Shelley Torey
3rd Floor Abbey 2
Department for Business Innovation and Skills
1 Victoria Street
London SW1H 0ET
By email: whistleblowingcallforevidence@bis.gsi.gov.uk

5 November 2013

Dear Sirs

Re: Response to the Government's call for evidence launched in July 2013 (the "Call for Evidence") in respect of the UK whistleblowing framework

Thank you for the opportunity to respond to the Call for Evidence.

Blueprint for Free Speech ("**Blueprint**"; "**we**") is an international not-for-profit organisation concentrating on research into "freedoms" law. Our areas of research include public interest disclosure (whistleblowing), defamation, censorship, right to publish, shield laws, media law, internet freedom (net neutrality), intellectual property and freedom of information. We have significant expertise in whistleblowing legislation around the world, with a database of analyses of more than 20 countries' whistleblowing laws, protections and gaps.

In addition to our broader research into whistleblowing law worldwide, in particular, in the UK, we commissioned a barrister who worked previously as a professional journalist to conduct in-depth interviews with 12 UK whistleblowers from different sectors earlier this year (the "**Case Studies**"). The arguments and recommendations set forth in this submission are supported by the Case Studies and other empirical data examined.

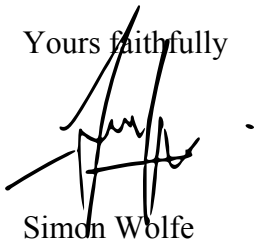
We have provided a response to each of the nine sections identified in the Call for Evidence and our responses are numbered accordingly. In respect of section 2 (*Methods of Disclosure*), we briefly touch on the new "public interest" test. For section 9 (*Further Evidence*), we have chosen to focus on the issues of: (a) law enforcement and national security; (b) resolving whistleblowing disputes; (c) settlement agreements and gag orders; and (d) public attitudes to whistleblowing.

Please also note that, whilst we have endeavored to respond within the parameters of the Call for Evidence, we have expanded the questions you raise in both section 3 (*Prescribed Persons (I)*) in which we discuss the role that an independent whistleblowing ombudsman would have in improving the current whistleblowing framework and section 8 (*Non-statutory Measures*) in which we consider that the only way to properly address the issues you raise, in certain areas, is through legislative change.

Where relevant, we have referred to the Public Interest Disclosure Act 2013 (Australia (Cth)) (the "**APIDA**"), which we hope will provide a useful comparison to the Employment Rights Act 1996 (United Kingdom) (the "**ERA**"), as amended by the Public Interest Disclosure Act 1998 (the "**PIDA**") and the Enterprise and Regulatory Reform Act 2013 (the "**ERRA**"). Please note that for the purposes of this submission any reference to "employer" is deemed to encompass agencies, institutions, companies and bodies (public or private) as it is used under the PIDA.

For any queries related to this submission, or any other matter, please do not hesitate to contact me. I would be happy to meet with you to discuss any of our recommendations in more detail.

Yours faithfully



Simon Wolfe
Head of Research
E-mail: simon@blueprintforfreespeech.net
Blueprint for Free Speech
Ross House, 247 Flinders Lane, Melbourne Australia 3000

Submission of Blueprint in response to the Call for Evidence in respect of the UK whistleblowing framework

1. Categories of disclosure which qualify for protection

We believe that the current categories of disclosure do not adequately capture all potential wrongdoing, especially misconduct by public officials in relation to abuse of authority, mismanagement and waste of public funds and property. It is imperative that UK legislation captures these types of wrongdoing and that any person who comes forward to expose such wrongdoing is afforded adequate protection.

We therefore support the expansion of the current six categories of protected disclosure to include conduct that amounts to (or has amounted to, or will amount to, as the case may be):

(a) perverting the course of justice;

(b) corruption of any kind;

(c) maladministration, which is based in whole or in part, on improper motives, or which is unreasonable, unjust, oppressive or negligent;

(d) abuse of public trust;

(e) gross mismanagement or wastage of public funds and public property; and

(f) a tightly drafted "catch-all" mechanism which would give employment tribunals flexibility to determine other categories of protected disclosure.

