ARTICLE 19

Tunisia: Comments on Draft Organic Law on Access to Information

October 2014

Legal analysis

Executive Summary

The Draft Organic Law on the Right to Access Information (the Draft Law) represents a significant step forward in ensuing that all persons in Tunisia will be able to achieve their right to information. This measure will have a positive effect on both the public and the government as its successful implementation will increase accountability, reduce corruption and improve public services.

ARTICLE 19 would like to recommend some further areas where the Draft Law can be strengthened to better ensure that this goal is achieved. The key areas relate to expanding the duty on public bodies to proactively publish information; clarifying the exemptions and ensuring strong harm and public interest tests; ensuing the Authority is independent; and strengthening sanctions.

ARTICLE 19 urges the National Constitutional Assembly to take these recommendations into account and adopt the law promptly.

Key recommendations in brief:

1. The systems for affirmative publication should be enhanced to include a broader range of documents for all public bodies.
2. The exemptions should be further tightened to only apply to sensitive information that needs protection. No information should be withheld unless it can be shown that it would cause significant harm to the interest to be protected.
3. Exemption 4 on the withholding of information simply because it is classified should be removed; Exemption 7 on privacy should be harmonised with the Data Protection Act.
4. The public interest test should be expanded to cover all information in the public interest.
5. Ensure the Information Authority is clearly independent and adequately resourced.
6. Improve provisions on open data and reuse of information.
7. Strengthen sanctions, including criminal and administrative sanctions.
8. Clearly provide that the law overrides other laws and create a mechanism for the review and repeal of existing conflicting laws.
9. Set the date of enactment for one year and delay the repeal of Decree-Law 2011-41 until the Draft Law is fully in force.
10. Adopt a separate law to protect whistleblowers.

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About the Article 19 Right to Information Programme

The ARTICLE 19 Right to Information Programme advocates for the development of progressive standards on access to information at the international and regional levels, and their implementation in domestic legal systems. The Right to Information Programme has produced a number of standard-setting publications, which outline international and comparative law and best practice in areas such as national security and privacy.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Right to Information Programme publishes a number of legal analyses each year, commenting on legislative proposals, as well as existing laws that affect the right to information. This analytical work frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/resources.php?tagid=464&lang=en

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I. Introduction

In this analysis, ARTICLE 19 reviews the Draft Organic Law on the Right to Access to Information approved by the Council of Ministers and sent to the National Constitutional Assembly in August 2014.

This analysis is based on an unofficial translation of the Draft Law. It should be read in conjunction with previous analyses produced by ARTICLE 19 relating to the Decree-Law 2011-41 and the Draft Law.

We welcome the collaborative approach that the Government of Tunisia has taken in the development of this Draft Law and urge the National Constitutional Assembly to revise and adopt the Law as soon as possible so that the implementation process can begin and both the public and the government can start benefitting from the right to access to information.

II. Analysis of the Draft Law

A. General Comments on the Draft Law

In its current form, the Draft Law is a significant step forward in ensuring the right to access information compared to the existing Decree-Law 2011-41. The Draft Law incorporates many of the best practices found in international and national laws, including the individual's legal right to demand information, procedures on the internal management of the right, obligations on bodies to publish information and an independent information commission with appropriate powers to enforce its provisions. These elements will make it the most advanced law on the right to information in the MENA region and most of its neighbouring European countries.

The comments and recommendations below are intended to help clarify and strengthen the provisions of the Draft Law, based on ARTICLE 19's experience over the past two decades in providing assistance in countries around the world on the adoption and implementation of the right to information and related legislation.

B. Improvement to the System of Publishing Information

1. Expand the list of published information

Chapter II of the Draft Law sets out provisions on the affirmative publication of information by public bodies on their own initiative without the need for requests. Public bodies which proactively make information available benefit from a reduced number of requests for basic information and subsequently reduce the resources needed to fulfil their duties. Furthermore, as discussed in Section E below, there are significant social and economic benefits in making such information available.

In the Draft Law, Article 8 sets out duties for all bodies to publish a limited set of information relating to their structure, services, functions and publications. Article 9 creates additional obligations for bodies "operating in the economic, financial, social and statistics fields" to publish additional information on public finances, statistics, social programmes and services, among other information.

