

MIDDLESEX UNIVERSITY LAW DEPARTMENT

REPORT OF A SURVEY
ON WHISTLEBLOWING
PROCEDURES IN UK
UNIVERSITIES

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EXECUTIVE SUMMARY

- **At the end of 2013 and in January 2014, information was obtained about the policies/procedures of 143 UK universities.** 81 (57%) of them pre-dated the legislative amendments made in 2013.
- 56 universities (39%) used both the terms whistleblowing" and "public interest disclosure" in the titles of their policies/procedures; 50(35%) used the word "whistleblowing" only and another 35(24%) mentioned the term "public interest disclosure" but not "whistleblowing."
- In terms of **overall responsibility** for the policy/procedure, information was available in relation to 48 universities (34%). The most frequently mentioned persons were human resources 13 (27%), the audit committee 11 (23%) and the university secretary 8 (17%).
- **A very wide range of people had access to whistleblowing arrangements.** Unsurprisingly, employees were the category most frequently mentioned 107 (75%) but outsiders featured in a number of guises, for example, agency workers 53 (37%) and contractors 37(26%).
- For the **initial reporting of a concern**, the most frequently cited recipient was the University Registrar/secretary (61 or 43%) and the next highest category was "a choice of persons" with 37(26%). **In terms of an alternative**, the most frequently identified was "a choice of persons" (86 or 60%). 70(49%) universities identified the chair of audit, 58(41%) the Vice-Chancellor/Principal and 53(37%)the chair of governors/court/council.
- As regards the **investigation of concerns**, information was not available at 22 institutions but the most frequently mentioned persons were internal auditors 47(33%).
- 96(67%) universities allowed for **anonymous reporting** and 136 (95%) provided for **confidentiality**.

- 131(92%) universities indicated that the person reporting a concern will be kept **informed about the progress of any investigation.**
- 112 (78%) universities specified **who could be approached if the person reporting a concern is dissatisfied** with the way it has been handled. The most frequently mentioned were head of audit 49 (44%) external bodies 45(40%) and the chair of governors/ council/court 44(39%).
- 59 (41%) procedures suggested that **independent advice** is available to a person reporting a concern or considering doing so. At 37 (26%) universities the procedure/policy stated that the person reporting can **bring a representative of their choice to a meeting** to discuss the concern.
- **In relation to the amended Section 43B Employment Rights Act 1996, half of the universities included the new public interest test. 111(78%) universities stated that those who report a concern must be acting in good faith.**
- 132 (92%) universities provided for **disciplinary action** to be taken against a person who acts in bad faith/ maliciously or knowingly provides false information when reporting a concern. By way of contrast, at only 50(35%) universities did the procedure provide for disciplinary action to be taken against those who victimise anyone reporting or about to report a concern.
- In terms of a possible **obligation to report**, 46 (32%) universities provided some sort of guidance. 31 (67%) used the word 'encouraged', 9 (20%) 'expected', 5 (11%) 'should' and 1(2%) 'duty'.
- 69 (48%) universities indicated that the effectiveness of their procedure is **reviewed or monitored**. Of these, 49 (71%) had provision for review, 15 (22%) monitored and 5 (7%) appeared to do both.

1. INTRODUCTION

This survey is a follow-up to a postal survey of 87 English universities conducted by researchers at Middlesex University in 2000. The total number of questionnaires returned in the earlier research was 51, yielding a response rate of 59%. 92% said that they had a whistleblowing procedure, although 57% of these had been in operation for less than 12 months. Significantly, 89% per cent of respondents who had a procedure indicated that it had never been used and the remainder stated that it had been invoked on less than five occasions.¹

The previous study was conducted relatively soon after the Public Interest Disclosure Act 1998 came into force in July 1999.² We decided to revisit the university sector at the end of 2013 in order to assess the impact of subsequent developments in the case law,³ recent amendments to the legislation⁴ and the publication of good practice guidelines.⁵ In particular, we were interested to discover if the scope of whistleblowing policies/procedures had been extended, whether duties to report were being imposed, whether 'hotlines' and 'helplines' were now commonplace and if arrangements reflected

¹ Lewis, David (with Ellis, Catherine, Kyprianou, Anna & Homewood, Stephen) 2001 'Whistleblowing at work: the results of a survey of procedures in further and higher education'. *Education and The Law* Volume 13 No.3 pages 215-225.

² It inserted Part IVA into the Employment Rights Act 1996 (henceforward ERA 1996).

³ Lewis, David 2008 'Ten years of public interest disclosure legislation in the UK: are whistleblowers adequately protected?'. *Journal of Business Ethics*. Vol 82. Pages 497-507

⁴ Contained in Sections 17-20 Enterprise and Regulatory Reform Act 2013

⁵ For example, the PAS Code of Practice on Whistleblowing Arrangements. British Standards Institute 2008 and The Whistleblowing Commission 'Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK. Public Concern at Work. November 2013.

the recent emphasis on public interest rather than good faith disclosures.

