

WHISTLEBLOWING TO REGULATORS: ARE PRESCRIBED PERSONS FIT FOR PURPOSE?

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EXECUTIVE SUMMARY

1. On March 31st 2013, a search was conducted of the websites of 53 persons prescribed under Part IVA Employment Rights Act 1996 (ERA). The search terms used were: 'whistleblower'; 'whistleblowing'; 'protected disclosure' 'public interest disclosure'; and 'confidential reporting.' Only one prescribed person displayed relevant information under all five search terms. **16 of the 53(30%) had relevant information under 3 or more search terms but 31 of the 53 (58%) prescribed persons had no relevant material under any of the terms.**
2. A questionnaire was sent to 54 prescribed persons on the 23rd February 2013. **42 organisations responded (78%).** 11 of the organisations (20%) contacted indicated why they were unable to participate in the survey. **28 organisations (52%) completed the full questionnaire.**
3. **Only 30 (71%) of respondents confirmed that they were prescribed persons.** 2 organisations (5%) said they were not, and 10 (24%) failed to specify either way. **However, all 28 organisations completing the full questionnaire acknowledged that they are prescribed persons**
4. **50% of those who completed the full questionnaire stated they had received training.** 9 of the 14 (64%) organisations who answered negatively felt that training would have been beneficial.
5. **27 respondents (96%) stated that they received no additional funding for their role as prescribed persons.**
6. **Of the 28 responses, 20 (71%) stated they had a person designated to receive disclosures under Part IVA ERA and 19(68%) specified that they had a separate policy/procedure for such disclosures.**
7. **24 respondents (86%) said that they referred people to organisations who could provide advice** and 15 of these (63%) named Public Concern at Work.
8. **20 respondents (71%) indicated that if the information received was not within their remit they would refer it to the correct prescribed person.** 23 respondents (82%) stated that they would inform the worker who the appropriate person is.

RECOMMENDATIONS

- (i) The list of prescribed persons must be maintained and updated regularly. Every time a prescribed person is added or removed (or their role changes) a complete list of prescribed persons should be produced. In their “Call for Evidence” the government are contemplating doing away with creating prescribed persons through statutory instruments and appointing them as the Secretary of State sees fit. The apparent inability of BIS to maintain an accurate list suggests that any softening of the law regarding their appointment could cause even more confusion.**
- (ii) All prescribed persons should be required to have information on their website which specifically explains their role. A link to this should be found on the homepage.**
- (iii) All prescribed persons should be provided with sufficient training to enable them to fulfil their role. Joint training of prescribed persons could create a forum for them to share their understanding of the issues, their practices and experiences.**
- (iv) Legislation should be amended to require prescribed persons to provide advice when requested or when they deem it necessary. ¹ Relying on charities to provide advice when they receive no funding from government is not appropriate.**
- (v) Consideration should be given to providing ring- fenced funding for the performance of the role of prescribed person.**
- (vi) It should be mandatory that all prescribed bodies have a designated person or team to receive disclosures of information under Part IVA ERA.**
- (vii) All prescribed persons should have a policy and procedure specifically for workers making disclosures under Section 43F Part IVA ERA.**
- (viii) When they are the incorrect recipient, a prescribed person should be obliged to encourage workers to consent to their disclosures being referred to an appropriate body.**

¹ This is currently provided by the Ombudsman under New Zealand’s Protected Disclosures Act 2000.

1. BACKGROUND

Recently, there has been an increasing public awareness of people who disclose information which they deem to be important and suggests some form of wrongdoing. Such persons are often referred to as whistleblowers. The media has highlighted the plight of those who have spoken out, for example, Michael Woodford, the Olympus CEO, and Terry Bryan, who blew the whistle on the Winterbourne care home which led to a BBC Panorama investigation.

