10 July 2013

Dear sirs

Re: Submission to Public Concern at Work’s Whistleblowing Commission Strengthening Law and Policy (the Commission)

Please see annexed submission to the Commission, from Blueprint for Free Speech.

For any queries in relation to this submission, or any other matter, please do not hesitate to contact me.

Yours, affectionately

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Submission to Public Concern at Work’s Whistleblowing Commission Strengthening Law and Policy (the Commission) by Blueprint For Free Speech

10 July 2013

1 Introduction

Thank you for the opportunity to provide comments to the Commission. We wholly embrace the sentiment of the commission as properly summarised in the briefing paper:

“If whistleblowing is to be embedded in our culture making it safe to speak up early and with confidence the messages will be heard, we need to understand what more can be done by government, employers, regulators and civil society.”

Blueprint for Free Speech (Blueprint) is an Australian based, internationally focused not-for-profit concentrating on research into ‘freedoms’ law. Our areas of research include public interest disclosure (whistleblowing), defamation, censorship, right to publish, shield laws, media law, Internet freedom (net neutrality), intellectual property and freedom of information. We have significant expertise in whistleblowing legislation around the world, with a database of analyses of more than 20 countries’ whistleblowing laws, protections and gaps.

We note that you have called for submissions across the breadth of whistleblowing generally. We have decided to focus on attitudes to whistleblowing, law and policy and reward systems for encouraging public interest disclosure. We consider these to be the pressing issues in the UK and indeed in most public interest disclosure regimes worldwide.

2 Attitudes to whistleblowing from individuals, organisations and wider society

There is no question that public demand for effective whistleblowing regimes has built to a critical mass. Set out in ‘Annexure A’ to this submission, we have provided research data from the UK, Australia and Iceland which clearly demonstrates that the public see whistleblowing as an important part of both transparency and anti-corruption platforms in government. Of significance in the UK is the fact that there is concern about secrecy in public institutions. Whistleblowing is seen as a way to ameliorate this, whether done internally or externally.

For example, in the UK, 53% of those surveyed said too much information is kept secret in organisations. 81% believe that people should be supported for revealing serious wrongdoing, even if it means revealing inside information and 88% of those surveyed in the UK, agreed that if

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someone in an organisation has inside information about serious wrongdoing, they should be able to use a journalist, the media, or the internet to draw attention to it.²

For further information and a breakdown and comparison of the survey, see Annexure A. For the comprehensive worldwide study see the World Online Whistleblowing survey, found at https://www.whistleblowingsurvey.org.

3 Law and Policy – is it adequate and effective?

(a) Confusing and complicated legislation

Whistleblowing legislation must be easily understood by whistleblowers in order that it is effectively used by those who may not usually be familiar with navigating legal process. First, the legislation must be easily understood and followed so that a potential whistleblower can not only comprehend the process in which they are about to participate, but further so that they can appreciate the risk they might potentially accept. Second, the legislation must limit the legal decisions an honest whistleblower must make before making the disclosure, such as a balancing of competing legal obligations or interests.

In respect of the UK, we take primary aim at the reforms to the Enterprise and Regulatory Reform Bill in its clause 14, specifically with the addition of a public interest test to the making of a disclosure. Blueprint recognises the intention of the clause – to remove the ability for an individual to disguise complaints about their individual employment contract as a public interest disclosure. However, the response to this problem is heavy handed and has dire consequences for whistleblowers that are actually attempting to make disclosures in the public interest.

The clause essentially requires a whistleblower to make a legal determination of whether the disclosure on the whole is in the public interest. This is too onerous a test and really is asking the wrong question. Currently under the PIDA Act, a whistleblower must have an honest belief in the truth of the information, which tends to demonstrate certain wrongdoing. This scheme works to disclose information in the public interest. To then demand that the whistleblower work out whether that information is then useful to the public as a whole adds a further barrier. This will have two effects on whistleblowing. First, it will discourage those with relevant information to come forward and make a disclosure, as it will be too complicated and difficult to assess the potential risk. Second, it leaves open for a discloser who comes forward in good faith to be ‘hung out to dry’ with no minimum legal protection in circumstances where they incorrectly judged an objective test of what is and is not a public interest disclosure.

