

**YUKON FEDERATION OF LABOUR**  
**SUBMISSION TO THE**  
**SELECT COMMITTEE**  
**ON WHISTLE-BLOWER PROTECTION**  
**OF THE YUKON LEGISLATIVE ASSEMBLY**

March 10, 2008

The Yukon Federation of Labour (YFL) would like to thank the Select Committee on Whistle-blower Protection for the opportunity to provide our input.

Our closest democratic associates, U.S., Britain, New Zealand and Australia, have all enacted whistle-blower legislation. Canada and each of its provincial/territorial jurisdictions, lags behind all four of these countries in its legal protection for people who expose mismanagement, misconduct, waste and corruption.

The purpose of protecting whistle-blowers is to help ensure that corruption and mismanagement are identified and rooted out quickly, before people are harmed or public money is wasted. As such, the importance and necessity of whistle-blower legislation cannot be over-estimated. Would the disaster with Walkerton's drinking water have happened if Ontario had whistle-blower protection?

While whistle-blowers are usually portrayed as heroes or snitches, most are just ordinary people who just want to do their job properly. When asked to do something improper, unethical or illegal or to 'turn a blind eye' they refuse. That refusal is a risk in itself, but if they move to get the wrongdoing stopped by reporting to senior management or the media that's when they can find themselves in serious trouble.

They almost always suffer vicious and carefully orchestrated reprisals which ruin their careers and often their personal lives. Most never receive any acknowledgement or thanks and often the reprisals do not stop even after they have been crushed and silenced. In Canada there are virtually no mechanisms to protect whistle-blowers from such treatment, so it should be no surprise that many scandals remain hidden for years.

In cases like the Tainted Blood scandal dozens of people must have known that something was amiss. Yet no one spoke up about the problems until there were

so many deaths that it became impossible to hide the truth. Given the personal consequences of breaking rank, who can blame those who remain silent? It is precisely in that kind of situation that whistle-blowers need to be encouraged protected and thanked for coming forward and doing the right thing at an early stage.

Whistle-blowing is often considered a public sector issue, which of course it is. While public sector workers are employed by the government of the day, they work for the people of their province/territory. However, whistle-blowing is also a private sector issue.

If one were to consider a distinction between public and private sector whistle-blower rights where would the dividing line be? "Public services" are rarely delivered exclusively by government. They are complex systems that combine a mix of public and private funding, and public private not-for-profit and private for-profit delivery.

Furthermore, it would be rare to find a private corporation where the public has no interest in the environmental practices of the organization or where the public has no legitimate interest in whether the company practices or encourages corruption. There are also many examples of public safety issues arising from private corporations.

If one considers a whistle-blower to be any employee, former employee, member of an organization or any citizen who reports misconduct to people or entities that have the power and willingness to take corrective action and that the misconduct can be a violation of law, rule, regulation and/or a direct threat to the public interest such as fraud health/safety violations and corruption, then there is absolutely no reason not to extend whistle-blower protection to the private sector.

One argument often put forward by opponents is that legislation protecting whistleblowers could be abused by disgruntled employees. The same argument was advanced when the right to refuse unsafe work was introduced. The feared abuse seldom happened and when minor instances of 'abuse' were weighed against the benefit of a safer and healthier workplace, the concern over potential abuse was hardly an acceptable reason not to proceed.

Few rights are completely shielded from abuse. That doesn't mean we deny the rights – it simple means we build in reasonable protections against the abuse. We have the fight of free speech and that can be abused – so we have ways to deal the abuse through laws prohibiting hate, slander and libel.

With regard to the specifics of the mandate for the Select Committee, the YFL has reviewed the submission of the Yukon Employees Union and supports their response to the nine issues raised in the motion.

We would also like to present several items which we believe would assist the Select Committee in its deliberations.

The Federal Accountability Initiative for Reform (FAIR) is an Ottawa based organization that promotes legislation and management practices that will provide effective protection for whistleblowers. It was founded by Joanna Gualtieri, a lawyer and an expert on whistleblower law a prominent whistleblower herself.

(In the early 1990s Gualtieri exposed lavish extravagance and gross violations in the rules for housing Canadian diplomatic staff abroad which had cost taxpayers vast sums over the course of a decade. Although both the Inspector General and the Auditor General latter supported her allegations, she was ostracized by her bosses, shunned by colleagues, and was eventually forced to take leave without pay. Her case is still making its way through court.)

The Yukon Federation of Labour supports the five essentials for whistle-blower legislation laid out by FAIR:

The following five points are FAIR's 'gold standard' for judging any whistleblower legislation. Meeting all these in full will ensure that the legislation can be made to work effectively; failing to meet any of these will create loopholes that may render the entire system useless.

### **1. FULL FREE SPEECH RIGHTS**

Whistleblowers must be able to blow the whistle on wrongdoing anywhere, anytime, and to any audience unless release of the information is specifically prohibited by statute, in which case disclosure must still be permitted to law enforcement and/or to Parliament [or in our case to the authority specified by the statute].

### **2. RIGHT TO DISCLOSE ALL ILLEGALITY AND MISCONDUCT**

Disclosure must extend to any illegality, gross waste, gross mismanagement, abuse of authority, substantial and specific danger to public health or safety, as well as the contravention of any workplace policy, regulation, rule, professional statement, directive, or code of conduct.

### **3. NO HARASSMENT OF ANY KIND**

Any harassment must be banned, whether active such as termination or passive such as refusal to promote, taken because of the exercise of a right must be banned.

### **4. FORUM FOR ADJUDICATION, WITH REALISTIC BURDEN OF PROOF AND APPROPRIATE REMEDIES**

Whistleblowers must have access to an effective judicial process including access to our courts of justice.

Considering that the whistleblowing may expose matters of substantial public interest that are highly embarrassing for government, the whistleblower must have access to our courts of law as the forum that is most independent and competent to serve as ultimate adjudicator. The

creation of any special-purpose judicial process for whistleblowers must be in addition to this right of access to the courts, not instead of.

Whistleblowers require also realistic burdens of proof; the law must therefore provide a reverse onus whereby once the whistleblower has shown that the whistleblowing was a contributing factor in the action taken against them (ie., a short time frame between the whistleblowing and the retaliation), the burden shifts to the employer to show by clear and convincing evidence that the employer had other legitimate reasons for taking the action.

Finally, if the whistleblower prevails, the relief must be comprehensive to cover all direct, indirect, and future consequences of the reprisal. This may mean relocation, medical bills, and compensation in lieu of salary. Compensatory and punitive damages must be available to "make whole" the whistleblower from the wounds of retaliation.

#### **5. MANDATORY CORRECTIVE ACTION**

Employees remain silent for two key reasons: one, they have no faith that anything will change; and two, fear of reprisal. In order to promote true accountability, persons who engage in harassment against an employee must be held personally responsible.

As well, ministers must be required to take remedial action on the wrongdoing.

The YFL also supports the FAIR recommendation that the Organization of American States (OAS) Model Law Protecting Freedom of Expression against Corruption be used to guide the process of drafting a law that will truly protect whistleblowers. Canada ratified the OAS Convention on Anti-Corruption on June 6, 2000. A copy of the model law and a copy of the explanatory notes are attached.

We also attach a copy of the 23 point check list from the Government Accountability Project.



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## Organization of American State Model Law

INTER-AMERICAN CONVENTION AGAINST CORRUPTION

ORGANIZATION OF AMERICAN STATES MODEL LAW

PROTECTING FREEDOM OF EXPRESSION AGAINST CORRUPTION

Part one. Protection Against Retaliation

Chapter I. General Provisions

Article 1. Purpose

The purpose of this law is to implement Article III, Section 8, of the Inter-American Convention Against Corruption by protecting those public servants and private citizens who exercise their human right to freedom of expression, by acting on their duty to disclose and challenge corruption.

