



Department for  
Business & Trade

# **Understanding the Effectiveness of the Whistleblowing Framework in Great Britain**

**14 July 2025**

## **Disclaimer**

The Department for Business and Trade (DBT) does not assume responsibility for verifying the accuracy, reliability, or completeness of evidence or information obtained through stakeholder interviews. While efforts were made by Grant Thornton to demonstrate transparency in reporting the findings, DBT cannot guarantee or validate the authenticity of this information.

## **Acknowledgements**

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An independent research report by Grant Thornton UK LLP for the Department for Business and Trade

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# Executive summary

## Background

In the context of the whistleblowing framework in Great Britain, whistleblowing refers to when a worker makes a disclosure of information which they reasonably believe is in the public interest and shows wrongdoing or someone covering up wrongdoing. Types of wrongdoing include criminal offences, the endangerment of health and safety, causing damage to the environment, a miscarriage of justice, or a breach of any legal obligation. Workers who blow the whistle are entitled to protection from detriment or dismissal as a result of blowing the whistle, and a route of redress through an Employment Tribunal if these protections are infringed.

The Public Interest Disclosure Act 1998 (PIDA) was introduced to provide legal protection for workers who blow the whistle on wrongdoing in the workplace. It amended the Employment Rights Act 1996 (ERA) in England, Scotland and Wales. The Enterprise and Regulatory Reform Act 2013 (ERRA) amended the ERA, making four significant changes to the framework. The Small Business, Enterprise and Employment Act 2015 later introduced an annual reporting requirement for prescribed persons. Taken together, this combination of laws and associated non-legislative guidance makes up what is referred to as the current 'GB framework'.

Employment law is a transferred matter in respect of Northern Ireland. This research study only considers England, Scotland and Wales under the GB framework.

## Aims and objectives

The Department for Business and Trade ('DBT') commissioned Grant Thornton UK LLP ('Grant Thornton') to conduct a research study to provide evidence as part of the Review of the whistleblowing framework: terms of reference, launched in 2023 under the 2022 to 2024 Sunak Conservative government. Evidence gathering took place between September and December 2023.

The aim of this research study is to provide an evidence base in relation to the effectiveness of the existing GB framework against the original objectives of PIDA. Those objectives are:

- to provide a route for workers to make whistleblowing disclosures
- to protect workers who have made disclosures from detriment and dismissal, and provide a route of redress where this happens
- to support wider cultural change, in which the benefits of whistleblowing are recognised and lead to action among employers and others. Action includes, for example, employers and prescribed persons implementing policies and practices that support whistleblowing

This report sets out the observations, emerging themes and suggestions for change raised during the research study, based on content from parts of the literature and research participants, to inform an assessment of the effectiveness of the GB framework.

The evidence base included in this report is set out according to the original PIDA objectives – which can be summarised as disclosure routes, protections, redress and cultural change – as well as additional topics specified in the terms of reference – definitions, concerns raised, and awareness and guidance.

The suggestions for change identified in parts of the literature and provided by research participants are summarised below, with the full detail, including challenges to suggestions, contained in Appendix A.

## **Methodology**

The research adopted a mixed-method approach, comprising of the following qualitative and quantitative research components:

- literature review – 67 relevant pre-existing pieces of literature on whistleblowing in Great Britain were reviewed as a foundation of the research and categorised into 8 literature types in the main body, including stakeholder (26), academic (14), journalistic (12), government body (1), public body (7), international body (2), parliamentary papers (3) and Ministry of Justice guidance and statistics (2). Full literature review methodology, including assessment criteria for inclusion, is set out in Appendix B.
- qualitative interviews – 35 qualitative interviews were conducted, involving whistleblowers (14), employer representatives (8) and prescribed person representatives (13). Full qualitative interview methodology, including assessment criteria for inclusion, is set out in Appendix C.
- focus groups – 6 focus groups were conducted, including prescribed person representatives (2 focus groups), employer representatives, whistleblowers and whistleblowing organisation representatives (2 focus groups) and legal professionals. Full focus group methodology, including sample composition, is set out in Appendix D.

Secondary data analysis, to identify and explore trends in data related to the GB framework, was also undertaken, comprising of:

- employment tribunal statistics published between 2014 and March 2023
- employment tribunal judgments and other related decision documents relevant to whistleblowing and public interest disclosure cases between 1 February 2017 and 27 March 2023
- prescribed persons annual disclosure reports for the years ended 31 March 2018 to 31 March 2022

The use of a text generative AI model was attempted to expedite the extraction of key information from the published Employment Tribunal judgments (and other published documents related to the decision) relevant to whistleblowing and public interest disclosure cases between 1 February 2017 and 27 March 2023, for analysis. However, accuracy of the information extracted using the AI model was insufficient to allow any meaningful analysis of this data to be undertaken and therefore the output of this activity has not been included in the report.

## **Methodology risks and limitations**

The observations (defined as perceptions from stakeholders, available literature or secondary quantitative sources), emerging themes and suggestions for change in this report were identified in parts of the literature and provided by research participants. These are not the views of Grant Thornton or DBT nor are they formal recommendations for government.

The research does not include an overarching conclusion regarding the effectiveness or ineffectiveness of the GB framework nor is it an assessment of individual elements of the framework. This is due to difficulty in assigning a weighting to qualitative statements, the potential of bias and wide-ranging views (as explained below). While relatively little evidence has emerged regarding the overall effectiveness of the framework, findings can be interpreted as both an indicator of ineffectiveness but also as a reflection of the difficulty in identifying and engaging individuals who have effectively raised concerns that are resolved and do not escalate or lead to a whistleblowing claim.

The research study was commissioned and undertaken with an acknowledged risk of inherent bias prevalent in the literature review, interviews, and focus groups. To minimise this bias risk, a strict and thorough sample selection and inclusion methodology was applied (a full discussion of the methodology and inclusion and exclusion criteria is set out in Appendix B, C and D). However, there is still a residual risk of this bias in the research content, particularly in relation to the prevalence of views highlighting areas of concern compared to the relatively little information highlighting areas of effectiveness related to the GB framework. Consequently, the observations and emerging themes are largely drawn from negative views and experiences of the GB framework.

The opinions of participants regarding redress are based on their own experience and therefore may not accurately represent the process of seeking redress after making a protected disclosure.

This research gathered a broad range of views and suggestions for change from literature and research participants (interviews and focus groups), consequently the research findings are wide-ranging. The suggestions for change include ideas for improving the existing GB framework, as well as ideas, which could impact whistleblowing outside of the existing GB framework. Elements of proposed laws and bills have been incorporated where appropriate in the sections of this report, rather than reflecting the bill or law itself as a suggestion for change. The suggestions for change should be interpreted cautiously as they have not been assessed for proportionality, desirability, feasibility, cost or impact and no weighting has been applied.

## **Research findings**

### **Definitions**

**The terms “reasonable belief”, “worker”, “public interest”, “whistleblower” and “protection” are important determiners in relation to the effectiveness of**

**the framework. Participants stated that the GB framework terms, and their definitions can often be seen as subjective, vague, inconsistent and narrow.**

Some research participants and parts of the literature highlighted issues with GB framework terms and their definitions. The issues related to the definitions themselves, the interpretation or application of the definitions, or the lack of definitions – creating further issues including subjectivity, inconsistent application, vagueness, and narrowness. Participants and literature identified that these issues result in uncertainty, confusion, and disappointment, and more broadly that some individuals are inappropriately denied or excluded from whistleblowing protections, as well as posing a potential barrier to raising concerns.

## **Disclosure routes**

**Whilst some organisations have internal frameworks in place and we have seen more reports being made, some participants pointed to capabilities and capacity as key barriers to disclosure.**

Some literature explained that more employers are adopting or implementing internal whistleblowing frameworks with associated routes, despite the GB framework legislation not creating an obligation to have effective internal whistleblowing frameworks and routes. Regulation has driven an increase in employers implementing frameworks in some sectors, but the increase is more generally driven by a recognition that these frameworks are an effective mechanism to identify issues and promote a culture of integrity.

However, many organisations do not have internal frameworks and where frameworks exist there are many factors that contribute to ensuring that these internal frameworks are effective. These factors include accessibility, trust, confidentiality, senior management commitment, and independence or objectivity.

Some of the literature explained that there has been an increase in concerns being raised with employers, due to more employers implementing internal whistleblowing frameworks.

Analysis undertaken as part of the research established that prescribed persons have seen an upward trend in the volume of concerns being raised since 2018, albeit there are issues (completeness, accuracy, consistency) with the annual data they report. Three sectors (Public Administration, Human Health, Financial Services, defined by SIC 2007 sectoral definitions) account for 96% of the prescribed person annually reported qualifying disclosure volumes, with a single prescribed person dominating each of those - HMRC, Care Quality Commission, and The Pensions Regulator respectively (acknowledging issues with the accuracy of The Pensions Regulator data).

Some of the literature and whistleblower participants identified gaps in the sector coverage of the prescribed person regime, including no specific prescribed person for the retail, construction, technology and manufacturing sectors. Whistleblower participants and some of the academic and stakeholder literature also identified that individuals have difficulty generally in identifying the correct prescribed person to contact, and that multiple prescribed persons in some sectors can add to this



confusion and uncertainty. These gaps, overlap and confusions can result in delays, inefficiencies, potential loss of protections, or wrongdoing going unchallenged.

Insights from some of the literature and prescribed person participants indicated that prescribed persons tend to have the capacity and capability to handle whistleblowing concerns they receive. However, the practices and processes described by prescribed person participants varied greatly, with some practices potentially exposing whistleblowers to increased risk of identification and detriment. The experiences and perspectives of whistleblower participants suggested that in some cases prescribed persons could do more to effectively manage the individual's expectations and to respond effectively and objectively to the concerns.

Some of the literature and research participants explained that concerns which are large, complex or with international elements are challenging due to ineffective, or non-existent mechanisms for coordination and collaboration, resulting in delays, inefficiencies and matters potentially being beyond the scope of the GB framework legislation.

Some whistleblower participants explained that legal obligations or duties meant they had a legal duty to raise concerns.

## **Concerns raised**

**Whilst many organisations can respond effectively to concerns raised, there are issues which can impact on whether an organisation was able to respond adequately. Organisations can have wider definitions of whistleblowing than the qualifying disclosure set out in the legislation. However, this can cause an expectation gap as to whether the concern will meet the criteria to qualify for protection.**

Some research participants and parts of the literature established that organisations can respond effectively to concerns raised, depending on resources or appetite. However, issues can arise where organisations do not respond appropriately, such as not undertaking an investigation. The consistency, independence, capacity and capability to conduct investigations, engagement with individuals, and management of conflicts of interest by organisations and prescribed persons in responding to concerns were questioned by some of the literature and research participants.

Some research participants and parts of the literature identified that the range of concerns encouraged by organisations and prescribed persons can be broader than the “qualifying disclosure” definition set out in the legislation. It is beneficial to organisations and prescribed persons to receive a broad range of concerns from those best placed to identify wrongdoing, usually members of the organisation, so they can be addressed. However, the research participants and parts of the literature noted that the varying definitions, and what is covered by legislation vis-a-vis what is broader, can cause an expectation gap as to whether the concern will ultimately meet the criteria to qualify for protection.

There was also discussion in some of the literature and among research participants around the extent to which organisations and prescribed persons manage the individual's expectations on the potential outcomes and how informed the individual is about those outcomes.

## Protections

**The protection under the GB framework legislation enables workers who have suffered a detriment or been dismissed to seek redress against their employer through the Employment Tribunals. Organisations can provide important protection outside of the GB framework legislation, especially confidentiality and anonymity. However, individuals may not understand what the protection provided by the GB framework legislation offers and many feel victimised after blowing the whistle.**

The research identified that additional or proactive protections are provided by organisations and prescribed persons, outside of the protections provided by the legislation. This section covers the awareness, knowledge of, types of and perceptions of these additional or proactive protections. The claiming and enforcement of protections under the legislation, provided by an Employment Tribunal process, are covered in the Redress – Employment section below.

Some literature noted that workplace culture and perceived safety are the determining factors in the decision to report a concern. However, some research participants and parts of the literature generally believed that the GB framework legislation does not provide effective whistleblower protection in practice, which contributed to the majority of whistleblower participants saying that they felt victimised by their employer as a result of blowing the whistle.

Some of the whistleblower participants and stakeholder and academic literature additionally highlighted that some individuals are generally not aware of what the protections are or how to qualify, which can expose them to greater risks of not qualifying for protections.

According to some research participants and parts of the literature, confusion and inconsistency is also caused by differences between employers' broader definition of the types of concerns that should be raised and the narrower criteria under the GB framework legislation, and a perception that detriment can be too narrowly interpreted by Employment Tribunals.

Some literature and research participants discussed anonymity and confidentiality as key protections provided by organisations and prescribed persons, even though they are not required protections under the legislation. However, there appear to be limits to what organisations and prescribed persons can do to protect workers' anonymity and protections can be difficult to apply in certain situations, particularly in relation to overseas staff. Some public body and stakeholder literature showed that effective segregation, between teams dealing with reports and the organisation's management, is essential for organisations to provide effective protection.

Some whistleblower participants expressed surprise that prescribed persons largely do not have a remit to respond to allegations of detriment and cannot generally protect them from detriment. A limited number of the prescribed person interviewees asked, confirmed that they seek to influence how organisations in their sector provide protections.

Some stakeholder literature reported that some internal and external processes can be used by organisations to victimise workers, such as professional registers.

## **Redress – Employment Tribunals**

**Whilst some workers were able to get justice at Acas or an Employment Tribunals, many participants criticised the redress process as not going far enough, not being balanced and fair and not meeting participant expectations.**

The observations and themes arising in relation to the effectiveness, including effectiveness of redress through Employment Tribunals, included:

- whether workers and employees have sought and accessed redress through Employment Tribunals
- whether there are barriers to individuals commencing or being successful at an Employment Tribunal
- routes of redress outside of the Employment Tribunals

The research is based on literature which more commonly highlighted criticisms of the redress process and may not provide a balanced view. In addition, the participants' views are based on their own interpretations and experiences in the period since 2014 and may contain inaccuracies or inconsistencies with the processes of the Employment Tribunals as they currently operate.

Parts of the literature and whistleblower participants claimed that the current GB framework legislation does not provide adequate redress or compensation for whistleblowers who suffer detriment or dismissal as a result of their disclosures.

Some literature showed, and a limited number of whistleblower participants explained, that some claimants have been successful at claiming redress through the Employment Tribunal and others have received settlements, through the preceding Acas process or before the final hearing takes place.

Whistleblower participants and some stakeholder literature identified concerns about access to justice. These concerns include:

- feeling that they lacked the necessary resources, such as time, money, knowledge, skills and experience to navigate the Employment Tribunal, particularly in comparison to the respondent
- reflecting that they lacked the mental capacity or resilience to effectively navigate the Employment Tribunal which, based on their experience, was complex and draining
- the evidential burden on the worker, to prove that the detriment or dismissal related to making a protected disclosure, was also described as a barrier to commencing or being successful at an Employment Tribunal
- experiencing unfair treatment throughout the process for reasons such as lack of access to relevant information or risk of breaching non-disclosure agreements, including either as part of normal working practices or as a result of a previous settlement

- time limits that apply to the Employment Tribunal process can be barrier to raising claims or accessing interim relief
- employment tribunals appear to experience delays

Some whistleblowers, participating in the research and reflected in the literature, felt that the involvement of prescribed persons did not always meet the whistleblower's expectation in terms of support at the Employment Tribunal.

Some whistleblower participants said that they did not trust the Employment Tribunal to be balanced and fair, and they perceived that it does not deliver meaningful outcomes, sufficient financial awards, and it was limited in the circumstances it would apply.

Parts of the literature asserted that non-disclosure agreements attached to some settlements, make it difficult for the whistleblower to discuss the experience and move on (professionally and emotionally) due to the limitations placed on them.

Other parts of the literature and whistleblower participants suggested that an Employment Tribunal may not be the most appropriate place to deal with whistleblowing cases because it can divert attention from the wrongdoing that has been raised, turning it into an employment dispute.

Parts of the literature and some employer participants identified that routes of redress outside of the Employment Tribunal are provided in very limited circumstances, including by prescribed persons, overseas regulators, or by a limited number of organisations.

## **Awareness and guidance**

**Whilst many employers were aware of guidance and processes, especially from the prescribed persons, many employees are not aware and those that are aware may find it unhelpful or confusing.**

Since the Whistleblowing framework call for evidence 2014 the government has introduced more detailed guidance for workers, employers, and prescribed persons. This research therefore considered whether such whistleblowing awareness and guidance has had an impact on the effectiveness of the GB framework. Some stakeholder literature and whistleblower participants indicated that individuals generally found the government guidance confusing, unclear and largely unhelpful and suggested it could be expanded in scope, for example to include greater guidance around Employment Tribunal procedures.

A whistleblower interviewee and an employer focus group agreed that some whistleblowers are not aware of the government guidance related to whistleblowing. Prescribed person participants explained that they had observed a lack of understanding of the GB framework legislation and misinterpretation of the government guidance by individuals. According to some stakeholder literature the most useful sources of advice for potential reporters are provided by whistleblowing organisations.

The majority of the employer participants explained that they did not regularly refer to the government guidance. Some of the stakeholder literature agreed and indicated

that organisations may have a low awareness of the government guidance and rely on other sources of guidance, such as regulatory guidance, sector best practice, referring directly to the GB framework legislation, and guidance provided by whistleblowing organisations, Acas, and legal advisors.

The majority of the employer participants explained that they were aware of whistleblowing related guidance from their relevant prescribed person. Parts of the literature stated that organisations in certain sectors, such as healthcare and financial services, have greater awareness of whistleblowing guidance due to additional regulatory requirements or priorities, while organisations in other sectors tend to have reporting mechanisms because “it’s common sense” or “it’s the right thing to do”.

There is discussion in some stakeholder literature of the inconsistencies between different prescribed persons in terms of the information provided to potential reporters in their annual reports and on their websites.

Parts of the literature showed that the government guidance for prescribed persons is helpful but lacks case studies and best practice across different sectors and locations in Great Britain. Prescribed person participants largely agreed that the guidance requires further development as it currently outlines broad and generic requirements and responsibilities. Prescribed person participants also noted that they rarely need to use the government guidance and tend to base their policies on the source legislation. Some stakeholder and public body literature showed that communications from the DBT or amongst prescribed persons around the GB framework is infrequent and insufficient.

In relation to prescribed persons annual reports related to whistleblowing, some prescribed person participants acknowledged that their reports were beneficial, with the benefits including engendering trust, increasing transparency, increasing visibility and highlighting their role in respect of the GB framework. However, other prescribed person participants questioned the usefulness of the annual reports. The effort to produce the annual reports is generally not an issue according to some stakeholder literature and the prescribed person participants. Prescribed person participants found the government guidance helpful for outlining the requirements for their annual reports, but a piece of stakeholder literature noted there is a need to drive consistency in how different prescribed persons interpret reporting requirements. Prescribed person participants identified a lack of consistency and clarity in language and definitions used in different prescribed person annual reports, leading to inaccuracies and doubts about the accuracy of figures reported.

## **Cultural change**

**Whilst there have been more whistleblowing reports in recent years and more organisations are putting frameworks in place, whistleblowing can still be subject to stigma and whistleblowers may not be offered adequate support.**

Cultural change is understood to be encouraging organisations to act with integrity, transparency and accountability such that it is normal and encouraged to highlight wrongdoing or corrupt practices in public and private organisations.

There have been some improvements in culture in relation to whistleblowing since the introduction of PIDA, measured by various organisations and researchers. From this evidence in the literature more organisations have frameworks for raising concerns, but it is not possible to discern whether this is a result of PIDA and other GB framework legislation, regulatory requirements, or for managing internal risks and culture.

Unlike some other sectors, the healthcare and financial services sectors have regulatory requirements, which include having adequate policies and procedures for whistleblowing. However, across all sectors some of the literature suggested that having a policy does not necessarily mean it is effective or has the range of factors which are reported to help create a trusted culture where concerns can be raised without fear of reprisal, such as tone from the top, quality training and awareness. In addition, some government body and academic literature and some participants reported that in some instances, the GB framework is used tactically to report non-genuine concerns, but the volume is unclear.

The increasing number of reports to the prescribed persons regime indicates that there are cultural improvements in that individuals are willing to raise concerns to them. Prescribed person participants indicated a motivation to detect wrongdoing but are limited in the actions they can take.

Some stakeholder literature and research participants reported that there are still positive and negative stereotypes associated with blowing the whistle, but some stakeholder literature showed that the prevalence of stereotypes may be decreasing. Nevertheless, some participants indicated that they would not blow the whistle again as a result of negative experiences.

There were suggestions in a few pieces of stakeholder literature that the effectiveness of the GB framework is not monitored effectively or reviewed frequently enough.

Some of the stakeholder and journalistic literature and research participants reported that individuals can experience significant mental health consequences, and that the GB framework does not provide sufficient support in this regard. Parts of the literature and some research participants also reported that there are significant financial costs associated with making a protected disclosure, which could act as a barrier to making a disclosure, and the existing GB framework is purported to not provide enough support.

## **Suggestions for change**

Throughout the fieldwork, numerous suggestions for change were identified in parts of the literature and provided by research participants. Challenges to suggestions for change were provided by other literature and focus group participants.

The suggestions for change (suggested by stakeholders but not necessarily endorsed by DBT or Grant Thornton) are summarised at the end of each research findings section and outlined in more detail in Appendix A. The suggestions for change at a high level are primarily focussed on:

- clarifying, extending and/or limiting definitions related to whistleblowing protection and who may be in scope.
- clarifying, extending and/or limiting definitions of who is responsible for operationalising whistleblowing protections
- clarifying, co-ordinating and/or making consistent the process for operating whistleblowing protections
- clarifying, transforming and/or making consistent the enforcement process and oversight for whistleblowing
- more consistent and accessible guidance, information and support for workers, employers and prescribed persons

# Introduction

**This report presents a set of evidence-based observations (defined as perceptions from stakeholders, available literature or secondary quantitative sources), and emerging themes relating to the effectiveness of the current whistleblowing framework in Great Britain against its original objectives and suggestions for change.**

## Instructions

The Department for Business and Trade ('DBT') commissioned Grant Thornton UK LLP ('Grant Thornton') to conduct a research study to provide evidence to the Review of the Whistleblowing Framework, under the 2022 – 2024 Sunak Conservative government. In accordance with the DBT's research specification, the aim of this research study is to provide an evidence base in relation to the effectiveness of the current whistleblowing framework in Great Britain ('GB framework') against the original objectives of the Public Interest Disclosure Act 1998 ('PIDA').

## Background

In the context of the GB framework, whistleblowing refers to when a worker makes a disclosure of information which they reasonably believe is in the public interest and shows wrongdoing or someone covering up wrongdoing. Types of wrongdoing include criminal offences, the endangerment of health and safety, causing damage to the environment, a miscarriage of justice, or a breach of any legal obligation. Workers who blow the whistle are entitled to protection from detriment or dismissal as a result of blowing the whistle, and a route of redress through an Employment Tribunal if these protections are infringed.

The Public Interest Disclosure Act 1998 (PIDA) was introduced to provide legal protection for workers who blow the whistle on wrongdoing in the workplace. It amended the Employment Rights Act 1996 (ERA) and applies in England, Scotland and Wales. The Enterprise and Regulatory Reform Act 2013 (ERRA) amended the ERA.

The ERRA introduced four significant changes to the framework and various elements of a 2014 government action plan have been implemented, including implementation of an annual reporting requirement for prescribed persons in 2016. Taken together, this combination of laws ('the GB framework legislation') and associated non-legislative guidance makes up the current GB framework.

While the whistleblowing framework across the United Kingdom follows a similar model, as employment law is a transferred matter in respect of Northern Ireland, this research study only considers England, Scotland and Wales under the current GB framework.

A core aim of the GB framework is to encourage workers to raise their concerns internally within their organisation, or externally to a prescribed person, without fear



of reprisals, detriment or dismissal from the organisation. The GB framework legislation sits within employment law.

## **Research aims and objectives**

The aim of this research study is to provide an evidence base in relation to the effectiveness of the existing GB framework against the original PIDA objectives namely:

- to provide a route for workers to make whistleblowing disclosures
- to protect workers who have made disclosures from detriment and dismissal, and provide a route of redress where this happens
- to support wider cultural change, in which the benefits of whistleblowing are recognised and lead to action among employers and others. Action includes, for example, employers and prescribed persons implementing policies and practices that support whistleblowing

The report also seeks to provide an up-to-date evidence base on whistleblowing in Great Britain covering the following key themes and topics:

- definition of whistleblower: evidence related to how workers and employees currently qualify for whistleblowing protections, experiences at Employment Tribunal, and access to compensation when suffering detriment or dismissal
- whistleblowing topics: what topics (categories of wrongdoing) workers speak up about, and any trends over time in volumes
- disclosure routes and whistleblower journeys: this includes whistleblower experiences of making disclosures internally (to an employer) or externally (to a prescribed person, or in limited and specific circumstances to the press), and the response by employers and prescribed persons, to identify common themes and best practice
- awareness and guidance: examine how workers/whistleblowers, employers and prescribed persons access information and guidance about the framework, and if there are unmet needs
- information and evidence about whistleblowing: an assessment of the available literature, evidence and data on whistleblowing, including potential gaps

This report sets out the observations, emerging themes, and suggestions for change raised during the research study, based on content from parts of the literature and research participants, to inform an assessment of the effectiveness of the GB framework.

## **Risks and limitations**

The observations, emerging themes and suggestions for change in this report were identified in parts of the literature and provided by research participants. These are not the views of Grant Thornton or the DBT or formal recommendations for

government. References to 'participants' relate to interviewee and focus group participant contributions from the stated GB framework user group.

The research does not include an overarching conclusion regarding the effectiveness or ineffectiveness of the GB framework or an assessment of individual elements of the framework. No weighting has been applied to the evidence base.

This research does not include a legal review and no assessment of case law has been performed. For clarity, this research is not a comparison of the GB framework with other international frameworks.

As specified in the terms of reference, the research does not include the following out of scope items:

- the effectiveness of sector specific whistleblowing initiatives in meeting their intended objectives for example: the National Guardians Office or in the financial services sector
- exemptions and special categories within the existing GB framework, such as Crown Employment, National Security, Police Officers, and work outside Great Britain
- circumstances where a disclosure of information is a criminal offence
- reporting channels and protections where there is no workplace relationship, for example, in business transactions, journalists, witnesses or third parties

No responsibility is accepted by Grant Thornton to anyone other than the DBT. Except to the extent set out in this report, Grant Thornton has relied upon the documents and information provided to it as being accurate and genuine. Use of information in this report should include the following attribution: Research Study to Understand the Effectiveness of the Whistleblowing Framework in Great Britain, Grant Thornton UK LLP, 14 July 2024, licensed under the Open Government Licence.

## **Structure of the report**

The evidence base included in this report is set out according to the original PIDA objectives above – which can be summarised as disclosure routes, protections, redress and cultural change – as well as the above additional topics specified in the terms of reference – definitions, concerns raised, and awareness and guidance.

The approach adopted to address the aims and objectives noted above is set out in – Methodology. The research topic sections are organised as follows, based on a chronology of a simplified whistleblower journey:

- Definitions
- Disclosure routes
- Concerns raised
- Protections

- Redress
- Employment Tribunals
- Awareness and guidance
- Cultural change

The delineation between the Disclosure routes and Concerns raised topic sections is that the Disclosure routes section covers the reporting and volumes of concerns, and the Concerns raised section covers the types of concerns and responses to them.

# Methodology

## Introduction

The research adopted a mixed-method approach comprising of the following qualitative and quantitative research components:

- literature review involving 67 pieces of literature
- 35 qualitative interviews
- 6 focus groups
- secondary data analysis

The literature review formed the foundation of the research and was supplemented with observations, emerging themes and suggestions for change from the qualitative interviews, focus groups and secondary data analysis.

The outputs from the literature review, qualitative interviews and focus groups were collated to produce observations and emerging themes relating to the effectiveness of the GB framework relevant to the research topics outlined above. This resulted in a variety of views and observations, from different sources, through different lenses.

## Engagement process for the approach

Grant Thornton and the DBT agreed to approach five prominent whistleblowing organisations ('the five whistleblowing organisations')<sup>1</sup> to participate in the research.

Meetings were undertaken between Grant Thornton and the five whistleblowing organisations in August and September 2023 to outline the approach, request relevant existing literature and data analysis, and request nominations of potential interviewees and focus group participants.

The substantive research took place between September to December 2023.

The detailed methodology for each of the four research components, including the sample selection methodology, are at Appendices B-G. The high-level approach to the four research components is provided below.

## Literature review

A review of 67 relevant pre-existing pieces of literature on whistleblowing in Great Britain was conducted. In accordance with the scope of the research, literature published between 2014 and March 2023 was reviewed.

The sources of potentially relevant literature were:

- literature identified by the DBT

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<sup>1</sup> Protect, WhistleblowersUK and Parrhesia Inc agreed to be named in this report. The other two whistleblowing organisations did not agree to be named.

- literature from open sources, such as Journal Storage ('JSTOR')
- literature published and provided by the five whistleblowing organisations
- additional literature provided during the research fieldwork, such as interviews and focus groups

The potentially relevant literature identified from the above sources was reviewed at a high-level to assess it against selection criteria for inclusion in the substantive literature review population. This resulted in 60 pieces of literature being selected for substantive review. Factors relevant to whether literature was selected for substantive review were whether the literature:

- existed before the DBT review was announced in March 2023
- related to the period after 2014 (when the last main legislative amendments were made to the GB framework)
- followed an evidence-based methodology
- considered the GB framework either as a whole or as a part of a wider piece of literature

The whistleblowing organisations suggested academics in the field of whistleblowing in Great Britain check the completeness of the substantive literature review population based on their knowledge of the subject. Three leading academics in the field of whistleblowing in Great Britain were contacted and consulted to check the completeness of the substantive literature review population based on their knowledge of the subject. Additional literature proposed by the academics was assessed against the selection criteria set out above, resulting in 7 additional pieces of literature being added.

The 67 pieces of literature reviewed are listed in the bibliography at Appendix B. To assist the reader, the literature has been categorised using the following categories:

- stakeholder literature (26)
- academic literature (14)
- journalistic literature (12)
- government body literature (1)
- public body literature (7)
- international body literature (2)
- parliamentary papers (3)
- the Ministry of Justice guidance and statistics (2)

Further detail in relation to the methodology adopted for the literature review is included in Appendix B.