A much simpler way to resolve this is simply to exclude the type of actions that are inadvertently being caught by this legislation – such as the ‘City Bankers’ who use the PIDA provisions to complain about their bonus payments. This alternative avoids the route, which has currently been

taken, which potentially affects legitimate whistleblowers and consequently prevents the disclosure of wrongdoing, which would serve the public interest.

On a final note to this issue, and of special concern to interested groups such as ours, it appears the consultation process on these reforms at the end of 2012 and the beginning of 2013 was extremely minimal. The UK government should take heed of the deep level of expertise in the UK and around the world on these and other issues in considering the impact of policy changes. The rushed broad stroke nature of these reforms lacked the input of those who have worked specifically in the area on a concentrated and profound level and there will be at the very least in this case negative obvious consequences for the impact of the reforms.

(b) Adequate compensation and remedies for victims of reprisal

Blueprint strongly supports the introduction of effective compensation provisions for whistleblowers under public interest disclosure legislation, as part of a regime aimed at protecting a whistleblower against reprisal for exposing wrongdoing in the public interest.

A whistleblower may take on serious risk to their financial position, reputation and personal safety when disclosing wrongdoing in the public interest. After making a disclosure, a whistleblower may be subject to reprisal from their employer, fellow employees or another person as a result of that disclosure. Accordingly, it is appropriate to have not simply protective measures for that whistleblower, but also to allow for effective compensatory remedies to return them to a position they would otherwise have been in but for making of the disclosure and any resulting reprisal taken against them.

Public interest disclosure legislation should be underpinned by an acknowledgement that it is often very difficult and risky for a whistleblower to come forward and expose wrongdoing. Effective compensation and favourable costs provisions only seek to encourage the exposure of wrongdoing by making the path to such disclosure easier for a whistleblower.

The issue becomes one whether the whistleblower has access and incentive to activate the rights to which they are entitled. This means solving the following two issues –

- how might they might prevent the invalidation of their rights by ensuring the protection of their ability to disclose information externally; and
- how to provide them with financial support should it be necessary to enforce their rights (or defend their actions) in a litigious process.

These two issues are dealt with below.

(c) External disclosure

It is paramount to the success of any public interest disclosure law that a whistleblower or discloser has the ability in appropriate circumstances to disclose wrongdoing externally to their organisation.
This is especially important where:

- there is endemic corruption within an organisation and the people to which the wrongdoing is to be reported are complicit in that wrongdoing;
- reporting channels within an organisation are not capable of investigating or dealing with the wrongdoing;
- the immediacy or gravity of the wrongdoing necessitates that it be revealed publicly or to someone outside the organisation.

This does not mean to say that an internal disclosure regime cannot co-exist with an external disclosure regime. In fact, both go ‘hand-in-hand’ – and it will depend on all of the circumstances to which is the most appropriate in any given context. It is common, of course, to make protections for external disclosure contingent on disclosing internally at first instance. However, such contingencies should remain reasonable – i.e. the whistleblower may consider the above bulleted points outweigh the desire of disclosing internally at first instance. In this case, the whistleblower should not have to forego rights they would otherwise have under the public interest disclosure regime simply because they were forced to disclose externally. In either case, it should be up to the whistleblower to make this assessment, based on a reasonable belief test, of whether the disclosure should be made internally or externally. This is because they are best placed to understand the serious wrongdoing in their organisation. Most whistleblowers use internal channels at least once if not twice before considering ‘going externally’. External disclosure often ends up with very high costs for the whistleblower, particularly if it is not anonymous, thus this provides a disincentive to ‘go external’ except in circumstances where it is truly needed in order to effect change to the on-going wrongdoing.

(d) Scope must include all wrongdoing and apply to all wrongdoers (including politicians, law enforcement, hospitals and all other government agencies)

It is imperative for the operation of a public interest disclosure bill that it applies to everyone, including public departments, irrespective of the types of information they might possess which might later become the subject of a disclosure. Importantly, the exclusion of particular classes of organisations or information should be avoided in any legislation.

