

The global rise in whistleblowing laws: international trends in protection

The activities of organisations affect people in real and direct ways, in the public services provided and in products and services sold. No matter what systems are put in place, things can go wrong. Inside organisations, whistleblowing can act as an early warning system but, importantly, whistleblowing is also a matter of public responsibility and public accountability. It saves lives and livelihoods.

As I wrote for PSI in 2016¹, some of the conceptual confusion around whistleblowing protection arises from the wide range of public interest information that can form the basis of a whistleblowing disclosure; the information disclosed may concern health and safety, human rights, the environment, or fraud, gross mismanagement or other abuses of power in any area of government or corporate life. However, the fact that whistleblowing interacts with several different areas of law and policy is also one of the reasons governments claim not to know or are genuinely uncertain about where whistleblower protection fits within law or policy. This is where the role of unions – as happened most recently in Europe – can be instrumental.

Where legislating has been most successful is when the focus has been on workers' rights against retaliation for reporting concerns. And as these rights have become more established, calls to extend the laws to regulate organisational and institutional responses to whistleblowing have increased. Important headway has been made in this regard in Australia, and in Europe unions played a very important role in achieving groundbreaking rules.

To be clear, legal and policy protections for whistleblowers are firmly rooted in labour and employment law. In the US, civil service reform in the 1970s provided the early context for implementing whistleblower protection across the federal sector – linking whistleblower protection to public accountability.

The International Labour Convention on Termination of Employment of 1982 (Articles 4 and 5) was one of the first international instruments to include whistleblower protection by providing that filing a complaint or participating in proceedings against an employer are not valid reasons for dismissal. The Convention also made it clear in Article 9 that the burden for proving the reason for dismissal should rest on the employer where possible. The legal reverse burden of proof has

proved essential to ensuring whistleblowers have a fighting chance to succeed in court proceedings and is found in most internationally accepted principles on whistleblower protection, which in many respects are still evolving².

Since those early days, whistleblower protections have advanced but there is still work to do. This article provides some observations on recent trends in an effort to support unions and all those interested in protecting worker's rights, social rights, and democratic accountability to engage effectively in this important area.

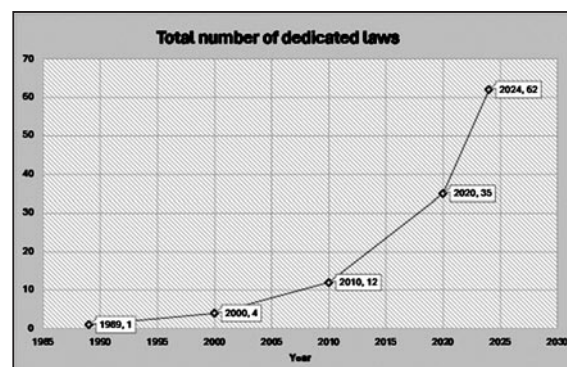
Whistleblower protection laws globally

The concept of whistleblowing as a legally protected activity is relatively new. The idea of speaking truth to power as a moral or social choice, however, has long been the subject of literary, religious, and philosophical explorations and teachings: the person who dares to speak up when everyone else turns a blind eye, so to speak.

The first modern dedicated whistleblower protection law, the US Whistleblower Protection Law of 1989 was adopted to help eliminate wrongdoing within the government by mandating that employees should not suffer adverse consequences for disclosing a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a “substantial and specific danger” to public health or safety. However, this built on earlier reforms to the Civil Service Act in 1978 and in fact on protections that have existed in the United States since the late 1770s³.

The graph⁴ below shows that the gradual adoption of dedicated whistleblower protection laws between

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1989 and 2010 (12 in total) gathered pace from 2010 and has advanced significantly in the last 5 years with the adoption of the EU Directive on the protection of whistleblowers⁵. ‘Dedicated’ in this context means whistleblower protections contained in a single law covering the public sector, or both the public and private sectors. It should be noted that these numbers do not reflect a myriad of provisions found in many different laws and legal provisions around the world – whether by sector or at subnational level – providing some form protection, nor do they reflect either the quality or effectiveness of these laws.