Article 2. Definitions

For the purposes of this Law:

(a) "Corruption" means "the acts of misconduct listed in Article VI of the Inter-American Convention Against Corruption." (Convention)

(b) "Person" or "protected witness" means "any party who engages, or who is perceived as engaging or as about to engage in protected activity. A person or protected witness includes any individual subject to the laws of the nation, and may be a public or private employee, private citizen, or non-profit or for-profit Non Governmental Organization, without respect to age, sex, religion or race." For purposes of this Law, "person" does not include employees of the legislature, judiciary or confidential, policymaking staff of the President.

(c) "Protected activity" means making any lawful disclosure that evidences acts of corruption or other violation of law, rule or regulation before liability for the misconduct has expired or that evidences gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety; refusing to participate in activities that the person believes would violate the law or contribute to corruption; taking or failing to take any other action to assist in achieving the purposes of the Convention; or exercising rights provided by this Law."

(d) "Any" means "without restriction to time, place, form, motive, or context, made to any audience by a person, including a disclosure made during the course of a person's employment duties."

(e) "Lawful disclosure" means "communication of any information whose release is not specifically prohibited by statute, or specifically, properly marked as required by law with prior designation as secret in the interest of national security. That information may be lawfully disclosed to the President, [Ombudsman] or Inspector General of any agency with relevant authority for the corruption, or other recipient designated by the head of any agency with relevant authority."

(f) "Evidences" means "information that is credible, relevant, and material."

(g) "Discrimination" means "to actively or passively recommend, threaten, take, or fail to take any action that prejudices the rights or undermines the interests of a protected witness or person in any way."

(h) "Contributing factor" means "alone or in combination with any other factor, to affect the outcome in any way."

#### Article 3. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

(3) Restrictions in this Law on the authority or discretion of a government official or government entity apply to former as well as current employees.

#### Article 4. Variation by agreement

Supremacy of provisions. In the event of a conflict between this and other provisions of law, the rights and responsibilities of this Law shall prevail and are controlling.

#### Chapter II. Scope of protection

#### Article 5. Unlawful discrimination

It shall violate this Law to discriminate against any person, because the person -- makes or is about to make, or is perceived as making or as about to make any lawful disclosure that evidences acts of corruption; refuses to participate in acts of corruption; otherwise assists in achieving the purposes of the Convention, or because that person is associated or perceived to be associated with a protected witness.

#### Article 6. Unlawful prior restraint

It shall constitute unlawful discrimination, in violation of this Law, to issue an order, including a judicial ruling, or to spend any funds implementing or enforcing any nondisclosure agreement, rule or policy that prohibits, discriminates, or otherwise interferes with exercise of activity protected by this Law.

#### Article 7. Burdens of proof -- general rule.

If the record demonstrates by a preponderance of evidence that protected activity was a contributing factor in any alleged discrimination in violation of this Law, the person shall prevail in an action taken to enforce rights under this Law, unless the defendant demonstrates by clear and convincing evidence that it would have taken the same action for independent, lawful reasons.

#### Article 8. Presumption for findings of fact by authorized agencies.

If the agency specified in Chapters III or IV, finds that discrimination prohibited by this Law has occurred but does not have authority to enforce its conclusions, the agency's determination will create a presumption



satisfying the requirement that protected activity was a contributing factor to discrimination in violation of this Law. The burden of proof will then be on the defendant to demonstrate by clear and convincing evidence that it would have taken the same action for independent, lawful reasons.

### Chapter III. Implementation through Office of [Ombudsman]

In addition to preexisting authority, the mandate, responsibilities, and authority of the agency Office of [Ombudsman] (Office) shall be created or modified, as follows:

#### Article 9. Establishment and authority

- (1) The Office shall be headed by an [Ombudsman], qualified through professional expertise and with a record of effectively combating corruption, free from conflict of interest, appointed by the President and confirmed by legislative vote in accordance with law.
- (2) The [Ombudsman] shall serve for a term of five years, and can only be removed for cause, after public proceedings and a two thirds joint vote of the legislature.
- (3) The [Ombudsman] shall receive the salary of a government minister reporting directly to the President, and shall have all necessary staff and resources to carry out the responsibilities of the Office. The [Ombudsman] may appoint an Advisory Committee of members with demonstrated expertise relevant for achieving the purposes of this Law, and free from conflict of interest.
- (4) Except as stated in the Constitution and this Law, the Office of [Ombudsman] shall be independent and not subject to control by outside authority.
- (5) The [Ombudsman] shall have official freedom of expression to investigate, report and make recommendations on corrective action against any misconduct covered by this Law, except those alleged by employees of the legislature, courts, and confidential, policymaking members of the President's personal staff. Violations of this Law by those in institutions or positions exempt from authority of the [Ombudsman] shall be enforced by preexisting government authority, as well as by relevant internal mechanisms of those institutions. In the absence of an allegation, the Office may investigate possible discrimination because of protected activity, unless an objection is filed by the person who made the alleged, lawful disclosure(s) which are protected against discrimination. This authority includes the right to investigate a pattern and practice of violating this Law.
- (6) The [Ombudsman] shall have freedom to employ assistants, to delegate authority within the Office, and to issue regulations.
- (7) Except as specifically provided by this Law, the [Ombudsman] shall have access, enforceable by subpoena authority, to all records possessed by public agencies, and all non-privileged private records that are relevant and necessary to carry out the responsibilities of the Office.
- (8) Except as specifically provided by this Law, the [Ombudsman] shall have authority enforceable by subpoena to inquire into any action or inaction relevant for compliance with this Law by any agency, public or private official.
- (9) The [Ombudsman] shall have discretionary authority to determine what complaints to investigate, what corrective action to order temporarily, and what corrective action to recommend for permanent relief.
- (10) Any institution or individual that is the object of specific findings or recommendations in a report by the Office is entitled to reasonable advance notice of the report and an opportunity to respond on the record in the report.
- (11) The [Ombudsman] and Office staff are immune from liability for performance of official duties under

this Law. It is outside the scope of immunity for official duties to violate the rights of persons seeking assistance as protected witnesses under this Law.

(12) The [Ombudsman] has authority to file suit to enforce an order for temporary relief, or for an expedited order by the Supreme Court, when necessary to enforce the authority of the Office. The [Ombudsman] also has the same authority to seek direct assistance from the President or other authority under law, as necessary to carry out the responsibilities of the Office.

#### Article 10. Responsibilities

(1) The Office may not actively or passively prejudice the rights of any alleged protected witness as a result of filing an action with the [Ombudsman]. Any person who files an action seeking assistance from the Office may withdraw it any time without prejudice.

(2) When the [Ombudsman] declines to investigate any complaint of alleged discrimination for protected activity under this Law, the Office shall provide written notification to the person seeking assistance. The Office also shall provide an explanation for the decision, including all material facts relied on and all relevant conclusions of law, as well as referral instructions for all other available avenues for relief provided by this and any other relevant Law.

(3) Prior to submitting any proposed findings, conclusions and recommendations to any party alleged to have violated this Law, the Office shall provide the proposed document to the person alleging discrimination, for comment. As an alternative to providing comments, the person may withdraw the action, including withdrawal of consent for the Office to release any information generated by the investigation except as specifically permitted by this Law.

(4) With the consent of the person seeking assistance, the [Ombudsman] may refer the alleged discrimination for mediation and, if necessary, subsequent arbitration from a decision maker or panel selected by mutual consent, conducted pursuant to the

Model Standards of Conduct for Mediators and the International Arbitration Rules, as relevant, except that any arbitration proceeding shall be open to the public as would be available in a judicial forum chosen under Chapter IV of this Law.

(5) All communications between the Office and a person alleging discrimination for protected activity are privileged and, in the absence of an imminent threat to public health or safety from corruption and reasonable prior written notice to the person, may not be released without the person's express written consent, as provided in Chapter VI. Consistent with this restriction, the Office shall operate a hotline available for confidential receipt of information that will assist in achieving the purposes of this Law, with respect to alleged corruption or discrimination.

