



BETTER REGULATORS

PRINCIPLES FOR
RECOMMENDED
PRACTICE

www.protect-advice.org.uk

WHO WE ARE

Protect is the UK's leading authority on whistleblowing. Since 1993, our free, confidential Advice Line has been supporting whistleblowers who wish to speak up about workplace wrongdoing. Each year our advisers handle more than 3,000 cases, and to date we have supported around 40,000 whistleblowers.

In addition to our Advice Line, we work with many diverse organisations offering training and consultancy to help them realise the benefits a good whistleblowing culture brings.

We believe whistleblowing is a good thing - it protects the public interest, helps employers identify and manage risk and holds organisations to account. We want more people to speak up, to stop harm.

WHAT WE DO

Protect aims to make whistleblowing work for individuals, organisations and society in the following three ways:

Advice Line provides free and confidential information and advice to around 3,000 whistleblowers each year

Training and consultancy
We work with organisations to instil best practice

Campaigning
We campaign for legal and policy reform to better protect whistleblowers

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FOREWORD

Regulators and professional bodies play a valuable role in society. They hold both public and private sector bodies to account and ensure best practice in the areas for which they are responsible. When it comes to whistleblowing, they set standards in sectors they regulate, as well as act as a recipient for whistleblowing concerns from workers.

Whistleblowers often take enormous risks in bringing their concerns to regulators and professional bodies and it's only right that these bodies take the concerns seriously, provide feedback where possible and have appropriate support mechanisms e.g. an ability to keep the identity of a whistleblower confidential.

We embarked on our "Better Regulators" campaign to learn more about current practice, to see what shared learning we could facilitate, with the overall aim of encouraging more regulators to set whistleblowing standards. Protect's view is that standards matter. Put simply, if regulators set standards for employers, there is more chance that effective whistleblowing will happen internally and concerns will be raised through employers' own whistleblowing channels – stopping harm before it becomes a matter for the regulator.

What we found through a series of round table discussions with regulators and professional bodies was a wide variety of approaches to setting standards. We were surprised some regulators did not see themselves as having a role here – while others thought that any standards would be too onerous for the diverse and numerous bodies that they regulated.

We also found variation in how regulators themselves treat whistleblowers who approach them – how they act on concerns, and how they learn from the concerns raised. This echoes the findings from our Advice Line – workers’ experience of regulators is patchy and inconsistent. In the round table discussions, it became clear there was an appetite for a greater understanding of best practice within regulators. We have written this guidance with that in mind. If regulators themselves respond better to whistleblowers, they will encourage others to raise concerns and harm will be stopped sooner. Whistleblowers who have had the courage to speak up will be respected and treated fairly. The wider public will benefit because wrongdoing is addressed.

We thank all those who participated in our round tables and who shared valuable insights and demonstrated their commitment to learning from each other. We hope this guidance helps you better support whistleblowers and reflect on how best whistleblowing concerns are addressed in your sector.

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RESEARCH METHODOLOGY

Primary Data

In 2019 Protect held a series of three round table discussions with organisations both with regulatory function and professional body status (see Annex A for a list of those that attended the round table). The challenges, goals and current operation issues raised inform this research.

In addition, primary data from our Advice Line has been thematically considered to ensure all the principles and suggestions are in line with day to day scenarios our advisers hear from whistleblowers calling us for advice and reflect what is needed to benefit them.

Secondary Data

Two significant reports have provided secondary data for this research.

The Government department BEIS produced guidance for Prescribed Persons in April 2017 and in 2015, the National Audit Office (NAO) created a report The Role of Prescribed Persons aimed at those regulators with prescribed person status. The NAO report aimed to show how prescribed persons can improve whistleblowing arrangements to better support and encourage whistleblowing and make better use of intelligence that they provide.

However, the data which informed this report was taken from just five bodies: Care Quality Commission (CQC), Financial Conduct Authority (FCA), Office of Rail and Road (ORR), Health and Safety Executive (HSE), The Independent Police Complaints Commissioner. The report found that though the prescribed persons they examined reviewed the handling of whistleblowers:

"there are opportunities for sharing good practice across the system that are being missed."

Three years on this guide will delve deeper into different aspects that a regulator or professional body needs to understand to run an effective whistleblowing system: accessibility, confidentiality, feedback and addressing victimisation.

The guide will also go further than both the NAO report and BEIS's guidance by examining how regulators can shape the standards of internal whistleblowing arrangements of entities they regulate, and how whistleblowing impacts on professional standards and code of conduct.



INTRODUCTION

The Principles for Recommended Practice captures the themes raised in the *Better Regulators* round table discussions and, like all of our work, has been written first and foremost with the whistleblower in mind.

The Principles for Recommended Practice is applicable to regulators, law enforcement bodies and professional bodies who regulate professionals, including those beyond the prescribed persons list. This guide places emphasis on 'handling the whistleblower'. Handling whistleblowing concerns effectively benefits regulators and professional bodies in their ability to deliver their public functions. Intelligence gained from disclosures can be applied to minimise risk and resolve issues.

Effective handling of whistleblowing concerns can help build trust and encourage more whistleblowers to come forward, as well as boost the profile of many regulators and professional bodies who can demonstrate that they are taking whistleblowing seriously.