Two other aspects are interesting to note here. The first is that the vast majority of the laws cover *both* public sector and private sector wrongdoing and extend to employees, workers or anyone reporting such concerns. Only six of the 62 laws relate solely to the public sector, i.e. – covering only wrongdoing related to a public body or only protecting those working in the public sector. This means that most laws cover wrongdoing wherever it occurs – whether in the public or private sectors. While the vast majority focus on protecting people from work-related forms of discrimination or retaliation such as removal of job duties, unfair disciplinary processes or dismissal, these are expanding to cover other types of harm such as psycho-social harm, to provide support and to protect other persons associated with a whistleblower, such as colleagues or family members.

The second trend is that whistleblowing is going global. Laws have been adopted by countries in all major world regions. The highest concentration is in

Europe (38 countries) and North America (where 2 out of the 3 countries have dedicated whistleblower protection laws), followed by Africa (eight countries), East Asia and Pacific (7 countries) and Latin America and the Caribbean (four countries). Three countries in the Middle East region have also adopted whistleblower protection laws and two have been adopted in Central and South Asia.

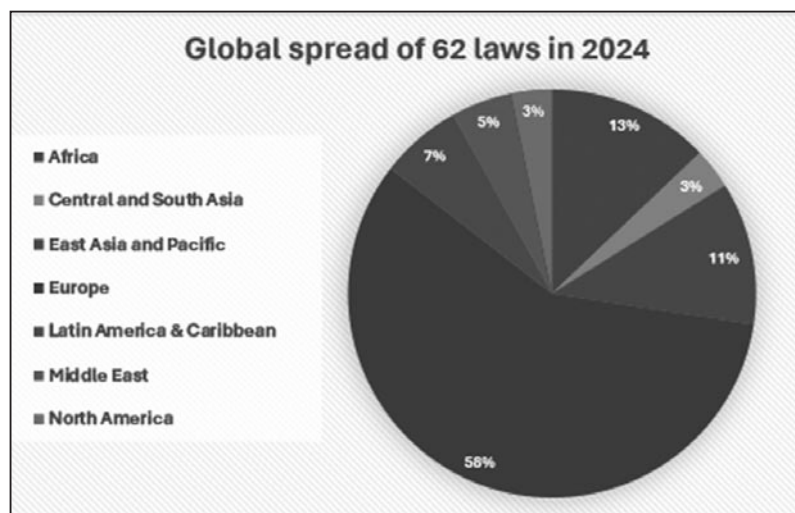
While the early whistleblower protection laws were adopted primarily in English-speaking countries with a common-law system, over half of the laws now in force are in non-English speaking countries with civil-law or mixed legal traditions. This expansion into different legal systems and languages should bring some interesting innovations and concepts into this evolving field.

Whistleblowing laws both reflect and need to adapt to the changing nature of work and risks to the public interest over time. This next section examines one of the most important recent innovations in whistleblower protection, organisational duties and responsibilities, and highlights a critical gap, the capacity of laws to protect and address cross-border whistleblowing.

Advances and new challenges

Australia was the one of the first jurisdictions to specifically address organisational accountability for the protection whistleblowers. Since 2019, public and larger companies can be held liable if they fail to prevent a third party (i.e. – one of their employees) from acting against a whistleblower or failing to take ‘reasonable steps’ to ensure the third person did not do so, which means corporations should have clear policies about how whistleblowers are to be supported and protected, *before* anyone starts taking out reprisals⁶. According to Professor AJ Brown, Chair of Transparency International Australia and an expert on organisational whistleblowing, this private sector development followed from “protections applying to union whistleblowers since 2016, which [made] organisations liable for failing to fulfil ‘a duty to prevent, refrain from, or take reasonable steps to ensure other persons under the respondent’s control prevented or refrained from, any act or omission likely to result in detriment’ to a whistleblower”⁷.

