Response to the Department for Business, Innovation and Skills
call for evidence

The whistleblowing framework

November 2013
THE WHISTLEBLOWING FRAMEWORK

Response submitted on 01 November 2013 by the Fraud Advisory Panel to the Department for Business, Innovation and Skills call for evidence on ‘the whistleblowing framework’ published in July 2013.

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INTRODUCTION

1. The Fraud Advisory Panel (the ‘Panel’) welcomes the opportunity to comment on the call for evidence on ‘the whistleblowing framework’, published by the Department for Business, Innovation and Skills (‘BIS’) on 12 July 2013, a copy of which is available from this link.

WHO WE ARE

2. The Fraud Advisory Panel is a registered charity and membership organisation which acts as the independent voice and leader of the anti-fraud community in the United Kingdom.

3. Established in 1998 the Panel works to encourage a truly multi-disciplinary perspective on fraud. It has almost 300 corporate and individual members, drawn from the public, private and voluntary sectors and across a variety of professions.

4. The Panel works to raise awareness of the immense damage fraud does to individual lives, the national economy and society at large and to encourage everyone, in every walk of life, to play their part in reducing it.

5. This response has been prepared on behalf of the Fraud Advisory Panel by a special project group of interested members from the Fraud Investigation and Legal Process Working Group. The Fraud Investigation and Legal Process Working Group brings together individuals from the business community, law enforcement, and the legal and accountancy professions to consider issues relating to the investigation process, criminal and civil procedures, arbitration and mediation.

6. Members of the special project group included Howard Brown, Tim Harvey and Andrew Price. It was chaired by David Clarke, a trustee director of the Fraud Advisory Panel and a former detective chief superintendent.
GENERAL POINTS

7. On 05 July 2013 the Fraud Advisory Panel responded to Public Concern at Work’s (‘PCAW’) consultation paper on a ‘whistleblowing commission: strengthening law and policy’.

8. We believe that there is a significant overlap between the current consultation and the previous PCAW consultation. Therefore rather than develop an entirely new response we have chosen to restate many of the comments we have previously made.

9. The Fraud Advisory Panel is particularly interested in whistleblowing disclosures relating to possible fraud and other forms of financial misconduct.

10. Fraud is a major threat to the citizens, businesses and government of the UK. The National Fraud Authority (NFA) estimates fraud losses to all victims at £52bn per annum: private sector £21.2bn, public sector £20.6bn, individuals £9.1bn, not-for-profit £147m.¹ Yet much fraud still goes undetected and unreported.

11. A 2010 special report by the Panel into the reporting of corporate fraud (both internally within a company and externally to ‘official’ third parties) found a ‘patchwork of reporting obligations with a worrying absence of any common thread.’² Despite the existence of the Public Interest Disclosure Act 1998 (‘PIDA’) a number of inhibiting factors were identified, including misunderstandings, ‘hassle’ and fear of retaliation, which worked to discourage employees from reporting suspicions.

12. Anecdotally this position seems to remain largely unchanged. Blowing the whistle is still all too often perceived as committing professional suicide, even when it is in the public interest. A fundamental cultural shift is urgently required to encourage and protect those who dare to come forward from victimisation.

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13. Consequently, the Fraud Advisory Panel believes that the PIDA is not working as effectively as it could be at the moment. An example of how the PIDA has failed to live up to expectations is the paucity of successful prosecutions brought as a result of whistleblowing in the financial crime sector.

14. Although the Serious Fraud Office (‘SFO’) has a whistleblower hotline, no rewards are paid. The Office of Fair Trading (OFT) is able to offer financial rewards up to £100,000 for information passed on to it about cartel behaviour, but we believe that this has not yet been used. By comparison, under the Dodd-Frank Act the US Securities and Exchange Commission (‘SEC’) has the ability to award between 10 – 30% of monies recovered to whistleblowers and on 01 October 2013 it awarded US$14m to one such whistleblower.3

15. In 2012, the SFO undertook 22 cases, of which eight related to bribery and corruption. Thus far, there has not been a single prosecution under the Bribery Act 2010 initiated by the SFO against a company/corporation. This could be due, in part, to the huge cost of investigating such cases by traditional methods but also to the absence of informants/whistleblowers who are encouraged to step forward under the current regime.

