

## Chapter 5.

### Protecting whistleblowers in Mexico: Ensuring secure channels and protections for reporting corruption

*Effective public sector integrity frameworks aim to incentivise whistleblowers to disclose misconduct by ensuring visible support and positive reinforcement from the organisational hierarchy, clear guidance on reporting procedures, and effective legal protection from retaliation. Such measures are considered paramount for effectively detecting misconduct, safeguarding the public interest and promoting a culture of integrity in the public sector. Mexico recently passed the General Law on Administrative Responsibilities, which will strengthen whistleblower protection when it comes into force in July 2017. This chapter will assess Mexico's new whistleblowing framework by examining the extent to which whistleblowers are protected from reprisals, whether disclosures of misconduct are effectively managed, whether civil servants and the public are aware of the critical role that whistleblowers play in safeguarding the public interest, and how the framework has implemented appropriate measures to monitor its effectiveness on an ongoing basis.*

*Note:* The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

## Introduction: Whistleblower protection for detecting corruption and cultivating a culture of integrity

The protection of whistleblowers who disclose misconduct in the civil service should be a core component of any public sector integrity framework. Whistleblowers who report misconduct may be subject to intimidation, harassment, dismissal and violence by public officials, work colleagues, superiors, or any other person acting on their behalf. In many countries, whistleblowing is even associated with treachery or spying (Banisar, 2011; Transparency International, 2013a). This may be due to misguided perceptions that loyalty is owed primarily to managers or the organisation instead of the public interest. Since Mexico has a strong tradition of clientelism in the public sector, Mexican public officials may be vulnerable to similar gaps in the institutional culture, which may deter them from disclosing misconduct that involves their colleagues or superiors.

As the modern public sector is becoming more and more complex, insiders have become a primary source of information in terms of exposing misconduct and promoting accountability (Johnson, 2004). Effective public sector integrity frameworks must therefore aim to incentivise whistleblowers to report misconduct by ensuring visible support and positive reinforcement from the government and the organisational hierarchy, clear guidance on reporting procedures, and effective and comprehensive legal protection from all kinds of retaliation. The right combination of these measures is considered paramount for safeguarding the public interest and promoting a culture of public sector integrity. By sending the message that officials and the public are expected to raise integrity concerns and dilemmas related to misconduct in the public sector, and that reprisals against whistleblowers should not be tolerated, these measures contribute to establishing a culture of integrity in the public sector and beyond that will be key to avoiding reprisals from occurring in the first place.

This chapter will assess the framework for public sector whistleblowers in Mexico. It will examine the extent to which whistleblowers are protected, whether they are aware of the rights and duties to report suspected corruption and misconduct, and whether they are able to securely and effectively report misconduct.

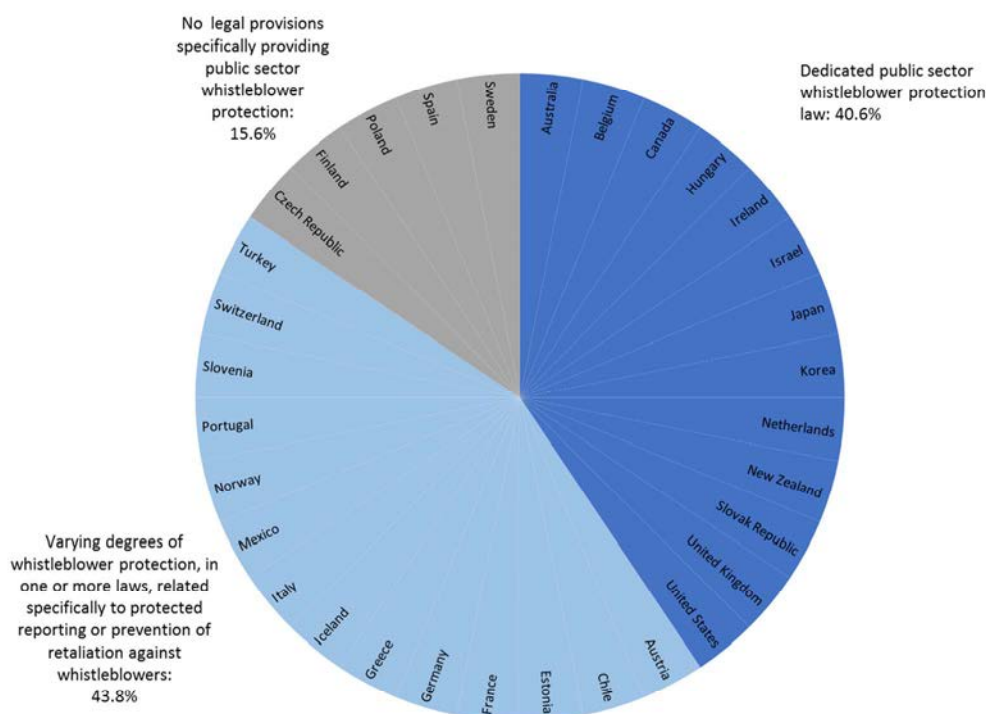
### Strengthening whistleblower protection from reprisals

***Mexico's recently adopted rules on the reporting of misconduct and the protection of whistleblowers are a positive step forward as they significantly extend the protection of the identity of those who report integrity violations in the public sector. However, Mexico could provide more comprehensive protection to whistleblowers by specifically prohibiting the dismissal, or any other formal or informal work-related sanction, without a cause, if the information reported can reasonably be believed to be true at the time of the disclosure.***

The need for effective whistleblower protection as part of a comprehensive public sector integrity framework is recognised in numerous multilateral anti-corruption treaties, such as the 2014 Council of Europe Recommendation of the Committee of Ministers to member states on the protection of whistleblowers, the United Nations Convention Against Corruption, the Inter-American Convention against Corruption, the 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service, and the G20 Anti-Corruption Action Plan for the Protection of Whistleblowers.

As a result, an increasing number of countries have developed their own legal and policy framework to facilitate the reporting of misconduct and protect whistleblowers from reprisals, particularly in the public sector. Whistleblower protection for public servants can originate from a single dedicated law or through provisions in several laws, including anti-corruption laws, competition laws and corporate laws (Figure 5.1).

**Figure 5.1. Legal protection for whistleblowers in the public sector**



*Notes:* The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

The figure presents a grouping of 32 OECD countries in line with the above description and on the basis of their responses to the 2014 OECD Survey on Public Sector Whistleblower Protection. Respondents were asked the following question: “Does your country provide protection of employees from discriminatory or disciplinary action once they have disclosed wrongdoing?” For the purpose of this publication, the answers provided were analysed according as to whether or not countries’ legal frameworks were related specifically to protected reporting or prevention of retaliation against whistleblowers.

*Source:* OECD (2016), *Committing to Effective Whistleblower Protection*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264252639-en>.

In Mexico, public officials and citizens who disclose misconduct in the public sector are protected by the following:

- Mexico’s new General Law on Administrative Responsibilities (*Ley General de Responsabilidades Administrativas*, LGRA), which will require, when it comes into force in July 2017, investigative authorities of public organisations subject to

the law to adopt anonymous and confidential reporting channels to disclose misconduct and increase the accountability of recipients of disclosures of misconduct.

- The Agreement establishing the new Code of Conduct and Integrity Rules (*Código de Ética y Reglas de Integridad*, DOF 20/08/2015), which establishes rules for reporting breaches of the Code of Ethics or other institutional integrity rules by public servants of the federal government.
- The General Law of the National Anti-Corruption System (*Ley General del Sistema Nacional Anticorrupción*), which provides for a centralised electronic platform through which any citizen can disclose misconduct anonymously.
- Sections 113 and 116 of the General Law on Transparency and Access to Public Information (*Ley General de Transparencia y Acceso a la Información Pública*) provide, which states that whistleblowers' personal data is kept confidential during investigations and disciplinary proceedings.
- To deter the exercise of reprisals, section 219(I) of Mexico's Federal Criminal Code (the scope of which will be further discussed below) states that a crime of intimidation is committed when civil servants, or a person acting on their behalf, uses physical violence or moral aggression to intimidate another person in order to prevent them from reporting, lodging a criminal complaint, or providing information concerning the alleged criminal act.

