OPINION

WHISTLEBLOWING REFORM

Better protection needed

Piers Rake of the Astraea Group argues that the UK's whistleblower regime is not fit for purpose and, worse, it undermines efforts to make the UK a destination of choice for investment.

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It is generally accepted that the UK's whistleblower regime, enshrined in the Employment Rights Act 1996 (ERA), as amended by the Public Interest Disclosure Act 1998 (PIDA), is not fit for purpose. As a result, the UK is falling behind the standards and protections that are afforded to whistleblowers across the EU under the Whistleblowing Directive (*2019/1937/EU*) and in the US (*see Briefing "Whistleblowing Directive: a new framework of protection", www.practicallaw.com/w-023-7739 and feature article "US whistleblower rules: ignore them at your peril", www.practicallaw.com/6-508-1535*).

In a 2021 International Bar Association (IBA) review (IBA report) that assessed 42 countries' whistleblowing legislation against international best practice, the UK ranked 11 places below the EU, meeting only five of the 20 criteria (*www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55*).

Cross-party consensus

There has been cross-party agreement since 2022 that the UK needs a new whistleblowing framework that would provide whistleblowers with early and adequate protection from retaliation, encourage a speak-up culture across all organisations and penalise wrongdoers who target whistleblowers. This was the central recommendation of a report by the All-Party Parliamentary Group on Whistleblowing (APPG), which was published in April 2022 (*www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_ffa164221ae540bfafdeb8206a0274db.pdf*).

Following the publication of the APPG report, two private members' bills (the Bills) were put forward in 2022. These called for the entire replacement of the current legal framework with one based around a new, independent "office of the whistleblower" (the Office), with both civil and criminal penalties for breaches. Neither of the Bills had moved beyond the early stages of the legislative process before Parliament was dissolved on 30 May 2024 for the general election on 4 July 2024.

In March 2023, the previous government launched a review of the UK's whistleblowing framework, which was due to report towards the end of 2024 but now will not do so because of the change of government following the general election. There is broad agreement that the imbalance of power and resources as between a claimant whistleblower and respondent organisation, and the use of settlement agreements and non-disclosure agreements, needs to be addressed. As far back as 2019, the previous government consulted on reforming the law around the misuse of non-disclosure agreements (*see News brief "Confidentiality on confidentiality clauses: end of days for NDAs?", www.practicallaw.com/w-019-6143*). While the consultation was completed in April 2019, no action was taken to reform the law.

As recently as February 2024, the Director of the Serious Fraud Office (SFO), Nick Ephgrave, outlined in a speech plans for a more pragmatic, more proactive SFO and emphasised the importance of collecting information at the very beginning of an investigation (*www.sfo.gov.uk/2024/02/13/director-ephgrave-speech-at-rusi-13-february-2024/*). In this context, he revisited the idea of paying whistleblowers, something the US has done for a number of years, with great success.

Shortcomings

The current legislation is drafted narrowly in terms of the type of disclosures that are protected and there are serious consequences for the whistleblower if they do not meet the

various thresholds set out in the law. There are no provisions for early protection for whistleblowers while in employment and no effective deterrent for those who retaliate against them. Further, PIDA does not provide any specific investigative powers and there is no evidence of any whistleblowing cases brought in an employment tribunal being referred to the Criminal Prosecution Service or police for investigation. This is concerning, given that it is generally accepted that whistleblowing reports are one of the most effective methods of identifying economic crime. This was illustrated by a 2024 report from the Association of Certified Fraud Examiners, which estimated that 43% of internal frauds are identified by tips received from whistleblowers (*https://legacy.acfe.com/report-to-the-nations/2024/*). The UK has a well-known fraud problem, with the National Crime Agency estimating that £190 billion is lost to fraud in the UK every year.

Under the current legislation, the onus falls on the individual whistleblower, half of whom represent themselves in the tribunal according to the IBA report, to prove that the protections afforded by the law apply to their disclosure and that their claim meets the various legal and evidential thresholds.

To pay for legal counsel to represent them in a legal case, a whistleblower will need to spend tens, if not hundreds, of thousands of pounds, with the risk of having to pay some of the other sides' costs if they are unsuccessful. In evidence submitted to the APPG, it was estimated that the legal costs of bringing a whistleblowing tribunal claim are between £75,000 and £200,000.

A tribunal will require the whistleblower to prove that the reason for their dismissal was the fact that they made a whistleblowing disclosure. It is rare that a company will immediately dismiss an employee who makes a whistleblower report and retaliation is often covert. More often, the whistleblower will find themselves isolated, overlooked for key projects or made to enter a performance review process; in effect, they are managed out of the organisation. Claimants frequently fail to meet this evidential threshold because the respondent organisation's lawyers argue that there are other reasons for their dismissal.