The design of the two articles would have the unfortunate effect of exempting many public bodies from having to publish basic financial information, including information relating to their budgets and expenditures, if they were determined to be not covered by Article 9. The is compounded by a lack of a definition of which bodies are to be covered under Article 9.

A better approach would be to merge Articles 8 and 9 and to create a more detailed list that applies to all public bodies under the Act, with bodies publishing the additional information on their social programmes when relevant.

This is more in line with international best practices and emerging standards. For example, the Model Law on Access to Information for Africa prepared by the African Union's Commission on Human and Peoples' Rights sets out detailed categories of information that public bodies should publish monthly[1]:

a) manuals, policies, procedures or rules or similar instruments which have been prepared for, or are used by, officers of the body in discharging that body's functions, exercising powers and handling complaints, making decisions or recommendations or providing advice to persons outside the body with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons may be entitled;

b) the names, designations and other particulars of the information officer and deputy information officer of the public body or relevant private body, including their physical contact details and electronic addresses where persons may submit requests for information;

c) any prescribed forms, procedures, processes and rules for engagement by members of the public with the public body or relevant private body;

d) the particulars of any arrangement, statutory or otherwise, that exists for consultation with, or representation by, members of the public in relation to the formulation or implementation of its policies or similar documents;

e) whether meetings of the public body or relevant private body, including its boards, councils, committees or similar other bodies, are open to members of the public and, if so, the process for direct or indirect engagement; but where a meeting is not open to the public, the body must proactively make public the contents of submissions received, the process for decision making and decisions reached;

f) detailed information on the design and execution of any subsidy programmes implemented with public funds, including the amounts allocated and expended, the criteria for accessing the subsidy, and the beneficiaries;

g) all contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body;

[1] Model Law on Access to Information for Africa, Prepared by the African Commission on Human and Peoples' Rights, Part II, http://www.achpr.org/files/news/2013/04/d84/model_law.pdf; Also see UK Local Government Transparency Code 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360711/Local_Government_Transparency_Code_2014.pdf

h) reports containing the results of surveys, studies or tests, including scientific or technical reports and environmental impact assessment reports, prepared by the public body or relevant private body; and

i) any other information directed by the oversight mechanism.

We would also recommend that legislative bodies automatically publish draft legislation and other related materials to extend public participation in the policy development process and in accordance with the spirit of the goals set out in Article 1.

2. Publication of Public Interest Information

Article 11 includes a progressive provision requiring the publication of any information that has been the subject of two or more information requests. We would suggest that this requirement be extended to any request where it is obvious there is a strong public interest in the information, including requests relating to pending legislation or issues of current public debate.

3. Clarify the Role of Access to Information Officer

Article 38, detailing the duties of the Access to Information Officer, is silent on the role of the Officer in ensuring that the obligations placed on public bodies under Chapter II are fulfilled. A lack of clarity, could lead to the unfortunate situation whereby a public body has no specific individual to ensure the information is in fact made available. Whilst the Information Officer may not be personally placing such information into the public registers, he or she should be given the duty and the authority to ensure that it is done.

4. Enforcement Powers of the Information Agency

Under Article 43 of the Draft Law, the Access to Information Authority has the responsibility to "monitor the commitments" on publication of information by public bodies under Chapter II. However, if those obligations are not met, the Authority does not appear to have any specific powers to order public authorities to meet their obligations. Nor does there appear to be any procedure or mechanism by which the public can complain.

Recommendations

- Merge Articles 8 and 9 and expand the list of documents and information that all public bodies publish; expand the list of documents under Article 11 to include those of public interest.
- Amend Article 38 to include Chapter II in the duties of the Information Officer.
- Amend Article 42 to specifically include enforcement of Chapter II as on of the powers of the Information Authority and to hear complaints on failing to meet the obligations.

C. Exemptions

The most problematic aspect of the Draft Law is Chapter IV on exemptions. The categories are overly broad and do not provide sufficient clarity on how to identify important and sensitive information, which is in need of protection. Furthermore, we believe that the harm tests need to be expounded to recognise different types of information have different sensitivities and need for protection. Finally, the

public interest test should be broadened to fully accommodate the range of public interests that the Draft Law seeks to achieve in Article 1.

