



Department
for Business
Innovation & Skills

**WHISTLEBLOWING FRAMEWORK
CALL FOR EVIDENCE**

Government Response

JUNE 2014

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Ministerial Foreword

Whistleblowing continues to be in the public spotlight. In a call for evidence last July, this Government set out its position in support of the important role of whistleblowing. We acknowledged that there were weaknesses in the framework, so that the legislation has not always achieved its intended outcome: to reduce malpractice in organisations and to ensure individuals can report malpractice without fear of reprisal.



The call for evidence has been an important process in which this Department has engaged with people from across the country, to understand their views and experiences of whistleblowing. We have had discussion sessions in London, Birmingham and Edinburgh, we have had 78 written responses and we have had regular engagement with representative groups as we have analysed the information that has been submitted to us.

The evidence we have analysed has confirmed to us that the whistleblowing framework in isolation does not always prevent malpractice from taking place. Nor does it encourage people to raise their concerns.

Why is this? We can draw the following conclusions:

- The whistleblowing framework is a remedy not a protection
- The framework is about addressing the workplace dispute that follows a disclosure rather than the malpractice reported by the disclosure
- There are negative attitudes ingrained in organisational culture that form barriers to whistleblowing working effectively
- The way some employers and prescribed persons respond to a disclosure is reinforcing some negative cultural attitudes.

So we are taking steps to address these barriers. This will involve both legislative and non-legislative measures. We will clarify what the whistleblowing framework does and how it can be enforced to create realistic expectations about what the legislation can achieve.

We will take action to help ensure that the issue about which the whistle is blown is addressed, and not lost behind the employment dispute.

We will make legislative changes to update the prescribed persons list and widen the scope of the protections to certain student groups.

Finally, we will take steps to change organisational culture, demonstrating the valuable role whistleblowing can play in an organisation.

However, it is not just about what the Government can do. Achieving cultural change relies also on employers, colleagues and prescribed persons responding positively to a whistleblower and recognising benefits whistleblowing can bring.

With all of us taking action we should be able to see a step change in the role of whistleblowing to help tackle malpractice, without those at the heart of it, the whistleblowers, suffering as a result.

A handwritten signature in black ink that reads "Jenny Willott". The signature is written in a cursive style with a large initial 'J' and a long horizontal stroke at the end.

Jenny Willott MP

Minister for Employment Relations and Consumer Affairs

Executive summary

The Government committed during the passage of the Enterprise and Regulatory Reform Bill 2013, to review the whistleblowing framework through a call for evidence and to consider any cases for change. At the time of publication, the Government considered the overall framework to work well. However since its introduction in 1998, a number of high profile issues like the Mid Staffordshire NHS Foundation Trust scandal and the financial collapse have taken place, focussing the spotlight on whistleblowing. As such, it was deemed appropriate and timely to consider the effectiveness of the framework against the backdrop of a change in ways of working and a shifting dynamic in the labour market.

Since making this commitment, the Government has carried out significant exploratory work including reviewing 78 responses and holding public discussion sessions in Edinburgh, Birmingham and London. At the same time, we have involved stakeholders at regular intervals as our analysis of the responses and thinking around this has developed.

A number of tensions have surfaced that are important to consider as part of the call for evidence. Firstly, that there is an expectation that the whistleblowing legislation provides a protection from suffering detriment, when in fact it offers a legal remedy for when detriment occurs. Secondly, that whistleblowers seek resolution through the framework on the issues they have raised concern about, yet the scope of the legislation and the Employment Tribunal are limited to addressing the workplace dispute rather than the issue of concern on which the whistle has been blown.

These tensions have helped shape the interpretation and analysis of the information we have received to the call for evidence. In turn, they have influenced the actions for change which are proposed in this government response.

Through analysis of the information submitted to this review, we have been able to identify five common themes that help describe the issues that reduce the effectiveness of the framework:

1. The balance of power between the whistleblower and the employer and support both parties receive.

It is evident that both the worker and the employer can feel exposed and unprotected once a disclosure has been made, often creating defensive behaviour on both sides. From the individual's perspective, they feel a moral sense of obligation to right a wrong but can feel wholly unsupported in doing so. From the employer's perspective, a disclosure can be interpreted as a criticism or failure on the part of the employer, resulting in a hostile response.

In practical terms, there is an onus on the whistleblower to enforce their legal rights and to prove that the employer caused them to suffer some form of detriment. This could also be a reason for whistleblowers feeling the balance of power is in favour of the employer.

Access to legal advice and support may also influence the balance of power. Generally the employer is more economically equipped to access advice and support.

2. The level of protection the whistleblower receives.

A whistleblower's feeling of vulnerability is compounded when there is an absence of clear whistleblowing policies, information and support. Knowing who to disclose to and how the disclosure will be dealt with can be enough to ensure the whistleblower feels 'protected'. Ultimately the law is only one element of preventing any bullying or harassment taking place. The law provides a remedy for detriment or dismissal as a result of the whistleblowing, with the intended effect that this should stop organisations mistreating those who blow the whistle.

3. The roles the regulators/prescribed persons play in the whistleblowing process.

Since the employment tribunal and whistleblowing legislation do not specifically deal with the issue about which the whistleblower has made a disclosure, the regulators are ultimately viewed by the whistleblower as the solution to addressing their issues. This is particularly so when the employer has not responded in a satisfactory way to issues that have been reported.

However, this expectation of the prescribed persons' role is often not lived up to, leading to a lack of confidence in the role of these bodies.

4. The categories of worker covered by the provisions and who qualifies for the protections.

There are a number of groups that may be in a position to witness malpractice but are not afforded a remedy for any detriment they may experience, should they choose to make a disclosure, for example students, volunteers and non-executive directors.

5. The need for culture change in this area.

Overall the call for evidence has identified cultural attitudes to whistleblowing as a root-cause of many of the issues raised. Despite the legislative framework, whistleblowing is not always embraced as a positive force or as a mechanism to prevent business-critical problems arising.

The Government Response

This report provides an analysis of the issues raised and identifies where there is a strong case for change. This report concludes with 9 recommendations as a package of measures that the Government will implement as a response. Whilst this will not involve change to shift the legislative focus from the detriment a whistleblower may suffer, to addressing the matter on which the whistle has been blown, it will involve changes to help address some of the problems that arise due to the expectation that the whistleblowing legislation should address malpractice within organisations.

