*Chapter 3*

# Guaranteeing effective whistleblower protection in Coahuila

*There is a general consensus among policymakers that effective whistleblower protection is needed to promote integrity, encourage transparency, and detect misconduct. To this end, many countries have introduced a dedicated whistleblower protection law. This chapter provides a review and analysis of Coahuila's whistleblower protection system. It addresses the need for Coahuila to enact a dedicated whistleblower protection law and make additional efforts to build trust in the protection system, enhance awareness, and systematically review and evaluate its whistleblowing system.*

## Introduction

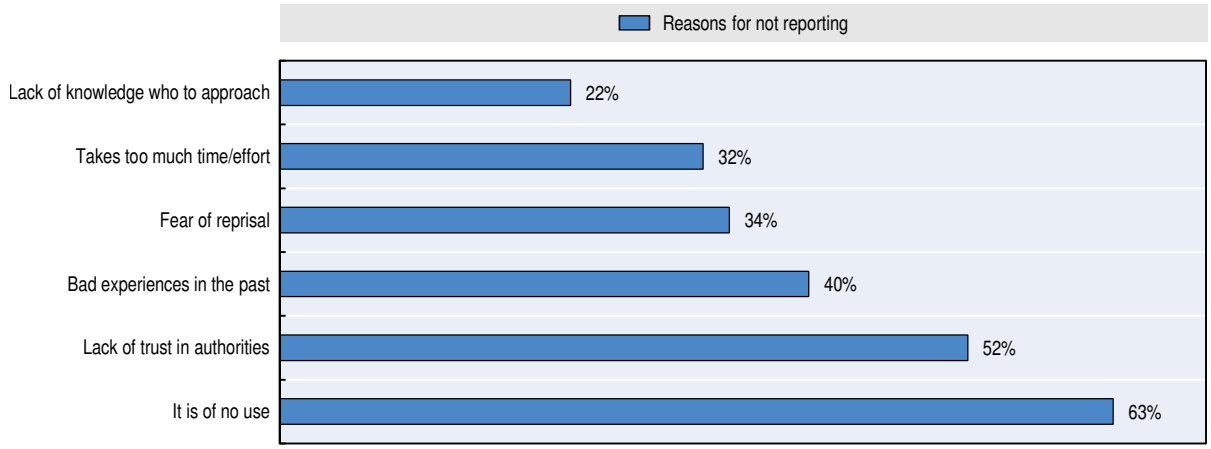
A key pillar of an effective integrity system in the public sector is the existence of formalised mechanisms through which employees can disclose wrongdoing without fear of reprisals. Even if an organisation has preventive measures in place such as an ethics code or ethical training, wrongdoing cannot be avoided entirely. Employees have access to up-to-date information concerning their workplaces' practices and are usually the first to recognise wrongdoings (UNODC, 2015). Whistleblowers can be an invaluable source of exposing irregularities, fraud, mismanagement, and corruption. However, blowing the whistle can carry high personal risks, especially when there are no guarantees for legal protection for whistleblowers against retaliation such as dismissal or physical and psychological abuse.

The OECD *Recommendation on Public Integrity* (2017a) recommends that an effective public integrity system supports an open organisational culture that is responsive to integrity concerns and that encourages whistleblowers to report misconduct by ensuring visible support and positive reinforcement from the government and the organisational hierarchy. Clear guidance on reporting procedures, effective and comprehensive legal protection from all kinds of retaliation, and criteria for investigation are also needed. The right combination of all these measures promotes a culture of accountability and integrity and facilitates the reporting of misconduct, fraud, and corruption. Ultimately, the protection of whistleblowers deters and detects wrongdoing. As such, it is the ultimate line of defence for safeguarding the public interest.

In Coahuila, 83.5% of citizens perceive corruption as a frequent occurrence (INEGI, 2015). Given the high perception of corruption across all levels of government and the lack of a professional civil service scheme, it can be assumed that public officials and citizens alike do not feel confident about reporting crime for fear of reprisal and the assumption that reports will not be followed up upon. Only 39% of Mexicans say they would report crime (Instituto Nacional Electoral, 2015).). The main reason for not reporting crime is that it "is of no use" (63%), followed by a lack of trust in authorities (52%) (Figure 3.1). On-site interviews confirm that the situation may not be so different in the state of Coahuila.

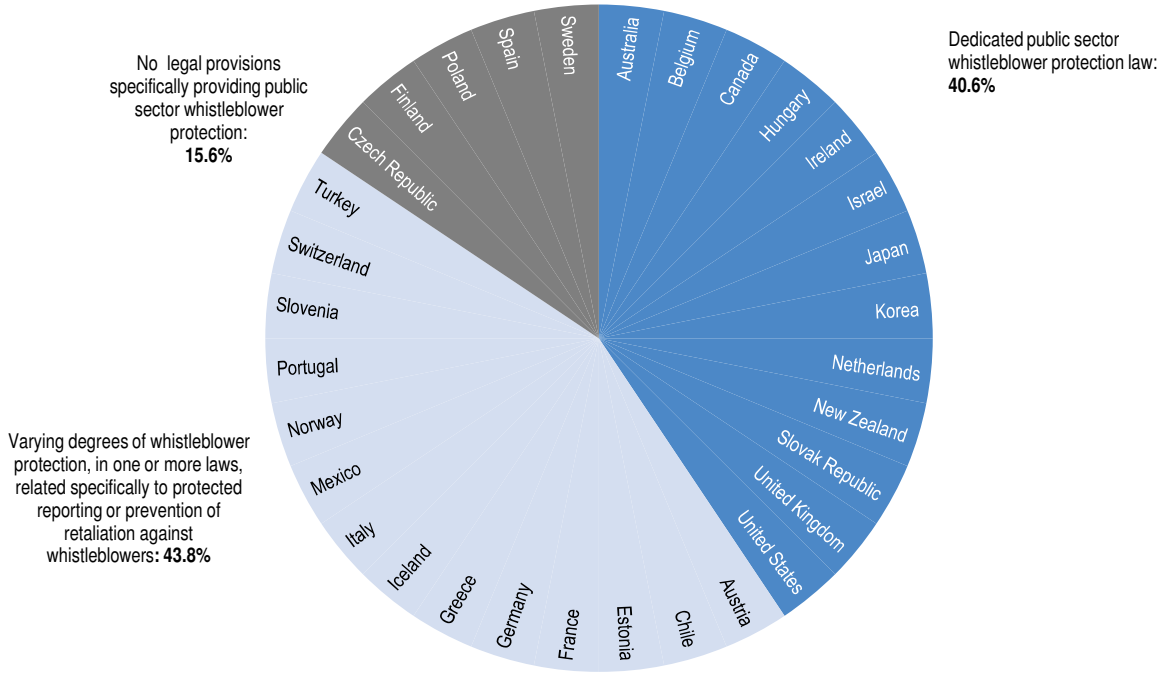
Over the last decade, the majority of OECD countries have introduced whistleblower protection laws that facilitate the reporting of misconduct and protect whistleblowers from reprisals, not only in the private sector; but especially in the public sector. In OECD countries, such protections can be provided through several different laws such as anti-corruption laws, competition laws or laws regulating public servants, or through a dedicated public sector whistleblower protection law (Figure 3.2). In federal states, the laws at the state level are required to provide at least the same framework for protection as at the federal level.

