



National Audit Office

Report

by the Comptroller
and Auditor General

The role of prescribed persons

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This report can be found on the National Audit Office website at www.nao.org.uk

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Summary

1 Whistleblowing is when an employee raises a concern in the workplace that has a public interest aspect to it. Officially, this is called ‘making a disclosure in the public interest’. Concerns can relate to a range of issues, such as social care and clinical failings, financial mismanagement and environmental damage.

2 A whistleblower will usually approach their employer to raise a concern, but in some cases this will not be appropriate. Potential whistleblowers may be concerned that they will suffer some form of detriment from their employer or co-workers as a result of raising a concern. In such instances, an option for a whistleblower is to approach a prescribed person. A prescribed person is someone who is independent of the employee’s organisation, but usually has an authoritative relationship with the organisation, such as a regulatory or legislative body.

3 The Department for Business, Innovation & Skills (the Department) is responsible for the legislation that denotes prescribed persons and has begun to provide support to the network of prescribed persons. However, individual prescribed persons play an important role in ensuring that whistleblowing arrangements across government operate effectively and as intended.

Scope of this investigation

4 This is our third report on whistleblowing. In our first report, we evaluated the whistleblowing policies of 39 government bodies and highlighted good practice. In our second report we reviewed how a number of these policies translated into practice. In this report we examine the system of prescribed persons, looking at:

- contacting a prescribed person;
- how a concern is handled; and
- how the system works for whistleblowers.

5 This report is aimed at the prescribed person community. It shows how prescribed persons can improve whistleblowing arrangements to better support and encourage whistleblowing and make better use of intelligence that they provide. Some prescribed persons choose not to categorise whistleblowing concerns from other types of concern, but our report is relevant to the handling of all concerns raised, of which whistleblowing is a subset.

6 The National Audit Office, as part of the prescribed person community, is committed to working alongside the Department and other prescribed persons to implement these recommendations, share knowledge and experience and embed a culture of continuous improvement.

7 As part of this report, we assessed the activity of 5 prescribed persons, as well as examining our own activities under the Comptroller and Auditor General's role as a prescribed person. However, the findings and recommendations are for consideration by all prescribed persons. We also met a range of stakeholders and drew on the experience of whistleblowers directly.

Key findings

8 It is not clear what is expected from the prescribed persons community.

The Department is responsible for the legislation that enables whistleblowers to claim compensation for detriment or dismissal. This legislation includes the list of prescribed persons. However, it does not specify the expectations of the role. For example, prescribed persons are not required to investigate every concern or to give feedback. The Department has recognised the need to act and has recently established a working group to develop best practice for prescribed persons.

9 Prescribed persons and the Department could do more to explain their remit.

It is important that whistleblowers contact the correct prescribed person. Raising a concern with the 'wrong' prescribed person could leave the whistleblower less likely to be protected under the legislation. We assessed the websites of our sample of prescribed persons. We found overall that prescribed persons could do more to explain the roles and responsibilities to potential whistleblowers. Generally, staff working for a prescribed person do not know much about a prescribed person's role and responsibilities.

10 Prescribed persons could do more to manage whistleblowers' expectations.

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. A prescribed person's decision of what action to take can be complex, depending on factors such as the prescribed person's remit, the gravity of the concerns raised and other intelligence held about similar concerns. Prescribed persons could do more to explain how they make a decision on what further action to take. For example, websites could give more information on how concerns raised with them will be handled.

11 Prescribed persons are well prepared to handle concerns. We found our sample of prescribed persons had a central team in place for handling concerns. Each prescribed person had a defined set of procedures. The staff most likely to handle a concern had a good level of knowledge of the responsibilities associated with working for a prescribed person and had high levels of confidence in handling such concerns. Complaints about the way prescribed persons handle concerns are rare.

