PhD thesis

Governance and guidance as alternatives to law change: solutions from a comparison of UK prescribed persons' approaches to whistleblowing with contemporary international practice

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Governance and Guidance as Alternatives to Law Change: Solutions from a Comparison of UK Prescribed Persons' Approaches to Whistleblowing with Contemporary International Practice.

(Volume I)

A thesis submitted to Middlesex University

In partial fulfilment of the requirements for the degree of Doctor of Philosophy

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Abstract

This thesis aims to evaluate whether the organisations prescribed in UK law to receive qualifying disclosures from whistleblowers appear to understand the relevant law and apply it accurately, and in turn, whether UK law reflects contemporary international practice, including Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. These aims are encapsulated in two research questions: (i) Do UK prescribed persons meet the requirements of the whistleblowing framework, including government guidance? and (ii) where not, how can identified incompatibility be addressed, where possible without recourse to law change and having regard to contemporary international practice? Thereafter, the thesis posits practical solutions to deficits identified by the research.

Freedom of Information Act 2000 (FOIA 2000) responses from UK prescribed persons (with comparable functions to the material scope of the Directive) assisted evaluation of the UK's *de jure* alignment with the Directive, and *de facto* application of prescribed persons' policies, procedures and processes when compared both with UK law and the Directive. Corroboration and contradiction of the FOIA 2000 responses were sought through examination of the prescribed persons' whistleblower policies, procedures and processes, where available. Given that prescribed persons are expected by law to publish annual reports about whistleblowing reports received, analysis was undertaken of such reports, where identified. Further comparison was made between the UK's *de jure* and *de facto* situations with comparable legislation in Australia, Canada, Ireland, New Zealand, and South Africa. Following this analysis, the research distilled practical guidance from international comparators to assist prescribed persons in addressing the inconsistent approaches that were identified. Finally, the lack of oversight, particularly of local authority prescribed persons' approaches, suggested a role for local government ombudsmen augmented by private sector audit capability.

Acknowledgements

Being in the right place at the right time to foil or end harm, damage or loss should be more than luck; it should be the consequence of converting information into action, and every organisation and every leader should understand the value of good intelligence.

So, I hold in high regard the few who find the courage to say something when it is easier to say nothing, who are prepared to confront because it offends their morality to turn away. It has been a privilege to work with such people. But, witnessing the effect upon many, indeed, most of them – their dawning realisation that the cavalry may not be coming soon or at all, their growing doubt turning to suspicion, frustration turning to anger, reflections on whether the personal and professional cost were worth it – has also left its impression on me. I extend my thanks and admiration to those brave people for the personal example they set for us all, and for the professional curiosity they inspired in me to understand why the 'system' is as it is for some, and what can be done, if anything, to bring deserving cases to attention and with a just conclusion.

I thank Professor David Lewis and Dr Alessandra De Tommaso for their wisdom and skill in helping to guide my academic output over these years.

Of course, I recognise the invaluable support of my colleagues, my friends, and my family for their manifold contributions, not least enduring my diatribes that 'something must be done', and for encouraging me to do that 'something'. They will never fully appreciate their part, but I do and that is why my deepest expression of gratitude goes to them.

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Table of Abbreviations

Abbreviation	Full title
ACAS/Acas	Advisory, Conciliation and Arbitration Service
APPG	All Party Parliamentary Group
BEIS	Department for Business, Energy and Industrial Strategy
'Brexit'	'[A]n exit (= act of leaving) by the United Kingdom from the European Union (short for "British exit")' Cambridge English Dictionary (no date) <https://dictionary.cambridge.org/dictionary/english/brexit> accessed 17 March 2022
CMA	Competition and Markets Authority
Commission	The European Commission
The Directive	Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law OJEU L 305/17
ECHR	European Convention on Human Rights and Fundamental Freedoms
EHRC	Equality and Human Rights Commission
ERA 1996	Employment Rights Act 1996 (UK)
ERRA 2013	Enterprise and Regulatory Reform Act 2013 (UK)
ET	Employment Tribunal
EAT	Employment Appeals Tribunal
FAQs	Frequently Asked Questions
FCA	• False Claims Act 1863 (USA) • Financial Conduct Authority (UK)
FOIA 2000	Freedom of Information Act 2000 (UK)
GDPR	General Data Protection Regulation

Guidance	• Department for Business, Energy & Industrial Strategy Guidance (2021) Whistleblowing: list of prescribed people and bodies • Office for Product Safety and Standards Guidance (2014) Weights and measures: business guidance • Local Government Association (2019) Guidance for new councillors 2019/20 • Local Government Association Guidance on Local Government Association Model Councillor code of Conduct (2021)
HC	House of Commons
HL	House of Lords
HMRC	His Majesty's Revenue and Customs
HMSO (see also SO)	His Majesty's Stationery Office
HSE	Health and Safety Executive
HSENI	Health and Safety Executive Northern Ireland
ICAC	Independent Commission Against Corruption (New South Wales)
ICO	Information Commissioner's Office
ILO	International Labour Organization
ISO	International Organization for Standardization
INWO	Independent National Whistleblowing Officer
LA	Local Authority
LAPP	Local Authority Prescribed Person
LGSCO	Local Government & Social Care Ombudsman (England)
'Moss Review'	Parliamentary Joint Committee on Corporations and Financial Services: Whistleblower Protections (Australia)
NHRI	Asia Pacific Forum National Human Rights Institution
NHS	National Health Service
NI	Northern Ireland

NIPSO	Northern Ireland Public Services Ombudsman
Non-LAPP	Non-Local Authority Prescribed Person
NR	FOIA 2000 Respondent (non-local authority prescribed person)
OECD	Organisation for Economic Cooperation and Development
OFCOM	The Office of Communications
OPSS	Office for Product Safety and Standards
OUP	Oxford University Press
PDA 2000	Protected Disclosures Act 2000 (New Zealand)
PDA 2000	Protected Disclosures Act 2000 (South Africa)
PDA 2014	Protected Disclosures Act 2014 (Ireland)
PD(A)A 2022	The Protected Disclosure (Amendment) Act 2022 (Ireland)
PDAA 2017	Protected Disclosures Amendment Act 2017 (South Africa)
PIDA 1998	Public Interest Disclosure Act 1998 (UK)
PIDA 2013	Public Interest Disclosure Act 2013 (Australia)
PIDO 1998	Public Interest Disclosure (Northern Ireland) Order 1998
PSDPA 2005	Public Servants Disclosure Protection Act 2005 (Canada)
PRA	Prudential Regulation Authority
R	FOIA 2000 Respondent (local authority prescribed person)
SFO	Serious Fraud Office
SO (see also HMSO)	Stationery Office
SPSO	Scottish Public Services Ombudsman
TI	Transparency International
VAT	Value Added Tax
'Zondo Commission'	Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (South Africa)

Table of Cases

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Attorney-General v Observer Ltd (No 2) [1990] 1 AC 109

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Gilham v Ministry of Justice [2019] UKSC 44

Ravat v Halliburton Manufacturing Services Ltd [2012] UKSC 1

South Africa

Labour Court

Ngobeni v Minister of Communications and Another (J08/14) [2014] ZALCJHB 96; (2014) 35 ILJ 2506 (LC) (3 April 2014)

Tshinga v Minister of Justice and Constitutional Development and another (JS898/04) [2006] ZALC 104; [2007] 4 BLLR 327 (LC); 2007 (4) SA 135 (LC) (26 December 2006)

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Australia

Public Interest Disclosure Act 2013

Public Interest Disclosure Amendment (Review) Act 2023

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Federal

Public Servants Disclosure Protection Act 2005

Provincial

Act to Facilitate the Disclosure of Wrongdoing Relating to Public Bodies 2016 C.34 c.1

Commodities Futures Act R.S.O. 1990 c.20

Public Interest Disclosure Act 2011 c.P-38.1

Public Interest Disclosure Act RSNB 2012 c.112

Public Interest Disclosure Act SBC 2018 c.22

Public Interest Disclosure and Whistleblower Protection Act 2017 c.11 R.S.P.E.I.

Public Interest Disclosure and Whistleblower Protection Act SNL2014 c. P-37.20

Public Interest Disclosure of Wrongdoing Act SNS 2010 c.42

Public Interest Disclosure of Wrongdoing Act SY 2014 c.19

Public Interest Disclosure (Whistleblower Protection Act) Alberta Regulation 71/2013

Public Interest Disclosure (Whistleblower Protection) Act C.C.S.M. c.P217

Securities Act R.S.O. 1990 c. S.5

Ireland

Protected Disclosures Act 2014

Protected Disclosure (Amendment) Act 2022

Workplace Relations Act 2015

New Zealand

Human Rights Act 1993

Protected Disclosures Act 2000

Protected Disclosures Amendment Act 2009

Protected Disclosures (Protection of Whistleblowers) Act 2022

South Africa

Protected Disclosures Act 2000

Protected Disclosures Amendment Act 2017

United Kingdom

Children Act 2004

Competition Act 1998

Consumer Protection Act 2002

Contempt of Court Act 1981

Copyright Designs and Patents Act 1988

Criminal Justice and Courts Act 2015

Data Protection Act 2018

Defamation Act 2013

Employment Rights Act 1996

Employment Relations Act 1999

Enterprise Act 2002

Enterprise and Regulatory Reform Act 2013

Equality Act 2010

European Union (Future Relationship) Act 2020

European Union (Withdrawal) Act 2018

Food Safety Act 1990

Freedom of Information Act 2000

Health and Safety at Work etc. Act 1974

Health and Social Care Act 2008

Health and Social Care (Control of data Processing) Act (Northern Ireland) 2016

Human Rights Act 1998

Justice and Security Act 2013

Legislative and Regulatory Reform Act 2006

Local Government Act 1974

Mental Capacity Act 2005

hth Act 1983

National Health Service Act 2006

Official Secrets Act 1989

Pensions Act 2004

Proceeds of Crime Act 2002

Public Interest Disclosure Act 1998

Public Services Ombudsman Act (Northern Ireland) 2016

Public Services Ombudsman (Wales) Act 2019

Public Services Ombudsman (Wales) Act 2005

Regulation of Investigatory Powers Act 2000

Safety Representatives and Safety Committees Regulations 1977

Scottish Public Services Ombudsman Act 2002

Sentencing Act 2020

Social Care Act 2008

Terrorism Act 2000

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Prescribed Persons (Reports on Disclosures of Information) Order 2017, SI 2017/507

Public Interest Disclosure (Northern Ireland) Order 1998, SI 1998/1763 (N.I. 17)

Public Interest Disclosure (Prescribed Persons) Order 2014, SI 2014/2418

Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2020, SSI 2020/5

Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007, SI 2007/1889

Safety Representatives and Safety Committee Regulations 1977, SI 1977/500

State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, SI 2020/1470

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Charter of Fundamental Rights of the European Union [2016] OJ C 202/389

European Convention on Human Rights and Fundamental Freedoms 4 November 1950, 213 UNTS221 (ECHR)

Directives

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

Recommendations

Council of Europe, Recommendation CM/REC (2014)7 of the Committee of Ministers to Member States on the Protection of Whistleblowers, adopted by the Committee of Ministers on the 30 April 2014 at the 1198 meeting of the Ministers' Deputies (SPDP Council of Europe 2014)

Resolutions

Council of Europe Parliamentary Assembly, Resolution 2300 (2019) Improving the protection of whistle-blowers all over Europe

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Chapter 1: Introduction

1.1 The research questions

The main research questions assessed in this thesis are: (i) Do UK prescribed persons meet the requirements of the whistleblowing framework, including government guidance? and (ii) where not, how can identified incompatibility be addressed, where possible without recourse to law change and having regard to contemporary international practice? Chapters 2 and 3 consider the first research question, whilst Chapters 4-6 consider the second.

When first proposed in 2019, the thesis was aimed at critically evaluating the likely impact of a new EU Directive on the UK's statutory framework and allied arrangements for whistleblowing.[1] The Directive imposes obligations on Member States to implement and uphold protections for whistleblowers who make disclosures about specified criteria which serve the public interest as defined by the EU. In the first phase of the research, it was considered appropriate to examine whether the UK complied with its own whistleblowing legislation from which inferences could be drawn about how well the Directive's requirements would align with the UK's approach. The methodology employed involved posing to relevant organisations a series of Freedom of Information Act 2000 (FOIA 2000) questions from which quantitative comparisons could be made. Analysis was also undertaken of the organisations' published or available whistleblowing policies. However, two developments occurred which necessitated a revision of the intended research goals and methodology. The first development was the outcome of legal challenges to the UK Government's prerogative powers following the 'Brexit' vote which meant that the Directive would not become legally binding upon the

[1] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law OJ L 305/17 [hereafter, 'Directive (EU) 2019/1937 (n 1)'].

UK.[2] Second, the finding from the research that there were significant shortfalls in the UK's compliance with its domestic whistleblowing laws. As a result, the focus of the thesis was adjusted to include the hypothesis that the UK does not consistently comply with its pertinent legislation. In consequence, the research parameters were adapted to encompass the identification of a suitable oversight mechanism to ensure that existing legal requirements are met by the responsible organisations in order to achieve the primary outcome intended by Parliament, namely, upholding the public interest. The international comparisons made in the research involve jurisdictions similar to the UK where whistleblowing laws appear to be directed at ensuring relevant organisations' consistent adherence to the intended outcomes, and addressing limited co-ordination of practice caused by the absence of adequate oversight of the arrangements. Finally, a view is offered about whether these remedies can be adopted in the UK without the need for law change. Whilst the focus of the thesis altered in part because of Brexit, common elements endure between the thesis as first conceived and as presented here. The core elements remain; firstly, comparing the UK's legislation with the emerging international practice represented by the Directive and jurisdictions similar to the UK, and, secondly, irrespective of the statutory framework the UK employs in maintaining the public interest through the agency of whistleblowers' disclosures, whether the law operates effectively. This effectiveness criterion, in turn, draws attention to the adequacy of oversight of whistleblower arrangements which, according to the evidence presented here, requires improvement.[3]

The substantive elements of the thesis are presented in six chapters. Chapter 2 examines the extent to which prescribed persons adhere to existing UK whistleblowing legislation. The researcher's assumptions had included that because the relevant law had come into effect in

[2] For example, Alison A Young, 'The Constitutional Implications of Brexit' (2017) 23(4) European Public Law 757 757.
[3] Directive (EU) 2019/1937 (n 1).

July 1999, prescribed persons' understanding and application of UK law would be mature. It was also expected that if the research identified defects in the application of existing law, diagnosis of the cause(s) would aid understanding of any difficulties in the future adoption of relevant international practice or new UK laws or guidance. Further, where deficiencies were identified, the search for potential solutions would be better directed, including exploring model approaches which other jurisdictions may have already found efficacious in contexts similar to the UK's. Chapter 2 undertakes the analysis of prescribed persons' adherence to UK law through examination of responses to FOIA 2000 questions posed of local authorities, and of their available whistleblowing policies from which empirical evaluation can also be made of their approach.[4] While the research notes significant inconsistencies and errors in the application of the law by local authority prescribed persons (LAPPs), the myriad accountabilities required of local authorities have to be appreciated and provide a context in which to consider identified shortcomings and the efficacy of solutions.

Chapter 3 considers a second group of prescribed persons which are sometimes described as regulators.[5] This group is smaller in number than LAPPs and usually has a more singular regulatory remit and is referred to here as non-local authority prescribed persons (non-LAPPs).[6] Chapter 3 examines how non-LAPPs apply the statutory framework to their role and

[4] Here, policy may include procedure and process where these are included in the document or publication assessed; preparation and sending and FOIA 2000 questions and evaluation of responses was undertaken between 29th November 2019 and 10th November 2021.

[5] Defined in the Oxford Advanced Learner's Dictionary as 'a person or an organization that officially controls an area of business or industry and makes sure that it is operating fairly' (OUP 2022) <https://www.oxfordlearnersdictionaries.com/definition/english/regulator> accessed 19 January 2022. Discussed, for example, by Arron Phillips and David Lewis, 'Whistleblowing to regulators; are prescribed persons fit for purpose?' (2013) Middlesex University eRepository 1 5 <https://eprints.mdx.ac.uk/14394/1/WhistleblowingReport.pdf> accessed 3 February 2022; Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2014) 35(3) Legal studies (Society of Legal Scholars) 408 415; Lisa Berry, 'Regulator calls for whistleblowing policy to protect patients and nurses' (2015) 14(1) Cancer Nursing Practice <https://rcni.com/cancer-nursing-practice/newsroom/analysis/regulator-calls-whistleblowing-policy-to-protect-patients-and-nurses-52331> accessed 1 April 2022. Each of the above sources describes the respective non-LAPPs as regulators.

[6] Department for Business Innovation & Skills, Better Regulation Delivery Office, Office for Product Safety and Standards, 'Regulators' Code' (2014) <https://www.gov.uk/government/publications/regulators-code> accessed 26 January 2022.

identifies areas of apparent non-adherence and inconsistency. In addition, Chapter 3 contrasts the differences in approach to whistleblowing identified in the research as between LAPPs and non-LAPPs, as well as evaluating similarities. Whilst each group of prescribed persons is subject to the same legal framework and operates to deliver similar outcomes in respect of whistleblowing disclosures, it was observed that adherence to the statutory framework was generally higher amongst non-LAPPs and reasons for that are briefly considered. Chapter 3 also critiques the findings of the research in respect of LAPPs and non-LAPPs by reference to the relevant professional literature which corroborates or contrasts with the findings of this study.

Chapter 4 provides analysis of the UK's *de jure* legal framework compared to the requirements of the Directive, and the *de facto* position (in respect of UK practice compared with the Directive) arising from the findings and conclusions drawn from the research undertaken and evaluated in Chapters 2 and 3. The distinction between espoused and actual practice is considered important in differentiating strategic factors (eg the adequacy of the legal framework intended to protect the public interest through whistleblowing) from more tactical considerations (eg amongst other factors the availability of staff training, resources, and the performance of prescribed persons).

Chapter 5 examines other countries' whistleblowing legislation and whether the modes examined could help address gaps identified in the UK's approach. The jurisdictions chosen as the comparator for the UK are Australia, Canada, Ireland, New Zealand and South Africa on the basis that they have similar common law roots.[7] Practice identified from these countries' laws, together with complementary elements identified in the Directive, suggest potential non-

[7] These countries were chosen because they display some historical, cultural and legal similarities to the UK including being predominantly English-speaking. However, the author accepts that there are also important dis-similarities which reflect the unique identity of each state.

statutory operational guidance for UK prescribed persons intended both to eliminate identified inconsistency and introduce contemporary practice.

Chapter 6 focuses on the absence of an effective whistleblowing oversight mechanism operating across the UK, with the implication that this may help address the apparent inconsistency of approach found amongst prescribed persons, particularly LAPPs. The role of local authority ombudsmen is considered as a solution, supported by private sector capacity where resources are an issue. Chapter 7 is the concluding chapter which synthesises the findings of Chapters 2-6 by drawing on the evaluation of the evidence from the research which leads to recommendations about how to address inconsistency and embed effective practice. The oversight model suggested is adaptable to changes in law, policy and practice meaning that evolutions are less likely to founder through want of effective governance.

Considerations for additional research arise from this analysis and are included in Chapter 7. The Chapter also describes the original contribution to knowledge which this research makes, and explains the limitations of the investigation and the constraints encountered over the period of the research.

The evidence is presented in 6 volumes. Volume 1 comprises Chapters 1–7, the general content of which is described above. Volume 1 stands alone and incorporates the key findings and lessons drawn from the research contained in Volumes 2-6. These Volumes are included to enable the reader to review the analysis undertaken and results observed. Volume 2 incorporates research Tables 1-25, Volume 3 incorporates research Tables 26–49, Volume 4 incorporates research Tables 50-74, Volume 5 incorporates research Tables 75–95, and Volume 6 incorporates Appendices I–X. The law is as stated at 1 November 2023.

1.2 Framing the relationship between the Directive and UK whistleblowing laws

Although the Directive does not have legal effect in the UK, it may nevertheless have future relevance for the UK's approach to whistleblowing.[8] In addition to the historical, social and economic association between EU Member States and the UK, a political and legal nexus exists between the Directive and the UK. In the aftermath of Brexit dissolution, the EU and UK formally recognised 'a commitment to uphold their respective high levels of protection in the areas of labour and social standards.'[9] Meanwhile, the EU Scrutiny Committee (comprising some UK Members of Parliament) formally reported to the relevant Secretary of State about documentation considered by the Committee to have on-going relevance to the EU UK Trade and Cooperation Agreement (a post-departure 'vehicle' to govern trade and co-operation between the parties after 1 January 2021).[10] The documents were described by the Committee as ones 'which we consider to be legally and/or politically important'.[11] In the annex accompanying the Committee's report is reference to the '[p]roposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937', (ie the Directive).[12] In 2020, the UK enacted domestic legislation to formalise the adoption of matters required to be carried forward as a non-EU member arising from its status as a former Member State and recognising aspects of the recent relationship.[13] The significant affairs incorporated into the Act included the Trade and Cooperation

[8] Directive (EU) 2019/1937 (n 1).

[9] Prime Minister's Office, 10 Downing Street, 'Agreements reached between the United Kingdom of Great Britain and Northern Ireland and the European Union: Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom Of Great Britain And Northern Ireland, of the other part' (2020) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf> accessed 2 August 2022 [hereafter, 'EU/UK Trade and Co-operation Agreement 2020 (n 9)'].

[10] UK Parliament, Committees, 'European Scrutiny Committee' (no date) <https://committees.parliament.uk/committee/69/european-scrutiny-committee> accessed 2 August 2022.

[11] European Scrutiny Committee, 'Scrutiny of EU documents: files considered to have been cleared' (10 February 2021) <https://committees.parliament.uk/publications/4661/documents/46998/default/> accessed 2 August 2022; EU/UK Trade and Co-operation Agreement 2020 (n 9) 6.

[12] Directive (EU) 2019/1937 (n 1); EU/UK Trade and Co-operation Agreement 2020 (n 9) Annex document 11053/20 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf> accessed 2 August 2022.

[13] European Union (Future Relationship) Act 2020.

Agreement referred to above.[14] Through these links it is suggested here that there is a continuing association between the Directive and existing UK whistleblowing laws. Whilst this connection is relatively slender, it nevertheless represents more than a nod to the importance of labour protections as articulated by the parties in the aftermath of their economic and political un-coupling. The UK also remains a member of the 46-member Council of Europe, the Parliamentary Assembly of which has encouraged non-EU Members to revise existing legislation or create new legislation to draw on the Directive.[15] The implications of the relationship are more likely to manifest at a practical level, however, in that in order to trade in the EU, UK employers may have to prove that their whistleblowing procedures meet the requirements of the Directive. More broadly, multi-national organisations will need to take account of the Directive in implementing appropriate cross-border whistleblowing arrangements.

1.3 The material scope of the Directive, and the wider scope of Part IVA Employment Rights Act 1996

The Directive delineates the whistleblowers who, as a result of their disclosures, require protection by Member States. Article 2 defines the material scope of the legislation as concerning breaches of EU law that relate to public procurement, financial services, product safety, transport safety, environmental protection, nuclear safety and radiation protection, food and feed safety, animal health and welfare, public health, consumer protection, and the protection of privacy, personal data, network security and information systems.[16] Given the scope of the Directive, it was necessary in this research to include the prescribed persons in the

[14] European Union (Future Relationship) Act 2020; EU/UK Trade and Co-operation Agreement 2020 (n 9) 6; Section 29(1) European Union (Future Relationship) Act 2020.
[15] Council of Europe Parliamentary Assembly, Resolution 2300 (2019) Improving the protection of whistle-blowers all over Europe.
[16] Directive (EU) 2019/1937 (n 1).

UK the functions of which include the receipt of whistleblowing disclosures in respect of the above matters.[17] It is of note that Part IVA Employment Rights Act 1996 (ERA 1996) and the Public Interest Disclosure (Prescribed Persons) Order 2014 (as amended) provide for a wider ambit than the Directive including matters that pertain to charities, children's interests, police and justice, and trade unions, but which are not considered here.[18]

1.4 What is meant by the term 'whistleblowing'?

The origin of the term 'whistleblowing' is uncertain and apocryphal.[19] Its application in the context of raising a concern about organisational wrongdoing is first credited to Ralph Nader, a consumer champion, who in 1972 explained it as meaning 'an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.'[20] Thus, over 50 years ago, the significance of the unique perspective on wrongdoing gained by those on the 'inside', notably distinguishing 'higher' interests than simply their own or of their organisation, began to crystallise in academic study. Since then, as the issue has been more extensively researched, numerous definitions of the term have emerged.[21] Of these, it is appropriate to comment on the characterisation and definition provided by Near and Miceli who described it as 'the disclosure by organization members (former or current) of illegal,

[17] Directive (EU) 2019/1937 (n 1).

[18] The list of prescribed persons and matters is found in Department for Business, Energy & Industrial Strategy Guidance, 'Whistleblowing: list of prescribed people and bodies' (2021) <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2> accessed 20 February 2022; Directive (EU) 2019/1937 (n 1).

[19] Said to relate to police officers blowing their whistles, or referees in sporting events [Siddhartha Dasgupta and Ankit Kesharwani, 'Whistleblowing: 'A Survey of Literature' (2010) IX(4) IUP Journal of Corporate Governance 57 57; Thomas Olesen, 'The Birth of an Action Repertoire: On the Origins of the Concept of Whistleblowing' (2021) Journal of Business Ethics 13 13].

[20] Ralph Nader, Peter Petkas and Kate Blackwell, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (Grossman 1972) vii.

[21] In 2021, a definition was added by the International Organization for Standardization, 'Whistleblowing management systems – Guidelines ISO 37002: 2021[E]' (ISO 2021) 3 <https://www.iso.org/obp/ui/en/#iso:std:iso:37002:ed-1:v1:en> accessed 17 July 2023.

immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.'[22] Their interpretation is regarded as significant, indeed seminal, because it is considered to have gained recognition as a conceptual benchmark against which comparisons can be made in an active and evolving field of research.[23]

It should be unsurprising that there is no 'universal' denotation of whistleblowing given the breadth of research perspectives and the dynamic nature of the manifestations of malpractice. Examination of a number of good-practice documents permits the suggestion that, generally, where variation in research perspectives arises, it tends to relate to the significance attributed to one or more of 7 'who', and 'what'-type factors.[24] These are described in Vol 6 Appendix I.[25] Whilst according to the research perspective chosen, divergence from other definitional standpoints may emerge, the 7 factors also allow for the convergence of viewpoints.[26] Noting

[22] Janet P Near and Marcia P Miceli, 'Organizational Dissidence: The Case of Whistle-blowing' (1985) 4(1) Journal of Business Ethics 1 4 [hereafter, 'Near and Miceli (n 22)'].

[23] By, for example, David Lewis, AJ Brown and Richard Moberly, 'Whistleblowing, its importance and the state of research' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 4.

[24] Amongst the good practice documents examined in this thesis are Directive [EU] 2019/1937 (n 1) where Explanatory Memorandum foot note (2) references UN Convention against Corruption, [per UN General Assembly, Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) A/RES/58/4]; Organisation for Economic Co-operation and Development, 'G20 Anti-corruption Action Plan: Protection of Whistleblowers, Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation (OECD 2011). Also considered here were: International Labour Organization, 'Termination of Employment Convention 1982 (No 158)'; Transparency International, 'International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest (TI 2013) <https://www.transparency.org/en/publications/international-principles-for-whistleblower-legislation> accessed 13 February 2022; Paul Moxey, 'Incentivising Ethics: Managing incentives to encourage good and deter bad behaviour' (TI 2016) <https://www.transparency.org.uk/publications/incentivising-ethics-managing-incentives-to-encourage-good-and-deter-bad-behaviour#:~:text=A%20key%20argument%20of%20this,think%20are%20unethical%20or%20dysfunctional > accessed 13 February 2022; Iheb Chalouat, Carlos Carrión-Crespo, Margherita Licata, 'Law and Practice on protecting whistle-blowers in the public and financial services sectors' (International Labour Office 2019) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf> accessed 13 February 2022; International Organization for Standardization, 'Whistleblowing management systems – Guidelines (ISO 37002: 2021)' (ISO 2021) <https://www.iso.org/obp/ui/en/#iso:std:iso:37002:ed-1:v1:en> accessed 17 July 2023.

[25] The 7 factors referred to are: (i) Who should be considered a whistleblower? (ii) What should be included as a disclosure? (iii) What should be considered the appropriate burden of proof? (iv) What should be the appropriate motivation for the disclosure? (v) Who should be considered a suitable recipient? (vi) What should be included as protection against retaliation? (vii) What should constitute adequate follow-up?

[26] ibid.

all of the foregoing, and for the purpose of explaining the concept of whistleblowing in this thesis, a number of characterising elements have been distilled from the literature cited and which the research explores.[27] These distillations suggest that whistleblowing involves a person who (i) in a work-related context (ii) discloses information (iii) involving their organisation, whether public or private (iv) about a perceived harm (v) which has a degree of seriousness such as to affect a wider category than just the person's interests (vi) to someone else (whether in their organisation or outside it) (vii) in the expectation that something will be done to address the harm (viii) but where making the disclosure entails a potential risk to the professional status and/or personal well-being of the person as a result of retaliation by member(s) of the organisation(s).

The diversity observed in the research which leads to multiple definitions of whistleblowing is also reflected in the range of legal perspectives found in different jurisdictions. It is therefore accepted in this thesis that '[t]here is no common legal definition of what constitutes whistleblowing' and in light of that, the principal context adopted here is that of the UK, derived from its legislation and accompanying guidance and policies (together, the legal framework).[28] The descriptions of who and what are to be considered whistleblowers and whistleblowing are those inferred from the title of the 'founding' UK whistleblowing legislation and the guidance provided by the UK Government.[29] These are, respectively; an 'Act to protect individuals who make certain disclosures of information in the public interest;

[27] An explanation of terms is provided in Vol 6 Appendix II.

[28] Organisation for Economic Co-operation and Development, 'G20 Anti-corruption Action Plan: Protection of Whistleblowers, Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (OECD 2011) 7.

[29] Public Interest Disclosure Act 1998 (PIDA 1998); Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 January 2022.

to allow such individuals to bring action in respect of victimisation; and for connected purposes', and

> [w]histleblowing is the term used when a worker passes on information concerning wrongdoing. In this guidance, we call that "making a disclosure" or "blowing the whistle". The wrongdoing will typically (although not necessarily) be something they have witnessed at work.[30]

1.5 The significance of whistleblowing: individual, organisational, and wider implications

In addition to explaining the essence of the term, it is also important to make plain the real-world significance of whistleblowing for everyone likely to be affected by malpractice or failings that may otherwise remain unseen. Worldwide, formal inquiries following high-profile events involving loss of life or gross fraud often establish that wrongdoing or poor practice was known about or suspected by persons working within the affected organisations. If personnel with that suspicion had felt able to speak up, or where they did so and were ignored, could have gone to a higher authority empowered and motivated to act, lives could have been spared, criminality confronted, and confidence in organisations' reputations preserved.[31]

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[30] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 January 2022.

[31] Examples in the UK include Her Majesty's Stationery Office, 'MV Herald of Free Enterprise: report of Court No. 8074 Formal Investigation' (HMSO 1987) 12.5 <https://assets.publishing.service.gov.uk/media/54c1704ce5274a15b6000025/FormalInvestigation_HeraldofFreeEnterprise-MSA1894.pdf> accessed 27 February 2022; The Stationery Office, 'Overview of the Government's action programme in response to the recommendations of the Shipman Inquiry' (SO 2007) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228886/7014.pdf> accessed 27 February 2022; 'Review: Lord Cullen – what have we learned from Piper Alpha?' *Finding Petroleum* (London, 16 September 2013) <https://www.findingpetroleum.com/n/Review_Lord_Cullen_what_have_we_learned_from_Piper_Alpha/044b5113.aspx> accessed 29 March 2022. In the USA, C. William Thomas, 'The Rise and Fall of Enron: When a company looks too good to be true, it usually is' (2002) Journal of Accountancy <https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html> accessed 21 July 2023; Gerard Beenan, Jonathan Pinto, 'Resisting organizational-level corruption: an interview with Sherron Watkins' (2009) 8(2) Academy of Management Learning & Education 276; regarding a spacecraft disaster see Kathleen Clark, 'White Paper on the Law of Whistleblowing' (2012) 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176293> accessed 28 February 2022. In India, for example, regarding the alleged murder of a whistleblower cited by Shivam Goel, 'Protection of Whistle-Blowers in India: A Corporate Perspective' (2014) 5 <http://dx.doi.org/10.2139/ssrn.2530397> accessed 2 March 2022.

Whereas Brown, Vandekerckhove and Dreyfus report that 'transparency values interrelate with public trust', and Stephen Kohn says of whistleblowing; 'it is widespread, worldwide and extremely effective', the question arises why whistleblowing, as an ostensibly noble activity that offers benefits to organisations and the public good is frequently undermined by its intended beneficiaries. Reasons are said usually to include fear of exposure and the sometimes-significant consequential personal, professional and corporate impact.[32] In this section the significance of whistleblowing is considered from three perspectives: the whistleblower, their employing organisation, and 'society'.

1.5.1 The whistleblower

Near and Miceli found that whistleblowers were more likely to blow the whistle if they had convincing evidence of wrongdoing, the wrongdoing was serious, and it directly affected them, whilst Keil and others' perspective inclines towards the tangible benefits for a whistleblower where

> the cessation of wrongdoing may actually benefit the whistleblower either through intrinsic rewards (e.g., an improvement in the workplace environment or resolution of a perceived problem) or through direct rewards (e.g., cash rewards such as those granted to federal whistleblowers).[33]

However, the risks of making a disclosure are also recognised as being serious for some whistleblowers. For example, Transparency International (TI) noted that '[t]hey may be fired,

[32] AJ Brown, Wim Vandekerckhove and Suelette Dreyfus, 'The Public's Interest: Empirical evidence on the relationship between transparency, whistleblowing, and public trust' (2014) 1 33. <http://dx.doi.org/10.4337/9781781007945.00008> accessed 8 March 2022; Stephen Martin Kohn, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* xv (Lyons Press 2011). Also, Tim Barnett, 'A preliminary investigation of the relationship between selected organisational characteristics and external whistleblowing by employees' (1992) 11(12) Journal of Business Ethics 950; Kim R Sawyer, Jackie Johnson, and Mark Holub, 'The Necessary Illegitimacy of the Whistleblower' (2010) 29 (1-4) Business & Professional Ethics Journal 87.

[33] Near and Miceli (n 22) 4; Mark Keil and others, 'Toward a Theory of Whistleblowing Intentions: A Benefit-to-Cost Differential Perspective' (2010) 41(4) Decision Sciences 787 790.

sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed'.[34] Bjørkelo and Matthiessen observed that '[s]ometimes, the act of reporting wrongdoing at work is met by retaliation, victimisation and even workplace bullying', and at a rate for whistleblowers twice that of non-whistleblowing co-workers.[35] In understanding and explaining the modus operandi of whistleblowing, it is also important to note that retaliation may not always be perpetrated by employers; sometimes, recriminatory action or inaction is instigated by fellow workers.[36] It is not surprising therefore that for some whistleblowers, along with stigma, comes stress and other health-related problems, and so legal safeguards at the individual level can be seen as essential if the positive benefits of effective whistleblowing are not to be subverted by, paraphrasing Park and Lewis, fears, smears, and intimidations.[37]

1.5.2 The employing organisation

For employers, the literature suggests that benefits accrue from responsible handling of disclosures. Teichmann and Falker offer a view predicated on organisational self-interest where 'it is in the best interest of the company to resolve corruption and problem behaviour internally before the media or authorities become aware of them.'[38] Whether from motives of organisational trepidation or altruism, effective whistleblower management in organisations is

[34] Transparency International 'Whistleblower Protection' (TI 2019) 1 1. <https://www.transparency.org/files/content/feature/2019_G20_Whistleblowing_Transparency_International.pdf> accessed 8 March 2022.

[35] Brita Bjørkelo & Stig Berge Matthiessen (2011) 'Preventing and Dealing with Retaliation Against Whistleblowers' in David Lewis and Wim Vandekerckhove (eds) *Whistleblowing and democratic values* 127 135 (International Whistleblowing Research Network 2011).

[36] Greg Wood, 'A Partnership Model of Corporate Ethics'(2002) 40 Journal of Business Ethics 61 73; Siddhartha Dasgupta and Ankit Kesharwani, 'Whistleblowing: 'A Survey of Literature' (2010) IX(4) IUP Journal of Corporate Governance 1 7.

[37] Heungsik Park & David Lewis, 'The negative health effects of external whistleblowing: A study of some key factors' (2018) 55(4) The Social Science Journal 387 390; ibid 389; ibid 394.

[38] Fabien M Teichmann, Marie-Christian Falker, 'Whistleblowing Incentives' (2021) 28(2) Journal of Financial Crime 394 402.

often commended.[39] Yet, the propensity for the whistleblower's organisation to perceive the disclosure as a threat and to be resisted is also well-recognised in the literature.[40]

1.5.3 'Society'

More widely, whistleblowing is said to bring a range of important benefits. For example, Devine and Maassarani report that '[w]histleblowers' actions have saved the lives of employees, consumers, and the general public, as well as billions of dollars in shareholder and taxpayer funds.'[41] In explaining the purpose of the EU Directive on the protection of persons who report breaches of EU law, a wide range of benefits is described in the recitals including 'safeguarding the welfare of society', a point which helps distinguish benefits that may accrue through disclosures made in the public interest from those that benefit the majority of the public.[42] As Eric Boot explains, '[t]his concern points towards the idea that the public interest is a moral concept', rather than simply a mathematical calculation of the ratio of beneficiaries to non-beneficiaries.[43] Whilst the terms 'moral' and 'ethical' are sometimes used interchangeably in everyday language, this thesis largely proceeds on the rules-based connotation of the ethical value of whistleblowing (through the application of relevant laws and policies; discussed later) whilst nevertheless respecting the attributed moral genesis of whistleblowing.

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[39] Jessica R Mesmer-Magnus, Chockalingam Viswesvaran, 'Whistleblowing in Organizations: An examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation' (2005) 62 Journal of Business Ethics 277 277; Wim Vandekerckhove and Cathy James, 'Blowing the Whistle on the Union: How Successful Is It?' (2013) 2(3) E-Journal of International and Comparative Labour Studies 1 7; Sonja R Clearly, Kerrie E Doyle, 'Whistleblowing Need not Occur if Internal Voices Are Heard: From Deaf Effect to Hearer Courage' (2016) 5(1) Int J Health Policy Manage 59 60.

[40] Kate Kenny, Marianna Fotaki, Alexis Bushnell, 'Post-disclosure Survival Strategies: Transforming Whistleblower Experience' (2019) 5 <https://www.whistleblowingimpact.org/wp-content/uploads/2019/06/19-Costs-of-Whistleblowing-ESRC-report.pdf> accessed 21 March 2022.

[41] Tom Devine, Tarek F Maassarani, *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth* 4 (Barrett-Koehler in association with the Government Accountability Project 2011).

[42] Directive (EU) 2019/1937 (n 1) Recital 1.

[43] Eric R Boot, 'The Feasibility of a Public Interest Defense for Whistleblowing' (2019) 39 Law and Philosophy 1 9.

The preceding paragraphs are intended to convey a sense of the meaning, pervasiveness, complexity and contentiousness of whistleblowing, as well as its importance to the public interest. It follows that for laws and related policies to be effective in securing the benefits of whistleblowing, they need to take account of the individual, organisational and wider context briefly discussed in the preceding paragraphs.

1.6 Understanding Part IVA of the Employment Rights Act 1996 and its significance for whistleblowing in the UK

1.6.1 The genesis and context of the legislation

The UK's common law tradition has provided case law precedent which underpins the legal relationship between employee and employer. One significant aspect of this is the expectation of confidentiality between the parties during the term of employment and which can persist beyond termination where necessary 'to protect legitimate business interests and are reasonable in all the circumstances'.[44] David Balaban Lewis cites important case law dating from the 1960s which affirms the principle that confidentiality pertains to bona fide business aims, and it follows that confidentiality cannot be claimed for the purpose of concealing malpractice of significance to the public interest.[45] An important caveat in this confidentiality exception (and relevant to the application of UK whistleblowing laws) is that the person to whom a disclosure is made in prima facie breach of employee/employer confidentiality must be 'someone who has an interest in receiving it'.[46]

[44] David Balaban Lewis, 'Nineteen years of whistleblowing legislation in the UK: is it time for a more comprehensive approach?' (2017) 59(6) Internal Journal of Law and Management 1126 1127.
[45] ibid; see *Initial Services v Putterill* [1968] 1 QB 396 wherein the first defendant took documents and information about his employers' alleged price fixing and disclosed details to a second defendant, a national newspaper.
[46] *Initial Services v Putterill* [1968] 1 QB 396.

On a separate track, the protection of those raising concerns was developing via health and safety at work concerns, and through the role of trade unions. The Health and Safety at Work etc. Act 1974 provides that employees have responsibilities including raising the existence of hazards where they work.[47] Later, the Safety Representatives and Safety Committee Regulations 1977 provided for the establishment of safety representatives and safety committees in organisations with union representation.[48] Subsequently, the Trade Union and Labour Relations (Consolidation) Act 1992 legislated for protection from detriment on grounds related to union activities, which would include pursuing the prevention or remediation of work-placed hazards, or as a result of safety representation or safety committee duty.[49] ERA 1996 includes protections from detriment, dismissal or redundancy for trade union representatives and others who are designated by the employer as undertaking similar duties.[50]

Meanwhile, the public interest defence, whilst available against actions for breach of confidence in an employment setting, was found to be inadequate to deal with a raft of scandals which surfaced in the UK during the 1980s and1990s. It was apparent that workers were aware of problems but were not adequately supported by mechanisms for effective intercession when problems were raised.[51] At the same time, disquiet about the alleged behaviour of public office holders prompted the UK government to establish a code of values and standards for such persons.[52] Concurrently, politicians were taking an active interest in the need for, and form of,

[47] Section 7 Health and Safety at Work etc. Act 1974.
[48] ibid Sections 3 and 9, respectively.
[49] ibid Section 146(1).
[50] ibid Sections 44, 100 and 136, respectively.
[51] Reported in James Gobert and Maurice Punch, 'Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998' (2000) 63(1) The Modern Law Review 25 25 which references the effect of: '*Report of the Court No 8074,* mv Herald of Free Enterprise (1987) (Sheen report); *Investigation into the Clapham Junction Railway Accident* Cm 820 (1989) (Hidden report); *Public Inquiry into the Piper Alpha Disaster* Cm 1310 (1990) (Cullen report).'
[52] HMSO, 'Standards in Public Life: First Report of the Committee on Standards in Public Life Volume 1: Report Cm 2850-1' (1995) <https://assets.publishing.service.gov.uk/media/5a7e4497ed915d74e33f124b/1stInquiryReport.pdf> accessed 31 July 2022.

legislation to uphold the public interest through the medium of whistleblowing and felt that the focus of protections should be for those making disclosures at work, hence the incorporation of the Public Interest Disclosure Act 1998 (PIDA 1998) into ERA 1996.[53] Between 1996 and 1998, the Bill that would become PIDA 1998 received 'mentions' on 34 occasions in the Houses of Parliament before its commencement date of 2 July 1999.[54] These developments in the UK are seen by others as being consistent with a global expansion in whistleblowing laws during the two decades spanning the end of the 20th century and the beginning of the 21st century.[55] One explanation to account for the 'the burst in activity' was the demise of the Soviet Union in 1990, with the associated hegemony of liberal democracies, the adoption of a freedom of information culture, and the ascendency of free markets.[56] It is not straightforward to reconcile the UK context for the advent of PIDA 1998 with this world-view of the adoption of symbols of democracy by both new and mature democracies. However, Robert Vaughan also posits the role of common problems for new, emerging and mature democracies alike; including health & safety considerations, anti-corruption requirements and the growing role of civil society movements in the rapid adoption of whistleblowing legislation internationally. [57] These factors arguably appear more consistent with the UK context for the development and adoption of PIDA.

1.6.2 Disclosures qualifying for protection

[53] Including private members' bills proposed by Dr Tony Wright MP, Don Touhig MP and Richard Shepherd MP. Their bill gained Government support on condition of its incorporation into ERA 1996; Protect, 'Whistleblowers need employment rights – In defence of PIDA' (2022) <https://protect-advice.org.uk/whistleblowers-need-employment-rights-defending-pida/#:~:text=When%20Parliament%20first%20addressed%20the,Rights%20Act%201996%20(2)> accessed 31 July 2022.

[54] Amounting to 14 mentions in the House of Commons, 5 mentions in the House of Lords and 15 written answers, according to Hansard ['Public Interest Disclosure Bill' <https://api.parliament.uk/historic-hansard/bills/public-interest-disclosure-bill> accessed 17 July 2022].

[55] Robert G Vaughan, *The Successes and Failures of Whistleblower laws* (Edward Elgar 2012).

[56] ibid.

[57] ibid 242.

Given the centrality of the UK context to this thesis, it is necessary to set out and explain how the key elements of the relevant legislation contained within Part IVA ERA 1996 are intended to operate and, with that, the benefits which should accrue to the UK public interest.[58] PIDA 1998, which came into effect from 2nd July 1999, legislated for the insertion of a new Part IVA into ERA 1996 and which is the cornerstone of the UK's statutory approach to whistleblowing (though the common law of confidentiality may also apply to whistleblowing in certain circumstances where the Part IVA is not applicable).[59] Part IVA does not define what a whistleblower is beyond the indication contained within PIDA 1998's long title, but the approach expected is that where a worker – often the first to identify malpractice in the workplace – sees or hears something within their organisation 'which in the reasonable belief of the worker' [Section 43B(1)] suggests that one or more of the public interest failures described in Section 43B(1)(a)-(f) is occurring, has occurred, or will occur, then the worker can raise the concern with their employer (and/or the person responsible, where not the employer) in the expectation that the employer (or person responsible) will want to address and resolve the matter.[60] This beneficial outcome is what is envisaged in Section 43C of Part IVA.[61]

1.6.3 Disclosure to the employer or other person responsible for the failure

Consistent with this principle of early and proximate resolution, Section 43C also addresses a circumstance where the employer is not responsible for the alleged failure and therefore would not be in a position to resolve it (although the whistleblower would still be making a protected

[58] This paragraph should be read in conjunction with Vol 6 Appendix II where relevant definitions of terms are included; the public interest would also be served by private organisations being able to operate unhindered by the adverse impact of the type of failures described in Section 43B(1) ERA 1996.
[59] Northern Ireland has its own legislation namely the Employment Rights (Northern Ireland) Order 1996 and the Public Interest Disclosure (Northern Ireland) Order 1998; the common law of confidentiality is not systematised and standardised because it has evolved through case law over time. However, its role is summarised as an explanatory note, where relevant, in some UK legislation including (in the context of the identification of an individual) the Health and Social Care (Control of Data Processing) Act (Northern Ireland) 2016 Explanatory Notes point 11.
[60] ERA 1996
[61] ibid.

disclosure to the employer).[62] Sensibly, it may be thought, the Section designates that a qualifying disclosure may also be made to some other person (ie not the employer) whose conduct has led to the failure, or to a person or organisation legally responsible for the failure (where not the employer or person whose conduct has led to the failure).[63] Consider the example of an agency worker who has a primary employer but is posted to different locations from time to time to provide services and where at one of those locations witnesses a failure [amounting to one or more of the grounds set out in Section 43B(1)(a)-(f)].[64] Here, the person could raise the relevant failure either with their employer or the organisation within which or by which the alleged failure is occurring (or, indeed, with both).[65] Section 43C(2) takes cognisance that some organisations formally establish an independent mechanism to which whistleblowing disclosures can be made; eg a whistleblowing call-centre operated by a third party.[66] This sub-section treats a report made under such an arrangement (all other criteria being met) as if it were a qualifying disclosure made directly to the employer.

If the disclosure at this primarily internal juncture leads to a satisfactory resolution, then it may be said that this is an effective and efficient way to secure an outcome beneficial both to the private interest of the employing organisation and the public good (and hence the value of employers implementing preventative measures such as clear policy, effective procedure, regular and targeted communication to, and adequate training of, their staffs). However, where the failure is not addressed by the employer or person responsible (Section 43C), other graduated options are available to the whistleblower to raise their concern about the alleged failure, but still with an expectation of proportionality as between protecting the public interest

[62] ERA 1996; Vol 6 Appendix II includes definitions of terms.
[63] Section 43C(1)(b)(i) ERA 1996.
[64] Further discussed in respect of Section 43K ERA 1996.
[65] The whistleblower, concurrently, could also raise the qualifying disclosure with the appropriate prescribed person under Section 43F ERA 1996.
[66] ERA 1996.

through the prompt resolution of the concern, and respecting the right of organisations to manage their own business affairs without unnecessary external interference.[67] These mechanisms are discussed in the ensuing sections.