The new EU Whistleblowing Directive places duties and obligations on organisations and institutions (regulators). While we won’t go into all the detail here, organisations with 50+ workers are required to establish internal channels for



whistleblowing and meet limits acknowledging receipt of the report and responding to its substance. This is the same for regulators who can receive direct reports from workers. The Directive also requires organisations and regulators to maintain the confidentiality of the whistleblower's identity in all but limited circumstances under law and organisations must ensure workers know they can report directly externally to regulators and how to do so. Regulators must clearly publish details on their websites setting out the conditions for qualifying for protection, how to contact them and how disclosures will be handled.

Importantly, the EU Whistleblowing Directive has backed up these duties with penalties for breaches including trying to stop someone from blowing the whistle, retaliating or bringing vexatious proceedings against a whistleblower, or breaching confidentiality. Enforceable duties on organisations and institutions is a game-changer. However, Transparency International's 2023 review⁸ of 20 laws and the European Commission's 2024 report⁹ found critical gaps including weak transposition of the penalty requirements which are meant to be 'effective, proportionate and dissuasive'.

Cross-border protection

Using Europe as a regional example, both the Council of Europe and the European Union have worked to address the lack of protections in many countries and the problems posed by inconsistent protections that make successful navigation of rights too difficult for most whistleblowers. The Council of Europe which has 46 member states began examining whistleblowing as a matter of rule of law and democratic accountability as early as 2010 and adopted the Recommendation to protect whistleblowers in 2014¹⁰. The European Union acted in 2019 to address fragmented rights¹¹ across its 27 Member States.

While there is no doubt these legal instruments have advanced the field in Europe in ways few would have predicted 15 years ago, civil society and unions need to remain vigilant to ensure these rights are implemented and enforced effectively nationally¹². But an important question remains here in Europe as it does elsewhere – how can we protect whistleblowers across borders?

Unions have plenty of reasons to be concerned about this, not least because of the changing nature and geographic boundaries of work but also because the harm caused by wrongdoing does

not always stop at national borders. This is as true in cases of corruption with illicit money flows around the world, as it is for health emergencies such as the global COVID epidemic, and environmental damage.

Currently, it is far from clear whether or how someone who reports a concern to a relevant regulator in one country can reassure themselves they will be protected against retaliatory acts taken against them in other jurisdictions. Interestingly the UK Public Interest Disclosure Act (1998) does not limit protection to disclosures made in or about wrongdoing in the UK but the law does require a sufficient nexus to UK employment law for PIDA to apply.

The case of Jonathan Taylor reveals just how complicated retaliation can be and how easy it is to fall outside jurisdictional limits¹³. Briefly, Taylor worked for a Monaco-based company and cooperated with authorities in four countries about his employer's cover up of serious bribery in Brazil. He was pursued by his former employers in the Netherlands for defamation – a country he was neither a citizen of nor had worked in – and was arrested in Croatia in 2020 and on an alert stemming from a criminal complaint in Monaco his former employer made against him in 2013. He had to fight the case in the Croatian Courts for 11 months before he was finally allowed to leave.

Another ongoing case is that of Johannes Stefansson, the "Fishrot" whistleblower. Stefansson is considered a protected witness in Namibia and a suspect in Iceland although he has cooperated fully with the authorities in both countries in what has proven to be a high-profile corruption case involving serious bribery in the fishing industry¹⁴.

Whistleblowers and journalists have found themselves in breach of Swiss banking rules that are sufficiently vague to allow prosecutions against whistleblowers and journalists acting in the public interest and who would be able to argue their right to be protected elsewhere¹⁵. Again, the EU Whistleblowing Directive has made strong headway in terms of protecting whistleblowers from liability in separate legal proceedings, like defamation, taken against them as a result of their disclosures – although it does not specifically deal with the issue of cross-border retaliation and relief. A new EU Directive to protect against SLAPPs¹⁶ may provide offer some support in cross border cases.