A strength of Mexico's whistleblowing framework regarding administrative offences is that it applies to the whole public sector, including state-owned enterprises. The LGRA also provides a broad definition of the concept of "whistleblower", which includes any corporation, individual or civil servant who reports to the authorities referenced by the law any acts or omissions that could constitute or that could be linked to administrative offences referenced by sections 91 and 93 of the law. The scope of what constitutes an appropriate disclosure in accordance with the law is clearly defined, which will help public servants and the public to define with certainty what may be disclosed and under which circumstances. Moreover, the framework will implement mechanisms that seek to ensure that the recipients of whistleblower disclosures take the appropriate action warranted by each specific disclosure, including protecting the identity of the whistleblower.

The framework for reporting a breach of the federal government's code of ethics, as well as of institutional integrity rules and codes of conduct, is provided by the Agreement, which states that any person may disclose any alleged breach of the code of ethics or other integrity rules, such as institutional codes of conduct, to the Ministry of Public Administration's (*Secretaría de la Función Pública*, SFP) Ethics and Conflict of Interest Committee. In the LGRA, the concept of "whistleblowers" under the Agreement is not limited to public servants. However, allegations must be accompanied by the testimony of a third party.

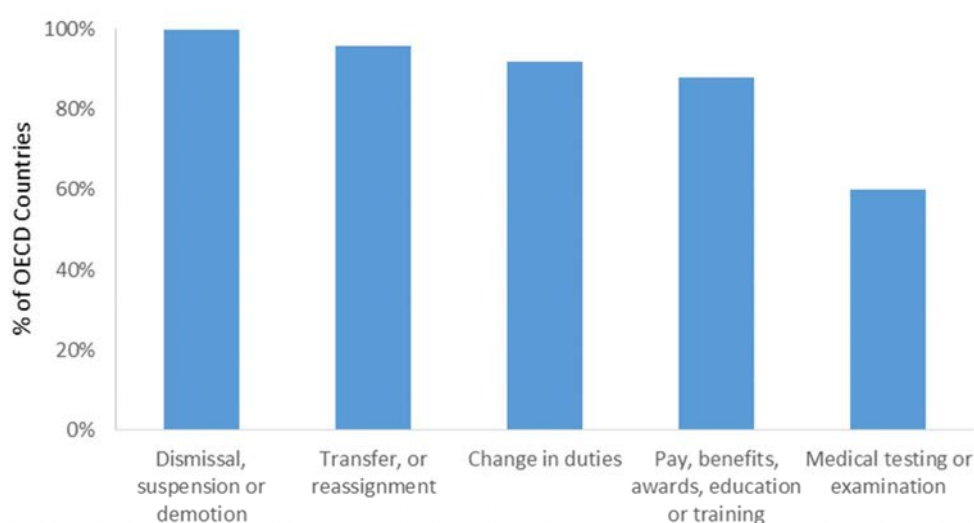
By sending the message that public servants and members of the public are expected to raise integrity concerns and dilemmas, and that reprisals against whistleblowers should not be tolerated, these measures will likely contribute to establishing a culture of integrity in Mexico that will be key to avoiding reprisals from occurring in the first place (ex ante protective measures).

However, there are times when such ex ante measures will not effectively protect whistleblowers. In some cases, it may be impossible to fully protect the identity of whistleblowers and, therefore, ex post protective measures should be available to ensure that whistleblowers have appropriate remedies at their disposal to seek compensation from the individual or organisation that may have exercised reprisals.

Mexico's whistleblowing framework is currently primarily designed to facilitate, or even require, the reporting of misconduct through the protection of identity, but there are few additional protections if the identity of the whistleblower is eventually disclosed.

Comprehensive whistleblower protection includes a number of mechanisms that seek to compensate whistleblowers experiencing reprisals in the workplace, such as dismissal, demotion or suspension; transfer or reassignment; or change in duties. Figure 5.2 outlines the main protection measures against reprisals granted by OECD countries responding to the 2014 whistleblowing survey.

**Figure 5.2. Main protective measures against reprisals as adopted by OECD countries**



Source: OECD (2014), *OECD Survey on managing Conflict of Interest in the executive branch and Whistleblower Protection*, OECD, Paris, [www.oecd.org/gov/ethics/2014-survey-managing-conflict-of-interest.pdf](http://www.oecd.org/gov/ethics/2014-survey-managing-conflict-of-interest.pdf).

These broad protections are considered good international practice. For example, Korea's Protection of Public Interest Whistleblowers (PPIW) Act provides a comprehensive list of the disadvantageous measures whistleblowers should be protected against, including financial or administrative disadvantages, such as the cancellation of a permit or license, or the revocation of a contract (Box. 5.1).

### Box 5.1. Comprehensive whistleblower protection in Korea

In Korea, the term “disadvantageous measures” means an action that falls under any of the following items:

- Removal from office, release from office, dismissal or any other unfavourable personnel action equivalent to the loss of status at work.
- Disciplinary action, suspension from office, reduction in pay, demotion, restriction on promotion and any other unfair personnel actions.
- Work reassignment, transfer, denial of duties, rearrangement of duties or any other personnel actions that are against the whistleblower’s will.
- Discrimination in the performance evaluation, peer review, etc. and subsequent discrimination in the payment of wages, bonuses, etc.
- The cancellation of education, training or other self-development opportunities; the restriction or removal of budget, work force or other available resources, the suspension of access to security information or classified information; the cancellation of authorisation to handle security information or classified information; or any other discrimination or measure detrimental to the working conditions of the whistleblower.
- Putting the whistleblower’s name on a black list as well as the release such a blacklist, bullying, the use of violence and abusive language toward the whistleblower, or any other action that causes psychological or physical harm to the whistleblower.
- Unfair audit or inspection of the whistleblower’s work, as well as disclosure of the results of such an audit or inspection.
- The cancellation of a license or permit, or any other action that causes administrative disadvantages to the whistleblower.

*Source:* Korea’s Act on the Protection of Public Interest Whistleblowers (2011), Act No. 10472, Mar. 29, 2011. Article 2 (6).

Mexico may consider modifying the LGRA or Mexico’s Labour Law, as appropriate, to specifically prohibit the dismissal without a cause of public and private sector whistleblowers, as well as other work-related reprisals, such as demotion, suspension and harassment. This protection may be limited in cases where tribunals have ruled that the whistleblower should have known that the disclosure was false or misleading at the time of the disclosure.

***Mexico could consider clarifying in what circumstances preventive measures of protection will be granted. This would include clarifying the meaning of the “reasonable means of protection” (“medidas de protección que resulten razonables”) under the LGRA, ensuring that whistleblowers who do not fall under the definition of “public servants” of the LGRA can benefit from similar protections, where appropriate, and ensuring that preventive measures can be imposed by the Ethics Committee before reprisals take place.***

Beyond the protection of whistleblowers’ identity, one of the few protections provided by Mexican law is section 64 of the LGRA, which allows civil servants to request protective measures that are “deemed reasonable” from the organisation

providing the reporting channels, which does not, therefore, protect whistleblowers who are working outside the public sector. Moreover, the lack of precision regarding the protections contemplated under this article leave a lot of uncertainty of the extent and scope of the protection that will be granted. While it is understandable that section 64 has been worded to avoid excluding any measures deemed appropriate in any particular case, this provision would be more effective at enhancing whistleblowers' trust in the system if its overall objective were included in the law, alongside a non-exhaustive list of examples of measures that may be considered under this section.