Overly broad categories of exemptions

Article 28 sets out ten categories of information that may be exempt from the right to information. While these categories are generally the same as those found in other laws around the world, most are notably brief in their descriptions ("national defence", "state economic interests") and thus encapsulate wide areas of information rather than ensuring that information that needs to be protected is protection while other information can be made public. As drafted, these categories of information are likely to cause confusion which in turn, may result in information in the public interest being withheld.

We believe that these categories should be more clearly defined to ensure that the principle of maximum disclosure is fulfilled. In particular, we wish to highlight several categories which are potentially harmful to the general goal of ensuing access to information.

Information classified as "secret"

Article 28(4) exempts information which has been 'classified as "secret" pursuant to the provisions of this law.' We believe that this category is not only problematic but also unnecessary and therefore, it should be deleted.

Article 28 specifies a number of interests relating to national security, including national defence, international relations and the prevention of crime. However, the current Draft Law fails to specify what information constitutes secret information. Such an approach raises the concern that officials may simply designate any information that they wish to keep from the public as "secret" without any standards or oversight. This is not a very helpful approach and many national laws and international standards have rejected this. Under the AU Model Law, "Information is not exempt from access under this Act merely on the basis of its classification status."[2] In many national laws, including the Indian Right to Information Act and the UK Freedom of Information Act, any information that has been administratively designated as Secret or Top Secret under the Official Secrets Act is still reviewed and can be released if it is not otherwise exempt under one of the exemptions for protecting national security or other interests.[3]

Further, As the UN Human Rights Council stated in General Comment 34, "it is not compatible with [the ICCPR], for instance, to invoke [official secrets or sedition laws] to suppress or withhold from the public information of legitimate public interest that does not harm national security."

ARTICLE 19 recommends removing this provision while making an assessment as to whether there are additional categories of information requiring protection which could be designated under the Article 28 exemptions and appointed the appropriate level of harm. This could, for example, include

[2] Model law §26

[3] See Banisar, David and Fanucci, Francesca, WikiLeaks, Secrecy and Freedom of Information: The Case of the United Kingdom (March 29, 2013). Brevini, Hintz, McCurdy (eds), Beyond WikiLeaks: Implications for the Future of Communications, Journalism and Society, Pallgrave MacMillan, 2013 . Available at SSRN: http://ssrn.com/abstract=2200461

information on the activities of the security services to protect national security as and when is necessary.

Relationship with Personal Data

Article 28(7) of the Draft Law creates an exemption for the "protection of personal life". This exemption should be further clarified to ensure that it only applies to private personal information held by public bodies rather than all information which may identify an individual.This should be harmonised with the "La loi organique relative à la protection des données personnelles" in such a way that the two rights are balanced based on the public interest.[4]

The law should also specify that such exemptions do not apply to information pertaining to an individual acting in a public capacity. The African Model Law stipulates that the privacy exemption does not apply if "the information relates to the position or functions of an individual who is or was an official of the information holder or any other public body or relevant private body".[5] Under the Yemen RTI Law (2012), personal information cannot be released if it is "[p]ersonal data which, if disclosed, may be considered as an unwarranted violation to the privacy of the individual, unless the personal data are connected to the duty or function or public office held by that individual"[6]

Harm Test

Article 28 states that public bodies may refuse access to information if "access could be damaging to" the list of the interests set below. Further, the determination of damage "shall be assessed upon receipt of the request and must encompass current and future damage". This is a disproportionately low threshold of harm for all of the categories. Such a low standard means nearly anything could be assessed to be damaging. Most of the exemptions in the AU Model law require that the release of the information "would cause substantial prejudice" or "would cause substantial harm" to the interest to be protected.

Under EU law, "the mere fact that a document concerns an interest protected by an exception to the right of access … is not sufficient to justify the application of that provision." Public bodies must show how the release of the information would "specifically and actually undermine the interest protected by the exception".[7]

Further, most RTI acts recognise that different categories have different sensitivities and thus set different thresholds of harm for each category.

Public interest test

Article 30 provides that the exemptions shall not apply in cases where "the general public interest outweighs the interest in protecting, due to a serious threat to the health, safety or environment as a

[4] For a detailed analysis on how this can be achieved, see Banisar, David, The Right to Information and Privacy: Balancing Rights and Managing Conflicts (March 10, 2011). World Bank Institute Governance Working Paper. Available at SSRN: http://ssrn.com/abstract=1786473

[5] §27(g)

[6] Law (13) for the Year 2012 Regarding the Right of Access to Information, §25(B).