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2. METHODOLOGY

A. THE UNIVERSITIES CONTACTED

In compiling an up-to-date list of universities, we endeavoured to be as accurate and comprehensive as possible. We therefore drew on the following four web sources between 21/11/13 and 27/11/13:

<http://www.thecompleteuniversityguide.co.uk/universities/>

<http://www.universitiesuk.ac.uk/aboutus/members/Pages/default.aspx>

<http://www.theguardian.com/education/list/educationinstitution>

http://www.thesundaytimes.co.uk/sto/University_Guide/

From these websites we produced a list of 187 potential universities. We removed three because they were not UK institutions⁶ and another was discounted as its website stated it was not an education institution⁷. It also became clear that another university had closed.⁸ Five institutions listed were

⁶ Yale, Harvard, Princeton

⁷ Armagh Observatory

⁸ University of Marine Biological Station Millport closed 31st October 2013

belonged to the University of London⁹ and, although they had a separate website presence, they did not have an independent policy available.¹⁰ Six further institutions were ruled out as they were part of other universities.¹¹ Two institutions were joint ventures between several universities and were guided by the arrangements at one of the institutions listed in the main searches¹². One university was eliminated because it had merged in 2012 with another.¹³ Two more institutions were excluded as they had no independent awarding powers and students were classified as part of another body.¹⁴

Having ruled out the 21 universities identified above, website searches were completed between 03/12/13 and 21/12/13 on the remaining 166 universities (listed in Appendix 1 below). 112 institutions had freely available policies (67%). Email addresses were sought for the other 54 and 50 were obtained.¹⁵ No email could be identified for four institutions but online web-forms were used for 2 of these and the other 2 had postal addresses.

⁹ British institute in Paris, Heythrop College, Institute of Cancer Research, University of London International Programmes and Central School of Speech and Drama.

¹⁰ Or, for freedom of information purposes, linked back to the University of London.

¹¹ Durham University Business School, Edinburgh College of Art, Faculty of health, Social Care and Education, School of pharmacy and St Mary's Belfast.

¹² Brighton and Sussex Medical School and Manchester School of Architecture

¹³ Scottish Agricultural College

¹⁴ New College of Humanities and Pearson College.

¹⁵ In the first instance an address was sought for human resources and, failing that, for freedom of information requests. If neither of these was visible a general email address was sought. Institutions were contacted via email between 08/01/14 and 12/01/14.

Of the 54 that were contacted, 37 responded. Two of the universities had recently merged ¹⁶ but they still had independent addresses so an email was sent to both.¹⁷ 31 of these provided a policy/procedure but 21 did not respond.¹⁸ Of the remaining two, one indicated that it was no longer a higher education institution and another stated that it was part of Kaplan and used its arrangements.

Thus, in total, information was obtained about the policies/procedures of 143 universities.¹⁹

B. THE SEARCH TERMS

Initially, the following search terms were used to locate a university's whistleblowing policy/procedure: "Public Interest Disclosure", "Whistleblowing Policy" and "Whistleblower". Where these terms failed to produce a result, a further search was conducted using the words: "protected disclosure", "confidential reporting procedure" and "speak up". If both these exercises proved fruitless, an attempt to obtain information was made by consulting any human resources pages that were displayed. As a last resort, the institution's freedom of information page was accessed to see if a policy/procedure or any relevant material was available.

¹⁶ Swansea Metropolitan and University of Wales, Trinity Saint David

¹⁷ Swansea Metropolitan stated that it could not provide a policy for the new university as it was currently being developed. However, it supplied the one in use for the Swansea campus at the time of the merger.

¹⁸ 4 of these acknowledged receipt of the request but then failed to respond.

¹⁹ In order to ensure consistency of approach, the process of data extraction was carried out by one person.

3. THE RESULTS

(i) HOW IS THE POLICY/PROCEDURE DESCRIBED?

30 (21%) were labelled "Whistleblowing policy", 20 (14%) used "Public Interest Disclosure (Whistleblowing) Policy and Procedure", 12 (8%) had a "Public Interest Disclosure Policy" and 11 (8%) were called "Public Interest Disclosure Policy and Procedure". Of the remaining 70(49%), no one title was invoked by more than 7 universities. Even allowing for the fact that many contained similar words but deployed them in a different order, we were surprised to find that there were 53 different descriptions used.

56 universities (39%) used both the terms "whistleblowing" and "public interest disclosure " in the titles of their policies/procedures; 50(35%) used the word "whistleblowing" only and another 35(24%) mentioned the term "public interest disclosure" but not "whistleblowing"²⁰. In terms of describing the document, 65 universities (45%) used the word "policy", 9 (6%) used the word "procedure" and 47(33%) displayed both terms. Twelve (8%) described their arrangements as a "code" (7) or "code of practice" (5) and another used the expression "protocol". Interestingly, 9 (6%) employed none of these words but simply set out the subject matter of their arrangements. For example: "Public interest disclosure (whistleblowing); "Whistleblowing (public interest) disclosure;" "Whistleblowing /fraud/risk management"; "Raising serious concerns at work (whistleblowing)"; "Raising matters of concern"; Public Interest Disclosure of Information (whistleblowing)".

