CHAPTER 5

Drafting and Implementing Whistleblower Protection Laws

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C. Drafting and Implementing Whistleblower Protection Laws

A. The Scenario for Whistleblowers in India

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Corruption has for a long time been known as a low-risk, high-profit business. It has two sides—demand and supply, and four layers—systemic, individual, public, and private. Corruption occurs at the intersection of the public and private sectors, and both liberalization and excessive regulation may help it flourish. Rapid political, social or economic changes may fertilize the ground for corruption and weak institutions. Liberalization, cut-throat competition and conflict of interest may also breed corruption. When corruption becomes systemic, it changes traditional behavioral norms; political and social systems are thoroughly undermined—bribes may even be used to reduce the risk of detection and conviction. In the long run, systemic corruption inevitably leads to anger against politicians and administrations who enrich themselves illicitly and to distrust in government, and finally to a sense of disillusionment about the ability and will to reduce corruption of those who promise to do so.

For action against corruption to be successful, the involvement of the community and non-governmental actors is crucial. Education and awareness-raising programs—today known as social marketing—are very important in this context, as they contribute to citizens' understanding about the negative impacts of corruption on a society and about available legal and institutional tools and mechanisms against it. The public at large must understand that their access to standard public services does not depend on their ability to pay a bribe. Only when people get a sense of participation will they be confident that combating corruption can make a difference. Citizens' action against corruption is especially effective when individuals join forces in groups such as non-governmental organizations (NGOs), watch dog agencies, vigilance organizations and professional associations.

Awareness-raising and education campaigns must further instill the message that reporting corruption is a public duty. Potential informants are usually reluctant to do so, however, as they fear revenge. Eventually, the sources of information dry up if confidentiality is not assured or if an informant is required to identify himself before a complaint can be heard. Anonymity and confidentiality are therefore crucial preconditions for whistleblowing and can be achieved, for instance, by allowing the use of masking names.

Furthermore, the initial reaction of the anti-corruption body when receiving the complaint largely influences the flow of information from such sources as whistleblowers: if the agency puts aside a minor allegation, the complainant may lose confidence in the agency's work or motives and at a future time may refrain from returning with a more important matter. In the case of fraud, victims' fears of embarrassment at having to admit to being defrauded seem to deter a large proportion of them from reporting. In the case of corruption, the lack of an actual victim and fear of adverse publicity make it particularly rare for an involved individual to report to a public authority.

Insiders may be the best informers: internal whistleblowers

In the case of both fraud and corruption, employees and third parties are thus particularly valuable sources of information and should consequently be encouraged to report their suspicions. Where the report is made in good faith, the employee making the report has to be protected by law. Further to legal provisions, a fraud hotline may be set up, for instance, and its existence and role in deterring or detecting fraud and corruption widely publicized. To further reassure informers of their anonymity and safety, operating this hotline through a third party could be considered.

A free press and access to information, legislation and policies may further promote disclosure and reporting of information on corrupt behavior. On the other hand, discrimination against newspapers by withdrawing government advertising and abuse of defamation laws against those who report corruption deter such action.

The Indian scenario

In India, the situation regarding corruption and its exposure by individuals or group initiatives is quite specific and mainly determined by the size of the country, its population, and an effective democratic framework that has proven stable over a considerable period of time. Recently, a number of measures have been taken that over time may help to increase the reporting rate on corruption.

In January 2003, for instance, an Access to Information Act was promulgated in India. Revenue Laws contain provisions for the protection of informants in their scope of application. A piece of far-reaching legislation called the Public Interest Disclosure Act, which would grant legal protection to whistleblowers, has been recommended by the Law Commission of India.

The role of NGOs in exposing areas of corruption has also been widely acknowledged in India. A 2003 study conducted by the Center for Civil Society on corruption in the city of Delhi revealed, for instance, that the Prevention of Food Adulteration Department has only 28 inspectors to oversee 150,000 establishments, and that farmers pay 7% to 15% commissions to agents at wholesale markets that are the monopoly of the Delhi Agriculture Marketing Board. The study further revealed that INR4 million (USD88,000) has been wasted in a pension scheme: more than one third of its beneficiaries were ineligible, and in 168 cases, pension payments continued although the beneficiaries had died.

Another voluntary organization called Mazdoor Kisan Sangharsh Samity made farmer-to-farmer contacts in the State of Rajasthan and initiated a mass movement to assert the public's right to scrutinize official records. It was found that Integrated Rural Development Funds were misused and payments made for clinics, schools and public toilets that were never built. Finally, surveys conducted by the Public Affairs Centre in Bangalore (State of Karnataka) exposed fraudulent systems under the Bangalore Development Authority in areas like waste management, drainage, etc. Following the disclosure of this information, the Bangalore Development Authority reviewed its respective service delivery schemes and established a committee composed of NGOs and public agencies to oversee operations in the areas that were revealed by the survey as corrupt or corruption-prone.

