Input by the Transparency Task Force to the Department for Business and Trade's Review of the Whistleblowing Framework

https://www.gov.uk/government/publications/review-of-the-whistleblowing-framework/review-of-the-whistleblowing-framework-terms-of-reference

Thank you, Minister.

As you will read, we are very concerned about the UK's whistleblower framework and we believe the evidence shows it is in urgent need of reform.

We are therefore very grateful to the Minister for the opportunity afforded to feed in to this important Review, and we stand by ready to support in any way that we can.

About the Transparency Task Force and our approach to the Review

The Transparency Task Force (TTF) is a Certified Social Enterprise with a mission to "promote ongoing reform of the financial sector so it serves society better".

We've developed and successfully executed ***"our strategy for driving change"***, which is"

> ***"To bring together those with a sense of passion and purpose for the change we want to see; and those with the power and position to make change possible."***

In particular, we're particularly pleased about:

- Our engagement with politicians, especially
    - Our running the secretariat to The All-Party Parliamentary Group on Personal Banking and Fairer Financial Services - an APPG we helped to initiate

    - Our successful campaigning that has led to three Parliamentary inquiries being opened - see here, here and here
- Our media presence, including the BBC Panorama programme in which we were featured very prominently and a BBC Radio 4 programme, the Transparency Detectives
- Our ongoing scrutiny and challenge of the Financial Conduct Authority (FCA); which we believe is failing to deliver on its consumer protection remit
- Our sub-brands, including The Rally for Better Financial Regulation and The International League of Ethical Financial Services Leaders
- Our role in the successful launch and ongoing success of the free-to-use public utility, Violation Tracker UK

Given our specialisation in financial services, it has made sense for us to focus our input on aspects of whistleblowing relevant to that sector. Furthermore, much of our knowledge base is built on the first-hand experience our members have gained as a consequence of their interacting with the FCA. As mentioned earlier, we are actively involved in the ongoing scrutiny and challenge of the FCA, an organisation that the evidence shows is failing to deliver on its consumer protection responsibilities.

That evidence includes testimony about the FCA that has been put into the public domain by the APPG on Personal Banking and Fairer Financial Services, as part of the output from its Call for Evidence about the FCA, which attracted over 170 submissions. Several of those responses were from financial services whistleblowers, unsurprising as one of the seven question sets developed for Call for Evidence was tailored specifically for whistleblowers.

Most, if not all of those whistleblower testimonies (which included responses from existing and former FCA employees) describe a horrendous experience after having blown the whistle.

We urge the reader to review some of that testimony, particularly the testimonies provided by:

- George Patellis
- Nicholas Wilson
- Paul Carlier
- Steve Middleton
- “Lesley”

Their testimony can be found amongst those here; note the page takes a while to open.

Fresh testimony prepared for the Review; and a shockingly stark conclusion

On Tuesday, 3rd October, TTF ran an online event especially for the purpose of sharing our collective experience of the failure of the UK's whistleblowing framework with the Department for Business and Trade, in relation to its Review.

The details of the event we ran are here.

In broad terms, our collective view is that the combination of law and practice does not work in the public interest and that radical reform, including in relation to governance structures and the hierarchy of oversight, is needed to tackle the very obvious deficiencies in the existing whistleblowing framework.

The shockingly simple yet stark conclusion we have come to, is that:

IT IS SIMPLY NOT SAFE FOR PEOPLE IN THE UK TO BLOW THE WHISTLE

The most direct way to understand the reason for that shockingly stark conclusion is to watch the recording of the event, through which, amongst many other things, you will come to understand how and why we are inspired by the words of Robert F Kennedy, shown here for convenience:

"EVERY TIME WE TURN OUR HEADS THE OTHER WAY WHEN WE SEE THE LAW FLOUTED; WHEN WE TOLERATE WHAT WE KNOW TO BE WRONG; WHEN WE CLOSE OUR EYES AND EARS TO THE CORRUPT BECAUSE WE ARE TOO BUSY, OR TOO FRIGHTENED; WHEN WE FAIL TO SPEAK UP AND SPEAK OUT—WE STRIKE A BLOW AGAINST FREEDOM AND DECENCY AND JUSTICE."

….and thereby why we attach such importance to speaking out against what is wrong.

You can watch the event by simply clicking here; in our opinion the event contains remarkably powerful testimony from several speakers, particularly Paul Carlier and we really do urge you to watch it.

