



1 November 2013

Our ref: ICAEW Rep 161/13

Shelley Torey
Department for Business Innovation and Skills
1 Victoria Street
London SW1H 0ET

By email: whistleblowingcallforevidence@bis.gsi.gov.uk

Dear Ms Torey

The Legal Framework for the Protection of Whistleblowing

ICAEW is pleased to respond to your request for comments on *The Whistleblowing Framework*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

THE LEGAL FRAMEWORK FOR PROTECTION OF WHISTLEBLOWING

Memorandum of comment submitted in October 2013 by ICAEW, in response to the Department for Business Innovation and Skills' Call for Evidence *The Whistleblowing Framework*, published in July 2013

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the Call for Evidence published by the Department for Business Innovation and Skills in July 2013, a copy of which is available from this [link](#).

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

MAJOR POINTS

Support for the initiative

5. We are pleased that the Department are carrying out this exercise, and that the Government in general is trying to encourage appropriate whistleblowing, as part of a general improvement in both public and private organisations. However, any change in the law is likely to be ineffective, unless both the general culture surrounding whistleblowing and awareness of its uses and desirability is improved.
6. We make various suggestions as to ways in which this might be done, in response to specific questions below. But the most important way is in terms of "tone from the top" not only from company boards and in other entity specific contexts, but also from Government itself. This might include:
 - Consistently positive Government reactions on positive "whistleblowing" even while they condemn negative "leaking", and encouragement of the debate on how to distinguish between the two.
 - Strong action to prevent any discrimination against whistleblowers in all Government departments and agencies as well as in political parties.
 - Encouragement, and possibly stronger action, to ensure that prescribed bodies provide information and encouragement to potential whistleblowers; and also take action to deter their regulated populations or other parties from prejudicing individuals who have whistleblown to them.
7. We welcome most of the recent changes introduced in the Enterprise and Regulatory Reform Act (ERRA). However, we believe that in terms of legal environment the current legislation has been working well. Further changes should be avoided unless there is a very strong case to be made for change. This is both to avoid unintended consequences and to minimise the costs to entities in changing their systems and procedures to accommodate changes in the underlying legislation.

8. As a separate issue, entities will have a stronger reason to accept and address corporate misconduct if they believe that it will result in real damage to them and their future prosperity and reputation. Currently, it is difficult to prosecute corporate entities for many crimes committed for them or on their behalf, due to the legal doctrine of “identification” by which legal persons can only be prosecuted if a single “directing mind and will” can be identified. This means that it is difficult to make large entities appropriately answerable for much criminal activity. Further information on this is available from our representations to the Law Commission in 2011 ([ICAEW REP 09/11](#)). We are pleased to see that the Law Commission is proposing to add this project to their programme of law reform. We believe that this should be given every encouragement, as a way of making whistleblowing more productive as well as more general issues of encouraging consistently good corporate behaviour.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Section 1: Categories of disclosure which qualify for protection

Q1: Are these categories sufficient to capture all potential instances of wrongdoing that may require public disclosure? Yes or No

Q2: If no, what additional categories should there be? Please provide any relevant evidence to support this.

9. Yes. The categories of wrongdoing that whistleblowers can reveal under the protection of PIDA are:

- That a criminal offence had been, is being or is likely to be committed,
- That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- That a miscarriage of justice has occurred, is occurring or is likely to occur,
- That the health and safety of any individual has been, is being or is likely to be endangered,
- The environment has been, is being or is likely to be damaged, or
- That information tending to show any matter falling within any of the preceding categories has been, or is likely to be deliberately concealed.

These are both general and all-encompassing. We are not aware of any gaps that have emerged.

Section 2: Methods of Disclosure

Q3: Do the methods of disclosure set out in the Call for Evidence affect whether a whistleblower might expose wrongdoing? Yes or No

Q4: If yes, how (or why)?

Q5: Do these conditions deter whistleblowers from exposing wrongdoing? Yes or No

Q6: If yes, how (or why)?

Q7: Do these conditions encourage whistleblowers to expose wrongdoing? Yes or No

Q8: If yes, how (or why)?

10. Neither the methods of disclosure nor the conditions which qualify a disclosure for protection are likely to materially significantly affect the likelihood of whistleblowing, compared with the altruism and motivation of the whistleblower, and the perception that their employer, regulator and society in general will welcome the disclosure and take appropriate action. Nevertheless, the conditions are important in providing a structure and hierarchy of disclosures, under which otherwise confidential information will be disclosed in appropriate circumstances and to an appropriate audience.