Investigative journalism in India has also been widely acknowledged as an effective tool to expose corruption. The much publicized Bofors gun deal allegedly involving payment of illicit commissions is a well-known example of the effectiveness of investigative journalism in helping detect corruption. The newspaper *The Indian Express* also investigated alleged favoritism and subjective selections made in the context of the allotment of petroleum products vending licenses.

And finally, whistleblowing by individuals has led to astonishing revelations in the alleged fake stamp paper scam in the course of the last 18 months. Claimed to be the story of a mastermind, one A. Telgi purchased a stamp printing press sold by the government as an old machine and ran a printing operation, conspiring with public officials to supply stamp papers so printed to authorized vendors. The illegal action spread over a number of states and a considerable period of time and involved some INR 2 billion (USD44 million).

B. Korea's Whistleblower Protection and Reward System

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Whistleblowing encourages members of an organization to place each other under surveillance. It is thus an effective means to control corruption. Irregular behavior always goes underground, and inexperienced eyes have a hard time detecting it. Members of the same organizational entity, however, can detect corrupt acts more easily because they work in the vicinity of the "crime scene"—the site of the corruption—and thus have easy access to compelling evidence.

In a society where whistleblowing is common, whistleblowers can work as collective deterrents to immoral or illegal activities in the entire society, thereby increasing its transparency level. Therefore, one of today's important government responsibilities is to provide an environment where anybody can reach the authorities without fear or hesitation. In this way, it can be predicted that the whistleblowing system will play a more important role as our society becomes more complex and specialized in the future.

Internationally, it was in the mid-1980s that the necessity of whistleblower protection systems was recognized and governments subsequently began efforts to set up protective legislation for whistleblowers. The importance of whistleblower and witness protection was again emphasized at the 11th International Anti-Corruption Conference held in Seoul in May 2003.

Overview of the Korean whistleblower protection system

The Korean whistleblower protection system entered into force in January 2002 as part of the Korean Anti-Corruption Act. This Act also established the Korea Independent Commission Against Corruption (KICAC), the institution responsible for receiving and handling information.

The new protection mechanism provides official outlets and procedures for disclosing corrupt practices. Previously, those who wanted to reveal organizational wrongdoing had no legal protection and no option but to go to the media or supportive groups, risking their careers or their lives. The Whistleblower Protection and Reward System also provides for financial rewards if a whistleblower's disclosure brings about benefits to related public authorities. This means a significant change in viewing "disclosure of organizational corruption," which has long been regarded as an act of betrayal.

So far, the mechanism has proven to be quite successful: whistleblowers have increasingly approached the KICAC. In 2002, 27.7% of the reports received were submitted by whistleblowers, and in 2003 the share increased to 34.2%. In terms of credibility and intentions, internal informers' allegations have been evaluated as more useful: 5% to 10% of their cases were transferred to investigation authorities and resulted in law enforcement action. Moreover, they contributed to the reversion of 81% of the total SKW8.4 billion (USD7.1 million) that was returned to the national treasury following the KICAC's investigations.

Key features of the Korean whistleblower protection and reward system

The Korean whistleblower protection and reward system consists of two basic elements: protection, encompassing protection of identity, employment, and physical security; and financial rewards.

Korean law prohibits disclosing or implying the identity of a whistleblower without his or her consent. Violators are subject to disciplinary measures or legal penal ties such as imprisonment of up to five years. When disadvantages or discrimination occur against whistleblowers at their workplace, the KICAC officially requests reinstatement or transfer. The authority is asked to take disciplinary measures against the offender or imposes a fine of up to SKW10 million (USD8,500) on a person who takes revenge against a whistleblower. Physical protection is provided when a whistleblower or his or her mate or relatives feel threatened. The KICAC, together with the competent police agency, provides physical security.

When the disclosure leads to financial gains or cost-saving to the national treasury, 2% to 10% of such benefits—up to SKW200 million (USD160,000)—go to the whistleblower as a reward.