A Parliamentary debate on whistleblowing in July 2019 highlighted how difficult it is for whistleblowers to understand how to engage with regulators who are not prescribed.

"I have had a number of cases where whistleblowers have tried to ask the relevant regulator, who is not a prescribed person, what they should do and they have then been signposted to the wrong people and given duff advice. That should not be happening, and the Government need to grasp the nettle and provide coherent guidance."

Anneliese Dodds MP
July 2019 Parliamentary debate

This guide has not been written with a view to providing advice directly to whistleblowers who are looking for guidance on raising their concerns, instead information on these topics can be found on [Protect's Advice Line page](#).

What is a Prescribed Person?

A prescribed person, under the whistleblowing legislation, the Public Interest Disclosure Act (PIDA), is someone who is an independent body which usually has an authoritative relationship with the organisation, industry or individual worker; such as a regulator or professional body. Raising a concern to one of these bodies is an easier route for whistleblowers to gain legal protection against detriment or dismissal than by making a wider disclosure, such as to the press.* The most prominent regulators are on the list including the Financial Conduct Authority, Care Quality Commission the National Audit Office etc. The Government maintains a list of all prescribed person regulators which can be found [here](#).

Whistleblowers approaching a regulator or professional body not prescribed under PIDA may still be protected by PIDA, it's simply that the legal tests will be more stringent for the whistleblower.**

All regulators and professional bodies whether prescribed or not, can be approached with concerns by whistleblowers.

New Regulatory Reporting Duty

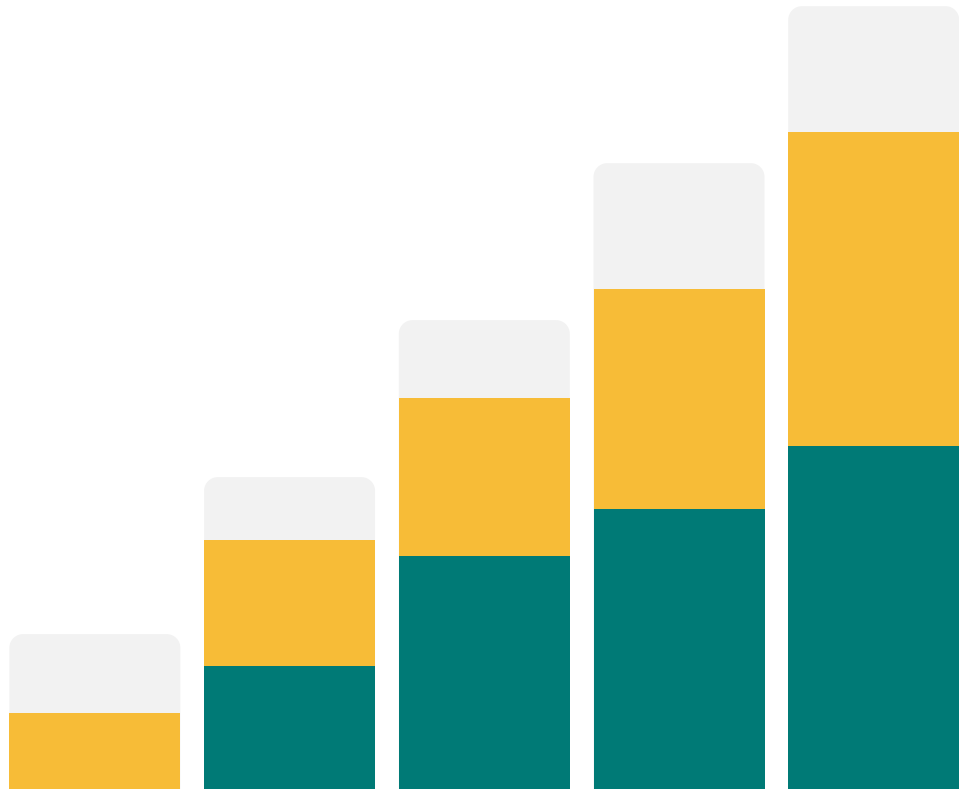
In a bid to make prescribed persons more transparent in their whistleblowing duty, the Department for Business, Economic and Industrial Strategy, (BEIS), introduced a new reporting duty on the UK's statutory regulators in 2017 making it compulsory to publish annual cases of whistleblowing, along with any impact and actions taken.*** Whilst the duty has increased transparency, it has not yet led to greater consistency in approaches with many regulators still feeling unsupported and unguided over the reporting duties.

* [43F of the Public Interest Disclosure Act 1998](#)

** [43G of the Public Interest Disclosure Act 1998](#)

***[S.c. 43A of the Public Interest Disclosure Act 1998](#).

To track the levels of compliance for the reporting duty we created a league table that gives a rating to each regulator subject to the reporting duty, we have been doing this since 2018.



HANDLING THE WHISTLEBLOWER: SIX PRINCIPLES

How individuals are treated when they approach regulators and professional bodies is important and can have an impact on future whistleblowing disclosures received.

Handling those making whistleblowing disclosures in an effective and supportive manner is essential for all bodies, to effectively deliver their public function, to maintain reputation and encourage further disclosures.

If whistleblowers are regularly and repeatedly mishandled, the perception of trust will be damaged, leading to lower engagement from concerned workers. This in turn may create the impression of an underperforming regulator, leading to less intelligence coming through from whistleblowers.