(6) If the [Ombudsman] opens an investigation of alleged discrimination for protected activity, the Office shall communicate regularly with the person alleging discrimination and provide a status report to that person every 60 days.

(7) In order to further the mission of the Office, in the event of imminent danger to a protected witness or associated person, or if delay would cause irreparable harm to a protected witness or associated person, the [Ombudsman] may order temporary relief against any alleged discrimination under investigation. Upon petition by the [Ombudsman], any forum available under Article IV shall enforce the order.

(8) The report of the Office, or other reason for closing a case, may not be released without express consent from the person alleging discrimination for protected activity. Except as specifically permitted by this Law, without the alleged protected witness' express consent the Office's findings or other records may not be released to or used in any other legislative, judicial or executive forum.

(9) If the Office issues an unfavorable ruling or one unsatisfactory to the person, or does not issue a ruling within 240 days after a person files an action seeking assistance, the person may continue the case or consider the inaction as constructive denial and file a de novo action for permanent relief in any forum chosen under Chapter IV of this Law. The person alleging discrimination may seek temporary relief from the forum chosen under Article IV while a case is pending before the [Ombudsman].

(10) If the Office concludes there has been discrimination for protected activity, the [Ombudsman] shall issue a report with its findings and associated comments by the witness and any party found in violation of this Law. The report shall include recommendations for relief, which at a minimum must include corrective action to end the discrimination and neutralize any direct or indirect prejudicial consequences suffered by the protected witness. Relief may include an authoritative finding that a protected witness is entitled to professional or personal relocation, or asylum in another nation under relevant domestic and foreign law, in order to prevent recurrence of unlawful discrimination.

(11) The [Ombudsman] may transmit any report of investigation to national and international nongovernment organizations for assistance in achieving recommendations, as permitted and directed by the protected witness.

(12) If the [Ombudsman]'s recommendations for corrective action against discrimination are not implemented to the protected witness' express satisfaction within 60 days of transmission, the [Ombudsman] shall forward the report and recommendations to all judicial, executive and legislative offices with responsibility for the matters raised by the protected witness, and with authority to enforce the recommendations.

(13) At the request of any individual alleging to be a protected witness, the [Ombudsman] shall review the disclosure of information evidencing corruption. If the [Ombudsman] determines there is a substantial likelihood the allegations of corruption are correct, the [Ombudsman] shall order relevant institutional head to conduct an investigation of the allegations as prepared by the protected witness, and to sign and transmit within 60 days a report including -- a list disclosing the issues as alleged by the protected witness, witnesses interviewed and summarizing all material evidence in the record of investigation, findings of fact and conclusions of law on all allegations raised by the protected witness, and commitments for any necessary corrective action. Comments by the protected witness and those accused of misconduct shall be included in the report. The report shall be transmitted to the President, the legislature, the protected witness and to all government agencies with relevant law enforcement responsibilities, and shall be available on file for public review at the Office of the [Ombudsman], and on the internet. The requirement for public disclosure does not include information whose release is specifically prohibited by law or properly marked as required by law with prior designation as secret in the interest of national security.

(14) With express consent by the protected witness, the [Ombudsman] may initiate Alternative Disputes Resolution (ADR) on the alleged corruption or other misconduct disclosed by a protected witness. ADR shall be conducted through mediation and, as necessary, subsequent arbitration from a decision-maker or panel selected by mutual consent. Mediation proceedings shall be conducted consistent with the Model Standards of Conduct for Mediators. Arbitration proceedings shall be governed by the International Arbitration Rules, except that any arbitration proceeding shall be open to the public as would be available in a judicial forum chosen under Chapter V of this Law. In addition, the [Ombudsman] shall submit a roster of proposed, qualified mediators for individual or group mediation of disclosures, including balanced membership representative of government, business, labor, academic and public interest nongovernment organizations affected by the disclosure of alleged corruption. Mediation panels with relevant subject matter expertise may be institutionalized within the [Ombudsman's] Advisory Committee, authorized by Article 9 (3). Mediated resolution or recommendations from the arbitrator shall be submitted to the President, the legislature, the protected witness and to all government agencies with relevant law enforcement responsibilities, and shall be available on file for public review at the Office of the [Ombudsman], and on the internet.

(15) The Office shall prepare an Annual Report on implementation and compliance with this Law by relevant institutions. The report shall disclose all significant actions by the Office to accomplish the purposes of this Law, including the record of results obtained. The report shall be publicly available, including on the internet, and transmitted to the President and all legislative and judicial offices with responsibility for this Law, and provided as part of international outreach and disclosures required by

Articles 31 and 32.

#### Chapter IV. Implementation through exercise of due process rights

##### 1. Article 11. Choice of forum

As an alternative or after seeking assistance from the Office of [Ombudsman], any person alleging discrimination for activity protected by this Law has the right to choice of forum. The person may file a civil action for relief in any lawful body with authority to conduct litigation and order authoritative relief on the subject matter covered by the alleged corruption. Proceedings shall be conducted pursuant to the published rules of procedure for the forum, including any right to trial by jury. The forum shall have jurisdiction to receive cases referred by the Office of [Ombudsman]. Beyond filing a case with the Office of [Ombudsman], the person may not pursue an action in more than one forum. The forum a protected witness may choose includes, but is not limited, to any –

1. Judicial or administrative tribunal with jurisdiction;
2. Alternative Disputes Resolution mediation and, if necessary, subsequent arbitration from a decision maker or panel selected by mutual consent, conducted pursuant to the Model Standards of Conduct for Mediators and the International Arbitration Rules, as relevant, except that any arbitration proceeding shall be open to the public as would be available in a chosen judicial forum.
3. National Human Rights Commission.
4. Government agency with authority over alleged misconduct disclosed by the protected witness.

##### Article 12. Transparency

With the person's consent, all proceedings under this Chapter to adjudicate alleged discrimination shall be open to the public, except with respect to information whose release is specifically prohibited by law, or properly designated by law as secret in the interest of national security.

##### Article 13. Right to counsel

Pursuant to order by the forum where the protected witness seeks relief, a person who cannot assert his or her rights due to inability to pay may be excused litigation costs and appointed counsel from the Office of Public Defender or other authorized agency.

##### Article 14. Affirmative defense

In any criminal or civil proceedings instituted against a person, including employment or defamation actions, the person may raise prohibited discrimination in violation of this Law as a complete defense against the action.

##### Article 15. Appeal.

Either party may appeal a final decision by the chosen forum to the Supreme Court, as provided by law. The person filing the action may seek review by any international forum with jurisdiction, including the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

#### Chapter V. Relief

##### Article 16. Cancellation of prejudice

If the protected witness alleging discrimination for protected activity prevails, that person is entitled to all relief necessary to be made whole, so that protected activity does not result in any direct or indirect prejudice. This includes but is not limited to cancellation of the discriminatory action; payment and any other compensation necessary to neutralize all direct and indirect consequences of discrimination; interim

relief during the proceeding in the chosen forum or the pendency of an appeal, or while a case is pending at the Office of [Ombudsman]; transfer, other relocation or protection against identification under Chapter VI, as well as attorney fees and all other necessary costs if the person alleging unlawful discrimination substantially prevails.

#### Article 17. Asylum

If requested by a protected witness who substantially prevails, the chosen forum shall certify that the protected witness, and associated persons as demonstrated in the proceedings, qualifies for asylum under international law applicable to the chosen forum and the nation from which asylum is sought, as proof that it is more likely than not the protected witness and associated persons face persecution for expression of political opinion protected by the Convention. If the protected witness does not substantially prevail, the chosen forum may still certify eligibility for asylum if the alleged protected witness or associated persons demonstrate the likelihood of persecution for asserting rights against discrimination under this Law.

#### Article 18. Liability

In addition to relief against the consequences of unlawful discrimination, a forum chosen under Article 11, sections (1) or (2) of this Law shall have authority to order sanctions listed below to impose responsibility on those who violate this Law, and to deter repetitive violations. The Office of [Ombudsman] may recommend, or a forum chosen under Article 11, Sections (3) or (4) of this Law may order the following listed sanctions to a forum with corresponding enforcement authority:

(a) employment disciplinary action, including termination, against those responsible for recommending or engaging in unlawful discrimination.