16. Although the current consultation paper covers a wide range of issues that are of interest to our members, we have chosen to limit our response to specific questions where we felt our expertise and input would add most value specifically focusing on wrongdoing in relation to fraud and financial crime.

RESPONSES TO SPECIFIC QUESTIONS

Section 1: Categories of disclosure which qualify for protection

Q1: Are the categories sufficient to capture all potential instances of wrongdoing that may require public disclosure?

Q2: If no, what additional categories should there be? Please provide any relevant evidence to support this.

17. The Fraud Advisory Panel believes that legislation should be consolidated and reformed to more broadly and uniformly define who may qualify for protection as a whistleblower (see paragraphs 24 to 28), and the categories of conduct that will qualify for protection.

18. US whistleblower programmes cover a broad range of wrongdoing exposed by whistleblowers. For example, under the Dodd-Frank Act, the most common types of wrongdoing reported relate to corporate disclosures and financials, offering fraud and manipulation. Other categories of complaints with lower reporting percentages relate to insider trading, trading pricing, Foreign Corrupt Practices Act violations, unregistered offerings, market events, and municipal securities and public pension. Moreover, the SEC allows for individuals to choose ‘other’ as the type of allegation when making a claim, which enables whistleblowers to provide tips on additional possible wrongdoing that does not fall within the other categories.4 Similarly, for the US False Claims Act, whistleblowers have reported a wide range of fraudulent activities. The types of fraud that have recently been the focus of False Claims Act litigation include off-label promotion of drugs,5 bribes paid by medical device manufacturers to physicians for using their devices,6 submission of false claims by charging Medicare/Medicaid for more expensive procedures or for individual procedures instead of submitting claims as a package,7 submitting false claims for health care services that were not medically necessary or were not actually performed,8 and defence contracts fraud.9 This may have increasing relevance to the UK position where, for example, the National Health Service (‘NHS’) is becoming increasingly exposed to multi-national corporations as

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they seek an increasing slice of its budget, and as the NHS becomes even more privatised.

19. Likewise, under the IRS whistleblower programme, categories of wrongdoing encompass any type of violation of the internal revenue laws, including refusing to pay or underpaying taxes.\textsuperscript{10}

**Section 2: Methods of disclosure**

Q3: Do these methods of disclosure affect whether a whistleblower might exposure wrongdoing? Yes or No?

Q4: If yes, how (or why)?

Q5: Do these conditions deter whistleblowers from exposing wrongdoing? Yes or No?

Q6: If yes, how (or why)?

Q7: Do these conditions encourage whistleblowers to exposure wrongdoing? Yes or No?

Q8: If yes, how (or why)?

Q9: How clear and understandable are the conditions that need to be met to ensure that the disclosure is protected?

Q10: If you have answered yes to questions 3, 5 and 7 please provide any evidence you have to support your response.

Q11: What changes, if any, do you think are needed to the qualification conditions?

20. The Fraud Advisory Panel has no comments to make in respect of questions 3 to 11 of the call for evidence.

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\textsuperscript{10} See 26 USCA. section 7623 (West).
Section 3: Prescribed persons (I)

Q12: Should this system be amended, to one where the prescribed person/body list can be updated by the Secretary of State without the need for a statutory instrument? Yes or No.

Q13: Do you foresee any problems with a system where the prescribed person/body list can be updated by the Secretary of State? Yes to No.

Q14: If yes, please explain why.

Q15: Are there any other ways to accurately reflect prescribed persons/bodies? (For example, a general description with general characteristics which a prescribed person/body can be recognized by?

