

**RESULTS OF A FTSE TOP 100 WEBSITE**  
**SURVEY ON WHISTLEBLOWING**  
**ARRANGEMENTS.**

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# **EXECUTIVE SUMMARY**

- For the purposes of this survey, the FTSE top 100 companies were identified at the beginning of August 2018 <sup>1</sup>and their websites were scrutinised between August and October 2018.
- Of the 10 firms who did not appear to mention such a procedure (or policy) on their website: 2 had under 500 staff; another 5 had 10,000 - 100,000; 2 had 100,001 – 200, 000 and 1 had more than 200,001.
- In relation to who has overall responsibility for the procedure, some aspect of the audit function was most frequently mentioned.
- 21 firms had a system in place for monitoring concerns raised under the procedure/policy.
- Given that interns and volunteers are not normally protected by whistleblowing statutes, it was encouraging to find that 26 firms gave both access to their procedures.
- The three most frequently used mechanisms for making people aware of the procedure were printed policy statements (69 firms); internet web pages (29 firms); and specifically targeted training (17 firms).
- The most frequently mentioned categories of reportable concerns were financial irregularities (70 firms); malpractice (67 firms) and health and safety (65 firms). These are in line with previous empirical studies but we were interested to note the express mention of modern slavery by 15 firms and human rights by an additional 4.
- In terms of mechanisms for reporting concerns, those featuring most frequently are telephone calls (46); oral reports (41); and emails (28). ‘Hotlines’ were also very common, with external ones being mentioned slightly more often than internal ones (31 compared to 27).

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<sup>1</sup> London Stock Exchange. <https://www.londonstockexchange.com/exchange/prices-and-markets/stocks/indices/constituents-indices.html?index=UKX>

- As regards the person to whom concerns should be reported, the line manager was identified by 57 firms.
- A wide variety of alternative recipients were displayed on the websites. The most common were: human resources (28); external providers (27) and internal 'hotlines' (21).
- Consistent with previous research, confidentiality was more readily available (61 firms) than anonymity (35 firms).
- Given the change in the UK law in 2013, it is slightly disappointing to see that 28 of the FTSE top 100 still required disclosures of information to be made in good faith. None of the websites suggested that firms had incorporated the statutory public interest test into their procedure/policy.
- 31 firms indicated that their procedure provided for disciplinary action to be taken against those who victimise a person reporting a concern.
- Given that UK employers have now had 20 years since legislation was passed to introduce whistleblowing procedures voluntarily, we think there is now a strong case for making them mandatory in both the public and private sectors. One effect might be that the FTSE top 100 (and other employers) would be encouraged to identify best practice in their sector and incorporate it into their arrangements. We hope that this report provides some pointers as to what best practice involves.

## INTRODUCTION

In the employment context, it has been argued that whistleblowing <sup>2/</sup> confidential reporting procedures should be encouraged for a number of reasons. First and foremost, reporting may be vital to preserve the health and safety of both the workforce and the general public. More generally, those who raise concerns can benefit their employers by offering solutions to work problems. Thus whistleblowing/confidential reporting procedures can be viewed as part of a risk or quality management strategy.<sup>3</sup> Indeed, if people do not have a mechanism for raising their concerns within an organisation, then either the problem will not be dealt with or the individual will feel obliged to air the issue externally. In this situation an organisation might lose control of the matter and suffer serious financial and/or reputational harm.

The purpose of the Public Interest Disclosure Act 1998, which inserted a new Part IVA into the Employment Rights Act 1996 ( henceforward ERA 1996), is “to protect individuals who make certain disclosures of information in the public interest”. Although this legislation indirectly encourages the use of internal reporting procedures, it does not oblige employers to introduce them. Official guidance is available in the form of a British Standards Institute Publicly Available Specification entitled ‘Whistleblowing arrangements Code of Practice’ <sup>4</sup> and a non-binding document from the Department for Business, Energy and Industrial Strategy. <sup>5</sup> More directly relevant to the research

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<sup>2</sup> According to the Department for Business, Energy and Industrial Strategy (DBEIS), “whistleblowing is the term used when a worker passes on information concerning wrongdoing”. *Whistleblowing: guidance and code of practice for employers*. 2015. page 3.

<sup>3</sup> See Transparency International: *The Business Case for Whistleblowing*. 2017

<sup>4</sup> PAS 1998: 2018.

<sup>5</sup> DBEIS. *Whistleblowing: guidance and code of practice for employers*. 2015

outlined below, the UK Corporate Governance Code 2018 states as a principle that: “The board should ensure that workforce policies and practices are consistent with the company’s values and support its long-term sustainable success. The workforce should be able to raise any matters of concern”.<sup>6</sup> In addition, page 5 provides as follows: “There should be a means for the workforce to raise concerns in confidence and – if they wish – anonymously. The board should routinely review this and the reports arising from its operation. It should ensure that arrangements are in place for the proportionate and independent investigation of such matters and for follow-up action”.