THE FOLLOWING SIX PRINCIPLES AIM TO PROVIDE A FRAMEWORK FOR HANDLING THE WHISTLEBLOWER:

1

Accessibility and Awareness

how regulators and professional bodies can improve the flow of information to their own systems

2

The Importance of Confidentiality

the regulator or professional body directly protecting the whistleblower to shield their identity once the disclosure has been made

3

Feedback

ensure information flows between the regulator/professional body and whistleblower by providing feedback

4

Addressing Victimisation

thinking about when and how a regulator or professional body should address a situation where a whistleblower has been victimised

5

Requirements for Regulated Entities

improving internal whistleblowing standards among the organisations regulators oversee

6

Whistleblowing and Professional Duties

looking at the challenges of holding professionals to account where they ignore the concerns or victimise a whistleblower

PRINCIPLE 1

Accessibility & Awareness

Being accessible and increasing awareness of a body's role to process whistleblowing concerns will boost public confidence in the regulator and ensure the most serious and relevant whistleblowing disclosures are taken to the right place to be investigated.

Knowing who to tell and how to do it removes both an operational and psychological hurdle, as the whistleblower is not taking a step into the unknown but choosing to access a service.

Challenges

Low awareness - awareness of regulators and professional bodies can be low, and there can also be variation across different sectors and industries.

Making contact - it is a challenge for regulators and professional bodies to know the best way of providing a confidential means for whistleblowers to pass their concerns through which is cost and administratively efficient for the organisation, but most importantly, easy and secure for the whistleblower.

The danger of undermining internal whistleblowing arrangements -

The most effective way for whistleblowing concerns to be addressed is by the employer, a highly visible regulator could undermine an organisation's internal whistleblowing processes. Another risk is large volumes of concerns coming through that do not fit the remit of the regulator or professional body, so the scope of concerns that a body can handle should be communicated clearly.

How to meet these challenges

Access points - Organisations should offer a range of channels for workers to raise their concerns. This could include email, webchat, phone etc. Online forms as the only means of communication can be burdensome and intimidating for the whistleblower. More basic forms can increase approachability, for example, structuring the form to make it clear what exact information is needed. Ideally online forms should be combined with options to communicate directly with a triage team (i.e. a process of taking the details of the whistleblowing disclosure from the whistleblower before passing it on to be investigated) or over the telephone.

Becoming a prescribed person - Becoming a prescribed person can assist with visibility among whistleblowers. Being prescribed also offers security to the whistleblower, and approaching a regulator with concerns means they access better legal protection if they are victimised compared to making a disclosure to a non-prescribed body.*

Think about communication - It is vital all regulators and professional bodies have clear and innovative ways to communicate to workers in the sector, so they know when and how to make contact with concerns. Included in this should be the message that regulators can use information provided by a whistleblower – it may be ‘investigated’ in its own right; it might support other work; it might be recorded against the entity or individual for future work. This underlines the value in whistleblowers raising concerns.

Make the message clear - Regulators and professional bodies should ensure they are clear on their website and other communication channels about the remit they have when dealing with whistleblowing concerns. An easily searchable ‘whistleblowing section’ on a regulator or professional bodies’ website should have clear descriptions on the process for raising concerns, and how disclosures are handled.

Online Sign-posting - Websites of regulators and professional bodies should have links that sign post to organisations such as Protect for advice and support which can make all the difference to better public understanding, as well as trade unions, and other relevant sources of advice.

*See 43F and 43G of the Public Interest Disclosure Act 1998.

'We often find a whistleblower comes to us almost as a last resort, they've been through the process, but they're not happy with outcome. They've been through some legal remedy, may have had payment and are subject to an NDA. It makes it hard for us to investigate and prosecute ... I don't know if the answer is to come to us at an earlier stage or people just feel the protections aren't there.'

Round table comment



Good Practice

As a regulator or professional body, consider the range of individuals who may approach you with concerns and attempt to offer routes for engagement.

Some examples of good practice include:

The ability to telephone health and financial services' regulators

Protect's experience from our Advice Line, is that many whistleblowers will want to take a preliminary step before raising concerns with a regulator or professional body to find out what will happen to the information they disclose. This will be part of the process of calculating whether to take the risk of reaching out to a third party. An online form does not provide this opportunity, while a triage process allows the regulator to explain, and potentially build trust with the whistleblower.

Two regulators, the Care Quality Commission (CQC) and the Financial Conduct Authority (FCA), offer a wider variety of ways to raise concerns. On top of online and email forms, both operate telephone triage processes. Having this option means whistleblowers will be able to discuss their fears over raising the concerns, and have the process explained to them before making the disclosure.

PRINCIPLE 2

The Importance of Confidentiality

Many whistleblowers, especially those raising concerns with a regulator or professional body about a current employer, will want to do so confidentially or anonymously, for fear of retaliation.

This principle looks at the importance of both confidentiality (where an individual expects their identity to be protected by the regulator or professional body), and anonymous disclosures (where the identity of the whistleblower is unknown to the regulator or professional body).

Offering a means for confidential and anonymous whistleblowing disclosures reduces the fear of negative consequences due to identification. Whistleblowers can fear identification by their employer or are concerned that being known as a whistleblower may damage their future employment prospects.

