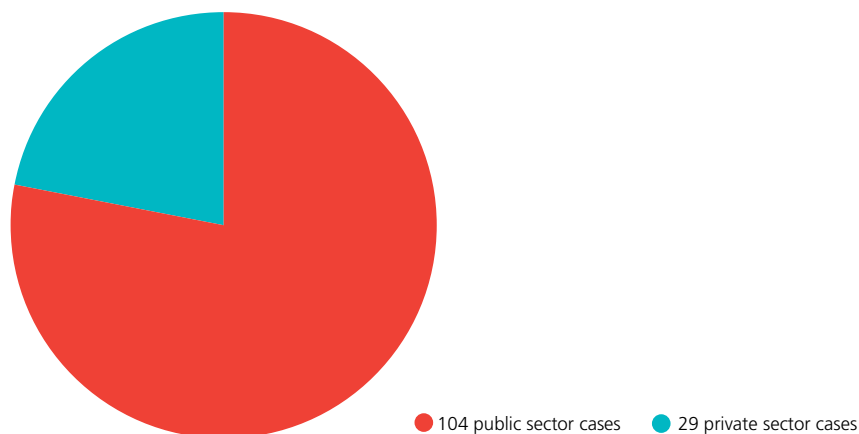
33 See www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg1590.pdf accessed 30 October 2020.

34 See www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg1111.pdf accessed 30 October 2020.

for the primary administrative agencies with authority to act on retaliation complaints and whistleblowing disclosures are summarised in Appendix 5.

Track record for whistleblower retaliation cases

Total cases: US



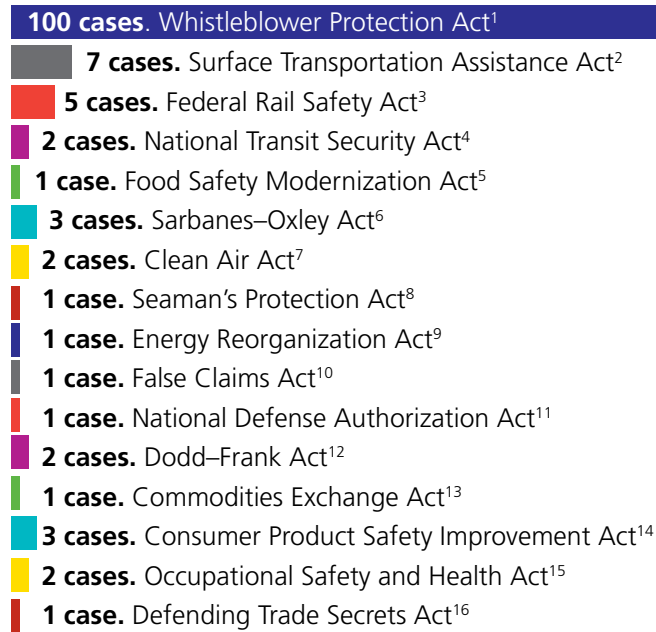
The US has a large quantity of due process case decisions per year arising from federal whistleblower laws. Our research of due process rulings analysed one year of final case decisions that were rendered in the 28 primary federal whistleblower protection laws in the public and private sectors,³⁵ 16 of which had reported decisions that year.³⁶ Our analysis focused on those in 2018 with one exception. Because the MSPB, which is the quasi-judicial agency responsible for adjudicating WPA claims for federal workers, has been without quorum since 2017,³⁷ we analysed WPA case decisions in 2016 to get a more accurate depiction of case outcomes over a one-year period. Our research found 133 case decisions, 104 of which were public sector workers and 29 were private sector workers.

35 This covers 23 US Department of Labor whistleblower laws, two NDAA laws 10 USC s 2409 and 41 USC s 4712, two Dodd–Frank laws 18 USC s 1514A and 7 USC s 26, and the WPA 5 USC s 2302.

36 Due to the congressional committee structure, the US does not have a single national whistleblower law except for the WPA of 1989, which covers all federal civil service workers. As a result, the US has some 106 federal statutes providing protection to different contexts or sectors of the economy.

37 Two out of three board members are required for quorum. There has been no quorum at the board since 2017. Therefore, we analysed cases from 2016. It is worth noting that one of the weaknesses of the effectiveness of the WPA is the lack of independence of the MSPB from political interference. The President nominates the members of the board and the Senate must confirm the nominees. The Former President Trump's delay in nominations prolonged the non-quorum, and the Senate's delay in confirming the nominees further prolonged the non-quorum.

Number of cases by US whistleblower law



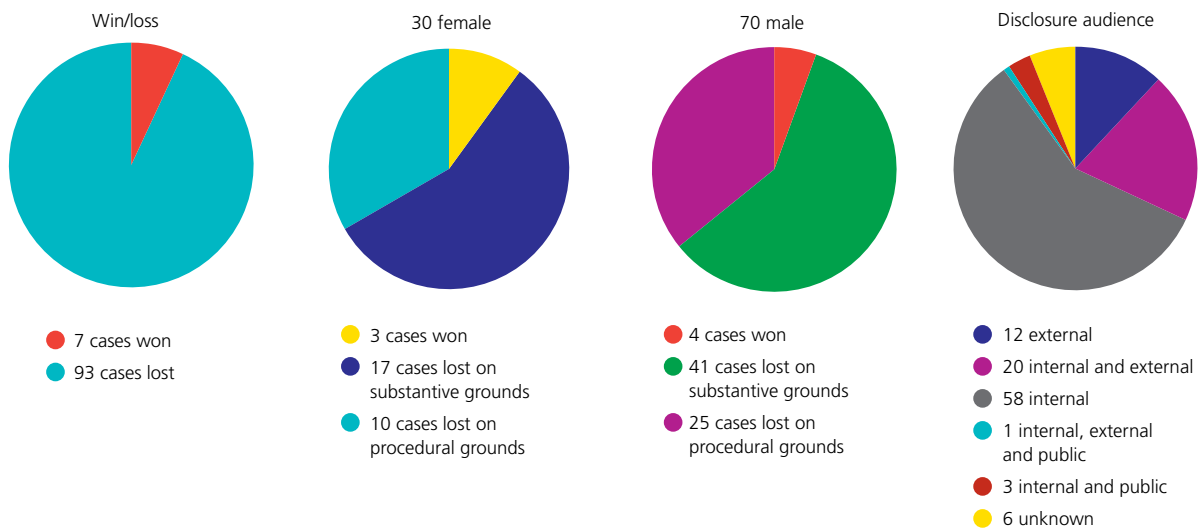
Notes

- | | |
|---------------------|---------------------|
| 1. 5 USC 2302(b)(8) | 9. 42 USC 5851 |
| 2. 49 USC 31105 | 10. 31 USC 3730(h) |
| 3. 49 USC 20109 | 11. 41 USC 4712 |
| 4. 6 USC 1142 | 12. 15 USC 78u-6(h) |
| 5. 21 USC 399d | 13. 7 USC 26(h) |
| 6. 18 USC 1514A | 14. 15 USC 2087 |
| 7. 42 USC 7622 | 15. 29 USC 660(c) |
| 8. 46 USC 2114 | 16. 18 USC 1833(b) |

Public sector results

Nearly all federal government employees seek relief through the WPA. However, a handful of corporate whistleblower laws provide jurisdiction for public or private employees. In 2018, there were decisions for federal employee whistleblowers under two statutes: the Clean Air Act and National Transit Security Act. The results are summarised below.

US public sector cases under the US Whistleblower Protection Act



WPA

The US government passed the WPA, which became Public Law No 101-12, in April 1989.³⁸

MSPB

The MSPB is the designated administrative forum to adjudicate WPA claims. Due process in court is not available for federal government employees to enforce their WPA rights, although it is common in corporate statutes. Although the MSPB lacked a quorum to issue final decisions in 2017 and 2018, the board's fiscal year 2018 annual performance report shows they received 25 stay requests to administrative judges in whistleblower cases. Curiously the board's annual report does not have data on the number of petitions granted. There were 648 appeals in MSPB regional and field offices.

According to the MSPB's fiscal year 2016 report, MSPB administrative judges, from whom employees seek temporary relief, received 24 stay requests in whistleblower cases from employees, but the board did not disclose how many were granted.³⁹

Based on a case-by-case review, in fiscal year 2016, the MSPB's board made final decisions in 100 cases. Seven case decisions on the merits were in favour of the whistleblower, and 58 lost on the merits (a 10.8 per cent win ratio). If the additional 35 who lost on procedural grounds are considered, the net record is a seven per cent win ratio.

Public-private whistleblower laws

Some US laws protect either public or private employees who blow the whistle on relevant statutory violations. In 2018, there were four decisions under two of those statutes, with whistleblowers having a 2-0 record for decisions on the merits, or 2-1 net after a procedural loss is added.

National Transit Systems Security Act

The OSHA of the US Department of Labor implements 23 whistleblower statutes protecting workers from retaliation for reporting violations of workplace safety, health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor safety, vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime and securities laws.⁴⁰

The government passed the National Transit Systems Security Act (NTSSA),⁴¹ 6 USC section 1142, which became Public Law No 110-53 in August 2007.⁴² The NTSSA protects public transportation agency workers. The case decisions found under the NTSSA were all public sector employees. Therefore, we analysed this section separately from the other OSHA statutes that were all private sector employees. Our research found two cases. Both lost on the merits, and both made internal disclosures. One case took 1,126 days to reach a final decision and the other's length of time could not be determined.

38 The WPA was amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub L No 112-199 www.congress.gov/bill/101st-congress/senate-bill/20/text accessed 30 October 2020.

39 See www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1374269&version=1379643&application=ACROBAT accessed 30 October 2020.

40 See www.whistleblowers.gov/sites/wb/files/2019-12/WB-Statute-Summary-Chart-10.8-Final.pdf accessed 30 October 2020.

41 Enacted as s 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007.

42 See www.congress.gov/110/plaws/publ53/PLAW-110publ53.pdf accessed 30 October 2020.

Clean Air Act

The Clean Air Act 1997,⁴³ 42 USC section 7622, also protects both private and public sector employees. During 2018, our research found decisions in Clean Air Act whistleblower cases that were from the public sector; therefore, we decided to present our findings separately from the statutes for private sector workers. Out of two cases, one won and one lost, resulting in a 50 per cent success rate. One whistleblower made disclosures to internal, external and public audiences, and the other made disclosures internally.

Private sector results

Our research covered the 14 private sector whistleblower statutes with 2018 final decisions. We combined these cases for analysis; however, it is worth noting that the venues available for administrating and adjudicating these statutes differ. The Department of Labor, for example, is responsible for enforcing 23 occupational safety and health laws, including SOX⁴⁴ that applies to publicly traded companies. At the administrative level, the Securities and Exchange Commission (SEC) is an option for the administrative enforcement of anti-retaliation rights for relevant whistleblowers under the Dodd–Frank Wall Street Reform and Consumer Protection Act ('Dodd–Frank'), which went into effect in July 2010. The same applies to Commodity Futures Trading Commission (CFTC) enforcement of rights created under Dodd–Frank. The Offices of Inspectors General (OIG) conduct initial investigations to enforce protection for federal contractors and grantees under the NDAA, 10 USC section 2409 and 41 USC section 4712.⁴⁵ If whistleblowers do not obtain relief at the administrative level, nearly all laws enacted since 2002 permit them to start fresh, or *de novo*, with a federal district court jury trial. The Dodd–Frank statutes permit direct court access without exhausting administrative remedies, but only with a judge on a bench rather than a jury trial.

Our research found 29 case decisions in the private sector. For final decisions on the merits, five claimants won and 11 lost: a 31 per cent success rate. If 13 additional procedural losses are considered, the net record was 5-24, or 17 per cent. Eighteen of the disclosures were to internal audiences, one was to internal and external audiences, four were to external audiences and six were unknown.

Of the five whistleblowers who prevailed, we found information on financial relief in three cases. Because the types of financial relief differ and because reporting on the amounts differ from case to case, we present the relief in the four cases without totalling the final amounts as doing so would not accurately portray whistleblower awards. Case 1 received \$655,198.90 in back pay, \$10,000 in compensatory damages and \$225,000 in punitive damages. Case 2 received \$2,167.15 in back pay and compensatory damages, and punitive damages were remanded to the below court for determination. Case 3 received back pay plus interest (amount not revealed), US\$50,000 in compensatory damages and \$10,000 in punitive damages.

43 See www.govinfo.gov/content/pkg/USCODE-2018-title42/pdf/USCODE-2018-title42-chap85-subchapIII-sec7622.pdf accessed 30 October 2020.

44 SOX (2002) 18 USC s 1514A protects employees of all publicly traded corporations from retaliation for reporting mail, wire, bank or securities fraud; violations of SEC rules and regulations; or violations of federal laws related to fraud against shareholders www.law.cornell.edu/uscode/text/18/1514A accessed 30 October 2020.

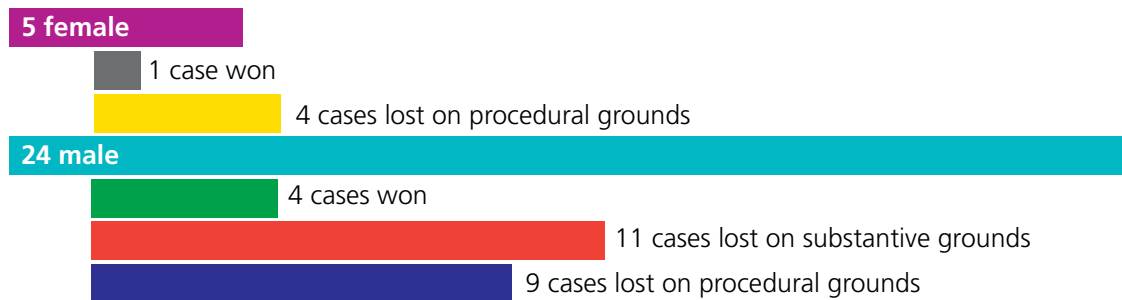
45 The NDAA does not cover disclosures that relate to an activity of any element of the intelligence community including the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, the National Reconnaissance Office or the intelligence elements, offices or bureaus of other federal agencies. For more information, see www.zuckermanlaw.com/wp-content/uploads/2014/01/Whistleblower-Protections-Under-the-National-Defense-Authorization-Act-w-008-5821.pdf accessed 30 October 2020.

US private sector cases

Win/loss



Gender



Disclosure audience



Financial relief

Case 1:

- \$655,198.90 in back pay;
- \$10,000 in compensatory damages; and
- \$225,000 in punitive damages.

Case 2:

- At least \$2,167.15 in back pay and compensatory damages; and
- punitive damages to be determined on remand.

Case 3:

- Back pay plus interest;
- \$50,000 in compensatory damages; and
- \$10,000 in punitive damages.

What we learned

The national data showed that the US system is successful in certain respects. It is significant when 10.8 per cent of federal and 31 per cent of corporate employees formally won retaliation claims, and a far larger percentage obtained informal relief. Prior to the passage of these rights, however imperfect, those numbers straddled zero. Further, there is considerable transparency and public access to information that allows more complete analysis, although there is a lack of consistency in government agency reporting in some respects, and some important information is missing from federal agency reports. Another success is the large volume of utilisation

of investigative agencies to report misconduct, as well as utilisation of remedial agencies and courts to challenge whistleblower retaliation (see Appendix 5).