Since the research described below reveals that 88 of the FTSE top 100 firms operate in more than one country,<sup>7</sup> it is appropriate to refer to other sources that might put pressure on multi-nationals to maintain effective whistleblowing procedures. Arrangements for reporting have become even more important in the UK since the implementation of the Bribery Act 2010 Section 7, which provides a defence to employers who have “adequate procedures” to prevent bribery taking place. In the US, Section 301 of the Sarbanes-Oxley act 2002 amended Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78f) to add the following: “(4) COMPLAINTS- Each audit committee shall establish procedures for--(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable

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<sup>6</sup> Page 4. Financial Reporting Council. July 2018.

<sup>7</sup> 12 operated in 2-5 places; 20 firms were operational in 6-20 countries; 30 in 21-50 places; 19 were in the range 51-100 and the remaining 7 operated in over 100 countries.

accounting or auditing matters”.<sup>8</sup> Most recently, a draft EU Directive was tabled in 2018 ‘on the protection of persons reporting on breaches of EU law.’ Article 4 (1) of this document provides that: “Member States shall ensure that legal entities in the private and in the public sector establish internal channels and procedures for reporting and following up on reports, following consultations with social partners, if appropriate.”<sup>9</sup> At the time of writing,<sup>10</sup> it is difficult to know how such a Directive would impact a Brexited UK but the very tabling of the measure reinforces the case for employers who operate in the EU to have whistleblowing arrangements.<sup>11</sup>

## **BACKGROUND TO THIS RESEARCH**

In 2006/7 a postal survey of FTSE top 250 firms was funded by the British Academy<sup>12</sup> and a repeat of this exercise was conducted in 2010 with sponsorship from SAI Global.<sup>13</sup> The positive response rate was 32% in the earlier research and 26% in 2010. Although these figures were higher than might have been anticipated for this type of research, it was decided in 2018 that a study which did not depend on the cooperation of individuals in these

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<sup>8</sup> 70% of the FTSE top 100 appeared to operate in North America.

<sup>9</sup> Article 4 (3) states that: “The legal entities in the private sector referred to in paragraph 1 are the following: a) private legal entities with 50 or more employees; b) private legal entities with an annual business turnover or annual balance sheet total of EUR 10 million or more; c) private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing, as regulated under the Union acts referred to in the Annex.

<sup>10</sup> November 2018

<sup>11</sup> 95% of the FTSE Top 100 appeared to operate in Europe.

<sup>12</sup> Lewis, D. 2008. *A survey of whistleblowing/confidential reporting procedures used by the FTSE top 250 firms*. Centre for Legal Research, Middlesex University. 28 pages. ISBN 978-0-9555964-1-4.

<sup>13</sup> Lewis, D and Kender, M. 2010 *A survey of whistleblowing/confidential reporting procedures used by the FTSE top 250 firms*. SAI Global and Middlesex University.

firms might be useful.<sup>14</sup> Thus the Law School at Middlesex University made funds available for a website survey of publicly available information about whistleblowing arrangements.

Inevitably, in a website survey, empirical data about the actual use of policies/procedures would be more difficult to obtain and qualitative assessments made by those operating them would be lacking. However, on this occasion our focus was on what information was in the public domain as it was thought that this in itself might reveal the approach being taken to the role of whistleblowing in FTSE firms. Indeed, the Financial Reporting Council's *Guidance on Board Effectiveness*<sup>15</sup> identifies "Whistleblowing, grievance and 'speak –up' data" as a source of cultural insights.

## **METHODOLOGY**

The task of searching for and documenting data in these circumstances was believed to require specialist knowledge and expertise. The person recruited not only had considerable experience as a senior human resources manager but also has specific interest in the field of whistleblowing. The 100 companies were identified at the beginning of August 2018, that being 20 years and one month since the Public Interest Disclosure Act 1998 was passed.<sup>16</sup> The websites were scrutinised between August and October 2018 so it is possible that the information displayed by a firm has changed subsequent to our research.

## **AIMS AND OBJECTIVES**

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<sup>14</sup> Previous research had also confirmed that several FTSE firms have a policy of not participating in surveys.

<sup>15</sup> July 2018. Page 7.

<sup>16</sup> The legislation came into force in July 1999.



In the light of the above, the aims and objectives of this research were to:

- 1) ascertain the extent to which the FTSE top 100 firms have introduced, monitored and revised their confidential reporting/whistleblowing policies/procedures.
- 2) examine the content of the policies/procedures displayed on their websites.
- 3) compare the current situation with that found to exist in previous surveys.
- 4) make recommendations about how reporting procedures could be improved and good practice disseminated.

## **RESULTS:**

### **THE EXISTENCE OF A WHISTLEBLOWING (OR SIMILARLY NAMED) PROCEDURE/POLICY <sup>17</sup>**

3 firms appeared to employ <sup>18</sup> less than 500 staff and another 2 had between 501 -1000 staff. 23% had 1001 -10,000 staff; <sup>19</sup> 36% had 10,001 -50,000; 20% had 50,001 -100,000; 14% had 100,001 -500,000 and 2 had over half a million staff.