²⁰ Two universities did not mention either "whistleblowing" or "public interest disclosures". One had a "Speak up policy" and the other was entitled "Raising matters of concern".

By way of contrast, terms like "Speak up" and "Raising matters of concern" may be more ambiguous in their meaning and we were pleased to find that they were only used at two institutions. We were also pleasantly surprised that the technical term "protected disclosure" was not used at any university and that the word "complaint", which is associated with grievances, appeared in only two documents.²¹

(ii) WHEN DID THE POLICY/PROCEDURE COME INTO FORCE?

Information was obtained in relation to 117 of the 143 universities (82%) and 82 of these (70%) had taken effect since 2011. In the light of the changes to the whistleblowing legislation in 2013, it should be recorded that 34 (29%) were dated that year and 2(2%) were dated 2014. (We will see below how many universities reflected the current statutory provisions in their arrangements). The fact that 81(69%) policies and procedures pre-dated the legislative amendments suggests that attention needs to be given to their implications. In this respect it is relevant to note that, of the 22 institutions providing information as to the duration of their policy/procedure, 19 (86%) indicated that their current arrangements had been in operation for 2 or more years and 14 (64%) had provisions that would be in operation until 2017.

(iii)WHO HAS OVERALL RESPONSIBILITY FOR THE POLICY/PROCEDURE?

This information was only available in relation to 48 universities (34%). The most frequently mentioned persons were human resources 13 (27%), the audit committee 11 (23%) and the university secretary 8 (23%). The only others identified more

²¹ As indicated when outlining our search terms (above), we also expected to see the words "confidential reporting" to appear in some document titles but this was not the case.

than once were: the Board of Governors (4), the University Council or Court (4) and the secretary/clerk to the court /council (3).

These results are in stark contrast to those obtained from our postal survey in 2000. In the earlier research almost the same number answered the relevant question (47) but this was a much smaller study and constituted 92% of the 51 university respondents. However, the Governing Body was most likely to have overall responsibility (45%) with Vice -Chancellors being mentioned by 40% of respondents and Human Resources identified by 11%. This discrepancy might be explained by the fact that in 2000 the questionnaire was completed by university respondents whereas in the later research we only had access to documentation and our information was gleaned from a mere third of the institutions involved in the study.

(iv) WHO CAN USE THE POLICY/PROCEDURE?

Data was obtained in relation to 142 universities (99%). As in the research conducted in 2000, a very wide range of people had access to the whistleblowing arrangements. Employees were the category most frequently mentioned (107 or 75%) but there were a number of related groups: staff 28 (20%); self-employed 20(14%); workers 12(8%);casual 10(7%);trainees 7 (5%); ex-employees 6 (4%); homeworkers 3 (2%)and volunteers 2(1%). The next most frequently identified body were students (62 or 44%). Other internal categories were: members of the university community 25(18%); university governors 19 (13%); members of council and committees 18(13%); lay members 6 (4%); board of trustees 2(1%) individuals studying or working 1 (1%). Outsiders featured in a number of guises: agency workers 53 (37%); contractors 37(26%); work experience 9(6%); consultants 8(6%); service providers 5(4%); academic visitors 4 (3%); suppliers 4(3%); members of the public 4 (3%); sub-

contractors 3 (2%); third parties 3 (2%); and external bodies 2(1%).

It is unsurprising that internal personnel were most frequently mentioned. However, it is interesting that outsiders were identified almost as frequently as students and other members of the university community. By way of comparison, in 2000 94% of respondents identified employees, 69% students, 29% contractors, 18% sub -contractors, 22% suppliers, 22% self-employed, 4% agency workers and 16% members of the public.

(v) DOES THE POLICY/PROCEDURE REFER TO THE RAISING OF "CONCERNS" AS SUCH?

As mentioned above, whistleblowing is about reporting suspected wrongdoing that is likely to affect a number of people rather than a grievance about a personal matter. Thus we think it more appropriate to refer to "concerns" than "complaints". Our results show that 118 universities (83%) referred to concerns and another 22 (15%) mentioned both concerns and complaints. Only 3 institutions referred solely to complaints. Needless to say, we are encouraged by these findings.

(vi) TO WHOM SHOULD PEOPLE INITIALLY REPORT A CONCERN?

The most frequently cited recipient was the University Registrar/secretary (61 or 43%) and the next highest category was "a choice of persons" with 37 (26%). Line managers were identified at 23 (16%) universities and the Vice-Chancellor/Principal at more 17 (12%). The following were also specified by more than five institutions: head of department 12 (8%), chair of governors/council/court and chair of audit committee/head of audit were both 11 (8%), human resources 9(6%), dean 7 (5%), director of finance 6 (4%). Designated persons, the

clerk to the council/governors, senior university officer, chief operating officer and head of governance and legal services were all mentioned on 5 (3%) occasions. The only others that feature at more than one university were: deputy Vice-Chancellor, trade union representative and student union 3 (2%) and chief executive, deputy chief executive, director of organisational development and an assessor at 2 (1%) institutions.