This response looks at the UK whistleblowing framework as a whole. Additional or alternative measures may still be appropriate in specific organisations. For example the Home Secretary is developing proposals to strengthen protections for whistleblowers in the police force; these are not addressed in the scope of this report.

Next steps

The Government plans to begin implementation of the non-legislative changes following publication of this response. For the changes requiring secondary legislation, work will begin and be subject to the parliamentary processes. The ambition will be to complete these by April 2015. The change requiring primary legislation will be introduced through the Small Business, Enterprise and Employment Bill.

Introduction

The Government has recognised the importance of whistleblowing in the workplace to raise concerns about wrongdoing and as an effective tool in the fight against fraud, corruption and malpractice.

This is why legislative changes were introduced through the Enterprise and Regulatory Reform Act 2013, alongside a commitment to review the framework as a whole through a call for evidence, to consider if further changes were required.

The *whistleblowing framework call for evidence* ran from 12 July to 1 November 2013. It considered 8 areas of the framework and asked a number of questions in relation to each area. The areas were:

- Categories of disclosure which qualify for protection
- Methods of disclosure
- Prescribed persons (I) – The statutory list
- Prescribed persons (II) - The Employment Tribunal referral system and the role of prescribed persons
- Definition of worker
- Job applicants
- Financial incentives
- Non-statutory measures

In total there were 78 respondents to the call for evidence. We received responses from a variety of respondents including individuals, local government, large business, micro business and legal representatives. The distribution of respondents is set out in Annex 2.

Throughout the call for evidence, we ran three discussion sessions to supplement the information coming through the submissions to the call for evidence, and to give us a better insight into both the individual's and the employer's experience of how the framework operates.

A summary of the discussion sessions is set out at Annex 1.

Responses to the call for evidence.

This section discusses the written responses to each question within the call for evidence. We looked at the framework as a whole and posed questions relevant to the sections which had not been affected by the changes introduced through the Enterprise and Regulatory Reform Act 2013.

Categories of disclosure which qualify for protection.

The first of these sets of questions focused on whether the categories of disclosure were broad enough to sufficiently capture all instances of wrongdoing and if not, what was missing.

As the law stands, a disclosure in the public interest should tend to show one or more of the following:

- 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.¹

Analysis of responses

The categories that respondents considered to be missing are:

- The incentivisation or incitement of others to conceal wrongdoing
- Misreporting or pressure to misreport
- Financial irregularities
- Professional malpractice (such as financial malpractice, or other such fraudulent activities)
- Mismanagement of public funds by public bodies or private bodies in receipt of public funding
- Abuse and misuse of power
- Gross waste or mismanagement of funds
- Serious abuse of authority

¹ See Section 43B(1) of the ERA 1996

- Breach of contract and employment malpractice and human rights abuses
- Breach of standards of conduct/professional standards (not necessarily criminal)
- Whistleblowing abuses outside of the UK
- Any other matter of public interest.

The Government response

The Government has considered and tested all the suggested categories to see whether or not they should be included by the legislation. In most cases the existing provisions would capture these suggestions. The Government is confident that any illegal activity and miscarriage of justice is currently captured by the legislation.

There is a case that “the abuse and misuse of power” and “gross waste or mismanagement of funds” would not be captured by existing categories. However we have taken legal advice on this point, and have concluded that the inclusion of such categories would create legal uncertainty, as the scope would be difficult to define and would be open to varying interpretation. As such, we are unable to commit to any change in this area at this point.

We will keep this issue under review and if it is considered the scope can be defined without creating legal uncertainty, we will consult on the matter.

The fact that many respondents felt that there were gaps in the criteria, demonstrates the difficulty in interpreting the current framework. Therefore improved guidance will be produced to help identify what may or may not be covered when making disclosures under the categories as they stand. We will work with those bodies that have to regularly navigate the framework to produce this improved guidance.

Methods of disclosure.

We asked a number of questions around the method of disclosure and whether these had an effect on a whistleblower's willingness to expose wrongdoing and if the whistleblower may in fact be deterred.

Under the current framework, depending on whom disclosures are made to, certain conditions must be met. This is to encourage individuals to make disclosure internally in the first instance, allowing employers an opportunity to address the issue which has been brought to their attention. As such when disclosing internally, the individual should have a reasonable belief that the disclosure is in the public interest.

When making any disclosure, the individual must have a reasonable belief that malpractice which would qualify under one of the legal categories,² has happened, is happening, or is likely to happen. However, when making an external disclosure the individual must also believe that the disclosure is substantially true. If disclosing to a prescribed person, this should be made to the correct prescribed person. If disclosing to an alternative external body, for example the media, the issue should be of an exceptionally serious nature.

A failure to follow these methods could mean that a whistleblowing claim is rejected by the employment tribunal.

Analysis of responses

The most significant issue raised in response to this question is that people are in fear of reprisal from raising concerns internally, with one respondent comparing this to the equivalent to "pressing the self-destruct button". Additionally reports of a negative attitude or the fear of a negative response from an employer, were cited as having a significant influence on whether individuals would blow the whistle internally.

A further concern was lack of clarity about whom disclosures should be made to, which is a deterrent from making a disclosure at all. This was reinforced by the fact that employers did not have whistleblowing policies in place, or had policies which were not clear enough for the individual to understand.

A number of respondents were supportive of the tiered conditions in place to qualify for whistleblowing protections. It was felt that the conditions were an effective way of making sure that there is a level of protection for the employer. In many cases, the employer as an organisation is not aware of wrongdoing which may be taking place until a later stage of

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 - 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.

the process. Having the opportunity to investigate and resolve the issue before it may be made public is valued.

The Government response

The Government agrees that the fear of reprisal is an issue, created by cultural attitudes and behaviours established over many years, rather than a consequence of the legislation. However, to help address part of the problem, the Government introduced an additional element to the framework in 2013 in the form of redress from detriment suffered vicariously through the actions of co-workers. We believe that addressing the issue of fear as a whole will rely on changing behaviours.

Whistleblowers should have the confidence that making a disclosure internally in the first instance, will be addressed without suffering any detriment. Equally, employers must have the opportunity to respond appropriately.

