

UK Whistleblowing Update – New Bill Before Parliament

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What is this about?

A “Protection for Whistleblowing Bill” (“the Bill”) was introduced before the UK Parliament this summer in an attempt to reform the current UK whistleblowing rules. In sum, the Bill seeks to:

- Establish an Office of the Whistleblower to protect whistleblowers and whistleblowing;
- Create offences relating to the treatment of whistleblowers and the handling of whistleblowing cases;
- Repeal the Public Interest Disclosure Act 1998.

This article is a brief look at this latest development.

What’s the current situation?

Employment

In a nutshell, in the UK workers are protected against retaliatory dismissal or detrimental treatment if they make a so-called “protected disclosure” to their employer or to some other so-called “prescribed person”. This has to be a disclosure of information which a worker reasonably believes is made in the public interest that indicates certain types of wrongdoing. The relevant UK whistleblowing legislation here is the Employment Rights Act 1996 (mainly Pt IVA, sections 43A to 43L – see here <https://www.legislation.gov.uk/ukpga/1996/18/part/IVA>) and the Public Interest Disclosure Act 1998 (see here <https://www.legislation.gov.uk/ukpga/1998/23/contents>). The UK government has also issued the “Government Whistleblowing: Guidance for Employers and Code of Practice” (“the Code” – see here <https://www.gov.uk/government/publications/whistleblowing-guidance-and-code-of-practice-for-employers>) which offers support and advice to employers who may need to handle whistleblowing reports; the Code has no statutory force.

Financial Services

In the area of financial services there are also special whistleblowing requirements that apply to certain types of businesses (UK deposit-takers with assets of £250m or greater, Prudential Regulation Authority designated investment firms, insurance and reinsurance firms within the scope of so-called Solvency II, & the Society of Lloyd’s and managing agents) under rules set out by the financial regulators the Financial Conduct Authority and the Prudential Regulation Authority – for more about these particular UK regimes see in particular here <https://www.fca.org.uk/publication/policy/ps-15-24.pdf> and here <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2015/ps2415>.

Competition/Antitrust

In the UK the competition/antitrust regulator, the Competition and Markets Authority (the CMA), offers financial rewards of up to £100,000 (currently around USD\$115,000 & €115,000) entirely at the CMA’s discretion and in exceptional circumstances for “inside” information about the existence of a cartel (for more see the CMA’s “Informant Rewards Policy” here <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>).

The Bill

Key aspects of the Bill include the following:

- A person is a “whistleblower” if that person has made, makes or is intending to make a “protected disclosure” or is perceived by a relevant person to have made, be making or intend to make a “protected disclosure”;
- A “protected disclosure” means a disclosure of a matter (made in the public interest) to certain persons

(see below) concerning the following matters: (a) a criminal offence or regulatory breach; (b) the failure of any person including a relevant person to comply with a legal obligation; (c) a miscarriage of justice; (d) the endangering of the health or safety of any person; (e) damage to the environment; (f) mismanagement of public funds; (g) misuse or abuse of authority; (h) such other matter as may be prescribed in regulations made by the Secretary of State; (i) concealment of information or removal or deletion or destruction of any documents relating to any of the above matters;