## **Qualitative interviews**

The qualitative interviews encompassed 35 interviews with whistleblowers (14), employers (8) and prescribed persons (13) to gather a cross-section of views across framework users.

It was intended for 40 qualitative interviews to be conducted. However, due to a low uptake in participation by employers, the number of employer interviews achieved were lower than the original intended quota.

A predominantly sector-based approach was applied to the sample selection to ensure sector coverage and diversity of interviewees. Further detail on the sampling approach is provided in Appendix D.

## **Prescribed persons**

The interviewee sample of prescribed persons was selected to include ten prescribed persons who received the highest volume of qualifying disclosures in the year ended 31 March 2021, as reflected in their annual disclosure reports, two prescribed persons believed to most impact consumers and their day-to-day lives, and one new prescribed person (since the beginning of 2022). Additional sample selection criteria considered included prescribed person type (i.e. professional association or regulatory body) and geographical coverage.

The interviewee sample selection was driven by the prescribed persons interviewee selection, with the aim of sourcing whistleblowers and employers from the same sectors covered by the prescribed persons sampled.

## **Whistleblowers**

There were two main sources of whistleblowers, who made a protected disclosure since 2014, for inclusion in the whistleblower interviews: a) whistleblower organisations and b) whistleblowers who showed an interest in participating in the research. Due consideration was given to the balance of interviews to enable participation and ensure impartiality in sample selection. The interviewee sample of whistleblowers predominantly covered the same sectors as the prescribed persons. Additional sample selection criteria included whistleblower experience and journey, size of the employer and role seniority.

## **Employers**

The interviewee sample of employers was selected from Grant Thornton's diverse client base and employer information held by the whistleblowing organisations and the DBT. The employer sample predominantly covered the same sectors as the prescribed person and whistleblower interviewees. It included a mix of public, private and charity entities. Additional sample selection criteria considered included, size of the employer, geographical location, and whistleblowing framework experience.

## **Process**

The 35 interviewees completed an online pre-interview questionnaire to enable provision of responses to close-ended questions to allow the interviews to focus on more detailed, open-ended questions and to allow time to discuss the effectiveness of the GB framework.

The interviews included follow up on questionnaire responses, for example where responses were unclear, and focussed on exploring views on the effectiveness of the GB framework.

The identity of the interviewees has been kept confidential and the responses and any data provided by interviewees has been anonymised and presented in a summary format, without the use of direct quotes.

Further detail in relation to the methodology adopted for the qualitative interviews is included in Appendix D.

## **Focus groups**

The focus groups encompassed four categories of attendees: prescribed person representatives (two focus groups), employer representatives, whistleblowers and whistleblowing organisation representatives (two focus groups), and legal professionals.

It was intended to conduct a trade union focus group. However, due to a low uptake in participation in the research from trade unions, it was not possible to conduct a trade union focus group. Six focus groups were conducted in total.

A predominantly sector-based approach, using the Office of National Statistics ('ONS') Standard Industrial Classification ('SIC') hierarchy, was applied to ensure diversity of focus group participants across the prescribed person and employer representatives focus groups (which given their connected nature, also achieved sector diversity in interviews).

## **Prescribed persons**

Two prescribed person focus groups were conducted. One focus group included participants predominantly from the same sectors as the prescribed person representatives interviewed. The other focus group included participants predominantly from other sectors.

## **Employers**

The intention was for the participants of the employer representatives focus group to be predominantly sourced from employers from sectors not covered by the employers interviewed, to obtain views from other sectors. Again, the employer participants for this focus group were selected from Grant Thornton's client base and employer information held by the whistleblowing organisations and the DBT. Due to a low uptake in participation, the employer representatives focus group had only two participants.

## **Whistleblowers and whistleblowing organisation representatives**

The whistleblowers and whistleblowing organisation representatives focus groups were attended by whistleblowers not selected for interview, representatives from the whistleblowing organisations, as well as representatives from other whistleblowing organisations suggested by the whistleblowing organisations.

## **Legal professionals**

The legal professionals focus group was attended by individuals that represent whistleblowers and employers, and a legal practitioner who also sits as an Employment Tribunal judge. The legal professionals were sourced from Grant Thornton's contacts within law firms and recommendations from the whistleblowing organisations, as well as the Law Society of England and Wales and Employment Lawyers Association.

## **Process**

The focus groups explored the observations and emerging themes from the literature review and qualitative interviews and gathered participant views on the effectiveness of the GB framework.

The identity of the focus group participants has been kept confidential and the responses and any data provided by participants has been anonymised and presented in a summary format, without the use of direct quotes.

Further detail in relation to the methodology adopted for the focus groups is included in Appendix E.

## **Secondary data analysis**

Three data sources were analysed to identify and explore trends in data related to the GB framework. The three data sources included:

- employment tribunal statistics published between 2014 and March 2023
- employment tribunal judgments and other related decision documents relevant to whistleblowing and public interest disclosure cases, between 1 February 2017 and 27 March 2023
- prescribed persons annual disclosure reports for the five years ended 31 March 2022

## **Employment Tribunal statistics**

The Employment Tribunal statistics were extracted from the quarterly tribunal statistics between 2014 and 31 March 2023 published on Gov.uk.<sup>2</sup> Employment Tribunal statistics are based on 'receipts', where claims are counted as received once the tribunal has accepted the claim as valid and 'disposals' following the closure of a case. This closure can be through a claim being settled, withdrawn, struck out, dismissed or decided at a hearing.

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<sup>2</sup> Specifically, the data contained in the 'Main Tables'



Time-series analysis of Public Interest Disclosure Employment Tribunal ‘receipts’ and ‘disposals’ was undertaken, as well as comparisons with other key related Employment Tribunal jurisdictions, including ‘Unfair Dismissal’, ‘Equal Pay’ and discrimination related claims.

Employment Tribunal data transitioned to a new case management system (Employment Case Management) during March to May 2021. It is not possible to provide full results from both databases during this migration period on a consistent basis. Full Employment Tribunal data is therefore not available for 2021/22. Due to gaps in the ‘disposals’ data from March 2021 onwards, analysis of outcomes was performed on the period between 1 April 2014 and 31 March 2021. ‘Receipts’ data for the year ended 31 March 2021 is unavailable.

Further detail in relation to the analysis of Employment Tribunal statistics is included in Appendix F.

## **Employment Tribunal judgments**

Whistleblowing and protected disclosure search terms were searched on the Employment Tribunal decisions Gov.uk webpage for cases between 1 February 2017 and 27 March 2023. The Employment Tribunal judgments and other related decision documents that were responsive to the search terms were downloaded. The aim was to extract certain key information from the judgments and other related decisions documents, such as the grounds for bringing the claim, the outcome(s) of the final judgment, and the reason(s) the Employment Tribunal gave for their judgment. The responsive documents (6,784 case documents) were complex and variable in terms of content and length. The research study therefore looked to devise a novel process and technology driven solution. This involved using text generative artificial intelligence software (an AI model) in a secure, closed environment to attempt to expedite the extraction of key information outlined above from the published Employment Tribunal judgments (and other published documents related to the decision) for analysis.

A random sample of 25 Employment Tribunal cases, consisting of 57 case related documents, were selected to form a benchmark for measuring the response accuracy of the AI model. These 25 cases were manually reviewed to identify the required information and compared to the responses from the text generative AI model based on initial prompts (questions). Amendments to prompts were made as necessary based on this comparison to improve response accuracy.

Despite making amendments to prompts, accuracy of the information extracted using the AI model was insufficient across a number of key information items. No meaningful analysis of the Employment Tribunal judgments has therefore been possible, and the output of this activity has not been included in the report.

Further detail in relation to the attempted analysis of Employment Tribunal judgments is included in Appendix G.

## **Prescribed persons annual disclosure reports**

The prescribed persons annual disclosure reports were collated by the DBT and provided for the years ended 31 March 2018 to 31 March 2022. The volume of 'disclosures', 'qualifying disclosures', and 'disclosures requiring further action' were manually extracted from the reports and quantitative time-series analysis was performed by prescribed person and by sector. A qualitative review of the prescribed persons reports for the year ended 31 March 2021 was undertaken to provide example insight into the characteristics of the reports, including completeness, consistency and clarity of the information.

Further detail in relation to the methodology adopted for the analysis of the prescribed persons annual disclosure reports is included in Appendix H.

## **Methodology limitations of the research**

The research study was commissioned and undertaken with an acknowledged risk of inherent bias prevalent in the literature review, interviews and focus groups. A strict, thorough and balanced sample selection and inclusion methodology was applied to the literature review, interviews and focus groups to minimise this bias risk and achieve as diverse a range of views as possible. However, there is still a residual risk of this bias in the research content, particularly in relation to the prevalence of views highlighting areas of concern compared to the relatively little information highlighting areas of effectiveness of the GB framework. Consequently, the observations and emerging themes are largely drawn from negative views and experiences of the GB framework.

The report does not provide numerical findings based on interview or focus group participant insights. This is because the adopted qualitative research approach aimed to achieve a diverse range of sampled participants, rather than a statistically representative sample. The qualitative research approach provides in-depth insight based on the range of experiences, observations, views, and suggestions of participants.

This research gathered a broad range of views and suggestions for change from literature and research participants (interviews and focus groups), consequently the research findings are wide-ranging. The suggestions for change should be interpreted cautiously as they have not been assessed for proportionality, desirability, feasibility, cost or impact and no weighting has been applied.

Specific limitations of the individual research components are outlined in Appendices B to G. These include the finite population of literature and interview and focus group participant sample sizes, low uptake in participation from some interview and focus group participant groups, and gaps in the Employment Tribunal statistics.

# Definitions

## Introduction

This section sets out the observations and emerging themes in relation to the evidence of the effectiveness of the GB framework legislation related terms and their definitions under the following sub-sections:

1. Definition of “reasonable belief”
2. Definition of “worker”
3. Definition of “public interest” concern
4. No statutory definition of “whistleblower”
5. No definition of “protection”

Suggestions for changes to the definitions identified in the research project are summarised at the end of the section and outlined in more detail in Appendix A.

## Background

The GB framework legislation protects against detriment and dismissal. It applies to a wide range of employees and workers, in the public and private sectors, including agency workers, trainees, and specific categories of NHS staff. The legislation protects workers from being subjected to any detriment or dismissed because they have made certain disclosures that they reasonably believe are in the public interest.

The Employment Rights Act 1996 (‘ERA’), as amended by the Public Interest Disclosure Act 1998 (PIDA) in Part 4A, currently defines a “qualifying disclosure” as “... any disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest, tends to show one or more of the following:

- that a criminal offence has been committed, is being committed 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 or safety of any individual has been, is being or is likely to be endangered
- that the environment has been, is being or is likely to be damaged, or
- that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be, deliberately concealed”

## Research observations and emerging themes

### 1. Definition of “reasonable belief”

One of the key elements for a disclosure to be deemed a qualifying disclosure under the GB framework legislation is that the worker must have a reasonable belief that the information they are disclosing tends to show one or more of the six types of wrongdoing. The literature explains that the worker does not have to prove that the information they are disclosing is true, only that they reasonably believed it to be true.<sup>3</sup> This means that the worker's belief must be based on some factual evidence or grounds, rather than mere speculation or opinion.<sup>4</sup> However, the worker's belief does not necessarily need to be correct.<sup>5</sup> A range of literature types went on to state that the reasonableness of the worker's belief will depend on the circumstances of each case, including the source and reliability of the information, the nature and seriousness of the wrongdoing, and the worker's position and expertise.<sup>6</sup>

### **Amendments to the good faith test**

Until 2013, the GB framework legislation required the worker to make the disclosure in good faith, meaning that they acted honestly and not for ulterior motives, such as personal gain or revenge. This provision was introduced to discourage frivolous or vexatious claims and to balance the interests of the employer and the worker.

However, the good faith test was removed by the Enterprise and Regulatory Reform Act 2013 ('ERRA')<sup>7</sup>, as a requirement to qualify for protections under the GB framework legislation. An element of the good faith test remains in that Employment Tribunals can consider it when determining an award or compensation for the claimant. The amendment followed recommendations from the Whistleblowing Commission<sup>8</sup> and the government consultation on whistleblowing<sup>9</sup> in 2013 as the good faith test was seen, according to academic literature, as:<sup>10</sup>

- confusing, unfair and inconsistent with the public interest test
- a deterrent for potential whistleblowers
- unnecessary and ineffective, as the Employment Tribunal already had the power to reduce compensation for bad faith disclosures, and the employer could take disciplinary action against workers who abused the system or breached confidentiality

### **The reasonable belief test**

One piece of academic literature stated that the reasonable belief test is too subjective and vague, and it creates uncertainty and confusion for both workers and employers.<sup>11</sup>

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<sup>3</sup> LR34, LR36

<sup>4</sup> LR13, LR28

<sup>5</sup> LR34, LR36

<sup>6</sup> LR26, LR28, LR34

<sup>7</sup> Enterprise and Regulatory Reform Act 2013 – Explanatory Notes ([legislation.gov.uk](https://legislation.gov.uk)) Accessed 24 January 2024

<sup>8</sup> Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK November 2013 - Public Concern at Work ([whistleblowingnetwork.org](https://whistleblowingnetwork.org)) Accessed 24 January 2024

<sup>9</sup> Whistleblowing framework call for evidence: Government response June 2014 ([publishing.service.gov.uk](https://publishing.service.gov.uk)) Accessed 24 January 2024

<sup>10</sup> LR34, LR36

<sup>11</sup> LR13

At a summary level in some academic literature it was suggested that workers sometimes make disclosures based on false or inaccurate information, albeit the concerns are raised in good faith, and in these instances employers can more easily challenge the worker's belief as unreasonable or irrational if the disclosure results in an employment dispute through the Employment Tribunal.<sup>12</sup>

Some academic and stakeholder literature included criticism of the reasonable belief test.<sup>13</sup> A piece of stakeholder literature contended that the reasonable belief test is too complex and troublesome,<sup>14</sup> and a piece of academic literature noted that it excludes some disclosures that are in the public interest.<sup>15</sup> A mix of academic and stakeholder literature implied that workers might not have enough information or expertise to form a reasonable belief, or that they might face difficulties in proving their belief to the Employment Tribunal, and this creates a barrier to accessing the Employment Tribunal.<sup>16</sup>

## **2. Definition of “worker”**

Being determined as a worker is crucial to accessing protection, as the GB framework legislation permits only those who are deemed to be a worker to bring a case to an Employment Tribunal.<sup>17</sup>

### **Indications of being a worker**

Under the existing definition some factors that may indicate a worker relationship are:<sup>18</sup>

- the degree of control exercised by the employer
- the level of integration into the organisation, the existence of mutuality of obligations
- the personal nature of the service or work in return for a reward

### **The Employment Tribunal decides who is a worker**

The Employment Tribunal has the power to determine whether a person is a worker for the purposes of Part 4A of ERA and may consider the reality of the working arrangement rather than the contractual terms.<sup>19</sup> Case law has established the inclusion of certain workers. For instance, it was determined that a district judge would be considered a worker and eligible for protection.<sup>20</sup> In addition, a whistleblower interviewee noted that they were able to bring a protected disclosure related Employment Tribunal claim as a non-executive director ('NED'), due to their status as an office holder, but were only able to claim victimisation and not unfair dismissal.

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<sup>12</sup> LR13, LR36

<sup>13</sup> LR18, LR34, LR36

<sup>14</sup> LR34

<sup>15</sup> LR36

<sup>16</sup> LR33, LR36, LR45

<sup>17</sup> LR55

<sup>18</sup> LR03, LR28

<sup>19</sup> LR17

<sup>20</sup> Case reference has not been provided as case includes the name of the whistleblower

A whistleblower interviewee noted that it was positive that workers with any length of employment at a company are covered by the GB framework legislation. This was also outlined in a piece of stakeholder literature, in that it is important to protect newcomers who may spot wrongdoing.<sup>21</sup>

### **The definition of worker under the GB framework legislation is broader than the ordinary meaning**

Some academic and stakeholder literature identified that the definition of “worker” under the GB framework legislation is broader than the ordinary meaning of the term, as it covers not only employees but also some contractors, some agency workers, some trainees, and some self-employed individuals depending on the contractual arrangement and on case law.<sup>22</sup> However, a piece of stakeholder literature also noted that the definition of “worker” under the legislation is not exhaustive, and there may be cases where the status of a worker is unclear or disputed.<sup>23</sup>

Some types of working arrangements exist where an individual might reasonably consider themselves a member of an organisation, and therefore eligible for protection in the event they report a concern. However, some individuals are not eligible for protections as, according to a range of literature, their arrangements are not expressly covered by the existing definition of “worker” in section 43K of the ERA.<sup>24</sup> Examples of such members that are unlikely to be eligible for protections are described by stakeholder and academic literature as:<sup>25</sup>

- trustees
- buyers
- non-executive directors
- suppliers
- volunteers
- franchisees
- carers, who are not workers

According to some stakeholder literature, persons closely connected to the organisation, such as a spouse of a “worker”, might also reasonably expect to be protected when they report the concern, especially where the organisations internal procedures encourage anyone aware of a potential issue to report it.<sup>26</sup>

Employer and prescribed person participants explained that they accept concerns from a wider group of individuals than the current “worker” definition under the GB framework legislation, in order to receive a broad range of concerns.

Different employer participants mentioned, for example, that they accept concerns from volunteers, students, work placement individuals, contractors, sub-contractors,

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<sup>21</sup> LR60

<sup>22</sup> LR03, LR10,

<sup>23</sup> LR03

<sup>24</sup> LR09, LR10, LR26

<sup>25</sup> LR10, LR31, LR33, LR35, LR41

<sup>26</sup> LR03, LR17, LR30

suppliers, agents and franchisees as they want to know about issues in their business.

Prescribed person representatives agreed during a focus group that they tend to accept concerns from a range of people, including members of the public, volunteers and customers, regardless of the definition within the legislation, as they want to know about issues that fall within their remit.

During one of the prescribed person focus groups, it was stated that some people raise concerns and expect to be considered whistleblowers, however because they are trustees or volunteers they are not covered. The same focus group noted that the narrowness of the current “worker” definition is potentially a barrier to organisations establishing a whistleblowing or speak up culture. The focus group also noted that while the current definition of worker may not be an issue for prescribed persons, due to prescribed persons looking to receive intelligence from a broad a spectrum of individuals, it does create confusion and may deter some individuals from raising concerns because they are unsure if they are a whistleblower or if the protections apply to them.

### **3. Definition of “public interest” concern**

#### **Subjectivity of what is meant by public interest**

For a worker to qualify for protection under the GB framework legislation, they must reasonably believe that the disclosure is made in the public interest.<sup>27</sup> There is no statutory definition of what constitutes the public interest (generally understood to impact the welfare or wellbeing of the general public), and it is left to the judge to interpret it on a case-by-case basis based on the facts before them.<sup>28</sup>

Some academic and stakeholder literature asserted that the term “public interest” in this context is vague and subjective and can lead to uncertainty and inconsistency in its application.<sup>29</sup> Some whistleblower, employer and prescribed person interview and focus group participants agreed.

During a prescribed person focus group it was noted that it is hard for people to understand what public interest means and it is also difficult to explain. During an employer focus group an employer representative explained that assessing if something was in the public interest was challenging for private sector organisations, providing the example that if a junior member of staff and a senior member of staff both exhibited the same unacceptable behaviour, the senior managers behaviour may be deemed to be in the public interest given their sphere of influence or impact on organisational culture.

#### **Determining whether a disclosure meets the public interest test**

It was broadly agreed at a separate prescribed person focus group that determining if a matter is in the public interest can be challenging, although it was also agreed that for some sectors or industries this is more straightforward. For example, during an employer focus group an employer representative stated that it is easier to fall

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<sup>27</sup> LR19, LR34

<sup>28</sup> LR13

<sup>29</sup> LR36, LR55

within scope of a protected disclosure if you raise concerns in the public sector, which creates an unfair disparity with the private sector.

According to some academic and stakeholder literature, the subjective interpretation of the meaning of public interest can mean that whistleblowers may not be able to predict whether their disclosure will be protected leading to reticence to come forward and, in addition, may face legal challenges from their employers or others who dispute the public interest element of their disclosure.<sup>30</sup> According to a piece of academic literature, although case law can help guide an individual as to when the public interest might be satisfied, it may not lead to success if the judge at the Employment Tribunal applies the case law differently to expectations.<sup>31</sup>

Some academic literature at a summary level indicated that the general term “public interest” may encompass some important issues that affect the well-being of individuals or groups, but do not have a wider impact on society.<sup>32</sup> For example, statutory or regulatory obligations, such as those required by the Financial Conduct Authority’s Handbook for senior managers, are outside the scope of the current definition of “public interest”.<sup>33</sup> However, a breach of these obligations could have widespread consumer implications and personal consequences.<sup>34</sup> Similarly, academic and stakeholder literature indicated that healthcare professionals have professional codes of conduct, which require them to meet a “Duty of Candour” to ensure no harm comes to patients and they do this by reporting unsafe or unacceptable practices.<sup>35</sup> In both cases, if they fail to make a disclosure, there is a risk of being sanctioned personally under that code or regulation.<sup>36</sup>

### **Other definitions of public interest in British legislation**

One piece of academic literature noted that other legislation has indicators of what is considered public interest, for example in Part 2 of the Data Protection Act 2018, or has detailed guidance relating to the public interest test, as in the Freedom of Information Act 2000.<sup>37</sup>

### **Other comments on public interest test**

One piece of stakeholder literature provided a contrasting perspective, suggesting that the public interest test does not require consideration of the whistleblower’s motive, namely to shine a light on the wrongdoing so that it will stop or be put right.<sup>38</sup> The stakeholder literature also considered that that the public interest should not be relevant as it does not deal with the underlying concern or wrongdoing.<sup>39</sup>

## **4. No statutory definition of “whistleblower”**

### **Employment Tribunal decides who is a whistleblower**

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<sup>30</sup> LR11, LR13, LR16

<sup>31</sup> LR13

<sup>32</sup> LR13,

<sup>33</sup> LR61

<sup>34</sup> LR10, LR61

<sup>35</sup> LR09, LR32, LR39

<sup>36</sup> LR09

<sup>37</sup> LR13, [Data Protection Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk), [Freedom of Information Act 2000 Public Interest Test Guidance](#)

<sup>38</sup> LR16

<sup>39</sup> LR16



The GB framework legislation provides a route for workers making a protected disclosure (whistleblowing) to seek a remedy for detriment and/or dismissal because they made a protected disclosure. The Employment Tribunal ultimately determines if an individual qualifies for protections (as a whistleblower) under the legislation.<sup>40</sup> Some stakeholder literature asserted that as a result, the focus becomes the relationship between an organisation (which meets the definition of employer) and an individual (who meets the definition of a worker and experienced detriment after reporting certain types of concerns).<sup>41</sup>

### **Common understanding of who is a whistleblower**

Several pieces of academic and stakeholder literature, as well as interviews and focus groups, commented that the term “whistleblower” covers a broad range of definitions in common understanding, and there is no legal definition of “whistleblowing” or “whistleblowers” in current legislation in Great Britain.<sup>42</sup>

Across some academic and stakeholder literature, whistleblowing was generally understood to be an act by an individual (or individuals) who expose wrongdoing or perceived wrongdoing on the part of an organisation of any kind of which they are generally a member.<sup>43</sup> This definition differs from the definition included in the legislation outlined above.<sup>44</sup>

A prescribed person interviewee expressed a view that individuals often confuse the broader term whistleblowing with the definition covered by the GB framework legislation.

### **Positive and negative connotations of the term ‘whistleblower’**

There are positive or negative connotations of the term ‘whistleblower’ depending on the individual’s perspective.<sup>45</sup>

The term “whistleblower” was discussed at the whistleblower focus groups and participants had mixed views. Participants generally dislike the term as it is not defined in law. They stated that it can have positive and negative connotations and perceived to be an unhelpful exclusionary term and tends to alienate people. A participant in one whistleblower focus groups noted that the United States has a definition of a whistleblower and they felt that adopting a similar approach would make sense. A prescribed person interviewee stated that the term “whistleblower” is often viewed negatively.

A piece of stakeholder literature highlighted that the lack of a definition of the term “whistleblower” has hindered whistleblowers’ ability to access protection.<sup>46</sup> Stakeholder and one piece of academic literature further suggested that the definition used by the current legislation is too narrow and only applies to a limited number of people who might self-identify themselves as a whistleblower.<sup>47</sup> Recognition as a whistleblower sometimes comes as a concession from the

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<sup>40</sup> LR17

<sup>41</sup> LR03, LR18

<sup>42</sup> LR03, LR10, LR11, LR36, LR38

<sup>43</sup> LR03, LR10, LR26

<sup>44</sup> LR03, LR24, LR26, LR67

<sup>45</sup> LR17, LR22

<sup>46</sup> LR03

<sup>47</sup> LR03, LR18, LR34, LR42

employer, rather than proactive recognition according to some stakeholder literature.<sup>48</sup>

## **Organisations and whistleblowing**

Since the introduction of the GB framework, many organisations have introduced policies which invite the reporting of concerns, have procedures in place which facilitate this reporting, and provide the individual with an undertaking that they will be protected against victimisation if they act with reasonable belief.<sup>49</sup> Most employers interviewed noted that they articulate a definition of a whistleblower in a policy (e.g. a whistleblowing policy), with some of these definitions in line with the legislative definitions, while others had broader definitions to encourage a wider range of individuals and concerns to be raised.

An employer representative explained during a focus group that they refer to “reporters” rather than “whistleblowers” as the definition of whistleblower can vary under different regulators nationally and internationally. During a prescribed person focus group it was noted that there is confusion between the term’s “whistleblowing” and “speaking up”, and that whistleblowing could be seen as being a sub-set of speaking up.

A piece of academic literature noted that there is no obligation for employers to have arrangements in place to receive protected disclosures, even though whistleblowing is often reported to be an important tool in managing organisational risk.<sup>50</sup> However, this statement needs to be caveated as according to some public body literature, some organisations, such as those in the financial services and health sectors, do have such an obligation required by their regulators.<sup>51</sup>

## **Prescribed persons and whistleblowing**

There is an expectation for prescribed persons to be able to receive reports from workers making a protected disclosure, but no corresponding expectation that they should investigate them, according to two academic and one piece of stakeholder literature.<sup>52</sup> These items of literature asserted that where prescribed persons do have detailed policies and procedures, they often make no mention of the public interest.

All prescribed persons interviewed noted that they have a definition of a whistleblower, generally in line with the legislation of a protected disclosure under the GB framework. However, participants explained that this does not stop them from receiving and accepting concerns from individuals that do not meet that definition. Some prescribed person participants explained that the only real impact of the definition is in respect of their annual prescribed person reporting obligations. Prescribed person annual reporting is explored further below.

A prescribed person interviewee noted that they frequently have to explain to colleagues within their organisation what the definition of a whistleblower is. The

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<sup>48</sup> LR17, LR22, LR32

<sup>49</sup> LR28

<sup>50</sup> LR13

<sup>51</sup> LR19, LR61

<sup>52</sup> LR13, LR43, LR45

prescribed person representative felt that the term is often misused and applied to anyone looking to provide information to the prescribed body.

Some stakeholder and government body literature established that the term “whistleblowing” can cause confusion or disappointment in relation to the role of a prescribed person and what they will do in practice with the reported concern.<sup>53</sup> A piece of stakeholder literature, commenting on the health sector, stated that this confusion may in part be due to some organisations and prescribed persons avoiding using “whistleblowing” as a term in their policies.<sup>54</sup>

### **Other discussions around the current definition of whistleblowing**

Some of the stakeholder and public body literature asserted that the term “whistleblowing” is sometimes taken to imply some sort of escalation from ‘raising a concern’ during the course of work, then ‘blowing the whistle’ potentially when the worker perceives that the concern has not been heard or investigated.<sup>55</sup> This ‘raising a concern’ stage, according to a piece of international body literature, represents an additional tier before the three tiers to report concerns, which are outlined in the GB framework (namely their employer, the relevant prescribed person, and, lastly, the media) and it is not included in how the GB framework defines a protected disclosure, despite being actively encouraged by organisations across all sectors.<sup>56</sup>

A piece of academic literature indicated that the implied definition of whistleblowing used by the GB framework legislation does not properly reflect the current working practices in Great Britain as, for example, it does not include public reporters of concerns, sometimes referred to as bellringers (for example customers or auditors).<sup>57</sup> Some academic and stakeholder literature indicated that the legislative definition excludes other categories of potential whistleblowers as well, such as suppliers or volunteers.<sup>58</sup> For instance, two pieces of stakeholder literature indicated that some of those who report their concerns, having been encouraged to do so by the organisation’s policy or a statutory obligation, later discover they are not a “whistleblower” as they are not a worker for the purposes of GB framework protections, even though the working practices of the organisation implied they would be protected – and the harm the individual has experienced, usually caused by the organisation, can be similar, such as reputational damage resulting in loss of income.<sup>59</sup>

Similarly, a piece of stakeholder literature noted that those who might expect protection, such as workers who are persecuted after being mistakenly identified as whistleblowers, or workers who are suspected of being about to blow the whistle are victimised before they do so, are not eligible for protection under the GB framework for the harm they experience at the hands of the organisation.<sup>60</sup>

## **5. No definition of “protection”**

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<sup>53</sup> LR03, LR38

<sup>54</sup> LR39

<sup>55</sup> LR04, LR38

<sup>56</sup> LR28

<sup>57</sup> LR36

<sup>58</sup> LR03, LR36

<sup>59</sup> LR41, LR56

<sup>60</sup> LR41

Some stakeholder and academic literature indicated that the protections from detriment within the GB framework are too narrow compared to the lived experiences of detriment and harm that a worker may encounter.<sup>61</sup> The GB framework provides protection in the form of redress in the event of an unfair dismissal or a detriment (such as poor treatment or disciplinary) because of making a protected disclosure. However a piece of journalistic literature and a piece of stakeholder literature considered that the protection is too limited and difficult to prove.<sup>62</sup> Specifically, it may not cover all forms of retaliation that whistleblowers, or those closely connected to them,<sup>63</sup> may face, such as harassment, bullying, isolation, blacklisting, or threats.<sup>64</sup> Stakeholder literature stated that the GB framework also places the burden of proof on the worker to show that they made a protected disclosure and suffered a detriment or dismissal because of their disclosure, which may be hard for the worker to establish in practice.<sup>65</sup>

## Summary of suggestions for change

Suggestions for change were identified in parts of the literature and provided by research participants in relation to the above definitions. The suggestions for change are summarised below and outlined in more detail in Appendix A:

- extend the existing “worker” definition to members of an organisation
- extend the “worker” definition to include relationships outside of an organisational relationship.
- remove whistleblowing from an employment law context
- replace “employer” definition with a “relevant person” definition
- amend the “public interest concern” definition
- create a statutory code of practice in relation to “public interest”
- remove the “public interest” element
- create a statutory definition of “whistleblower”
- create a definition of “protection”
- reform or overhaul of the GB framework legislation

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<sup>61</sup> LR03, LR10

<sup>62</sup> LR17, LR53

<sup>63</sup> Persons closely connected could include colleagues, family or friends who experience detriment as a result of the whistleblower reporting a concern

<sup>64</sup> LR17

<sup>65</sup> LR31, LR33

# Disclosure routes

## Introduction

This section sets out the observations and emerging themes in relation to the existence and effectiveness of disclosure routes under the following sub-sections:

1. Existence of routes
2. Increase in concerns being raised with both organisations and prescribed persons
3. Reporting internally
4. Reporting to prescribed persons
5. Reporting to MPs and the media

Suggestions for changes to the disclosure routes identified in the research project are summarised at the end of the section and outlined in more detail in Appendix A.

