



IoD response to BIS Call for evidence: *The Whistleblowing Framework*

The Institute of Directors (IoD) welcomes the opportunity to respond to the Call for evidence on *The Whistleblowing Framework* published by the Department for Business Innovation & Skills in July 2013.

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 36,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises (SMEs), ranging from long-established businesses to start-up companies. IoD members' organisations are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

IoD member survey on whistleblowing

1. In order to contribute to the Government's Call for Evidence, and to inform the IoD's response, we surveyed our members on their experience of working within the law on whistleblowing and on their views on some of the suggestions made in the document. Over 1,300 IoD members responded to the survey.
2. 43% of members who responded to the survey questions said they have a formal, written whistleblowing policy or procedure explaining to employees how they can raise concerns at work. 39% have no such written policy/procedure. The remainder (18%) either did not know, or have no employees.
3. Just 2% of respondents said their organisation has been the subject of an employment tribunal claim over the past 3 years alleging dismissal or detrimental treatment for having made a protected disclosure. Of these, just one claim had been upheld by an employment tribunal. 16 claims had been settled with the claim withdrawn, and 10 claims had been dismissed or struck out by the employment tribunal. These numbers should be seen in the context of the fact that many employers will choose to settle before a formal tribunal claim is made, even if they believe the allegations have no merit, in order to avoid the time and costs incurred defending a tribunal claim.
4. We asked IoD members to what extent they agreed or disagreed that the current law provides adequate employment protections for whistleblowers? 38% said they agreed that the law provides adequate protections, 29% said they disagreed, while 22% were neutral.

5. From comments made in response to the survey, it is clear that IoD members generally support the policy of helping genuine whistleblowers, and of providing them with protection against retaliatory behaviour. However, it is also the case that many members have had negative experiences of the whistleblowing law being used in an inappropriate, unjustified or malicious way. The following are some typical comments:

“Protected disclosure is currently so wide that it has been claimed in the 2 tribunals [cases against the employer], even though neither were genuine whistleblowing cases. Our view is that it is being used in order to uncup the potential damages and/or up pressure on the employer to settle.”

“Malicious anonymous whistleblower allegation of financial wrongdoing, causing personal distress to the accused while it was investigated. Subsequent investigations found the allegation had come from an ex-employee who had been dismissed for financial wrong doing!”

“Need to be careful to distinguish between genuine whistleblowers and others who may be under performers etc who seek sanctuary behind the title. Ie someone fearing dismissal or redundancy shouldn't be able to just put in a spurious claim in order to delay or avoid the application of fair employment procedures.”

“Not my own organisation, but client companies have had unnecessary costs/time incurred dealing with spurious claims as part of other employment issues - a sort of "bolt on" to other claims.”

“There has been/remains too much weight in respect of encouraging people to make disclosures without due evidence i.e we have had circumstances where employees/ex-employees have made malicious allegations to cause trouble then disproved, but in the meantime the investigations have caused significant cost and upheaval to areas of the business. A way needs to be found to enable genuine whistleblowing and give protection in those cases, whilst discouraging (or even penalising) those found to be abusing the system.”

“This is potentially noxious law, Whilst the intent is good, trying to protect yourself against malcontents with false accusations is difficult, costly and time consuming.”

“We have had experience of a whistle-blowing complaint by an employee who was the subject of disciplinary procedures and subsequently left the company. While broadly in favour of protecting genuine whistleblowers, this should be tempered by penalties for whistleblowers who make unfounded or malicious allegations because of a grievance rather than because they genuinely believe that there has been a breach of the law.”

“Unfortunately the Legal profession is not helping with their no win no fee culture and even though we won our two tribunals it still cost the business a tidy sum of money to sort out and the claimant got away scot free.”

6. In contrast, some IoD members believe whistleblowers are inadequately protected, particularly in the public sector where there have been high profile cases of individuals disciplined or dismissed. The following are some comments:

“Research shows that most high-profile whistleblowers have been isolated and persecuted. The reaction of government and large organisations is still largely negative. Whistle-blowers then suffer further penalties and prejudice whilst seeking another job. In short, protections are inadequate.”

“The experience of whistleblowers so far has shown that they have no 'de facto' protection, irrespective of what the law says.”

“There is certainly no further protection required within the private sector - maybe not the case in the public sector!”

“Needs to be stronger - eg. NHS.”