There will also be situations where the whistleblower will be unconcerned about being identified and will proceed on an open basis. Having a process for all three types of disclosure is important.

“The two main barriers whistleblowers face are a fear of reprisal as a result of making a disclosure and the perception that no action will be taken if they do make the decision to ‘blow the whistle’.”*

Confidentiality is the primary means by which a regulator can protect whistleblowers as they are not the employer and cannot take direct action if a whistleblower has been victimised for raising concerns.

* Whistleblowing Prescribed Persons Guide, April 2017, p.g. 7.

Challenges

Anonymous disclosures - This method of disclosure makes things difficult in a number of ways, first the disclosure will be harder to investigate because it may well be only one attempt to pass on the information so there will be no opportunity for vital follow up questions. It is also difficult to safeguard the whistleblower's position through shielding their identity in an investigation, and things like consent and feedback are all but impossible.

The whistleblower's assumption of confidentiality - Whistleblowers may assume that confidentiality is guaranteed when in reality investigating the concerns will make this practically impossible. For example, if there is a small workforce or if the whistleblower has already raised their concerns internally with their employer, any further investigation may compromise confidentiality.

When to breach confidentiality - There are times when it may be necessary to breach confidentiality, for example, in cases where criminal prosecution is brought, or there is a safeguarding risk to a vulnerable child or adult. There is a risk that a breach of confidentiality could damage the reputation of a regulator or professional body to effectively and safely handle whistleblowing concerns, putting others off from coming forward in the future.

Consent - It may not always be possible to gain consent from whistleblowers, especially if the concerns communicated are serious in nature and the regulator believes there is either a legal or ethical obligation to act. This can be especially difficult if the whistleblower withdraws their cooperation or refuses to give further information.

How to meet these challenges

Confidentiality as the default approach - Whenever possible responding to a whistleblowers concerns should be done on a confidential basis. Whistleblowers who feel vulnerable to victimisation, whether they are raising concerns about a current employee or where they have left employment, may view a confidential disclosure as a way of protecting themselves. Other whistleblowers may not require this protection as they have moved on in their career, for example, by finding another job. The key point is regulators and professional bodies should be open and transparent about how they will respond to the concerns.

Connected to this is ensuring staff dealing with the concerns are aware of how to discuss confidentiality with the whistleblower. This will help to ensure an open and transparent process with the whistleblower, and that expectations around the limits of confidentiality can be better managed. It may also be beneficial for regulators and professional bodies to create online platforms and drop boxes which can disguise the identity of the whistleblower but allows a continued conversation over a secure anonymised platform.

Sensitive investigation - The identity of the whistleblower can sometimes be accidentally indicated through investigation, for example, when there are few employees who could have witnessed an incident. In these circumstances, it can be beneficial to give the whistleblower notice of the intended action (especially if they are still in employment at the company) and ask them for ways to reduce the impact of the investigation.

Diversion - There is often no need to say that the information has come from a whistleblower. Where confidentiality is in place, regulators should avoid informing a company or individual an investigation or action has occurred, due to a whistleblower.

Storing information - Regulators should consider very carefully how they handle the information presented by whistleblowers internally. Some approaches include: separating those who have initial contact (a triage system) with the whistleblower from those who investigate the concerns, or ensuring staff have regular training on confidentiality practices. However, the approach of separating contact and investigation brings its own difficulties, both in providing feedback to the whistleblower, and in protecting the whistleblower from reprisal, if the investigators are not aware of the risks to the individual. Clear internal processes to protect that information are also vital.

Consent to act - Whether the whistleblowers consent is needed for regulatory action to be taken, is a key issue for confidentiality, and can be quite controversial. Some whistleblowers are under a legal duty to raise concerns with their regulator, and regulators may have a legal duty to act. All regulators need to balance the individual harm the whistleblower has identified, against the risk to their credibility and effectiveness as a regulator if they act without consent. For instance, there may be situations where a regulator decides not to investigate the concerns if they do not have the whistleblower's consent to do so. This approach will preserve their reputation as a safe place for whistleblowers to raise concerns, but may not be suitable for consideration when responding to serious concerns.

Do not discount anonymous whistleblowing concerns - Anonymous whistleblowing disclosures are going to be made to all regulators and professional bodies. For some whistleblowers they may wrongly feel it guarantees confidentiality, while it's also an expression of a fear in coming forward. These disclosures should not be excluded, as sometimes they are the only way for whistleblowers to make vital disclosures. Acting on the information if possible and recording the information as intelligence are obvious actions. If regulators receive a large number of such disclosures this could be an indicator of a wider cultural issue of fear and trust within an organisation or even across the sector that will need to be addressed.

Good Practice

Regulators should ensure those triaging whistleblowing concerns - i.e. those taking the information from the whistleblower - and those investigating the concerns are trained to be able to explain the nuances of confidentiality.

This will be key in explaining to the whistleblower what the process will look like once they have raised their concerns, and what limitations there maybe to confidentiality. It is advisable to be clear with the whistleblower when these occasions can occur from the outset as this will help reassure an anxious whistleblower.

Regulators can attempt to parallel source the information before acting, as this would help disguise the whistleblower and distance them from any actions taken.