(b) personal liability for punitive damages.

(c) referral of the case for criminal investigation to consider whether the unlawful discrimination is evidence of obstruction of justice.

#### Article 19. Preservation of remedies

Relief and corresponding jurisdiction under this Law are in addition to, and not limited by or substitutive for relevant provisions in preexisting law. Except to raise an affirmative defense in ancillary proceedings, the protected witness may choose to pursue relief under this Law or preexisting available remedies, but not both.

#### Chapter VI. Identity Protection

##### Article 20. Duty of Protection

(1) Any current or former government recipient of information covered by this Law must inform the person making disclosures or otherwise engaging in protected activity of the rights in this Chapter, before accepting any information that may reveal a person's identity.

(2) All protected activity under this Law is privileged. Acceptance of information by a government entity creates a corresponding duty of protection to the person for information disclosed, or for information generated by the disclosure.

(3) No government official has the discretion to violate the provisions of this Chapter. Violation shall create civil liability. Reckless violation shall create criminal liability.

(4) All agreements pursuant to this Chapter must be signed in writing both by the protected witness or associated person, and by an authorized representative for the government entity receiving the disclosure.

(5) Before withdrawing any special protection available under this Chapter, the government entity receiving a disclosure must provide reasonable, prior written notice to the person. Prior written notice must be provided sufficiently in advance so that the person may take realistic, alternative measures to prevent prejudice. Protection under this Chapter may only be withdrawn based on --

1. an imminent threat to public health or safety from corruption for which there is no reasonable alternative than revealing identity, or
2. because the decision to provide protection under this Chapter was based on material, false information from the person seeking it.

#### Article 21. Confidentiality of disclosures

(1) If a person makes a disclosure to the government, the recipient may not use the information in a manner that the person believes would reveal his or her identity, or the identity of associated persons or family members, without the person's express written permission.

(2) This restriction does not apply if there is an imminent threat to public health or safety from corruption, and there has been reasonable prior written notice to the person, as provided in Article 19.

#### Article 22. Confidentiality of identity

Before providing consent for exposure of a protected witness or associated individual, the person may request that the government entity commit to a program of identity protection for the person, which must include the following provisions as a minimum to protect the person or associated individual's identity:

(1) Change the identity of the protected witness and associated person(s), in which case the person protected by this measure may only use the new identity.

(2) Order the issuance of new replacement documents necessary for the protected witness and associated person's identity, such as the certificate of civil registry, document of identity, passport, certificate of judicial background, labor or administrative certificates, or other analogous records, without engaging in ordinary procedures that may expose the protected witness' identity.

(3) With the protected witness and associated person's consent, select an available domestic or international location as the person's permanent or transitory residence.

(4) Order government security agencies to give necessary protection to the person and associated individuals.

(5) Offer the modification of physical features, as necessary to prevent identification.

(6) Take necessary measures to guarantee fulfillment of any monetary, civil, labor, commercial, fiscal and administrative obligations assumed by anyone in the Identity Protection Program prior to admission in the program, or as a result of participation in the program.

(7) Provide necessary, reasonable funds to cover ongoing living expenses, and provide all necessary support to find new employment, including training and placement assistance.

#### Article 23. Admission criteria

Before assuming the responsibilities under this Chapter to the protected witness and associated persons, the government entity receiving the disclosure shall consider the significance of the evidence, and the nature of threatened prejudice to the protected witness, including threats of physical harm to the witness, family members or other associated persons. The nature and duration of identity protection must be signed

as a binding commitment prior to using any information provided by the protected witness.

#### Article 24. Interim protection.

In the event of imminent danger to a protected witness or associated person, or if delay would cause irreparable damage to subsequent identity protection, the government entity with a duty of protection may seek permission to provide interim relief from any authorized body before completing the requirements of this Chapter. Consistent with Article 9(9) and 9(12), the [Ombudsman] may order interim identity protection.

#### Article 25. Duty of good faith

The protected witness has a duty to participate in the Identity Protection Program in good faith. This duty includes the responsibility to safely cooperate with and testify in corresponding proceedings to act on the disclosure of alleged corruption. A person who is removed from the program for relying on material false statements to secure admission, or who violates this duty of good faith, may be ordered to compensate the government agency for costs incurred. Prior to making any payment ordered, the person shall have all rights of appeal available under law. The provisions of this Chapter do not create immunity or imply exoneration for crimes committed after entering the program.

#### Article 26. Withdrawal

Any person protected under this Chapter may request a voluntary release from the program by signing a written document manifesting the intention to withdraw from its protections. The government entity with a duty of protection must grant the request, unless it secures a court order that ending Identity Protection Program will create an imminent danger to public health or safety from corruption.

### Part two. Action on disclosures of information evidencing corruption or other misconduct

In order to deter discrimination and to contribute to the Convention's purpose of defeating corruption, in addition to preexisting procedures this Law includes the following provisions to act on disclosures of information made by a protected witness.

#### Article 27. Alternative Disputes Resolution.

If the Office of [Ombudsman] does not initiate Alternative Disputes Resolution for alleged misconduct in a protected disclosure, and there is not an active, pending criminal investigation or prosecution, the person may initiate Alternative Dispute Resolution proceedings to challenge associated corruption revealed by the protected disclosure. The person may pursue the same actions for mediation or arbitration through the same procedures available to the Office of [Ombudsman] under Chapter III. Based on public information from a disclosure covered by this Law, any other nongovernmental organizational or citizen has standing to initiate Alternative Disputes Resolution proceedings to challenge associated corruption.

#### Article 28. Citizens Enforcement Act.

Any party may file an action to challenge corruption exposed by a protected disclosure under this Law, in the court of jurisdiction over the matters in the disclosure. The court may order injunctive relief, actual and punitive damages, and treble damages for repayment of the national Treasury in an action against fraud in a government contract, in which case the party filing the action shall receive 25% of the recovery. Additionally, the Office of [Ombudsman] shall receive 25% of the recovery, reserved for direct service to protected witnesses. With the consent of both parties, any action under this Article may be pursued through Alternative Disputes Resolution under the procedures available for the [Ombudsman] in Article 12 and to a

person in Article 27. Filing a suit under this Article is activity protected by this Law.

### Part three. Implementation

#### Article 29. Budget.

The Office of [Ombudsman] and any other agency with responsibility to implement or enforce this Law shall receive a guaranteed annual appropriation sufficient to fulfill its responsibilities under this Law. The appropriation shall include sufficient funds to train all personnel on their rights and responsibilities under this Law. Budgetary resources for the Office may not be rescinded, withheld or otherwise reduced after being approved.

#### Article 30. Posting.

Every public or private entity covered by this Law shall prominently post its provisions in an area where they will be normally communicated to all employees and members of the public.

#### Article 31. Coordination with international organizations

Any agency with responsibility to implement or enforce this Law shall attempt to communicate and coordinate efforts with other agencies as necessary, including those in other States or International Organization, using the internet and other available resources to facilitate collection and sharing of information, fulfillment of confidentiality and identity protection responsibilities to protected witnesses and associated persons in Chapter VI, and collaboration as necessary to achieve the purposes of this Law.

#### Article 32. Certification and oversight by the Organization of American States

The Organization of American States may review and determine whether to certify that any system approved to adopt and implement this Law complies with the Law's requirements, and Article III, Section 8 of the Inter-American Convention Against Corruption. The OAS may appoint a rapporteur to monitor implementation and provide ongoing technical support as needed. The rapporteur also may provide periodic, ongoing certifications that this Law as implemented complies with the Convention.

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## Organization of American States Explanatory Notes

INTER-AMERICAN CONVENTION AGAINST CORRUPTION

ORGANIZATION OF AMERICAN STATES MODEL LAW

PROTECTING FREEDOM OF EXPRESSION AGAINST CORRUPTION

SECTION-BY-SECTION EXPLANATORY NOTES

Guide to explanatory notes.