These results are very similar to those obtained in 2000.²² In the earlier research, the most frequently identified recipient was the secretary/registrars 17(33%), 10(20%) pointed to the line manager and the same percentage to the Vice-Chancellor/Principal. The next highest categories were head of department 7(14%) and Director of Finance 4 (8%). The Head of Human Resources, the chair of the council, the clerk to the governors and designated assessors were all cited by 3 (6%) respondents.

(vii) IF THEY NEED AN ALTERNATIVE, TO WHOM SHOULD PEOPLE REPORT A CONCERN?

The highest number was for "a choice of persons" (86 or 60%).²³ 70(49%) universities identified the chair of audit, 58(41%) the Vice-Chancellor/Principal and 53 (37%) the chair of governors/court/council. The next most frequently mentioned were: human resources 15(10%), university secretary/registrars 14(10%), deputy Vice-Chancellor 7(5%) and an external body 4(3%). A range of other internal and external recipients were identified at three or less universities. These include: directors of finance, internal auditors, prescribed persons,²⁴

²² In that survey respondents were asked "to whom should concerns be reported?".

²³ This may well depend on the nature of the concern

²⁴ These persons are referred to in Section 43F Employment Rights Act 1996.

designated persons,²⁵ deans, line managers, rectors, internal 'hotlines'.²⁶

These results are broadly in line with those obtained in the earlier research, although the chair of audit, the chair of governors/court/council and human resources feature more prominently in the recent survey. In the 2000 survey the most frequently cited alternative recipient was the Vice-Chancellor /Principal 20 (39%). 9(18%) universities mentioned the university secretary/registrar and 7(14%) referred to the chair of audit. 6 (12%) universities identified the Governing Body and same number referred to the chair of council and Head of Department. Human Resources was mentioned by 3(6%) respondents.

(viii) DOES THE PROCEDURE ENCOURAGE PEOPLE TO USE A PARTICULAR MECHANISM FOR REPORTING CONCERNS?

Information was obtained for 60 universities (42%) and of the 81 mechanisms identified, writing was the most popular category 63 (78%). Of these, 52 (83%) did not specify any further, although 6 (10%) mentioned email and 5 (8%) required paper. Oral reporting was permitted at 16 (20%) institutions and the telephone at two others (2%).

It almost goes without saying that if employers genuinely want concerns to be raised they should make doing so as easy as possible for potential reporters. However, written records need to be kept for the purposes of investigation, feedback etc.²⁷ Only 2 universities had a telephone 'hotline'²⁸ dedicated

²⁵ These are people designated in the university policy/procedure.

²⁶ A whistleblowing officer and a trade union were identified by one university.

²⁷ There are data protection implications in keeping records. See, for example, Lewis, David 2011 'Whistleblowing and data protection principles: is the road to reconciliation really that rocky?' *European Journal of Information Technology* Vol.2 No.1

to the reporting concerns, one being internal and the other external. We believe that 'hotlines' are not a desirable means of reporting as they circumvent normal managerial structures. Nevertheless they may be useful as a fallback i.e. where a person is unwilling to report wrongdoing in any other way.

(ix) WHO INVESTIGATES CONCERNS THAT HAVE BEEN REPORTED UNDER THE PROCEDURE?

Information was not available at 22 institutions but the most frequently identified persons were internal auditors 47 (33%). The next highest categories were "person appointed by the receiver of the discloser" 23(16%), designated person 19(13%), senior management and "appropriate person" both 17 (12%) and independent person 16(11%). The head of audit was mentioned by 6(4%) universities and "person appointed by the Vice - Chancellor by 4 (3%). Others identified at 3 or less institutions included independent council members and "depends on the circumstances".

In 2000, internal auditors were also the most frequently cited investigators 8 (16%). 5(10%) respondents pointed to the Head of Department, 4 (8%) referred to designated persons/assessors and the same number to "an independent officer of the university" and human resources.

(x) DOES THE PROCEDURE ALLOW A CONCERN TO BE REPORTED ANONYMOUSLY?

96(67%) universities provided for anonymous reporting.²⁹ Each one stated that whether such a report would be considered was at the university's discretion. It was made clear that

²⁸ Reporting 'hotlines' need to be distinguished from 'helplines' which have an advisory function

²⁹ The equivalent figure in 2000 was 70%.

anonymous concerns were difficult to investigate and thus the name of the discloser was preferred.³⁰

(xi) DOES THE PROCEDURE SPECIFY THAT CONFIDENTIALITY WILL BE MAINTAINED?

As in the 2000 survey, 95% (136) of universities provided for confidentiality. However, in the recent survey we were interested to record whether there were any qualifications to this. Importantly, 134 (99%) procedures indicated that it may not be possible to maintain confidentiality in all circumstances.³¹

(xii) DOES THE POLICY/PROCEDURE INDICATE THAT THE PERSON REPORTING A CONCERN WILL BE KEPT INFORMED ABOUT THE PROGRESS OF ANY INVESTIGATION?