Quoting a comment from one of the attendees at the 3 October event,

"I used to be proud of the UK's rule of law and the integrity of its officials - now I am much less certain, having seen the hard evidence produced by Paul Carlier"

And there is also powerful testimony and evidence in Paul's slides, available here.

Despite the beliefs we hold to be true as set out above, we would like to discuss our shockingly stark conclusion, that would-be financial services whistleblowers are not safe if they choose to speak out, at a meeting with relevant individuals at the Department for Business and Trade, and suggest it is a matter of some urgency for us to do so.

During the discussion/s we propose to have, we shall elaborate on these key points:

- The data in Violation Tracker UK shows the financial services sector to be the most violating of all the industries in the UK (based on the amount of fines since 2010) and further analysis shows it to be highly recidivist, which not only points to the likelihood that some financial services firms consider fines for malpractice to be a 'cost of doing business' but also that the principal conduct regulator (the FCA) is ineffective at driving good conduct into the market.

  These points are being made here because they support the idea that the very positive role performed by whistleblowers should be fully supported and protected - the good that they do is desperately needed in the financial services sector.

  However, the reality couldn't be any further from the truth - the financial services sector treats whistleblowers abominably - as we shall go on to show.

- The financial services regulatory framework favours the industry rather than the individual blowing the whistle:
  - There is a clear motivation evident in the fact patterns of real cases shared, for senior employees at commercial firms to protect the companies they work for.
  - This pattern even extends to the senior individuals in public service roles including at the regulators, who are motivated by an agenda to protect themselves as individuals and their organisations from embarrassment and blame for their failings.
  - The loser of course is the public interest in general and also whistleblowers in particular.

- The whistleblowing framework creates a deception; an illusion of protected shelter under law for the whistleblower that doesn't actually exist, giving rise to false comfort and a pretence of a solution. As this reality becomes better known, it is understandably less likely that whistleblowers will come forward; and that's obviously the opposite of what's needed. This is a case where transparency would help whistleblowers, who are currently systematically and deliberately tricked out of the protections which legislation was clearly intended to give them, ruining lives in the process.

- The law should therefore be amended to recognise that whistleblowers are not trained in law and their complaints must all be reviewed by a totally and demonstrably independent agency; and that proper restitution is due. This is a route for Parliament to follow.

- We do not believe the FCA always acts with integrity, including when they have dealt with whistleblowers. The notion that the FCA may have tendencies to be dishonest and even to be unlawful is supported by recent press coverage, where it has been shown to have acted knowingly unlawfully through its use of an 'intercept and divert' policy which has adversely impacted a range of stakeholders including whistleblowers. Further detail about the issue is available here and in particular, here.

- The FCA's own whistleblower form must be urgently changed: Presently, it deliberately fails to ask the whistleblower to state what regulation has been broken, even after the FCA has been alerted to the extreme adverse consequences this poses for whistleblowers. This is a truly tragic situation, because amongst other things that employees who speak up internally encounter at employment tribunals, is that because they have failed to state which financial rule they believe is being broken when making their disclosure, **the court does not consider them to be a whistleblower**, because they have failed to obtain whistleblower status (despite thinking they have) as they have not explicitly stated which rule/s have been broken.

  It is vital for his or her protection in law that the whistleblower responds in writing at the time of whistleblowing to these questions (or something very similar) in full, even though he or she may be discouraged from doing so by employer or even FCA;

  "Have you ever witnessed any actions or conduct that, in your reasonable belief, breached any law, regulatory code or applicable or relevant policy?

  If so, please explain which law, code or policy you believe was breached."

  Both of the questions above must be stated to help ensure the whistleblower is not cheated out of whistleblower status.

  And as explained elsewhere it is very troubling that whistleblowers are not being guided to provide that vital testimony by either Protect or the FCA.

  As explained, the FCA's own form for whistleblowers does not ask those making a disclosure to say which rules they believe are being broken. Why? The inexperienced

whistleblower is in effect being led straight into a tactical trap from which it is unlikely they will ever escape.

- The issue explained above, where the individual is denied whistleblower status, is one of the most significant flaws in PIDA. The matter is made even worse because Protect is continuing to fail to use its influence to put things right; it consistently fails to give whistleblowers the right advice, despite being challenged on this matter many times, by Paul Carlier and others.