1.6.4 Disclosure to a legal adviser

Section 43D enables a disclosure to be made 'in the course of obtaining legal advice' by means of a 'disclosure to legal adviser.'[68] Although a legal adviser would clearly include lawyers (solicitors, instructed counsel), there is contention on at least two grounds about other roles which may be so considered for the purposes of Section 43D, and what constitutes legal advice.[69] Firstly, it is arguable that the term may also relate to union officials and members of professional bodies (eg accountants, and auditors) providing advice and, secondly, whether the advice provided by such advisers is sufficient (for the purposes of Section 43D) when merely general in character or should be specific to the facts of the case.[70] Section 43D provides for two approaches as to how a disclosure under this Section can be made.[71] The first is where the whistleblower is seeking legal advice in contemplation of making a disclosure themselves and, secondly, where the solicitor etc. will make the disclosure on behalf of the whistleblower (to the extent authorised by the whistleblower). One can readily envisage the benefits of interposing a legally qualified mediator who is emotionally detached from the events between those responsible for the alleged failure and the whistleblower. It follows that a disclosure under Section 43D to a legal adviser could be made prior to, or after, the same or substantially the same, disclosure is made under Section 43C or Sections 43E – 43H (discussed in Section

[67] ERA 1996.
[68] This is the wording of the heading above Section 43D in ERA 1996, and the wording of the sidenote included in PIDA 1998 adjacent to the section which amends ERA 1996.
[69] ERA 1996.
[70] Jeremy Lewis and others, *Whistleblowing: law and practice* (3rd edn, OUP 2017) 100 paras 5.36 – 5.47 [hereafter, 'Lewis and others (n 70)'].
[71] ERA 1996.

1.6.5 below), though the situations where such a multi-faceted approach would be necessary vary in their likelihood.[72]

For illustration, a sense of how key sections of Part IVA interact can be gleaned from the following hypothetical scenario: a worker could take advice from their solicitor on the compatibility of their information with Part IVA (under Section 43D), and then report the matter to their employer (under Section 43C), and at the same time if they chose, to the correct prescribed person (Section 43F).[73] If the employer does not address the issue (where the disclosure was made to the employer only), the worker might make the disclosure to a prescribed person (under Section 43F) and if this person does not address it, the worker could make the same, or substantially the same, disclosure to another body well-placed to address the failure (under Section 43G).[74] Finally, if the concern is still not resolved and the risk of harm is exceptionally serious, then the worker may make a public disclosure (probably via the media) if the requirements of Section 43H are met.[75] To be clear, this outline does not suggest that the legislation requires that this sequence must be followed; whilst a 'linear' approach to disclosure is encouraged where it is reasonable and proportionate to do so, a non-linear disclosure may be appropriate and therefore lawful, where the relevant criteria for that type of disclosure are met.

The following paragraphs are intended to explain and illustrate how Part IVA should apply, including the protections available for the worker and their employer (and/or person responsible for the failure). Part IVA should be thought of as a process in which a qualifying disclosure is managed and escalated, as necessary, from the intended starting point of the

[72] ERA 1996 .
[73] ibid.
[74] ibid.
[75] ibid.

internal realm of the worker-employer relationship (Section 43C to Section 43E), to the involvement of outside bodies and the public (Sections 43F – 43H) and, ultimately, the courts.[76]

1.6.5 Disclosure to a Minister of the Crown

Section 43E relates to a qualifying disclosure made to a Minister by a worker in a government department or one of the non-departmental bodies accountable to a Minister. Whilst not all Ministers are Members of Parliament, government guidance provides that '[i]n addition, you can blow the whistle to your legal adviser or to your MP.'[77] As the guidance relates to prescribed persons, it is assumed that the conditions for disclosure to an MP would be analogous to those under Section 43F for other prescribed persons.[78] However, the reference to 'your legal adviser' in the same sentence of the guidance can relate, for legal advisers, only to the circumstances described in Section 43D (ie in the course of obtaining legal advice), so it is assumed that the guidance also includes a legal adviser making a disclosure of a nature and to the extent authorised by the whistleblower and on their behalf.[79]

1.6.6 Disclosure to a prescribed person

Part IVA, through Section 43F, creates the concept of the 'prescribed person'; a person or body to whom a qualifying disclosure can be made, as designated by ministers [under the Public Interest Disclosure (Prescribed Persons) Order 2014, pursuant to Section 43F(2)].[80] The role of prescribed persons is not clearly defined in the relevant guidance.[81] In particular,

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[76] ERA 1996.
[77] Department for Business, Energy & Industrial Strategy Guidance, 'Whistleblowing: list of prescribed people and bodies' (2021) <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2> accessed 20 February 2022; ibid.
[78] ERA 1996.
[79] An assumption supported by others, eg '[i]n respect of a Member of the House of Commons, there is a catch all, in that they are prescribed for anything falling within the description for any other prescribed person', in Lewis and others (n 70) 117 para 5.57.
[80] ERA 1996.
[81] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 5

circumspection is noted in the description of their role and what action a whistleblower might expect following a disclosure in the public interest to a prescribed person.[82] In making a disclosure under Section 43F, the wording of the legislation signals that a whistleblower is taking a significant step outside the internal paradigm of worker-employer relations (where mutual expectations of loyalty and confidentiality operate) in approaching an external person 'prescribed by an order made by the Secretary of State…'.[83] The legislation places additional requirements (as compared to those under Section 43C) on the whistleblower in that the whistleblower must make the disclosure to the correct prescribed person [Section 43F(1)(b)(i)], and – most notably in comparison with Section 43C – the burden of proof becomes higher in that 'the information disclosed, and any allegation contained in it, are substantially true' according to Section 43F(1)(b)(ii), whereas the whistleblower needs only a 'reasonable belief' under Section 43B(1) that the disclosure 'tends to show' in the public interest that one of the designated failures is at issue.[84] It is worth emphasising that this differential burden on the whistleblower reflects the significance (as established by the legislators) of the effect of transition from internal to external disclosures by workers.[85] The nexus between escalations that take disclosures outside the worker's organisation, and complementary enhanced burdens, may be said to be a theme of Part IVA.

1.6.7 Disclosure outside the internal or regulatory provisions

1.6.7.1 Section 43G: disclosure to other external persons or bodies

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 20 February 2022.

[82] ibid 6.

[83] Section 43F(1)(a) ERA 1996.

[84] ERA 1996.

[85] HL Deb. 11 May 1998, vol 589, cols 888-904 where Lord Borrie set out the intended effect of Section 43 ERA 1996 and how it was expected to operate.

The next identifiable threshold that provides insight into the legislative intention of Part IVA is observed where the whistleblower considers that their qualifying disclosure has not been satisfactorily addressed (or is unlikely to be, in certain defined circumstances) by the internal and regulatory disclosure strata established by Sections 43C-43E (together 'internal') and Section 43F (the 'regulatory' stratum).[86] Provided the legislative criteria are met, the whistleblower may escalate the substance of the disclosure to an external category of recipient which could, in extremis, include the public via the media. Again, it is to be noted that additional requirements are imposed on the discloser the more they dis-engage from the core employer-worker relationship, to ensure that the disclosure is reasonable in all the circumstances and that statutory protection of the whistleblower remains justified because the enhanced criteria have been met.

Noting the above operating principles, Section 43G enables the whistleblower to make a protected disclosure to someone well-placed to address the failure subject of the qualifying disclosure. An example may include where a healthcare professional is concerned that a colleague has engaged in the abuse of vulnerable clients and, in the whistleblower's view, represents an on-going risk to others. Having raised the substance and detail of their concerns with the employer and/or a prescribed person (per Sections 43C and/or 43F, respectively), if the whistleblower remains dissatisfied with the response because clients remain at risk, the whistleblower could make a disclosure under Section 43G to the relevant police service which, whilst not a body prescribed in the Public Interest Disclosure (Prescribed Persons) Order 2014, is often regarded as an agency of last resort which has a range of powers and capabilities that can be deployed to prevent crime and safeguard those at immediate risk of harm.[87] However,

[86] ERA 1996.

[87] The circumstances of the case will determine whether the concern is a qualifying disclosure and properly made to the correct entity (whether a prescribed person or not) ie, together, a protected disclosure (Vol 6 Appendix II includes a definition of terms).

Section 43G includes additional considerations that must be addressed by the whistleblower to ensure that the disclosure remains protected.[88] As with Section 43F, the degree of certainty of the 'facts' is elevated to the standard of a reasonable belief 'that the information disclosed, and any allegation contained in it, are substantially true' and that the disclosure is not 'for purposes of personal gain' [Section 43G(1)(c)].[89] In addition to the terms of Section 43C (disclosure to the employer/person responsible for the harm or failing) and Section 43F (to the relevant prescribed person), the additional requirement is imposed that 'in all the circumstances of the case, it is reasonable for him to make the disclosure' [Section 43G(1)(e)].[90] Section 43G also introduces further criteria (at the 'reasonable belief' standard) to ensure that the disclosure and the whistleblowing worker can remain protected.[91] These requirements specify that the worker must be unable to make the disclosure to their employer (Section 43C) or the appropriate prescribed person (Section 43F) for (reasonable) fear of detriment by the employer [Section 43G(2)(a)], or that the employer will dispose etc. of relevant evidence when informed of the disclosure (and where there is no person prescribed to receive the same disclosure) [Section 43G(2)(b)], or where a previous but fruitless report of the same or comparable information has been made to the employer or prescribed person (under Section 43C or 43F, respectively).[92]

Section 43G(3) sets out the considerations which establish the test of reasonableness in the 'all the circumstances' criterion included in Section 43G(1)(e) and mentioned above.[93] In summary, these considerations include the identity of the person to whom the disclosure is made (in reference to the relevancy of their function); the seriousness of the failure alleged; whether the disclosure would breach confidentiality owed by the employer to someone else;

[88] ERA 1996.
[89] ibid.
[90] ibid.
[91] ibid.
[92] ibid.
[93] ibid.

the action taken (or which could have been taken) by the prescribed person to whom the disclosure was previously made; and where the disclosure had already been provided to the employer, that it was made in accordance with the employer's relevant procedure for reporting such concerns.[94] Finally, Section 43G(4) permits the inclusion of information about the action, or lack of action, taken by anyone to whom the disclosure had previously been made under Section 43C or Section 43F (provided that the disclosure was substantially the same as in any previous disclosure made, excluding any element relating to the action taken or not taken by others under Section 43C or Section 43F).[95]

1.6.7.2 Section 43H: disclosure in exceptional circumstances

The final disclosure scenario within Section 43 is described in Section 43H which is entitled in its side note as 'Disclosures of exceptionally serious nature'.[96] This context is the key differentiator between the requirements of Section 43G and 43H (whereas the other conditions described in Section 43G continue to apply in Section 43H; namely, a reasonable belief that the disclosure and any allegation are substantially true, there is no personal gain accruing to the whistleblower through the disclosure, and that the disclosure is reasonable in all the circumstances). The expression 'exceptionally serious nature' was subjected to close scrutiny during the passage of the PIDA 1998 Bill where it was explained that in balancing the benefit of exposing failures of such gravity, and the potential risk of a whistleblower disclosing confidential information, it was appropriate that an even more elevated (but not insurmountable) threshold be established meaning that Section 43H would be available only rarely to a whistleblower.[97]

[94] See Section 43G(3)(a)-(f) ERA 1996.
[95] ERA 1996.
[96] ibid.
[97] See HL Deb. 5 June 1998, vol 590, cols 629-30. In particular, Lord Haskel: 'The purpose of inserting "exceptional" is to indicate that the case is indeed a rare case. Nobody wants individuals disclosing confidential information to other bodies unless the circumstances are exceptional.'

1.6.8 Other significant elements of Part IVA

Another important tenet of Part IVA is noted in the short Section 43J which makes void any agreement between employer and worker that would prevent the worker from making a protected disclosure, or from commencing or continuing with legal proceedings brought under ERA1996 or 'any proceedings for breach of contract because of making a protected disclosure'.[98] Clearly, it is in the public interest that serious failures cannot be suppressed through contract terms and conditions which could affect the livelihood of those in a position to reveal malpractice.

The categories of worker described in Section 43K(1) are extended beyond those referenced in Section 230(3) to include agency workers, contractors working for an employer elsewhere than at the employer's place(s) of work, persons working within some health services, and those undertaking work experience as trainees.[99] Section 43K(2) defines who should be treated as the employers of those workers included in Section 43K(1).[100] This extension of the definition of a worker has regard to the changing nature of employment over time.

Other sections within Part IVA are significant to the protection of workers who raise concerns about wrongdoing.[101] Section 47B establishes that a worker should be protected from detriment caused by the action or inaction of the employer as a result of making a protected disclosure, including where the detriment is caused by a co-worker of the whistleblower (unless the employer can demonstrate that it took reasonable steps to prevent co-worker detriment).[102] Section 48(1A) enables a worker to bring proceedings before an employment tribunal (ET) alleging a detriment because of making a protected disclosure, and Section 49(6) limits the

[98] See Section 43J(1) and (2) ERA1996.
[99] ERA 1996; Vol 6 Appendix II includes definitions of terms.
[100] ERA 1996.
[101] ibid.
[102] ibid; Vol 6 Appendix II includes definitions of terms.

compensation payable to a worker whose contract (other than a contract of employment) has been terminated for the same reason.[103] The compensation payable to the worker in these circumstances is restricted so as not to exceed that payable had an unfair dismissal claim been successful where the claimant was an employee. Section 103A provides that dismissal will be unfair if the reason or principal reason for it was that the employee had made a protected disclosure.[104] In similar vein, Section 105(6) renders redundancy unfair where the reason or principal reason for selecting the employee was because they had made a protected disclosure.[105] Section 108 (ff) provides that an employee can complain of unfair dismissal irrespective of their length of service if the reason or principal reason for dismissal was the making of a protected disclosure.[106] Though not part of Part IVA ERA 1996, Section 237(1A)(a) Trade Union and Labour Relations (Consolidation) Act 1992 provides for the protection of those engaged in unofficial industrial action who would otherwise face dismissal for these activities but where the main reason for their dismissal is having made a protected disclosure.

Of the remaining 10 sections of PIDA 1998 which amended ERA 1996, two are commented upon here for their particular significance to the protection of whistleblowers making disclosures in the public interest. Sections 128 and 129 ERA 1996 provide that an employee who was unfairly dismissed because they made a protected disclosure may seek an order for interim relief (including reinstatement to their position) from an ET. Secondly, although Section 196(3A) provides that Part IVA does not apply where a worker ordinarily works outside Great Britain, it is important to note that under Section 43B(2) it is irrelevant where a

[103] ERA 1996.
[104] ibid.
[105] ibid.
[106] ibid.

relevant failure occurs and, with that, whether the law applying to it is that of the UK or another jurisdiction.[107] Therefore, the public interest 'reach' of Part IVA could be said to be extensive.

In summary, PIDA 1998, through its 18 sections, created an integrated set of protections and responsibilities in defined circumstances intended to protect the public interest through the agency of whistleblowers. The ensemble of measures was embedded as a new Part IVA of ERA 1996, the primary employment legislation in the UK, acknowledging workers' unique purview of their organisations' failures, and recognising that employers are generally best placed to address such breakdowns. This pair of principles, along with setting the bar in terms of defining relevant harms and failures, provides the logic and operating nodes around which the other precepts, including the approved escalation process if a worker's qualifying disclosures are not addressed, are established within Part IVA. This thesis examines how well these arrangements are followed in practice, how they compare against contemporary international legal formats, and how deficits can be addressed without the need for law change, where possible.

[107] ERA 1996; noting that separate legislation pertains to Northern Ireland ie the Employment Rights (Northern Ireland) Order 1996.

Chapter 2: Assessing the compliance of local authority prescribed persons with UK whistleblowing legislation

2.1 Introduction

Chapter 2 reviews FOIA 2000 responses to establish whether LAPPs follow the requirements of the statutory framework comprising Part IVA ERA 1996 (established by PIDA 1998), the Enterprise and Regulatory Reform Act 2013 (ERRA 2013), the Public Interest Disclosure (Prescribed Persons) Order 2014, and the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, and the national equivalent legislation for the constituent countries of the UK, where different. The information provided by LAPPs was augmented by open-source access to local authority whistleblowing policies, where not provided by the respondent LAPPs. The analysis of these sources uncovered a range of inconsistencies considered likely to undermine the effectiveness of the framework.

2.1(a) Objectives

The primary objective of this Chapter is to identify and evaluate themes in LAPPs' FOIA 2000 responses and their published or available whistleblowing policies which, separately and together, suggest whether, and how well, LAPPs discharge their obligations as supposed investigators of disclosures.

2.1(b) Methodology

The design of the FOIA 2000 questions was intended to be quantitative in order to secure 'Yes', 'No' or 'Don't know' responses and thereby facilitate comparison between prescribed persons. The exceptions are Questions 11 and 12 which are more descriptive in character, whilst Question 15 (for non-LAPPs) was simply a request for data held. After each 'Yes' option the

phrase 'Please explain what action is taken' was included, to accommodate any elaboration the respondent wished to add (Vol 2 Table 1/Appendix XI). Many respondents took the opportunity to append narrative to the intended binary responses. Their comments are included for completeness' sake and were considered only to the extent necessary to facilitate understanding of any apparent inconsistency between a quantitative response and the accompanying remarks (Vol 2 Tables 5A and 5B).

Three information sources underpinned the research. The first was the responses received from 367 local authorities following FOIA 2000 requests submitted to 409 local authorities in the UK (an 89.7% response rate). Requests were also made to 86 non-LAPPs (the functions of which accord with the specified public interest criteria described in the Directive) from which 78 responses (90.7%) were received and which are considered in Chapter 3.[1]

In addition to the FOIA 2000 responses, a second information source assessed was the whistleblower policies produced by each LAPP (and non-LAPPs evaluated in Chapter 3), where publicly available or provided with the FOIA 2000 response. These policies were sometimes described by different names (apparently according to LAPPs' individual preferences) but usually fulfilled a similar function in setting out the prescribed person's policy position and in many cases, the procedure and process to be followed in managing a whistleblowing disclosure.[2] Prescribed Persons are assisted to a degree in their role through guidance provided by the UK Government's Department for Business, Energy & Industrial Strategy which advises that '[a]ll disclosures should be dealt with on a case-by-case basis and

[1] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law OJ L 305/17 [hereafter, 'Directive (EU) 2019/1937 (n 1)'].

[2] Including, 'Confidential Reporting Policy' (Vol 2 Table 20 R22); 'Confidential Reporting Code' (Vol 2 Table 20 R42); 'Raising Concerns Procedure' (Vol 2 Table 22 R106); 'Anti Fraud and Corruption Policy' (Vol 2 Table 22 R122); 'Speaking up about wrongdoing' (Vol 2 Table 24 R314); 'Whistleblowing Policy' (Vol 2 Table 22 R105).

to a defined and published set of policies and procedures, ensuring a consistent approach.'[3] The third data source used was the reports required to be published annually by local authorities about whistleblowing reports received by them. Together, the three information sources provided 6,178 data points for analysis and from which research conclusions were subsequently drawn.[4]

2.2 UK prescribed persons with analogous roles to those included in the Directive

2.2(a) Local authority prescribed persons

According to the Schedule published in Article 3(1) and (2) of the Public Interest Disclosure (Prescribed Persons) Order 2014, local authorities which 'are responsible for the enforcement of food standards in accordance with Section 5 and 6 of the Food Safety Act 1990…' are designated as prescribed in respect of '[c]ompliance with the requirements of food safety legislation.'[5] Also, '[l]ocal authorities which are responsible for the enforcement of health and safety legislation' are deemed to be prescribed persons regarding '[m]atters which may affect the health or safety of any individual at work; [and] matters which may affect the health and safety of any member of the public, arising out of or in connection with the activities of persons at work.'[6] In addition, the 2014 Order mandates that '[l]ocal weights and measures authorities as defined by Section 69 of the Weights and Measures Act 1985 which are responsible for the enforcement of consumer protection legislation' are prescribed in respect of '[c]ompliance with

[3] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 January 2022.

[4] Comprising consideration of 14 questions x 367 responders (5,138), 404 available local authority whistleblowing policies and 636 'reports' (Vol 3 Table 30) under the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, together providing 6,178 data. This figure does not include the responses from non-LAPPs assessed in Chapter 3.

[5] Public Interest Disclosure (Prescribed Persons) Order 2014; Food Safety Act 1990.

[6] Public Interest Disclosure (Prescribed Persons) Order 2014.

the requirements of consumer protection legislation.'[7] Because these categories of alleged failures for which local authorities are prescribed accord with the equivalent categories described in the Directive, local authorities were asked via FOIA 2000 requests about how they manage disclosures from external whistleblowers who raise analogous concerns.[8]

As to which type of local authority is required to act as a prescribed person, the UK Government provides guidance that is nuanced according to which kind of the constituent nations' local councils is engaged.[9] In respect of two-tier authorities in England, county councils (first tier) usually have responsibility for trading standards activity, and district councils (second tier) will undertake environmental health duties, but where there is an immediate health risk, the first and second tier authorities are expected to work together.[10] Where an area has only one tier of local authority, food standards investigations etc are carried out by that authority.[11] In Wales, the unitary authorities are accountable for both trading standards and environmental health, while in Scotland, where all councils are unitary, they are expected to undertake most food-related regulatory activity.[12] In Northern Ireland where again different legislation applies, guidance provides that district councils have law enforcement responsibility for the majority of food premises.[13]

Similarly, guidance is provided by the Health and Safety Executive in Great Britain which provides that 'HSE or one of the over 380 local authorities…' has responsibility for

[7] Public Interest Disclosure (Prescribed Persons) Order 2014; Weights and Measures Act 1985.
[8] Directive (EU) 2019/1937 (n 1).
[9] Food Standards Agency, 'The Food Safety Act 1990 – A Guide for Food Businesses 2009 Edition' (2009) <https://www.food.gov.uk/sites/default/files/media/document/Food%20standards%20safety%20act%201990%20PDF.pdf> accessed 13 December 2021.
[10] ibid 16.
[11] ibid.
[12] ibid.
[13] Food Standards Agency, 'The Food Safety (Northern Ireland) Order 1991 – A Guide for Food Businesses 2009 Edition' (2009) <https://www.food.gov.uk/sites/default/files/media/document/nifood%20safety%20order%2019.7%20business%20guide.pdf> accessed 13 December 2021.

enforcement and 'LAs are the main enforcing authority for retail, wholesale distribution and warehousing, hotel and catering premises, offices, and the consumer/leisure industries.'[14] In Northern Ireland, district councils have enforcement responsibilities in respect of 15 different types of premises in the public and private sectors.[15] In respect of weights and measures legislation, published UK Government guidance outlines that '[m]ost UK weights and measures legislation is enforced by Local Authority Trading Standards (or the Department for the Economy in Northern Ireland).'[16]

In summary, although different local authority types exist across the United Kingdom of Great Britain and Northern Ireland, it can be said that local authorities have a duty as a prescribed person in respect of one or more of the functions described in the Schedule to Articles 3(1) and (2) Public Interest (Prescribed Persons) Order 2014.[17] On that basis, all LAPPs were given the opportunity to supply information to assist this research. The information subsequently provided by them, and from examination of their publicly available whistleblowing policies (or when provided as part of the FOIA 2000 response), has been included in the appended Volume 2, Tables 1 to 33 and is the basis of analysis, evaluation and reporting.

2.2(b) Non-local authority prescribed persons

The non-LAPPs with a remit analogous to the activities legislated for in the Directive are discussed in Chapter 3.[18]

2.3 The data tables

[14] Health and Safety Executive, 'Local Authority Enforcement' (no date) <https://www.hse.gov.uk/lau/enforcement.htm> accessed 13 December 2021.
[15] See HSENI, 'Enforcement responsibilities' (no date) <https://www.hseni.gov.uk/articles/enforcement-responsibilities> accessed 13 December 2021.
[16] Office for Product Safety and Standards, 'Guidance Weights and measures: business guidance' (2021) <https://www.gov.uk/guidance/national-regulation-weights-and-measures> accessed 15 January 2022.
[17] Public Interest (Prescribed Persons) Order 2014.
[18] Directive (EU) 2019/1937 (n 1).

2.3(a) Communication with local authority prescribed persons and response metrics

FOIA 2000 questions were sent to all local authorities regarding their policy in respect of disclosures made by external whistleblowers (Vol 2 Table 1/Appendix XI). The qualification 'external' is important as it was intended to help LAPPs distinguish between their role and responsibilities as employers to internal whistleblowers (under Section 43C) and any other policy related to their statutory role as a prescribed person (under Section 43F) regarding disclosures from persons outside the organisation about failures for which the local authority is prescribed by the 2014 Order.[19] One focus of the thesis is whether LAPPs make any distinction between their responsibilities to external and internal whistleblowers and, if so, whether the contrast is legally and operationally meaningful in achieving the requirements and expectations of the legal framework.[20]

Although it is reported by the Local Government Association that the remit of local authorities extends to discharging '1,300 different statutory duties and responsibilities…', local authorities provide broadly similar public services.[21] Meanwhile, whistleblower legislation provides for how prescribed persons should operate such that local authorities might be expected to adopt reasonably consistent approaches to the identification and management of concerns raised by whistleblowers even within local authorities' complex operating context.[22] Given that the approach of local authorities within their policies is a key area assessed in the research, significance attaches to the rationale behind the FOIA 2000 questions that were posed.

[19] ERA 1996; Public Interest Disclosure (Prescribed Persons) Order 2014.

[20] PIDA 1998 asserts in its title that it is an 'Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.'

[21] Local Government Association, 'Guidance for new councillors 2019/20' (2019) <https://www.local.gov.uk/sites/default/files/documents/11.166%20Councillors%20Guide%202019_08_0.pdf > accessed 15 January 2022.

[22] The principal elements of the whistleblowing regulatory structure comprise, chronologically, Employment Rights Act 1996; Public Interest Disclosure Act 1998; Enterprise and Regulatory Reform Act 2013; Public Interest Disclosure (Prescribed Persons) Order 2014; Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, and national equivalent enactments.

Examining who the intended subjects of the policies are, and what the guidance provided to policy subjects and users is, are important variables in the FOIA 2000 question-set underpinning the research. These considerations were felt to be salient in evaluating whether and how LAPPs envisaged their role in supporting persons making disclosures (together 11/78.6% of the questions), along with establishing the criteria for investigation, incentives for whistleblowing, and staff training (3/21.4% of the questions) (Vol 2 Table 2).

Although most questions were binary (Yes/No), some sought a factual description of process. Thought was given to this blended approach to eliciting information having regard to the experiential advice of Savage and Hyde who caution against overly broad or narrow requests for information.[23] Also, cognisance was taken of the approach adopted by Phillips and Lewis who chose not to follow an FOIA 2000-based methodology to obtain responses from some prescribed persons because '[b]y choosing not to make statutory requests, our emphasis has been placed on those prescribed persons who make information readily available.'[24] These authors nevertheless found that some respondents treated the requests as if sought under the FOIA 2000 provisions, and so it was decided here that requests made regarding this thesis would be made under that legislation.[25]

At an early stage, analysis of the responses provided by LAPPs suggested low levels of compliance with the requirements of the Prescribed Persons (Reports on Disclosure of Information) Regulations 2017.[26] As a result, an additional question (Question 15) was posed of the 86 non-LAPPs whose functions mirrored or closely approximated with those described

[23] Ashley Savage & Richard Hyde, 'Using freedom of information requests to facilitate research' (2014) 1(3) International Journal of Social Research Methodology 303 308.
[24] Arron Phillips and David Lewis, 'Whistleblowing to regulators; are prescribed persons fit for purpose?' (2013) Middlesex University eRepository 1 8 <https://eprints.mdx.ac.uk/14394/1/WhistleblowingReport.pdf> accessed 3 February 2022.
[25] ibid.
[26] Vol 3 Table 30.

in Article 2 of the Directive.[27] Even though no Question 15 was posed of LAPPs, it was nevertheless possible to compare LAPPs' and non-LAPPs' adherence to the requirements of the 2017 Regulations (assessed together in Chapter 3).[28]

Most LAPPs responded to the FOIA 2000 questions whilst some did not, and in other instances, some acknowledged receipt of the FOIA 2000 request but subsequently failed to provide a substantive response. In fairness to those that did not respond, it should be noted that the majority of the FOIA 2000 requests were submitted in March 2020 when COVID 19-related restrictions were imposed across the UK. Many interim communications received from respondents reported disruption to, and re-prioritisation of their services and resources leading to extended FOIA 2000 response times. Nevertheless, 367 responses were eventually received representing an overall response rate of 89.7% (Vol 2 Table 3).[29]

It should be noted that in 2019, there were 343 local authorities in England but, in fact, contact was made with 344.[30] The explanation is that although the research began in 2019, the majority of FOIA 2000 requests were sent on 2nd March 2020 and responses were received over subsequent months (eg by 1st July 2020, 309 local authorities had provided FOIA 2000 responses as compared to a total of 367 responses which were ultimately received in 2021). During this period, local authority boundaries were being re-drawn and one such affected council, Northamptonshire County Council, provided information along with its successor authorities, leading to the additional datum. It is not felt that this anomaly adversely affects the

[27] Directive (EU) 2019/1937 (n 1).
[28] Prescribed Persons (Reports on Disclosure of Information) Regulations 2017.
[29] This rate is considered acceptable for this type of research, if regarded as a survey [Yehuda Baruch, Brooks C Holtom (2008) 'Survey response rate levels and trends in organizational research' 61(8) Human Relations 1139 1139; Frederik Anseel and others, 'Response Rates in Organizational Science, 1995–2008: A Meta-analytic Review and Guidelines for Survey Researchers' (2010) 25(3) Journal of Business & Psychology 335 346; ICO, 'Response rates' (no date) <https://ico.org.uk/for-organisations/foi-self-assessment-toolkit/topic-1-timeliness/response-rates/> accessed 19 July 2022.]
[30] Institute for Government, 'Local government' (2021) <https://www.instituteforgovernment.org.uk/explainers/local-government> accessed 13 December 2021.

methodology. Also, the Mayor of London's Office was approached with the FOIA 2000 requests but it is accepted that it is not a local authority or prescribed person and it is not included in the research findings, although it is mentioned in Vol 2 Table 3 for completeness' sake.

Different laws sometimes pertain to Northern Ireland as compared to other parts of the UK. In the context of this research, the Public Interest Disclosure (Northern Ireland) Order 1998 amended the Employment Rights (Northern Ireland) Order 1996 in the same way that PIDA 1998 amended ERA 1996 in Great Britain. The different response rates within the constituent nations of the UK are included in the research and it will be seen that the lowest response rate was from local authorities in Wales (16 of 22 local authorities; 72.7%), and the highest response rate was from those in Northern Ireland (11 of 11 local authorities; 100%), with Scotland and England providing a response rate of 96.8% (31 of 32 local authorities) and 89.8% (309 of 344 local authorities contacted), respectively. Noting these returns, it is submitted that the national response rates and aggregated response rate (89.7%) provide an adequate dataset by volume to facilitate analysis and evaluation (Vol 2 Table 4).

2.3(b) Responses received from local authority prescribed persons and themes identified

The verbatim responses to the 14 FOIA 2000 questions made to the 409 local authorities are included [Vol 2 Table 5A (Questions 1 – 7) and Table 5B (Questions 8-14)]. The 'running number' is used in subsequent tables to identify the respondent local authority. Where the name of a person was provided in a response (eg the email address of a local authority worker), the name was replaced by the cypher 'xxxx'. It should be noted that 27 LAPPs (7.4%) provided a supplementary response (described as '2nd response' in Vol 2 Tables 5A and 5B) where they explained, tellingly, that they had not initially understood the concept of an 'external'

whistleblower and sought to clarify their policy position.[31] For the purposes of this research, their further ('2nd response') explanation was accepted as the definitive one where different to the first position. However, both responses, where two were provided, were reported (Vol 2 Tables 5A and 5B).

A wide range of responses was received and it was necessary to group the 367 replies into 7 categories to gain a better understanding, and means of comparison, of the approaches adopted by LAPPs.[32] Although 'Yes', 'No', 'Not known' answers were sought for most questions, some authorities provided additional context which suggested in some cases that their response was more nuanced.[33] For example, in respect of Question 1 (Protecting external whistleblowers from detriment etc.), Respondent 347 (R347) provided a 'Yes*'* response but included that *'*the local authority's adult social care commissioning team is working on a Quality Assurance referral process…'[34] An inference to be drawn from this is that at the time of responding, this Authority's approach was not yet finalised or, possibly, was in transition from one position to another. In similar vein, R232 in response to Question 1 replied that

> [t]he Corporate Fraud team are currently reviewing and updating the Council's overarching Counter Fraud policy and this will include any associated underpinning policies and procedures, for example whistleblowing. The opportunity will be taken to ensure all stakeholders are clear of the Council's practices and what they can do to report any areas of concern.[35]

R69 also gave a nuanced response to Question 1 when it provided a 'Yes' answer but added 'in the sense explained in the aforementioned context of CDC periodically receiving food safety, or health and safety-related complaints.'[36]

[31] The 27 '2nd responses' are found in Vol 2 Tables 5A and 5B R14, R26, R47, R60, R69, R98, R118, R127, R141, R172, R187, R234, R238, R248, R252, R254, R272, R275, R276, R279, R311, R322, R326, R358, R383, R389, R394 ('n 31').
[32] Vol 2 Table 7.
[33] n 31.
[34] Vol 2 Tables 5A and 5B R347.
[35] ibid R232.
[36] Vol 2 Tables 5A and 5B R69; 'CDC' is Chichester District Council.

As compared to contextualised responses of this type, others were emphatic but incorrect. For example, R152 responding to Question 3 (protections in anticipation of detriment), stated that it did not hold the information requested and explained that 'Harlow Council is not a prescribed body under the Public Interest Disclosure (Prescribed Persons) Order 2014', whereas Harlow Council's website states that '[w]e inspect all premises that sell, cook, store, prepare or distribute food' which is consistent with its status as a district council prescribed under the 2014 Order in respect of food safety.[37] R13 responded to Question 1: 'Yes. Although no policy in place, this would fall within our data protection policy.' Similarly, R50's answer to Question 6 stated: 'Yes. We don't have a written policy.' Such responses raise for consideration whether a policy used for one purpose can be extrapolated to include a different purpose, and whether an un-written policy can be properly represented as a formal policy by a local authority. The preceding paragraphs provide an indication that some of the FOIA 2000 responses received which appear to include a significant caveat, are also arguably unclear or incorrect (Vol 2 Table 6).[38]

2.4 Analysis of the data provided by respondents

The percentage of respondents which replied 'Yes' to Question 1 appeared relatively high at 39.5% and seemed to reflect positively on the policy intention of LAPPs to protect external whistleblowers, when compared to the 30% which replied 'No' to the question. However, this impression may be specious in that the majority of respondents advanced their internal whistleblower policy as the basis for their positive response when, in fact, there was no evidence adduced from their response (or any document included with their FOIA 2000 reply),

[37] Public Interest Disclosure (Prescribed Persons) Order 2014; Harlow Council, 'Check a food hygiene rating' (no date) <https://www.harlow.gov.uk/safety-and-crime/food-safety/check-food-hygiene-rating accessed 15 December 2021.

[38] In Vol 2 Table 6 highlighted in red are 340 responses which involve a degree of interpretation beyond the 'Yes' or 'No' etc. response sought. Of the 5,138 individual responses received (367 local authorities x 14 questions), this represents 6.6% of the total and may help put this category of nuanced reply into a perspective.

or by subsequent assessment of their published whistleblower policy, that positive responses related to external whistleblowers, which was the subject of the question (Vol 2 Table 7).

2.4(a) Persons protected by local authority prescribed persons' whistleblowing policies

A pattern was discernible in the responses to Questions 1 – 3 (which relate to protections provided to external whistleblowers, persons reporting on behalf of whistleblowers, and in anticipation of detriment, respectively). To clarify, these questions were intended to elicit LAPPs' understanding of the concept of external whistleblowers. One deduction that can be drawn from the responses is that fewer LAPPs would take action to protect persons raising concerns on behalf of whistleblowers as compared to when whistleblowers make qualifying disclosures themselves (33% and 39.5%, respectively). Fewer still suggest that any protection would extend to external whistleblowers where employers are contemplating (rather than engaging in) unjustified action against an individual (23.7%). The 'No' responses to the same questions show a corresponding correlation ie there was a higher proportion of 'No' responses to Question 3 as compared to Question 2, and between Question 2 and Question 1. Of course, the law only provides protection to workers making a protected disclosure; no one else. The expressed intentions of respondents to protect others, whilst laudable, would not be covered by ERA 1996.

Notable among the responses were those which related to Question 4 (offering a reward for information). Whilst 8.1% of subjects did not answer this question, 63.8% provided a 'No' response. Only one respondent (R224) provided a 'Yes' response, though this is believed to be in error.[39] The subject of rewards is considered further when the FOIA 2000 responses from non-LAPPs are considered in Chapter 3.

[39] This response may be a 'cut and paste' of the responses to a number of other questions.

2.4(b) Support and feedback provided by local authority prescribed persons to people making or contemplating making disclosures

One facet of the research was to establish how well prescribed persons support workers who make a protected disclosure. FOIA 2000 questions sought to quantify whether guidance is provided for external whistleblowers as to how prescribed persons follow-up on a disclosure, noting that advice to prescribed persons from the Department for Business, Energy & Industrial Strategy includes that '[f]eedback to the whistleblower is important where possible.'[40] Of the 367 respondents, 52.6% replied that they did not publish such guidance (which is the not the same as saying that there is no guidance, but could be inferred). Respondents were asked whether there is a policy guiding the transfer of disclosures between LAPPs ie when one prescribed person does not feel it is the appropriate body to pursue a disclosure and passes the information to a more appropriate body, and whether the whistleblower is informed about the transfer of the issue to the other body. Fewer than 25% of respondents agreed that they had policy approaches in respect of these issues (23.4% and 19.6%, respectively). A small proportion (3.7%) said that they prepared a 'frequently asked questions' facility for whistleblowers and 17.7% suggested that they provided specialist training to personnel involved with whistleblowers even though government advice from the Department for Business, Energy & Industrial Strategy suggests that '[i]t can be a difficult decision for a whistleblower to make a disclosure, and the prescribed person should be sensitive to this.'[41]

A particular point posed to respondents was what, if any, action is taken to investigate acts of retaliation against external whistleblowers, to which 27 respondents (7.4%) suggested that they

[40] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 January 2021; Vol 2 Table 7 Question 5.

[41] ibid; Questions 6, 7, 9 and 10.

would act.[42] Of these, 14 (51.9%) suggested that they would only act in respect of internal employees, 9 (33.3%) replied 'Yes' but without further qualification, and 4 (14.8%) replied that they would probably act but the situation had not arisen before.[43] Some confusion was noted as between local authorities' understanding of the distinction between their role as an employer (where Section 43C ERA 1996 could apply) and as a prescribed person (under Section 43F ERA 1996). Even where a local authority believed it would be acting as a prescribed person in respect of an alleged act of retaliation against a worker raising a qualifying disclosure, the local authority would have no power to act (except where the act of retaliation is itself a matter for which the local authority has enforcements powers). As acts of retaliation against a whistleblower will usually involve a workplace detriment, measures to provide interim relief against such detriment lie with an ET and not the prescribed person, however egregious the retaliation.[44] The same loci apply in respect of the ultimate detriment to the worker who makes a protected disclosure, namely dismissal as a result of doing so.[45]

Finally, in respect of whether LAPPs provide public awareness programmes, the majority of respondents (59.1%) reported that they did not deliver such programmes whilst just 4.1% reported that they did undertake, or had undertaken, structured awareness-raising.[46] Of these

[42] Vol 2 Table 7 Question 11 and Vol 2 Table 6 R18, R21, R63, R94, R118, R121, R127, R143, R170, R172, R176, R177, R189, R226, R237, R254, R259, R267, R274, R294, R297, R336, R345, R350, R383, R394, R397.

[43] Vol 2 Table 7 Question 11 and Vol 2 Table 6 R18, R21, R63, R94, R118, R121, R127, R143, R170, R172, R176, R177, R189, R226, R237, R294, R297, R336, R345, R350, R383, R394, R397; see Vol 2 Tables 5A and 5B, and Vol 2 Table 6 R18, R118, R121, R143, R172, R176, R177, R189, R226, R237, R254, R259, R274, R383; ibid R21, R63, R94, R170, R267, R336, R294, R297, R397; ibid R127, R345, R350, R394.

[44] Michael T Rehg and others, 'Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships' (2008) 19(2) Organization Science 221 228 <https://doi.org/10.1287/orsc.1070.0310> accessed 9 January 2022; Heungsik Park, Brita Bjørkelo and John Blenkinsopp, 'External Whistleblowers' Experiences of Workplace Bullying by Superiors and Colleagues' (2018) 161(3) Journal of business ethics 591 593 <https://doi.org/10.1007/s10551-018-3936-9> accessed 10 January 2022. Others suggest that stigmatisation, where it occurs, may be temporary, [Meghan Van Portfliet, 'Resistance Will Be Futile? The Stigmatization (or Not) of Whistleblowers' (2020) 175(3) Journal of Business Ethics 451 462 <https://doi.org/10.1007/s10551-020-04673-4> accessed 15 January 2022]. Sections 2 and 3 Public Interest Disclosure 1998 amend Sections 47 and 48 ERA 1996; and Section 9 PIDA 1998 amends Sections 18(1)(b) and 129(1) ERA 1996.

[45] Section 5 PIDA 1998 amends Section 103 ERA 1996 by inserting a new Section 103A.

[46] Vol 2 Tables 5A and 5B, and Vol 2 Table 6 R18, R28, R75, R105, R140, R176, R179, R191, R192, R207, R214, R243, R250, R267, R402.

15, five (33.3%) did so in respect of fraud; of which four specified that housing or social housing or tenancy fraud was the focus.[47] R192 mentioned raising awareness of whistleblowing amongst contractors; R267 described publicising the outcome of specific cases and only R402 indicated its involvement in 'periodic public campaigns' but did not specify the subject matter. In terms of the media used for campaigns, hotlines, newspaper articles, posters, and social media were mentioned.[48] The majority of 'Yes' respondents described programmes to address malpractice that would undermine the functioning of the local authority, mainly fraud, rather than in respect of the local authority's role as LAPP for disclosures regarding other organisations.[49]

The research considered in more detail the nature of the protections which LAPPs suggested they offered to whistleblowers, noting in Section 47B whistleblowers' right not to suffer detriment.[50] Nine categories of 'protection' were gleaned from the responses provided by the LAPPs (and the non-LAPPs discussed in Chapter 3), of which 7 categories relate to LAPPs.[51] About one third (31.3%) of LAPPs replied that maintaining confidentiality was a measure they adopted to protect external whistleblowers from detriment.[52] Fewer respondents advised that this protection was applied when the person making the disclosure was not the whistleblower *per se* (25.9%) and a lower proportion still (15.8%) replied positively when the detriment was contemplated rather than actual.[53] A similar pattern was observed in respect of respondents which stated that they offered protection from victimisation ie 'Yes' replies were less frequent in relation to protection envisaged for those reporting on behalf of the whistleblower, and lower

[47] Vol 2 Tables 5A and 5B, and Vol 2 Table 6 R105, R140, R179, R191, R214; see Vol 2 Table 6 R105, R140, R179, R214.
[48] Vol 2 Table 5B R105, R250 ('hotlines'); R207 ('newspaper articles'); R176 ('posters'); R250 ('social media').
[49] Vol 2 Table 7 Question 14.
[50] ERA 1996.
[51] Vol 2 Table 8.
[52] ibid category a. Question 1.
[53] ibid Questions 2 and 3.

still when detriment was contemplated rather than extant or *post facto*.[54] One respondent suggested that protections included where the whistleblower could decline to make a witness statement, or to participate in proceedings.[55] Declining to make a statement or support proceedings may not amount to protections from detriment, particularly if the identity of the whistleblower is already known (Vol 2 Table 8).

2.5 Whistleblowers who have participated in the failure alleged

Several whistleblowing policies accompanying the FOIA 2000 responses reported that those LAPPs affirm a 'clean slate' approach ie where whistleblowers are encouraged, and arguably incentivised, to admit any personal culpability in the failures they disclose: [56]

> If you blow the whistle and actively co-operate with an investigation in which you may be implicated in any wrongdoing, you are likely to receive a lighter sanction than might otherwise have been the case (unless the misconduct is so serious that no amount of co-operation or other mitigating conduct can justify a decision not to bring any action). In making any disclosure you must tell the Council as soon as possible if you have any involvement or direct personal interest in the matter. (R31)[57]
>
> A whistle-blower is asked to provide the nature of the concern and why they believe it to be true, background details giving names, dates and places where possible. An informant will be asked if they have any personal interest in the matter. (R64) [58]
>
> Rarely, a case might arise where it is the employee that has participated in the action causing concern. In such a case it is in the employee's interest to come into the open as soon as possible. The Council cannot promise not to act against such an employee, but the fact that they came forward may be taken into account. (R94)[59]

[54] Vol 2 Table 8 category b. Questions 2 and 3.
[55] ibid category c. R61.
[56] ibid category h R31, R64 and R94.
[57] Boston BC, 'Whistleblowing Policy' (full date illegible: 2018 or 2019). <https://democracy.boston.gov.uk/documents/s3775/Revised%20Whistleblowing%20Policy%20document.pdf> accessed 19 December 2021.
[58] Cheltenham BC, 'Whistleblowing policy' (2017) para 4.10 <https://www.cheltenham.gov.uk/downloads/file/1781/whistle_blowing_policy> accessed 19 December 2021.
[59] Darlington BC, 'Whistleblowing Policy' (2018) para 14 <https://www.darlington.gov.uk/media/3093/part-42-code-of-conduct-for-employees-whistleblowing-policy.pdf> accessed 19 December 2021.

R64's policy is less specific than R31's and R94's about whether a clean slate approach is intended. The expression 'personal interest' has a broad meaning including as to the motive for the disclosure (which could go to the issue of the public interest *bona fides* of the whistleblower).[60] However, personal interest could also be a euphemism for culpability and hence it is included in this section along with cases R31 and R94.

Part IVA is silent about workers involved in a failure about which they make a disclosure (but the issue of whether a worker derives benefit from doing so, and to whom that disclosure is made, could be relevant in certain circumstances).[61] Generally, provided that the statutory criteria are met under Section 43B and adduced to the employer (or other person responsible for the failure) in the first instance, and the necessary standard of belief is held by the whistleblower, then the whistleblower who may have participated in the alleged failure could secure the protections afforded by the Act.[62] However, whilst one can see the logic in adopting a policy position which encourages a clean slate, caution would be required in taking action against others based on the 'participating' whistleblower's disclosure. It is supposed that an ET would inquire carefully into the reasons why the whistleblower made the disclosure, especially where they were a co-conspirator.[63] If their motive in coming forward was only or mainly because they thought they were about to be exposed ie making the revelation for a self-serving reason, then chariness would be required in the interests of natural justice, particularly

[60] Section 2.12 of the thesis considers 'good faith'.

[61] ERA 1996. The provisions of Sections 43G(1)(c) and 43H(1)(c) permit argument that personal gain could include a disclosure from a co-participant in the failure seeking to avoid or mitigate repercussions. However, indications of the financial context of 'personal gain' can be found in the discussion at the Bill Stage of PIDA 1998 (eg Baroness Buscombe, HL Deb 5 June 1998, vol 590, cols 611-39, 628). Co-operation with criminal investigators and prosecutors has statutory support in the UK vide Section 74 Sentencing Act 2020.

[62] ERA 1996.

[63] ATH Smith 'Immunity from Prosecution' (1983) 42(2) Cambridge Law Journal 299 300; Stephen S Trott, 'Words of Warning for Prosecutors Using Criminals as Witnesses' (1996) 47(5-6) The Hastings Law Journal 138 138; Peter JP Tak, 'Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti' (1997) 5(1) 2 25 European Journal of Crime, Criminal Law and Criminal Justice; Gabriele Chlevickaite and Barbora Hola, 'Empirical Study of Insider Witnesses: Assessments at the International Criminal Court' (2016) 16(4) International Criminal Law Review 673 675.

in the absence of corroboration of their evidence.[64] The corollary of this situation would be the difficulty in deciding whether to take action against a whistleblower who has come forward, and what mitigation is appropriate in determining sanction, assuming the individual had played no more than a minor role in the failure(s). It is presumed that R31, R64 and R93 are referring to participating whistleblowers who are local authority workers making a disclosure under Section 43C (ie to the employer or other responsible person for the failure) rather than to the local authority as a prescribed person under Section 43F.[65] In the latter scenario, R31, R64 and R93 would be unlikely to hold powers to sanction a participating whistleblower who was not one of their local authority workers.