Unfortunately, there are many troubling issues highlighted by our findings. The number of disclosures referred for investigation and the number of substantiated cases is low. The glitz and glamour of large government financial recoveries resulting from whistleblower disclosures and occasionally high rewards given to them in exchange for information distracts from volumes of cases that go uninvestigated, unclosed or unsubstantiated. The lack of a streamlined reporting channel makes it challenging to obtain national data on the total number of whistleblower disclosures each year, given the large quantity of federal investigative agencies. Another gaping hole in tracking information is the US Congress, which does not have a system for tracking the volume or subsequent resolution of disclosures to the legislature, although it is generally known to receive many disclosures.

Overall, the information analysed in Appendix 5 indicates that the number of people making whistleblower disclosures is significantly higher than the number of retaliation cases (9,277 retaliation complaints versus 602,392 disclosures, or 1.5 per cent).⁴⁶ Although one could infer that most whistleblowers do not experience retaliation, it is important to also consider the lengthy litigation process, the relatively low success rate, and the low compensatory damages precedence, which are likely to be factors for dissuading whistleblowers from filing formal retaliation complaints. Further, the OIG, SEC and CFTC hotlines, which channel the majority of disclosures, provide anonymity, making them less effective but less risky. It is difficult to draw conclusions about the true volume of retaliation – we are limited to analysing those who choose the uphill challenge of filing a whistleblower retaliation complaint.

Asia and the Pacific

AUSTRALIA

The Government of Australia passed the Public Interest Disclosure Act 2013 (Cth),⁴⁷ and the Treasury Laws Amendment to the Corporations Act 2019 (Cth).⁴⁸ The former exclusively protects federal government employees and contractors (there are also equivalent laws for regional government employees). The latter significantly strengthened protection for private sector employees found in the Corporations Act 2001 (Cth). As these amendments were not introduced until 2019, they are excluded from this portion of the study, but their features are credited in the above section on best practices.

We found three retaliation cases under PIDA. Of the three cases, two whistleblowers lost on the merits and one settled. In the two cases where the court rendered a decision, the window from commencement to decision was 248 and 1,058 days (the latter involved a self-represented complainant in poor health, exacerbating the delay). Notably, in both cases, the whistleblowers were ordered to pay the opposing party's costs. Section 18 of PIDA precludes an order for costs unless the court is satisfied that the applicant instituted the proceeding vexatiously or without reasonable cause, or that the applicant's unreasonable act or omission caused another party to the proceeding to incur the costs.

46 The total figure of retaliation cases includes the number of formal complaints analysed in this study with the number of reported retaliation complaints to federal administrative agencies OSHA and OSC (for OSC, we used the number of active and pending cases reported in fiscal year 2018). The SEC, CFTC and OIGs did not have data available on retaliation complaints. To calculate the total number of national disclosures, we combined the number of disclosures reported by OSC, SEC, CFTC and OIGs with the number of whistleblower retaliation complaints. It is worth noting that some of the retaliation complainants may be double-counted because agencies may have reported the same complainants in the number of people who made a disclosure to them. It is also worth noting that the actual number of disclosures is likely to be much higher, and this study did not examine every administrative agency that received whistleblower disclosures.

47 See www.legislation.gov.au/Details/C2013A00133 accessed 30 October 2020.

48 See www.legislation.gov.au/Details/C2019A00010 accessed 30 October 2020.

BANGLADESH

The Government of Bangladesh passed the Public Interest Information Disclosure Act 2011, which came into force on 21 June 2011.⁴⁹ The law protects any person who discloses public interest information to a competent authority. However, our research did not find any reported whistleblower retaliation case decisions or public reports with information on the number of disclosures.

JAPAN

The Government of Japan passed the WPA (Act No 122 of 2004), which came into force on 1 April 2006.⁵⁰ It is worth noting that on 8 June 2020, Japan's parliament passed an amendment to the Act to increase the protection for whistleblowers. The 2020 Amendment will take effect by June 2022.⁵¹ The WPA covers private sector employees and public sector employees in limited circumstances.⁵²

Our research found 30 whistleblower retaliation cases: 28 were from the private sector and two were public sector workers. Four involved males, but the gender of the remaining complainants was unknown. Twenty-five of the whistleblowers failed to prevail on substantive grounds. Only one out of 30 was a clear merit win (3.3 per cent). It is worth noting, however, that the whistleblowers obtained full relief in four of the cases where the judge ruled that final retaliation findings were unnecessary because the challenged action was an illegal 'abuse of authority over personnel matters' (illegal dismissal in three cases and transfer in one).⁵³ While these cases did not prevail under the merits on their whistleblower claim they still obtained relief by filing it. Of the four cases prevailing on abuse of authority grounds, two received back pay and compensatory damages and attorneys' fees, one received compensatory damages and attorneys' fees, and one received back pay only.

Fifteen out of 30 whistleblowers made disclosures to external audiences, nine to internal audiences, three to internal and external audiences and two to public audiences. One falls into an 'other' category because the plaintiff alleged the whistleblowing activity was access to the defendant's email system and thus no disclosure to any audience was made.

Overall, Japan has seen some utilisation of claims under its law since it came into force in 2006. The earliest judgment was in 2008. If evaluating all abuse of authority wins as a success (ignoring negative rulings on WPA claims), then five out of 30 cases (30 per cent) prevailed on either whistleblowing or its abuse of authority 'substitute'.

MALAYSIA

49 See <https://repatriatescir.blogspot.com/2018/01/publication-of-public-interest.html> accessed 30 October 2020.

50 See www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=2&dn=1&x=49&y=4&co=01&ia=03&ja=04&ky=whistleblower&page=1 accessed 30 October 2020.

51 The 2020 Amendment requires business entities to: (1) appoint a person who engages in receiving whistleblowing reports, conducting investigations and taking remedial actions; and (2) establish a necessary system to deal with whistleblowing reports. Business entities with 300 or fewer employees are obliged to make an effort to have a whistleblower policy and procedure. Because the authors had not received the text prior to publication, these new provisions are not credited for Japan in the best practices criteria.

52 The following public sector employees are excluded: (1) national public officers in the regular service; (2) court officers to whom the Act on Temporary Measures concerning Court Officer is applicable; (3) Diet officers to whom the Diet Officers Act is applicable; (4) Self-Defense Force personnel specified in para 5 of Art 2 of the Self-Defense Forces Act; and (5) local public officers in the regular service.

53 In Japan, a dismissal is an abuse of authority if: (1) there is no reasonable ground; or (2) dismissal is disproportionately harsh. This principle is stipulated in Art 16 of the Labor Contract Law, ie, 'If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid'. This principle is based on para 3 of Art 1 of the Civil Code of Japan, ie, 'No abuse of rights is permitted'. One possible rationale for the judge's utilisation of abuse of authority standards above the WPA is because the burden of proof for plaintiffs makes it too difficult to show the link between whistleblowing and occupational detriment. However, there is a significant accumulation of case law on abuse of power claims, and it is easier for plaintiffs to prevail using its burden of proof standard.

The Government of Malaysia passed the WPA 2010 (Act 711) in June 2010, and it became effective in December 2010.⁵⁴ Our research for formal decisions in the public record found six retaliation cases. Of those cases, two whistleblowers won, one lost on the merits and three lost on procedural grounds. Of the two successful cases, only one sought financial relief. In that case, the award was the equivalent of US\$734. Only one case sought interim relief, and the court granted it. Two whistleblowers made their disclosures to external audiences, two to public audiences, one to internal, external and public audiences and two to both internal and external audiences. Of the six cases, the average length of time to decision was 473 days, and the range was 273–730 days.

These statistics reiterate that effective protection requires cultural as well as legal changes. Malaysia's law provides whistleblowers with the infrastructure to bring a retaliation claim, and a one-in-three success rate shows the law is going some way towards protecting those who make disclosures against their employers. However, that only six formal decisions were made between 2010 and 2018 suggests the law is being underutilised. Laws are only effective if they are known about and lawyers know how to use them. The prevalence of cases that did not succeed on procedural grounds indicates that lawyers, as well as the law, may be a barrier to the effective enforcement of whistleblowing rights; continuing legal education to raise awareness about these laws and their intricacies may assist.

NEW ZEALAND

In New Zealand, anti-retaliation protection is available in the Employment Relations Act 2000⁵⁵ and the Protected Disclosures Act 2000.⁵⁶ Our research found 11 retaliation cases under the latter law. Of the 11 cases, eight lost on the merits, two won on the merits, one won as a whistleblower defendant claiming immunity and one settled. In four instances, the whistleblowers were ordered to pay the opposing party's costs in addition to their own.⁵⁷

These statistics reveal the indirect ways legal proceedings can deter whistleblowers from coming forward or bringing a retaliation claim. 'Loser pays' rules are particularly disadvantageous to those already unemployed and without income. Further, whistleblowers frequently are self-represented, trying to act on their rights through trial and error. Without the benefit of professional legal counsel, whistleblowers are more likely to be regarded as disruptive plaintiffs bringing meritless claims than altruist citizens.

REPUBLIC OF KOREA

The Government of the Republic of Korea passed two laws that extend protection to whistleblowers: The Protection of Public Interest Whistleblowers (공익신고자보호법),⁵⁸ which went into effect in September 2011 and applied to the public and private sectors, and the Act on The Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission ('ACRC'), which went into effect in January 2002 and applied only to the public sector.⁵⁹

54 See www.bheuu.gov.my/pdf/Akta/Act%20711.pdf accessed 30 October 2020.

55 See www.legislation.govt.nz/act/public/2000/0024/112.0/DLM58317.html accessed 30 October 2020.

56 See www.legislation.govt.nz/act/public/2000/0007/latest/DLM53466.html accessed 30 October 2020.

57 See eg, www.nzlii.org/nz/cases/NZEmpC/2014/111.html and www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZERA/2013/767.html?query=%22Protected%20Disclosures%20Act%202000%20%22 and www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZERA/2011/648.html?query=%22Protected%20Disclosures%20Act%202000%20%22 accessed 30 October 2020.

58 See www.acrc.go.kr/en/data/2.0.Act%20on%20the%20Protection%20of%20Public%20Interest%20Whistleblowers.pdf accessed 30 October 2020.

59 See www.acrc.go.kr/en/data/1.0.ACRC%20Act.pdf accessed 30 October 2020.

Case results

Our research did not find any publicly reported decisions in whistleblower retaliation cases. However, the ACRC has published reports showing statistics about disclosures and requests for protection, including from retaliatory adverse personnel actions.

Statistics from ACRC reports

We are unable to verify the accuracy of data presented in the reports because we do not have access to the original case data used and some of the findings omit important information, such as the outcomes of public interest disclosures.

The ACRC has published information on their website and public reports evaluating the progress of their whistleblower programme. The commission also provided the authors of this study with an unpublished report with more recent data on corruption reporters and public interest whistleblowers' requests for protection. The data provided by the ACRC indicates that they are making disclosures and they know what channels to use. The data also indicates a lack of final decisions on retaliation claims. However, that does not necessarily mean that whistleblowers are not utilising the law. Rather, the Korean strategy is designed to protect and prevent retaliation, more than to fight back. The substantial payouts made under the reward programme and the ACRC statistics on the 'guarantee of position' are evidence that whistleblowers are receiving remedies. Below are selective indicators of how the programme is working.

Disclosure investigations

The ACRC published a report showing how many corruption disclosures and public interest disclosures were received and handled from 2009–2019.⁶⁰ The ACRC only reported outcomes concerning the corruption disclosure investigations (the findings reflect a trend of extremely small percentages of substantiated disclosures) not the public interest disclosures.

⁶⁰ See www.acrc.go.kr/en/board.do?command=searchDetail&method=searchList&menuId=02031607 accessed 30 October 2020.

Corruption report cases

Year	Received	Handled	Referred	Notified as violations of the code of conduct	Percentage of non-referred disclosures resulting in a violation determination ⁶¹
2009	2,693	2,695	106	47	1.8
2010	3,099	3,066	81	73	2.4
2011	2,529	2,546	73	80	3.3
2012	2,527	2,529	74	79	3.2
2013	3,735	3,670	139	43	1.2
2014	4,510	4,481	236	53	1.2
2015	3,885	3,904	296	75	2.1
2016	3,758	3,735	324	67	2.0
2017	4,066	3,966	221	48	1.2
2018	7,328	7,224	306	78	1.1
2019	9,435	8,701	398	203	2.2

Public interest report cases

Year	Received	Handled	Referred
2009	No data	No data	No data
2010	No data	No data	No data
2011	292	227	8
2012	1,153	1,113	104
2013	2,887	2,509	73
2014	9,130	8,239	168
2015	5,771	7,089	90
2016	2,611	2,560	79
2017	2,521	2,238	85
2018	3,923	3,952	37
2019	5,164	5,165	388

Reward programme results

Between 2008 and 2015 (an eight-year period), the government gave rewards in 209 cases amounting to \$6.3m, which is 8.6 per cent of the total recovered public funds. As of July 2015, the largest award was \$978,580.

Protective measures results

Overall, the ACRC's unpublished report shows that from September 2011 (the date the law was enacted)

⁶¹ This calculation was added for the purposes of this report and was not included in the commission's article. Our analysis was on cases received and the outcome for all the non-referred intakes.

to December 2019, there were 329 requests for protection from public interest whistleblowers.⁶² Of those requests, 20 sought to 'prohibit disadvantageous measures', meaning employment actions such as termination, suspension, economic disadvantages, wage discrimination, termination of goods contracts, cancellation of permits or licenses, or bullying. Only three out of the 20 requests to prohibit disadvantageous measures were accepted (15 per cent).⁶³ Unfortunately, the report does not clearly demonstrate how many of the public interest whistleblower protection requests were successful.

VIETNAM

The Government of Vietnam adopted the Law on Denunciation in November 2011 (Law No 03/2011).⁶⁴ The 14th National Assembly adopted revisions to the Law on Denunciation in 2018, which took effect in January 2019.⁶⁵ The 14th National Assembly also adopted the 2018 revised Law on Anti-Corruption after years of debate, which took effect in January 2019.⁶⁶ Our research did not find any publicly reported court decisions on whistleblower retaliation cases brought under the whistleblower laws. However, according to Transparency International Vietnam (TIV), the Anti-Corruption Bureau of the Government Inspectorate reported that from 2011 to 2015 the authorities received 699 requests for protection from whistleblowers, including 99 from those who reported corruption.⁶⁷ Only one-third of the requests were processed.⁶⁸ TIV's summary of the report findings does not specify the specific outcomes of protection requests that were processed. In December 2016, the Vietnam Government Inspectorate reported that it received and handled 69,267 disclosure forms related to about 45,197 cases.⁶⁹ There were 86,463 disclosures about corruption solved by authorities in all government and local levels within ten years of the implementation of the Law on Anti-Corruption, but the findings from the disclosures and results were not clear from the report.⁷⁰

There may be a cultural explanation for the significant discrepancy between the number of requests for protection from whistleblowers made to the Anti-Corruption Bureau of the Government Inspectorate and the Vietnam Government Inspectorate, and the absence of court decisions on whistleblowing retaliation cases. The 2013 Global Corruption Barometer revealed that only 38 per cent of responding Vietnamese citizens were willing to denounce corrupt acts.⁷¹ Fifty-one per cent responded that their reluctance to report corruption came from a belief that 'it wouldn't make any difference' and 28 per cent said they were 'afraid of the consequences'. A similar survey conducted by the Government Inspectorate and the World Bank found that 62 per cent of respondents said they were hesitant to denounce corruption because they feared reprisals.⁷²

The lack of data on the outcomes makes it difficult to assess whether requests are prevailing and remedies are being received. What is clear from the statistics is that Vietnamese whistleblowers are making disclosures, but they are only rarely utilising the retaliation protection in the law.