In 1998 the Public Interest Disclosure Act was passed. This sought to protect workers who raised specified concerns with an appropriate recipient by inserting Part IVA into the Employment Rights Act 1996 (henceforward ERA). The legislation encourages whistleblowers to disclose information to their employer in the first instance. However, there are occasions when reporting internally may not be appropriate, for example where evidence of wrongdoing has been ignored in the past. Prior to Part IVA ERA, it was difficult for employees to speak out as they were constrained by the duty of fidelity owed to their employer. Only in very limited circumstances were the courts willing to override this duty in the public interest². As a result, people were scared to raise concerns for fear of reprisals and many that did were ignored. This had some tragic consequences, such as the Piper Alpha and Herald of Free Enterprise disasters³. Thus it was important that the legislation had a mechanism for external reporting and Part IVA ERA provides for disclosures to be made to specified regulators, known as the prescribed persons.⁴

Prescribed persons are bodies or organisations that are able to receive and investigate a disclosure. They are granted this power by an Order made by the Secretary of State, most often the Secretary of State for Business, Innovation and Skills (henceforward BIS). The original list can be found in the Public Interest Disclosure (Prescribed Persons) Order 1999 No 1549. This was superseded by The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003 No 1993 and has been amended on several occasions by various Acts of Parliament and Statutory Instruments.⁵ Each of these amendments either adds or deletes the name of a prescribed person or amends the matters for which a person is prescribed.

2. WHY THE RESEARCH WAS CONDUCTED.

Prescribed persons are important because they can investigate concerns and hold organisations to account where it appears that they have breached their obligations. In

² *Gartside v Outram* (1856) 3 Jur NS 39 see also *Initial Services v Putterill* [1968] 1 QB 396

³ Public inquiry into the Piper Alpha disaster, CM. 1310 (1990) see also Court of Inquiry, Department for Transport, Ct No. 8074, 1987, HMSO

⁴ Section 43F ERA 1996

⁵ 2004 No 3265, 2005 No 2464, 2008 No 531, 2009 No 2457, 2010 No 7, 2012 No 462 and 2013 No 2213

2006, Lewis looked at prescribed persons under Part IVA ERA and their policies and procedures on whistleblowing⁶. However, this only looked at the position for internal staff and not disclosures made by external persons under Section 43F ERA. In 2011, Lewis and Lavery examined the websites of the prescribed persons to see what information about whistleblowing was contained in them⁷. This research suggested that, while many had information on whistleblowing, the majority failed to have information about their role as a prescribed person.

Apart from these two reports, there appears to be very little scrutiny of prescribed persons and how they function under the legislation. 14 years after the statutory provisions came into force it might have been thought that more research would have been done. The absence of empirical evidence makes it difficult to assess the impact of the prescribed person mechanism. Thus the first named author of this report decided to conduct research on this topic in part fulfilment of his LLM degree at Middlesex University.

3. RESEARCH METHODOLOGY

a. WHO IS PRESCRIBED?

The first task was to identify precisely which organisations were prescribed persons. This was not straightforward as none of the statutory instruments after 2003 create a definitive list and some persons were designated as a result of different legislation. Another problem was that some organisations had been abolished, for example the Scottish Commission for the Regulation of Care as a result of the Public Service Reform (Scotland) Act 2010. In cases such as this the prescribed person list states:

A person (“person A”) carrying out functions, by virtue of legislation, relating to relevant failures falling within one or more matters within a description of matters in respect of which another person (“person B”) is prescribed by this order, where person B was previously responsible for carrying out the same or substantially similar functions and has ceased to be so responsible.

About matters falling within the description of matters in respect of which person B is prescribed by this Order, to the extent that those matters relate to functions currently carried by person A.

This allows another organisation to assume the role without the need for an amendment to the statutory instrument. Thus when the Scottish Commission for the Regulation of Care

⁶ Lewis, D. 2007 “A survey of whistleblowing/confidential reporting procedures used by persons prescribed under the Public Interest Disclosure Act 1998”. *Communications Law*. Vol 12. No.4. Page 1

⁷ Lewis D and Lavery, A. 2011 “A survey of information about whistleblowing provided on the websites of persons prescribed under Part IVA Employment Rights Act 1996” Middlesex university

was abolished, Social Care and Social Work Improvement Scotland was created in the same piece of legislation. It took over the majority of roles performed by the Scottish Commission for the Regulation of Care and became a prescribed person.

Starting from the 2003 schedule and tracking the legislation, the first author was able to create a list of what he believed to be prescribed persons. To validate these efforts, this list was compared with the one published by BIS on 20th February 2013. This exercise leads us to suggest that the BIS document contains some errors. The list published in 2013 fails to include the Office of Qualifications and Examination Regulation, which was added by Statutory instrument 2012 No 462. It also places the responsibility for disclosures about Scottish charities with the Scottish Ministers, despite the fact that the Charities and Trustees Investment (Scotland) Act 2005 gave the role of regulating charities to the Office of the Scottish Charity Regulator. We believe that this transferred the role of the prescribed person across to the regulator under the person A to person B rule described above.