Greater clarity may also be provided regarding how such reasonable measures apply to both public sector and non-public sector whistleblowers by bringing changes to the LGRA, or to another legislation, as appropriate. This provision could be particularly useful in difficult and potentially hazardous situations when anonymity and confidentiality may not be sufficient, such as when the disclosed misconduct involves senior public officials, political staff or organised crime, or when there are risks that the physical integrity of whistleblowers may be threatened.

Section 7 of the General Guidelines to Promote the Integrity of Public Servants (*Lineamientos generales para propiciar la integridad de los servidores públicos y para implementar acciones permanentes que favorezcan su comportamiento ético, a través de los Comités de Ética y de Prevención de Conflictos de Interés*), included in the Agreement, states that the chairman of the Ethics Committee may determine preventive measures to avoid harassment, assault, intimidation or threats against a person who discloses misconduct. Creating greater certainty about the eligibility and the scope of protective measures and clarifying what measures may be considered by the chairman of the Ethics Committee, as well as the circumstances upon which these measures will be imposed, would enhance the effectiveness of the framework at encouraging disclosures of misconduct.

***Mexico could consider shifting the burden of proof to the employer to provide evidence that any sanction exercised against a whistleblower following a disclosure of misconduct is not related to that disclosure.***

Whistleblower protection systems may reverse the burden of proof onto the employer to prove that the conduct taken against the employee is unrelated to his or her disclosure of misconduct. This is in response to the difficulties an employee may face in proving that the retaliation was a result of the disclosure, “especially as many forms of reprisals may be very subtle and difficult to establish” (Chêne, 2009, p. 7). In Germany, to qualify for protection provided by the civil code, public servants are charged with the burden of proof and have to demonstrate that their disclosure was legally permissible, that discrimination took place, and that retaliation happened because of their disclosure. In the event that the employer has not explicitly mentioned this as the reason for termination, this type of proof has been almost impossible to provide. To mitigate this, several whistleblower protection systems provide a more flexible approach to burden of proof and assume that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified by management on grounds unrelated to the disclosure.

The system in the United States applies a burden-shifting scheme, whereby a federal employee who is a purported whistleblower must first establish that she or he:

1. Disclosed conduct that meets a specific category of wrongdoing set forth in the law.

2. Made the disclosure to the “right” type of party (depending on the nature of the disclosure, the employee may be limited regarding to whom the report can be made).
3. Had a reasonable belief that the information is evidence of wrongdoing (the employee does not have to be correct, but the belief must be one that could be shared by a disinterested observer with equivalent knowledge and background as the whistleblower).
4. Suffered a personnel action, the agency’s failure to take a personnel action, or the threat to take or not to take a personnel action.
5. Demonstrated that the disclosure was a contributing factor for the personnel action, failure to take a personnel action, or the threat to take or not take a personnel action (in practice, this is largely equivalent to a modest relevance standard).
6. Sought redress through the proper channels.

If the employee establishes each of these elements, the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same action in the absence of whistleblowing, in which case relief to the whistleblower would not be granted (US Merit Systems Protection Board, 2010). Clear and convincing evidence means that it is substantially more likely than not that the employer would have taken the same action in the absence of whistleblowing.

In Slovenia, the whistleblower protection system maintains that “if a reporting person cites facts in a dispute that give grounds for the assumption that he has been subject to retaliation by the employer due to having filed a report, the burden of proof shall rest with the employer”.

In Norway, when employees submit information that gives reason to believe that they have been retaliated against as a result of having come forward with a protected disclosure, it shall be assumed that such retaliation has taken place unless the employer substantiates otherwise.

Should Mexico decide to modify the LGRA or Mexico’s Labour Law to specifically prohibit the dismissal of whistleblowers as a result of disclosures of misconduct, it could consider strengthening this prohibition by shifting the burden of proof onto the employer if an employee who has made a protected disclosure is subject to any type of sanction.

***Mexico may consider providing express civil remedies for civil servants who experience reprisals after disclosing misconduct as defined by the law.***

Most whistleblower protection systems include specific remedies that will involve whistleblowers who have suffered reprisals in enforcing prohibitions against the exercise of reprisals, as opposed to leaving enforcement entirely to the enforcement authorities. Measures of this nature may cover all direct, indirect, and future consequences of reprisal.<sup>1</sup> They vary from return to employment after unfair termination, job transfers or compensation, or damages if there was harm that cannot be remedied by injunctions, such as difficulty or impossibility of finding a new job. Such remedies may take into account lost salary and compensatory damages for suffering, such as punitive damages (Banisar, 2011). Canada’s Public Servants Disclosure Protection Act (PSDPA) includes a comprehensive list of remedies (Box 5.2).



### **Box 5.2. Remedies for public sector whistleblowers in Canada**

To provide an appropriate remedy to the complainant, the Tribunal may, by order, require the employer or the appropriate chief executive, or any person acting on their behalf, to take all necessary measures to:

- Permit the complainant to return to his or her duties.
- Reinstatement the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored.
- Pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant.
- Rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant.
- Pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal.
- Compensate the complainant, by an amount of not more than USD 10 000, for any pain and suffering that the complainant experienced as a result of the reprisal.

*Source:* Canada's Public Servants Disclosure Protection Act of 2005, 21.7 (1).

Under UK law, courts have ruled that compensation can be provided for suffering, based on the system developed under discrimination law (Banisar, 2011). The total amount of damages awarded under the UK PIDA in 2009 and 2010 was GBP 2.3 million, with the highest award of GBP 800 000 in the case of John Watkinson v. Royal Cornwall Hospitals NHS Trust (PCaW, 2011). The average PIDA award in 2009 and 2010 was GBP 58 000, compared to average awards of GBP 18 584 for race discrimination, GBP 19 499 for sex discrimination and GBP 52 087 for disability discrimination cases (PCaW, 2011).

Allowing whistleblowers to introduce their own recourse before the courts, instead of relying on the availability of resources of public authorities, could contribute to reinforcing the public's trust in the whistleblowing framework, and allow for a more optimal use of enforcement authorities' limited resources. As a result, Mexico could consider providing express civil remedies for civil servants who experience reprisals after disclosing misconduct as defined by the law.

The availability of effective civil remedies may contribute to mitigating the professional marginalisation of whistleblowers by providing an opportunity for rehabilitation by civil courts. Such remedies could also compensate whistleblowers for prospective revenue losses. Combined with effective public awareness-raising campaigns, appropriate civil remedies can significantly contribute to improving public perceptions about whistleblowers, and thus indirectly mitigate professional marginalisation and prospective financial losses.

***Mexico should broaden the scope of the criminal prohibition against exercising reprisals on whistleblowers to a broader range of reprisals from a broader range of individuals, and to disclosures that are related to any breach of federal or state laws.***

To increase deterrence of the exercise of reprisals against whistleblowers, some OECD countries have implemented criminal prohibitions. Mexico has implemented section 219 of the Federal Criminal Code, which states that a crime of intimidation is committed when a civil servant, or a person acting on their behalf, uses physical violence or moral aggression to intimidate another person in order to prevent them from reporting, lodging a criminal complaint, or providing information concerning the alleged criminal act.

While this provision provides a deterrent effect, its impact could be reinforced by broadening the scope of its application. The scope of the concept of “reprisals” is somewhat too narrow, as it only includes “acts of physical violence or moral aggression” that can intimidate the whistleblower in order to prevent him or her from reporting. However, as discussed above, there are several other ways to intimidate or threaten to exercise reprisals against whistleblowers in the civil service, including, but not limited to, public disclosure of the identity of the whistleblower.