Review and follow-up

The performance of the whistleblower protection and reward system is being closely monitored. According to the reports as of the end of September 2003, five informants experienced reprisal such as dismissal or demotion. Our commission addressed such cases by requesting reinstatement and transfer or arranging new employment opportunities. Fines of approximately SKW8.5 million (USD7,000) for negligence were imposed on the two violators. The four informants who asked for physical protection were provided with appropriate support. In 30 cases, the commission warned against potential "witch-hunting" or mental harassment as preventive measures. Approximately SKW1.2 billion (USD1 million) were returned to the national treasury and SKW65 million (USD55,000) were awarded to two whistleblowers.

After only a short time, the protection and reward mechanism has become a basic element of the Korean whistleblower protection system and has proved its effectiveness in controlling corruption. However, cultural resistance and lack of experience at the time of the scheme's creation have left marks in ineffective laws. Based on the past two years' experience, the KICAC plans a number of reforms to overcome these deficiencies and to improve the mechanism's performance:

- To prevent the exposure of a whistleblower, the KICAC is striving to improve security by allowing proxy representation and the use of pseudonyms in court.
- It has been frequently reported that whistleblowers suffered isolation in their organizations. KICAC is thus attempting to broaden the definition of "reprisal" to include the "infliction of mental distress." Further, under current laws, an informant has to prove that reprisals occurred after the whistleblowing. To ease this burden, the KICAC is drawing up measures to hold a challenged party responsible for the documentation of the non-occurrence of organizational reprisal.
- Current instruments seem insufficient to deter reprisal practices. The KICAC is thus looking for ways to obtain power to coerce the requested party into submission and add provisions to criminalize actions constituting reprisal against a whistleblower.
- Reward payments are rare, due to the current strict preconditions that require reward money to be derived from collected penalties; payments can thus be made only after a court ruling. The KICAC is attempting to modify these conditions, to raise the ceiling and to apply a higher percentage to the calculation.

- Under current laws, a whistleblower has to present documents and records to back up his claims. This often conflicts with the duty of maintaining job-related secrecy. KICAC is thus considering a new provision that allows the exemption from such duty for a well-intentioned and reasonable disclosure.

C. Drafting and Implementing Whistleblower Protection Laws

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For several good reasons, management should support whistleblowing and whistleblowers. Before people will blow the whistle, however, certain prerequisites must be met, to properly deal with disclosures and to protect those who come forward. These prerequisites concern management commitment and action, and effective legal protection of whistleblowers.

Why should management support whistleblowing and whistleblowers?

Whistleblowers are often best placed to bring to light serious problems within the management and operations of an organization. There, problems can be broadly classified into two categories:

- unintentional problems due to misjudgments, mistakes, delays, haste and so on—primarily competence and resources issues; and
- intentional problems due to misconduct, corruption and/or illegality—primarily integrity issues.

The first category can generally be identified through alert management, effective management reporting systems, performance measures, internal or external audit and complaints from customers. The second category is much harder to identify: it is not in the interests of the parties to such conduct to draw attention to it; on the contrary, it is in their interest to take active steps to hide or disguise the problem and their involvement. Illegality, corrupt conduct and serious misconduct are usually brought to light only in one of the following four ways:

- by very astute internal or external auditing, or hands-on management and supervision, that identifies an anomaly and traces it through to a cause—a relatively rare occurrence;
- where small errors or mistakes made by one of the parties are noticed and followed up by others, thus leading to the discovery that a problem exists—again, a rare occurrence;
- where a strong moral sense is affronted by conduct that is clearly wrong—this happens occasionally; or
- through whistleblowing by a disaffected employee or former employee, or by a relative, friend or work colleague motivated by a breakdown in a physical relationship, a falling-out or on-going ill will—probably the most common way that integrity issues are likely to be brought to light.

Looked at in terms of a corporate body's defenses against the "disease" of corruption, whistleblowers can be seen as a pain that draws attention to the problem.

Not uncommonly, disclosures made by whistleblowers are branded as "malicious"; such a reaction is often used to justify taking no action. However, people motivated by malice or disaffection can still bring invaluable information to light. The fact that a whistleblower's motive may be improper or inappropriate often has little bearing in practice on whether the information provided or disclosed is of value. Certainly in the area of corrupt conduct, where both parties to a corrupt transaction are equally to blame, disclosures motivated by malice or disaffection are often the only way that such transactions are brought to light.

Another frequent claim is that whistleblowers or their disclosures are "vexatious"; again, this is used to justify taking no action. When assessing whether a whistleblower or his or her disclosures are in fact vexatious it is again important to make a clear distinction between the motive of the whistleblower and the content of the disclosure. A whistleblower may be annoying and his or her intention may even cause problems for some person, group or organization, but that is insufficient reason to ignore or take no action on their disclosure. What is crucial is the content of the disclosure.

