

26 September 2022

TMWBPS / 2022 – Opening Statement of the Whistleblowing International Network, represented by Ida Nowers and Chido Onumah

On behalf of the Whistleblowing International Network, I would like to thank the International Labour Organisation for the opportunity for us to observe this meeting. We are delighted that the protection of whistleblowers is the topic of these timely discussions and welcome the publication of the background paper.

Whistleblowing is as old as society itself, and whistleblower protection laws have an ancient lineage. In Europe, legal provisions to promote whistleblowing can be traced back to at least the 7th century and the protection of freedom of speech, including to report wrongdoing, is constitutionally protected in many jurisdictions. The sweeping legal reforms seen globally since the 1970's, now mean a quarter of the globe benefits from standalone national whistleblowing legislation, as well as other piecemeal provisions found in multiple international instruments as well as local regulations or sectoral rules. The scale and scope of reforms globally is remarkable, yet we know that much more is needed to ensure all whistleblowers feel safe to speak up.

At the international level, we now we rapidly emerging consensus on best practice principles to protect whistleblowers.

Further to several intergovernmental instruments, whistleblowers are also increasingly afforded special recognition under international and regional human rights regimes. In the context of human rights, evolving norms on whistleblower protection have developed in parallel to statutory legislation – recognising that robust protection protects not only freedom of expression rights of the individual speaking up and helps expose human rights abuses (if indeed they are the subject matter of the report) but also upholds the rights of the audience to which the information being disclosed. That is, the right to access to information on matters of public interest which affect them, and information necessary to formulate an informed opinion, in order to participate in public affairs.¹ This is particularly important, of course, in the public sector.

This sustained focus of policy makers to consolidate and strengthen whistleblower rights, at least on paper, demonstrates that whistleblower protection is increasingly accepted necessary tool to facilitate reporting needed for effective law enforcement, and in the fight against corruption.

Most recently, many of these high-level protection standards have been exemplified in the 2019 EU Directive on the protection of persons reporting breaches of Union law (Dir(EU)2019/1937). The freedom of choice of the whistleblower, to choose the most appropriate reporting channel based on the circumstance of the case, including to report directly externally to a competent authority - or to the public in some circumstances - is the corner stone of this new framework.

The Directive establishes a network of secure confidential reporting channels in both the public and private sector; at the employer, national regulatory and EU level and introduces minimum standard requirements for protection - to provide timely feedback to whistleblowers, introduce immunities from civil and criminal liabilities for disclosure, effective dissuasive penalties for whistleblower

¹ See Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on the protection of whistleblowers and sources; A/70/361 (2014) ; available at <https://www.ohchr.org/en/documents/reports/report-special-rapporteur-promotion-and-protection-right-freedom-opinion-and-0>

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retaliation, interim injunctive relief measures and a reversed burden of evidential proof in retaliation claims.

Still, the Directive only scores 16 out of 20 criteria for best practice legislation, published in landmark comparative study published in 2020.² The Directive must be now carefully implemented by EU governments to ensure a coherent framework. From closely monitoring transposition we see diversity in approach. For some those who have adopted legislation have chosen, we see some progressive provisions which go beyond the minimum standard requirements, to ensure comprehensive protection from retaliation and set the bar high, further evolving best practices.

Despite these improvements, whistleblowers continue fall through these gaps³ particularly in cross border cases, despite the whistleblower benefiting from strong protection in their country in which they reside or work, we have seen several cases where that individual is considered collaborating protected witness in one jurisdiction whilst being legally harassed in another.

Getting this right requires learning from the best. We have seen policy and law makers consider a wide range of provisions to properly ensure anti-retaliation provisions work in practice. Recent examples include a placing a legal duty of care on employers to protect their employees from any detrimental treatment for speaking up, the mandating of specialised training of judges before they can hear whistleblowing cases. To dissuade retaliation, we have seen the reform of professional standards to link whistleblowing rules with ‘fit and proper persons’ or fitness to practice requirements, and the introduction of significant criminal sanctions of whistleblower retaliation, both to set a zero-tolerance approach to whistleblowing suppression. Most recently, discussions have turned to need for a broad public interest defence to protect reporting persons who inevitably fall through the gaps in other protection.

In the context of lacking or weak legal protection, civil society have a long tradition of stepping up to insulate whistleblowers worldwide, by establishing support service and support groups to facilitate their disclosures in often hostile environments. Much hard-won expertise exists in this so called ‘whistleblower protection community.’

The Whistleblowing International Network, which I today here represent, connects the civil society organizations and practitioners, across over 50 countries, which support and defend public interest whistleblowers. Fourteen of these organisations are NGOs which provide direct access to free legal advice to whistleblowers. The provision of free and independent legal advice is an essential compliment to confidential reporting, which again is the cornerstone of any whistleblowing framework. From working closely with whistleblowers on the ground, we are able to work with policy makers and with employers to design the mechanisms and tools whistleblowers actually want, and need.

Official support measures are a “no brainer” for all stakeholders interested in whistleblowing reforms, but are often missing in whistleblower protection laws. It is helpful to recognise the role of civil society actors providing these services within international standards as in integral part of local

² See IBA Report

³ See Whistleblowing Impact Report “Post disclosure survival Strategies: Transforming Whistleblower Experiences”; available at <https://www.whistleblowingimpact.org/topics/post-disclosure-survival-strategies/publications/>

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whistleblowing ecosystems. These civil society actors often provide the protection where it is otherwise lacking.

Importantly, for employers, which have at times been vocal with concerns for whistleblowing reform, the provision of advice can encourage what is sometimes called “sensible” whistleblowing. We know that most whistleblowers speak up internally to their employer first, but where they speak to the wrong person or are ignored or retaliated against, some whistleblowers understandably seek to escalate concerns externally – which comes with regulatory response and a risk to reputation of the organisation or in the public sector, undermining of public confidence in state institutions.

In the last two years, growing empirical evidence on the benefits of institutional whistleblower protection has informed the development of several international guidelines for employers, from the ISO, the OECD and the International Chamber of Commerce. Importantly, as seen in the recent UN Principles of Responsible Investment Report on why and how investors should engage with companies on their whistleblowing protection, we see indications that whistleblowing has begun to be understood as potentially “good for business.”⁴ There is no good reason the public sector should fall behind the standards increasingly expected in the private sector.

Further international standard setting on whistleblower protection can not only help to keep momentum needed to improve local legal protections, but, importantly, allow debate on public and cultural attitudes towards whistleblowers and whistleblowing which still has negative connotation as informants or as disloyal or disgruntled. By discussing and overcoming these negative connotations, we can further understand whistleblowing and begin to encourage whistleblowers as a tool to facilitate the free flow of information needed, ultimately, for democratic accountability.

I finish my short intervention with a reminder: Anyone can be a whistleblower. Any one of us participating in this meeting could tomorrow witness wrongdoing and find themselves in an impossible dilemma of whether to report and where to turn. No one should suffer professional devastation, threats to their personal security, or legal harassment for reporting public interest information. The necessary support needed to survive the process is lacking or weak. This is true even for those working in countries with standalone national legislation in public administration or safety-critical industries. It is for this reason we again welcome these discussions on the protection of whistleblowers in the public sector.

Thank you.

⁴ See UN PRI Report “Whistleblowing: Why and how to engage with your investee companies (2020); available at <https://www.unpri.org/sustainability-issues/environmental-social-and-governance-issues/governance-issues/whistleblowing>