131 (92%) of universities indicated that this was the case³² and 25 of these (19%) stated how this would be achieved. At 23 written feedback was supplied. However, at 37 institutions (28%) there were limits on the provision of information. 26 (70%) procedures restricted the supply of information if it would impact on the confidentiality of others, 8 (22%) confined data to the outcome and action taken and a further 3 (8%) gave information only at the conclusion of an investigation.

(xiii) DOES THE PROCEDURE SPECIFY WHO CAN BE APPROACHED IF THE PERSON REPORTING A CONCERN IS DISSATISFIED WITH THE WAY IT HAS BEEN HANDLED?

112 (78%) universities so specified and 79 (71%) of these indicated whether this applied pre- or post-investigation or

³⁰ The name of the reporter may also become obvious from the circumstances or nature of the disclosure.

³¹ In some situations there is a legal obligation to reveal both what has been reported and by whom. For example, where acts of terrorism are suspected.

³² The equivalent figure in 2000 was 90%

both. 50 (63%) applied to both, 25 (32%) to pre-investigation and only 4 (5%) confined approaches to post -investigation. A very wide range of persons were identified. The most frequently mentioned were: head of audit 49 (44%), external bodies 45(40%) and the chair of governors/council/court 44(39%). The Vice-Chancellor/Principal was identified in 10(9%) procedures

As regards external agencies, the most frequently identified were HEFCE/HEFCW/HEFCS 19(17 %), prescribed persons 19(17%) and MP/MSP 16(14%). The police featured at 13(12%) institutions and the Department of Business Innovation and Skills and the Department for Education and Employment were both mentioned on 8(7%) occasions. The National Audit Office, Public Concern at Work and the Health and Safety Executive were all identified at 6 (5%).

In 2000, only 20 universities supplied information but the results reflect a similar pattern. 9(45%) identified the chair of the audit committee, 4(20%) pointed to the Vice-Chancellor, 3(15%) mentioned the chair of the Council and 2 (10%) the Board of Governors. In relation to external bodies, 3(15%) respondents mentioned the Visitor and the same number identified the Funding Council. Two (10%) pointed to the police and the same number referred to the National Audit Office, the DFEE and MP's. Given the limited amount of information provided in 2000, it would be wrong to draw conclusions about changes over 13 years.

(xiv) DOES THE PROCEDURE/POLICY STATE THAT INDEPENDENT ADVICE IS AVAILABLE TO A PERSON REPORTING A CONCERN OR CONSIDERING DOING SO?

59 (41%) procedures suggested that this was the case with following being mentioned: Public Concern at Work 48(81%), trade union 17(29%), private lawyer 10(17%), professional body

3(5%), HEFC/HEFCW and Citizens Advice 2(3%), Health and Safety Executive and Government website 1(2 %). Only one university appeared to offer a telephone 'helpline' service for potential users of the procedure/policy.

While this is a ringing endorsement of the specialist services offered by Public Concern at Work, one might question why trade unions and professional bodies are not suggested more frequently. It is also worth noting that in the 2000 survey only 29% stated that independent advice was available. Hopefully, developments in the law and practice have highlighted the need for advice to be given to both actual and potential whistleblowers.

(xv) DOES THE PROCEDURE/POLICY STATE THAT THE PERSON REPORTING A CONCERN CAN BRING A REPRESENTATIVE OF THEIR CHOICE TO A MEETING TO DISCUSS THE CONCERN?

At 37 (26%) universities this was the case. Those who attend grievance or disciplinary hearings are legally entitled to be accompanied by virtue of Section 10 Employment Relations Act 1999. We think it is in the interests of both employers and workers that whistleblowers are accompanied.

(xvi) DOES THE POLICY/PROCEDURE REFER TO SECTION 43B ERA 1996 AS SUCH?

Section 43B ERA 1996 defines 'qualifying disclosures' and was amended by the Enterprise and Regulatory Reform Act 2013.³³ 77

³³ The current provision states: "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or

(54%) procedures referred to this provision and, of these, 53 (69%) invoked its wording. However, only 6 of the 53 (11%) used the current version wording so at least 47 universities need to take corrective action in this respect.

(xv) DOES THE PROCEDURE/POLICY INDICATE THAT IT CAN ONLY BE USED IF THERE IS A PUBLIC INTEREST IN RAISING A CONCERN?³⁴

Half of the universities mentioned the public interest test and half did not. Of those that did, 29 (41%) reflected the statutory provision by using the qualifying words “reasonably believe or reasonable belief”. Another two institutions explained that for protection to apply the disclosure had to be “more than a private matter”.

(xvi) DOES THE PROCEDURE STATE THAT THOSE WHO REPORT A CONCERN MUST BE ACTING IN GOOD FAITH?

At 111 (78%) universities this was the case. ‘Good faith’ has not been a requirement for a ‘qualifying disclosure’ since June 2013, although Section 123(6A) ERA 1996 provides that the lack of it may be taken into account when a tribunal makes an award of compensation.

(xvii) DOES THE PROCEDURE PROVIDE FOR DISCIPLINARY ACTION TO BE TAKEN AGAINST A PERSON WHO ACTS IN BAD FAITH/MALICIOUSLY OR KNOWINGLY PROVIDES FALSE INFORMATION WHEN REPORTING A CONCERN?