62 The annual breakdown of the requests for protection shows that there has been a large increase of requests from public interest whistleblowers. In 2017, there were only 28 requests, and by 2019, there were 168.

63 The commission did not define what it meant by accept, so it is not clear if these cases prevailed or were merely accepted for investigation.

64 See <https://drive.google.com/open?id=1h-6I9fMFplaiLoHo1Etc01MF-hKpOZG> accessed 30 October 2020.

65 See <https://drive.google.com/open?id=1TkiV9YFoiJN1YtZwoN0PizzbPQyVWxb7a> accessed 30 October 2020.

66 See www.economica.vn/Content/files/LAW%20%26%20REG/Law%20on%20Anti-Corruption%202018.pdf accessed 30 October 2020.

67 Towards Transparency (TT) Vietnam Law Magazine (Hanoi, 29 May 2016) <http://vietnamlawmagazine.vn/corruption-whistleblowers-protection-mechanism-under-current-laws-5374.html> accessed 30 October 2020.

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 Towards Transparency (TT), National Contact of Transparency International (TI) in Vietnam, the 2013 Global Corruption Barometer – Views and experiences from Vietnamese citizens.

72 Government Inspectorate and World Bank, Corruption from the views of citizens, enterprises and officials and civil servants, 2013, p 68.

Europe

ALBANIA

The Government of Albania passed the Law on Whistleblowing, which came into effect in October 2016 for the public sector.⁷³ Article 10 of the law, which applies to the private sector, came into effect in July 2017.⁷⁴ Our research did not find any publicly reported case data under this law or reports on whistleblower disclosures.⁷⁵

The law requires private entities with more than 100 employees and public entities with more than 80 employees to establish internal whistleblower reporting units, as well as procedures for protection against retaliation. Resistance from the private sector impacted the effectiveness of the new law during the initial phase of establishing internal reporting units. Some businesses considered the process a 'state intervention in private affairs'.⁷⁶ Others simply refused to establish the internal reporting units.⁷⁷ There were also reports of private companies facing difficulties with regard to the composition of these internal reporting units, revealing the unpopularity of whistleblowers. Internal reporting units should be composed of one or more employees, but one large business sent an official response to the High Inspectorate of Declaration and Audit of Assets and Conflicts of Interest (HIDAACI) asking how to find an employee who would exercise the function. Employees of the company were not wanting to accept or fulfil this role.

Given the problem of corruption and malpractice in the public sector there has been less attention to support action on implementing the whistleblower law in the private sector. The resistance to establishing reporting units stemming from employee prejudice underscores the importance of awareness-raising campaigns. Awareness-raising actions have been undertaken recently by local civil service organisations.⁷⁸ However, the HIDAACI's annual report in June 2018 included a chapter on the implementation of Albania's whistleblowing law, which highlighted that the achievements of awareness raising and new internal reporting units have been minimal. Out of 163 internal reporting units, only seven have reported one or two whistleblower cases, while eight other cases have been directly reported to the HIDAACI.⁷⁹ This may be because awareness raising was only provided in 32 out of the 609 internal reporting units meant to provide them.⁸⁰ The report also acknowledges that awareness-raising efforts were hampered by the misinformation presented by the Albanian media. Internal reporting units are frequently described in terms such as 'espionage structure', the law of 'spies' or the '007 of the business sector'.⁸¹ These definitions reinforce prejudice against the content and purpose of the law.

Nevertheless, there has been good faith government support for the reforms, and active oversight by the Center for the Study of Democracy and Governance, an effective national NGO. Many pioneer laws lack the bells and whistles in more advanced statutes. However, numerous international institutions consider the Law on Whistleblowing to be an important step in Albania's fight against corruption. The OECD Monitoring Report

73 See www.opengovpartnership.org/wp-content/uploads/2001/01/Albania_NAP3_ENG.pdf accessed 30 October 2020.

74 See http://partnersalbania.org/wp-content/uploads/2016/07/fletore_zyrtare_115-2016_Ligji_per_Sinjalizimin_dhe_mbrotjen_e_sinjalizuesve.pdf (Albanian) and <https://drive.google.com/open?id=1fX5YuWHfWfV1oGDamoTnFS1we3PyqaV> (English) accessed 30 October 2020.

75 Whistleblower cases from the private sector are yet to be recorded in Albania, as shown by the 2018 and 2019 HIDAACI reports. See: <http://www.ildkpi.al/raporte-vjetore/>

76 See <http://csdgalbania.org/the-implementation-of-the-law-on-whistleblowing-in-albania-faced-with-challenges> accessed 30 October 2020.

77 See <https://sot.com.al/politike/bizneset-refuzojne-ildkp-nuk-pranojne-futjen-e-spiunëve-për-denoncimin-e-afërave> accessed 30 October 2020.

78 See https://www.youtube.com/watch?v=iuVdcp3k4m8&fbclid=IwAR0DZOIRHBjYlg9a4_EMFbLRngRMHJPqluhAji7avWs3Kf5J4KfdbWtQY accessed 12 November 2020.

79 See <https://see-whistleblowing.org/2017-annual-report-shows-scanty-results-on-implementation-of-the-law-on-whistleblowing-in-albania> accessed 30 October 2020.

80 *Ibid.*

81 See <http://csdgalbania.org/the-implementation-of-the-law-on-whistleblowing-in-albania-faced-with-challenges> accessed 30 October 2020.

(November 2017) found the establishment of reporting units to be a well-advanced process. Thus, rights in this nation are a work in progress.

BOSNIA AND HERZEGOVINA

The Government of Bosnia and Herzegovina passed the Law on the Protection of Persons Who Report Corruption in Institutions of Bosnia and Herzegovina in early 2014.⁸² The law protects public sector whistleblowers. Our research found decisions in three cases. However, we were unable to find and analyse court decisions, and ultimately cannot verify that the whistleblowers brought their claims under the statute. Of the three cases identified independently, all whistleblowers won. In one, the whistleblower was awarded €15,000 in damages.⁸³ In another decision, the Agency for the Prevention of Corruption and Coordination of the Fight Against Corruption ('APIK') ordered reinstatement.⁸⁴ To obtain protection, employees must prove a probable connection between their report and the adverse action taken against them. The burden of proof falls on the employer to show the adverse action was lawful and justified.

Bosnia and Herzegovina's law is unusual in granting pre-emptive protection to employees before retaliation has occurred.⁸⁵ Employees can apply for pre-emptive protection from APIK, which has 30 days to respond. This status legally prevents a state institution from retaliating against an employee who has reported corruption under the law. While employees need not have suffered any reprisals when they apply for whistleblower status, there must be an 'objective prospect' of retaliation. The Ministry of Justice is then required to investigate any APIK application to determine if the request is legitimate.⁸⁶ Whistleblower status can be indefinite, unless revoked on the finding that the report was false. A fine of up to €10,000 can be imposed on individuals who fail to establish mandatory internal reporting procedures; ignore orders to stop retaliation against a whistleblower; and those who knowingly submit a false report of corruption.⁸⁷

The thoroughness of the law reflects the eagerness of the executive to encourage and support whistleblowers in Bosnia and Herzegovina. The death of whistleblower Milan Vukelić, a construction engineer who was killed after publicly accusing officials of corruption and the police of threatening him, gave impetus to the campaign for better protection. Vukelić was killed in 2007 by a car bomb that injured two others. Before his death, his mother's house had also been set on fire.⁸⁸ A two-year cross-party campaign involving NGOs and stakeholders resulted in unanimous support for the law from both Houses of Parliament.

This legislature's initiatives, however, do not align with the Bosnian and Herzegovinian public generally, reinforcing that a cultural shift is necessary for effective whistleblower protection. A 2013 survey of seven Western Balkan countries asked respondents why they would not report their personal experiences of corruption to authorities. For Bosnia and Herzegovina, the most popular reason given by 44 per cent of respondents was the belief that nobody would care.⁸⁹ The protection offered by the law is not well known, and many citizens fear

82 See www.ustavnisud.ba/public/down/Zakon_bs.pdf and www.paragraf.ba/propisi/republika-srpska/zakon-o-zastiti-lica-koja-prijavljuju-korupciju.html accessed 30 October 2020.

83 See <https://rm.coe.int/16806ffffb0> accessed 30 October 2020.

84 Interview with Stephen Kohn (13 February 2020).

85 Handbook for Enforcing the Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina, Centre for Responsible Democracy–Luna, March 2014.

86 See n 79 above, p 51.

87 *Ibid.*

88 Bosnia and Herzegovina, Whistleblower Protection in the Central and Eastern Europe Region www.whistleblowing-cee.org/countries/bosnia-and-herzegovina/research accessed 30 October 2020.

89 See http://rai-see.org/wp-content/uploads/2015/07/Whistleblower_Protection_in_SEE.pdf, at page, 17, accessed 12 November 2020.

that reporting crimes will cause problems for themselves or have no impact.⁹⁰ However, NGO coalitions, such as the Southeast Europe Coalition on Whistleblower Protection,⁹¹ have used the new rights for effective legal campaigns that surrounded initial victories. Attempts by the government to correct this perception do exist; the State Investigation and Protection Agency conducts awareness-raising programmes with the media.⁹²

FRANCE

The Government of France passed La Loi Sapin II (No 2016-1691) in December 2017.⁹³ Our research found decisions in two retaliation cases. Both cases lost. Both claimants worked in the public sector. It is worth noting that in 2017, one whistleblower successfully defended herself in a libel suit and prevailed when using whistleblowing as a defence (albeit not under La Loi Sapin II).⁹⁴

HUNGARY

The Government of Hungary passed a whistleblower law, Act CLXV of 2013 on Complaints and Public Announcements, which came into effect in January 2014.⁹⁵ The act provides anonymity for whistleblowers and enables the submission of complaints electronically using a designated reporting channel, which is operated by the country's fundamental rights commissioner (the ombudsman). Primarily, the ombudsman forwards the disclosures to the competent authorities, while secondarily, the ombudsman is entitled to examine disclosures on request or *ex officio* (meaning by virtue or because of an office) if such authorities properly follow up reports forwarded to them.

Our research did not find any reported case decisions under this law. According to an OECD report, since 2014 the ombudsman has received around 350 disclosures each year.⁹⁶ However, the majority were unrelated to allegations of offences, such as landlord-tenant conflicts. Only about two per cent involved corruption. According to the ombudsman's reports from 2014–2018, the ombudsman received 1,616 whistleblower disclosures.⁹⁷ Although this indicates high utilisation of the reporting mechanism, unfortunately there was a lack of reporting on the results of these disclosures.

IRELAND

The Government of Ireland passed PDA 2014, which came into force in July 2014.⁹⁸ The PDA provides protection to whistleblowing employees across all sectors, both public and private. Our research found two case decisions. Of the two cases, both lost: one on the merits and one on procedural grounds. There was a further case not

90 *Ibid.* at pg. 17.

91 See <https://see-whistleblowing.org> accessed 30 October 2020.

92 See https://rm.coe.int/16806ffffb0%20page%2014_p_14 accessed 30 October 2020

93 See www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id accessed 30 October 2020.

94 See https://drive.google.com/file/d/1OJIDg7_ZXNjLfsaO-AitroQNb6l0uO7/view?usp=sharing and <https://drive.google.com/file/d/1VpqjGIQoKOPAPDBLAyN04F0QnuloBx/view?usp=sharing>. See also www.liberation.fr/france/2017/11/21/maltraitance-dans-un-centre-pour-enfants-handicapes-le-tribunal-a-donne-un-signal-fort-a-tous-les-la_1611546 accessed 30 October 2020.

95 See http://corruptionprevention.gov.hu/download/7/a2/90000/KIM%20555_2013-4.pdf accessed 30 October 2020.

96 See www.oecd.org/corruption/anti-bribery/OECD-Hungary-Phase-4-Report-ENG.pdf accessed 30 October 2020.

97 309 reports in 2014, www.ajbh.hu/documents/10180/2119301/AJBH+Besz%C3%A1mol%C3%B3+2014/e4cb6abb-2b16-4f67-bcdf-e24ccb74cca2?version=1.0; 358 reports in 2015, www.ajbh.hu/documents/10180/2515707/AJBH+Besz%C3%A1mol%C3%B3+2015/4507ceb3-4c6b-4f54-b212-63d1743c8e13?version=1.0, 314 reports in 2016, www.ajbh.hu/documents/10180/2613063/AJBH+Besz%C3%A1mol%C3%B3+2016/7233e88b-d26c-a439-6b06-6905a291526e?version=1.0; 328 reports in 2017, www.ajbh.hu/documents/10180/2811425/AJBH+besz%C3%A1mol%C3%B3+2017/60b3d968-ac8e-d28e-058b-64d0eb7e6d69?version=1.2; 307 reports in 2018, www.ajbh.hu/documents/10180/2811425/AJBH+besz%C3%A1mol%C3%B3+2017/60b3d968-ac8e-d28e-058b-64d0eb7e6d69?version=1.2 accessed 30 October 2020.

98 See www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html accessed 30 October 2020.

filed by whistleblowers but rather the Director of Corporate Enforcement, who challenged the company's alleged breaches of confidentiality and sought an order from the court appointing inspectors to investigate whether or not the company breached the PDA when the whistleblowers' identities were revealed.⁹⁹ The court ruled in favour of the director.¹⁰⁰

ITALY

The Government of Italy recently passed Legge 30 November 2017, No 179, which became effective in December 2017 and protects public and private sector whistleblowers.¹⁰¹ This was the first whistleblowing regulation generally applicable to the private sector in Italy. The protection scheme applies only when the company-employer has adopted an organisational model for crime prevention pursuant to Decree No 231/2001 relating to corporate criminal liability. Article 54-bis of Decree No 165 of 30 March 2001 regulates the forms of protection available to public sector workers who become whistleblowers.¹⁰² Finally, National Anti-Corruption Authority (Autorità Nazionale AntiCorruzione or ANAC) Resolution No 1033 of 30 October 2018 regulates the protection of anyone who reports a crime or impropriety he or she became aware of as part of an employment relationship.¹⁰³

There was some anecdotal information in the 2018 ANAC report that revealed the number of files opened in 2018 after whistleblowers made disclosures to them. The report reveals that in 2018, more than 90 per cent of the cases of whistleblowing occurred in the public sector, but it does not indicate any form of resolution.¹⁰⁴ In 2018, ANAC claimed it received 621 disclosures and opened 334 cases. ANAC has the authority to sanction individuals who retaliate against whistleblowers. However, there has only been one sanction award of €5,000.¹⁰⁵

Kosovo

In 2011, the Government of Kosovo passed Law No 04/L-043 on the Protection of Informants.¹⁰⁶ In December 2018,¹⁰⁷ the government replaced this prior law with Law No 06/L-085. This new law states that it does not enter into force until 15 days after its publication, and the provisions pertaining to the private sector are not applicable until one year after its entry into force. Thus, the new whistleblower law was outside the scope of this study, but is credited in the section on best practices.

Our research did not find any reported judicial decisions on whistleblower cases. However, it is apparent that some occurred under the law. FOL Lëvizja, an NGO, published a report, *Anti-corruption Legal Reform: An analysis of the Law on the Protection of Informants in Kosovo*, which highlighted the case of Abdullah Thaçi to illustrate how the law failed to protect whistleblowers. In 2015, the Basic Court of Prizren fined Thaçi €5,000 for his disclosure that resulted in the successful indictment of an official who was abusing public funds.¹⁰⁸ His

99 See [http://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2018/H488.html&query=\(%22protected+disclosures+act%22\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2018/H488.html&query=(%22protected+disclosures+act%22)) accessed 30 October 2020.