Figure 3.1. **Reasons for not reporting**




*Source:* Instituto Nacional Electoral (2015), Informe País sobre la calidad de la ciudadanía en México – Resumen ejecutivo,p.19, available from *http://portalanterior.ine.mx/archivos2/portal/DECEYEC/EducacionCivica/informePais/*.

Figure 3.2. **Legal protections for whistleblowers in the public sector in OECD countries**




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

Similar to the regulations at the federal level prior to the General Law on Administrative Responsibilities *(Ley General de Responsabilidades Administrativas*, LGRA), Coahuila does not have a dedicated whistleblower protection law, but relies on provisions in one or more laws, related specifically to protected reporting or prevention of retaliation against whistleblowers:

- Federal Criminal Code (*Código Penal*) provides that a crime of intimidation is committed when a civil servant, or a person acting on their behalf, uses physical violence or moral

aggression to intimidate another person in order to prevent them from reporting, lodging a criminal complaint, or providing information concerning the alleged criminal act.

- Access to Information and Protection of Personal Data Law of Coahuila (*Ley de Acceso a la Información Pública y Protección de Datos Personales*) protects the anonymity of whistleblowers by classifying the information they provide as confidential (Article 39) and by classifying it as reserved information if there is a risk to the person's security (Article 30).
- Law to prevent and sanction corruption in public procurement procedures (*Ley para prevenir y sancionar las prácticas de corrupción en los procedimientos de contratación pública del Estado de Coahuila de Zaragoza y sus Municipios*) details the process to report misconduct. The authorities are obliged to protect the whistleblower's identity and rights. In order to guarantee the anonymity of the whistleblower, each case file is given a number. The whistleblower receives legal assistance and is protected from reprisals in the workplace, such as dismissal.

While this piecemeal approach is positive in the sense that it applies to the whole public sector, including state-owned enterprises, and offers a form of protection from the threat of reprisal, the extent of Coahuila's protection can be considered limited and insufficient. Besides the activity of public procurement, the legal provisions refer only to the obligation of public officials to refrain from inhibiting or preventing reporting by others – they do not provide specific protection for those who report.

Making use of the opportunity of the introduction of the local anti-corruption system and the necessary passing of secondary legislations, Coahuila could develop a whistleblower protection framework that is a strong shield behind which a whistleblower is kept safe from reprisals (Devine and Walden, 2013). In this way, Coahuila would go beyond the federal framework, which provides only limited protection. Specifically, Coahuila could strengthen protection, increase awareness, and conduct evaluations based on the following recommendations. For the purposes of this review, the focus will be on policies that seek to directly and indirectly protect whistleblowers in the workplace, which includes public servants, contractors, and suppliers, irrespective of their labour regime.

## Guaranteeing strong protection for whistleblowers

***To avoid fragmentation and to ensure the effectiveness of the whistleblower protection provisions spread throughout different laws, Coahuila could enact a dedicated whistleblower protection law that avoids duplication and ensures clarity.***

Establishing the Local Anti-corruption System obliges Coahuila to harmonise the necessary secondary laws with the federal level. Despite further room for improvement, the legislation protecting whistleblowers has been strengthened at the federal level (OECD, 2017b). Public officials and citizens who disclose misconduct in the public sector are protected by the following:

- Mexico's new General Law on Administrative Responsibilities (*Ley General de Responsabilidades Administrativas*, LGRA), which requires investigative authorities of public organisations subject to the Law to adopt anonymous and confidential reporting channels to disclose misconduct and increase the accountability of recipients of disclosures of misconduct
- The General Law of the National Anti-corruption System (*Ley General del Sistema Nacional Anticorrupción*), which provides for a centralised electronic platform through which any citizen can disclose misconduct anonymously

Coahuila could adopt a dedicated whistleblower protection law based on the benchmarking of whistleblower protection laws in other countries (Box 3.1). Rather than

strengthening the current fragmented piecemeal approach, a dedicated whistleblower protection would ensure universally applicable protection provisions, which would bring clarity and would make it easier to raise awareness of the existence of these provisions (Banisar, 2011). Translating whistleblower protection into a dedicated law legitimises and structures the mechanisms under which individuals can disclose actual or perceived wrongdoings, protects them against reprisals, and, at the same time, can help encourage them to come forward and report wrongdoing. However, Coahuila would need to ensure that the legislation's provisions are effectively implemented and that the measures are executed in a clear, unambiguous, and reassuring way.

Box 3.1. **Whistleblower protection in Alberta**

Alberta's whistleblower protection law came into force on 1 June 2013, with the enactment of the Public Interest Disclosure (Whistleblower Protection) Act (Section 1 and Part 6 of the Public Interest Disclosure [Whistleblower Protection] Act came into force on 24 April, 2013). The goal of the legislation is to protect public sector employees from job reprisal, such as termination, if they report wrongdoing. The new law applies to the Alberta public service, provincial agencies, boards and commissions, as well as to academic institutions, school boards, and health organisations.

The law also creates processes for the disclosure of wrongdoing and for the Office of the Public Interest Disclosure Commissioner to investigate and resolve complaints by public sector employees who report violations of provincial or federal law, acts, or omissions that create a danger to the public or environment, and gross mismanagement of public funds.

The penalty for offences under the Act is CAD 25 000 for the first conviction to a maximum of up to CAD 100 000 for subsequent offences.

*Source*: Public Interest Commissioner (2016), Public Interest Disclosure (Whistleblower Protection) Act, available from *https://yourvoiceprotected.ca/*.

Adopting a dedicated whistleblower protection law would send a strong message to public servants and citizens alike. With it, they would understand that they are expected to speak up and report wrongdoings, and that reprisals against whistleblowers are not to be tolerated. If drafted in a way that provides broad coverage and provides for the availability of reporting channels, such a law will likely contribute to establishing a culture of integrity in Coahuila that will be key in avoiding reprisals from occurring in the first place (*ex ante* protective measures).

However, there are times where such *ex ante* measures will not effectively protect whistleblowers. In some cases, it may be impossible to fully protect the identity of whistleblowers and therefore, the law will also need to comprise *ex post* protective measures to ensure that whistleblowers have appropriate remedies at their disposal to seek compensation from the individual or organisation that may have exercised reprisals (OECD, 2017b).

***To mitigate the risk of having whistleblowers come forward with information that may not constitute protected disclosures, and to avoid potentially exposing them to unnecessary risks and overburdening the intake system with non-applicable cases, Coahuila could clarify the nature of a protected disclosure.***

A whistleblower protection system ought to promote and facilitate the reporting of "illegal, unethical and dangerous" activities (Banisar, 2011). To ensure clarity and avoid

incertitude surrounding the process, the precise classification of elements of disclosure that warrant protection is critical. The legal framework should provide a clear definition of the protected disclosures, specifying the acts that constitute violations to any code of conduct, regulation or law: gross waste or mismanagement, abuse of authority, dangers to the public health or safety, or corrupt acts. Clarifying the subject matter considered as a protected disclosure may be a deciding factor in whether an individual comes forward with a disclosure or keeps quiet due to uncertainty. Nevertheless, balance should exist between being overly prescriptive and thus making it difficult to disclose or requiring the discloser to have detailed knowledge of relevant legal provisions, and being overly relaxed, which allows for unlimited disclosures that in the end may not encourage internal resolution of issues within an organisation (Banisar, 2011).