2.6 The criteria considered by local authority prescribed persons in deciding whether to investigate whistleblowing disclosures

Respondent LAPPs were requested to describe the criteria applied in deciding whether to investigate a disclosure.[66] As one might expect, the largest proportion of responses (24.8%) proposed that the criteria described in whistleblowing polices were followed.[67] The data suggested that internal, council-centric issues were pursued and whilst this approach will achieve some public interest benefit (given the very wide remit of local authorities), it will be unlikely to take account of non-internal public interest considerations as required of prescribed persons by the Public Interest Disclosure (Prescribed Persons) Order 2014. One implication of this deficiency is the potential inhibition of the promulgation of good practice identified

[64] Good faith is not relevant to the issue of the statutory protections available but the absence of good faith may be relevant to the issue of costs awarded to the whistleblower, noting the powers of an ET to reduce any award by no more than 25% for this reason under section 18(5) ERRA 2013. Personal gain (which includes keeping what one has as well as gaining something which one has not) is not available in respect of a disclosure made under Sections 43G or 43H ERA 1996.
[65] ERA 1996.
[66] Vol 2 Table 1 Question 12 'Please describe what criteria you consider in deciding whether to investigate information received from an external whistleblower about a matter in respect of which you are prescribed?'; Vol 2 Tables 9 and 10.
[67] Vol 2 Table 9 category I.

through handling disclosures from outside the council about the harms and failures within the LAPP's purview. By volume, the next largest group (13.1%) stated (using a variety of expressions) that there was no fixed criterion for deciding what referrals were progressed for investigation.[68] This response type was almost matched in volume (12.8%) by respondents which used a different construction to make a similar point ie that there was no policy covering the criteria for investigation.[69] In a corresponding response group were the 10.1% of authorities which stated that 'no information' or 'no record' was held.[70] Overall, at least 36% of respondents accepted that they were not operating to defined investigation criteria, which suggests limited coherency of approach amongst LAPPs. At the other extreme, 6.3% of respondents reported that they would investigate 'all', 'every' and 'any' issue raised with them.[71] It is suggested here that those which reported that their regulatory functions provided a basis for deciding to investigate (8.4%) were more likely to have regard to external whistleblowers' disclosures.[72] Only four respondents (1.1%) cited 'qualifying disclosure' or 'public interest' as a ground for investigation.[73] This percentage is *de minimis* and part of the picture which emerges from the analysis that LAPPs may not have an adequate understanding of their responsibilities as prescribed persons (Vol 2 Table 9).

Criteria expected to be included in deciding whether to investigate a disclosure, namely seriousness, and evidential corroboration, were found at low volumes (5.4% and 2.5% of responses, respectively).[74] A notable proportion commented that knowing the identity (2.5%), or the reliability or credibility (4.6%) of the source provided the basis for further

[68] Vol 2 Table 9 category A.
[69] ibid category E.
[70] ibid category L.
[71] ibid category P.
[72] ibid category O.
[73] ibid R11, R202, R234, R267.
[74] ibid categories R and V.

investigation.[75] This aspect is highlighted in light of subsequent discussion in the thesis of the proper focus being upon the veracity of the disclosure rather than the motive of the discloser.[76]

Responses were aggregated by volume in a hierarchy of themes which suggest that only 10.4% are compatible with the expectations of Part IVA and the Public Interest Disclosure (Prescribed Persons) Order 2014.[77] The majority of respondents either had no clear policy or followed other policy considerations (ie not public interest factors) in deciding whether to investigate a disclosure. Together, these represent 76.5% of responses.[78]

2.7 Local authority prescribed persons distinguishing internal and external whistleblowers in policies

Further evidence that some local authorities may not adequately understand their responsibilities as LAPPs was found in the verbatim responses from the FOIA 2000 questions; in particular, insight into their appreciation of whether they have, or need to have, a policy to manage disclosures from external whistleblowers (Vol 2 Table 11). Strictly speaking, and given the myriad of responsibilities vested in local authorities, LAPPs are under no statutory obligation to publish policies as to how external whistleblowers' disclosures will be managed; however, it is noted that the majority have internal whistleblower policies which they are also under no obligation to produce (except, perhaps, in terms of establishing through the publication of an internal whistleblowing policy a defence to a vicarious liability complaint or action under Section 47B).[79] Analysis revealed that 19.6% of local authorities suggested that their internal whistleblowing policy was suitable to manage external whistleblowers.[80] In

[75] Vol 2 Table 9 categories Q and S.
[76] Section 2.12 of the thesis regarding 'good faith'.
[77] Vol 2 Table 10 where categories 4 and 8 combined amounts to 10.4%, whilst noting the imprecision of some FOIA 2000 responses; ERA1996.
[78] Vol 2 Table 10 categories 1 and 2.
[79] Section 47B(1B) ERA 1996.
[80] Vol 2 Table 11 2nd column.

addition, 3% of respondents reported either that they were not prescribed persons or that the legislation did not apply to them; responses which are not compatible with the requirements upon local authorities under the Public Interest Disclosure (Prescribed Persons) Order 2014.[81] The analysis also suggested that only 4.6% of local authorities probably followed a policy which recognised external whistleblowers.[82]

Given the evidence assessed to this point, it is appropriate to consider why LAPPs should have an external whistleblower policy and not simply rely on the policy intended to apply to council workers and/or council affairs. Although members of the public could potentially suffer detriment if perceived as the source of an unwelcome disclosure, they are unlikely to have their livelihood put at risk like a worker raising the same issue about their employer. For example, a customer complaining about receiving stale food from a fast-food restaurant is unlikely to be put in jeopardy to the same extent as a worker at the outlet making a disclosure ostensibly to the same effect that the expiry date of food ingredients is routinely ignored leading to potential health or safety risks as well as potential fraudulent trading. Whilst many local authority respondents were at pains in their FOIA 2000 submissions to describe how carefully they protected the confidentiality of sources, establishing whether the informant is willing to be a witness, and the attendant risks and implications of the disclosure for that individual, exemplify how important it is to understand the different risks to and needs of sources, and differentiate the approaches required to manage a complainant, and a whistleblower. In practice, the response to a question of the source 'Do you work for the organisation about which you are making the disclosure?' should raise for the LAPP a range of handling considerations depending on the individual's role. Their status could be as a local authority internal

[81] Vol 2 Tables 5A and 5B, and Vol 2 Table 11 R43, R119, R126, R159, R179, R180, R227, R251, R334, R362, R398, 6th column.
[82] Vol 2 Table 11 R18, R34, R50, R53, R57, R141, R149, R160, R166, R185, R192, R229, R234, R270, R300, R359, 1st column.

whistleblower; a member of the public acting as a non-worker discloser of concerns, or as an external whistleblower who is a worker reporting upon their own organisations under Section 43F, or under Section 43G or, in extremis, Section 43H.[83] Arguably, making these few distinctions should be a simple but fundamental requirement of any local authority approach. A related question would be 'Are you a former worker of the organisation about which you are now making a disclosure?'. Establishing why the source left their employment (eg because of detriment or dismissal as a result of making a qualifying disclosure), gleaning their motive for making the disclosure, and the likelihood of their former organisation suspecting the ex-employee as the conduit, should also prompt an appropriate and nuanced approach from the LAPP. Unless LAPPs have a policy, procedure and process to identify and manage the different risks that pertain to the varied circumstances in which persons provide information, then LAPPs' effectiveness may be undermined and the public interest adversely affected.[84]

Whilst it is not for the LAPP to determine whether a detriment or dismissal has arisen because of the disclosure, the initial approach adopted by the LAPP in relation to the status of the person making the disclosure may be relevant in any subsequent legal action before an ET. Important initial steps for the LAPP would include identifying that the report is a protected disclosure (rather than a complaint) and, secondly, as a routine facet of the investigation, to understand why the whistleblower may be raising the matter. These points are pertinent because an ET will often seek independent evidence that a protected disclosure was, in fact, made and, secondly, early and consistent indications of a whistleblower's public interest motive may undermine subsequent allegations of an ulterior motive in making the disclosure (eg personal

[83] ERA 1996; also Vol 6 Appendix III which sets out permutations of disclosures which local authorities as employers and LAPPs may be confronted with. The intersecting complexity of the law and local authorities' extensive remit becomes evident through this analysis.
[84] Vol 6 Appendix III sets out permutations of disclosures.

gain which is a disqualifying criterion in Sections 43G and 43H).[85] Whether or not such allegations are made, the ET must establish that a disclosure is both a qualifying disclosure and a protected disclosure.[86]

2.8 Persons to whom local authority prescribed person whistleblowing policies apply

The considerations outlined above were examined more closely following review of the publicly available whistleblowing policies of the 409 local authorities (or which were provided with the FOIA 2000 responses). By way of context, for the purposes of Part IVA, only a worker can make a protected disclosure.[87] Section 230 ERA 1996 provides that a worker is usually an employee [Section 230(1)] or someone who, under a contract, provides or provided work or services in person [Section 230(3)(b)].[88] The evidence gleaned from the review suggests that 68.9% of local authority whistleblower policies included role descriptions of persons who ordinarily would not be considered workers as defined in Section 230(1) and Section 230(3)(b).[89] In the absence of further explanation, examples of non-compliant roles described in policies include volunteers, councillors, job applicants, members of the public, school governors, interns and those on work experience. Amongst the narratives in the '68.9%' dataset are less clear-cut descriptions such as 'employees' (without reference to other forms of contracted worker) and 'partners'. Partner arrangements can be more or less formal but to be compliant with Section 230(3)(b), and case law precedent as regards limited liability partnerships, the partnership worker (or the employer, more likely) would need to be operating under a contract to provide work or services to the reciprocal partner even where a worker is

[85] Powers available to ETs under the Civil Procedure Rules 1998, SI 1998/3132 Rules 1.1–1.3, and Rules 29 and 53 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
[86] Vol 6 Appendix II and III include definitions and context, respectively.
[87] ERA 1996 Section 43A.
[88] ERA 1996.
[89] ibid; Vol 2 Table 12 final column.

self-employed but has entered into the contract to perform work or provide services to others (Vol 2 Table 12).[90]

As part of the research, assessment was made of expressions used that appear generically to refer to employees but without the precision to permit an assumption that they are workers and therefore within the ambit of Part IVA.[91] Imprecise terms appear in 68.9% of FOIA 2000 responses (Vol 2 Table 12).[92] However, whilst noting a degree of vagueness about some of the expressions used, it is considered more likely than not that a would-be whistleblower would be able to equate their employment status with those indicated in most policies.

Of the apparent non-worker roles included in policies (and therefore outside the ambit of ERA 1996), it is observed that the two largest cohorts were councillors and volunteers (though it is uncertain whether an 'authorised volunteer' would be subject of a Section 230-compliant contract, as distinct from a 'volunteer') at 31.8% and 27.4% respectively.[93] Policies which suggested that 'members of the public' (19.1%) were covered by the policy, procedure and process were believed to refer to people who raise concerns about the local authority eg fraud perpetrated in respect of the council's housing stock, rather than as non-local authority workers making a disclosure about their employer's activities (Vol 2 Table 14).[94]

The research identified that a range of terms was included in local authority whistleblowing policies which, without further explanation, did not appear to satisfy the requirements of Section 230 ERA 1996 regarding the contractual relationship between the provider and

[90] *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32; even though Section 43C permits a protected disclosure to be made to the employer (which could be the partner) as well as to the person responsible (which could be the local authority).
[91] ERA 1996.
[92] 82 of 367 responses.
[93] ERA 1996; Vol 2 Table 14 4th column. For 'authorised volunteer' see, for example, Vol 2 Table 12 R5, R15, R17, R118, R177, R187, R202, R238.
[94] Under Section 43F ERA 1996.

recipient of work or service (ie employer and worker). Some 'partners' within the largest group (14.9%) could conceivably be operating within a contractual relationship and therefore comply with Section 230 ERA 1996; however, insufficient detail was available to substantiate this. The next largest group, those on 'work experience' (etc), at 4.9%, may also be compatible with Section 230 ERA 1996 but clearer articulation of the type of work experience involved would have clarified the nexus to Section 230 (Vol 2 Tables 14 and 15).[95]

In contrast, the Directive purposely takes a broader view of what may constitute work and uses [at Article 5(9)] the expression 'work-related context' to embrace the multiple circumstances in which persons could disclose relevant information in the public interest but to their detriment.[96] A more detailed comparison of Part IVA ERA 1996 and the Directive is made in Chapter 4.[97]

2.9 Local authority prescribed persons and qualifying disclosures

This section considers how wide the net should be cast by prescribed persons to include potential whistleblowers and, by implication, what responsibility (if any) accrues to prescribed persons who wittingly or unwittingly extend the worker definition beyond that which Parliament intended. LAPPs would secure the benefit of receiving more information (whether or not it would ultimately amount to a qualifying disclosure) from the broadest set of sources. Where LAPPs do include extraneous issues or persons in their policies, procedures and processes, according to UK Government guidance LAPPs are under no compunction to act upon information received, and so accrue the benefit of the expansive approach without the

[95] Section 43K(1)(d) ERA 1996 extends the definition of a worker to include a trainee on work experience, or on an approved course where they are in education. In either case, the training provider is treated as their employer. Thus, Part IVA ERA 1996 protections could be available to this class of worker.
[96] Directive (EU) 2019/1937 (n 1).
[97] ibid.

need to commit resources to follow-up.[98] The contention that a positive public interest outcome accrues when a potential qualifying disclosure is raised early and to the person responsible for the failure or, other requirements met, the mandated prescribed person, then this approach should be encouraged through policy and leadership. If, however, casting the net wider than the law provides whilst not, at the same time, having a specific responsibility to provide advice, or to ensure that protections afforded under Part IVA are accurately articulated in that advice, then it is arguably not in the public interest to be expansive.[99] Further, where because of a reporter's status as a non-worker, or because the matters that they are invited to raise are not qualifying disclosures within the meaning of Section 43B, the reporter's experience can become deleterious to them where they are subsequently unable to access legal protections as a whistleblower (Vol 2 Tables 10-13).[100]

It was noted in the analysis that many policies had reportedly been subject of consultation with trade unions.[101] Engagement with stakeholders in the design and implementation of important policies is likely to be beneficial, provided it is effective. For example, airing for discussion a more expansive and possibly formal role for trade unions in whistleblowing policy, procedure and process, Lewis and Vandekerckhove highlight outcomes which would act as antidotes to some of the potential harms noted in this research. In particular, they suggest that

> [t]he availability of union advice and counselling would also have advantages for employers as representatives would be obliged to warn about a range of matters. For example, the lack of protection for disclosures not made in accordance with the relevant statutory and contractual provisions, the problems involved in maintaining anonymity or confidentiality, and any sanctions likely to be imposed for false and malicious disclosures.[102]

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[98] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 January 2022.

[99] ERA 1996.

[100] ibid.

[101] Vol 2 Table 5A R10, R84, R181, R307.

[102] David Lewis and Wim Vandekerckhove, 'Trade Unions and the Whistleblowing Process in the UK: An Opportunity for Strategic Expansion*?'* (2016) 148(4) Journal of Business Ethics 835 842 [hereafter, Lewis and Vandekerckhove (n 102)'].

However, it follows that it would be important to avoid including additional non-statutory disclosure criteria in policies with the good intention of employers 'listening' to interested parties' views but with the attendant risk of straying beyond legislative intention. As Lewis and Vandekerckhove also note:

> Thus, we think it is appropriate that, after consultation with trade unions, senior management should take sole responsibility for the whistleblowing policy. Nevertheless, trade unions will have to ensure that the messages conveyed in the policy are consistent with the arrangements for its implementation.[103]

For these reasons, it is important that prescribed person whistleblowing policy, procedure and process are firmly anchored to the requirements of Part IVA.[104]

2.10 Criteria which local authority prescribed persons include as qualifying disclosures

Section 43B(1)(a)-(f) sets out 6 categories of failure which constitute '[d]isclosures qualifying for protection'.[105] The research included examination of the disclosure criteria documented in local authority whistleblower policies and identifies where statutory criteria were not cited (Vol 2 Tables 16 and 24). Failure to include statutory loci are found in 14.9% of the available 409 local authority policies.[106] The effect of this omission could be that if a whistleblower was relying on the policy to indicate what matters may be raised and protected, the fact that statutory qualifying disclosures are not mentioned may deter the individual from reporting a matter that otherwise could be disclosed. Other apparent discrepancies were identified which suggest that the requirements of Section 43B were not being met consistently. For example, Section 43B(1)(d) specifies 'health or safety' failings as matters about which a qualifying disclosure

[103] Lewis and Vandekerckhove (n 102)
[104] ERA 1996.
[105] ibid Section 43B(1).
[106] Vol 2 Table 16 R92, R129, R153, R154, R155, R165, R175, R181, R200, R202, R219, R270, R271, R278, R281, R286, R287, R288, R289, R291, R300, R306, R311, R312, R315, R319, R320, R325, R329, R335, R338, R340, R342, R346, R347, R356, R357, R359, R360, R362, R363, R366, R368, R369, R370, R380, R382, R383, R384, R389, R403, R407 and Vol 2 Table 24 R352, R353, R377, R388, R394, R396, R398, R399, R401.

can be made. The analysis found that the phrase 'health and safety' was used in 74.6% of the LAPP policies in the context of describing what a qualifying disclosure is, thereby mis-quoting the relevant section of the Act.[107] The effect of this mis-statement is potentially to introduce an extra burden of proof on the discloser by creating the erroneous impression that the whistleblower has to establish both a health *and* safety issue rather than a health *or* safety issue to satisfy the requirements of Part IVA.[108] It is accepted that 'health and safety' is a well-recognised expression in common usage, but it is not the expression Parliament chose to adopt for the purposes of Section 43B.[109] This is one example of legal imprecision, but other forensically vague expressions were used extensively in whistleblowing polices, including the following construction:

> Thus, any serious concerns that employees have about any aspect of service provision or the conduct of officers or members of the Council or others acting on behalf of the Council can be reported under this Policy and Procedure. This may be about something that:
> - makes them feel uncomfortable in terms of known standards, their experience or the standards they believe the Council subscribes to;
> - is against the Council's Constitution and supporting policies;
> - falls below established standards of practice; or
> - amounts to improper conduct.

This or a near identical expression arises in 11% of policies, yet the legislation does not provide that in respect of whistleblowers that 'any serious concerns […] that make[s] them feel uncomfortable…' would amount to a qualifying disclosure.[110] The above example is subjective, eg the potential discloser feels 'serious concerns'.[111] Yet, the 'test' suggested to qualify these concerns appears incompatible with the use of the word 'serious' where policies suggest that the perceived failure could include anything that makes the recipient feel

[107] Vol 2 Table 16; ERA 1996.
[108] ERA 1996.
[109] Noting the title of the Health and Safety at Work etc. Act 1974; ERA 1996.
[110] Vol 2 Table 19 R4, R12, R27, R28, R42; Table 20 R60, R83, R89, R93, R94, R95, R97, R98, R99; Vol 2 Table 21 R120, R128; Vol 2 Table 22 R168, R177, R178; Vol 2 Table 23 R240, R256, R263, R264, R265, R266, R283, R289, R297, R299; Vol 2 Table 24 R304, R307, R310, R323, R337, R339, R345, R362, R363, R373, R374, R380, R388, R391, R399, R401.
[111] ibid.

'uncomfortable', a mild and imprecise adjective which arguably fails to invoke seriousness.[112] As well as imprecision, inconsistency of approach was observed in policies examined. It was clear that passages or phrases used in policies were copied between local authorities, but small yet significant differences were noted. For example, a further 7.6% of policies which reference feeling 'uncomfortable' do not employ the adjective 'serious' to preface 'concerns' meaning that whilst some policies require concerns to be serious (11%) others do not require them to be serious (7.6%).[113] Together, the passages which reference 'uncomfortable', whether with or without the use of the word 'serious', amount to 18.8% of policies examined. In similar vein, the expression 'conflict with a general understanding of what is right or wrong' appears in some whistleblowing policies as a disclosure criterion.[114] Expressions like 'improper conduct', 'malpractice', 'poor value for money', 'unacceptable business risks', and 'weaknesses in procedures' also appear in policies examined.[115] Phrases like 'this list is not exhaustive' or the list is not 'comprehensive' or 'definitive' suggest the illustrative context in which the local

[112] Vol 2 Table 19 R4, R12, R27, R28, R42; Vol 2 Table 20 R60, R83, R89, R93, R94, R95, R97, R98, R99; Vol 2 Table 21 R120, R128; Vol 2 Table 22 R168, R177, R178; Vol 2 Table 23 R240, R256, R263, R264, R265, R266, R283, R289, R297, R299; Vol 2 Table 24 R304, R307, R310, R323, R337, R339, R345, R362, R363, R373, R374, R380, R388, R391, R399, R401.

[113] ibid R29, R34, R43, R48; Vol 2 Table 20 R80, R93, R94, R96, R97, R98, R99; Vol 2 Table 21 R148; Vol 2 Table 22 R152, R158, R168, R173, R177, R178, R187; Vol 2 Table 23 R223, R233, R247, R263, R265, R282; Vol 2 Table 24 R348, R357, R361, R378, R395, R397.

[114] ibid R15, R27; Vol 2 Table 22 R177, R187, R228.

[115] For 'improper conduct' Vol 2 Table 19 R8, R27, R28, R29, R34, R38, R42, R43, R48, R52, R56, R59, R60, R61, R69, R70, R79, R80, R83, R85, R89, R93, R94, R95, R96, R97, R98, R101, R102, R111, R119, R120, R128, R136, R138, R147, R148, R152, R154, R168, R170, R174, R175, R177, R178, R179, R187, R194, R206, R211, R216, R217, R223, R229, R230, R231, R240, R247, R252, R253, R256, R263, R265, R266, R275, R280, R282, R283, R287, R289, R291, R295, R297, R299, R304, R307, R310, R318, R319, R320, R323, R324, R337, R339, R345, R346, R347, R348, R356, R357, R359, R361, R362, R363, R368, R370, R371, R373, R374, R375, R378, R380, R381, R388, R391, R394, R399, R401, R406; and in respect of non-LAPPs see Vol 3 Table 47 NR4, NR44. for 'malpractice' Vol 2 Table 12 R2, R6, R33, R77, R146, R155, R167, R219, R232, R252, R285, R313, R327, R335, R369, R395, Vol 2 Table 16, R2, R10, R16, R30, R35, R47, R53, R56, R57, R63, R64, R74, R78, R85, R86, R89, R92, R94, R98, R100, R102, R103, R104, R111, R116, R119, R122, R126, R130, R131, R135, R136, R138, R141, R142, R146, R147, R149, R155, R158, R160, R161, R162, R168, R171, R178, R182, R194, R206, R209, R218, R219, R221, R224, R226, R230, R231, R232, R235, R238, R239, R245, R254, R269, R271, R273, R282, R284, R288, R300, R305, R306, R310, R312, R313, R314, R320, R322, R335, R342, R346, R355, R360, R381, R390, R394, R402, R410; Vol 2 Table 17 R69, R89, R101, R102, R122, R126, R130, R134, R136, R139, R152, R153, R163, R169, R174, R198, R207, R220, R224, R236, R276, R277, R283, R292, R326, R329, R336, R344, R352, R356, R357, R366, R371, R382, R395, R398, R407, R410, R411; Vol 2 Table 19 R8, R29, R30, R42, R43, R46; for 'poor value for money' Vol 2 Table 16 R10, R22, R57, Vol 3 Table 47 NR2, NR8; for 'unacceptable business risks' Vol 2 Table 16 R80, R348; for 'weaknesses in procedures' Vol 2 Table 16 R121.

disclosures are presented, but for the lay user of the policy imprecise concepts can imply that they are statutory criteria.[116] For example, where the expression 'other unethical conduct' is included in policies, it becomes difficult to conceive of types beyond a criminal offence, a failure to comply with any legal obligation, damage to the environment, a miscarriage of justice, a risk to health or safety or engaging in a cover-up, that would meet the requirements of Section 43B ERA 1996.[117]

Even where not imprecise, the frequency with which non-statutory criteria are referenced in local authority policies leads to the assumption that matters of local concern were included which authorities were (properly) interested in, and wished to receive information about. However, the evidence gathered here suggests that inadequate differentiation is made between matters of local but non-statutory interest, and qualifying disclosures subject of Part IVA.[118]

As local authorities provide similar services to the public within a similar statutory regime, one might expect to see comparable approaches adopted in discharging their objectives. In this regard, some policies examined delimit to repeating the Section 43B qualifying disclosures, and in a significant number of cases, parts of policy documents are copied verbatim or substantially so into other local authorities' documents.[119] It is unclear how some phraseology

[116] For 'this list is not exhaustive' Vol 2 Table 16 R21, R52, R53, R64, R70, R73 R85, R86, R138, R147, R174, R181, R217, R238, R242, R253, R264, R276, R292, R299, R319, R320, R321, R356, R367, R370, R384, R390, R410; Vol 2 Table 19 R166; for 'comprehensive' Vol 2 Table 19 R35; Vol 2 Table 21 R136; Vol 2 Table 22 R155; Vol 2 Table 23 R224, R242; Vol 2 Table 24 R394; for 'definitive' Vol 2 Table 19 R147.

[117] For 'other unethical conduct' Vol 2 Table 19 R10, R14, R15, R19, R21, R22, R27, R28, R29, R42, R45; Vol 2 Table 20 R54, R57, R59, R60, R64, R66, R70, R78, R80, R83, R86, R93, R94, R95, R96, R98, R99; Vol 2 Table 21 R105, R113, R114, R117, R120, R132, R133, R135, R143, R148; Vol 2 Table 22 R155, R157, R158, R159, R168, R171, R172, R177, R178, R187, R192, R196, R197; Vol 2 Table 23 R206, R207, R208, R214, R216, R217, R223, R228, R236, R237, R239, R243, R247, R253, R256, R257, R259, R263, R264, R266, R276, R282, R283, R289, R297, R299; Vol 2 Table 24 R304, R307, R310, R316, R319, R321, R323, R329, R330, R331, R345, R346, R348, R350, R362, R363, R371, R373, R374, R380, R383, R384, R388, R391, R396, R399, R401.

[118] Section 43B ERA 1996.

[119] For those which repeat the qualifying disclosures Vol 2 Table 19 R7, R11, R13, R17, R18, R24, R32; Vol 2 Table 20 R72; Vol 2 Table 21 R107, R145; Vol 2 Table 22 R163, R183, R193; Vol 2 Table 23 R203, R204, R234, R277, R285; Vol 2 Table 24 R327, R344, R354, R358, R379; for phrases or passages copied verbatim Vol 2 Tables 16 to 21.

becomes commonly adopted, given that there is no formal, central mechanism associated with the legislative provisions through which practice can be promulgated. Informal mechanisms (which must exist because of the duplicated phrases found) are significant where, for example, legally inaccurate passages or phrases are adopted by multiple prescribed persons.[120] One assumption is that local authorities simply read others' whistleblowing policies importing content considered useful, whilst adding local variations as seen fit. It would be beneficial through further research to understand what the informal conduits are for whistleblowing policy development amongst local authorities, given the manifest risk to legality and consistency of approach arising from the observed 'tectonic drift' of many policies away from the legislation.

Another area where tension is found between Section 43B and the local authority context is the phrase 'damage to the reputation' of the local authority, raised by 0.8% of FOIA 2000 respondents and found in 7.3% of whistleblower policies.[121] There can be no doubt that the qualifying disclosure criteria described in Section 43B(1)(a)-(f) could amount to circumstances in which the reputation of the local authority might be damaged. If that is correct, then it is not clear why it would be necessary to specify that outcome in its own right unless, for example, the qualifying criteria within Section 43B(1) are suggested as being predicate conditions to that outcome. However, no basis for this explanation was advanced in the FOIA 2000 responses or observed in the whistleblowing policies examined. Advocating reputational damage in its own right as a qualifying disclosure appears incompatible with Part IVA if some local authorities, as prescribed persons, subscribe to this (under Section 43F).[122] However, local authorities as

[120] For example, observations about 'health *and* safety' (74.6% of policies), and 'feel uncomfortable' (11% of policies).
[121] ERA 1996; for FOIA 2000 respondents see Vol 2 Tables 5A and 5B R98, R121, R150; for whistleblower policies see Vol 2 Table 19 R4, R40; Vol 2 Table 20 R61, R65, R67, R91, R93; Vol 2 Table 21 R123, R140; Vol 2 Table 22 R153, R185, R191, R196; Vol 2 Table 23 R205, R214, R125, R217, R222, R243, R246, R249, R249, R259; Vol 2 Table 24 R308, R315, R316, R333, R349, R375, R390, R397, R403.
[122] ERA 1996.

employers could include protection of reputation as a ground upon which to make a 'local' disclosure but it would not be a qualifying disclosure under Section 43B.[123]

The term 'negligence' is listed as a disclosure ground in 6.4% of local authority policies, along with phrases like 'neglect of duties', 'neglecting their duties', and 'neglectful advice'.[124] It is possible that one or more of the statutory qualifying disclosures could involve a precursor state of negligence [eg health or safety failures under Section 43B(1)(d), or damage to the environment under Section 43(B)(1)(e)] but negligence is generally insufficient to establish the necessary *mens rea* in respect of most criminal offences [significant because of Section 43B(1)(a)] where intent rather than recklessness is usually a pre-requisite.[125] Whilst the term 'neglect' can be found in 4.9% of policies examined (as in, 'abuse or neglect of vulnerable people'), 'negligence' is also deployed apparently interchangeably with 'neglect' (as in, 'negligence or abuse of customers or clients') whereas in contrast, other terms are used in some policies which are more specific about poor-treatment failure eg 'mistreatment of a client of the Council'.[126] Overall, the terms 'negligence' and 'neglect' as advanced in some of the policies examined appear imprecisely used and may or may not amount to qualifying disclosures, depending on the circumstances. However, a clear exception would include the

[123] ERA 1996.

[124] For 'negligence' Vol 2 Table 16 R4, R22, R37, R40, R57, R61, R67, R81, R100, R108, R123, R140, R153, R67, R175, R180, R198, R219, R225, R238, R243, R246, R259, R261, R286, R300; for 'neglect of duties' Vol 2 Table 21 R353; for 'neglecting their duties' Vol 2 Table 18 R126 and Vol 2 Table 21 R341; for 'neglectful advice' Vol 2 Table 20 R292 and Vol 2 Table 21 R384.

[125] ERA 1996; the detail of the debate about what should constitute intent in the context of *mens rea* is outside the scope of this thesis but is considered more thoroughly by AP Simester, 'Why Distinguish Intention from Foresight' in AP Simister and ATH Smith (eds), *Harm and culpability* (OUP 1996); Mohamed Elewa Badar, *The concept of mens rea in international criminal law: the case for a unified approach*. (Hart Publishing 2013); Benjamin Levin, 'Mens Rea Reform and its Discontents' (2019) 109(3) Journal of Criminal Law & Criminology 491; Stephen P Garvey, *Guilty Acts, Guilty Minds* (OUP 2020). Substantive criminal offences that can involve recklessness include criminal damage, manslaughter, and certain matters under the Health and Safety at Work etc. Act 1974.

[126] For 'neglect' Vol 2 Table 19 R21; Vol 2 Table 20 R64, R85, R86, R96; Vol 2 Table 21 R105, R132; Vol 2 Table 22 R158, R171; Vol 2 Table 23 R254, R264, R289, R292, R299; Vol 2 Table 24 R352, R353, R368, R402, R403, R406; for 'abuse or neglect of vulnerable people' Vol 2 Table 23 R254; for 'negligence or abuse of customers or clients' Vol 2 Table 20 R81; for 'mistreatment of a client of the Council' Vol 2 Table 19 R16.

criminal neglect of vulnerable people to whom a duty of care is owed, in which case the criminal offence criterion under Section 43B(1)(a) could be considered.[127]

The research found that the phrases 'unethical conduct', 'other unethical conduct', 'other unethical behaviour', 'activities… [etc. which are] unethical', 'other conduct which gives you cause for concern' or which is 'improper' were used in 62.3% of policies examined.[128] Even if these words are used as a general descriptor or catch all, they lack the specificity required by Section 43B. Such phrases are listed by the majority of local authorities as an individual item or bullet point in their policies, suggesting that the words have a particular status as a disclosure distinct from other failures included in the published documents. Again, it is assumed here that their meaning is of local significance as they do not appear to meet the qualifying disclosure criteria within Part IVA (Vol 2 Table 19).[129]

Though protecting finite revenues is clearly an important public interest factor, the purview of PIDA 1998 is broader than financial loss, noting its preamble.[130] In regard to finances, another

[127] For example, Section 44 Mental Capacity Act 2005; Sections 126-130 Mental Health Act 1983; Sections 20 and 21 Criminal Justice and Courts Act 2015.

[128] For 'unethical conduct' Vol 2 Table 19 R6, R30, R39, R43, R50; Vol 2 Table 20 R52, R55, R97; Vol 2 Table 21 R123, R124, R125, R128, R137; Vol 2 Table 22 R151, R164, R185, R186, R194; Vol 2 Table 23 R209, R211, R221, R222, R224, R231, R233, R238, R258, R292, R296; Vol 2 Table 24 R313, R324, R370, R375; for 'other unethical conduct' Vol 2 Table 19 R10, R14, R15, R19, R21, R22, R27, R28, R29, R42, R45; Vol 2 Table 20 R54, R57, R59, R60, R64, R66, R70, R78, R80, R83, R86, R93, R94, R95, R96, R98, R99; Vol 2 Table 21 R105, R113, R114, R117, R120, R132, R133, R135, R143, R148; Vol 2 Table 22 R155, R157, R158, R159, R168, R171, R172, R177, R178, R187, R192, R196, R197; Vol 2 Table 23 R206, R207, R208, R214, R216, R217, R223, R228, R236, R237, R239, R243, R247, R253, R256, R257, R259, R263, R264, R266, R276, R282, R283, R289, R297, R299; Vol 2 Table 24 R304, R307, R310, R316, R319, R321, R323, R329, R330, R331, R345, R346, R348, R350, R362, R363, R371, R373, R374, R380, R383, R384, R388, R391, R396, R399, R401; for 'other unethical behaviour' Vol 2 Tables 19 – 21 R89, R154, R322; for 'activities… [etc. which are] ... unethical' Vol 2 Table 23 R225; Vol 2 Table 24 R306, R390; for 'other conduct which gives you cause for concern' Vol 2 Table 21 R127; for 'improper' Vol 2 Table 19 R8, R9, R12, R27, R28, R29, R34, R38, R42, R48; Vol 2 Table 20 R56, R59, R60, R61, R69, R70, R80, R83, R85, R89, R93, R94, R95, R96, R97, R98; Vol 2 Table 21 R101, R102, R105, R111, R119, R120, R128, R136, R138, R147, R148; Vol 2 Table 22 R152,R158,R165,R168,R170,R174,R175,R177,R178,R179,R187; Vol 2 Table 23 R206, R209, R217, R229, R231, R240, R247, R248, R250, R256, R263, R264, R265, R266, R275, R280, R281, R283, R285, R287, R289, R291, R293, R295, R297, R299; Vol 2 Table 24 R304, R306, R307, R309, R310, R318, R319, R320, R321, R323, R337, R339, R345, R346, R347, R348, R356, R357, R359, R361, R362, R363, R368, R370, R371, R373, R374, R378, R380, R381, R388, R391, R394, R399, R400, R401, R406.

[129] ERA 1996.

[130] 'Act to protect individuals who make certain disclosures of information in the public interest to allow such individuals to bring action in respect of victimisation; and for connected purposes.'

subject raised as a disclosure by 3.7% of local authorities, using identical wording, is where it is suggested that someone (their role or status is not specified) should 'take reasonable steps to report and rectify any situation which could result in the Council incurring avoidable costs or loss of income'.[131] In trying to understand the practical effect of this phrase, one scenario envisaged is where the whistleblower is aware that another person has failed (or is failing or, potentially, could fail) to report and to rectify loss of income, avoidable cost, etc. If this scenario is what is intended, then there is no obvious analogous qualifying disclosure in Section 43B [except, hypothetically, where avoidable loss is occurring through fraud or theft, etc. under Section 43(B)(1)(a) but then a substantive qualifying disclosure would be available]. It is likely that there would need to be a contractual term or condition requiring the reporting worker to make such a report and rectification, or that there was another duty to do so eg a statutory, professional regulatory, or fiduciary requirement.[132] In such circumstances, a legal obligation may arise and therefore fall within the ambit of Section 43(B)(1)(b), but in the absence of these contractual or professional-body etc. pre-requisites, it is not axiomatic that every would-be whistleblower (whether a worker within or outside a local authority) would be under a legal duty to report and rectify the situation described. Whether this 'report and rectify' condition amounts to a legal duty is contentious for the reasons given above, so any exhortation like this contained in a whistleblowing policy should be clearly expressed in order to be efficacious and, in addition, the basis for the expectation explained. The whistleblowing policy for R206 states that '[m]any of the above areas [disclosures] will represent inevitably an avoidable loss, which affects our service delivery'.[133] It cannot be deduced from that single source that the whistleblowing policies of the other local authorities which include a 'report and rectify'

[131] Vol 2 Table 19 R35; Vol 2 Table 20 R63, R73; Vol 2 Table 21 R146, R147, R149; Vol 2 Table 22 R155; Vol 2 Table 23 R231, R242, R258, R282; Vol 2 Table 24 R346, R366, R370, R382.

[132] For example, 'health and safety (Regulation 14 of the Management of Health and Safety Regulations 1999), money laundering and anti-terrorism legislation (Proceeds of Crime Act 2002)' cited in Lewis and Vandekerckhove (n 102) 840.

[133] Vol 2 Table 16.

criterion also intended to imply that the failures they reference may lead to avoidable loss etc. by those authorities.

Another possible interpretation of the 'report and rectify' phrase, could be an expectation that the whistleblower makes a disclosure about another person who is under a duty to report and rectify avoidable costs or loss of income (and presumably has failed, is failing, or will fail to do so). In these circumstances, the whistleblower would need reason to believe that the person subject of the disclosure (where there is an identified individual) was under a legal duty to report and rectify. This interpretation contains a number of hypothetical gateways which make navigation for the whistleblower potentially problematical and appear outside the requirements described in Section 43B.[134] How a whistleblower would know or establish that another person is under such a duty (contractually or through some other legal obligation) is not described in the policies examined, whilst also noting that some policies stated that the whistleblower should not investigate the disclosure but merely report it based on reasonable belief.[135] 'Report and rectify' could be interpreted as positing two duties depending on how the expression is interpreted; 'to report' and 'to rectify' any situation which is likely to cause avoidable costs or loss of income. This potential disclosure type appears incompatible with the approach generally intended by Part IVA on two grounds. Firstly, it appears unlikely to be a qualifying disclosure under Section 43B(1)(a)-(f) (though it may be a 'local' requirement) and, secondly, an ordinary worker (ie those not under a statutory, contractual, fiduciary or professional-body requirement) is under no Part IVA-imposed obligation to report failures identified.[136]

However, if the local authority whistleblowing polices cited intended to impose 'report and rectify' obligations, the further question arises as to what the consequences may be for any

[134] ERA 1996.
[135] Vol 2 Table 16 R16 (Clause 3.2), R34 (Clause 8.8), R36 (Page 8), R41 (Clause 12.1).
[136] ERA 1996.

potential whistleblower who fails to report and/or fails to rectify avoidable loss of income or avoidable costs. It is not clear what transgression arises where a person 'reports' but does not 'rectify' or conversely rectifies but does not report. The policies containing this criterion are silent about whether the whistleblower could be subject to sanction for failing to 'report and rectify' though, again, sanction would appear incompatible with the ethos of Part IVA in the absence of special duties through employment contract, etc.[137] Further, as worded, the 'report and rectify' ground for disclosure in some policies appears to be future-facing 'take reasonable steps to report and rectify any situation which could result in', or 'likely to give rise to', or 'likely to cause', etc.[138] If correct, this approach contrasts with Section 43B which in addition to future failure(s), includes both historical and extant failure(s) about which disclosures can be made. The expressions could also be interpreted as meaning that an unspecified failure ('any situation') which is presently occurring, that might have a future impact of incurring avoidable cost and/or potential loss of income, is in issue. Beyond the use of the phrase 'could result in', there is no qualification added like 'reasonably foreseeable' to guide the proportionate use of the whistleblowing policies.[139]

Whilst the 'report and rectify' provision is found in only 15 policies, it is raised here as evidence of a discernible lack of clarity and of imprecision observed in policies.[140] Through examination of the phrase the point is advanced that where a local authority whistleblowing policy seeks to expand the disclosure ambit beyond Section 43B, uncertainties may arise which

[137] ERA 1996.
[138] For 'take reasonable steps to report and rectify any situation which could result in…' Vol 2 Table 23 R231, R282; for 'likely to give rise to…' Vol 2 Table 19 R35; Vol 2 Table 20 R63, R73, Vol 2 Table 21 R146, R147, R149; Vol 2 Table 23 R242, R258; Vol 2 Table 24 R346, R370; for 'likely to cause…' Vol 2 Table 19 R155; Vol 2 Table 21 R366, R382.
[139] For 'take reasonable steps to report and rectify any situation which could result in…' Vol 2 Table 23 R231, R282.
[140] 3.7% where n=409.

could prove counter-productive in terms of gaining the confidence of whistleblowers and, with that, upholding the public interest.

2.11 Disclosure of breaches of local authority codes of conduct

It is rational that local authority whistleblower policies include reference to the conduct of council workers, noting the breadth and complexity of local authorities' functions and their purpose to provide services to the public, including to the most vulnerable members of communities. Maintaining good discipline and professional standards would be reasonable expectations of both officers and members (but who are not workers).[141] It was discovered that 12.2% of whistleblower policies, procedures and policies examined included breach of a local authority code of conduct as a criterion for disclosure.[142] The corollary of this is that 87.8% of policies did not refer explicitly to breaches of a code of conduct as amounting to grounds for a disclosure. Again, the point can be made that whilst local authorities could include non-qualifying disclosures in their local policies, it is potentially confusing and problematical for whistleblowers where local authorities fail to clarify that some conduct issues are unlikely to amount to qualifying disclosures within the meaning of Section 43B.[143]

Of those that do make reference to a code of conduct, some refer to elected members, others to officers, some to both, whilst others are generic in that they do not differentiate between elected representatives and local government officers.[144] One authority uses the description '[a] breach of a professional code of conduct' which implies a narrower focus, perhaps on persons in

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[141] Local Government Association, 'Guidance on Local Government Association Model Councillor code of Conduct' (2021) Clauses 8.1 and 9.1–9.3 <https://www.local.gov.uk/publications/guidance-local-government-association-model-councillor-code-conduct> accessed 11 January 2022.

[142] Vol 2 Table 16 R4, R8, R9, R10, R11, R40, R52, R53, R55, R57, R58, R63, R67, R85, R90, R97, R133, R135, R140, R142, R146, R174, R185, R186, R188, R207, R208, R213, R246, R259, R269, R281, R292, R295, R296, R306, R308, R320, R324, R336, R347, R349, R350, R351, R356, R361, R368, R375, R383, R384.

[143] ERA 1996.

[144] For reference to 'elected members', for example, Vol 2 Table 16 R74, R78, R82; for reference to 'officers', for example, R61, R65, R87; for reference to 'both', for example, R51, R58, R59; for generic entries, for example, R69, R79, R165.

professions like accountancy, law or social work.[145] A recent report on local government ethical standards observed that '[t]here is considerable variation in the length, quality and clarity of codes of conduct. This creates confusion among members of the public, and among councillors who represent more than one tier of local government.'[146] The consideration arises as to whether any type of misconduct by local authority officers or members could amount to a qualifying disclosure under Section 43B.[147] An example that suggests that *any* breach of a code of conduct should arguably not amount to a qualifying disclosure can be found in the published code of conduct for R306 which includes 'dress code'.[148] Whilst it may be laudable to have a dress code, it would seem unworthy to raise as a whistleblowing issue the wearing of lanyards (which 'should not be worn out with working times. Lanyards should not be worn while driving a motor vehicle.') and for the legislation to apply through Section 43B.[149] Nevertheless, where adherence to a code of conduct is a contractual condition, then it is feasible that wearing the lanyard in that example could amount to a qualifying disclosure under Section 43B(1)(b), though the public interest benefit must be considered and met in such a case.

In further contemplation of whether breaches of codes of conduct are qualifying disclosures or matters of local interest only, the research included assessment of the publicly available codes of conduct for the local authorities covering the four principal cities, namely Belfast, Cardiff, Edinburgh and London, in the constituent countries of the UK.[150]

As with the 'report and rectify' discussion where obligations to report failures were discussed, a similar situation is noted in respect of whistleblowing policies which may infer code of

[145] Vol 2 Table 24 R347.
[146] Local Government Ethical Standards, 'A Review by the Committee on Standards in Public Life' (2019) 1 10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777315/6.4896_CO_CSPL_Command_Paper_on_Local_Government_Standards_v4_WEB.PDF> accessed 29 December 2021.
[147] ERA 1996.
[148] Vol 6 Appendix IV.
[149] ibid R306.
[150] Vol 6 Appendix V.

conduct breaches are qualifying disclosures (12.2%).[151] In the Belfast, Cardiff, Edinburgh and London examples, a range of exhortations about reporting observed misconduct were cited along a continuum from 'are expected to' report to 'must' report, and including the prospect of sanction for failing to report others who may be in breach of a code of conduct.[152] Part IVA requires that a disclosure is made in the public interest but is silent on the issue of a positive duty to report imposed on a whistleblower whether by contract, other professional requirement or a fiduciary or statutory duty.[153] That said, an important premise recognised in the case of *Sybron Corporation v Rochem Ltd* is that no general duty exists for employees to make qualifying disclosures about their co-workers.[154] However, case law is nuanced and distinguishes between obligations on company directors and other workers who are members of professions which are subject to disclosure obligations, supervisory workers, and those in more junior positions.[155] According to some commentators, other more dynamic features may be salient including whether the failures are historical or on-going, as well as the seriousness of the alleged failure.[156]

The definition of 'worker' currently does not include an elected member of a local authority even though codes of conduct which have a statutory footing apply to such individuals.[157] There is therefore no unequivocal argument that local authority codes of conduct are a statutory requirement for the purpose of Part IVA, and that to be in breach of the code of conduct is

[151] Vol 2 Table 19 R4, R8, R9, R10, R40; Vol 2 Table 20 R52, R53, R55, R57, R58, R63, R67, R85, R90, R97; Vol 2 Table 21 R133, R135, R140, R142, R146; Vol 2 Table 22 R158, R174, R185; Vol 2 Table 23 R201, R207, R208, R210, R213, R246, R259, R269, R281, R292, R294, R295, R296; Vol 2 Table 24 R306, R308, R320, R324, R336, R349, R350, R351, R356, R361, R368, R375, R383, R384.
[152] Vol 6 Appendix V.
[153] ERA 1996.
[154] *Sybron Corporation v Rochem Ltd* [1984] 1 Ch 112, CA.
[155] Professions which are subject to disclosure obligations eg *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2004] IRLR 928; *Nottingham University v Fishel* [2000] ICR 1462; [2001] RPC 367, QBD; for supervisory workers eg *Swain v West (Butchers) Limited* [1936] 3 All ER 261 CA; for those in junior positions eg *Ladbroke Racing Limited v King*, Daily Telegraph, 21 April 1989, EAT.
[156] Jeremy Lewis and others, *Whistleblowing: law and practice* (3rd edn, OUP 2017) 430 para 13.29.
[157] The Local Authorities (Model Code of Conduct) Order 2007, SI 2007/1159.

automatically to engage Section 43B [though contracts of employment which include as a condition a requirement to report a breach of a code of conduct for employees, may engage Section 43B(1)(b)].[158] Finally, it is worth re-stating that any matter raised as a qualifying disclosure must have a legislated-for public interest value, and it is noted that 19.1% of policies examined do not reference this fundamental requirement of the law.[159]

As well as including disclosures which are not statutory, 11% of policies examined failed to include one or more of the 6 statutory disclosures described in Section 43B.[160] The most frequently omitted criterion at 4.6% was 'miscarriage of justice' ([Section 43B(1)(e)] followed by 'concealment' of wrongdoing at 3.4% [Section 43B(1)(f)]. At an operational level, a local authority official agreeing to cancel a parking ticket for a relative, friend or colleague can amount to a miscarriage of justice, just as failing to record an incident of poor patient care could constitute deliberate concealment for the purposes of Section 43B(1)(f). These examples illustrate why policies should accurately reflect the law about what failures constitute a statutory qualifying disclosure, and what other matters included do not.[161]

In summary, analysis of the available data suggests that some local authorities, whether wittingly or unwittingly, have extended their remit beyond the criteria provided for in law in two ways; either by including non-qualifying disclosures, or by including role holders who are not legally recognised as workers. It is reasonable for authorities to include matters of local concern within their whistleblowing policies but a distinction should be drawn with statutory considerations. Risks to the public interest may arise where qualifying and non-qualifying disclosures are conflated without distinction in the same document, which may confuse or

[158] ERA 1996.
[159] Vol 2 Table 24.
[160] ERA 1996.
[161] For 'miscarriage of justice' omissions Vol 2 Table 16 R129, R153, R154, R165, R181, R287, R288, R291, R300, R311, R315, R338, R340, R342, R353, R356, R357, R366, R370; for no mention of 'concealment' R92, R200, R312, R319, R347, R362, R363, R368, R369, R380, R384, R388, R399, R401.

mislead a prospective whistleblower and/or encourage them to pursue a course of action which may result in procedural or legal difficulty. The same situation may befall an individual whose worker-status is not included within the provisions of Part IVA but is led to believe, according to the wording of some policies, that their role is protected.[162] Noting the large number of local authorities and their wide range of responsibilities, it is perhaps understandable how confusion can arise unless specific policy and procedure is available, differentiated and clear, and predicated upon the key tenet of protecting the public interest, as required under Sections 43F-43H.[163] For emphasis, and noting the foregoing, it is nevertheless within the discretion of a local authority as an employer to include matters in its whistleblowing policy which are of internal significance but which would not necessarily meet the public interest test. However, it is difficult to understand why any local authorities omit from their policies statutory criteria included in Section 43B, such as miscarriage of justice and concealment. Finally, evidence was found of the omission from policies of statutory qualifying criteria, which is a different manifestation of the problems of imprecision and inconsistency noted in this section.