100 *Ibid.*

101 See www.gazzettaufficiale.it/eli/id/2017/12/14/17G00193/sg accessed 30 October 2020.

102 Art 54-bis of Legislative Decree No 165 of 30 March 2001.

103 Pirola Pennuto Zei & Associati tax and legal advice firm, Compliance Newsletter, December 2018 www.piolapennutozei.it/wp-content/uploads/2018/05/Compliance-Newsletter-April-2018.pdf accessed 30 October 2020 and Art 54-bis of Legislative Decree 165/2001.

104 *Ibid.*

105 Interview with Giorgio Frascini, Transparency International Italia.

106 See <http://old.kuvendikosoves.org/common/docs/ligjet/Law%20on%20protection%20of%20informants.pdf>

107 See <https://md.rks-gov.net/desk/inc/media/701773B8-903F-476F-9D1E-2F7CC2C86A84.pdf> accessed 30 October 2020.

108 See <http://levizjafol.org/wp-content/uploads/2017/11/An-analysis-of-the-Law-on-the-Protection-of-Informants-in-Kosovo.pdf> p 27 accessed 30 October 2020.

employer, Pro Credit Bank, sued him for revealing commercial secrets and Thaçi used the Law on Protection of Informants as a defence. The employer's lawsuit was unsuccessful.¹⁰⁹

MALTA

Malta passed the Protection of the Whistleblower Act, 2013, which took effect in September 2013.¹¹⁰ Our research did not find any formally reported case decisions in the public record. It is worth noting that media sources reveal there are whistleblowers in Malta who have made significant disclosures of corruption and experienced retaliation, to the extent of one journalist's alleged murder.¹¹¹

MOLDOVA

The Government of Moldova passed two public sector anti-retaliation laws: the Decision on Approving the Framework Regulation on Whistleblowers No 707, which took effect in September 2013, and the Integrity Law No 82, which took effect in July 2017.¹¹² Our research found three retaliation cases. Of the three cases, two won and one lost on the merits. The whistleblower who lost also sought interim relief, and the court did not grant it. The whistleblowers made disclosures to public audiences in two cases, and in one case, to both external and public audiences. The compensatory damages that the two prevailing whistleblowers received was US\$3,040 and \$505. The length of time to decision ranged from 180 days to 1,686 days.

The small number of retaliation cases is partly explained by the negative way whistleblowing is perceived in Moldova. The term 'whistleblowing' is not well known and is often confused with 'witness', which can deter people who fear involvement in court proceedings from coming forward.¹¹³ To help improve public awareness of the laws, Moldova's National Anti-Corruption Centre has partnered with various international institutions

Moldova hosted one of Europe's best-known whistleblower cases, although it predated the national laws. In 2003, Iacob Guja was fired from his position as head of the press office in the Prosecutor General's Office for revealing evidence of political interference in a criminal case. In 2008, the European Court of Human Rights ruled that Moldova had violated Guja's right to freedom of expression granted under Article 10 of the European Convention on Human Rights. It held that, as a whistleblower acting in the public interest, Guja had a right to inform the public about the officials' misconduct. This landmark case established the principles used to determine whether and how freedom of expression should be protected under the European Convention.¹¹⁴

NORTH MACEDONIA

The Government of North Macedonia passed the Law on Whistleblowers Protection 2015 (Official Gazette No 196/2015), which took effect in March 2016.¹¹⁵ The Law on Amendment and Supplementation of the Law on Protection of Whistleblowers was adopted in February 2018 (Official Gazette No 35/18). Our research did not find any reported retaliation decisions or statistics on whistleblower disclosures. However, Slagjana Taseva, Chair

109 *Ibid.*

110 See www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=25151&l=1 accessed 30 October 2020.

111 The law's disuse is particularly ironic, since the murder of whistleblowing journalist Caruana Galizia stirred outrage across the continent https://en.wikipedia.org/wiki/Daphne_Caruana_Galizia#Reactions accessed 30 October 2020, and is credited as one of the catalysts that sparked the passage of the EU Whistleblower Protection Directive.

112 See <http://lex.justice.md/md/370852> accessed 30 October 2020.

113 Paul Stephenson and Shonali Routray, 'Whistleblower Protection; A Comparative Analysis', A Study for the Commissioner for Information of Public Importance and Personal Data Protection of Serbia', 2012.

114 *Guja v Moldova*, European Court of Human Rights, Application no 14277/04, Strasbourg, 12 February 2008.

115 'Whistleblower Protection Law', Official Gazette of Republic of North Macedonia, no 196/2015 www.pravda.gov.mk/toc/1/44 accessed 30 October 2020.

of Transparency International Macedonia, informed our researchers that a source from the State Commission for the Prevention of Corruption claimed they received 19 reports in 2019 and only four in 2020.

Although our research did not find any officially reported case decisions, we would be remiss not to mention Gjorgi Lazarevski and Zvonko Kostovski, whose whistleblowing took place several months before the Law on Whistleblowers Protection went into effect and were not covered by the law due to the timing of their disclosure. After exposing mass illegal wiretapping of political opponents by the government of then-Prime Minister Gruevski, they lost their jobs at the Office for Security and Counterintelligence and were imprisoned for 11 months – most of it in solitary confinement.¹¹⁶ Thanks to an effective public campaign by Transparency International North Macedonia and the Southeast Europe Coalition on Whistleblower Protection, despite the lack of formal legal rights, Lazarevski and Kostovski were reinstated in December 2018.¹¹⁷

NORWAY

The Government of Norway passed the Working Environment Act, which became effective in January 2006 (it was amended in January 2019).¹¹⁸ Our research found one case decision in 2009.¹¹⁹ The identity of the parties was undisclosed.¹²⁰ The whistleblower won. The whistleblower was a worker for a non-destructive testing company in Oslo who witnessed serious problems with welding and exposure to radioactive materials. The whistleblower made disclosures internally to the chief executive officer (CEO), but the CEO concealed and ignored the disclosure, and the whistleblower's supervisor retaliated with acts such as spitting, throwing a security tape and threatening termination of employment. The whistleblower was ultimately terminated. The whistleblower won the case in the lower court, but did not receive any financial compensation. After appeal, the court awarded approximately \$10,860.

ROMANIA

The Government of Romania passed the Public Servants Disclosure Protection Act, which became effective in December 2004 (Law No 571/2004).¹²¹ Romania was the first country in continental Europe to pass a designated whistleblower law.¹²² It has only produced a handful of cases, but all reported decisions have been successful.¹²³ Our research found six cases, and in all six, the whistleblower prevailed. Whistleblowers made disclosures to public audiences in four cases, internal audiences in one case, and both internal and external audiences in one case. It is worth noting that because the names of plaintiffs and defendants, as well as file numbers, are censored, we were not able to verify that the decisions were final rulings. No information on the date claimants filed their cases was available, so we were unable to determine how long it took for whistleblowers to receive decisions from the courts and tribunals.

Transparency International Romania (TIR) has raised critiques on the ignorance of the law among public servants. Some public institutions lack mandatory internal policies and are reluctant to implement the law. TIR's 2013 report corroborates our own findings that public information about the number of whistleblower

116 See <https://drive.google.com/open?id=1HJdCiUZpvljM-T0pZsyHoxv-clEylfW1> accessed 30 October 2020.

117 *Ibid.*

118 See <https://lovdata.no/dokument/NLE/lov/2005-06-17-62> accessed 30 October 2020.

119 The Head of the International Secretariat in Norway sent this case to Government Accountability Project upon request for information.

120 See <https://drive.google.com/file/d/1N51CbmR3JNnVlrMdtYViusfmvMRbdLc2/view> accessed 30 October 2020.

121 See www.whistleblowing.it/Romanian%20Law%20571-2004%20-%20whistleblowingEN.pdf and <https://drive.google.com/open?id=1qk5z1hBfg6uu5JvL5EuDaPflEhkOWGoJ> accessed 30 October 2020.

122 See n 79 above, p 51.

123 It has been speculated that there was no national discussion or debate before the law was passed, which has caused it to remain relatively unknown among the public. See n 109 above, p 55.

cases, sanctions and benefits is limited.¹²⁴ Other studies have found that civil servants are aware of the legal protection available for whistleblowing, but they are discouraged from doing so because the incentives to report wrongdoing are insufficient to outweigh the potential consequences.¹²⁵ There is hope that the tide is changing. TIR recorded that whistleblowers, once considered 'informants', are now known as '*avertizori de integritate*' – those who give integrity warnings.¹²⁶

SERBIA

In December 2014, Serbia passed the WPA, which became effective in June 2015.¹²⁷ The law provides legal protection against any retaliation except criminal prosecution. Its broad coverage includes government and corporate employees, as well as corporations, other media and civil society organisations, even extending to members of the public affected by the misconduct. They are protected for reporting a wide range of wrongdoing, including violations of laws or human rights, and risks to public health, security or the environment. Following international standards, whistleblowers are permitted to disclose information directly to the public if they reasonably believe evidence may be destroyed. In all cases, if not satisfied, they may go public without delay after an initial report either to an internal or external government authority. Acts seeking to prevent whistleblowing are banned under the law. Every significant public or private institution must have an internal system with a whistleblower office. Fines are imposed on organisations that do not set up whistleblower procedures or fail to act on a disclosure within a set time period.

The law does not provide administrative remedies. Whistleblowers go directly to court to file their complaints, with a special emphasis on interim relief. In terms of challenging corruption, they are entitled to participate in investigations of their charges, to the extent of access to the investigative file.¹²⁸

We were unable to find any relevant published court decisions. However, Pištaljka, the leading whistleblower protection organisation in Serbia whose lawyers represent whistleblowers in retaliation cases, claims that out of 16 cases with final decisions, four lost (one lost on procedural grounds and three on the merits) and 12 won. Eleven cases sought interim relief, and it was granted in ten cases. Of the 12 cases that won, all received financial relief. Where financial relief was awarded, it was either back pay, back pay plus damages or just damages. Damages awarded were in the range of \$1,000–\$2,000. Eleven whistleblowers made disclosures to internal audiences, three to internal and external audiences, and two to external audiences. These final decisions understate the law's use and impact, which were magnified by the law's emphasis on temporary relief.

SLOVAKIA

The Government of Slovakia passed Slovak Act No 307/2014 Coll on Certain Measures Related to Reporting of Antisocial Activities, which came into force in January 2015. The law regulates conditions for the protection of whistleblowers reporting criminal offences or other so-called anti-social activities. It is worth noting that this 2014 law was repealed and replaced with Act No 54/2019 Coll on Whistleblower Protection

124 TIR has raised a number of critiques, including that many public servants have little or no knowledge of the law; some public institutions lack mandatory internal policies and are reluctant to implement the law; and public information about the number of whistleblower cases, sanctions and benefits is limited; TIR, *Report on Whistleblowing in Romania*, 2013 www.asktheeu.org/en/request/994/response/5851/attach/7/Country%20report%20Romania.pdf accessed 30 October 2020.

125 Iulia Coșpanaru, Irina Lonean, Ruxandra Mitică, Georgeta Ionescu and Iulia Drăjăneanu, 'National Integrity System Assessment: Romania', TIR, 2011.

126 TIR, *Report on Whistleblowing in Romania*, 2013, p 20.

127 See <https://drive.google.com/open?id=1QlufRMMwMv-FbSQv1BTJdkFHIGKwGSKO> accessed 30 October 2020.

128 *Ibid.* Regional Anti-Corruption Initiative, *Whistleblower Protection in Southeastern Europe: An Overview of Laws, Practice and Recent Initiatives* (2015) p 55.

and on Amendments and Supplements to Certain Acts, which came into effect on 1 March 2019.¹²⁹ The new law established an independent Office for the Protection of Persons Reporting on Anti-Social Activities (whistleblowers). Our research did not find any reported whistleblower retaliation case decisions, or public reports with information on the number of disclosures.

There are multiple possible reasons for the lack of cases in Slovakia. The responsibility to protect whistleblowers was decentralised to regional labour inspectorates. Transparency International Slovakia (TIS) informed Government Accountability Project that they conducted ‘mystery shopping’ by contacting inspectorates as whistleblowers. None of the inspectorates responded to their requests for advice fast enough to enable a whistleblower to ask for suspension of an adverse employment action. After an unlawful dismissal from work, an employee has to turn to a labour inspectorate within a seven-day limit. According to TIS, in most cases the complainant was not provided with all the necessary information, even if the inspectorate responded quickly. Nearly two-thirds of inspectorates did not recognise whistleblowing and did not mention the possibility of protection. Other indicators that explain the law’s lack of success, according to TIS, include a lack of funding for inspectorates to handle the increased responsibilities and the lack of awareness of the law among the public. In October 2018, TIS published the 100 Biggest Slovak Municipalities Ranking based on 100 indicators, including questions about the number of reports of wrongdoing they received from 2014–2018. Accordingly, 89 per cent of Slovak cities surveyed reported that they never received any whistleblower reports.

SWEDEN

The Government of Sweden’s whistleblower law, Lag (2016:749) om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden (Employment Protection of Retaliation for Reporting Serious Misconduct) became effective in January 2017.¹³⁰ Our research found one 2019 private sector whistleblower retaliation case under the law, which was resolved through settlement. The whistleblower received compensation, but his employer did not reinstate him.

UK

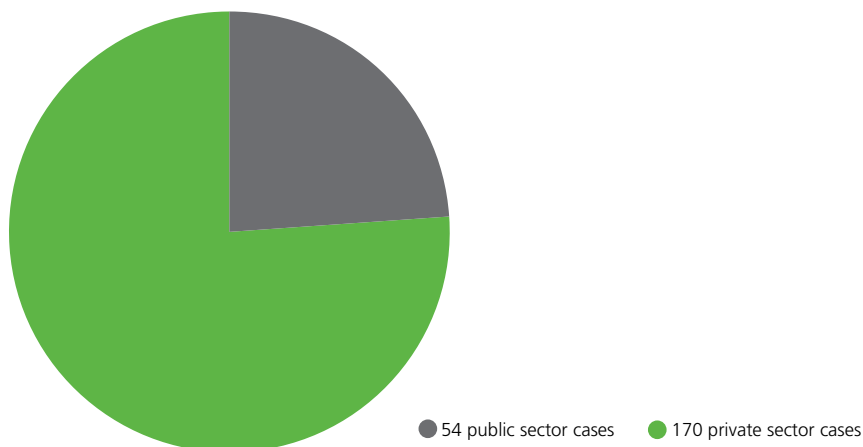
In July 1999, the UK government passed PIDA 1998, which amended the Employment Rights Act of 1996.¹³¹ Its provisions apply to England, Scotland and Wales. Unlike the majority of countries included in this study, the UK has hundreds of cases each year brought under the whistleblower law. As a result, our research and analysis focused on one year of data.

129 See www.slov-lex.sk/pravne-predpisy/SK/ZZ/2019/54/20190301 accessed 30 October 2020.

130 See www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016749-om-sarskilt-skydd-mot-repressalier_sfs-2016-749 accessed 30 October 2020.

131 See www.legislation.gov.uk/ukpga/1998/23/contents accessed 30 October 2020.

Total cases: Great Britain



PIDA

We analysed a total of 224 case decisions rendered in 2018 in England, Scotland and Wales. The vast majority were in England and Wales; only 17 cases were filed in Scotland.