- The persons referred to above are as follows: (a) the Office of the Whistleblower (“the Office”); (b) a relevant person (see below); (c) a person who, in the reasonable belief of the person making the disclosure is a relevant person; (d) a person to whom it is reasonable for the person making the disclosure to make that disclosure;
- A “relevant person” means: (a) an employer; (b) a body acting on behalf of a group of employers; (c) a regulator; (d) a public authority; (e) any organisation with a statutory obligation to safeguard; or, (f) such person as may be prescribed by regulations made by the Secretary of State;
- A “relevant person” must not subject, or cause or permit others to subject, a person to “detriment” (see below) as a consequence of that person: (a) being or being perceived to be a whistleblower; (b) being or being perceived to be a person associated with a whistleblower or with a person perceived as a whistleblower; (c) making an allegation (whether or not express) that a person has contravened the Bill/Act; (d) bringing proceedings or giving evidence or information in connection with the Bill/Act; (e) doing any other thing for the purposes of or in connection with the Bill/Act; or (f) facilitating the making by another of a “protected disclosure”;
- A “protected disclosure” is made to a relevant person if it is made by a whistleblower to any person who, in the reasonable belief of the whistleblower, is a person who is in a position: (a) to address the matters raised in it; or (b) to refer it to a person who is in a position to address the matters raised in it;
- A “detriment” is that which causes disadvantage, loss or harm to a person;
- A “relevant person” must respond timeously and in a co-operative manner to any request made of that person by the Office;
- A “relevant person” to whom a protected disclosure has been made must deal with that disclosure in accordance with such standards as may be laid down from time to time by the Office;
- Within one year after the passing of this Bill/Act, the Secretary of State must establish a body corporate called the “Office of the Whistleblower” (“the Office”);
- The principal duty of the Office is to protect whistleblowers and have oversight of the process of whistleblowing – the Office must carry out all its work in accordance with the principal duty;
- The objectives of the Office are: (a) to encourage and support whistleblowers to refer concerns to the appropriate authorities; (b) to support an effective and fair whistleblowing process; (c) to protect the public purse and ensure that wrongdoers bear the cost of wrongdoing revealed by whistleblowing; (d) to promote good governance through the normalisation of whistleblowing; (e) to ensure that concerns raised by whistleblowers are acted upon; (f) to monitor and review the operation of the Bill/Act – the Office must seek to achieve those objectives consistently with its principal duty;
- The functions of the Office are to: (a) set minimum standards for whistleblowing policies, procedures and reporting structures; (b) monitor the compliance of organisations with those standards; (c) enforce compliance with those standards; (d) bring prosecutions for the offences specified in the Bill/Act; (e) provide an independent disclosure and reporting service; (f) provide information and advice on whistleblowing; (g) provide support for whistleblowers; (h) share information with relevant regulatory and other bodies in the UK and abroad so far as it may judge this necessary or desirable to enable it to achieve its objectives or perform its other functions; (i) promote public awareness of the importance of whistleblowing and the protections provided to whistleblowers;
- The Office must set minimum standards for relevant persons in carrying out their duties. Standards for handling protected disclosures must include requirements for: (a) preserving the confidentiality and anonymity of the whistleblower; (b) screening, assessment and investigation methods; (c) referrals to other relevant regulatory or other bodies, both in the UK and elsewhere; (d) information to be provided to the whistleblower; (e) information to be reported to the Office; and, (f) any other matters that seem appropriate to the Office;
- The Office has such powers in relation to whistleblowing complaints (including powers to establish schemes for the recognition of whistleblowers, and powers of investigation in relation to whistleblowing complaints, and in relation to the handling of complaints by relevant persons) and such other matters falling within its

powers and duties as may be prescribed in regulations by the Secretary of State;

