

**Hearing on strengthening the protection of whistleblowers
Parliamentary Assembly Committee on Legal Affairs and Human Rights**

Statement of Anna Myers (Lawyer and Expert Coordinator/Director, Whistleblowing International Network)

Council of Europe, Strasbourg
Tuesday, 24 June 2014

Two opening remarks:

1. All remarks are mine rather than representative of all bodies of the Whistleblowing International Network (WIN) although many will have similar views and mine are borne of my experience working with them in the field over many years.
2. I would like to acknowledge the difficulty of Mr. Snowden's position; while being in the midst of his own case but also expected to stand back and discuss objectively/dispassionately. Offer my apologies to Mr. Snowden if in any errors when speaking about his case and hope that he will have an opportunity to respond if that is the case.

Introduction

If we are honest with ourselves, most of us do not want to live in a world that relies on individual whistleblowers to protect our rights, our safety, our democracies. We want our social, economic and political systems as well as our regulatory and judicial institutions to act in our best interests and protect our well-being. We want whistleblowers to be our back up. When they go public we tend to consider them a sort of breed apart, brave but foolhardy individuals whose simple actions raise complicated questions about trust, duty, responsibility, and loyalty. So what do the "Edward Snowdens" of the world reveal to us? Is this the future? Have we individualised responsibility for democratic accountability, economic prosperity, and environmental sustainability? Do we admire them or do we loathe them? Can we afford to stand on the side-lines and wait to see whether a single whistleblower is on the winning or the losing team (or even has a team) before we join the game?

For many of those working the field of public interest whistleblowing over many years, the actions of Edward Snowden marked a dramatic shift rather than a revolution; by revealing what so many suspected but could not "prove" about the extent and reach of national security surveillance in the USA and beyond. [I do question the current tendency to stand back and wait for proof before engaging in difficult social and political debates about proper accountability and human rights safeguards.]

The content of the disclosures and the manner in which Edward Snowden delivered the information - openly, directly to the media, internationally, without any obvious personal gain, monetary or otherwise - has proved as sensational as it is straightforward.

Mr. Snowden's revelations underscore the global impact of government and corporate conduct on citizens outside national borders; the extent to which new technology harnessed in the service of "national security" have surpassed and outflanked national democratic mechanisms of accountability; the myriad of ways in which public services delivered by private corporations have

blurred if not obfuscated the lines of accountability between government and citizen, challenging the very notion of a social compact; and a knowledge gap which renders a generation of traditional technocrats dependent on a new vanguard of young technology experts.

The fact that Mr. Snowden went public with his information is causing consternation for those working with and in national security agencies around the world, but should come as no surprise to them either. Edward Snowden, as we know now, is the latest in a longer line of NSA whistleblowers raising similar concerns; each one pointing to what they saw as a serious deficiency in accountability mechanisms and individual, citizen and human rights safeguards. Instead of tackling these important issues when they were more manageable, the power structures appear to have closed ranks and national security whistleblowers have been targeted and prosecuted more harshly than in any other time in US history.

There are two paradoxes here. The first is that this harsh treatment is being meted out at a time when whistleblower protection is being more generally recognised, and to some degree, normalised in the American federal public sector as well as in specific industries, particularly the financial sector - many of you will be familiar with Sarbanes-Oxley law and the Dodd-Frank Act. The second is that Edward Snowden did not choose anonymity - and at a time when anonymous reporting is increasingly seen as the only way to protect oneself. While Edward Snowden clearly used his technological skills to protect himself and the information he wanted to disclose until he was ready to disclose it, he stood by his revelations and has allowed the public to take their measure of him. He acknowledged that he - as an individual - could not hope to survive a cat and mouse chase with the most powerful agency in the world, so his focus was on winning public support for his actions. This is what public interest whistleblowers do and why Edward Snowden seems so familiar.

One of the biggest impacts of Edward Snowden disclosures one year on, in my view, is that the world is still talking as much if not more about the substance of Edward Snowden's revelations as the fact that he did it. (Though perhaps more so outside the US, and more so in the public domain than in private circles). Attempts to isolate and personalize the issues to Edward Snowden, the man or the employee, have not seemed as acceptable to the public as they might have been only a few years back. This may be due in part to the manner in which Mr. Snowden made his disclosure. If so, we need to understand that the way he did it, as he has explained on numerous occasions, was with the goal of ensuring the focus was on the substance of the disclosures. And it is the substance of the disclosure that transcends national borders - the disclosure does not lend itself to being limited to the US arena as a matter of domestic national security; nor does it lend itself to wholly national response that in effect tells the world that this is not their business. As is so often the case, the facts appear to be speaking for themselves.

In the globalized world we have created, we must begin to think of the public interest as applying across borders and how we can ensure there are clear mechanisms for public accountability. Whistleblowing offers some clues.

Whistleblowing and democratic accountability

Whistleblowing has and continues to be the one of the most effective ways that failures in accountability are identified accurately - locally, regionally, nationally and now internationally. Whistleblowers provide the information that allows informed engagement with the root causes of problems and often presents exceptional opportunities to reform our systems in publicly

accountable ways. In the UK for instance, many years ago, whistleblowing by an anesthetist about the unusually low success rates of doctors operating on children in the baby cardiac unit of his hospital effectively changed the way the medical profession regulated itself. Until that point a doctor could only be struck off the register for causing harm, and in this case the head of the hospital who was a doctor was struck for failing to prevent harm - in others words he was publicly accountable for his conduct. The whistleblower also paid a price because he found it impossible to find work in the UK and moved to Australia to save his career. But there have been many whistleblowers since and one of them - another anesthetist that I know raised the alarm on a negligent surgeon who was eventually jailed and the whistleblower not only kept his job but was eventually promoted to deputy medical director of his hospital.