This is essentially a battle of the public interest. Whilst Blueprint in no way wishes to diminish the importance of secrecy in certain situations and the need for confidentiality, there are certain circumstances in which the public interest is better served by the exposure of certain wrongdoing than the maintenance of secrecy. The tilt in this direction is more properly reflective of the free and open society that western democracies seek to pursue.

The issue of whether politicians should be included under legislation is also imperative to resolve in the affirmative. Considering that publicly elected officials are in charge of the ‘purse strings’ and may simultaneously be involved in the administration of the policy, it is imperative that public interest legislation catches this class of persons and a person who comes forward to expose
wrongdoing by such class is afforded protection. Further, it offends notions of fairness whereby all are to be treated equally under the law. This should apply equally to ministers, ordinary members of parliament and public servants alike.

It is important to create a system that captures all wrongdoing and allows protection for whistleblowers in all situations, where the information and people against which the wrongdoing is revealed have the greatest power and capacity to take reprisal on the discloser.

4 Rewards and support – should whistleblowing be incentivised / independently funded?

(a) Introduction

Qui tam remedies – or remedies that are designed to incentivise whistleblowing by providing a percentage of the savings due to the exposure of the wrongdoing – are a growing effective trend in whistleblowing worldwide. These types of remedies are most prevalent in the US, where the False Claims Act sets the benchmark for whistleblowers exposing corruption in military procurement.

There are three options for going forward with qui tam remedies:

(a) the whistleblower him or herself receives a percentage of the money saved from the exposure of wrongdoing; or

(b) a ‘public interest disclosure fund’ or ‘whistleblower protection fund’ is created to assist future whistleblowers with costs, funded by a percentage of cases brought on behalf of the government (i.e. a qui tam remedy but the beneficiaries are future whistleblowers). Costs should include legal expenses, loss of income as a result of the disclosure, medical costs associated with the making of the disclosure, retraining costs where a whistleblower must change employment / profession; or

(c) both of the above.

We recommend the commission should pursue options (b) or (c), as applied to government or public agencies. In particular, option (c) is worth strong consideration, implementing both the financial percentage to the whistleblower that exposes the wrongdoing and also contributing a percentage to a ‘public interest disclosure fund’ designed to ensure future whistleblowers have legal funding to defend themselves. Both work to encourage whistleblowing and therefore the exposure of corruption in two separate ways – the first to personally incentivise a whistleblower to come forward where it might seem the risk to their safety or career is too great in normal circumstances. The second is where the whistleblower, whilst convinced of the merit of their disclosure, simply cannot afford to defend themselves against legal reprisal. Qui tam remedies create an incentive based system, which on balance has had success in the US in a number of situations, particularly where large-scale fraud is involved.

However the arrangements for the split of any monies must be transparent and consistent, with percentages enshrined in legislation or static regulation so whistleblowers do not have to argue their
case yet again just to receive the monies they would expect. As a guide, we would propose the following division:

- 50% returned to the government;
- 30% to the Whistleblower Protection Fund; and
- 20% to the Whistleblower.

Further we would envisage that the Whistleblower Protection Fund would be administered on the basis of supporting those whistleblowers whose cases are both most in the public interest and of a nature where the whistleblower would not be entitled to a share of any recovered monies.

One likely option would be a path for whistleblowers to apply for financial support of costs under the Fund. As the Fund’s financial resources may be limited, it seems logical to assess such applications on the basis of the above two tests.

This second criteria might apply for example to whistleblowing acts exposing wrongdoing that was serious but not necessarily involving fraud. If for example the whistleblower-exposed practices leading to deaths in hospitals, they would not normally receive any Qui Tam remedies (since there is no financial fraud involved) however, they may have significant legal expenses. It is just this sort of case that we would envisage might receive financial support from the Whistleblower Protection Fund.

A Whistleblower who received the 20% ‘bounty’ would not be eligible for financial support from the Fund. In this way, society can ensure that all types of public interest disclosures – including those that don’t involve the opportunity to win ‘bounties’ – will be protected.