Of the 10 firms who did not appear to mention such a procedure on their website: 2 had under 500 staff; another 5 had 10,000 -100,000; 2 had 100,001 – 200, 000 and 1 had more than 200,001. By way of comparison, all 64

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<sup>17</sup> The DBEIS Code of Practice asserts that “It is considered best practice for an employer to: have a whistleblowing policy or appropriate written procedures in place”.... *Whistleblowing: guidance and code of practice for employers*. 2015.

<sup>18</sup> This word was used although we are aware that it is sometimes used to cover both those who are legally defined as “employees” and “workers” in the Employment Rights Act 1996

<sup>19</sup> 50% of those supplying information in the 2010 FTSE top 250 survey had less than 10,000 staff. Similarly, only 6% of those supplying information in 2007 had over 100,000 staff whereas 16% of the current FTSE Top 100 fell into this category.

respondents in our 2010 survey stated that they had a procedure and it was suggested then that those without a procedure were less likely to respond.

Although 60 firms had a separate whistleblowing (or similarly named) policy none of the 10 apparently without a procedure had one.<sup>20</sup> Of the 10 companies appearing not to have either a procedure or policy, one operated in the UK only and 2 of the remaining 9 worked in 20+ countries. Using the companies house standard industrial classification, we discerned that 3 of the 10 were in the wholesale and retail trade,<sup>21</sup> 2 were in finance and insurance<sup>22</sup> and another 2 were in administration and support services.<sup>23</sup>

## **RESPONSIBILITY FOR THE PROCEDURE/POLICY AND A SYSTEM FOR MONITORING CONCERNS**

In relation to overall responsibility, information was only visible on the websites of 35 firms. 15 mentioned some aspect of the audit function [i.e. Head of Audit (13), Director of Risk and Audit (1) or the audit committee (1)]; 7 identified the Compliance Officer; 4 referred to an ethics team or committee; 3 mentioned the Company Secretary; 2 mentioned the Board; 2 mentioned Group Solicitor/General Counsel and the Chief Executive and Conduct Manager were both identified once. In 2010 the people most likely to have overall

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<sup>20</sup> One had an Anti-Bribery and Corruption Policy. The DBEIS guidance states: “some organisations may choose to have a standalone policy whereas others may look to implement their policy into a code of ethics.....” *Whistleblowing: guidance and code of practice for employers*. 2015. page 6.

<sup>21</sup> 13 of the FTSE top 100 appeared to fall within this category.

<sup>22</sup> 22 of the FTSE top 100 appeared to be operating in this industry. It is worth noting that detailed guidance on whistleblowing is provided by the relevant regulator, the Financial Conduct Authority. See *Whistleblowing in deposit-takers, PRA-designated investment firms and insurers*. Policy Statement. October 2015 PS15/24.

<sup>23</sup> The others were in manufacturing, information and communication and accommodation and food service activities.

responsibility were the company secretary (35% of those supplying information)<sup>24</sup> and auditors (27%)<sup>25</sup>.

In terms of having a system in place for monitoring concerns raised under the procedure/policy, 21 suggested that this was the case. It was evident that monitoring was used for the following purposes: to ensure concerns are investigated in a timely and appropriate way (19 firms);<sup>26</sup> to measure performance (10 firms); identify trends (9 firms) and highlight problems (7 firms). Of the 21 firms, 11 had more than one purpose detectable.

The frequency of monitoring was identifiable in 13 organisations: 8 of these were annually, 4 were quarterly and one suggested “as issues arise”.

## **TO WHOM DOES THE POLICY/PROCEDURE APPLY?**

Part IVA of the Employment Rights Act 1996 gives rights to workers who make protected disclosures and provides a broad definition of a worker.<sup>27</sup> Thus a critical issue for an organisation is whether a procedure should be open only to its own staff or extended to others who might be in a position to raise concerns about wrongdoing, for example, contractors, suppliers, volunteers, interns or members of the public.<sup>28</sup>

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<sup>24</sup> This is was notably higher than the 21% in our previous survey.

<sup>25</sup> For these purposes we aggregated the returns that mentioned internal audit, audit committee, chair of the audit committee and director/head of audit.

<sup>26</sup> Only 3 of these specified time limits that should be adhered to for investigations

<sup>27</sup> See Sections 43K and 230 ERA 1996.

<sup>28</sup> Article 2 of the draft EU Directive suggests a broad personal scope (our emphasis): “1. This Directive shall apply to reporting persons working in the private or public sector who acquired information on breaches in a work-related context including, *at least*, the following: a) persons having the status of worker, with the meaning of Article 45 TFEU; b) persons having the status of self-employed, with the meaning of Article 49 TFEU; c)

It was evident from the websites that 75 firms covered employees but we would expect that in practice all such procedures would have such staff in mind. The next largest category was contractors (37) and third was suppliers (27). Most encouraging was the fact that 26 firms indicated that interns and volunteers are covered - neither category is currently protected by UK legislation. As regards firm size, interns and volunteers were proportionately less likely to have access in firms with less than 10,000 staff – 19% compared with 28% in the survey overall. However, at 35%, their access in firms with over 50,000 staff was proportionate.<sup>29</sup> In terms of prevalence in particular industries, coverage was extended to volunteers and interns in 5 of 13 firms in Mining and Quarrying, 5 of 12 in Manufacturing and 4 of 9 in Information and communication. Perhaps surprising given the detailed guidance available in the sector, only 3 of 22 firms in Financial and insurance activities appeared to include volunteers and interns.