Take all possible measures to avoid inadvertently revealing the identity of the whistleblower during investigation, and if practical, ask for their consent before acting.

“Prescribed persons should accept completely anonymous reports. It would be good practice for the prescribed person to make it clear to the whistleblower that anonymity may make it more difficult for the individual to receive legal protections.”*

*Whistleblowing Prescribed Persons Guidance, BEIS, 2017, p.g. 7.

Disguising the source of the information

An effective method of protecting the identity of a whistleblower can be achieved by shielding where the information has come from that sparked an investigation. We know many regulators and employers will investigate whistleblowing disclosures through alternative routes, for example as a random audit; looking at all records, and not just those highlighted by the whistleblower.



PRINCIPLE 3

Feedback

Providing feedback assures the whistleblower their concern has been heard, creating confidence in the regulatory system.

Feedback has three main operational functions: it assures the whistleblower their concern has been received and processed, it informs them whether action was taken or not, and explains the outcome of any actions.

Where possible, all whistleblowers should be given initial feedback to confirm receipt of the information. Individuals can then be asked if they would like to receive further communication and an outcome, if appropriate.

Challenges

Resources - Keeping regular contact with whistleblowers can be a strain on resources and may be quite difficult in small regulators and professional bodies.

Restrictions - Feedback to the whistleblower may be restricted and very difficult especially if their disclosure triggers an investigation or a disciplinary hearing. Whether that's because of confidentiality within an investigation or fears around providing sensitive information (e.g. legal restrictions around market sensitive information), the restrictions can make feedback extremely difficult.

Expectations - Sometimes there are high expectations when it comes to feedback, a whistleblower may expect to have a full account of actions that flowed from their disclosure and expect this to happen quite quickly. This can be for a mix of different reasons ranging from a deep concern or interest in the issue they are disclosing, or because an outcome may have some bearing on their rights to confidentiality or their legal rights. Either way it can be difficult to manage the gap between a whistleblower's expectations and what they receive.

How to meet these challenges

Setting expectations - Expectations of feedback can be set out before first contact with guidance provided online or as part of the process of reporting. This will help manage the relationship from the start and prevent frustration further down the line. The whistleblower is less likely to approach another body, or even the media if they know when to expect a response. This will come down to the understanding of staff dealing with whistleblowers as to the stress and strains on them as individuals.

Providing appropriate information - Even with restrictions (set out in the challenge section) there will be information that can be given to a whistleblower to indicate their disclosure has been assessed and not wasted. Regulators and professional bodies should look for any information that can be provided to the whistleblower to reassure them and be open where there are restrictions (e.g. if its confidentiality or market sensitive then communicate this to the whistleblower) or where no further investigation is required.*

Time frames - Ideally, a disclosure should be acknowledged (within 24 hours if possible) and a time given for a response to the whistleblower as to whether or not further action is going to be taken (recommended within 1 – 2 weeks).** A reasonable timeframe for the investigation should also be given, we recommend this shouldn't exceed three months, unless it is a complex or long running investigation in which case a six month timeframe may be appropriate. In any event, explaining to the whistleblower at regular intervals that the investigation is taking longer than expected can help manage expectations and provide assurance.

Frequency of contact - The whistleblower should be asked if they would like to be kept updated on developments, as not all want this. If the whistleblower does wish to be informed, one way of managing this is if the regulator and the whistleblower can agree on a frequency of contact, e.g. once a month. This will be a key part of managing the relationship if the concerns are fed into an investigation that takes a long time to conclude.

Feedback from the whistleblower - In some cases, offering the whistleblower an opportunity to comment on the regulator's findings before publication may be appropriate. This may allow the whistleblower to identify any errors or issues which have not been raised in the report and ask further questions. It may also be beneficial for regulators and professional bodies to consider asking whistleblowers for feedback on their experience of how the regulator has acted, as this can help to improve the way future disclosures are handled. It also demonstrates the whistleblower is recognised as an important part of the process, where they wish to be.

**"Of the 17 whistleblowers who spoke on the issue, 10 said their expectations were not met. This was most commonly because they believed the Prescribed Person did not investigate the concern they raised." [The NAO report, The Role of Prescribed Persons' point 10](#), February 2015*

***These time frames mirror what has been proposed in the EU Directive on Whistleblowing 2019 and Protect Draft Whistleblowing Protection Bill published in 2019.*

Good Practice

Ideally, where the whistleblower wants feedback, the approach should be to share as much information as possible. When it is not possible to share information or detail, as thorough an explanation as possible should be given to the whistleblower. If practicable, organisations could gain benefit from asking workers who disclose to them how they have found the experience.

Expectations as to the level of feedback available should be set at the outset, explaining restrictions as early as possible.

