



Law Centre (NI) response to DEL consultation on Public Interest Disclosure and Annual Duty to Report

About the Law Centre

The Law Centre is a public interest non-governmental legal organisation that aims to advance social welfare rights. We work to promote social justice and we provide specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. The Law Centre provides a specialist legal service (advice, representation, training, information and policy comment) in different areas of law including employment. Law Centre services are provided to approximately 350 member agencies in Northern Ireland. Through our employment advice service, we have a daily exposure to the range and type of contentious employment law problems that arise. We provide advice and legal representation before the Industrial Tribunal and Fair Employment Tribunal for employees/workers who do not have alternative access to legal advice/representation.

Responses to questions

- 1. Do you believe that providing information in an annual report will:**
 - 1.1 Increase confidence that reports of wrongdoing are handled correct?**
 - 1.2 Dispel the belief that the whistleblowing framework is failing whistleblowers?**
 - 1.3 Improve the consistency of information across prescribed persons?**

The Small Business, Enterprise and Employment Act has introduced a duty on prescribed persons in Great Britain to report annually on the whistleblowing disclosures they receive. The purpose is to ensure more systematic processes in the way public interest disclosures are handled and to provide greater assurance to the whistle blower that action is being taken by the prescribed person. DEL is now considering making a similar change to the Employment Rights (NI) Order 1996. In general, the Law Centre supports this proposal and we see the potential for it to meet the aims outlined above. We also think that the collection and publication of this data will improve public information on whistleblowing and will also provide regulators with an early warning system for potential problems in specific sectors, thus providing the opportunity for proactive monitoring and regulatory action.

While we are generally supportive of the proposal, we believe that the requirement should only apply to prescribed organisations that have a regulatory/investigatory function. We do not think it should apply to other organisations that can receive protected disclosures (as per the NI Guide to the Public Disclosure Act, this can

include legal advisers and Ministers)¹ and that do not have the powers to monitor cases, obtain further information, etc.

2. If Northern Ireland was to replicate the duty on prescribed persons to report annually on whistleblowing disclosures they receive, how should this reporting requirement be implemented in practice?

2.1 What information should be included in the annual report?

As an organisation that advises and represents whistle blowers, confidentiality of our clients (i.e. the workers) is our paramount interest. Therefore, we would urge DEL to adopt the BIS approach, which is for the accompanying Regulations to include a confidentiality clause that will explicitly protect identities from being revealed.²

We recognise that the list of prescribed organisations is broad and that each has very different remits and activities – e.g. Food Standards Agency, General Chiropractic Council, District Councils, the Charity Commission, etc. – and thus suggest that DEL is not overly prescriptive about what evidence is collected. That said, we believe that the reports should include the following information as a minimum:

- a) An explanation of the functions, objectives and statutory powers of the body producing the report;
- b) The number of concerns reported to that body that can reasonably be identified as whistleblowing concerns;
- c) The number of concerns where further action was taken;
- d) Commentary on the types of action taken;
- e) The number of disclosures where no further action was taken.

In addition, DEL should encourage prescribed organisations to provide further information that could be helpful, including:

- f) The outcome of each case;
- g) The number of investigated organisations that had whistleblowing policies in place;
- h) Commentary on how the information from whistle blowers has impacted on the prescribed organisation's activity in the relevant sector.

Ultimately, whether a concern amounts to a public interest disclosure is a matter for the Industrial Tribunal. It is therefore necessary that the reporting mechanism does not require the prescribed organisation to make a definitive 'finding' on any of the

¹ <http://www.delni.gov.uk/public-interest-disclosure-guidance-2014.pdf>

² Department for Business Innovation & Skills, 'Prescribed Bodies: Annual Reporting Requirements on Whistleblowing, Government Response' (March 2015), p 9.

concerns that it has received: it is more important that the organisation records and publishes claims that can reasonably be identified as being a PIDA claim.

2.2 Where should the report be published – on each organisation’s website, within existing annual reports or to the NIA for example?

We would like each report to be available online so as to be easily accessible to workers, their representatives, regulators, civil servants, researchers, etc.

2.3 When should the report be published – at the end of the financial year for example?

Our preference is for the reports to be published as part of the annual report process i.e. at the end of the calendar year.

It would be extremely useful if DEL could produce a single report on an annual basis that collates all the individual reports from the different regulators. Essentially this would serve as a summary of (disclosed) whistleblowing activities and would serve as a handy reference point for any organisation or agency seeking to identify patterns.

2.4 Will this duty to report create additional burdens on your organisation?

Not really. Where relevant, we would advise our clients / advice line callers that the regulator is required to report the concern.

3. Should the current definition of worker be amended to include student nurses for Public Interest Disclosure purposes?

Yes. We support this proposal, however it should also be extended to apply to student doctors and student social workers (who may not be covered by PIDA when their training takes place in a work setting).

We note that Public Concern at Work has suggested that legislation should be further amended to include volunteers, interns, non-executive directors, public appointments, priests and ministers of religion, foster carers, members of armed forces, job applicants and all categories of workers listed under the Equality Act.³ We suggest that DEL considers these additional categories.

³ Public Concern at Work, ‘Evidence to the Public Bill Committee: Small Business, Enterprise and Employment Bill’ accessible here: <http://www.publications.parliament.uk/pa/cm201415/cmpublic/smallbusiness/memo/sb67.htm>

Other issues

Introducing an annual PIDA reporting requirement is a step towards improving the way whistleblowing operates and is perceived to operate. However, we would like DEL to consider other actions, as proposed by the Whistleblowing Commission, to help change cultural attitudes to whistleblowing. Possible actions include:

- a) A Code of Practice with statutory underpinning

The Whistleblowing Commission recommends that the government adopts its draft code of practice and that the code has statutory underpinning.⁴

- b) Legal advice on PIDA in compromise/settlement agreements

The Whistleblowing Commission is concerned about a perception among workers that, where compromise agreements include a non-disparagement or confidentiality clause, that these in effect amount to a gagging clause. As a result, some workers feel that they have been gagged when in actual fact they have not.

To remedy this, the Commission suggests amending the relevant legislation (in Northern Ireland, section 67J of the Employment Rights Order⁵) to be much clearer by stating:

Contractual Duties of Confidentiality

“No agreement made before, during or after employment, between a worker and an employer may preclude a worker from making a protected disclosure”

As a related issue, the Commission also recommends that the legislation governing the provision of legal advice in the event of a compromise or settlement agreement should specifically be extended to include advice on protected disclosures.⁶

The Law Centre invites DEL to consider both these points.

- c) Protection for those seeking advice from Trade Union

Both the Trade Union Congress and the Whistleblowing Commission recommend that individuals should be protected when seeking advice from a trade union i.e. in the same way that they would be when seeking legal advice. The Law Centre supports this proposal.

⁴ A copy of the Commission’s Code of Practice is accessible here:
<http://www.pcaw.org.uk/bsi?email=elizabeth.griffith%40lawcentreni.org>

⁵ <http://www.legislation.gov.uk/nisi/1996/1919/article/67J>

⁶ i.e. Section 245 of the Employment Rights Order – Restrictions on Contracting Out.
<http://www.legislation.gov.uk/nisi/1996/1919/article/245>

d) Extension of the categories of wrongdoing

The Commission suggests that PIDA should contain a non-exhaustive list of the categories of wrongdoing so as to allow more flexibility in workers reporting concerns.

Conclusion

We are pleased to respond to this consultation and would be happy to provide further information if helpful.

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