As an aside, the information on Page 2 of the BIS list suggests that potential whistleblowers write their information down and send it to the prescribed person. However, the legislation does not require a whistleblower to do this. While it may be considered good practice and of benefit to workers should legal proceeding arise at a later stage, Section 43F ERA does not make documentation mandatory. **We would argue that a government department should be informing potential whistleblowers of all the ways they could disclose to a prescribed person rather than limiting the possibilities.**

Having endeavoured to identify the prescribed persons, the next step was to determine who should be contacted, as including all of them would have made the research very onerous and time consuming. In line with the decision taken previously by Lewis and Lavery,⁸ local authorities were excluded simply because of their number.

3.2 THE TWO STRANDS OF THE RESEARCH

The research was conducted using two approaches: a website search and a questionnaire. These were chosen as they were thought likely to yield better results than requesting interviews with each of the prescribed persons.

The website scrutiny was chosen because it could build on the previous research. As Lewis and Lavery took a broad approach to collecting data, the value of their results in relation to the specific role of a prescribed person is somewhat limited. The approach taken in our research was much more restricted, the sole question being whether the website had information about the organisation/body's role as a prescribed person. Only the first page of search results were scrutinised since the aim was to observe the site from a

⁸ D Lewis and A Lavery, "A survey of information about whistleblowing provided on the websites of persons prescribed under Part IVA Employment Rights Act 1996". Middlesex University. May 2011

whistleblower's perspective and it was surmised that they are unlikely to sift through more than one page. Although this may have led to relevant information being missed, it could be said that a prescribed person had failed to highlight their role. On balance it was felt this approach was justified. To ensure consistency, the searching was all done on 31st March 2013 by the first author. To make the results comparable with Lewis and Lavery, the same five search terms were used: 'whistleblower', 'whistleblowing', 'protected disclosure', 'public interest disclosure' and 'confidential reporting'.

A questionnaire was sent to the prescribed persons identified. The questions were simple - the majority requiring a yes or no answer with room to elaborate should the respondent so wish. The questionnaire was designed so as to make responses from each of the organisations easy to collate and turn into simple statistical data. The questionnaires were sent by first class mail on the 23rd February 2013 with a covering letter and a return envelope. The letter also provided an email address in case respondents preferred to communicate in that way. On the 1st April 2013 a follow-up exercise was conducted in order to chase up those who had not responded. As the organisations had failed to respond by post, it was felt that the follow-up should be via email. Each of the non-respondents' websites were searched for either a general enquiry email address or one specifically for whistleblowing disclosures. The reason for this was that it was feared that any other email address might not reach a person who could respond effectively. Furthermore, using email inhibits any organisation (other than those who did not have a relevant email address) from suggesting that they never received the questionnaire. Seven organisations did not have a suitable email address. All results were collated on the 12th May 2013 and no responses were received after that date.

3.3 FREEDOM OF INFORMATION REQUESTS

The questionnaire could have been interpreted as a request for information under the Freedom of Information Act 2000. While this possibility was considered when composing the questionnaire, it was decided not to make such requests. One function of prescribed persons is to regulate organisations and help them to become more transparent. Therefore, in our opinion, it is important that the prescribed persons themselves are open. Furthermore, these organisations have been prescribed under a statutory framework and should therefore be accountable to the public without the need to force them to provide information. By choosing not to make statutory requests, our emphasis has been placed on those prescribed persons who make information readily available. Nevertheless, it should be noted that some of the prescribed persons did treat the questionnaire under their freedom of information procedures.

4. THE WEBSITE RESEARCH

Initially, the first author believed that potentially 54 organisations had been prescribed. During the research, it became clear that the Office of Scottish Charity Regulator was a prescribed person and not the Scottish Ministers. It also emerged that the Head of Consumer Product and Safety does not have its own website, so this body was excluded from the exercise. No results were obtained for the Charity Commissioner for England and Wales because every time a search was attempted the result would come back with 'server too busy'. Again this body has been omitted for statistical purposes. The Children's Commissioner for Wales had no search function available on its website and was treated as having no relevant information under each search term.

4.1 THE SEARCH TERMS

'WHISTLEBLOWER'

Only 13 of the 53 searched (25%) had any relevant information. 38 prescribed persons (72%) displayed no information and 2 were deemed not applicable (3%).

