

Whistleblower Protection and the UN Convention against Corruption

- Executive summary -

This submission by Transparency International proposes ways of enhancing whistleblower protection through the review process for the UN Convention against Corruption (UNCAC).¹ It is intended as a contribution to discussions in the UNCAC Implementation Review Group (IRG)² and Conference of States Parties (COSP).³ It surveys the findings in country reviews and thematic reports produced in the first three years of the UNCAC review process.⁴ It also reviews information on practice and developments in whistleblower protection and makes recommendations for ways of making further progress. It is based on desk research as well as inputs from member organisations of the UNCAC Coalition.⁵

Introduction

Recent financial crises underline the importance to all economies of encouraging whistleblowers in all sectors to raise concerns before corruption hollows out and destroys economic, social and political activity. Can any country afford *not* to protect whistleblowers? Clearly, the level of economic development may affect a country's ability to introduce the full panoply of measures necessary to protect whistleblowers but some measures can be taken relatively easily and the savings to be had through doing so successfully will far outweigh the costs.

A key focus of this study is on findings about country implementation of UNCAC Article 33.⁶ This article is crucial to the overall success of the Convention. Investigators consistently report that whistleblowers are among the main triggers for successful corruption investigations. Without inside information corruption is hard to detect. Article 33 requires states to carry out a process of evaluating appropriate measures in their country and it is unlikely that any state could consider do this properly without finding scope for improvement, whether in legal framework or in practice. The development of systems to protect whistleblowers is complex, far more so than the criminalisation of corrupt behaviour, and experience shows it is unlikely to be achieved in a single stroke. No perfect solution has been found, but some countries have made efforts towards finding one, and their experiences can be illuminating.

A range of other UNCAC articles also underline the importance of providing the right framework for reporting corruption. These include two articles in Chapter II on Prevention, namely Article 8(4) on facilitating reporting by public officials; and Article 13(2) on anonymous reporting to anti-corruption bodies. They also include three other articles in Chapter III currently under review, namely Article 32 on protection of witnesses, experts and victims; Article 37 on measures to encourage reporting by persons implicated; and Article 39(2) on encouraging reporting to law-enforcement authorities.

In terms of findings about implementation, the main source of information for this report was the 30 Executive Summaries available from the UNCAC review process at the time of writing, as well as

¹ The full paper is available at <http://www.uncaccoalition.org/learn-more/resources/viewcategory/25-special-topics>

² The IRG is made up of States Parties and was established as part of the UNCAC Implementation Review Mechanism. It is tasked with assessing the results of the review process to identify challenges, good practices and technical assistance requirements, and make recommendations to the COSP.

³ The UNCAC COSP was established by UNCAC Article 63 'to improve the capacity of and cooperation between States parties to achieve the objectives set forth in the Convention and to promote and review its implementation'.

⁴ The first five-year cycle is focused on the chapters on Criminalisation, Enforcement and International Cooperation. As of 1 April 2013, 30 Executive Summaries of country reviews had been published.

⁵ The UNCAC Coalition is a global network of more than 350 civil society organisations (CSOs) in more than 100 countries, committed to promoting the ratification, implementation and monitoring of the UNCAC.

⁶ 'Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.'

the full reports that five countries had agreed to publish on the UNODC website as of the time of writing. These were from Brunei Darussalam, Chile, Finland, France and Switzerland.⁷ The full UNCAC review reports are not published unless the reviewed country consents. Reference was also made to the thematic reports prepared by the United Nations Office on Drugs and Crime (UNODC).

Main findings

The UNCAC review process has shown that there are wide variations among States Parties in whistleblower protection. UNODC's thematic report of 27 August 2012 records that overall there is 'an absence of specific regulations and systems' and that where protective regulations do exist they often do not apply to private-sector employees.⁸

There are important steps states should take beyond creating obligations for reports of offences to be made, anonymous hotlines, and provisions outlawing dismissal for whistleblowing. Some of the reasons why such measures do not suffice have been mentioned in country reports. For example, they may not deal with:

- Situations where the act has not yet taken place or when the whistleblower is not sure whether the behaviour is corrupt.
- The conflict that is likely to arise when the whistleblower's report contains material that his/her employers have classified as confidential.
- Situations where the normal reporting channels are tainted or inactive.
- Forms of retaliation that do not amount to dismissal.
- The burden of proof issue: dismissal and other reprisals are always likely to be presented as being carried out for other reasons, so a legal presumption that whistleblowing was the cause is essential.

The Executive Summaries of the country reports generally contain little about Article 33. (In those where it is discussed, there is often a focus on the lack of whistleblower protection in the private sector.) In the five full reports published at the time of preparation of the report there was more useful material on whistleblower protection, clarifying to some degree remarks in the Executive Summaries.

In several Executive Summaries, recommendations have been made that countries should consider new measures. Given the brevity of the reports these generally do not indicate what types of measures should be introduced. Similarly, the summaries report commitments made by States Parties to consider measures, but do not provide information about the measures or the plans.

In countries where frameworks have been put in place, the UNCAC reviews rightly cite good practice in this context but may omit to consider the impact of the laws. A useful contribution is made by the country review reports prepared by civil society organisations (CSOs), most of which consider impact.⁹

Civil society organisations have contributed to the development of whistle blower protection legislation in several countries. For example, Transparency International Liberia, the Citizens' Coalition for Anti-Corruption Legislation in South Korea; the Open Democracy Advice Centre in South Africa; Public Concern at Work (PCaW) in the UK; and the Government Accountability Project in the US have contributed substantially to whistleblower protection legislation in Liberia, South Korea, South Africa, the UK and the US respectively. Civil society groups in Australia, Canada, Ireland, India, Morocco, Nigeria and Serbia, to name just a few, are contributing to efforts to improve legislation in those countries.