1. These notes have two purposes. The first objective is to explain and clarify the intent for specific provisions in the Model Law Protecting Freedom of Expression Against Corruption. Detailed illustrations, as necessary, illustrate the impact of statutory provisions. The second purpose is to explain why specific provisions are necessary to achieve the Convention's purpose of preventing corruption.

Part one. Protection Against Retaliation

Chapter I. General Provisions

Article 1. Purpose

2. The purpose of the Model Law is to protect freedom of expression for individuals who bear witness against betrayal of the public trust by challenging corruption. To accomplish its potential, it must be implemented as part of a global package of civil society reforms necessary to implement the Inter-American Convention Against Corruption. The Model Law protects individuals who in various societies have been termed "whistleblowers," "bell ringers," and "lighthouse keepers." All expressions refer to a common identity – an individual who warns of threats to the public by serving as a "people's witness." For purposes of this Model Law, the term "protected witness" will be used to designate those honoring their duty of disclosure. This form of freedom of expression is a basic human right. People's witnesses are the lifeblood for efforts to prevent, investigate and prosecute corruption. They personify a basic premise of jurisprudence that "sunlight is the best disinfectant." Without the free flow of information from knowledgeable witnesses, anti-corruption campaigns are empty and lifeless. Experience demonstrates, however, that in a repressive environment they will be silent observers instead of speaking out on behalf of the public. Freedom of expression provides our citizens the freedom to be partners in genuine challenges to corruption.

Article 2. Definitions

3. "Corruption" This term includes the preexisting laws provided by national experts. For purposes of this Model Law, exercise of freedom of expression also is protected to challenge any misconduct prohibited in the Inter-American Judicial Committee's Model Legislation on Illicit Enrichment and Transnational Bribery.

4. "Person" This term includes all those covered by the Convention's broad mandate to maximize the flow of information from witnesses who can make a difference by testifying against corruption, without limitation based on whether they discovered the evidence as public employees, private employees, journalists, or as private citizens. This right protects those who provide a public service by exercising freedom of expression, independent of setting. It protects both profit and non-profit nongovernmental organizations. For specified

portions of this Model Law, including employees of the legislature, judiciary and confidential, policy-making members of the President's staff, remedies are limited to preexisting available procedures, due to the sensitive nature of the positions.

5. "Protected activity" reflects the boundaries of the Whistleblower Protection Act of 1989 in United States law. It is defined by its internal terms. The specific categories are included, because they represent misconduct that contributes to, is regularly associated with, or is a byproduct of corruption. To illustrate, "illegality" ranges from violations of international law, including human rights conventions, to internal regulations and procedures of a government agency. "Gross mismanagement" means arbitrary actions that significantly interfere with the efficient accomplishment of the agency mission. "Abuse of authority" means arbitrary actions that create favoritism or discrimination. This category also covers human rights misconduct, which often is designed to sustain corruption benefiting politically favored individuals. "Gross waste" refers to patterns of petty misspending, or individual misspending of \$12,000 or more under U.S. precedent. "Substantial and specific danger to public health or safety" requires specific, tangible threats from particular activity, rather than generic safety objections. Action to challenge unlawful discrimination in violation of this Model Law is protected the same as an initial disclosure exercising freedom of expression against corruption.

6. "Prohibited by law" refers to statutory prohibitions passed by the legislature and signed by the President. The term does not include agency rules, regulations or policies, which are insufficient *per se* to overcome protection for speech of such significant public value. If a protected witness waits until after liability has passed, the disclosure no longer retains sufficient public benefit to qualify for protection. The prohibition also extends to information properly classified and designated as secret by the President, on grounds of national security or foreign policy.

7. "Refuses to violate the law" means extending protection to those who honor their duties in deeds as well as words, through refusing to assist or become co-conspirators in corruption by participating in it. It is a significant provision in the Whistleblower Protection Act and is increasingly being adopted as a cornerstone of modern laws protecting freedom of expression. The provision only requires that the protected witness have a good faith basis for declining to contribute to corruption. Protection against discrimination under this provision does not require a corresponding ruling from conclusive legal proceedings as a prerequisite.

8. "Action taken to assist in achieving the purposes of this statute" protects contributions other than protected disclosures. Examples could range from constructing witness lists, to providing haven for a protected witness who is endangered by threats of physical harassment.

9. "Any" is intended to mean "without exception." The term is specifically included so there is no uncertainty: there can be no valid loopholes to protection, except those specifically listed in this Law. Although the scope of protected disclosures can be limited by law, protection cannot be denied because of factors that are irrelevant for the public benefit. Illustrations of factors that are interesting but not relevant to protection under the Model Law include -- whether the disclosure was oral or written; for motives noble or ignoble; conducted to fulfill professional duties or as a personal initiative; to an audience inside or outside an institution; or exercised during working hours at a meeting or after hours in a formal or informal public setting. As long as the disclosure communicates information that qualifies as evidence against listed misconduct contributing to corruption, it is protected. The reason for protection is the disclosure's value as a resource against corruption.

10. "Evidences" means the information is sufficiently credible, relevant and significant to be admissible in the record of government investigations or enforcement actions or of litigation challenging corruption.

11. "Discrimination" also should be interpreted broadly, to include any action that chills exercise of freedom of expression fostered by the Model Law. It covers commonly recognized forms of perceived retaliation, such as ending a person's employment, reassignment, removal of duties or failing to approve promotions or provide training. It includes political discrimination, such as retaliatory investigation and surveillance, imprisonment, inhuman treatment such as torture, and civil or criminal prosecution through public or private litigation. It includes physical harassment that can extend to kidnapping or murder. The boundary is not established by the type of discrimination, but whether its impact is to stifle the flow of lawful disclosures from protected witnesses.

12. "Contributing factor" is the evidence standard to prove a prima facie case of unlawful discrimination. It is drawn both from the Whistleblower Protection Act and analogous World Bank Standards and Procedures for Inquiries and Investigations. It reflects a no tolerance policy against unlawful harassment that threatens the flow of information necessary to enforce anti-corruption laws, by outlawing actions when protected activity "in any way" affects the decision to engage in alleged discrimination.

#### Article 3. Interpretation

13. The Explanatory Notes serve as authoritative guidance for interpretation of provisions in the Model Law.

#### Article 4. Variation by agreement.

14. While the Model Law overturns preexisting barriers to relevant freedom of expression and creates new affirmative defenses, it is designed to be compatible with preexisting legal structure.

### Chapter II. Scope of Protection

#### Article 5. Unlawful discrimination

15. This provision reflects the definition for "protected witness." It applies the Model Law's protection to other settings wherever retaliation can have a severe chilling effect. Protection against mistaken perceptions of protected activity, and against guilt by association, both are necessary to stop isolation of those who make protected disclosures. Isolating the witness is a common tactic used to intimidate other potential witnesses into remaining silent observers of corruption, instead of honoring their duty to disclose and provide testimony reinforcing the pioneer witness. Protection for those who are perceived as "about to" make disclosures is necessary to guard against preemptive strikes. When sufficiently repressive, they make retaliation unnecessary by creating a climate of silence, instead of disclosure.

#### Article 6. Unlawful prior restraint.

16. The prohibition against prior restraint is a cornerstone for the First Amendment to the United States Constitution. This provision applies that principle to the Model Law, based on a U.S. appropriations law passed annually for the last thirteen years. It is known as the "anti-gag statute," because it outlaws spending for gag orders. The provision also reinforces the supremacy of legislative rights to freedom of expression that conflict with restraints imposed by administrative agencies, the primary source of gag orders. Although this provision is primarily intended as a safeguard against government or corporate bureaucratic secrecy, the underlying principles apply equally to abuses of judicial secrecy.