## Background

A range of literature sources summarised that one of the main goals of the GB framework is to provide a route to raise a concern.<sup>66</sup> Whistleblowing, or the act of using an appropriate disclosure route to report wrongdoing in an organisation, is often seen as a vital mechanism for ensuring issues are identified that would hinder that organisation's interests, prevent different kinds of misconduct from occurring as well as promoting a culture of integrity in organisations and across wider society.<sup>67</sup> However, whistleblowers can face many challenges and risks, such as retaliation, stigma, legal threats, and career damage. It is therefore important to examine the existence and effectiveness of different disclosure routes for whistleblowing, including internal and external routes and anonymous reporting.<sup>68</sup>

## Research observations and emerging themes

### 1. Existence of routes

A range of literature showed that routes exist to disclose wrongdoing. It further showed that existing legislation provides a tiered approach to disclosure routes for reporting concerns (internal<sup>69</sup>, prescribed person, and other routes<sup>70</sup>) so that a worker is protected from detriment or dismissal for passing on information related to that concern that meets the criteria for a protected disclosure (public interest, reasonable belief, and relevant failure).<sup>71</sup>

Internal reporting, or disclosing wrongdoing to someone within the organisation, is often the preferred option for workers as it lets them alert their organisation about the issues, theoretically without harming their image or work relationship, according to a

<sup>66</sup> LR18, LR26, LR28, LR32, LR33, LR34

<sup>67</sup> LR03, LR30, LR33, LR56, LR59, LR65

<sup>68</sup> LR03, LR15, LR17, LR18, LR20, LR25, LR28, LR30, LR37, LR58, LR66

<sup>69</sup> Internal refers to employers, and can also include legal advisers and Minister of the Crown

<sup>70</sup> Other routes are typically understood to mean releasing to the media or public in some form

<sup>71</sup> LR14, LR19

piece of stakeholder literature and a piece of international body literature.<sup>72</sup> That said there are examples provided in stakeholder, academic and public body literature of mandatory internal reporting such as sectors where a professional body requires speaking up about wrongdoing in order to maintain professional fitness tests.<sup>73</sup> Examples include healthcare, social workers or financial services workers with senior manager responsibilities.<sup>74</sup>

A piece of academic literature stated that workers, who do not believe effective change has resulted from internally raised concerns, have more effect and influence when they report externally as it allows them to reveal the wrongdoing to the regulators or media, who may be able to act and resolve the wrongdoing.<sup>75</sup> According to a range of literature, whistleblowers reduce their risk and vulnerability when they report anonymously, as anonymity can shield them from retaliation or being identified.<sup>76</sup>

## **2. Increase in concerns being raised with both organisations and prescribed persons**

### **Sectors**

Some literature looked at disclosure routes through the lens of sectors. A few pieces of journalistic and stakeholder literature indicated that there has been an increase in reported concerns across all sectors to organisations and prescribed persons since 2014.<sup>77</sup> In terms of volume, stakeholder literature suggested that the sector with the highest volume of concerns reported is health, followed by financial services, technology, education, and then all other sectors.<sup>78</sup>

However, a separate piece of stakeholder literature contradicts this view and concluded that there had been a decline in the volume of reports and that this decline is due to the fear of retaliation.<sup>79</sup> Separate stakeholder literature provided examples of high-profile whistleblowing cases that included elements of harm or retaliation.<sup>80</sup>

### **Organisations**

Academic and public body literature indicated that the process of disclosure usually begins with the concern being reported to a line manager and then escalated to alternative management or an independent investigation function or nominated specialist.<sup>81</sup> Different academic and public body literature indicated that this initial response sets the tone for the experience of the individual with organisational curiosity and psychological safety being identified as probable features for an improved experience.<sup>82</sup> There are acknowledged best practices across organisations and across sectors in the stakeholder literature, in relation to providing a route to

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<sup>72</sup> LR03, LR28

<sup>73</sup> LR61, LR39

<sup>74</sup> LR61

<sup>75</sup> LR46

<sup>76</sup> LR10, LR26, LR30, LR56, LR67

<sup>77</sup> LR07, LR22, LR58

<sup>78</sup> LR44, LR58

<sup>79</sup> LR17

<sup>80</sup> LR22, LR37

<sup>81</sup> LR26, LR28, LR34

<sup>82</sup> LR09, LR66

make a disclosure, including routes which factor in language, accessibility, confidentiality, and anonymity needs.<sup>83</sup>

There is an acknowledgement in a mix of literature sources that there is an increase in concerns being raised internally because of organisations increasingly adopting internal reporting procedures, despite there being no legal obligation for organisations to do so.<sup>84</sup> Motivations outside of the GB framework legislation are covered below. A different mix of literature sources indicated that changes in communication methods and preferences (e.g. internet access and smart mobile phones) has facilitated easier and increased communication and resulted in greater public awareness and attention on the reputations of organisations.<sup>85</sup> This means, according to stakeholder literature, that it is more likely there will be associated negative consequences if wrongdoing came to light.<sup>86</sup> Therefore, an organisation having an internal procedure appears to provide organisations with some protection against external reporting, according to academic and stakeholder literature.<sup>87</sup>

Expanding on this, a range of literature showed that whistleblowers are often recognised by organisations, consumers and wider society for their courage and efforts to bring wrongdoing to light and there are many unheard positive stories where concerns have been raised and heard by an organisation, resulting in higher levels of engagement and staff loyalty.<sup>88</sup>

Several employer participants have observed year-on-year increases in the volume of concerns they receive. One employer interviewee suggested this was as a result of increased awareness and trust in their internal whistleblowing framework. Another employer interviewee noted that there was a drop in the number of disclosures during the Covid-19 lockdowns, but numbers are now returning to previous levels.

Public body literature noted that certain sectors (health and financial services) have additional requirements in relation to internal whistleblowing frameworks and disclosure routes, as set out by the relevant professional or regulatory body.<sup>89</sup> A prescribed person interviewee from the financial services sector stated that they have seen speak up cultures develop in the organisations in their sector, and therefore workers increasingly raising complaints and issues.

A piece of public body literature, as well as evidence gathered through interviews and focus groups, indicated that the GB framework legislation is not necessarily the motivation for organisations who embed an effective internal whistleblowing framework.<sup>90</sup> Where an organisation has a route for disclosure it is associated with better outcomes for both the reporter and the organisation, according to a piece of academic literature.<sup>91</sup>

## **Prescribed persons**

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<sup>83</sup> LR33, LR65

<sup>84</sup> LR03, LR08, LR17, LR28

<sup>85</sup> LR02, LR03, LR20, LR61

<sup>86</sup> LR02, LR03, LR35, LR44

<sup>87</sup> LR20, LR67

<sup>88</sup> LR04, LR17, LR24, LR32, LR44, LR55, LR56, LR60, LR63, LR66

<sup>89</sup> LR59, LR66

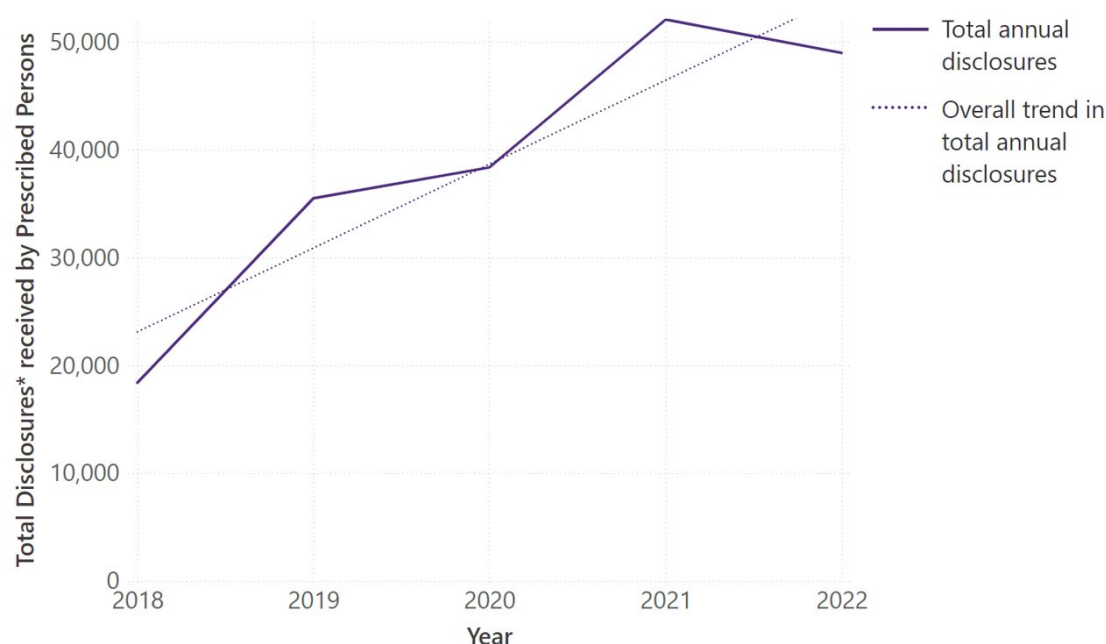
<sup>90</sup> LR66

<sup>91</sup> LR10

Since April 2017, specific categories of prescribed persons are legally required to produce an annual report related to the whistleblowing disclosures they have received.<sup>92</sup> The purpose of this obligation is to increase public confidence in the way whistleblowing disclosures are dealt with and to provide information on the issues raised by whistleblowers.<sup>93</sup> Amongst other things, the annual reports must include the number of qualifying disclosures received by the prescribed person which fall within the matters for which they are prescribed, an explanation of the functions and objectives of prescribed persons, a summary of the type of action taken on disclosures, and how the information has impacted on the prescribed person's ability to perform its functions.

This research included analysis of the data within the prescribed person annual reports for the five years ended 31 March 2022. The chart below shows the number of disclosures received by the prescribed persons with available annual reports during this period, with the solid line and dotted lines representing annual disclosures and the overall trend, respectively. The term "disclosures" is used rather than "qualifying disclosures" because some prescribed person reports include concerns raised that may not qualify for protections under the GB framework while others only include concerns raised that may qualify.

**Chart 1: Total Disclosures\* received by Prescribed Persons by year**



\* Disclosures include qualifying disclosures, where explicitly stated in reports, or all disclosures, where reports are unclear.

Despite issues with the report data, as explained below and further in Appendix H, the chart shows that the volume of concerns being raised with prescribed persons is trending upwards. The annual reports include a total of 193,260 disclosures during the period.

<sup>92</sup> LR25, LR33, LR64

<sup>93</sup> LR25, LR33, LR64



The chart shows that the total number of disclosures received by prescribed persons increased year-on-year, except between 2020/21 and 2021/22 during the COVID-19 pandemic, where the number of disclosures marginally decreased by 6%, from 52,065 to 48,972. However, the number of disclosures in 2021/22 were still 28% higher than the 38,351 disclosures in 2019/20.

As outlined in Appendix H, caution should be taken in relation to the analysis of the data included in prescribed person annual reports due to issues around data completeness, differing interpretations and inclusion of statistics that do not meet the definitions (e.g. “qualifying disclosure”) under the GB framework legislation, and lack of clarity and consistency in language used in reports. For example, a prescribed person interviewee noted that the number of “qualifying disclosures” they include in their annual report has significantly declined because they no longer include non-qualifying disclosures. Notwithstanding these issues with the data, it has been assumed that these issues have been consistent throughout the period and therefore the “upward trend in volumes” stands.

### **3. Annually reported disclosure volumes are dominated by three sectors – and one prescribed person within each of those sectors**

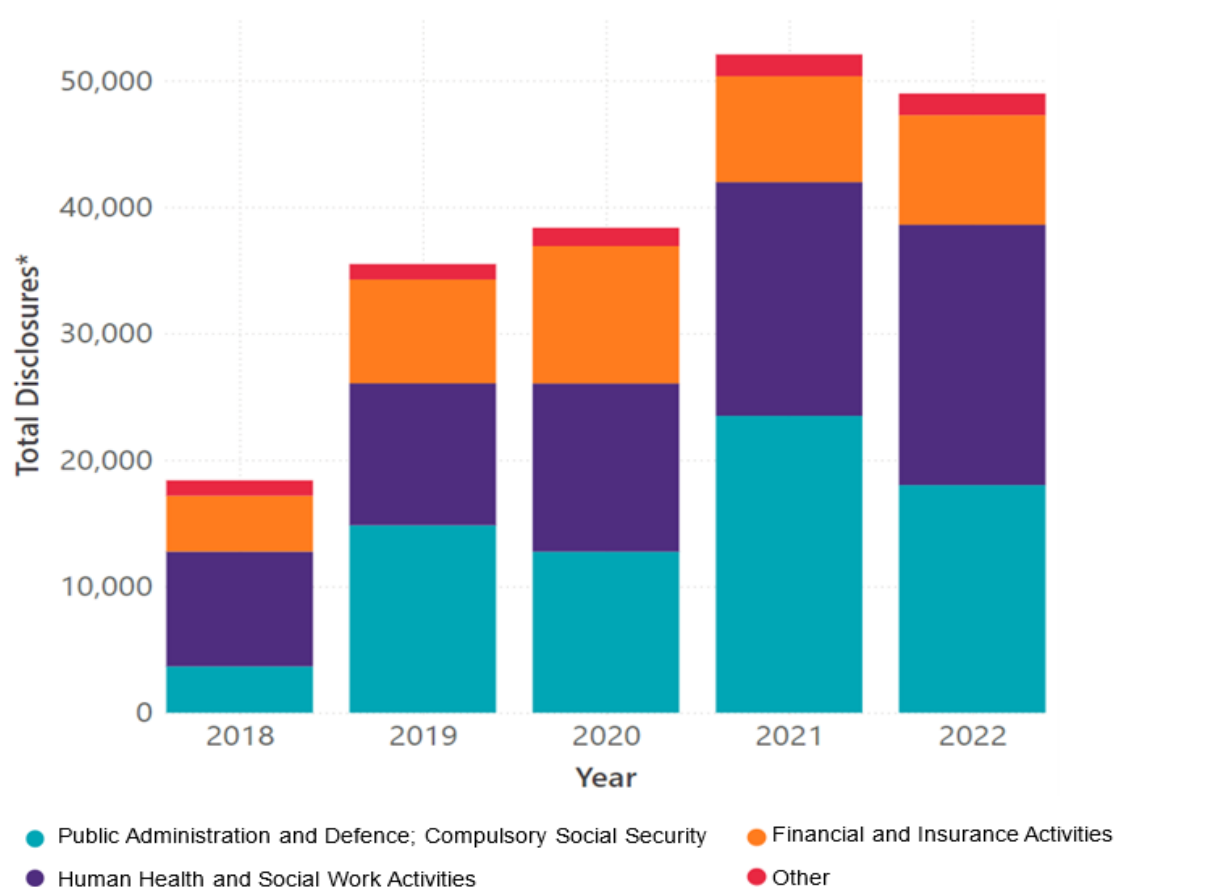
Prescribed persons that have an annual reporting obligation were categorised as part of the research project with reference to the 14 ONS sectors detailed in Appendix H. Analysis of annual disclosure volumes by sector identified that three sectors account for 96% of reported disclosures, and the volumes in each of these sectors are dominated by one prescribed person:

- public administration and defence; compulsory social security (His Majesty’s Revenue and Customs (‘HMRC’))
- human health and social work activities (Care Quality Commission (‘CQC’))
- financial and insurance activities (The Pension Regulator (‘TPR’))<sup>94</sup>

The chart below shows the number of disclosures received per year in each of these top three sectors and disclosures received in the other ten sectors, grouped into a single “Other” category.

<sup>94</sup> TPR reveals 99.9% fall in whistleblowing disclosures following policy change ([www.pensionsage.com](http://www.pensionsage.com)) Accessed 9 January 2024. The Pensions Regulator implemented a change in its policy for 2022/23 which resulted in a 99.9% reduction in the number of disclosures reported in 2022/23 compared to 2021/22. If the number of disclosures received by the Pensions Regulator annually between 2017/18 and 2021/22 were at these levels, disclosures received by the Financial Conduct Authority would dominate the Financial and Insurance Activities sector.

**Chart 2: Disclosures\* received by ONS sector by year**



The sum of disclosures received in these three sectors increased year-on-year, except between 2020/21 and 2021/22 (a 6% fall). Further, the number of disclosures received by the top three sectors doubled between 2017/18 to 2018/19, in common with the overall trend. The composition between the disclosure volumes of the three dominant sectors varied year-on-year with 'Public administration and defence: compulsory social security' having the most volatile movements.

## 4. Reporting internally

### Ease of reporting internally

Some journalistic and stakeholder literature appeared to show that the increase in internal reporting of concerns is due to it potentially being easier for workers to report concerns.<sup>95</sup> This is credited to many organisations having clearer policies and third-party systems and having several internal routes for workers to use to report their concern.<sup>96</sup> In some other stakeholder literature there are indications that some workers trust their internal arrangements, and that it was easy to blow the whistle.<sup>97</sup> One piece of academic literature asserted that the ease of reporting internally is also influenced by the individual's personality traits, situational characteristics of the organisation and the concern and environmental or cultural factors.<sup>98</sup>

<sup>95</sup> LR20, LR60

<sup>96</sup> LR60

<sup>97</sup> LR63

<sup>98</sup> LR67

However, while academic and stakeholder literature suggested that in some organisations there are more routes and it is becoming easier for concerns to be raised<sup>99</sup>, other pieces of stakeholder literature indicated that there are issues which impact how or if concerns are raised.<sup>100</sup> A range of literature also suggested at a high level that it quickly became challenging for the worker, where there is a conflict of interest present for those receiving the report, in that the subsequent actions did not meet the expectation of the worker potentially due to that conflict of interest.<sup>101</sup>

Employer participants described multiple channels for individuals to make disclosures, primarily via email, web form, third-party portal, telephone and face-to-face. This is consistent with some academic and stakeholder literature.<sup>102</sup> Employer participants explained that they have ensured that disclosures are easy for individuals to make in order receive a broad spectrum of concerns from a broad spectrum of individuals by some or all of the following:

- designing a comprehensive, accessible whistleblowing policy, which outlines the available channels
- communicating the existence and nature of the whistleblowing policy through training, communications, and campaigns
- designing simple to use and easy to understand routes and communications
- providing clear signposting to available channels
- making the process accessible, including using bitesize questions on forms and providing multiple language options for each channel
- posting case studies online showing whistleblowers being interviewed (with their faces pixelated and voices distorted) explaining what their experience was like
- providing guidance on team communications and report handling for line managers and people representatives
- working closely with external third-party channel providers
- regularly testing the channels to ensure they are working from a user experience

The majority of employer participants communicated external routes, such as prescribed persons, to potential reporters and sources of independent external advice, such as industry bodies, whistleblowing organisations and the Advisory, Conciliation and Arbitration Service (Acas). Whistleblower participants explained that after raising their concerns they sought advice, including consulting with whistleblowing organisation, trade unions, lawyers, and Acas.

Whistleblower participants explained that they raised their concerns internally with various teams or individuals, including:

- line manager

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<sup>99</sup> LR10, LR56, LR60

<sup>100</sup> LR02, LR39, LR50

<sup>101</sup> LR02, LR10, LR39, LR50, LR60

<sup>102</sup> LR10, LR56, LR60

- senior management
- executive level management (C-suite)
- speak up Guardian
- legal and compliance team
- board of directors
- human resources team
- internal audit team
- organisation President

However, several whistleblower participants stated that it was not easy to blow the whistle to their employer. For example, one whistleblower interviewee had little faith in the process having blown the whistle before, another interviewee was put off due to stories of retaliation and the difficult process, and another interviewee felt restricted by project specific non-disclosure agreements in place as part of their role.

Several whistleblowers stated that they had no choice but to blow the whistle as it was their legal duty and/or they were professionally obligated in their role.

### **Indicators of effectiveness and in-effectiveness of internal routes**

Several pieces of literature suggested that the effectiveness of disclosure routes depends on various factors, such as:<sup>103</sup>

- how the disclosure fits within the legal framework in Great Britain, regulations, and standards, which may provide the guidance, protection, and incentives for the disclosure process
- the type, severity, and scope of the wrongdoing, which may influence the choice, urgency, and outcome of the disclosure
- the organisational culture, policies, and practices, which may affect the availability, accessibility, and responsiveness of the disclosure channels
- the personal characteristics, motivations, and experiences of the worker, which may shape their perceptions, expectations, and satisfaction with the disclosure process

Employer participants noted that the effectiveness of their internal whistleblowing framework is as much about confidence and trust as it is about process and that it takes time and commitment from senior management to build trust and confidence in an internal whistleblowing framework.

A mix of academic and stakeholder literature noted that internal reporting routes can be ineffective for several reasons:

<sup>103</sup> LR10, LR12, LR19, LR26, LR28, LR66, LR67

- first, internal reporting may not be accessible or transparent, as whistleblowers may not know who to report to, what procedures to follow, or what outcomes to expect. Having a disclosure route is not a guarantee of its use or ease of use.<sup>104</sup>
- second, internal reporting may not be safe or supportive, as whistleblowers may face reprisals, isolation, cover ups or indifference from their managers or colleagues and this dissuades potential reporters from raising concerns.<sup>105</sup>
- third, internal reporting may not be responsive or corrective, as whistleblowers may not receive feedback, acknowledgment, or perceive that remedies for the wrongdoing have been undertaken, again creating a confidence crisis for individuals considering raising a concern.<sup>106</sup>

A piece of government body literature further indicated that there are organisations which have disclosure routes which discourage or increase the risks for a worker making a disclosure. For example, some disclosure routes do not effectively encourage disclosures because there is an absence of support for the process. Another example is where the disclosure involves an entity within the broader organisation which is not the worker's employer, and therefore the worker is discouraged from making a report or risks making disclosure in an unprotected manner.<sup>107</sup> Some stakeholder literature explained that this increased risk is due to the content of internal disclosure forms<sup>108</sup> and/or the GB framework not defining how organisations ought to respond when receiving concerns.<sup>109</sup> Several whistleblower participants indicated that this can be further complicated if there are multiple organisations involved in the wrongdoing.

One piece of academic literature asserted that the actions or outcomes arising as a result of a concern being raised internally are influenced by the power of the individual (i.e. the position they hold within the organisation).<sup>110</sup> On this basis, the literature concluded that the "success" of internal reporting is variable as it may depend on the individual's power.<sup>111</sup>

In other government body and stakeholder literature, the improvement in engagement with internal reporting is attributed to the changes in internal whistleblowing arrangements providing routes to report and to escalate internally.<sup>112</sup>

According to a range of literature, anonymous internal reporting, or internally disclosing wrongdoing without revealing one's identity, is often the preferred route for workers who do not feel safe to speak up with their identity known, or for those who might not meet the definition of worker under the GB framework legislation.<sup>113</sup>

<sup>104</sup> LR03, LR16, LR17, LR25, LR34

<sup>105</sup> LR02

<sup>106</sup> LR34

<sup>107</sup> LR38

<sup>108</sup> Internal disclosure forms could be email, third party system or internal form. They do not routinely collect data on who the individual's employer is and whether it is the same body the concern relates to.

<sup>109</sup> LR08, LR18

<sup>110</sup> LR46

<sup>111</sup> LR46

<sup>112</sup> LR60, LR66

<sup>113</sup> LR10, LR22, LR26, LR30, LR34, LR67

However, a range of literature indicated that anonymous reporting can also be ineffective for several reasons:<sup>114</sup>

- first, anonymous reporting may not be possible or feasible, as whistleblowers may not have access to secure and confidential channels or may leave traces of their identity that can be exposed or traced
- second, anonymous reporting may not be reliable for organisations, as whistleblowers may provide incomplete, inaccurate, or unverifiable information, or may be perceived as lacking credibility, motives, or accountability
- third, anonymous reporting may not be a beneficial or protective route for the whistleblower, as whistleblowers may not receive any feedback, support, or protection, or may still face negative consequences or risks

## **5. Reporting to prescribed persons**

### **Identifying the appropriate prescribed person**

Most whistleblower participants found it easy to make their report to a prescribed person and knew which prescribed person to raise their concerns to. Their knowledge came from their career experience, research, or advice from a whistleblowing organisation.

However, participants at prescribed person and legal representatives focus groups, as well as whistleblower participants, stated that finding the appropriate prescribed person can be difficult in some circumstances. This difficulty is supported in several pieces of academic and stakeholder literature, which stated that workers often do not have a clear understanding of the appropriate prescribed person to report their concern to.<sup>115</sup> Examples from the same literature included that whistleblowers often raised their concerns with the wrong prescribed person, either because they did not know who the right one was, or because they did not trust the one that was relevant to their sector or issue.<sup>116</sup> That literature showed that raising concerns with the wrong prescribed person can lead to delays, confusion, frustration, or loss of protection for the worker, as well as inefficiency and duplication of work for the prescribed persons.<sup>117</sup>

Some prescribed person interviewees explained that they regularly receive disclosures outside their prescribed person's scope. One prescribed person interviewee stated as much as 90% of the disclosures they receive are outside their scope. Prescribed person participants explained that they either refer such disclosures to the alternative organisation (where data sharing allows) or more commonly go back to the whistleblower (where known) and direct them to that organisation.

### **Some sectors do not have a sector specific prescribed person**

<sup>114</sup> LR22, LR26, LR28, LR30, LR56, LR65

<sup>115</sup> LR03, LR25, LR27, LR43, LR45, LR64, LR65

<sup>116</sup> LR03, LR25, LR27, LR43, LR45, LR64, LR65

<sup>117</sup> LR03, LR25, LR27, LR43, LR45, LR64, LR65

Employer participants were aware of the relevant prescribed person(s) for their sector, where one is present.

However, some employer participants noted there was no sector-specific prescribed person in their construction and retail sectors. Similarly, a whistleblower interviewee and an employer interviewee noted that there is no regulator (or union) in the technology sector and therefore there is no potential sector-specific prescribed person for workers to blow the whistle to. A participant at a legal representatives focus group agreed that sometimes there is not a relevant prescribed person for whistleblowers to approach.

A few pieces of academic and stakeholder literature suggested that not having a sector specific prescribed person may result in wrongdoing going unchallenged and frustration for the worker, as there is no apparent further route to take before deciding whether to make a disclosure to the media.<sup>118</sup>

A number of sources of academic and stakeholder literature indicated that a further impact of not having a prescribed person in a sector is a lack of clarity and guidance that the worker can refer to.<sup>119</sup> A worker may not know who to report their concerns to, or how to report them in a safe and confidential manner.<sup>120</sup> They may also lack information and advice on their rights and remedies under the GB framework, unless they speak to a whistleblower organisation.<sup>121</sup>

A few pieces of stakeholder literature indicated workers in sectors without a prescribed person may not enjoy the same level of legal protection and support as those who report to a prescribed person.<sup>122</sup>

### **Some sectors have several prescribed persons**

An employer interviewee noted that there are multiple prescribed persons in the health sector for individuals to escalate disclosures to, depending on the nature of the perceived wrongdoing. In their view, this can make it complex for a potential reporter to determine which prescribed person to make a disclosure to. Similarly, a prescribed person participant noted that in certain sectors there are many prescribed persons with different roles and so it can be difficult for members of the public to determine the correct prescribed person to whom they should raise their concern.

Where there is no prescribed person for the worker to go to, or there are several prescribed persons to report parts of the wrongdoing to, stakeholder literature suggested it is harder for the worker to ensure their concerns are properly investigated and addressed by an independent and impartial authority.<sup>123</sup> The same literature stated that they may also not be able to access feedback, follow-up, or redress mechanisms in case their concerns are ignored, dismissed, or covered up.<sup>124</sup>

### **Complex multifaceted concerns can be challenging for prescribed persons**

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<sup>118</sup> LR25, LR43, LR45, LR65

<sup>119</sup> LR03, LR25, LR33, LR34, LR43, LR45, LR64, LR65

<sup>120</sup> LR03, LR25, LR33, LR43, LR45, LR65

<sup>121</sup> LR03, LR33, LR65

<sup>122</sup> LR03, LR33, LR43, LR65

<sup>123</sup> LR03, LR33, LR43, LR65

<sup>124</sup> LR03, LR33, LR43, LR65

Several pieces of literature indicated that whistleblowing concerns that are large or complex in nature – such as concerns involving multiple issues, jurisdictions, or organisations – are challenging for prescribed persons to respond to effectively.<sup>125</sup> Some academic and stakeholder literature asserted that the challenges arise due to complex concerns potentially falling into the remit of more than one prescribed person<sup>126</sup> and therefore requiring coordination, collaboration, and investigation across different sectors, agencies, or authorities.<sup>127</sup> However, a range of literature stated that mechanisms to ensure that this coordination is effective do not currently exist.<sup>128</sup>

### **Whistleblowing with international aspects of the concern**

A range of literature further highlighted that some whistleblowing concerns – such as those involving international aspects, such as cross-border operations, transactions, or impacts of an organisation or sector – may be beyond the scope of the GB framework, which only applies to Great Britain.<sup>129</sup>

A whistleblower interviewee noted a lack of effective involvement by prescribed persons and UK government in their matter, which was complex and involved multiple international agencies. They explained that their case (and the protection they received) suffered due to slow cooperation between the British prescribed persons they raised their concerns to and overseas regulators.