⁷ The full report on the UK has since been posted on the UNODC website.

⁸ CAC /COSP/IRG/2012/7/Add.1 [<http://www.unodc.org/unodc/en/treaties/CAC/IRG-session3-resumed.html>].

⁹ See CSO UNCAC country reports at <http://www.uncaccoalition.org/uncac-review/cso-review-reports>

Contributions by civil society organisations have also been made in the form of development of recommendations and principles that should inform whistle blower provisions and practice. Transparency International has developed “International Principles for Whistleblower Legislation”. The Open Society Justice Initiative is leading an CSO initiative to draft a set of Principles on National Security and the Right to Information. CSO work has also contributed to the G20 principles and the emerging Council of Europe principles.

CSOs also play a role in raising awareness about whistleblower protection arrangements and in offering advice to whistleblowers. For example, the Transparency International Advocacy and Legal Advice Centres, of which there are 80 worldwide, perform this function. In the UK, PCaW offers free legal advice to whistleblowers, and in the US the Government Accountability Project advises and represents whistleblowers.

Recommendations to the IRG and the COSP

Country reviews and thematic reports

Conduct more rigorous country reviews: Country reviews should test more rigorously whether whistleblower systems are in place and to what extent they work in practice. Checking whether a real system is in place would mean answering the following questions:

- Do measures apply to all workers in both public and private sectors?
- Does that include police? Military? Security services?
- Is there a reversal of the burden of proof in favour of the whistleblower who alleges a reprisal?
- Is there any limitation on what may be considered as a reprisal?
- Does that include action by co-workers? Third parties?
- Is the whistleblower’s good faith presumed?
- Are confidentiality laws and agreements over-ridden where there are public interest issues?
- Is there protection for seeking legal advice?
- Which authorities may whistleblowers address?
- Is there any obligation for the whistleblower’s report to be investigated?
- Will s/he be kept informed of the outcome?
- In what circumstances will reports to the media and CSOs be protected?
- Is there an institution to oversee protection?
- Are whistleblowers able to seek a remedy in court?
- How effective is the court system in dealing with whistleblowing cases?
- Is there unlimited compensation?
- Is there a rewards system?
- How much is the general public aware of available protections and reporting channels?

Assess the practical effect of laws in operation: The making of the law is only the start of the process and reviews should make further efforts to gauge the practical effect of laws in operation. If there is a framework in place then there should be more information about its impact. This could also be a valuable area for a cross-cutting study by the UNODC of those jurisdictions with significant experience, particularly in view of the relative absence of authoritative reviews. The types of question that should be covered in country reviews are:

- What measures are taken to ensure the law is well known?
- Are there any published studies on its impact?
- Are there examples of notable corruption cases uncovered by whistleblowers?
- How many reports from whistleblowers have public bodies received?
- How many calls to advice lines from whistleblowers?
- How many cases where protection sought against reprisals?
- Number and amounts of compensation awards?

- What examples are there of organisations' policies and procedures that have been implemented?
- What are the views of civil society on its impact?

Provide positive examples and information on technical assistance results: As they stand, the thematic reports are unlikely to assist States Parties who wish to develop measures. There is much that can be learnt from what has been tried elsewhere, especially where there has been a significant period of operation (e.g. in Australia, South Africa, South Korea, the UK and the US). It is recommended that the thematic reports should contain more information on positive examples, and also on the results of any technical assistance where that has been provided. UNODC has access to the full country reports and it should be possible to provide a full summary of extracts on Article 33. A thematic report devoted specifically to whistleblowing might be useful.

Make specific recommendations on new measures: Where recommendations are made to introduce new measures they should be specific. In the absence of specific recommendations, it will be difficult in the future to ensure that they have been followed up.

Publish full review reports: Most countries for which reviews have been undertaken have not yet instructed UNODC to publish their full review reports. This should be encouraged, as the full reports provide valuable information supplementing the brief findings and recommendations in the Executive Summaries.

Further guidance on Article 33

Include a wider range of expertise: UNCAC reviews generally bring together anti-corruption experts (visitors and domestic), while the issue of whistleblowing may have a home in government outside the anti-corruption arena. Corruption experts may be more familiar with the process of reporting of crimes already committed, rather than the wider uses of whistleblowing, including as an aspect of risk management. The IRG and UNODC should invite a wider community of experts to provide advice and assistance.

Prepare special guidance: It is recommended that special guidance should be prepared for Article 33. The guidance should take into consideration material developed by other institutions such as the Transparency International (TI) "International Principles for Whistleblower Legislation" as well as best-practice materials, guiding principles and model legislation produced by the Organisation for Economic Co-operation and Development (OECD), Organization of American States (OAS) and others. They provide detailed pointers and cite some promising examples of national laws or practices. The guidance should make clear, inter alia:

- The crucial role of civil society. Citizens are increasingly concerned about corruption and the inadequate measures taken to deal with it, and the best way to harness this concern in a positive way is to ensure they are fully committed to the national whistleblowing system.
- That the aim of whistleblower systems should be to create a climate where people do not feel compelled to raise issues anonymously.