18 firms appeared to include the self-employed and 15 appeared to apply the policy/procedure to sub-contractors. Other identified were customers (7); agency staff (6); members of the public (4); temporary workers (2) and business partners (1).<sup>30</sup>

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shareholders and persons belonging to the management body of an undertaking, including non-executive members, as well as volunteers and unpaid trainees; d) any persons working under the supervision and direction of contractors, subcontractors and suppliers. 2. This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information concerning a breach has been acquired during the recruitment process or other pre-contractual negotiation.”

<sup>29</sup> Such firms constituted 36% of the survey overall.

<sup>30</sup> In 2010, all respondents indicated that employees could use their procedure and 83% said that it could be used by self-employed people. 50% allowed contractors to invoke it, 42% permitted sub-contractors to use it and the same number allowed access by suppliers. 16% stated that members of the public could invoke the procedure. It is worth observing that

## HOW ARE PEOPLE MADE AWARE OF THE PROCEDURE/POLICY? <sup>31</sup>

The three most frequently used mechanisms were printed policy statements (69 firms); internet web pages (29 firms); and specifically targeted training (17 firms). An induction programme and intranet web pages were mentioned by 6 firms and posters were referred to by 5. The following were also utilised: contracts of employment (2 firms); newsletters (2 firms); signing code (2 firms); employee handbook (1 firm); notice board (1 firm); given out by line manager (1 firm) and yearly awareness campaign (1 firm). Most firms appeared to use more than one mechanism. <sup>32</sup>

Given that previous surveys in both the public and private sector had recorded a lack of specialised training for both managers and their staff, we were particularly interested to note the frequency with which targeted training was mentioned on websites. <sup>33</sup> This was most prevalent in Mining and Quarrying (5 of 13 firms) and Accommodation and food service activities (3 of 8 firms).

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respondents in previous public sector surveys were more likely to allow members of the public to access their procedures.

<sup>31</sup> According to the DBEIS Code of Practice “It is considered best practice for an employer to: ...ensure the whistleblowing policy or procedures are easily accessible to all workers; raise awareness of the policy or procedures through all available means such as staff engagement, intranet sites, and other marketing communications”. The guidance goes further by stating that “written policies are not enough” and “actively promoting a policy shows that the organisation is genuinely open to hearing concerns from its staff.” *Whistleblowing: guidance and code of practice for employers*. 2015. page 7.

<sup>32</sup> Previous research in both the public and private sector has demonstrated that the more mechanisms used the more likely it is that a procedure will be invoked.

<sup>33</sup> The DBEIS Code of Practice provides that “It is considered best practice for an employer to: ....provide training to all workers on how disclosures should be raised and how they will be acted upon; provide training to managers on how to deal with disclosures”. According to the guidance, “providing training at all levels of an organisation on the effective implementation of whistleblowing arrangements will help to develop a supportive and open culture”. *Whistleblowing: guidance and code of practice for employers*. 2015. page 5.

In 2010, 65% referred printed policy statements and the same number referred to intranet webpages. However, most frequently mentioned was the induction programme (73% of respondents). 63% used employee handbooks; 55% provided posters; the internet and contracts of employment were mentioned by 26%; email by 23% and newsletters by 19%.

### **WHAT TYPES OF ISSUE CAN BE REPORTED VIA THE PROCEDURE/POLICY?**

In the light of previous research and the provisions of the Bribery Act 2010, we were not surprised to find that financial irregularities were identified most frequently (70 firms). The next largest categories were malpractice (67 firms) and health and safety (65 firms). Discrimination was identified as a reportable issue at 50 firms, with harassment/bullying and sexual harassment being mentioned separately at 35 and 33 firms respectively. Computer misuse featured on 36 websites, alcohol/drug misuse at 31 firms and environmental matters at 28 firms.

Other issues were visible much less frequently but are still of interest. Modern slavery was mentioned by 15 firms and human rights by an additional 4. Modern slavery was identified as a topic at 4 firms in both Mining and Quarrying<sup>34</sup> and the Wholesale and retail trade; repair of motor vehicles and motorcycles. Conflicts of interest were identified on 6 websites with insider information, political interactions and lobbying, trade sanctions, unfair competition and misuse of assets each being mentioned by one firm. Criminal activity was listed by 2 firms.

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<sup>34</sup> Another 2 firms in this industry mentioned human rights.