### **Variable capacity of prescribed persons to handle concerns and referrals**

A piece of public body literature found that prescribed persons, spoken to as part of other research, largely had sufficient capacity and capability to handle incoming reports from whistleblowers, although there was variance in terms of volumes and practices.<sup>130</sup> Some prescribed persons receive very few or no reports at all, while others received hundreds or thousands of reports per year. Some prescribed persons have dedicated teams or units for dealing with whistleblowing concerns, while others rely on staff from other areas.<sup>131</sup> The same literature continued, that some prescribed persons have clear and robust policies and procedures for handling whistleblowing concerns, while others have more informal or flexible approaches. Some stakeholder literature stated that prescribed persons provide regular and comprehensive feedback and support to whistleblowers, while others provided minimal or no communication or assistance.<sup>132</sup> Explanations provided by prescribed person participants suggested that the variability of practices may reflect the diversity and complexity of the sectors and issues that prescribed persons cover, as well as the resources and priorities that they have.

However, some academic and stakeholder literature suggested that some prescribed persons may not have the capacity or capability to effectively handle concerns, especially when referrals between prescribed persons are required or when the

<sup>125</sup> LR03, LR25, LR39, LR64, LR65

<sup>126</sup> For example, a whistleblower may report a concern about health and safety risks in a construction project that involves both the Health and Safety Executive and the Environment Agency as prescribed persons

<sup>127</sup> LR03, LR25, LR65, LR67

<sup>128</sup> LR01, LR03, LR25, LR27, LR36, LR39, LR64, LR65, LR67

<sup>129</sup> LR16, LR19, LR22

<sup>130</sup> LR27

<sup>131</sup> Such as complaint or general enquiry teams

<sup>132</sup> LR33, LR65



whistleblowing concern involved more than one sector, jurisdiction, or level of authority.<sup>133</sup>

Some prescribed person participants expressed similar views, particularly around knowing who to contact at other prescribed persons and local authorities<sup>134</sup> and facing delays or barriers in getting a response or cooperation from local authorities.

Prescribed persons explained that these challenges around finding the right person to speak with, and the capacity or competence of the recipient to handle the concern effectively, could impact the timely and effective resolution of whistleblowing concerns, and the accountability and transparency of the whistleblowing process.

### **Incentives offered by prescribed persons to provide information**

Some stakeholder literature also explored the evidence of incentives or rewards that some prescribed persons provide to informants to encourage use of their disclosure route to report wrongdoing, separate from the GB framework.<sup>135</sup> The same sources also identified examples of prescribed persons that offer financial incentives or recognition to informants. This literature considered the potential benefits and drawbacks of rewarding informants and reflected that Great Britain may be an outlier internationally by not offering incentives for whistleblowers to make disclosures. The literature continued that other countries have not seen an increase in the frivolous and malicious reports that are cited as the primary argument against incentives, but the literature did not explore all the ethical and practical challenges of implementing such schemes in Great Britain.

An interviewee from one of these prescribed persons confirmed that rewards can be provided to all types of informants, including whistleblowers, members of the public and covert intelligence sources, depending on whether certain factors are met. The factors considered include the level of effort of the informant, level of risk to the informant, potential harm to the economy or business area, and fines levied. The prescribed person interviewee confirmed that they never comment on whether or not a reward has been paid.

None of the employer participants spoken to provide incentives to individuals.

### **Effectiveness of reporting to prescribed persons**

As explained above, reporting to prescribed persons is often the alternative or supplementary option for workers who determine it is necessary. However, a lot of literature asserted that external reporting, for example to prescribed persons, may not be possible or effective.<sup>136</sup> For instance, it may not be possible due to whistleblowers facing legal restrictions, contractual obligations, or ethical dilemmas that limit their ability to disclose information to outsiders.<sup>137</sup> In addition, a range of

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<sup>133</sup> LR25, LR65

<sup>134</sup> Whistleblowing: list of prescribed people and bodies (www.gov.uk), Accessed 24 January 2024. The list of prescribed people and bodies states that local authorities should be contacted about compliance with the requirements of consumer protection legislation; food safety legislation; and matters which may affect the health or safety of any individual at work or any member of the public arising out of or in connection with the activities of persons at work

<sup>135</sup> LR22, LR55

<sup>136</sup> LR03, LR25, LR27, LR32, LR33, LR41, LR45, LR64, LR65

<sup>137</sup> LR03, LR32, LR33,

literature indicated that whistleblowers encounter scepticism or indifference from prescribed persons who may not have the power to effect change.<sup>138</sup>

Participants at a whistleblower focus group discussed that they felt that there is a lack of trust in some prescribed persons, as some concerns raised may suggest a failure of regulatory duty. The prescribed person may therefore be conflicted in taking necessary action.

### **Referrals from the Employment Tribunal**

Employment Tribunals can make a referral to prescribed persons, if the prescribed person is named on the ET 1 form. By using the ET1 form, workers can indicate if they would like their claim to be notified to the relevant prescribed person.

However, a piece of stakeholder literature suggested that the information is rarely passed from the Employment Tribunal to the relevant prescribed person to evaluate.<sup>139</sup> This literature does not offer a clear explanation for this. However, a prescribed person interviewee explained that whilst they receive ET1 forms from Employment Tribunals, the forms they receive often do not fall under their remit.

## **6. Reporting to other external routes**

### **Reporting to MPs**

Some whistleblower participants noted that they also raised their concerns to their MP. One whistleblower interviewee explained that their MP wrote to government ministers on several occasions, but the replies subsequently provided to the whistleblower were generic in nature. Another whistleblower interviewee explained that they received no response from their MP. A piece of stakeholder literature mentioned that MPs appear to struggle to identify when they have received a protected disclosure or understand that they are a prescribed person on occasions.<sup>140</sup>

### **Reporting to the media**

One piece of academic literature summarised that the media is seen as a tool for countering corruption when all other avenues have been exhausted, and it is believed that this type of external disclosure can help save lives and wrongdoing more effectively than other routes in some instances.<sup>141</sup>

### **Civil servant security clearance**

During a focus group a whistleblower participant provided a sentiment of incompatibility between security clearance of civil servants and protections under the GB framework, meaning that matters that may genuinely be in the public interest are excluded and civil servant whistleblowers may be dissuaded from raising concerns with their MPs. The whistleblower participant also felt that removal of security clearance can be used as a way of subjecting a whistleblower to detriment.

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<sup>138</sup> LR43, LR62, LR65

<sup>139</sup> LR43

<sup>140</sup> LR03

<sup>141</sup> LR11

## **Summary of suggestions for change**

Suggestions for change were identified in parts of the literature and provided by research participants related to disclosure routes. The suggestions for change are summarised below and outlined in more detail in Appendix A:

- create obligations and offences for organisations to have reasonable procedures to receive and respond to concerns
- create further sector specific prescribed persons
- consider removing overlapping prescribed persons
- create a central prescribed body (or similar office or ombudsman)
- create a central whistleblowing unit for local authorities to triage disclosures
- improve guidance to assist individuals to find the appropriate prescribed person
- allow information to be shared more freely between prescribed persons

# Concerns raised

## Introduction

This section sets out observations and emerging themes in relation to the definition of concerns and the responses to those concerns, under the following sub-sections:

1. Organisations' definition of concerns
2. Prescribed persons' definitions of concerns
3. Organisations' responses to concerns raised
4. Prescribed persons' responses to concerns raised

Suggestions for changes to the definition of and response to concerns raised identified in the research project are summarised at the end of the section and outlined in more detail in Appendix A.

## Background

As stated at the beginning of the previous section, according to a range of literature, one of the main goals of the GB framework is to provide a route to raise a concern.<sup>142</sup>

In this context of concerns, the GB framework legislation states that a “qualifying disclosure” involves a disclosure of information that the worker reasonably believes to show one or more of the following categories of wrongdoing:<sup>143</sup>

- criminal offence
- miscarriage of justice
- environmental damage
- failure to comply with legal obligations
- health or safety is endangered
- deliberate concealment (of any of the above)

At a high level, some of the stakeholder and public body literature and participants identified that organisations and prescribed persons have different approaches to defining concerns and handling or responding to those concerns.<sup>144</sup>

According to a piece of public body literature, workers and the public contact prescribed persons to raise a range of concerns, a sub-set of which may be considered qualifying disclosures.<sup>145</sup> Two pieces of academic literature suggested that initially concerns are typically raised within the organisation in an informal way to local colleagues or management, with an escalation internally to higher

<sup>142</sup> LR18, LR26, LR28, LR32, LR33, LR34

<sup>143</sup> LR05, LR19, [Public Interest Disclosure Act 1998 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>144</sup> LR33, LR38, LR61, LR65

<sup>145</sup> LR27

management.<sup>146</sup> A piece of academic literature indicated that the individual escalates their concerns to increasingly independent recipients until individuals turn to the specialist internal reporting channels (where available) in an effort to successfully place the spotlight on the wrongdoing concerns.<sup>147</sup> Usually, only after exhausting these internal channels, does the individual turn to the prescribed person to escalate their concern.<sup>148</sup>

## Research observations and emerging themes

### 1. Organisations' definition of concerns

A range of mostly stakeholder and academic literature asserted that organisations use a broad definition of “concern”, including covering any type of wrongdoing that is reportable, either internally or externally, under the relevant legislation, regulations, or professional standards.<sup>149</sup> Some of these items suggested at a summary level that these definitions may include, but not be limited to, fraud, corruption, misconduct, malpractice, health and safety breaches, environmental damage, or human rights violations.<sup>150</sup>

However, according to two pieces of public body literature and one piece of stakeholder literature, organisations, and some prescribed persons, have a broader definition of concerns, which means not all concerns raised fall under the wrongdoing categories in the GB framework legislation – set out above.<sup>151</sup> A couple of pieces of stakeholder and public body literature showed that this can cause confusion as to whether a concern will fall under the legislation.<sup>152</sup> The prescribed person focus group, and a whistleblower focus group both agreed that there is confusion regarding protections due to broader employer definitions of concerns compared to what is covered by the qualifying disclosure definition under the legislation.

A range of literature indicated that the following categories of wrongdoing or concerns are raised with organisations and prescribed persons, in order of commonality:<sup>153</sup>

- crime (which may include categories of wrongdoing listed separately)
- patient safety and bullying
- fraud
- bribery
- misuse or misappropriation of assets
- price fixing

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<sup>146</sup> LR10, LR36

<sup>147</sup> LR46

<sup>148</sup> LR40, LR52, LR61

<sup>149</sup> LR03, LR09, LR28, LR32, LR34, LR42, LR44, LR56, LR67

<sup>150</sup> LR03, LR09, LR28, LR32, LR44, LR56, LR62, LR67

<sup>151</sup> LR40, LR62, LR63

<sup>152</sup> LR30, LR40

<sup>153</sup> LR03, LR05, LR07, LR09, LR10, LR20, LR25, LR42, LR56, LR58, LR60, LR62, LR63, LR67 LR15, LR51

- sexual harassment
- mismanagement
- child sexual abuse
- health and safety
- imminent threat to a person or property
- public safety
- breaches of codes of conduct
- breaches of regulatory rules
- breaches of company policy

The research project considered the trends highlighted in several pieces of literature in relation to the categories of wrongdoing reported by whistleblowers. Although different increases are highlighted by journalistic and stakeholder literature, there is a consistent view that there is an increase in reported concerns outlining risks to health and safety, public safety, and fraud.<sup>154</sup> One piece of academic literature noted that individuals are more likely to make disclosures where physical harm is involved.<sup>155</sup>

Employer participants noted either avoiding having an internal definition of a qualifying disclosure or having a broader definition, to encourage individuals to raise a broad range of concerns, simplify the process, and avoid overcomplicating individuals with technical legal jargon. One employer interviewee did however state that they do indicate the types of concerns that are afforded whistleblower protection so that individuals are aware of their rights.

### **Balance between clarity and prescriptive definitions**

A piece of stakeholder literature and a piece of public body literature asserted that a careful balance is needed between clarity and overly prescriptive definitions, such that knowledge and capability barriers could emerge to reporting wrongdoing. For example, it is not clear whether all dangerous or unethical activities would fall within the categories of wrongdoing under the GB framework legislation and therefore the individual may not feel confident that they are protected for reporting such activities.<sup>156</sup> In this context, two pieces of public body literature considered that the descriptions in relation to the wrongdoing under the legislation are proportionate.<sup>157</sup>

### **Benefits to organisations of receiving a broad range of concerns**

According to some of the stakeholder literature, organisations are likely to benefit from receiving reports of wrongdoing from its workers in relation to a broad range of concerns, and this is often wider than is protected under the qualifying disclosure definition under the GB framework legislation.<sup>158</sup> One piece of stakeholder literature suggested that this allows organisations to manage their risks, but it does result in

<sup>154</sup> LR05, LR07, LR17, LR22, LR58, LR60

<sup>155</sup> LR67

<sup>156</sup> LR03, LR28

<sup>157</sup> LR28, LR38

<sup>158</sup> LR30, LR60

confusion if the individual is victimised because of raising a concern which does not qualify under the legislation.<sup>159</sup> A range of different types of literature indicated that this contributes to the cases which are not successful at the Employment Tribunal as the broader definition can create expectation gaps and issues if the individual believes they have made a protected disclosure.<sup>160</sup> Examples of such confusion is most commonly found in the health sector where the sector definition of whistleblowing and the overlapping requirements of professional bodies have a different definition than under the legislation, according to one piece of academic literature.<sup>161</sup> A whistleblower interviewee from the financial services sector gave another example. They explained that this had happened to them, when the Employment Tribunal decided that their concerns did not meet the requirements of the legislation, despite the employer informing the individual that they did.

One employer interviewee felt that due to having a broad definition of concerns, the vast majority of concerns they receive each year are grievance or human resource related, and many would not meet the definitions of the legislation.

Another employer interviewee explained that sometimes they face difficulties with their definition of concerns being broader than the public interest requirement. For example, under their whistleblowing policy they still have to investigate concerns raised by an employee claiming to be a whistleblower during a redundancy process, regardless of whether those concerns are deemed to be in the public interest.

A separate employer interviewee explained that, in their opinion, senior management in their organisation apply too much weighting to whether or not a concern would qualify under the GB framework legislation. They explained that there is an inclination for senior management to take disclosures more seriously if they are qualifying disclosures under the legislation because they pose greater risk to the organisation. This means that the organisation may take legal advice on whether disclosures raised are qualifying under the legislation or not. However, they stated that their investigation team handle all concerns equally, regardless of whether or not they are qualifying disclosures.

### **Organisational members are best placed to raise a concern**

Some public body and stakeholder literature indicated that while members of an organisation are usually those who are aware of wrongdoing and are therefore best placed to raise a concern, they also take the most risk in doing so.<sup>162</sup> The risks associated with raising concerns are included in the Protections section below.

Two pieces of stakeholder literature indicated that a quarter of workers are aware of some misconduct or wrongdoing in their organisation. However, more than half of those chose not to report it – and a quarter of reported concerns are investigated, which in some sectors dropped to as low as 10% during the pandemic.<sup>163</sup> Observations and emerging themes related to the responses of organisations and prescribed persons are included in this section below.

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<sup>159</sup> LR64

<sup>160</sup> LR25, LR27, LR65

<sup>161</sup> LR09

<sup>162</sup> LR26, LR58

<sup>163</sup> LR58, LR60

## **2. Prescribed persons' definitions of concerns**

### **Prescribed persons receive a broad range of concerns, a sub-set of which may be considered qualifying disclosures**

Several prescribed person participants explained that they are interested in all information (sometimes referred to as intelligence by prescribed persons) to understand whether there are potential issues in organisations. A few prescribed person participants explained that they accept concerns that are broader than the definition of a qualifying disclosure under the GB framework legislation. One prescribed person interviewee explained that they accept broader concerns, as they do not expect potential whistleblowers to necessarily understand whether the regulations, they are reporting on have been breached and hence whether the disclosure is qualifying.

Despite accepting concerns related to a broad range of issues, many prescribed person participants confirmed that they tend to adopt the definition of a qualifying disclosure under the GB framework legislation. One prescribed person interviewee felt that it is important to be consistent with legislative provisions rather than having a definition unique to the prescribed person. That way, individuals can be confident about the way in which they are protected.

Some prescribed person participants explained that they try to distinguish between non-qualifying and qualifying disclosures. One prescribed person interviewee explained that this allows them to prioritise qualifying disclosure as these tend to be higher risk. Another prescribed person interviewee noted that distinguishing between qualifying and non-qualifying disclosures allows them to manage and record qualifying disclosures appropriately and provide tailored advice.

A prescribed person interviewee commented that it can be challenging to make a distinction between non-qualifying and qualifying disclosures. Another prescribed person interviewee explained that a questionnaire is completed by individuals to help determine whether the disclosure is qualifying and confirm to the individual whether they are potentially a whistleblower. However, a separate prescribed person interviewee noted that they are not actually required to determine whether a disclosure is qualifying or not as that is the role of the Employment Tribunal.

However, many prescribed person participants explained that their approach is that all intelligence matters, and non-qualifying and qualifying disclosures are handled in the same way. One prescribed person interviewee also noted that the employment status of the individual does not impact the treatment of the concern. These points are suggested at a summary level in a piece of stakeholder literature.<sup>164</sup>

### **Varying definitions of concerns can create an expectation gap**

Some public body literature suggested that the difference in definition amongst prescribed persons and compared to the GB framework legislation, creates a potential expectation gap for the worker as to what is protected when they report a concern to a prescribed person.<sup>165</sup> According to several pieces of mostly academic literature, some of these concerns fall inside the definition of a qualifying disclosure

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<sup>164</sup> LR65

<sup>165</sup> LR61, LR62



under the legislation and as such that the individual would be protected whilst other concerns fall outside the definition.<sup>166</sup>

Examples of this are found in the health sector, according to a piece of stakeholder literature and a piece of academic literature, where practitioners can be told to act without delay if there is a risk to an individual's safety or they are being asked to act beyond their role, experience and training, the latter of which doesn't always meet the categories of wrongdoing outlined in the GB framework legislation above.<sup>167</sup> Another example can be found in the financial services sector, within one piece of public body literature, where in addition to the above, breaches of the organisations own policies and procedures, or behaviour that harms or is likely to harm the reputation or wellbeing of the firm would be included in the definition of reportable concerns for organisations regulated by the Financial Conduct Authority.<sup>168</sup> This is shown in the categories of wrongdoing the Financial Conduct Authority receives each year, according to a piece of public body literature.<sup>169</sup>

### **Prescribed persons tended to consider concerns raised as intelligence**

At a summary level across a range of types of literature, based on reporting guidance on their websites and their annual reports, most prescribed persons tended to consider concerns as information which is added to the broader intelligence it has gathered on an organisation, rather than something which is addressed with a dedicated investigation.<sup>170</sup>

During a focus group involving prescribed person representatives it was agreed that concerns raised can be used as intelligence and inform the strategy of the prescribed person for overseeing or regulating the relevant organisation. At the same focus group, it was agreed that whistleblowers are often treated by prescribed persons along the lines of human intelligence sources by anonymising their identity, managing their risk of compromise during any investigation or actions, and protecting them at court if necessary.

## **3. Organisations' responses to concerns raised**

A couple of pieces of academic and stakeholder literature showed that there are differences between organisation whistleblowing procedures, with some deemed to be lacking while others are deemed to be robust or adequate. The GB framework legislation does not include a requirement for organisations to have procedures (robust, adequate or otherwise) to receive disclosures about wrongdoing.<sup>171</sup> One piece of stakeholder literature suggested that organisations usually implement procedures to receive concerns because they understand the advantage of knowing about issues in order to better manage the risks that misconduct could pose to them.<sup>172</sup> That said, according to public body literature and one piece of stakeholder literature, in some sectors regulators have imposed requirements around whistleblowing procedures, which has resulted in the impacted organisations having

<sup>166</sup> LR11, LR26, LR35, LR36, LR40, LR64

<sup>167</sup> LR04, LR09

<sup>168</sup> LR61

<sup>169</sup> LR62

<sup>170</sup> LR45, LR62, LR64, LR65 and [Report tax fraud or avoidance to HMRC \(www.gov.uk\)](https://www.gov.uk/guidance/report-a-concern-if-you-are-a-member-of-staff-cqc.org.uk), [Report a concern if you are a member of staff \(cqc.org.uk\)](https://www.gov.uk/guidance/report-a-concern-if-you-are-a-member-of-staff-cqc.org.uk), and [Whistleblowing: Prescribed Person Report 2022 to 2023 \(www.gov.uk\)](https://www.gov.uk/guidance/whistleblowing-prescribed-person-report-2022-to-2023) All accessed 24 January 2024

<sup>171</sup> LR12, LR17

<sup>172</sup> LR63

more consistently effective reporting mechanisms alongside better training and awareness.<sup>173</sup>

### **Organisations' management of individual expectations**

Under the GB framework organisations are not obliged to investigate the reported concern. Some stakeholder literature indicated that a significant number of organisations do not have robust processes to receive, assess and investigate concerns.<sup>174</sup> Two pieces of stakeholder and academic literature showed, and a range of participants agreed, that the legislation focuses on potential disputes between employers and workers, and it does not cover expectations regarding responding to (and investigating if appropriate) the concerns raised by the worker.<sup>175</sup>

A piece of stakeholder literature included indicators that regulators have had some success improving confidence of whistleblowers to speak up. This literature explained that this improvement has arisen where regulators have enhanced the standards at organisations in relation to the types of wrongdoing being reported, awareness of procedures for reporting, and proper responses to wrongdoing, although it also acknowledged that the extent of improvement is disputed.<sup>176</sup>

### **Organisations investigation of concerns**

Despite the GB framework legislation not creating an obligation, the majority of employer participants explained that they initially triage concerns received to decide how to respond to the concern, including whether to commence an investigation. Some employer participants mentioned escalation processes to ensure senior leaders are informed as necessary of serious concerns.

Some employer participants stated that it is relatively uncommon for concerns raised to require a formal investigation, with one employer stating that approximately 10% to 15% of disclosures result in a formal investigation.

Employer participants highlighted the need for independence with investigations and use an independent internal team or external investigators to undertake the investigation.

### **Organisation's engagement with individuals**

Employer participants outlined that they seek to manage the whistleblower's expectations in terms of the process and potential outcomes at the beginning of the interaction. For example, by setting out expectations and the process for handling responses, timeframes and next steps in a whistleblowing policy.

Employer participants described their engagement with individuals in response to a concern being raised (a case), as a means of providing progress updates. The frequency of interaction varied between employers, with variation also arising due to the length of a case and the individual's preference. One employer interviewee mentioned that they interact with an individual more frequently if they are deemed to be more vulnerable. Another employer interviewee mentioned the importance of not

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<sup>173</sup> LR61, LR63

<sup>174</sup> LR03, LR30, LR32

<sup>175</sup> LR17, LR45

<sup>176</sup> LR60

compromising confidentiality of the individual or the integrity of their whistleblowing system through engagement.

Some employer participants commented that they provide feedback to an individual at the end of an investigation. However, one employer interviewee noted that it was not always possible to feed back to individuals with the outcome of an investigation, particularly where the concerns raised involved safeguarding issues, vulnerable adults and children. The same employer interviewee acknowledged that the lack of information provided by the employer could be difficult for individuals to accept or understand.

Some employer participants noted that they do ask for and receive feedback from individuals at the conclusion of an investigation. However, they do not typically allow individuals to provide input into the investigation findings themselves.

### **Conflicts of interest in organisations' response**

Some academic and stakeholder literature indicated that there can be conflicts of interest in organisations' responses to concerns that qualify under the GB framework.<sup>177</sup> At a summary level a piece of academic literature suggested this may occur where the person or organisation receiving the concern has competing or incompatible interests, obligations or loyalties which may influence their decisions or actions in response to the concern.<sup>178</sup>

According to some stakeholder and academic literature, organisations in certain sectors – such as health care or social work – may face competing pressures from their stakeholders, patients, customers, regulators, or government contracts, which may influence how they deal with whistleblowing concerns.<sup>179</sup> For example, according to stakeholder and academic literature, an organisation may have an incentive to conceal or downplay a concern that could damage its reputation, access to resources or funding, profitability, or contractual obligations, rather than address it transparently and effectively.<sup>180</sup>

### **Conflicts of interest due to lack of independence of managers receiving concerns**

Moreover, varying types of literature suggested that there is a lack of independence or oversight of how management respond to concerns raised by workers, especially if the concern implicates senior managers or executives.<sup>181</sup> Stakeholder and academic literature suggested that this may create a situation where workers are not treated fairly, objectively, or consistently, and where their concerns are not properly investigated or resolved.<sup>182</sup> Additionally, according to stakeholder and academic literature, some workers may face retaliation or victimisation from their managers or colleagues, who may perceive them as disloyal, a troublemaker, or a threat.<sup>183</sup>

An employer participant stated during a focus group that they had seen conflicts of interest in how matters were investigated within their organisation. A whistleblower

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<sup>177</sup> LR10, LR30, LR32, LR39

<sup>178</sup> LR10

<sup>179</sup> LR09, LR17, LR39

<sup>180</sup> LR39, LR42

<sup>181</sup> LR04, LR10, LR51, LR63, LR65, LR66

<sup>182</sup> LR32, LR34, LR41, LR42

<sup>183</sup> LR10, LR30, LR32, LR34, LR 36, LR37, LR39, LR42, LR63

interviewee from the health care sector stated that the speak up system in their organisation was flawed because of a conflict of interest, namely the individuals tasked with receiving and advising on concerns are salaried employees of, and are therefore answerable to, the employer.

An employer interviewee explained the steps they take to manage any conflicts of interest, which includes segregating the team dealing with the individuals from the team which investigates concerns and oversight by internal legal counsel who manages the majority of conflicts of interest. If the legal team is conflicted in any way, the team dealing with the disclosure would step outside of the normal reporting line and consult a non-executive director to oversee the investigation. A separate employer interviewee explained that whether an investigation should be commenced, and the scope of that investigation was the role of the investigation team, and nobody could influence their decisions in this regard.

### **Independence of organisations' response**

As set out above, the GB framework legislation does not place obligations on organisations regarding responding to (investigating if appropriate) concerns raised. A few pieces of stakeholder and academic literature suggested at a summary level that this lack of obligation or requirement means that workers may not receive adequate feedback or assurance that their concerns have been addressed or resolved, which may affect their trust and confidence in the system and their willingness to speak up initially, or in the future.<sup>184</sup>

Some academic and stakeholder literature noted that organisations with independent functions (materially and in perception) or independent oversight, may be better at assessing concerns and progressing related actions (i.e. conducting an investigation and responding to investigation findings) independently without interference from management.<sup>185</sup> A piece of stakeholder literature relating to best practice indicated this may enhance the credibility and impartiality of the response and reduce the risk of retaliation or reprisal from the employer or other colleagues.<sup>186</sup> However, some stakeholder and public body literature indicated that some independent functions within organisations can handle concerns in a way that creates a disconnect or communication gap between the worker and the independent team, resulting in the worker feeling excluded or isolated from the process and outcome.<sup>187</sup>

A piece of stakeholder literature and a piece of public body literature suggested that workers may expect to receive information or feedback on the status and outcome of their concern, as well as the rationale and evidence behind the decisions or actions taken by the organisation.<sup>188</sup> However, according to a different piece of stakeholder literature, it may not be appropriate for individuals to gain full sight of the organisation's response (e.g. investigation or remedial actions) due to other legal and regulatory obligations.<sup>189</sup> For example, one piece of public body literature showed that organisations may be constrained by confidentiality, privacy, or security considerations that limit the amount and type of information that can be disclosed to

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<sup>184</sup> LR03, LR17, LR25

<sup>185</sup> LR32, LR36, LR56, LR59

<sup>186</sup> LR56

<sup>187</sup> LR03, LR40, LR58, LR66

<sup>188</sup> LR33, LR66

<sup>189</sup> LR65

the worker.<sup>190</sup> According to stakeholder literature this situation can result in the individual feeling as though they are being ignored or their concerns are not being taken seriously.<sup>191</sup> A piece of academic literature inferred this may also create a sense of injustice or dissatisfaction for the worker, who may feel that their concern has not been adequately addressed or resolved, with the associated risk of escalating their concern to a prescribed person.<sup>192</sup>

A few pieces of academic and journalistic literature showed that in some cases workers may also perceive a lack of accountability or oversight from management. Management may not be fully aware or involved in the response or the actions taken by the independent function.<sup>193</sup>

### **Organisations can respond effectively to concerns raised, depending on resources or appetite**

A piece of academic literature asserted that organisations could respond independently and robustly to concerns raised if they have the resources and the appetite to do so.<sup>194</sup>

According to some academic and stakeholder literature, there are two elements to an organisation being able to respond appropriately to concerns: the capacity of the worker's immediate superior within the organisation (workload and skillset) and the existence of a dedicated function responsible for receiving and managing concerns.<sup>195</sup> Separate academic and stakeholder evidence in the literature argued that where these two elements exist, the organisation and the individual have better outcomes, or the negative outcomes are less impactful, in relation to the concern, although all cases are unique.<sup>196</sup>

### **Issues can arise where organisations do not respond appropriately to concerns**

Where an organisation does not have the resources or appetite for receiving and responding appropriately to concerns, a piece of academic literature and a piece of public body literature suggested that it is more likely that the organisation will fail to provide an adequate response, and the individual will escalate to an external prescribed person or the media.<sup>197</sup>

Some academic and government literature also suggested at a summary level that when organisations do not have adequate resources, potential whistleblowers either do not know about or do not trust the organisation's capacity to appropriately handle a concern raised.<sup>198</sup> Some stakeholder literature suggested that the process of investigation and taking action in response to investigation findings can take a long time, which can limit the organisations ability to take effective action in response to the investigation findings.<sup>199</sup> An example of this from academic literature comes from

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<sup>190</sup> LR62

<sup>191</sup> LR06, LR58, LR60, LR63

<sup>192</sup> LR36

<sup>193</sup> LR36, LR50, LR09

<sup>194</sup> LR09

<sup>195</sup> LR03, LR09, LR63

<sup>196</sup> LR04, LR10, LR63

<sup>197</sup> LR66, LR67

<sup>198</sup> LR10, LR38

<sup>199</sup> LR16, LR38, LR41, LR63

the healthcare sector, where reports often relate to inadequate staffing levels and related patient safety concerns, but the organisation may not have the financial or physical resources to address the concern.<sup>200</sup>

A number of whistleblower participants stated that nothing was done in relation to the wrongdoing they raised, and in a subset of these, that the whistleblower was threatened into silence enforced by compromise agreements, which include non-disclosure clauses.