Information disclosed in relation to these categories is clearly in the "public interest". The inclusion of the above conduct would bring the ERA closer in line with comparable legislation in Australia and the US. For example, Section 29 of the APIDA lists ten categories of suspected or probable illegal conduct/wrongdoing, or "disclosable conduct", including certain of the categories identified above. Similarly, US federal legislation allows for federal employees to disclose information relating to gross mismanagement, gross waste of funds, and abuse of authority.

2. Methods of disclosure

Whistleblowing legislation must be easily understood by whistleblowers, some of whom may not usually be familiar with navigating legal process. However, the legal conditions and thresholds imposed by the ERA are not easily understood by most whistleblowers (even the legal community has little idea as to what exactly the "public interest" constitutes, subject to a ruling by the courts). In our experience, this has led to a perception amongst whistleblowers that the legal system focuses on the whistleblowers rather than the wrongdoing itself. Specifically, whistleblowers are concerned that a court will focus more on their intentions and actions rather than on the substance of their disclosure.

Our particular concerns are as follows:

(i) *The legal threshold for internal disclosure is too high*

We believe that the introduction of the public interest test deters employees from making internal disclosures (Section 43(B)(1) of the ERA provides that a disclosure, regardless of whether it is made internally or externally, must be in the public interest). As such, we recommend that, at a minimum, the public interest test be expressly excluded for internal disclosures. By way of example, we refer to Section 26 of the APIDA, by which the public interest test applies only to external disclosures or to disclosures in the course of obtaining legal advice.

(ii) *The "reasonable belief" test, when combined with the "public interest" test in Section 43(B)(1) of the ERA, sets the legal threshold too high*

Concern was raised in the Shipman Inquiry Fifth Report[1] (the "**Shipman Inquiry**") as to whether employees can establish that they have a reasonable belief in the truth of the information being disclosed, especially when the information they have received is incomplete and of a second-hand nature. When combined with the public interest test, we feel that the legal threshold for protection has been set too high. Employees are now required to determine what the bigger picture is, and on the basis of incomplete information. This will only result in employees believing that they can never qualify for protection, as they believe that the odds are stacked against them. The result will be that fewer whistleblowers will step forward and less serious wrongdoing revealed – thus the public will lose. We therefore support changing the "reasonable belief" test to one of "reasonable suspicion or concern" in Section 43(B)(1) of the ERA.

(iii) *The "reasonable belief" test for internal disclosure in Section 43(C)(1)(b) and prescribed persons in Section 43(F) discourages whistleblowers*

Internal disclosures or disclosures to a prescribed person should be encouraged partially because there is a chance for the wrongdoing to be rectified swiftly and early on. We agree with the Shipman Inquiry that the imposition of a reasonable belief test discourages an employee who is sufficiently concerned about a matter from disclosing it to the employer, because he is skeptical of the information received and cannot prove "reasonable belief". We are concerned that, by the time that the employee can show "reasonable belief", the wrongdoing may have already existed for some time. Therefore, we recommend amending the reasonable belief test to one of "reasonable suspicion and concern", in order to encourage early disclosure.

In respect of disclosures made to a prescribed person, a similar argument could be made regarding the condition that the information must be "substantially true". This is an unrealistic condition, as it is the case that whistleblower will sometimes only have access to incomplete or second hand information. This is because an employee may only be able to see or prove the wrongdoing that touches their particular area of an organisation. The odds are further stacked when taking into account the fact that a whistleblower will lose protection if the report is to a prescribed person not on the list or to the wrong prescribed person. A high

[1] Fifth Shipman Inquiry report, Cm. 6394 (2004).

threshold, combined with a risk of losing protection, only discourages potential whistleblowers, which ultimately prevents the regulator from being aware of a wrongdoing of which they should be aware.

We therefore recommend removing the condition that information must be substantially true; a fairer allocation of roles would be for the whistleblower to report a suspicion or concern as soon as possible, and for the regulator or ombudsman (please note our recommendations in respect of the ombudsman in section 3 (*Prescribed Persons (I)*)) to investigate its veracity.