The categories of wrongdoing, outlined in Figure 3.3 and extracted from existing whistleblower protection laws in OECD countries, encompass a broad range of subject matters which warrant the status of protected disclosures. Similar to most OECD countries, wrongdoings indicated by Coahuila in the interviews as constituting a protected disclosure are as follows:

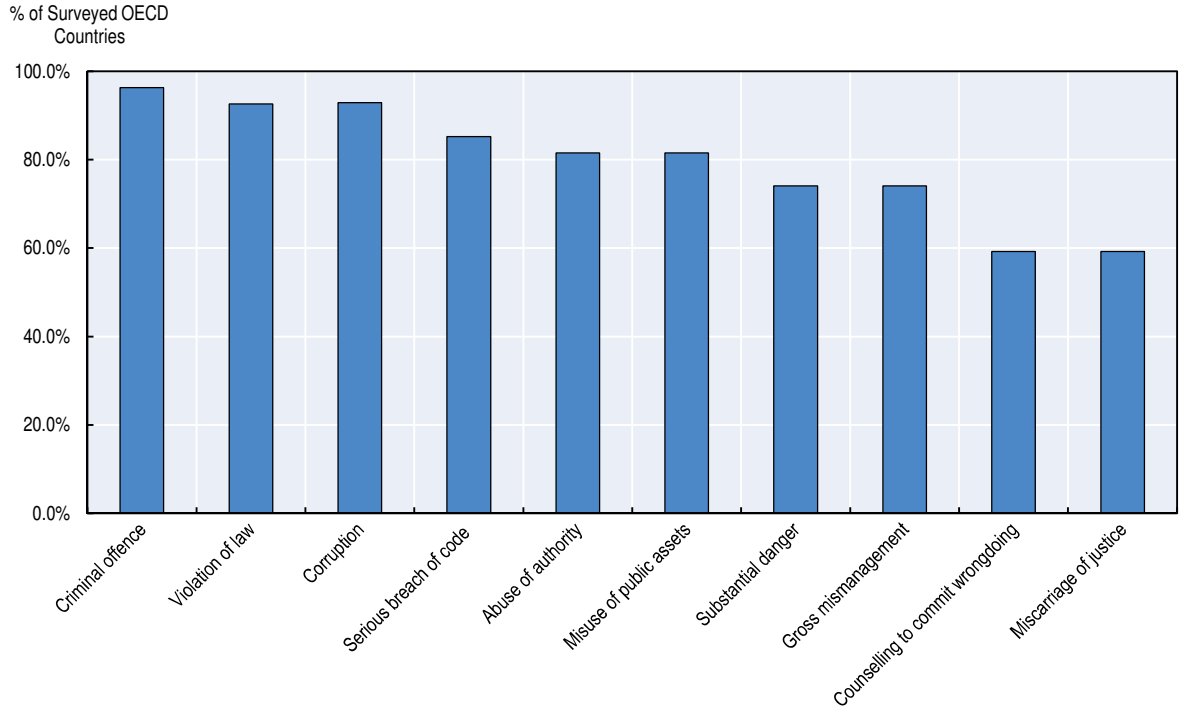
- a violation of law, rule, or regulation
- a serious breach of a code of conduct
- a misuse of public funds or a public asset
- abuse of authority
- a criminal offence has been committed, is being committed, or is likely to be committed
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant
- types of wrongdoing that fall under the term "corruption" as defined under domestic law

To mitigate the eventuality of having whistleblowers come forward with information that may not be considered as a protected disclosure, potentially exposing them to unnecessary risks and overburdening the intake system with non-applicable cases, Coahuila may wish to consider a more detailed and balanced approach similar to the system in place in the United Kingdom. The UK legislation provides a balanced approach with a detailed definition including exceptions (Box 3.2).

### *Given the low trust in institutional safeguards, the possibility of anonymous reporting should be made available to facilitate the reporting of misconduct.*

The Access to Information and Protection of Personal Data Law of Coahuila provides for the protection of whistleblowers' identities, which are kept confidential unless the whistleblower provides his or her consent for disclosure. However, it is important that confidentiality extends to all identifying information. The mechanisms in place in the United States, for example, prohibit the disclosure of identifying information of a federal sector whistleblower without consent, unless the Office of the Special Counsel (OSC) "determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law."[1] If the whistleblower's identity is disclosed, the whistleblower will be informed in advance (OECD, 2016).

Figure 3.3. **Categories of wrongdoing constituting a protected disclosure in OECD countries**




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

Beyond confidentiality, the possibility to disclose anonymously can encourage whistleblowers to come forward by providing a safe avenue to report. It may encourage reporting, especially where the institutional safeguards are non-existent or too weak to provide adequate protection.

Australia's whistleblower protection system allows for a public interest disclosure to be made anonymously as one of three options for reporting a public interest disclosure. In addition, it provides the option of making a public interest disclosure verbally or in writing, and without the discloser asserting that the disclosure is made for the purposes of the act. In Japan, anonymous reporting is protected by the interpretation of a number of articles within the Japanese Whistleblower Protection Act (WPA). In the Slovak Republic, employees may file an anonymous report to the internal disclosure handling system. A number of countries have established electronic intake systems and hotlines that cater to, among others, anonymous reporting. For example, the Netherlands has a national trustline where individuals can report suspected malpractices anonymously.

Mexico's new General Law on Administrative Responsibilities requires investigative authorities of public organisations to adopt anonymous and confidential reporting channels to disclose misconduct and increase the accountability of recipients of disclosures of misconduct. Pursuant to Article 109 of the National Code of Criminal Protection, victims and other injured parties have a right to anonymity when their safety is at risk. However, the right to anonymity for victims is not sufficient in the case of whistleblowers. The possibility to report anonymously should be made available to potential whistleblowers in Coahuila and it could be considered to introduce an anonymous reporting line, such as the trustline in the Netherlands.

Box 3.2. **A detailed definition of protected disclosures in the United Kingdom**

In the United Kingdom, the Public Disclosure Act defines a protected disclosure and provides clear criteria of the kind of disclosures that merits protection according to the law:

Part IV - A: Protected disclosures

43A: Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.

43B: Disclosures qualifying for protection

1. In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:
   a. that a criminal offence has been committed, is being committed, or is likely to be committed,
   b. that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject,
   c. that a miscarriage of justice has occurred, is occurring, or is likely to occur,
   d. that the health or safety of any individual has been, is being, or is likely to be endangered,
   e. that the environment has been, is being, or is likely to be damaged, or
   f. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
2. For the purposes of Subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
3. A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
4. A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
5. In this part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of Subsection (1).

*Source*: UK Public Disclosure Act of 1998, adding Part IV - A to Employment Rights Act of 1996.

### *Coahuila could consider clarifying the overlap between witness and whistleblower protection and ensuring that disclosures that do not lead to a full investigation or to prosecution are still eligible for legal protection.*

There is a potential overlap between whistleblowers and witnesses as some whistleblowers may possess solid evidence and eventually become witnesses in legal proceedings (Transparency International, 2013a). When whistleblowers testify during court proceedings, they can be covered under the existing witness protection laws. The Mexican framework offers witness protection pursuant to Article 109 of the National Code of Criminal Procedures (*Código Único Nacional de Procedimientos Penales*), which applies to the state level and Coahuila's Victims Law.