A second limitation to the application of this prohibition is that it applies only to information linked to a criminal complaint or an alleged criminal act. As a result, an employer would not be prohibited from exercising reprisals against an employee who has disclosed misconduct that constitutes a contravention to any law, but that does not constitute a criminal offence.

Reprisals must come from a civil servant or a person acting on his or her behalf in order to be sanctioned under the Federal Criminal Code. As any citizen or corporation may disclose misconduct in the public sector under the LGRA, reprisals against whistleblowers could be exercised by private sector representatives and other citizens. The deterrent effect of section 219 of the Federal Criminal Code should also apply to reprisals exercised by individuals who do not work for the public sector, or to other persons acting on their behalf.

Section 425.1 of Canada’s Criminal Code establishes a criminal prohibition to exercising reprisals against whistleblowers, and does not include such limitations (Box 5.3). It applies to a broad range of reprisals, which include disciplinary measures against an employee, such as demotion and termination, or measures that otherwise adversely affect the employment of a whistleblower, or threaten to do so. It also applies to any employer or person acting on their behalf. Moreover, this section applies to disclosures related to the breach of any federal or provincial laws or regulations, and is therefore not limited to criminal offences.

### **Box 5.3. Section 425.1 of the Canadian Criminal Code prohibiting reprisals against whistleblowers**

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so:

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

(2) Any one who contravenes subsection (1) is guilty of:

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Source: Criminal Code, R.S.C., 1985, c. C-46 <http://laws-lois.justice.gc.ca/eng/acts/C-46/>.

Mexico could consider broadening the scope of the criminal prohibition to exercise reprisals on whistleblowers to a broader range of reprisals from a broader range of individuals, and to disclosures related to any breach of federal or state laws. Mexico could also consider imposing a criminal offence on individuals who unduly disclose or threaten to disclose the identity of a whistleblower, as this can constitute an effective form of reprisal or intimidation.

### ***Mexico could consider imposing sanctions on individuals who exercise reprisals against whistleblowers who have disclosed misconduct in accordance with applicable rules.***

As discussed above, the LGRA sanctions public officials responsible for investigating, qualifying and prosecuting administrative offences if they do not carry out their role in accordance with the law. However, it does not provide any sanctions for public officials who exercise reprisals against whistleblowers.

Sections 1h) and 11l) of the Integrity Rules for the Exercise of Public Functions (*Reglas de Integridad para el Ejercicio de la Función Pública*) prohibit the obstruction of disclosures of misconduct by public servants. However, these prohibitions only apply to federal public servants, and it is not clear whether or not the exercise of reprisals following a disclosure of misconduct would be qualified as an “obstruction” to disclosing misconduct.

This stands out from internationally recognised good practice. For instance, Australia’s whistleblower protection system invokes imprisonment for two years, 120 penalty units,<sup>2</sup> or both, in cases of reprisal against whistleblowers;<sup>3</sup> while in Korea, the punishment for retaliation varies depending on the type of reprisal that took place (Box 5.4).

### Box 5.4. Sanctions for retaliation in Korea

According to Korea's Protection of Public Interest Whistleblowers Act, any person who falls under any of the following points shall be punished by imprisonment for not more than two years or by a fine not exceeding Korean Won (KRW) 20 million:

- A person who implemented disadvantageous measures described in Article 2, subparagraph 6, item (a) [Removal from office, release from office, dismissal or any other unfavourable personnel action equivalent to the loss of status at work] against a public interest whistleblower.
- A person who did not carry out the decision to take protective measures that had been confirmed by the Commission or by an administrative proceeding.

In addition, any person who falls under any of the following points shall be punished by imprisonment for not more than one year or a fine not exceeding KRW 10 million:

- A person who implemented disadvantageous measures that fall under any of Items (b) through (g) in Article 2, Subparagraph 6 against the public interest whistleblower [(b) disciplinary action, suspension from office, reduction in pay, demotion, restriction on promotion and any other unfair personnel actions; (c) work reassignment, transfer, denial of duties, rearrangement of duties or any other personnel actions that are against the whistleblower's will; (d) discrimination in the performance evaluation, peer review, etc. and subsequent discrimination in the payment of wages, bonuses, etc.; (e) the cancellation of education, training or other self-development opportunities; the restriction or removal of budget, work force or other available resources, the suspension of access to security information or classified information; the cancellation of authorisation to handle security information or classified information; or any other discrimination or measure detrimental to the working conditions of the whistleblower; (f) putting the whistleblower's name on a blacklist as well as the release such a blacklist, bullying, the use of violence and abusive language toward the whistleblower, or any other action that causes psychological or physical harm to the whistleblower; (g) unfair audit or inspection of the whistleblower's work, as well as the disclosure of the results of such an audit or inspection; (h) the cancellation of a license or permit, or any other action that causes administrative disadvantages to the whistleblower].
- A person who obstructed the public interest whistleblowing, etc. or forced the public interest whistleblower to rescind his/her case, etc. in violation of Article 15, Paragraph 2.

*Source:* Korea's Protection of Public Interest Whistleblowers Act No. 10472 (2011), Chapter V Article 30 (2) and (3).

In certain circumstances, some OECD countries, such as the United States, impose criminal sanctions against employers who retaliate against whistleblowers. The US Federal Criminal Code 18 U.S.C. §1513 (e) states that “whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.”

Mexico could align its sanctions framework in the public sector with other OECD member countries by imposing sanctions on civil servants who threaten to exercise or

exercise reprisals on whistleblowers disclosing misconduct in accordance with the Agreement and the LGRA.

### **Ensuring complaints are effectively communicated, reviewed and pursued**

*Mexico could consider better defining and formalising the structures underlying the communication channels for reporting misconduct to ensure public officials and citizens are fully aware of who they can contact if they decide to disclose misconduct, of how their anonymity or confidentiality will be protected, and of the remedies available to them if they experience misconduct.*

According to sections 10 and 11 of the LGRA, whistleblowers may report disclosures either to internal control bodies, present in each public organisation, or to national or subnational supreme audit institutions. Section 64 requires recipients of whistleblower disclosures to preserve the confidentiality or anonymity of whistleblowers, and sections 113 and 116 of the General Law on Transparency and Access to Public Information (*Ley General de Transparencia y Acceso a la Información Pública*) provides that whistleblowers' personal data is kept confidential during investigations and disciplinary proceedings. Although Mexico's electronic anti-corruption platform allows for completely anonymous disclosures by not requiring the provision of any personal data, it is unclear how confidentiality mechanisms would function in practice. Mexico's whistleblowing framework also does not specifically detail what would happen to an anonymous whistleblower identified following her or his disclosure, for instance by the nature of the information included in the disclosure. Making the detailed functioning of confidentiality and anonymity mechanisms publicly available facilitates the reporting of misconduct by potentially reinforcing public trust in the system, provided that such mechanisms have been appropriately designed.

Whistleblowers who wish to disclose a breach of the principles provided by the Agreement can also make such disclosures to SFP's Ethics Committee. However, since section 16 of the LGAR provides that a breach to the Code of Ethics (which is included in the Agreement) is a non-serious administrative offence, both the Ethics Committee and the relevant organisation's internal control body may be competent to investigate such an allegation.

If a disclosure is made to an internal control body, it can conduct the preliminary assessment and investigation, and can impose sanctions if the disclosure is related to a non-serious offence, as defined by sections 2, 49 and 50 of the LGRA. If the internal control body comes to the conclusion that the disclosure is related to a serious offence as defined by sections 51 to 64 of the LGRA, it must complete its investigation and submit it to the Administrative Tribunal. If the Tribunal confirms the qualification of a serious offence by the internal control body, it will initiate the procedure to impose appropriate sanctions. If the Tribunal overturns the qualification as a serious offence, the case will be sent back to the internal control body for decision.