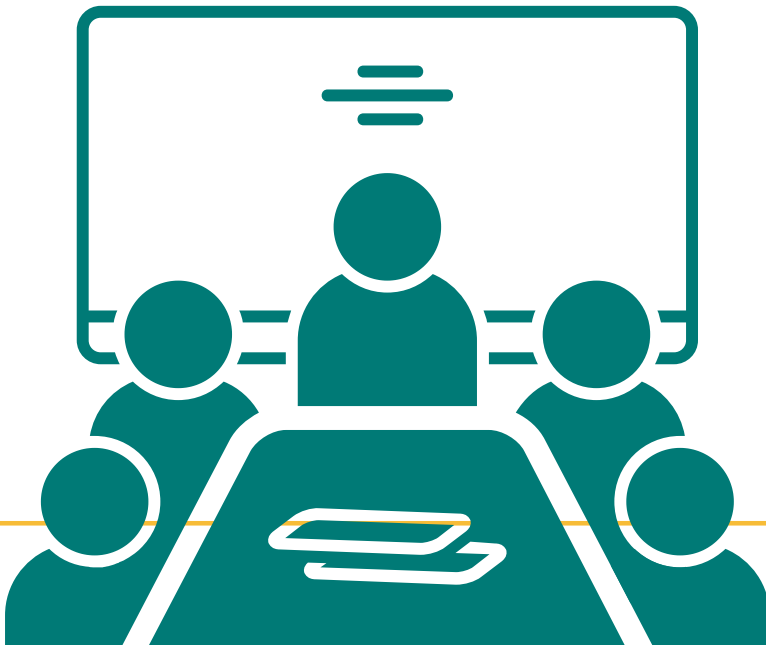
Below is an example of how one regulator maintains feedback, and feels they have a duty of care to do so.

An "ongoing relationship"

The best examples of feedback from regulators are from those bodies who are willing to engage with the whistleblower, even if the information is limited or the information may disappoint the whistleblower in terms of the action they expected to take place. An effective means of expressing this approach was found by a delegate at one of our regulator round tables when they described the process of an "ongoing relationship". It represents an attitude where, if the whistleblower wants it, the conversation can be continued.

'We have regular ongoing meetings - we feel we have a duty of care towards that person. We don't necessarily update them on every detail but to see how they are and consider risks to and develop risk assessment towards that person.'

Round table comment



PRINCIPLE 4

Addressing Victimisation

Whistleblower victimisation is both devastating for the individual and can seriously damage the whistleblowing culture of the organisation they work for, putting off future whistleblowers from raising concerns. In essence, a regulator or professional body may well have a duty of care towards the whistleblower in terms of responding to reported acts of victimisation.

Victimisation can also damage the wider public as it may stop future disclosures from being made.

All professional bodies and regulators should think seriously about how they should respond if they become aware that a whistleblower has been victimised for raising their concerns.

“Where a negative outcome is experienced by whistleblowers, it is not likely to encourage others to come forward.”*

*The NAO report, ‘The Role of Prescribed Persons’ Part 4.9

Challenges

Remit - Regulators and professional bodies may not be in a position where they will be expected to take the same responsibility for the treatment of the whistleblower that an employer would.

Capacity - Many bodies are already operating at full capacity. If an additional responsibility such as addressing all allegations of victimisation was added to their responsibilities, the primary function of the regulator or professional body may start to suffer.

Support - For regulators who are legally obligated to investigate issues, providing advice to a whistleblower will be difficult. Professional bodies will be in a position to supply advice in relation to ethical issues, but not on rights the whistleblower may or may not have under PIDA.

Practical limits - Cases of alleged victimisation are often unclear and may never be fully proven or resolved.

Confidentiality - If regulators are contacting entities (the organisations they regulate) to highlight potential victimisation, it will be necessary to consider how confidentiality can be managed.

How to meet these challenges

What is a regulator or professional body's role when it comes to

victimisation - Regulators and professional bodies need to consider what their role is when whistleblowers report victimisation. While there are constraints on regulators and professional bodies as they are not the employer, they still have a duty of care towards the whistleblower and must act accordingly.

For regulators, it may well be setting regulations or rules that require entities they regulate to take action against victimisation (e.g. the FCA's anti-victimisation rules). They may then oversee progress on implementing these standards, ensuring the policies in place are in line with recommended practice, training is appropriate and complaints of mishandling are monitored.

Professional bodies may take action against a member of their profession who they believe has treated a whistleblower badly - for example, they may act if the outcome of an employment tribunal has shown they have victimised a whistleblower.

Breaches of confidentiality by the employer - Any breaches of confidentiality, whether deliberate or accidental can be stressful and potentially damaging for the whistleblower. This may also have a knock-on effect for the whole workforce, as breaches in confidentiality mean other workers know an individual has raised concerns and the system has let them down. This may influence the decision of others when considering raising concerns and may act as a deterrent.

Guidance and oversight - Regulators and professional bodies need to consider what guidance they will provide, and action they will take, if an employer or member of their professional body has breached a whistleblower's confidentiality.

Good Practice

The FCA are attempting to address victimisation of whistleblowers in the sector by including standards on how senior managers should respond to whistleblowing in their Senior Managers Regime. The regime is designed to hold senior managers in the financial sector to account for their actions this can result in disciplinary action where they are found to stray from these standards including being struck off the regime and so unable to work in the sector.

This is a welcome innovation and led to disciplinary action against Chief Executive of Barclays Bank Jes Staley when, against the wishes of his board, he attempted to find out the identity of an anonymous whistleblower who he believed had raised malicious whistleblowing concerns against another senior manager. When the board found out that Staley had attempted to circumvent their decision by for example employing detectives from the US to find the whistleblower's identity, they reported Staley and the bank to the FCA. After an investigation by the regulator Staley avoided being struck off but was fined £642,000 and the bank was fined £15 million by New York regulators over the scandal.