132 (92%) provided for such disciplinary action.³⁵ The precise behaviours identified are worth recording: malicious 124 (94%), vexatious 88(67%), personal gain 24(18%), without foundation/false 20(15%) , frivolous 16(12%), bad faith

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.”

³⁴ The public interest test came into effect in June 2013.

³⁵ In 2000, 96% of universities provided for disciplinary action to be taken against those who maliciously report a concern.

14(11%), "going external in breach of the internal procedure" 7(5%), breach of procedure 5(4%), causing a detriment to others 4(3%), breach of confidentiality 3(2%), slander 2(2%), making a disclosure irresponsibly 1(1%).

(viii) DOES THE PROCEDURE PROVIDE FOR DISCIPLINARY ACTION TO BE TAKEN AGAINST THOSE WHO VICTIMISE ANYONE REPORTING OR ABOUT TO REPORT A CONCERN?

This was the case at 50(35%) universities. Only 4 specified what action would be taken and in all of them this was dismissal. Interestingly, in 2000 66% of respondents provided for such disciplinary action to be taken. We believe that the victimisation of actual or potential whistleblowers is a very serious matter. However, we recognise that this issue may be dealt with in a university's disciplinary rules (which we did not examine) rather than its whistleblowing arrangements.

(xix) DOES THE PROCEDURE MENTION THAT THE UNIVERSITY MAY BE LEGALLY RESPONSIBLE FOR VICTIMISATION BY ITS STAFF?

Since statutory vicarious liability was only introduced in 2013, it is unsurprising that this issue was only mentioned in one procedure. We would expect that when whistleblowing arrangements are updated employers will place more emphasis on their need to take action in order to avoid vicarious liability.

(xx) DOES THE PROCEDURE INDICATE THAT PEOPLE ARE ENCOURAGED TO/SHOULD/UGHT OR MUST REPORT ILLEGAL CONDUCT?

Many universities state in the preamble to their policy /procedure that their arrangements are intended to encourage staff to disclose information internally. However, we only recorded data which identified particular conduct or repeated the general encouragement in the main body of the policy /procedure. 46(32%) provided some sort of statement and we think it worth setting out the particular words used:

'encouraged' 31 (67%), 'expected' 9 (20%), 'should' 5 (11%), and 'duty' 1(2%).

In terms of the types of conduct, again we think it worth listing all that were found in the procedures: malpractice 24 (52%), wrongdoing 8(17%), prohibited under policy 8(17%), impropriety 5, (%) misconduct 4(11%), illegal 4(11%), conduct listed as qualifying disclosures 3(7%), corruption 2(4%), discrimination and harassment 1(2%). It can be seen that not all of these categories clearly match the items listed in Section 43B ERA 1996 (see above).

(xxi) DOES THE POLICY/PROCEDURE GIVE ANY INDICATION ABOUT THE TYPES OF ISSUES THAT MIGHT BE REPORTED UNDER THE PROCEDURE?

142 universities provided such an indication and 106 (75%) of these identified all the matters listed in Section 43B ERA 1996. Again, a wide range of issues was mentioned and we think it useful to mention them all: health and safety 131(92%), criminal activity 129 (91%), concealment of wrongdoing 127 (89%), failure to comply with legal obligations 126 (89%), environmental 125(88%), miscarriage of justice 111(78%), financial irregularities 106(75%), malpractice 99(70%), improper conduct or unethical behaviour 66(46%), frustrating academic freedom 13(9%), breach of academic standards 13 (9%), fraud /corruption/bribery 12(8%), undisclosed conflict of interest 11(8%), abuse of authority 10(7%), failure to safeguard assets 10(7%), damage to university reputation 7(5%), maladministration 5(4%), breach of confidentiality 4(3%), negligence 4(3%), breach of good governance 3(2%), misuse of funds 2(1%), dangerous working conditions 2(1%), discrimination 1(1%), alcohol/drugs 1(1%), wrongdoing 1(1%). Thus it can be seen that many universities have chosen to go beyond mirroring the statutory categories and seem to have tailored their arrangements to their perceived needs.

(xxii) DOES THE PROCEDURE INDICATE THAT ITS EFFECTIVENESS IS REVIEWED OR MONITORED?

69 (48%) of procedures gave such an indication. Of these, 49 (71%) had provision for review, 15 (22%) monitored and 5 (7%) appeared to do both. 17(25%) universities did not specify how frequently the procedure was monitored/reviewed. However, 18(26%) indicated annually, 14 (20%) every 3 years, 7(10%) stated "every time used", 6 (9%) "when required", 5(7%) "periodically", 5 (7%)biannually, and 1 (1%)every 4 years and another every 5 years. Several universities had more than one trigger for review, for example "every time used" and at least every three years.

We could find no information about who was responsible for monitoring/review at 20(29%) universities who carried them out. However, this responsibility was given to the audit committee at 24 (35%) institutions, the university secretary at 9 (13%), human resources at 5 (7%), the governors at 4 (6%), the policy council at 3 (4%), a joint negotiation and consultation committee at 2 (3%) and a whistleblowing officer at 1 (1%). In 2000, 26 universities indicated that their procedure was monitored. Again, the body primarily responsible was the audit committee (31%) and human resources were mentioned by 19%.