2.12 The inclusion of a 'good faith' criterion in whistleblowing policies

The research identified two further issues likely to be significant to whistleblowers' confidence to make disclosures; firstly, the expectation included in 55.3% of policies that 'good faith' is shown by the whistleblower in making a qualifying disclosure when the requirement for the whistleblower to act in good faith was removed by Section 17 ERRA 2013 in respect of Sections 43C and 43F (though the absence of good faith can reduce compensation payable for a whistleblowing-related detriment by up to 25%).[164] Secondly, the suggestion found in 45.5% of policies that disciplinary proceedings may be invoked against a person perceived to be acting

[162] ERA 1996.
[163] ibid.
[164] Section 18(4) ERRA 2013.

for personal gain and not in the public interest. Threat of discipline reflects no requirement of Part IVA, where personal gain only nullifies a disclosure made under Sections 43G and 43H.[165] It is incongruous that in contemporary local authority policies the good faith requirement is still included some 10 years after the law was changed to remove its effect (compensation, aside). It may be that its continued inclusion is a conscious decision by some authorities which include non-statutory considerations in their policies. However, without explanation and clarification, this approach runs contrary to the statutory position established by ERRA 2013 where the focus was directed towards the disclosure and away from the motivation of the discloser.[166] The continuing inclusion of good faith could undermine users' understanding of the law, and their confidence in engaging with it. Also, error through mis-application of law and policy in complex scenarios could lead to persons being inappropriately and unnecessarily exposed to the threat of discipline, which is bound to deter some potential whistleblowers.[167] Although disciplinary action instigated by local authorities is highly unlikely to arise for non-local authority employees or workers, such persons may be unaware of their status as potential whistleblowers and may mis-interpret those whistleblowing policies which contain a threat of action, even where legally irrelevant.

It was found that only 3.7% of available local authority whistleblower policies were dated prior to 25th April 2013, and a minimum of 59.9% were published or updated after that date.[168] Therefore, it should follow that no (or only a small proportion of) current published policies should still include a requirement that whistleblowers must be acting in good faith when making a disclosure (Vol 2 Table 18). Though the research suggests that most whistleblower

[165] Vol 2 Table 17 (final row); ERA 1996.
[166] Section 18(1) ERRA 2013.
[167] Vol 6 Appendix III where 6 scenarios are outlined that demonstrate the complexity of Part IVA ERA 1996, and the margin for error in mis-applying the law.
[168] When ERRA 2013 received Royal Assent.

policies are for internal use, 19.6% of local authority respondents suggested that their policies were also appropriate for use by external whistleblowers.[169]

2.13 Protections described in local authority prescribed persons' policies

As well as identifying and assessing apparent dis-incentives to reporting whistleblowing disclosures, the analysis considered what protections for whistleblowers, if any, local authorities advanced in their whistleblowing policies. It was discovered that 79.5% of policies suggested a link between the policy and Part IVA or PIDA 1998 or their Northern Ireland equivalents.[170] It was also found that 19.1% of policies did not explicitly associate their policy position with the core legislation and its public interest criterion (Vol 2 Tables 19-24). Whilst it is not a legal requirement to formally link whistleblowing policy and whistleblowing law, doing so may be appropriate for three reasons. Firstly, to demonstrate that steps have been taken to communicate accurately the relevant law in a complex field to those who may be affected. Secondly, to enable those contemplating making a disclosure (and their advisers) to refer directly to the legislation and, thirdly, to identify the protection (as distinct from remedies) available to workers making a protected disclosure, against suffering a detriment or facing dismissal as a result of doing so.[171]

In the research the principal safeguards referenced in the majority of published whistleblowing policies (whether mention was made of Part IVA etc. or not) were protection from victimisation (98%), and maintaining the confidentiality of the identity of the person making the disclosure (97.1%).[172] These high levels sit in apparent contrast with the FOIA 2000 responses received from local authorities where only 10.4% of the total cohort of respondents (n=367) reported

[169] Vol 2 Table 11.
[170] ERA 1996; PIDO 1998 and Employment Rights (Northern Ireland) Order 1996; summary data at the end of Vol 2 Table 24.
[171] Section 47B ERA 1996 regarding 'detriment' and Section 103A ERA 1996 regarding 'dismissal'.
[172] ERA 1996; summary at end of Vol 2 Table 24 (n=409).

that they offered protection from victimisation or detriment etc. and 31.3% reported that they offered confidentiality to protect external whistleblowers from unjustified treatment by their employers or others. It is not possible to account confidently for the apparent disparity between policy intention and the responses directly received. It is feasible that some respondents did not understand the FOIA 2000 question properly, whilst others did not believe that external whistleblowers are, or should be, afforded similar protections to internal whistleblowers.[173] Analysis revealed that none of the claims by 72 local authorities that their whistleblowing policies were suitable both for internal and external whistleblowers stood scrutiny, as they were obviously intended for internal workers only (Vol 3 Table 26). On balance, however, the available evidence does not support a hypothesis that external whistleblowers are deliberately treated less favourably on policy grounds (in respect of protections provided) than their internal counterparts, although a LAPP is not empowered to prevent a detriment or dismissal of a non-council worker (except where this outcome is a by-product of its enforcement activities). A comparable position as between internal and external whistleblowers should be expected when confidentiality is the protection consideration, and the available evidence supports this contention.[174]

2.14 Advice provided by local authority prescribed persons to whistleblowers

The opportunity was taken to evaluate whether, and from what sources, information was provided to users of local authority whistleblowing policies regarding advice about whistleblowing and the implications of making a disclosure. It was decided that assessment of 51% of local authority whistleblowing policies (209; n=409) would be sufficient to establish a representative sample from which conclusions could be drawn (Vol 2 Tables 23 and 24).

[173] Vol 2 Table 8 Row 2.
[174] Analysis presented in Vol 2 Tables 7 and 22, and Vol 3 Tables 27 and 29.

It is a positive feature of the 209 policies examined that the majority (75%) referred to one or more sources of advice independent of the local authority, including trade unions, professional associations, Protect (the whistleblowing advice charity), and other unnamed but independent resources. Less positively, 8.6% made no mention of how to acquire advice before making a disclosure whilst a further 12.9% only referred to providers within the local authority (Vol 2 Table 25).[175] The proportion of local authorities that mentioned securing advice (91.4%) appears high and there was no obvious reason to account for this high threshold found in the documents examined. It can be speculated that the legislation (upon which policy should be based) is understood to be complex, or that the potential pressures on, and implications for, a person contemplating a disclosure are recognised, or that as employers, local authorities are pre-emptively protecting their position in the event that they are challenged by workers about a response to an alleged failure.[176]

As possible errors were noted in the description of relevant law in some of whistleblowing policies, it was considered appropriate to review whether advice about sources of counsel to a putative whistleblower was legally correct and unambiguous. Where information was provided about whistleblowing advice and potential further action (external to the local authority), one would have expected that referrals to other prescribed persons were made in accordance with the requirements of the legislation. It was determined that 9.1%% of the policies advised those who were 'dissatisfied', 'not satisfied', 'not happy' or 'remain concerned' to contact one or more of a number of organisations, including the police (Vol 2 Table 24).[177] Police services in

[175] In Vol 2 Table 25, no source of advice was referred to by R210, R225, R234, R254, R269, R271, R285, R318, R324, R327, R338, R341, R353, R362, R366, R379, R382, R389; internal source(s) referred to by R203, R206, R207, R222, R226, R228, R236, R257, R259, R260, R262, R267, R273, R286, R290, R294, R296, R297, R299, R323, R348, R350, R358, R378, R380, R392, R402.

[176] A defence is available for the employer to show that the employer took all reasonable steps to prevent other workers from victimising a co-worker whistleblower [Section 47B(1D) ERA 1996].

[177] For 'dissatisfied' Vol 2 Table 24 R306, R345, R390; for 'not satisfied' Vol 2 Table 23 R247, R281 and Vol 2 Table 24 R310, R319, R339, R356, R363, R368, R371, R374, R388, R396, R401, R407; for 'not happy' Vol 2 Table 24 R399; for 'remain concerned' Vol 2 Table 23 R291 (n=209)

the UK have a wide remit including the investigation of crime but are not prescribed persons and, without explanation of the limitations of the police services' role, it may unwittingly mislead the whistleblower as to the protections available within Part IVA by advising those discontented with a local authority's action or inaction to make a disclosure to the police (with the exception of the special circumstances described in Sections 43G, and 43H).[178] Whilst the subject matter of the disclosure may include a criminal offence and thereby engage Section 43B(1)(a), Section 43 mandates that a qualifying disclosure only becomes a protected disclosure when it 'is made by a worker in accordance with any of Sections 43C - 43H'.[179] Police services are not included as a statutory recipient under Sections 43C – 43F and so disclosures to them could only be protected if made in accordance with Sections 43G or 43H (the more emergency-like criteria) but these caveats are not explained adequately or at all in the policies examined.[180]

In addition to some of the less precise formulations observed in the research and described above, an approach included in 13 policies (6.2%) stated that 'you may wish to consider discussing your concern with a colleague first and you may find it easier to raise the matter if there are two (or more) of you who have had the same experience or share the same concerns', or very similar wording.[181] In some circumstances it could be argued that canvassing may be a reasonable tactic used by, for example, a trade union with whom the disclosure is raised in order to put 'distance' between the issue and the whistleblower to help preserve confidentiality, or to establish whether the substance of the disclosure is sufficiently pervasive in the work

[178] Police Foundation and the Policy Studies Institute, 'The report of an independent inquiry established by the Police Foundation and the Policy Studies Institute: The Role and Responsibilities of the Police' xii (Latimer Trend 1996); also Public Interest Disclosure (Prescribed Persons) Order 2014 and Section 43F ERA 1996; ERA 1996.
[179] ERA 1996.
[180] ibid.
[181] Vol 2 Table 23 R205, R228, R263, R265, R266 and Vol 2 Table 24 R307, R317, R334, R337, R358, R363, R371, R373 (n=209).

environment as to amount to a public interest factor.[182] However, the formulation of the wording described could also be construed as a suggestion that a potential whistleblower canvass others who may have similar concerns as it will then be 'easier to raise the matter'.[183] Such an approach raises concerns including that confidentiality (raised as a protective factor in 97.1% of published policies) would be compromised for the potential whistleblower who, in effect, is being encouraged to identify themselves to others as the potential source of a future disclosure.[184] It is therefore of significance when some local authorities actively encourage potential whistleblowers to seek out others for the explicit purpose of revealing the whistleblower's knowledge of alleged failures. Also, the employer has an obligation reasonably to protect workers under suspicion whose reputation may be impugned through dialogue between colleagues. Further, in the interests of justice, it is important that potential witnesses should not confer. It could be construed that the policy of inviting whistleblowers to discuss their concerns with co-workers is a 'fishing expedition' for other potential witnesses who might not otherwise have elected to report matters on their own volition. The policy of encouraging interaction could be subject of criticism subsequently, not least by those representing a person who, or entity which, was subject of a disclosure about alleged wrongdoing. Whilst a whistleblowing procedure is not intended to be a legalistic one *per se*, there is a possibility that it can become so (even if a disciplinary issue), and a policy that encourages collaboration could be challenged as inviting collusion and if so found, lead to the termination of proceedings.[185] There was no inclusion of cautionary words of the legal risks implicit in discussing concerns with colleagues in the policies described; particularly given that such proactive co-operation-seeking by the potential whistleblower may be taking place before

[182] An issue examined in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2015] ICR 920 EAT.
[183] Vol 2 Table 23 R228, R263, R265, R266 Table 24 R307, R317, R334, R337, R358, R363, R373.
[184] Vol 2 Table 24.
[185] The effects on fairness of witness collusion (in a non-whistleblowing case) is very clearly described in *AA v London Borough of Southwark* [2014] EWHC 500 QB.

any public interest test has been undertaken of the content of the potential disclosure. Finally, it appeared from the wording of the quoted example that no regard was given to whether the person to whom the conversation was directed was expected to have any relevant skills, experience or training in discharging any form of advisory role to the potential whistleblower about imparting and/or receiving sensitive or distressing information.

Analysis of the FOIA 2000 responses also revealed that 72 LAPPs (19.6%) claimed their whistleblowing policies were appropriate for use by external whistleblowers. From the wording of the policies examined, none appeared to distinguish between internal whistleblowers, external complainants and external whistleblowers raising qualifying disclosures in the public interest (Vol 3 Table 26). It is possible that there is a substantive difference between the *de jure* position outlined in the whistleblowing policy and the *de facto* situation which respondents have suggested; however, the credibility of the advocated position may be called into question where policy was, in key respects, quite different to the operating one. Equally, though a majority of respondents (58.6%) suggested that they had no specific policy in place to deal with external whistleblowers, two reported that they had an unwritten policy.[186] Where policies are not documented, the credibility of such responses is questionable. It is unclear why respondents would hold out that policies, clearly intended to manage internal whistleblowing (Section 43C) are also suitable for disclosures from external whistleblowers (Section 43F), or that informal approaches to managing external disclosures are 'policy'. One possible explanation is that some local authorities may be reluctant to admit error in how they publicly report on their myriad of responsibilities.

[186] Vol 2 Table 11 column 4 summary; for 'we do have a policy, but it is not written down' Vol 2 Tables 5A and 5B eg R297; for 'this policy is not written' Vol 2 Tables 5A and 5B eg R172.

Whilst some respondents have offered questionable explanations, 6 others have been more candid and accepted that their approach would benefit from review, intimating that the FOIA 2000 questions prompted this suspicion or realisation.[187] In contrast, 17 responses (4.6%; n=367) when assessed and compared with the associated published whistleblowing policies, were reasonably compelling that the respondents both understood the legal position and distinguished qualifying disclosures via external sources, from internal whistleblowing, and complaint management. It follows, therefore, that 95.4% of respondents (augmented by analysis of their respective policies) did not appear to follow a formal policy designed to meet the operational requirements of legislation which defines their obligations as prescribed persons (Vol 3 Table 27).

Collating the evidence described above that leads to the proposition that most local authority whistleblowing policies are not consistent with Part IVA, it was assessed that 'worker' criteria were incorrectly or insufficiently described, qualifying disclosures appeared an amalgam of locally identified as well as statutory criteria, statutory criteria were omitted, and protections were inaccurately or inadequately explained (together found in 83.1% of policies; n=409).[188] Also, reference to the underpinning legislation (to help advise and guide users) was not described in documents (19.1%), and the motivation ('good faith') of the whistleblower (as opposed to consideration of the public interest) was still incorporated in many publicly available policies years after the relevant law was amended (55.3%), aligned to the finding that punitive action was also associated with good faith and/or personal gain (45.5% of policies) (Vol 3 Table 28).

[187] Vol 6 Appendix V sets out 6 instances where local authorities stated that they had committed to review their policy, procedure and process etc. following receipt of the FOIA 2000 requests.
[188] ERA 1996.

From the analysis, it is possible to distil-out three significant conclusions from the information provided in the FOIA 2000 responses. Firstly, only 4.2% of respondents' published or available whistleblower policies appeared adequately to reflect the local authorities' awareness of their obligations as prescribed persons. Secondly, just 3.2% of internal whistleblower policies appeared readily compatible with Part IVA.[189] Thirdly, less than 1% of local authority whistleblowing policies appeared satisfactorily to address the local authorities' dual roles as employers and prescribed persons (Vol 3 Table 29).

2.15 Local Authorities' Compliance with Regulation 5 Prescribed Persons (Reports on Disclosures of Information) Regulations 2017

In managing the passage of the 2017 Regulations through Parliament, the responsible Minister, Baroness Buscombe, made the following comments to explain the rationale for the legislation:

> In response to the concerns raised following the call for evidence in 2013, the Government sought a way to increase confidence that disclosures from workers were indeed investigated and followed through. They sought to increase transparency in the system, which might identify which prescribed persons are not effectively undertaking their responsibilities, while respecting the importance of treating disclosures in confidence.[190]

According to the above, it was clearly intended that one outcome of the 2017 legislation was to improve the effectiveness of prescribed persons in discharging their public interest obligations to whistleblowers.[191] Regulations 3-5, in particular, detail what is required of prescribed persons in respect of publicly reporting on disclosures received, when to report and in what format; hence, the research included assessment of whether prescribed persons comply.[192] Noting that the Regulations' commencement date was 1st April 2017 and that Baroness Buscombe had indicated in the House of Lords debate that the annual reporting period

[189] ERA 1996.
[190] Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 [hereafter, 'Reports on Disclosures of Information regulations 2017 (n 190)']; HL Deb 30 March 2017, vol 782, cols 740-45.
[191] Reports on Disclosures of Information Regulations 2017 (n 190)
[192] ibid; Regulations 3-5 are appended for reference in Vol 6 Appendix VI.

was to be from 1 April to 31 March, the years 2017/18, 2018/19 and 2019/20 were principally evaluated in the research.[193]

One of the challenges in identifying whether LAPPs comply with the law and encountered in the research, and identified by others, is the plethora of expressions used to describe 'whistleblowing'; even in respect of how the word itself is recorded.[194] Therefore, the internet search criteria had to be broadly set and from which 303 local authorities (74.1%) 'mentions' of whistleblowing (or similar expressions) were identified in local reports (Vol 3 Table 30).

However, a degree of caution should be exercised in accepting these data as wholly reflective of the position in respect of published reports. In the research, a 'set 1' of internet search criteria was devised which disclosed annual reports (as required by Regulation 3) for only 32 (7.8%) of LAPPs.[195] Having formed a view of the circumstances in which 'set 1' criteria had been more or less effective, and whilst also having regard to the discretion as the manner of publication provided by Regulation 4(1)(b), a 'set 2' of search criteria was prepared which included examining a variety of local authority audit, scrutiny, governance and other committees that were dynamically identified on an authority-by-authority basis.[196] Unlike search criteria set 1, set 2 included the year 2021 given that many local governance reports appeared to be prepared and published more promptly than the 'annual reports' searched for in set 1. Unsurprisingly, more quarterly or bi-annual records of internal council discussions regarding whistleblower disclosures were found. The analysis also sought to establish whether local authority committee reports distinguished internal and external disclosures [having regard

[193] HL Deb 30 March 2017, vol 782, col 744.
[194] David Lewis and Tracy Boylin, 'Results of a FTSE top 100 website survey on whistleblowing arrangements' (2018) 10 <https://www.mdx.ac.uk/__data/assets/pdf_file/0017/500363/RESULTS-OF-FTSE-TOP-100-WEBSITE-SURVEY-ON-WHISTLEBLOWING-Dec-2018.pdf> accessed 3 April 2022; terms include 'whistleblowing' (Vol 2 Table 16 R5), 'whistle blowing' (Vol 2 Table 16 R50), 'whistle-blowing' (Vol 2 Table 16 R66), 'WhistleBlowing' (Vol 2 Table 16 R410).
[195] Reports on Disclosures of Information Regulations 2017 (n 190).
[196] ibid.

to the requirements of Regulation 5(a)(i) and (ii)].[197] In addition, each relevant committee report was evaluated as to whether it appeared to comply with the public reporting requirements of Regulation 5 more generally.[198] Where it did not comply on one or more grounds, the reason was recorded. Although Regulation 4(1) mandates that the prescribed person must publish the report, the research identified a number of examples where caveats were adopted preventing publication of information required to be published (after suitable vetting by virtue of Regulation 5 to prevent the identification of the worker making the disclosure).[199] The analysis also identified other local governance reports referring to whistleblowing matters but which appeared to contain contradictory information or were unclear for other reasons.[200] It was concluded from the analysis that only 2.4% of the local authority reports examined positively complied with the requirement under Regulation 5 (to publish compliant annual reports); however, 34.4% of authorities reported that they had not received disclosures during the reporting period which, arguably, boosts compliance to 36.8% (Vol 3 Table 30). [201]

It is accepted that despite the efforts described here to research all LAPP reports required to be published under Regulation 3, the searches may not have identified all terminology that refers to a person making a protected disclosure, or discerned all committees and forums charged with whistleblower oversight in whatever capacity, meaning that the findings presented here

[197] Reports on Disclosures of Information Regulations 2017 (n 190).
[198] ibid.
[199] ibid; Vol 3 Table 30: 'not for publication' (R8, R177, R205); 'In confidence' (R8); 'Confidential (Exempt) session' (R72); 'EXEMPT ITEMS' (R165); 'information was presented verbally' (R165); 'Exempt information' (R192, R193); 'Proposes resolution: THAT the press and public be excluded from the proceedings…' (R193); 'Reserved Matters – In accordance with Council policy, representatives of the Press will not be in attendance for this section of the Meeting'. (R226); 'Items restricted in accordance with Part 3 of Schedule 6 of the Local Government Act (Northern Ireland) 2014' (R243); '7.3 The Committee considered the report and RESOLVED to: • agree that the content of the Anti-Fraud, Bribery and Corruption and Whistleblowing annual report 2020-21 (Appendix A), the key messages, that the progress is satisfactory, and arrangements are effective' (R244); 'Exempt from the Press and Public' (R293); **'**Part II Matters involving Exempt or Confidential Information in respect of which reports have not been made available for public inspection' (R298, emphasis included in the original); '145. Whistleblowing Complaints**:** Members noted the report and exempt appendix' (R369).
[200] ibid R130, R181, R214, R231, R298, R335, R341, R357, R369, R393, R403, R407.
[201] Reports on Disclosures of Information Regulations 2017 (n 190).

may understate the true level of reporting.[202] As described above, however, cases are cited in which public reporting of information was considered by local authorities but explicitly rejected. As to why this has occurred, two hypotheses may merit comment. Firstly, as by far the majority of policies relate to internal whistleblowing in local authorities, reporting upon these by the councils may have been treated more discreetly because they are an employer, albeit a public one, and sensitivities are catered for. Secondly, local authorities were not properly aware of the legal requirement to publish relevant data imposed upon them by the Regulations (even if local authorities were capable of distinguishing external whistleblowing from internal disclosures).[203] As one respondent authority commented in explaining their apparent non-compliance:

> It is in respect of the annual reporting requirements that we have fallen short. The legislation requires us to publish brief statistical information about the number of whistle blower complaints we receive from workers, the nature of the complaints, and the action we have taken. This will not include any details of the identity of the whistle blowers or their employers. We will start to publish this information annually starting from April 2021, and to support that we will start to collect the information in a reportable format from 1st April 2020.[204]

The issue of preserving anonymity was explicitly considered and discussed in the passage of the Regulations through Parliament. Baroness Buscombe reported to the House of Lords that '[t]he duty will increase confidence in the actions taken by prescribed persons through greater transparency about how disclosures are handled—of course, the balance between transparency and anonymity is a very difficult one to strike.'[205] Nevertheless, and despite the Minister's recognition of a perceived fine line between the confidence-building and confidence-reducing effects of openness, Regulation 5 sets out a requirement to publish information.[206] Further, Government prescribed persons' guidance specifically references the duty that 'Prescribed

[202] Reports on Disclosures of Information Regulations 2017 (n 190).
[203] ibid.
[204] R265 provided this response in an email follow-up to the FOIA 2000 request. The email is available on request.
[205] HL Deb 30 March 2017, vol 782, col 744.
[206] Reports on Disclosures of Information Regulations 2017 (n 190).

Persons are required to report in writing on whistleblowing disclosures made to them as a prescribed person.'[207] A number of local authorities appear to have disregarded, or were unaware of, the Regulations and the guidance.[208]

Consistent with a theme generally apparent in the research, only 2.4% of reports found in the analysis (n=636) appeared to differentiate between internal and external whistleblowers.[209] In addition to the caveat already described about the search criteria employed to identify relevant reports, cognisance should be taken of the significant minority of instances (34.6%) where no whistleblowing disclosure had been identified by the LAPP.[210] If, as found, LAPPs do not have the systems of policy, procedure, process and reporting in compliance with the 2017 Regulations then it is unsurprising that qualifying disclosures from whistleblowers, particularly external whistleblowers, may not have been detected.[211] In any event, it has not been possible to satisfactorily resolve in this research how many more local authorities could have identified whistleblowing disclosures and distinguished internal and external sources had appropriate processes been in place.

Regulation 3 is titled 'Annual report on disclosures of information' but it is reasonable to infer that a more regular reporting period could be compliant; so, where local authorities were found to report publicly on whistleblowing at, for example, quarterly governance forums, there is an argument that the requirements of Regulation 3 could be met (even if by the aggregation of quarterly etc. data into an annual picture).[212] Adopting this approach, a collation of available annual and quarterly etc. reports prepared by local authorities has been prepared through which

[207] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 8 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 January 2022.
[208] ibid.
[209] Vol 2 Table 30.
[210] ibid.
[211] Reports on Disclosures of Information Regulations 2017 (n 190); Vol 2 Table 32.
[212] Reports on Disclosures of Information Regulations 2017 (n 190).

(but having regard to the potential limitations of the search criteria) it was possible to gauge the proportion of LAPPs which published 'annually' in compliance with Regulation 3.[213] It is likely that data for the 2020-21 period are lower than for the preceding years because of the timing of the research.[214] Nevertheless, of 74.1% LAPPs' 'reports' which mentioned whistleblowing, only 1.2% of LAPPs differentiated between internal and external whistleblowers.[215] Overall, a conclusion can be reached that Regulation 3 was not being complied with by LAPPs during the period covered in the research (Vol 2 Tables 30 and 31).[216]

Consideration was then given to whether the reports (either annual or more frequent) complied with the requirements of Regulation 5, in particular.[217] It is appropriate to briefly explain the rationale for the presentation of the data. A total of 636 reports were considered (against the 'set 2' search criteria described earlier).[218] This means that some authorities prepared multiple reports during a year but the response 'values' (eg complies with Regulation 5; does not comply with Regulation 5) could vary, meaning multiple values could be recorded against a single local authority.[219] Where such values were different, each value (by authority and year or part year) was recorded separately and where all values were the same for a LAPP, then only one value was recorded. However, all values (even where the same) were also separately recorded leading to a total of 636 entries. Only 3.6% of the entries satisfactorily addressed the requirements of Regulation 5 (but 34.6% related to where no whistleblowing disclosures were reportedly

[213] Reports on Disclosures of Information Regulations 2017 (n 190).
[214] Vol 3 Table 30 'set 1' search criteria consider annual reports between 2017-2020 whereas the quarterly (etc.) forum reports were available into calendar year 2021. However, this phase of research was completed between January – March 2021.
[215] Vol 3 Table 30 final row re 74.1%; Vol 3 Table 31 column 5 re 1.2% which distinguish internal/external sources. This latter datum (1.2% of LAPPs) is distinct from the number of reports regarding external and internal sources (2.4% - Vol 3 Table 30), and the 5.9% of LAPPs which produced compliant reports (Vol 3 Table 32).
[216] Reports on Disclosures of Information Regulations 2017 (n 190).
[217] ibid.
[218] Vol 3 Table 30.
[219] Reports on Disclosures of Information Regulations 2017 (n 190).

received, meaning the compliance rate could be 37%), whilst 57.9% did not comply.[220] A small proportion of reports (3.8%) contained imprecise or contradictory information such that it was not possible to make a determination about their compliance with Regulation 5 (Vol 3 Table 32).[221]

As stated, Regulation 3 requires the annual publication of reports summarising whistleblowing information received.[222] Using the 'positive' methodology described (ie that a published, quarterly committee meeting report is compliant with the spirit of Regulation 3), the annual reporting compliance based on the 636 reports examined in respect of the 409 local authorities was assessed (Vol 3 Table 33).[223] By way of explanation, the delineation of years does not infer that reporting is in successive years; eg 'Two years compliance' could relate to any two years between 2017-2021. The smallest proportion identified (1.2%) was of authorities which had produced at least one report in each of the four years since the Regulations were implemented (1st April 2017). This small percentage may be accounted for, in part at least, by the fact that this phase of the research was concluded by March 2021 when all reports for 2021 were unlikely to have been published. However, attention is drawn to the data which suggest that the largest cohort is of local authorities which published only one report since 2017 (36.4%). Finally, and if these data are reflective of the UK position, they suggest that 26.2% of LAPPs had not published any reports (using the search criteria described in set 1 and set 2); a situation which would be in contravention of the 2017 Regulations unless there was some well-founded

[220] Reports on Disclosures of Information Regulations 2017 (n 190). Vol 3 Table 32: 3.6% of satisfactory reports (which is a different category to the 1.2% of LAPPs distinguishing internal/external sources, and different again to the 2.4% of reports which contrast external and internal sources produced by the 1.2% of LAPPs).
[221] Vol 3 Table 30 summary on last page, and Vol 3 Table 33 last column; Reports on Disclosures of Information Regulations 2017 (n 190).
[222] Reports on Disclosures of Information Regulations 2017 (n 190).
[223] ibid.

reason, like no reports were received (assuming that LAPPs had an adequate system to identify disclosures).[224]

In respect of 'no reports received', it is unclear whether the Regulations require prescribed persons to report when no disclosures are received.[225] Regulation 3(1) states that '[i]n relation to each reporting period, each relevant prescribed person must report in writing on the workers' disclosures that it has received.'[226] Arguably, in the balance between the bureaucracy of preparing 'negative' reports, against the benefit of being able to identify trends over time etc., it is considered that the public interest lies in making negative returns. However, this is a moot consideration where, as found, most local authorities do not have systems in place to identify external whistleblowers.

If the data gathered accurately reflect that UK LAPPs are inadequately complying with legislation specifically directed at ensuring their effectiveness in driving-up the confidence of whistleblowers, then the question arises as to whether a mechanism exists to achieve this accountability. No such mechanism has been identified and it is noted that the government department which is responsible for collating prescribed persons' annual reports takes no action to establish whether prescribed persons' annual reporting meets the regulatory requirement to do so: 'In collating these reports, [Department of] BEIS has not assessed them for compliance with the duty. The legal obligation falls on the prescribed person to meet the annual reporting duty requirement'.[227] This statement suggests that there is no central oversight of adherence to the legislation and may be one reason why compliance is incomplete. This strategic defect is considered in Chapter 6.

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[224] Vol 3 Table 30 final column regarding local authorities which stated that they had not received disclosures.
[225] Reports on Disclosures of Information Regulations 2017 (n 190).
[226] ibid.
[227] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed Persons Annual Reports 2018/19' (2020) <http://data.parliament.uk/DepositedPapers/Files/DEP2020-0013/PP_Annual_Reports_2018-19_-_Part_2.pdf> accessed 6 January 2022.

2.16 Observations on the research findings

It is appropriate to consider who is intended to benefit from whistleblowing disclosures. The Act makes it clear that the intended beneficiary is the public (through a public interest test) when a qualifying disclosure is made to someone prescribed in law to address the failure.[228] Often, this is to the worker's employer. A lower burden of proof is provided-for to enable a whistleblower to make an early disclosure to the employer (or the person responsible for the failure, if different), in contrast to the evidential standard required in respect of disclosures to other potential recipients.[229] Uncertainty about what the receiving organisation may do about a disclosure may be a factor influencing a whistleblower's appetite to disclose. Miceli and Near found that 'perceived organizational responsiveness was associated with whistle-blowing.'[230] As a symbol of organisational intent and commitment of leaders, a whistleblowing policy may be significant for a would-be whistleblower concerned about the relevancy of their disclosure, its legal compliance and merit, and the personal implications of making a report.[231] Of more consequence is the situation post-disclosure where the whistleblower finds that they are now reliant, at least to a degree, on the organisation to which they gave information. Making a disclosure about something which inspires a person to feel 'uncomfortable' has already been mentioned in the context of its forensic vagueness, but other examples intended by LAPPs to help the potential whistleblower understand what may count as a 'disclosure' within its remit as a local authority employer (rather than as a LAPP) such as raising 'other unethical conduct' or matters which 'conflict with a general understanding of what is right and wrong' are

[228] PIDA 1998.

[229] For burden of proof, 'reasonable belief' is described in Section 43B ERA 1996 and 'reasonably believes' in Section 43C ERA 1996 and 'the information disclosed, and any allegation contained in it, are substantially true' in Section 43F ERA 1996.

[230] Marcia P Miceli, Janet P Near, 'Individual and Situational Correlates of Whistleblowing' (1988) 41(2) Personnel Psychology 267 278.

[231] Looking to managers for ethical standards and serving as a role model are suggested as significant by Jeanette Taylor, 'Internal Whistle-blowing in the Public Service: A Matter of Trust' (2018) 78(5) Public Administration Review 717 719.

arguably other examples of ambiguity arising from want of explanation of the law.[232] Given that the aim of the legislation is to ensure that persons shall qualify for protection when their qualifying disclosures are made in the public interest, it is concerning that 92.9% of the policies examined do not distinguish local disclosures from qualifying disclosures.[233] Further, the research evidence suggests that the majority of policies examined could be expressed in a way more consistent with the legislation so as to act as an effective guide to whistleblowers about what properly constitutes a statutory qualifying disclosure and to whom it should be made. Also, to better serve as a conduit to facilitate understanding and reasonable expectation about what subsequently happens both to the whistleblower and the disclosure. The inconsistency and lack of precision of content identified in some policies also provide reasons to suggest that the handling of a disclosure and management of a whistleblower may vary according to where within the UK, and even within a constituent nation, the disclosure is made. Further, where it is adjudged by the receiving authority that a disclosure has been incorrectly directed to it, eg by reference to geography or the nature of the disclosure, there appears no consistent process to ensure that matters are effectively transferred between prescribed persons.[234] If there has been a wide casting of the disclosure net, then the question arises as to what mechanism could constrain an apparent drift away from the legislative requirements. That question has implications for the bodies charged with governance of local authorities and is discussed in Chapter 6.

It is relevant in this thesis that local authorities can distinguish their responsibilities to people within, and outside their organisation, who raise qualifying concerns. The research suggests that a large majority (95.4%) did not differentiate between internal and external

[232] For 'other unethical conduct' Vol 2 Table 19 R10; for 'conflict with a general understanding of what is right and wrong' Vol 2 Table 19 R15, R27 and Vol 2 Table 22 R177, R187.
[233] Vol 2 Table 16 final row.
[234] For reference to 'geography or the nature of the disclosure' Vol 2 Tables 9 and 10; for reference to transfer between prescribed persons Vol 2 Table 5A Question 7 FOIA 2000 response.

whistleblowers.[235] In their first replies, 19.6% of respondents reported that their policy related to external ie non-council disclosures.[236] However, as noted, analysis of those authorities' policies' wording made clear that the policies related to people (whether internal or external) making disclosures about councils' activities.[237] A minority of authorities (9.8%) suggested that they used their public complaint process as the vehicle to manage disclosures from outside the organisation, with the express or implied indication that external whistleblowers would use the same process as other types of complainants.[238] It is worth emphasising that only 4.6% of authorities appeared to have a policy which recognised the local authority role as a prescribed person to which external whistleblowers could make a disclosure in a way analogous to the approach offered in the internal whistleblower policies.[239] Claims that the internal policy was also suitable for persons to report concerns about their workplace (not the councils') may indicate a misunderstanding by LAPPs of their role as a prescribed person for external whistleblowers. Taken to its logical conclusion, the proposition that internal policies are suitable for external whistleblowers suggests that persons outside the council could expect access to the benefits and support suggested in internal policies and provided by the council for their workers including that '[a]dvice and guidance on matters of concern can be obtained from: Chief Executive…', that they may 'be represented by their trade union representative when raising a concern…', or that they can 'speak to HR and OD Services for advice on how to raise a concern.'[240] It is inconceivable that such local authority assistance would be available for external whistleblowers and reference to it in the context of external whistleblowers would

[235] Vol 2 Table 11.
[236] ibid.
[237] Vol 2 Table 26.
[238] Vol 2 Tables 5A and 5B R2, R8, R14, R21, R23, R26, R57, R61, R69, R74, R78, R84, R95, R108, R118, R133, R139, R143, R146, R155, R166, R173, R183, R195, R203, R214, R224, R235, R242, R244, R259, R270, R275, R318, R354, R377 (n=367).
[239] Vol 2 Table 11 column 1.
[240] For reference to '[a]dvice and guidance on matters of concern can be obtained from: Chief Executive…' Vol 2 Table 24 R356; for reference to 'be represented by their trade union representative when raising a concern…' Vol 2 Table 23 R212 and R397; for reference to 'speak to HR and OD Services for advice on how to raise a concern…' Vol 2 Table 24 R397.

be misleading. To be clear, however, in the majority of policies examined, wording was unequivocal that the policy was directed at council workers and their respective councils. Taken together, the research findings convey that the majority of LAPPs have not properly understood the expectations of their role in respect of external whistleblowers. The analysis also provides evidence that the limitations of their role as employers imposed by the legislation in respect of internal whistleblowing may not be properly appreciated by some local authorities; particularly about what amounts to a qualifying disclosure and who may seek protection. There appears no effective mechanism to address these deficits in function and understanding.

Section 43C provides that a whistleblower can make a protected disclosure to either their employer or the person responsible for the harm, where different. In the research, 19.1% of whistleblowing policies mentioned workers working in a partnership with the local authority.[241] A large proportion of policies (91.4%) referenced availing workers of support eg via trade unions or the human resources department, and there was generally no indication in the evidence from respondents and their published whistleblowing policies that a different approach was taken in policy terms for partnership workers.[242] In respect of the majority of policies which did not reference partners or partnerships (80.9%), the basis for the non-inclusion was not clear, given most local authorities operate with other agencies.[243] Description of how each employer within the partnership should interact to provide reasonable and seamless support to the worker would provide some assurance that the challenges faced by this category of worker had been considered. No policy made reference to the practical and legal issues of one employer bringing a disclosure to the attention of the partner employer, though

[241] Vol 2 Table 15 row 1.
[242] Vol 2 Table 25.
[243] Percentage derived in this way: References to 'partners' and 'partnership(s)' etc. amounting to 19.1% (n=409) in Vol 2 Table 15 row 1, which means that 80.9% do not contain such a reference.

one policy noted that '[c]ouncil partners and contractors will be required to bring this procedure to the attention of their employees'.[244]

Where the whistleblower takes suitable advice at an early stage, any misunderstanding of policies potentially can be rectified. Where, in seeking such advice, an internal source of guidance eg an officer of the council, is approached by the prospective whistleblower, then arguably a disclosure has been made to the officer who may feel a need to act or may be under an obligation to do so, depending on the nature of the disclosure and the status of the recipient. Where no advice, whether internal or external, is signposted, the risk of proceeding based on the literal appreciation of a policy by the whistleblower may subsequently prove problematical for the individual whistleblower and the public interest, given the lack of rigour found in some documents examined.

It is appropriate to consider what implications may arise from the findings in this research which suggest that local authorities, generally, do not distinguish between internal and external whistleblowers. It is assumed that local authorities would have regard to their responsibilities under Section 43F as the statutory recipients of certain qualifying disclosures. There are legal distinctions to be drawn in respect of a local authority which is handling a disclosure under Section 43B(1)(a)-(f) from one or more of its workers received under the provisions of Section 43C(1)(a) as the employer (whether responsible for the failure or not), as distinct from a disclosure made by a worker from outside the council under Section 43F to a prescribed person, or Sections 43G or 43H. The critical difference arises from the state of belief of the whistleblower as to whether a failure is occurring, has occurred or will occur. It follows that a prescribed person should establish the state of belief of the person making the disclosure in order for it to amount to a statutorily protected disclosure. This forensic requirement underpins

[244] Vol 2 Table 20 R77.

principles of fairness both to the whistleblower and those allegedly responsible for the failure, and to the administration of justice. The evidence from the research is that the required distinctions are unlikely to be drawn because a large majority of LAPPs do not have a system to distinguish external from internal whistleblowers.[245] This absence of a methodology can manifest in practical as well as theoretical ways; for example, only 17.7% of respondent authorities stated that they provided training to their personnel who had communication with whistleblowers (though even where councils had a policy that related to external whistleblowers, fewer than 50% reported that they provided training to their whistleblowing-facing officers).[246] Inadequately defining and denoting external and internal whistleblowers must also mean that the prescribed person fails to observe its duty under Regulation 5 of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017. In turn, failing to identify the distinctive legal context of external whistleblowing disclosures, compounded by failing to meet the requirements of the 2017 Regulations, may suggest a similar lack of awareness of these legal requirements by the organisations which have a scrutiny function in respect of some local authority functions, such as the UK's local government ombudsmen when investigating complaints about local authorities.[247] It was found from the FOIA 2000 responses that 35.1% of respondents did not have an independent appeal mechanism for external whistleblowers, and a further 8.7% reported that they 'held no information' (or similar expression), whilst 3.3% stated that they 'didn't know' if they had an appeal mechanism or

[245] Summarised at Vol 2 Tables 9-11.

[246] Vol 2 Table 7 Question 10 regarding training; for reference to 'councils which had a policy that related to external whistleblowers' Vol 2 Table 11 column 1; for reference to training Vol 2 Tables 5A and 5B R18, R34, R50, R53, R57, R141, R149, R160, R166, R169, R185, R192, R229, R234, R270, R300, R359. Of these, the following responded that they did not provide training or specific training Vol 2 Tables 5A and 5B R57, R141, R149, R160, R169, R229, R270, R300. R185 did not provide a response and R192 responded 'Not known'; R18, R34, R50, R52, R166, R234, R359 responded 'Yes'.

[247] For example, in respect of England, guidance does not consider whether the ombudsman has a role in whistleblowing investigations [Local Government & Social Care Ombudsman, 'Are you thinking of complaining to us? Introduction' (no date) <https://www.lgo.org.uk/> accessed 14 January 2021]; Chapter 6 for further discussion; Reports on Disclosures of Information Regulations 2017 (n 190).

not.[248] The availability and role of external oversight in these circumstances would appear important as is assurance that the oversight mechanism has the requisite knowledge of the legislation and the mandate to seek-out and rectify systemic issues.

It is reasonable to expect that local authorities as both employers and prescribed persons should have regard to the protection and support available to whistleblowers through the legislation. In practice, however, the policies, procedures and processes examined do not adequately set out what protections are available. Whilst policies need to differentiate between protection and remedies (which are only available to ETs), no policy examined referenced interim relief under Section 128(1)(b) and Section 129(1) or articulated the protections available under Section 103A regarding unfair dismissal, and Section 105(6A) regarding redundancy protection.[249]

Based on the evidence assessed here, there is no 'official' means of measuring how well local authorities are complying with the law, given the general lack of adherence to the statutory reporting requirements under Regulations 3 – 5 of the 2017 Regulations.[250] There is limited understanding amongst many of the local authorities across the UK of the concept of external whistleblowers. It follows from these two observations that the nature and number of disclosures from whistleblowers are not being consistently recorded. In addition, no way exists to aggregate data for the purpose of identifying, monitoring and, where appropriate, responding to trends or patterns involving the relationship between workers, reported failures, and employers, as it evolves over time. This means that there is an anecdotal approach to public policy which is insufficiently robust or systematic to monitor and report changes. In contrast, the ability to collate, assess, evaluate and report on trends and patterns nationally and by sector would better enhance the ability to improve the effectiveness of the arrangements first

[248] Vol 2 Tables 6 and 7 Question 8.
[249] ERA 1996.
[250] Reports on Disclosures of Information Regulations 2017 (n 190).

established 25 years ago and formalised in the 2017 Regulations' intended reporting regime.[251] This reporting issue is more than of academic interest; it has a range of implications of which the most important is the surfacing of extant malpractice and, thereafter, its resolution which leaves the public better protected from serious harms.

As a result of this analysis, Chapter 6 explores the merit of an oversight arrangement which would have a specific remit in ensuring that the regulatory framework is observed, good practice is identified and promulgated, and that accountability of prescribed persons for their statutory obligations is tangible rather than notional.

2.17 Conclusions

The principal conclusions that can be drawn from the research and analysis described in this Chapter are that:

1. The majority of local authorities in the UK have not distinguished their statutory responsibilities as a prescribed person under the Public Interest Disclosure (Prescribed Persons) Order 2014 to external whistleblowers from their responsibilities as an employer to internal whistleblowers.

2. An inconsistent approach has been identified from local authorities' FOIA 2000 responses and published whistleblowing policies as to which matters should be subject of disclosure. Terminology to describe qualifying disclosures is often not sufficiently clear or consistent between the scope of LAPPs' policies and the requirements of the fundamental legislation. In particular, there is evidence adduced that some local authorities fail to distinguish between statutory qualifying disclosures and other matters

[251] Reports on Disclosures of Information Regulations 2017 (n 190).

of local but non-statutory significance. This is important because, locally, a good faith test could be applied and a public interest test excluded, whereas the opposite is the case in respect of statutory qualifying disclosures ie a good faith test is not required (save in respect of compensation awarded by an ET) and the public interest must be considered.

3. A requirement for good faith on the part of whistleblowers in making a qualifying disclosure continues to feature in a significant number of published local authority whistleblowing policies even though this criterion has not been a lawful requirement in respect of statutory qualifying disclosures since the enactment a decade ago of the Enterprise and Regulatory Reform Act 2013.

4. Since 2017, local authorities, and their internal and external governance arrangements, have generally failed to implement the requirements of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.

5. The confluence of non-compliance, inaccuracy, inconsistency, and ineffectual oversight at local and national level may have an undermining effect on the efficacy of the strategic intentions of PIDA 1998 as transacted through Part IVA of the Employment Rights Act 1996.

6. In these circumstances, were the UK to adopt international practice, for example, Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of European Union law, it is likely that the identified deficiencies in achieving adherence would be replicated.

2.18 Recommendations

The principal recommendations that arise from the conclusions above are:

1. Reports compliant with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 are produced in a format from which data can be used to analyse performance, patterns and trends using the statutory criteria mandated in the above Regulations.

2. Locally and nationally, governance arrangements are reviewed and revised to ensure that reports compatible with Regulations 3 – 5 of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 are produced which can support effective performance and accountability of prescribed persons, as well as promulgating identified good practice.

3. Consideration is given to the establishment of an oversight mechanism with the remit to co-ordinate activity intended to achieve the strategic outcomes described in Recommendations 1 and 2 above.

Chapter 3: Assessing the Compliance of Non-Local Authority Prescribed Persons with UK Whistleblowing Legislation

3.1 Introduction

Chapter 3 reviews information provided by non-LAPPs to establish whether they follow the requirements of the whistleblowing statutory framework. Information was requested under the provisions of FOIA 2000 and augmented by open-source access to non-LAPPs whistleblowing policies and procedures. The Chapter includes an evaluation of the data which suggests similarities and dis-similarities of approach within this group, and discusses potential drivers of noted inconsistency. Whilst a more diverse group than LAPPs, non-LAPPs demonstrate variations in the criteria underpinning decisions to investigate whistleblowing disclosures and, in some cases, different approaches to the use of payments for information. Conclusions and recommendations drawn from the analysis in this Chapter both complement and add to issues identified in Chapter 2 regarding LAPPs.

3.1(a) Objectives

Chapter 3 seeks to identify and evaluate patterns in the non-LAPPs' responses to 15 questions posed under FOIA 2000, and gleaned from these bodies' available whistleblowing policies and procedures. Together, both sets of information help construe whether these prescribed persons understand and discharge their obligations under UK law. In this Chapter, more substantive consideration than provided in Chapter 2 is given to the contentious issue of financial payments as incentives or rewards for whistleblowing disclosures. That debate is also relevant to gaining an appreciation of whether whistleblowing is a moral imperative to which all citizens should aspire in society's interests, or whether it is the outcome of the logical evaluation by individuals of the costs and benefits (to them) of raising a concern. Whilst an understanding of the

'philosophy' of whistleblowing does not lead directly to proposals for the most suitable structure to ensure that the law works as intended, consideration of motivations (which the payment question helps adduce) may add value to understanding what functions and form may best fit the whistleblowing governance and co-ordinating mechanism which this research has found is necessary but absent.

3.1(b) Methodology

The methodology adopted in Chapter 3 mirrors that in Chapter 2. To briefly recap, the primary source of information is the quantitative responses from 78 UK non-local authority prescribed persons to FOIA 2000 requests submitted to 86 bodies, the functions of which align with the material scope specified in Article 2 of the Directive.[1] The second source of information is the prescribed persons' whistleblower policies and procedures, and the third source is the annual statutory whistleblowing public report per prescribed person. Combined, these information sources provided 1,513 data points for analysis and from which Chapter 3's conclusions are drawn.[2]

3.2 Analysis of the data tables in respect of non-local authority prescribed persons

Similar research to that undertaken in respect of LAPPs was employed in respect of non-LAPPs with comparable responsibilities in respect of the 10 areas within the material scope described in the Directive's Article 2.[3] Of the 10 responsibilities, four are within the remit of one or more

[1] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law OJ L 305/17 [hereafter, 'Directive (EU) 2019/1937 (n 1)']; a 90.7% response rate.