3. Prescribed Persons (I)

Provisions in the PIDA relating to a "prescribed person" are complex and many regulatory bodies are not on the list of prescribed persons. Consequently, it is difficult for a potential whistleblower to know who to approach when the nature of their disclosure is such that they do not want to disclose internally but at the same time do not want to go public. Furthermore, approaching the wrong regulator can potentially strip the whistleblower of any protection under the PIDA. We believe that giving the Secretary of State flexible powers to amend the list of prescribed persons, although a step in the right direction, will only work effectively if whistleblowers are provided with the right support framework in order to identify the right prescribed person.

To provide this framework and to improve the whistleblowing landscape in the UK in a variety of different ways, we believe that there is a general need for an independent, cross-sector whistleblowing ombudsman responsible for ensuring that the rights afforded to whistleblowers can be protected as effectively as possible. We envisage such an ombudsman having a wide-ranging scope of authority to: (i) investigate any disclosures made to it; (ii) ensure employers and regulators are fulfilling their obligations effectively (see sections 4 (*Prescribed Persons (II)*) and 8 (*Non-statutory Measures*) in respect of our thoughts on these); (iii) impose fines or other sanctions on employers when they breach their obligations; and (iv) generally being a focal point for advice to whistleblowers and employers whilst working across the spectrum of the different regulatory bodies – it is in this context that an ombudsman would have the specialist knowledge to assist potential whistleblowers in identifying the relevant regulator. We note that the Commonwealth Ombudsman in Australia was attributed with similar powers this year under the APIDA. Legislatively, as is the case in the APIDA, any disclosure made to an ombudsman would, by necessity, need to be protected.

In addition, the ombudsman could play an important part in promoting public educational and awareness programmes (see section 8 (*Non-statutory Measures*) which deals with the need for raising the public profile of the benefits of whistleblowing).

4. Prescribed Persons (II)

The Case Studies highlight a number of instances in which regulators are often not clear about their role in the whistleblowing process and are in some cases not fulfilling their roles and intervening when necessary. For example, when an employee raises a concern with a prescribed regulatory body, there is no requirement that the regulator should investigate the concern, provide feedback or protect the employee from reprisal. In addition, even if the regulator is willing to investigate the disclosure, the law does not prescribe any powers for the regulator to deal with or penalise an employer that has victimised/dismissed a whistleblower.

We believe that the regulators need to be equipped with greater responsibility in the investigation of all disclosures made to them with associated powers similar to those we propose are given to an ombudsman. We envisage the relevant regulator and the ombudsman having a dual role. Whilst there would be some degree of overlap, the ombudsman would necessarily have more of a backseat role in overseeing the work of each regulator ("regulating the regulators") and any disclosures made to it specifically whereas the regulator would have a statutory obligation to actively monitor each disclosure made to it.

5. Definition of Worker

Owing to ever-changing developments in the UK workforce and workplace, certain groups of employees are not covered by the protections of the ERA and the PIDA. These include volunteers, non-executive directors, board members appointed by the public appointments commissions, LLP members and employees wrongly identified as whistleblowers. Please refer to section 9 (*Further Evidence*) for our comments in respect of members in the armed services and intelligence services.

6. Job Applicants

Under current UK legislation there is no protection offered to former whistleblowers from being "blacklisted". Unlike those alleging discrimination, however, candidates for employment who are victimised because of a prior protected disclosure have no recourse. There is significant anecdotal evidence that whistleblowers can be perceived as troublemakers and can struggle to find work. The problem of blacklisting is particularly acute in small, close-knit or specialised industries.

The Case Studies reveal that for many employees whistleblowing was career destroying and resulted in the loss of a hard-won reputation. One whistleblower in particular complained that he was subject to onerous background checks and employers regarded him as "dangerous". Another whistleblower interviewed stated that her former organisation had written to clients giving its story about what really happened and as a result clients viewed her as "too dangerous" to work with. Many of the whistleblowers interviewed struggled to find new employment and those who did so were often forced to accept employment that was significantly less well remunerated than their previous employment and they were often only offered a short-term contract.

