Sent: Monday, 26 November 2012 5:52 PM
To: Committee, SPLA (REPS)
Subject: Re: Whistleblower Protection Bill - 30 Nov Hearings

Dear Ms Cullen,

Please find attached a copy of a research article which I authored in 2009 on '*Making Whistleblower Protection Work*' : the article was commissioned by the Christian Mickelsen Institute for the Utstein Group of international Aid agencies.

I would be happy if the Committee were to consider the article as representing my views generally on this subject-matter, and treat it as my formal submission to the Committee's review.

with best wishes

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U4 BRIEF

Making whistleblower protection work: elements of an effective approach

Protection of whistleblowers – individuals who make a principled public interest disclosure of wrongdoing[1] – is now broadly accepted as an essential tool for strengthening accountability and reducing corruption in the public and private sectors.

This U4 Brief argues that aid organisations and all other public organisations should encourage staff report misconduct and corruption as part of their legal and professional duty. Protecting whistleblowers from retaliation or reprisal is a central strategy for achieving this objective. A positive management approach based on securing the organisation's best interests, rather than ethics alone, is the key to success.

U4 Anti-Corruption Resource Centre www.U4.no

by Howard Whitton
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Recent developments in WBP policy and practice

Whistleblower protection (WPB) is undoubtedly an inherently complex policy and practice area. Nevertheless, evidence based on two decades of experience demonstrates that it is possible for an organisation to achieve substantial advantages from a well-designed and well-implemented scheme. The policy model for Whistleblower Protection adopted by the UN General Assembly in 2006 departed significantly from the problematic US tradition in this area. The adopted model is generally based on the UK P*ublic Interest Disclosure* law of 1998, and its antecedents, which have proved broadly effective.[2]

In more recent schemes of protection, retaliation against a protected disclosure of wrongdoing by a whistleblower is now seen as a form of misconduct based on conflict of interest. The control of such misconduct is already part of a manager's responsibility to his or her employer. This focus on the employment context of whistleblowing – rather than on the presumed mindset and motives of the discloser – is crucial to understanding that effective whistleblower protection requires that the focus must be *on the disclosure itself*, and not on the whistleblower. Provided that the *bona fide* discloser of defined wrongdoing believes, on reasonable grounds, that the disclosure is true, their motives are irrelevant.

> *"the focus must be on the disclosure itself, and not on the whistleblower"*

For any WBP scheme to succeed, the organisation must recognise the 'principled disclosure of wrongdoing' as an act of loyalty to the organisation and to the public interest, rather than as an act of personal disloyalty. 'Martyrdom' of a genuine whistleblower is usually fatal to any scheme's credibility, and to the credibility of the organisation that permits it to happen.

General objectives of modern WBP systems

The general policy model adopted by the UN General Assembly and several member countries is founded on a strategic and preventive approach, in which genuine disclosure of 'wrongdoing' is defined by statute as a duty or responsibility of employment. The phrase '*whistleblower protection provides a shield, not a sword*' captures this perspective.

This approach to whistleblowing is not to be confused with the fundamentally different system of '*qui tam*' private-capacity legal actions in the United States, which originated in Civil War procurement fraud. Under the US model, a successful 'whistleblower' litigant stands to gain a percentage of the fraud proceeds recovered through prosecution. The model is founded on the assumption that whistleblowing is not the business of the employer, but rather a private-capacity initiative motivated by individual moral conscience, to be treated as an exercise of Constitutionally-protected free speech. The notion of whistleblowing as it operates in the United States might be most aptly characterised by the phrase '*whistleblower protection provides a sword, not a shield*'.

In some jurisdictions, the terminology of 'whistleblowing' is also often employed to refer to an individual's exercise of 'principled dissent' in relation to government or organisational policy. Such activity has not been protected as whistleblowing in OECD countries or within the UN Secretariat, however. Policy disputes should be covered by a separate process that encourages internal discussion and analysis of an organisation's policy position or administrative practices.