  Why is Protect, which exists to protect whistleblowers, deliberately failing to protect whistleblowers and is actively putting them in harm's way, by behaving in a manner that fools whistleblowers into thinking they are protected, with whistleblower status, when they are not?

  It is surely even worse than having no protection at all to think you ARE protected when in fact you are NOT! **This is an untenable and morally bankrupt situation that must be brought to an end by the Review.**

- The FCA has a track record of failing to protect whistleblowers; Paul More RIP is one of the highest profile individuals who was let down terribly by the regulator.

- In the Foreword to the Silence in the City 2 report by Protect (on page 2) Protect's Chief Executive Liz Gardiner suggests that it is surprising that a high proportion of whistleblowers are treated poorly:

  "While our sample are whistleblowers who have self-identified as in need of advice - we were shocked to find that still 7 in 10 of those raising concerns were victimised for doing so and a third reported that their concerns were ignored.

  But why are Liz Gardiner and Protect surprised? - when those that follow Prootect's policy advice on how to blow the whistle safely (supposedly a topic that Protect are subject-matter experts on) are very likely to experience a very poor outcome because they will not get whistleblower status if they do not state which law, code or policy they believe was breached.

  So even the mildest scrutiny of the facts challenges Protect's narrative - it is perfectly obvious that there will always be a high level of harm if whistleblowers are led through a perilously precarious and poisoned process 'like lambs to the slaughter'.

And perhaps this perilously precarious and poisoned process explains why such a small percentage of whistleblowers win at Tribunal? - some reports suggesting the win rate may be as low as 4%

Why such an appallingly poor statistic? The answer is simple - whistleblowers are being misdirected, i.e. they are literally being guided to do what is most definitely not in their interests; by entities that supposedly have their interest at heart. This is an egregious breach of natural justice.

- **But it is not just Protect that needs to be challenged; the same applies to the FCA. We have heard testimony of a credible whistleblower who, during a telephone call with a member of the FCA's whistleblowing team, was literally coached into NOT specifying which rules have been broken. More details available on request.**

So why are both Protect and the FCA misdirecting whistleblowers?

- The testimony of Paul Carlier, which is amply and shockingly supported by documents recently acquired from the FCA using the provisions of GDPR, shows that the whistleblower policy of Lloyds does not appear to be worth the paper it is written on, even if followed in a precisely correct manner, because case law overrides it. It is likely that the flaws of Lloyds' policies are not unique; there needs to be a thorough review, and that review should start with the major banks and any other organisation known to be heavily influenced by Protect's policy on whistleblowing processes - because it is fundamentally flawed.

- This issue also probably extends to the whistleblower policies of, and guidance provided by, most if not all companies in the financial sector. We are not suggesting that most companies are deliberately tricking potential whistleblowers of their rights, and we would like to believe that most would willingly change their policies and guidance if the disconnect with case law were properly publicised.

  But the problem is that they are following what has been deemed to be good practice, as defined by Protect, which it is most certainly not.

- The UK has thus far failed to absorb international best practice in relation to whistleblowing frameworks. We urge the Department for Business and Trade to consider the benefits of absorbing the thought leadership expressed by the USA's Government Accountability Project.

- Furthermore, we are particularly keen that serious consideration be given to the merits of the entirety of the protections and measures found in the EU Directive,

especially articles 19 (prohibition of retaliation) and 20 (measures of support). Whistleblowers must be protected from all forms of retaliation (direct and indirect) and should receive compensation for any injury, loss or damage they incur due to retaliation.

- The issue of poor treatment of whistleblowing is symptomatic of wider policy capture within regulators and corporates. Here vested parties are incentivised to thwart public challenge of the industry or its regulator. In many ways, lobbying and policy capture are the very antithesis of whistleblowing. A regulator that can be managed by the industry to the benefit of its self-interest is the outcome of policy capture.

  The issues just mentioned relate to the topic of the systemic reluctance to put the interests of the consumer first - a subject covered in the Redington prize-winning essay, entitled ***"What would be a sustainable economic and finance system for the public interest?"*** available here.

- Lobbyists operate beneath public scrutiny and seek to influence and manipulate from within. Policy capture thus creates a culture that allows and indeed self-reinforces certain malfeasant behaviours to perpetuate within the City and dissuades any open challenge. It also creates a 'loose lips sinks ships' culture, one that quickly outcasts whistleblowers as pariahs, which can have drastic effects to employment prospects, industry reputation and colleague relations/engagement.