As a first step, we strongly recommend that the Government should extend the existing legislation, which prevents the blacklisting of employees who have engaged in trade union activities, to whistleblowers. [2] In addition, the reach of the whistleblowing regime should extend to cover job applicants who suffer detriment from prospective employers. It is imperative that employment tribunals when making their award for compensation appreciate the difficulties faced by whistleblowers in finding new employment. The inadequacy of compensation awarded by employment tribunals was one the most cited complaints in the Case Studies.

---

2 The Employment Rights Act 1996 (Blacklists) Regulations 2010.

7. Financial Incentives

The US Experience

We welcome the Government's recent decision to consider the case for incentivising whistleblowing, including the provision of financial incentives, to support whistleblowing in cases of fraud, bribery and corruption. The Government should seek to draw on the experience in the US of the False Claims Act (as amended) 1986 (the "**FCA**") which contains *qui tam* provisions that allow individuals with evidence of fraud against the government to sue on behalf of the government. The whistleblowers are eligible under the FCA to receive rewards of between 15 - 30% of the amount they help the government to recover. A similar reward scheme was established by the Securities and Exchange Commission (the "**SEC**") after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (the "**Dodd-Frank Act**"). Under the SEC scheme, whistleblowers who supply high quality information that results in sanctions exceeding $1 million can receive rewards representing up to 30% of those sanctions.

In our view, the *qui tam* remedies offered in the US have proven to be an effective tool in combatting fraud against the government by encouraging whistleblowers to speak up about allegations of fraud. In support of this assertion, statistics released by the US Department of Justice indicate that of the $4.9 billion in fiscal year 2012 recoveries, a record $3.3 billion was recovered in whistleblowers suits.[3] The results in terms of spurring whistleblowers have also been impressive with 647 *qui tam* suits filed in fiscal year 2012 alone.[4] In contrast, prior to the introduction of the *qui tam* provisions, FCA actions averaged six or fewer per year. The introduction of *qui tam* remedies was a significant factor for the dramatic increase in *qui tam* suits. Other key changes such as the lowering of the burden of proof and the degree of control whistleblowers were given over the litigation also contributed to the rise in *qui tam* suits.

Empirical research – what motivates whistleblowers to speak up?

Furthermore, empirical studies from both the US and the UK indicate that financial incentives play a significant role in motivating whistleblowers to disclose. In 2009, the University of Chicago and University of Toronto conducted a seminal study of 216 whistleblowing cases and concluded that "monetary incentives for fraud revelations seem to play a role regardless of the severity of the fraud … a strong monetary incentive to blow the whistle does motivate people with information to come forward".[5] Similarly, in the UK a survey conducted by PricewaterhouseCoopers ("PWC") earlier this year revealed that about half of the 111 respondent employers felt that offering cash rewards would encourage an open culture of speaking up.[6]

---

3 See, Press Release by US Department of Justice dated 4 December 2012, available at http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html.

4 See, Taxpayers Against Fraud statistics, available at https://www.taf.org/resource/fca/statistics

5 *Dyck, Morse, and Zingales*, Who Blows the Whistle on Corporate Fraud?, 65 Journal of Finance 6, pp. 2213 – 2253 (Sept. 2009), available at http://faculty.chicagobooth.edu/luigi.zingales/papers/research/whistle.pdf, p. 4.

6 PWC Survey 2013: Whistleblowing – Striking a balance, available at http://www.pwc.co.uk/fraud-academy/publications/whistleblowing-striking-a-balance.jhtml.

Opponents of *qui tam* remedies often cite empirical studies where the majority of whistleblowers indicated that they were motivated by personal ethical standards or a desire to curtail the wrongdoing. This is supported by the Case Studies we conducted which revealed that whistleblowers are often motivated by the desire to do "the right thing" and not by financial incentives. However, the desire to do "the right thing", on the one hand, and to be compensated for risk, on the other hand, are by no means mutually exclusive.

A strong sentiment that emerged from the Case Studies was that the compensation awarded to the whistleblowers was grossly inadequate. This is largely due to the high costs of funding legal assistance. For example, one of the whistleblowers we interviewed was awarded the sum of £100,000 including aggravated damages but she incurred legal costs of £212,000. The legal costs were kept down by the fact that she was a solicitor and able to do a large part of the work herself. We argue that the introduction of financial incentives would allow for a more balanced risk/reward assessment and encourage whistleblowers, who are motivated by a moral duty but worried about the personal and financial hardship, to come forward.