The Government took steps in March this year to add Members of Parliament (MPs) to the list of prescribed persons. This will be helpful to those whistleblowers who don't know who to report to in order to qualify for the legal protections. MPs can also help ensure to that the matter of wrongdoing is looked into by the relevant regulator.

The Government will work to improve guidance and create a model whistleblowing policy to help business in this area by:

- Improving understanding of how the provisions work
- Making clear the role an employer should be playing in relation to whistleblowers
- Highlighting the benefits to a business through embracing an open culture of whistleblowing.

Prescribed persons (1) – The statutory list

We asked a number of questions around the process for amending the prescribed persons list and if this process which is currently through laying a statutory instrument, should be amended to one where the changes can be made by a less formal method and if any problems could be seen with this.

We also asked questions about better reflecting the bodies on the prescribed persons list in a less prescriptive manner.

Analysis of responses

While a high proportion of respondents suggested that removing the list from the parliamentary process would be acceptable, with many favouring a more simplified approach, this was caveated with the need for safeguards to be put in place to ensure changes were not being made by the Secretary of State as a result of political pressure if a less formal approach was adopted.

Concern was also raised about the possibility of removing the parliamentary process for updating this list, which provides scrutiny over any proposed changes to the list.

There was concern that general descriptors could introduce an uncertainty that does not currently exist, with the lack of clarity potentially leading to unnecessary legal arguments about whether or not a prescribed person fell within a general descriptor.

The Government response

In light of this, the Government concludes that the risks of taking away the statutory process, removing the certainty of an actual description of prescribed persons and the matters on which individuals can make disclosures about, outweighed the benefits of introducing such a change. We will therefore retain a statutory procedure but take action to improve our approach for maintaining the list.

The Department for Business Innovation and Skills will commit to ensuring an updated list is published as soon as possible. We will also ensure this information is updated online promptly following any changes made by Statutory Instrument. Finally, we will commit to reviewing the list on an annual basis going forward with other government departments, to ensure the bodies on the list are correct.

As referenced in the call for evidence document, we intended to make changes to the list in respect of the Civil Aviation Authority and professional regulatory bodies for health and social care workers. These changes have now been made.

As mentioned in the previous section, we have amended the list, to include MPs to the prescribed persons list and this change came into force on 6 April 2014. Adding MPs to the list means individuals can make disclosures to them and these are protected in the same way as disclosures made to other bodies on the list, effectively increasing the protection available to individuals by providing another group of people who they can make a disclosure to. Consideration is also being given to the inclusion of other bodies.

Prescribed persons (II) – The Employment Tribunal referral system and the role of prescribed persons.

The Employment Tribunal referral system

We asked questions about the referral of disclosure information to prescribed persons through the Employment Tribunal (ET) claims process.

Analysis of responses

Concern was raised around the ET referral process because the ET cannot always easily identify the appropriate prescribed person to refer an issue to. It could be argued that this is beyond the ET remit. The point was also raised that the time it takes an ET claim to get through the system (with some cases taking longer than a year), may negate the need for the information to be referred as the issue may have already been resolved.

The Government recognises that the ET referral system should be a useful tool to give prescribed bodies more information than they may currently have, to enable them to consider trends and to pick up issues which may not have ordinarily been brought to their attention. This referral could play a more strategic role in ensuring the matter about which an individual had blown the whistle, is investigated by the appropriate regulator.

The Government response

To address the concerns raised, the Government will analyse the current referral system in place, working with HMCTS and prescribed bodies, to collate numbers and evaluate its effectiveness. As part of this work, the Government will look at a sample of ET1 forms specifying a referral to prescribed persons to understand if this happened and if not, what the reasons behind this are, with a view to making changes if this is the appropriate course of action.

The role of prescribed persons

We asked questions around the role of the prescribed persons and what action they take in respect of disclosures made to them.

Analysis of responses

A number of issues were raised about what prescribed persons do with the information once a disclosure has been made to them. There is a lack of confidence that issues are considered or investigated. This appears to be centred around the lack of communication in response to the person who has blown the whistle.

However the constraints that prescribed persons operate within, including overriding legal obligations, often mean that they are restricted from providing the whistleblower with any information about the progress or outcome of investigations.

The Government response

The Government considers the challenge of the issue presented to us through the responses, is finding a credible balance between reassuring the whistleblower that action is being taken and maintaining confidentiality of the case reported.

Every disclosure should be given reasonable consideration and we would expect all prescribed persons to have processes in place to ensure that this happens. The Government believes that greater transparency through a reporting process could help instil confidence in the actions of the prescribed persons. Therefore the Government will introduce a requirement on prescribed persons to report annually on whistleblowing and consult on the detail of the matters which should be included within this report. We envisage this would cover matters such as number of disclosures received, numbers investigated, and of those claims investigated, the number of organisations which had a whistleblowing policy in place.

This measure will be designed to strike a balance between the desires of individuals to know action has been taken in respect of their disclosure, with the constraints that prescribed persons operate within, such as their responsibilities to maintain confidentiality.

We believe the introduction of this duty will drive up standards across all prescribed persons and the best practice created by this standard will filter across the employment landscape.

Definition of worker

The definition of worker at section 43K of the Employment Rights Act (ERA) 1996 is used specifically for whistleblowing purposes. We asked if this definition was broad enough to capture the relevant groups which should be included within the protections.

Analysis of responses

Respondents identified a number of groups not included in this definition and therefore did not automatically qualify for a legal remedy under the whistleblowing framework:

- Non-executive directors, solicitors, auditors and partners of firms, police officers
- self-employed individuals, including those employed through Construction Industry Schemes who are self employed for tax purposes but usually workers for employment purposes.
- students, student nurses, student midwives, trainee social workers, volunteers, trainee police officers, trainee soldiers.
- interns
- external consultants
- members of organisations
- those supplying a professional service to an organisation on a contract basis - contractors
- individuals on placement
- civil servants and members of the armed forces, public appointments, partners in Limited Liability Partnerships, Ministers of Religion, foster carers, workers acting in the capacity of a trade union representative and as full-time trade union officials
- job applicants and those who have ended their employment relationship
- categories covered by the Part of the Equality Act 2010 on “work” including barristers, local authority members

Respondents argued that these groups may be in a position to witness some form of malpractice that would be in the public’s interest to report. For example, a consultant in a bank may witness money laundering, a non-executive director may discover mis-reporting or a volunteer in a hospital may witness poor care of patients.