There were 170 cases from the private sector and 54 from the public sector. This is perhaps unsurprising, given that 81.3 per cent of the UK workforce work in the private sector.¹³² Of the 224 cases, 31 won, 153 lost on the merits, or a 17 per cent success rate for decisions on the merits. Thirty-six lost on procedural grounds and four lost for unspecified reasons. If considering the overall success rate for cases filed with final decisions, then the success rate was 14 per cent. It is noteworthy that the tribunal required ten of the losing whistleblowers to pay the other party's costs as well as their own.¹³³ Four cases requested interim relief; only one succeeded. One hundred and nine cases were made to internal audiences (48 per cent), 22 to internal and external audiences (ten per cent), 13 to external audiences (six per cent) and in 80 cases, the information was not available (35 per cent).

Breakdown of whistleblower cases in Great Britain

Win/loss

31 cases won

193 cases lost

153 cases lost on substantive grounds

36 cases lost on procedural grounds

4 cases lost for unknown reasons

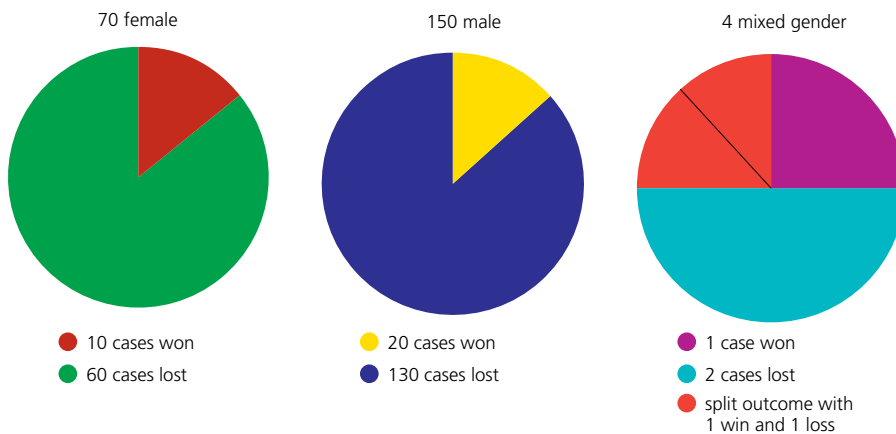
132 Office of National Statistics and the Civil Society Almanac NCVO (2018). Referenced in the All Party Parliamentary Group (APPG) for Whistleblowing report *Making whistleblowing work for society* (2020) 6 https://a02f9c2f-03a1-4206-859b-ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf accessed 16 November 2020.

133 See, eg, https://assets.publishing.service.gov.uk/media/5c4b213ae5274a6e43feb71c/Mr_A_Kuznetsov_-v_Manulife_Asset_Management_Europe_Limited__Case_2200417_2017_-_Costs.pdf accessed 30 October 2020. Pursuant to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Rules 74 to 84, in instances where the tribunal finds a party acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way the proceedings have been conducted; or if any claim or response has no reasonable prospect of success. For more information on why the 'unreasonable' standard is abusive, see <https://whistleblower.org/blog/the-real-unreasonable-how-the-uk-uses-this-vague-term-to-deny-rights-to-whistleblowers-with-retaliation-trauma-symptoms> accessed 30 October 2020.

Cases in Great Britain by location



Gender



A recent report¹³⁴ by the All Party Parliamentary Group (APPG) for Whistleblowing in England and Wales revealed concerning trends with regards to the way that PIDA is being implemented in the Employment Tribunals. It reveals that while most employers have legal representation, 'more than three out of five whistleblowers at ET hearing have weaker representation power than the employer' and almost half of whistleblowers in 2018 were representing themselves. These litigants in person were more likely to have their claim dismissed at the preliminary stage and far less likely to be successful in the final hearing. These issues with access to justice and equality of arms were further compounded by delays in the tribunal process, which, for one in five whistleblower claimants in 2018, took longer than three years.

The APPG report also makes broader criticisms by arguing that the Employment Tribunals are not the most appropriate institution for dealing with whistleblowing, as they are unable to correct the wrongdoing itself – the very reason that motivated the whistleblower to speak out in the first place. It recommends the establishment of an independent, dedicated Office of the Whistleblower to investigate the concerns raised.

¹³⁴ All Party Parliamentary Group (APPG) for Whistleblowing report *Making whistleblowing work for society* (2020) https://a02f9c2f-03a1-4206-859b-ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf accessed 16 November 2020.

ERO

In Northern Ireland, the Public Interest Disclosure (Northern Ireland) Order 1998 amended the Employment Rights (Northern Ireland) Order 1996 (the 'ERO') and introduced provisions in Article 130(1) protecting workers from unfair dismissal and detriment in the event of them having made protected disclosures.¹³⁵ The law states that this 'Order is made only for purposes corresponding to those of the [1998 c. 23] Public Interest Disclosure Act 1998'. Our research found four publicly reported case decisions. Three lost on the merits and one lost on procedural grounds. Two of the cases were from the private sector and two from the public sector. Two whistleblowers made disclosures to internal audiences, one to an external audience and one for which the audience is unknown.

Middle East and North Africa

ISRAEL

The Government of Israel passed the Protection of Employees (Exposure of Offences of Unethical Conduct and Improper Administration) Law 5757-1997 in 1997 to protect private and public sector whistleblowers.¹³⁶

The Protection of Workers (Disclosure of Offences and Harm to Integrity or to Proper Administration) Law (Amendment No 2) 5768-2008 was passed in June 2008 by the Knesset (Israel's Parliament).¹³⁷ The amendment was designed to further protect workers who report violations of the law and ethics by strengthening appropriate civil and criminal enforcement measures. The amendment authorises the imposition of a no-fault statutory fine, up to a specified ceiling, on a person who violates the law. The labour court can also impose a punitive fine in an amount not exceeding 50 times the amount of the ceiling, depending on the severity of the violation or the relevant circumstances, including the employer's behaviour and its repetitiveness. The amendment further imposes a criminal penalty of imprisonment or a fine on an employer who harms the conditions of employment or fires an employee in violation of the law. The State Comptroller Law granted the ombudsman special quasi-judicial authority to protect whistleblowers in public service.

Our research did not find any publicly reported court case decisions from the regional labour courts. However, according to the ombudsman's report in 2018,¹³⁸ 44 retaliation complaints were filed by employees, and of the 22 complainants whose cases the ombudsman investigated, 50 per cent received remedies (or 25 per cent of filed retaliation complaints). Five of the prevailing whistleblowers received permanent protection orders, and 17 settled their case or the ombudsman decided their case (the report does not break down how many settled and how many were decided by the ombudsman).¹³⁹

TUNISIA

The Government of Tunisia passed Basic Law No 10 reporting corruption and protecting whistleblowers, which came into effect on 7 March 2017.¹⁴⁰ Our research did not find any publicly reported case decisions under Tunisia's law.

135 See www.legislation.gov.uk/nisi/1998/1763/contents/made accessed 30 October 2020.

136 See www.nevo.co.il/law_html/Law01/092_001.htm accessed 30 October 2020.

137 See www.loc.gov/law/foreign-news/article/israel-whistleblowers-protection accessed 30 October 2020.

138 The only annual reports published on the ombudsman's website cover 2018, and 2012–2013. The 2012–2013 reports did not have information on the number of whistleblower disclosures or complaints under Law 5757-1997.

139 See www.mevaker.gov.il/sites/DigitalLibrary/Documents/ntz-new/2019-NTZ45/2019-NTZ45-KeyPoints-ENG.pdf accessed 30 October 2020.

140 See <https://legislation-securite.tn/ar/node/55295> accessed 30 October 2020.

Sub-Saharan Africa

BOTSWANA

The Government of Botswana enacted the Whistleblowing Act 2016 on 9 December 2016.¹⁴¹ The law protects any person who makes a disclosure of impropriety to a competent authority. Our research did not find any reported whistleblower retaliation case decisions or public reports with information on the number of disclosures.

GHANA

The Government of Ghana enacted the Whistleblowers Act 2006 in October 2006.¹⁴² Our research did not find any publicly reported case decisions under the law. Research has been done to indicate that Ghanaians are reluctant to blow the whistle, due to negative perceptions of whistleblowers. A recent examination of the 2006 law conducted by researchers at the Cape Coast Technical University and the Frederic Bastiat Institute found that Ghanaian society 'is such that in their attempt to do the right thing for their country, these "whistleblowers" will be labelled as being "disloyal" by the concept of "friendship/mastership" which will in turn be identified as an additional layer of discouragement hindering the development of a robust whistleblower culture'.¹⁴³

NAMIBIA

The Government of Namibia enacted the Namibia WPA 2017 (Act No 10 of 2017),¹⁴⁴ which was published in the official gazette in October 2017.¹⁴⁵ Our research did not find any reported case decisions in Namibia. One law professor, Bernhard Tjatjara, wrote that in 2018, Justice Minister Ludwina Shapwa claimed that the whistleblower law's lack of utilisation is caused by the government's lack of funding for its implementation.¹⁴⁶ Whistleblower laws must be accompanied by the necessary government funding for whistleblower protection mechanisms and systems to be successful.

RWANDA

The Government of Rwanda passed Law No 35/2012 Protection of Whistleblowers, which came into effect in May 2012.¹⁴⁷ Our research did not find any publicly reported case decisions under this law.

SOUTH AFRICA

The Government of South Africa passed the PDA Act 26 of 2000, which became effective in February 2001 and covers both the private and public sectors.¹⁴⁸ Our research found decisions in 33 whistleblower retaliation cases under the PDA. It is worth noting that section 159 of the Companies Act 72 of 2008 and section 31 of the National Environmental Management Act 107 of 1998 also include relevant provisions. However, our research did not find any reported whistleblower cases brought under either of these latter two acts.

141 See <https://botswanalaws.com/alphabetical-list-of-statutes/whistleblowing#:~:text=140%2C%202016.,to%20provide%20for%20related%20> accessed 30 October 2020.

142 See www.drasmuszodis.lt/userfiles/Ghana%20Whistleblower%20Act.pdf accessed 30 October 2020.

143 Haruna Ndeguri and Emmanuel Tweneboah Senzu, 'Examining the Whistleblowing Act of Ghana and its Effectiveness in Combating Corporate Crime', Cape Coast Technical University, Frederic Bastiat Institute MPRA Paper No85602 (2 April 2018) pp 25–26.

144 See www.lac.org.na/laws/annoSTAT/Whistleblower%20Protection%20Act%2010%20of%202017.pdf accessed 30 October 2020.

145 See https://laws.parliament.na/cms_documents/6450-0064c372ce.pdf accessed 30 October 2020.

146 See www.namibian.com.na/197275/archive-read/Whistleblower-Protection-Law-Hangs-in-the-Balance accessed 30 October 2020.

147 See https://drive.google.com/open?id=1gyTxVkjU8i6gdl1brFOhEe8d4G_ieGd accessed 30 October 2020.

148 See www.gov.za/sites/default/files/gcis_document/201409/a26-000.pdf accessed 30 October 2020.

Of the 33 case decisions arising from the PDA, seven whistleblower cases won and 25 cases lost (21 on the merits and four on procedural grounds). This equates to a 25 per cent success rate for decisions on the merits. One case won the relief requested, but the court did not render a decision on the merits of the claim because it determined that the decision-makers lacked legal authority over the whistleblower, and thus the disciplinary proceedings were automatically unlawful.¹⁴⁹ Thirteen of the cases analysed were from the public sector; 20 were from the private sector.

Only two cases specified the compensation awarded: \$11,215 in one and \$18,462 in the other (plus costs). Other prevailing cases involved other types of relief: reinstatement, declaratory relief, remuneration (reimbursement for salary and/or benefits) and special damages, such as *aquilian* damages (compensation for monetary loss sustained due to physical damage to a person or property). Of the cases that requested temporary relief, two out of six received it. It is noteworthy that in four instances, whistleblowers who lost their cases were ordered to pay the opposing party's costs, as well as their own.¹⁵⁰ Subsections 162(1) and (2) of the Labour Relations Act gives the court discretion to make cost orders, such as when the matter before the labour court should have been referred to arbitration first or based on their conduct during the proceedings.

Disclosures were made to a variety of audiences, primarily internal. Of the disclosures, 13 cases made internal disclosures, nine made external disclosures, one made a public disclosure, six made both internal and external disclosures, one made both an internal and public disclosure, one made both an external and public disclosure and in one case, the disclosure audience was unknown.

Our research also found 14 cases that were decisions on requests for interim relief (also known as injunctive or temporary relief), which were not included in the above win/loss rate because there was no final decision on the merits. For decisions on interim relief alone, the court granted the whistleblowers' requests in nine cases (64 per cent). Frequently, interim relief starts successful settlement negotiations without the necessity for final decisions on the merits. Although settlement data is unavailable for South Africa, it may be a potential indicator of how successfully the whistleblower system is operating.

TANZANIA

The Government of Tanzania passed the Whistleblower and Witness Protection Act 2015,¹⁵¹ which came into effect in May 2015. Our research did not find any publicly reported case decisions in Tanzania.

UGANDA

Uganda passed the WPA 2010, which came into effect in May 2010.¹⁵² Two cases are relevant to this study. One case in 2015 concerned a lawsuit against a private sector whistleblower and an Inspector General for conspiracy, bad publicity, embarrassment, inconvenience and abuse of process. The defendants were successful in using the WPA as a defence, and the judge awarded them legal fees.¹⁵³ The second case is a 2017 decision that does not address the WPA by name, but the facts demonstrate its application. The whistleblower made internal disclosures concerning allegations of fraud that resulted in an investigation and accountability. Later, she made

149 *Litha v Madonsela and Others* (12369/05) [2005] ZAGPHC 106 (6 October 2005) www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZALAC/2018/55.html&query=Protected%20Disclosures%20Act%2026%20of%202000 accessed 30 October 2020.

150 Eg, see www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2013/71.html&query=%20Damane accessed 30 October 2020.

151 See <http://parliament.go.tz/polis/uploads/bills/1447073069-A%20BILL%20-WHISTLEBLOWERS%20ACT,%20%202015-%20Kabunga.pdf> accessed 30 October 2020.

152 See <https://ulii.org/ug/legislation/act/2015/6-10> accessed 30 October 2020.

153 *Prime Contractors Ltd v Inspector General of Government* (MISC CAUSE No 301 OF 2013) [2013] UGHCCD 150 (11 November 2013) https://ulii.org/ug/judgment/high-court-civil-division/2013/150_b accessed 30 October 2020.

disclosures to the media and her employment was terminated.¹⁵⁴ The judge agreed that the disclosures were in the public interest, but ruled against the whistleblower, questioning her motives because the internal disclosure had resulted in a resolution.¹⁵⁵

ZAMBIA

Zambia passed the PIDA Act 4 of 2010,¹⁵⁶ which came into effect in July 2010. We did not find any publicly reported final decisions under this law. However, it is worth noting that the Supreme Court decided in favour of a whistleblower in 2018 when it ruled that the lower court should not have dismissed the case.¹⁵⁷ In that case, the court instructed the whistleblower to file a complaint with the Industrial Relations Court within 30 days, which is why this case is not a final decision on the merits of the retaliation claim.¹⁵⁸ The Industrial Relations Court of Zambia has only published a limited selection of decisions, and there is no record of a subsequent ruling in the case.