21. The Panel notes that currently Members of Parliament and many of the regulators of the professions are not included and consider they should be included within the definition of prescribed persons. The Panel has not sought to identify each individual that ought to be prescribed. Rather, it appears to the Panel that a test of reasonableness ought to be included by which to judge whether a report was made to an appropriate authority on any individual case.

Section 4: Prescribed persons (II)

Q16: Should the referral of whistleblowing claims to prescribed persons/bodies be made mandatory? Yes or No.

Q17: If yes, please provide any evidence you have to demonstrate that this could support the regulators’ role.

Q18: What should the prescribed person/body do with the information once received?

Q19: Should prescribed persons/bodies be under a reasonable obligation to investigate all disclosures they received? Yes or No.

22. At the very least prescribed persons/bodies should be under a reasonable obligation at to make an assessment of disclosures received and to record actions taken (if any). Investigations should be conducted unless it is deemed wholly unreasonable to do so.
23. Regulators should also take an interest in the whistleblowing arrangements of the organisations that they regulate, and to encourage and promulgate best practice. They should be especially alert to the opportunities and threats presented by the ever evolving market for ‘big data’ analytics. Advances in analytical software tools particularly those used for compliance within regulated financial firms are staggering and have been proved to be able to identify some forms of serious wrongdoing that could negate the need for whistleblowers or corroborate their information. In the same vein, it remains to be seen whether the identity of a whistleblower, police informant or any other person for that matter can realistically be kept anonymous from organisations that have the resources to analyse big data. The use, manipulation and protection of data is a topical matter and one which is expected to grow in line with the vast increases in online data. Regulators should fully understand both the potential and limitations of data analytical software tools used by the organisations they regulate. To this end, the Panel stresses the importance of preserving the independence of regulators to prescribe regulations and/or undertake enforcement activity relating to whistleblowing.

Section 5: Definition of worker

Q20: Does the current definition of worker exclude any group that may have need of the protections afforded to whistleblowers? Yes or No.

Q21: Is yes, what groups are these?

Q22: Please provide any evidence to demonstrate these groups require protection.

24. Yes. The Fraud Advisory Panel believes that the current definition of worker excludes groups that may have need of the protections afforded to whistleblowers.

25. As part of our 2010 special project into corporate fraud reporting we recommended that ‘the legal and regulatory frameworks for whistleblowing need to be enhanced and
extended to require companies to consider formal adoption and extend PIDA protection to volunteers and non-executive directors’.  

26. The requirement for charities, in particular, to act in the public interest, and the obligation resting on trustees’ to safeguard charitable funds, add weight to the inclusion of volunteers within the definition of ‘worker’ in the PIDA. Previous research by the Panel on fraud in charities found that 60% of respondents had no anti-fraud policies and procedures in place at all. The other 40% had at least one or more measures in place. These were most likely to be a whistleblowing policy (18%), fidelity or crime protecting insurance (16%) and/or a risk register that includes fraud (14%). Unsurprising then, that few frauds were detected through whistleblowing mechanisms; the same proportion as those detected by accident (9%).

27. It is worth noting that for US whistleblower programmes, the definition of whistleblower is wider than an employee. For example, under the Dodd-Frank Act, a whistleblower is ‘any individual who provides ... information relating to a violation of the securities laws to the Commission in a manner established, by rule or regulation, by the Commission’.  

Similarly, under the US False Claims Act, whistleblowers are ‘any persons or entities with evidence of fraud against federal programmes or contracts.’ In addition, under the IRS regime, whistleblowers are ‘people who provide specific and credible information to the IRS if the information results in the collection of taxes, penalties, interest or other amounts from the noncompliant taxpayer.’ For these whistleblower programmes, so long as the qualified individual or entity has information that another individual or entity has violated the law, he, she and, in certain circumstances, it, may qualify as a whistleblower.