A further complication in understanding of the phenomenon of whistleblowing arises from the fact that most media accounts of whistleblowing, and many academic treatments, have tended to treat all whistleblowing as equivalent over time. Media accounts in particular tend to assume that the experience of whistleblowers in one jurisdiction or country can be directly compared to experience in a different cultural or legislative context, often at a different time. It should be self-evident that the severe retaliation suffered by a whistleblower in the United States, France, or the UK, perhaps years ago, does not of itself tell us anything of value today.

Other WBP policy issues

There is clear relevance for good policymaking in the model provided by the UK *Public Interest Disclosure* law, which provides that retaliation or reprisal against a whistleblower is a matter arising in the employment relationship, rather than as a criminal offence. The resolution of cases by a relevantly empowered Tribunal has clearly proved effective in the UK, in contrast to the few successful cases against alleged retaliation in jurisdictions where criminalisation applies.

Any scheme will also need to deal with situations where there is no protected disclosure as such. Protection may be required for an individual who has not made a protected disclosure of information, but is mistakenly suspected of having done so. Protection must also be provided for an individual who has been required (as part of his or her duties) either to report certain information via an internal administrative process, or to assist with an internal or external process such as an inquiry or audit. In each case, an attempt may be made to 'warn off' the individual from doing their duty conscientiously. Such threats should be treated as forms of retaliation.

> *"whistleblower protection provides a shield, not a sword"*

Any scheme will also need to pay close attention to preventing abuse by the makers of non-bona fide 'strategic' allegations, who seek to misuse the available protections for personal advantage, or to damage the reputations or interests of other individuals or organisations, or simply to cause mischief by way of revenge-taking against their (former) employer.

Under modern policy approaches, the whistleblower is *not* required or invited to provide evidence to 'prove' that their disclosure is true: vigilantes should not be endorsed in advance, and incriminating evidence should be obtained *only* by competent investigatory authorities. To require otherwise is to risk compromising an official investigation, and to involve the discloser inappropriately in the matter.

The whistleblower *may* be permitted to provide evidence where it is properly available to him/her in the ordinary

course of their work, but they must not be encouraged (nor indemnified) to act illegally or improperly in order to provide evidence. To do so may alert the subject of a disclosure to the fact that their conduct has come under suspicion and enable them to destroy evidence, or to interfere with potential witnesses, or otherwise to undermine an investigation or prosecution.

Careful distinctions also need to be drawn to identify and protect the following categories of person:

- disclosers who are genuine in their belief about a claim of wrongdoing, but prove to be ill-informed
- disclosers of claims which ultimately prove to be without foundation or which ultimately cannot be proved
- disclosers who are genuine in their belief but not necessarily motivated by 'public interest' considerations.

In such instances, the outcomes, evidence, and motives of the whistleblower should be of no significance provided that they can satisfy the 'good faith' test: 'an honest belief held on reasonable grounds' that their disclosure was true *at the time it was made*.

Disclosure to the public at large or to the media may be conditionally protected as a last resort, where the matter concerns a significant and urgent danger to public health and safety, or where the whistleblower has already made the same disclosure internally but has not seen an appropriate response, or where a crime is in process or appears about to be committed. Acceptance of financial or other personal reward for making such a disclosure is generally regarded as a disqualification from protection: this is appropriate, as reward issues tend to introduce fatal conflicts of interest.

Purported 'disclosure' of unsubstantiated rumour should not be protected: making a false public interest disclosure, knowing it to be false, is to be regarded as misconduct, and treated as a disciplinary offence. A 'strategic' disclosure about wrongdoing in which the whistleblower was personally involved, in order to seek to escape the consequences, should be protected *only in relation to any retaliation for making the disclosure*, not for the disclosed misconduct itself.

> *"the outcomes, evidence, and motives of the whistleblower should be of no significance"*

The investigating authority must provide a reasonable level of reporting to the discloser, who should not be empowered to accept or reject the outcome of an investigation, but should be able to make the disclosure afresh to another appropriate authority.