- Whistleblowing ultimately seeks to challenge, to cast light on these behaviours and issues into the public domain through either regulatory channels or the media. It is a necessary catharsis to check poor cultures and behaviours. To this end solutions to improve whistleblowing align well to reducing policy capture within regulators and corporate firms.

- Capture also creates a revolving door where executives move between regulator and regulated with impunity, which impedes independent oversight and more critically engenders poor cultures which further denigrate whistleblowing efforts. Indeed, it is the mobility and future mobility of policy makers that allows capture to fester and incentivises poor treatment of whistleblowers.

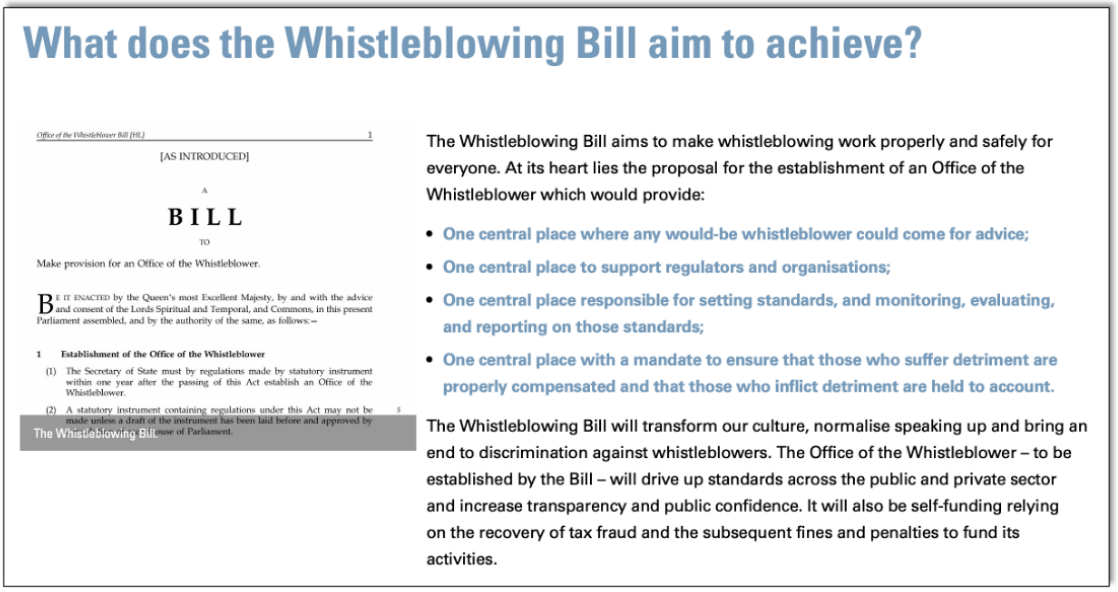
- We encourage the reader to consider that the issues facing whistleblowing are endemic of wider cultural dysfunction and review the work on policy capture in the US by NGO Preventable Surprises.

- **In far too many instances, there is a 'David v Goliath' asymmetry of power, resource and experience that works heavily against the whistleblower**.

  Whistleblowers are not trained in whistleblowing law and they are at a massive disadvantage. To help counter this, there ought to be what is in effect, a genuinely independent whistleblower champion, to act as the whistleblower's mentor and coach - to guide and support and in particular to point out the pitfalls and the trip-wires and to work with the whistleblower to protect his/her interests as best as possible.

  We therefore wholeheartedly support the idea of the creation of an Office of the Whistleblower; and hope that it can be established in a way that will fully protect its independence and integrity in the short, medium and long term.

  For further details, please see [the manifesto of the APPG on Whistleblowing] and its reference to the Whistleblowing Bill, the key points being:



What does the Whistleblowing Bill aim to achieve?

Office of the Whistleblower Bill [HL] 1

[AS INTRODUCED]

A

BILL

TO

Make provision for an Office of the Whistleblower.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

1 Establishment of the Office of the Whistleblower

(1) The Secretary of State must by regulations made by statutory instrument within one year after the passing of this Act establish an Office of the Whistleblower.