We have also received evidence about the possible detriment these groups may suffer, including loss of post, loss of business, loss of income, impact on future employment prospects and damage to reputation.

The Government Response

The whistleblowing provisions under the ERA 1996 were created with employment rights in mind but may be suitable for providing a remedy for other groups in certain circumstances. Therefore the provisions do not definitively exclude some members of these groups, for example, solicitors, consultants, and interns.

Where an individual loses paid employment as a result of making a disclosure it is clearer to see how they would qualify for a remedy under the whistleblowing framework. However, what is less clear is a possible remedy within the whistleblowing framework that would be an appropriate form of redress for a detriment that is not directly an employment issue (for example loss of business).

From the analysis we have conducted so far, there is a clear case for student nurses to be brought into scope of the whistleblowing framework. This is due to the employment-like relationship and the nature of the detriment suffered. The Government will therefore bring this group into scope through secondary legislation³.

Recent case law has also considered the definition of worker. In the Supreme Court decision in the case of *Clyde & Co LLP and another v Bates van Winkelhof* it was concluded that a member of a Limited Liability Partnership (LLP) can be a worker within the meaning of the ERA 1996 and therefore is entitled to claim the protection of its whistleblowing provisions. In light of this decision, the Government believes that further legislative change will not be necessary in respect of the status of members of LLPs.

For the remaining groups, the Government will not be making any changes at this point but will continue to keep this area under review with a view to consulting if further changes are considered necessary, and make legislative changes through the secondary legislation power introduced through the Enterprise and Regulatory Reform Act 2013.

³ Using Secondary legislation to make this change was made possible by a power introduced in the Enterprise and Regulatory Reform Act 2013.

Job applicants

We asked about the problems associated with regaining employment should whistleblowing lead to loss of employment.

Analysis of responses

We understand from the responses that some whistleblowers struggle to find new employment after they blew the whistle in a previous employment.

Some respondents alleged that a form of 'blacklisting' can take place following a whistleblowing case. For example references mentioning whistleblowing could potentially prevent an individual securing a new post.

The Government response

The Government has taken action to deal with serious offences of blacklisting relating to trade union activity that were uncovered in the past. Amongst the actions taken, the Government has increased the penalty the Information Commissioner's Office can impose for serious breaches of the Data Protection Act 1998 to £500,000.

For workers who have evidence that their employer has provided a negative reference on the basis that the individual has made a public interest disclosure, there is a route to redress against their existing employer through the employment tribunal.

Additionally, individuals who believe they are being unfairly excluded from employment, for example, because they are on a list of known whistleblowers can report concerns to the Information Commissioners Office, which has powers to investigate misuse of personal data under the Data Protection Act 1998.

We would also urge those individuals to report any knowledge of these practices a prescribed person, for example an MP.

The Government believes that cultural attitudes to whistleblowing play an important part in ensuring that the role of a whistleblower is embraced and welcomed as a positive force within an organisation. For example whistleblowing can be an effective part of internal audit processes to prevent malpractice. The actions in response to this call for evidence are aimed at facilitating a cultural change. We hope that as a result, employers will start to embrace the role of whistleblowing and we will be identifying employers who have done this in order to show others what value it can bring.

Financial incentives.

We asked questions around financial incentives but made clear in the document that the Government did not consider the evidence base strong enough to introduce this sort of system into the UK framework. However, we were interested to read of the research the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) were planning⁴ to undertake on this issue, and the strength of feeling of respondents as to the appropriateness of such a system in the UK framework.

Analysis of responses

The majority of respondents considered that this was not appropriate for the framework for various reasons. The main arguments in support of this view were:

- unintended consequences such as an increase in the number of disclosures made for personal gain purely to access a financial reward,
- the corruption of the process, making people far more suspicious of whistleblowers overall,
- the potential for issues to remain unreported for longer than originally would, to ensure that a problem is actually there to secure a financial reward,
- it could make some employees more interested in policing their employer rather than working for them
- it would constrain entrepreneurs and create more difficult working environments
- it would dilute the motivation of principled actions and introduce possible greed as a motive.

Of those respondents who considered that the introduction of incentives would be appropriate as a form of reward, this view was formed mainly in light of the fact that the individuals are acting in the public interest not their own, yet suffer a personal detriment. Responses suggest individuals should be rewarded for any stress, loss or detrimental effects they have suffered as a result of blowing the whistle.

⁴ The FCA committed to carrying out research in response to the Parliamentary Commission on Banking Standards report into Banking standards - <http://www.fca.org.uk/static/documents/pchs-response.pdf>

The Government Response

The Government does not believe financial incentives should be introduced as an integral part of the whistleblowing framework to reward whistleblowers. However, it does understand the arguments around the costs an individual can incur if having to make a claim at an ET on a public interest matter. The package of measures which are summarised in the recommendations section, are intended to facilitate a culture change in this area and stop whistleblowers being victimised and marginalised in the first instance with employers being more receptive to whistleblowers.

For those who still find themselves in the position where they have suffered a detriment as a result of blowing the whistle and have to make a claim at an ET, the Government would expect that in relation to the fees required to bring the claim at ET, a successful claimant should be reimbursed by the respondent by order of the ET. This remains at the discretion of the ET judge and a number of other factors may influence this decision, however, we expect that most ETs will apply this practice.

The Government is aware that the Financial Conduct Authority and the Prudential Regulation Authority are due to publish statements on the impact of incentivising whistleblowers financially, including the findings of their research into the system of financial incentives that operates in the US. These may be helpful to other authorities or bodies when forming their whistleblowing policies.

Going beyond the overall whistleblowing framework, in due course, the Government may consider whether the use of financial or other incentives would be beneficial as a way to encourage openness and to enhance the support provided to those who report wrongdoing in specific organisations or in very specific types of cases. For example, in the Serious and Organised Crime Strategy, the Government committed to consider the case for incentivising whistleblowing, including the provision of financial incentives to support whistleblowing in cases of fraud, bribery and corruption. Due consideration should be given about whether the introduction of incentivisation would create adverse effects or have unintended consequences in a particular environment.

Non statutory measures

This exercise was not just about legislative measures but about the way in which whistleblowing works in practice. We therefore asked what non-statutory measures could be introduced to support the framework.