'WHISTLEBLOWING'

18 of the 53 (34%) had relevant information. 33 had no relevant information (63%) and 2 were deemed not applicable (3%).

'PROTECTED DISCLOSURE'

14 of the 53 (27%) had relevant information. 37 offered no relevant information (70%) and 2 were deemed not applicable (3%).

'PUBLIC INTEREST DISCLOSURE'

18 of the 53 (34%) had relevant information. 33 had no relevant information (63%) and 2 were deemed not applicable (3%).

'CONFIDENTIAL REPORTING'

2 of the 53 (3%) had relevant information. 49 (94%) had no relevant information and 2 were deemed not applicable (3%).

Only one prescribed person (the Serious Fraud Office) displayed relevant information under all five search terms. 16 of the 53 (30%) had relevant information under 3 or more search terms but 31 of the 53 prescribed persons (58%) had no relevant material under any search term. When these results are compared with previous research, it is disappointing to see that Lewis and Lavery located more information. While this can be attributed to their broader remit, it is still of concern that two years later the website information for whistleblowers is still poor.

5. THE RESULTS OF THE QUESTIONNAIRE

The questionnaire was sent to the 54 organisations on the 23rd February 2013 (it being still questionable at this stage as to who was responsible for Scottish charities). By the 1st April 2013, 26 organisations had responded (48%) in some form. Of the remaining 28 organisations, 21 of them (75%) were sent an email follow-up.⁹ From these, a further 16 responses were received by the 12th May 2013 when the results were analysed. Thus 42 organisations in total responded (78%) and 12 organisations failed to reply (22%).¹⁰

5.1 ORGANISATIONS UNABLE TO RESPOND

11 of the organisations (20%) contacted indicated that they were unable to respond to us.

THE COMPTROLLER AND AUDITOR GENERAL OF THE NATIONAL AUDIT OFFICE

This body stated they it did not complete questionnaires. Why this was the case was not specified and one can only speculate. However, it is interesting to note that all other auditing organisations that are prescribed completed the questionnaire. The response directed the first author to a website:

www.nao.org.uk/about_us/whistleblowing_concerns.aspx

However, every time this link was checked (before 21st October 2013), the page could not be found.

THE SERIOUS FRAUD OFFICE

This body was unable to fill in the questionnaire as they could not find a prescribed person within the organisation. Interestingly, this Office was the only organisation in the website survey that had information under every search term. The fact that the person who responded to the email, a strategic policy advisor, was unaware that the organisation was a prescribed person and was looking for a specific individual raises serious questions about how the Office responds to actual or potential whistleblowers.

LORD ADVOCATE OF SCOTLAND

The Lord Advocate failed to respond to the original questionnaire and thus was sent a follow-up email. The BIS list identifies the contact as the head of international and financial crime unit but the response received stated that no such department exists! It is of concern that the details given by the relevant government department were incorrect. It is not unreasonable to assume that a whistleblower would rely on the information in that document.

⁹ 7 (25%) organisations did not display an email address so nothing further was sent.

¹⁰ These are identified in Appendix 1

THE CHILDRENS COMMISSIONER FOR WALES

The Commissioner stated that it had to prioritise the needs of children and young people in Wales and did not have 'capacity' to respond to the survey. It is sad that the commissioner felt unable to participate, considering the general yes or no responses requested. It is felt that the email explaining their refusal was likely to have taken more time to formulate than the time it would have taken had to complete the questionnaire!

CARE QUALITY COMMISSION

Without giving a reason, the Commission indicated that it was unable to complete the questionnaire. In the email (10th April 2013) the CQC apologised for the delay in responding, stating that HR did not receive the original correspondence. This was both unexpected and slightly disturbing because (on the 1st March 2013) an email was received acknowledging receipt of the request and giving a reference number.

THE OFFICE OF FAIR TRADING

This Office stated that they did not have the time and resources to answer student queries in detail and can only give general guidance. However, in accordance with their policy of transparency, the first author was referred to their website: www.oft.gov.uk. One worry here is that in the website survey the Office of Fair Trading failed to display any relevant information about their role as a prescribed person.