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Conclusion

Whistleblowers are the guardrails of democracy and often the first defence against corruption. I would liken it to citizen's action at its best. In Europe, unions played an instrumental role in the successful adoption of the EU Whistleblowing Directive by engaging directly with policy makers and campaigning. Importantly, Eurocadres, representing almost six million professionals and managers, hosted and convened a coalition of unions, whistleblower protection, journalist and media freedom, anti-corruption and open government organisation to work together on this important project¹⁷.

At the international level, PSI has long advocated for stronger and more effective whistleblower protections and standards and has ensured whistleblowing remains on the ILO agenda. And unions on the ground are fighting daily for the rights of workers everywhere. As power and information continues to concentrate in the hands of the few and authoritarianism is on the rise around the world, unions are leading the defence against attacks on existing whistleblower protections and infrastructure and working hard to support those who speak up.

Whistleblowing International Network (WIN) is an international membership network and information hub dedicated to public interest whistleblowing. We reinforce and mobilise the civil society whistleblower protection community, collaborate and exchange expertise and advocate for better protections for whistleblowers around the world.
<https://whistleblowingnetwork.org/>

- 1 Public Services International (PSI) (2016) *Checkmate to corruption: making the case for a wide-ranging initiative on whistleblower protection*.
- 2 See amongst others, G20 High-Level Principles for the Effective Protection of Whistleblowers (2019) and the Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member states on the protection of whistleblowers and the first UN Resolution on whistleblowing adopted at the Conference of the States Parties to the United Nations Convention against Corruption in 2023.
- 3 Considered to be forerunner to the First Amendment of the American Constitution, the US passed congress the first whistleblower law in 1778: 'it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge. See Stanger, Alison (August 7, 2020) *Democracy's Tripwire: Global Corruption and Whistleblowing in Europe and the U.S.*, CES Open Forum Series 2020-2021 No. 40 - August 7, 2020, Minda de Gunzburg Center for European Studies (CES), Harvard.
- 4 Updated graph from the IFAC/CPA-Canada (2023) *Understanding Whistleblower Protection: Laws, Practices, Trends and Key Implementation Considerations*, Figure 2 at page 9. (This report was drafted by Anna Myers).

- 5 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (hereinafter 'EU Whistleblowing Directive')
- 6 See Australia's Corporations Act, s. 1317AD(2A).
- 7 See New Chance for Openness published on the WIN website, December 2018.
- 8 How well do EU countries protect whistleblowers? (Transparency International, 2023), at: <https://www.transparency.org/en/publications/how-well-do-eu-countries-protect-whistleblowers-speakup>
- 9 Report from the Commission to the European Parliament and the Council on the implementation and application of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024DC0269>
- 10 The Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2014 24)2 on countering the use of strategic lawsuits against public participation (SLAPPs), at: <https://rm.coe.int/0900001680af2805>
- 11 See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Strengthening whistleblower protection at EU level, Brussels, COM(2018) 214 final 23 April 2018, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0214>
- 12 A 2024 European Commission interim evaluation report (COM(2024) 269 final (3 March 2024) confirmed only 3 out of the 27 EU Member States had met the 2-year deadline to transpose the Directive and that in 23 jurisdictions they were able to look there were failures to meet minimum standards or examples of incorrect transposition of key provisions etc. The Commission will submit a full report assessing the impact of transposition at the end of 2026. See also the WIN civil society-run EU Whistleblowing Monitor for more information.
- 13 For more details see Whistleblowing International Network Spotlight (2020) The UK Government must intervene to protect oil industry whistleblower Jonathan Taylor
- 14 For more information see BBC News (2023) Fishrot: The corruption scandal entwining Namibia and Iceland, at: <https://www.bbc.co.uk/news/world-africa-64526018>
- 15 See the ongoing fall-out from Suisse Secrets, an investigation journalist project into how the Swiss bank Credit Suisse had handled funds without due diligence.
- 16 The EU adopted Directive 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation').
- 17 Eurocadres also set up the online platform whistleblowerprotection.eu as a hub of information on the advocacy taking place and victories along the way.