In many respects these results are consistent with those obtained in the 2010 postal survey. Here 78% of those supplying information mentioned harassment/bullying, 69% cited financial irregularities, 60% identified discrimination and 45% indicated malpractice. Health and safety matters and alcohol/drug abuse were both mentioned by 44%, computer misuse by 31% and environmental issues by 9%.

### **WHAT MECHANISMS ARE AVAILABLE FOR REPORTING CONCERNS?**

Again, a broad range of mechanisms were identified. Those featuring most frequently are: telephone calls (46); oral reports (41); and emails (28).

‘Hotlines’ were also very common, with external ones being mentioned more often than internal ones (31 compared to 26).<sup>35</sup> External ‘hotlines’ were more likely to be found in firms with more than 20,000 staff – 82% compared with 64% of firms of this size having internal ‘hotlines’.<sup>36</sup>

In terms of industrial classification, external ‘hotlines’ were most frequently found in Mining and Quarrying (7 of 13); Electricity, gas, steam and air conditioning supply (3 of 5); Professional, scientific and technical activities (3 of 6); Accommodation and food service activities (4 of 8); Information and communication (4 of 9). Only 7 of 22 firms in Financial and insurance activities mentioned such an external facility and only 2 in this industry mentioned internal ‘hotlines’ on their website. Internal ‘hotlines’ were most prevalent in

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<sup>35</sup> Those identified were: Ethics point/Navex (7) firms; Expolink (6) firms; Safecall (4) firms; Speak up (3); Speak out (1); Ethics line (1); ‘Talk to Peggy’ (1)!

<sup>36</sup> 77% of those with external and 81% with internal ‘hotlines’ seemed to function in more than 5 countries.

Mining and Quarrying (7 of 13), which may reflect the particular consequences of health and safety failures in this industry.

Paper reports and website were both used at 8 firms and focus groups and a webservice were each identified on one occasion.

The telephone was also the most frequently mentioned mechanism in the 2010 survey with the next most common being email, oral reporting, paper reports and then via a website. The 2010 survey included a specific question on 'hotlines'. 75% of respondents indicated that they had one and, of those supplying information, 35% were provided internally and 65% externally.

#### **TO WHOM SHOULD CONCERNS BE REPORTED AND WHO ARE REGARDED AS APPROPRIATE EXTERNAL RECIPIENTS?**

It almost goes without saying that the most appropriate person to contact will depend on the seriousness and sensitivity of the issues involved and who is suspected of wrongdoing.<sup>37</sup> Unsurprisingly, the line manager was identified by 57 firms.<sup>38</sup> The next largest categories were an external provider and internal 'hotlines', which were each mentioned by 6 firms.<sup>39</sup> The Head of Audit, a designated officer and a general email address were visible at one firm each .

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<sup>37</sup> The DBEIS Code of Practice states that "It is considered best practice for an employer to: ....ensure the organisation's whistleblowing policy or procedures clearly identify who can be approached by workers that want to raise a disclosure". *Whistleblowing: guidance and code of practice for employers*. 2015.

<sup>38</sup> In 2010, 68% of respondents indicated that line managers were the initial point of contact.

<sup>39</sup> In 2010, 24% identified an external provider as an initial recipient of a concern and 5% mentioned 'hotlines'. One reason for external providers being used less frequently as an initial recipient of a concern may be that the FTSE top 100 companies are more willing to manage the process themselves where possible.



Only 8 firms stated who were appropriate external recipients - 7 referred to regulators and one suggested a Government department.

### **ARE THERE ALTERNATIVE CHANNELS FOR THOSE WHO MAY NOT WANT TO RAISE A CONCERN WITH IMMEDIATE MANAGEMENT?**

A wide variety of alternative recipients were displayed on the websites.<sup>40</sup> The most common were: human resources (28); external providers (27) and internal 'hotlines' (21). The Head of Legal Services was identified on 17 occasions, the Head of Department on 16 and the Head of Audit on 12. Others indicated by more than one firm were: company secretary (6); compliance manager (4); confidential helpline (4); ethics team (2); chairperson (2); head of finance (2). The following were all mentioned at one firm: chief executive ; helpline and website; ethics line and website; any designated officer ; internal audit ; conduct management ; generic email address; general counsel; money laundering reporting officer.

Again these findings are in some respects consistent with those obtained in our previous FTSE survey. In 2010 human resources was identified by 51% of respondents<sup>41</sup>, the Head of Department and an external provider were both mentioned by 28%, the Chief Executive by 26%, the Head of Legal Services by 18%, and the company secretary by 7% . The most notable difference is the current mention on the FTSE top 100 websites of internal 'hotlines'.

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<sup>40</sup> The DBEIS Code of Practice states that "organisations should ensure a range of alternative persons who a whistleblower can approach in the event a worker feels unable to approach their manager. If your organisation works with a recognised union, a representative from that union could be an appropriate contact for a worker to approach."

<sup>41</sup> This is a lot higher than the 2007 FTSE top 250 survey.