- The Office must not consider a complaint made by a whistleblower unless it is presented: (a) before the end of the period of six months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the Office considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of six months;
- The Office may issue a written notice (an “information notice”) requiring any person: (a) to provide such information as the Office reasonably requires for the purposes of carrying out the Office's functions, or (b) to provide the Office with such information as the Office may require for the purposes of investigating any of the offences specified in the Bill/Act;
- If the Office is of the opinion that a person: (a) is contravening one or more standards (as referred to earlier above), or has contravened one or more of those standards in circumstances which make it likely that the contravention will continue or be repeated, it may issue a written notice (an “action notice”) which requires the person to take, or refrain from taking, such steps as are specified in the notice;
- In the event that the Office is of the opinion that a relevant person has subjected a person to “detriment” (see above) contrary to the provision referred to above concerning what a “relevant person” must not subject a person to “detriment” etc., it may issue an order (a “redress order”) to the relevant person directing the relevant person to take, or refrain from taking, such steps as may be specified in the order so as to provide to the person such redress as the Office may determine;
- The Office may issue an interim relief order in the event that it considers it reasonably necessary to do so in order to protect the interests of a whistleblower pending the completion of investigations concerning a complaint from that whistleblower or into the content of a “protected disclosure”;
- The Office must publish guidance concerning the manner in which it exercises various of its functions and powers;
- Appeals may be brought against any decision, direction order, notice, penalty or other determination of the Office;
- Where the Office is satisfied that by reason of any person's failure to comply with that person's obligations under certain sections of the Bill/Act, the Office may by notice in writing require that person to pay, within a prescribed period, a penalty in respect of that failure not exceeding the maximum amount, which means: (a) in the case of an individual, 10% of that individual's gross annual income, not to exceed £50,000; (b) in any other case, 10% of annual global turnover, not to exceed £18,000,000; or such higher maximum amounts as the Secretary of State may prescribe;
- It will be a criminal offence where a person intentionally or recklessly submits a person to “detriment” (see above) contrary to the provision referred to above concerning what a “relevant person” must not subject a person to “detriment” etc.;
- Any agreement between a “relevant” person and any other person will be void in so far as it purports to prevent or restrict that other person from making a “protected disclosure”. Such void agreements include: (a) agreements containing confidentiality and equivalent clauses; (b) other contractual duties of confidentiality, insofar as they relate to protected disclosures. If the Office reasonably determines that any such agreement as is specified above (including any proposed agreement) has the effect of preventing or restricting a person from making a “protected disclosure”, the Office may issue an order declaring its invalidity and take such further or other steps in that regard as it may consider appropriate; and,
- In the event that any person is prosecuted for any offence consisting of the disclosure of information in circumstances where such disclosure is prohibited or restricted, it will be a defence for that person to show that, at the time of the alleged offence, the disclosure was, or was reasonably believed by that person to be, a “protected disclosure”. No cause of action in civil proceedings lies against a person in respect of the making of a “protected disclosure”.

What's next?

In theory the Bill will next be subject to a Second Reading in the House of Lords. As there is now a new Prime Minister and cabinet we will have to see what their legislative plans are to understand if there might be an impact on the Bill.

There have been several previous attempts to change the UK whistleblowing rules, including one this year that was

very similar to the current Bill, which have all stalled. So it is possible that this latest Bill may meet the same fate.

What else should I bear in mind?

Please note that whistleblowing in an organization also raises data protection/GDPR issues (for more see “Does whistleblowing present any data protection issues?” in our EU Whistleblowing FAQs which can be found here <https://www.corderycompliance.com/eu-whistleblowing-faqs/>) – there is also some background to GDPR here www.bit.ly/gdprfaq.

Over the years there has been a steady growth in the field of modern slavery/ESG/supply chain due diligence compliance (such as under the UK Modern Slavery Act 2015 disclosure and transparency requirements) – many organisations cater for these issues through their whistleblowing hotlines.

Key takeaways

The Bill's progress should be followed. In any event, as a matter of course, organisations should consider doing the following:

- Review their existing whistleblowing policy, internal procedures and training materials; and,
- Ensure that everything that they do concerning whistleblowing complies with data protection requirements – probably the best way to do this is by undertaking a Data Protection Impact Assessment.

Further Information

Our FAQs and film about the EU whistleblowing regime can be found here <https://www.corderycompliance.com/eu-whistleblowing-faqs/>. Our previous update article about whistleblowing in the UK can be found here: <https://www.corderycompliance.com/uk-whistleblowing-update/>

We write about modern slavery/ESG/supply chain due diligence and compliance issues here <https://www.corderycompliance.com/category/modern-slavery-supply-chain-management/> and most recently about proposed EU rules here <https://www.corderycompliance.com/eu-hr-eai-and-supply-chain-dd/>.

We write about privacy/data protection issues here <https://www.corderycompliance.com/category/data-protection-privacy/>.

We write about anti-bribery and corruption issues here <https://www.corderycompliance.com/category/bribery-corruption/>.

We have also written about the UK criminal offence of failure to prevent the facilitation of tax evasion here <https://www.corderycompliance.com/failure-to-prevent-tax-evasion/>.

For more information please contact André Bywater or Jonathan Armstrong who are lawyers with Cordery in London where their focus is on compliance issues.

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