If a disclosure is made to a supreme audit institution, it will conduct the investigation only if the disclosure appears to relate to a serious offence. If the disclosure is related to a non-serious offence, the case will be sent to the appropriate internal control body for assessment, investigation and decision. The supreme audit institution will submit serious offence cases to the Administrative Tribunal, in accordance with section 12 of the LGRA.

Such a structure is aligned with international good practices, which recommend that the individual circumstances of each case should determine the most appropriate channel of disclosure (Council of Europe, 2014). As outlined by the United Nations Office on Drugs and Crime (UNODC) Resource Guide on Good Practices in the Protection of Reporting Persons, and the UNODC Technical Guide to the United Nations Convention against Corruption, channels of reporting should not be limited to a choice of either reporting internally within the organisation or directly to external authorities. Instead, both levels should operate concurrently, so that potential whistleblowers can choose where they trust their disclosure will likely have more impact on the organisation's behaviour. Individuals who decide to report should have the option of submitting their disclosure to an external body, if upon disclosing internally they were not provided with an adequate response within a certain timeframe, or if appropriate action was not taken. In addition, potential whistleblowers should have direct access to external review agencies, skipping the internal element of the disclosure process, if they fear and have reason to believe that they would be reprimanded by their organisation's internal mechanism. Despite the assigned paths of disclosure, providing whistleblowers with the chance to decide to whom to disclose, or within which parameters, enables them to do so more willingly and with greater ease.

Internal reporting is a channel that whistleblowers tend to explore first across countries, as “people in the UK, Turkey and South Korea would all prefer to blow the whistle through a formal internal procedure” (Transparency International, 2009). However, while employers should react in a supportive and accountable manner by executing the letter of the law or abiding by organisational policies, this is not always the case. In these scenarios, the whistleblower often fears their employer's indifference or is left with no other choice but to disclose externally to ensure a timely and well received response that will effect change and put an end to the wrongdoing. Opting for external disclosures as the first port of call may be indicative of a closed organisational culture, where management is not responsible or willing to protect its employees (ODAC, 2004).

To provide an increased variety of disclosure channels, and offer whistleblowers the opportunity to discuss potential misconduct with their direct supervisor as they deem appropriate, Mexico could consider formalising a channel for the disclosure of misconduct to supervisors. Organisations could operate on the premise that employees would approach management with disclosures of wrongdoing, questions and advice, and that management would support the individual's courage, follow the measures in place to protect them, and investigate the allegations accordingly. Furthermore, by being receptive to disclosures and encouraging them as a method of detection, management can mitigate the reputational damage that may ensue from the employee disclosing externally.

For example, in Canada, employees have three different options in terms of disclosing misconduct. First, they can make protected disclosures to their supervisors. Second, they can disclose misconduct to their organisation's designated Senior Officer for Disclosure, who receives, records and reviews disclosures of wrongdoing, leads investigations of disclosures, and makes recommendations to the chief executive regarding any corrective measures to be taken in relation to wrongdoing found. Senior Officers for Disclosure also have key leadership roles in providing information and advice to employees and supervisors on the act. (Box 5.5). Third, if employees prefer not to use internal reporting channels, they can disclose externally to the independent Public Sector Integrity Commissioner, who protects the identity of whistleblowers and acts upon allegations of misconduct made by federal civil servants.

### Box 5.5. Options for making a protected disclosure of wrongdoing in Canada

What are your options for making a protected disclosure of wrongdoing? Know your options.

Ask yourself...

Who do I feel comfortable approaching if I want to make a disclosure?

Does my organisation have internal policies on how to make an internal disclosure?

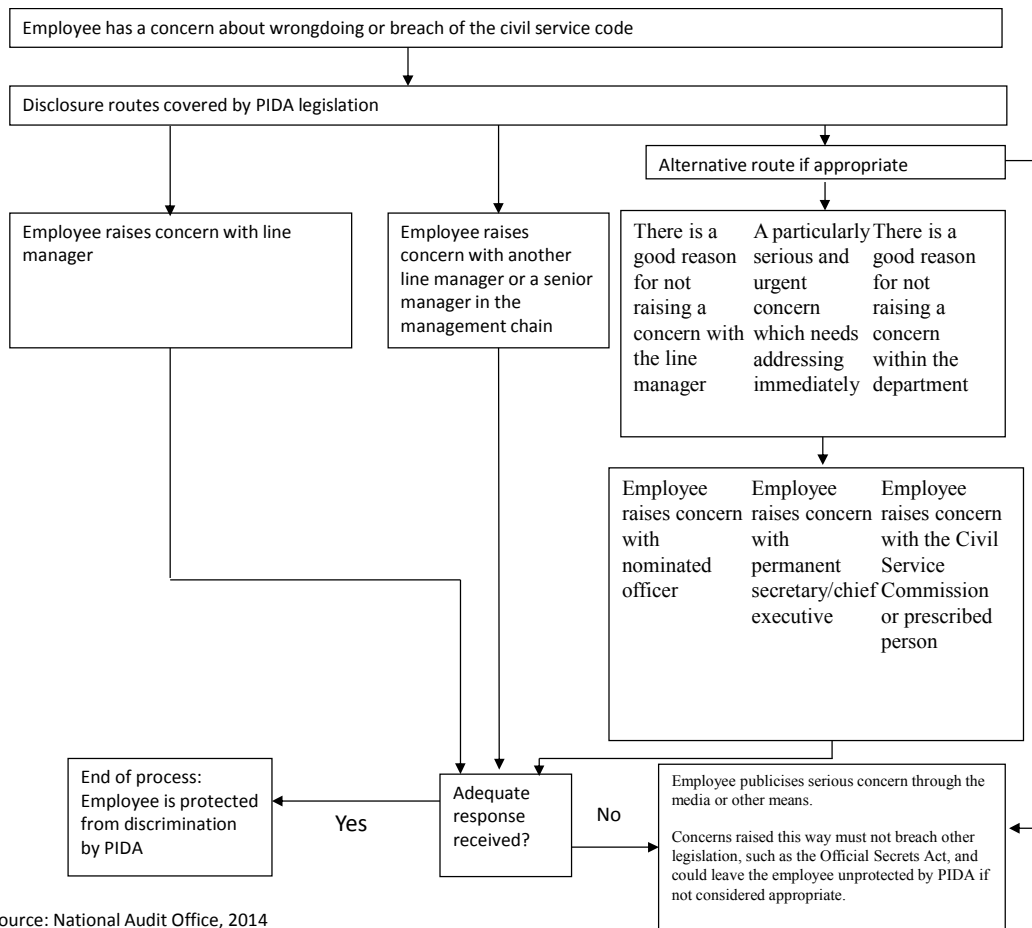
My supervisor/manager	My senior officer	The Office of the Public Sector Integrity Commissioner
I can go directly to my supervisor/manager to make an internal disclosure.	I can find the co-ordinates of my Senior Officer on my organisation's intranet or I can consult the Treasury Board list of Senior Officers ( <a href="http://www.tbs-sct.gc.ca">www.tbs-sct.gc.ca</a> ). If my organisation has not identified a senior officer, I can make a disclosure to the Office of the Public Sector Integrity Commissioner.	I can go directly to the Office at any time. I do not have to exhaust internal mechanisms before making a disclosure to the Office.

Source: Office of the Public Sector Integrity Commissioner of Canada, "Five Questions about Blowing the Whistle" <http://psic-ispcc.gc.ca/eng/resources/decision-making-guide>.