This is because while Qui Tam remedies are successful in encouraging and protecting the disclosure of wrongdoing in matters such as fraud, they are less useful as a tool where there is simply serious wrongdoing of other, non-financial types. Therefore it is important that the Whistleblower Protection Fund aim to support these types of whistleblowers – and particularly their often-high legal costs. Their whistleblowing may serve a serious and very sweeping public interest, such as revealing wrongdoing in the health system leading to patient deaths. Yet because the wrongdoing does not involve significant financial fraud, they may not be able to benefit from any qui tam remedies. Thus giving this sort of whistleblowing first protection under the new Fund would ensure that at the very least they are not facing financial hardship.

(b) Model Clause

In the creation of an effective qui tam remedy, we have prepared a list of principles to be incorporated into the legislation. We have created this as a ‘model clause’ with an explanation of how the mechanism would work.

“Model Clause 1 – Qui tam damages and whistleblowing defence fund”
(1) For the purposes of this Clause:
   (a) ‘the government’ includes the government itself, a governmental agency, a government owned corporation or a contractor (or sub-contractor) to any of the aforementioned;
   (b) ‘Costs’ includes legal expenses, loss of income as a result of the disclosure, medical costs associated with the making of the disclosure, retraining costs where a whistleblower must change employment / profession;
   (c) calculable financial loss means a quantifiable amount lost or potentially lost as a result of wrongdoing;
   (d) public interest disclosure fund — means a fund established under this Clause, a consequent Clause, or another Bill:
      (i) to be administered by an independent authority;
      (ii) that is separate from an investigating authority into any wrongdoing disclosed;
      (iii) for the purpose of funding or subsidising actual or prospective disclosers in disputes arising from a disclosure;
      (iv) to be separate from any other type of legal aid provided to a discloser for disputes arising from a disclosure.
(2) Any person may bring an action for a fraud upon the government on behalf of the government and themselves.
(3) Persons who bring an action under Model Clause (1) must notify the government.
(4) Where a person brings an action under Model Clause 1(1), or discloses information that leads the government to bring an action for a fraud upon the government, the Court may award a person up to 20% of any calculable financial loss prevented as a result of the action and the exposure of the wrongdoing, to assist with Costs.
(5) The government may elect to not pursue an action brought under this Clause, but it must notify the person or persons who brought the action of its decision to do so.
(6) If the government decides not to elect to pursue an action under Model Clause 1(5), the person or persons who brought the action may continue the action by showing that it has reasonable prospects of success.
(7) This Clause does not confer immunity from liability on any person actively involved in a fraud on the government.
(8) The Public Interest Disclosure Fund shall be established.

(9) If a successful action is brought by either the government or another person pursuant to this Model Clause, the Court must award, in addition to, an award under Model Clause 1(4), 30% of the calculable financial loss prevented as a result of the action and the exposure of the wrongdoing to the public interest disclosure fund.

(10) If a successful action is brought by either the government or another person pursuant to this Clause, the Court must award all remaining monies to the Government but only after any other award has been allocated pursuant to this Clause to either the person who brought the action or the Public Interest Disclosure Fund.

(c) Explanation of Model Clause

The Model Clause allows people to bring an action for fraud upon the government. This Clause allows disclosers to recover a percentage of any money recovered by the government where the information they disclosed ‘leads to’ a successful action for wrongdoing, and where that money is used to cover the often-expensive costs associated with whistleblowing.

The Model Clause is intended to reward disclosers who reveal serious frauds on the public purse, not to undermine the capacity of the government to bring actions in its own right. Therefore, the government can dismiss an action under the Clause, but it can be continued if the person bringing it can show that there are reasonable prospects that it will succeed. This allows disclosers and other citizens to enforce the rule of law even if the government declines to do so.

As for rewarding disclosers, the Model Clause recognises that disclosing information that reveals serious fraud is likely to be fraught with personal difficulty for the discloser and that therefore they should receive protection through the reimbursement of the often high financial cost paid by whistleblowers. Although this reward comes from damages that the government would have otherwise received, the government still gains because it would likely not have been able to recover any damages at all without the disclosure.