Questions may be asked about whether HR should be recipients of concerns or have a purely oversight role to ensure that the procedure/policy operates as intended. Nevertheless, it is clear that many FTSE Top 100 firms are willing to let HR be involved if people feel comfortable raising concerns with them. Indeed, one argument for putting HR in this position is that staff may well be familiar with how to approach this function about other matters, for example, pay issues, annual leave, benefits, grievances. While there may be some difficulty distinguishing precisely between ‘hotlines’ and ‘helplines’ in this context, it is clear that these two mechanisms are regarded as potentially valuable reporting channels.

## **ANONYMITY AND CONFIDENTIALITY**

45 firms indicated that they allowed a concern to be raised anonymously and, of these, 71% had more than 20,000 staff and only 13% had less than 5000 staff. In 2010, 86% of respondents stated that concerns could be raised anonymously and in the quantitative research for the Francis *Freedom to Speak Review* 83% of respondent trusts said their procedure allowed a concern to be reported anonymously.<sup>42</sup>

As regards confidentiality, 41 specified that this would be maintained in all circumstances and 20 suggested that it would only be maintained if it was legal to do so.<sup>43</sup> In 2010, 98% said that their procedure provided for confidentiality

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<sup>42</sup> The DBEIS guidance suggests that “anonymous information will be just as important for organisations to act upon.” *Whistleblowing: guidance and code of practice for employers*. 2015. page 10.

<sup>43</sup> The DBEIS guidance points out that “the law does not compel an organisation to protect the confidentiality of a whistleblower. However, it is considered best practice to maintain that

and 91% of respondent trusts in the Francis *Freedom to Speak Review* indicated that they provided for confidentiality in reporting.

These results are in line with earlier studies in giving priority to confidentiality rather than anonymity. This is to be expected given the difficulties that can occur in investigating anonymous reports and preserving anonymity. However, the opportunity to conceal their identity may be important to a potential whistleblower who is not convinced that confidentiality will be maintained. Perhaps for this reason the US Sarbanes -Oxley Act 2002 hedges its bets by using the rather confusing phrase “confidential, anonymous submission by employees”.<sup>44</sup>

#### **DOES THE PROCEDURE/POLICY STATE THAT INDEPENDENT ADVICE IS AVAILABLE TO A PERSON REPORTING A CONCERN?**

This was only visible on 5 websites and the sources of advice were: a lawyer (3 firms) and Public Concern at Work (2 firms).<sup>45</sup> In the 2010 survey, 39% of respondents indicated that such advice was available and those most frequently identified were an external provider and Public Concern a Work.<sup>46</sup>

#### **DOES THE PROCEDURE/POLICY IMPOSE A GOOD FAITH AND/OR PUBLIC INTEREST REQUIREMENT WHEN RAISING A CONCERN?**

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confidentiality, unless compelled by law to disclose it.” *Whistleblowing: guidance and code of practice for employers*. 2015. page 10. Some statutes oblige employers and others to disclose wrongdoing to the police, for example, in relation to money laundering.

<sup>44</sup> Section 301 is set out above.

<sup>45</sup> Subsequently renamed as *Protect*.

<sup>46</sup> Both were identified by 26% of those who indicated the possible sources of advice.

In the quantitative research for the Francis *Freedom to Speak Up Review* in 2014, 84% of trust respondents stated that they had a good faith requirement. Given the change in the law in 2013,<sup>47</sup> it is slightly disappointing to see that 28 of the FTSE top 100 still referred to good faith. It appears that about half of the listed firms in Mining and Quarrying (6 of 13); Manufacturing (6 of 12); Professional, Scientific and Technical activities (4 of 6); Professional, Scientific and Technical activities (3 of 6) had a good faith requirement. By way of contrast, only 3 out of 22 in Financial and Insurance activities referred to such a test. Again we suggest that the recent detailed guidance about good practice provided by the Financial Conduct Authority may provide at least a partial explanation for this situation.

It is sometimes difficult to know what people mean by good faith and the uncertainty surrounding the term may well deter potential whistleblowers. Because we believe that attention should focus on the message conveyed rather than the messenger's behaviour/ motive, we are pleased that good faith is no longer required for disclosures of information to attract statutory protection. Indeed, in order to encourage people to report suspicions and not just concrete evidence of wrongdoing, we would advocate that disciplinary action should only be taken if a person has knowingly supplied false information. This appears to be the case at 20 FTSE firms in 2018.<sup>48</sup> About 25% of firms provided for such disciplinary action in Financial and Insurance activities (5 out of 22); Manufacturing (4 of 12); Mining and Quarrying (3 of

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<sup>47</sup> Good faith is no longer a requirement for a disclosure to be legally protected but may be taken into account if compensation is awarded. See Sections 49 (6A) & 123(6A) ERA 1996.

<sup>48</sup> 70% of respondents in the FTSE top 250 survey in 2010 provided for disciplinary action against those who maliciously report.

13); Administrative and Support service activities (3 of 6); and Professional, scientific and technical activities (2 of 6).