(2) A statutory instrument containing regulations under this Act may not be made unless a draft of the instrument has been laid before and approved by

The Whistleblowing Bill

The Whistleblowing Bill aims to make whistleblowing work properly and safely for everyone. At its heart lies the proposal for the establishment of an Office of the Whistleblower which would provide:

- One central place where any would-be whistleblower could come for advice;
- One central place to support regulators and organisations;
- One central place responsible for setting standards, and monitoring, evaluating, and reporting on those standards;
- One central place with a mandate to ensure that those who suffer detriment are properly compensated and that those who inflict detriment are held to account.

The Whistleblowing Bill will transform our culture, normalise speaking up and bring an end to discrimination against whistleblowers. The Office of the Whistleblower – to be established by the Bill – will drive up standards across the public and private sector and increase transparency and public confidence. It will also be self-funding relying on the recovery of tax fraud and the subsequent fines and penalties to fund its activities.

- PIDA is not fit for purpose; it is riddled with serious flaws. For example, why is there a requirement for an individual to be an employee before they can secure the protections potentially available to a whistleblower?

  It makes no sense to deny people the protections potentially available to those that want to speak out against wrongdoing they have become aware of.

- Those who seek to expose the wrongdoing by those in powerful positions in companies and organisations such as the FCA often encounter what can be thought

of as 'the patronising disposition of unaccountable power'. Such individuals seem to operate with impunity, refusing to disclose vital information, contriving and falsifying evidence and so on. We recognise these allegations to be serious; they are mean seriously, and we would be happy to share the evidence we have that motivates us to make such claims - you can start with watching the event we held on Tuesday 3rd October, as mentioned earlier.

- The word 'pulverised' is a good descriptor for how many financial services whistleblowers feel about their life experience. The devastation sometimes leads to suicidal ideation.

- There are prima facie clear indications of collusion between banks, the FCA as regulator, the complaints commissioner and even police, to the detriment of the whistleblower. This needs to be monitored, and punitive action taken where necessary against specific individuals and organisations involved.

- There are parallels with the Post Office committing the biggest legal travesty of justice against sub postmasters who were falsely accused of theft as a result of a faulty IT system (Horizon) built by Fujitsu. The PO colluded with Fujitsu to ensure that sub postmasters, as a result of the malfunctioning software, were criminally found guilty of theft destroying lives, careers, marriages and in some cases resulting in suicide. Again no criminal charges have been brought against the individuals in the Post Office and Fujitsu who committed this travesty of justice. Why is this so? Government should be asked this question.

- The empirical evidence suggests that the FCA cannot be trusted to look after the interests of whistleblowers (amongst other things). That thought leads us to the question 'Quis custodiet ipsos custodes?' The Government needs to ensure a sufficiently robust scrutiny and accountability body is put in place to oversee the work of the FCA. There is a TTF proposal for such an entity here; it is an evolution of what has been put in place in Australia, following the Royal Commission into severe financial services misconduct there.

  Perhaps it's time for the UK to have something similar? We also believe that so long as the FCA has on its board a majority of members with industry affiliation, the culture of cronyism will never be addressed, however many regulations are introduced supposedly to try and guide behaviour.

- One of the problems with existing whistleblowing law is that it does little to protect the whistleblower from unfair and vindictive (and sometimes illegal) treatment by the employer. This is often discreet and below the line.

- Technology may provide a partial, but still insufficient, solution to the problem, if it can provide anonymity to the whistleblower.
  For example:

    - An internal procedure (probably an AI system) where if there is more than one anonymous complaint (say three) about an issue or person, a ‘red flag’ is raised that instigates an internal investigation from a Trusted Ethics Team (or similar) within the organisation that is trusted by both sides.
    - This would work particularly for sexual behaviour or bullying issues where if an individual was mentioned three times, ‘alarm bells’ would ring.
    - If the investigation does not result in a resolution then the complainants could go to an independent, external website where the issue is escalated, again under the protection of anonymity

  However - it is not beyond imagination that ways would be found within companies of defeating this “solution”, where a Chief Executive demands to know the identity of a whistleblower, regardless of what policies are in place, as disgracefully perpetrated by Jes Staley, when Chief Executive of Barclays.

Suggested next steps

As mentioned earlier, we suggest one or more meetings to discuss our input; and we suggest Paul Carlier be included in the discussion/s.

If you would like to discuss any of the ideas proposed in this document, please contact Andy Agathangelou, Founder of Transparency Task Force, at this address: andy.agathangelou@transparencytaskforce.org