#### Article 7. Burdens of Proof – General Rule

17. Under the Whistleblower Protection Act and parallel laws, once the record demonstrates a prima facie case by meeting the contributing factor test, the burden shifts to the employer to demonstrate that in the absence of protected activity it would have taken the same action for lawful, independent reasons. The employer must present clear and convincing evidence to meet its burden. The employer's reduced burden of proof is intended to be far more severe than prior standards only requiring a "preponderance of the evidence" for independent justifications. The impact from these revised burdens of proof has been highly significant, raising the rates of favorable decisions on the merits under whistleblower protection laws from 5-10%, to 25-33% after the burdens were modernized as in this Article.

#### Article 8. Presumption for authorized agencies.

18. A person alleging unlawful discrimination may seek help under the Model Law from certain organizations with the power to investigate and confirm violations, but without the authority to enforce associated recommendations for corrective action. These include the Office of Ombudsman and Human Rights Commissions. If a protected witness seeks enforcement of these findings in an authoritative forum,

the supportive conclusions will meet the requirement for a prima facie case of discrimination, shifting the burden of proof to require that the accused provide an innocent justification for the alleged discrimination against the protected witness by clear and convincing evidence.

### Article III. Implementation through Office of Ombudsman

#### Article 9. Establishment and authority for the Office of Ombudsman

19. The Model Law relies on a reinforced Office of Ombudsman with a guaranteed budget to seek informal relief against retaliation, including the authority to investigate and order temporary relief to protect victims of alleged discrimination. The structure of the agency includes safeguards to prevent abuses of this authority that have occurred in analogous structures adopted by the U.S. This context was chosen because of the Ombudsman's comparative autonomy and freedom from conflict of interest, and the existence of well-established international standards to apply its mandate. If a preexisting structure is not in place for an Ombudsman or another agency is more compatible with the requirements for the Model Law, however, the provisions may be adopted through that institution as an alternative to creating a new agency. Brackets are inserted around "Ombudsman" in the text for the Model Law, to highlight that this institution is just an illustration of agencies acceptable for implementation of the Model Law. To comply with the increased authority and responsibilities of the Model Law would require structural modification for any preexisting Office of Ombudsman. A protected witness may but is not required to seek assistance from the Ombudsman in order to act on rights under the Model Law.

#### Article 10. Responsibilities

20. This article contains structural safeguards against abuse of authority, and outlines the Office's responsibilities to a person seeking assistance. The primary principle is that a protected witness should not bear the risk of being worse off for having sought the Ombudsman's help. The primary strategy to achieve that objective is by giving alleged discrimination victims control of information used by the Ombudsman, through a privilege analogous to the attorney-client privilege. The Office's duties include regular communication with a person seeking assistance, while the case is being investigated and after its completion. To maximize resources and with the person's consent, the Ombudsman may pursue Alternative Disputes Resolution through third parties under established mechanisms. Failure to act by the Ombudsman constitutes constructive denial after 240 days. The Model Law's intent is that a finding of unlawful discrimination by the Ombudsman will be the catalyst for negotiated resolution. As provided by Article 8, if the defendant disregards the Ombudsman's findings, a protected witness may seek their enforcement in an available forum, where the Office's support satisfies requirements for a prima facie case.

21. The protected witness also may direct the Ombudsman's assistance in acting on evidence of corruption. If the Office finds a substantial likelihood the protected witness' charges are well taken, the Ombudsman may order the defendant to investigate and issue a report signed by its organizational leadership with findings and appropriate corrective action commitments. The Model Law contains detailed requirements to assure that the report reflects full disclosure, instead of serving to further conceal results from the investigation it summarizes. Witnesses who make voluntary disclosures, without subpoena or other compulsory enforcement, may testify confidentially as provided by this Law, and their identities need not be included in the witness list for the subsequent public report. With the protected witness' consent, the Ombudsman also may initiate Alternative Disputes Resolution to seek constructive problem solving or an expedited forum on alleged misconduct contributing to corruption.

### Chapter IV. Implementation through exercise of due process rights

#### Article 11. Choice of forum

22. The Model Law's impact will depend on having a forum with credibility among those in need of protection, as well as the independence and objectivity to render a fair decision. That legitimacy will be a prerequisite for the Model Law to have a significant impact against corruption. This article resolves the challenge by offering the full diversity of available tribunals. That approach maximizes flexibility for protected witnesses with widely varying resources and backgrounds, and maximizes the possibility of an objective forum. It reflects a similar principle recognizing choice of forum in the Whistleblower Protection

Act. Adjudication of cases shall be under the normal rules of procedure for each forum, except as specifically provided in the Model Law. Although jury trial is an available choice where it exists already, the Model Law does not require changes to preexisting judicial structures or procedures.

#### Article 12. Transparency

23. The Model Law provides for adjudication to be open to the public, to maintain consistency with its purpose of fighting corruption in part by strengthening the public's right to know. This principle does not require exceptions to legitimate secrecy. Litigation may be closed for specific portions on matters for which a protected witness is not entitled to make public disclosures under the Model Law.

#### Article 13. Right to counsel

24. The Model Law creates a right to counsel for purposes of this statute, in recognition that efforts to challenge corruption and defend against retaliation require knowledgeable representation. "Other authorized counsel" includes attorneys from public defender and legal aid organizations, as well as from human rights and other organizations, recognized by the Organization of American States and eligible to represent protected witnesses in subsequent appeals to an international forum.

#### Article 14. Affirmative defense

25. This provision extends freedom of expression rights in the Model Law to any litigation context where it is relevant, not merely to actions in the conventional employment context or those filed by a protected witness. The most common scenarios where this right is necessary are actions initiated by the government, or by an organization using litigation to shield corruption or to harass those who are challenging it. Illustrative examples include political prosecutions and defamation actions filed against individuals, nongovernmental "watchdog" organizations and the media. The provision does not make any modifications to preexisting criminal or civil liability, except as specifically changed by the terms of the Model Law. If a forum finds that the challenged litigation was taken because of protected activity, the action shall be dismissed. Consistent with burdens of proof governing the Model Law, however, by definition the affirmative defense cannot prevail if the same litigation would have commenced for independent, lawful reasons independent of protected activity.

#### Article 15. Appeal

26. The Model Law contemplates expedited appeal to obtain authoritative Supreme Court interpretations applicable throughout the broad range of tribunals available for adjudication. Interpretations by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights also will be invaluable to foster consistency

among nations signing the Convention. This provision shall be interpreted consistent with Article 46 of the American Convention on Human Rights. Under that convention, failure by domestic courts to issue a timely decision renders a protected witness eligible for appeal to international tribunals with jurisdiction.

#### Chapter V. Relief

#### Article 16. Cancellation of prejudice

27. The cornerstone for the Model Law to create a climate respecting freedom of expression is that those who prevail will not be any worse off for exercising that right. There are no limitations on other indirect consequences that may require compensation. To illustrate, the credit rating may drop and the interest rates rise for a protected witness who no longer has a steady income after being terminated from employment. Housing expenses may increase after a retaliatory transfer. Costs of medical care can rise

sharply for physical consequences of violence, or treatment of medical illness caused by stress. These are illustrative, but not exhaustive, examples of relief a protected witness may seek after prevailing.

28. Requests for temporary relief in a forum chosen for litigation shall be considered on an emergency basis, in order to neutralize facts accomplished that punish protected witnesses for months or years before they have an opportunity to exercise their rights. Illustrative examples include but are not limited to lack of income due to retaliatory dismissal; geographic transfers that force separation of families or severe associated hardships; prolonged pretrial detention, and ongoing retaliatory investigations or surveillance. While a case is pending, the Ombudsman has authority to make binding judgments providing temporary relief. The chosen forum shall enforce the Ombudsman's order, if necessary.

29. The provision for payment of attorney fees shall be interpreted liberally and generously, to attract qualified legal talent for implementation of efforts defending those who attack corruption. More than a mere payment to counsel, attorney fees under the Model Law are an investment to recover far more significant financial returns of resources taken from society through corruption.