Q9: How clear and understandable are the conditions that need to be met to ensure that the disclosure is protected?

11. The conditions for protection are not likely to be very clear to most employees, but need to be expressed in language which is legally robust. We do not think that an appropriate response is to change the language in the statute, but rather to ensure that appropriate guidance is available to whistleblowers and potential whistleblowers.

Q10: If you have answered yes to questions 3, 5 and 7 please provide any evidence you have to support your response.

12. N/A.

Q11: What changes, if any, do you think should be made to the qualification conditions?

13. We welcome the addition of the “public interest” condition, introduced by the ERRa, to avoid unintended protection for employees whose whistleblowing is aimed only at improving their personal position, rather than the public interest.
14. We note that when this condition was added, the “good faith” condition was removed, and replaced with a fixed adjustment to the amount of damages. Rather, we believe that the EAT should have absolute discretion to amend, or not, the amount of damages payable in cases where whistleblowing has not been done in good faith.

Section 3: Prescribed persons (I)

Q12: Should this system be amended, to one where the prescribed person/body list can be updated by the Secretary of State without the need for a statutory instrument? Yes or No

Q13: Do you foresee any problems with a system where the prescribed/person body list can be updated by the Secretary of State? Yes or No

Q14: If yes, please explain why.

Q15: Are there any other ways to accurately reflect prescribed persons/bodies? (For example, a general description with general characteristics which a prescribed person/body can be recognised by)

15. We understand why the Government considers the present system for amending the list of “Prescribed Persons” (to which protected disclosures can be made) is too rigid to allow appropriate protection to be extended, in a rapidly changing world. However, it is important that appropriate checks and balances are in place, to ensure that the nature of, and rationale for the addition of, prescribed persons is not changed too rapidly or without justification.
16. On the other hand, the present list is arbitrary and incomplete. It is unclear why the list, available [here](#), includes prescribed persons in most important areas of life, but not all. For example, education is completely missing, without prescribed persons for schools, universities or awarding bodies for qualifications. The Financial Reporting Council (FRC) is listed for matters relating to the independent oversight of the regulation of the accountancy, auditing and actuarial professions, but no body for the legal profession, though they also have an equivalent oversight regulator, in the Legal Services Board.
17. We suggest that the principles on which prescribed bodies are included should be analysed, and all bodies which come within that description should be automatically included. We suggest that this should be based on inclusion for all regulatory or law enforcement government bodies and agencies.

- 18.** We also suggest that protection should be provided in relation to appropriate disclosures made to the statutory auditors of the worker's employer. Discussions should be held with representative bodies for auditors, to ensure that this is worded in a way which will best improve the reliability of annual financial statements.

Section 4: Prescribed persons (II)

Q16: Should the referral of whistleblowing claims to prescribed persons/bodies be made mandatory? Yes or No

Q17: If yes, please provide any evidence you have to demonstrate that this could support the regulators' role.

- 19.** No. The automatic referral of whistleblowing disclosures to the prescribed persons would introduce an unwelcome perception of mandation to the disclosure of information to public sector bodies, which the whistleblower had intended to be retained by the employing organisation. In some cases, the information may include professionally, commercially or personally confidential information which it would not be appropriate to disclose outside the employing organisation.

Q18: What should the prescribed person/body do with the information once received?

Q19: Should prescribed persons/bodies be under a reasonable obligation to investigate all disclosures they receive? Yes or No

- 20.** It is inevitable that some disclosures will be made to prescribed persons which are trivial, ill-conceived or based on mistaken assumptions. However, if whistleblowing is to be encouraged then no whistleblower should be left with the impression that a disclosure made after thought and often with a great deal of anxiety has not been treated seriously. Prescribed persons should include in their information available to whistleblowers a general description of what will happen with the information they have given, whether it will be possible to give them feedback and if so when. It should also explain if feedback will not be given, why not.
- 21.** Whistleblowing information given to prescribed persons puts them on notice of the matters disclosed. If at a later stage that information is discovered to indicate a significant regulatory or other functional failing, then the prescribed person should be held additionally culpable for that failure. In addition, inaction by a prescribed person makes it more likely that a whistleblower will be justified in making a further disclosure, for example to Parliamentarians or the press. Prescribed persons which value their reputation will wish to avoid such disclosures.
- 22.** For these reasons, we do not think that it is appropriate or necessary to include specific obligations on prescribed bodies to investigate all the disclosures that they receive, but records of them should be kept for a reasonable period. Responsible Government Departments should make it clear to prescribed persons that where a disclosure has been made, which if investigated would have provided a clear public interest benefit, the fact that no investigation was made will be considered a serious matter.