Section 17 of the Enterprise and Regulatory Reform Act 2013 introduced a public interest test for information to be treated as a qualifying disclosure and, in the quantitative research for the Francis *Freedom to Speak Up Review* 2014, 10% of the trusts that responded had imposed such a test. None of the websites suggested that the FTSE firms had incorporated the statutory public interest test into their procedure/policy. This is unsurprising given that the test is vague and information about wrongdoing is being sought primarily to serve the employer's interest in efficiency, good governance, risk management etc. Indeed, in the private sector shareholders may well point out that, apart from the need to abide by the law, the public interest is of no relevance to them unless it has the effect of maintaining or increasing the value of their stock.<sup>49</sup>

**DOES THE PROCEDURE/POLICY IDENTIFY ANY FORMS OF SUPPORT THAT MAY BE AVAILABLE TO A PERSON RAISING A CONCERN?**

Again relevant information was discernible on 4 websites. The offerings here consisted of: appropriate support; management support; reasonable support and a wellbeing service.<sup>50</sup> Only one firm indicated that a person could be represented by someone of their choice in any meeting to discuss their concern.

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<sup>49</sup> For a fuller discussion see Lewis, D. 2015 "Is a public interest test for workplace whistleblowing in society's interest?" *International Journal of Law and Management* Vol. 57. No.2 2015. pp 141-158. ISSN 1754-243X

<sup>50</sup> None of them defined what the support in any of these categories entailed.

### **DOES THE PROCEDURE/POLICY INCLUDE A TIMESCALE FOR HANDLING CONCERNS?**

Only 3 firms indicated that they had a timescale for addressing concerns. These were: 10 working days, 14 days and 60 days.

### **ARE PEOPLE KEPT INFORMED ABOUT THE HANDLING OF A REPORT AND, IF SO, HOW IS THIS DONE?**

In addition to the firms where information about the handling of reports was not accessible, 45 appeared not to mention feedback.<sup>51</sup> Where it was referred to, the most frequent method appears to be oral feedback (14 firms). Emails and 'by reference number' were identified at 3 firms and the following were available at 2 firms: letter; through website; and 'by hotline pin'. A unique code, ethics line and 'by contacting the external provider' were each identified at one firm respectively.

### **DOES THE PROCEDURE/POLICY SET OUT WHO A PERSON CAN APPROACH IF THEY ARE DISSATISFIED WITH THE OUTCOME OF AN INVESTIGATION?**

Only 6 firms indicated on their website that this was the case and the following were identified: chair/head of audit (3); audit committee (1); group investigations and forensic audit (1); and ethics point (1).

In 2010, 52% of respondents answered affirmatively and the persons most frequently identified were the company secretary and auditors.

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<sup>51</sup> The DBEIS Code of Practice provides that "It is considered best practice for an employer to: .....provide feedback to the worker who raised the disclosure where possible and appropriate subject to other legal requirements. Feedback should include an indication of timings for any actions or next steps".

## **DOES THE PROCEDURE/POLICY PROVIDE FOR DISCIPLINARY ACTION TO BE TAKEN AGAINST THOSE WHO VICTIMISE A PERSON REPORTING A CONCERN?**

31 firms indicated that this was case,<sup>52</sup> 6 of these mentioning the possibility of dismissal. Firms with more than 50,000 staff were proportionately more likely to provide for disciplinary action -45% compared with 36% overall; and firms with less than 10,000 staff were proportionately less likely to make such provision – 19% compared with 28% overall.

In the 2010 survey, 78% stipulated that disciplinary action could be taken against those who victimise.<sup>53</sup> Again, we appreciate that firms might not want to draw attention on their website to the possibility of reprisals being taken against whistleblowers.

## **DURATION OF PROCEDURE AND PROVISION FOR REVIEW**

It is understood that these may not be the most important pieces of information to display on a website. However, data about duration was visible in the case of 29 firms. Whereas 19 indicated that their procedure/policy was first introduced within the last three years, 10 (34%) had arrangements which had been in place for more than five years (including 3 that had existed for 10+ years).<sup>54</sup>

Frequency of monitoring may reflect a variety of factors, including the number and nature of concerns being raised, the type of business, changes in the law and particular problems caused by external whistleblowing. 15 firms appeared

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<sup>52</sup> Another firm stated that retaliation “will not be tolerated” but did not expressly refer to disciplinary action.

<sup>53</sup> In the quantitative research for the Francis *Freedom to Speak Up Review*, of the respondent trusts which expressed a view, 80% stated that provision was made for disciplinary action to be taken against those who victimise anyone reporting a concern.

<sup>54</sup> In the 2010 FTSE top 250 survey, 45% stated that their procedure had been in existence for more than 5 years.

to have reviewed their procedure/policy since it was implemented. Of the 13 offering information, one reviewed annually and another in 2015; 3 had reviewed in 2016; 5 in 2017 and 3 in 2018. 6 firms indicated that their procedure/policy had been amended.

In the 2010 survey, 40% of the organisations supplying information monitored their procedures annually, 23% did so quarterly and 21% every two years.