The punishment Staley faced has received criticism from some quarters as being too lenient: he kept his job and the fine was seen as quite small given his annual salary is reported as being £3.9 million a year. This is a fair argument, but the wider point is the FCA as a regulator are attempting to tackle the issue of victimisation via regulation rather than leaving it to the employment tribunal. The fact Barclays self-reported the incident and there was an investigation is more action than many regulators take in such situations.

PRINCIPLE 5

Requirements for Regulated Entities

****This Principle only applies to regulatory bodies***

Very few regulators have in place enforceable standards or rules for internal whistleblowing arrangements of the entities they regulate. This is also a missed opportunity to provide clear guidance to organisations on what good internal whistleblowing arrangements look like.

Many regulators as a result are missing an opportunity to drive up standards in their sector in how whistleblowing is handled. The public miss benefits of scandals or disasters being resolved at an early stage, and regulators miss an opportunity to reduce their workload as well.

When we talk about these requirements we mean that regulators are encouraging or requiring organisations they regulate to have in place internal whistleblowing arrangements, train managers to handle whistleblowing concerns and review arrangements to ensure they are operating effectively.*

*The internal whistleblowing standards as laid out by the Whistleblowing Commission:
<https://protect-advice.org.uk/documents/protect-formerly-public-concern-at-work-whistleblowing-code-of-practice/>

"Having a whistleblowing policy makes it more likely that concerns will be raised internally, which reduces the likelihood of escalation to a prescribed person."

BEIS

"To provide more confidence in the system, prescribed persons should work together to... share expectations of what good whistleblowing policies and procedures look like with the bodies they oversee."

NAO The Prescribed Person Report

Challenges

Creating more regulation - Creating new rules or regulations may be seen as burdensome for organisations whether it's in a private, public or voluntary sector.

Enforcement - Another challenge is how to enforce such standards should this be achieved.

How to meet these challenges

Requiring all those they regulate to have a whistleblowing policy - As a minimum, regulators should consider insisting on a policy, which should be proportionate but certainly should be required of every employer with 50+ staff, which is in line with the requirements of the new EU Directive on Whistleblowing.*

Requiring regulated entities to publish reports - Regulated organisations should be encouraged to report on the concerns they have received through the year. This may be internally to their own staff, through their annual report, as part of another public announcement, for example on their website, or simply to their regulator. How the information is published may be dependent on size of the body and the nature of the industry. Such a practice can benefit the organisation itself. Feedback from our round table highlighted how some regulators found the annual reporting of numbers of whistleblowers approaching them as a regulator, to be useful in terms of thinking internally about processes that were in place. The reports also demonstrate to sector staff that whistleblowing is a positive and encouraged behaviour. It also increases confidence and trust in how the organisation handles concerns (if confidentiality is not broken).

*<https://protect-advice.org.uk/eu-directive-on-whistleblowing/>

Requirements are an investment not a burden - Well-run organisations will be following the principles of best practice*, poorly run organisations will not be and so the burden will fall on those poorly run organisations to improve or they may face sanctions.

Enforcement - Enforcement is key whether it's enforcement of prescriptive rules, or forms part of an inspection process. It enables a regulator to punish and improve poorly performing organisations while offering guidance to well run organisations. This is because well run organisations will already be putting in place whistleblowing arrangements, so rules and regulation can further this development, while poorly run organisations will not.

Good Practice

Ideally, entities should do all that is within their gift to demonstrate raising whistleblowing concerns is a responsible behaviour, and part of a 'business as usual' approach. All staff, managers and executives should want the same thing – a safe, ethical and compliant business – therefore all should be relied on to play their part in protecting the business from any risks or wrongdoing.

Regulators could even consider honouring those entities which do perform well. Progressive industries brave enough to show off their support for whistleblowing, who thank those for preventing harm, are more likely to attract responsible investment and secure public confidence. They are organisations people are proud to work for.

The aviation industry is often looked to as a sector to emulate when it comes to learning from mistakes as it avoids a blame and witch hunt culture. Below are two examples of best practice in highly regulated sectors.

*Whistleblowing Commission: <https://protect-advice.org.uk/documents/protect-formerly-public-concern-at-work-whistleblowing-code-of-practice/>

Whistleblowing rules in the aviation industry

Since 2014, the aviation industry regulator has promoted a 'Just Culture', in the spirit of learning from mistakes. This encourages staff to report errors and unsafe acts without fear of negative consequences; if the practice was not deliberate, reckless or represented an unjustifiable risk. This has been enshrined in law, including expectations on aviation companies to have whistleblowing systems in place to encourage concerns to be raised, analysis of issues reported (including reporting to the regulatory body the Civil Aviation Authority) and feedback to whistleblowers including analysis of the concern and follow up actions.

In the event of an accident, investigators, who are independent of the airlines, the pilots' union and the regulators, are given full rein to explore the wreckage and to interrogate all other evidence. Mistakes are not stigmatised, but regarded as learning opportunities.

In the aftermath of the investigation the report is made available to everyone. Airlines have a legal responsibility to implement the recommendations. Every pilot in the world has free access to the data. This enables everyone to learn from the mistake, rather than just a single crew, or a single airline, or a single nation. This turbo-charges the power of learning

The FCA's Whistleblowing Rules

In 2015 in the wake of the Libor scandal and financial crash the FCA were tasked with improving whistleblowing cultures across the financial services. Their response was to publish whistleblowing rules for internal whistleblowing systems in banks, and then insurance companies.