#### Article 17. Asylum

30. In many instances, there is no realistic remedy to protect any witness from lifelong harassment or physical threats by those who never forget, or for the most effective protected witnesses -- from those who no longer have anything to lose. This provision recognizes that political asylum in another nation may be the only viable means for a protected witness and associated persons such as family to survive professionally, financially and, in many cases, physically. This provision institutionalizes the precedent in Grava v. Immigration and Naturalization Service, 205 F.3d 1177, 1181 (9<sup>th</sup> Cir. 2000), explained by the court as follows:

[W]here the whistle blows against corrupt government officials,

it may constitute political activity sufficient to form the basis of persecution on account of political opinion. See *Reyes-Guerrero*

v. INS, 192 F.3d 1241, 1245 (9<sup>th</sup> Cir. 1999); cf. *Marquez v. INS*,

105 F.3d 374, 381 (7<sup>th</sup> Cir. 1997) (writing that political agitation against state corruption might well be a ground for asylum).

Recognizing the grounds to protect those who decline to participate in corruption, the court continued, "Refusal to accede to government corruption can constitute a political opinion for purposes of refugee status."

#### Article 18. Liability

31. This provision is essential to deter repression, which is the life blood of corruption. Without potential consequences for their harassment, those who retaliate against protected witnesses have nothing to lose. For them, the worst that can happen is that they will not get away with it. Even then, they often are rewarded through career advancement for their willingness to "do the dirty work." That climate encourages repetitive harassment against those challenging corruption. It sustains the chilling effect against freedom of expression, by institutionalizing the high risk of probable reprisal. Witnesses will not feel or be free to challenge corruption, merely because they are able to defend themselves in a lawsuit. The environment must be safe for freedom of expression. This provision adopts and combines three well-established legal remedies which foster that goal by creating a counter threat to key interests of those who retaliate: (1) professional, through permitting a protected witness facing job termination to counter-claim and seek dismissal of those responsible for unlawful discrimination; (2) financial, through personal liability for punitive damages; and (3) liberty, through creating criminal liability for attempting to obstruct justice through repression.

#### Article 19. Preservation of remedies

32. This Model Law is intended to reinforce, not replace, established legal channels to defend against discrimination. In any particular circumstance, preexisting mechanisms may be superior to achieve the Convention's purpose of an environment safe to challenge corruption. As with a forum available under the Model Law, however, the protected witness must choose between preexisting remedies and those available through the Model Law, which is not intended to create duplicative litigation.

## Chapter VI. Identity Protection

### Article 20. Duty of Protection

33. In many instances, the primary threat of discrimination may be from physical violence, rather than employment actions. The threats can extend to family members or others associated with a protected witness. As a result, effective identity protection may be the most significant shield in the Model Law to prevent irreparable losses. The Model Law provides protected witnesses the right to control the flow of information in their disclosures that they believe could identify them. This is necessary not only to prevent avoidable discrimination, but to prevent a chilling effect that stifles the flow of information from witnesses who do not feel safe. A citizen's duty of disclosure against corruption does not extend to endangering his or her family or risking physical martyrdom. The duty of protection is not discretionary, and applies to anyone who engages in allegedly protected activity that could result in disclosure, as soon as the affected government representative becomes aware of the protected activity. Consistent with generic definitions, the Model Law reemphasizes that the duty of protection extends to government recipients after they have left public employment. Communications from the protected witness are privileged, with equivalent rights for the protected witness as available through the attorney-client privilege. The duty must be memorialized in writing, signed by the protected witness and government representative authorized to make binding commitments for all covered by the duty of protection. Identity protection only can be withdrawn if it were granted based on false information, or if disclosure is essential to curtail imminent threats to the public from corruption. Even then, the protected witness must receive adequate notice to minimize avoidable prejudice.

### Article 21. Confidentiality of disclosure

34. This provision extends generally the same restrictions applicable for the Office of Ombudsman, regarding communication of disclosures by a protected witness, to any other government recipient.

### Article 22. Confidentiality of identity

35. The assistance in this provision is presented as a minimum, based on common international standards for witness protection by law enforcement agencies. Those with a duty of protection should work closely with each protected witness to determine whether other, particular measures are necessary. The written agreement for terms of protection should certify that the witness is satisfied the scope of protection is complete.

### Article 23. Admission criteria

36. These criteria are consistent with those relied on by law enforcement agencies. The criteria invoke a balancing test weighing the value of the protected witness' potential contribution against corruption, compared to the threats of physical violence or other prejudice. The decision and its duration on admissions must be made before the government uses any information disclosed. Similarly, the decision must be communicated, memorialized and signed prior to using any information disclosed. Failure to honor these non-discretionary requirements constitutes violation of the duty to a protected witness.

### Article 24. Interim protection

37. This provision provides a government with authority to seek immediate, temporary authorization for interim identity protection, based on the impact of a protected witness' disclosure and imminent consequences either to the protected witness or the public.

#### Article 25. Duty of good faith

38. A witness who receives protection has a corresponding duty to follow through on efforts against corruption resulting from the disclosure. Failure to honor this duty of participation, as well as reliance on false statements for admission to the program, are grounds for removal in compliance with the requirement for reasonable prior written notice.

#### Article 26. Withdrawal

39. A protected witness may withdraw from the Identity Protection at any time, unless the government recipient obtains a judicial order that exposure of the witness' identity would create an imminent danger to public health or safety from associated corruption.

#### Part two. Action on Disclosures of Information Evidencing Misconduct

##### Article 27 Alternative Disputes Resolution

40. Effective efforts to fight corruption are the best defense to prevent or disarm retaliation. This chapter is intended to encourage protected witnesses to act on their duty to disclose, by empowering citizens and nongovernmental organizations with opportunities to challenge corruption that are not generally available in preexisting law. Alternative Disputes Resolution can be pursued through the same procedures available to the Ombudsman.

##### Article 28. Citizens Enforcement Act

41. This opportunity to challenge corruption is derived from the False Claims Act, the most effective U.S. statute available for challenges against fraud in government contracts. The False Claims Act represents a class of laws known as private attorney general statutes. These statutes empower citizens by breaking the government's monopoly on law enforcement. In practice, they create opportunities to apply and expand on significant precedents won through government prosecutions, and to successfully challenge misconduct that realistically is beyond the scope of the government's resources for litigation. By rewarding citizens whose litigation reinforces government law enforcement efforts, the law transforms the concepts of "doing well" and "doing good" into partners, instead of competitors. The False Claims Act is known as the "Lincoln Law," because President Lincoln proposed it during the U.S. Civil War. It was passed in response to deaths of union soldiers killed by their own, defective weapons produced by contractors engaging in fraud. Over the next century, its provisions were eroded until the statute became dormant as a mechanism for citizens. The Model Law also returns 25% of Citizens Enforcement Act recoveries to the Office of Ombudsman, earmarked for direct service to investigate alleged discrimination and provide relief for victims. In 1986 Congress passed amendments reviving the law.

42. The results of the False Claims Act have been a breakthrough in challenges against corruption, both by private citizens and the government. In 1985, total recoveries to the U.S. Treasury from taxpayers in U.S. Department of Justice civil litigation against fraud in government contracts was \$26 million. Over the next decade, False Claims Act suits increased that total to over \$3 billion cumulatively. Perhaps even more significant, an economic study commissioned by Taxpayers Against Fraud, a U.S. non-profit, nongovernmental organization, concluded that the modernized law deterred \$295.8 billion in fraud.

#### Part 3. Implementation

##### Article 29. Budget

43. If the Model Law is not funded adequately, its promise will be as empty and lifeless as anti-corruption efforts without citizens who bear witness. By approving the Model Law, the President and legislature also are approving a mandatory commitment for funding sufficient to protect those who rely on it and to achieve the Convention's purposes. There is no lawful discretion to rescind or otherwise reduce funding for the Office after it has been approved. Historically, this type of institutional budgetary reprisal has been taken against remedial agencies who defend protected witnesses against harassment by politically powerful



adversaries.