Analysis of responses

Most responses to this exercise called for changes to legislation, demonstrating that there is a strong reliance on the law to drive the right behaviours.

However, many of the problems identified by respondents are caused by cultural attitudes and practices that are driven by social norms rather than the legal framework. For example, the way a business responds to a disclosure, the behaviour of colleagues towards co workers in respect of disclosures made and the assumptions that a whistleblower is there to cause trouble or using a disclosure as a threat against an employer.

A number of proposals suggested tools to clarify the framework and how to apply it. These include a code of conduct and better guidance more generally.

The Government response.

The responses to this call for evidence build a strong case for a change in cultural attitudes to whistleblowing. Legislation can only go so far in achieving this kind of change.

The Government agrees that better guidance for both employers and individuals is needed. Importantly, new guidance should clarify that the legislation is a remedy not a protection, that it addresses the detriment an individual suffers not the matter about which a disclosure is made, and that a whistleblower has to take certain steps to enforce their rights under this framework.

It is clear that whistleblowing is not always embraced as a positive force within an organisation or as a mechanism to prevent business critical problems arising. For example whistleblowing could be embraced as an internal audit tool.

To help drive a cultural change, the Government will identify and celebrate where organisations embrace whistleblowing and where organisations effectively use whistleblowing as a way of ensuring malpractice is either dealt with at an early stage or avoided completely.

Recommendations

Based on the emerging themes previously discussed, we are making a number of recommendations and setting out the way in which we consider these can be achieved.

1	<p>Improved Guidance for individuals</p>	<p>The lack of comprehensive guidance available for whistleblowers at the moment from the Government has been highlighted through the call for evidence as insufficient.</p> <p>The Government would like to work with those who are required to navigate the framework more regularly, to contribute to and drive the content of the guidance, to ensure that the information we assemble and publish is actually of benefit to those who need to use it.</p> <p>This may include for example, information on how to blow the whistle, plugging the gap where employers do not have policies and giving examples of what reasonable belief that one of the categories of disclosure has happened, is happening, or is likely to happen may look like, the ways individuals should disclose for the disclosure to be protected and clarifying issues such as the invalidity of gagging clauses.</p> <p>We will identify the relevant bodies and convene a working group to achieve this.</p>
2	<p>Best practice guidance/ non-statutory code of conduct.</p>	<p>The protections as currently drafted, do not stipulate a business should have a process or guidance in place for dealing with whistleblowing. We do not want to mandate this, but evidence suggests central guidance would assist business in creating policies for dealing with whistleblowing and help instil a consistent level of best practice across organisations.</p> <p>To support this, we will also create a model whistleblowing policy which can be adopted by business.</p> <p>Again, we will identify the relevant bodies to produce the guidance and model policy.</p>

3	Making clear the position in relation to cost awards.	<p>Respondents strongly oppose the introduction of ET fees and view it as an unfair disadvantage that whistleblowers have to fund their case without financial assistance.</p> <p>Following an unsuccessful challenge via judicial review to the introduction of these fees, the Government guidance now says that 'the general position is that, if you are successful, the respondent will be ordered to reimburse you'. We will take steps to make sure people are aware of this.</p>
4	Assessment of the current whistleblowing ET1 referral system	<p>The Government will carry out some analysis of the current ET1 referral system to establish its effectiveness and to understand if improvements need to be made. This will be carried out with both HMCTS and those bodies on the prescribed persons list.</p>
5	The introduction of a duty to report.	<p>The protections do not stipulate that prescribed persons need to do anything with or about any disclosures they receive. This undermines the system and creates a lack certainty for the whistleblower in relation to what may or may not be done in respect of a disclosure they have made.</p> <p>The Government will introduce a duty on prescribed persons to report annually.</p> <p>We will consult on the detail of the matters which should be included within this report, including matters such as number of disclosures received, numbers investigated, and of those claims investigated, the number of organisations which had a whistleblowing policy in place. We will also consult on how these reports should be published.</p> <p>This will be introduced through the Small Business, Enterprise and Employment Bill.</p>

6	Update the prescribed persons list	<p>The list which is maintained through Statutory Instrument contains bodies which are prescribed, for having disclosure made to them.</p> <p>This is published online at gov.uk for ease of reference. The gov.uk information is currently out of date and not an accurate reflection of all the prescribed bodies contained in the list.</p> <p>BIS will commit to ensuring this information is updated online promptly following any changes made by Statutory Instrument and implement a system to ensure this is updated each time the list is amended.</p> <p>This will be helpful to those seeking to rely on it but also show that the Government is committed to keeping the information relevant.</p> <p>We will also commit to reviewing this on an annual basis going forward with Other Government Departments, to ensure the bodies on the list are correct.</p>
7	Include relevant groups currently excluded from the protections	<p>We believe there is a clear case for student nurses to be brought into the scope of the whistleblowing framework due to the employment relationship and the nature of the detriment suffered. We also consider other student arrangements similar to student nurses should be included. The Government will therefore bring this group into scope through secondary legislation.</p> <p>For the remaining groups, the Government will not be making any changes at this point but will continue to look at this area with the view to consulting if further changes are considered necessary.</p>

8	No introduction of financial incentives	<p>While we have made clear through this response document that the culture surrounding whistleblowing needs to change, we remain unconvinced that the introduction of financial incentives, would change the cultural landscape in a positive way.</p> <p>Going beyond the overall whistleblowing framework, in due course, the Government may consider whether the use of financial or other incentives would be beneficial as a way to encourage openness and to enhance the support provided to those who report wrongdoing in specific organisations or in very specific types of cases.</p>
9	Explore options to celebrate those employers who embrace whistleblowing in their organisations	<p>The Government would like to see the celebration of whistleblowing as a positive tool to aid business. The Government will identify opportunities to celebrate those organisations that embrace whistleblowing and effectively use it as a tool to prevent malpractice.</p>

Next Steps

This Government response sets out changes the Government will introduce that are both legislative and non-legislative. For the changes that can be made via secondary legislation, work will begin immediately with the view to implementation by April 2015. A duty on prescribed persons to report on whistleblowing case handling will be introduced through the Small Business, Enterprise and Employment Bill. Work on the non-legislative measures will commence immediately with a view to completing guidance and the non-statutory code of conduct by the end of 2014.