154 See https://ulii.org/ug/judgment/high-court-civil-division/2013/150_b accessed 30 October 2020.

155 *Ibid.*

156 See www.parliament.gov.zm/sites/default/files/documents/acts/Public%20Interest%20Disclosure%20%28Protection%20of%20Whistleblowers%29%20Act%202010.PDF accessed 30 October 2020.

157 *First Quantum Mining v Augustine Tembo*.

158 Appeal No 124-2015 *Augustine Tembo v First Quantum Minerals Ltd*-Mining Division-May-2018- Justice Hamaundu, JS https://drive.google.com/open?id=1zjoiinbiWqt8CS1eZ6PcoREdBcW04-5_ accessed 30 October 2020.

Analysis

Assessing the efficacy of whistleblowing is no easy task. For whistleblowers themselves, success can be measured by whether they achieved what they set out to accomplish with their disclosure, typically some sort of institutional change, balanced against the personal costs endured. A whistleblower's 'success' might be a grey area, but the black and white on each side are relatively easy to identify.

Whistleblower protection laws are different. Any whistleblower law should protect, empower and provide adequate remedies for whistleblowing. But laws reflect prevailing community standards and facilitate access to justice – they do not guarantee an outcome. Thus the 'success' of a law might be better measured by the number of cases brought under it rather than the outcome of determined cases. On the other hand, the effectiveness of whistleblower protection laws would be compromised if they were broad enough to allow other employment grievances to be brought under them.¹⁵⁹ This is a delicate balance to strike. For the majority of countries in this study, the first failure of the law is aligned to the former: the numbers of cases brought. This is not for want of better drafting, but because the citizens such laws seek to protect are not using them.

The reasons for this persistent underuse vary across jurisdictions, but together they underscore that whistleblower protection laws do not exist in a vacuum. They must be read against a cultural context. Surveys taken in the countries featured in this report repeat similar reasons why whistleblowers choose not to come forward: primarily a belief that nothing will come of a disclosure and loyalty to employers, but also fear of retaliation. Laws must work in tandem with public awareness schemes that emphasise the public interest in the suppression of unlawful activity through disclosure.

Settlements

Of the reprisal complaints that are made, few proceed to hearing. This is not a determinative sign that the laws are failing. Settlements are often a sign of a healthy system. Conciliation and private settlements in whistleblowing law distort the figures around the amount of damages awarded; if it were possible to include them in this study (most are confidential), the numbers would likely have been much higher. Claimants and respondents alike can benefit from out-of-court settlements: it encourages both sides to freely engage in seeking a resolution without the pressure of public scrutiny.¹⁶⁰

Nonetheless, a settlement-focused model suffers from a transparency deficit. It is also compromised by the inherent power imbalance between the employer and the whistleblower. Relying on settlements as the primary way to resolve disputes reinforces the individualistic nature of the whistleblowing framework. Resolving the majority of matters behind closed doors results in a lack of guidance for lawyers, courts and future whistleblowers as to the application of the law because settlements do not create precedent. Each whistleblower is left to forge his or her own path, not knowing how others have proceeded before. When the burden falls on the individual whistleblower to enforce the law without the benefit of a public trial and judicial oversight, there is a significant risk that the full protection of the law will not be widely available.

159 The 'floodgate' fears have been used to argue in favour of limiting whistleblower protection to internal witnesses. It is argued that this protects the reputation of the whistleblower legislation and keeps cases streamlined. Open standing provisions create the illusion that whistleblower legislation could be used to facilitate other employment grievances, which will only lead to frustrated complainants who unsuccessfully relied on a law that was never meant to protect them in the first place. Paul Latimer and A J Brown, 'Whistleblower Laws: International Best Practice' (2008) 31 University of New South Wales Law Journal 766.

160 Dominique Allen and Alysia Blackcham, 'Under Wraps' p 29.

The financial burdens of litigation

Where conciliation fails, or produces an unsatisfactory result for the complainant, the whistleblower must bear the burden of enforcing the law against retaliation and risk the considerable costs of trial. Legal fees mean that even a successful whistleblower may not emerge in a positive, or even neutral, financial position if those costs are not covered or the damages awarded are too low. Adversarial justice systems rest on the assumption that there is equality between the parties. Unfortunately, the reality is that employers, particularly large corporations and government entities, often have far greater bargaining power than employees who blow the whistle. As a result, they can afford costly litigation. Attrition tactics, like contesting the whistleblower's ability to access documents, or at the opposite end of the spectrum, 'drowning' them in voluminous materials of questionable relevance, are common in proceedings to increase the costs. Further, the employer will typically attempt to put the whistleblower's entire life under a microscope. The employer will flood the proceeding with motions and challenges that are legal bluffs, but tedious, costly and draining bluffs to call. Responding to these tactics adds to the costs of exercising rights and the stress of litigation.

Pursuing claims incurs further risks if unsuccessful whistleblowers have costs awarded against them. 'Loser pays' rules can force an unemployed whistleblower to pay expensive corporate or government attorneys. This transforms the whistleblower 'protection' law into a Trojan horse, turning the loss of salary into possible bankruptcy or lifelong debt. This is a strong reason not to gamble on rights where there is only a 25 per cent or less chance of prevailing.

'Loser pays' rules seem increasingly inappropriate, given the emerging trends. Although these rules may be embedded in national civil procedure laws, whistleblower laws should be exempt from 'loser pays' judgments given the fundamental rationale behind whistleblowing and whistleblowing laws. The key rationale of whistleblower laws is to minimise the amount of money lost due to waste, fraud and abuse of power. Accordingly, tribunals should not undermine legislative intent by penalising complainants who bring forward cases on grounds reasonable enough not to warrant dismissal before trial. Moreover, our evidence showed that the number of justiciable whistleblower cases is so limited, and the number of winners so few, that fears of excessive litigation are unwarranted.

Additionally, there is no doubt as to the public policy importance of whistleblowing. This is illustrated by the EU Whistleblower Protection Directive's recognition that whistleblower laws must shift away from 'good faith' requirements for protected speech, stipulating that the individual need only have 'reasonable grounds' to believe that they are disclosing information about illegal behaviour. The move away from 'good faith' legal frameworks was to stop the practice of scrutinising the whistleblower's motives more intensely than the wrongdoing itself.¹⁶¹ These rules are a back-door way to put a spotlight on whistleblowers' motives, while making them risk financial catastrophe for seeking to enforce them.

Access to legal counsel

Whistleblowing laws can be a complex maze, even for experienced practitioners. As such, legal counsel is often essential for whistleblowers to be able to effectively enforce their rights. Even in jurisdictions with reverse burdens of proof, the assistance of a lawyer is essential for a whistleblower's prospects in court. There are a number of NGOs around the world that seek to help whistleblowers in need of legal counsel, including the Horuragi Foundation in the Republic of Korea; Protect (formerly Public Concern at Work) in the UK that provides legal advice but does not represent whistleblowers; and Government Accountability Project in the US, which provides direct legal representation to whistleblowers. However, NGOs can only help a small percentage of

¹⁶¹ IBA, *Whistleblower Protections: A Guide* (2018).

those who deserve justice. Some statutes are addressing the challenge by providing legal aid for whistleblower retaliation cases.

Merits decisions

Beyond the scope of our analysis was research into judicial bias in the cases that were ultimately decided on the merits. Judgments given on merits reveal how different judges consider the burdens of proof. Comparing and contrasting how and why judiciaries vary in their decision-making internationally would reveal whether whistleblowers face bias at a judicial level as well as societal. Such research would be a welcome addition to the findings of this report.

Gender

Out of a total of 487 cases found in our research, the majority concerned male whistleblowers (316, 67 per cent), while females accounted for 160 cases (31 per cent). The remaining two per cent comprises unknown whistleblowers (where the identity was protected) and cases involving more than one whistleblower.

These statistics need to be treated with caution. It would have been helpful to compare them to the backdrop of the overall gender ratio of people working in their organisations, a mammoth task that is beyond the scope of this study. It is also important to notice that the gender identification process used to collect this data relied mainly on the name of the claimant and the gender pronouns used by the judge or other decision-maker in their final case decision, creating a marginal risk of error in gender characterisation.

With these caveats in mind, these numbers nevertheless reveal a striking trend of gender disparity, raising questions both about the motivations of male and female whistleblowers and the environments they are in. Are women less likely to blow the whistle because they might feel less secure in their jobs and more at risk of retaliation by their superiors? Do they feel that there would be limited support and protection available for them if they were to speak out, both from within their organisation and outside of it? The fact that unknown cases represent only one per cent of the grand total of cases may raise questions about the use of anonymity as protection for whistleblowers. Given that women are more likely to experience retaliation, or harassment and bullying in the workplace more broadly, it is possible that this lack of anonymity is a factor that deters women from blowing the whistle.

A key issue here is that of the power imbalance, which is already a problem for whistleblowers more generally. On the one hand, combining this with the power imbalance between men and women across many professions could go some way to explaining the difference in whistleblowing numbers. On the other hand, the interaction between whistleblowing and power may be more complex. For instance, the fact that men are more likely to hold higher positions both in corporations and government bodies means that they might be more likely to be aware of any wrongdoing that is occurring.

The relationship between power, gender and whistleblowing was explored in detail in a survey of 3,288 employees of a large US Air Force unit.¹⁶² It showed that women are more likely to suffer retaliation than men when they blow the whistle, something which increases with the seriousness of the wrongdoing and the power of the wrongdoer. It also examined the effect of a woman's power (or lack of it) in her workplace. Defining whistleblowing as an 'influence attempt' and an 'assertive complaint', it posited that female employees are less likely to see themselves as influencers and to act in a way that is inconsistent with their social role expectations.

162 Michael T Rehg, Marcia P Miceli, Janet P Near and James R Van Scotter, 'Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships' (2008) 19(2) *Organization Science* 187 www.academia.edu/21226753/Antecedents_and_Outcomes_of_Retaliation_Against_Whistleblowers_Gender_Differences_and_Power_Relationships accessed 16 October 2020.

Moreover, the male whistleblowers' power (including both their formal status and perceived informal leverage) had an inverse relationship with retaliation, whereas no such relationship was detected for female whistleblowers. This suggests that their gender identity as women overrode their status within the organisational hierarchy, which did little to protect them from retaliation.

However, an interesting observation was that female whistleblowers reacted more actively after the perceived retaliation, namely by reporting to external channels. The study suggests that this was a way for women to seek vindication for the original action, especially as internal channels had mostly already been exhausted without success. A second explanation for this trend was that women may feel a greater need to pursue what they hope will be retaliation protection from an external party, as well as confirmation that they are legitimate whistleblowers and not troublemakers.

More research needs to be done to see if these findings are generalisable beyond the particular context of the survey, which was based on the participants' subjective experience rather than on the final outcomes of cases at trial.

In terms of cases that do proceed to trial, our data shows that the win-loss success rate among men and women appears to be fairly similar, from the information that could be gathered. Out of 146 cases involving female whistleblowers, 28 won – amounting to a success rate of 19 per cent among female claimants. Out of 316 cases involving male whistleblowers, 53 won – amounting to a success rate of 17 per cent. In some countries, this difference is more pronounced, such as in the US, where the general success rate out of the total number of cases in 2018 was 14 per cent for women, but only eight per cent for men.

The interaction between gender and various aspects of trial process were also examined in a recent report¹⁶³ by Britain's APPG for Whistleblowing, specifically in the context of the Employment Tribunals (ET) in England and Wales. It reveals that 'female whistleblowers are much less likely than male whistleblowers to have legal representation at the ET', something which further impacts the inequality of arms (although, interestingly, the lack of legal representation seems to have less of an impact on the success of a whistleblowing claim for women than for men). It also highlights that women seem to be more at risk of missing the high bar that English law requires for automatic unfair dismissal, (with nearly 25 per cent of female claimants with successful whistleblowing claims being told that their dismissal was not unfair). Although the report does not offer definitive explanations for these trends, it acknowledges the complexity of the gender dimension and opens the door for more research.

One reason for the tentative nature of these conclusions is that the role of gender is only beginning to be robustly considered in the broader anti-corruption space. As that changes – organisations such as the OECD and World Bank are beginning to contemplate how gender and corruption intersect and what that means for law and practice – greater emphasis on the gendered nature of whistleblowing is recommended.

Technology and whistleblowing 2.0

Technology is transforming whistleblowing by empowering human whistleblowers and changing the nature of whistleblowing itself. Whistleblowing laws will increasingly need to take into account these technological developments.

For example, web portals are replacing traditional hotline services, with the additional benefits of anonymity, while facilitating the provision of supporting documentation and communication with an investigative authority

163 All Party Parliamentary Group (APPG) for Whistleblowing report *Making whistleblowing work for society* (2020) https://a02f9c2f-03a1-4206-859b-ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf accessed 16 November 2020.

throughout. Web portals can function internally within an organisation or be outsourced to a third party. The effectiveness of web portals is demonstrated by the emerging market for open-source whistleblowing software, providing any organisation with tools to create their own whistleblowing web portal.¹⁶⁴

Whistleblowing mobile apps combine the advantages of web portals with the accessibility of mobile phones. They have particular value in countries with less developed technological infrastructure. Wahala Day is a whistleblowing app that was launched in 2017 by Nigeria's Independent Corrupt Practices and Other Related Offences Commission. The purpose of the app is to track corrupt practices across government agencies and the private sector. It is possible to file an anonymous complaint with supporting documents attached to provide a secure and private outlet for whistleblowers.

Blockchain is one of the most promising technological developments for whistleblowers yet to be fully realised. WhistleAI, Crypto Community Watch and Darkleaks are among the few blockchain-based whistleblowing platforms that exist today. Blockchain technologies allow for the balance to be struck between the whistleblowers' desire for anonymity and the investigative authorities' need for continued communication.¹⁶⁵ Data uploaded to a blockchain-based platform is immutable, meaning employers or organisations implicated by the disclosure cannot delete or tamper with evidence that has been aggregated onto interconnected blocks. Timestamping also allows whistleblowers to build up evidence over a period of time. In combination with the immutability of data, that means information can be used in future court proceedings without concern for the authenticity of evidence. Information escrow is another possible advantage of using blockchain. Smart contracts can be programmed to release information only if certain conditions are satisfied. Callisto software, originally designed for the reporting of sexual harassment, forwards the reported misconduct on to the appropriate authorities only when multiple complaints have been made about the same perpetrator. This can help to eliminate the 'first-mover disadvantage' and lessen the likelihood of retribution.¹⁶⁶

Web portals, apps and blockchain are just a few examples of the way technology can enable whistleblowers. They demonstrate how whistleblower protection laws are not the only means to protect and empower whistleblowers. Better adoption of these technologies will make the process of disclosure easier; it may also mean that fewer people will have to rely on the law's protection in the first place.¹⁶⁷

164 One example is GlobaLeaks, Italy-based software that allows any organisation to set up its own website, guaranteeing the security level necessary for a whistleblowing platform. The Italian Anti-Corruption Authority has based its online whistleblowing platform on GlobaLeaks software since 2018.

165 WhistleAI ensures anonymity on its platform through zero-knowledge protocols. These entail splitting information into fragmented pieces before sending them to the nodes for verification, thus ascertaining the protection of the whistleblower's identity while allowing the member of the network to verify correspondence on the whistleblower's allegation with the information provided in its report.

166 Ian Ayres and Cait Unkovic, 'Information Escrews' (2012) 111 Michigan Law Review 145.

167 For a more detailed discussion on the way technologies are transforming modern whistleblowing, see Kieran Pender, Sofya Cherkasova and Anna Yamaoka-Enkerlin, 'Compliance and Whistleblowing: How Technology will Replace, Empower and Change Whistleblowers' in Jelena Madir (ed), *FinTech: Law and Regulation* (Edward Elgar 2019). See also Project on Government Oversight, 'caught-between-conscience-career-expose-abuse-without-exposing-your-identity/.