28. The broad definition of whistleblower and broad categories of wrongdoing under the US whistleblower programmes have proved to be effective in detecting fraud. According to a 2007 survey, while professional auditors were only able to detect 19% of the frauds

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12 See section 21F(a)(6), 15 USC. section 78u-6(a)(6). (Emphasis added)
on private corporations, whistleblowers exposed 43% of the frauds.\textsuperscript{15} The SEC reported that, for the fiscal year 2012, 3,001 whistleblower tips, complaints, and referrals were received, which included a wide range of complaint categories and submissions from ‘individuals in all 50 states, the District of Columbia and the US territory of Puerto Rico, as well as 49 countries outside the United States.’\textsuperscript{16} With regard to the US False Claims cases, the Justice Department reported that it ‘secured US$4.9b in settlements and judgments in civil cases involving fraud against the government in the fiscal year ending 30 September 2012.’\textsuperscript{17} This amount constitutes a ‘record recovery for a single year ... and brings total recoveries under the False Claims Act since January 2009 to US$13.3b.’\textsuperscript{18} As the experiences of US whistleblower programmes have shown, expanding the definitions of whistleblowers and wrongdoing should be strongly considered for the purposes of the PIDA.

Section 6: Job applicants

Q23: What impact does whistleblowing have on the individual's future employment, e.g. if there are issues around 'blacklisting' or other treatment?

Q24: Please provide any relevant evidence to confirm whether these practices are taking place.

29. As discussed above in paragraph 12, blowing the whistle can often be seen as professional suicide and may decrease the chances of obtaining work.

Section 7: Financial incentives

Q25: Would a system of financial incentives be appropriate in the UK whistleblowing framework? Yes or No.

Q26: If yes, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrongdoing?


\textsuperscript{16} See SEC. Annual Report of the Dodd-Frank Whistleblower Program, Fiscal Year 2012.’


\textsuperscript{18} Ibid.
Q27: If no, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrongdoing?

Q28: Where are financial incentives used as an effective measure to prevent wrongdoing / illegal activity? For example, in certain industries.

30. There is a case for examining whether financial rewards should be offered to whistleblowers. However, nothing should be done which might undermine the undoubted moral duty on all citizens to report concerns about alleged wrongdoing and/or criminal activity that is related to their workplace. Similarly, financial rewards should not create perverse incentives that might encourage false or delayed reporting of wrongdoing or cause doubts to be raised about the credibility of a whistleblower and their evidence were they to become a witness in future criminal or civil proceedings.

31. We would draw attention to the US experience of incentivising whistleblowing. In recognition of the genuine risks faced by whistleblowers, US whistleblower programmes do provide financial incentives to whistleblowers. For example, SEC whistleblower programme provides monetary awards to eligible whistleblowers who voluntarily provide original information leading to successful SEC enforcement actions and certain other related actions resulting in the imposition of monetary sanctions over US$1m, with awards in the range of 10% to 30% of the sanctions collected.\(^{19}\) Whistleblower awards are paid from the SEC’s Investor Protection Fund, the proceeds of which come from undistributed monetary sanctions obtained in judicial or administrative actions brought by the SEC.\(^{20}\) The US regards whistleblowers as vital to the public interest in detecting and exposing illicit and fraudulent conduct.\(^{21}\)

32. The experience of the more recently enacted US whistleblower programmes has shown that financial incentives have and do motivate whistleblowers to come forward.

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\(^{20}\) See Dodd-Frank Act, section 922(g).

\(^{21}\) See, e.g., 2010 Senate Comm. Report, at 110 (observing that, prior to the US’s enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (‘Dodd-Frank Act’) whistleblower program, whistle-blower tips were 13 times more effective than the US Securities and Exchange Commission’s external audits in uncovering fraudulent schemes by public companies).
Despite the risks. Indeed, US government officials and investigators alike have applauded the significant benefits resulting from information provided by whistleblowers. For instance, they have observed that the tips provided to the SEC and US Internal Revenue Service (‘IRS’) in connection with their whistleblower programmes have been greater in volume and of better quality.