In sharing these comments from IoD members we would stress that it is possible the respondents have in mind instances reported in the media where individuals have either not (or not yet) sought to enforce their rights at an employment tribunal, for whatever reason, or they have done so but the respondents were unaware of any compensation that was awarded. As we point out below, if some whistleblowers suffer unacceptable treatment it does not automatically follow that the law is inadequate.

7. We asked whether there were any aspects of the current law that have caused IoD members unnecessary problems, costs or burdens. The following are some illustrative comments:

“Additional costs incurred for external Professional Service to produce and implement a Whistleblowing Policy.”

“As with any small organisation, without its own HR department, the cost - in time as well as money - to refute claims is prohibitive and out of proportion to the size of organisation. As is the uncapped damages potential.”

“The fact that every case has to be investigated which is resource heavy led to one settlement due to the burden to fight a small claim; completely the wrong behaviour and sets precedent but at times necessary. In danger if not controlled to swamp a company (especially a small one) like employment tribunals did in the past.”

8. Other feedback from the survey is included in responses to specific questions below.

General comments on the Call for Evidence

9. The UK already has one of the strongest regimes in Europe for the protection of whistleblowers against retaliatory behaviour by their employer. This is recognised in the Call for Evidence document. The protections are pursued through an Employment Tribunal. As noted in comments above from IoD members, Employment Tribunal claims – and even the mere threat of a claim - can take up considerable resources of time and money to defend. Many claims are spurious, added on to other grievances in order to put more pressure on an employer to pay out, or simply to try to extract revenge for perceived mistreatment. With claims for unfair dismissal now subject to a 2-year qualifying period and a cap of 12 months' pay, the absence of a qualifying period and of a compensation cap for whistleblowing protections may create further incentives to bring unjustified claims. Given this, the Government should only consider further tightening of the law if there is a compelling case that existing protections are inadequate.

10. If employees are not benefiting from the protection provided by the law, it may well be the case that existing law is not being made use of by employees to the extent that it could. The answer to that is not to tighten up the law further, but to look at why some employees do not seek to enforce their rights – if that is the case. It must not be automatically assumed that any problem lies with the law itself, and that further tightening of the law would solve it.

11. As is noted in the Call for Evidence document, whistleblowing protections have only recently been strengthened through the Enterprise & Regulatory Reform Act 2013 by extending them to include detrimental treatment by co-workers. To repeat, there must be a compelling case for even further strengthening of the law. And before considering changes to the law, better regulation principles demand that alternatives to regulation such as improved guidance, are considered. It seems to be the case that public sector employers need to do much better in this area. But that is no reason to impose new laws on private sector employers as well.

Responses to questions in the Call for Evidence

Section 1 - Categories of disclosure which qualify for protection

Question 1 - *Are these categories sufficient to capture all potential instances of wrongdoing that may require public disclosure? Yes or No*

Question 2 - *If no, what additional categories should there be? Please provide any relevant evidence to support this.*

Yes. The existing categories are already very extensive. They cover any criminal offence, any breach of a legal obligation, and other misdemeanours (health and safety, environmental damage) which are not even breaches of the law. The legislation should not be extended even further to cover other acts which are not breaches of the law.

Section 2 - Methods of disclosure

Question 3 - *Do these methods of disclosure affect whether a whistleblower might expose wrongdoing? Yes or No*

Question 4 - *If yes, how (or why)?*

No. They constitute an important hierarchy of methods which are designed to encourage internal whistleblowing where that is appropriate – which it will be in most cases – and to discourage non-genuine whistleblowing. It is important that the progressively stronger conditions are maintained.

Question 5 - *Do these conditions deter whistleblowers from exposing wrongdoing? Yes or No*

Question 6 - *If yes, how (or why)?*

No. They may help to deter non-genuine whistleblowers, but that is what they are intended to do.

Question 7 - *Do these conditions encourage whistleblowers to expose wrongdoing? Yes or No*

Question 8 - *If yes, how (or why)?*

Yes. They encourage internal whistleblowing in the first instance, which will be the most appropriate method in most cases.

Question 9 - *How clear and understandable are the conditions that need to be met to ensure that the disclosure is protected?*

Question 10 - *If you have answered yes to questions 3, 5 and 7 please provide any evidence you have to support your response.*

Question 11 - *What changes, if any, do you think are needed to the qualification conditions?*

The provisions in the Employment Rights Act – like most law – are difficult for non-lawyers to follow. What is more important is official guidance explaining the law in layman's terms. A search of the www.gov.uk website reveals that the guidance for potential whistleblowers is rather inadequate, hardly describing the conditions that have to be met at all.