Recommendations

In the UK, we see that there are three options going forward with *qui tam* remedies:

(a) the whistleblower him or herself receives a percentage of the money saved from the exposure of wrongdoing; or

(b) a "public interest disclosure fund" or "whistleblower protection fund" (the "**Whistleblower Fund**") is created to assist future whistleblowers with costs, funded by a percentage of cases brought on behalf of the Government (i.e. a *qui tam* remedy but the beneficiaries are future whistleblowers). Costs should include legal expenses, loss of income as a result of the disclosure, medical costs associated with the making of the disclosure, retraining costs where a whistleblower must change employment / profession; or

(c) both of the above.

We recommend the Government should pursue options (b) or (c), as applied to government or public agencies. In particular, option (c) is worth strong consideration, implementing both the financial percentage to the whistleblower that exposes the wrongdoing and also contributing a percentage to the Whistleblower Fund designed to ensure future whistleblowers have legal funding to defend themselves. Both work to encourage whistleblowing and therefore the exposure of corruption in two separate ways – the first to personally incentivise a whistleblower to come forward where it might seem the risk to their safety or career is too great in normal circumstances. The second is where the whistleblower, whilst convinced of the merit of their disclosure, simply cannot afford to defend themselves against legal reprisal.

In our opinion, the establishment of the Whistleblower Fund would address many of the perceived weaknesses in the US system. In particular, it would facilitate a more equitable distribution of monies recovered by the Government and avoid rewarding only one arbitrarily selected victim of the misconduct. Monies from the Whistleblower Fund could be used to fund legal representation for whistleblowers, which would in turn improve the adequacy of a compensatory award.

We envisage that the Whistleblower Fund will be administered on the basis of supporting those whistleblowers whose cases are both in the public interest and of a nature where whistleblower would not be entitled to a share of any recovered monies. Many whistleblower cases reveal fraud, but some reveal other types of wrongdoing that do not directly involve things such as theft of money or assets. The public debate occurring presently in the UK stemming from extensive media reportage of health-related whistleblowing incidents illustrates the importance of these "non-financial wrongs" to the wider citizenry. If, for example, a whistleblower exposed practices leading to deaths in hospitals, they would not normally be entitled to a financial reward, as there would be no financial saving made by the government.

It is just this sort of case that we would envisage might receive financial support from the Whistleblower Fund. We envisage that the Whistleblower Fund should be able to award *qui tam* remedies at its own discretion to whistleblowers to compensate for losses which cannot be recouped in other ways, e.g. for cases involving a non-monetary wrong. Any person who has a pre-existing legal or contractual duty to report information about wrongdoing would not be eligible for an award or funding under the proposed scheme.

The mechanics of the Whistleblower Fund should be set out in legislation, including the split of monies, and a small independent body should be established to administer the Whistleblower Fund. As a guide, we would propose the following division of monies recovered through whistleblowing:

- 50% returned to the Government;
- 30% to the Whistleblower Fund; and
- 20% to the whistleblower.

Whistleblowers would be encouraged to apply to the Whistleblower Fund for financial support. The independent body would review requests for funding against defined criteria. We would suggest that the independent review body would include representatives from the broader community who have previously been whistleblowers (and whose cases have concluded), as well as legal experts. Further, this review body would include representation across a wide set of industries/disciplines, with special focus where there has been significant whistleblowing activity in the broader public interest. These areas would include, among others, health, aged care, financial services and consumer safety.

It is worth noting that a "bounty scheme" is not totally alien to the UK as the Office of Fair Trading ("OFT") is already empowered to pay rewards up to £100,000 for information leading to the detection of illegal cartels.[7] Other jurisdictions are also considering establishing a whistleblower protection fund, most notably in Europe, where the Netherlands has proposed in its Bill on whistleblowing the establishment of a whistleblower fund that will provide financial assistance to whistleblowers.