Section 5: Definition of worker

Q20: Does the current definition of worker exclude any group that may have need of the protections afforded to whistleblowers? Yes or No

Q21: If yes, what groups are these?

Q22: Please provide any evidence to demonstrate these groups require protection.

- 23.** We are not aware of any categories of "worker" which should be added to the list of those which are protected under PIDA. However, in today's rapidly changing and more flexible employment market, it is quite probable that new categories will emerge. Categories should be able to be added through statutory instrument, and not require primary legislation.

Section 6: Job applicants

Q23: What impact does whistleblowing have on the individual's future employment, e.g. if there are issues around 'blacklisting' or other treatment?

Q24: Please provide any relevant evidence to confirm whether these practices are taking place.

24. There is much anecdotal information to the effect that whistleblowers suffer a significant detriment to their future employment prospects. However, it would be difficult to separate out this as the reason why a particular job applicant has been rejected: there are too few whistleblowers for their acceptance by certain employers to be treated in a statistical manner, as is currently done for employment bias on racial or gender grounds. However, this bias would reduce or be eliminated were whistleblowing to become more generally socially acceptable.

Section 7: Financial incentives

Q25: Would a system of financial incentives be appropriate in the UK whistleblowing framework? Yes or No

Q26: If yes, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrong doing?

Q27: If no, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrong doing?

25. No, it would not be appropriate to have statutory or judicial financial incentives for whistleblowers, though we see no reason why individual employers should not include them as an element of employee contracts, if they consider that desirable.

26. Financial incentives should never be available for employees in exchange for an agreement not to blow the whistle. Gagging clauses in employment contracts and termination agreements should not only be unenforceable, but should also be made illegal.

Q28: Where are financial incentives used as an effective measure to prevent wrongdoing / illegal activity? For example, in certain industries.

27. We do not have information available on this matter.

Section 8: Non-statutory measures

Q29: How would the introduction of non-statutory measures make a difference?

Q30: What types of non-statutory measures could Government consider to support the statutory framework?

28. As noted above, we believe that whistleblowing can only be encouraged if those making disclosures believe that their information will be helpful in that their employer, regulator and society in general will welcome the disclosure and take appropriate action. Much could be done in non-statutory ways, by the Government and its agencies that will encourage society and all its participants in this belief. Actions that could be taken would include:

- Using very consistent language to distinguish desirable "whistleblowing" which will help promote the public interest in the UK, from undesirable "sneaking", "leaking" or otherwise revealing confidential information that is likely to harm it.
- Encouraging public debate on the distinction between these. This will raise public awareness, as well as decreasing the likelihood of inappropriate disclosures by public servants.

- Public recognition of whistleblowers.
- Strong condemnation and other non-statutory action against any public body (including political parties) who do not welcome appropriate whistleblowing disclosures.

Section 9: Further evidence

Q31: Please provide any further evidence in support of any issues you feel should be reflected through this call for evidence but have not been captured in the main document.

- 29.** As noted above, under the previous section, we do not think that financial incentives should ever be available for employees in exchange for an agreement not to blow the whistle. Gagging clauses in employment contracts and termination agreements should not only be unenforceable, but should also be made illegal.
- 30.** As part of the general campaign to increase awareness of the desirability of more whistleblowing and its actually being done, we think that all prescribed persons should include advice to whistleblowers on their web sites. This could include how and what whistleblowers should communicate to the prescribed person, what action they will take as a result and what the whistleblower can expect by way of feedback (and why). Web based information should be backed by the availability of further guidance by telephone. This could initially be suggested to the prescribed persons, but if that fails to result in the desired actions, consideration could be given to imposing a statutory requirement.

Q32: Please provide any case studies of situations where a whistleblower has had a positive outcome with their employer after blowing the whistle.

- 31.** We do not have information available on this matter.

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