#### Article 30. Posting

44. The Model Law will not be effective in breaking the cycle of secrecy, if its existence and corresponding freedom of expression rights are a secret. The requirement for funding includes a public education campaign on the rights and opportunities created by the Model Law. Every government agency eligible to receive disclosures from protected witnesses must prominently post a summary of provisions in the Model Law, including the opportunity to challenge corruption directly through private attorney general suits under the Citizens Enforcement Act. The summary should be prepared by the Office of Ombudsman, under the legislature's oversight to assure the full mandate has been communicated.

#### Article 31. Coordination with international organizations

45. This article seeks to maximize consistency and results, through coordination with both public and private international organizations that can share and apply lessons learned during implementation. International organizations, or regional Organization of American States networks, could contribute to this effort by creation of secure hotlines through the internet or other available technology. A regional hotline could be a source for potential protected witnesses to safely verify their rights and proper procedures under the Model Law, as well as to make disclosures.

#### Article 32. Certification and oversight by the Organization of American

States

This article is intended to provide legitimacy for systems proposed to implement the Model Law, by providing for review and certification that the law as implemented in each nation complies with requirements of the Model Law and the Convention. The article also recognizes that implementation will be an evolving process, and authorizes creation of an OAS rapporteur to share lessons learned, provide ongoing oversight and certify agency compliance.

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**Government Accountability Project's Twenty-Three Point Checklist for  
Effective Whistleblower Protection**

**SCOPE OF COVERAGE**

1. Full Free Speech Rights. Protected whistleblowing should cover “any” disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate law enforcement functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of institutional leadership, or to designated law enforcement or legislative offices.

2. Permitting All Disclosures of Illegality and Misconduct. Whistleblower laws should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, as well as any other information that assists in implementing or enforcing the law or achieving its purpose.

3. Duty to Disclose Illegality. This provision helps switch the whistleblowing context from a personal initiative for conflict, to a public service duty to bear witness.

4. Right to Obey the Law. This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality however, in many institutions, an employee who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the employee who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

5. Stopping Harassment Intended to Prevent Disclosures. The law should cover all common scenarios that could have a chilling effect on responsible exercise of free speech rights. Representative scenarios include employees who are perceived as whistleblowers, even if mistaken (to guard against guilt by association), and employees who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection). These indirect contexts often can have the most significant potential to lock in secrecy by keeping employees silent, and isolating those who do speak out. The most fundamental is reprisal for exercise of anti-retaliation rights.

6. Covering Staff and Project-Affected Communities. Coverage should extend to all relevant applicants or personnel who challenge betrayals of the institutional mission or public trust, regardless of formal status. It should not matter whether they

## GAP's Twenty-Three Point Checklist

are full time, part time, temporary, permanent, expert consultants, contractors or employees seconded from another organization. If harassment could create a chilling effect that undermines the bank's public service mission, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is such a common tactic.

7. Protecting Anonymity. To maximize the flow of information necessary for accountability, protected channels must be available for those who choose to make anonymous disclosures.

8. Safety From Harassment After Blowing the Whistle. The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action.

9. Unrestricted Free Speech Rights. Any whistleblower law must include a ban on "gag orders" through an employer's rules, policies, or nondisclosure agreements that would otherwise override free speech rights and impose prior restraint.

10. Effectively Communicating Obligations and Rights to Disclose Illegality and Policy Violations. Whistleblowers are not protected by any law, if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace.

## **FORUM**

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest. The records of administrative boards and grievances have been so unfavorable that as a rule, laws adjudicated in these settings are Trojan horses. Two settings have a track record of giving whistleblowers a fair day in court.

11. Right to Fair and Independent Complaint Mechanisms. This rule institutionalizes normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court on non-proprietary or legally confidential matters, the right to confront the accusers and witnesses, objective and balanced rules of procedure and reasonable deadlines.

12. Option for Mediation with an Independent Party of Mutual Consent. Arbitration can be an expedited, less costly forum for whistleblowers, if compensation is shared by the parties who select the decision maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower

disputes. It is contemplated as a normal option to resolve retaliation cases in the model whistleblower law to implement the Organization of American States Inter American Convention Against Corruption.

### ***RULES TO PREVAIL***

13. Realistic Requirements of Proof. In the United States, the federal Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights.

The current standard, which since 1989 has been adopted consistently in federal laws, is that a whistleblower established a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination. The discrimination does not have to involve retaliation, which could require personal hostility, but only need occur "because of" the whistleblowing. Once a *prima facie* case has been made, the burden of proof shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the federal government switched the burden of proof in whistleblower laws, the rate to prevail on the merits has increased from 1-5% annually, which institutionalizes a chilling effect, to 25-33%, which gives whistleblowers a fighting chance to successfully defend themselves.

14. Adequate Time Frame for Accepting Disclosures. Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Three months is the minimum functional statute of limitations. One-year statute of limitations are consistent with common law rights and are preferable.

### ***RELIEF FOR WHISTLEBLOWERS WHO WIN***

15. Compensating Whistleblowers. If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect, and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment.

16. Immediate Relief. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication, for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive, or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years. Relief should be awarded during the interim for employees who prevail.

17. Coverage for Attorney Fees. Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, employers can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Employees can be ruined by that type victory, since attorney fees not uncommonly reach five to six figures.

18. Transfer Option. It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. In order to prevent repetitive reprisals that cancel the law's impact, those who prevail must have a strong transfer preference for any realistic chance at a fresh start after winning.

19. Accountability for Misconduct and Retaliation. To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is that they won't get away with it, and they may well be rewarded informally for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violating whistleblower laws. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. The most superficial is to make compliance with the whistleblower law a critical element in every manager's performance appraisal, and for decision makers in reprisal cases to refer responsible officials for investigation to determine if sanctions are appropriate for violating this element.

20. Taking Corrective Action. Whether through hotlines, ombudsmen, compliance officers, or other mechanisms, the point of whistleblowing through an internal system is to give the employer an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. The track records of these systems will determine whether institutions have that opportunity or are blindsided due to the absence of early warnings from employees. Studies repeatedly have confirmed that the primary reason would-be whistleblowers remain silent is the fear that their actions won't make a difference and not the concern of retaliation.

## ***MAKING A DIFFERENCE***

21. Public Audits and Records for Whistleblower Hearings and Conclusions. Like secret free speech rights, secret reforms are a contradiction in terms. By definition, that would be an institutional honor system for resolution of alleged institutional misconduct. As a result, it is insufficient for government agencies secretly to correct betrayals of the public trust, without transparency through a public record on the nature of alleged misconduct, its causes, and the evidence and corrective action to prevent recurrence. Exceptions must occur to preserve proprietary information or honor preexisting legal confidentiality commitments. However, there is no basis for

trust without some ultimate public record, and timely initial notice to government regulatory or law enforcement officials to permit oversight of how the institution handles the dispute.

22. Prosecuting Criminal Misconduct in National Judicial Systems. Even more significant is enfranchising whistleblowers and citizens to file suit in court against illegality exposed by their disclosures. These types of suits are known as private attorney general, or "qui tam" actions in a reference to the Latin phrase for "he who sues on behalf of himself as well as the king." These statutes can provide both litigation costs (including attorney and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges "doing well" with "doing good," a rare marriage of the public interest and self interest. In the U.S., this approach has been tested in the False Claims Act for whistleblower suits challenging fraud in government contracts. It is the nation's most effective whistleblower law in history for making a difference, increasing civil fraud recoveries in government contracts from \$27 million annually in 1985, to over a billion dollars in 2002 for the third year in a row. Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions.

23. Committed Leadership. The intangible element of leadership's commitment to announced reforms normally is key to determining how seriously institutional staff take it, and how much is accomplished. Unless a leader demonstrates that commitment through highly visible public actions, would-be whistleblowers may dismiss the changes as public relations gestures or empty rhetoric, and the changes may not disrupt ingrained patterns of management secrecy enforced by retaliation.