Recommendations

Our core recommendation is simple: draft laws that reflect global best practices and implement them in good faith. However, even best practice laws will be ineffective without public support for and oversight of these rights. That cannot happen without transparency and education. The following recommendations are the foundation for sound whistleblower protection.

1. Countries should publish case decisions online within searchable databases

Access to information was one of the biggest challenges in this study. Transparency about case outcomes is essential to oversight of whistleblower protection rights. Some courts removed the names of a party or parties to protect their identities. That is one way to ensure protection of whistleblowers, while maintaining transparency.

2. Governments should publish reports with consolidated information about the impact of whistleblower laws to benefit society

It is important to have consolidated information about the impact of whistleblower disclosures, illustrating how they have made a difference against corruption or other abuses of power. This is especially true in countries that have large numbers of channels for receiving, investigating and resolving whistleblower disclosures and retaliation complaints. The resolution of whistleblower disclosures is one of the most important indicators of an effective whistleblower system.

Reporting metrics should be consistent and report essential data, including the number of disclosures submitted, referred to another agency, investigated and concluded; the number of disclosures not investigated; the number of substantiated versus unsubstantiated disclosures; and how all outcomes of substantiated investigations made a difference, either in terms of financial recovery, changes in law or tangible impact. Reports should also indicate how many requests for investigation and protection remedial agencies received and how many were granted; how many whistleblower complaints were filed and how many were confirmed; and how confirmed retaliation complaints were resolved.

3. Laws should remove economic barriers for whistleblowers challenging retaliation

From the start of a whistleblower retaliation case, there is a dramatic power imbalance between the employer and the employee in terms of time, resources and access to evidence. Our study found that cases took anywhere between a year to a decade to resolve in courts – which can be long enough to severely damage careers, finances, mental health and family relations. Whistleblower retaliation remains difficult to prove. Empirically, most whistleblowers lose their retaliation claims. If the balance of power problem was not bad enough considering the above factors, some countries, such as New Zealand, South Africa and the UK, forced reprisal victims to risk total financial ruin in order to assert their rights by enforcing ‘loser pays’ rules against whistleblower plaintiffs. This means that, if they lose, they may have to pay legal fees accumulated in blank cheque budgets of wealthy multinational corporations or powerful government agencies.

There are a number of solutions to these problems. First, in jurisdictions that retain the ‘loser pays’ principle in civil litigation, whistleblower cases should be an exception to not undermine the key rationale for whistleblower laws in the first place. Unfortunately, ‘loser pays’ rules exacerbate the economic power imbalance between individual whistleblowers and institutional defendants.

Second, access to affordable counsel through attorney fee reimbursement and legal assistance funds is also important to give whistleblowers a fighting chance to sustain litigation against their employers.

Third, the length of time it takes to resolve disputes can be mitigated by alternative dispute resolution programmes. This can be much quicker, less expensive and provide a better chance for justice than government forums if the mediators are independent and it is structured to guarantee a consensus on its objectivity and free from conflicts of interest.

Fourth, due process should include a high priority right to seek temporary relief in whistleblower laws. Temporary relief helps eliminate instances where employers prevail by cutting off the whistleblower's income and causing delays in proceedings; thus, exhausting the plaintiff's ability to sustain litigation against them. Forcing employers to keep whistleblowers on payroll until there is a final verdict helps to address the power imbalance and incentivise expeditious resolutions of controversies.

4. All national whistleblower laws should include a periodic review of the laws' effectiveness

Including the EU Whistleblower Protection Directive, only 33 out of 64 nations with national whistleblower laws or policies have a periodic review. However, the directive does not specify reporting requirements for the case results with various indicators, such as those utilised in this study. There is no requirement to trace how the directive's anti-retaliation rights are working in practice; only the impact of disclosure provisions.¹⁶⁸ Other nations that have the requirement, such as Canada, have ignored it in practice. Such periodic reviews should be mandatory for all nations. Additionally, donors should make funding available for independent reviewers to periodically assess the implementation of national whistleblower protection laws utilising a similar methodology to this study.

5. Bias and discrimination should be addressed through intensive public education and training

Our last recommendation is that intensive government and NGO public education about whistleblower rights may be the most significant effort needed to make a difference. Many of the best laws on paper are dormant or only used on a token basis because those who need them are either unaware of their existence (except perhaps for NGOs and government officials) or afraid to use them due to cultural bias. Protecting whistleblowers requires an evolution, as rapidly as possible, in attitudes among governmental and corporate institutions, among lawyers and judges, and among employees and employers – better protection will not come only through changes in the laws on the books.

Public education must also convince societies that the point of these laws is to challenge government abuses of power rather than enable them. Deeply ingrained social norms reinforce bias and subsequent discrimination at the employer level. This negative psychological response is counterproductive, and yet it continues with little consequence. It is essential to target negative attitudes that vilify whistleblowers through public education campaigns and trainings for various stakeholders including law enforcement, employers, lawyers and NGOs. The public needs whistleblowers as much as, if not more, than corporations and governments do.

The key to convincing the public is demonstrating to organisational leaders, as well as the public, the ways whistleblowers make a difference by improving institutional and collective wellbeing. For example, research by Stubben and Welch demonstrates empirically that whistleblowers save businesses money. Higher volumes of internal whistleblowing are associated with fewer and lower amounts of government fines and material

¹⁶⁸ Under Article 27, Member States must submit, on an annual basis, 'the following statistics on the reports referred to in Chapter III to the Commission, preferably in an aggregated form, if they are available at a central level in the Member State concerned: (a) the number of reports received by the competent authorities; (b) the number of investigations and proceedings initiated as a result of such reports and their outcome; and (c) if ascertained, the estimated financial damage, and the amounts recovered following investigations and proceedings, related to the breaches reported.'

lawsuits.¹⁶⁹ Further studies are necessary to examine the effectiveness of public education and training programmes to see how they are working, and if they need to be amended and/or continued. It should not be an assumption that one training or message per year is enough to change human attitudes, behaviours and beliefs.

Conclusion

French poet Victor Hugo famously wrote: ‘You can resist an invading army; you cannot resist an idea whose time has come.’ Today, whistleblower protection is one such idea – as evidenced by the rapidly increasing domestic, regional and international activity on the topic – one of the most dynamic in global law. We sincerely hope this research will help countries across the globe introduce and implement laws where these values take root in reality. In particular, we trust that this research will serve as a useful contribution as EU Member States look to transpose the landmark whistleblowing directive – probably the most significant development in a decade – into new or updated laws among EU Member States by the end of 2021. At the time of writing, only 13 EU Member States have a national whistleblower law.¹⁷⁰ They must update their laws to meet the directive’s minimum requirements. The remaining Member States, which presently have few or no safeguards for whistleblowers, must enact standalone whistleblower protection for the first time.¹⁷¹

Whistleblowers are essential players in the fight against the corporate and government abuses of power that have sustained and exacerbated corruption, as well as dangers to public health and safety. This study demonstrates that most whistleblowers make disclosures internally to their employer – in other words, before making an external or public disclosure. Thus, most whistleblowers give their employer an opportunity to address the problem.

The dearth of credible public data, in the majority of countries in this study, on the operation of national whistleblower laws in practice greatly hampered this study’s evaluation of the effectiveness of such laws. Where transparency exists, we learned that at best, 25 per cent of whistleblowers formally succeed in retaliation claims. More receive informal relief, so the rights are very probably having an impact compared to just a few decades ago when there were no remedies to seek. Unfortunately, the impact is still too modest to fully thaw the chilling effect of repression. Almost no legally successful whistleblowers receive enough relief to make them whole. When whistleblower laws fail, everyone loses – except those who succeed through lawlessness. Corporations lose to fraud and corruption. Governments lose their witnesses for oversight and law enforcement.

While the EU Whistleblower Protection Directive requires transparency about the substance of whistleblowing, it does not explicitly include any requirement to disclose the track record of new laws in protecting whistleblowers from retaliation. This report confirms that, in the overwhelming majority of countries with standalone whistleblowing laws, there is a vacuum of information about the operation of these laws. Where data does exist, it indicates that whistleblowing rights are not yet sufficiently used or effective in many/most cases. For those landmark rights to work in practice, greater monitoring, data-gathering and analysis will be essential. American jurist Justice Louis D Brandeis once observed that ‘sunlight is said to be the best of disinfectants; electric light the most efficient policeman’. This quotation is often used in support of whistleblowing. Much the same could be said of whistleblower protection laws themselves. For this protection to truly succeed, on paper and in practice, more sunlight is needed on the laws and their operation. We hope that this report is an early ray of light.

169 See n 1 above, p 9.

170 Belgium, Croatia, France, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Romania, Slovakia and Sweden.

171 Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Lithuania, Poland, Portugal and Spain.

Appendix 1

Nations with dedicated whistleblower laws (48, 62 with EU)

Albania: Albania Law No 60/2016 on Whistleblowing and the Protection of Whistleblowers ('Albania WPA')

Australia: Public Interest Disclosure Act 2013 ('Australia PIDA')

Bangladesh: Act No 7/2011 ('Bangladesh WPA')

Belgium: Law on the Termination of a Suspected Violation of the Integrity in a Federal Administrative Authority by a Member of his Staff, 15 September 2013 ('Belgium WPA')

Bosnia: Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina ('Bosnia WPA') (2014); reinforced by Law on Protection of Persons who Report Corruption (2017)

Botswana: Whistleblowing Act (Act No 9 of 2016) ('Botswana WPA')

Canada: Public Servants Disclosure Protection Act ('Canada PSDPA')

Cayman Islands: Whistleblower Protection Law 2015 ('Cayman Islands WPA')

Croatia: Whistleblower Protection Act 2019 ('Croatia WPA')

France: Law on Transparency and Anti-Corruption ('Sapin II') 2016 ('France WPA')

Great Britain: Public Interest Disclosure Act 1998 ('UK PIDA')

Ghana: Whistleblower Act (2006) ('Ghana WPA')

Guyana: Protected Disclosures Act of 2018 ('Guyana WPA')

Hungary: Act CLXV of 2013 on Complaints and Public Interest Disclosures ('Hungary PIDA')

Ireland: Protected Disclosures Act 2014 ('Ireland PDA')

Israel: Protection of Employees (Exposure of Offenses of Unethical Conduct and Improper Administration) Law, 5757-1997 ('Israel PEL'); supplemented by Protection of Workers (Disclosure of Offenses and Harm to Integrity or to Proper Administration) Law (Amendment No 2), 5768-2008

Italy: Whistleblowing Act 2017 ('Italy WPA')

Jamaica: Protected Disclosures Act 2011 ('Jamaica PDA')

Japan: Whistleblower Protection Act (Act No 122 of 2004) ('Japan WPA')

Kenya: Whistleblower Protection Bill 2018 ('Kenya WPA')

Kosovo: Law No 06/L –085 on Protection of Whistleblowers ('Kosovo WPA')

Latvia: Whistleblowing Alarm Lifting Law ('Latvia WPA')

Lebanon: Law for the Protection of Detecting of Corruption 2018 ('Lebanon WPA')

Lithuania: Republic of Lithuania Law on Protection of Whistleblowers ('Lithuania WPA')

Malaysia: Whistleblower Protection Act 2010 ('Malaysia WPA')

Malta: Protection of the Whistleblower Act 2013 ('Malta PWA')

Moldova: Moldova Integrity Law 2017 ('Moldova WPA')

Namibia: Namibia Protection Act 2017 ('Namibia WPA')

Netherlands: Whistleblowers' Center Act (34105/7) ('Netherlands WCA')

New Zealand: Public Disclosure Act 2000 ('New Zealand PDA')

North Macedonia: Law on the Protection of Whistleblowers, CDL-REF (2016)002 ('North Macedonia WPA')

Norway: Work Environment Act 2005 ('Norway Work Act')

Pakistan: Whistleblower Protection and Vigilance Commission Act ('Pakistan WPA')

Papua New Guinea: Whistleblower Act 2020 ('Papua New Guinea WPA')

Peru: Law No 29542, Whistleblower Protection Law ('Peru WPA')

Republic of Korea: Act On the Protection of Public Interest Whistleblowers (Act No 10472 of 2011) ('Korea ACA')

Romania: Law No 571-2004, Law concerning the protection of personnel from public authorities, public institutions and from other establishments who signalize legal infractions ('Romania WPA')

Rwanda: Law No 35/2012 of 19/02/2012 Relating to the Protection of Whistleblowers ('Rwanda WPA')

Serbia: Law on the Protection of Whistleblowers ('Serbia WPA')

Slovakia: Whistleblower Protection Act (Act 54 of 2019) ('Slovakia WPA')

South Africa: Protected Disclosures Act 2000 ('South Africa PDA')

Sweden: Act on special protection for workers against reprisals for whistleblowing concerning serious irregularities (2016:749) ('Sweden WPA')

Tanzania: Whistleblower and Witness Protection Act 2015 ('Tanzania WWPA')

Tunisia: Law on Protecting Reporters of Corruption in the Public Sector 2017 ('Tunisia WPA')

Uganda: Whistleblowers Protection Act 2010 ('Uganda WPA')

US: Whistleblower Protection Act 1989 ('US WPA') and 50 private sector laws

Vietnam: Law No 25/2018/QH14 on Denunciation 2018 ('Vietnam WPA')

Zambia: Public Interest Disclosure (Protection of Whistleblowers) Act 2010 (Act No 4 of 2010) ('Zambia PIDA')

Nations without dedicated national laws but covered by the EU Whistleblower Protection Directive (14)

EU Directive 2019 on the Protection of Persons who Report Breaches of Union Law

- Austria
- Bulgaria
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- Germany
- Greece
- Lithuania
- Luxembourg
- Poland
- Portugal
- Spain

Nations with whistleblower laws passed by legislature but not yet enacted (2)

Iceland (2020)

India (2014)

Appendix 2

National laws' track record for compliance with best practices

(Number of criteria met, followed by relevant national law)

- 16 – EU Whistleblower Protection Directive, Australia, US
- 15 – Ireland, Serbia
- 14 – Namibia
- 13 – Kosovo
- 12 – Cayman Islands, Croatia, Latvia, North Macedonia, Zambia
- 11 – Kenya, New Zealand
- 10 – Guyana, Lithuania, Republic of Korea
- 9 – Slovakia
- 8 – Albania, Jamaica, Malta, Uganda, Vietnam
- 7 – Bosnia, France, Ghana, Malaysia, Tanzania, Tunisia
- 6 – Moldova
- 5 – Britain, Japan, Pakistan, South Africa
- 4 – Bangladesh, Belgium, Botswana, Italy, Rwanda
- 3 – Papua New Guinea, Romania, Sweden
- 2 – Israel, Hungary, Netherlands, Peru
- 1 – Canada, Lebanon, Norway

Appendix 3

Nations with rights broader than the employment context (33, 47 with EU)

EU Whistleblower Protection Directive, Articles 21.3 and 21.7 (affirmative defence against criminal liability for gathering evidence unless accompanied by an independent crime, immunity from criminal or civil liability for disclosure if whistleblower reasonably believes disclosure is necessary to reveal misconduct); and Article 4.1 (also covers shareholders and corporations).