However, if the subject matter of a whistleblower report does not result in criminal proceedings, or the whistleblower is never called as a witness, then witness protection will not be provided. Even if a whistleblower is entitled to witness protection due to eventual involvement in related criminal proceedings, the measures provided (such as relocation, changed identity, etc.) may not always be relevant. Also, given that whistleblowers are usually employees of the organisation where the reported misconduct took place, they may face specific risks which are normally not covered by witness protection laws, such as demotion or dismissal. Furthermore, in terms of remedies for retaliation, they may need compensation for salary losses and career opportunities. Witness protection laws are therefore not sufficient to protect whistleblowers (Transparency International, 2009).

Indeed, basing the eligibility for such protection on the decision to investigate disclosures and subsequently prosecute related offences decreases certainty surrounding legal protections against reprisals. This is because such decisions are often taken on the basis of considerations that remain inaccessible to the public. Indeed, it may be more effective, in terms of detecting misconduct, to implement facilitation measures through which whistleblowers may report relevant facts that could lead to an investigation or prosecution. Whistleblowers will be more likely to report relevant facts if they know they will be protected regardless of the decision to investigate or prosecute.

The provisions of a dedicated whistleblower law in Coahuila would therefore modify the National Code of Criminal Protection to establish protection for those disclosing information pertaining to an act of corruption that might not be recognised as a crime, but could be subject to administrative investigations.

***Coahuila could provide more comprehensive protection to whistleblowers by specifically prohibiting dismissal of whistleblowers without a cause, or any other kind of formal or informal work-related sanction that has been exercised in response to the disclosure, if the information reported can reasonably be believed to be true at the time of the disclosure.***

Whistleblowers face the risk of retaliation when exposing wrongdoing. Such retaliation usually takes the form of disciplinary action or harassment in the workplace. Whistleblower protection frameworks should provide protection against discriminatory or retaliatory personnel action. According to the United States' Project on Government Oversight, typical forms of retaliation include (Project on Government Oversight, 2005):

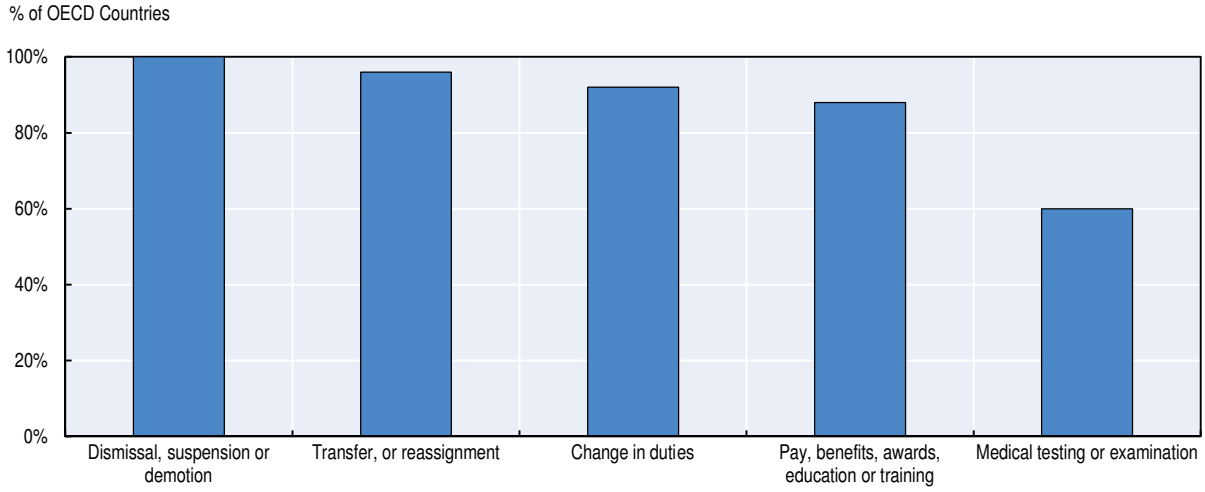
- taking away job duties so that the employee is marginalised
- taking away an employee's national security clearance so that he or she is effectively fired
- blacklisting an employee so that he or she is unable to find gainful employment
- conducting retaliatory investigations in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose
- questioning a whistleblower's mental health, professional competence, or honesty
- setting the whistleblower up by giving impossible assignments or seeking to trap him or her
- reassigning an employee geographically so he or she is unable to do the job

Unlike the majority of OECD countries (Figure 3.4), Coahuila indicated that it does not provide protection from a broad range of reprisals. It does not protect whistleblowers from the following retaliatory action:

- dismissal, suspension, or demotion
- transfer or reassignment

- decisions concerning pay, benefits, awards, education or training
- significant change in duties, responsibilities, or working conditions such as harassment
- medical testing or examination

Figure 3.4. **OECD countries providing protection from all discriminatory or retaliatory personnel actions**




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

Protection from reprisal in Coahuila's legislative framework is merely limited to protection from physical harm. A broader range of reprisals is necessary to protect whistleblowers from potential retaliation following a disclosure of wrongdoing. Anchoring these protections within the law will give whistleblowers more confidence in the procedures. For example, Korea's Protection of Public Interest Whistleblowers (PPIW) Act provides a comprehensive list of what disadvantageous measures whistleblowers should be protected against, including financial or administrative disadvantages such as the cancellation of a permit or license or the revocation of a contract (Box 3.3).

Concerning the protection from physical harm, in line with Article 64 of the LGRA, Coahuila will have to allow civil servants to request protective measures that are "deemed reasonable" (*medidas de protección que resulten razonables*) from the organisation providing the reporting channels. However, the lack of precision with respect to the protections that are contemplated under this article leave significant uncertainty as to the extent and scope of the protection that will be granted. Therefore, Coahuila should develop this provision further in its local regulations and set a benchmark for other states by including a non-exhaustive list of examples of measures that may be considered. Coahuila may consider specifically prohibiting dismissal without a cause of public and private sector whistleblowers, as well as other work-related reprisals such as demotion, suspension, and harassment. This protection may be limited in cases where tribunals have ruled that the whistleblower should have known that the disclosure was false or misleading at the time.

Such a list could be particularly useful in difficult and potentially hazardous situations when anonymity and confidentiality may not be sufficient, such as when the disclosed misconduct involves senior public officials, political staff, or organised crime, or when there are risks that the physical integrity of whistleblowers may be threatened.

Box 3.3. **Comprehensive protection in Korea**

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

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

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

By creating greater certainty about the eligibility and the scope of protective measures, clarifying what measures may be available as well as the circumstances upon which these measures will be imposed, the effectiveness of the framework would be enhanced to encourage disclosures of misconduct.

### Expanding the scope of the criminal prohibition to exercise reprisals on whistleblowers to a broader range of reprisals and to disclosures that are related to any breach of state laws could reinforce Coahuila's commitment to effective whistleblower protection and reassure potential whistleblowers.

To increase deterrence against the exercise of reprisals against whistleblowers, some OECD countries have implemented administrative and criminal prohibitions to exercise such reprisals. One of the strengths of the legal framework in Coahuila is that the Law of Responsibilities and the Criminal Code considers it an offence to take a reprisal against someone, to threaten reprisal, and to prevent a person from reporting. Threatening to take action can have the same effect on the whistleblower as actual retaliation. In this way, Coahuila has taken a positive step in including this provision in its legal framework.