---

[7] See OFT, Rewards for information about cartels, http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards. Similarly in Australia, the former chairman of the Australian Competition & Consumer Commission has called for the introduction of financial rewards for whistleblowers, which would allow regulators to take on more cases and help level the enforcement playing field; see http://www.theaustralian.com.au/business/companies/reward-whistleblowers-to-keep-level-the-playing-field-baxt/story-fn91v9q3-1226748521775.

8. Non-statutory Measures

Although the PIDA affords protection to genuine whistleblowers, it is nevertheless a remedy that need not exist in a perfect world in which all employers have both the motivation and the internal mechanisms to sufficiently challenge inappropriate behaviour that is brought to their attention by whistleblowers. The Case Studies highlight a variety of failure points that still exist within employers when dealing internally with whistleblowers. These can lead to protracted, incompetent and often self-serving internal investigations which, ultimately, often prove ineffective at dealing with malfeasance which are unnecessarily traumatic and career-threatening for the whistleblower.

These failure points include a lack of information being made available to employees on when and how to whistleblow; internal policies which allow inappropriate persons (such as the line manager of the person being investigated) to lead the internal investigation on matters they may be implicated in or with whom they have a conflict of interest; treating a disclosure in same manner as an internal "grievance" which fundamentally undermines the disclosure by demeaning it to nothing more than a HR issue; and investigations being drawn out over a prolonged period of time with limited information being provided to the whistleblower. These failures are illustrated by a recent YouGov survey in which 34% of respondents stated they would not be comfortable with disclosing at work and 55% were unsure whether there is a law protecting whistleblowers.[8] [9]

Furthermore, despite progress in promoting the importance of whistleblowing, whistleblowers often still suffer a workplace culture, which results in intimidation and victimisation towards them (no matter how just the disclosure). This continues to lead to formal reprisals (which, as demonstrated by the Case Studies still involves dismissal).

The Need for Statutory Measures

Whilst there are non-statutory remedies available to help ameliorate these problems (discussed below), we nevertheless believe that there are certain minimum standards that should be enshrined on a statutory basis. We propose the following:

(a) for all listed companies, the imposition of an obligation to adopt a whistleblowing policy based on the British Standards' (BSI's) *Whistleblowing Arrangements Codes of Practice.* This would significantly improve the current regime in which listed companies merely need to demonstrate that they have a suitable whistleblowing system in place pursuant to the UK Corporate Governance Code and more closely

---

[8] YouGov Survey commissioned by Public Concern at Work, June 2013.

[9] These figures take on even greater significance when compared to a recent survey which found that 81% of people in Britain believe that people should be supported for whistleblowing (http://www2.gre.ac.uk/about/news/articles/2012/a2382-public-support-for-whistleblowers). See section 9(d) for more detail on this. The University of Greenwich ran the survey in the UK. The survey was developed by The University of Melbourne and Griffith University in consultation with key members of the International Whistleblowing Research Network worldwide. The extended survey is available at https://whistleblowingsurvey.org in ten languages.

align the UK with the obligations placed upon companies listed in the US pursuant to the *Sarbanes-Oxley* legislation;

(b) for all employers, there should be certain minimum standards and procedures to be adhered to as is the case in the APIDA. We recommend that the following are placed on a statutory basis in the UK:

(i) employee anonymity if requested (including reprisals against fellow employees and employers if breached);

(ii) the use of designated officers and channels within each employer for dealing with whistleblowing matters and ensuring that the issue is given full weight and not treated merely as an internal "grievance"; and

(iii) time limits for internal employer investigations and certain other key "milestones" that must be achieved in respect of each disclosure to ensure that it is investigated as fully and fairly as it deserves whilst keeping whistleblowers in the loop; and

(c) all employers should be compelled to provide each employee with a standard form guide to whistleblowing which includes details on that employer's internal whistleblowing procedures; the rights afforded to the employer under the PIDA; and details of how to contact the relevant regulator or whistleblowing ombudsman.

In section 3 (*Prescribed Persons (I)*), we outline the need for a cross-sector whistleblowing ombudsman. We believe that the role of such an ombudsman would go hand-in-hand with enforcing the statutory obligations that need to be imposed on employers if a comprehensive solution to encouraging whistleblowing within employers is to be achieved.