[2] Comprising consideration of 15 questions x 78 respondents (1,170), 74 published/available non-local authority whistleblowing policies and 269 published reports, where available (Vol 4 Table 56) under the Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 [hereafter, 'Reports on Disclosures of Information Regulations 2017 (n 2)'], together providing 1,513 data.

[3] Directive (EU) 2019/1937 (n 1); the 10 areas considered in Article 2 are: i. public procurement ii. financial-related services iii. product safety iv. transport safety v. protection of the environment vi. Radiation/nuclear protection and nuclear safety vii. food and feed safety vii. animal health and welfare viii. public health ix. consumer protection x. protection and security of privacy, personal data, and information systems.

prescribed persons operating supranationally at UK level, and 6 are managed by prescribed persons with a remit to operate within a constituent nation of the UK.[4] In respect of the 8 prescribed persons which failed to respond to the FOIA 2000 requests, two hold a UK-wide mandate, four operate just in England, and two act in Northern Ireland only (Vol 3 Table 34).[5]

As described in Chapter 2, the FOIA questions were designed to be quantitative to facilitate comparisons between prescribed persons' responses.[6] After each 'Yes' response option there was included the phrase 'Please explain what action is taken', which was intended to help facilitate any elaboration that the respondent wished to add.[7] It will be apparent from consideration of the non-LAPP FOIA 2000 responses that many respondents took the opportunity to add narrative to their responses. These comments are included in the research for completeness' sake and were considered only to the extent necessary to facilitate understanding of any apparent inconsistency between a quantitative response and the accompanying remarks (Vol 3 Tables 36A and B).[8]

The majority of respondents (70.5%) reported that they would take action to protect external whistleblowers, even though the precise role of prescribed persons is difficult to define having

[4] The four areas within material scope are i. public procurement (1 prescribed person), ii. financial services/money laundering (10 prescribed persons), iii. transport safety (3 prescribed persons), and iv. radioactivity/nuclear safety (1 prescribed person); these 6 are v. Protection of the environment (6 prescribed persons in 3 countries) vi. food and feed safety (4 prescribed persons in 3 countries) vii. public health (30 prescribed persons in 4 countries) viii. product safety/consumer protection (30 prescribed persons in 4 countries) ix. information security and privacy (5 prescribed persons in 3 countries) derived from Department for Business Innovation & Skills, 'Guidance Whistleblowing: list of prescribed people and bodies' (2023) <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2/whistleblowing-list-of-prescribed-people-and-bodies> accessed 19 December 2023.

[5] Relating to financial services and transport, respectively; all in public health; information privacy and information network security, respectively.

[6] Thesis Section 2.1(b) Methodology; the exceptions are Questions 11 and Question 12 which were intended to be more descriptive in character, whilst Question 15 (for non-LAPPs) was simply intended to be a request for data held. Vol 3 Table 35 sets out non-LAPPs' *prima facie* quantitative responses to the FOIA 2000 questions posed.

[7] Format as Vol 2 Table 1.

[8] Inconsistency could arise from how a respondent interprets the FOIA 2000 request, noting that four respondents (5%) declined to answer in whole or in part on the basis that the FOIA 2000 request was not considered legitimate. Also, the extent of the respondent's understanding of whistleblowing and whistleblower protection.

regard to the official guidance as to their role.[9] One respondent (NR63) expressed its positive intentions in asserting that '[w]e have an important role to play in encouraging and supporting whistleblowers', but did not substantiate its claim beyond '[w]e treat all disclosures confidentially.'[10] Some 17.9% of respondents answered 'No' to this question, one answered '[n]ot known', whilst 9.0% did not provide a response (though they did answer other questions).[11] At 50.0%, fewer respondents agreed that they would protect persons reporting on behalf of whistleblowers (as compared to whistleblowers *per se* at 70.5%), whilst 29.5% answered that they would not extend protection to those reporting on behalf of whistleblowers. Two (2.6%) replied that they did not know their position and 12.8% failed to respond.[12]

3.3 Pre-emptive and post-retaliation measures to protect whistleblowers

Other research suggests that whistleblowers who make disclosures outside their organisation experience greater retaliation than internal whistleblowers for reasons including perceived disloyalty and the circumvention of channels considered by the organisation to be effective.[13] FOIA 2000 Question 3 sought to elicit whether pre-emptive action would be taken by the non-LAPPs to protect external whistleblowers before they were subjected to detriment.[14] Whilst 44.9% of non-LAPPs answered that they would act prior to a detriment to the whistleblower, most such responses when analysed referred back to the answer given to Question 1 in which

[9] Department for Business, Energy & Industrial Strategy 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 8 May 2022.

[10] LAPP respondents have been described as 'R' followed by their URN while non-LAPPs are referred to as 'NR' followed by the URN allocated in Vol 3 Table 36A.

[11] For reference to 'no' answers Vol 3 Table 36A NR3, NR9, NR10, NR19, NR21, NR22, NR32, NR42, NR62, NR69, NR70, NR71, NR72, NR73. for reference to 'not known' Vol 3 Table 36A NR20; for reference to those who did not answer the question (but answered other questions) Vol 3 Table 36A NR5, NR23, NR47, NR75, NR76, NR77, NR78.

[12] The respondents which did not know their position are NR20 and NR73 (Vol 3 Table 36A); those which did not respond to this question are NR23, NR32, NR35, NR45, NR47, NR66, NR75, NR76, NR77, NR78 (Vol 3 Table 36A).

[13] Terry Morehead Dworkin, Melissa S Baucus, 'Internal vs. External Whistleblowers: A Comparison of Whistleblowering Processes' (1998) 17 Journal of Business Ethics 1281 1286.

[14] Under consideration was that some non-LAPPs as regulators have additional powers to deal with professional malpractice by those regulated.

preserving confidentiality or anonymity of the source was the main protection envisaged. Where those alleged to be responsible for a relevant failure are not members of a profession regulated by the prescribed person, it is hard to contemplate how a prescribed person could take pre-detriment action to protect a whistleblower and so it is valuable to understand how those respondents envisaged action. NR5 described its approach thus; 'for us to take action, it must relate to a registered Chiropractor and the unjustified treatment would need to constitute a breach of the Code'. NR13 reported that '[w]e can take legal action in response to breaches of equality and human rights law where doing so would meet the criteria set out in our litigation and enforcement policy.'[15] NR27 referred back to its response to Question 1 which stated '[y]es, this is outlined in the Protected Disclosures policy'; however, no information could be found in the policy which suggested a pre-emptive approach would be taken.[16] NR28 also referred to its Question 1 response: 'We may investigate and potentially take action if the disclosure concerns a person we regulate and if the allegations call into question the fitness to practise of a registrant.' NR53 stated that '[w]here the Counter-Fraud Team are informed of any intention or proposal by an employer they would undertake appropriate action or referrals to ensure that complainants do not suffer unjustified treatment for making a protected disclosure.' NR57 indicated that '[i]f the "proposed or unjustified" action are (sic) such that it would amount to a breach of the SSSC codes of practice then we may take action however I don't know if this meets the answer to your particular question.'[17] Even though Question 3 is purposely hypothetical, responses did not appear compelling that much would or, indeed, could be done by a non-LAPP prior to and in anticipation of a detriment being caused to a whistleblower, particularly where protecting the identity of the whistleblower would be an

[15] Noting that this response is not a specific answer to the particular issue raised in Question 3.
[16] NR27's policy is found at 'Whistleblowing (Protected Disclosure) Policy' <https://www.hee.nhs.uk/sites/default/files/documents/HEE%20Whistleblowing%20Protected%20Disclosure%20Policy.pdf> accessed 25 April 2022.
[17] Vol 3 Table 36A.

issue. Where expressed, any action contemplated appeared to fall into two categories: preserving confidentiality, and consideration of professional malpractice if precursor conduct could amount to a professional failing by a regulated individual. The fact that some non-LAPPs declined to accept the questions as FOIA 2000 compliant, and noting the range of responses received, suggests grounds to question whether there is consistency of approach amongst this group of more specialist prescribed persons about how they utilise their prescribed person status. However, and to be clear, Part IVA is predicated on post-facto protections, and it has already been noted that Government guidance is vague as to what is expected of prescribed persons given their often pre-existing remits, size and varied regulatory powers.[18]

Questions 1–3 in the FOIA 2000 requests are apposite in establishing who prescribed persons seek to protect. The most quoted protection was to 'offer confidentiality'.[19] In addition, a small proportion (6.7%) indicated that they would provide protection but failed to specify what the protection would be.[20] Four respondents (5.1%) suggested that they would take 'enforcement action' in respect of the situation raised in Question 1 where external whistleblowers face unjustified treatment by their employers or others.[21]

Noting that protection from further victimisation, and compensation for detriment are determined after the event and by an ET, FOIA 2000 Question 11 sought to establish what, if anything, non-LAPPs would do when aware of retaliation against a whistleblower. Seven

[18] Chapter 3 uses the expressions 'regulator' and 'prescribed person'. The terms are not used interchangeably and are distinguished primarily by reference to the ability to intercede in the activities of the bodies that they regulate using powers or good offices. Two sources are relied upon in this thesis to facilitate distinctions between prescribed persons which are regulators and those which are not. The first one describes the characteristics of regulations and regulators ie National Audit Office, 'A short Guide to Regulation' (2017) <https://www.nao.org.uk/wp-content/uploads/2017/09/A-Short-Guide-to-Regulation.pdf> accessed 3 July 2022. The second is the guidance provided to oversight bodies for the professions which are regulated in the UK from the Department for Business, Energy & Industrial Strategy, 'Guidance: UK regulated professions and their regulators' (2021) <https://www.gov.uk/government/publications/professions-regulated-by-law-in-the-uk-and-their-regulators/uk-regulated-professions-and-their-regulators> accessed 3 July 2022.

[19] At 53.8%, 43.6% and 33.3% respectively in relation to Questions 1 – 3 Vol 3 Table 38.

[20] Vol 3 Table 38 NR4, NR25, NR28, NR45, NR69 regarding unspecified protections.

[21] ibid NR28, NR50, NR51, NR57.

respondents (9%) suggested that they would act and so their responses were considered worthy of closer consideration.[22] Three categories were identified; those emphatic that they would act and would deploy their regulatory powers (presumably where relevant); those emphatic but did not specify what they would do; and those who suggested that their action would be to make enquiries of, or seek assurances from, the regulated entity.[23] The majority of the respondents who replied 'No' to Question 11 (43.6%) explained that action in respect of retaliation is the responsibility of ETs, whereas 32.1% of respondents suggested that they might act depending on the facts/case by case basis.[24] It will be apparent from the foregoing that there is a wide range of views expressed by non-LAPPs about how they might act on what are essentially the same facts (though broadly and hypothetically expressed). Whilst many non-LAPPs correctly reported that it is a matter for ETs to respond to victimisation including its 'lesser' forms, like 'harassment, name-calling, ostracism, blame, threats, or the "silent treatment"', 56.4% of respondents ('case by case' and 'not answered') were more equivocal about the separation between their role and that of the ET, noting that whistleblowers subject of victimisation have

[22] Vol 3 Table 36A and 36B NR11, NR25, NR26, NR40, NR46, NR50, NR51.

[23] For those emphatic that they would act and would deploy their regulatory powers: Vol 3 Table 36B NR40 which stated '[a]ny allegation of retaliation against an external whistle-blower, would lead to a further FTP concern investigation into that behaviour for breach of the Standards the GDC sets'; NR50 which stated '[y]es. The FCA would regard any act of retaliation for whistleblowing as a serious matter'; NR51, which stated '[y]es. The PSR would regard any act of retaliation for whistleblowing as a serious matter.'; for those emphatic but who do not specify what they would do: NR11 which stated '[o]ur Regulatory Framework sets out how we regulate RSLs and the housing and homelessness services provided by local authorities. Section 6 "Taking action where we need to" explains more about how we may respond where there is poor decision-making or evidence of mismanagement or misconduct'; NR45 which stated '[w]e would not investigate the specific alleged act of retaliation. We do not have the legal powers to investigate individual complaints. However, all social care providers and local authority social services must have whistleblowing policies and practices in place and we encourage them to promote a culture that makes it more likely concerns are raised with them directly. How the provider reacts to a disclosure may inform our next inspection of that provider.'; for those who suggest their action would be to make enquiries or seek assurances of the regulated entity: NR25 which stated: 'However, if we become aware of specific cases, we may choose to make enquiries to inform our wider audit function'; NR46 provided that '[w]e may seek assurances from the organisation concerned, before determining whether any further action is required by HIW.'

[24] For those which explained that action in respect of retaliation is the responsibility of ETs: for example, NR48 which stated 'this is explicitly the responsibility of Employment Tribunals.'; for those which suggested that they may act depending on the facts, or on a case by case basis: for example, NR3 which stated '[i]t would depend on the facts. We may investigate if the matter directly pertained to the allegations already under investigation. In other circumstances, we may advise the external whistleblower to get appropriate representation and report the matter to the employing organisation, reminding them of their responsibilities.'

only a short period in which to apply to an ET.[25] It may be commendable that non-LAPPs are willing to consider how they can intervene to protect a whistleblower from on-going victimisation (and, indeed, guidance suggests that prescribed persons with statutory powers may choose to act).[26] However, it is important that prescribed persons' aspirations and intentions do not distract whistleblowers from pursuing the formal statutory route to protection available where the victimisation arises from a qualifying disclosure. None of the respondents made the point that even where they could act within their powers, unwittingly impeding the whistleblower's timely approach to an ET was to be avoided. It is accepted that non-LAPPs vary greatly in terms of their remit and the number of whistleblower referrals they receive (and with that, their relative experience in the field), but it is important that they develop a thorough understanding of the applicable law and its limitations so that where they have powers which could be used to intervene, they are deployed appropriately. The evidence gathered in this research, and having regard to the broadly-worded UK Government guidance, raises questions about whether there is consistency of understanding and approach in the complementary application of regulatory powers and Part IVA by non-LAPPs (though they are not expected to act as a collective).[27] Whilst it is feasible that regulatory powers and Part IVA can be engaged in parallel, a whistleblower would need carefully to consider, or be appropriately advised about, navigating separate streams with contrasting intended outcomes. [28]

[25] In respect of the role of ETs, Section 48 ERA 1996 deals with detriments suffered by workers, and Section 103A with the dismissal of employees; Lilia Cortina, Vicki Magley, 'Raising voice, risking retaliation: Events following interpersonal mistreatment in the workplace' (2003) 8(4) Journal of Occupational Health Psychology 247 248; in respect of the time period in which to instigate a claim before an ET, this is usually within three months of the alleged incident(s) (Section 48(3) ERA 1996) or within the 7 days immediately following the effective date of termination in order to secure interim relief following unfair dismissal as a result of a whistleblowing disclosure [Section 128(2) ERA 1996].

[26] Though not specifically relating to victimisation, guidance states that '[s]ome prescribed persons may be able to take enforcement action should they find evidence of wrongdoing in relation to their statutory powers', Department for Business, Energy & Industrial Strategy 'Whistleblowing: Prescribed persons guidance' (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 10 May 2022.

[27] ibid; ERA 1996.

[28] ERA 1996.

In that regard, 42.3% of respondents replied that they did not publish a step by step guide as to how information from external whistleblowers is followed up, whilst 57.7% also responded that they did not publish 'frequently asked questions' for external whistleblowers.[29] A whistleblower's understanding of what may happen to them and their disclosure is unlikely to be clarified by many non-LAPPs given that 30.8% indicated that they did not have a policy and procedure to refer disclosures not within their remit to another prescribed person better placed to act.[30] A further 5.1% suggested that they would deal with such matters on a case by case basis, which may suggest that they hold no policy, as such.[31] Non-LAPPs were also asked whether they provided training for their personnel who communicate with or otherwise manage external whistleblowers to which 55.1% answered that they did, whilst 35.9% responded that they did not.[32] Phillips and Lewis made similar inquiry about the training of non-LAPPs (expressed as 'prescribed persons') and 50% of the organisations which completed the authors' full questionnaire stated that they had received training, a finding broadly compatible with this research.[33] Although the respective inquiries are separated by some 10 years, it is notable that Phillips and Lewis recommended then that all prescribed persons should be provided with adequate training; a proposal apparently not fully addressed in the interim.[34]

These issues go to the question of why it is important that prescribed persons (whether regulators or not) have an effective relationship with whistleblowers. Savage and Hyde suggest that there is a symbiosis between regulators and whistleblowers because the former cannot be omni-present and, of course, the latter need the shield and sword that a regulator can sometimes

[29] Vol 3 Table 37 Questions 5 and 9.
[30] ibid Question 7.
[31] ibid Question 6 NR28, NR32, NR64, NR74.
[32] ibid Question 10.
[33] Arron Phillips and David Lewis, 'Whistleblowing to regulators; are prescribed persons fit for purpose?' (2013) Middlesex University eRepository 1 13 <https://eprints.mdx.ac.uk/14394/1/WhistleblowingReport.pdf> accessed 3 February 2022 [hereafter, 'Phillips and Lewis (n 33)'].
[34] ibid.

wield on their behalf.[35] Whilst the cited authors commend the flexibility of PIDA 1998, they identify inconsistent approaches to handling concerns raised with the regulators, a view supported by this research.[36] Similarly, Baldwin and Black summarise the challenges which confront regulators (some of which are also prescribed persons) as including resource constraints, insufficient powers, and responsibilities incoherently dispersed amongst different bodies.[37] Achieving effective co-ordination in such an environment becomes more complicated where organisations are pursuing different approaches to regulation.[38] One such contemporary issue where diverse views are evident is incentivising or rewarding whistleblowers through payments for information.

3.4 Payments for disclosures

Paying for disclosures highlights some of the controversy as to whether, paraphrasing Vandekerckhove and Lewis, whistleblowing is a duty or a right, with implications for the composition and effectiveness of whistleblowing legislation and associated policy.[39] A specific FOIA 2000 question sought information about whether respondents had a policy of paying whistleblowers for information, and two respondents (2.6%) indicated that payments might be made.[40] NR29 stated that it 'operates an informant reward policy, which, in principle, is available to whistleblowers under the PIDA 1998, as well as to those who provide the CMA with information about potential cartel activity.'[41] NR38 reported that '[w]e are empowered to pay rewards by virtue of Section 26 of the Commissioners for Revenue and Customs Act 2005

[35] Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2014) 35(3) Legal studies (Society of Legal Scholars) 408.
[36] ibid 419.
[37] Robert Baldwin and Julia Black, 'Really Responsible Regulation' (2008) 71 Modern Law Review 59 59.
[38] ibid 60 describing 'responsive regulation' and 'risk-based regulation', which in summary involve, respectively, escalating actions towards the punitive where compliance is not achieved through persuasion, and targeting resource according to 'the risks that the regulated person or firm poses to the regulator's objectives' 66.
[39] Wim Vandekerckhove and David Lewis, 'The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines' (2012) 108 Journal of Business Ethics 253 255.
[40] Vol 3 Table 36A NR29, NR38, and Vol 3 Table 37 Question 4.
[41] 'CMA' means Competition and Markets Authority.

(CRCA).' In both cases the non-LAPPs have specific powers to investigate relevant criminal activity which would fall within the ambit of Section 43B(1)(a) ERA 1996, where raised as a protected disclosure. As discussed in Chapter 2, it is likely that there will be careful consideration of the public interest motive of a person who receives a reward for information and who subsequently seeks compensation for any detriment following a complaint to an ET made under Section 48(1A) ERA 1996. Noting that, it would nevertheless be surprising if there was a conflict between the respective public interest goals of Part IVA ERA 1996 and the legislation which governs the use of covert human intelligence sources, namely Sections 29 – 30 Regulation of Investigatory Powers Act 2000.

3.4.1 Payments to whistleblowers: USA experience and influence

The limited responses from UK prescribed persons (NR29 and NR38 highlighted above) should be contrasted with experience in the USA where it is said that '[f]inancial incentives for whistleblowing have been implemented by various regulatory agencies for over 150 years.'[42] Prominent amongst US whistleblowing legislation is the False Claims Act 1863 (FCA 1863) which, as its name suggests, permits members of the public (including whistleblowers) to seek to recover money paid by or owed to the Government as a result of fraudulent payments.[43] This is a *qui tam* arrangement wherein the claimant (known as a 'relator') acts on behalf of the Government when it has decided not to take over the investigation of the case.[44] US Department of Justice data suggest that the scale of payments to relators is substantial at over $8 billion between 1986 and 2021, although the number of relators is not included in these statistics.[45]

[42] Jacob M. Rose, Alisa G. Brink, Carolyn Strand Norman, 'The effects of Compensation Structures and Monetary Rewards on Managers' Decisions to Blow the Whistle' (2018) 150(3) Journal of Business Ethics 853 855.
[43] The False Claims Act (FCA), 31 U.S.C. §3729-3733.
[44] National Whistleblower Center, 'False Claims Act (Qui Tam) Whistleblower FAQ' (no date) <https://www.whistleblowers.org/faq/false-claims-act-qui-tam/> accessed 2 May 2022; 'Qui tam literally means "in the name of the king."'
[45] US Department of Justice Fraud Statistics, 'Overview (October 1, 1986 – September 30, 2021)' (Updated February 2, 2022) <https://www.justice.gov/file/1467871/download> accessed 27 April 2022.

Nevertheless, it is possible to derive the average payment per matter related made over this period (about $53.8K), albeit not all relators are necessarily whistleblowers.[46] Since enactment, FCA 1863 has been amended on a number of occasions which suggests that it has long-standing relevancy for whistleblowing in the USA.[47] But this is not to say that the principle of payment to whistleblowers is wholly positively received in the USA. Robert Vaughan offers misgivings about the use of monetary incentives and grounds upon which the concerns are based, including 'the belief that whistleblowers acting for financial gain influence perceptions of their reliability', and that rewards 'disrupt the workplace and can reduce efficiency by encouraging costly safeguards'.[48] Berger, Perreault and Wainberg conclude that financial considerations may supplant ethical ones where the 'value' of fraud is too small to attract rewards and suggest that some whistleblowers will 'assess a higher likelihood that reporting will be strategically delayed in order to allow the fraud to grow in size'.[49] If correct, this suggested effect of financial incentivisation appears incompatible with the public interest merit of whistleblowing protection. Dey, Heese and Perez-Cavazo found evidence of a public interest benefit and calculated that whistleblowers in the USA would expect to gain $140,000 from their FCA

[46] US Department of Justice, Office of Public Affairs, 'Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021' (1 February 2022) <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year> accessed 2 May 2022 where the data available via footnote 358 permits the calculation that between 1986 and 2021 14,595 *qui tam* 'newly received referrals, investigations, and new *qui tam* actions' were settled with the total relator share awards of $785.3M. From this, an indicator can be derived that settled matters attract an award of about $53.8K each, and the proportion of relator share awards to the total of *qui tam* settlements is 22.7% over the same period ($785,299,390 v $3,480,590,062).

[47] Regarding FCA 1863, significant amendments and consequential legislation are reported as including: the Civil Service Reform Act 1987, Deficit Reduction Act 2005, the Fraud Enforcement and Recovery Act 2009 and the Patient Protection and Affordable Care Act 2010 [Robert G Vaughan, *The Successes and Failures of Whistleblower laws* 126 (Edward Elgar 2012)].Whereas the FCA 1863 has a public finance focus, other US legislation relates to the private sector corporations which are publicly traded. Significant amongst these are the Sarbanes-Oxley Act 2002 and the Dodd-Frank Act 2010. In respect of the latter Act, the number of 'tips' received by the Programme increased over a 10-year period from 2,520 in 2012 to 12,200 in 2021 [U.S Securities and Exchange Commission, '2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (2016) 1 <https://www.sec.gov/files/owb-annual-report-2016.pdf> accessed 6 May 2022, and U.S Securities and Exchange Commission, '2021 Annual Report to Congress on the Dodd-Frank Whistleblower Programme (2021) 2 <https://www.sec.gov/files/2021_OW_AR_508.pdf> accessed 6 May 2022].

[48] Robert G Vaughan, *The Successes and Failures of Whistleblower laws* (Edward Elgar 2012) 132.

[49] Leslie Berger, Stephen Perreault, James Wainberg, 'Hijacking the Moral Imperative: How Financial Incentives Can Discourage Whistleblower Reporting' (2017) 36(3) Auditing: A Journal of Practice & Theory 1 10.

1863-related disclosure but would lose $5,500-$6,500 per year in long-term income as a consequence of retaliation against them.[50] Their data would appear to suggest that it would take 21.5 years of retaliation-effect to offset the average FCA 1863-derived reward, making the financial benefit-versus-cost seemingly positive for a whistleblower (though the non-financial effects of retaliation are not considered).

3.4.2 Payments to whistleblowers: considerations for the UK context

Given the provenance of the US legislation and its apparent success in terms of the recovery of public funds in the USA, it is not surprising that the idea of financial incentivisation has drawn attention in other jurisdictions. For example, Kim Sawyer, from an Australian legal perspective, propounds that '[t]he history of the FCA has shown that incentives empower whistleblowers, and that all taxpayers, except the fraudulent, are the beneficiaries.'[51] A Norwegian study found that whilst 'most subjects were opposed to receiving money' and that 'it may lead to incorrect reporting, where the focus becomes more on the prize itself, rather than on reporting and preventing unwanted behaviour', the study concluded overall 'that almost all participants would accept an offer of reward or compensation if it was formalized and included in the municipality's frameworks and routines'.[52]

In the USA there is no federal framework of employment protection laws and the US federal legal environment does not feature a compensation safety net for people who lawfully whistleblow and suffer detriment or dismissal as a consequence. In contrast, there is a national

[50] Aiyesha Dey, Jonas Heese, Gerrardo Perez-Cavazo, 'Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers' (2021) 59(5) Journal of Accounting Research 1689 1693 [compare the figure of $140K cited in contrast to $53.8K derived in text to n 46].

[51] Kim R Sawyer, 'Lincoln's Law: An Analysis of an Australian False Claims Act' (2011) 1 11 <https://ssrn.com/abstract=1923412> accessed 2 May 2022.

[52] Jarle Løwe Sørensen, Ann Mari Nilsen Gaup and Leif Inge Magnussen, 'Whistleblowing in Norwegian Municipalities—Can Offers of Reward Influence Employees' Willingness and Motivation to Report Wrongdoings?' (2020) 12(8) Sustainability 3479 1 19.

framework of employment laws in the UK and there is a system of compensation arising from unlawful detriment and dismissal because of making a protected disclosure. This distinction in approach is significant because some research suggests that whistleblowers consciously calculate what they stand to gain or lose as a result of making a disclosure. Miceli, Near and Dworkin report that 'observers of wrongdoing consider the costs and benefits of acting, along with other factors'.[53] Sawyer suggests that '[i]n sum, the whistleblower trades off the benefits of blowing the whistle with the costs imposed by retaliation, litigation and reputation risk', while Dasgupta and Kesharwani observe that where a cost-benefit analysis is undertaken, 'introduction of rewards would increase the perceived benefits and reduce the financial cost and risks involved in blowing the whistle'.[54] Taylor and Guthrie however suggest that 'literature on the effects of these measures is mixed and sparse, especially in business settings', and go on to take a different position (to that of Miceli, Near and Dworkin, and Sawyer, above) when they (Taylor and Guthrie) continue '[f]or example, it is unclear whether whistleblowers are aware of the potential for serious retaliation against them, and even if they are aware, whether they consciously weigh the expected cost of retaliation against the benefits of reporting.'[55]

Protect, the UK whistleblowing charity, states that it is 'not opposed to rewards in addition to compensation, whether from employers, regulators or others who want to recognise the good work that whistleblowers do' and '[a] rewards programme could be used in addition to the employment law rights and compensation offered by PIDA.'[56] Others in the UK well placed to

[53] Marcia P Miceli, Janet P Near, Terry Morehead Dworkin, 'A Word to the Wise: How Managers and Policy-Makers can Encourage Employees to Report Wrongdoing' (2008) 86(3) Journal of Business Ethics 379 386.
[54] Sawyer (n 51) 8; Siddhartha Dasgupta and Ankit Kesharwani, 'Whistleblowing: A survey of literature' (2010) IX(4) IUP Journal of Corporate Governance 57 60.
[55] Taylor EZ, Guthrie CP, 'Protect or Pay? Promoting Internal Whistleblowing' (Forensic Accounting Conference Denver 13 March 2015) 2 <https//doi:10.13140/2.1.2573.9047> accessed 4 May 2022 [hereafter, 'Taylor and Guthrie (n 55)'].
[56] Protect 'Whistleblowing – a rewarding act?' (2022) no page <https://protect-advice.org.uk/whistleblowing-a-rewarding-

have a view disagree; for example, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA).[57] In their 2014 evidence to the Treasury Select Committee, the FCA and PRA cited the absence of empirical evidence, combined with the complex administration arrangements, and the potential to undermine regulated bodies' internal whistleblowing policies as amongst the principal grounds for the FCA's and PRA's conclusion that 'providing financial incentives to whistleblowers will not encourage whistleblowing or significantly increase integrity and transparency in financial markets'.[58] In respect of their joint objection about excessive bureaucracy, no evidence was found in their submission to the Treasury Select Committee in 2014 that the whistleblower's perspective was taken as a starting point ie what would be best for the potential whistleblower (and arguably better for the public interest), rather than what is best for the prescribed person when acting as a regulator.[59] In respect of their second principal objection (lack of empirical evidence of the efficacy of financial incentives), a contemporary (2014) experimental survey conducted by Taylor and Guthrie did provide some empirical evidence.[60] It tested whether protections from retaliation or financial incentives would encourage employees to report internal misconduct. The researchers found that properly-enforced (by management) anti-retaliation measures supported increased likelihood of reporting, and concluded there was insufficient evidence of a similar effect for financial incentives. However, participants responded more positively to financial incentives where they were framed as compensatory rather than as a reward, and larger rewards

act/#:~:text=Whistleblowers%20can%20be%20given%20up,the%20COVID%2D19%20relief%20schemes> accessed 4 May 2022; PIDA 1998.

[57] Bank of England Prudential Regulation Authority, 'Financial Incentives for Whistleblowers: Note by the Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee' (2014) 1 2 <https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf> accessed 4 May 2022.

[58] ibid 7.

[59] Albeit the FCA/PRA included in their submission that 'respondents who did support it [incentivisation] did so mainly because whistleblowers act in the public interest rather than their own, yet may suffer personal detriment' [Bank of England Prudential Regulation Authority, 'Financial Incentives for Whistleblowers: Note by the Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee' (2014) 1 5 <https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf> accessed 4 May 2022].

[60] Taylor and Guthrie (n 55).

were found to increase reporting intentions but this increase was possibly prompted by initial lower financial payments.[61] Others muse on whether or not if whistleblowers can be financially incentivised to report wrongdoing, they may be similarly persuaded not to do so by, for example, the payment of a bribe.[62] Whilst largely hypothetical, this conjecture about bribery perhaps indicates at least one potential limitation of adopting, without reservation, the notion that whistleblowing can be reduced solely to a cost/benefit analysis without regard to ethical precepts.

The UK's All Party Parliamentary Group on Whistleblowing (APPG) has been active in drawing attention to perceived weaknesses of PIDA 1998 and the need for replacement legislation.[63] On the issue of payment for information, the APPG has determined that '[t]he issue of financial incentivisation has been discussed with experts in the UK and abroad who concluded that it was time for the UK to introduce some form of reward scheme.'[64] Whilst the APPG has committed to undertake further research, it has remitted any substantive decision on payment to the proposed 'Office of the Whistleblower' which is the cornerstone of the draft Whistleblowing Bill that the APPG is spearheading.[65]

Overall, disparity of opinion, compounded by inconclusive empirical evidence, is apparent between proponents who see whistleblowing as primarily a values-based activity which should remain unsullied by financial motivations, and those who see it more literally as a cost/benefit activity where the measure is monetary. It is reasonable to query why the approach should be

[61] Taylor and Guthrie (n 55) 26.
[62] Yehonatan Givati, 'A Theory of Whistleblowing Rewards' (2016) 45(1) Journal of Legal Studies 43 63.
[63] At the time of writing (June 2023).
[64] It is observed that the APPG does not identify the experts or their evidence such that the opinions offered can be evaluated; Georgina Halford-Hall, 'The Whistleblowing Bill' (2022) <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_ffa164221ae540bfafdeb8206a0274db.pdf> accessed 5 June 2022.
[65] All Party Parliamentary Group, 'Whistleblowing Bill' (2022), Part 2 Clause 4 remit of the Office of Whistleblower' <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_4490728b5bc747e28770ed8efbe475e3.pdf> accessed 5 June 2022.

binary between financial incentives or compensation following retaliation, and why incentivisation and compensation, available in tandem, could not be appropriate in some circumstances. For example, where as a result of a whistleblower's disclosure, misappropriated funds are restored to the lawful (probably public) owner, the whistleblower could receive a proportion of the funds returned, whilst the safety net of compensation as a result of retaliation would remain available, if required. A number of implications would arise from this postulation; not least in respect of the required public interest test, the good faith of the whistleblower, and the level of compensation awarded following an initial reward. One limitation of such an approach is that it is likely to be fraud-centric and less able to deal with non-financial wrongdoing such as medical malpractice, though approaches to manage this could be found.[66] However, other jurisdictions whose legislation is modelled on the UK's appear to have considered these matters and enacted law which permits good faith and reward to co-exist.[67]

In summarising this section, it was found that a small number of respondents suggested that they could offer payments to whistleblowers, whereas the majority did not. Most scholarly debate accentuates either the ethical probity of non-financial benefits or the practical considerations of those who undertake a financial cost-benefit analysis of making a disclosure. Opinions, though fervently held, and the available empirical data, are inconclusive and arguably fail to suggest a clear path upon which UK prescribed persons should proceed. There appears no singular mechanism available in the UK to commission and respond to evidence about the value of financial incentives whether alone or in combination with the *post-facto*,

[66] There is precedent in the UK to hypothecate road traffic speed enforcement fines to fund further enforcement activity [Select Committee on Transport, Local Government and the Regions, 'Appendices to the Minutes of Evidence' (2002) <https://publications.parliament.uk/pa/cm200102/cmselect/cmtlgr/557/557ap103.htm> accessed 28 August 2022]. Using such a model approach, it may be possible to net-off rewards from 'financial' cases to non-financial ones.

[67] Article 22(1) of Zambia's Public Interest Disclosure (Protection of Whistleblowers) Act 2010.

compensatory framework established within existing UK legislation. It is possible that the proposed Office of the Whistleblower may provide a means to do so, in due course, if it comes into being.[68] In the meantime, the position remains that in some circumstances whistleblowers cannot make a protected disclosure where their motive is predicated on personal gain.[69]

3.5 Transferring disclosures to other bodies, and discretion to investigate

Pursuing the theme of the absence of a co-ordinating mechanism to bring consistency to the application of the whistleblowing framework, it will be observed that in answer to the FOIA 2000 question about whether and how non-LAPPs referred disclosures to other, better-placed regulators, 35.9% of respondents indicated that they had no policy and process to refer disclosures outside their remit to another prescribed person.[70] These data can be compared with other research wherein a question with similar intent was posed to regulators.[71] In that research by Phillips and Lewis, 71% responded that they would refer the disclosure to another prescribed person; the converse being that 29% would not do so.[72] The authors also sought to establish from regulators whether a whistleblower would be advised about the appropriate prescribed person to contact, and 82% of respondents stated that they would so advise; alternatively, it can inferred that up to 18% may not do so. Whilst not precisely analogous with the question posed in this research, but nevertheless compatible with Phillips' and Lewis' finding, FOIA 2000 Question 7 of this research elicited that 30.8% of respondents did not have a policy and process to advise whistleblowers when their disclosures were passed to another prescribed person.[73] Phillips and Lewis recommended that '[w]hen they are the incorrect

[68] At the time of writing (June 2023), the Protection of Whistleblowing Bill had received its first reading by Baroness Kramer on 13 June 2022 in the House of Lords. HL Deb. 13 June 2022, vol 822, 3.21pm.
[69] Per Sections 43G(1)(c) and 43H(1)(c) ERA 1996.
[70] Vol 3 Tables 35 and 37 Question 6. NB it does not mean that they do not make referrals; rather, they do not have a policy-based approach and process to do so.
[71] Phillips and Lewis (n 33) 16.
[72] ibid 54 78% response rate.
[73] Vol 3 Table 37.

recipient, a prescribed person should be obliged to encourage workers to consent to their disclosures being referred to an appropriate body'; a proposal supported by the evidence of inconsistent approaches to referrals between prescribed persons noted in this research.[74]

According to Government guidance, non-LAPPs have a wide discretion as to whether and to what extent they choose to investigate whistleblower disclosures.[75] What they choose to investigate and why is therefore of interest when seeking to evaluate consistency of approach amongst these prescribed persons. FOIA 2000 Question 12 was of an 'open' kind rather than the mainly 'Yes/No/Don't Know' type usually posed in this research. To aid analysis, similar responses were grouped into categories.[76] In category A, 11.5% of respondents suggested that they employed 'no set criteria' (or similar wording eg 'case by case') to describe the basis for investigation.[77] Two broad expressions were incorporated in categories I and O (respectively, 23.1% responded somewhat simplistically that the matters referred to in their whistleblowing policies were the matters investigated, whether internal and/or external, and 29.5% responded with generalisms like 'normal procedures'). Whilst the proportion of these responses was relatively high, the responses were of limited value in explaining the basis upon which investigations were conducted.

Category G is significant in that four respondents (5.1%) suggested that a response to FOIA 2000 Question 12 was not applicable (or similar wording) to them.[78] There is considered to be

[74] Phillips and Lewis (n 33) 4.
[75] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 footnote 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 10 May 2022.
[76] Categories A–Z in Vol 3 Table 39. Each term in each category does not have the same meaning as other terms in the same category.
[77] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 10 May 2022 which expects that '[all] disclosures should be dealt with on a case-by-case basis and to a defined and published sets of policies and procedures.'
[78] Vol 3 Table 39 Category G (derived from Vol 3 Table 36B NR9, NR10, NR32, NR42).

analytical value in these responses because the lack of consistency of approach to the management of whistleblower disclosures features in this and other research cited. In the instant cases, each non-LAPP accepted that it was a prescribed person but provided no compelling reason as to why the law was not applicable.[79] In its response, NR10 admitted that it would be 'good' to have an external whistleblowing policy, and NR42 which plainly stated that it 'does not produce annual reports' even though it is required to do so by the Regulations and is the Government department with policy responsibility for producing the prescribed persons' list and the national guidance about whistleblowing.[80] It is not clear on what basis NR42 can lawfully claim an exemption from the reporting requirement, and underlines that there is no challenge mechanism for self-selected abrogation as in this example.

Category U describes a criterion of 'professional judgment' as the basis for investigative decision-making, reported by 6.4% of respondents. Professional judgment, without further elaboration, is difficult to gainsay as it does not provide a description of the factors taken into

[79] For non-LAPPs which accepted that they were prescribed persons Vol 3 Tables 36A and 36B where NR9 stated that 'while the Commissioner is a "prescribed person" and reports annually on the number of relevant workers' disclosures under The Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 (the Regulations), he has not received any such disclosures under the Regulations'; NR10: 'The Water Industry Commission for Scotland ("the Commission") is a prescribed body under the Public Interest Disclosure Act for whistle blowing matters relating to the water and sewerage industry in Scotland; NR32: 'As mentioned previously, this information can be found in the prescribed persons reports that we publish'; NR42: 'The Secretary of State for BEIS is prescribed in relation to disclosures covering 'fraud and misconduct in relation to companies' and 'consumer safety'. In most cases there is likely to be a more appropriate body on the prescribed persons list that would have the investigatory and regulatory functions to consider the information that has been disclosed'; for those non-LAPPs which provided no compelling reason NR9: 'In addition, I must inform you that the Commissioner does not currently have a policy on processing third party whistleblowing'; NR10: 'I am sorry we cannot provide the information you asked for. However, having considered your information request, the Commissioner's Head of Corporate Services has agreed that it would be good for the Commissioner to have such a policy. She will be discussing this with the Commissioner'; NR32: 'We do not have remit to carry out such investigations'; NR42: 'Not applicable as BEIS does not produce annual reports.'

[80] Department for Business, Energy & Industrial Strategy: 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/media/5a823e4c40f0b62305b93400/whistleblowing-prescribed-persons-guidance.pdf> accessed 10 May 2022; 'Whistleblowing: Prescribed Persons Annual Reports 2018/19' (2020) <https://data.parliament.uk/DepositedPapers/Files/DEP2020-0013/PP_Annual_Reports_2018-19_-_Part_2.pdf> accessed 10 May 2022; 'Guidance: UK regulated professions and their regulators' (2021) <https://www.gov.uk/government/publications/professions-regulated-by-law-in-the-uk-and-their-regulators/uk-regulated-professions-and-their-regulators> accessed 10 May 2022; 'Guidance Whistleblowing: list of prescribed people and bodies' (2023) <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2> accessed 19 December 2023.

account in any decisions. The well-known legal assessment of discretion for public authorities is the 'Wednesbury unreasonable' test.[81] However, *Wednesbury* is coming under increasing scrutiny before the UK courts and thereby bringing greater accountability for, and less deference to, the margin of discretion afforded decision-makers.[82] One respondent, R54, suggested that it 'uses a Decision Making Tool' as the basis upon which it decides to investigate but the test of reasonableness in decision-making would apply even where aids are employed to support judgments. Reflecting the apparently diverse basis for deciding whether to investigate, and the grounds for doing so, it was found that 6.4% of respondents reported that they would investigate all matters brought to their attention (Vol 3 Table 39).[83]

Further distillation of categories A-Z was undertaken to better understand the basis upon which whistleblowing investigations were conducted by non-LAPPs. The largest grouping is described as 'policy-mandated approach' (which is comprised of 5 of the 26 A-Z categories) at 59%, and the next largest category is the 26.9% of respondents which did not provide evidence that they have a policy to address disclosures made to them under Sections 43F - 43H (comprised of 7 of the A-Z categories).[84] The analysis suggested that non-LAPPs are afforded, and exercise, considerable discretion as to whether to investigate whistleblower disclosures and how they do so. This may be understandable given that many of these bodies pre-existed the advent and requirements of the Public Interest Disclosure (Prescribed Persons) Order 2014. Nevertheless, the evidence questions the overall regularity and reliability of non-LAPPs' rationales for, and approaches to, investigating whistleblowers' disclosures (Vol 3 Table 40).

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[81] That is, no reasonable decision-maker would have taken the decision made because of reliance on irrelevant facts or failing to take into account facts that were relevant, or the decision was otherwise absurd. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] EWCA Civ 1 KB 223.

[82] In respect of health-related decision making see Daniel Wei Liang Wang, 'From Wednesbury Unreasonableness to Accountability for Reasonableness' (2017) 76(3) Cambridge Law Journal 642 655. Also, *Wednesbury* in the context of proportionality arising from human rights considerations in Rajan Varghese, 'The Relevance of 'Wednesbury Unreasonableness' in the Light of 'Proportionality' as a Ground for Judicial Review' (2014) 60(1) Indian Journal of Public Administration 88 101.

[83] Vol 3 Table 39 category P and NR5, NR8, NR40, NR55, NR62.

[84] Vol 3 Table 40 categories A, B, D, E, F, G, H.

3.5.1. Protections offered by non-local authority prescribed persons

Analysis was undertaken of the policies and procedures of the non-LAPPs where reference was made to the protections afforded to persons making a disclosure, whether a qualifying disclosure or a non-statutory, 'local' disclosure (Vol 3 Table 41). Of the 78 respondents' policies available (74), 64 (82.1%) indicated that they would respect the confidentiality or anonymity of the source, whereas 10 (12.8%) did not provide that indication.[85] Most respondents (56/71.8%) suggested that they would protect a whistleblower from victimisation whereas 18 (23.1%) did not include this policy aim in their published document.[86]

In reality, the ability of non-LAPPs to provide protections for whistleblowers is limited and so it is important that prescribed persons are consistent in their intentions and actions. Maintaining the confidentiality of the whistleblower's identity, and challenging employers/co-workers who victimise the whistleblower were frequently proposed by FOIA 2000 respondents and in their whistleblowing policies. Contrast was noted between the levels of espoused 'confidentiality' and 'victimisation' protection signified in the whistleblowing polices (71.8% and 82.1%) compared to the responses submitted to the relevant FOIA 2000 questions (53.8% and 19.2%).[87] It is not possible to account for the differential in values; hypotheses would include that the respondents did not properly understand the FOIA questions, or did not make the connection between their FOIA 2000 responses and their whistleblowing policies, or the respondents did not readily perceive that their existing whistleblowing policies actually afforded the protections the policies intended, or respondents accepted that their policies were largely internally focused. A further hypothesis is that the whistleblowing legislation is not thoroughly understood. Whilst one example alone cannot be determinative of this latter

[85] Vol 3 Tables 41 and 49 NR15, NR22, NR25, NR32, NR33, NR35, NR48, NR53, NR56, NR76.
[86] Vol 3 Table 41 (summary table row 4) and Vol 3 Table 49 (final row).
[87] Vol 3 Table 38 Question 1 responses (53.8% and 19.2% [categories b.-i. combined]).

hypothesis, NR70's policy gives cause to suspect that some non-LAPP's understanding of the law may be incomplete. In that case, contrary to the assertion made in NR70's whistleblowing policy, the Public Interest Disclosure (NI) Order 1998 does indeed extend protection to 'external' whistleblowers under sections in the Order identical to Sections 43F-43H as well as Section 43C of Part IVA.[88] It is not satisfactorily resolved whether any of these hypotheses explains differences in FOIA 2000 responses and policies regarding protections afforded whistleblowers (Vol 3 Table 41).

3.5.2 Workers and non-local authority prescribed persons

There are 18 expressions other than worker referenced in non-LAPP whistleblowing policy documents.[89] As was described in Chapter 2, Section 230(1) ERA 1996 provides that a worker is an employee or, according to Section 230(3)(b), someone who under a contract provides work or services in person.[90] Analysis found that 55.1% of the available non-LAPP whistleblowing policies included reference to persons whose status is either incompatible with the 'worker' requirement of Section 230 or, because of vague wording, compliance is not clear.[91] Also of note, 14.1% of those policies did not reference ERA l996 where such reference might aid policy users to understand key terms like 'worker.' Whilst some descriptors of people used in policies may be intended to be non-legalistic for the proposed recipients, there is an expectation that important policy narratives should be technically accurate as well as

[88] Vol 3 Table 41 NR70 '10. The Public Interest Disclosure (NI) Order 1998, **does not** extend or provide protection to "external" whistleblowers, a whistleblower as defined in the Order is someone **inside** the organisation.' (emphasis included in the original response), whereas Public Interest Disclosure (Northern Ireland) Order 1998 Sections 67F - 67H and Section 67C, respectively, suggests this response is incorrect; ERA 1996.

[89] Vol 3 Table 44 'employee', 'employees and others', 'staff and others, 'employees and public officials', 'you', 'your', 'all of us, 'an individual', 'anyone', 'any person', 'people', 'people at work', 'those working', 'professional', 'staff', 'staff employed', 'a member of staff', 'officers'.

[90] Thesis Section 2.8 Persons to whom local authority prescribed person whistleblowing policies apply; ERA 1996; the definition of worker has been extended per Section 43K ERA 1996.

[91] Vol 3 Table 43; ERA 1996.

comprehensible to prospective users (Vol 3 Table 43).[92] As a generic descriptor, 'individual' (or similar) is the most common category used in 16.6% of policies examined, but that is surpassed (at 18%) where the combined totals which mention 'employees' are included (Vol 3 Table 44).[93] Assessment of non-worker categories mentioned in policies reveals the 'public' as the largest category cited at 20.5% followed by volunteers at 9% (Vol 3 Table 45). A small number of policies used expressions ['member of an organisation (5.1%) and 'stakeholders' (1.3%)] the meaning of which is imprecise as regards compliance with the Section 230 and Section 43K worker definitions (Vol 3 Table 46).[94]

3.5.3 Policies differentiating external from internal whistleblowers

The view taken in this thesis is that the distinction between 'complaints' and 'disclosures' is an important one, predicated on two important grounds: firstly, that a member of the public does not receive the protections provided by Part IVA; only a worker does, and secondly, a complaint may not relate to a matter of sufficient seriousness to satisfy the public interest 'test' required through the qualifying disclosures described in Section 43B.[95] It is also important to emphasise that where a prescribed person has no means to detect external whistleblowing disclosures as distinct from public complaints, then it is likely that the unique challenges and retaliation risks (as compared to internal whistleblowers) which external whistleblowers may face, reflected in the legal protections and remedies available to them, may not be appreciated by the prescribed person perhaps to the detriment of the whistleblower and the public interest. So, for example, the response of NR53 appeared contradictory in that it stated that it did not distinguish between public complaints and whistleblowing disclosures but nevertheless

[92] Particularly having regard to the fact that Part IVA ERA 1996 provides different rights as between workers and employees.
[93] Employee/Employees etc. (15.4%) and Employees and others etc. (2.6%) in Vol 3 Table 44 columns 1 and 2.
[94] ERA 1996.
[95] ibid.

suggested that, somehow, the distinction (ie between a public complaint and a whistleblowing disclosure) is 'factored in when grading the intelligence provided and determining the scale of the investigation necessary'.[96] Similarly, NR64's response contained the paradox that whilst a distinction is not made between a complaint and disclosure, it is nevertheless possible to differentiate and 'develop a specific plan'; however, no elucidation was provided as to how this would be achieved.[97]

Respondents' claims were scrutinised to see if their published whistleblowing policies adequately distinguished and addressed the different needs of internal and external whistleblowers. It was found that four (5.1%) respondents' claims that their policies recognised both external and internal sources were not supported by the evidence adduced, whereas 85.9% of respondents' claims to that effect were borne-out by the evidence cited (Tables 52 and 53, respectively).[98] Phillips and Lewis adopt a positive perspective, suggesting that having a policy of some kind is better than having no policy at all.[99] Whilst they found 68% of organisations in their survey specified that they had a separate policy/procedure for external disclosures, it is not clear whether these statements were compared and contrasted against the content of the policies themselves, an approach found to have probative value in this research. Nevertheless, Phillips and Lewis conclude that 'the lack of a separate policy/procedure for receiving disclosures under Part IVA ERA is a significant pitfall'.[100]

[96] Vol 3 Table 36B column 7 NR53: 'The Counter-Fraud Team do not distinguish between reports from members of the public or whistle blowers associated with the bodies to which the complaints relate. However, this will be factored in when grading the intelligence provided and determining the scale of investigation necessary. The Department also has a separate complaints procedure which is separate from fraud and financial irregularity reporting'.