While this provision certainly has a deterrent effect, its impact could be reinforced by broadening the scope of its application. The scope of the concept of "reprisals" is somewhat too narrow, as it only includes "acts of physical violence or moral aggression" that can

intimidate the whistleblower in order to prevent him or her from reporting. However, there are several other ways to intimidate or threaten to exercise reprisals against whistleblowers in the civil service, including but not limited to the public disclosure of the identity of the whistleblower.

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

Finally, the reprisals have to come from a civil servant or a person acting on his or her behalf in order to be sanctioned under the Criminal Code. Given that any citizen or corporation may disclose misconduct in the public sector, reprisals against whistleblowers could certainly be exercised by private sector representatives and other citizens. The deterrent effect of the Law of Responsibilities and the Criminal Code should also apply to reprisals that are exercised by individuals who do not work for the public sector and to other persons acting on their behalf.

Section 425.1 of Canada's criminal code, which also establishes a criminal prohibition to exercise reprisals against whistleblowers, does not include such limitations (Box 3.4). It applies to a broad range of reprisals including disciplinary measures against an employee such as demotion, termination, or otherwise adversely affecting the employment of such a whistleblower, or threatening to do so. It also applies to any employer or person acting on his behalf. Moreover, Section 425.1 of the Criminal Code applies to disclosures related to the breach of any federal or provincial law or regulation, and is therefore not limited to criminal offences.

Box 3.4. **Section 425.1 of the Canadian Criminal Code prohibiting reprisals against whistleblowers**

1. No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate, or otherwise adversely affect the employment of such an employee, or threaten to do so,
   a. with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or
   b. with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (*a*) to a person whose duties include the enforcement of federal or provincial law.
2. Anyone who contravenes Subsection (1) is guilty of
   a. an indictable offence and liable to imprisonment for a term not exceeding five years
   b. an offence punishable on summary conviction.

*Source:* Criminal Code of Canada, R.S.C., 1985, c. C-46.

Consequently, similar to the OECD (2017b) recommendation given at the federal level, Coahuila could broaden the scope of the criminal prohibition to exercise reprisals on whistleblowers, extending its application to a broader range of reprisals from a broader range of individuals, and to disclosures that are related to any breach of laws. Disclosing the identity of a whistleblower can be another form of reprisal or intimidation. As such, Coahuila could consider it a criminal offence to disclose or threaten to disclose the identity of a whistleblower.

***Coahuila could introduce sanctions on individuals who exercise reprisals against whistleblowers who have disclosed misconduct in accordance with applicable rules.***

As discussed above, the federal criminal code sanctions public officials responsible for investigating, qualifying, and prosecuting administrative offences if they do not carry on their role in accordance with the law. The criminal code generally prohibits the obstruction of disclosures of misconduct by public servants. However, it remains ambiguous whether the exercise of reprisals following a disclosure of misconduct would be qualified as an "obstruction" to disclosing misconduct and if any sanctions for public officials who would exercise reprisals against whistleblowers apply.

This is contrary to international benchmarks. For example, Australia's whistleblower protection system calls for two years of imprisonment – or 120 penalty units[2], or both – in case of reprisal against whistleblowers[3]; in Korea, the punishment for retaliation varies depending on the type of reprisal that took place (Box 3.5).

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

Aligning the framework with international standards and OECD recommendations to Mexico's Federal Government (2017b), a dedicated whistleblower protection law could impose sanctions on civil servants who threaten to exercise or actually exercise reprisals on whistleblowers disclosing misconduct.

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

Whistleblower protection systems may reverse the burden of proof on the employer to prove that the conduct taken against the employee is unrelated to his or her disclosure of misconduct. This is in response to the difficulties an employee may face in proving that the retaliation was a result of the disclosure, "especially as many forms of reprisals may be very subtle and difficult to establish" (Chêne, 2009, p. 7). In Germany, to qualify for protection provided by the Civil Code, public servants are charged with the burden of proof and have to demonstrate that their disclosure was legally permissible, that discrimination took place, and that retaliation happened because of their disclosure. In the event that the employer has not explicitly mentioned this as the reason for termination, this type of proof has proven almost impossible to provide. To mitigate this, several whistleblower protection systems provide a more flexible approach to the burden of proof and assume that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified by management on grounds unrelated to the disclosure (OECD, 2016).

### Box 3.5. **Sanctions for retaliation in Korea**

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

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

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

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

*Source*: Korea's Protection of Public Interest Whistleblowers Act No. 10472 (2011), Chapter 5, Articles 30 (2) and (3).

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

- disclosed conduct that meets a specific category of wrongdoing set forth in the law
- made the disclosure to the "right" type of party (depending on the nature of the disclosure, the employee may be limited regarding to whom the report can be made)
- had a reasonable belief that the information is evidence of wrongdoing (the employee does not have to be correct, but the belief must be one that could be shared by a disinterested observer with equivalent knowledge and background as the whistleblower)
- suffered a personnel action, the agency's failure to take a personnel action, or the threat to take or not to take a personnel action

- demonstrated that the disclosure was a contributing factor for the personnel action, failure to take a personnel action, or the threat to take or not take a personnel action (in practice, this is largely equivalent to a modest relevance standard)
- sought redress through the proper channels

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

Besides the introduction of protection of reprisals against the whistleblower after reporting misconduct, Coahuila could shift the burden of proof on the employer if an employee who has made a protected disclosure is subject to any type of sanction.

***Providing express civil remedies for civil servants who experience reprisals after disclosing misconduct as defined by the law would add a further layer of protection to the whistleblower protection framework.***

Most whistleblower protection systems include specific remedies that will involve whistleblowers who have suffered reprisals in enforcing the prohibitions against the exercise of reprisals, as opposed to leaving enforcement entirely to enforcement authorities. Measures of this nature may cover all direct, indirect, and future consequences of reprisal[4]. They vary from return to employment after unfair termination, job transfers or compensation, or damages if there was harm that cannot be remedied by injunctions, such as difficulty or impossibility of finding a new job. Such remedies may take into account not only lost salary but also compensatory damages for suffering, such as punitive damages (Banisar, 2011). Canada's Public Servants Disclosure Protection Act (PSDPA) includes a comprehensive list of remedies (Box 3.6).

Box 3.6. **Remedies for public sector whistleblowers in Canada**

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

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

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

Finally, allowing whistleblowers to introduce their own recourse before courts, instead of relying on the availability of resources of public authorities, could help to reinforce public trust in the whistleblowing framework and allow for a better use of enforcement authorities' limited resources. In this way, Coahuila could provide civil remedies for public servants who experience reprisals after disclosing misconduct as defined by the law.

Moreover, the availability of effective civil remedies may contribute to mitigating the professional marginalisation of whistleblowers by providing an opportunity for rehabilitation by civil courts. This role could be taken on by the Administrative Justice Tribunal (*Tribunal de Justicia Administrativa*), which will be established according to the governance of the Local Anti-corruption System. Such remedies could also compensate whistleblowers for prospective revenue losses. Combined with effective public awareness-raising campaigns, appropriate civil remedies can significantly improve public perceptions about whistleblowers, thus indirectly mitigating professional marginalisation and prospective financial losses (OECD, 2017c).