[7] Case C-350/12, Council of the European Union v in't Veld

result of a criminal act." This is a narrow version of a public interest test and it is unlikely to result in much information being released.[8]

A better approach would be to include a strong public interest test which sets out broader goals in line with Article 1 of the Bill including the promotion of transparency and accountability, improving the quality of public services and improving public participation.

This is the current approach found in many national laws and international guidelines. For example, the Parliamentary Assembly of the Council of Europe, recently recommended that nations ensure that "access to information should be granted even in cases normally covered by a legitimate exception, where public interest in the information in question outweighs the authorities' interest in keeping it secret".[9] They defined areas of public interest to include information that would:

- make an important contribution to an ongoing public debate;
- promote public participation in political debate;
- expose serious wrongdoings, including human rights violations, other criminal offences, abuse of public office and deliberate concealment of serious wrongdoing;
- improve accountability for the running of public affairs in general and the use of public funds in particular;
- benefit public health or safety.

Recommendations

- Provide more detailed descriptions of exemptions to ensure that the exemptions clearly describe the types of information that need to be protected.
- Eliminate exemption (4) on information classified as secret.
- Qualify exemption (7) so that it does not apply to information about the official activities of public officials. Clarify the relationship with Data Protection Act.
- Revise the harm test to require that the release "is likely to cause serious harm".
- Extend the public interest test to cover a wider range of interests, with the balance in favor of disclosure unless it is outweighed by the need to protect.

D. Office of Information Authority

The inclusion of the independent Access to Information Authority in the Draft Law is an important provision in the Draft law. Nearly every country around the world with an RTI law has included an

[8] For a detailed analysis of the public interest test in operation, see UK Information Commissioner's Office, The public interest test, version 2. Available at http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx

[9] COE Parliamentary Assembly, Resolution 1954 (2013) National security and access to information, 2 October 2013. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20190&lang=en.

external agency which is tasked with the monitoring and enforcement of the Act. These bodies are considered to be a crucial interface between the public and the bureaucracy to make the law work more effectively.

International law clearly requires that human rights bodies are functionally and administratively independent from all public authorities. The Paris Principles, endorsed by the UN General Assembly, set minimum standards for such bodies.[10] The roles of specialised information commissions builds on these principles which have been further elaborated on by international bodies including the African Commission on Human and Peoples' Rights in the Model Law on Access to Information for Africa.

Under the Draft Law, the Authority is made up of seven members, headed by a President, who must be a judge of the Administrative Court, and a Vice President who must also be a court judge. The other members are professionals with expertise in related fields including law, journalism, and academia.

Under Article 47, a commission sets a short list of the most qualified candidates and ranks them based on their qualifications. However, "the Head of Government appoints the members of the Authority from among the candidates, without any obligation as regards the ranking included in the list that was submitted to him." This seems a rather contradictory provision. It would be better for the ranking to be considered and any for any deviation in the decision to be justified.

Under Article 52, the benefits and privileges of the President, Vice President and members of the Authority are set by decree. It would be better to set these in law, linked to the benefits set for the judiciary, to ensure that there is no concern that the decree could be changed following a negative decision.

There is also a concern that under this model, there is insufficient time for the Authority to be able to decide cases. Under the Draft Law, only the President and the Vice-President are fully employed by the authority. Presumably, the rest of the members will have other employment and may not be able to meet as often as necessary to make timely decisions, which is especially crucial during the early stages of implementation. It may be better to ensure that all of the members are fully employed by the Authority to ensure they have adequate time to oversee the implementation of the law.

As set out in the membership of the Authority, there are many fields from which experts may be appointed. It is therefore unclear why roles of President and Vice-President are limited to only judges. In fact, very few information commissioners around the world have been judges. For example, in the long-standing commissions in the UK, Scotland, Mexico and Canada, none of the commissioners have ever have been judges.