As a result of not investigating concerns properly, some journalistic and stakeholder literature indicated that some organisations may not take appropriate action in response to the wrongdoing.<sup>201</sup> A separate piece of academic literature observed that the organisation which was the subject not only needed to investigate a concern but to be willing to respond positively to the investigation findings, to learn from mistakes, and prevent the issue from happening again.<sup>202</sup>

Stakeholder and journalistic literature showed that if an individual raising a concern becomes the target of a hostile organisation, retaliation can start against the individual, instead of responding appropriately to the concern they raised.<sup>203</sup>

### **Some types of harm are not protected under the GB framework**

Stakeholder literature suggested that it is at the stage after a concern is reported that whistleblowers are often unfairly treated, disciplined or dismissed, which is protected under the GB framework, or harmed in other ways which are not covered by the legislation but are similarly impactful on the life of the individual.<sup>204</sup> One of these pieces of stakeholder literature indicated that harm can include occurrences of psychological abuse (such as bullying or gaslighting) and degradation of mental and physical health due to retaliation by members of the organisation.<sup>205</sup> Other examples include being added to a blacklist<sup>206</sup>, harassment, legal action, or reputational damage via a report to a professional body. That some harms are not protected by the legislation is noted by a piece of stakeholder literature as a weakness of the current GB framework.<sup>207</sup>

Some stakeholder literature stated that retaliation not only harms the individual but also prevents others from speaking up about any concerns they have – through fear of retaliation and a sense of futility when nothing happens.<sup>208</sup>

PIDA states that, “a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act, by his employer”,<sup>209</sup> and the ERA added actions or failures to act “by other workers and agents of the employer”. Given that protection from retaliation for whistleblowers is a core goal of the GB framework, a piece of stakeholder literature asserted that the lack of meaningful consequences for those that have retaliated against whistleblowers is an indication that the current GB

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<sup>200</sup> LR04, LR09

<sup>201</sup> LR02, LR03

<sup>202</sup> LR09

<sup>203</sup> LR16, LR24, LR42, LR51

<sup>204</sup> LR16, LR17

<sup>205</sup> LR17

<sup>206</sup> Unless the employer is an NHS employer, in which case the worker is protected against this form of discrimination by 49B of the ERA

<sup>207</sup> LR16

<sup>208</sup> LR37, LR44

<sup>209</sup> [Public Interest Disclosure Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk)

framework is not effective, as it incentivises silence rather than safety in speaking up.<sup>210</sup>

### **Whistleblower participants perceive that organisations do not adequately respond to concerns raised**

Some whistleblower participants felt that their organisation did not respond adequately to their concerns and instead did one or more of:

- actively seeking to cover-up or bury the wrongdoing
- not investigating or not investigating properly
- not taking appropriate action in response to investigation findings
- retaliating against the individual (i.e. “going on the attack”) – see examples in the Protections section below

Furthermore, several pieces of stakeholder literature argued that organisations that adopt an aggressive “cover-up mode” in response to concerns tend to also “go on the attack” in retaliation against the reporter.<sup>211</sup>

Some whistleblower participants explained that they expected the concerns they raised with their employer would be quickly looked into, resolved and appropriate action taken. However, these expectations were generally not met, with disclosures allegedly ignored, original concerns completely lost, and a lack of an investigation (or an inadequate or “sham” investigation) undertaken. One whistleblower interviewee felt their employer was in denial, did not want to engage in the issue and failed to appropriately grade the severity of their concerns. The interviewee believed that an expectation gap emerges between how the whistleblower expects the employer to respond and how the employer does respond.

Another whistleblower interviewee felt that there were no legal obligations on employers to investigate or act on whistleblowing concerns. They continued that the GB framework is delivering on helping workers to speak up but not in terms of forcing employers to listen.

During a whistleblower focus group a participant commented that they did not get enough feedback from their employer’s investigators about what the investigators were doing or what they were finding in relation to their concerns. A whistleblower interviewee noted that they were not privy to what, if anything, their employer investigated in relation to their concerns. A different whistleblower interviewee alleged that their employer drafted new terms of reference, defining the scope of the investigation, to ensure that any investigator would tell them what they wanted to hear.

A separate whistleblower interviewee noted that some of their disclosures appeared to have been well received by their employer, whereas others resulted in aggressive responses. Another whistleblower interviewee explained that their employer initially

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<sup>210</sup> LR37

<sup>211</sup> LR02, LR32, LR37, LR49, LR50

dismissed their concerns, however the concerns were subsequently substantiated by an external investigation.

The majority of whistleblower participants described retaliation from their employer, providing examples which are listed in the Protections section below.

One whistleblower interviewee believed that their employer put all of their resources into misdirecting blame and not dealing with the issues. Similarly, another whistleblower interviewee explained that based on their experience, it is easier for a large company to force a whistleblower to leave the company than investigate their concerns.

A separate whistleblower interviewee felt that if you raise a concern in their organisation, rather than those concerns being looked into, the organisation takes action aimed at discrediting and dismissing the whistleblower. They described the response as involving malicious allegations being made against the whistleblower so that a disciplinary process could be started that allows the employer to dismiss the whistleblower.

## **4. Prescribed persons' responses to concerns raised**

### **Prescribed persons respond to concerns in various ways**

As set out above, the initial response of prescribed persons to receiving concerns can be to advise the individual to contact the correct prescribed person or less often to contact the correct prescribed person on behalf of the individual. Where a prescribed person receives a concern that is within their remit, prescribed person participants and a few pieces of stakeholder and public body literature<sup>212</sup> described various ways in which they respond to concerns, including:

- requesting assurance or information from the organisation in relation to the concern raised
- considering the concern as part of broader intelligence or information sources, used to indicate potential regulatory risk and/or quality issues in an organisation or sector
- factoring the intelligence into broader regulatory oversight tools, including assessment, inspection, or investigation plans
- undertaking a targeted assessment, inspection, or investigation
- referring the concern to another team within the prescribed person, such as regional teams
- referring the concern to the appropriate external body, including local authorities or police

Some public body and stakeholder literature summarised that the response by the prescribed person tends to depend on their specific regulatory or statutory remit.<sup>213</sup> Separate stakeholder and public body literature further indicated that some

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<sup>212</sup> LR33, LR40, LR62

<sup>213</sup> LR27, LR33,



prescribed persons have a remit to investigate and the power to enforce consequences as a regulator if the wrongdoing is substantiated.<sup>214</sup>

For example, some prescribed person participants reported that they do not have the powers to undertake investigations, at all or in relation to individual concerns received.

One prescribed person interviewee stated that limited resources sometimes prevent a full investigation being carried out. Another prescribed person interviewee commented that it was sometimes difficult to identify or contact the appropriate organisation to hand over the investigation to. A piece of stakeholder literature appeared to support this view.<sup>215</sup>

Prescribed person participants also noted that initial disclosures often do not include sufficient information, and individuals do not always respond to clarificatory queries. Prescribed person participants explained that it is clearly more difficult to develop, investigate and take action in these situations and when the individuals are anonymous.

### **Prescribed person engagement with individuals**

Prescribed person participants described their engagement with individuals as a means of obtaining further information, managing the process, and managing the individual's expectations. The level of engagement with individuals varied between prescribed person participants. For example, several prescribed person participants described engagement practices similar to those set out by organisations including regular, open communication with the individual, depending on the individual's wishes. Conversely, one prescribed person interviewee commented that there is generally no further interaction with the individual following receipt of the concern. This variation is echoed in some public body literature.<sup>216</sup>

Several prescribed person participants explained that they provide advice to individuals, including making individuals aware of the government guidance, whistleblowing organisations and the Acas process.

### **Large or complex concerns can be challenging for prescribed persons**

Some stakeholder literature suggested that when dealing with large or complex concerns, prescribed persons may face practical, legal, or ethical difficulties in fulfilling these expectations, such as:<sup>217</sup>

- limited resources, expertise, or jurisdiction to deal with the scope or scale of the concern
- lack of clarity or consistency on the roles, responsibilities, and powers of different prescribed persons involved in the same concern

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<sup>214</sup> LR62, LR65

<sup>215</sup> LR17

<sup>216</sup> LR40, LR62

<sup>217</sup> LR33, LR43, LR45, LR64, LR65

- challenges in sharing information, evidence, or intelligence with other prescribed persons or relevant authorities, due to confidentiality, data protection, or security issues
- delays, obstacles, or resistance in conducting joint or parallel investigations, inspections, or enforcement actions with other prescribed persons or relevant authorities
- conflicting or competing interests, agendas, or priorities among different prescribed persons or relevant authorities
- risks of compromising the identity, safety, or rights of the whistleblower or other sources or witnesses

According to some stakeholder and academic literature, large or complex whistleblowing concerns can therefore be challenging for prescribed persons in Great Britain to respond to.<sup>218</sup> A whistleblower interviewee added that in their large, international and complex case, prescribed persons in Great Britain only looked at small parts of the overall picture and could not address all material issues of the concern.

### **Lack of clarity and consistency regarding prescribed persons' remits and procedures**

The majority of prescribed person participants explained that they sought to manage whistleblower expectations by explaining the prescribed persons' remit, the process, and the potential outcomes. However, the participants described varied approaches and terminology. A prescribed person interviewee stated that they understand that prescribed persons are obligated to receive, potentially act on and report at a high level on whistleblowing disclosures received.

According to mostly stakeholder literature, one of the main challenges that some workers and prescribed persons face is a perceived lack of clarity and consistency in the role and responsibilities of prescribed persons under the GB framework.<sup>219</sup> The same literature indicated that the legislation does not specify what prescribed persons should do with the disclosures they receive, how they should communicate with the individuals, or how they should handle any issues or complaints that may arise from the disclosure process. As a result, this literature suggested that different prescribed persons may have different policies, procedures, and practices for dealing with concerns disclosed to them, which may not be transparent, accessible, or accountable to the workers or the public.

For example, during a focus group a prescribed person representative explained that they determine whether the concern is in the public interest and therefore whether it is in their remit. The prescribed person explained that informing the individual that they have determined the concern not to be in the public interest can be problematic and can lead to some individuals feeling let down.

### **Some dissatisfaction in response of prescribed persons**

<sup>218</sup> LR43, LR45, LR64, LR65

<sup>219</sup> LR03, LR16, LR27, LR39, LR40, LR43, LR45, LR64, LR65,

The challenges outlined above may lead to individuals having unrealistic or unmet expectations of what prescribed persons can or will do with their disclosures, especially if they are not informed or updated about the progress or outcome of their case, according to stakeholder literature.<sup>220</sup> In addition, some of this literature suggested the fact that a prescribed person may not always be able to share the action they have taken with the original individual for confidentiality reasons, adds to individual frustration.

Whistleblower participants expressed various points of dissatisfaction regarding the relevant prescribed persons response, including:

- only providing an acknowledgement and nothing more
- providing no assistance at all
- numerous prescribed persons stating that they did not have the authority with regard to the subject matter of the concern

Further, an employer participant suggested during a focus group that their prescribed person has a backlog of investigations that could include whistleblowing cases and therefore believed that the prescribed person is not adequately resourced for investigations into whistleblowing.

However, as shown in a range of literature<sup>221</sup> and raised by participants at the legal representatives focus group, prescribed persons may not have the legal mandate, the resources, or the willingness to investigate and take action, or may face obstacles or resistance from the organisations or individuals involved in the wrongdoing. Some stakeholder literature suggested that in some cases, prescribed persons may even be complicit or implicated in the wrongdoing or may have conflicts of interest that may undermine their impartiality or credibility.<sup>222</sup> The participants and some academic and stakeholder literature indicated that these factors may affect the quality and effectiveness of the response that prescribed persons provide to individuals or may erode the trust and confidence that workers have in them.<sup>223</sup>

### **Individual expectations of prescribed persons may not be met**

Whistleblower participants who approached a prescribed person explained that they generally expected the prescribed person to have a duty to investigate their concerns and act against the wrongdoing. The participants also explained that they expected the prescribed person to protect them from any retaliation or victimisation that they may suffer as a result of their disclosure or investigate any retaliation or victimisation that they believe they have already suffered. However, the whistleblower participants commented that these expectations were generally not met, with whistleblowers feeling that their concerns were ignored or that the prescribed person's response was insufficient. The role of prescribed persons regarding responding to or investigating allegations of victimisation are included in the Protections section below.

<sup>220</sup> LR03, LR39, LR40, LR43, LR64, LR65

<sup>221</sup> LR17, LR43, LR45, LR62, LR65

<sup>222</sup> LR32, LR39, LR51

<sup>223</sup> LR45, LR51, LR65

The evidence from a piece of public body literature and interviews has shown in some cases the escalation to a prescribed person does not ensure that the individual's concerns are addressed. A lack of consistency in approach can contribute to an expectation gap between what is required and delivered by the GB framework compared to what is expected by users of the framework, especially when it comes to consequences such as enforcement related to the wrongdoing.<sup>224</sup> Some prescribed person participants and a whistleblower interviewee agreed that there is an expectation gap. The prescribed person participants added that some individuals struggle to understand the role of the prescribed person and what the prescribed person can deliver, based on their limited remit and statutory functions.

A whistleblower interviewee believed that the perceived lack of response by prescribed persons could be interpreted by whistleblowers as helping to cover up alleged wrongdoing. Another whistleblower interviewee felt that the perceived lack of response by the prescribed person in their case caused harm to them and allowed the alleged wrongdoing to continue.

However, during a prescribed person focus group a prescribed person participant stated that it is not their direct role to investigate whistleblowing concerns. Another participant at another prescribed person focus group felt that it would not be reasonable to directly investigate all concerns raised, as the prescribed person must consider appropriate use of public funds.

Whilst some prescribed person participants acknowledged the dissatisfaction felt by some individuals that the prescribed person may not be able to investigate and ultimately resolve their concerns, a prescribed person interviewee said that individuals overall accepted this.

There is evidence in a piece of stakeholder literature which suggested that concerns relevant to British organisations but with overseas links are being raised using international whistleblower reward programmes, such as those in the United States.<sup>225</sup> The same literature asserted that this leads to valuable intelligence crossing borders to foreign regulators (predominantly the United States) who are committed to better protection (of both the identity and potentially also the finances) of the individuals using those frameworks.<sup>226</sup>

When a concern relates to direct criminal activity or cases which are complex in terms of jurisdiction, a piece of stakeholder literature showed that it can be difficult to know which organisation has the clear responsibility and oversight of responding to and investigating the concern.<sup>227</sup> This can give the impression that a concern is not being investigated.<sup>228</sup> Public body literature indicated that a blame culture can exist between organisations involved in handling complex cases, such as where there are potentially related failings in their oversight or duties, which in some instances can lead to inappropriate or unprofessional behaviour such as intimidation and bullying to cover up the wrongdoing or their failings.<sup>229</sup>

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<sup>224</sup> LR40

<sup>225</sup> LR55

<sup>226</sup> LR55

<sup>227</sup> LR22

<sup>228</sup> LR22, LR40, LR62

<sup>229</sup> LR66

## **Conflicts of interest in prescribed persons' response**

A few pieces of stakeholder literature highlighted that there can be conflicts of interest in a prescribed person's responses to concerns under the GB framework due to potentially conflicting obligations.<sup>230</sup> One piece of stakeholder literature gave an example of senior management in an organisation also holding a role within a regulatory body, where the potential conflict of interest was not recognised or the prescribed persons did not have the systems in place to manage the conflict of interest.<sup>231</sup>

## **Summary of suggestions for change**

Suggestions for change were identified in parts of the literature and provided by research participants related to the definition of a qualifying disclosure and how organisations and prescribed persons respond. The suggestions for change are summarised below and outlined in more detail in Appendix A:

- expand and clarify the qualifying disclosure definition
- create national standards on providing proactive protection and responding to concerns
- create consequences for non-compliance with new standards
- board or most senior level accountability for effectiveness of frameworks
- independent oversight of response and management of individuals
- recognise effective frameworks (of prescribed persons, organisations and individuals)
- improve the guidance on prescribed persons' responsibilities for responding to concerns and set standards across all prescribed persons
- create requirements for prescribed persons to investigate concerns in line with proven best practice guidance
- create a separate investigative body – generally or regarding allegations of retaliation

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<sup>230</sup> LR32, LR39, LR51

<sup>231</sup> LR51

# Protections

## Introduction

This section sets out the observations and emerging themes in relation to the effectiveness of additional or proactive protections provided by organisations and prescribed persons, outside of the protections provided by the GB framework legislation, under the following sub-sections:

1. Individuals' experience of protection and victimisation
2. Organisations' provision of protection and response to allegations of victimisation
3. Prescribed persons' provision of protection and response to allegations of victimisation

Suggestions for changes to additional or proactive protections identified in the research project are summarised at the end of the section and outlined in more detail in Appendix A.

## Background

A range of literature of different types summarised that one of the main goals of the GB framework legislation is to provide protection to workers who report wrongdoing.<sup>232</sup> The legislation offers several protections for workers making a protected disclosure, which can be enforced through an Employment Tribunal claim, such as:<sup>233</sup>

- protection from detriment or dismissal by the employer organisation for making a protected disclosure
- protection from breach of contract for disclosing information that would otherwise be restricted
- protection from discrimination or victimisation by co-workers or third parties for making a protected disclosure
- eligibility for compensation or remedies if the whistleblower suffers any loss or harm as a result of making a protected disclosure

The claiming and enforcement of protections under the legislation, provided by an Employment Tribunal process, are covered in the Redress – Employment Tribunals section. This section covers the additional or proactive protections provided by organisations and prescribed persons, outside of the protections provided by the GB framework legislation.

Some stakeholder and international body literature indicated that the level and scope of protection that workers experience depends on various factors.<sup>234</sup> The factors identified across a mix of types of literature include:<sup>235</sup>

<sup>232</sup> LR03, LR16, LR17, LR18, LR25, LR26, LR28, LR32, LR33, LR34, LR41

<sup>233</sup> LR13, LR33, LR36

<sup>234</sup> LR15, LR19, LR32

<sup>235</sup> LR03, LR13, LR15, LR26, LR30, LR31, LR38, LR53, LR62

- the type and subject matter of the disclosure
- the person or body to whom the disclosure is made
- the reasonableness and motivation of the whistleblower
- the seriousness and urgency of the wrongdoing
- compliance with any internal or external procedures or policies

## **Research observations and emerging themes**

### **1. Individuals experience of protection and victimisation**

#### **Experiences of protection provided by the GB framework**

Based on their experiences, the whistleblower participants generally believed that the GB framework does not provide any proactive real-time protection to whistleblowers in practice. This view is also reflected in some government body and stakeholder literature.<sup>236</sup>

A range of literature types suggested that the decision to report a concern is determined by the workplace culture and perceived safety to do so without negative repercussions.<sup>237</sup> A prescribed person interviewee noted that in poor workplace cultures proactive real-time protections are limited and whistleblowers have to be very brave to raise concerns. Similarly, a whistleblower interviewee described their belief that it is at the employer's discretion as to which, if any, protections are afforded.

One whistleblower interviewee noted that there are no repercussions for organisations which have victimised whistleblowers. Even if an organisation were to lose an Employment Tribunal case it can just move on. Several pieces of stakeholder literature agreed with this perspective.<sup>238</sup>

Another whistleblower interviewee noted the specific lack of protection that workers based in the UK face from an overseas employer and retaliation from overseas colleagues.

#### **Victimisation suffered by whistleblowers**

The majority of whistleblower participants did not feel protected by their employer and described suffering harm from their employer as a result of blowing the whistle. A range of literature types included this perspective to varying degrees.<sup>239</sup> The types of harm experienced by whistleblowers, noted by whistleblower participants and across this mix of literature, include:

- subjection to malicious allegations, intimidation, harassment and discrimination
- suspension

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<sup>236</sup> LR38, LR42

<sup>237</sup> LR09, LR28, LR39, LR67

<sup>238</sup> LR03, LR16, LR17, LR39, LR42,

<sup>239</sup> LR02, LR03, LR04, LR06, LR10, LR14, LR15, LR16, LR17, LR18, LR24, LR25, LR32, LR33, LR34, LR38, LR42, LR44, LR45, LR49, LR50, LR51, LR53, LR55, LR58, LR60, LR63, LR65, LR67

- being served with disciplinary action
- dismissal
- accusation of bullying
- given pay cuts
- isolation
- threat of demotion
- labelling as a troublemaker
- denial of independent legal advice
- exposure of identity
- threat of redundancy
- allegations of poor performance
- being sued for defamation
- being investigated themselves
- subjection to a charge over their property
- imposition of hostile contractual changes
- being reported to a prosecutor

This research study has not assessed the extent to which these are covered or not by the GB whistleblowing framework legislation and case law.

Some whistleblower participants felt that their lack of protection from harm or victimisation occurred despite the whistleblowers following their employer's whistleblowing policy and training and therefore expecting to be protected. One whistleblower interviewee felt that their employer ignored their own whistleblowing policy in relation to responding to concerns and providing protection.

### **Individuals are generally not aware of what the protections are or how to qualify**

Stakeholder and academic pieces of literature highlighted that a further challenge for potential whistleblowers is that the knowledge of how to qualify for protections under the GB framework legislation is often obtained after they have initially raised their concerns, by which point it can be too late to secure them.<sup>240</sup> A participant at the legal representatives focus group stated that some whistleblowers only find out whether they are protected when the legal tests are applied at an Employment Tribunal.

For instance, some stakeholder and academic literature suggested that a worker has greater success accessing protection through the Employment Tribunal if their first

<sup>240</sup> LR03, LR11, LR13, LR14, LR18, LR32, LR45



disclosure includes details of the law that they believe has been breached and they reference that they consider themselves to be speaking up or whistleblowing.<sup>241</sup> However, understanding how to improve the likelihood of success requires knowledge of the process in advance.<sup>242</sup> Some stakeholder literature and parliamentary papers found that many workers do not have this knowledge and do not realise they have made a protected disclosure until they report to have faced victimisation or seek legal advice.<sup>243</sup> Stakeholder and academic literature suggested that some workers may miss the opportunity to make a protected disclosure because they raise their concerns informally or inadvertently, without following the prescribed channels or procedures.<sup>244</sup>

Whistleblower participants and a prescribed person interviewee commented that whistleblowers were generally not aware of what the protections in the GB framework were at the time they blew the whistle or knew how to qualify.

Some whistleblower participants commented that they were theoretically aware of the protections based on their prior career experience or employer's whistleblowing policy, but many others only learned about protections through their experience after blowing the whistle, for example from a whistleblowing organisation or through their Employment Tribunal process.

### **Confusion and inconsistency on protection applying to certain types of disclosures**

Different types of literature showed, and as set out in the definitions of concerns sub-sections above that there is confusion and inconsistency regarding whether protection applies to certain types of disclosures, due to the differences between the broader definitions of whistleblowing used by employers and the narrower criteria for qualifying disclosures under the GB framework legislation applied at Employment Tribunals.<sup>245</sup> A prescribed person focus group and a whistleblower focus group both agreed.

A piece of journalistic literature indicated that some workers may think they are protected because they have reported wrongdoing in accordance with their employer's whistleblowing policy, but they may not meet the legal requirements for a protected disclosure, such as having a reasonable belief, the subject matter being in the public interest, or disclosing to the appropriate person or body.<sup>246</sup>

### **Organisational structures can make protection more complex**

A piece of stakeholder literature suggested that in addition, due to the nature of the relationship between different organisations it is possible that harm is caused by an organisation which is not the worker's employer, potentially making the individual ineligible to access the protection offered by the GB framework legislation.<sup>247</sup> For example, stakeholder literature indicated that this can be the case for workers in healthcare where their employer and the organisation which an individual is

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<sup>241</sup> LR17, LR67

<sup>242</sup> LR03, LR32, LR52

<sup>243</sup> LR03, LR32, LR52

<sup>244</sup> LR03, LR32, LR36, LR67

<sup>245</sup> LR03, LR11, LR32, LR38, LR50

<sup>246</sup> LR53

<sup>247</sup> LR33

encouraged to report concerns to are different.<sup>248</sup> A whistleblower interviewee explained that they raised concerns with an overseas line manager and their UK-based employer argued during an Employment Tribunal that the disclosure did not qualify under the GB legislation, as it had been raised outside of the UK.

### **Raising concerns informally or inadvertently can increase risks of detriment or dismissal**

Several pieces of stakeholder and academic literature stated that some workers who raise concerns about wrongdoing in their workplace are not fully aware of the legal protections available to them under the GB framework legislation and that this lack of awareness can expose them to greater risks of retaliation in the form of detriment and/or dismissal.<sup>249</sup> The research project identified several factors that contribute to this situation.

Stakeholder and academic literature indicated that some workers may raise concerns informally or inadvertently, without being fully aware of the potential implications or consequences of their actions.<sup>250</sup> For example, a mix of literature types suggested that some workers may express their concerns informally to a colleague or a manager, without following a formal procedure or making a written record.<sup>251</sup> Academic literature indicated that some workers may also disclose information that qualifies as a protected disclosure under the GB framework legislation, without intending to do so or recognising that they have done so.<sup>252</sup> The same literature suggested these scenarios can increase the risks of detriment and/or dismissal for the worker, as they may not benefit from the legal protections afforded by the legislation, or they may not be able to prove that they have made a protected disclosure if they face retaliation.

Some whistleblower participants explained that they were not aware that they had made a protected disclosure at the time of blowing the whistle. For example, some whistleblower participants did not consider themselves as a whistleblower having made a protected disclosure until after they faced retaliation from their employer. A whistleblower focus group indicated that individuals are often not aware they have blown the whistle. The focus group further felt that this lack of awareness prevents individuals from seeking legal advice or guidance prior to disclosure.

A separate whistleblower interviewee noted that because their initial disclosures had been made orally, they found it more difficult to prove that they had made valid public interest disclosures in the Employment Tribunal.

### **Workers lack awareness of potential risks of detriment or dismissal**

Some stakeholder and academic literature suggested that workers who raise concerns informally or inadvertently may lack awareness or understanding of the potential risks of detriment or dismissal associated with whistleblowing, and therefore may not take steps to mitigate those risks, such as seeking prior legal advice, or choosing anonymity or confidentiality.<sup>253</sup> A range of mostly stakeholder literature also

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<sup>248</sup> LR33, LR39

<sup>249</sup> LR03, LR10, LR17, LR23, LR36

<sup>250</sup> LR03, LR10, LR32, LR36

<sup>251</sup> LR15, LR26, LR32, LR37

<sup>252</sup> LR10, LR36

<sup>253</sup> LR17, LR32, LR36, LR49

indicated that some workers may be reluctant or unable to access legal advice, due to the costs, complexity, or availability of such services.<sup>254</sup> Several pieces of stakeholder and academic literature further noted that some workers may not be familiar with the options or procedures for raising concerns anonymously or confidentially or may not trust their employer or the prescribed person to respect their anonymity or confidentiality.<sup>255</sup>

Several pieces of stakeholder and other types of literature suggested that each of these factors can increase the vulnerability of workers who raise concerns, as they may not be prepared for the potential consequences of their actions.<sup>256</sup> A mix of literature types also indicated that some workers may be deterred from raising concerns altogether, as they perceive the legal protections to be inadequate or inaccessible.<sup>257</sup>

### **Detriment can be too narrowly interpreted**

The GB framework legislation does not specify the meaning of detriment. Some pieces of stakeholder and academic literature<sup>258</sup>, in addition to participants at a whistleblower focus group, suggested that the detriment that whistleblowers may suffer because of reporting their concerns can be too narrowly interpreted and applied at Employment Tribunals.

## **2. Organisations' provision of protection and response to allegations of victimisation**

### **Anonymity and confidentiality are key protections provided by organisations**

Several literature sources of different types highlighted that anonymity and confidentiality are crucial for encouraging workers to raise concerns and protecting them from retaliation, but they are not explicitly guaranteed by the GB framework legislation.<sup>259</sup> During the legal representatives focus group, a participant stated that the ability of a whistleblower to remain anonymous was essential to an effective whistleblowing system.

All employer participants confirmed that they accept anonymous concerns, often through a third-party provider, and seek to maintain anonymity and confidentiality as a means of protecting the individual. One employer interviewee highlighted that it is naturally difficult to protect anonymous whistleblowers.

Another employer interviewee explained that their organisational confidentiality regime involves:

- separating access to information with firewalls and “sterile corridors”
- restricting knowledge of the individual’s identity to the team dealing with disclosures

<sup>254</sup> LR03, LR16, LR21, LR24, LR25, LR32, LR33, LR39, LR42

<sup>255</sup> LR03, LR10, LR30, LR32, LR62

<sup>256</sup> LR18, LR26, LR31, LR42, LR53

<sup>257</sup> LR09, LR11, LR17, LR38, LR66, LR67

<sup>258</sup> LR03, LR33, LR36

<sup>259</sup> LR08, LR10, LR12, LR26, LR28, LR42, LR56

- sanitising information to ensure that the individual cannot be identified by the investigation team
- emphasising the importance of confidentiality and anonymity in all training and publications
- maintaining a confidential register of all the details of people who support whistleblowing investigations

### **Segregation of teams helps provide protections**

A piece of public body literature and a piece of stakeholder literature showed that effective segregation between teams dealing with individuals (including related investigations teams) and management is essential to protect investigations from interference and conflicts of interest in the investigation into the concern.<sup>260</sup> There is evidence in this piece of stakeholder literature that this form of case management is improving organically, as opposed to being required.<sup>261</sup>

In relation to this segregation, an employer interviewee explained it had two distinct teams within its dedicated Speak Up function: one which had direct interaction with individuals and one which conducted investigations with no knowledge of the identity of the individual unless the individual explicitly permits their identity to be shared. The employer interviewee noted that the identity of individuals is not shared outside of the Speak Up team if an individual wishes to remain confidential and otherwise a “need to know” basis is applied.

### **Limits to preventing harm through anonymity and confidentiality protections**

A mix of literature types asserted that organisations and prescribed persons who are effective in providing protection tend to place a great deal of emphasis on establishing and preserving anonymity and confidentiality as a way of building trust and confidence with workers who raise concerns.<sup>262</sup> However, some public body and stakeholder literature acknowledged that there may be limits to what organisations and prescribed persons can do to protect workers’ anonymity and confidentiality, especially in cases where the disclosure leads to a formal investigation or legal action, or where the worker's identity is already known to the organisation or suspected by others in the organisation.<sup>263</sup>

Some academic and stakeholder literature indicated that workers who disclose their identity or have it revealed may face various forms of harm, outlined above.<sup>264</sup> A couple of other pieces of academic and stakeholder literature also noted that some workers may not trust their employer or the prescribed person to keep their identity confidential or may fear that their identity can be inferred from the nature or source of the information they provide.<sup>265</sup>

An employer interviewee explained that whether anonymity is maintained can depend on whether or not the individual receiving the concern follows their policy and procedures. Another employer interviewee noted that there is a risk, and there

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<sup>260</sup> LR26, LR37

<sup>261</sup> LR37

<sup>262</sup> LR12, LR26, LR28, LR37, LR56, LR65, LR67

<sup>263</sup> LR40, LR62, LR65

<sup>264</sup> LR34, LR42, LR65

<sup>265</sup> LR13, LR30

have been instances, of accidental exposure of a whistleblower's existence and/or identity within their organisation, particularly where the concerns arise in small teams and therefore the whistleblower's identity can be inferred. A separate employer interviewee stated that if the concern raised has serious safeguarding implications it may not be possible to provide protection via anonymity.