## Ensuring effective review and investigation of reports

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

International best practices recommend that the individual circumstances of each case should determine the most appropriate channel of disclosure (Council of Europe, 2014). These channels need to be clearly demarcated and facilitate disclosure to create confidence in the system and encourage reporting. As outlined by the UNODC *Resource Guide on Good Practices in the Protection of Reporting Persons* and the UNODC *Technical Guide to the United Nations Convention against Corruption*, channels of reporting should not be limited to a choice of reporting internally within the organisation, externally to a designated body or to the media or the public. Instead, all three levels should operate concurrently so that potential whistleblowers have a choice. If upon disclosing internally they were not provided with an adequate response within a certain timeframe, or if appropriate action was not taken, then the discloser should have the option of submitting the disclosure to an external body. In addition, potential whistleblowers should have direct access to external review agencies if they fear and have reason to believe that they would be reprimanded by their organisation's internal mechanism (OECD, 2016).

In Coahuila, the Attorney General's Office (*Procuraduría General de Justicia del Estado de Coahuila*, PGJE) and SEFIR are the authorities competent to receive and evaluate disclosures. In addition, each institution, as well as the *Procuraduría*, has installed an online reporting system that allows citizens and public servants to report corruption cases in the public administration. According to the LGRA, whistleblowers may report disclosures either to internal control bodies, present in each public organisation, or to national or subnational supreme audit institutions. Furthermore, according to the Law on the Anti-corruption System (*Ley del Sistema Anticorrupción del Estado de Coahuila de Zaragoza*), an information system will be established in Coahuila. Its information and data will be incorporated in the digital national platform, which includes a whistleblower reporting system. However, it is unclear how the state and national platform will co-ordinate to follow up on reports.

If a disclosure is made to an internal control body, SEFIR can conduct the preliminary assessment, the investigation, and it can impose sanctions if the disclosure is related to a non-serious offence. If during the preliminary assessment, the conclusion is reached that the disclosure is related to a criminal offence, SEFIR must complete its investigation and submit it to the Attorney's Office.

However, on-site interviews revealed that neither the existence of the various channels nor the procedure for following up on a report are clear to the majority of public officials. In addition, a strong reluctance to report any misconduct to superiors or other bodies was evident due to previous negative experiences and a lack of trust. In accordance with the recommendation given at the federal level by the OECD (2017b), Coahuila could add additional channels through which protected disclosures can be made. These could include internal disclosures made to a Senior Officer for Disclosure, external disclosures to a designated body, and external disclosures to the public or to the media.

To provide an increased variety of disclosure channels and offer whistleblowers the opportunity to discuss potential misconduct with their direct supervisor, Coahuila could also consider formalising a channel for disclosure of misconduct to supervisors. This would place a stronger responsibility on senior officials to actively create a culture in which employees come forward to management with disclosures of wrongdoing, questions and advice, and that the latter would, in turn, follow the measures in place to protect them and investigate the allegations accordingly. Furthermore, by being receptive to disclosures and encouraging this as a method of detection, management could mitigate the reputational damage that may ensue. In addition, the proposed Integrity Contact Point (see Chapter 2) could be an additional channel that receives, records, and reviews disclosures of wrongdoing and refers them to the appropriate authority to investigate the claims.

For example, in Canada, employees have three different options in terms of disclosing misconduct. Their first option is to make protected disclosures to their supervisors. In addition, they can disclose misconduct to their organisation's designated Senior Officer for Disclosure who receives, records, and reviews disclosures of wrongdoing, leads investigations of disclosures, and makes recommendations to the chief executive regarding any corrective measures to be taken in relation to the wrongdoing found. Senior Officers for Disclosure also have key leadership roles in the providing information and advice to employees and supervisors on the act (Box 3.7).

Finally, in Canada, if employees prefer not to use internal reporting channels, they may also disclose externally to the independent Public Sector Integrity Commissioner, who protects the identity of whistleblowers and acts upon allegations of misconduct made by federal civil servants.

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

Box 3.7. **Options for making a protected disclosure of wrongdoing in Canada**

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

Ask yourself…

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

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

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

*Source*: Office of the Public Sector Integrity Commisioner of Canada, Decision-making Guide, available from *http://psic-ispc.gc.ca/eng/resources/decision-making-guide*.

***Establishing clear follow-up mechanisms and communication procedures between the whistleblower and the receiving agency would ensure the effective management of reports. This could include information about the receipt of the report, regular updates on the status of investigation, and the final outcome or explanation of reasons why an investigation has not been undertaken.***

Allowing whistleblowers to follow up on the outcome of their disclosure of misconduct promotes the accountability of recipients of whistleblower allegations, who are often the internal audit, compliance, legal, or investigation divisions of an organisation. The ability to follow up on disclosures may also lead to better communication between whistleblowers and disclosure recipients in cases of unclear or insufficient information (OECD, 2017c).

The LGRA defines a follow-up mechanism through which whistleblowers are kept informed of the proceedings. In addition, according to Sections 102 to 110 of the LGRA, whistleblowers can reinforce accountability by enabling whistleblowers to appeal a decision made by internal control bodies with respect to the investigation, qualification, and prosecution of administrative offences, and participate in the proceedings.

Utilising the future electronic platform, Coahuila could consider strengthening the process foreseen by the LGRA by clearly detailing the procedural steps that are to be taken by the receiving agency to inform the whistleblower. The following steps could be made obligatory:

1. acknowledging the receipt of information
2. indicating the period of time to undertake a preliminary review to determine whether an investigation will be launched
3. if no investigation is launched, informing the whistleblower of the reasons why no investigation was undertaken
4. if an investigation is launched, keeping the whistleblower informed of the formal status of the case and the conclusion

***To strengthen trust in the procedures and guarantees of the whistleblower protection framework, Coahuila could create an independent agency mandated to receive and investigate reports on misconduct and provide remedies as necessary.***

The on-site interviews showed even if there were strong legal protections guaranteed for whistleblowers, public officials would not necessarily feel comfortable to come forward to report misconduct due to mistrust and the lack of a civil service scheme. Although enacting a dedicated whistleblower protection law may increase awareness of the importance of encouraging whistleblowing and assuring protection, this will not necessarily translate into the dedication of specific resources.

Therefore, in the long term, Coahuila could send a strong signal that the protection of whistleblowers and fight against corruption is a priority. To do so, Coahuila could create an independent body with the capacity to receive, investigate, and provide remedies for complaints related to retaliation. Best practice when setting up an oversight and enforcement agency is to ensure that it is independent, that it has sufficient budgetary resources to enable it to operate effectively, and that it meets the objectives of the law.

Several best practices on the federal level could inform the introduction of such a body. In the United States, the Office of the Special Counsel (OSC) is an independent federal investigative and prosecutorial agency that protects federal employee whistleblowers. It receives, investigates, and prosecutes appeals from whistleblowers who claim to have suffered reprisals. In addition, the Merit Systems Protection Board, an independent quasi-judicial agency with the power to adjudicate decisions, was established to protect federal employees against political and other prohibited personnel practices and ensure that there is adequate protection from abuse by agency management[5]. In Canada, the Public Sector Integrity Commissioner of Alberta is required to report annually to parliament and has the power to give recommendations to the heads of public offices (Box 3.8). The Public Servants Disclosure Protection Tribunal is in charge of determining remedies and sanctions when violations of whistleblowers' rights occur (Banisar, 2011).