Finally, under Article 51, the staff of the Authority will be made up of "agents seconded from public administrations and agents to be recruited in compliance with the statute related to the Authority's agents". While it is important to have employees who are familiar with the nature and workings of public bodies, seconded employees who are planning to go back to their or other public bodies may be conflicted in how they oversee them, knowing they will be returning to the public administration in the future. Thus, the emphasis should be on hiring new staff from outside the current civil service and ensure that those that are seconded are not conflicted in relation to their previous and future posts.

[10] UNGA Resolution, 48/134, National institutions for the promotion and protection of human rights, A/RES/48/134, 20 December 1993.

Recommendations:

- Ensure that the appointment process considers the ranking of qualifications.
- Consider making all members full time to ensure they have adequate time to decide cases and provide oversight and guidance.
- Link benefits and privileges to judicial officers to prevent possible threats to independence.
- Open up the position of President and Deputy President to all qualified members.
- Ensure systems are in place to limit potential conflicts of interest with seconded employees.

E. Open Data and Reuse

When Tunisia hosted the World Summit on the Information Society in 2005, it demonstrated its technological prowess and positioned itself as the technical leader in the region. It is therefore surprising that the Draft Law does not take better advantage of technical measures for access and reuse of information in order to facilitate transparency and access the economic benefits of government information.

Open Data

There are significant benefits in making information available in an Open Data format. As described by the G-8 leaders at the 2013 Lough Erne Summit:

> Open government data are an essential resource of the information age. Moving data into the public sphere can improve the lives of citizens, and increasing access to these data can drive innovation, economic growth and the creation of good jobs. Making government data publicly available by default and reusable free of charge in machine- readable, readily-accessible, open formats, and describing these data clearly so that the public can readily understand their contents and meanings, generates new fuel for innovation by private sector innovators, entrepreneurs, and non-governmental organisations. Open data also increase awareness about how countries' natural resources are used, how extractives revenues are spent, and how land is transacted and managed.

The Open Data Charter announced by the G-8 leaders agreed to five principles[11]:

- Open Data by Default
- Quality and Quantity
- Useable by All
- Releasing Data for Improved Governance
- Releasing Data for Innovation

[11] Policy paper, G8 Open Data Charter and Technical Annex, 18 June 2013

The Draft Law is largely silent on the issue of ensuing that the information and data provided under the Law is available in an electronic format useful to those who wish to technically manipulate it or combine it with other information.

Under Chapter II, as discussed above, public bodies are required to publish information on web sites including statistical information. However, there is no obligation to ensure the information is not limited to paper or technically limited versions, such as PDFs.

Similarly, under Article 15, one of the modalities for access is obtaining an "electronic version of the information, when possible" and a general duty on bodies to "make available the information in the requested form" which is limited by the following sentence "In the event the information is not available in the requested form, the concerned Body shall provide it in the available form."

Typically, bodies do not use open data formats for their internal processing of information and must make some (often minor) formatting changes to make it available in that format. Given the significant benefits, bodies should be required to publish and to answer in useable formats when requested, unless there are significant costs available. Even then, the public interest in making the information available should be considered. Furthermore, public bodies should make efforts to ensure that new systems being put into place have open format options.

Reuse of Information

Article 60 of the Draft Law states that a special legal instrument will determine the right of reuse of public information. We believe that it is important to set out the standards within the Draft Law itself in order to ensure that any limitations on the reuse of information will not result in limitations on the right to information.

The Draft Law should make it clear that there are no limitations on the reuse of information for non-commercial or commercial purposes. In practice, this allows any person to publish documents or information obtained from public bodies on websites, social media platforms or other means of dissemination. By way of example, the UK has created an "Open Government License"[12] which allows any person to:

- copy, publish, distribute and transmit the Information;
- adapt the Information;
- exploit the Information commercially and non-commercially for example, by combining it with other Information, or by including it in your own product or application.

As long as the person using the information "acknowledge[s] the source of the Information by including any attribution statement specified by the Information Provider(s) and, where possible, provide a link to this license".

Recommendations:

- Ensure that requests can be made electronically and are responded to in the form requested and ensure that information released under Chapter II is in open data format for easy reuse.

[12] See http://www.nationalarchives.gov.uk/doc/open-government-licence/version/2/

- Include a provision permitting the free reuse of information for any purpose.