National laws

- Protection for those outside the workplace: 19/47
- Protection against retaliation outside the workplace: 27/47

Australia PIDA: sections 10(a), 23, 57 and 78; Corporations Act, sections 1317AB(1), 14ZZX(1)(a) and 14ZZZAA (criminal and civil liability), and section 1317 ADA (illegal 'detriment' means any damaging action, including damage to property, reputation or business or financial position). Section 10 – law protects 'an individual [who] makes a public interest disclosure', Corporations Act, sections 1317AAA(g) and (h) cover relatives and dependents. Section 14ZZU of the Treasury Laws Amendment Act also defines 'individual' to include the whistleblower's associates, relatives and dependents, as well as corporate suppliers, trustees and officers.

Bangladesh WPA: section 5(2) (no civil or criminal liability for a protected disclosure)

Bosnia WPA: section 7(3) (civil and criminal liability)

Botswana WPA: section 15 (civil and criminal liability)

Cayman Islands WPA: sections 14.2 and 16 (civil and criminal liability)

Croatia WPA: Article 13 (protection for 'affiliated persons', without respect to workplace status)

France WPA: Sapin II Article 6A (law protects disclosure by a 'physical person')

Ghana WPA: sections 1.1(3), 2 and 12 (protection for 'a person' who makes a disclosure, with specific provision for non-employees); sections 17 (police protection for whistleblower and family) and 18 (civil and criminal liability)

Guyana WPA: section 22(1) (protection for 'a person related to or associated with the person who made the protected disclosure') and 17 (civil and criminal liability)

Hungary PIDA: Article 11 ('any action... which may cause disadvantage')

Ireland PDA: sections 13 (remedy for retaliation against 'third person'), 14 and 15 (civil and criminal liability)

Jamaica PDA: section 15 (civil and criminal liability)

Kenya WPA: sections 24(2) and 25(2) (protection for relatives); 2 ('any other discriminatory action that would adversely affect the exercise of rights protected by this Act'); 10 and 24(1)(b) (civil and criminal liability); and 28.4 ('public interest' defence to liability)

Kosovo WPA: Articles 3.1.1, 3.1.5, 3.1.11, 3.1.12, 8 and 9 (without restrictions to workplace, protects 'any person' or any person associated with the whistleblower', including immunity from civil and criminal liability)

Latvia WPA: sections 13(1) (ban on direct or indirect adverse consequences to whistleblower or family, without qualifier) and 15 (civil and criminal liability release)

Lebanon WPA: chapter III ('physical or moral harm or physical damage to property or personal property')

Lithuania WPA: Articles 2(6), 4, 8 and 10(3) (protection for 'any person', specifically including family members), and 3.4, 8.1 and 15 (any liability)

Malaysia WPA: section 7(b), 9 (civil and criminal liability)

Malta PWA: sections 2 (definition of 'detrimental action'), 4.1 and 19

Namibia WPA: sections 1, 5(3), 45(1) and 48(1-2) (protection also covers those 'related to or associated with' the whistleblower, and disclosures may be made 'by any person, in respect of another person or a private body or institution'), and 5(1-2) and 47 (civil and criminal liability)

New Zealand PDA: section 18(1) (immunity from civil and criminal proceedings)

North Macedonia: Articles 2(3), 2(7), 8 and 9 (covers those in a business relationship with or who use services, as well as close persons including all relatives and anyone so designated), and 8(1) (includes any liability)

Pakistan WPA: section 10 ('victimised by any proceedings or otherwise')

Republic of Korea ACA: Articles 2(4) (whistleblower defined as 'a person'), 6 ('any person' can make a whistleblowing disclosure) and 11(1) (protection for relatives and co-habitants); Articles 2(6)(1) (protection against cancellation of contracts, services or any action that causes economic disadvantage for the whistleblower), 14(3) (police protection against threats to life), 14(4) (civil liability shield) and 15 (protection against 'any disadvantageous measure')

Rwanda WPA: Articles 2.5 (in addition to employees, law also protects 'any other person' who makes a covered disclosure) and 16 (civil and criminal liability)

Serbia WPA: Articles 2(2) ('any natural person', including owners of corporations, those who engage in business with or use an institution's services) and 2(7) – all civil liability ('any action... which puts [whistleblowers] at a disadvantage')

Slovakia WPA: section 2(1)(a) ('reporter' includes any 'natural person' and 'any close person of such a natural person having an employment relationship or another similar relationship with the same employer shall also be deemed a reporter')

Tanzania WPA: Parts II.4.1 (covers 'any person', not just employees) and III.10 (danger to life or property)

Tunisia WPA: Article 19 (all civil and criminal liability)

Uganda WPA: sections 2.3 (covers 'a person'), 11 (protects against threats to life or property of whistleblower's family) and 10 (immunity from civil and criminal liability, including override of secrecy laws)

Vietnam WPA: Articles 2.1 (covers all individuals, not just employees) and 47.1 (protects job, health, property and life of 'his/her spouse, natural parent, adoptive parent, stepfather, stepmother, natural child, adopted child [... collectively referred to as 'the protected person']')

Zambia PIDA: section 56 (absolute immunity through public interest defence for any liability)

Appendix 4

Whistleblower laws with significant national security or law enforcement loopholes (14/48, independent of EU Whistleblower Protection Directive)

The list below does not cover restrictions on disclosures of classified information. The criteria are restrictions for disclosures of unclassified information by national security/law enforcement whistleblowers or due process anti-retaliation rights that are weak or non-existent compared to the rest of the whistleblower law.

Canada PIDA: (no provision to override the Official Secrets Act)

EU Whistleblower Protection Directive: (with certain procurement-related exceptions, the EU does not have authority over national security matters)

France WPA: Article 6A

Jamaica PDA: (no provision to override the Official Secrets Act)

Japan WPA: Article 7 (secondary intra-agency controlled parallel system for national security and military personnel)

Malta PWA: section 2(1) ('national security, defense, intelligence, public order and the international relations of the State')

New Zealand PDA: section 12 (may only make disclosures to the Inspector General of Intelligence and Security)

Netherlands: Whistleblowers' Center Act, Article 4.2.b (protection does not apply to intelligence and security personnel)

Norway Work Act: Introduction (excludes military aviation)

Pakistan WPA: (nearly all-encompassing loopholes include security and strategic information)

Peru WPA: section 7 (protection does not apply to national defence or intelligence employees)

Slovakia WPA: sections 1(3) and 21 (law does not apply to military or intelligence operations, or to classified information)

South Africa PDA: (no provision to override the Official Secrets Act)

UK PIDA: (no provision to override the Official Secrets Act)

US: 5 USC 2302(a)(2)(C) (government employees); 10 USC 2409(f), 41 USC 4712(f) (government contractors)

Appendix 5

American administrative agencies

Beyond the analysis of court cases, the track records of federal administrative agencies that handle whistleblower disclosures and retaliation complaints are contributing indicators of the effectiveness of US whistleblower laws. We examined the primary federal administrative agencies in the US that whistleblowers utilise.¹⁷² Federal agencies report statistics to US Congress on an annual, semi-annual or quarterly basis, and the reports are publicly available online. Overall, federal agencies did not consistently report compensatory damages awarded and cases relieved through settlement agreements. Our findings show that, generally, few whistleblower cases are referred for investigation and few are substantiated.

Detailed track records for the primary administrative agencies with authority to act on retaliation complaints and whistleblowing disclosures are summarised below. US federal agencies report in fiscal year periods rather than calendar year. In the US, fiscal year 2018 was from 1 October 2017 to 30 September 2018.

DEPARTMENT OF LABOR OSHA OFFICE OF WHISTLEBLOWER

Protection programmes

In fiscal year 2018 the Department of Labor OSHA, which primarily covers the private sector anti-retaliation laws, reportedly received 3,007 whistleblower retaliation complaints and completed 2,924 whistleblower investigations, awarding nearly \$28m to complainants, including 59 reinstatements.¹⁷³ In fiscal year 2018, OSHA found illegal whistleblower retaliation in 44 complaints (695 settled). On balance, out of 1,681 complaints that were not withdrawn, settled or 'kicked out' to federal court, whistleblowers won only 2.6 per cent. However, when settlements from their complaints were considered, 31 per cent received some relief as a result of asserting their whistleblower rights.¹⁷⁴

Except for occupational health and safety complaints, the Department of Labor does not investigate whistleblower disclosures – the office only investigates retaliation claims. However, most administrative agencies also have the capacity to help the whistleblower start making a difference through conducting or ordering investigations of their disclosures and reporting their findings. We say 'start' because the investigations only lead to recommendations that agency leadership can accept or reject. Overall, we found a large volume using disclosure mechanisms. In fiscal year 2018, the US Office of Special Counsel (for public sector employees) received 1,559 new disclosures of alleged wrongdoing; the SEC received 5,200 whistleblower tips; while the CFTC received 760 tips and complaints. Seventy-three federal Offices of Inspector General processed 585,596 hotline complaints. Although there are variations in what is included in each statistic, and this list of agencies is not exhaustive of all available whistleblower channels, the equation at a national level is at least 593,115 disclosures to federal investigative agencies in the course of fiscal year 2018. As discussed below, however, our findings show that, generally, few whistleblower disclosures are referred for investigation and few are substantiated.

172 OSHA, SEC, CFTC, OSC and OIGs.

173 See www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V1-01.pdf p 16 accessed 30 October 2020.

174 See www.osha.gov/sites/default/files/3D_Charts-Received_Closed.pdf accessed 30 October 2020.

OIG

The US has 74 federal OIGs.¹⁷⁵ They report individually on the volume of disclosures they receive and investigate. The Council of the Inspectors General on Integrity and Efficiency's (CIGIE) annual reports to Congress do not include consolidated data on the volume of whistleblower disclosures, retaliation complaints, their investigations or results. Although there is a lack of national consolidated data about OIG's effectiveness in handling disclosures, CIGIE's annual report for fiscal year 2018 states that federal OIGs closed 19,858 investigations and processed 585,596 hotline complaints.¹⁷⁶ These investigations resulted in \$49bn in potential savings from audit recommendations and \$15.3bn from investigative receivables and recoveries.¹⁷⁷ The accountability stemming from OIG findings included 3,971 successful criminal prosecutions, 4,462 indictments and criminal information, 1,160 successful civil actions, 3,785 suspensions and debarments, and 4,664 personnel actions.¹⁷⁸

OIG reports to Congress demonstrate the large volume of disclosures each Inspector General may receive. To illustrate, in fiscal year 2018, the Department of Justice OIG received 603 whistleblower complaints. This figure includes both disclosures and retaliation complaints because the OIG did not distinguish them, and opened 186 for investigation (about 30 per cent). The OIG referred 273 (about 45 per cent) to different components of the Department of Justice for their investigations. However, no information was provided about substantiations in whistleblower cases, either for disclosures or retaliation complaints. The Department of State OIG received 2,192 hotline complaints,¹⁷⁹ opened 78 cases for investigation, received 15 whistleblower retaliation complaints, completed eight retaliation investigations and substantiated four.

In short, OIG's have the authority to investigate and recommend corrective sections on whistleblower retaliation complaints, but annual reports provide only anecdotal data.

OFFICE OF SPECIAL COUNSEL

According to the Office of Special Counsel's (OSC) 2018 annual report to Congress, in fiscal year 2018, it received 1,559 new whistleblower disclosures; sent 41 whistleblower disclosure reports to the President and Congress; and federal agencies substantiated wrongdoing in 36 of those cases.¹⁸⁰ Out of 1,624 new and pending disclosures processed and closed, OSC found a 'substantial likelihood' of wrongdoing and ordered the agency chief to investigate in 139 cases, or 8.6 per cent of disclosures.¹⁸¹

The OSC also is the primary agency to investigate and act on alleged whistleblower retaliation or other violations of the civil service merit system. It received 4,168 new 'prohibited personnel practices' complaints.¹⁸² The OSC reported that 21 out of 32 completed mediations resulted in settlement (66 per cent mediation success rate). OSC reported that there were 6,137 overall active or pending retaliation complaints in fiscal year 2018, and

175 See <https://crsreports.congress.gov/product/pdf/R/R45450/4> accessed 30 October 2020.

176 See www.oversight.gov/sites/default/files/cigie-reports/archive/26727//FY18_Annual_Report_to_the_President_and_Congress.pdf accessed 30 October 2020.

177 *Ibid.*

178 *Ibid.*

179 It is not clear how many are classified as whistleblower disclosures.

180 See <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202018%20Annual%20Report%20to%20Congress.pdf> accessed 30 October 2020.

181 See <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202018%20Annual%20Report%20to%20Congress.pdf> accessed 30 October 2020.

182 *Ibid.*

4,073 resolved complaints.¹⁸³ OSC reported that there were favourable actions in 196 matters negotiated with agencies for whistleblower retaliation. Unfortunately, the OSC did not state how many of these complaints were for whistleblower retaliation cases specifically so there is no baseline for the success rate of whistleblower complaints.

The OSC has authority to seek stays for temporary relief. OSC's fiscal year 2018 annual report says that it negotiated 47 stays in the previous year (stays are the temporary delay or reversal of a personnel action while the case is pending) with agencies to protect employees from premature or improper personnel actions¹⁸⁴ and obtained two stays and ten stay-extensions from the MSPB. The OSC report also reveals that it successfully prosecuted 22 disciplinary actions from the board (against retaliators).¹⁸⁵

SEC

According to the SEC fiscal year 2018 report, that year, the agency received 5,200 whistleblower tips (28,000 between fiscal year 2011 and 2018).¹⁸⁶ The quantity of whistleblower tips represents allegations, not the number of people making those disclosures. It is interesting to note that, in fiscal year 2018, the SEC received whistleblower tips from individuals in 72 foreign countries.¹⁸⁷ In fiscal year 2018, the SEC awarded approximately \$168m to 13 individuals who provided original information that led to the opening of an investigation or contributed to a successful enforcement action. From programme inception to the end of fiscal year 2018, the SEC awarded over \$326m to 59 individuals.¹⁸⁸

While legally it can protect whistleblowers, the SEC's impact here has been negligible. SEC reports that, since July 2010, it brought three anti-retaliation enforcement actions against employers for retaliation, and nine enforcement actions against people who impeded an individual from communicating with them.¹⁸⁹ The SEC has not disclosed the results. It is further worth noting that the OSC's annual report did not provide any other data about how many retaliation or communication obstruction complaints the SEC received.¹⁹⁰

CFTC

According to the CFTC fiscal year 2018 report on its whistleblower programme, the CFTC received 760 whistleblower tips and complaints in fiscal year 2018 and posted 31 'notices of covered action'. During the same period, there were 120 whistleblower award claims. The CFTC issued 31 final orders addressing 55 whistleblower award applications, granting awards to five whistleblower applications, denying them to 50 and three withdrew.¹⁹¹ Since the inception of the whistleblower programme, the CFTC issued nine awards totalling approximately \$87m. The CFTC reports on the whistleblower programme have not disclosed any activity to challenge whistleblower retaliation.

183 See <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202018%20Annual%20Report%20to%20Congress.pdf> p 16 accessed 30 October 2020.

184 See <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202018%20Annual%20Report%20to%20Congress.pdf> p 15 accessed 30 October 2020.

185 *Ibid.*

186 See www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf accessed 30 October 2020.

187 *Ibid.*

188 *Ibid.*

189 *Ibid.* at pp 18 and 19.

190 *Ibid.*

191 See <https://whistleblower.gov/sites/whistleblower/files/2018-10/FY18%20Annual%20Report%20to%20Congress%20Final.pdf> accessed 30 October 2020.