A protected disclosure may be made to any appropriate authority in relevant circumstances: internal disclosure within the employee's own organisation as a first step is not necessarily required.

Disclosures by a private citizen of wrongdoing by an employee of the organisation, or by a contractor (such as abuse of staff or unlawful discrimination, breach of Health and Safety law, damage to contracting organisation's mission or reputation, breach of contract terms, fraud, or theft), should be protected as far as is feasible. A private sector contractor who is proven to have taken or threatened reprisals against such a discloser should be subject to administrative fines, contract cancellation, closer contract audit/supervision, debarment from future contracts, and/or prosecution.

Any scheme of protection will also need to recognise three further practical difficulties:

- anonymous disclosures should in principle be accepted by the receiving authority, at least for the purposes of preliminary assessment, especially in the early months of the scheme's introduction; the authority should have the discretion to decide whether or not to investigate a particular claim, based on the information provided by the anonymous discloser together with any other relevant information available or potentially available to investigators. Failure to adopt this pragmatic approach to anonymous disclosures renders the organisation a potential hostage to fortune, especially if a scandal emerges subsequently and evidence surfaces that the organisation had been informed by a whistleblower but had done nothing to investigate
- it is difficult in a complex organisational context to protect whistleblowers against 'subtle reprisal' by establishing policy. As in all areas of management involving the enforcement of standards, diligence and commitment on the part of middle and senior managers is critical to ensure that the organisation's policy is not undermined
- organisations should be subject to a reversal of the usual burden of proof in relation to claims of retaliation: it should be assumed that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified on management grounds unrelated to the fact or consequences of the disclosure.

Conclusion

Every act of whistleblowing takes place in a specific legal, organisational, and cultural context, which is likely to significantly colour the expectations of the discloser, the outcomes of a given disclosure, and the attitudes of anyone affected by it. For this reason, the experience of whistleblowers in the United States in the 1990s, or anywhere else, cannot be assumed to be directly relevant to the experience of whistleblowers in any other jurisdiction or organisation in 2008.

There appears to be no serious suggestion that employees who genuinely disclose corruption, fraud, theft, criminal conduct, abuse of office, serious threat to public health and safety, official misconduct, maladministration, or avoidable wastage of an organisation's resources should not be entitled effective protection from retaliation for so doing. On the contrary, organisations which fail to protect genuine whistleblowers, and permit, or take, reprisal action against them, increasingly face, at a minimum, severe public censure, and may furthermore risk legal action based on failure to provide a safe workplace. The task for organisations now is to make whistleblower protection work. ■

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Notes

Two decades of experience with relevant policy and practice issues involved in the statutory protection of whistleblowers in Australia has recently been the subject of a major national research project jointly funded by the Australian Research Council, five participating universities, and fourteen industry partners including important integrity bodies and public sector management agencies in all nine states and territories, and at the federal level.

For the first time, the review authoritatively points to a very large body of empirical data which show that the various laws have generally been well conceived in principle, and have broad acceptance. What is lacking, the research data demonstrates, is effective administrative and organisational support for whistleblowers and would-be whistleblowers, and more accessible mechanisms for protection. The report is discussed in Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management, at: http://epress.anu.edu.au/anzsog/whistleblowing/pdf/whole_book.pdf

Endnotes

[1] In the system adopted by the UN and operating in the UK and Australia, as discussed in this paper, 'wrongdoing' is not left to the whistleblower to decide: it is defined in law. Hence, only the disclosure of 'wrongdoing, as defined' is protected. Such a system ensures that whistleblowing is not about personal moral crusades or policy disputes, but rather about doing one's duty (by disclosing what the employer/ the state has defined) and being protected for doing so.

[2] See in particular the work of the UK Charity, Public Concern at Work, generally, at http://www.pcaw.co.uk

Photo by sharadhaksar at http://sharadhaksar.deviantart.com