33. At the same time, US agencies with whistleblower programmes expressed little concern that providing financial incentives to whistleblowers might induce illegitimate claims. The SEC’s whistleblower programme includes ‘robust and comprehensive review processes’ which they claim can be readily implemented for weeding out illegitimate claims.

34. Processes adopted by the SEC’s whistleblower programme may help to prevent claims that are false and unfounded but it is questionable whether they can prevent a whistleblower with a legitimate claim from taking action that could hinder an investigation and increase their reward; for example, exposing their identity to the press.

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22 See SEC, Office of Inspector General, Office of Audits Evaluation of the SEC’s Whistleblower Program, Report No. 511, at 22-23 (Jan. 18, 2013), http://www.sec-oig.gov/Reports/AuditsInspections/2013/511.pdf (‘The two most detailed studies we reviewed concluded high rewards can motivate potential whistleblowers to come forward because the monetary award may mitigate the cost of professional and social sanctions that can result.’); see also 2010 Senate Comm. Report, at 110 (‘[The Dodd-Frank Act whistleblower program] provides for amply rewarding whistleblower(s), with between 10% and 30% of any monetary sanctions that are collected based on the ‘original information’ offered by the whistleblower. The program is modelled after a successful IRS Whistleblower Program enacted into law in 2006. The reformed IRS program, which, too, has a similar minimum-maximum award levels and an appeals process, is credited to have reinvigorated the earlier, largely ineffective, IRS Whistleblower Program. The Committee feels the critical component of the Whistleblower Program is the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.’); see also Speech by SEC Chairman, Mary L. Shapiro: Opening Statement at SEC Open Meeting: Item 2 – Whistleblower Program (May 25, 2011), http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm (‘Today’s rules are intended to break the silence of those who see a wrong. . . . Already, the whistleblower provision of the Dodd-Frank Act is having an impact. While the SEC has a history of receiving a high volume of tips and complaints, the quality of the tips we have received has been better since Section 922 became law. And we expect this trend to continue.’).

23 See Speech by SEC Chairman, Mary L. Shapiro: Opening Statement at SEC Open Meeting: Item 2 – Whistleblower Program (May 25, 2011) (‘Finally, in deciding upon the appropriate amount of an award, the rule indicates that the Commission will focus on the timeliness and quality of a whistleblower’s assistance. Already, I have heard stories from our investigators about how whistleblowers have saved us weeks of investigation time because of the specific, credible and timely information they provided.’); see also SEC Press Release: SEC Issues First Whistleblower Program Award (Aug. 21, 2012), http://www.sec.gov/news/press/2012/2012-162.htm (noting that since the establishment of the SEC’s whistleblower program, the SEC is receiving approximately 8 tips per day); see also US Secretary of Treasury, Fiscal Year 2012 Report to the Congress on the Use of Section 7623, at 6, http://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress.pdf. (‘During FY 2012, the IRS received 332 whistleblower submissions relating to 671 taxpayers that, based on the face of the submissions, appear to meet the threshold of $2,000,000 in tax, penalties, interest, and additions to tax in section 7623(b). Many of the individuals submitting information to the IRS claimed to have inside knowledge of the reported transactions, often including extensive documentation in support of their claims.’).

24 See SEC, Office of Inspector General, Office of Audits Evaluation of the SEC’s Whistleblower Program, Report No. 511, at 22-23 (Jan. 18, 2013) ('We solicited views from other federal government agencies with whistleblower programs on the minimum and maximum award levels that are established in their programs. . . . [R]eponents were not particularly concerned that award levels could induce illegitimate claims since they were confident their review process would weed out illegitimate claims through independent corroboration of asserted facts.').

when there is an opportunity to provide them with anonymity and delaying their report in order to maximise the size of the reward available.