Some whistleblower participants explained that their anonymity was not maintained by their employer, against their wishes. One whistleblower interviewee described that their employer reviewed their emails and discovered that they had made a disclosure. Another whistleblower interviewee thought that even if details are anonymised, it is still possible for others to discover the identity of whistleblowers, which could lead to cases of victimisation.

### **Monitoring and support provided by organisations**

Some employer participants stated that they convey the protections they provide in their whistleblowing policy or associated internal frameworks. The majority of employer participants commented that they also have a definition of detriment in their policy. Employer participants described their policy definitions of detriment as including any form of threat, retaliation or disciplinary action. One employer interviewee provided some examples of detriment, including ostracism, poor performance reviews, intimidation, withholding promotion or training, changes to roles and duties, micromanagement and changes to place or hours of work.

A range of literature types noted that some organisations and prescribed persons actively manage the risk of detriment, by providing support and advice, monitoring the situation, intervening if necessary, or referring the matter to other authorities.<sup>266</sup> An employer interviewee explained that they proactively undertake a victimisation risk assessment at the outset of an investigation, which is kept under review throughout the duration of the investigation. The risk assessment includes recording any "red flags" which may result in a breach of a whistleblower's confidentiality. Examples of red flags include whether the individual works in a small team, has told anyone of their intention to blow the whistle, and/or has already raised the issue with management. The internal whistleblowing team then decide on appropriate steps to take in order to mitigate the risk of inadvertent exposure of an individual, with these decisions being documented to provide a transparent audit trail if required.

Another employer interviewee noted that in their organisation protections start with the individual's line manager taking the matter seriously and following due process. To ensure that the protections continue to be provided, the organisation's human resources team works with the individual's line manager to ensure that there is no impact on the individual's day to day role, no mistreatment and no impact on benefits received.

Employer participants described that necessary support is provided to individuals through safeguarding support, employee assistance services, regular welfare checks and/or external counselling support.

### **Protections are challenging to apply in some situations**

<sup>266</sup> LR12, LR25, LR28, LR35, LR38

As set out above, effectively providing proactive protection can be challenging for a number of reasons. These include where the whistleblower is anonymous to all, where safeguarding concerns are raised (meaning protecting the whistleblower is no longer the primary concern), where investigations or legal actions taken expose the whistleblower's identity, or where the whistleblower has raised their concern informally or as part of their role or is part of a small team meaning their identity may be known or inferred.

Academic and stakeholder literature also indicated at a summary level that protections for workers are challenging to apply in some situations under the GB framework, especially when the disclosure relates to sensitive or complex issues.<sup>267</sup> For example, mostly stakeholder literature suggested that workers who report wrongdoing in the health sector may face resistance (or hostility) from their colleagues or managers.<sup>268</sup> The same literature indicated this may be for a number of reasons, including being perceived as disloyal or disruptive, having personal or professional ties with the wrongdoers, or being unable to respond appropriately or effect change due to material shortages of resources.

### **Some internal processes can be used to victimise without oversight**

A few pieces of stakeholder and academic literature suggested at a summary level that a lack of independent oversight of business processes, such as human resources grievance processes or performance management processes, means some of those business processes can be used to target a whistleblower.<sup>269</sup> Some stakeholder and academic literature asserted that these types of processes can be manipulated or misapplied to harass, treat unfairly, impose discipline, or even dismiss workers, especially if they are seen as troublemakers or disloyal by managers or colleagues.<sup>270</sup> A few items of stakeholder literature also asserted that workers may face difficulties in challenging or appealing the outcomes of these processes, as they may lack access to evidence, representation, or impartial adjudication.<sup>271</sup>

### **Organisations response to allegations of detriment is inconsistent and challenging**

A piece of stakeholder literature indicated that there is a lack of consistent and comprehensive measures to protect whistleblowers from detriment, and to ensure that organisations fulfil their responsibilities and duties towards them under the GB framework legislation.<sup>272</sup> One piece of stakeholder literature suggested that one of the areas that organisations often struggle to recognise, or address, is the link between whistleblowing and victimisation, and organisations may treat them as separate issues.<sup>273</sup> A piece of public body literature indicated that this can result in delayed, ineffective, or biased investigations, and a lack of support or remedy for whistleblowers who suffer detriment.<sup>274</sup> Further complexity and challenges occur,

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<sup>267</sup> LR03, LR10, LR23

<sup>268</sup> LR09, LR17, LR25, LR32, LR38, LR42, LR66

<sup>269</sup> LR10, LR32, LR37

<sup>270</sup> LR10, LR18, LR32, LR37

<sup>271</sup> LR18, LR32, LR42,

<sup>272</sup> LR63

<sup>273</sup> LR42

<sup>274</sup> LR59

according to a different piece of public body literature, where there are multiple organisations involved in the wrongdoing and/or the victimisation of the worker.<sup>275</sup>

Some employer participants explained their response to allegations of victimisation of whistleblowers, including when there is a separate investigation into the allegations of victimisation. One employer interviewee noted that its whistleblowing policy states that any employee who is involved in causing detriment to whistleblowers may be subject to disciplinary action. The policy also states that whistleblowers who feel they have been subject to detriment should inform the whistleblowing team immediately. If the issue remains unresolved from the perspective of the whistleblower, the policy advises the whistleblower to pursue a complaint formally via the grievance or bullying and harassment policy. Another employer interviewee explained that they ask individuals if they have experienced any victimisation up to six months after the end of an investigation and will investigate possible victimisation.

During an employer focus group, a participant commented that they have investigated allegations of victimisation, but it is very hard to prove, as the alleged victimisation can occur over a long period, so requires an in-depth investigation that looks at the entire picture.

### **3. Prescribed persons' provision of protection and response to allegations of victimisation**

#### **Prescribed persons have limited roles in providing protection**

A couple of items of stakeholder literature stated that the GB framework legislation only provides protection reactively if a worker is unfairly dismissed or disciplined because of making a protected disclosure, but it does not effectively or proactively prevent the victimisation or remedy the victimisation that whistleblowers often face.<sup>276</sup> A few pieces of stakeholder literature suggested that prescribed persons, and the legislation more widely, have limited roles in protecting workers who report wrongdoing.<sup>277</sup>

Stakeholder literature indicated that prescribed persons, who are designated authorities that can receive whistleblowing disclosures, have an implied duty (subject to certain exceptions) to protect the identity and confidentiality of whistleblowers, but they have little power or obligation to investigate or act on their concerns.<sup>278</sup> According to different stakeholder literature, only a few prescribed persons, such as regulators in financial services and healthcare, have some influence over how organisations in their sector provide protections to whistleblowers, but this is not replicated consistently or effectively across different sectors.<sup>279</sup>

Also, and as outlined above, stakeholder and public body literature described an expectation gap between what whistleblowers hope to achieve by reporting to prescribed persons and what these bodies can do for them.<sup>280</sup> Many whistleblowers referred to in stakeholder literature reported feeling surprised and disappointed to

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<sup>275</sup> LR59

<sup>276</sup> LR32, LR41

<sup>277</sup> LR32, LR33, LR34, LR41

<sup>278</sup> LR03, LR17, LR25, LR32, LR43, LR45

<sup>279</sup> LR22, LR33, LR45, LR65

<sup>280</sup> LR27, LR65

learn that prescribed persons cannot prevent, protect, or remedy them from retaliation, intervene in their cases, or provide them with feedback or support other than referrals to whistleblowing organisations.<sup>281</sup>

### **Whistleblowers are surprised that prescribed persons cannot generally protect them from victimisation**

A piece of public body literature indicated that there is a gap between the expectations and experiences of whistleblowers, who often hope that prescribed persons can provide them with protection, advice or advocacy.<sup>282</sup> Other stakeholder literature indicated that whistleblowers may feel let down or betrayed when they discover that prescribed persons have limited powers or willingness to help them.<sup>283</sup>

The majority of whistleblower participants felt that the prescribed persons they engaged with did not protect them. One whistleblower interviewee believed that there is an expectation gap between what a prescribed person has a statutory duty to provide, and the protections expected by whistleblowers. A piece of journalistic literature, a piece of public body literature<sup>284</sup> and a prescribed person participant in a focus group agreed. The whistleblower interviewee felt that prescribed persons are not carrying out their duties by not protecting the whistleblower.

Another whistleblower interviewee explained that they expected the prescribed person to provide them with protection. However, instead the whistleblower felt that the prescribed person dealing with their case went to great lengths to deprive them of protection and compounded the victimisation from their employer.

Prescribed person participants outlined that they do not generally have a role in protecting individuals from detriment and some prescribed person participants mentioned that they make this clear to individuals. One prescribed person interviewee commented that any protection they can provide is largely limited to protecting the identity of the individual. A participant in a prescribed person focus group stated that the inability of prescribed persons to provide protection can create an instant barrier to the prescribed person establishing an effective relationship with the individual.

Prescribed person participants also noted that they signpost individuals to guidance and advice regarding protection, particularly in relation to protection eligibility under the GB framework legislation. This includes signposting individuals to independent legal advice, whistleblowing organisations, trade union representatives, Citizens Advice and the government guidance.

A participant at the legal representatives focus group explained that they have been involved in a prescribed persons review in relation to how whistleblowers are treated. They commented that one of the findings was that the terms “whistleblowing” and “speaking up” were used interchangeably by prescribed persons but there was not a shared understanding of what they meant, resulting in workers being disappointed that they were not protected if a matter progressed to an Employment Tribunal.

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<sup>281</sup> LR32, LR41, LR45, LR55

<sup>282</sup> LR27

<sup>283</sup> LR03, LR33, LR45

<sup>284</sup> LR15, LR27



## **Prescribed persons have various ways of responding to allegations of victimisation**

A piece of stakeholder literature indicated that prescribed persons, who are designated organisations or individuals that can receive whistleblowing disclosures, have different approaches and powers to deal with allegations of victimisation.<sup>285</sup>

Stakeholder literature and a piece of academic literature conveyed that many prescribed persons do not have a clear role or duty to investigate allegations of victimisation, or to intervene to prevent or stop it.<sup>286</sup> The majority of prescribed person participants agreed and noted that their response to such allegations includes:

- using the information as a potential indication of existing or developing poor culture in an organisation
- signposting the individual to the police, Acas or their relevant union, as applicable
- advising that the individual seeks independent legal advice
- advising that the individual contacts a whistleblowing organisation
- referring the individual to the Employment Tribunal process

A whistleblower participant at a whistleblower focus group explained that the prescribed person they contacted advised them that their only option in response to their alleged victimisation seemed to be to resign from the organisation.

A piece of stakeholder literature suggested that some prescribed persons may lack the resources, expertise, or authority to deal with complex or sensitive cases of victimisation.<sup>287</sup> A participant at a prescribed person focus group expressed the view that investigating allegations of victimisation may blur the lines of responsibility between the organisation and the prescribed person as the legislation currently stands.

According to different types of literature and participants, only prescribed persons in the financial services sector, such as the Financial Conduct Authority and the Prudential Regulation Authority, have a clear mandate to investigate cases of victimisation as part of their regulatory functions.<sup>288</sup> Public body literature from the financial services sector showed that these regulators can also take enforcement action against organisations that breach whistleblowing rules or fail to protect whistleblowers.<sup>289</sup>

A piece of public body literature and piece of stakeholder literature suggested that other prescribed persons, such as the Health and Safety Executive, the Care Quality Commission, and the Information Commissioner's Office, do not have a specific remit to investigate allegations of detriment, but they may respond to them in various ways.<sup>290</sup> The same literature showed that for example, they may provide advice,

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<sup>285</sup> LR65

<sup>286</sup> LR03, LR33, LR43, LR45

<sup>287</sup> LR65

<sup>288</sup> LR03, LR19, LR22, LR62

<sup>289</sup> LR62

<sup>290</sup> LR03, LR40

guidance, or support to whistleblowers, refer them to other agencies or authorities, or use the information to inform their inspection or assessment of the organisations' systems and controls related to whistleblowing. However, this literature noted that there is limited evidence on the effectiveness and impact of these responses.

Some prescribed person participants explained that they refer whistleblowers to whistleblowing organisations to enable them to obtain independent legal advice before making a disclosure to the prescribed person.

### **Anonymity and confidentiality are the main protections provided by prescribed persons**

Prescribed person participants explained that their role in protecting individuals is largely limited to accepting anonymous concerns and preserving anonymity and confidentiality, regardless of whether or not the individual might be a whistleblower. A prescribed person interviewee noted that they explicitly explain to whistleblowers how they protect the whistleblower's identity and information. Methods to maintain anonymity and confidentiality described by prescribed person participants were similar to those described by employer participants (see above) and included:

- summarising, sanitising, or redacting disclosure information
- orally disseminating information internally as required
- creating separation between the individual's personal information and the disclosure
- creating separation between the disclosure and any potential investigation
- locking down disclosure information securely
- creating separation between the individual and any potential investigation

It was agreed during a prescribed person focus group that segregation between prescribed person teams interacting with individuals and teams taking consequential action tended to exist. It was agreed during a separate prescribed person focus group that the extent to which segregation occurs depends on the prescribed persons approach to reporter engagement during an investigation and the complexity of the case. One prescribed person participant felt that it is not possible to have a total segregation between the whistleblower and the action taker (e.g. investigator or inspector) in complex cases. In some cases, it becomes necessary to connect the whistleblower with those undertaking the enquiries, which also showed to the whistleblower that their concern is being treated seriously.

A prescribed person interviewee felt that confidentiality is naturally easier to maintain for generic disclosures involving large organisations.

Some prescribed person participants highlighted the practical difficulties of protecting anonymous whistleblowers. This challenge is also suggested by two pieces of stakeholder literature at a summary level.<sup>291</sup> One prescribed person interviewee explained that it is actually easier to protect the individual from being identified during an investigation if they disclose their identity to the prescribed person. Other

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<sup>291</sup> LR49, LR65

prescribed person participants noted that anonymity limits the protection they can offer as they are unable to confirm whether or not the individual is a whistleblower. This makes it difficult for the prescribed person to establish whether a disclosure is a protected disclosure and whether redress for alleged detriment suffered can be sought at an Employment Tribunal.

Some prescribed person participants explained that there are certain circumstances when they may be required to disclose the individual's identity, and therefore increase the risk of detriment, particularly where a legal duty, serious crime, safeguarding, or imminent harm were involved. This view is supported by a piece of stakeholder literature.<sup>292</sup> One prescribed person interviewee explained that they assess the risk to the individual when making this decision. Another prescribed person interviewee noted that they make it clear in their communications with workers that there may be a need to disclose their identity, and another prescribed person interviewee said that they tell the individual before disclosing their identity.

### **Protections are challenging to apply in some situations**

From a piece of stakeholder literature, it appeared that some prescribed persons take action that could compromise the individuals' identity and therefore increase the risk of detriment, particularly where safeguarding or imminent harm were involved.<sup>293</sup> Several prescribed person participants explained ways in which they contact organisations in relation to concerns they receive. Some provided descriptions of the robust steps they take to prevent the existence or identity of a whistleblower becoming known. However, one prescribed person interviewee explained that in some instances they contact the relevant organisation to seek assurances about the reported concern, and sometimes the organisation works out the source of the concern.

Section 43J of the ERA includes a provision that aims to prevent a confidentiality clause, or a non-disclosure agreement being used to prevent worker from making a protected disclosure. However, according to stakeholder, journalistic and academic literature, some individuals may not have the legal expertise to understand this and such agreements can therefore act as a deterrent from making a protected disclosure, or may limit the information that can be provided without risking personal exposure to legal consequences.<sup>294</sup> This literature suggested that in these cases, workers may find it difficult to prove that they acted with reasonable belief and/or in the public interest, and they may not receive adequate protection or redress under the GB framework legislation through the Employment Tribunal.

A piece of stakeholder literature noted that workers in multinational organisations who report international concerns may not be protected by the GB framework or by the laws of other countries and may face additional risks or barriers in accessing justice or remedies.<sup>295</sup>

### **Timing of concerns raised with prescribed persons**

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<sup>292</sup> LR65

<sup>293</sup> LR65

<sup>294</sup> LR03, LR45, LR48

<sup>295</sup> LR30

A piece of stakeholder literature and a piece of academic literature suggested that due to fear of reprisals and perceived lack of protection, many whistleblowers do not raise their concerns with prescribed persons.<sup>296</sup> However, at a summary level academic and stakeholder literature suggested that it is more likely a worker will raise concerns with a prescribed person sooner where a worker has a tenure under two years, there is clear evidence of wrongdoing, or the workplace does not have a supportive culture, as it presents a clearer route for demonstrating their status as a whistleblower, and therefore their right to protection and remedy under the GB framework legislation.<sup>297</sup>

A whistleblower interviewee explained that they chose not to approach the prescribed person until liability had been established by the Employment Tribunal, so that approaching the prescribed person was not perceived or portrayed as trying to advance their Employment Tribunal claim. However, a prescribed person interviewee felt that the commencement of Employment Tribunal proceedings was too late for a disclosure to be made to a prescribed person.

### **Potential conflicts of interest between some prescribed persons and organisations in their sector**

Whistleblower and legal representative participants described conflicts of interest between organisations and regulators/prescribed persons. During a whistleblower focus group one participant stated that one of their sector's prescribed persons had been complicit in colluding with their employer to cause harm to them. Another whistleblower participant at the same focus group stated that relationships between employers and their regulators, specifically staff moving between the two, can create potential conflicts of interest. A further whistleblower participant agreed, expressing a view that some regulators work too closely with the organisations they regulate and are therefore potentially conflicted. A participant at the legal representatives focus group also agreed. Two pieces of stakeholder literature agreed that this occurs in the health sector.<sup>298</sup>

### **Some external processes can be used to victimise workers**

A few pieces of stakeholder literature indicated that processes outside of the organisation, such as professional registers, can be used inappropriately to victimise workers.<sup>299</sup> This literature further indicated that whistleblowers who report concerns that affect their profession or industry may face repercussions from the bodies that administer the registers, including some prescribed persons. This literature also indicated that these bodies may have the power to suspend, revoke, or downgrade the workers' registration, which can affect their employability, reputation, or income.

One piece of stakeholder literature also stated that the bodies which administer such processes may not have adequate policies or procedures in place to deal with protected disclosures and may inadvertently cause harm to individuals by disclosing their identity, ignoring their concerns, or failing to protect them from retaliation.<sup>300</sup>

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<sup>296</sup> LR17, LR34

<sup>297</sup> LR34, LR39, LR65, LR67

<sup>298</sup> LR32, LR39

<sup>299</sup> LR03, LR32, LR39

<sup>300</sup> LR32

## **The extent to which prescribed persons influence how organisations in their sector provide protections**

A limited number of the prescribed person interviewees asked, confirmed that they seek to influence how organisations in their sector provide protections, which was supported by stakeholder and public body literature.<sup>301</sup> This included setting standards and ensuring these standards are met through supervision and monitoring, requiring organisations to periodically attest that they have adequate whistleblowing procedures, and conducting outreach events to communicate best practice. However, a prescribed person interviewee explained that they are prevented by law from being involved in the internal administration of organisations in their sector and therefore cannot require organisations to provide certain levels of protection to individuals.

## **Summary of suggestions for change**

Suggestions for change related to additional or proactive protections were identified in the literature and provided by research participants. The suggestions for change are summarised below and outlined in more detail in Appendix A:

- broaden the interpretation of detriment by Employment Tribunals
- make the guidance on protections clearer and more visible for individuals
- set national standards and provide training on responding to allegations of harm
- make it a civil or criminal offence to harm a whistleblower or to not fulfil responsibilities to protect whistleblowers
- greater consequences for organisations found to be victimising individuals than currently applied by Employment Tribunals, and potentially for this to be governed outside of Employment Tribunals
- independent body to investigate retaliation against whistleblowers with the power to fine employers and dissuade the organisation (and others by proxy) from retaliating
- senior management to be held accountable for detriment caused to whistleblowers under their management
- compel prescribed persons to provide protection to whistleblowers
- place increased onus on prescribed persons in relation to whistleblower allegations of victimisation
- provide protections for whistleblowers who refuse to do the wrong thing
- provide protections for whistleblowers raising concerns with journalists or the media
- provide increased protection to UK whistleblowers based overseas

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<sup>301</sup> LR62, LR64

- ensure consistency of employer whistleblowing policies with case law

# Redress – Employment Tribunals

## Introduction

This section sets out the observations and emerging themes arising in relation to the effectiveness of redress through Employment Tribunals under the following sub-sections:

1. Redress under the GB framework legislation which has been applied in Employment Tribunals
2. Barriers to individuals commencing or being successful at an Employment Tribunal
3. Routes of redress outside of the Employment Tribunal

The opinions of participants are based on their own experience of seeking redress and therefore may not accurately represent the process of seeking redress after making a protected disclosure.

Suggestions for changes to redress identified in the research project are summarised at the end of the section and outlined in more detail in Appendix A.

## Background

The process of an Employment Tribunal redress claim under the GB framework legislation has several stages:<sup>302</sup>

1. The worker should first try to resolve the issue internally by following the organisation's grievance and whistleblowing policy or by raising the concern with their line manager, HR department, or trade union representative.
2. If this does not lead to a satisfactory outcome, a worker is usually required to contact Acas and enter the Early Conciliation process to see if a settlement can be reached. If this does not lead to a satisfactory outcome, Acas will provide a certificate to that effect to the worker so they can make a claim to an Employment Tribunal within three months minus one day of the act or failure to act that forms the basis of their complaint. To do this, they must fill in an online form (ET1).
3. The employer will then have 28 days to respond to the claim by filling in another online form (ET3).
4. The Employment Tribunal will then arrange a preliminary hearing to decide on the issues to be determined at the final hearing, the timetable for the exchange of documents and witness statements, the disclosure of relevant evidence, and any other procedural matters.
5. The final hearing will then be held if the claim is not settled or withdrawn. During the hearing both parties will present their case, and the Employment

<sup>302</sup> [Make a claim to an Employment Tribunal: When you can claim \(www.gov.uk\)](https://www.gov.uk/make-a-claim-to-an-employment-tribunal) Accessed 24 January 2024

6. Tribunal will reach a decision and decide on the remedy to compensate the worker if they win their claim.

## **Research observations and emerging themes**

### **1. Redress under the GB framework legislation which has been applied in Employment Tribunals**

**The GB framework legislation only provides protection reactively – if a worker unfairly dismissed or suffers a detriment**

Several pieces of stakeholder literature suggested that the GB framework legislation only has a limited role in protecting workers who report wrongdoing.<sup>303</sup> Two pieces of stakeholder literature described how the legislation provides protection reactively if a worker is unfairly dismissed under Part 10 of the ERA or suffers a detriment under Part 5 of the ERA because of making a protected disclosure, but suggested it does not prevent or remedy the victimisation that whistleblowers often face.<sup>304</sup>

One whistleblower interviewee felt that the GB framework legislation applies for a whistleblower when it is too late. They believed that the legislation only offers protection to whistleblowers after they have already “lost everything” due to reputational damage and loss of job and career. Participants at a whistleblower focus group agreed that the legislation only provides protections after it has gone wrong.

Some prescribed person participants see the GB framework legislation as only providing retrospective protection and questioned how it protects whistleblowers from detriment occurring in the first place.

**Employment Tribunals are the sole route to claim protections (and redress) under the GB framework legislation**

According to some of the stakeholder literature, Employment Tribunals are the sole route to claim protections and redress, as there is no alternative dispute resolution mechanism or ombudsman service available for whistleblowing cases in Great Britain.<sup>305</sup>

Many prescribed person and whistleblower participants also recognised that Employment Tribunals are the final route to claim protections (and redress) for whistleblowing cases. However, a participant at a whistleblower focus group believed that due to how cases are being decided in Employment Tribunals, the onus is on individuals to raise perfect concerns in line with their employer’s policies if they want a chance of it being seen as protected.

A whistleblower interviewee explained that their motivation to pursue an Employment Tribunal claim was driven by a sense of duty to those who their employer might victimise in the future if there was no consequence.

**Some claimants have been successful at claiming redress**

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<sup>303</sup> LR18, LR38, LR39, LR55

<sup>304</sup> LR18, LR42

<sup>305</sup> LR18, LR38, LR41



It is evident from a range of literature,<sup>306</sup> some of the whistleblower participants, and secondary data analysis of the Employment Tribunal statistics (below) that some claimants have been successful at Employment Tribunals, either by winning their cases or reaching a settlement with their employers. Two pieces of academic literature identified several factors that contributed to successful outcomes, such as having clear and credible evidence of wrongdoing, following internal procedures, seeking legal advice, and having support from trade unions or whistleblowing organisations.<sup>307</sup>

However, a couple of stakeholder literature sources are inconsistent in terms of percentage of success, as they suggested that success rates range between 3% and 21% where claimants are awarded redress after the full Employment Tribunal process.<sup>308</sup> A separate piece of stakeholder literature highlighted examples of whistleblowers who received substantial compensation awards from Employment Tribunals, ranging from £100,000 to over £1 million, depending on the nature and extent of the detriment or dismissal they suffered.<sup>309</sup>

### **Employment Tribunal statistics**

The research analysed Employment Tribunal statistics for the period 1 January 2014 and 31 March 2023. 'Public Interest Disclosure' is one of the 22 jurisdictional complaints considered by Employment Tribunals and included in the statistics, with examples of other jurisdictions being age discrimination, breach of contract and equal pay. The analysis shows that 'Public Interest Disclosure' claims made up 1% of total jurisdictional complaint receipts (submitting a claim) and disposals (case closures) during the period of analysis.

The Employment Tribunal statistics include outcome categories which the research project coded as being in favour of the employee or not in favour of the employee, based on the outcome coding assumptions outlined in Appendix F. Analysis of these outcome codes indicated that an average of 38% of disposals of 'Public Interest Disclosure' claims were made in favour of the employee over the seven-year period between 1 April 2014 and 31 March 2021. This is marginally lower than the average across all jurisdictions, for which 42% of outcomes were in favour of the employee.

The below chart shows the percentage of disposals by outcome as an average over the seven-year period for each jurisdiction, as well as the average across all jurisdictions (both including and excluding Public Interest Disclosure claims).

<sup>306</sup> LR03, LR17, LR23, LR29, LR49, LR53

<sup>307</sup> LR21, LR23

<sup>308</sup> LR17, LR49

<sup>309</sup> LR42

**Chart 3: Average percentage of disposals by outcome for selected jurisdictions for the seven years ended 31 March 2021**



However, as outlined in Appendix F caution should be applied over the analysis of the Employment Tribunal statistics as:

- receipts are categorised into jurisdictions based on tick boxes completed by the claimant in the ET1 form - therefore the accuracy of jurisdictional receipts data is limited
- data showing “disposals” by jurisdiction and outcome is not available for March 2021 onwards
- data showing “receipts” by jurisdiction is not available for the year ended 31 March 2021

## 2. Barriers to individuals commencing or being successful at an Employment Tribunal

Academic and stakeholder literature views the Employment Tribunal as a setting intended for the worker and employer to be on equal footing, but claims that this has not been borne out in practice.<sup>310</sup> However, a number of mostly stakeholder literature pieces asserted that some claimants have faced challenges and barriers at Employment Tribunals, as discussed in the next sub-section.<sup>311</sup> According to mostly stakeholder literature and a piece of academic literature, pursuing a claim at an Employment Tribunal can also be time-consuming and risky for those who enter the process, as they may face retaliation, stigma, and isolation from their employers and colleagues.<sup>312</sup>

<sup>310</sup> LR17, LR18, LR21, LR23, LR53

<sup>311</sup> LR02, LR03, LR07, LR13, LR17, LR18, LR21, LR23, LR33, LR42

<sup>312</sup> LR03, LR17, LR33, LR36, LR53

A range of literature types also noted some gaps and weaknesses in the GB framework legislation which contribute to the challenges, such as the narrow definition of protected disclosures, the limited scope of qualifying persons, the uncertainty about the public interest test, and the low level of compensation awarded in practice, even though there is no cap on whistleblowing case awards.<sup>313</sup> A range of literature indicated that the following factors can contribute to this:<sup>314</sup>

- the high burden of proof to prove the link between the detriment and/or dismissal and the protected disclosure
- the personal legal costs
- the difficulty of accessing interim relief for unfair dismissals
- the lack of legal aid (unless discrimination is also claimed)
- the low awareness and understanding of the GB framework legislation among workers and employers

Several pieces of stakeholder literature and one piece of academic literature suggested that these potential barriers may deter some whistleblowers from seeking redress under the GB framework legislation or result in them accepting lower settlements than they deserve.<sup>315</sup> The research highlighted multiple barriers to being successful at Employment Tribunal, which are expanded below.