Additionally, the Qui Tam provisions contain funding for a public interest disclosure fund. This fund is designed to be self-funding and requires no contribution from consolidated revenue. Its mission is to support disclosers or potential discloser through the financial hardship that can result from enforcing one’s rights in making a disclosure. The Clause is structured such that the Court must award the Qui Tam remedy directly to the discloser (up to the amount necessary to cover Costs), and in addition the Court must also award 30% to the public interest disclosure fund. This provides a useful benefit to society in the sense that it continues to encourage disclosures by funding legal aid, however it does not compel the Court to award money to a discloser in inappropriate circumstances.
5 Gag Clauses

The issue of whistleblowers being prevented from revealing the serious wrongdoing due to ‘gag clauses’ continues to be a serious problem, particularly in the UK and in the health area. While we do not have an easy solution to this problem, we believe that it must be addressed – and urgently.

The essential tension is this - on the one hand, the mechanisms for fixing the problem should ensure that whistleblowers are free to discuss their cases – and the wrongdoing that triggered those cases – in order to ensure that the wrongdoing is not allowed to continue. On the other hand, any person should be free to contract away their rights to discuss such matters (assumedly at an additional price to the person insisting on the gag clause). Public interest disclosure is a right against the world. I.e. the difficulty is how to measure a private citizen's right to contract for silence against the other party (presumably for a higher price) as against the unfairness of not being able to disclose particular conduct, for the benefit of the public as a whole. Public interest gagging contracts might be thought of as having three parties (say the employer, the employee (being gagged) and ‘the public’. ‘The public’ is not a party to a contract and therefore this creates difficulties in regulating the contents of the contract.

While the UK's PIDA appears to be supposed to stop organisations from imposing gag orders on whistleblowers, in practice this has not worked. Exactly why this is so requires more in depth analysis, which Blueprint will be conducting over the coming months. Thus we may be in a position later in the year to provide more comment on this specific point.

The two competing tensions identified above must at least be considered and a solution must be found that respects each of these rights. Either way, the problems of gag orders must be addressed as it strikes at the heart of being able to expose and then stop serious wrongdoing, which is why people blow the whistle in the first place.

6 Conclusion

We would like to take this opportunity to again thank the commission for receiving our submission and we consider it a great honour to be able to provide our expertise and thoughts.

Public interest disclosure law and whistleblowing generally is a very important plank in anti-corruption regimes. In order for it to fulfil that purpose, it must be drafted in such a way as that it is effective in both protecting the whistleblower and exposing the wrongdoing revealed in their disclosure.
APPENDIX A –
Strong community support for whistleblowing and whistleblower law reform across countries

Introduction

The following data is based on questions developed for the World Online Whistleblowing Survey conducted jointly by the University of Melbourne and Griffith University. Eight of the questions were run as random sample general population polls commissioned by Griffith University (Australia), Greenwich University (UK) and Blueprint with the Social Science Research Institute at the University of Iceland (Iceland).

Results of research so far have shown an unequivocal desire to protect whistleblowers and ensure that information that is in the public interest should be in the public domain. Principally, the participants were asked the following questions (a) to (j), with the results speaking for themselves.

(a) When asked whether too much information is kept secret in organisations:

- In Iceland, 63% said too much information is kept secret in organisations, whereas 15% believe it’s about the right amount, 3% say not enough is kept secret and 19% say it’s neither or cannot say;
- In Australia, 50% said too much information is kept secret in organisations, whereas 26% believe it’s about the right amount, 7% say not enough is kept secret and 18% say it’s neither or cannot say;
- In the UK, 53% said too much information is kept secret in organisations, whereas 22% believe it’s about the right amount, 8% say not enough is kept secret and 16% say it’s neither or cannot say;

(b) When asked whether they believe that it is acceptable for someone to reveal inside information about serious wrongdoing by a family member or personal friend working in an organization:

- In Iceland, 67% believe that it is acceptable, whereas only 13% say it is unacceptable and 19% say neither or cannot say;
- In Australia, 60% believe that it is acceptable, whereas only 13% say it is unacceptable and 27% say neither or cannot say;
- In the UK, 58% believe that it is acceptable, whereas only 18% say it is unacceptable and 23% say neither or cannot say;

(c) When asked whether they believe that it is acceptable for someone to reveal inside information about serious wrongdoing by other staff or workers in an organization:

- In Iceland, 77% believe that it is acceptable, whereas 10% say it is unacceptable and 13% say neither or cannot say;
- In Australia, 77% believe that it is acceptable, whereas only 5% say it is unacceptable and 18% say neither or cannot say;
• In the UK, 70% believe that it is acceptable, whereas only 16% say it is unacceptable and 14% say neither or cannot say;

(d) When asked whether they believe it is acceptable for someone to reveal inside information about serious wrongdoing by people in charge of an organisation:

• In Iceland, 83% believe that it is acceptable, whereas 9% say it is unacceptable and 8% say neither or cannot say;
• In Australia, 82% believe it is acceptable, whereas only 4% say it is unacceptable and 14% say neither or cannot say;
• In the UK, 71% believe it is acceptable, whereas only 16% say it is unacceptable and 13% say neither or cannot say;

(e) When asked whether people should be supported for revealing serious wrongdoing, even if it means revealing inside information:

• In Iceland 87% believe that people should be supported for revealing serious wrongdoing, even if it means revealing inside information, whereas only 3% say people should be punished and 9% say neither or cannot say;
• In Australia 81% believe that people should be supported for revealing serious wrongdoing, even if it means revealing inside information, whereas only 9% say people should be punished and 10% say neither or cannot say;
• In the UK 81% believe that people should be supported for revealing serious wrongdoing, even if it means revealing inside information, whereas only 6% say people should be punished and 13% say neither or cannot say;

(f) When asked if whether they observed wrongdoing, they would feel personally obliged to report it to someone in their organisation:

• In Iceland, 95% agree that they would, whereas only 1% disagree and 5% say neither or cannot say;
• In Australia, 80% agree that they would, whereas only 6% disagree and 14% say neither or cannot say;
• In the UK, 75% agree that they would, whereas only 6% disagree and 19% say neither or cannot say;

(g) When asked whether if they reported wrongdoing to someone in their organisation, they would be confident something appropriate would be done about it:

• In Iceland, only 57% agree that they would be confident, whereas 17% disagree and 26% say neither or cannot say;
• In Australia, 55% agree that they would be confident, whereas 18% disagree and 27% say neither or cannot say;
• In the UK, 58% agree that they would be confident, whereas 18% disagree and 24% say neither or cannot say;

(h) When asked whether management in their organisation is serious about protecting people who report wrongdoing:
• In Iceland, only 38% agree, whereas 18% disagree and 44% say neither or cannot say;
• In Australia, only 49% agree, whereas 14% disagree and 47% say neither or cannot say;
• In the UK, only 46% agree, whereas 13% disagree and 41% say neither or cannot say;

(i) When asked what the most effective way to stop serious wrongdoing:

• In Iceland:
  o According to 47% of Icelandic people, via internal channels;
  o 19% to journalists or news organisations;
  o 6% directly to the public via the internet, Twitter, Facebook or online blogs; whereas
  o 18% believe there is no effective way to report wrongdoing; and
  o 10% either cannot say or believe some other way is most effective.
• In Australia:
  o According to 56% of Australian people, via internal channels;
  o 17% to journalists or news organisations;
  o 6% directly to the public via the internet, Twitter, Facebook or online blogs; whereas
  o 9% believe there is no effective way to report wrongdoing; and
  o 12% either cannot say or believe some other way is most effective.
• In the UK:
  o According to 52% of UK citizens, via internal channels;
  o 19% to journalists or news organisations;
  o 7% directly to the public via the internet, Twitter, Facebook or online blogs; whereas
  o 11% believe there is no effective way to report wrongdoing; and
  o 11% either cannot say or believe some other way is most effective.

(j) When asked if whether someone in an organisation has inside information about serious wrongdoing, they should be able to use a journalist, the media, or the internet to draw attention to it:

• In Iceland, 90% believe that they should (9% in any situation, 27% whenever there become specific reasons to do so and 54% as a last resort), whereas only 4% say never and 6% cannot say.
• In Australia, 87% believe that they should (7% in any situation, 34% whenever there become specific reasons to do so and 46% as a last resort), whereas only 5% say never and 8% cannot say.
• In the UK, 88% believe that they should (10% in any situation, 34% whenever there become specific reasons to do so and 44% as a last resort), whereas only 5% say never and 8% cannot say.