In addition, for their report to meet the test for a protected disclosure, the claimant will also have to show that they knew, or it was reasonable to believe, that the concerns raised tended to show that any wrongdoing was likely rather than merely possible. In *Zarembok v BP plc and others*, the claimant's case against BP was dismissed because he knew, or ought reasonably to have known, that his concerns did not meet the test (the wrongdoing in question was only possible, rather than likely) (*ET3200630/2019*). The tribunal accepted BP's arguments that the reason for the claimant's dismissal was because there had been a breakdown in trust between the parties, resulting from the claimant's whistleblowing report.

In practice, these challenges and an imbalance of power as between the claimant whistleblower and the respondent organisation, have resulted in very few successful whistleblower claims, with only 3% of claims brought by whistleblowers in a tribunal being successful (*www.gov.uk/government/collections/tribunals-statistics*).

Legislative change needed

The consensus in the previous Parliament, and among lobbying and expert groups, appears to be aligned with the recommendations contained in the APPG's report and as reflected in the Bills. The key principles of the proposed reforms to the UK's whistleblower framework include the repeal of PIDA, the establishment of the Office, and the creation of new offences in relation to the treatment of whistleblowers and the handling of whistleblowing cases. The remit and authority of the Office would include:

- Powers to set, monitor and enforce standards.
- The provision of advice to prospective whistleblowers.
- Powers to initiate and direct independent whistleblowing investigations.
- The authority to order the payment of compensation to whistleblowers who have suffered detriment or retaliation.

Without these changes, which have all-party support, whistleblowers will continue to be targeted and the UK will continue to fall behind other jurisdictions, including the EU. The new government now needs to make it happen. In the meantime, companies would be best advised to act now.

New beginnings, old problems

The early identification of misconduct results in businesses, brands and reputations being protected from what are often existential repercussions. Organisations need to embed a speak-up culture (*see feature article "Whistleblowing policies: reaping the rewards", www.practicallaw.com/w-008-4812*).

Code of conduct. It is good practice to start with defining an organisation's general business principles or values, supported by a code of conduct. The code should set

Measuring effectiveness

One of the perennial questions facing risk and compliance teams is how to measure the effectiveness of a whistleblowing framework. A lack of reports could either mean that a business is doing well or that it is doing badly because people do not feel safe in reporting concerns. Conversely, increased reporting could mean either that a business has problems or that the speak-up culture is being embraced. However, there is no easy answer and unless an organisation investigates, monitors and measures allegations of wrongdoing, it neglects one of the most valuable risk mitigation measures available to a board. An organisation's staff becomes its eyes and ears, and its early warning system.

out the standards that underpin the way in which the company expects its staff at all levels to behave. It should state that it is a requirement for employees to speak up. It should make clear that retaliation is not tolerated and what will happen to employees who breach the code. Where people retaliate against whistleblowers or otherwise breach the code, visible action should be taken in order to reinforce a zero-tolerance ethos.

The code should detail how individuals can report their concerns and what they can expect to happen after they have made a report, including timelines for receiving an update or response. It is a good idea to allow reporting by third parties that interact with the organisation, such as suppliers, customers and key partners.

Exit interviews. The HR function should conduct exit interviews with all employees who leave an organisation and the leaver should be explicitly asked whether they had any concerns regarding the conduct of their colleagues or managers, with their comments recorded in writing and escalated to senior management or the board, where appropriate.

Training. Organisations should deliver annual training on their values, code of conduct and what concerns to report or escalate, and how. This should be supported by an ongoing board-sponsored communications campaign to set the tone from the top and to remind staff of the organisation's values, and what people should do if they have concerns about any colleagues conduct. Some organisations have found that the use of compliance ambassadors, at middle management level, is an effective way to amplify the message and embed behaviours. These ambassadors are from the core business and are trained by the compliance function to deliver the whistleblowing training to their colleagues.

Managing whistleblowing reports. How organisations design and manage their whistleblowing framework will depend on the type of business, its size and where it operates. For larger multinational organisations, this is likely to include a managed helpline and a reporting platform. Larger organisations frequently have specialised in-house whistleblower teams who are trained on managing whistleblower reports. The reports are triaged on receipt, with cases rated by severity and tasked to the relevant internal investigations team. The case may be directed to HR, a legal and risk function, or relevant subject matter experts, such as those dealing with bribery or sexual misconduct.

Cultural differences will also need to be taken into account. For example, in some countries speaking up is considered to be disloyal or associated with troublemaking. Again, while there is no one-size-fits-all approach, many multinational organisations manage their whistleblowing programmes at a global level, so that reports are collected and filtered at the head office, and then tasked or investigated at a local or regional level. The advantage of this approach is that it enables an organisation to deal with localised cultural considerations, while ensuring that oversight and common standards are in place across its global business. It also means that the organisation can create a feedback loop, capturing and delivering qualitative data-driven insights to the board and senior management on conduct, patterns of reporting and potential areas of the business that may require a more forensic operational review. Findings can also feed in to the organisation's enterprise-wide risk assessment (*see box "Measuring effectiveness"*).

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