[97] ibid column 6 NR64: 'We have no specific criteria for whistleblowers. The same criteria as applies to a standard complaint would operate. However, for whistleblowing complaints we will assess the circumstances of each case and develop a specific plan of action'.

[98] Vol 4 Table 52 NR3, NR8, NR70, NR71.

[99] Phillips and Lewis (n 33) 15.

[100] ibid 17.

3.5.4 Research to identify non-local authority prescribed persons' internal whistleblowing policies

It was considered pertinent to try to identify non-LAPPs' internal whistleblowing policies (ie in respect of their own workers) to enable comparison with externally-facing ones. The simple method used was to search each non-LAPP website for the word 'whistle' (to take account of 'whistle blowing', 'whistle-blowing', 'whistleblower' 'whistle-blower' and 'whistleblow'), and 'confidential reporting', 'protected disclosure', and 'speak up.'[101] By this method, only 6 (7.7%) internal policies were identified of which one was considered probably to be consistent with Part IVA.[102] There could be two main reasons why such a seemingly small number of policies was discovered in the search; either the incorrect search terms were used by the researcher or the internal policies are not published documents. By the same search method, 22 (16.7%) policies were identified which relate to disclosures by external whistleblowers, and these were found to be congruous with Part IVA.[103] It was only possible to identify two non-LAPPs with both a published internal and external whistleblower policy and procedure that appeared to be Part IVA-compliant, according to the criteria described here.[104] Given the limitations of the search method, it is conceivable that more examples could exist but it is the lack of consistent terminology and inaccessibility of policies and procedures that are the notable points (Vol 4 Table 55).

3.5.5 Policies which include non-statutory disclosures

[101] There is no formal requirement to use a particular term to describe 'whistleblowing'.
[102] For internal whistleblowing policies Vol 4 Table 55 NR33, NR36, NR57, NR64, NR7. NR61 is considered probably consistent (but when the link to the policy was clicked on, the inquirer was taken to a log-in page where the inquirer must have a pre-existing NHS login ID to access what is assumed to be an internal whistleblowing policy).
[103] ERA 1996.
[104] Vol 4 Table 55 NR33 and NR35.

As discussed in Chapter 2, mixing statutory and non-statutory disclosures within a single policy document may create operational and legal uncertainties with consequent risks for users. The research highlights that 42.3% of non-LAPPs included within their whistleblowing policies disclosures which may not accord with the 6 statutory categories defined in Section 43B(1)(a)-(f) ERA 1996. Also, 6.4% of those policies were found not to reference the fundamental legislation which could aid stakeholders' appreciation of the legal significance of the potential disclosure and guide them on how to proceed (Vol 3 Table 47).[105]

3.5.6 Policies which include inappropriate reference to 'good faith' and 'personal gain'

It was supposed that the research might establish that the narrower remit of many non-LAPPs could help them achieve greater adherence to Part IVA, as compared to local authorities which have a broader range of functions.[106] It was therefore significant that 28.2% of non-LAPPs' whistleblowing policies were found to include a 'good faith' criterion which was removed as a legal consideration (except as a consideration in the award of compensation) by ERRA 2013 (Vol 3 Table 48). It was established in the research that only one policy amongst those examined was dated prior to the Royal Assent date of ERRA 2013 which suggests that reference to 'good faith' (except for the purpose of non-statutory disclosures) should not be included in current policy documents if the inference is that good faith is a requirement for making a protected disclosure (Vol 4 Table 54).[107] Further, it is of concern that 7.7% of policies made reference to the significance of personal gain in potentially undermining the legality of the disclosure.[108] In respect of qualifying disclosures, personal gain is relevant only in respect

[105] For non-LAPPs which did not reference the fundamental legislation: NR19, NR32, NR40, NR58, NR74. NB Vol 3 Table 49 includes a larger proportion of respondents than Vol 3 Table 47 (which only includes extraneous categories of 'worker') and it is noted that 75.6% of policies cited in Vol 3 Table 49 reference one or more of the relevant 'fundamental' statutes, whilst 19.2% do not).
[106] ERA 1996.
[107] NR39; 25 April 2013.
[108] Vol 3 Table 48 NR19, NR24, NR47, NR55, NR64, NR74.

of Sections 43G and 43H, but none of the policies which raised personal gain included the important clarification that personal gain is not relevant in respect of qualifying disclosures made under Sections 43C – 43F (except in respect of a subsequent award by an ET).[109] This omission is particularly pertinent in respect of Section 43F which relates to disclosures from external whistleblowers to prescribed persons.[110]

3.5.7 Inferring policies likely to assist whistleblowers

Consideration was given as to which whistleblowing policies published by non-LAPPs appeared most cognisant of Part IVA requirements.[111] To be clear, the criteria considered, for example, '[p]olicy makes no mention of confidentiality and anonymity', have no formal status and are not statutory 'failures' or contrary to Government guidance. Rather, it is suggested here that the criteria selected tend to reflect weaknesses or limitations in how the policies could aid users' understanding of the legal framework. The 'top three' issues which together comprise over 87% of the perceived 'defects', were found to be misquoting Section 43B (38.5%), adding additional criteria to Section 43B (without clarifying that matters of local interest are not necessarily qualifying disclosures [29.5%]), and, less significantly, failing to reference ERA 1996 /PIDA 1998 etc in the policy as a reference source (19.2%) (Vol 4 Table 50).[112]Further, based on the factors and logic described, 40 policies (51.2%) adequately addressed the 'worker' and 'qualifying disclosure' requirements of Part IVA whilst only 34 (43.6%) of the published documents eliminated the 'good faith' and 'personal gain' misapplications described earlier and are therefore reasonably cognisant of the requirements of Part IVA (Vol 4 Table 51).[113]

[109] Or similar expression, like 'any ulterior motives', as described in NR47.
[110] ERA 1996.
[111] ibid.
[112] ibid.
[113] ibid.

3.5.8 Compliance with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017

While only limited information could be gathered from publicly available sources about non-LAPP internal whistleblowing policies, varying the research parameters appeared to provide better returns. The addition of 'annual report' to 'whistle' produced a much larger number of reports about non-LAPPs' compliance with the reporting requirement established by the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 (Vol 4 Table 56).[114] Positively, a slight increasing trend in reporting per annum was discernible since 2017 (though reports for 2020-21 were less likely to have been completed when this phase of the research was undertaken). When the internet search criteria were widened based on experience of factors identified as a result of the research, more information was found on websites.[115] Regulation 4 of the 2017 Regulations specifies that the annual report must be published via the responsible organisation's website or in another way which the publishing organisation considers appropriate to bring the report to public attention.[116] The research revealed a myriad of ways in which the Regulation 4 requirement has been interpreted and suggests that an interested member of the public would not always enjoy a 'user-friendly' experience trying to locate an annual report (Vol 4 Table 56).[117]

Whilst the modestly improving picture over time is to be welcomed, it was observed that only 19.2% of annual reports distinguished whistleblowing reports coming from either an internal or external source (Vol 4 Table 57). This is significant given non-LAPPs' role under Section 43F.[118] Regulation 2 makes explicit that the 2017 Regulations apply to a prescribed person

[114] This finding may support the hypothesis that few non-LAPPs publish their internal whistleblowing policies.
[115] 'Internet search criteria (2)' in Vol 4 Table 56.
[116] Reports on Disclosures of Information Regulations 2017 (n 2).
[117] ibid.
[118] ERA 1996.

within the meaning of Section 43F ERA 1996 and it follows that many non-LAPPs which do not delineate their internal Section 43C ERA 1996 whistleblowing disclosures from those under Section 43F ERA 1996, may not be complying with the Regulations.[119] In respect of LAPPs, only five authorities (1.2%) separated internal and external qualifying disclosures.[120] The research suggests that the real issue is more profound than failing to distinguish between internal and external sources for reporting purposes; rather, the concern is that that the majority of prescribed persons do not identify those persons who fall within Section 43F.[121] These whistleblowers probably comprise some of the most vulnerable reporters as a result of deciding to make disclosures outside their organisation and arguably will be most in need of protection because of 'income depletion, related costs of whistleblowing and time burdens'. [122]

Regulation 2 of the 2017 Regulations lists 6 categories of persons or bodies exempt from the obligation to comply with the reporting requirement.[123] This research identified that in 26.9% of the reports found and examined (or via the FOIA 2000 respondents' responses), non-LAPPs suggested that they were under no statutory duty to comply with the Regulations (Vol 4 Table 58).[124] This is a sizeable proportion and adds to the emerging picture of an inconsistent approach to the collation and presentation of important information, a situation which undermines the ability to evaluate the strategic effectiveness of the legal framework.

3.6 Comparison of local authority and non-local authority prescribed persons FOIA 2000 responses

[119] Reports on Disclosures of Information Regulations 2017 (n 2).
[120] ibid Regulation 2 defines 'relevant prescribed persons' and cites the exemptions from the reporting requirement; for the 15 reports from 5 LAPPs: Vol 3 Table 31 column 5 regarding R209(20/21), R212(19/20, 18/19, 17/18), R316(21, 20 x 2, 19 x 2, 18 x 2), R389(19/20, Jan-Jun 19,17/18), R405(19/20).
[121] ERA 1996.
[122] Kate Kenny, Marianna Fotaki, 'The Costs and Labour of Whistleblowing: Bodily Vulnerability and Post-disclosure Survival (2023) Journal of Business Ethics 341 343.
[123] Reports on Disclosures of Information Regulations 2017 (n 2); Members of Parliament, Ministers of the Crown, Welsh and Scottish Ministers, the European Securities and Markets Authority, and external auditors of smaller authorities.
[124] Reports on Disclosures of Information Regulations 2017 (n 2).

It was possible to compare the responses obtained via the common 14 FOIA 2000 questions asked of the respective prescribed persons' groups, and salient aspects are discussed here. From the data, it could be said that non-LAPPs appear more willing to be assertive and proactive than their LAPP counterparts in taking, or at least contemplating, steps to protect those making qualifying disclosures or persons doing so on their behalf (FOIA 2000 Questions 1-3).[125] It is also notable that, generally, there were higher rates of unanswered questions or 'no information held' responses by LAPPs than non-LAPPs.[126] The 'not answered' criterion was particularly high (28.1%) in respect of Question 4 (payment etc. to whistleblowers) from LAPPs. However, it is not believed that local authorities do make such payments so it is unclear why a substantive response was not forthcoming in more instances. Questions 5–9 were intended to establish whether prescribed persons guided whistleblowers about how to make qualifying disclosures and thereafter how disclosures are handled by the recipient, including any avenue for whistleblowers to appeal prescribed persons' decisions. This kind of support appears more likely to be available from the non-LAPP cohort than the LAPPs, even though fewer than 66% of non-LAPPs provide such assistance.[127] Question 10 sought to establish whether personnel who engaged with whistleblowers received training for that purpose, noting the legal, professional and personal risks which sometimes arise for workers contemplating whistleblowing. The margin of difference between the groups is observed to be three-fold in favour of non-LAPPs (although just 55.1% of those respondents suggested that they provided training) (Vol 4 Table 61).

One area where a similar level of response between the prescribed person groups was observed is Question 11, a purposely challenging question intended to test prescribed persons'

[125] Vol 4 Table 62 provides a more detailed breakdown of the data relating to Questions 1-3 included in Vol 4 Table 61.
[126] With the exception of 'not answered' in respect of Question 3 where the non-LAPP responses were slightly higher at 15.4% compared to 13.6%.
[127] Vol 4 Table 61 Question 8.

understanding of whistleblowing law, as well as the relevant application of their enforcement or regulatory powers, where available.[128] Fewer than 10% of respondents from either set answered in the affirmative, but this question attracted the highest response rate (and at similar levels as between the coteries) for a 'case by case' approach.[129] Question 13 reveals an almost four to one difference between the two respondent groups' approach to distinguishing external whistleblowing from public complaints, with LAPPs providing much the lower affirmative rate.[130] This finding is significant because the ability to distinguish whistleblowing from public complaints is fundamental to the operation of the legal framework. Question 14 suggests pervasive low levels of public campaigning by prescribed persons to raise awareness of whistleblowing but with a markedly higher level (still just 14.1%) amongst non-LAPPs. The impression is created by these low levels of awareness-raising that the ethical encouragement of whistleblowing disclosures is not ascribed a high value by most prescribed persons.

FOIA 2000 Question 12 sought to elicit the basis upon which prescribed persons investigate disclosures. The first point of note is the broad range of criteria selected by respondents in both cohorts. The largest response from both groups (23.1% for LAPPs and 24.8% for non-LAPPs) was that the criteria followed were those included in whistleblowing policy documents. This response is of limited analytical value because Question 12 specifically asks about external whistleblowers yet many responses provided undoubtedly related to internal whistleblowing. Also, this answer did not address the question posed which was about the considerations underpinning investigation not what is investigated (an issue which may not have been understood, rather than deliberately misrepresented in the responses). There is, however, some analytical value in the responses because insight is gained into the degree of understanding of

[128] FOIA 2000 Q11 asked 'Where, after a disclosure to your organisation by an external whistleblower about a matter for which you are prescribed, an alleged act of retaliation occurs against the external whistleblower by the employer or another person, does your organisation investigate the alleged act of retaliation?'
[129] At 7.9% for LAPPs and 9.0% for non-LAPPs.
[130] At 19.1% for LAPPs and 71.8% for non-LAPPs.

whistleblowing law displayed by prescribed persons, as well as their approach to process and procedure overall; though identifying a higher appreciation amongst non-LAPPs. In support of this observation, the next highest response from both groups and at a similar level between the groups (13.1% and 11.5%, respectively) was 'no set criteria' in determining the basis for investigation (Vol 4 Table 63). Noting this, it is pointed out that there are ample, available and well-tested criteria which could form the basis of a consistent approach to investigations in the UK. Examples include the investigation factors published by the Asia Pacific Forum, and the criteria posted by New South Wales Independent Commission Against Corruption.[131]

3.7 Comparison: identifying external disclosures made under Section 43F ERA 1996

The ability of prescribed persons to identify disclosures under Section 43F is fundamental if Part IVA is to operate effectively, and examination of prescribed persons' approaches is therefore a significant aspect of the research underpinning this thesis.[132] The findings from the research demonstrate starkly that local authorities would be unlikely to manage disclosures effectively under Section 43F if, by inference, the absence of policy correlates with an inability to distinguish those making a qualifying disclosure under that Section, as compared to the making of a public complaint, a qualifying disclosure under Section 43C, or a non-statutory disclosure of local concern.[133] The findings suggest that 58.6% of LAPPs and 5.1% of non-LAPPs accepted that they do not have a policy to facilitate the identification and management of external whistleblowers' disclosures. These percentages do not include the situation identified where prescribed persons asserted that their internal policy also related to external

[131] Asia Pacific Forum, 'Identifying issues and deciding whether to investigate' (no date) <https://www.asiapacificforum.net/support/what-we-do/training/investigations/identifying-issues-and-deciding-whether-investigate/> accessed 6 July 2022; New South Wales Independent Commission Against Corruption 'Conducting an investigation' (no date) <https://www.icac.nsw.gov.au/investigations/investigation-process> accessed 6 July 2022.
[132] ERA 1996.
[133] ibid; Vol 6 Appendix III provides further consideration of the implications of the type of disclosure or report.

whistleblowers (19.6% and 3.8%, respectively), and '[h]as no record or information' (9.5% and 1.3%). Overall, a striking contrast is noted between LAPPs' and non-LAPPs' external whistleblowing policy availability and use, with non-LAPPs appearing to be more Part IVA-compliant (Vol 4 Table 64).[134]

3.8 Comparison: use of Part IVA-compliant terminology in respect of workers and others

A simple comparison was made between the two groups of prescribed persons in respect of references in policy and procedure documents to the foundational statutes (which may act to guide stakeholders to the relevant legislation). Here, the groups were similar with 19.1% of LAPPs and 19.2% non-LAPPs failing to include such reference (Vol 4 Tables 65 and 73). The data also suggested high levels of inclusion in policies of subjects who may not be workers (for the purposes of Sections 230(1) and (3), and 43K), the effect of which may be to confuse whistleblowers as to whether the policy (and the underpinning law) applies to them.[135] Higher rates of non-inclusion were found in LAPPs (68.9%) as against 43.6% for non-LAPPs.[136] Additional evaluation was made of the terminology used by prescribed persons in their descriptions of categories of persons to whom their policies apply. The findings were generally proximate, with the largest variance arising in respect of the expression '[a]n individual' etc. (1.2% of LAPP policies as against 16.6% of non-LAPPs). It was noted that 18 terms describing workers were used in prescribed persons' whistleblowing policies (Vol 4 Table 66). Generic, legally imprecise phrases like some of those found may not serve the interests of users, even when such terms are intended to be engaging and assuring. Understandably, some divergence between the types of stakeholders with whom LAPPs and non-LAPPs engage was observed. None of the non-LAPPs' whistleblowing policies examined include 'councillors' or 'elected

[134] ERA 1996.
[135] ibid.
[136] Vol 4 Table 65.

members' as policy subjects whereas 31.8% of LAPPs include, erroneously according to the legislation, these politicians as workers (Vol 4 Table 67). Another example found in LAPP policies but not those of non-LAPPs is the term 'partners' (19.1%). This category is not readily recognisable in Section 230 ERA 1996, without further information. Local authorities are often required by law to work in partnership with other bodies which may account for the greater preponderance of that term in the published policies of LAPPs (Vol 4 Table 68).[137] It is also conspicuous that the category 'members of the public' (non-workers according to Section 230 ERA 1996) is included in 19.1% and 20.5% respectively of LAPPs' and non-LAPPs' policies, noting that whilst information from the public may be valuable, the legislation relates to workers only.[138]

Comparison between the groups included whether the grounds for disclosure incorporated into whistleblowing policies meet the requirements of Part IVA.[139] Whilst LAPPs' inclusion of doubtful disclosures (at 92.9%) was twice that of their non-LAPP counterparts, the level amongst the non-local cadre (42.3%) was still substantial and concerning in terms of potential non-adherence to the legislation (Vol 4 Table 69).[140] Comparison between the two prescribed person groups which reported or were found through the research to have no clear policy to deal with external-source whistleblowing disclosures revealed proportions of 40.7% and 26.9% respectively, of LAPPs and non-LAPPs. Only a small proportion in either group referred to 'risk' (6.2% and 3.8%) and 'weight of evidence' (3.0% and 2.6%) as grounds for investigation, which may be considered to be important factors in decision-making (Vol 4 Table 70). A

[137] Explanatory Memorandum to the Crime and Disorder (Formulation and Implementation of Strategy) Regulations 2007 No.1830, and the Crime and Disorder (Prescribed Information) Regulations 2007 No. 1831 <https://www.legislation.gov.uk/uksi/2007/1830/pdfs/uksiem_20071830_en.pdf> accessed 13 June 2022.
[138] Vol Table 67 row 3.
[139] ERA 1996.
[140] It is accepted here that there may be value in receiving reports not covered by Section 43B ERA 1996 or from non-workers, provided that the person making the public complaint or 'disclosure' does so in the knowledge that the legislation may not apply to them.

similar pattern was observed between the groups regarding reviewing and updating whistleblowing policies following the implementation of ERRA 2013 in April 2013.[141] It can be seen that non-LAPPs' whistleblowing policies appear to have a higher 'undated' descriptor (37.2% versus 7.8% for LAPPs) but this may be attributable to the greater use of webpages amongst this group compared to LAPPs (Vol 4 Table 71).

Significant disparity was detected between the two groups regarding the inclusion of 'good faith' (55.3% and 28.2%) and 'personal gain' (45.5% and 7.7%) in policies, with LAPPs including these expressions far more frequently (Vol 4 Table 72). References to the legislation within policies (PIDA 1998, ERA 1996, etc.) when compared, disclosed no meaningful disparity at 79.5% and 75.6%, respectively (Vol 4 Table 73). Finally, contrasting the respective reporting outturns under the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 revealed that non-LAPPs perform better than LAPPs in terms of making compliant data available to the public (62.8% versus 5.9%) (Vol 4 Table 74).[142]

Overall, it can be concluded that non-LAPPs more closely adhered to the legislative framework comprising Part IVA ERA 1996, ERRA 2013, and the 2017 Regulations than LAPPs.[143] However, there remain conformance gaps for non-LAPPs and it cannot be unarguably concluded that this group as a whole provides a satisfactory benchmark against which LAPPs should be judged.

3.9 Published research relating to prescribed persons

[141] UK Parliament, Parliamentary Bills (no date) <https://bills.parliament.uk/bills/1011/stages> accessed 19 June 2023.
[142] For clarity, the research identifies the proportion of prescribed persons that produce compliant and non-compliant reports; and, separately, the number of reports produced that are compliant and non-compliant.
[143] Reports on Disclosures of Information Regulations 2017 (n 2).

The National Audit Office (NAO) conducted a survey of five prescribed persons in 2015 from which it drew a number of conclusions.[144] The research undertaken in this thesis included four of the five bodies surveyed by the NAO and so it is possible to compare aspects of the NAO's findings with this research.[145]

The NAO found that '[i]t is not clear what is expected from the prescribed persons community' but that '[t]he Department [for Business, Energy & Industrial Strategy-BEIS] has recognised the need to act and has recently established a working group to develop best practice for prescribed persons.'[146] The nebulous nature of the Government guidance has already been commented upon in this thesis and concurs with the view expressed by the NAO that expectations are unclear.[147] It is noted that the NAO report and the BEIS guidance were each published in 2015. The Government website hosting the guidance states that it was '[l]ast updated 1 April 2017'.[148] The website also includes a '+ show all updates' facility for the guidance which when accessed, reports that the only update since 2015 has been '1 April 2017 Guidance added on the duty to report annually on whistleblowing disclosures.'[149] It is therefore unclear what became of the working group mentioned by the NAO, as the guidance does not

[144] The NAO selected the Care Quality Commission, the Financial Conduct Authority, the Health and Safety Executive, the Independent Police Complaints Commission, and the Office of Rail Regulation but did not say why they were chosen and whether they, and the NAO's observations, are representative of other regulators; National Audit Office, 'The role of prescribed persons HC1033 session 2014-15' (2015) 13 <https://www.nao.org.uk/wp-content/uploads/2015/02/The-role-of-prescribed-persons.pdf> accessed 16 June 2022.

[145] Vol 3 Table 36A NR48, NR50, NR54, NR67 but not the Independent Police Complaints Commission which does not have a function analogous to any described in Article 2 Directive (EU) 2019/1937 (n 1).

[146] National Audit Office, 'The role of prescribed persons HC1033 session 2014-15' (2015) 5. <https://www.nao.org.uk/wp-content/uploads/2015/02/The-role-of-prescribed-persons.pdf> accessed 16 June 2022.

[147] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 June 2022; National Audit Office, 'The role of prescribed persons HC1033 session 2014-15' (2015) 5 <https://www.nao.org.uk/wp-content/uploads/2015/02/The-role-of-prescribed-persons.pdf> accessed 16 June 2022.

[148] ibid.

[149] ibid.

appear to have been substantively amended to address the absence of clarity noted by the NAO in 2015 and latterly in this research.

Generally, the NAO provides an upbeat and positive assessment of the five prescribed persons' approach to receiving and handling disclosures (eg 'Prescribed persons are well prepared to handle concerns.')[150] With the possible exception of NR50, the findings of this research in respect of NR48, NR54 and NR67 suggest that the 'widespread activity to improve procedures' noted by the NAO report does not yet appear to have resulted in full compliance with practice that accords to the guidance.[151] Whilst any desire on the part of the NAO to encourage progress is understandable, there is no evidence that it conducted follow-up to ensure accountability. The NAO made a number of recommendations both for prescribed persons and the Department for BEIS, with which the findings from this research generally concur and specifically in respect of proposals about providing information to assist whistleblowers, equipping staff to deal effectively with whistleblowers, and achieving adequate understanding of the law by prescribed persons.[152]

When Savage and Hyde conducted their research into prescribed persons, there were 48 organisations prescribed.[153] Though this number has increased, the issues identified by Savage and Hyde do not appear to have been addressed since. For example, the authors found that 'the handling of whistleblowing concerns varies from regulator to regulator', and that 'most local authority websites do not contain specific information, and indeed often the only reference to

[150] National Audit Office, 'The role of prescribed persons HC1033 session 2014-15' (2015) 5 <https://www.nao.org.uk/wp-content/uploads/2015/02/The-role-of-prescribed-persons.pdf> accessed 16 June 2022.

[151] Vol 3 Table 36A and 36B entries NR48, NR50, NR54 and NR67 provide contrast with the NAO's observations.

[152] National Audit Office, 'The role of prescribed persons HC1033 session 2014-15' (2015) 7 <https://www.nao.org.uk/wp-content/uploads/2015/02/The-role-of-prescribed-persons.pdf> accessed 16 June 2022.

[153] Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2014) 35(3) 420 Legal studies (Society of Legal Scholars) [hereafter, 'Savage and Hyde (n 153)'].

whistleblowing is the internal policy applicable to staff…'[154] They found that whilst '[t]he national regulators tend to be better…', there were still issues to be addressed that may 'inhibit the enrolment of whistleblowers who may have limited time to discover how to contact a regulator, and then may choose either to say nothing or to make a disclosure to a body without the regulatory competence to address the concern.'[155] In 2014, the authors noted the 'good faith' criterion not being removed from policies and it is a concern that in 2023 a substantial proportion of prescribed persons still formally reference this non-requirement.[156] However, Savage and Hyde did not appear to have considered that 'good faith' could be a legitimate requirement in respect of disclosures not covered by Part IVA.[157] In similar vein, they observed the phenomenon identified in this research of disclosures not covered by Section 43B being included within policies, to the extent that they concluded that in respect of the specific cases they examined '44 disclosures out of 90 would not be protected under PIDA'.[158] Their research also encountered a failure by prescribed persons to distinguish whistleblowing disclosures from complaints, with potential consequential impact for the public interest.[159] Finally, and of relevance to this research, they concluded that it is necessary to have a process to re-direct disclosures to 'the correct regulator within a regulatory network', a matter explored and reported upon via FOIA 2000 Question 6 in this research.[160]

3.10 The 2017 Regulations, accountability and non-local authority prescribed persons

Whilst there appears no formal oversight of how the 2017 Regulations are operating, civil society provides insight via Protect's 'Better Regulators League Table' which examines the

[154] Savage and Hyde (n 153) 422; 424.
[155] ibid 424.
[156] ibid 426.
[157] ERA 1996.
[158] Savage and Hyde (n 153) 424.
[159] ibid 427.
[160] ibid 424.

adherence of regulators to the Regulations.[161] Protect's 2020 report noted that of 65 prescribed persons in its league table, '100% did not state the impact of disclosures', '33% did not state what action they have taken as a result of disclosures' and '14% did not report on the number of disclosures they received'.[162] As with the NAO, Protect's approach is 'to share and learn best practice with the overall aim of achieving a sea change in whistleblowing'.[163] It is not possible to comment on how effective encouragement strategies like those of the NAO and Protect are. Whilst this research noted the potential improvement in the number of public reports made over time, a causal link between encouragement and improvement is not established.[164]

Protect also reported that it felt that whilst the duty under the 2017 Regulations 'has increased transparency, it has not yet led to greater consistency in approaches with many regulators still feeling unsupported and unguided over the reporting duties.'[165] The research included in this thesis does not unreservedly support the contention that there has been increased transparency given the disparity in annual reporting found; neither is it axiomatic that increased transparency (where it occurs) necessarily correlates with higher levels of reporting by prescribed persons of whistleblower concerns. Protect does not offer empirical evidence in its publication to underpin directly its contention that regulators feel unsupported, though the concept of support is a theme of their report. Nevertheless, it is accepted in this thesis that the prescribed persons' guidance is vague and unlikely to provide support through a clarity of purpose for prescribed

[161] Reports on Disclosures of Information Regulations 2017 (n 2); Protect, 'Better Regulators League Table' (2020) <https://protect-advice.org.uk/better-regulators-league-table-2020/> accessed 20 June 2022.
[162] ibid.
[163] ibid.
[164] Vol 4 Table 57.
[165] Reports on Disclosures of Information Regulations 2017 (n 2); Protect, 'Better Regulators League Table' (2020) <https://protect-advice.org.uk/better-regulators-league-table-2020/> accessed 20 June 202; Laura Fatah and Andrew Pepper-Parsons, 'Better Regulators: Principles for Recommended Practice' (Protect 2020) 10 <https://s3-eu-west-1.amazonaws.com/public-concern-at-work/wp-content/uploads/images/2020/04/27134617/Better-Regulators-Report-April-2020_Protect.pdf> accessed 19 June 2022.

persons. However, this is not to suggest that the role of prescribed persons is valueless. Vandekerckhove and Phillips found that disclosures to external regulators were more effective than internal disclosures because 'whistleblowing to an external channel appears to trigger more investigations' and they note 'that regulators seem less likely to neglect a whistleblower concern if it has been raised previously with another recipient.'[166]

In respect of the inadequacy of co-ordination and consistency across prescribed persons assessed in this thesis, Russell and others consider how overlaps between regulators eg on food safety, or health/safety concerns, should be addressed; '[i]n these cases, the Code establishes a clear expectation that responsibility for the resolution of any differences or inconsistencies should lie with the regulatory agencies rather than with the regulated entity.'[167] The 'Code' referred to was issued by the UK Government in 2014 to assist regulators in how to 'promote proportionate, consistent and targeted regulatory activity.'[168] It is important to note that the Code is a statutory one which regulators must have regard to in terms of their policies and procedures, and where they determine not to follow it, to record their grounds for doing so.[169] Within the Code, under a heading entitled 'Monitoring the effectiveness of the Regulators' Code', it is stated by the Minister that '[t]he Government will monitor published policies and standards of regulators subject to the Regulators' Code, and will challenge regulators where there is evidence that policies and standards are not in line with the Code or are not

[166] Wim Vandekerckhove & Arron Phillips, 'Whistleblowing as a Protracted Process: A Study of UK Whistleblower Journeys' (2017) 159 J Bus Ethics 201 213; ibid.

[167] Graham Russell and others, *Regulatory Delivery*: *introducing the regulatory delivery model: a guide for those charged with implementing regulations who believe that outcomes of protection, prosperity and efficiency matter* (Hart 2019).

[168] Better Regulation Delivery Office, 'Department for Business Innovation & Skills 'Regulators' Code'' (2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913510/14-705-regulators-code.pdf> accessed 6 June 2022.

[169] Section 22 Legislative and Regulatory Reform Act 2006; Better Regulation Delivery Office, 'Department for Business Innovation & Skills 'Regulators' Code'' (2014) 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913510/14-705-regulators-code.pdf> accessed 6 June 2022.

followed.'[170] As part of this research, an FOIA 2000 request was made to the Department for BEIS seeking evidence of the number of occasions since 2014 that such challenges had been made to regulators as part of monitoring the Code's effectiveness. Vol 6 Appendix VIII appends the letter of response from BEIS (which includes the FOIA 2000 questions posed) from which two significant points can be gleaned. Firstly, no challenges by the UK Government have been made of regulators since 2014 and, secondly, the Office of Product Safety and Standards (OPSS) which has responsibility for the Code reports that neither it nor its host Department (BEIS), has power to make such challenges. Like the strategy of positive encouragement noted in respect of the NAO and Protect, OPSS describes its role in the FOIA 2000 response as '[f]irst, we support relevant regulators to understand the good practice principles of the Code, for example by offering guidance or tools to enable better engagement with local businesses to support compliance with regulation.'[171] This response appears at odds with the Minister's assurance that 'challenge' is a means available to secure compliance with the Code, given that there have been no challenges in the last decade. In the context of this thesis, it is suggested that this example of lack of competence to challenge is further evidence of a systemic absence of accountability of prescribed persons for the discharge of their statutory functions, a deficit apparent throughout the UK framework of whistleblowing-related legislation. Arguably, this deficit is exacerbated by overly-empathetic and accentuated positives of the kind discussed above which may serve only to paper over cracks in the system.

3.11 Comments on potential drivers of inconsistency

[170] Better Regulation Delivery Office, Department for Business Innovation & Skills 'Regulators' Code'' (2014) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913510/14-705-regulators-code.pdf> accessed 6 June 2022.

[171] Vol 6 Appendix VIII.

It is appropriate to comment on what factors may account for the inconsistency observed; for example, whether different legal frameworks to which prescribed persons must have regard, particularly where they are regulators, contribute to discrepant outcomes. It is noted that Sections 21 and 22 Legislative and Regulatory Reform Act 2006 set out principles of transparency, accountability, consistency and proportionality to be adopted by regulators in respect of their relationship with their regulated entities, and the expectation that regulatory activity should be targeted at cases which require action. In contrast, the guidance provided to prescribed persons is more in keeping with the employer/employee relationship to which ERA 1996 is dedicated, arguably with emphasis towards the whistleblower rather than the regulated body.[172] Whilst the Regulators' Code and the prescribed persons' guidance do not expect the regulator to look in two directions at the same time, the balance of the approach for prescribed persons which have 'softer' or 'harder' regulatory powers is potentially more difficult to discern and may contribute to the tentativeness of approach gleaned in some of the published policies and FOIA responses. Similarly, the accretion of roles, responsibilities and expectations without adequate co-ordination, and means to calibrate the compound effect, may generate small inconsistencies amplified across hundreds of prescribed persons in the UK. Other jurisdictions have recognised that the outcomes intended in law may not transpire in practice and therefore include a review mechanism of whistleblower arrangements (statutory and operational) to help understand what elements are functioning well or less well over time.[173] No such mechanism is available in respect of Part IVA.[174]

[172] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 'Provide feedback' (1); 7 'Managing the whistleblower's expectations', 'Clear policies and procedures', 'Setting realistic expectations', 'Confidentiality', 'Anonymity', 'Provide feedback' (2) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 4 July 2022.

[173] For example, Council of Europe, 'Protection of Whistleblowers Recommendation CM/Rec(014)7 and explanatory memorandum' (2014) 1 42 Principle 29 94. Also, Article 27 Directive (EU) 2019/1937 (n 1).

[174] ERA 1996; such matters are attracting the attention of UK Parliamentarians via the APPG on Whistleblowing.

3.12 Disparity in adherence between local authority and non-local authority prescribed persons' compliance with whistleblowing legislation

Overall, there is evidence of material disparity between LAPPs' and non-LAPPs' adherence to the legal framework and associated guidance. It would be helpful to understand why the non-LAPPs appear generally more observant; the inferred benefit of doing so being that following the law and good practice should improve whistleblower and public confidence and thereby uphold the public interest. Factors already commented upon include the broad remit and different tiers of local authorities which may generate different levels of experience of whistleblowing.[175] Whilst it is expected that both LAPPs and non-LAPPs have governance arrangements in place, one aspect which distinguishes them is the overtly political make-up of local authorities which see elected members following manifesto commitments that should be delivered by the officers of the council.[176] None of the local authority respondents indicated that training about whistleblowing was provided to the elected politicians. The research undertaken in this thesis suggests a labyrinthine system of committees with varying responsibilities periodically considering whistleblowing, almost invariably in the context of issues of internal interest to the committees comprised of elected members. There is limited evidence to suggest that political pressures operate on regulators, and even if they do, the effects are not necessarily causal in suppressing action about disclosures. Nielsen suggests that '[w]hen regulators do not respond to whistle-blowers because of political pressures, sometimes regulators can be threatened with exposure for not doing their jobs and therefore, incentivized

[175] Vol 3 Table 36B NR5, NR10, NR18, NR20, NR21, NR24, NR27, NR39, NR59, NR62 where 12.8% of non-LAPPs state that they have never received any qualifying disclosures, from which it could be inferred that their whistleblowing experience may be limited.

[176] Local Government Association, 'A councillor's workbook on effective councillor/officer relationships (2018) 5 <https://www.local.gov.uk/sites/default/files/documents/11.213_A_councillor%27s_workbook_on_councillor_x3A_officer_relationships_v04.pdf>accessed 19 June 2023.

to do their jobs.'[177] The singularity of purpose of some regulators along with the apolitical framing of their functional oversight may be factors that are relevant to distinguishing the apparent substantial compliance gap between LAPPs and Non-LAPPs. Also, non-LAPPs include a number of regulators whose membership comprises professionals who act under codes of professional ethics and associated disciplinary rules which involve a 'duty to disclose' concerns about colleagues' fitness to practice. Such a working environment may raise the importance of the role of and protections for, whistleblowers. This demographic of whistleblowers may be different to those who raise concerns under Section 43F to local authorities. The ability to prove or disprove these hypotheses requires additional research which cannot be undertaken here. Such research may offer value in identifying oversight mechanisms that would ensure both LAPPs and non-LAPPs adhere to good standards, whilst taking account of the democratic mandate of local politicians and, where relevant, the diverse pressures upon, and needs of, professional and non-professional whistleblowers.

3.13 Conclusions

The principal conclusions that can be drawn from the research and analysis described in this Chapter include:

7. Non-LAPPs generally demonstrate a higher degree of adherence to the requirements of the UK whistleblowing framework than LAPPs.

8. The evidence is inadequate to account for the substantial difference between LAPPs' and non-LAPPs' adherence to legal requirements and associated guidance, though the role of

[177] Richard P Nielsen, 'Whistle-Blowing Methods for Navigating Within and Helping Reform Regulatory Institutions' (2013) 112 Journal of Business Ethics 385 386.

local politicians, and the professions' membership of some regulated groups, may be worthy of further research.

9. The extent to which disparate whistleblowing approaches are observable, particularly in respect of the basis upon which disclosures are selected for investigation, suggests inconsistent appreciation and application of relevant law and guidance by non-LAPPs.

10. Prescribed persons which are regulators appear to have non-harmonised objectives set through different applicable laws, codes and guidance as between their roles as prescribed persons, and regulators. (Speculatively, these unaligned expectations may contribute to some degree to the inconsistent approaches identified in the research evidence.)

11. The issue of payment to whistleblowers as an incentive or as a reward rather than as compensation is contentious and the evidence for and against its efficacy is disputable.

(Conclusions and recommendations have a running number from the preceding Chapter)

3.14 Recommendations

The principal recommendations that arise from the conclusions above are that:

4. As recommended in Chapter 2, and for the same reasons, consideration is given to the establishment of an oversight body or mechanism with the remit to co-ordinate activity and the obligation to achieve consistency of approach predicated on good practice, though the evidence suggests that a focus on LAPPs would be more proportionate.

5. Criteria are developed and implemented to bring consistency to the rationale underpinning decisions to investigate.

6. In respect of financial payments to incentivise or reward some potential whistleblowers, a clear policy position should be considered by the UK Government, having regard to the available evidence which tends to support or reject the concept.

Chapter 4: Comparison of the UK's *de jure* legal framework and the *de facto* position evaluated in Chapter 2 and Chapter 3, with the Recitals of the Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law

Chapter 4.1 Introduction

This Chapter evaluates where Part IVA meets, exceeds or fails to meet the intended outcomes of the Directive's Recitals.[1] Through this analysis, opportunities are identified to enhance the UK's approach to whistleblowing, particularly in respect of the support which should be available to whistleblowers; clearer communication protocols with them, a greater expectation of follow-up, and an enforcement mindset in respect of breaches. As will be shown, analysis of the Recitals also suggests that disclosures relating to the financial interests of the EU are more overtly distinguished as public interest criteria than in Part IVA, which may serve to moderate a notion that the Directive's intentions are superior to Part IVA's desired outcomes.[2]

4.1(a) Objectives

Part IVA is 25-year-old legislation.[3] This part of the research examines how Part IVA with its amendments, and other relevant statutes, along with formal guidance (together, 'the legal framework'), compare with the intended outcomes and practice included in contemporary legislation that is the Directive.[4] Where differences of approach are observed, evaluation of these may suggest proportionate ways to improve the effectiveness of Part IVA.[5] Conclusions

[1] ERA 1996; Directive EU 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law [hereafter, 'Directive EU 2019/1937 (n 1)'].
[2] ibid.
[3] ERA 1996.
[4] Directive (EU) 2019/1937 (n 1).
[5] ERA 1996.

are then drawn from the analysis, and recommendations made which are considered in more detail in subsequent chapters of the thesis.

4.1(b) Methodology

It will be noted that it is the Recitals of the Directive that are considered in detail in the Chapter. It is understood that recitals are not law *per se* and have a value only in interpreting the substantive article where a competent court finds that an article is not clear. However, it is said that 'the general understanding of the purpose of recitals […] is to put [the content of the articles] *in context'*.[6] In this thesis, particular analytical value is seen in the Directive's Recitals' contribution through their explanations of the intentions and outcomes expected in the Articles.[7]

A first step is 'mapping' the relevant Recitals against the Articles and Chapters of the Directive (save for some purely administrative aspects) which explains the link between the subjects of the Recitals and Articles (Vol 5 Table 75). This perspective provides for two methods of analysis; firstly, the means to compare the Recitals with the *de jure* position of the UK legal framework and, secondly, against the *de facto* application of UK law as interpreted by prescribed persons through their responses to FOIA 2000 questions and by evaluation of their whistleblowing policies and procedures, where available. This methodology enables conclusions to be drawn about whether the *de jure* and *de facto* position of UK law and prescribed persons' policies meet the objectives of the Directive, noting some differences of context which are discussed (Vol 5 Table 76). The assessment is a qualitative interpretation of

[6] Tadas Klimas and Jurate Vaiciukaite, 'The Law of Recitals in European Community Legislation' (2008) 15(1) ILSA Journal of International & Comparative Law 67 (emphasis in the original text); Directive (EU) 2019/1937 (n 1).

[7] Some Recitals consider issues not directly referred to in the Articles, or consider issues in greater detail (Vol 5 Table 75).

the available data and thereby involves a risk of subjectivity. However, it is submitted that separating the *de jure* and *de facto* perspectives in the analysis helps limit this.

4.2 The genesis of Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law

The European Commission is responsible for proposing new laws and policies.[8] Concluding in 2017, the Commission carried out an exercise to map the EU instruments and mechanisms which include whistleblower protection.[9] The analysis revealed that 35 Regulations, Directives, and 'tools' had been adopted between 2000 – 2017 across a range of EU responsibilities.[10] The exercise concluded that protection for whistleblowers was 'limited in scope', 'piecemeal', 'uneven' and mainly 'left at the discretion of Member States.'[11] The Commission had also instigated separate consultations (referred to in its study as public, targeted, expert, and follow-up) on the need for action by the EU to strengthen the protection of whistleblowers.[12] The summary of the public consultation drew similar conclusions to the 2017 analysis ('piecemeal', etc.).[13] As a result, the Commission proposed a Directive intended to strengthen at horizontal level, rather than 'sectorial' (national) level, minimum standards for

[8] Commission, 'Better Regulation: why and how' (undated) < https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en> accessed 7 December 2022.

[9] Commission, '58 Annex 1 – Better Regulation, Annex 5: Existing EU Rules on Whistleblower Protection' (2017) 1 87 <https://ec.europa.eu/info/sites/default/files/1-11_annexes.pdf> accessed 6 December 2022.

[10] ibid financial services (8 Regulations, 9 Directives), competition (1 Directive, 1 'tool'), trade secrets (1 Directive), transport safety (1 Regulation, 2 Directives), environmental protection (2 Directives), protection of the financial interests of the Union (2 Regulations), rules applicable to EU institutions (2 Regulations), data protection (1 Regulation, 1 Directive), equal treatment (4 Directives).

[11] ibid 93.

[12] ICF, 'Study on the need for horizontal or further sectorial action at EU level to strengthen the protection of whistleblowers – Final Report Volume I – Principal Report' (European Commission 2017) <https://ec.europa.eu/info/sites/default/files/14_annex_-_icfs_study_whistleblower_report_-_vol_i_-_principal_report.pdf> accessed 7 December 2022; European Commission, 'Summary results of the public consultation on whistleblower protection' (2017) 1 20 <https://ec.europa.eu/newsroom/just/document.cfm?doc_id=47885#:~:text=Among%20respondents%20with%20knowledge%20of,of%20those%20collecting%20case%20information> accessed 7 December 2022.

[13] ibid.

whistleblower protection targeted at serious harms to the public interest.[14] In October 2019, the EU Parliament formally adopted the Directive which entered into force in December 2019, and Members States were required to transpose it into national law by December 2021.[15] However, in January 2022, the Commission opened infringement proceedings against some Member States because of delays in transposition but by January 2023, 48% of Member States had transposed the Directive into their 'national legal and institutional systems'.[16] Although the UK formally left the EU on 31 January 2020, the Directive will remain relevant for those organisations which operate in both the UK and the EU, and post-Brexit arrangements will remain under the parties' formal purview to ensure that a 'level playing field' is maintained.[17]

4.3 The structure of the Directive

The Directive is divided into 7 chapters comprising 29 Articles.[18] Chapter I (Articles 1–6) sets out the scope of the law, definition of terms and those to whom protection applies. Chapter II (Articles 7–9) obliges public and private sector organisations which have 50 or more workers to establish internal reporting channels. Chapter III (Articles 10–14) legislates for external reporting channels to which whistleblowers can report without first having tried internal channels. Chapter IV (Article 15) relates specifically to when a public disclosure is protected.

[14] Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law 2018/0106(COD); Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Strengthening Whistleblower Protection at EU Level Com/2018/214 7 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0214> accessed 7 December 2022.

[15] Article 26 Directive (EU) 2019/1937 (n 1).

[16] European Commission, 'Infringement decisions' (no date) <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&DG=JUST&title=32019L1937&submit=Search > accessed 19 January 2023; EU Whistleblowing Monitor, 'Status of Transposition' (no date) https://www.whistleblowingmonitor.eu/ accessed 7 December 2022.

[17] Local Government Association, 'EU exit: Guidance on the transition period' (no date) <https://www.local.gov.uk/topics/european-and-international/eu-exit-guidance-transition-period> accessed 8 December 2022; Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/10 Article 355.

[18] Directive (EU) 2019/1937 (n 1).