If the content raises a valid concern or a serious issue, it needs to be dealt with appropriately. However, while it is vitally important to separate the message from the messenger, neither can be ignored. The only circumstances where a disclosure should be declined and no action taken on the basis that it is vexatious is where the motivation of the whistleblower is improper and the disclosure

does not raise any valid or serious issue. Since determining the motive of a whistleblower is a particularly difficult issue, it is generally best, at least initially, to ignore motivation and focus solely on the content of the disclosure and its accuracy.

Organizations should support whistleblowing and whistleblowers for several other good reasons as well. For example, in many jurisdictions, occupational health, safety and duty-of-care obligations impel employers to protect their staff from victimization and harassment.

Further, it can be assumed that most, if not all, organizations would prefer to have the opportunity to deal with problems in-house rather than go through the joys of an investigation by some external body such as an ombudsperson, an anti-corruption body or the police, or find out when they look at the daily newspaper. An effective internal disclosure system encourages staff to make disclosures within an organization, providing an early warning system for problems.

If a whistleblower's disclosure is not dealt with appropriately, or the whistleblower is subjected to detrimental action or victimization, this can lead to conduct both by the whistleblower and other staff that is seriously detrimental to the operations of the organization and to the morale of its staff, often over an extended period of time.

Treatment of whistleblowers

Worldwide experience has clearly shown that the lot of a whistleblower is not a happy one. Such disclosures are seen as disloyalty to the employer and colleagues, if not an attack upon them. In such circumstances, the response of both employers and colleagues has generally been to take or support detrimental action against the whistleblower in reprisal. Such detrimental action can include

- blaming the whistleblower for the problem;
- "payback" complaints against the whistleblower;
- loss of opportunity for advancement;
- harassment and/or victimization;
- disciplinary action or dismissal;
- legal action against the whistleblower, for defamation, or breach of confidence or secrecy; or
- assault.

In practice, the potential for such detrimental action can arise in two different sets of circumstances:

- Where the identity of the whistleblower is *known* to the employer and concerned staff because the whistleblower has made little attempt to conceal his or her intentions or identity, because the nature of the disclosure points to the identity of the informant or because the identity of the whistleblower has been disclosed to enable the disclosure to be investigated; or
- Where the identity of the whistleblower is *unknown* to the employer or colleagues because the disclosure was made anonymously or confidentiality has been maintained, but assumptions (not necessarily correct) have been made as to the identity of the person or persons most likely to have made the disclosure.

Prerequisites for whistleblowing and how to meet them

Leaving aside the odd obsessive or attention seeker, for the vast majority of employees to stand up and be counted when they become aware of misconduct or serious mismanagement, there are three almost universal pre-requisites:

- First and foremost, they must be confident that they will be protected if they do so—that they will have a good chance of surviving the experience in terms of their employment and legal liability;
- Second, they must believe that blowing the whistle will serve some good purpose —that appropriate action will be taken by the agency; and
- Third, they must be aware that they can make such a disclosure and how they should go about doing so—to whom, how, what information should be provided, etc.

Effective achievement of the three prerequisites for whistleblowing, properly dealing with disclosures and protecting whistleblowers requires both management commitment and an effective whistleblower protection law. The protections required in a whistleblower protection law must include both sanctions for detrimental/reprisal action and protection of whistleblowers from legal liability and prejudice in their employment.

However, a legislative scheme alone is not enough; it is also important that agencies have procedures and practices in place to protect whistleblowers on an administrative level. This is best done by having an effective internal complaints system that provides the climate in which staff feels confident that

they can complain without fear or disadvantage. For this to be effective, an organization-wide commitment is necessary to deal with any *bona fide* disclosure, including a strong commitment from senior management.

Management is far more likely to deal with whistleblowers and their disclosures appropriately if a clear legislative obligation impels them to do so. While it should make little difference to the management of an organization whether a disclosure is made under whistleblower legislation or not, experience shows us that in practice, it does make a difference.

This is not a one-sided issue: a corresponding obligation should impel staff to make their disclosures in accordance with the procedures and practices established by the law or the organization for receiving and dealing with such matters.

Key elements of a whistleblower protection law

In drafting whistleblower protection legislation, the aim should be to encourage and facilitate the making of disclosures. Each of the provisions of such legislation should therefore be designed with one or more of the following objectives in mind:

- To protect whistleblowers;
- To ensure that disclosures are properly dealt with; and
- To facilitate the making of disclosures.

The Annex following this article sets out the key elements required to achieve these objectives, and various options for implementing each element.