As in some OECD countries, Mexico could consider following a tiered approach, whereby each tier incrementally requires a higher threshold of conditions to satisfy in order for the whistleblower to be protected. For example, the United Kingdom applies a "tiered" approach, whereby disclosures may be made to one of the following "tiers" of persons:

- Tier 1. Internal disclosures to employers or Ministers of the Crown.
- Tier 2. Regulatory disclosures to prescribed bodies (e.g. the Financial Services Authority or Inland Revenue).
- Tier 3. Wider disclosures to the police, media, members of parliament and non-prescribed regulators (Figure 5.3).

**Figure 5.3. Example of a whistleblowing processing the United Kingdom**



Source: National Audit Office, 2014

Source: NAO (2014), *Government Whistleblower Policies*, National Audit Office, London, [www.nao.org.uk/wp-content/uploads/2014/01/Government-whistleblowing-policies.pdf](http://www.nao.org.uk/wp-content/uploads/2014/01/Government-whistleblowing-policies.pdf)

Whether Mexico considers administering disclosures through a tiered system or not, channels of disclosure need to be clearly demarcated and facilitate disclosure, as whistleblowers may lack confidence in the system or may not be comfortable or persistent in coming forward. The availability of channels is not sufficient to render a confusing process clear. Instead, the process should be accompanied by an explanation of the steps to follow and the processes to abide by in order to ensure that whistleblowers are well informed regarding whom to disclose to and understand the potential repercussions of disclosure, which can depend on the party that is disclosed to and the subject matter at hand. Information campaigns should include a component that explains appropriate procedures regarding how the anonymity or confidentiality of whistleblowers will be protected.



***Mexico could consider better defining and formalising co-ordination mechanisms among the different bodies responsible for handling allegations of misconduct.***

As discussed above, while implementing multiple channels for disclosing misconduct is recognised as international good practice to enhance disclosures and maximise the protection of whistleblowers, such mechanisms must be well-coordinated and their functioning must be made understandable to potential users. Otherwise, a variety of uncoordinated bodies responsible for investigating whistleblower allegations, combined with unduly complex and non-transparent reporting channels, run the risk of acting as a disincentive to disclosing misconduct and allow for the duplication of work for investigative authorities, for instance if whistleblowers transfer their allegations to more than one competent body at the same time.

To avoid wasting resources and to promote effectiveness regarding conducting investigations, Mexico may consider implementing appropriate co-ordination mechanisms among the SFP Ethics Committee, internal control bodies responsible for handling whistleblower allegations under the LGRA, and supreme audit institutions. This could increase transparency regarding the functioning of the system and avoid unnecessary duplication of investigation-related work, while protecting the identity of whistleblowers as much as possible. The implementation of co-ordination mechanisms among these bodies may also contribute to ensuring the consistency of the investigation and sanction decision-making processes. Such co-ordination mechanisms may include: sharing information on ongoing investigations, organising regular meetings to discuss ongoing issues and arising operational challenges, and establishing common precedents that will guide decision making and ensure consistency across all investigative bodies.

***Mexico could consider implementing mechanisms that hold internal control bodies more responsible for how they handle disclosures, and particularly how they protect the anonymity and confidentiality of whistleblowers.***

The LGRA provides innovative mechanisms that seek to hold recipients of whistleblower allegations accountable for how they take action following disclosures of misconduct. As discussed above, it provides clear definitions on what constitutes serious or non-serious administrative offences, which define the discretionary power of public officials responsible for qualifying or prosecuting administrative offences.

Section 91 provides that investigations are launched *ex officio* by internal control bodies or supreme audit institutions once they receive a disclosure of wrongdoing. The exception is for disclosures that fall under one of the exceptions provided by section 101: when there are no losses incurred in terms of public funds, when the correctness of the action by the civil servant is based on a subjective opinion that does not imply a contravention to applicable rules, and when the act or omission was corrected spontaneously by the civil servant.

Before a decision is taken as to whether an offence, or which offence, will be prosecuted within an internal control body, section 10 provides that investigators must submit their case to a supervisory authority (*Autoridad substanciadora*) that will review the investigators' decision. This may promote consistency and help establish guidelines on the investigation and prosecution of administrative offences.

Section 64 provides that public services responsible for investigating, qualifying and prosecuting administrative offences commit the offence of obstruction of justice if they

downplay a serious offence to a non-serious offence, if they do not initiate the appropriate procedure within 30 days of misconduct being disclosed, or if they disclose the identity of a whistleblower against his or her will.

For federal public servants, the Agreement provides that disclosing misconduct anonymously is possible if whistleblowers provide the name of a third party to represent them. However, the confidentiality of whistleblowers, or of third parties, shall be protected only “when necessary” and when they are not public servants.

According to sections 102 to 110 of the LGRA, whistleblowers can participate in reinforcing accountability over public servants who are responsible for handling disclosures of misconduct. These provisions set a specific procedure whereby whistleblowers can appeal a decision made by internal control bodies regarding the investigation, qualification and prosecution of administrative offences, and participate in the proceedings.

These provisions are consistent with international good practices that seek to increase the accountability of recipients of whistleblower allegations by guiding their discretionary power. In the United States, for example, protected disclosures include, among others, gross mismanagement and gross waste of funds. To qualify as “gross” there must be something more than a debateable difference in opinion, and the agency’s ability to accomplish its mission must be implicated. The term “gross mismanagement” is also included in Canada’s system, under paragraph 8(c) of the PSDPA. While not defined therein, the factors that the Office of the Public Sector Integrity Commissioner of Canada considers, independently of one another, when investigating an allegation of gross mismanagement, include:

- Matters of significant importance.
- Serious errors that are not debatable among reasonable people.
- More than *de minimis* wrongdoing or negligence.
- Management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organisation, office or unit to carry out its mandate.
- The deliberate nature of the wrongdoing.
- The systemic nature of the wrongdoing.

New Zealand’s system outlines the term “serious wrongdoing” in section 3(1) of its Protected Disclosures Act 2000. It refers to the term as including the following:

- An unlawful, corrupt, or irregular use of funds or resources of a public sector organisation.
- An act, omission or course of conduct that constitutes a serious risk to public health or public safety or the environment.
- An act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial.
- An act, omission, or course of conduct that constitutes an offence.

- An act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement, whether the wrongdoing occurs before or after the commencement of this Act.

It is important that the internal control bodies within each government institution are exempt from political interference exercised by political or government officials. Some of the interviews with public officials revealed that they had little trust in internal control bodies, and that they would avoid disclosing misconduct to such bodies as they would fear potential adverse consequences for their careers. Increased scrutiny and accountability over how the identity of whistleblowers is protected will be key to reinforcing trust by civil servants and citizens in internal control bodies in Mexico.

Some of the information gathered during the interviews tended to show that the allocation of human, technical and financial resources may not be sufficient to effectively deal with the number of disclosures made to internal control bodies and to supreme audit institutions, particularly considering that the disclosures made through the electronic platform of the National Anti-Corruption Plan are all channelled to internal control bodies.

Perceptions about internal control bodies must be changed through the establishment of a culture of integrity in internal control bodies, as well as through awareness-raising campaigns that would publicise the reporting channels and the accountability mechanisms that apply to internal control bodies. Insufficient funding may also affect perceptions of the structures underlying the whistleblowing framework. It is thus key to undertake ongoing assessments of decision-making processes and the methods for allocating resources to ensure that these structures are used in an optimal way. To sustainably reinforce accountability in internal control bodies, structures could be subject to spontaneous external audits by supreme audit institutions, these could also cover how internal control bodies will protect the identity of whistleblowers.

***Mexico should consider protecting the confidentiality of federal public servants who disclose misconduct under the Agreement.***

As discussed above, the Agreement provision that the Ethics Committee must protect the identity of whistleblowers is applicable only when necessary, or when whistleblowers or third parties responsible for representing them are not public servants. There is a great deal of uncertainty as to when the Ethics Committee will consider it necessary to protect the identity of whistleblowers. Moreover, the lack of confidentiality for public servants who disclose misconduct may expose them to reprisals from colleagues or those who are subject to the allegations. Confidentiality is one of the most effective protection measures for whistleblowers, and all should benefit from this, regardless of whether they are a federal public servant or citizen.