OFFICE OF THE RAIL REGULATOR

This Regulator did not respond to the questionnaire in the manner requested but sent a detailed account of their role in overseeing the industry. They also provided a copy of their complaints procedure and acknowledged that they were a prescribed person. It was stated that they did not have a policy or procedure for public interest disclosures because they have never received a complaint under the legislation distinct from their normal complaints procedure. The word "complaint" here was used by the Regulator in their response. However, in our opinion it is not suitable for use when describing a whistleblower's disclosure (see below for further comment on this).

THE DEPARTMENT OF BUSINESS, INNOVATION AND SKILLS

BIS is responsible for overseeing and appointing prescribed persons and is itself a prescribed person in relation to insider dealing or fraud and other misconduct in relation to companies, investment business, insurance business, or multi-level marketing schemes (and similar

trading schemes)¹¹. However, BIS stated that it was unable to respond because it was departmental policy not to complete questionnaires.

MONITOR

The independent regulator of NHS trusts confirmed that they were a prescribed person. They were, however, unable to complete the questionnaire and stated that that this resulted from the nature of their work. Given that the questionnaire asked very simple questions and did not seek confidential information, we were disappointed with this response.

HEALTH AND CARE PROFESSIONS COUNCIL

The Council indicated that it was unable to respond because it was 'a regulatory body who has never encountered this type of situations' (sic). As the questionnaire itself was more directed to the organisation's preparation for receiving a disclosure, this response is worrying. If the Council itself appears to be unaware or unprepared for performing its role as a prescribed person, how can a whistleblower have any faith that their disclosure will be dealt with appropriately?

THE OFFICE OF THE SCOTTISH CHARITY REGULATOR

This Regulator felt they were unable to provide an informed response at the time. This would appear to merit the same comment as that made in relation to the Health & Care Professions Council. However, given that there were difficulties in identifying who was the prescribed person in relation to Scottish charities, we might infer that the organisation could be unaware that it had this role.

Two organisations indicated that they did not consider themselves to be prescribed persons. The Public Service Ombudsman for Wales gave no reason as to why they felt this was the case. The Standards Commission for Scotland indicated that, as an adjudicatory authority, they were not responsible for dealing with 'complaints'. They stated that the function was performed by the Public Standards Commissioner for Scotland, a role previously carried out by the chief investigating officer. The statutory instrument and the BIS list of prescribed persons both state that the chief investigating officer and the Standards Commission for Scotland have responsibility for disclosures. It is therefore apparent that there is some confusion over who performs this function. Having noted that several inaccuracies appear in the BIS list and that the legislation is not updated effectively, it is likely that the response

¹¹ Statutory Instrument 1999 No. 1549 (referred to under previous name of Secretary of State Trade and Industry)

received from the Standards Commission for Scotland is an accurate picture of the current position.

Only one response was received where the data could not be interpreted. The Scottish Environment Protection Agency indicated that they were not a prescribed person. Although they did not answer question 2 or 3, they completed the rest of the survey, which suggests they may have misread the first question or answered it wrongly. In any event, the response does not provide us with reliable information so we have excluded it from our results.

5.2 POSITIVE RESULTS

28 organisations (52%) completed the full questionnaire and are identified in Appendix 2.

Q1. DOES THE ORGANISATION PERFORM THE FUNCTION OF PRESCRIBED PERSON?

All 28 organisations completing the full questionnaire acknowledged that they are prescribed persons. However, when we add all the responses received (42) this percentage drops: **only 30 (71%) of the total confirmed their status**. 2 organisations (5%) said they were not and 10 (24%) failed to specify either way.

Q2. A) DID YOU RECEIVE TRAINING IN HOW TO PERFORM YOUR ROLE? Q2. B) DID YOU RECEIVE TRAINING IN WHAT TO EXPECT WHEN WHISTLEBLOWERS CONTACT YOU?

Of the 28 organisations completing the full questionnaire, 14 stated they had received training whilst the other 14 answered negatively to both questions. Unfortunately both questions fail to specify whether the training was internal or external and the comments received suggest that respondents were unsure what they were being asked. **9 of the 14 (64%) organisations who answered negatively felt that training would have been beneficial.**

Clearly, inadequate training is not desirable. Training should be provided both for those already performing the role as well as those who assume it in the future. Joint training of prescribed persons could create a forum for them to share their understanding of the issues, their practices and experiences. Indeed, some consistency in approach to external disclosures might be helpful to actual and potential whistleblowers.

Q3. WERE YOU GIVEN ADDITIONAL FUNDING TO ASSIST WITH THE ADDITIONAL COST THIS ROLE MAY INCUR?