(xxiii) IS THERE ANY INDICATION THAT THE UNIVERSITY IS PLANNING TO REVISE/UPDATE OR AMEND ITS PROCEDURE?

This was evident at 26 (18%) universities.³⁶ Of these, 9 (35%) specified within the year, at 8 (31%) the revision date had passed, 7 (27%) indicated that this would be in a year's time or longer and at 3 (12%) universities the procedure was

³⁶ In 2000, 20% of universities stated that they had plans to alter their procedure.

currently being changed.³⁷ Of course, plans to amend, update or revise would not necessarily be displayed in an existing procedure. However, in the light of some of the findings set out above many universities need to ensure that their arrangements reflect the recent changes to the statutory provisions

(xxiv) THROUGHOUT THE PROCEDURE/POLICY, WHAT TERMINOLOGY IS USED IN REFERRING TO THE PERSON MAKING A DISCLOSURE?

Over the years researchers have commented on the use of unhelpful words in whistleblowing policies and procedures. In particular, we think it important to make clear that individuals do not necessarily have a complaint or personal grievance.³⁸ We were therefore pleased to discover that only 18 (13%) universities referred to complainants and none mentioned grievants. The other descriptions used were: individual 62(43%), person 32(22%), discloser 25 (17%), whistleblower 13(9%), employee 13(9%), staff 11(8%), you 7(5%), worker 5 (4%), university member 3(2%), informant 2(1%), eligible person 1(2%). It is also worth recording that 40 (28%) universities used more than one label.

4. CONCLUSION AND RECOMMENDATIONS

It almost goes without saying that the title of whistleblowing documents should convey their nature and contents. Ideally employers should provide both a policy and procedure and this should be flagged by mentioning the word “whistleblowing” as well as the term “public interest disclosure”. “Whistleblowing” is used in common parlance whereas the latter expression

³⁷ One university indicated that the date for review of the policy/procedure had passed but that it was currently under review.

³⁸ We would expect all universities to have a separate grievance procedure.

reflects the basis on which statutory protection is currently afforded. Since many potential disclosers (and recipients) of information are likely to find themselves in unfamiliar territory, we think that using both expressions will help to explain the precise nature of the arrangements.

By comparison with our postal survey in 2000, it would seem that there is an increased willingness to allow non-employees to raise concerns. Hopefully, this reflects the fact that universities have come to appreciate that they have an interest in learning about alleged wrongdoing from any source. Allowing access to a whistleblowing procedure enables employers to deal with a situation promptly and before the matter is raised with external bodies.

As regards the investigation of concerns, it would seem that arrangements have become more sophisticated since 2000 in that there appears to be clearer recognition of the need to appoint people who are appropriate to deal with the particular concerns raised. It is also significant that human resources are no longer seen to be appropriate investigators. Presumably this is in recognition of the fact that they may be asked for advice about how the whistleblowing policy/procedure should operate and therefore need to remain detached from the day-to-day application of the arrangements.

In relation to anonymous reporting, we were impressed that every university permitting this stated that consideration of such a report was discretionary. We regard this as important because a blanket policy of ignoring anonymous whistleblowing could lead to dangerous or damaging situations being ignored. Similarly, in pointing out that confidentiality cannot be guaranteed in all circumstances, we believe that universities have taken a helpful and realistic approach to this issue.

We are encouraged by the findings in relation to feedback since its provision whenever possible is critical. Whistleblowers who remain in the dark about their employer's actions in response to the raising of a concern are likely to feel frustrated. They might also be tempted to make an external disclosure which could be damaging to both the organisation and themselves. In terms of who could be approached if the person reporting a concern is dissatisfied with the way it has been handled, it is notable that in the recent survey there seemed to be less reliance than previously on the Vice-Chancellor/Principal and greater reference to external agencies. It is of considerable significance that an employer's whistleblowing procedure allows concerns to be raised externally, since the specification of such recipients provides workers with statutory protection under Section 43C ERA 1996.

The amendment to Section 43B ERA 1996 is still very recent but it goes without saying that, if it is deemed appropriate to quote the legislation, this must be done accurately! In many ways it is encouraging that half of the universities do not require a public interest test to be satisfied. An optimistic view would be that these organisations have come to appreciate that promoting the reporting of wrongdoing is a matter of enlightened self-interest. More pessimistically, it may be that some universities have simply not caught up with the legislative changes in 2013 and will insert a public interest dimension when their policy/procedure is next revised. It should also be remembered that workers who are not reporting in accordance with their employer's arrangements will have to satisfy the statutory test if they make disclosures to external bodies.