Box 3.8. **Office of the Public Interest Commissioner in Alberta**

The Office of the Public Interest Commissioner is an independent office of the Alberta Legislature providing advice and investigating disclosures of wrongdoing and complaints of reprisals made by employees of jurisdictional public entities covered by the Public Interest Disclosure Act of Alberta. The Public Interest Commissioner is a nonpartisan officer of the Legislature appointed by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly for a term of five years with the possibility of reappointment. On its website, the Office provides clear guidance on who the whistleblower legislation applies to, what is defined as a wrongdoing, what a reprisal is, and how public officials are protected. An online disclosure form is made available through the website.

The Office of the Public Interest Commissioner also gives advice to public entities by providing examples of whistleblower policies and procedural guidelines and checklists. The Office also provides recommendations on legislation and possible improvements.

Its annual budget in 2014-15, which is approved by the legislative assembly, was CAD 1 196 000.

*Source:* Public Interest Commisioner (2016), "About us", available from *https://yourvoiceprotected.ca/about-us/#role-of-the-commissioner*.

Alternatively, if adequate financial resources cannot be guaranteed due to budget constraints, Coahuila could introduce an anti-corruption commissioner or trust attorney that allows whistleblowers to report anonymously. Coahuila could follow the model of several German states (Box 3.9). This would provide individuals with a channel for disclosing wrongdoing that they may feel more comfortable with than alternatives. In some cases, hotlines or online platforms provide potential whistleblowers with the option of disclosing information anonymously, a practice that should be coupled with the allocation of a unique identification number to callers that allows them to call back later, and anonymously, to receive feedback or answer follow-up questions from investigators (Banisar, 2011).

### Box 3.9. **External reporting channels in German states**

German states have established different external channels to facilitate reporting:

- **Schleswig-Holstein's Anti-corruption Commissioner**: In 2007, the government of Schleswig-Holstein, Germany, set up a contact point for combating corruption (KBK-SH), which was established as a permanent institution after a two-year pilot phase. The KBK-SH has been created as a point of contact for whistleblowers and is independent from the administration. An Anti-corruption Commissioner for the state of Schleswig-Holstein was appointed to carry out the tasks. The Anti-corruption Commissioner acts as an independent mediator between whistleblowers, the administration, and law enforcement agencies. Whistleblowers can report to him anonymously or under confidentiality. The Anti-corruption Commissioner is obliged to maintain total discretion and to protect fully the identity of the whistleblowers. Reports not within the area of responsibility of the KBK-SH are forwarded to the respective responsible office. The Anti-corruption Officer can be contacted by telephone, e-mail, or post. Detailed information is made available on the website of the state government of Schleswig-Holstein.
- **Lower Saxony's Internet-based information system**: Since 2003, the State Office of Criminal Investigation has been using an Internet-based information system to receive anonymous reports of corruption and economic crime (BKMS system). It is also possible to use a virtual mailbox to communicate anonymously with the police officer and answer follow-up questions on the report.
- **Baden-Wuerttemberg's trust attorney:** In September 2009, the position of trust attorney was introduced to improve the handling of reports of corruption. The attorney can be contacted as an independent contact point outside the administration to receive corruption-relevant reports. The attorney accepts anonymous reports and examines them for their credibility and criminal relevance. In the event of sufficient evidence of misconduct of employees or third parties at the expense of the state government, the report will be referred to the highest state authority. The authority will be in charge of further investigations and may, if necessary, ask the attorney to forward questions to the whistleblower. If the report does not fall under the purview of the authority, it will be referred to the respective local authority unless employees of the local authority are accused. It is then sent to the next higher-ranking body. In addition, the State Office of Criminal Investigation operates an Internet-based dialogue system.

*Source:* Denny Mueller (2012), *Korruptionsbekaempfung in Deutschland: Institutionelle Ressourcen der Bundesländer im Vergleich*, Transparency International, available from *www.transparency.de/fileadmin/pdfs/Themen/Justiz/Korruptionsbekaempfung_web.pdf*, accessed 27 February 2017.

## Strengthening awareness

***To implement the law effectively, Coahuila could consider promoting a broad communication strategy and undertaking increased awareness efforts through various channels.***

Strengthening the legal and institutional framework to protect whistleblowers is only one component of an effective whistleblower protection framework. On its own it is not sufficient to promote a culture of openness and integrity in which public officials trust that their reports will be followed up and that they will be protected from reprisals. As such, whistleblower protection legislation needs to be validated by awareness-raising, communication, training, and evaluation efforts. Assuring whistleblowers that their concerns are being heard and that they are supported in their choice to come forward is paramount to the integrity of an organisation, and to how whistleblowers are viewed by society as a whole. There are multiple measures organisations can take to encourage the detection and disclosure of wrongdoing. These measures would contribute to an open organisational culture and help reinforce trust, working relationships, and boost staff morale.

Led by SEFIR, all institutions within the administration could introduce awareness-raising campaigns which underscore the role of whistleblowers in promoting the public interest by shedding light on misconduct that harms the effective management and delivery of public services, and ultimately, the fairness of the whole public service. Such campaigns will repudiate any perceptions that blowing the whistle is a sign of lack of loyalty to the organisation. Well-targeted campaigns make clear that civil servants' loyalty belongs first and foremost to the public interest, and not to their managers. For example, the Public Interest Commission of Alberta designed a series of posters and distributed them to public entities to be displayed in employee work spaces. The posters show messages such as "Make a change by making a call. Be a hero for Alberta's public interest." In this respect, reporting structures and internal rules should be designed so that civil servants feel they should be loyal to the public interest, and not to public officials who have been appointed by the government of the day. The UK Civil Service Commission suggests including a statement in staff manuals to assure them that it is safe to raise concerns (Box 3.10). Coahuila may consider similar statements and materials.

Box 3.10. **Example of a statement to staff reassuring them to raise concerns**

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

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

By introducing and implementing such measures, Coahuila can facilitate awareness of whistleblowing and whistleblower protection, which will not only enhance understanding of these mechanisms, but will also help to improve the often negative and misguided

perceptions linked to the term "whistleblower". By expanding these communication efforts, the public view of whistleblowers as important safeguards for the public interest can be improved. Furthermore, communicating the importance of whistleblowers and showing how they are protected in practice can help restore trust in the government. In the United Kingdom, the way the public understands the term "whistleblower" changed considerably since the adoption of the Public Interest Disclosure Act in 1998 (Box 3.11).

### Box 3.11. **Change of cultural connotations of "whistleblower" and "whistleblowing": The case of the UK**

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

*Source*: Public Concern at Work (2010), *Where's whistleblowing now? 10 years of legal protection for whistleblowers*, Public Concern at Work, London, p. 17, YouGov (2013), YouGov/PCAW Survey Results, YouGov, London, page 8.

In Peru, CAN launched in 2013 the campaign "*Yo denuncio la Corrupción*" (I report corruption). In parallel, a Whistleblower Manual was developed with clear and easily understandable information on the specific mechanisms for administrative complaints in government agencies. In addition, the "Whistleblower Counselling Centre" was implemented to facilitate communication with whistleblowers via e-mail, phone, or mail. This initiative provides for a free hotline, distribution of leaflets containing basic information as well as stickers and pins, and an advertisement campaign was launched. More recently, training and awareness-raising activities were held by relevant authorities at different public entities in 2015 and 2016 in order to publicise the scope of the Peruvian Whistleblowing Law (OECD, 2017c).