While whistleblowing is unlikely to ever be risk free - because the messages whistleblowers deliver are often very challenging ones - but the risks to the individual messenger need not be so high.

The Council of Europe has done some very good and important work situating whistleblower protection at an international level squarely within a public interest and democratic accountability framework. For this it should be commended. On the 30th April this year a [Recommendation on the Protection of Whistleblowers](#) drafted by the European Committee on Legal Cooperation, was adopted by the Committee of Ministers and provides a clear overview of what can and should be done at a national level to ensure accountability operates more effectively locally and that there are whistleblower protections that ensure safe alternatives to silence. While this is extremely important work, it is still at an embryonic stage.

There are ways and means at the disposal of Council of Europe, to further strengthen the protection of public interest whistleblowers and one of them is referring to the recommendations it has already made in other areas, including on measures to combat discrimination, protect human rights defenders, and the protection of journalist sources, among others. This work clearly associates these protections to fundamental principles of human rights including: freedom of association, freedom of expression and the right to peaceful assembly. These protections can be integrated and extended to those who make public interest disclosures.

Ultimately, the burden of responsibility to protect the public interest lies with us, with the public, with our governments, with our institutions and our corporations. This means we need to be able to illustrate without narrowly defining what the public interest in a globally connected world. In court, the concept is used to ensure that interests not specifically represented by the parties to a particular case are taken into account. We have plenty of international principles on which to rely. By strengthening the protection of public interest whistleblowers we are taking that responsibility seriously because we are lifting the burden from their individual shoulders and placing it on our collective ones. We must provide the legal and institutional frameworks to make that shift of burden real.

We should also take into account that the debate in many jurisdictions and around the world is changing - it is no longer just about whether any one individual whistleblower did the right thing, whether they are a traitor or a saint (and I suggest neither) - but rather whether the information delivered was properly assessed and investigated by those who received it and whether those responsible for any harm or damage caused were properly held to account.

Whistleblowing in a globally connected world

As national jurisdictions are only beginning to consider what whistleblower protection should look like, the nature and scope of whistleblowers' disclosures is changing. While the national work is vital and must continue, the "voluntary canaries" in the mine are telling us where the gas is leaking and it is leaking across borders. Whistleblowers continue to alert us to failures in accountability and these now transcend borders in ever increasing numbers. Think for instance about the global financial crisis - there were national whistleblowers raising concerns about the practice of credit rating agencies who operated globally but we were dealing with them nationally, and there were banking whistleblowers (some of them heads of compliance) raising concerns about their bank's compliance systems that were effectively gagging information and keeping it away from national regulatory oversight - these banks were operating globally but we were dealing with the whistleblowers nationally.

Whistleblowing and national security information

Finally a word about the national security information and its relevance to us all: while whistleblower protection is slowly being strengthened, at least in some countries, national security is one area which has been consistently excluded from the kind of public oversight that whistleblower protection and access to information laws seek to support. It is well accepted that to ensure the full exercise of freedom and human rights, there may be legitimate reasons to withhold information on the grounds of national security. It is also clearer than ever before that national security interests are best protected when the public is well-informed. Until recently, we were happier to live with the tension between the public's right to information and a government's desire to keep information secret on the basis of national security. However, we also thought we understood what the limits were and that we had proper safeguards in place. Now the tension has increased dramatically and, it seems, in direct proportion to the broadening of the range of information we are told is to be kept secret on national security grounds - much of it done without full and proper public debate and scrutiny.

As well, and we mustn't forget, that while we may be grappling with the enormity of the impact of the national security carve out from access to information and whistleblower protection in Europe and in the USA, in many parts of the world, this is nothing new. "National security" has been used as a blunt instrument wielded by too many governments around the world to effectively silence dissent in any form and to challenge the very notion of public interest whistleblowing from the outset.

Conclusion

Potential responses in the European and transnational context:

1. The Council of Europe has already made strong and clear recommendations for member states to provide for whistleblower protection within their legal and institutional frameworks as a matter of public interest and human rights. Separately, the Council of Europe has recommended measures to combat discrimination and provide clear protection for human rights defenders - many of these could now helpfully be integrated to strengthen the protection of public interest whistleblowers.

2. The Council of Europe's Recommendation on the Protection of Whistleblowers makes it clear that while there may need to be some flexibility in how member states provide protection for those disclosing public interest information in the context of national security - the limits are on the information and not the class of workers. In this regard, the [Explanatory Memorandum](#) refers to the Global Principles on National Security and The Right to Information (the "[Tshwane Principles](#)"). The Principles also include, in the context of national security whistleblowing, a public interest defence that, in my view, can be applied in other public interest whistleblowing contexts.

3. No matter what system for whistleblowing is in place nor how well-intentioned - the situation will always evolve. Individuals should be able to avail themselves of a public interest defence and we have good case law from European Court of Human Rights already on what factors a court might need to take into account - and whether the public interest value of the information outweighs the interest in keeping it secret. In a [resolution](#) approved on October 2, the Parliamentary Assembly urged the governments of all 47 member states to take the Tshwane Principles "into account in modernizing their legislation and practice." This work must now begin in earnest.

4. Cross border protection for whistleblowers, whether it is about having the right to permanent residence or asylum, needs to be reconsidered in light of the globally connected world we have created. A whistleblower may well be working or living in one country and raise concerns about wrongdoing, risk or harm that occurs or has an impact in another country - much like Edward Snowden. However, if their residency is connected to their work and they are fired for being a whistleblower - they risk deportation even if they are successful in seeking a compensatory remedy for loss of earnings. These issues must be explored further.

Finally - we need to ask ourselves what the worse outcome really is - what would happen if there were no more whistleblowers; what if they all went silent?