Annex 1: Discussion sessions

To support the information gathered for the call for evidence, we ran three discussion sessions to help better understand an individual's experience of the framework but also get a view from employers.

These sessions were well attended with a cross section of individuals, business, Government departments, business representatives, legal representatives and regulators.

To ensure these sessions were effective, we prepared the flow chart at diagram 1, which illustrated all possible 'journeys' a whistleblower may experience. We then asked for comments on this and asked for gaps to be identified.

This diagram was key to starting the discussion around the framework and helped establish the key themes which have underpinned the responses we have received to the call for evidence. This was very well received with attendees considering this to be a relatively accurate reflection of potential whistleblower journeys.

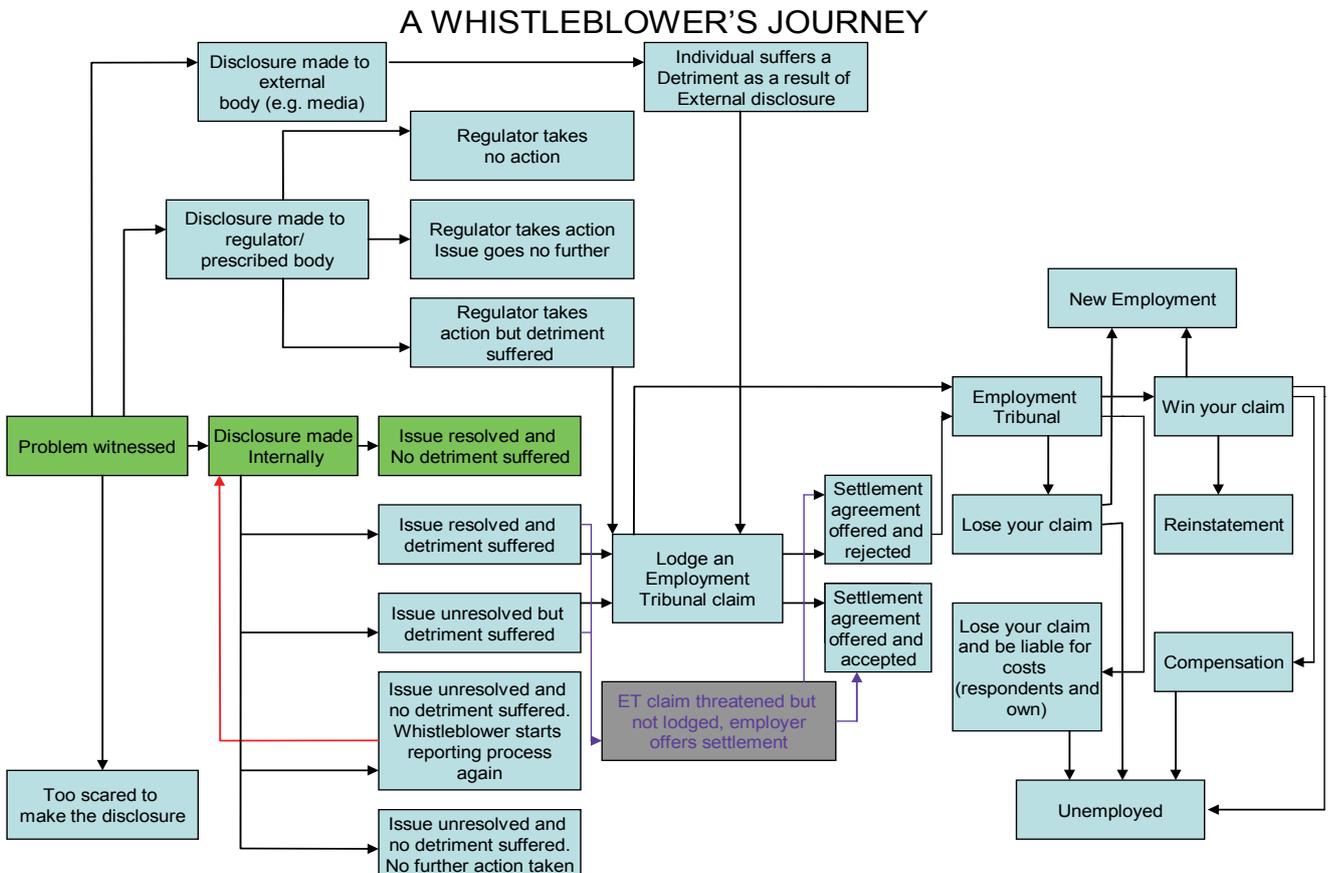


Diagram 1

Diagram 2 shows where it was considered we had missed some of the possible routes. These are indicated with the additional routes in yellow lines and the purple box in the prescribed body section.