12 There is widespread activity to improve procedures. All prescribed persons we examined have recently carried out, or are in the process of carrying out, some review of their activity or guidance. Some of these reviews are routine assessments, others are a response to operational difficulties or previous weakness in performance. The Care Quality Commission is reviewing its procedures for handling whistleblowing as part of a wide-ranging review of its regulatory role. However, there are opportunities for sharing good practice across the system that are being missed.

13 Contacting a prescribed person does not in itself prevent the whistleblower suffering detriment or dismissal. While prescribed persons have an important role to play in encouraging and supporting whistleblowers, an employment tribunal determines whether an employee has suffered detriment. The Department understands that whistleblowers may feel the balance of power is in favour of the employer, given the financial resources available to an employer, and that the burden is on the whistleblower to enforce their legal rights. However, the Department's view is that the law is designed to strike a balance between employer and employee. Public Concern at Work monitors and analyses all judgments and has concluded that, in its opinion, the legislation is too complex and not always interpreted consistently. The Whistleblowing Commission, established by Public Concern at Work, recommended that the law be reviewed and simplified.

14 Whistleblowers can experience negative outcomes but the government does not monitor how whistleblowers are treated. The government aims to ensure that whistleblowers are protected from suffering any detriment, but for individual whistleblowers all redress is retrospective. However, the government is unable to collect the data it needs to know how well it is achieving this. Of the 28 whistleblowers we spoke to, 9 were suspended or asked to leave, 3 were placed on extended leave and 3 remained in the organisation despite experiencing detriment. The remaining 13 left voluntarily or experienced no change in their status. In all, 10 took their concerns to an employment tribunal. Without robust and consistent information the Department will find it difficult to know how well the system is working. It will not be able to create a system where employers are held to account if an employee experiences detriment after raising a concern, which is essential to the integrity of the system and protection for future whistleblowers. Neither will it be able to understand where concerns are adequately acted on.

Concluding remarks

15 Our case study organisations have demonstrated a sound commitment to improving their procedures for handling concerns raised. This includes working with staff to raise awareness of the role of a prescribed person. Prescribed persons could do more to work together to share best practice and improve. However, it is fair to say that a gap remains between whistleblowers' expectations and the actions of prescribed persons, and it is unlikely that it will ever be fully closed. Whistleblowers will, on occasions, continue to feel let down by the arrangements in place and this will not encourage potential whistleblowers to raise concerns with confidence.

16 The Department has an important role to play to support the prescribed persons community in implementing these actions. In addition, wider government has a role to play – in policy development, removing barriers, understanding the experience of whistleblowers and acting where detriment is suffered.

Recommendations

17 To provide more confidence in the system, prescribed persons should work together to:

- a** publish more information to help reassure potential whistleblowers. This information could include details of their procedures, factors considered when deciding whether to investigate and details of how whistleblowers' information is used. Simply publishing volumes of cases alone will not be sufficient to increase confidence. However, it is important that prescribed persons publish examples of where the system has worked to improve confidence;
- b** manage whistleblowers' expectations by clearly communicating the prescribed person's powers, remit and responsibilities;
- c** explain to all staff who work for a prescribed person how they are expected to handle concerns; and
- d** share expectations of what good whistleblowing policies and procedures look like with the bodies they oversee.

18 The Department can support the network of prescribed persons by:

- a** ensuring that prescribed persons understand their responsibilities within the legislation;
- b** working with existing bodies to oversee and develop a set of good practice guidance. This should set out what a prescribed person should do in handling a concern and promoting their role. It should include procedures, remit, communication, guidance and a feedback mechanism to help reduce any gap in expectations;
- c** reviewing whether prescribed person status should apply to all bodies capable of handling a concern, and/or make the legislation apply to all cases involving detriment or dismissal; and
- d** working with other bodies to collect more accurate data on employment tribunal outcomes for whistleblower cases. It should also assess how well organisations are tackling the causes of the detriment or dismissal, including the sanctions applied to individuals. In assessing this, it should consider whether there is a need for greater powers to enforce sanctions on those who have been found to have subjected a whistleblower to detriment or dismissal.