Looking at the first prerequisite for disclosures (as noted above and in the Annex's Point 11), appropriate statutory protections for whistleblowers should include

- protection from exposure of identity (i.e., confidentiality and secrecy);
- protection from detrimental/reprisal action (e.g., obligations on employers/chief executive officers (CEOs) to protect whistleblowers; a right to complain to an independent external body; criminal and disciplinary sanctions for detrimental action; injunctions; relocation of whistleblowers and/or or witness protection);
- protection from liability (e.g., from any criminal or civil liability arising out of the disclosure); and
- redress for detriment or reprisal (e.g., damages in tort or compensation).

Managing whistleblowers

For the good of the whistleblower, the employer, the investigation of a disclosure and the public interest generally, it is vitally important that the whistleblower is dealt with appropriately. Such treatment includes

- managing their expectations to ensure from the outset that they are realistic (for example as to the process to be followed, its time frame and the likely outcomes);
- where possible and appropriate, ensuring their confidentiality (or alternatively, normally with their consent, identifying them and ensuring that they are properly protected);
- where confidentiality is to be maintained, cautioning the whistleblower about the care needed for them to avoid blowing their own cover;
- providing on-going information and support to the whistleblower (including prior warning before steps are taken that could lead to the whistleblower being identified);
- giving reasons for any decisions made in relation to the whistleblower's disclosure or how his or her disclosure is to be dealt with;
- being patient and staying calm; and
- trying to walk in their shoes.

As indicated above, statutory provisions alone do not go far enough to ensure the protection of whistleblowers; proactive management action is also required. This should include

- an explicit statement of management support for whistleblowing in general and whistleblowers in particular;
- proper and adequate investigation of allegations made by whistleblowers, as well as any allegations that may be made against them;
- preventing colleagues of whistleblowers from ostracizing them if it becomes known that they have "blown the whistle," i.e., to take active steps to prevent or stop victimization and harassment;
- providing whistleblowers with a proactive system of protection;
- providing advice and assistance, appreciating that staff who are in need of welfare assistance very often do not realize they need it, or they feel embarrassed about asking for it;
- assuring whistleblowers that they have done the right thing; and

- providing a mentoring program or arrangement whereby a senior member of the staff is given responsibility to provide advice, guidance, assistance, counseling, support, etc., to the whistleblower.

Not uncommonly, the experiences of a whistleblower that led up to their disclosure, or that followed the making of the disclosure, have a significantly detrimental affect on them. This can result in attitudes and behavior that employers, investigators and colleagues find problematic. However, the fact that a whistleblower may be "difficult" or exhibit challenging behaviors does not mean the whistleblower or his or her disclosure should be ignored. When referring earlier to whistleblowers being the pain that draws attention to problems, that term "pain" was used in more than one sense.

On the other side of the coin, whistleblower legislation should also provide that staff who make disclosures should not be given any advantage or preferential treatment because they have done so.

Dealing with disclosures

Looking at the second pre-requisite for whistleblowing, namely that whistleblowers must believe that appropriate action will be taken, it is vital, in order for an internal reporting system to be effective, that there be mechanisms in place to ensure that disclosures are dealt with properly.

This requires that allegations be dealt with competently, impartially and promptly. Of course the nature and scale of the action warranted to address a disclosure will depend on the seriousness of the allegations, whether the matter alleged concerns mismanagement or misconduct and the potential for detrimental action to be taken against the whistleblower.

However, no matter what the substance of a disclosure, the relevant facts need to be established and documented, appropriate conclusions need to be reached based on the available evidence and a suitable response needs to be determined.

Not every disclosure requires a formal investigation. However, once a disclosure has been assessed as warranting investigation, the first step is to determine whether the allegation relates to policies, procedures and practices, or alternatively to the conduct of individuals.

At one end of the spectrum, all that may be required is to assess the disclosure and provide an explanation to the whistleblower. The options could then range through such things as an internal audit of an issue or of the general operations of a unit of the organization; a formal investigation into policies, procedures or practices; a formal investigation into alleged misconduct; or even

referral to an external body such as an ombudsperson, an anti-corruption body, or the police.

Determining the nature of the investigation at the outset has an important bearing on issues such as *powers* that will be required to investigate the complaints (and whether they are available); the *resources* that will be needed; the *authorization* necessary to undertake the investigation; and the nature of the *possible outcomes*.

It is essential that an organization-wide commitment be in place to deal with any valid disclosures. Commitment from all levels of the administration must include

- a formal statement of commitment by the CEO (endorsed by any board or council), supporting the right of staff to make complaints and asserting the CEO's and the organization's intention that they should not suffer detriment for doing so;
- a strong commitment to and acceptance by the organization's management and staff of the right of staff to make disclosures; and
- a strong commitment to investigate disclosures and to take appropriate action on those that are sustained.