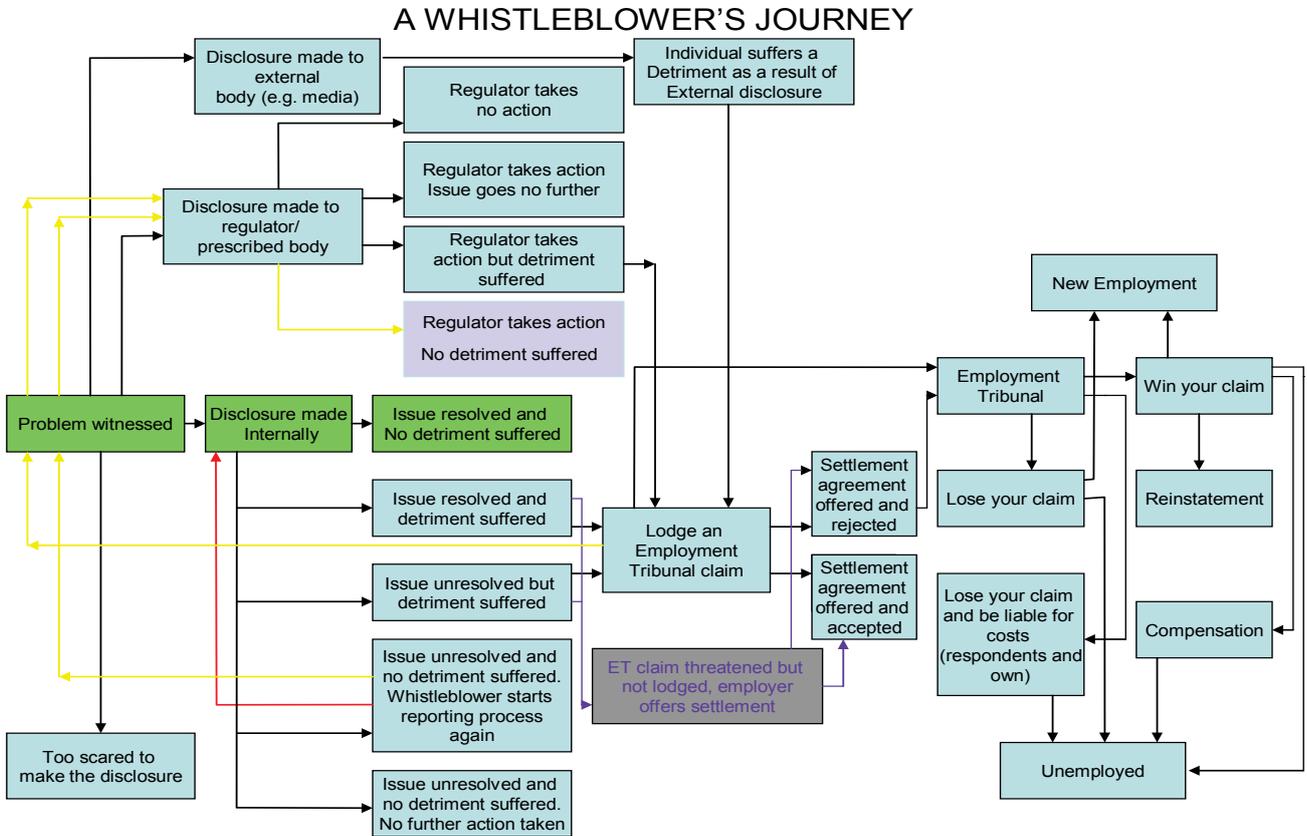


Diagram 2

Diagrams three to five, break down the chart into three sections, internal disclosures, external disclosure and making a claim at an employment tribunal.

The yellow boxes reflect the comments we received in relation to the different issues and perceptions that individuals experience at the various stages.