Again this question was defective in that it failed to specify whether this was funding from within the organisation or from the government. **However, of the 28 responses 27 (96%) stated that they received no additional funding.** One prescribed person stated that it did receive funding but, based on the other responses; it is likely that it was referring to an internal rather than external allocation of resources. Five respondents (18%) commented in

various ways that there was internal funding available should it become necessary. The Care Inspectorate commented that they did not think that funding was necessarily required for the role.

It is difficult to understand why the government does not consider funding to be necessary for the effective performance of the role of prescribed person, which is to receive the concerns of whistleblowers and to investigate them. In some cases this can be complex. The investigations are likely to take time and will often involve preliminary sifting and research, such as requesting information, examining documents and providing feedback. While these functions might be performed in any event under the organisation's general remit, the role of a prescribed person requires special attention. The fact that information has been supplied by a worker in an employment context means that particular care and sensitivity are required and the time and effort put into the task of investigation may be greater. Given that the persons prescribed vary in size and the volume of disclosures received will differ, it would be inappropriate to provide a fixed budget annually. However, if funds are not made available for the performance of this statutory function prescribed persons can only rely on the money available for other matters. In the current climate this is often allocated in advance and tightly stretched across the entire organisation.

Q4. IS THERE A PERSON WITHIN YOUR ORGANISATION WHO IS DESIGNATED TO RECEIVE DISCLOSURES?

Of the 28 responses, 20 (71%) stated they did have a person designated. The Independent Police Complaints Commission said they did not but commented they had a department. In the light of this we considered that there were, in effect, 21 positive responses (75%). The remaining 7 organisations (25%) responded negatively. However, the Commissioner for Children and Young People in Scotland indicated that in the first instance disclosures were likely to be dealt with by the enquiries officer or a senior manager. This was discounted as a positive result owing to the element of uncertainty.

The majority have a person or department designated for this task and should be commended yet it is worrying that others do not. The failure to designate a person or department to deal with disclosures can lead to confusion when a disclosure is received, as illustrated by the response from the Serious Fraud Office (see page 7 above). If people within the organisation do not know the person to whom external disclosures should be referred (or even that the organisation is a prescribed person!), this is likely to have a negative effect - a whistleblower may well perceive that their concern will not be taken seriously. Having a designated person or department facilitates consistency and provides a whistleblower with a specific point of contact should they wish to provide further information or seek feedback about how their disclosure is being handled. **Thus, in our opinion, when an organisation is prescribed it should be mandatory for it to name either**

a person or a department as the designated recipient under Section 43F ERA and make this known both internally and externally.

Q5. DO YOU HAVE A SPECIFIC POLICY/PROCEDURE FOR DISCLOSURES (SEPARATE TO ANY YOU MAY HAVE FOR INTERNAL STAFF)?

It was encouraging that 19 organisations (68%) specified that they had a separate policy/procedure for external disclosures and that, in some cases, they were reviewed. This is good practice and is thus a step that all organisations should take on a regular basis.¹²

9 organisations, however, did not have a separate policy (22%). The Accounts Commission for Scotland, Auditor General for Scotland and Audit Scotland stated that they followed their ‘correspondence’ policy when dealing with disclosures. The Social Care and Social Work Improvement Scotland use their complaints process, whilst the Secretary of State for Transport (through the Maritime and Coastguard Agency) specified that it uses the same policy for internal and external disclosures. We are not confident that such alternatives are appropriate in this context. A correspondence approach suggests that the organisation might enter into an extensive dialogue with a discloser, which might put extra and unnecessary pressure on an whistleblower. Similarly, we feel that following a complaints procedure is not desirable. A person who raises a concern does not necessarily have a complaint. Indeed they may have no evidence of wrongdoing but only reasonable suspicion that they want investigated. We are worried that the treatment of whistleblowers as complainants may have negative consequences. If potential whistleblowers feel that they are going to be treated as busybodies with a personal grievance rather than a person speaking out in the public interest they may choose to remain silent or disclose information via the media. The former course of action could result in the continuation of the wrongdoing being and the latter may lead the worker to lose his or her employment protection rights.

Using the same whistleblowing policy for internal and external disclosures is a better option than those discussed above but it is far from ideal. Internal policies are written with an emphasis on disclosures to line management and keeping information within the organisation. By definition, when a whistleblower contacts a prescribed person, he or she has decided that it is necessary to make an external disclosure. The concern will usually have been raised internally first¹³ and in most cases this is required in order to receive legal protection.