F. Sanctions

Sanctions are an important function of a right to information law in order to deter negative conduct by officials who may not agree with openness and transparency. Article 62 imposes a fine of "five hundred (500) dinars" on those who hamper access to information or damage information illegally. This is unlikely to seriously deter anyone from mishandling information, especially in the absence of other penalties. We note that ineffective deterrents were a similar issue in Decree-Law 2011-41.

In our view, Article 62 should be significantly strengthened. Firstly, illegal destruction of information should result in criminal penalties. Secondly, there should be stronger administrative penalties against officials, including termination of employment and/or demotion, as any public official who acts in such a way has violated their oath of office.

G. Relationship with other Laws

Like many other countries, Tunisia has a large body of existing law which may affect the disclosure of information by public bodies. Many of these laws were adopted under the previous regime and do not adequately reflect international standards on human rights.

Article 6 states that when interpreting the law, the right to access to information has primacy over other issues rights. However, Article 6 does not express how this right operates in relation to other laws

As an organic law, it is well recognised that the Draft Law will exist at a higher constitutional level than other laws and therefore should have primacy over those laws when a conflict emerges between them. However, it is our experience that officials do not always make that distinction and often instead make decisions based on the previous experience with older laws rather than fully applying the newer act.

Thus in many countries, the right to information law includes provisions which call for the systematic review and repealing of existing laws which conflict and specifically state that the law overrides other laws which conflict with its provisions. In New Zealand, the Official Information Act repealed the Official Secrets Act. In order to give full effect to the aims of the law on the right to information, similar provisions should be included in the Draft Law.

Recommendations:

- Include a provision requiring a specific public authority to review existing laws and repeal those that conflict with its provisions.

- Include a provision which states that the Law overrides all conflicting laws and create a mechanism for reviewing them for repeal.

H. Date of Enactment

Under Article 66, the Draft Law cancels Decree-Law 2011-41 and has immediate effect. Yet under Article 65, the Authority will only come into existence within one year of the Draft Law coming into effect and the Administrative Court is to decide the cases in the interim.

Consequentially, this leaves at least a year where public bodies are obliged to implement the new law without the guidance or assistance of an Authority. Many will already be familiar with the principles of

the right to information and even have structures in place as required under Decree-Law 41, but many others may have to start new structures and processes without guidance. The lack of an established Authority during this initial implementation stage is likely to bring legal uncertainty and confusion.

A better approach would be to set a 12 month deadline for the full implementation of the new Law and during this period, the existing Decree-Law 2011-41 should remain in full effect. In addition, a maximum period of 6 months should be set for an Authority to be created, thereby giving that Authority an additional 6 months in which to get established and assist public bodies in preparation for the full implementation of the new Law. In the UK, the Open Government Code (a decree similar to Decree-law 41) remained in place while bodies prepared for the new law.

I. Law on Whistleblower Protection

Previous drafts of the Draft Law provided for limited protection of whistleblowers. Whistleblowing is a means of promoting accountability by allowing any individual to disclose information about misconduct whilst simultaneously protecting that individual from sanctions or legal repercussions. Whistleblowing relates to all forms of disclosure from both public and private organisations. The disclosure can be internal, to a higher-ranking official within the organization for example, or to an external authority such as regulatory bodies, ombudsmen, anti-corruption commissioners, elected officials and the media.

Whistleblowing is also a distinct from laws and policies on the protection of witnesses. There is often confusion on this issue with many governments and media mistaking witness protection laws for whistleblowing laws.[13] The focus of whistleblowing is thus a free speech right, an ethical release, and an administrative mechanism. The result is to ensure individuals have the ability to speak their conscience and that organisations are more open and accountable to their employees, shareholders and the greater public in terms of their structures and activities.

There are an increasing number of international instruments that recognise the importance of whistleblowing and require or encourage countries to adopt measures to encourage and protect disclosures. Most of these agreements are in the field of anti-corruption but there is also increasing recognition of the importance of whistleblowing for free speech and good governance. These include the United Nations Convention Against Corruption, the COE Civil Law Convention on Corruption and the African Union Convention on Preventing and Combating Corruption.

Over 50 countries have adopted some form of whistleblower protection law relating to corruption, environmental protection and anti-trust law. In many countries, including South Africa, the UK, Canada, Rwanda, Uganda and Ghana, a comprehensive whistleblower law has been adopted.