We do not believe any changes are needed to the qualification conditions, but better guidance is needed to explain them (see our response to question 30 below).

Section 3 - Prescribed persons (I)

Question 12 - *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*

Yes we support this change in the interests of simplification and more efficient use of resources.

Question 13 - *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*

Question 14 - *If yes, please explain why.*

Yes – if the guidance on prescribed persons is not kept up to date. A system will be needed for ensuring that changes are notified to whoever writes the guidance, and that the guidance is updated in a timely manner. The present guidance [as of 30/10/2013] is dated February 2013. Given what is said about frequent changes to the list of prescribed persons, one wonders if the guidance is up to date.

Question 15 - *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)*

It is not clear whether this is suggesting abandoning the present approach of clearly identifying who is a prescribed person, in favour of a more general description of who to blow the whistle to. If so, we do not agree. Clarity is needed for whistleblowers, and this is best achieved by simply listing in guidance who is a prescribed person.

Section 5 - Definition of worker

Question 20 - *Does the current definition of worker exclude any group that may have need of the protections afforded to whistleblowers? Yes or No*

Question 21 - *If yes, what groups are these?*

Question 22 - *Please provide any evidence to demonstrate these groups require protection.*

We are not aware of any excluded categories that should be covered.

Section 6 - Job applicants

Question 23 - *What impact does whistleblowing have on the individual's future employment, e.g. if there are issues around 'blacklisting' or other treatment?*

Question 24 - *Please provide any relevant evidence to confirm whether these practices are taking place.*

We asked IoD members whether they supported the extension of whistleblowing protections to job applicants. 48% of respondents said they disagreed or strongly disagreed (22% strongly disagreed), while 35% said they agreed or strongly agreed (7% said they strongly agreed). The remainder (17%) were neutral or did not know.

We asked members, irrespective of whether they agreed or disagreed with the move, whether they saw any specific practical issues from an employer's perspective. The main reasons given for disagreeing with the extension of protections to whistleblowing was that it could be used inappropriately by individuals who were not genuine whistleblowers, and that it would add further risk to the process of recruiting people. The following are some typical comments:

"A charter potentially for malcontents and radicals. It is difficult because the genuine whistleblower has breached trust with their employer and how can they be trusted again. Morally they should be protected but trust is important in business."

"A company should have the right to employ the best person with the correct skills and culture. Deliberate non selection of whistle blowers is ethically wrong, however a system where whistle blowers can claim further enforces the negative claim culture."

"A known whistleblower could easily make a living from compensation claims without even having an interview. I have experience of someone doing this in other areas of discrimination"

"Can't see this is a real issue - only a successful, high profile whistle blower would realistically have any chance of coming to the attention of a prospective employer."

"I cannot see how this can be proved. It is up to the employer to choose the person they believe most suited to the job and no employer is going to state the reason for not hiring as being due to being a previous whistleblower. What it would do is make employers even more reluctant to hire people generally."

"I don't see why additional legislation is required and would consider this adding to the risk of recruitment, especially for small businesses like my own. I am fully in favour of protecting valid whistle blowing, but there are always examples of abuse. I think it should be left to a business to determine the merits of an individual, without further interference."

"It is unhealthy to encourage litigious behaviour. Far better for companies to have transparent ethics policy and for management to actively demonstrate integrity and honesty."

"In my experience there are far more spurious claimants than genuine ones and the employer is the one that has to pay - even if they have done nothing wrong. The costs can be prohibitive and very worrying for smaller firms."

"Seems a little overprotective for an incredibly small number of potential applicants."

"The employment process is difficult enough with the ability for potential employees to bring spurious discrimination claims when applying for a job. This would be another subjective layer on top."

"We are nervous enough already about taking on new staff.... Please don't make it more complicated...!"

We would add that it would not be easy to frame a law to protect jobseekers in these circumstances. Would it protect only those who have won a claim at an employment tribunal? If so, it would create an incentive to pursue a claim to a decision, rather than settling with the employer - something that would be contrary to the Government's policy of encouraging settlements without resorting to an employment tribunal. If on the other hand the law protected anyone who claimed to have blown the whistle with a previous employer, this would be too low a standard to justify the protection.