Confidentiality can be a two-edged sword

No discussion about whistleblowing can be complete without some consideration being given to the issue of confidentiality. While confidentiality can be a vital protection for a whistleblower, experience in the State of New South Wales, Australia, has shown that confidentiality can be a two-edged sword. On the one hand, it may be the best way to protect certain whistleblowers from detrimental action or victimization, but on the other hand, it can also be used as an effective defense by a defendant in any proceedings for detrimental action, victimization or in tort. A further problem is that sometimes people who are the subject of disclosure make an incorrect assumption about who made the disclosure and subject that misidentified person to detrimental action.

In a recent case involving a police officer, the defendant was able to demonstrate that the identity of the whistleblower had not been disclosed by the Police Service or its investigators. On this basis, it could not be proven that the detrimental action he took against the whistleblower was substantially in reprisal for the making of a disclosure.

The fact that an organization and its investigators have intentionally not disclosed the identity of the whistleblower often has little relevance to whether or not that information is in fact available to the person or persons that are the

subject of the disclosure. It is not uncommon that people telegraph their concerns about an issue, or even their intention to complain, before making a formal disclosure. In such circumstances, once it becomes known that a matter is being investigated, it is easy for people "in the know" to put two and two together.

Similar situations occur when a person is spotted approaching a disclosure officer. A few years ago, the office of the Ombudsman investigated a matter concerning a local council. A member of the outdoor staff had approached the nominated disclosure officer in that council to make a disclosure. The officer nominated to receive disclosures was not a person whom the outdoor staff would normally have approached, and the person in the next office to that of the nominated disclosure officer witnessed the member of the outdoor staff entering that office. The investigation revealed that this person sitting in the office next door immediately rang colleagues of the whistleblower to inform them. This was also a case where the member of the staff had indicated his concerns about a particular situation prior to making his disclosure. His colleagues put two and two together and allegedly victimized him. The point here is that even though the council had taken all reasonable steps to maintain confidentiality, the whistleblower was still identified. If this matter had ended up in disciplinary or court proceedings, it would have been very difficult for the whistleblower or the council to prove that the whistleblower's colleagues were aware he had made a disclosure.

Sometimes the nature or subject matter of a disclosure will be sufficient for people "in the know" to be able to identify the whistleblower. Again, in these circumstances the authority and its relevant staff may not be aware that the information they have made available has been sufficient to identify the whistleblower.

In other circumstances, the sheer fact that a disclosure has been made will point to the person who made the disclosure. In such cases, a solution found by some of the larger agencies is to arrange for an internal audit of related matters or of matters of which the disclosure is only part and to indicate to the staff of the relevant area that this is merely a routine audit without disclosing the fact that any allegations have been made.

As mentioned above, the other edge of the confidentiality sword is that it may be used as a defense by anybody alleged to have committed detrimental action or victimization. Where an agency has assiduously attempted to ensure confidentiality, it will be open to a defendant in any such proceedings to argue that the detrimental action taken by them could not have been taken because of a disclosure of public interest information, as they were not aware either of the disclosure or, alternatively, of the identity of the person who made the disclosure. Of course, another defense that might be open to the defendant in

such circumstances is to claim that "I never liked the person and I have been after him for years."

Internal reporting systems

Looking at the third prerequisite, the nuts and bolts of making a disclosure, it is important that agencies have a detailed internal reporting policy in place that advises staff on how to disclose, what they may disclose, to whom they are to disclose it, etc.[34]

The rights of people who are the subject of a disclosure

When considering the protection of whistleblowers, one must not forget that people who are the subject of a disclosure also have rights. They have the right to

- confidentiality (as long as this does not unduly interfere with the investigation);
- a quick and thorough investigation;
- the support of the organization and the senior management: if the allegations contained in a disclosure are found to be clearly wrong or unsubstantiated, the nature of that support will depend on the circumstances of the case but could include a public statement of support or a letter from the organization stating that the allegations were clearly wrong or unsubstantiated; and
- procedural fairness in the conduct and outcome of the investigation (including impartiality and the right to be heard).

Procedural fairness

On this last point,[35] in common law countries it is presumed that the rules or principles of procedural fairness (natural justice) must be observed in exercising powers that could affect the rights, interests or legitimate expectations of individuals. Procedural fairness is, at law, a safeguard applying to the individual whose rights or interests are being affected. The rules of procedural

[34] The Protected Disclosures Guidelines (4th edition) published by the Office of the Ombudsman of New South Wales are available at www.ombo.nsw.gov.au.