Q6. IF SOMEONE REQUESTS ADVICE, DO YOU REFER THEM TO ORGANISATIONS THAT CAN PROVIDE IT?

¹² See the BSI Code of Practice on *Whistleblowing Arrangements*. 2008

¹³ This is demonstrated by empirical evidence in the UK and elsewhere.

24 of the respondents (86%) said that they did refer people. They were also asked which organisations they refer them to and 15 of the 24 (63%) named the leading charity Public Concern at Work. Other organisations listed were Citizens Advice, law centres, HR centres and trade unions. One troubling response was that of the Scottish Information Commissioner, who indicated that people would be referred to organisations in the Schedule of prescribed persons and also provided the link¹⁴. The problem with using this list, as identified earlier, is that it has changed considerably since its implementation in 2003. Thus there is a risk of referring whistleblowers to organisations that either do not exist or are no longer prescribed. Of the 4 that did not say they would refer (14%), two stated they would if the need arose, implying that the scenario has not yet arisen. The other two organisations just stated “no” without any comments.

Q7. IF SOMEONE MAKES A DISCLOSURE OUTSIDE YOUR REMIT, DO YOU REFER IT TO THE CORRECT PRESCRIBED PERSON?

20 respondents (71%) stated that they would do so. Many indicated that, because it would involve confidential information, this would depend on whether they had permission to do so from the whistleblower. To avoid this difficulty, they would often inform the whistleblower where to take their concern. It is appropriate that the whistleblower is consulted about the transfer of their information and details to the correct recipient but it is also necessary to view the disclosure in a wider context. The whistleblower is generally acting on a suspicion of wrongdoing and suggesting that the matter should be raised somewhere else creates a risk that this will not happen. If the government is serious about encouraging people to speak out in the public interest, consideration should be given to enabling or requiring prescribed persons to transfer information in specified circumstances.¹⁵

Q8. IF YOU ARE NOT THE RELEVANT PRESCRIBED PERSON, DO YOU TELL THE WORKER WHO IS?

23 respondents (82%) stated that they would inform the worker who the correct person is. It is interesting that the Director General of Water Services indicated that they would not do so as they do not provide advice. In our view, informing the whistleblower who the appropriate prescribed person is does not amount to providing advice but merely points the whistleblower in the right direction. Four organisations made no response or specified that the issue has yet to arise.

¹⁴ www.legislation.gov.uk/ukxi/2003/1993/made

¹⁵ This is provided for in some overseas statutes. For example, see state legislation on Australia.

Q9. AS A PRESCRIBED PERSON, DO YOU HAVE ANYTHING TO SHARE WHICH COULD BE CONSIDERED GOOD PRACTICE?

Nine of the organisations felt they had something to share. This ranged from online booklets and guidance developed by the organisation and Public Concern at Work, to newsletters and website information. The majority of these nine responses mentioned working with Public Concern at Work in one way or another.

Q10. IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD ABOUT YOUR ROLE AS A PRESCRIBED PERSON?

The majority of prescribed persons had nothing to add but a few offered comments and made some valuable and interesting points. The Water Industry Commissioner for Scotland pointed out that it is likely the role varies depending on the size of the prescribed person's organisation. The opportunities for problems etc to arise in the smaller ones may be more limited but the effect of any that do occur are magnified.

The Financial Services Authority felt that the person or small team receiving the disclosure(s) should be beyond reproach. It was suggested that senior personnel should be designated who are well versed in the procedures and have sufficient expertise in the area regulated. The Gas and Electricity Markets Authority commented that the role has grown organically at the organisation and required re-focusing, which they were doing with the help of Public Concern at Work. Healthcare Improvement Scotland commented that there was still a lot to be done in the area. Taken as a whole, the responses to both questions 9 and 10 shows that there is some commonality among the prescribed persons. Clearly they take their role seriously. The fact that Public Concern at Work appeared prominently throughout the responses suggests that they are trusted and respected as a good source of information for both whistleblowers and prescribed persons.

6. CONCLUSIONS

While the research discussed above is somewhat limited in its scope, **it clearly shows that many prescribed persons are not ready and prepared to receive disclosures from potential whistleblowers.** The failure of some respondents to have a designated person or team to receive a disclosure is of concern because it may mean that a whistleblower gets passed around the organisation.