Non-Statutory Measures

In addition to the statutory measures outlined above, fundamental attitudes within many employers need to change to further increase awareness that having in place an effective whistleblowing framework will be in their own long-term interests (for example by preventing circumstances arising which could lead to injuries and deaths; regulatory or other external interference; financial loss or fines; or litigation). Employers need the "carrot" of being duly incentivised to appreciate these benefits just as much as they need the "stick" of a basic statutory whistleblowing framework to comply with. It is this that will engender the cultural changes within employers that are necessary. We propose that:

(a) insurers are made aware through a targeted campaign of the financial benefits of having in place an effective whistleblowing policy and encouraged to impose greater premiums on employers that cannot demonstrate an internal whistleblowing policy of sufficient robustness relative to the size and business of that employer. This would create a market-based incentive for employers to address their own attitudes and approaches to whistleblowing; and

(b) a general campaign is launched by Government to employers and the public at large highlighting the wider socio-economic benefits of whistleblowing about serious wrongdoing and the rights that are available to individuals under the PIDA.

9. Further evidence

A. National Security

We do not wish to diminish the need for secrecy and confidentiality in certain situations. However, there are circumstances in which the public interest is better served by the exposure of serious wrongdoing than the maintenance of secrecy. The notion of a blanket ban on legally-protected disclosure for the armed forces and/or intelligence services is not supported by comparable legislation in other countries, such as Australia and the United States.

Ultimately, Blueprint strongly supports the Public Interest Disclosure Bill 2012 (Australia(Cth)) (the "**Wilkie Bill**"), which provides detailed guidance on when and how public officials can disclose internally and externally. For example, Part 5 of the Wilkie Bill potentially enables employees in the armed forces and the intelligence services to disclose to the media, subject to clear constraints as to how and when they can do so (for example, whistleblowers are only allowed to disclose what is reasonably necessary to show a wrongdoing; it does not allow them to freely disclose any and all information received).

At a bare minimum, however, the Government should adopt provisions similar to those in the APIDA in respect of disclosures made by employees in the armed forces and national security. There is little reason why UK employees serving in those areas cannot be afforded similar protections that their Australian counterparts currently enjoy. Section 26 of the APIDA allows for the internal disclosure by all officers or employees, including those who work in the armed forces and also the intelligence services.

In addition, we support limited external disclosure by the armed forces. Such a precedent can also be found under Section 26 of the APIDA. The APIDA also introduces the concept of a separate ombudsman (independent to that proposed in section 3 (*Prescribed Persons (I)*)) which would deal exclusively with matters of intelligence. We propose that a similar bi-focal structure is adopted here in the UK.

B. Resolving whistle-blowing disputes

Research has shown that the two main reasons why people do not report perceived wrongdoing are fear of retaliation and a belief that, even if they did so, the matter would not be rectified.[10] The remit of the employment tribunal is limited to finding a causal link with the detriment and the compensation that flows from that. In addition to retribution and compensation, whistleblowers are often looking for understanding and reconciliation. The Case Studies reveal that many whistleblowers view the employment tribunal as formalistic, expensive and a playground for lawyers to engage in tactical games. Employment tribunals are ineffective at resolving whistleblowing disputes because they are neither empowered to investigate protected disclosures nor to recommend rectification where wrongdoing is established.

---

10 *Lewis*, Resolving Whistleblowing Disputes in the Public Interest, Industrial Law Journal, Vol. 42, no.1.

We strongly recommend the imposition of a duty on the employment tribunals to refer any decision made at an interlocutory or final decision stage to the relevant regulator to investigate the wrongdoing. This would reassure whistleblowers that positive steps are being taken to eradicate the wrongdoing and would change their perceptions about the dispute resolution process. However, the effectiveness of this approach will depend on how competently the regulator deals with the investigation. We envisage a supervisory role for the ombudsman in the investigatory process similar to that proposed under the APIDA, whereby a decision of the principal officer not to investigate a disclosure, along with the reasons for the decision, must be notified to the ombudsman. This degree of oversight would ensure that a proper investigation of the wrongdoing is carried out by the regulator (where justified) and that valuable information disclosed by a whistleblower is not lost in a black hole.[11]

In addition, we urge the Government to consider obliging employers to provide alternative forms of redress for whistleblowers such as consultation, mediation and arbitration. These alternative dispute resolution mechanisms are procedurally less formal, inquisitorial rather than adversarial, and less expensive. The existence of effective mechanisms such as these also encourages serious wrongdoing to be tackled much earlier, before it becomes large-scale.