In the light of the legislative changes made last year, we recommend that 'good faith' should be removed from all university policies/procedures as a pre-requisite for protection. In our view, focussing on a whistleblower's motive is a distraction from the message being conveyed.³⁹ Similarly, the findings in relation to disciplinary action must be seen in the context of the recent amendments to the legislation. Protection is still afforded where there is bad faith so long as a qualifying disclosure is made to an appropriate recipient. In these circumstances we would urge universities to revisit the grounds on which they discipline whistleblowers. In our opinion, disclosers should only be vulnerable if they knowingly provide false information. Indeed, *if there is a protected disclosure*, disciplinary action cannot lawfully be taken against those who behave frivolously, vexatiously,⁴⁰ in breach of confidence or in breach of the employer's procedure. It should be borne in mind that the consequences of inflicting inappropriate disciplinary action on whistleblowers might not only be that employers can be sued. In addition, potential disclosers might observe the events and choose to remain silent about serious wrongdoing.

We were pleased to see that the vast majority of universities avoided imposing an obligation to disclose, since this would

³⁹ It is recognised by the courts that motives/intentions are difficult to identify and may change during the whistleblowing process. See: *Morrison v Hesley Lifecare Services UKEAT/0534/03/DM*

⁴⁰ Perhaps there is some confusion here with the availability of costs in employment tribunal cases. Schedule 1 Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. S.I.1237 provides that: "(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that- (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success."

cause practical difficulties for both worker and employer. Anxious workers may report on the basis of inadequate information for fear of being in breach of duty and employers may have to consider disciplinary action if it became apparent from one person's whistleblowing that others had failed to fulfil their obligation to disclose wrongdoing.

Finally, it goes without saying that monitoring and review are imperative if universities are to keep pace with the evolving law and practice of whistleblowing. Regular monitoring/review should not be too demanding and should be seen as an aspect of good governance. While acknowledging the need for more in-depth research, we hope that this report will inform discussions about the contents of a good whistleblowing policy /procedure in the university sector.

APPENDIX 1

UNIVERSITIES WITH FREELY AVAILABLE POLICIES/ PROCEDURES:

Aberdeen, Abertay Dundee, Aberystwyth, Aston, Bangor, Bath, Bath Spa, Birckbeck, Birmingham, Birmingham City, Bishop Grosseteste, Bolton, Bournemouth, Bradford, Brighton, Bristol, Brunel, Bucks New, Cambridge, Canterbury Christ Church, Cardiff, Cardiff Metropolitan University, Chichester, Cumbria, De Montfort, Dundee, Durham, East Anglia, East London, Edinburgh, Edinburgh Napier, Essex, Exeter, Falmouth, Glasgow, Glasgow Caledonian, Glasgow School of Art, Gloucestershire, Glyndwr, Goldsmiths, Greenwich, Harper Adams, Heriot-Watt, Hertfordshire, Highlands and Islands, Huddersfield, Imperial College London, Institute of Education, Keele, Kent, King's College London, Lancaster, Leeds, Leeds metropolitan, Leicester, Liverpool, Liverpool Hope, Liverpool John Moores, University of London, London Metropolitan, London School of Economics, London school of hygiene and tropical medicine, Loughborough, Manchester, Middlesex, Northampton, Northumbria, Nottingham, Open University, Oxford, Oxford Brookes, Plymouth, Portsmouth, Queen Mary, Queen's Belfast, Reading, Robert Gordon, Royal College of Art, Royal College of Music, Royal Conservatoire Scotland, Royal Holloway, Royal Veterinary College, Salford, Sheffield, SOAS, South Wales, Southampton, Southampton Solent, St Andrews, St Mary's Twickenham, Stirling, Stranmillis University College, Strathclyde, Sunderland, Surrey, Sussex, Swansea, Teeside, Ulster, University campus Suffolk, University College London, University for the creative arts, Warwick, West London, West of England in Bristol, West of Scotland, Westminster, Winchester, Wolverhampton, Worcester, York, York St John

UNIVERSITIES WHICH PROVIDED A POLICY/PROCEDURE UPON REQUEST:

Arts University Bournemouth, Bedfordshire, Central Lancashire, Chester, City University of London, Courtauld Institute of Art, Cranfield, Derby, Hull, Kingston, Leeds College of Art, Leeds Trinity, Lincoln, Liverpool Institute for Performing Arts, London Business School, London South Bank, Manchester Metropolitan, Norwich University of Arts, Nottingham Trent, Roehampton, Royal Academy of Music, Royal Agricultural

University, Royal Northern College of Music, Royal Welsh College of Music and Drama, Scotland's Rural College, Sheffield Hallam, St George's University of London, St Mark and St John, Swansea Metropolitan, University of Wales, Writtle College

UNIVERSITIES WHERE A POLICY/PROCEDURE WAS NOT PROVIDED:

Anglia Ruskin, BPP, Buckingham, College of Estate Management, Conservatoire for Dance and Drama, Coventry, Edge Hill, Edge Hotel School, Guildhall School of Music and Drama, IFS School of Finance, Institute of Marangoni, University of Law, Leeds College of Music, Newcastle, Newman, Queen Margaret, Ravensbourne, Rose Bruford College, Staffordshire, University College Birmingham, University of the Arts, Trinity Laban conservatoire of music and dance, University of Wales Trinity Saint David