Section 7 - Financial incentives

Question 25 - *Would a system of financial incentives be appropriate in the UK whistleblowing framework? Yes or No*

IoD members were strongly opposed to the idea of offering financial incentives for whistleblowing. 71% of respondents to our survey said they disagreed or strongly disagreed with the idea (41% strongly disagreed), while only 16% agreed or strongly agreed with it. Comments included the following:

"A financial incentive could make some employees more interested in policing their employer rather than work for them. Some US employers have had problems of this nature and are then accused of trying to hide something when they, quite reasonably, sack the employee for not doing the work they are being paid to do."

"A moral code of conduct should be sufficient motivation for a whistle blower."

"Adding financial incentive on top of an existing moral imperative makes morality seem to be a matter of money. That's wholly inappropriate and will shift behaviour in unpredictable ways."

"An industry would grow up around this like it has around Personal Injury claims."

"Appalling idea; if you want staff to responsibly take control of their own safety and good conduct you have to develop the culture to do it - not drive the expectation that you should get paid for it. You would drive the potential whistleblower to consider the value of the situation, or even make it potentially worse before declaring it - talk about the law of unintended consequences."

"Corrupts the whole process and will consequently make people far more suspicious about the validity of the whistleblower."

"Financial incentives would potentially create a culture of whistleblowing for the smallest of issues"

"Guaranteed to constrain entrepreneurs and create more difficult working environments"

"I think financial incentives create the wrong culture and would likely result in a number of vexatious claims bogging down the system and denying genuine concerns to be aired timeously and investigated fully."

"It should be a matter of conscience or civic duty not a business."

"It would dilute the motivation of principled actions and introduce possible greed as a motive. This would not be to the advantage of the company or the genuine claimants"

"Need to look at how this worked in other places and whether or not it actively encourages bogus claims that waste company time and effort in litigation"

“Terrible idea. Unscrupulous individuals could tarnish businesses deliberately, to set up scenarios to collect cash or to attempt “blackmail” to stop them going to the authorities. Whistleblowers should be protected, but this is going too far”

“The problem with this is that it is limited to whistleblowing regarding financial irregularities - what about the NHS scandals etc. Also, will it apply to central government and, in particular, the Houses of Parliament (where quite a few could be on a good potential earner, it seems)”

“This is yet another example of the misguided belief that people are only motivated by financial rewards. It also introduces into what should be a purely moral arena the distorting effect of monetary gain. It is highly dangerous and will lead to much wasted time for employers fighting spurious claims by profit seekers.”

“Whistleblowing should be done with high moral and ethical standards, a financial incentive could undermine that.”

We note that the current law specifically states that a disclosure must not be made for purposes of personal gain. It would therefore represent a fundamental shift in the law if that were to change. As noted in the Call for Evidence document, IoD has always supported the law on whistleblowing, but any change that introduced a system of financial incentives would cause us to rethink that support.

Question 26 - 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?

Question 27 - 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?

Question 28 - Where are financial incentives used as an effective measure to prevent wrongdoing / illegal activity? For example, in certain industries.

Please see comments above from IoD members in response to these questions.

Section 8 - Non-statutory measures

Question 29 - How would the introduction of non-statutory measures make a difference?

Question 30 - What types of non-statutory measures could Government consider to support the statutory framework?

As noted earlier, we think the guidance on whistleblowing on the www.gov.uk website is inadequate. What guidance there is, is found under the section on “Employing people”. There ought also to be guidance under the section on “Working” aimed at employees. The guidance under “Employing people” should be aimed at employers – at present much of it is aimed at employees, eg “How to blow the whistle”. Instead, employers need guidance on how to create and implement a whistleblowing policy. A model whistleblowing policy could be useful in this respect. The guidance for both employees and employers also needs to explain the law better. For example, it should explain the hierarchy of employer/Minister or prescribed person/third party and the different conditions that need to be met.

Section 9 - Further evidence

Question 31 - *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.*

Question 32 - *Please provide any case studies of situations where a whistleblower has had a positive outcome with their employer after blowing the whistle.*

No comments to add.

Thank you once again for inviting the Institute of Directors to participate in this call for evidence. We hope you find our contribution useful.

Yours sincerely

A handwritten signature in black ink, appearing to be 'PS', followed by a long horizontal line extending to the right.

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Institute of Directors