C. Settlement Agreements and Gag Orders

The lack of funding for whistleblowers, which has been exacerbated by the recent cuts to legal aid and the imposition of mandatory fees on employment tribunal claimants, is forcing many whistleblowers to enter into contingency fee arrangements ("**CFA**"). CFAs incentivise settlement and create potential conflicts of interest. The "pressure to settle", inherent in CFAs, leads to cases being compromised inappropriately.

Furthermore, in practice, the entry into a settlement agreement often entails agreeing to a gag order that prohibits the disclosure of the wrongdoing to the public. The issue of whistleblowers being prevented from revealing the serious wrongdoing due to gag orders continues to be a serious problem in the UK, particularly in the health sector.

While on paper the PIDA restricts the imposition of gag orders on whistleblowers, in practice this has not worked. Exactly why this is so requires more in depth analysis, which Blueprint will be conducting over the coming months. Thus we may be in a position later in the year to provide more comment on this specific point. While we do not have an easy solution to this problem, we believe that it must be addressed – and urgently.

The essential tension is this - on the one hand, the mechanisms for fixing the problem should ensure that whistleblowers are free to discuss their cases – and the wrongdoing that triggered those cases – in order to ensure that the wrongdoing is not allowed to continue. On the other hand, any person should be free to contract away their rights to discuss such matters (assumedly at an additional price to the person insisting on the gag clause). Public interest disclosure is a right against the world. I.e. the difficulty is how to measure a private citizen's right to contract for silence against the other party (presumably for a higher price) as against the unfairness of not being able to disclose particular conduct, for the benefit of the public as

[11] A Freedom of Information request, submitted by Fundweb, revealed that the UK Financial Services Authority did not record what happened in the 15% of the whistleblowing reports it received in 2012/13.

a whole. Public interest gagging contracts might be thought of as having three parties (say the employer, the employee (being gagged) and "the public"). The public is not a party to a contract and therefore this creates difficulties in regulating the contents of the contract.

The two competing tensions identified above must at least be considered and a solution must be found that respects each of these rights Either way, the problems of gag orders must be addressed as it strikes at the heart of being able to expose and then stop serious wrongdoing, which is why people blow the whistle in the first place.

D. Public Attitudes to Whistleblowing

It is worth noting that the public attitude to whistleblowing, as illustrated by population survey, is highly supportive of protection for whistleblowers. In a representative sample survey of 2000 people in the UK, 81% of Britons believed that people should be supported for revealing serious wrongdoing, even if it meant revealing information from inside the organisation, however, only 47% of respondents believed it was currently generally acceptable for this to happen. [12]

This illustrates an enormous gap between what is currently the case in the UK and what the population would like to be the reality. Further, only a little more than half (58%) of Britons were confident something appropriate would be done if they reported wrongdoing in their organization.

Finally there is overwhelming public support for allowing whistleblowers to use external channels. 88% of Britons believing that whistleblowers should be able to use a journalist, the media or the Internet to draw attention to serious wrongdoing, either in the first option, (9%), last resort (44%) or whenever there becomes a specific reason to do so (34%). Only 5% of Britons believed whistleblowers should not be able to use these external channels. [13]

We wish to take this opportunity once again to thank the Government for accepting our evidence and we hope to be continually useful as it considers potential reform to the whistleblower legislation.

---

[12] The following data comes from a survey run by ComRes for the University of Greenwich, conducted among 2,000 Britons aged 18+ in 2012. Respondents were randomly selected, and data was weighted to be demographically representative of all British adults. The questions in the survey were drawn from the World Online Whistleblowing survey at https://whistleblowingsurvey.org, developed by The University of Melbourne and Griffith University in consultation with key members of the International Whistleblowing Research Network worldwide. See: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176193

[13] 8% of respondents answered "don't know".