[35] *The Complaint Handlers Tool Kit* (2nd edition), which will be published by the Office of the Ombudsman of New South Wales in 2003, deals with this issue in more detail.

fairness have been developed to ensure that decision making is fair and reasonable. Put simply, procedural fairness involves informing people of the case against them, giving them a fair hearing, not being biased and acting on the basis of logically probative evidence.

An investigator should not regard procedural fairness obligations as a burden or impediment to an investigation, to be extended grudgingly. Procedural fairness is an integral element of professional investigation, one that benefits the investigator just as much, if not more, than the person under investigation. For an investigator, procedural fairness serves a number of related functions:

- It is an important means of checking facts and of identifying major issues;
- The comments made by the subject of the investigation may expose any weaknesses in the investigation, which avoids later embarrassment; and
- It also provides advance warning of the basis on which the investigation report is likely to be attacked.

For the person whose rights, interests or legitimate expectations are likely to be affected, procedural fairness allows the person the opportunity

- to deny the allegations,
- to call evidence to rebut the allegations,
- to explain the allegations or present an innocent explanation, and
- to provide mitigating circumstances.

Depending on the circumstances that apply, procedural fairness may require an investigator or decision maker to

- ensure that investigators and subsequent decision makers act fairly and without bias,
- ensure that investigations are conducted or issues are addressed without undue delay,
- inform any person
- whose interests are or are likely to be adversely affected by a decision that a decision needs to be made and about any case the person needs to make, answer or address,
- who is the subject of an investigation about the substance of any allegations against them or the grounds of any proposed adverse comment in respect of them (at an appropriate time),

- provide any such person with a reasonable opportunity to put their case or to show cause why contemplated action should not be taken or a particular decision should or should not be made,
- consider any submissions so made,
- make reasonable inquiries or investigations before making a decision, and
- ensure that no person decides a case in which they have a direct interest or a conflict of interest.

While a person should be informed of the substance of the allegations against them and of any proposed adverse comment about them, this does not require that all information in the investigator's possession supporting those allegations be disclosed to that person. Indeed, it may damage the effectiveness of the investigation to show the investigator's hand completely by offering too much information too early to the person who is the subject of the investigation.

The obligation to inform the person of the substance of an allegation does not apply if the investigation does not directly involve proceedings which will affect the person's rights or interests, for example if an investigation is not going to lead to findings and/or recommendations that could detrimentally impact on any individuals.

Annex: Key elements of whistleblower protection legislation

Following is a list of key elements and options to be considered for inclusion in whistleblower legislation. The list does not purport to be comprehensive. Some elements may be implemented through other legislation, for example relating to powers of investigation for watchdog bodies, witness protection, etc.

KEY ELEMENTS	OPTIONS
1. Scope of the Act	Nature of conduct: • criminal/illegal activity • corrupt conduct • misconduct/improper conduct • maladministration • waste/mismanagement of public resources • public health and safety issues • environmental damage Responsibility for conduct: • public sector: state/national local/provincial legislative judicial • private sector: government contractors corporations any person or body
2. Potential whistleblowers (i.e., persons who may make disclosures and be protected under the legislation)	• Public officials generally • Employees of the public sector agency concerned • Government contractors • Private citizens • Legal representatives • Anonymous disclosures • Voluntary or mandatory reporting
3. Reporting options	Internal reporting options: • CEOs • nominated disclosure officers

KEY ELEMENTS	OPTIONS
	• supervisors and managers generally • the organization concerned • the employing organization (about another organization) External reporting options: • ombudsperson or equivalent • public sector standards body • auditor general or equivalent • any anti-corruption body • police • government ministers • members of the legislature [possibly subject to limitations or pre-conditions] • journalists [possibly subject to limitations or pre-conditions][a]% other relevant agency
4. Internal reporting systems	Mandatory adoption and implementation; or Discretionary adoption and implementation
5. Threshold tests for protection	Procedural: • written and/or oral disclosure • made to proper/specified person, position or organization • voluntary or mandatory reporting Factual: • made in good faith/with reasonable belief in truth • suspicion on reasonable grounds of the existence of conduct alleged; or • disclosure shows or tends to show the conduct alleged Seriousness: • misconduct/maladministration/waste generally • serious misconduct/maladministration/waste • public interest • warranting disciplinary action/dismissal/