35. Where a whistleblower who has received or may later receive a financial reward for their information is required to provide witness evidence in civil or criminal proceedings, the receipt or potential for a reward could call into question the credibility of their evidence. However such accusations of lying or exaggerating in order to receive a benefit are frequently levelled against co-operating suspects under section 71 – 73 of the Serious Organised Crime and Police Act 2005 ('SOCPA').26 The court process is able to deal with such allegations, and as such this does not undermine the rationale for introducing the SOCPA legislation nor for amending the PIDA legislation to incorporate a reward mechanism.

36. The Fraud Advisory Panel welcomes the government’s introduction of a test that will require whistleblowers to raise concerns which are in the public interest in order to gain legal protection and giving tribunals the power to deduct a percentage from damages where bad faith is found. The Panel views this as a good step in deterring inappropriate behaviour and believes other issues may be mitigated by applying additional criteria to a rewards scheme that:

- Favours early reporting
- Discourages the deliberate withholding of information
- Takes account of a whistleblower’s actions in respect of minimising their exposure to risk, and
- Has the option to defer payment of a reward pending the outcome of criminal or civil proceedings.

37. In summary, financial incentives may not only compensate whistleblowers for the immense risks they face in coming forward with critical information, but, in the US at least, have proved to be a powerful and effective tool for government agencies to root out illegal activity and conduct. For these reasons, extending current legislation so that

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financial incentives (with strict criteria for their award) are available to whistleblowers should be considered as a possible option.

38. Rewards might be funded from any sanctions, penalties and/or damages recovered. In terms of non-financial wrongdoing, it would be helpful to establish minimum sanction amounts for conduct that rises to a certain level of culpability (perhaps intentional or reckless disregard of applicable law), based upon the seriousness of the conduct at issue (related to a determination as to whether the conduct relates to the integrity of the financial or other applicable market), so that a funding mechanism would exist to compensate whistleblowers, as well as finance government enforcement efforts, which can serve as a means to deter undesirable conduct along with the consequential, reputational damage associated with the establishment of a sanction regime that includes economic and non-economic elements.  

Section 8: Non-statutory measures

Q29: How would the introduction of non-statutory measures make a difference?

Q30: What types of non-statutory measures could Government consider to support the statutory framework?

39. The Fraud Advisory Panel is pleased to note that Government is considering what non-statutory steps could be taken to encourage a cultural change within business and the public sector to remove the stigma of whistleblowing and help individuals under the protections currently afforded by legislation.

40. Requirements already exist for some organisations and professionals to report fraud to regulatory and/or law enforcement agencies. However in circumstances where regulatory or legal obligations do not exist, organisations should be encouraged to voluntarily adopt whistleblowing arrangements as a matter of good governance and best practice.

41. Commercial organisations subject to the Bribery Act 2010 should also consider the establishment of whistleblowing procedures for the reporting of bribery as part of their adequate procedures.\(^{29}\)

42. The British Standard PAS 1998:2008 Whistleblowing Arrangements Code of Practice provides a suitable framework for the establishment of whistleblowing arrangements. It may now be timely to review, update and more energetically promote the Standard to organisations operating in non-regulated sectors.

43. We believe that a risk-based approach (RBA) is the best approach to whistleblowing. Organisations should be encouraged to identify and introduce policies, systems and procedures that they consider to be most appropriate in responding to the unique needs and risks of their business and to have the flexibility to modify and adapt these as necessary to changing circumstances and business practice. To be truly effective, sector-specific guidance should be made available to organisations to dissuade the practice of taking a ‘tick-box’ approach.

**Section 9: Further evidence**

Q31: Please provide any further evidence in support of any issues you feel should be reflected through this call for evidence but have not been captured in the main document.

Q32: Please provide any case studies of situations where a whistleblower has had a positive outcome with their employer after blowing the whistle.

44. The Fraud Advisory Panel has no comments to make in respect of questions 31 and 32 of the call for evidence.

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