### **Lack of resources – time, cost, knowledge, skills and experience**

Some stakeholder literature outlined that workers often lack the necessary resources to pursue their claims in the Employment Tribunal.<sup>316</sup> A range of literature types suggested that workers may lose their jobs, income, and livelihoods as a result of blowing the whistle, and may struggle to afford legal representation and other expenses associated with the Employment Tribunal process.<sup>317</sup> Participants and a range of literature stated that they may also face difficulties in accessing relevant information, evidence, and witnesses to support their claims, especially if they no longer work for their employer, or their employer withholds or destroys such material.<sup>318</sup> Moreover, according to academic and journalistic literature, they may lack the knowledge, skills, and experience to navigate the complex and technical legal system, especially if they are litigants in person, which may disadvantage them against their employers who are likely to have more resources and expertise.<sup>319</sup> A piece of stakeholder literature and academic literature suggested these challenges were exacerbated by the introduction of fees (since removed, with Employment Tribunal fees abolished in 2017)), the reduction of legal aid to cases which do not also include discrimination, and the increased workload and delays at Employment Tribunals.<sup>320</sup>

<sup>313</sup> LR12, LR13, LR16, LR17, LR18, LR33, LR34, LR36, LR39, LR41, LR53

<sup>314</sup> LR02, LR03, LR09, LR13, LR16, LR17, LR18, LR23, LR24, LR31, LR32, LR33, LR36, LR41, LR47, LR67, LR70

<sup>315</sup> LR03, LR05, LR34, LR39, LR49

<sup>316</sup> LR03, LR33, LR41

<sup>317</sup> LR03, LR17, LR18, LR21, LR23, LR24, LR44, LR49, LR53, LR55

<sup>318</sup> LR01, LR02, LR03, LR17, LR21, LR41, LR47, LR51, LR52

<sup>319</sup> LR21, LR23, LR53

<sup>320</sup> LR03, LR23

A whistleblower interviewee noted that the pursuit of their claim in the Employment Tribunal placed a significant burden on their time. The same whistleblower interviewee also said that the Employment Tribunal process was not accessible to individuals working in lower skilled jobs, many of whom do not speak English as their first language, meaning that the terminology of the legal system would be difficult for these individuals to understand, and legal representatives of respondents may use this to purposefully “trip up” such whistleblowers. Similarly, another whistleblower interviewee outlined that the arguments present in Employment Tribunals are highly technical and legal and many whistleblowers, particularly litigants in person, reported that they struggle with this.

In terms of cost constraints which prevent whistleblowers from affording legal representation, a whistleblower interviewee explained that their insurance company was reluctant to engage with them as they could not access insurance without a merits assessment. The merits assessment was costly and could not be done properly before the conclusion of the grievance process, which was ongoing and had been subject to significant delays. Another whistleblower interviewee described their Employment Tribunal process as extremely expensive.

Conversely, a whistleblower interviewee believed that the absence of adverse costs in the Employment Tribunal is positive. Another whistleblower interviewee explained that as a litigant in person they suffered no direct financial costs pursuing their claim at an Employment Tribunal.

During a focus group a prescribed person participant stated that high costs mean that claimants may not be able to afford to proceed to the final Employment Tribunal judgment stage.

### **Relative lack of mental capacity or resilience – the law and Employment Tribunal process are complex, complicated, draining, and often traumatising for whistleblowers**

Some stakeholder literature indicated that workers may also lack the mental capacity or resilience to cope with the stress, pressure, and emotional toll of the Employment Tribunal process.<sup>321</sup> Mostly stakeholder literature and a piece of academic literature, indicated that the law and the procedures governing whistleblowing claims are complex and complicated, requiring workers to prove that they made a qualifying disclosure in the public interest, that they suffered a detriment or dismissal as a result, and that there was a causal link between the two.<sup>322</sup> A similar range of literature types suggested that these elements can be hard to establish, especially if the employer denies or disputes them, or raises counter-allegations against the worker.<sup>323</sup>

The Employment Tribunal process itself is described by some stakeholder literature as long, drawn-out, and unpredictable, with frequent delays, adjournments, and settlements.<sup>324</sup> Stakeholder literature indicated that workers may have to endure cross-examination, scrutiny, and criticism of their motives, character, and credibility, which can be humiliating, intimidating, and damaging to their reputation and self-

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<sup>321</sup> LR03, LR17

<sup>322</sup> LR08, LR13, LR17, LR18, LR21, LR23, LR33

<sup>323</sup> LR03, LR17, LR30, LR32, LR36, LR41

<sup>324</sup> LR02, LR07, LR18

esteem.<sup>325</sup> The same literature continued that the whole experience can be draining and often traumatising for workers, who may suffer from anxiety, depression, post-traumatic stress disorder, and other mental health issues as a result. Whistleblower participants used the following words and phrases to describe their experience of the Employment Tribunal process:

- public execution
- beyond difficult
- miserable
- complex
- arduous
- horrible and abusive
- not simple
- soul destroying
- toxic
- unsafe
- stressful
- demanding
- exhausting

### **Lack of trust – claimants perceive Employment Tribunals to be unbalanced and unfair, especially for litigants in person**

Some stakeholder literature illustrated that workers may also lack trust in the fairness and impartiality of the Employment Tribunal system, especially if they feel that they are not treated equally or respectfully by the judges, lawyers, and other parties involved.<sup>326</sup> The lack of trust and fairness was also raised by some whistleblower participants, with some particularly strong views expressed where, from their perspective, the Employment Tribunal lacked impartiality.

Two pieces of stakeholder literature and a parliamentary paper suggested that workers may perceive that Employment Tribunals are biased towards employers, who have more power, influence, and resources, and who may use various tactics to undermine, discredit, or silence workers, such as threatening, bribing, gagging, or blacklisting them.<sup>327</sup> Various whistleblower participants described their perception of an imbalance of power in Employment Tribunals between the significant resources of employers defending a case, utilising large teams of high-ranking lawyers and barristers to pick apart a claim, and whistleblowers who often cannot afford the same legal fees and commence the case as a litigant in person.

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<sup>325</sup> LR03, LR17

<sup>326</sup> LR17, LR18

<sup>327</sup> LR03, LR17, LR52

A participant at a whistleblower focus group highlighted the imbalance in resources and that employers often unfairly benefit from having the relevant documents, whereas claimants may have left those behind if they have left their employment. Another participant at the same focus group believed that the current imbalance indicates a low level of perceived value in whistleblowing. A further whistleblower participant felt that respondent lawyers have taken over Employment Tribunals, meaning that public bodies are wasting large amounts of taxpayer money to defend claims.

Some stakeholder and academic literature also showed that workers may also feel that the Employment Tribunals are ineffective, inconsistent, and arbitrary, with varying standards of evidence, interpretation, and application of the law, and with limited oversight, accountability, and transparency.<sup>328</sup> This and several other pieces of stakeholder literature indicated that these perceptions may be exacerbated for litigants in person, who may face additional challenges and disadvantages in presenting their cases, understanding their rights and obligations, and accessing legal advice and support.<sup>329</sup> One whistleblower interviewee, who represented themselves as a litigant in person, felt that they sounded less credible because they had prepared written documents in layman's terms rather than as a lawyer.

At an employer focus group, the participants agreed that accessing redress under the GB framework is litigious and adversarial if it results in an Employment Tribunal. A whistleblower interviewee believed that Employment Tribunals should be inquisitorial and not adversarial.

Another whistleblower interviewee described blowing the whistle as an "all or nothing gamble", with little chance of a successful or appropriate outcome for the whistleblower, even when the GB framework legislation and employer policies are followed. An employer interviewee noted that large employers seemed to win Employment Tribunals over whistleblowers. During a focus group prescribed person representatives felt that organisations' lawyers defending their position at all costs at Employment Tribunals can be an issue affecting trust in the system.

### **Perceived lack of meaningful outcomes – the limited financial compensation in practice, and the limited circumstances in which these are awarded**

According to several pieces of literature the main remedy available to workers at Employment Tribunal is financial compensation, which is calculated based on the loss of earnings, pension, and benefits, and the injury to feelings, suffered by the worker as a result of the detriment or dismissal.<sup>330</sup> Some stakeholder literature suggested that financial awards are granted by Employment Tribunals in a minority of cases, as most claims are either withdrawn, dismissed, or settled before or during the Employment Tribunal hearing.<sup>331</sup>

The financial compensation is reportedly low in practice, according to two pieces of stakeholder literature, and the limited circumstances in which compensation awards are made, mean that claimants do not "win".<sup>332</sup> Two pieces of stakeholder literature

<sup>328</sup> LR13, LR16, LR17, LR18, LR21, LR23, LR33

<sup>329</sup> LR17, LR18, LR21, LR23, LR24, LR49

<sup>330</sup> [Check what you can get from an Employment Tribunal - Citizens Advice](#) Accessed 24 January 2024

<sup>331</sup> LR17, LR32, LR55

<sup>332</sup> LR17, LR42

indicated that claimants may be dissatisfied with the outcomes of their Employment Tribunal claims, as the compensation awarded may not reflect the actual losses, damages, or suffering they have incurred, or may not be paid at all by the respondents.<sup>333</sup> A whistleblower participant explained during a focus group that currently there are two potential outcomes for a whistleblower, they either "lose" or they "come out even". Further, the whistleblower participant explained that "coming out even" also feels like losing and that the equation needs to be changed to include the possibility of making a profit or "winning".

Several whistleblower participants who were successful in their Employment Tribunal case had negative views of their experience. One whistleblower interviewee described that it does not feel like they 'won' as they are financially worse off compared to if they had never raised concerns in the first place. Another whistleblower interviewee described themselves as an "extremely rare winner" and their experience as rather "supposedly winning", as blowing the whistle was the worst experience of their life so far as it resulted in loss of their job and career. An employer interviewee felt that the Employment Tribunal process was currently falling short in genuinely protecting whistleblowers and awarding adequate compensation for damages to whistleblowers.

Conversely, a separate whistleblower interviewee stated that in theory they had a good outcome, as their concerns were upheld. Another whistleblower interviewee outlined that given their hearing success to date, they are so far happy with the Employment Tribunal process.

A whistleblower interviewee noted that they received a financial reward from an overseas regulator for blowing the whistle. A piece of stakeholder literature indicated concerns are being increasingly raised under the United States schemes by workers in Great Britain.<sup>334</sup> According to this piece of the literature, these schemes, which are administered by various United States authorities, such as the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Internal Revenue Service (IRS), offer monetary incentives to workers who provide original and useful information about fraud, corruption, or misconduct that affects the United States markets, investors, or taxpayers. The same piece of literature noted that United States schemes are open to whistleblowers from any country, including Great Britain, and they do not require whistleblowers to exhaust local remedies or to report internally before reporting externally. Moreover, the same literature source suggested that the United States schemes offer more substantial and uncapped rewards, ranging from 10% to 30% of the sanctions imposed on the wrongdoers, as well as more robust and comprehensive protection from retaliation or discrimination, compared to the regime in Great Britain.

This piece of stakeholder literature concluded that some British workers may opt to report their concerns to United States authorities, rather than to British tribunals or regulators, if they believe that they have a valid and viable claim, and that they can obtain more favourable and effective outcomes.

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<sup>333</sup> LR17, LR42

<sup>334</sup> LR55

However, this stakeholder literature continued that this may raise some material concerns, such as:

- the potential loss of control, ownership, or involvement of British workers in the United States proceedings
- the potential conflict or inconsistency between British and United States laws, rules, and standards
- the potential undermining or bypassing of the British tribunals and regulators, and their roles and responsibilities in addressing and resolving whistleblowing issues

### **Disincentives or consequences for organisations**

A mix of literature sources also noted that there appears to be no meaningful incentives for organisations to behave better with workers in the future.<sup>335</sup> A piece of stakeholder literature further showed that claimants may also find that the Employment Tribunal orders, such as reinstatement, redress or costs, are not enforced, complied with, or monitored by the authorities.<sup>336</sup> Stakeholder literature suggested that claimants may also feel that their claims have no impact on the prevention, deterrence, or redress of discrimination, harassment, or victimisation in the workplace, as the respondents may not acknowledge, apologise, or change their behaviour or policies.<sup>337</sup> Several pieces of academic and stakeholder literature suggested that having been through an Employment Tribunal and even having won financial compensation, there is not a mechanism (in the Employment Tribunal or elsewhere in the GB framework legislation) which focuses attention to correct the wrongdoing which was the subject of the protected disclosure.<sup>338</sup>

One whistleblower interviewee noted that under the Employment Tribunals Act 1996, a whistleblower can apply for a penalty if the respondent company fails to comply with a previous judgment. However, the whistleblower argued that the fine that was imposed was inconsequential to large corporates and that they are not fazed by the relatively minor implications of a successful claim by an employee at an Employment Tribunal.<sup>339</sup>

Some employer participants stressed the risk of an employer entering the Employment Tribunal process. One employer interviewee explained the risks include reputational risk if the claimant goes to the press, financial risks associated with costs of the Employment Tribunal process, and risks to staff and the whistleblower if there is a genuine issue which has not been resolved. Another employer interviewee sees reputational damage as the overriding risk of entering an Employment Tribunal.

### **Employment Tribunals are experiencing delays**

Several pieces of literature indicated that claimants perceive that the Employment Tribunal service is experiencing delays.<sup>340</sup> A whistleblower interviewee expressed the view that the Employment Tribunal service was overwhelmed due, in part, to whistleblowing cases being complex, resulting in delays, numerous preliminary

<sup>335</sup> LR02, LR03, LR41, LR42, LR51

<sup>336</sup> LR42

<sup>337</sup> LR17, LR41

<sup>338</sup> LR14, LR16, LR34, LR44, LR49, LR67

<sup>339</sup> [Employment Tribunals Act 1996 \(legislation.gov.uk\)](#) Section 12A provides the current financial penalties.

<sup>340</sup> LR02, LR03, LR21, LR37, LR39, LR41, LR47



hearings and long final hearings. The whistleblower reflected a positive opinion of Employment Tribunal staff and judges but said that the service was hindered by inadequate technology. Another whistleblower interviewee noted that Employment Tribunals take a long time and there is a backlog of cases in the system.

### **Employment Tribunals may not be the right place to deal with whistleblowing cases**

Two stakeholder pieces and a journalistic piece of literature noted that the underlying wrongdoing that the whistleblower initially raised is not central to the Employment Tribunal case and in many Employment Tribunal judgments it is not mentioned.<sup>341</sup> The wrongdoing itself is not addressed by the process which is resolving a dispute between a worker and their employer and there is no mechanism to force an organisation to address the concern outlined in the disclosure they received.

A whistleblower interviewee believed that Employment Tribunals are not fit for purpose for whistleblowing claims. Similarly, another whistleblower interviewee questioned whether Employment Tribunals were appropriate to deal with whistleblowing disclosures, particularly those with criminal implications such as money laundering, fraud or situations where lives are threatened. The whistleblower suggested that it might be appropriate for the police to get involved with certain disclosures.

### **Feedback for Employment Tribunal judges**

A whistleblower interviewee felt that their Employment Tribunal judge had not seen many whistleblowing cases and therefore did not understand them. The interviewee also perceived that there was a default or inherent bias from their judge towards higher ranked barristers acting on behalf of the employer. A different participant at a whistleblower focus group felt that their Employment Tribunal judge did not seem to be aware of how the Employment Tribunal process adversely impacts them as the claimant. A piece of journalistic literature supported these points.<sup>342</sup>

Another participant during a whistleblower focus group felt that there is an inconsistency between an Employment Tribunal judge forming a view that no regulatory breach has taken place but the relevant regulators having a view that there has been a breach.

### **Time limits can prevent individuals raising claims or accessing interim relief**

Some whistleblower participants and a piece of stakeholder literature<sup>343</sup> explained that internal processes (e.g. grievance procedures) take a long time and therefore some whistleblowers miss the opportunity to raise an Employment Tribunal claim within the usual 3-month time limit. One whistleblower interviewee explained that the "three months less one day" rule meant that they had to file a claim before the grievance process was resolved, which meant the situation became immediately adversarial and their employer took a defensive stance, rather than working to resolve the issues and acknowledge errors.

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<sup>341</sup> LR17, LR42, LR53

<sup>342</sup> LR53

<sup>343</sup> LR33

A participant at a whistleblower focus group stated the current 7-day limit to raise a claim, in order to apply for interim relief, is too short. A participant at another whistleblower focus group explained that interim relief is meant to be urgent, but felt that Employment Tribunal appeals delayed the payments, which they believe invalidates the purpose of interim relief.

### **Continued victimisation by organisations despite Employment Tribunal decision censure**

A whistleblower interviewee noted that there is no follow-up process or ability to go back to the same judge to notify that the issues are still ongoing or that their judgment has been ignored. The whistleblower explained that following their successful Employment Tribunal judgment, their employer obstructed their ability to leave the company through role changes preventing their ability to amass relevant experience. The whistleblower explained that they also suffered increased detriment, including being blocked from promotion and other financial rewards by their employer, which has resulted in health concerns for the whistleblower.

Similarly, a participant at the legal representatives focus group raised that there is no enforcement element associated with employers that cause harm or detriment, and that in their opinion there should be.

### **Tactics employed by respondents and their legal representatives at Employment Tribunals**

Whistleblower participants, a piece of journalistic literature and a piece of stakeholder literature mentioned<sup>344</sup> various tactics employed by employers and their legal representatives at Employment Tribunals, including:

- using delay strategies, including dragging out judicial mediations and postponing and rearranging hearings as much as possible to place further financial constraints on the whistleblower
- abusing the 'dates to avoid' process, including blocking out significant periods of time as dates to avoid
- overcomplicating the process
- sending crates of disclosure documents late at night and at weekends
- seeking to overwhelm the claimant with information, such as creating large trial bundles
- seeking to diminish or exclude the claim for unsubstantiated reasons, such as arguing that the claim is out of time, which causes delays in the process
- citing pre-existing conduct or competency issues as the reason for dismissal rather than the disclosure itself
- waiting until close to the final hearing date before making a settlement offer, which means that it is too late for the vacated hearing to be filled with other cases

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<sup>344</sup> LR02, LR17

During the legal representatives focus group, a participant noted that some employers sometimes claim that they took action against the claimant (such as dismissal) not in retaliation to the protected disclosure but due to the claimant's own conduct. Further, in some cases the employer may try to justify their actions against the claimant by arguing that the method of disclosure chosen by the claimant was inappropriate, unreasonable or in breach of the employer's internal whistleblowing policy.

### **Perceived unfair treatment by respondents and their legal representatives at Employment Tribunals**

A piece of stakeholder literature<sup>345</sup> outlined, and whistleblower participants claimed, various forms of perceived unacceptable or inappropriate behaviour by respondents and their legal representatives at Employment Tribunals, which in some instances potentially amounted to intimidation towards claimants and illegality, such as concealing evidence or misleading the Employment Tribunal. A participant at a whistleblower focus group felt that there do not seem to be any real consequences for employers who breach Employment Tribunal rules.

### **Redress of all financial and non-financial consequences of the claimant**

Whistleblower participants and a mix of literature types outlined various financial and non-financial consequences of making an Employment Tribunal claim, including:<sup>346</sup>

- significant loss of earnings while pursuing a claim
- lifetime loss and reduction of income and benefits
- large legal fees
- difficulties finding reemployment
- time taken to seek compensation
- health impacts

Many whistleblower participants agreed that the current compensation provided by an Employment Tribunal award is not enough given the financial and non-financial costs above. One whistleblower interviewee described the compensation as “hopelessly inadequate”.

### **Employers offer settlements to claimants often with non-disclosure agreements attached**

Despite guidance from the Solicitors Regulatory Authority against using them, two pieces of stakeholder literature and one piece of journalistic literature indicated there is a rise of using non-disclosure agreements to settle an Employment Tribunal claim in part or in full, which is stated to be indicative of the inequality of arms between workers and the organisation.<sup>347</sup> The same literature suggested that this creates an

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<sup>345</sup> LR03

<sup>346</sup> LR02, LR03, LR41, LR47

<sup>347</sup> LR17, LR20, LR55

environment which is hostile to accessing redress for harm as workers are limited in the information they can disclose to the Employment Tribunal.

Several whistleblower participants explained that they were offered settlements by their employers before commencement or finalisation of the Employment Tribunal process, often with non-disclosure agreements attached. Some whistleblower participants rejected settlement offers as they wanted to get their concerns out in the public domain through the Employment Tribunal. One whistleblower interviewee explained that they accepted a settlement offer as they became aware of the searchable nature of Employment Tribunal cases and did not want their role as a whistleblower to be discoverable by potential future employers.

A separate whistleblower interviewee noted that they could not discuss their experiences fully as their settlement is subject to a non-disclosure agreement.

### **Individuals expect support from prescribed persons at Employment Tribunals**

A whistleblower interviewee felt that the prescribed person they approached could have supported their case at the Employment Tribunal. However, a prescribed person participant at a focus group explained that they decline requests from whistleblowers to attend Employment Tribunals as a regulator. The prescribed person participant further explained that they can only confirm if the claimant has raised a concern with them, and therefore claimants are disappointed, as they believe that prescribed persons are required to attend an Employment Tribunal.

## **3. Routes of redress outside of the Employment Tribunal**

### **Redress provided by prescribed persons and organisations**

The range of literature did not indicate that there is an alternative route to access redress available via prescribed persons. Financial incentives offered by some prescribed persons are included above.

A small number of employer participants explained that they offer a form of redress to individuals who suffer detriment. The escalation routes for the review of alleged detriment described by these employer participants included their internal whistleblowing team, employee relations team or senior contacts. One employer interviewee provided an example of providing redress by paying a whistleblower an enhanced notice period when they resigned after making their identity known. Several pieces of literature across a range of literature types noted that settlement agreements for cases referred to the Employment Tribunal but settled between the organisation and the worker before the full hearing, may or may not contain redress for detriment experienced by the worker in monetary or other beneficial form.<sup>348</sup>

## **Summary of suggestions for change**

Suggestions for change relating to redress for whistleblowers were identified in parts of the literature and provided by research participants. The suggestions for change are summarised below and outlined in more detail in Appendix A:

<sup>348</sup> LR03, LR19, LR33, LR38, LR42, LR45

- establish an oversight body or adjudicator for whistleblowing cases
- full redress and expedited remedies (such as interim relief) for whistleblowers
- amend time limits associated with interim relief and filing an Employment Tribunal claim to prevent premature adversarial situations
- provide additional financial support to whistleblowers through legal aid statutory advocates and/or cap respondent's legal fees
- reverse the burden of proof within the proceedings and/or review
- address the extension of the "reasonable belief" test and apparent need to raise perfect concerns
- ban non-disclosure agreements as part of settlements
- further training or specialist judges for whistleblowing related Employment Tribunal claims
- employment tribunals to be heard by jurors rather than solely judges
- employment tribunal claimants to automatically be awarded costs if they win their case
- make civil or criminal courts responsible for enforcement
- public fines for organisations that fail to comply with Employment Tribunal judgments
- take whistleblowing cases outside of the Employment Tribunal process to improve efficiency and to appropriately deal with concerns raised
- expand of remedies and sanctions

# Awareness and guidance

## Introduction

This section considers the evidence of the effectiveness of whistleblowing awareness and guidance in Great Britain under the following sub-sections:

- individuals' awareness and use of guidance
- organisations' awareness and use of guidance
- prescribed persons' awareness and use of guidance
- prescribed persons' annual reports

Suggestions for changes to whistleblowing awareness and guidance identified in the research project are summarised at the end of the section and outlined in more detail in Appendix A.

## Background

The government guidance on whistleblowing aims to provide information and advice for individuals, organisations, and prescribed persons in relation to how to handle or raise concerns about wrongdoing or malpractice in an organisation.<sup>349</sup> The guidance for employees covers the legal definition of whistleblowing, the benefits and challenges of speaking up, the process and channels for reporting, and the rights and remedies for whistleblowers under the law.

The guidance and non-statutory code for employers covers the definition of whistleblowing, the employer's responsibilities in regard to whistleblowing, disclosure or grievance, matters related to whistleblowing policies and procedures, dealing with disclosures, and confidentiality. The guidance for prescribed persons includes information and advice on their role as a prescribed person and on how to handle and report on disclosures.

## Research observations and emerging themes

### 1. Individuals' awareness and use of guidance

#### Participant awareness of government guidance

The majority of whistleblower participants outlined that at the time they blew the whistle; they were not aware of the rights and protections afforded to whistleblowers nor the government guidance on the topic of whistleblowing. A participant in the employer focus group agreed that whistleblowers were not often aware of guidance until they had progressed along their journey.

Conversely another employer interviewee noted that there appears to be an awareness of the GB framework by individuals in their organisation, as it was

<sup>349</sup> Whistleblowing for employees: What is a whistleblower ([www.gov.uk](http://www.gov.uk)), Whistleblowing: Guidance for Employers and Code of Practice ([publishing.service.gov.uk](http://publishing.service.gov.uk)), Whistleblowing: guidance for prescribed persons ([www.gov.uk](http://www.gov.uk)) All accessed 24 January 2024

referred to in some disclosures. The literature selected for this research did not directly comment on individual awareness of government guidance.

### **Usefulness of the government guidance**

Two pieces of stakeholder literature indicated that some individuals found the government guidance confusing and largely unhelpful, and that it does not adequately explain the risks associated with raising concerns nor how to mitigate these.<sup>350</sup> These pieces of literature reported that the public has low awareness of the definitions, protections, and mechanisms for making a report before they speak up around wrongdoing, which is attributed to a lack of education and the quality of the guidance. The language is considered too technical and complicated to be adequately understood by potential whistleblowers so that they meet the requirements to be eligible for protection. However, the familiarity with guidance is higher in the healthcare and financial services sectors, which have a higher level of whistleblowing related regulatory requirements.<sup>351</sup>

A whistleblower participant explained during a focus group that the government guidance was not helpful for whistleblowers and its scope should be broadened. Another whistleblower participant expressed the view that the current government guidance available to whistleblowers is limited in relation to Employment Tribunal procedures and this leads to time being wasted in preliminary hearings for some whistleblowers by needing to explain the basics.

A piece of stakeholder literature also indicated that the guidance for individuals is lacking in relation to the Employment Tribunal process, and in terms of guides, templates, and advice.<sup>352</sup> A whistleblower interviewee noted that there was lack of guidance available to help claimants, especially litigants in person, to understand the language and process of the Employment Tribunal.

Several participants at a separate whistleblower focus group agreed and provided the following views in relation to the government guidance:

- it was deemed to be unclear and not typically referred to until after an employee has lost their job
- it needed to be clearer so the reader could determine if they had blown the whistle
- it was deemed to be misleading as it reportedly discussed protections in a way which could be interpreted that individuals are protected rather than how individuals are actually given a right to raise an Employment Tribunal claim, which is not the same
- it was deemed to be inadequate as it did not set out the risks to the whistleblower of raising concerns

A prescribed person interviewee observed that individuals submitting disclosures were often not aware of what whistleblowing was under the GB framework. The

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<sup>350</sup> LR03, LR42

<sup>351</sup> LR19, LR62

<sup>352</sup> LR33

prescribed person interviewee felt that the legislation was not very user friendly in relation to explaining the definition of a whistleblower.

Another prescribed person interviewee stated that the government guidance for whistleblowers was being misinterpreted as individuals were making disclosures that they did not think fit the definition of a qualifying disclosure because although the individual was a worker, they may have become aware of the wrongdoing by a means other than through the normal course of their work.

Similarly, there is discussion in some stakeholder literature that prescribed persons are not providing consistent information to individuals, including through the information contained in their annual reports.<sup>353</sup> The same literature suggested that some prescribed persons are proactive in providing clear information on their responsibilities as a prescribed person on their websites, but others are not up to date and are not clear.<sup>354</sup>

### **Use of other guidance**

According to a piece of stakeholder literature, under half of workers know whether their employer has a whistleblowing policy.<sup>355</sup> In addition, the guidance provided by their employer does not ensure that the worker is well informed about their rights under the GB framework and that requiring employers to provide such information might be beneficial.<sup>356</sup>

Further, a piece of stakeholder literature and government body literature suggested that guidance is lacking for individuals around identifying the appropriate prescribed person and managing their expectations generally, and specifically in relation to the prescribed persons role.<sup>357</sup> The literature went on to suggest the number of prescribed persons involved in complex cases can be confusing and in the view of reporters may divert the focus away from the wrongdoing, which means that wrongdoing can go unchallenged.<sup>358</sup>

The most useful sources of advice for individuals, according to several stakeholder literature sources, are those provided by whistleblower organisations such as Protect, WhistleblowersUK and Compassion in Care.<sup>359</sup> Protect is the largest of these organisations<sup>360</sup> and referred to most often by research participants.

Some whistleblower participants noted that the whistleblowing organisation they approached were very helpful, but others did not find the advice they received helpful. A participant at a whistleblower focus group explained that they had received advice from a whistleblowing organisation that led them to believe they would be protected, however the case failed at the Employment Tribunal which led them to believe that the advice had been misleading or wrong.

## **2. Organisations awareness and use of guidance**

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<sup>353</sup> LR33, LR64, LR65

<sup>354</sup> LR64, LR65

<sup>355</sup> LR33

<sup>356</sup> LR33, LR63

<sup>357</sup> LR03, LR27

<sup>358</sup> LR03, LR27

<sup>359</sup> LR03, LR16, LR25, LR33, LR37

<sup>360</sup> LR33, LR63



## **Awareness and use of government guidance**

According to a piece of stakeholder literature, organisations have a low awareness of the guidance provided by the government and rely on other sources to create effective internal whistleblowing frameworks.<sup>361</sup> The majority of the eight employer participants interviewed explained that they did not regularly refer to the whistleblowing related government guidance for organisations and did not use it when designing and drafting their whistleblowing policy. Some stakeholder literature and employer participants noted that the other sources of guidance include:<sup>362</sup>

- regulatory requirements and guidance
- referring directly to PIDA
- guidance related to the other related legislation in the GB framework, such as the ERA and the UK Bribery Act 2010
- guidance provided by whistleblowing organisations, Acas, legal advisors, and sector best practice and requirements

One employer interviewee was not aware of the government guidance related to the GB framework. Another employer interviewee expressed the view that the government guidance was useful on the law, but much less useful on how to make an effective speak up culture and framework.

A piece of stakeholder literature highlighted that the focus of the government guidance is on the individual's relationship with the employer, rather than on the concern raised and the robustness of the organisation's response to it.<sup>363</sup>

## **Awareness and use of prescribed persons guidance**

The majority of employer participants explained that they were aware of whistleblowing related guidance from their relevant prescribed persons. However, one employer interviewee was not aware of guidance from their prescribed persons and another employer interviewee, from a sector that does not have a prescribed person, was not aware of the function or existence of prescribed persons before this research.

A separate employer interviewee explained that they did not refer to the guidance provided by their prescribed person often. They felt that whilst the guidance was helpful around the dynamics of the requirements of a policy, it was not sufficient to guide the organisation around making individuals feel comfortable to raise their concerns.

## **Level of awareness in organisations is driven by regulatory requirements or desire to have a Speak Up culture**

A piece of international body literature and a piece of public body literature suggested that sectors having greater awareness of guidance was as a result of additional requirements on those sectors.<sup>364</sup> Public body literature suggested this

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<sup>361</sup> LR03

<sup>362</sup> LR03, LR33

<sup>363</sup> LR03

<sup>364</sup> LR19, LR61

relates primarily to the health and financial services sectors.<sup>365</sup> For instance, in financial services there is a requirement by the Financial Conduct Authority to implement whistleblowing arrangements under Senior Management Arrangements, Systems and Controls ('SYSC') 18 of its handbook.<sup>366</sup> This includes appointing a whistleblower champion, establishing and maintaining reporting arrangements, providing appropriate training, and producing a report annually for the Board. In addition, the organisations regulated by the Financial Conduct Authority need to tell it if the organisation loses a contested Employment Tribunal claim and requires firms to make it clear in settlement agreements with workers that nothing in the agreement prevents a worker from making a protected disclosure.