The rules set minimum standards across the entities they regulated and where these rules were broken, this would be a breach of FCA regulations. This last point is unique as too few regulators create such standards, let alone enforce against them.

The rules cover the entire internal whistleblowing system a firm should have in place, including a whistleblowing policy and how the firm should deal with confidentiality, responding to the victimisation of a whistleblower, feedback, the training of managers on responding to whistleblowing concerns and the creation of a whistleblowing champion that oversees the system from board level.

PRINCIPLE 6

Whistleblowing and Professional Duties

****This Principle is only relevant for professional bodies and regulators that regulate professionals e.g. the FCA's Senior Managers Regime***

Whistleblowing features in many codes of conduct and standards for professionals. Typically, they deal with situations where a registered professional witnesses conduct that breaches their professional code, for example, concerns about the conduct or practice of a fellow professional. It is an individual's duty to raise a concern, and it is a breach of that duty if the concerns are not raised, or, if they are not dealt with and escalated to a professional body or regulator.

Two further areas of disciplinary action can arise where a member of the professional body has been shown to have victimised a whistleblower, or where a senior member of a profession who occupies a leadership position, fails to deal with a concern raised by a whistleblower.

Professional bodies should recognise acts of victimisation as a breach of their code or standards, but it will need to be sufficiently serious in nature to mean the person is unsafe or unsuitable to practice.

From our round table discussions with professional bodies, it was highlighted how their narrow focus on whether a professional was fit to practice meant there was not always room to ask professionals to reflect on their practice or seek training.

This principle examines the balance needed between supporting professionals in all aspects of whistleblowing from raising to handling concerns, to the disciplinary measures that maybe required when the conduct of a professional slips below standards expected.

Challenges

Standards on reporting whistleblowing concerns - It is important to create standards for professionals that make clear what is expected of them, while at the same time avoid unfair punishment for failing to raise concerns while working for an organisation that has a poor whistleblowing culture.

The victimisation of a whistleblower - Professional bodies will be limited in the proactive action they can take as they are not the employer and must act carefully to avoid prejudice of any future legal action.

Mishandling whistleblowing - Another issue professional standards can deal with is the situation where a senior professional is seen to have ignored or failed to deal with a whistleblowing concern raised with them. This will typically be someone who is either in a management or leadership position, so often a senior member of the profession. The challenge is how to appropriately discipline a manager who fails to deal with a whistleblowing issue when it is mixed with a cultural or systems failure within the organisation.

Support for members - it is vital that professionals understand what is expected of them when raising a concern or when they are handling a whistleblowing situation. The challenge here is knowing what type of support to put resources into and then how to communicate this to members.

How to meet these challenges

Ensure whistleblowing is part of any code of conduct or professional standards - An agreed mission statement or standard that sets the expectations for professionals will set the tone for the profession.

Balanced enforcement - professional bodies need to construct disciplinary measures that can hold professionals to account when their actions fall below the standards expected. It makes sense to hold more senior professionals, especially those tasked with responding to concerns, to higher levels of accountability, than more junior members.

Support - enforcement on its own will not safeguard the public or the reputation of a profession. Members need support in the form of advice and promoted guidance on what their duties are and how they should respond. Professional bodies should consider what support their members need. This should include training for both professionals to raise concerns but also for those senior members who are expected to then handle whistleblowing concerns as managers or directors. Other forms of support are going to be key including guidance and advice for members to access. These types of measures will bring clarity to a code of conduct and the enforcement mechanism sitting behind it.

'A lot of the time it's the culture part that needs sorting out - an area where we do not have any remit'

Round table comment

Good Practice

Ideally professional bodies should be looking holistically at whistleblowing creating clear standards for raising concerns, handling the issues raised and the treatment of the whistleblower. These standards should be reflected in communication work around the standards or code of conduct, considering particular cultural issues that exist with the sector or industries that the professionals work in. Enforcement of these standards should be robust- especially for senior professionals in leadership positions who are dealing with concerns or setting the whistleblowing systems within organisations.

Support for members is going to be key whether that's guidance, training or access to confidential legal advice.

ANNEX A

The following organisations took part in our round table events last year:

Association of Accounting Technicians

Bank of England

Bar Standards Board

Care Quality Commission

Charity Commission

Chartered Institute of Taxation

Chartered Institute for Legal Executives

Chartered Institute for Securities and Investment

Chartered Institute of Management Accountants

Civil Aviation Authority

Competition and Markets Authority

Financial Conduct Authority

Financial Reporting Council

General Dental Council

General Pharmaceutical Council

Health and Care Professions Council

Independent Office for Police Conduct

Information Commissioner Office

Institute of Financial Accountants

National Audit Office

Protect

National Crime Agency

National Guardian's Office

NHS improvement

Nursing and Midwifery Council

Office for Rail and Road

Office of the Scottish Charity Regulator

Office of Water Services

Ofqual

Ombudsman Wales

Osteopathic Council

Pensions Regulator

Serious Fraud Office

The Market Research Society

Wales Audit Office



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