Chapter V (Articles 16–18) provides for confidentiality, data processing and record-keeping which are common to the internal and external reporting mechanisms described in Chapters II and III. Chapter VI (Articles 19-23) deals with prohibiting retaliation, support for those affected, and penalising those responsible. Chapter VII (Articles 25–29) is described as the 'Final Provisions' significant amongst which are 'more favourable treatment' and 'non-regression' clauses and the two-year transposition requirement. Finally, Part 1 of the Annex to the Directive lists the legislation relevant to the material scope of the Directive as described in Article 2, and Part II of the Annex which lists the relevant sector-specific EU laws (mentioned in Article 3) that already include rules on reporting breaches of EU law.[19]

4.4 Comparing the Recitals with UK legislation

As noted in Section 4.1(b) of the thesis, the Recitals to the Directive may contain insights into what the legislators intended the outcome of the law to be.[20] Whilst Recitals must be distinguished from and are subservient to Articles in consideration of EU jurisprudence, courts may nevertheless take recitals into account when determining what a law means from the intention behind it, unlike in the UK where statutes do not include recitals.[21]

Two approaches were adopted in the research to help facilitate analysis and comparison. In addition to the comparison of the Recitals with the Articles of the Directive described above, a *de facto* and *de jure* comparison of the Recitals with Part IVA (and other UK laws, where relevant) was undertaken.[22] This methodology enabled conclusions to be drawn about similarities and differences between UK and EU whistleblowing legislation. Where relevant, the analysis also includes the role played by UK non-whistleblowing legislation in providing

[19] Directive (EU) 2019/1937 (n 1) Annex Part II A.-C.
[20] ibid.
[21] European Union (Withdrawal) Act 2018 Section 63 footnote 1.
[22] Directive (EU) 2019/1937 (n 1); ERA 1996.

the same effect for whistleblowers as the Directive intends. It is pointed out that some Recitals have multiple commentary points because some Recitals contain more than one issue pertinent to a comparison with UK law.[23]

4.4.1 De facto and de jure comparison of UK law with the Directive's Recitals

4.4.1.a Evaluating Recitals 1-15

Recital 1 explains that the Directive applies to public and private organisations, as does Part IVA and to that extent is compliant with the Recital.[24] Recital 2 suggests that whistleblowing disclosures benefit the public interest through their contribution to national investigation, detection and prosecution efforts.[25] That proposition over-states Part IVA's contribution to UK law enforcement because Part IVA is focussed on protecting whistleblowers and not on detecting wrongdoing and wrongdoers.[26] Analysis reveals that only 10.5% and 17.9%, respectively, of LAPPs' and non-LAPPs' policies and procedures state that relevant disclosures would be reported to the police (Vol 5 Table 76). It can be said therefore that Part IVA makes a contribution to law enforcement, but only incidentally to its primary purpose.[27] Recital 3 recognises that whistleblowers should be protected from retaliation and commends robust, confidential and secure reporting channels.[28] Sections 43C and 43F-43H of Part IVA provide internal and external reporting channels, though the mechanisms to access them are different to those described in Recital 3.[29] Recital 4's description of fragmented whistleblower protections across Member States is not directly relevant to the UK as a single state, but the

[23] Vol 5 Table 76.
[24] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 1.
[25] Directive (EU) 2019/1937 (n 1).
[26] PIDA 1998 introduced a new Part IVA into the Employment Rights Act 1996. The introductory text of the 1998 Act states that it is an 'Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes'.
[27] ERA 1996; Vol 5 Table 76 entry 2.
[28] Directive (EU) 2019/1937 (n 1).
[29] ERA 1996; Vol 5 Table 76 entry 3.

UK comprises four nations some of which have devolved legislative powers.[30] Overall, it is concluded that Part IVA demonstrates Recital 4's strategic intention of achieving legal consistency across defined territories.[31] Recital 5 advocates common minimum standards of protection, including the elimination of under-reporting by whistleblowers.[32] In the UK, the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 require prescribed persons to report on action taken in respect of disclosures (with a view to encouraging increased reporting). This legislation has not been adopted in Northern Ireland, and there is a statutory exemption for Ministers from adherence to these Regulations leading to Government departments in Wales not observing them.[33] This research suggests that there is limited adherence to the 2017 legislation by most LAPPs, in particular.[34] Taken together, these strands of evidence suggest that the approach suggested by Recital 5 is not yet met in the UK.[35]

Recitals 6–9, 11–15, Recital 18 and Recital 68 describe the subjects within the material scope of the Directive.[36] Through the Public Interest Disclosure (Prescribed Persons) Order 2014 and Section 43F ERA 1996 there is analogous coverage in the UK.[37] Recital 9 raises the issue of 'just culture' (defined in the Directive as 'the protection of workers who report their own honest mistakes against retaliation').[38] There is no equivalent within Part IVA, but several prescribed persons directly reference just culture whilst, conversely, others suggest that making a

[30] Part IVA ERA 1996 (England, Scotland and Wales) and Part VA Employment Rights (Northern Ireland) Order 1996 (Northern Ireland).
[31] Vol 5 Table 76 entry 4.
[32] Directive (EU) 2019/1937 (n 1).
[33] Regulation 2(c) Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 [hereafter, 'Reports on Disclosures of Information Regulations 2017 (n 33)']; Vol 5 Table 76 entry 146 NR44 'Welsh Ministers', and therefore CIW, are exempt from the 2017 Reporting Regulations so does not need to report.'
[34] Reports on Disclosures of Information Regulations 2017 (n 33); Vol 3 Table 32.
[35] Vol 5 Table 76 entry 5.
[36] Directive (EU) 2019/1937 (n 1).
[37] Vol 5 Table 76 entries 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 19, 86.
[38] Directive (EU) 2019/1937 (n 1) Recital 9. (Author's note: 'honest mistake' in this context is considered different to an 'honest mistake' by the whistleblower in erroneously raising the disclosure.)

whistleblowing disclosure will not provide immunity from disciplinary action.[39] It is difficult to countenance when issues of public interest which involve intent or recklessness, for example, the commission of a criminal offence or breach of civil law (Section 43B), could be regarded as an honest mistake in which a just culture outcome could be contemplated, and so it cannot be suggested that Part IVA provides a ready equivalent to Recital 9.[40] Discussion of mistaken belief in respect of Recital 33 features below.[41]

4.4.1.b Evaluating Recitals 16-30

In respect of the 'common minimum standards' sought in Recital 16, the UK is not a member of the EU internal market and therefore the Recital is not relevant to UK whistleblowing laws.[42] That said, ERA 1996 (and its equivalent in Northern Ireland) applies across the UK, and in the circumstances where an organisation operates in Europe and the UK, a breach of an EU law which also meets the qualifying criteria required by Section 43B, could engage Part IVA.[43] However, and overall, Part IVA is not considered directly relevant to the context of Recital 16.[44] Recital 17 relates to competition law, and a similar expectation, rationale and conclusion apply as in respect of Recital 16 (although noting Northern Ireland's circumstances following Brexit).[45] In respect of Recital 18 (breaches of corporate tax law), the material scope of Part IVA is set out in the introductory text of PIDA 1998, as it is in Article 2 and Recital 19 of the

[39] ERA 1996; Vol 5 Table 76 entry 10; a prescribed person which was not included in this research publishes relevant guidance: Maritime and Coastguard Agency 'Improving safety and organisational performance through a just culture' (2014) <https://www.gov.uk/government/publications/a-just-culture-improving-safety-and-organisational-performance> accessed 27 November 2022; also, the Civil Aviation Authority (which did not respond to the FOIA 2000 request) publishes guidance: Sean Parker, 'Just Culture' (2014) <https://www.caa.co.uk/media/sf3eiszu/fwm20160629_06_just-culture.pdf> accessed 27 November 2022; Vol Table 76 entry 10 R114, R169, R198, R218.
[40] ERA 1996; Vol 5 Table 76 entry 10.
[41] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 36.
[42] Directive (EU) 2019/1937 (n 1).
[43] ERA 1996.
[44] ibid; Vol 5 Table 76 entry 17.
[45] Vol 5 Table 76 entry 18.

Directive, such that Part IVA and the Recital appear compatible in intent.[46] Whereas Recital 20 draws attention to other EU legislation which contains whistleblower protections, Part IVA and Part VA in Northern Ireland are the UK statutes dealing with whistleblower protections.[47] The research notes other authoritative, but non-statutory, institutional documentation which UK courts may find relevant in whistleblower cases involving those institutions.[48] Overall, Recital 20 is not found compatible with Part IVA.[49]

Analysis suggests that ERA 1996 provides similar legal protections for workers' representatives reporting breaches of employment law as envisaged in Recital 21.[50] The role and relevant publications of the Health and Safety Executive (and its equivalents in the UK nations) and local authorities which together provide health and safety protections for workers including their representatives, are noteworthy in this context.[51] It is concluded that UK law and practice meet the Recital's expectations.

Recital 22 excludes from protection personal grievances which relate primarily to the person raising them. The public interest requirement of Part IVA also usually eliminates individual grievances from protection, but in some circumstances, it has been established that a disclosure may be both of personal and public interest.[52] Analysis suggests that 18.6% of LAPPs and 15.4% of non-LAPPs explain that grievances are outside the scope of policy.[53]

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[46] Vol 5 Table 76 entries 19 and 20.
[47] Part IVA ERA 1996 and Part VA Employment Rights (Northern Ireland) Order 1996.
[48] For example, Bank of England, 'PRA Rulebook' (no date) <https://www.prarulebook.co.uk/> accessed 22 November 2022, and Financial Conduct Authority, 'FCA Handbook' (no date) <https://www.handbook.fca.org.uk/handbook> accessed 22 November 2022; Vol 5 Table 76 entry 21.
[49] Directive (EU) 2019/1937 (n 1).
[50] ibid Recital 21.
[51] Health and Safety Executive, 'Acts owned and enforced by HSE' (no date) <https://www.hse.gov.uk/legislation/acts.htm> accessed 22 November 2022, and Health and Safety Executive, 'Statutory Instruments owned and enforced by HSE/local authorities' (no date) <https://www.hse.gov.uk/legislation/statinstruments.htm> accessed 22 November 2022; Vol 5 Table 76 entry 22.
[52] Vol 5 Table 76 entry 23. UK case law clarifies that in some circumstances, a disclosure may be both of personal interest and public interest: eg *Chesterton Ltd V Nurmohammed & Anor* [2015] IRLR 614; *Morgan v Royal Mencap Society* [2016] IRLR 428; *Dobie v Felton* [2021] IRLR 679.
[53] Vol 5 Table 76 entry 23.

Regarding Recital 23's expectation of protections of the EU's financial interest, the UK does not have a supra-national body like the EU, and the Recital is therefore not a relevant comparison with Part IVA.[54] Recitals 24 and 25 relate to national security and the protection of classified information, and recognise the significance to Member States of these fundamentals of statehood.[55] As a matter of law, Part IVA excludes security and intelligence agencies from its protections (but other law provides for administrative arrangements for members of these agencies to raise concerns).[56] Also in respect of sensitive information, Recital 26 emphasises that the Directive should not affect privileged communications between lawyers and clients, and health care providers and patients.[57] UK law and practice recognise similar standards of confidentiality and appear compatible. It was found that a small number of LAPPs (6/1.5%) refer to legally privileged information in their whistleblowing policies but expressed in cautionary terms perhaps intended to dissuade council staff from reporting externally.[58] Recital 27 relates to other professionals making disclosures in accordance with their

[54] Vol 5 Table 76 entry 24; ERA1996.

[55] Directive (EU) 2019/1937 (n 1).

[56] Vol 5 Table 76 entries 25 and 26; Section 11 PIDA 1998 amended Section 193 ERA1996 to remove from the protections of Part IVA members of the security and intelligence etc. services who would otherwise suffer detriment (Section 47B) or dismissal (Section 103A) as a result of making a protected disclosure; Section 1, Justice and Security Act 2013 provided for the establishment of the 'Intelligence and Security Committee of Parliament'. In its annual report, the Committee recognised that it had a role in receiving disclosures from within the services per APS Group on behalf of the Controller of Her Majesty's Stationery Office, 'Intelligence and Security Committee Annual Report 2016-17: Further Government Response' (2018) 10 <https://isc.independent.gov.uk/wp-content/uploads/2021/01/CCS001_CCS0718140448-001_ISC_supplementary_16-17_AR_response_Web_Accessi..._1_.pdf> accessed 24 November 2022.

[57] Section 43D ERA 1996 allows a legal adviser to make a disclosure if, and to the extent, instructed by the client, but legal professional privilege applies otherwise.

[58] Vol 5 Table 76 entry 27. R74 provides in its whistleblowing policy: 'A disclosure will not qualify if a worker commits an offence by making it, or if the information is subject to legal professional privilege (or a claim to confidentiality between a client and professional legal adviser in Scotland).'; R319: '10.3 If an employee decides to take the matter outside the Councils, they are strongly encouraged to seek advice from Public Concern at Work before doing so and to ensure that they do not unnecessarily disclose confidential or privileged information.'; R356: 'If staff do take this matter outside the Council, they need to ensure that they do not disclose confidential information or that disclosure would be privileged. Staff should check with the contact point about that.'; R357: '31. If you do take the matter outside the Council, you need to ensure that you do not disclose confidential information or that disclosure would be privileged. You should consider taking advice about that.'; R369: 'If an employee wishes to take the matter outside the Council, they need to ensure that they do not disclose confidential information or that disclosure would be privileged. This can be checked with the Local Government Ombudsman who will also advise on ways to proceed.'; R383: '7.2 If employees take matters outside the Authority, it will be necessary to ensure that they do not disclose confidential or legally privileged information. As such it is advisable that employees take appropriate advice before proceeding.'

professional rules on a matter within the material scope of the Directive.[59] Part IVA through Section 43B applies to any worker (which could include such professionals), and the motive for the disclosure is, usually, immaterial provided it is in the public interest.[60] Noted in the research are examples of UK laws and professions' advice which suggest that there is a mature and generally responsible approach to the protection of sources, balancing the public interest in such confidentiality against fairness to those affected.[61] Finally, in respect of the security and confidentiality Recitals, Recital 28 describes how although whistleblowing may entail a confidentiality breach, a relevant disclosure should provide a limited exemption to penalty.[62] The Recital also makes clear that the Directive does not affect domestic rules on criminal procedure specifically 'those aiming at safeguarding the integrity of the investigations and proceedings or the rights of defence of persons concerned.'[63] For clarity, it is important to distinguish confidentiality of the information subject of the disclosure, and confidentiality of the identity of the discloser. Section 43G(3)(d) includes a reasonableness test in respect of the former, ie that consideration must be given to the confidentiality owed by the employer to any person regarding that information, but is silent in respect of confidentiality of the person(s) providing it.[64] A notable proportion of LAPPs' whistleblowing policies and procedures (13.4%) set out when the confidentiality of whistleblower disclosures may not be maintained,

[59] Vol 5 Table 76 entry 28.
[60] Bad faith is considered when compensation is assessed per Section 18 ERRA 2013.
[61] Vol 5 Table 76 entry 29. In addition to the common law duty of confidentiality, statutes which protect health data in the UK are the Data Protection Act 2018 and National Health Service Act 2006. More generally, Section 10 of the Contempt of Court Act 1981 serves to protect sources of information from public exposure during proceedings subject to upholding the interests of justice, protecting national security or the prevention or detection of crime. Some professions publish guidance to members about making a disclosure in apparent breach of a duty of confidentiality; for example, Institute of Chartered Accountants in England and Wales, 'Disclosure of confidential information (for members in practice)' (no date) <https://www.icaew.com/restrictedmedia?mediaItemId=e0570fe9-f942-4b1c-99c5-e765b85e439d> accessed 25 November 2022; Association of Chartered Certified Accountants, 'Internal Audit's role in whistleblowing' (2019) <https://www.accaglobal.com/uk/en/member/discover/cpd-articles/governance-risk-control/ias-role-in-whistleblowing.html> accessed 25 November 2022.
[62] Directive (EU) 2019/1937 (n 1).
[63] ibid.
[64] ERA 1996.

with the rights of accused persons prominent amongst the reasons advanced.[65] On the theme of the lack of consistency of approach evident amongst many prescribed persons' approaches, 3.7% of policies emphasise, without caveat, that confidentiality will be maintained even though such a commitment cannot be guaranteed in law.[66]

Recital 29 explains the protections available to workers' representatives, including when they are defending workers' employment rights.[67] The research identifies relevant sections of the Trade Union and Labour Relations (Consolidation) Act 1992 intended to safeguard such representatives who may be more vulnerable to detriment through their role, and to sections of ERA 1996 which pertain to the negative outcomes – detriment, dismissal, redundancy – which could befall union representatives (as workers).[68] It is concluded that UK law (including the non-whistleblowing legislation mentioned above) meets the expectations of the Recital. No contrary position was argued in any of the whistleblowing policies and procedures examined in the research.

Recital 30 excludes from the Directive's protections recipients of rewards from law enforcement authorities.[69] Whilst Chapter 3 set out an analysis of the benefits and drawbacks of financial rewards to whistleblowers, it remains the position that Sections 43G(1)(c) and 43H(1)(c) preclude from protection persons motivated by personal gain.[70] Two non-LAPPs suggested in their FOIA 2000 responses that their reward schemes could be applicable to

[65] Vol 5 Table 76 entry 29 R5, R6, R9, R10, R13, R14, R18, R20, R21, R26, R31, R33, R34, R36, R39, R40, R42, R43, R44, R45, R46, R47, R51, R52, R53, R54, R55, R58, R60, R61, R63, R65, R69, R70, R71, R75, R76, R77, R80, R84, R85, R92, R94, R99, R100, R101, R104, R114, R170, R185, R234, R279, R355, R359, R397.
[66] Vol 5 Table 76 entry 29 R18, R57, R58, R64, R74, R85, R94, R114, R192, R245, R267, R300, R306, R368, R378.
[67] Directive (EU) 2019/1937 (n 1).
[68] Vol 5 Table 76 entry 30; Sections 146 and 152 of the Trade Union and Labour Relations (Consolidation) Act 1992; Sections 44(1)(b), 100 and 136 ERA 1996.
[69] Directive (EU) 2019/1937 (n 1).
[70] ERA 1996.

whistleblowers. The mooted position of two prescribed persons appears insufficient to suggest that the UK's *de facto* position is incompatible with the Recital.[71]

4.4.1.c Evaluating Recitals 31- 40

In consideration of Recital 31 and the inter-relationship between making a qualifying disclosure under Section 43B and the right to freedom of expression under Article 10 European Convention on Human Rights (ECHR), a UK Supreme Court judgement has brought greater clarity to what had been an un-settled position.[72] In respect of the appellant's submissions, the Court observed that '[i]t is indeed possible to see that imposing certain detriments upon her as a result of her public interest disclosures would be an interference with her freedom of expression.'[73] No whistleblowing policy or procedure examined made mention of the right to freedom of expression. Overall, however, it is concluded that the Recital and the UK stance, clarified by the Supreme Court, are consistent.

Recital 32 establishes the burden of proof required to secure the protection of the Directive.[74] Some variation between the Recital and Part IVA is observable. While they have in common a requirement for a reasonable basis for the whistleblower's belief of an adverse impact on the public interest, they differ in that the Directive requires that all elements of the disclosure must be 'true' whereas the requirement in Part IVA is 'substantially true', a less onerous burden of proof.[75] Also, Part IVA provides an additional expectation that not only the information but 'any allegation contained in it, are substantially true.'[76] In addition, there is wide variation amongst prescribed persons' policies as between using 'true' or 'substantially true' whilst one

[71] Vol 5 Table 76 entry 31 NR29 and NR38.
[72] *Gilham v Ministry of Justice* [2019] UKSC 44, where it was held that a judge was a worker for the purposes of Section 230(3)(b) ERA 1996.
[73] ibid 9 para 26.
[74] Directive (EU) 2019/1937 (n 1).
[75] Sections 43F(1)(b)(ii), 43G(1)(b) and 43H(1)(b) ERA1996.
[76] ibid.

uses both in the same policy.[77] In the round, it cannot be concluded that the Recital and the *de jure* and *de facto* positions of Part IVA are congruent.[78] Recital 32 adds that the whistleblower needs reasonable grounds to believe that the information reported falls within the scope of the Directive, whereas Section 43B requires a reasonable belief that the disclosure 'tends to show' one or more of the qualifying criteria is occurring, has occurred or will occur and is made in the public interest; thus, in that regard, Part IVA could be said to exceed the requirement of the Recital.[79] As the research has revealed, the *de facto* situation is one in which some prescribed persons include disclosures in whistleblowing policies and procedures which are not described in Section 43B.[80] Whilst there is benefit in including wide criteria that attract the protection of prescribed persons' policies and procedures, 'extra' criteria not compliant with Section 43B will fall outside statutory protections following detriment or dismissal, etc.[81] *De facto,* in these circumstances prescribed persons' policies are relying on protections provided by the employer rather than Part IVA (an important distinction that should be explained to disclosers but appears not to be) but neither are these non-Section 43B protections so broad as to encompass the groups covered in the Directive.[82] Therefore, neither the UK's *de jure* nor *de facto* situation is found to be compatible with the Recital.[83]

Recital 33 sets out the discretion afforded whistleblowers to choose the channel through which to make their disclosure 'depending on the individual circumstances of the case'.[84] However,

[77] Vol 5 Table 76 entry 33. For 'true': R5, R11, R16, R22, R37, R41, R47, R64, R65, R75, R82, R86, R112, R123, R126, R131, R132, R134, R137, R158, R159, R163, R173, R196, R200, R205, R214, R217, R219, R226, R244, R264, R266, R270, R276, R294, R305, R317, R330, R344, R348, R352, R364, R373, R393, NR2, NR11, NR16, NR35, NR41, NR44, NR45, NR47, NR74 and for 'substantially true': R8, R17, R20, R34, R42, R46, R123, R124, R173, R193, R213, R234, R283, R302, R308, R330, R334, R359, R376, R386, R390, R400, R410, R411, NR17, NR20, NR24, NR27, NR36, NR46, NR47, NR49, NR55, NR64, NR68, NR69, NR72. R55 uses both 'true' and 'substantially true'.
[78] ERA 1996.
[79] ibid.
[80] ibid; Vol 2 Table 16 (LAPPs) and Vol 3 Table 47 (non-LAPPs) describe the inclusion of non-statutory criteria.
[81] ERA 1996.
[82] Vol 2 Table 16 (LAPPs) and Vol 3 Table 47 (non-LAPPs) describe the inclusion of non-statutory criteria.
[83] Table 76 entry 34.
[84] Directive (EU) 2019/1937 (n 1).

Article 15 of the Directive provides that a public disclosure must only follow an internal and external disclosure unless no appropriate action was taken by the competent authority.[85] In UK law, whistleblowers may report to the employer, and/or the person responsible (if not the employer) and/or the correct prescribed person. Whistleblowers do not have the option at the same time to make a protected disclosure to another body (under Section 43G) or to the public in extremis (Section 43H) unless additional tests are satisfied.[86] On balance, the Recital when evaluated and Part IVA describe a similar *de jure* approach. The *de facto* position must take into account that 10% of LAPPs' and 7.7% of non-LAPPs' policies and procedures suggested disclosures can be made to bodies which are not prescribed persons.[87] Whilst disclosures can be made under Sections 43G, and/or 43H, the additional qualifying requirements explicit in those Sections are not explained adequately or at all in the above policies.[88] It is concluded that the *de jure* position is inconsistent with the Directive.[89]

Recital 34 relates to anonymous disclosures.[90] Where the source is unidentifiable, then it is less likely that they will be subject to detriment (unless subsequently identified by the employer or other person responsible for the failure). It follows that an anonymous whistleblower who is subject of detriment as a result of making a qualifying disclosure must go 'on the record' at some point to the relevant 'channel(s)' available under Section 43 if the whistleblower seeks the protection of the legislation, at which juncture they are no longer anonymous and their

[85] Directive (EU) 2019/1937 (n 1) Article 15.
[86] ERA 1996.
[87] Vol 5 Table 76 entry 35 where R7, R18, R26, R31, R239, R241, R269, R271, R274, R281, R284, R291, R306, R309, R310, R311, R312, R319, R339, R340, R343, R345, R350, R355, R356, R360, R361, R363, R368, R369, R371, R374, R388, R390, R391, R396, R399, R401, R404, R407, R410 refer to LAPPs, and NR5, NR30, NR54, NR65, NR67, NR74 refer to non-LAPPs. Also Tables 23-25 and 41; ERA 1996.
[88] ibid where R7, R18, R26, R31, R239, R241, R269, R271, R274, R281, R284, R291, R306, R309, R310, R311, R312, R319, R339, R340, R343, R345, R350, R355, R356, R360, R361, R363, R368, R369, R371, R374, R388, R390, R391, R396, R399, R401, R404, R407, R410 refer to LAPPs, and NR5, NR30, NR54, NR65, NR67, NR74 refer to non-LAPPs. Also Tables 23-25 and 41; ERA 1996.
[89] Directive (EU) 2019/1937 (n 1).
[90] ibid.

former anonymity does not add anything to the outcome.[91] Argued this way, there is no need for Part IVA to operate differently in terms of persons who should receive its protection.[92] The Recital leaves to the discretion of Member States whether to accept and follow-up on anonymous qualifying disclosures. Arguably, for the reason set out above, Part IVA does not need to engage with this issue as it has no locus in the investigation of the failure beyond the treatment of the source.[93] *De jure*, Part IVA and Recital 34 do not appear incompatible but the *de facto* position is less clear.[94] It was found that 10% of LAPPs' and 46.2% of non-LAPPs' policies and procedures highlighted the difficulty in investigating anonymous allegations.[95] Of the LAPP approaches, 3.2% expressed in different ways and to different extents the contention that anonymous disclosures may not be investigated. In comparison, non-LAPP policies (3.8%) were less specific and more inferential that anonymous disclosures may not be progressed.[96] In the round, the degree and extent of inconsistency suggest that the *de facto* position is not compatible with the Recital. Recital 34 also expects that where the source is subsequently identified, protections should be afforded; a position compatible, by implication, with Part IVA which is silent on the issue of anonymity.[97] Although only 7 prescribed persons specifically raised in their policies awareness of the implications of anonymous sources becoming identifiable, it is considered that the *de jure* and *de facto* positions of UK law are consistent with the Recital.[98] Recital 35 relates exclusively to disclosures made to EU institutions, and as

[91] ERA 1996.
[92] ibid.
[93] ibid.
[94] ibid.
[95] Vol 5 Table 76 entry 37 R5, R10, R14, R16, R21, R26, R46, R50, R53, R57, R63, R66, R69, R71, R104, R114, R134, R175, R176, R185, R193, R196, R202, R210, R214, R218, R219, R238, R254, R259, R307, R325, R328, R330, R333, R344, R347, R349, R351, R381, R395 in respect of LAPPs, and NR2, NR4, NR5, NR7, NR9, NR14, NR17, NR18, NR20, NR21, NR31, NR34, NR36, NR37, NR38, NR40, NR41, NR42, NR44, NR47, NR50, NR51, NR52, NR54, NR57, NR60, NR61, NR62, NR65, NR68, NR69, NR70, NR71, NR72, NR74, NR75 in respect of non-LAPPs.
[96] Vol 5 Table 76 entry 37 R53, R73, R115, R123, R134, R144, R156, R166, R227, R265, R320, R357, R370 regarding LAPPs, and NR13, NR27 and NR55 regarding non-LAPPs.
[97] ERA 1996.
[98] Vol 5 Table 76 entry 38 R175, R229, R329, R378 (1%; n=409) NR31, NR40, NR55 (3.8%; n=409).

there is no UK supra-national body with connected institutions like the EU, this Recital is not considered relevant to the comparative approach adopted in this Chapter.[99]

Recital 36 highlights that protections apply because of the power imbalance usually found between workers and employers, but where no such imbalance exists (as is usually, though not always, found with 'ordinary' complainants), protections against retaliation are not necessary.[100] This position is consistent with Part IVA (although 19.1% of LAPPs include members of the public in their whistleblowing policies).[101] As determined in the *Gilham* judgment, even a judge (who may be considered a relatively powerful individual) is not immune from retaliation and, on balance, the role demonstrated sufficient characteristics of a 'worker' to receive protections following detriment suffered as a whistleblower.[102] To a degree, therefore, the concept of 'worker' may evolve predicated on the changing nature and formality of the relationship between those providing a service and those providing remuneration in exchange, and having regard to the power balance between them.[103] *Gilham*, in the context of freedom of expression, may strengthen recourse for UK whistleblowers where a breach of that right also occurs (but only when caused by a public authority).

Recital 37 suggests that the Directive provides for the protection of a broader scope of individuals than under Part IVA.[104] The Directive relates to persons who by virtue of their 'work-related activities' learn of breaches significant to the public interest whereas the *de jure* position of UK law is narrower, relating only to workers. A second element of Recital 37 is in

[99] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 39.
[100] Directive (EU) 2019/1937 (n 1); eg where a member of the public wishes to complain about a medical practitioner, but fears denial of treatment.
[101] Vol 5 Table 76 entry 40 R18, R20, R24, R25, R26, R35, R36, R37, R46, R47, R52, R59, R60, R62, R69, R76, R80, R81, R82, R83, R99, R102, R104, R119, R137, R139, R144, R153, R154, R156, R173, R177, R178, R179, R184, R185, R187, R189, R193, R207, R217, R218, R219, R221, R224, R230, R233, R244, R253, R259, R271, R280, R281, R282, R292, R293, R301, R304, R314, R315, R316, R324, R325, R327, R331, R338, R340, R352, R356, R357, R361, R366, R374, R382, R384, R394, R395, R398; ERA 1996.
[102] *Gilham v Ministry of Justice* [2019] UKSC 44 at para 12.
[103] Vol 5 Table 76 entry 40.
[104] Directive (EU) 2019/1937 (n 1); ERA 1996.

reference to the nationality of the whistleblower which concludes that 'whether they are Union citizens or third-party nationals' is irrelevant. In the UK context, an applicant to an ET must normally work in Great Britain, but there is a fact-sensitive, 'sufficient connection' test between the circumstances of the employment and Great Britain, and its employment law.[105] It is concluded that neither the UK's *de jure* nor *de facto* legal position is substantively consistent with the intention of Recital 37.[106]

Recital 38 establishes that protections should be available to workers in non-standard and 'precarious' working relationships.[107] As observed, the Directive's bounds are set wider than Section 230 and 43K, but as Recital 38 does not provide an exhaustive list of employment types which can be compared with ERA 1996, it can be said that there is general compatibility between this Recital and ERA 1996 as to workers who should be protected.[108] However, the research found that 68.9% of LAPPs included persons not considered workers for the purposes of ERA 1996.[109] Whilst this evidence points to inconsistency in the policy application of Part IVA by some LAPPs, it inadvertently suggests closer *de facto* alignment with the Recital because of its wider scope.[110] Recital 38 also specifically references those in public service who, with the exception of members of the armed forces, security and intelligence services, would also be included within Part IVA.[111] There is considered reasonable *de facto* congruence between the Recital and Part IVA regarding protection of public servants.[112]

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[105] *Ravat v Halliburton Manufacturing Services Ltd* [2012] UKSC 1 at para 29; *Clyde and Co LLP v Bates van Winkelhof* [2014] UKSC 32 at para 41.
[106] Vol 5 Table 76 entry 41.
[107] Directive (EU) 2019/1937 (n 1).
[108] ERA 1996.
[109] Vol 5 Table 76 entry 43; Vol 2 Table 12.
[110] Vol 5 Table 76 entries 42 and 43; ERA 1996.
[111] Section 10 PIDA 1998 amends Section 191 ERA 1996 to provide that those in Crown employment (which includes civil servants) are subject of Part IVA ERA 1996. However, 'public service employees' who are members of the security and intelligence services, and members of the armed forces are not subject of Part IVA by virtue of Sections 192 and 193 ERA 1996. Local authority employees and workers are included within the ambit of Part IVA ERA 1996.
[112] Vol 5 Table 76 entry 44; ERA 1996.

In respect of Recital 39, it is noted that the self-employed, suppliers, shareholders, most job-applicants and others at employment pre-contract stage would be protected by the Directive but would not be under Part IVA.[113] Key tenets of Part IVA are upholding the public interest and mitigating the power-imbalance between parties, whereas the Directive emphasises the public interest in protecting those well-placed to report breaches or failures.[114] The *de jure* scope of Part IVA and the Recital are different, predicated on the latter providing broader coverage.[115] A small proportion (3.7%) of LAPPs included self-employed persons in their policies as did one (1.3%) non-LAPP. Freelance staff, shareholders and job applicants mentioned in a small proportion of non-LAPPs' policies and procedures, are unlikely to be workers for the purpose of Sections 230 and 43K.[116] The UK's *de facto* position is more inclusive (as compared to the Recital) than its *de jure* one, but insufficient to propose that Recital 39 and Part IVA are congruent.[117]

Recital 39 also sets out behaviours that constitute retaliation. Wim Vandekerckhove distinguishes between 'retaliation' and 'detriment' (the latter term used in Part IVA) on the basis that the former is deliberate whereas the latter may not be.[118] However, where the effect on the whistleblower is the same, distinction may be moot.[119] Nevertheless, it can be argued that Part IVA provides a lower threshold for protection ('detriment', though Recital 93 mentions 'detrimental action') than the Directive.[120] In respect of the *de facto* situation, it was established that 3.2% and 15.4% of LAPP and non-LAPP responses use the expression

[113] Vol 5 Table 76 entry 44; ERA 1996.
[114] ERA 1996; Directive (EU) 2019/1937 (n 1).
[115] ibid.
[116] Vol 5 Table 76 entry 45 R5, R26, R45, R50, R75, R84, R126, R181, R205, R208, R211, R213, R216, R295, R338 regarding LAPPS, and NR48 regarding the single non-LAPP.
[117] ERA 1996; Directive (EU) 2019/1937 (n 1).
[118] Wim Vandekerckhove, 'Research on retaliation against whistleblowers' (2020) <https://nationalguardian.org.uk/2020/10/21/research-retaliation/> accessed 16 September 2022; ERA 1996.
[119] Wim Vandekerckhove, 'Is It Freedom? The Coming About of the EU Directive on Whistleblower Protection' (2022) 179 Journal of Business and Ethics 1 9.
[120] Directive (EU) 2019/1937 (n 1).

'retaliation'.[121] Whilst it must be noted that the FOIA 2000 question asked about 'retaliation' rather than 'detriment', there remains inconsistency between the *de jure* and *de facto* positions in the UK's approach. It is concluded that the UK's *de jure* position exceeds Recital 39's aspirations, whereas the *de facto* position meets it.[122] However, it is noted that Recital 87 describes the span of persons who should receive protection against retaliation, but Part IVA does not meet that expectation because of its more limited scope, and too few prescribed persons (LAPPs, in particular) recognise 'external' whistleblowers and thereby must fail to implement appropriate reporting and handling arrangements for them.[123]

Recital 40 discusses the protection of volunteers.[124] Volunteers are not usually considered workers for the purpose of Sections 230 and 43K primarily because they do not receive remuneration in return for their services.[125] Therefore, the Recital's coverage is broader than Part IVA's *de jure* position; however, a different perspective is gained from the UK's *de facto* position. Analysis of whistleblowing policies established that 27.4% of LAPPs' and 9.0% of non-LAPPs' approaches reference volunteers.[126] Where volunteers or other extra-statutory categories are provided for in UK prescribed person whistleblowing policies, such additional inclusions should be differentiated from those protected by statute, to avoid potential confusion and difficulty. This is another example of an anomaly where some prescribed persons' *de facto* policies are closer to the *de jure* position of the Directive than Part IVA.[127] Recital 40 also deals with trainees, whether paid or unpaid.[128] The *de jure* and *de facto* position of Part IVA and

[121] Vol 5 Table 76 entry 46 R18, R172, R176, R177, R183, R226, R234, R237, R271, R294, R359, R383, R389 in respect of LAPPs, and NR2, NR5, NR12, NR19, NR38, NR40, NR41, NR43, NR45, NR50, NR51, NR67 in respect of non-LAPPs.
[122] Vol 5 Table 76 entry 46; Table 1 Q11 regarding 'retaliation'.
[123] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 112; Vol 2 Table 7 and Vol 3 Table 37; ERA 1996.
[124] Directive (EU) 2019/1937 (n 1).
[125] ERA 1996.
[126] Vol 2 Table 14 regarding LAPP policies which include volunteers, and Vol 3 Table 45 regarding non-LAPPs.
[127] Vol 5 Table 76 entry 47.
[128] Directive (EU) 2019/1937 (n 1); Table 76 entry 112; ERA 1996.

policies are consistent with the Recital because protection is available to trainees (as intended by ERA 1996).[129]

4.4.1.d Evaluating Recitals 41-60

Recital 41 outlines that persons with a work-related connection to the reporting person should be protected against retaliation whether direct or indirect (eg via family members); again, a wider construction than ERA 1996.[130] Analysis reveals that 33.0% and 50.0% of LAPPs and non-LAPPs stated in their FOIA 2000 responses that action in respect of victimisation would extend to persons reporting on behalf of external whistleblowers.[131] However, these responses are not sufficient to suggest that the *de facto* position is different to the *de jure* one because most *de jure* responses related to internal whistleblowing, rather than external whistleblowing (which was the focus of the question).[132] Recital 41 also describes how protections extend to trade union representatives making disclosures either as workers or when acting in support of a whistleblower; and other UK legislation, notably the Trade Union and Labour Relations (Consolidation) Act 1992, provides compatible protection to the Directive.[133] No evidence was found in the analysis of prescribed persons' data that the *de facto* position in the UK is different to the *de jure* one.[134]

Further, Recital 41 suggests that the reach of the Directive includes targeting indirect retaliation against an organisation to which the whistleblower has a work-related connection. In the UK context, it is possible but unlikely, that the person responsible for the breach or failure (where not the employer) could retaliate against the whistleblower's organisation but unless this

[129] Vol 5 Table 76 entry 48.
[130] Directive (EU) 2019/1937 (n 1).
[131] Vol 2 Table 7 and Vol 3 Table 37.
[132] Vol 5 Table 76 entry 49.
[133] Trade Union and Labour Relations (Consolidation) Act 1992; Directive (EU) 2019/1937 (n 1).
[134] Vol 5 Table 76 entry 50.

caused detriment to the whistleblower, Part IVA would not be engaged.[135] Hypothetical construction aside, there is no evidence from the FOIA 2000 responses and policy analysis that the 'informal or indirect pressures' mentioned by 11.7% of LAPPs relate to the whistleblower's organisation; rather, to the individual making the disclosure.[136]

Recital 42 discusses eliminating practices that are not unlawful *per se* but defeat the object of the law.[137] Part IVA includes no equivalent catch-all provision.[138] Minh Alexander and Martin Morton suggest that the absence of accountability for the kind of failures described within ERA 1996 render Part IVA an example of a structural defect in the law that defeats its intended purpose.[139] This claim may be refuted by reference to the purpose of PIDA 1998 which is directed at protecting the source of the disclosure rather than targeting the object of the disclosure.[140] A more apposite example of what Recital 42 intends is probably Section 43J which makes unlawful the use of non-disclosure agreements to curtail disclosures.[141] The available evidence infers compatible intent between Part IVA's and the Recital's *de jure* positions, and there is nothing found in the research which suggests a different *de facto* approach in prescribed persons' practice.[142]

Recital 43 relates to past, present and future breaches, and acts or omissions reasonably considered by the whistleblower to be such breaches, and attempted cover-up, which are

[135] ERA 1996.
[136] Vol 5 Table 76 entry 51 R106, R117, R123, R125, R133, R136, R144, R152, R174, R196, R198, R199, R214, R215, R224, R230, R236, R256, R257, R261, R264, R265, R266, R283, R293, R297, R304, R307, R310, R319, R323, R324, R331, R337, R339, R355, R358, R362, R363, R373, R374, R380, R384, R384, R390, R391, R401, R411.
[137] Directive (EU) 2019/1937 (n 1).
[138] ERA 1996.
[139] Minh Alexander and Martin Morton, 'Replacing the Public Interest Disclosure Act (PIDA)' (2018) <https://minhalexander.com/2018/07/18/replacing-the-public-interest-disclosure-act-pida/> accessed 18 September 2022.
[140] PIDA 1998, an 'Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.'
[141] ERA 1996.
[142] Vol 5 Table 76 entry 52.

familiar considerations in Section 43B.[143] The notable difference is that Recital 43 is more onerous because it employs the phrase 'very likely to take place' whereas the test is 'likely' under Part IVA.[144] The Recital states that the protections of the Directive apply where the person discloses reasonable concerns or suspicions. Part IVA's 'stepped' approach means that, whereas under Section 43B the standard is a reasonable belief which 'tends to show' a failure has or will occur etc.; under Sections 43F-43H, the whistleblower must reasonably believe that the information and any allegation within it are substantially true; thus, the *de jure* position of Part IVA becomes more exacting.[145] A range of expressions ('suspicion', 'reasonable suspicions', 'concern', 'serious concerns', 'major concerns') were included by both LAPPs and non-LAPPs which further portrays the inconsistent description of the law in some whistleblowing policies and procedures.[146] The *de facto* position cannot be said to comply with either the *de jure* position of UK law or the expectation of Recital 43.

Recital 44 commends a wide definition of retaliation to encompass a broader, work-related context envisaged in Recital 41.[147] However, the *de jure* position of Part IVA is limited to the narrower definition of worker described in Sections 230 and 43K and does not achieve the expectations of Recital 44.[148]

[143] Directive (EU) 2019/1937 (n 1); ERA 1996.
[144] Section 43B ERA 1996.
[145] ERA 1996; Vol 5 Table 76 entry 53.
[146] Vol 5 Table 76 entry 54 where 'suspicion' is used by R50, R66, R123, R143, R156, R167, R184, R189, R228, R292, R312, R338, R384; NR20 and NR77 use 'reasonable suspicions'; R34, R52, R62, R76, R80, R91, R104, R107, R117, R174 use 'serious concerns'; R134, R141, R144, R174, R184, R205, R212, R234, R274, R292, R322, R339, R340, R342, R343, R344, R34, R385, R387, R388, R396, R397, R398, R400, R401 use 'concerns', 'serious concerns' and 'major concerns'; R347, R348 use 'major concerns'; R349, R350, R351, R352, R355, R356, R357, R358, R359, R360, R362 R367, R368, R369, R370, R371, R372 R373, R377, R378, R379, R381, R383, R394, R402, R403, R404, R406, R407 use 'concerns' and 'serious concerns'; R374, R390, R391, R399 use 'serious concerns' and 'major concerns'; R392, R393, R394, R395, R408, R410, R411 use 'concerns'.
[147] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 49; also discussion under Recital 39.
[148] ERA 1996; Vol 5 Table 76 entry 55.

Continuing the theme of retaliation, Recital 45 cites circumstances where whistleblowers can make disclosures public including via the media and social media, or to elected officials, civil society organisations, trade unions and businesses.[149] On the face of it, this Recital goes further than Part IVA where, as observed, it is only the worker making a protected disclosure who is included in defined circumstances.[150] The impression created that a whistleblower can report directly to the public is belied by Article 15 which requires that internal and external channels must have been utilised first but where no appropriate action was taken by them during the timescales specified within Article 9(1)(f) or Article 11(2)(d).[151] Article 15 contextualises Recital 45 thus bringing it more in line with Part IVA than envisaged from consideration of the Recital alone. However, having regard to the 'exceptionally serious' criterion in Section 43H(1)(d) ERA 1996, and the absence in Recital 45 of the 'no personal gain' requirement of Section 43H(1)(c), the *de jure* position of Part IVA involves higher thresholds than contemplated in the Recital. The *de facto* situation of some prescribed persons is arguably more demanding than the *de jure* one in that 1% of LAPPs and 5.1% of non-LAPPs appear actively to dissuade potential whistleblowers from approaching the media.[152] It is concluded that neither the *de facto* nor *de jure* position achieves the expectations of Recital 45.

Recital 46 considers the protection of whistleblowers who are journalistic sources.[153] Part IVA does not demarcate the role of journalists or their sources but relevant safeguards are provided

[149] Directive (EU) 2019/1937 (n 1).
[150] ERA 1996.
[151] Directive (EU) 2019/1937 (n 1).
[152] Vol 5 Table 76 entry 56 R64, R85, R136, R393 provide that '[i]f a person does approach the media with their concerns, the informant should expect in most cases to lose their whistle-blowing law rights.'; NR37, NR38 suggest that '[i]f you report your concern to the media, in most cases you'll lose your whistleblowing law rights.'; NR74: 'If you report your concerns to the media, in most cases you will lose the protection of the whistleblowing provisions.' NR74 continues: 'Please note, if you have not followed internal procedures, whistle blowing disclosures to the media or by other public disclosure will generally be considered to be an unreasonable course of action. Reporting your concerns for public circulation, even if done in good faith, before raising them in accordance with these procedures may result in disciplinary proceedings, which could lead to dismissal.'; NR73 adopts a more measured tone: '1.5.3 Protection is also available for disclosures to regulatory bodies and, in exceptional circumstances, wider disclosures (for example to an MLA or the media) may also be protected.'
[153] Directive (EU) 2019/1937 (n 1).

elsewhere in UK law.[154] Unlike Part IVA and UK policy, Recital 46 suggests that effective protection of whistleblowers 'encourages whistleblowing also through the media'.[155] None of the prescribed persons' FOIA 2000 responses and policies included reference to journalistic sources though some present a largely dissuasive narrative about media involvement.[156] During the passage of PIDA 1998 through Parliament, the intention behind Section 43H was keenly debated and it is clear that disclosures to the media were intended to be rare.[157] This intention appears incompatible with the espoused position of the Recital and, on balance, it is concluded that Recital 46 and Part IVA are not aligned on a *de jure* or *de facto* basis.[158]

Recital 47 proposes that public and private sector organisations should have internal procedures for managing reports.[159] As discussed, Part IVA applies to private and public sector organisations (except the military, security and intelligence services) but does not mandate reporting mechanisms.[160] However, Section 43G(3)(f) may act, to a degree, as an incentive to employers to have in place an internal reporting mechanism because the Section effectively creates an additional 'hurdle' which a whistleblower must clear in order to make a protected disclosure.[161] Nevertheless, it cannot be said that all public and private sectors bodies which should have a whistleblowing procedure actually have one. On balance, the *de facto* and *de jure* positions in the UK are not considered compatible with the requirements of the Directive.[162]

[154] ERA 1996; Section 10 Contempt of Court Act 1981 provides that journalistic sources should not be disclosed in proceedings except in the interests of justice, national security, or crime and disorder prevention.
[155] ERA 1996; Directive (EU) 2019/1937 (n 1).
[156] Vol 5 Table 76 entry 56 R64, R85, R136, R393, NR37, NR38, NR73, NR74.
[157] Lord Haskel: 'New Section 43H provides protection for workers who make disclosures about exceptionally serious failures […] The new section is meant to apply only in very rare cases.' in HL Deb. 5 June 1998, vol 590, cols 629-30.
[158] Vol 5 Table 76 entry 57; ERA 1996.
[159] Directive (EU) 2019/1937 (n 1).
[160] ERA 1996.
[161] ibid.
[162] Vol 5 Table 76 entry 58.

Recital 48 specifies that organisations with 50 or more workers should establish internal reporting channels.[163] Although Part IVA applies to all workers (for the purposes of Sections 230 and 43K) and their employers, it does not establish a numerical threshold and there is no evidence in the policies examined that work-force size is deterministic.[164] However, this research has only focused on prescribed persons. Protect, a UK whistleblowing charity, has reported that in a 2021 survey of 2,005 persons, 31% stated that they knew how to raise a concern at work, 38% stated they did not know but could find out, and 31% reported that they did not know.[165] Whilst it cannot be assumed that those who know how to raise a concern are referring to an organisational policy, it is one inference. On balance, it is not believed that the *de facto* position meets Recital 48.[166] Recital 50 extends the reach of Recital 48 to include organisations comprising fewer than 50 workers where there is a pre-existing requirement to have reporting channels eg as a condition of operating as a financial institution.[167] There is no analogous requirement under Part IVA. Linked to the above, Recital 51 clarifies that workers in private sector organisations which do not have internal reporting channels should be able to report via external channels.[168] There is evidence in the research that some prescribed persons (1.2% of LAPPs and 6.4% non-LAPPs) refer to disclosures under Section 43F and in one case to Section 43G criteria.[169] The *de jure* and *de facto* evidence suggests that Part IVA and Recital 50 are not congruent, whereas Recital 51 is.[170]

[163] Vol 5 Table 76 entry 57; ERA 1996.
[164] ERA 1996.
[165] Protect, 'Public attitudes to whistleblowing in the workplace in 2021 – YouGov research' (no date) <https://protect-advice.org.uk/the-public-and-whistleblowing-2021-research/> accessed 16 January 2023.
[166] Vol 5 Table 76 entry 59.
[167] Directive (EU) 2019/1937 (n 1).
[168] ibid.
[169] Vol 5 Table 76 entry 63 R59, R193, R245, R311, R377 regarding Section 43F, and R245 regarding Section 43G ERA 1996; NR13, NR16, NR19, NR20, NR64 regarding non-LAPPs.
[170] Directive (EU) 2019/1937 (n 1); ERA 1996.

Recital 49 emphasises the assertion made in Recital 31 that protection against retaliation is a means of safeguarding freedom of expression.[171] Of note, neither the Articles nor Recitals include a concept of the 'person responsible' for the failure or breach [where not the worker's employer per Section 43C(1)(b)] as someone else to whom a report can 'freely' be made.[172] The basis for the inclusion of 'person responsible' in Part IVA is not attributable to the freedom of expression argument advanced under Recital 31 but the concepts are not incompatible.[173] It may transpire that the requirement for all organisations with more than 50 workers (Article 8 and Recital 48) to have an internal policy may address the 'responsible person' issue available under Part IVA because of the Directive's wider ambit of work-related activities.[174] A second aspect of Recital 49 suggests that a different category of person (as compared to the first part of the Recital) who makes information publicly available through the media or social media or via other types of organisations (which are not the designated external channels) should also be protected. *De jure,* Part IVA is unlikely to pertain if such a person is not the worker making a protected disclosure.[175] As previously discussed, the *de facto* position includes a dissuasive 'tone' by some prescribed persons towards whistleblowers' reporting via the media.[176] Indeed, a theme is manifest in the LAPP FOIA 2000 responses and whistleblowing policies and procedures on the de-merits of making disclosures outside the local authority (and where the body does not set out the circumstances in which it may be necessary, proportionate and lawful to do so).[177]

[171] Directive (EU) 2019/1937 (n 1); ERA 1996.
[172] ibid.
[173] Also, Richard Hyde and Ashley Savage, 'Cross-border Concerns: Perils and Possibilities' (2013) 2(3) 1 3 E-Journal of International and Comparative Labour Studies <http://ejcls.adapt.it/index.php/ejcls_adapt/article/view/132> accessed 8 September 2022.
[174] Directive (EU) 2019/1937 (n 1) Article 8, Recital 48; Vol 5 Table 76 entries 59 and 60.
[175] ERA 1996.
[176] Vol 5 Table 76 entry 56 R64, R85, R136, R393, NR37, NR38, NR73, NR74.
[177] ibid entry 27 R74, R319, R356, R357, R369, R383.