### **DOES THE FIRM OFFER REWARDS OR AWARDS TO THOSE WHO RAISE A CONCERN?**

There was no evidence on any of the websites of awards or rewards being available. It almost goes without saying that FTSE firms may well be acknowledging the value of whistleblowers in a variety of ways that are invisible to the public. Whereas reward systems may lead to questions about why a person speaks -up, other mechanisms can be invoked to recognise the value of information being disclosed about wrongdoing. For example, the willingness to raise and listen to concerns could be criteria for appointment or promotion and financial or non-financial awards might be made on a discretionary basis.

### **CONCLUSIONS AND RECOMMENDATIONS.**

Our research in both the public and private sector since 2003 reveals that organisations are increasingly willing to make their whistleblowing/confidential reporting procedures available to people who are not employed by them. This may simply be a result of the increased incidence of outsourcing and the gig economy generally. However, it might also demonstrate that there is some appreciation that procedures should exist in order to encourage the raising of concerns and not merely as a legal defence mechanism.



It almost goes without saying that there is little point in having a procedure if people are not aware of its existence. Thus we think it desirable that, as a matter of principle and good practice, organisations display their whistleblowing arrangements on their websites. Similarly, we would expect firms to use a variety of methods to communicate these arrangements to those who are employed by them. Perhaps reassuring in the internet age, we found that the FTSE top 100 firms were continuing to use printed policy statements in addition to other mechanisms.

That firms were more likely to provide for confidential than anonymous reporting is unsurprising given that the latter is often difficult to handle. In the writers' opinion, if reporting is to be encouraged, a procedure should assure potential users that, whenever possible, the organisation will protect the identity of those who raise a concern and do not want their name revealed.<sup>55</sup>

To some extent the FTSE results in both 2018 and 2010 reflect UK society's increased use of 'hotlines' for a variety of different purposes. Clearly, further research is needed on this mechanism for raising concerns about wrongdoing. For example, does the provision of a 'hotline' relate to the nature or size of the business, the costs involved, the organisation's relative lack of expertise compared with that of an external provider or the desire to outsource as much as possible? It would also be interesting to explore the attitude of trade unions to 'hotlines'. Is it possible that they are now seen less as a threat to union

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<sup>55</sup> The DBEIS Code of Practice provides that "It is considered best practice for an employer to: ...undertake to protect the identity of the worker raising a disclosure, unless required by law to reveal it and to offer support throughout with access to mentoring, advice and counselling".

autonomy than a vital outlet for those who have no confidence in the other reporting channels available to them? <sup>56</sup>

Because it may be difficult to report financial irregularities elsewhere, it is understandable why firms want them reported via whistleblowing procedures. However, as with the earlier studies, there are serious questions to be asked about whether discrimination, bullying/harassment, health and safety, computer misuse and alcohol/drug abuse issues ought to be channelled through specialist procedures. It is hardly conceivable that organisations can function without specialist procedures in 2018, so do the whistleblowing arrangements serve as an alternative rather than a backstop? For example, can the whistleblowing procedure be invoked if workers are unaware of a relevant specialist procedure or feel that the issue has not been properly dealt with under that procedure? It is also possible that there is a problem of overlapping procedures which needs to be addressed.

A comparison of the results obtained in our previous FTSE studies with the results of this website analysis reinforces the view that respondents to our postal surveys were probably those who adhered to best practice. Our snapshot in 2018 suggests that while some firms appeared to operate sophisticated policies and procedures others did not (at least publicly) display even the essential rudiments of acceptable arrangements. Inevitably, we are bound to recommend that those firms that are still at first base in their thinking should take a long hard look at what others in their field are doing. Benchmarking on the basis of recognisable criteria is perfectly feasible and

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<sup>56</sup> On trade unions as potential recipients of concerns see: Lewis, D and Vandekerckhove, W. 'Trade unions and whistleblowing process: an opportunity for strategic expansion'. 2018. *Journal of Business Ethics*. Issue 4. ISSN 0167-4544.

there are many sources of information about how to go about this.<sup>57</sup> However, given that employers have now had 20 years to introduce whistleblowing procedures voluntarily, we think there is a strong case for making them mandatory in both the public and private sector. Not only would such a move be consistent with the draft EU directive but it would accord with international best practice. For example, in Ireland Section 21(1) of the Protected Disclosures Act 2014 requires public bodies to “establish and maintain procedures for the making of protected disclosures by worker who are or were employed by the public body and for dealing with such disclosures.” Section 21(4) stipulates that such bodies must have regard to the statutory guidance that has been issued in relation to these duties.<sup>58</sup> In addition, a statutory code of practice has been produced by the Workplace Relations Commission which is intended to impact on the private and non-profit sectors.<sup>59</sup>

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<sup>57</sup> For example, see the services offered by *Protect*, the leading charity in the field, as well as specialist commercial consultancies.

<sup>58</sup> *Guidance for the purpose of assisting public bodies in the performance of their functions under section 21(1) of the Protected Disclosures Act 2014.*

<sup>59</sup> Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015. S.I. No. 464