A range of literature types suggested that the health sector, in response to crises and scandals, has incorporated additional requirements similar to the Financial Conduct Authority, including that there is a guardian system for health workers to report to.<sup>367</sup>

Some of the stakeholder literature and public body literature identified weaknesses in the requirements, including in relation to the investigation, governance, and processes to ensure that there is a consistent approach after a report has been made.<sup>368</sup>

It is apparent from some of the stakeholder and government literature that organisations in other sectors without this regulatory requirement tended to have reporting mechanisms or a whistleblowing policy and attribute the existence of these to the business benefits.<sup>369</sup>

### **3. Prescribed persons awareness and use of guidance**

A range of literature types showed that the current guidance produced in 2015 and updated in 2017 can be helpful to prescribed persons but does not include case studies and examples of best practice across different sectors, or areas of Great Britain, so that it is clear what is expected from a prescribed person.<sup>370</sup> The goal, according to some stakeholder literature and some public body literature, is for the prescribed persons to improve whistleblowing arrangements to better support and encourage whistleblowers to report their concerns and to make good use of any information they provide.<sup>371</sup>

Prescribed person participants largely agreed that the government guidance for prescribed persons was helpful, but that further development was required. Suggestions for further development included updating the 2017 version of the guidance to include changes in best practice since then. One prescribed person interviewee noted that they had only recently come across the guidance and thought that it was not well promoted.

Prescribed person participants described that the government guidance was useful for basic information and outlined the broad and generic requirements and

<sup>365</sup> LR19, LR38, LR39, LR59, LR62

<sup>366</sup> LR59

<sup>367</sup> LR38, LR39, LR61

<sup>368</sup> LR03, LR43, LR59

<sup>369</sup> LR63, LR66

<sup>370</sup> LR03, LR27, LR33, LR62, LR65

<sup>371</sup> LR25

responsibilities of prescribed persons in respect of whistleblowing. One prescribed person interviewee believed that the government guidance was limited because the law in relation to the role of the prescribed person was limited.

Prescribed person participants agreed during a focus group that the government guidance was referred to often and extensively in some instances. However, some prescribed persons participant noted that they did not regularly refer to the government guidance. One prescribed person interviewee explained that they rarely needed to use the guidance given their remit means that all disclosures received tended to be qualifying disclosures. Another prescribed person interviewee noted that they had not referred to the guidance since they used it when the annual reporting requirement was introduced. A further prescribed person interviewee explained that most prescribed persons had in house legal teams and therefore took a risk averse approach to designing policies, with a preference to base it on the source legislation, rather than government guidance.

Prescribed person participants expressed gratitude regarding the level of engagement created by the research and wanted this level of engagement to continue.

Some stakeholder literature and public body literature also showed that communications from the DBT or amongst each prescribed persons, around framework developments, best practice, and case studies, is infrequent and insufficient.<sup>372</sup>

## **4. Prescribed persons annual reports**

### **Benefits of the annual reports**

Since 2017, many of the prescribed persons are required to publish an annual report detailing the number of reports it has received, action it has taken and the impact on fulfilling its functions. A piece of stakeholder literature acknowledged that annual reports may create an element of visibility and therefore potentially have an impact on trust in relation to the prescribed person arrangements, although the impact is not measurable.<sup>373</sup>

Some prescribed person participants acknowledged that their whistleblowing annual reports were beneficial, with the benefits including engendering trust, increasing transparency, increasing visibility, and highlighting their role in respect of the GB framework.

However, a participant in a prescribed person focus group expressed the view that the annual reporting duty was "a completely pointless exercise" and did not feel the requirement was the best way to give confidence to whistleblowers that reporting concerns to the prescribed person was safe and the appropriate thing to do. Another prescribed person participant described that the annual reporting had maybe increased transparency, however they thought that trust in their processes had come from the assurances offered by their guidance.

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<sup>372</sup> LR27, LR43, LR64

<sup>373</sup> LR64

One prescribed person interviewee felt that the annual reporting duty of prescribed persons played no role in increasing transparency and trust and instead encouraged Freedom of Information requests from individuals or organisations attempting to seek out whistleblowers. They saw the reporting as a compliance tool.

Another prescribed person interviewee questioned the usefulness of prescribed person annual reports and was unsure what the information in their annual report was used for and what value it added. During a prescribed person focus group a participant explained that they were not aware of what the DBT did with the annual reports received from prescribed persons.

One prescribed person interviewee stated that their annual report informed the activity they undertook and were hopeful that it meets the requirements.

A small number of prescribed person participants voiced the belief that not many people accessed their published annual report, and one prescribed person interviewee thought that maybe only academics accessed them.

### **Effort to produce annual reports**

The effort to produce annual reports was not an issue according to a couple of pieces of stakeholder literature, either because protected disclosure concerns were a sub-set of other reporting requirements or volumes of related concerns were low.<sup>374</sup> The majority of prescribed person participants agreed and provided the same reasons.

Some prescribed person participants explained that the preparation of their annual report had become less time consuming over time as their systems and processes had improved. However, one prescribed person interviewee found the annual reporting duty an administrative burden and time consuming. Issues with determining the cut off dates to apply to the status of whistleblowing disclosures reported on were also noted.

### **Guidance on annual reporting requirements**

The majority of prescribed person participants explained that they found the government guidance helpful for outlining the requirements of what was expected in their annual report. One prescribed person interviewee commented that they were planning to use other guidance from whistleblowing organisations on annual reporting best practice to further enhance their annual report. The flexibility provided in the guidance for the preparation of the annual report was appreciated by a further prescribed person interviewee and allowed them to tailor the report to their remit.

A piece of stakeholder literature showed that there is a need to drive consistency of how the reporting requirements are interpreted by prescribed persons, such that whistleblowers will know that regulators will take their concerns seriously and investigate where possible and appropriate.<sup>375</sup>

A prescribed person interviewee questioned the accuracy of the figures reported in the prescribed person annual reports due to different classifications year to year and

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<sup>374</sup> LR33, LR65

<sup>375</sup> LR33, LR64

between different prescribed persons. Participants at a whistleblower focus group agreed.

Another prescribed person interviewee highlighted the overall inconsistency between different prescribed person annual reports. It was highlighted how it was difficult for prescribed persons to provide much detail in their annual report and there was a large time lag between a disclosure and conclusion of an investigation, which made the reporting less accurate.

As noted in the Disclosure routes section above and Appendix H, there was a specific lack of clarity and consistency in the language and definitions used in different prescribed person annual reports, with some prescribed persons reporting total disclosures received, rather than qualifying disclosures. Some prescribed person participants explained that they sought to determine whether or not a disclosure is qualifying. One interviewee explained that if there was doubt, then the prescribed person gave the benefit of the doubt and classed a disclosure as qualifying. Another prescribed person noted that in their annual reports they stated the number of all disclosures received.

One prescribed person interviewee felt that the annual reporting guidance was ambiguous as it does not make it clear that only external disclosures (i.e. disclosures received in the organisation's prescribed person capacity) should be reported on. The prescribed person suggested that the guidance should be "tightened up," as they did not believe, for example, that the intention of the annual reports was to provide information on internal whistleblower disclosures (i.e. disclosures received from within the prescribed person organisation).

## **Summary of suggestions for change**

Suggestions for change were identified in parts of the literature and provided by research participants related to whistleblowing awareness and guidance. The suggestions for change are summarised below and outlined in more detail in Appendix A:

- greater and more accessible guidance for individuals
- greater education for organisations on the benefits of listening and responding to concerns
- greater guidance for prescribed persons
- more frequent communication between prescribed persons and from the DBT to prescribed persons

# Cultural change

## Introduction

This section sets out the observations and emerging themes in relation to cultural change under the following sub-sections:

- some organisations have frameworks for raising concerns
- prescribed persons regime has created additional routes for raising concerns
- stigma remains in relation to “blowing the whistle”
- some individuals spoken to would not blow the whistle again
- irregular assessment of effectiveness of existing legislation
- individuals suffer significant mental health impact and lack support
- individuals lack financial support
- overall views on effectiveness of PIDA

Suggestions for cultural changes in relation to whistleblowing identified in the research project are summarised at the end of the section and outlined in more detail in Appendix A.

## Background

Given that the culture associated with whistleblowing impacts the entire GB framework, some of the observations and emerging themes in this section overlap with observations and emerging themes included in previous sections. While efforts have been made to avoid duplication, some duplication remains.

## Research observations and emerging themes

### 1. Some organisations have internal frameworks for raising concerns

One piece of stakeholder literature showed that since PIDA was introduced in 1998, internal whistleblowing frameworks have become more prevalent in organisations and there are routes for concerns to be raised in many organisations across many industries.<sup>376</sup> PIDA does not place an obligation on organisations to adopt internal reporting mechanisms, and some organisations do not have an internal whistleblowing framework in place.<sup>377</sup>

Some whistleblower participants noted that their employer had a whistleblowing policy at the time they blew the whistle, whereas others did not. One whistleblower interviewee commented that whilst their employer had no specific whistleblower policy, their employer's conduct guidelines emphasised that employees were

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<sup>376</sup> LR37

<sup>377</sup> LR03, LR08, LR28

expected to raise concerns and said that retaliation was not tolerated. In the absence of their employer having a whistleblowing policy, another whistleblower interviewee explained that they decided to raise their concerns through the chain of managerial authority.

According to a piece of academic literature and a piece of stakeholder literature, internal reporting frameworks are widely recognised as an important means of identifying wrongdoing and potentially addressing it as part of the firm's risk management framework.<sup>378</sup> An internal reporting mechanism is considered by some stakeholder literature to be a cost-effective tool for organisations to manage their risks and interests and protect the organisation's resources and those who interact with it.<sup>379</sup>

However, some stakeholder and journalistic literature also showed that having an internal framework is not enough to ensure that concerns are raised effectively and safely on all occasions.<sup>380</sup> According to some academic, stakeholder and government literature, in order to drive cultural change, the internal framework needs to be embedded in the organisational culture, communicated clearly to all staff, and supported by senior management.<sup>381</sup> Moreover, multiple literature sources stated that the internal framework needs to provide multiple channels for raising concerns, such as internal or external hotlines, ombudspersons, or independent regulators.<sup>382</sup> Stakeholder literature indicated that the internal framework also needs to ensure that concerns are handled promptly, fairly, and confidentially, and that feedback is given to the whistleblower on the outcome of the investigation.<sup>383</sup> Finally, stakeholder, journalistic and academic literature indicated that the internal framework needs to include protection against all forms of retaliation, such as harassment, discrimination, demotion, or dismissal, and provide remedies and support for whistleblowers who suffer adverse consequences.<sup>384</sup>

### **Motivation and benefits for having an internal whistleblowing framework**

A piece of journalistic literature highlighted that many organisations have whistleblowing systems which meet the criteria above, although whether this cultural change is a result of the GB framework, is a subject of varying opinion.<sup>385</sup>

A piece of stakeholder literature mostly suggested that the motivation for having internal frameworks appears to be driven by regulatory requirements and having an awareness of concerns to improve business performance and culture, rather than by the GB framework.<sup>386</sup> Some international body and stakeholder literature indicated that there have been recent improvements in how whistleblowers are perceived and that there is a consensus that whistleblowers should be encouraged and not victimised.<sup>387</sup> According to some government body and stakeholder literature,

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<sup>378</sup> LR03, LR67

<sup>379</sup> LR03, LR17, LR65

<sup>380</sup> LR17, LR20, LR44

<sup>381</sup> LR10, LR63, LR66

<sup>382</sup> LR03, LR12, LR30, LR37, LR66

<sup>383</sup> LR63

<sup>384</sup> LR20, LR33, LR34

<sup>385</sup> LR20

<sup>386</sup> LR63

<sup>387</sup> LR28, LR33

prescribed persons rely on the intelligence that whistleblowers provide to ensure compliance with the laws and rules in Great Britain according to their remit.<sup>388</sup>

Employer participants noted a range of motives and benefits of having an internal whistleblowing framework, including:

- "doing the right thing"
- protecting the organisation
- staff being the best "eyes and ears"
- risk management purposes
- providing safe routes for employees to raise concerns
- maintaining sector licence to operate
- increasing trust with staff
- appropriate investigations of concerns
- improving organisation culture
- increasing public profile of an organisation
- providing a protective culture
- saving money
- preventing unwanted behaviour (for example, cutting between "5% and 10% of thefts")
- wider sector cultural and discrimination issues and crises
- avoiding organisational scandal leading to intense scrutiny of an organisation

An employer interviewee provided a view that the current legal framework does not drive organisations to deliver whistleblowing policies that are necessarily beneficial to its staff and the organisation. Instead, organisations can use the legal framework in a manner which results in whistleblowers not feeling safe.

### **Regulation of culture exists within the health and financial services sectors**

According to some academic literature sources, the regulation of culture was more prevalent in the health and financial services sectors and, as referenced in the Awareness and guidance section, these sectors had an additional layer of whistleblowing requirements in addition to the requirements of the GB framework.<sup>389</sup> A piece of stakeholder literature also suggested that having adequate procedures to receive concerns is also relevant to all organisations who may have criminal liability under the Bribery Act 2010 and the Criminal Finances Act 2017.<sup>390</sup>

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<sup>388</sup> LR33, LR62

<sup>389</sup> LR09, LR10

<sup>390</sup> LR22



Prescribed person participants in the health and financial services sectors explained their regulation of whistleblowing cultures in organisations in their sectors. One of these prescribed person participants explained that they provided guidance to organisations in their sector to explain why they should have a whistleblowing policy and procedures, and the prescribed person's expectation of their role around whistleblowing. The prescribed person ensured organisations had effective systems in place to hear and respond to the views and perspectives of their workforce by building it into the methodology of its inspections in the sector.

Another prescribed person interviewee explained they had a regulatory framework to regulate whistleblowing culture in the sector. This included publishing rules and guidance, which covered appropriate internal procedures for handling reportable concerns.

An employer interviewee commented that whilst their organisation was regulated, their regulator did not have regulations targeted at culture. A separate prescribed person noted that it did not impose requirements or oversee the whistleblowing culture or policies of organisations. However, the prescribed person did seek to improve internal whistleblowing standards in the organisations they had a relationship over through sector training and ensuring that policies and procedures were in place for whistleblowing.

### **Policy existence does not necessarily mean an effective framework is in place**

A piece of academic literature and a piece of stakeholder literature suggested that having a whistleblowing policy did not necessarily mean an effective framework was in place.<sup>391</sup> Some academic literature and a piece of stakeholder literature further suggested that having a policy could act as a catalyst to encourage whistleblowers to speak up about wrongdoing, but the focus had not been on ensuring there was an appropriate response and investigation undertaken.<sup>392</sup>

The GB framework also attracted some criticism from stakeholder literature in relation to the extent of protection, or lack of it.<sup>393</sup> A piece of public body literature showed that allegations of wrongdoing can continue to be suppressed and individuals who proceed or escalate their concerns are often subject to negative consequences in terms of their livelihood, and their financial, mental, and physical wellbeing.<sup>394</sup> Those who attempt to use the GB framework to access compensation for this detriment regularly fall foul of legal arguments in the courts and are unable to access meaningful protection. A piece of academic literature and some stakeholder literature suggested that culturally, particularly in the health sector, this lack of effective protection acts as a significant barrier for whistleblowers to speak up about future wrongdoing and can facilitate the harm that is experienced by those who do report a concern.<sup>395</sup>

A whistleblower interviewee felt that their employer's whistleblowing policy may have been theoretically "compliant" as a document but that in practice it was not compliant with the GB framework legislation. Similarly, another whistleblower interviewee noted that whistleblowing policies are great on paper but questioned whether in the real

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<sup>391</sup> LR09, LR17

<sup>392</sup> LR09, LR10, LR17

<sup>393</sup> LR03, LR33

<sup>394</sup> LR40

<sup>395</sup> LR10, LR17, LR58

world they actually work. A participant at a whistleblower focus group explained that their employer did have a whistleblowing policy but that it was not backed up by systematic or robust procedures, meaning nothing substantive was in place to prevent unlawful detriment.

### **Several factors are crucial to creating and maintaining a trusted Speak Up culture**

Some government body and stakeholder literature, as well as employer participants, noted a range of factors or concepts that were crucial to creating and maintaining a trusted Speak Up culture in organisations, including:<sup>396</sup>

- “tone from the top”
- training modules for new starters, current employees and management
- appropriate governance
- accessible, straightforward, digestible, easy to understand guidance without jargon on how to report concerns
- emphasis on “doing the right thing”
- making it easier for concerns to be raised
- commitment of management and resources
- clear guidance for line managers, encouraging them to promote whistleblowing within their team, and being responsible for taking matters seriously
- confidentiality
- addressing the culture around speaking up
- independence
- considering protections for individuals from discrimination
- effective and regular communication of the existence of whistleblowing arrangements
- emphasising that victimisation of whistleblowers will not be tolerated
- clear policies around confidentiality, anonymity, and where applicable, safeguarding transparency

A prescribed person interviewee believed that organisations with “learning cultures”<sup>397</sup> recognise speaking up as a gift and therefore engage with workers to drive change.

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<sup>396</sup> LR26, LR33, LR56, LR66

<sup>397</sup> Learning culture in this context means open communication and feedback between employees and managers in the workplace, such that mistakes are not hidden and provide an opportunity to improve.

## **Non-genuine concerns raised tactically**

An employer interviewee gave examples where they have received disclosures from staff which are not genuine, including one from an individual who was at risk of losing their job and allegedly raised a concern tactically so they could claim that they were pushed out due to that.

A number of participants at a whistleblower focus group explained that they had seen spurious or malicious whistleblowing claims and therefore employers needed a degree of protection as well. Some government body literature and a piece of academic literature agreed that this does sometimes occur.<sup>398</sup>

## **2. Prescribed persons regime has created additional routes for raising concerns**

A piece of stakeholder literature indicated that the volume of reports to prescribed persons appear to be trending upwards, and this suggests that individuals are willing to raise concerns to them as bodies with the potential to hold organisations to account.<sup>399</sup> The literature further indicated that the prescribed persons do not provide information which would be helpful, such as the impact of reported concerns on investigations, fines, enforcement and harm prevented which would demonstrate the cultural impact of the GB framework.

### **Prescribed persons motivation to detect wrongdoing**

A prescribed person interviewee stated that they are motivated to detect wrongdoing through whistleblowing to ensure that economic systems and markets operate fairly, efficiently and within the law. Another prescribed person interviewee noted that their motivation is to better discharge their regulatory duties. This was supported by some stakeholder, government body and public body literature.<sup>400</sup>

### **Employer view that prescribed persons have limited power**

An employer interviewee thought that their regulator was not a strong regulator and had limited powers to motivate organisations to have whistleblowing policies in place or to enforce in relation to this element. It was felt that greater motivation to improve culture in the sector came from influence from policies implemented by other similar organisations.

Another employer interviewee perceived that regulators or prescribed persons may not have adequate resources to address all whistleblower concerns received, compared to the other roles and remits they have, and this had an impact on culture.

### **Employer views on sector-based approach for prescribed persons**

Employer participants had mixed views on the impact that the sector-based approach for prescribed persons had on whistleblowing culture. Some employer participants thought that the sector-based approach made sense to drive positive change. One employer interviewee suggested that it could be beneficial to have an

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<sup>398</sup> LR11, LR38, LR61

<sup>399</sup> LR64

<sup>400</sup> LR25, LR26

alternative disclosure route for whistleblowers in different sectors with added confidentiality.

However, another employer interviewee expressed the view that the current sector-based approach for prescribed persons resulted in some bodies being more effective than others. A separate employer interviewee felt that a central prescribed person would be more suitable than separate sector-based bodies as staff in its industry currently had no natural body to which concerns could be reported externally.

### **3. Stigma remains in relation to “blowing the whistle”**

A piece of stakeholder literature showed that individuals are typically motivated to speak up about wrongdoing as part of their job. They did not see speaking up as being extraordinary, but the perceptions of others more typically fall into the common stereotypes of whistleblowers.<sup>401</sup> Some of these stereotypes included being described by stakeholder literature as “heroes”, “trouble-makers” or “survivors”, and stereotypes did not fairly reflect the nuances of those who speak up.<sup>402</sup> This stereotyping can be a form of covert detriment, and it has an impact on the individual’s life in ways which are difficult to quantify or protect the whistleblower from.<sup>403</sup> Elevating someone to the status of hero, or implying victimhood, creates a difficult and dominant narrative focussing on the whistleblower’s motives and character rather than the whistleblowing concerns.<sup>404</sup> Some of the stakeholder literature indicated that some of the stigma associated with whistleblowing has decreased since the introduction of PIDA.<sup>405</sup> A whistleblower interviewee expressed the view that there needs to be a cultural change so that whistleblowing is seen as a positive act.

A piece of stakeholder literature recognised that the narratives championing the benefits of speak up cultures or when an individual has a “good” experience and outcome are being drowned out by the more negative narratives.<sup>406</sup> A whistleblower interviewee noted that due to the stigma around whistleblowing, being a whistleblower is not something that can be shared openly with friends and acquaintances.

A piece of stakeholder literature also reported that the consequences for victimising individuals under the GB framework do not result in organisations taking action to improve their internal reporting mechanisms and mechanisms, or to avoid causing harm to individuals in the future.

Several pieces of stakeholder literature highlighted concerns with the use of non-disclosure agreements in the settlements agreed between the employer and the individual which does not add to a transparent and open culture where whistleblowers feel safe to report a concern.<sup>407</sup>

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<sup>401</sup> LR17

<sup>402</sup> LR03, LR17

<sup>403</sup> LR03, LR17

<sup>404</sup> LR03

<sup>405</sup> LR17, LR39

<sup>406</sup> LR17

<sup>407</sup> LR03, LR17, LR32

#### **4. Some individuals spoken to would not blow the whistle again**

Some stakeholder, journalistic and government body literature showed, and most whistleblower participants agreed, that the financial and non-financial consequences of raising their concerns were not worth it.<sup>408</sup> This literature suggested that the current legislation does not adequately protect whistleblowers from retaliation, nor does it encourage a culture of trust and accountability within organisations. Several pieces of stakeholder and journalistic literature and several whistleblower participants provided various financial and non-financial reasons why whistleblowers would not blow the whistle again, including:<sup>409</sup>

- lack of a safe, efficient and effective route to raise concerns
- loss of contact with and/or being ostracised by colleagues
- asymmetrical risk towards the employee
- reputational damage
- lack of protections
- legal threats
- financial loss, including legal costs and loss of earnings during legal proceedings
- detriment in the public arena, including online death threats and being shouted at in the street
- loss of employment
- mental health damage
- revocation of professional qualifications
- enduring legal processes
- reduction in future earnings
- unjust processes
- career damage
- unethical processes
- loss of ability to trust others
- feeling failed and let down by others

Some whistleblower participants also provided the following comments, questions and broader views related to not wanting to blow the whistle again:

- potential whistleblowers should “turn a blind eye” and become one of the “silently complicit”

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<sup>408</sup> LR03, LR24, LR66

<sup>409</sup> LR16, LR15, LR18, LR24, LR39

- dilemma between “doing the right thing” and potentially being subjected to detriment or living with the guilt of “standing by” and not reporting wrongdoing
- why would anyone risk “raising their head above the parapet” if they saw wrongdoing, if they had seen the impact on others who had blown the whistle?
- “whole army” of workers with intelligence to share but they fear they will suffer retaliation for not disclosing it at the time of the wrongdoing
- better off just resigning
- “society will pay an immense price” if concerns are not raised
- blowing the whistle is “pointless”

Stakeholder and journalistic literature noted that these financial costs and non-financial impacts are often felt to outweigh the benefits of reporting misconduct, especially when there is little guarantee that their concerns will be properly addressed or resolved.<sup>410</sup> According to the piece of journalistic literature many whistleblowers therefore regretted their decision and would not repeat it if they had the chance.<sup>411</sup>

Conversely, one whistleblower interviewee stated that despite their experiences, they would still blow the whistle again as they would not want to be perceived as covering up the wrongdoing. However, they said they would blow the whistle very differently. Another whistleblower interviewee explained that they had previously blown the whistle at a previous employer. Despite that resulting in significant retaliation and loss of their job, after serious consideration they decided to make whistleblowing disclosures at their new employer.

A further whistleblower interviewee stated that if they blew the whistle again, they would initially raise the matter with the press.

## **5. Irregular assessment of effectiveness of existing legislation**

A few pieces of stakeholder literature indicated that current timescales of assessment and monitoring of the effectiveness of whistleblowing legislation in Great Britain are not sufficient.<sup>412</sup> The last formal review occurred in 2013/2014<sup>413</sup> and whistleblower focus group participants noted that the research project was the only activity they were aware of since that date.

## **6. Individuals suffer significant mental health impact and lack support**

Some stakeholder and journalistic literature<sup>414</sup> and whistleblower participants note the following mental health related impacts of blowing the whistle:

- trauma

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<sup>410</sup> LR24, LR49

<sup>411</sup> LR24

<sup>412</sup> LR03, LR17, LR31

<sup>413</sup> Whistleblowing framework call for evidence: Government response June 2014 ([publishing.service.gov.uk](https://publishing.service.gov.uk)) Accessed 24 January 2024

<sup>414</sup> LR03, LR15, LR17, LR24

- self-harm
- stress
- suicidal thoughts
- anxiety
- post-traumatic stress disorder
- mental exhaustion
- relationship strain or breakdown
- depression

The stakeholder and journalistic literature showed that the mental health price paid by whistleblowers can be high.<sup>415</sup> One whistleblower interviewee described the mental health costs of whistleblowing as "enormous", and another noted the impact on their mental health as "catastrophic".

A prescribed person interviewee explained that their whistleblowing team is trained to engage empathetically with whistleblowers who are distressed. Such whistleblowers are referred to relevant support organisations, such as Mind and Samaritans.

Stakeholder literature noted that there is no formal mental health support for whistleblowers and compensation under the GB framework is only potentially provided after the damage has occurred rather than proactively protecting individuals.<sup>416</sup> A participant at the legal representatives focus group agreed and stated that they had represented numerous claimants at Employment Tribunals and all had experienced significant trauma, which was often exacerbated by the Employment Tribunal process. The participant stated that there is insufficient mental health support, or guidance around what support is available. One whistleblower interviewee reported that they felt their employer blocked them from accessing emotional support typically provided by the organisation.

## 7. Individuals lack financial support

Several pieces of stakeholder literature showed that the financial cost or impact of reporting a concern is significant.<sup>417</sup> Whistleblowers reported losing their employment, savings and sometimes their homes when they enter the often-lengthy process of accessing compensation through an Employment Tribunal.<sup>418</sup> According to stakeholder literature, the process to enter the Employment Tribunal is complex and legal advice is usually required to navigate it.<sup>419</sup>

It appeared from a couple of pieces of stakeholder and journalistic literature that Employment Tribunal hearings can last many weeks for complex claims and the overall Employment Tribunal process can take years.<sup>420</sup> Whistleblower participants

<sup>415</sup> LR03, LR15, LR17, LR24

<sup>416</sup> LR03, LR17

<sup>417</sup> LR03, LR17, LR33, LR39, LR41

<sup>418</sup> LR25, LR32, LR36, LR51

<sup>419</sup> LR03, LR17

<sup>420</sup> LR03, LR53

confirmed this and described the process as lengthy and time consuming. In one instance, this resulted in the whistleblower losing a contract and a job offer. A prescribed person interviewee agreed that it can take a long time to obtain compensation for victimisation via an Employment Tribunal.

Stakeholder literature indicated that the time required to bring and progress an Employment Tribunal claim requires the claimant to have a degree of financial security.<sup>421</sup> If the claimant is acting for themselves, it often means they are not able to concurrently work or if they have secured legal support, the cost is high.

In contrast, employers have financial resources which, according to stakeholder literature, could be interpreted as an “inequality of arms” between the worker and the employer.<sup>422</sup> Stakeholder literature indicated that this can act as a deterrent for potential future individuals of concerns if the cost is seen as too high.<sup>423</sup>

An academic piece of literature and a stakeholder piece of literature showed that lower income earners are less likely to commence an Employment Tribunal claim due to cost and complexity.<sup>424</sup> Stakeholder literature suggested that it is not affordable to many, particularly in the health and caring sectors, who either choose not to pursue their claim, or attempt to pursue their claim as a litigant in person.<sup>425</sup> A participant in a prescribed person focus group agreed and noted that the consequences of speaking up can be far greater for people who have a lower level of income generally.

## **8. Overall views on effectiveness of the GB framework**

The research project asked participants for their overall views on the effectiveness of the current GB framework. Specific responses have been noted in the previous sections of the report where appropriate, however more general views are outlined below.

Most whistleblower participants interviewed voiced overall discontent with the current GB framework and felt that the framework was ineffective, outdated, inadequate, not fit for purpose, failed to cover multinational concerns and deters whistleblowers who have a legal duty to expose wrongdoing from blowing the whistle.

Contrastingly, one whistleblower interviewee expressed contentment with the current legal framework for whistleblowing given the law currently states that individuals cannot be dismissed for blowing the whistle and should not experience detriment. The whistleblower interviewee added that the GB framework had been useful for them because it included lots of “musts and shoulds” rather than “mays”.

An employer interviewee noted that whilst the GB framework legislation had been in place a long time and could be improved with updates, they had not found any challenges with the current framework.

A prescribed person interviewee stated that the way they have adopted the whistleblowing legal framework means that it works for their remit. Another

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<sup>421</sup> LR03, LR05

<sup>422</sup> LR03, LR21

<sup>423</sup> LR03, LR17, LR53

<sup>424</sup> LR16, LR23

<sup>425</sup> LR16, LR23, LR41, LR42, LR49



prescribed person interviewee noted that the GB framework is one of the clearer pieces of legislation that they navigate through.

## **Summary of suggestions for change**

Suggestions for change were identified in parts of the literature and provided by research participants for cultural change related to the GB framework. The suggestions for change are summarised below and outlined in more detail in Appendix A:

- create a central body for whistleblowing
- ongoing engagement and research to assess and monitor all aspects of the GB framework
- efforts to improve effectiveness should be multifaceted and monitored
- improved mental health support for individuals
- legal advice and a degree of financial security while the claim progresses
- consideration of disincentives and incentives, for example implementation of a United States style reward system

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