The lack of a separate policy/procedure for receiving disclosures under Part IVA ERA is a significant pitfall. A separate policy/procedure demonstrates that the prescribed person is ready and prepared to receive the disclosure and has a mechanism for dealing with it.

Although it is not the fault of the regulators, the lack of a current up to date list of prescribed persons is a worry. If the BIS list is incorrect and the statutory provisions are not updated in full, how can whistleblowers be expected to navigate the legislation and disclose to appropriate external recipients?.

The authors believe that the role of the prescribed person is one of utmost importance. The significance of being in a position to investigate the concerns of whistleblowers cannot be underestimated. It is possible that the knowledge that regulators are effective recipients of external disclosures might encourage employers to prepare policies and procedures that are based on good practice. In turn, a desirable consequence of this might be that workers feel more secure about disclosing internally and do not expose themselves to the risks that arise from going to an outside body. Currently there are two consultations being conducted about the law and practice of whistleblowing. First, there is the Whistleblowing Commission established by Public Concern at Work which is publishing its results in mid-November.¹⁶ The other is a “Call for Evidence” being carried out by BIS which is open until 1st November 2013. It is hoped that both the Whistleblowing Commission and BIS will consider our findings when deciding what recommendations to make about the future role of prescribed persons.

7. RECOMMENDATIONS

- (i) The list of prescribed persons must be maintained and updated regularly. Every time a prescribed person is added or removed (or their role changes) a complete list of prescribed persons should be produced. In their “Call for Evidence” the government are contemplating doing away with creating prescribed persons through statutory instruments and appointing them as the Secretary of State sees fit. The apparent inability of BIS to maintain an accurate list suggests that any softening of the law regarding their appointment could cause even more confusion.**

- (ii) All prescribed persons should be required to have information on their website which specifically explains their role. A link to this should be found on the homepage.**

- (iii) All prescribed persons should be provided with sufficient training to enable them to fulfil their role. Joint training of prescribed persons could create a forum for them to share their understanding of the issues, their practices and experiences.**

¹⁶ The consultation ended in June 2013

- (iv) Legislation should be amended to require prescribed persons to provide advice when requested or when they deem it necessary. ¹⁷ Relying on charities to provide advice when they receive no funding from government is not appropriate.**
- (v) Consideration should be given to providing ring- fenced funding for the performance of the role of prescribed person.**
- (vi) It should be a mandatory that all prescribed bodies have a designated person or team to receive disclosures of information under Part IVA ERA.**
- (vii) All prescribed persons should have a policy and procedure specifically for workers making disclosures under Section 43F Part IVA ERA.**
- (viii) When they are the incorrect recipient, a prescribed person should be obliged to encourage workers to consent to their disclosures being referred to an appropriate body.**

¹⁷ This is currently provided by the Ombudsman under New Zealand's Protected Disclosures Act 2000.

APPENDIX 1: ORGANISATIONS WHO FAILED TO RESPOND TO THE SURVEY

Charity Commissioner for England and Wales

Scottish Ministers (responsible for charity regulation)

Chief Executive of the Scottish Criminal Case Review Commission

Competent Authority (head of listing department London stock exchange)

Commissioner for revenue and customs

Food Standards Agency

Scottish Social Services Council

Health and Safety Executive

Children's Commissioner

Financial Reporting Council

Serious Organised Crime Agency

Head of Consumer Product and Safety

APPENDIX 2: THE 28 ORGANISATIONS WHO COMPLETED THE FULL QUESTIONNAIRE .

Accounts Commission for Scotland

Audit Commission for England and Wales

The Certification Officer

Chief Executive of the Criminal Cases Review Commission

Civil Aviation Authority

Auditor General for Wales

Auditor General for Scotland

Audit Scotland

Director General of Water Services

Water Industry Commissioner for Scotland

Environment Agency

Care Council for Wales

Financial Service Authority

Regulator of Social Housing

Information Commissioner

Scottish Information Commissioner

Social Care and Social Work Improvement Scotland

Pensions Regulator

Secretary of State for Transport

Independent Police Complaints Commission

Officer of Communications

Gas and Electricity Markets Authority

Commissioner for Children and Young People in Scotland

Office of Qualifications and Examinations Regulation (OFQUAL)

Care and Social Services Inspectorate Wales

Healthcare Inspectorate Wales

Welsh Housing Directorate

Healthcare Improvement Scotland