We have previously expressed our concerns that the whistleblowing provision in the Bill is too limited to provide substantive protection for whistleblowers and in effect, it may even be counterproductive.

[13] See e.g. Council of Europe Parliamentary Assembly, The protection of "whistleblowers": Introductory memorandum, AS/Jur (2008) 09, 3 April 2008.
http://omtzigt.cda.nl/Portals/13/docs/whistle%20blowers%20memo%20Omtzigt.doc

As such, we welcome the commitment to the Open Government Partnership to develop a separate whistleblower protection act. As an initial step, we would recommend that the following principles be considered and incorporated in a new bill[14]:

- **Broad application.** The law should have a broad application. It should cover a wide variety of wrongdoing including violations of laws, rules and ethical norms, abuses, mismanagement, failures to act and threats to public health and safety. It should apply to public and private sector employees and also those who may face retribution outside the employer-employee relationship such as consultants, former employees, temporary workers, volunteers, students, benefit seekers, family members and others. It should also apply to national security cases.

- **Disclosures procedures.** The law should set up reasonable requirements to encourage and facilitate internal procedures to disclose wrongdoing. However, the procedures should be straightforward and easily allow for disclosure to outside organisations such as higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective. There should be easy access to legal advice to facilitate disclosures and reduce misunderstandings.

- **Outside agency.** The law should create or appoint an existing independent body to receive reports of corruption, advise whistleblowers and investigate and rule on cases of discrimination. However, this body should not have exclusive jurisdiction over the subject. The whistleblower should be able to also appeal cases to existing tribunals or courts. Legal advice and aid should be available.

- **Confidentiality.** The law should allow for whistleblowers to request that their identity should remain confidential as far as possible. However, the body should make the person aware of the problems with maintaining confidentiality and also make clear that the protection is not absolute.

- **Protection against retribution.** The law should have a broad definition of retribution that covers all types of job sanctions, harassment, loss of status or benefits, and other detriments. Employees should be also to seek interim relief to return to the job while the case is pending or be allowed to seek transfers to other equivalent jobs within the organisation if return to the existing one is not advisable due to possible retribution.

- **Compensation.** Compensation should be broadly defined to cover all losses and to put the individual back to their prior situation. This should include any loss of earnings and future earnings. This loss should not be capped. There should also be provisions to pay for the pain and suffering incurred because of the release of such information and any subsequent retribution.

- **Protection of free speech.** The law should recognise that there is a significant importance in free speech whistleblowing. Public interest and harm tests should be applied to each release and for public bodies it should be expressly stated that the unauthorised release of any information that could have been released under freedom of information laws cannot be sanctioned.

- **Limits on liability.** Any act of authorised disclosure should be made immune from liability under other national security and secrets acts and other libel/slander laws. An even more significant move would be to eliminate these archaic laws, which has already been done in New Zealand as their repealed the Official Secrets Acts.

[14] For more information, see Banisar, David, Whistleblowing: International Standards and Developments (February 1, 2011). CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY, I. Sandoval, ed., World Bank-Institute for Social Research, UNAM, Washington, D.C., 2011. Available at SSRN: http://ssrn.com/abstract=1753180

- **Rewards.** In some cases, whistleblowers should be rewarded for making disclosures that result in the important recovery of funds or discoveries of wrongdoing. Qui Tam cases, such as those used in the US, may be an appropriate mechanism for such recoveries.

- **No sanctions for misguided or false reporting.** The law should still protect whistleblowers who make a disclosure in good faith even if the information was not to the level of a protected disclosure. The law should not allow for the threat of criminal sanctions against whistleblowers who make false disclosures. In cases of deliberate falsehoods, allowing for normal sanctions such as loss of job should be sufficient.

- **Extensive training and publication.** Governments and private bodies should be required to adopt management policies to facilitate whistleblowing and train employees on its provisions. A high level manager should supervise this effort and work towards developing an internal culture to facilitate disclosures as non-confrontational processes.

- **Reviews and disclosures.** Government bodies and large corporate bodies should be required to publish annually a review of disclosures and outcomes, reports on discrimination and outcomes including compensation and recoveries. The law should require a regular review of the legislation to ensure that it is working as anticipated.

Recommendations:

- Adopt a comprehensive whistleblower protection act based on the above principles.