KEY ELEMENTS	OPTIONS
	criminal charge [a high threshold if the sole test] • corrupt conduct/illegality [a high threshold if the sole test]
6. Circumstances when disclosures are not protected	Motivation: • disclosure known to be false/made in bad faith [Note: as a general principle, the content of the disclosure is what is important, not the motivation of the whistleblower] Conduct: • whistleblower fails to assist investigation • whistleblower makes further unauthorized disclosure
7. Obligations on whistleblowers	To maintain confidentialityTo assist/ cooperate with investigators
8. Obligations on persons/ organizations that receive disclosures	Adopt and implement an internal reporting system Confidentiality (where possible, practical, appropriate, etc) for • whistleblowers • subjects of disclosure Adopt and implement procedures for the protection of whistleblowers Protect whistleblowersImplement sanctions for detrimental/reprisal action, e.g.: • disciplinary action • dismissal • criminal charges • injunctions or orders to restrain conduct Deal with disclosures: • adopt and implement procedures for investigating disclosures • investigate disclosures

KEY ELEMENTS	OPTIONS
	• appoint or select investigators [to ensure impartial or independent investigation] • provide/ensure procedural fairness in the conduct of investigations Notify whistleblowers • of receipt of disclosure • of action taken or proposed • of progress • of outcome of investigations Notify any central monitoring/coordinating agency • of disclosures received each year • of outcomes of investigations
9. Coordinating/monitoring body/role	Establish a monitoring/coordinating body/ role performed • by a separate watchdog body established for the purpose • by an existing watchdog body • by a central government agency Functions and powers of any coordinating/ monitoring body Reporting on the operation of the legislation
10.Determinative function as to whether a disclosure is protected under the legislation	By a court/tribunal By an ombudsman/auditor general/public sector standards agency or equivalentBy the receiving agency or official • generally • in specified circumstances By some other person or body
11.Protections for whistleblowers	Protections from exposure of identity • confidentiality obligations (with listed exceptions) implemented by… • discretionary guidelines

KEY ELEMENTS	OPTIONS
	• statutory obligations with or without a criminal offense for breach, and • provisions for disclosures to be made anonymously • secrecy provisions/Freedom of Information exemptions • suppression orders in court proceedings Protections from detrimental/reprisal action: • obligation on employer/management/ CEO to protect whistleblowers and investigate disclosures • complaints to external watchdog body about detrimental/reprisal action • sanctions for detrimental/reprisal action: • disciplinary action, and • criminal charges [see 12 below] • injunctions or orders to remedy or restrain a breach • relocation of whistleblowers within or between organizations • witness protectionProtection from liability arising out of a disclosure: • from all criminal liability or any civil action, claim or demand, including protection against actions in defamation • from actions for breach confidence/secrecy • indemnity from prosecution or disciplinary actionRedress for detrimental/ reprisal action: • damages for detrimental/reprisal action (e.g., in tort); and/or • compensation from employer or government
12.Criminal offense for detrimental/reprisal action	Onus of proof: • on prosecution, or • on defendant (i.e., a reversed onus of proof)

KEY ELEMENTS	OPTIONS
	Evidentiary tests: • "substantially in reprisal" for the making of a disclosure; or • "because" a disclosure was made [i.e., a "but for" test that would generally be very difficult to meet] Admissibility of evidence Time periods for commencement of proceedings/limitation periods Nomination of a person or a body responsible for prosecuting breaches, e.g.: • police/Director of public prosecution • a watchdog body • the employing agency or its CEO • the whistleblower personally
13.Beneficial treatment of whistleblowers	Provision of beneficial treatment for whistleblowers is either • prohibited, or • authorized Nature and scope of the benefits/rewards that may be offered/ provided where beneficial treatment is authorized (e.g., on substantiation of allegations, on conviction, etc.) Timing of offer/provision of beneficial treatment: • on receipt of a disclosure [NB: beneficial treatment offered as inducement for the making of a disclosure, or provided automatically on receipt, is likely to prejudice the credibility of the whistleblower and the disclosure] • on conclusion of any investigation where the disclosure is substantiated • on conviction or imposition of disciplinary penalty

KEY ELEMENTS	OPTIONS
14.Referral of disclosures	When: • in what circumstances • at what stages in the process Where: • between agencies • to an external watchdog body • between external watchdog bodies
15.Records of disclosures (i.e., statistics)	Kept by receiving agency Reported in receiving agency annual report Reported to any monitoring/coordinating body Reported in any monitoring/coordinating body annual report on the implementation of the Act Secrecy provisions/Freedom of Information exemptions
16.Other	Powers to investigate: • generally, or • for particular agencies/organizations/ persons who otherwise have insufficient powers to do so effectively Sanctions for false or misleading disclosures Timelines for action Any other obligations for reporting of outcomes Reviews of the legislation