## **Raising awareness amongst public officials of their whistleblower rights and duties to report**

***To promote the effective implementation of the whistleblowing framework, Mexico could consider promoting a broad communication strategy and undertaking increased awareness efforts through various channels.***

The decision to disclose wrongdoing is often difficult for a public official. Assuring them that their concerns are being heard and that they are supported in their choice to come forward is paramount to the integrity of an organisation, and to how whistleblowers are viewed by society as a whole. There are multiple measures organisations can take to encourage the detection and disclosure of wrongdoing. These measures would contribute to an open organisational culture and help to reinforce trust and working relationships, and boost staff morale.

Adopting comprehensive whistleblower laws is just one part of an effective whistleblowing framework, and is insufficient alone for effectively promoting a culture of openness and integrity that is supportive of those who take the risk to disclose wrongdoing in the workplace. Periodic awareness-raising campaigns specifically tailored to each context are key to improving public perceptions about whistleblowers. Awareness-raising campaigns are most effective at establishing positive perceptions about whistleblowers when they are associated with additional concrete measures, such as transparent decision making and meaningful remedies, to show that senior managers and decision makers are committed to “walking the talk”.

As such, an open organisational culture and whistleblower protection legislation should be supported by effective awareness raising, communication, training and evaluation efforts. This starts with communicating the rights and obligations when exposing wrongdoing to public or private sector employees, as outlined in the 1998 Recommendation on Improving Ethical Conduct in the Public Service. Principle 4 of the Recommendation stresses that “public servants need to know what protection will be available to them in cases of exposing wrongdoing”. Even more importantly, officials need to understand how whistleblowers are important for promoting public interest by shedding light on misconduct that harms the effective management and delivery of public services and, ultimately, the fairness of the whole public service. An organisational culture of openness is key as it will contribute to reinforcing most incentives and protection measures for whistleblowers. Comprehensive awareness-raising campaigns will repudiate perceptions that whistleblowing shows a lack of loyalty to the organisation. Well-targeted campaigns show that civil servants’ loyalty belongs first and foremost to the public interest, and not to their managers. In this respect, reporting structures and internal rules should be designed so that civil servants feel that they can be loyal to the politically neutral civil service, and not to public officials appointed by the government of the day. The UK Civil Service Commission suggests including a statement in staff manuals to provide assurance that it is safe to raise concerns (Box 5.6). Mexico may consider similar statements and materials.

### Box 5.6. Example of a statement to staff reassuring them to raise concerns

“We encourage everyone who works here to raise any concerns they have. We encourage ‘whistleblowing’ within the organisation to help us put things right if they are going wrong. If you think something is wrong please tell us and give us a chance to properly investigate and consider your concerns. We encourage you to raise concerns and will ensure that you do not suffer a detriment for doing so.”

Source: UK Civil Service Commission (2011), *Whistleblowing and the Civil Service Code*, <http://civilservicecommission.independent.gov.uk/wp-content/uploads/2014/02/Whistleblowing-and-the-Civil-Service-Code.pdf>.

By introducing and implementing such measures, Mexico can facilitate the awareness of whistleblowing and whistleblower protection, which enhances understanding of these mechanisms and constitutes an important mechanism for improving the often negative perceptions linked to the term “whistleblower”. Communicating the importance of whistleblowing from, for example, a public health and safety perspective, can help improve the public’s view of whistleblowers as important safeguards for the public interest. In the United Kingdom, public understanding of the term “whistleblower” has changed considerably since the adoption of the Public Interest Disclosure Act in 1998 (Box 5.7).

### Box 5.7. Change of cultural connotations of “whistleblower” and “whistleblowing”: The case of the United Kingdom

In the United Kingdom, a research project commissioned by Public Concern at Work from Cardiff University examined national newspaper reporting on whistleblowing and whistleblowers between 1 January 1997 to 31 December 2009. This includes the period immediately before the introduction of the Public Interest Disclosure Act and tracks how the culture has changed since then. The study found that whistleblowers were overwhelmingly represented in a positive light in the media. Over half (54%) of the newspaper stories represented whistleblowers in a positive light, with only 5% of stories being negative. The remainder (41%) were neutral. Similarly, a study by YouGov found that 72% of workers view the term “whistleblowers” as neutral or positive.

Sources: PCAW (2010), *Where’s whistleblowing now? 10 years of legal protection for whistleblowers*, Public Concern at Work, London, p. 17.

YouGov (2011), YouGov/PCAW Survey Results, YouGov, London, p.8, [http://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/aecs67p0bl/YG-Archive-PCAW-whistleblowing-work-concerns-100611.pdf](http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/aecs67p0bl/YG-Archive-PCAW-whistleblowing-work-concerns-100611.pdf).

In Peru, the High-level Anti-corruption Commission (Comisión de Alto Nivel Anticorrupción, or CAN) launched the campaign “*Yo denuncio la Corrupción*” (I report corruption) in 2013. In parallel, a whistleblower manual was developed with clear and easily understandable information on the specific mechanisms for administrative complaints in government agencies, and the Whistleblower Counseling Centre was implemented to facilitate communication with whistleblowers via e-mail, phone or mail. This initiative provides a free hotline, distribution of leaflets containing basic information, as well as stickers and pins, and an advertisement campaign was launched.

In 2015 and 2016, training and awareness-raising activities were held by relevant authorities at different public entities in order to publicise the scope of the Peruvian Whistleblowing Law.

To boost awareness of the whistleblower mechanisms in the National Anti-Corruption System and the LGRA, Mexico could consider designing a strategic plan to communicate whistleblowing activity and information. This could be similar to efforts in Korea, where the government has been implementing national strategies to raise public awareness of the benefits of whistleblowing and to strengthen protection for whistleblowers.

Mexico could tailor its outreach efforts to those of the US Office of Special Counsel (OSC). The OSC has a certification programme developed under section 5 U.S.C. § 2302(c), which has made efforts on promoting outreach, investigations and training as the three core methods for raising awareness. The OSC offers training to federal agencies and non-federal organisations in each of the areas within its jurisdiction, including reprisal for whistleblowing. To ensure that federal employees understand their whistleblower rights and how to make protected disclosures, agencies must complete the OSC's programme to certify compliance with the Whistleblower Protection Act's notification requirements.

The No Fear Act in the United States requires that agencies provide annual notices and biannual training to federal employees regarding their rights under employment discrimination and whistleblower laws. Title 5 of the U.S. Code makes the head of each agency responsible for: 1) the prevention of prohibited personnel practices; 2) compliance with and enforcement of applicable civil service laws, rules, and regulations and other aspects of personnel management; and 3) ensuring (in consultation with the OSC) that agency employees are informed of the rights and remedies available to them, including how to make a lawful disclosure of information that is specifically required by law or Executive Order to be kept classified (Box 5.8).

#### **Box 5.8. The United States' approach to increasing awareness through the Whistleblower Protection Enhancement Act (WPEA)**

Section 5 U.S.C. § 2302(c) of the WPEA stipulates that “the head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (...) that agency employees are informed of the rights and remedies available to them under (...), including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures.”

Furthermore, Section 117 of the Act “designates a Whistleblower Protection Ombudsman who shall educate agency employees:

1. About prohibitions on retaliation for protected disclosures.
2. Who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures.”

*Source:* American Bar Association, Section of Labor and Employment Law, “Congress Strengthens Whistleblower Protections for Federal Employees,” Issue: November-December 2012.