Moreover, Coahuila could tailor its awareness-raising efforts similar to the US Office of Special Counsel (OSC). Specifically, the OSC has a Certification Programme developed under section 5 U.S.C. § 2302(c), which has made efforts to promote outreach, investigations, and training as the three core methods for raising awareness. The OSC offers training to federal agencies and non-federal organisations in each of the areas within its jurisdiction, including reprisal for whistleblowing. To ensure that public officials understand their whistleblower rights and how to make protected disclosures, agencies must complete OSC's programme to certify compliance with the Whistleblower Protection Act's notification requirements (Box 3.12). In Coahuila, SEFIR could oversee annual trainings and notices to public officials regarding their rights and available protections under the whistleblower legislation.

Box 3.12. **The United States' approach to increasing awareness through the Whistleblower Protection Enhancement Act (WPEA)**

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

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

(i) about prohibitions on retaliation for protected disclosures; and

(ii) who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures."

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

## Conducting evaluations and increasing the use of metrics

***Coahuila could consider including a mandate to review periodically its whistleblower protection scheme in the corresponding legislative bill so that the state government could evaluate the relevance of its objectives, implementation, and effectiveness.***

Similar to the recommendation on the federal level by the OECD (2017b), Coahuila could consider reviewing on a periodic basis the Law of Responsibilities and, if enacted, the dedicated whistleblower protection legislation, as well as any other additional whistleblower protection laws that may be adopted in the future, to assess whether the mechanisms in place are meeting their intended objectives and whether the law is adequately implemented. If necessary, the framework can then be amended to reflect the results of the evaluation. Provisions regarding the review of effectiveness, enforcement, and impact of whistleblower protection laws have been introduced by a number of OECD countries such as Australia, Canada, Japan, and the Netherlands. The Japanese Whistleblower Protection Act specifically outlines that the Government must take the necessary measures based on the findings of the review. In Canada and Australia, the review must be presented before the House of Commons or Parliament (OECD, 2017c).

***To evaluate the effectiveness of the whistleblower framework, Coahuila could consider systematically collecting data and establishing robust indicators.***

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

This data, particularly information on the outcomes of cases, can be used in the review of a government whistleblowing framework in order to assess its impact on public sector organisations. Furthermore, employee surveys can review staff awareness, trust, and confidence in whistleblowing mechanisms. In Colombia, for example, the National Statistics Department (*Departamento Administrativo Nacional de Estadística*) conducts surveys with public officials which include questions on why a public official would not report corruption, whether there is knowledge of the existence of protection mechanisms, and if public officials would seek protection. Such efforts play a key role in assessing progress – or lack thereof – in implementing effective whistleblower protection systems.

To measure the effectiveness of protective measures for whistleblowers, additional data could be collected on cases where whistleblowers claimed having experienced reprisals. Such data could include whether allegations of reprisals were investigated, by whom, and how reprisals were exercised, whether and how whistleblowers were compensated, the grounds for underlying these decisions, the time it takes to compensate whistleblowers, and whether they were employed during the judicial process (OECD, 2017c).

## Proposals for Action

Integrity and openness are important features of any administration and efforts to encourage employees to express their concerns without fear of persecution should be made. Legitimising and structuring the mechanisms under which public officials can disclose actual or perceived wrongdoings is essential to this approach. An organisational culture built on integrity and open communication not only detects, but also prevents corruption. To ensure that Coahuila's whistleblower system is effective in facilitating the reporting of wrongdoing and protecting against reprisals, the following measures could be considered: strengthening protections, increasing the accountability of the recipients of whistleblower allegations, raising awareness, conducting evaluations and increasing the use of metrics.

### *Guaranteeing strong protection for whistleblowers*

- To avoid fragmentation and ensure the effectiveness of the whistleblower protection provisions spread throughout different laws, Coahuila could enact a dedicated whistleblower protection law that avoids duplication and ensures clarity.
- To mitigate the risk of having whistleblowers come forward with information that may not constitute protected disclosures, and to avoid potentially exposing them to unnecessary risks and overburdening the intake system with non-applicable cases, Coahuila could clarify the nature of a protected disclosure.
- Given the low trust in institutional safeguards, the possibility of reporting anonymously should be made available to facilitate the reporting of misconduct.
- Coahuila could consider clarifying the overlap between witness and whistleblower protection and ensuring that disclosures that do not lead to a full investigation or to prosecution are still eligible for legal protection.
- Coahuila could provide more comprehensive protection to whistleblowers by specifically prohibiting dismissal of whistleblowers without a cause, or any other kind of formal or informal work-related sanction that has been exercised in response to the disclosure, if the information reported can reasonably be believed to be true at the time of the disclosure.

- Expanding the scope of the criminal prohibition to exercise reprisals on whistleblowers to a broader range of reprisals and to disclosures that are related to any breach of state laws could reinforce Coahuila's commitment to effective whistleblower protection and reassure potential whistleblowers.
- Coahuila could introduce sanctions on individuals who exercise reprisals against whistleblowers who have disclosed misconduct in accordance with applicable rules.
- Coahuila could consider shifting the burden of proof to the employer to provide evidence that any sanction exercised on a whistleblower following a disclosure of misconduct is not related to that disclosure.
- Providing express civil remedies for civil servants who experience reprisals after disclosing misconduct as defined by the Law would add a further layer of protection to the whistleblower protection framework.

### *Ensuring effective review and investigation of reports*

- Coahuila could consider defining and formalising the communication channels for reporting misconduct to ensure public officials are fully aware of who they can contact if they decide to disclose misconduct, of how their anonymity or confidentiality will be protected, and of the remedies available to them if they experience reprisal.
- Establishing clear follow-up mechanisms and communication procedures between the whistleblower and the receiving agency would ensure the effective management of reports. This should include information about the receipt of the report, regular updates on the status of investigation, and the final outcome or explanation of reasons why an investigation has not been undertaken.
- To strengthen trust in the procedures and guarantees of the whistleblower protection framework, Coahuila could create an independent agency mandated to receive and investigate reports on misconduct and provide remedies as necessary.

### *Strengthening awareness*

- To implement the law effectively, Coahuila could consider promoting a broad communication strategy and undertaking increased awareness efforts through various channels.

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

- Coahuila could consider including a mandate to review periodically its whistleblower protection scheme in the corresponding legislative bill so that the state government could evaluate the relevance of its objectives, implementation, and effectiveness.
- To evaluate the effectiveness of the whistleblower framework, Coahuila could consider systematically collecting data and establishing robust indicators.

### *Notes*

1. See the United States' Whistleblower Protection Act 1989; 5 U.S.C. § 1213(h).
2. In Australia, penalty units are used to describe the payable for fines under commonwealth laws. By multiplying AUS Dollar equivalent of one penalty unit, the fine for an offence is set.
3. Australia's Public Interest Disclosure Act, Subdivision B, Part 2 – Section 19.
4. See for example the United States' Whistleblower Protection Act, Subchapter III Section 1221(h)(1); the United States' False Claims Act 31 U.S.C. §3730(h)).
5. The MSPB and the OSC were set up under the Civil Service Reform Act (CSRA) of 1978.

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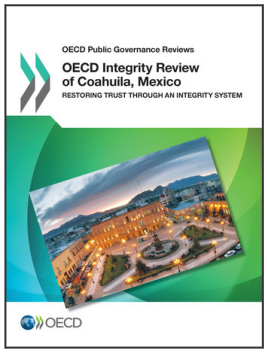


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