Internal disclosure

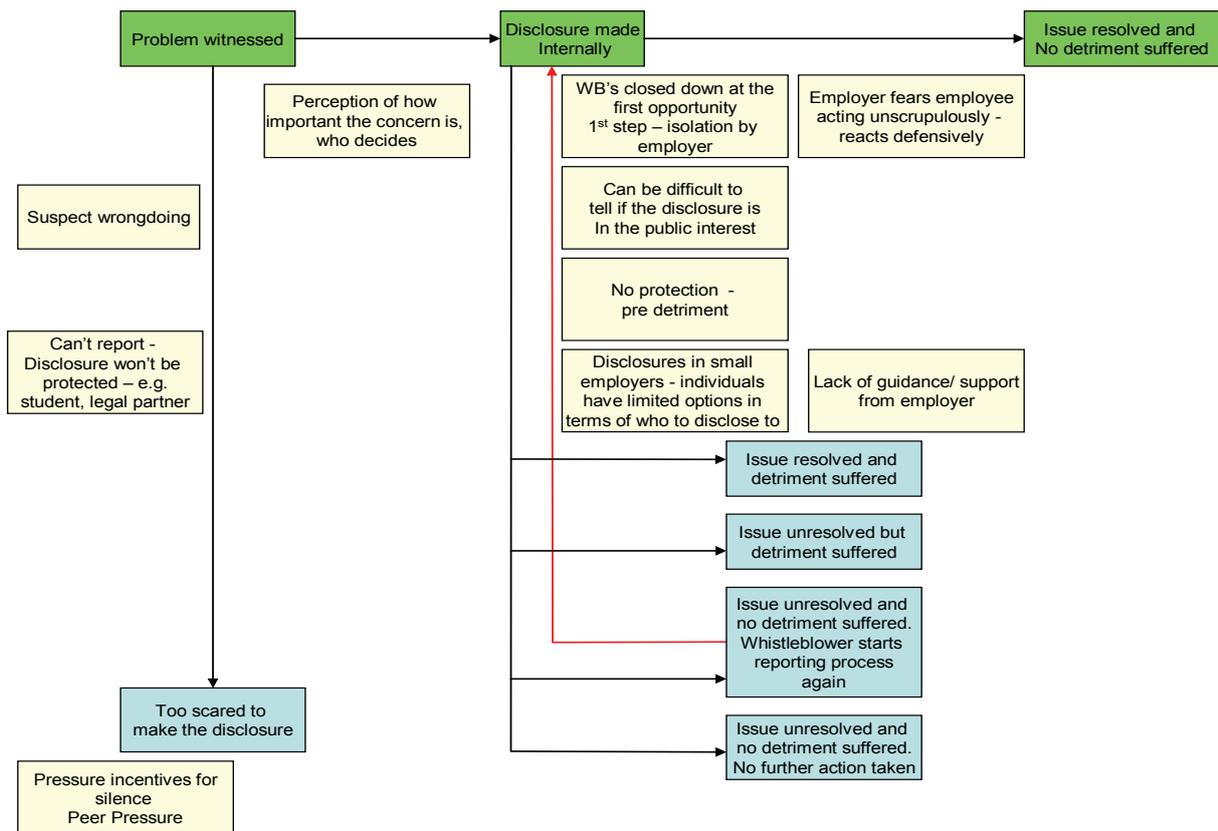


Diagram 3

External Disclosure

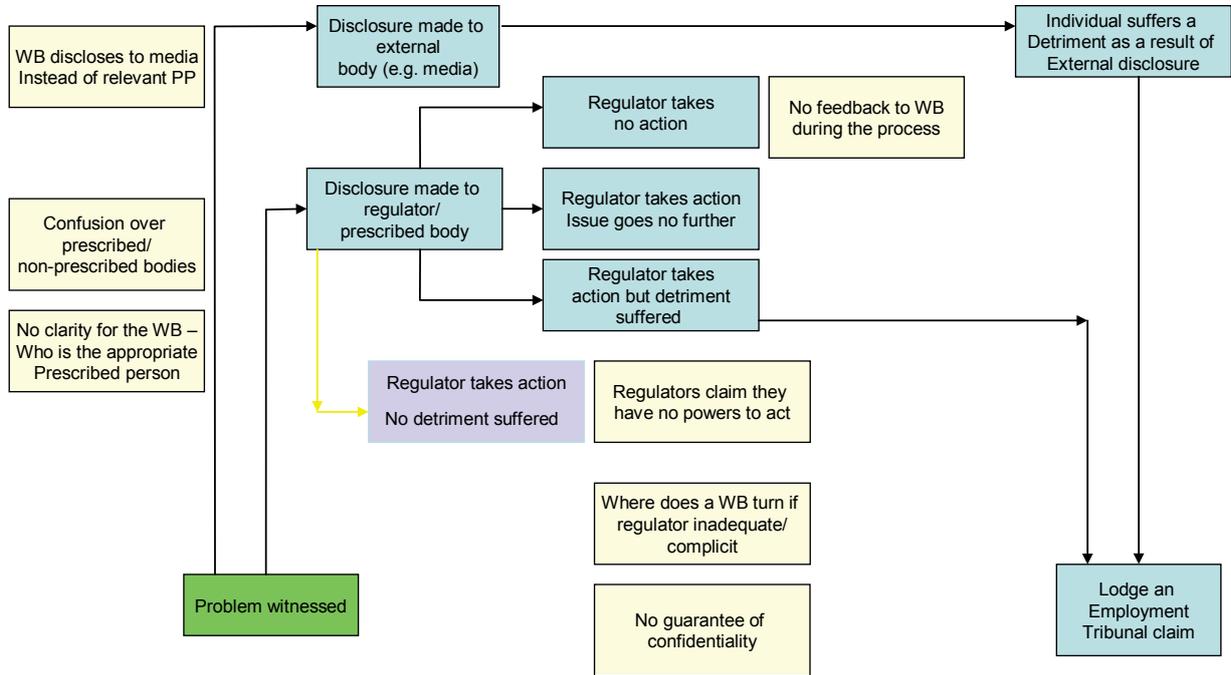


Diagram 4

Employment Tribunal process

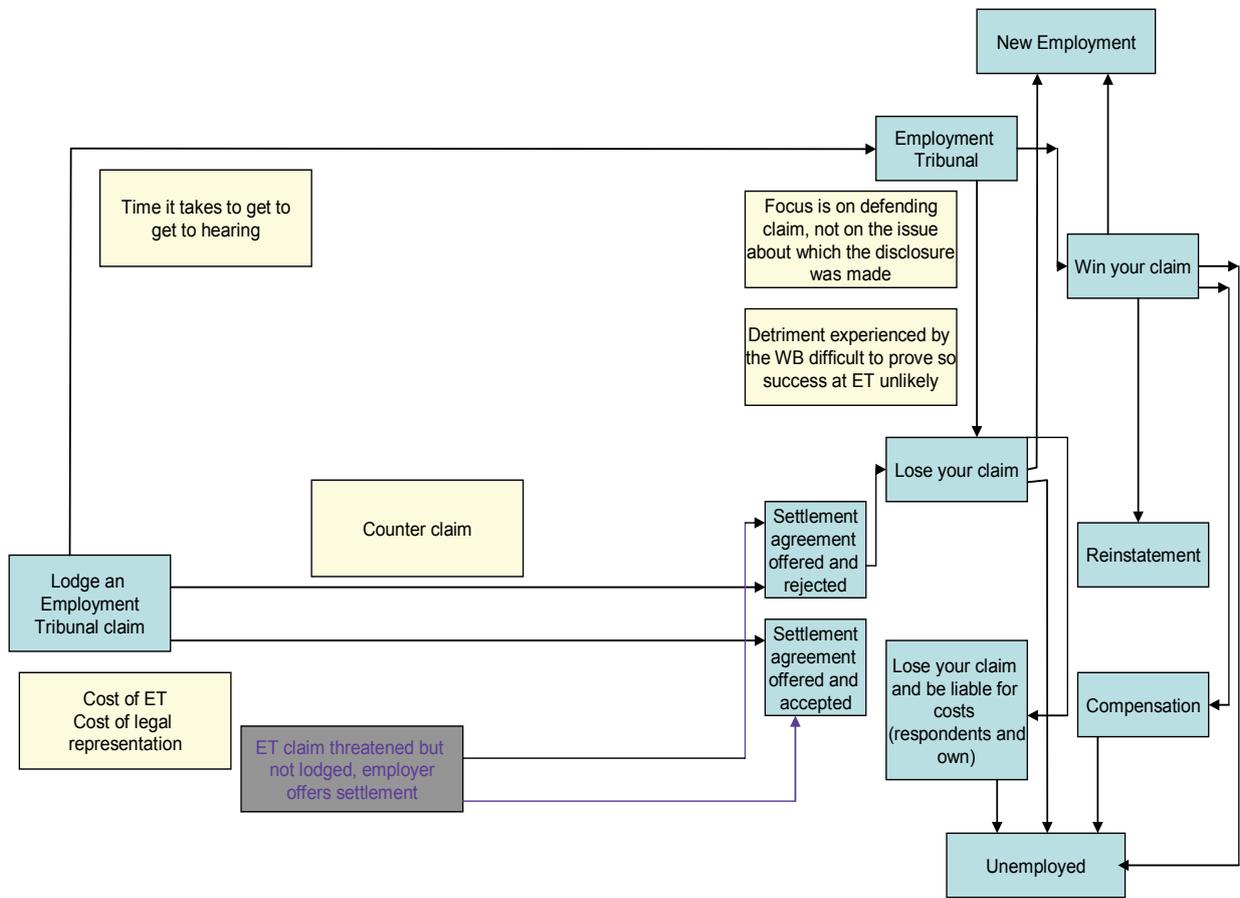


Diagram 5

Annex 2: Distribution of responses

	Type of organisation	Responses
	Business representative organisation/trade body	12
	Central government	2
	Charity or social enterprise	5
	Individual (other than whistleblower)	24
	Large business (over 250 staff)	5
	Legal representative	2
	Local Government	2
	Medium business (50 to 250 staff)	0
	Micro business (up to 9 staff)	1
	Small business (10 to 49 staff)	1
	Trade union or staff association	9
	Other (please describe)	11
	NHS	2
	Whistleblower	2
	Total	78

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