By using open channels of communication and support, and emphasising civil servants' primary obligation to be loyal to the public interest, employers and managers can give employees the confidence to discuss concerns or alleged wrongdoings and help create a workplace guided by the tenets of integrity. Informing employees about their rights and responsibilities, as well as the resources available to them, is crucial for creating an environment of trust, professionalism and collegiality. Clear and effective communication can give employees the confidence to voice their concerns, and highlights the importance not only of coming forward about suspected wrongdoing, but also of defending the tenets of integrity in both the workplace and society.

### ***Mexico can engage with civil society as an effective way of applying awareness raising measures***

In addition to awareness raising conducted by governments within OECD countries, a number of non-governmental organisations (NGOs) are active in the field. In the United Kingdom, Public Concern at Work provides independent and confidential advice to workers who are unsure whether or how to raise a public interest concern. It also conducts policy and public education work, and offers training and consultancy to organisations. In the United States, the Government Accountability Project, primarily an organisation of lawyers, defends whistleblowers against retaliation and actively promotes government and corporate accountability. Transparency International conducts advocacy, public awareness and research activities in all regions of the world. It has established Advocacy and Legal Advice Centres in around 50 countries, through which it offers advice to whistleblowers and works to ensure that disclosures are addressed by appropriate authorities. The Whistleblowing International Network, co-founded by Public Concern at Work (PCaW) and the Government Accountability Project (GAP) among others, is another cross-border initiative.

Raising awareness about the processes and safeguards in place to report wrongdoing, and communicating them effectively within an organisation, are necessary elements for the workplace culture to evolve into an open and supportive environment. Training management, meeting with staff regularly, and clearly outlining the steps to follow when disclosing wrongdoing, through promotional materials, public campaigns or staff guidelines, can assure employees of the measures in place to protect them from reprisal. Furthermore, evaluating the processes in place within whistleblower systems enables necessary modifications, which may help streamline and facilitate procedures to better promote and uphold the tenets of integrity.

## **Conducting evaluations and increasing the use of metrics**

### ***Mexico could consider reviewing its whistleblower protection legislation to evaluate the relevance of its objectives, its implementation and its effectiveness.***

Mexico could consider periodically reviewing the LGRA, as well as any other additional whistleblower protection laws that may be adopted in the future, to assess whether the mechanisms in place are meeting their intended objectives and the overall spirit of the whistleblowing framework, and whether the law is being adequately implemented. If necessary, the framework can then be amended to reflect the results of the evaluation. Provisions regarding the review of effectiveness, enforcement and impact of whistleblower protection laws have been introduced by a number of OECD countries, such as Australia, Canada, Japan, and the Netherlands. The Japanese Whistleblower

Protection Act specifically outlines that the government must take necessary measures based on the findings of the review. In Canada and Australia, the review is carried out by parliamentary committees and presented before Parliament.

***Mexico could consider systematically collecting data and information as another means of evaluating the effectiveness of its whistleblowing system.***

In its data collection, Mexico could gather information on: 1) the number and types of disclosures received; 2) the entities receiving most disclosures; 3) the outcomes of cases (i.e. if the disclosure was dismissed, accepted, investigated, and validated, and on what grounds); 4) whether the misconduct came to an end as a result of the disclosure; 5) whether the organisation’s policies were changed as a result of the disclosure if gaps were identified; 6) whether sanctions were exercised against wrongdoers; 7) the scope, frequency and target audience of awareness-raising mechanisms; and 8) the time it takes to process cases (Transparency International, 2013b; Apaza and Chang, 2011; and Miceli and Near, 1992).

This data, in particular information on the outcomes of cases, can be used in the review of a country’s whistleblowing framework in order to assess its impact on public sector organisations. Furthermore, public sector organisations can distribute surveys to review staff awareness, trust and confidence in whistleblowing mechanisms. In the United States, for example, the Merit Systems Protection Board has gathered information by conducting surveys with employees about their experiences as whistleblowers (Banisar, 2011). Such efforts play a key role in assessing the progress, or lack thereof, in implementing effective whistleblower protection systems.

To measure the effectiveness of protective measures for whistleblowers, additional data could be collected on cases where whistleblowers claim to have experienced reprisals. Such data could include: whether allegations of reprisals were investigated, by whom and how reprisals were exercised, whether and how whistleblowers were compensated, the grounds underlying these decisions, the time it takes to compensate whistleblowers, and whether they were employed during the judicial

## **Summary of proposals for action**

### ***Strengthening whistleblower protections in the workplace***

- Mexico may protect whistleblowers from reprisals in the workplace, such as by specifically prohibiting the dismissal of whistleblowers without a cause or any other kind of formal or informal sanction exercised in response to the disclosure, if the information reported can reasonably be believed to be true at the time of the disclosure.
- Mexico could consider clarifying under what circumstances preventive measures of protection will be granted. This would include clarifying the meaning of the term “reasonable measures of protection” (“*medidas de protección que resulten razonables*”) under the LGRA, ensuring that whistleblowers who do not fall under the LGRA’s definition of “public servants” can benefit from similar protections, where appropriate, and ensure that preventive measures can be imposed by the Ethics Committee before reprisals take place.



- Mexico could consider shifting the burden of proof onto the employer to provide evidence that any sanction exercised against a whistleblower following a disclosure of misconduct is not related to that disclosure.
- Mexico may consider providing express civil remedies for civil servants who experience reprisals after disclosing misconduct as defined by the law.
- Mexico may broaden the scope of the criminal prohibition to exercise reprisals on whistleblowers to extend its application to a broader range of reprisals from a broader range of individuals, and to disclosures that are related to any breach of federal or state laws.
- Mexico could consider imposing sanctions on individuals who exercise reprisals against whistleblowers who have disclosed misconduct in accordance with the General Law on Administrative Responsibilities.

### ***Ensuring complaints are effectively managed, communicated, reviewed and pursued***

- Mexico could consider better defining and formalising the structures underlying the communication channels for reporting misconduct to ensure that public officials and citizens are fully aware of who they can contact if they decide to disclose misconduct, of how their anonymity or confidentiality will be protected, and of the remedies available to them if they experience misconduct.
- Mexico could consider better defining and formalising co-ordination mechanisms among the different bodies responsible for handling allegations of misconduct.
- Mexico could consider implementing mechanisms that hold internal control bodies more responsible for how they handle disclosures, and particularly on how they protect the anonymity and the confidentiality of whistleblowers.
- Mexico should consider protecting the confidentiality of federal public servants who disclose misconduct under the Agreement.

### ***Raise awareness and capacities***

- To promote the effective implementation of the whistleblowing framework, Mexico could consider promoting a broad communication strategy and undertaking increased awareness efforts through various channels.
- Mexico could engage with civil society as an effective way of applying awareness-raising measures.

### ***Conduct evaluations and increase the use of metrics***

- Mexico could consider reviewing its whistleblower protection legislation to evaluate the relevance of its objectives, its implementation and its effectiveness.
- Mexico could consider systematically collecting data and information as another means of evaluating the effectiveness of its whistleblowing system.

## Notes

- 1 See for example the United States' Whistleblower Protection Act, Subchapter III Section 1221(h)(1); the United States' False Claims Act 31 U.S.C. §3730(h).
- 2 In Australia, penalty units are used to describe the payable for fines under commonwealth laws. By multiplying AUS Dollar equivalent of one penalty unit, the fine for an offence is set.
- 3 Australia's Public Interest Disclosure Act, Subdivision B, Part 2 – Section 19.

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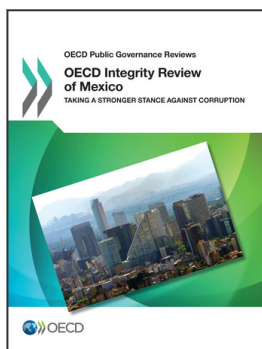
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