Recital 52 stresses that internal reporting channels should be available to ensure public procurement rules are observed.[178] The public interest criteria described in Section 43B which attract protections are not hierarchically arranged according to relative seriousness or other ascribed value; certainly, public procurement is not distinguished.[179] Nevertheless, it is proposed here that the *de jure* approach of Part IVA would satisfy the Recital because a number, albeit small, of prescribed persons' whistleblowing policies and procedures (1.7% of LAPPs and 2.6% of non-LAPPs) specifically reference procurement processes as potential grounds for whistleblowing disclosures.[180] It is assessed that where a procurement breach is a qualifying wrongdoing or failure (per Section 43B) then the *de facto* position would be commensurate with Recital 52.[181]

Recital 53 proposes that whistleblowers can request a physical meeting with the 'channel' to make their disclosure and within a reasonable timeframe, whereas Part IVA does not, and UK Government guidance only advises that '[a]n idea of the time frame for handling any disclosures raised' should be provided.[182] Analysis suggests that 2.9% of LAPPs include reference to meetings involving whistleblowers and their representatives and the employer.[183] However, the context is invariably that the whistleblower is an employee or worker within the local authority.[184] It is concluded that the *de jure* and *de facto* positions of Part IVA do not accord with Recital 53.

[178] Directive (EU) 2019/1937 (n 1).
[179] ERA 1996.
[180] Vol 5 Table 76 entry 64 R42, R136, R198, R209, R240, R283 from LAPPs, and NR6 and NR74 from non-LAPPs.
[181] ERA 1996.
[182] Directive (EU) 2019/1937 (n 1); Department for Business Innovation & Skills, 'Whistleblowing: Guidance for Employers and Code of Practice' (2015) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf> accessed 22 December 2022.
[183] Vol 5 Table 76 entry 66 R18, R228, R263, R307, R317, R322, R347, R352, R364, R367, R373, R393 regarding LAPPs. No compatible evidence was found in non-LAPPs available policies and FOIA 2000 responses.
[184] ibid.

Recital 54 and Section 43C(2) acknowledge that third parties can be authorised to receive reports on behalf of public or private sector organisations.[185] Identified in the research are 11.2% of LAPPs and 11.5% of non-LAPPs which refer in their policies and procedures to 'hotline', 'helpline', or 'telephone reporting mechanism', and some indication of how feedback from these facilities will be provided to reporting persons.[186] The *de facto* position, through these examples, appears broadly consistent with the *de jure* expectation of Part IVA and the Recital.

Recital 55 emphasises that in-scope private sector organisations should have in-house reporting procedures that can span a company's group structure.[187] Part IVA makes no similar requirement though most workers are protected by the statute, and employers should feel motivated by Section 43G(3)(f) to have in place whistleblowing policies which may act as a defence to employers' vicarious liability for detriments caused by their staffs to whistleblowers.[188] This research has focused on prescribed persons' operations which affect the public sector but it is noted that in 41.3% of LAPP whistleblowing policies and procedures examined 'suppliers' are included, some of which are likely to be in the private sector, and the expectation is that they will make qualifying disclosures to the local authority about the local authority. On balance, it is concluded that Part IVA and Recital 55 are *de jure* and *de facto* compatible.[189]

[185] Directive (EU) 2019/1937 (n 1); ERA 1996.
[186] ERA 1996; Vol 5 Table 76 entry 67.
[187] Directive (EU) 2019/1937 (n 1).
[188] ERA 1996.
[189] Vol 5 Table 76 entry 68 R5, R8, R15, R19, R20, R23, R24, R25, R27, R28, R29, R36, R38, R41, R44, R49, R52, R54, R60, R62, R64, R66, R68, R70, R71, R73, R80, R82, R83, R86, R91, R93, R94, R97, R98, R99, R105, R108, R111, R112, R114, R125, R120, R123, R124, R125, R127, R128, R131, R135, R136, R137, R139, R143, R144, R147, R148, R150, R152, R166, R168, R172, R173, R177, R178, R184, R185, R187, R188, R190, R191, R192, R198, R200, R201, R202, R203, R206, R207, R208, R210, R213, R217, R223, R224, R225, R228, R231, R236, R237, R239, R240, R241, R242, R243, R244, R247, R256, R257, R260, R261, R263, R264, R265, R266, R267, R271, R274, R275, R279, R280, R286, R289, R292, R297, R299, R301, R302, R304, R307, R310, R314, R315, R319, R321, R322, R323, R324, R325, R327, R328, R329, R337, R339, R341, R342, R343, R344, R340, R345, R346, R347, R348, R350, R351, R352, R355, R361, R363, R367, R368, R370, R371, R373, R375, R384, R385, R386, R387, R388, R390, R391, R394, R395, R397, R399, R401, R403, R411.

Recital 56 provides guidance on which role holders or departments could be designated to receive and follow-up on disclosures.[190] Discerning factors highlighted include the ability to maintain independence and avoid conflicts of interest.[191] Whilst Part IVA does not provide prescription about such matters, the research found inferences (in 3.4% of LAPP policies) whereby a conflict of interest and/or the absence of independence by the employer (all other requirements being met) may constitute a breach of the worker's contract thereby potentially engaging Section 43B(1)(b).[192] The *de facto* situation is considered in the context of the range of approaches which are offered in LAPPs' policies etc as to when disclosures can be made and advice sought (12.0%).[193] Given the differences in size and resources of local authorities, such variation is understandable. However, Recital 56 relates to private sector organisations and, as discussed in respect of Recital 48 (organisations with 50 or more workers), it is not established, but is adjudged unlikely, that the *de facto* position in the UK accords with Recital 56.

Recital 57 describes what constitutes reasonable follow-up after a disclosure, the rationale behind any decision to pursue follow-up action, how it should be provided, and in what timeframe.[194] Part IVA does not engage this level of detail but UK Government guidance addresses similar considerations though is much less specific than the Recital.[195] Analysis of prescribed persons' whistleblowing policies discloses wide variation and inconsistency in approach regarding basic communications with whistleblowers involving whether, when and

[190] Directive (EU) 2019/1937 (n 1).
[191] ibid Recital 56.
[192] Vol 5 Table 76 entry 69 R26, R156, R176, R177, R202, R238, R250, R281, R290, R328, R387, R393, R401, R402; ERA 1996.
[193] ibid entry 69 R213, R230, R233, R236, R237, R239, R256, R261, R262, R266, R280, R281, R282, R283, R286, R287, R289, R296, R299, R310, R317, R319, R321, R323, R326, R337, R339, R340, R3445, R346, R350, R355, R356, R358, R363, R365, R368, R371, R373, R374, R380, R388, R400, R405, R406, R410.
[194] Directive (EU) 2019/1937 (n 1).
[195] Vol 5 Table 76 entry 79; ERA 1996; Department for Business Innovation & Skills, 'Whistleblowing: Guidance for Employers and Code of Practice' (2015) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf> accessed 22 December 2022.

within what timescale acknowledgments of receipt of a disclosure are given, and when any investigation is likely to be completed.[196]

Recital 58 suggests that a reasonable timescale for advising the reporting person about the action envisaged or taken is three months.[197] The research found disparity amongst prescribed persons' nominated timescales for action and outcome, and so the same position applies as in respect of Recital 57; namely, that the UK *de facto* and *de jure* positions do not meet the expectations of Recital 58.[198] This view pertains to the assessment of Recitals 66 and 67 which also relate to providing timely feedback to reporting persons and suggest a reasonable timeframe as being one which 'should not exceed three months, but could be extended to six months where necessary due to the specific circumstances of the case.'[199]

[196] Vol 5 Table 76 entry 70 where responses range from no follow-up, R232: '[t]here is no feedback to whistleblowers on the case at any stage. Whistleblowers are thanked for raising their concern and given assurance that it will be dealt with in the appropriate way in accordance with the Council's counter fraud policies.'; being informed of the outcome only, R81: '3.3.10 The employee will be notified of the outcome of any action taken.'; and those which offer more extensive communication, R84 '31. Once you have told us of your concern, we will assess it and consider what action may be appropriate. This may involve an informal review, an internal inquiry or a more formal investigation. We will tell you who will be handling the matter, how you can contact them, and what further assistance we may need from you. If you ask, we will write to you summarising your concern and setting out how we propose to handle it and provide a timeframe for feedback. If we have misunderstood the concern or there is any information missing, please let us know.' In respect of differing timescales Vol 5 Table 76 entry 71: R56: '42. The Contact Officer will acknowledge your concern as soon as possible and contact you within 14 calendar days of you raising your concern to:…'; R61: 'Within 10 working days, an acknowledgment from the Monitoring Officer that the matter has been raised by you.'; R63: 'We will acknowledge receipt of your concerns within 5 working days and confirm how we will deal with the concerns raised and when you can next expect to hear from us.' In terms of reporting the outcome, NR52: 'SEPA will endeavour to provide the individual with feedback within 3 months of their report where this is permissible by law. The feedback received will depend on the information provided and the action that we have taken. We are not able to commit to providing ongoing or interim feedback.'; NR63: 'We also aim to provide a final response within 30 working days.'; R37: 'It is our aim to conclude all investigations within 20 working days and we will confirm the outcome in writing.'; NR38: 'We strictly adhere to the Commissioners for Revenue and Customs Act 2005 (CRCA). CRCA section 18 details the requirement for confidentiality when handling information held by HMRC. For this reason, we do not provide feedback or confirmation of actions or decisions taken with information provided by the public.'

[197] Directive (EU) 2019/1937 (n 1).

[198] Vol 5 Table 76 entry 71 NR52: 'SEPA will endeavour to provide the individual with feedback within *3 months* of their report where this is permissible by law. The feedback received will depend on the information provided and the action that we have taken. We are not able to commit to providing ongoing or interim feedback.'; NR63 'We also aim to provide a final response within *30 working days*.'; R37 'It is our aim to conclude all investigations within *20 working days* and we will confirm the outcome in writing.' (Emphasis added).

[199] ibid entries 84 and 85; Recital 67 Directive (EU) 2019/1937 (n 1).

Recital 59 proposes that whistleblowers 'should be able to make an informed choice on whether, how and when to report.'[200] Also, the Recital requires that public and private sector organisations should provide information on what their whistleblowing procedures are, including how to report to competent authorities.[201] Part IVA provides a tiered approach with higher thresholds for each graduation as the worker escalates from Section 43C and 43F to Sections 43G and 43H, effectively from 'internal' to 'external' disclosures.[202] In Part IVA, whilst decisions whether and when to report remain matters for the worker (subject to any statutory or contractual requirements upon them), the 'how' aspect described in the Recital is not within the UK whistleblower's discretion.[203] Also, Government guidance makes no requirement of employers to have whistleblowing policies and procedures in place.[204] Noting these factors, it is concluded that the *de jure* position of Part IVA does not meet the intention of Recital 59. The *de facto* position identified from the variations in approach noted in the research, leads to the conclusion that the Recital and Part IVA are not compatible.[205] Recital 59 further expects that procedural information for whistleblowers and others associated through their work-related activities, should be clear and easily accessible. There is no similar requirement under Part IVA, and this investigation found that 52.6% of LAPPs did not provide step by step guidance and 80.9% did not publish 'FAQs' for whistleblowers. Similarly, 42.3% of non-LAPPs were found not to publish step by step guides whilst 57.7% had not published FAQs. It cannot be said that the UK's *de jure* or *de facto* arrangements satisfy the Recital on the availability of procedural information.[206]

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[200] Directive (EU) 2019/1937 (n 1).
[201] ibid.
[202] ERA 1996.
[203] ibid.
[204] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 23 December 2022.
[205] Vol 5 Table 76 entry 72 and Vol 2 Tables 23-25 which include analysis of the arrangements described by a representative sample (51%; n=209) of LAPPS in their whistleblowing policies and procedures. 75% indicate an independent body, whilst 21.5% offered internal channels only, or no sources of advice.
[206] Vol 4 Table 61 Questions 5 and 9.

Recital 60 highlights the contribution that legislators believe whistleblowers make to the prevention and detection of breaches of the law.[207] In contrast, Part IVA is about the protection of whistleblowers not the detection of wrongdoing.[208] UK Government guidance on the enforcement role of prescribed persons is necessarily tentative because some prescribed persons have enforcement powers and others do not.[209] Separately in respect of Recital 60, confidentiality is distinguished as a significant protective measure, whereas it is not in Part IVA.[210] However, most prescribed persons' policies and procedures evaluated asserted confidentiality as a protection objective (only 2.9% did not) from which it is concluded that the *de jure* position is not compatible with the Recital but that the *de facto* position is.[211] (See also Recitals 82 and 85 which raise the observance of confidentiality for whistleblowers; a position generally respected in UK law and in practice, according to the evidence.)[212]

4.4.1.e Evaluating Recitals 61-81

Recital 61 provides for escalation routes where internal channels do not exist or prove ineffective.[213] Part IVA through Sections 43F-43H meets the expectations of the Recital.[214] The research identified ample evidence that the *de facto* position accords with Part IVA and the Recital, although some of the bodies and agencies included in prescribed persons' referral advice are not prescribed persons. Whilst recipients of disclosures need not be prescribed persons under Section 43G, some policies are considered inadequate by failing to make that point and drawing attention to the additional conditions required to maintain the status of a

[207] Directive (EU) 2019/1937 (n 1).
[208] PIDA 1998.
[209] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 23 December 2022.
[210] ERA 1996.
[211] Vol 2 Table 24 final row.
[212] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 106 and 110.
[213] ibid.
[214] ERA 1996.

protected disclosure.[215] The analysis also noted that the *de facto* approach is not consistent across all prescribed persons which reference escalation channels.[216] Recital 62 considers the situation where the internal channel is compromised and retaliation or breach of confidentiality would follow, or where other channels are more appropriate.[217] Part IVA and the *de facto* position as assessed through examination of whistleblowing policies and procedures appear compatible with the intentions expressed in Recital 62.[218] Recital 62 also suggests examples of conduct which would inform the judgment to report to a competent authority; eg the destruction or concealment of evidence or where urgent action is necessary to protect life. Sections 43F-H and prescribed persons' policies are considered substantially compatible with Recital 62.[219] One area in which Recital 62 and Part IVA are not compatible is the expectation that '[i]n all cases, persons reporting externally[…]should be protected.'[220] The Directive protects a wider range of persons who in the work-related context acquire information about failures or breaches, but because of Part IVA's narrower scope, it cannot meet Recital 62's expectation.[221] Finally, Recital 62 expects protection for persons who are required to make disclosures as part of their duties or because the breach is criminal.[222] Part IVA does not require people to report criminal breaches, but Part IVA would apply where a person is under a duty eg via a term or condition of their contract of employment, or as pre-requisite of their membership of a profession, that they report relevant breaches or failures coming to their attention.[223] Some LAPP policies were found to include an insistence that there exists a duty to report impropriety. In most circumstances (save for those outlined above), this may be no more than a moral duty

[215] Vol 2 Tables 23-25 and Vol 3 Table 41.
[216] ibid.
[217] Directive (EU) 2019/1937 (n 1).
[218] Vol 5 Table 76 entry 76; ERA 1996.
[219] ibid entry 77; ibid.
[220] Directive (EU) 2019/1937 (n 1).
[221] Vol 5 Table 76 entry 78.
[222] Directive (EU) 2019/1937 (n 1).
[223] Section 43B(1)(b) ERA 1996.

or a 'local' requirement.[224] As observed in the research, there are persons included in prescribed persons' whistleblowing policies not protected by Part IVA; a situation which, inadvertently, is more aligned with the Recital, but only serves to highlight the seam of inconsistency observed in the policy and procedure analysis.[225] On balance, whilst the UK *de jure* and *de facto* positions are perhaps inconsistent with each other, they separately appear to address the conditions of Recital 62.

Recital 63 expounds 'a need to impose a clear obligation' on national authorities to establish external reporting channels and to follow-up on the reports within a reasonable timeframe.[226] Section 43F(2) via an Order empowers Ministers to prescribe persons or bodies to receive and 'investigate' whistleblowing disclosures, which are one form of external channel.[227] Part IVA does not impose obligations on bodies to follow-up within reasonable timescales. Particularly in respect of LAPPs, the concept of external whistleblowers is barely recognised (4.2%) though the majority of non-LAPPs do recognise external whistleblowers (85.9%).[228] Overall, whilst some of Recital 63's intentions are discernible within Part IVA, compatibility appears insufficient to state that there is *de jure* and *de facto* alignment.[229] Recital 64 provides examples of organisations, bodies and institutions which could fulfil the functions envisaged in Recital 63.[230] Though prescribed persons are designated by Ministers through statutory instrument, some commentators opine that the existing prescribed person system is inadequate. Grounds advanced for that view include; gaps in coverage because bodies which should be designated are not; insufficient compatibility between some prescribed persons' functions and the harms they are prescribed for; also, that some prescribed persons are hindered by competing

[224] Vol 5 Table 76 entry 79 R18, R62, R126, R201, R250, R335, R341, R389, R400 in respect of LAPPs.
[225] ibid entry 78; Vol 2 Tables 12-15 and Vol 3 Tables 43-46; ERA 1996.
[226] Directive (EU) 2019/1937 (n 1).
[227] Section 3 Public Interest Disclosure (Prescribed Persons) Order 2014.
[228] Vol 3 Table 29 and Vol 4 Table 53, respectively.
[229] Vol 5 Table 76 entry 80.
[230] Directive (EU) 2019/1937 (n 1).

priorities.[231] Further, analysis of the *de facto* approach of prescribed persons reveals that some LAPPs do not recognise their prescribed status.[232] Additionally, analysis of prescribed persons' compliance with the Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 suggests low levels of conformance by LAPPs in that only 2.4% of published reports appear to meet the requirements in respect of both internal and external whistleblowers.[233] These factors provide a credible basis to critique the structure adopted in the UK which relies on LAPPs and regulators to fulfil the competent authorities' function described in Recital 64. The evidence suggests that LAPPs, in particular, operate with inconsistency sufficient to make the prescribed persons' model incoherent and inadequate to discharge the competent authorities' role envisaged in Recital 64.[234]

In addition to competent authorities possessing the powers to assess and address the alleged breach raised, Recital 65 expects that authorities should be able to prosecute and recover funds.[235] Part IVA protects sources rather than targeting wrongdoers, and so does not require that prescribed persons must have the capacities and powers to address breaches; rather, it is for Ministers to identify and prescribe suitable bodies via the Public Interest Disclosure (Prescribed Persons) Order 2014.[236] The research established that two elements mentioned in Recital 65, namely powers to prosecute, and to recover funds, are inconsistently available across prescribed persons, particularly non-LAPPs, meaning some are unable to prosecute or

[231] Arron Phillips, 'Whistleblowing Externally: Does the Public Interest Disclosure Act 1998 fail whistleblowers when internal disclosure fails?' (2013) Middlesex University Erepository 1 13 <https://eprints.mdx.ac.uk/14395/1/APhillipsThesis.pdf> accessed 10 October 2022; regulators' competing objectives and regulatory constraints are raised by the All Party Parliamentary Group on Whistleblowing, 'The Whistleblowing Bill' (2022) introduction <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_ffa164221ae540bfafdeb8206a0274db.pdf> accessed 5 June 2022 which has proposed new legislation vide All Party Parliamentary Group Whistleblowing, 'Whistleblowing Bill' (2022) 19 <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_4490728b5bc747e28770ed8efbe475e3.pdf> accessed 5 June 2022; Vol 5 Table 76 entries 64 and 65.

[232] Vol 5 Table 76 entry 81.

[233] Vol 3 Table 30 summary section of column 4.

[234] ibid.

[235] Directive (EU) 2019/1937 (n 1).

[236] Section 43F(2) ERA 1996.

recover funds; indeed, one example was identified of a non-LAPP lobbying for powers to seize assets.[237] However, non-LAPPs' functions may not necessitate the availability of powers to recover funds.[238] Also, some non-LAPPs are signatories to a prosecution 'convention' with the Crown Prosecution Service, and under Section 222 Local Government Act 1972 LAPPs have a range of prosecution powers such that, in the round, the *de jure* and *de facto* position broadly accords with the Recital's intention regarding prosecution and asset recovery powers.[239] A second aspect of Recital 65, linked to Recital 72 (competent authority co-operation mechanisms), recommends that authorities should refer a disclosure to another authority better able to provide follow-up.[240] The research established that there is neither a statutory requirement nor a good-practice protocol to transfer disclosures between prescribed persons in the UK. Contrary to the warning expressed in Recital 65 about lack of independence amongst competent authorities, it can be argued according to the evidence that the opposite problem is true in the UK; ie the absence of intrusive oversight allows for incoherency which may undermine the public interest, just as lack of independence may. The data gathered suggest that 23.4% and 48.7% respectively of LAPPs and non-LAPPs said they have an established process to refer-on disclosures received, and 19.6% and 48.7% have a policy and process to notify

[237] Vol 5 Table 76 entry 82: NR74 seeks powers under the Proceeds of Crime Act 2002 to seize assets to the value of the benefit achieved through crime [Information Commissioner's Office, 'ICO call for views on the application for powers under the Proceeds of Crime Act' (2019) <https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/ico-call-for-views-on-the-application-for-powers-under-the-poca/> accessed 11 October 2022].

[238] Arguably, the non-LAPPs involved in transport safety, public health, protection of the environment, radiation and nuclear safety, food and feed safety, animal health and welfare, and protection of privacy.

[239] CPS, 'Relations with other prosecuting agencies', (2020) <https://www.cps.gov.uk/legal-guidance/relations-other-prosecuting-agencies> accessed 10 October 2022, which identifies the Attorney General's Office, Civil Aviation Authority, Department for Business, Energy and Industrial Strategy, Department for the Environment, Food and Rural Affairs, Department of Work and Pensions, Environment Agency, Financial Services Agency, Food Standards Agency, Gambling Commission, Health and Safety Executive, Information Commissioner's Office, Maritime and Coastguard Agency, Office of Fair Trading, Office of Rail Regulation, Revenue and Customs Prosecutions Office (incorporated into the CPS in 2010), Serious Fraud Office and Service Prosecuting Authority; Section 222 Local Government Act 1972; powers to recover funds etc. in certain circumstances per Gov.UK, 'Annex 8: relevant local authority powers' (no date) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890287/Annex_8_-_Relevant_LA_powers.pdf> accessed 10 October 2022.

[240] Directive (EU) 2019/1937 (n 1).

whistleblowers of a referral.[241] Noting the above, the *de jure* and de *facto* arrangements are incompatible with Recital 65 in respect of effective transfer arrangements.

Recital 69 provides that common minimum standards for external channels should apply across the EU.[242] Whilst the UK is not part of that arrangement, it is relevant to consider how the UK legal framework applies across the UK, given devolution. On a *de jure* basis, the exception is Northern Ireland where, at the time of writing, the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 have not been transposed into Northern Ireland law and so it cannot be said that there is a consistent approach across the UK.[243] On a *de facto* basis, it has been noted that the 2017 Regulations are inadequately adhered to, particularly amongst LAPPs, such that the expectations of the Recital are not met.[244]

Recital 70 (see also Recital 103 which relates to judicial review of decisions to terminate etc. investigations) allows competent authorities to dispense with investigation of minor or repetitive disclosures, which Part IVA does not provide for. Whilst the public interest requirement of Part IVA infers a threshold of seriousness, the *de facto* situation suggests that a broad discretion is available to and utilised by prescribed persons as to which matters receive follow-up. Government guidance also provides wide latitude for prescribed persons, and with no mechanism to challenge the *de facto* arrangements, it must be assumed that the status quo is accepted by the legislature and courts.[245] Repetitive reports are cited as an example ground to terminate investigation under Recital 70. In the research, disclosures which have become vexatious, whether through repetition or other reason, were raised by 14.4% of LAPPs as a

[241] Vol 5 Table 76 entry 83 and Vol 4 Table 61 Questions 6 and 7.
[242] Directive (EU) 2019/1937 (n 1).
[243] November 2023.
[244] Reports on Disclosures of Information Regulations 2017 (n 33); Vol 5 Table 76 entry 87.
[245] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 23 December 2022.

basis for dispensation, and for non-LAPPs the proportion was 5.1%. The available evidence suggests that the *de jure* position is not compatible with the Recital but the *de facto* operation may be.[246]

Recital 70 allows competent authorities to prioritise 'serious breaches', a term undefined, and so it is assumed that there is latitude for the authorities to determine what is 'serious'. Noted in the research was the regular reference in the Recitals (17.3%) to protecting EU revenues which may suggest a particular status for financial harms in the appreciation of the public interest and what may be considered a 'serious breach'.[247] Section 43B does not ascribe relative seriousness to the criteria within subsection (1)(a)-(f), whereas Sections 43G and 43H entail a 'seriousness' threshold that must be met for a disclosure to become protected.[248] Prescribed persons operate to the Section 43F criteria where no seriousness requirement is implied (beyond the public interest 'test') and therefore prescribed persons usually do not, *de jure,* have the leeway described in the Recital to 'triage' according to the seriousness of the disclosure. However, prescribed persons rely on various grounds in selecting what to follow-up, including the resources available to them.[249] This may infer a subjective approach to the 'public interest'

[246] Vol 5 Table 76 entry 88 R31, R33, R44, R52, R58, R64, R75, R82, R83, R86, R101, R104, R112, R126, R139, R143, R148, R149, R162, R167, R169, R174, R207, R208, R214, R220, R229, R235, R252, R260, R269, R273, R275, R276, R283, R285, R287, R291, R296, R302, R306, R315, R326, R336, R351, R352, R357, R364, R368, R370, R381, R383, R384, R393, R404, R407, R408, R411 in respect of LAPPs, and NR19, NR48, NR55 in respect of non-LAPPs.

[247] References to EU-related revenue and internal free market etc. protections are mentioned (amongst other considerations) in the following Recitals: 1, 5, 6, 7, 8, 11, 13, 14, 15, 16, 17, 19, 22, 33, 35, 50, 53, 56, 59 (17.3% of the total where n=110 Recitals).

[248] Section 43G ERA 1996 requires consideration of the 'seriousness of the relevant failure'; and under Section 43H that the relevant failure must be 'of an exceptionally serious nature'.

[249] Vol 5 Table 76 entry 89 R150: 'Does the identified problem link to local priorities or known problem/monitored trader?'; R378: 'Local priorities'; NR5:1 'In particular, when we assess what action to take (if any) we will have regard to our organisational strategy and priorities, and the factors set out in our Administrative Priority Framework (APF).'; NR54: 'The most serious enquiries, for example where there is a risk of harm to an individual, will immediately trigger a safeguarding process that may include a referral to the local authority.'; NR55: 'In exceptional circumstances HSENI may also decide not to investigate where it is faced with inadequate resources or other emerging priorities.'; NR74: 'We use this information alongside information from a wide range of other sources, and seek to substantiate the concerns raised.'; it is conceivable that a qualifying disclosure made to another prescribed person could be protected under Section 43G(2)(a)-(c) where the first prescribed person cannot be approached for fear that the whistleblower will face detriment from his employer for doing so, or a prescribed person does not exist for the purpose of Section 43F, or substantially

which Part IVA seeks to uphold, and when interpreted across hundreds of prescribed persons which are largely unfettered in their discretion, it is difficult to gain an overarching operational perspective of what amounts to the public interest but case law assists, where disputes progress to that stage.[250] Of course, the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 should provide this overview but the evidence collated suggests that this is an incomplete mechanism. Nevertheless, according to the evidence, the *de facto* position achieves the objective of Recital 70.[251] Recital 71 relates solely to EU institutions and as there is no UK comparator, comparison with Part IVA is moot.[252]

Recital 72 expects co-operation between competent authorities to facilitate the exchange of relevant information, but there is no similar provision in Part IVA.[253] Linked to consideration of Recital 65, it is assessed that in respect of LAPPs, 41.7% of FOIA 2000 respondents reported that they did not have a process to refer disclosures to other prescribed persons, compared to 35.9% of non-LAPPs.[254] These proportions suggest that there is no substantive *de facto* process of communication and co-operation between UK prescribed persons in the systematic way envisaged by the Recital. It also proposes that ad hoc arrangements should be made for co-operation where formal arrangements are not in place as per the first part of the Recital but there is no parallel provision in Part IVA, or process commended in Government guidance, or systematic process found in practice.[255] FOIA 2000 responses suggested only patchy 'cross-

the same facts have already been reported to the first prescribed person. There is also the possibility that a disclosure could be made to a prescribed person under Section 43H.

[250] For example, *Chesterton Ltd V Nurmohammed & Anor* [2015] IRLR 614; *Morgan v Royal Mencap Society* [2016] IRLR 428; *Dobie v Felton* [2021] IRLR 679.

[251] Vol 5 Table 76 entry 90.

[252] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 91.

[253] Directive (EU) 2019/1937 (n 1); ERA 1996.

[254] Vol 5 Table 76 entry 92; Vol 2 Table 7; Vol 3 Table 37; Vol 4 Table 61 Questions 6 and 7.

[255] Vol 5 Table 76 entry 92.

border' arrangements, though exceptions were evident in a small number of cases.[256] Overall, no *de facto* equivalent to the Recital appears available in the UK.

Recital 73 promotes the role of those managing disclosures, emphasising communication and engagement, security and confidentiality.[257] Part IVA does not legislate for such enablers.[258] Analysis of available data revealed that a minority of prescribed persons' policies and procedures described some criteria similar to those mentioned in the Recital (0.5% of LAPPs and 10.3% of non-LAPPs) but, overall, there was insufficient evidence found to suggest that the *de facto* position is compatible with Recital 73.[259] A second aspect of Recital 73 recommends that separate channels for communications from whistleblowers (as distinct from complainants, etc.) are provided. Part IVA is silent on communications' channels, and analysis indicated that 40.9% and 20.5% of LAPPs and non-LAPPs do not differentiate channels, as commended.[260] It cannot be said that there is *de facto* compatibility with this aspect of the Recital.

Recital 74 considers the training of competent authorities' personnel who have communication with whistleblowers.[261] Part IVA does not engage with this issue but the data assessed suggests the *de facto* situation in the UK in that 52.9% of LAPPs reported that they did not provide specialist training whilst only 17.7% did so.[262] Non-LAPPs' position was that 35.9% did not provide such training whilst 55.1% did.[263] Neither the *de jure* nor *de facto* situations can be said to comply with the Recital. Recital 75 includes an expectation that competent authorities

[256] NB 'cross-border' includes cross-agency; Table 76 entry 93 R26 (0.25%; n=409); NR36, NR58, NR70, NR71 (5.1%; n=78).
[257] Directive (EU) 2019/1937 (n 1).
[258] ERA 1996.
[259] Vol 5 Table 76 entry 94 R98 and R134 in respect of LAPPs, and NR13, NR24, NR43, NR49, NR50, NR51, NR55, NR58 in respect of non-LAPPs.
[260] ibid entry 95 and Vol 4 Table 61 which compares LAPP and non-LAPP responses to FOIA 2000 Question 13.
[261] Directive (EU) 2019/1937 (n 1).
[262] ERA 1996; Vol 5 Table 76 entry 96; Vol 4 Table 61 Question 10.
[263] Vol 5 Table 76 entry 96; Vol 4 Table 61 FOIA Question 10.

provide clear and readily accessible information to help potential whistleblowers navigate the disclosure process.[264] Again, Part IVA does not make this provision but available information about the *de facto* arrangements disclosed that 52.6% and 42.3% of LAPPs and non-LAPPs advise that they do not provide step by step guides, and it must therefore be concluded that the *de jure* and *de facto* arrangements are inconsistent with Recital 75.[265]

Recital 76 gives prominence to the protection of whistleblowers' personal data.[266] Part IVA does not address this but the Data Protection Act 2018 (DPA 2018) provides compatible safeguards and penalties for transgression such that *de jure* alignment is available. Analysis of prescribed persons' whistleblowing policies and procedures found only limited reference to data protection in the context of whistleblowing arrangements (1.5% of LAPPs' and 10.3% of non-LAPPs' policies).[267] However, in two cases prescribed persons suggested that data protection obligations would prevent data-sharing with another prescribed person which, in those cases, could defeat the objective of Recital 72 (cross-border/cross-agency data sharing).[268] Overall, *de facto* alignment between the operation of UK law and Recital 76 is made out, not least because of the existence of the Section 43B(1)(a) and (b) criminal and civil criteria, which would include data protection commitments. Recital 77 specifies that organisation staff members dealing with whistleblowing disclosures should treat with appropriate sensitivity information received and transmitted.[269] DPA 2018 creates offences concerning the misuse of personal data, including where misuse leads to the identification of a

[264] Directive (EU) 2019/1937 (n 1).
[265] Vol 5 Table 76 entry 97; Vol 4 Table 61 Question 5; also Recital 59 regarding 'FAQs' and Recital 89 regarding guides explained by reference to Vol 5 Table 76 entry 72 and 114, respectively; ERA 1996.
[266] Directive (EU) 2019/1937 (n 1).
[267] Vol 5 Table 76 entry 98 R134, R183, R244, R300, R344, R347 in respect of LAPPs, and NR13, NR32, NR48, NR55, NR56, NR65, NR69, NR74 in respect of non-LAPPs.
[268] ibid entry 98 where NR63 and NR79 report that 'we do not share disclosures we receive with other prescribed persons.'
[269] Directive (EU) 2019/1937 (n 1).

person.[270] As found in the responses and polices of most prescribed persons, protecting the identity of sources is often the primary safety measure, and so punishment for mis-use of information by prescribed persons should encourage appropriate training.[271] On the available evidence, the UK's *de jure* and *de facto* stance is consistent with Recital 77. Together with Recital 76 and Recital 77, Recital 83 emphasises protecting personal data and for the same reasons as advanced in respects of those Recitals, Recital 83, Part IVA and related legislation appear compatible.[272]

Recital 78 commends regular reviews of competent authorities' operations to identify and share good practice, but this is not a *de jure* requirement of Part IVA.[273] Examination of prescribed persons' FOIA 2000 responses and published policies and procedures, found that reviews of policies were said by 12.5% of LAPPs and 19.2% of non-LAPPs to be regularly undertaken; however, it is not clear what elements were reviewed and how reviews were undertaken.[274] Indeed, some 1.6% of FOIA 2000 responses intimated that it was the FOIA 2000 question itself which prompted the respondent to suggest that a policy review was underway or imminent.[275] Whilst many identical or near-identical phrases were used widely across whistleblowing policies researched, there is little evidence that good practice is shared, as proposed by the Recital.[276]

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[270] Section 170 DPA 2018 re unlawful obtaining etc. of personal data; Section 171 re re-identification of de-identified personal data; Section 172 re re-identification: effectiveness testing condition; Section 173 re alteration etc. of personal data to prevent disclosure to data subject.

[271] Vol 5 Table 76 entry 99.

[272] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 108.

[273] Directive (EU) 2019/1937 (n 1).

[274] Vol 5 Table 76 entry 100.

[275] ibid, for example, R162: 'We are reviewing our position on the Public Interest Disclosure (Prescribed Persons) Order 2014 and associated guidance. This review is underway and will be complete by 30/11/20.'; R239: 'Please note: The Council acknowledges its obligations under the legislation and will be reviewing its policies and procedures; and that all concerns that are raised are considered under existing policies and procedures.'; R360: 'This area is in need of review to be honest but essentially yes, no written policy for managing external whistleblowers.' Vol 6 Appendix VI includes further examples.

[276] Identical or near-identical phrases are seen in Vol 2 Table 19 R4, R12, R27, R28, R42; Vol 2 Table 20 R60, R83, R89, R93, R94, R95, R97, R98, R99; Vol 2 Table 21 R120, R128; Vol 2 Table 22 R168, R177, R178; Vol 2 Table 23 R240, R256, R263, R264, R265, R266, R283, R289, R297, R299; Vol 2 Table 24 R304, R307, R310, R323, R337, R339, R345, R362, R363, R373, R374, R380, R388, R391, R399, R401.

Recital 79 asserts that after making an internal and external report, a person should be protected if making a public disclosure.[277] Part IVA provides comparable protection via Sections 43G and 43H and there is evidence of 'Section 43H-like' channels of reporting included in whistleblowing policies and procedures examined (14.4% of LAPPs and 3.8% of non-LAPPs).[278] However, some policies stated or inferred that media disclosures will undermine the whistleblower's legal position but without setting out the qualifying criteria that would eliminate such jeopardy.[279] Recital 79 suggests that follow-up decisions should be objective and include an obligation to assess the disclosure and prevent a breach of law, whereas Part IVA refers to the whistleblower's state of mind; not the prescribed person's considerations.[280] As noted, few LAPPs recognise external whistleblowers, such that it is difficult to equate the Recital with the *de facto* background. Government guidance only briefly refers to prescribed persons' investigation of wrongdoing, and whereas the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 establishes a reporting requirement, this thesis notes limited take-up has been achieved (5.9% of LAPPs and 62.8% of non-LAPPs).[281] It is concluded that the UK's *de jure* position is not compatible with Recital 79. Given the range of criteria employed by prescribed persons in assessing whether and what to investigate, *de facto* alignment is doubted between Part IVA and the Recital.[282] The final part of Recital 79 returns

[277] Directive (EU) 2019/1937 (n 1).
[278] ERA 1996; Vol 5 Table 76 entry 101.
[279] Vol 5 Table 76 entry 101 R64, R90, R137, R217, R218, R222, R226, R246, R251, R269, R349, R351, R355, R372, R393, R404 in respect of LAPP commentary on media disclosures, and NR37, NR38 and NR74 in respect of non-LAPPs.
[280] Directive (EU) 2019/1937 (n 1); ERA 1996.
[281] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 23 December 2022; Vol 4 Table 74.
[282] Vol 5 Table 76 entry 102, for example, R229: 'We only investigate the complaint made to us under Health and Safety law.'; R258: 'We consider any allegations of fraud, loss or corruption to be very serious and will investigate them as a matter of urgency.'; R306: 'A decision to investigate is based on the information provided by the external whistleblower. That would be considered and appropriate action taken.'; R336: 'We investigate all information and allegations provided to us. The decision to progress an investigation is made by a senior officer in consideration of the allegation and the results of initial enquiries made.'; ERA 1996; Directive (EU) 2019/1937 (n 1).

to the *de minimis* considerations (per Recital 70, regarding grounds not to investigate, or to discontinue investigations) where it was concluded that the UK's *de jure* and *de facto* postures were compatible with Recital 70 and therefore Recital 79.[283]

Recital 80 explains that protections should also accrue in cases of imminent or manifest danger to the public interest which includes harm to a person or 'irreversible damage'.[284] Section 43 ERA 1996 sets out a graduated approach that enables a whistleblower to make a protected disclosure, and whilst Part IVA does not use the wording of the Recital regarding the imminence of harm, it is submitted that, together, Sections 43G and 43H satisfy both the seriousness and imminence requirements of the Recital.[285] No contrary *de facto* evidence was found in prescribed persons' FOIA 2000 responses or whistleblowing policies and procedures examined. Therefore, the *de jure* and *de facto* approach of Part IVA appear in alignment with Recital 80.[286] Recital 81 adds that where a public disclosure is made without resorting first to an external channel, protections may still apply where there was a reasonable belief of extant risk of retaliation or that the breach would have remained unaddressed.[287] Similar measures are found within Sections 43G and 43H, provided their criteria (eg exceptional nature of the

[283] Vol 5 Table 77 entry 103 R73: '7.2. However it must be appreciated that it will be easier to follow up and to verify complaints if the complainant is prepared to give his or her name and unsupported anonymous complaints and allegations will have to be treated with caution.'; R221: 'No. There is not a published step by step guide on the follow up to allegations however there is information on how the Council will respond within the published Council policy.'; R281: 'We will follow up with the matters raised in one of the following ways: • internal investigation by management, audit & investigations team, or through disciplinary procedures. • referral to the police • referral to the external auditor • independent enquiry We will make initial enquiries before starting an investigation to decide appropriate action. We will refer any concerns which fall within the scope of specific procedures. Examples include child protection or discrimination issues.'; in respect of non-LAPPs, NR48: 'carried out follow-up activity on 3030 of 3654 concerns raised by potential whistleblowers (employees, ex-employees, self-employed, union/work safety representatives) that presented a significant risk.'; NR50 and NR51: 'No. Each whistleblowing disclosure is assessed and followed up and the means of follow-up is determined on a case by case basis.'; NR74: 'How we may follow up will depend on a case-by-case basis. All the relevant information we provide can be found on our website.'

[284] Directive (EU) 2019/1937 (n 1).

[285] ERA 1996; Vol 5 Table 76 entry 104 reprises the relevant elements of Sections 43G and H ERA 1996.

[286] ibid.

[287] Directive (EU) 2019/1937 (n 1).

failure) subsist.[288] However, the fact that evidence may be lost, concealed, etc. does not provide sufficient grounds *per se* for a public disclosure as Section 43G(2)(b) adds a caveat that loss, concealment etc. pertain only where no person is prescribed for the relevant failure.[289] Nevertheless, it is assessed that there is reasonable *de jure* compatibility between Part IVA and Recital 81.[290] In the research, 31.8% of LAPPs referenced 'serious' or 'seriousness' in respect of malpractice that should be reported, whilst the proportion was 23.1% for non-LAPPs.[291] Separately, 15.9% of LAPP policies and procedures used 'serious' to describe concerns held by the potential whistleblower rather than about the breach or failure, a significant mis-statement of the law.[292] Four LAPP policies (1.0%) used the expression 'serious and sensitive' in their policies, which may reflect local authorities' political context and considerations.[293] Overall, however, it is concluded that the *de facto* disposition aligns with Recital 81.

4.4.1.f Evaluating Recitals 82-99

Along with Recital 60, Recitals 82 and 85 highlight the importance of confidentiality in preventing retaliation and set out the limited circumstances in which revelation of identity may be lawful and proportionate.[294] Part IVA makes no similar requirement but three connected groups of exceptions to preserving confidentiality were observed in the research regarding LAPPs: revelations of information to 'court'/'tribunal' (7.8%), 'required by law'/'legal obligations'/'legal reasons' (2.9%), and 'prosecution'/'criminal or disciplinary proceedings'/'police' (6.1%). Non-LAPP data in the same categories were disbursed 7.7%, 23.1% and 11.5%, respectively, wherein the generic 'required by law' phrase was used more

[288] ERA 1996.
[289] ibid.
[290] ERA 1996; Directive (EU) 2019/1937 (n 1).
[291] Vol 5 Table 76 entry 105.
[292] ibid.
[293] ibid R206, R307, R396, R401.
[294] Directive (EU) 2019/1937 (n 1).

extensively than by LAPPs. The *de facto* position in the UK is considered congruent with this aspect of Recital 82.[295] The Recital also seeks to eliminate the protection of confidentiality for whistleblowers who intentionally identify themselves. Part IVA makes no similar pronouncement and no evidence has been identified in the FOIA 2000 responses received or whistleblowing policies and procedures examined that UK prescribed persons include Recital 82's considerations in their policies or practices. As a matter of common sense, however, it is considered unlikely that a prescribed person, on grounds of practicality if not principle, would try to protect the identity of a whistleblower who deliberately exposes their role. On the available evidence, the UK *de jure* perspective does not recognise this part of Recital 82, but the *de facto* situation is likely to be compatible.[296]

Recital 84 emphasises the importance of the Directive's procedures in upholding the public interest, particularly in respect of the enforcement of EU law.[297] UK whistleblowing law does not include enforcement as a goal and neither do the prescribed persons' whistleblowing policies examined. It cannot be said that there is *de jure* and *de facto* alignment between Part IVA and Recital 84.[298]

Recital 86 relates to ensuring that adequate records of alleged breaches are maintained.[299] Part IVA does not engage this issue but it is an implicit requirement of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017; therefore UK law is compatible with the Directive, in principle.[300] However, the *de facto* evidence accrued suggests that there is inconsistency because most LAPPs were found not to comply with the 2017 Regulations,

[295] Vol 5 Table 76 entry 106.
[296] ibid entry 107.
[297] Directive (EU) 2019/1937 (n 1).
[298] Vol 5 Table 76 entry 109 and Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 28 October 2022.
[299] Directive (EU) 2019/1937 (n 1).
[300] Reports on Disclosures of Information Regulations 2017 (n 33).

whilst most non-LAPPs were compliant.[301] The *de facto* position does not satisfy the practice suggested in Recital 86, given also that only 4.2% of LAPPs recognise external whistleblowers.[302]

Further addressing retaliation, Recital 88 proposes that personal liability should attach to retaliators.[303] ERA 1996 asserts the right of a worker not to be subject of detriment by their employer [Section 47B(1)], or by a co-worker [Section 47B(1A)]. It was also established by a Court of Appeal judgement in 2018 in *Timis v Osipov* that personal liability can accrue to an individual worker for the detriment of dismissal of another worker, and so it can be said that UK whistleblowing law can operate as the Recital intends.[304] As most LAPP policies and procedures relate to internal, Section 43C-type circumstances, disciplinary proceedings could be instigated against workers responsible for retaliation.[305] In respect of victimisation of whistleblowers external to their organisation, 39.5% of LAPP and 70.5% of non-LAPP FOIA 2000 respondents expressed an intention to take action against those responsible though, in fact, there is generally little they can do by law.[306] In some cases, however, prescribed persons which are regulators and have relevant powers may be able to take action against some retaliators.[307] Overall, on assessment of the available evidence, it is concluded that the *de facto* position is characterised by inconsistencies to the extent that the practice commended in the Recital is not routinely achieved in the UK.

Further to Recital 59, Recital 89 commends that whistleblowers should be able to access confidential and free advice.[308] Whilst Part IVA does not legislate for this, the research

[301] Reports on Disclosures of Information Regulations 2017 (n 33).; Vol 3 Table 32 and Vol 4 Table 58, respectively.
[302] Vol 3 Table 29.
[303] Directive (EU) 2019/1937 (n 1).
[304] *Timis & Anor v Osipov & Anor* [2018] EWCA Civ 2321.
[305] ERA 1996.
[306] Vol 2 Table 7 regarding LAPPs and Vol 3 Table 37 regarding non-LAPPs.
[307] Vol 5 Table 76 entry 113.
[308] Directive (EU) 2019/1937 (n 1).

evidence allows the conclusion to be drawn that there are independent sources of advice, including work-based trade unions (though the majority of workers are not union members), available to workers (mentioned in 14.3% of LAPP and 15.4% of non-LAPP policies) such that this part of Recital 89 is met on a *de facto* basis.[309] The Recital also approves information centres or similar, as sources of advice but Part IVA does not address this (though Section 43C(2) allows a qualifying disclosure to be made via call centre-type arrangements designated for that purpose by employers).[310] A small number of LAPPs and non-LAPPs (1.0% and 6.4%) mentioned such centres in their whistleblowing policies and procedures.[311] Whilst the *de jure* position is not aligned, when the availability of confidential and free advice is considered in the round the *de facto* position appears compatible. Finally, Recital 89 commends that sources of advice could include legal counselling and charities etc. which also would be protected from retaliation. Part IVA does not enact the provision of legal advice, but a significant proportion of LAPPs reference the charity Protect (23.0%) or Citizens' Advice Bureaux (6.4%) as sources, whilst 9.0% of non-LAPPs also refer to Protect.[312] In addition, Part IVA only relates to detriment caused to workers and would not include retaliation against civil society organisations providing legal counselling (even though a qualifying disclosure can be made in the course of obtaining legal advice).[313] It is concluded that, *de jure,* Part IVA is not compatible with the Recital but when references in prescribed persons' policies to independent sources of advice are taken into account as well as sources of legal counselling, it is suggested that *de facto* alignment exists between this part of Recital 89 and prescribed persons' practice.[314]

[309] Vol 2 Table 25 re LAPPs, and Vol 5 Table 76 entry 115 regarding non-LAPPs.
[310] ERA 1996.
[311] Vol 5 Table 76 entry 116 R27, R176, R296, R339 in respect of LAPPs, and NR37, NR38, NR52, NR54, NR61 in respect of non-LAPPs.
[312] Vol 5 Table 76 entry 117.
[313] Section 43D ERA 1996.
[314] Directive (EU) 2019/1937 (n 1).

According to Recital 90, competent authorities should provide reporting whistleblowers with proof that external reporting to the authorities has taken place.[315] Whilst Part IVA does not engage with this consideration, Rule 31 of the Civil Procedure Rules empowers ETs to order disclosure of documents which contain information that may have probative value in proceedings, including from bodies which are not parties to those proceedings, a situation which could achieve Recital 90's objective.[316] Nothing to the contrary was found in prescribed persons' FOIA responses or their whistleblowing policies and procedures, and therefore it is assessed that the *de facto* situation could accord with the *de jure* one and each would meet Recital 90.[317] This Recital also provides that whistleblowers can access certification that proves that they have met the applicable rules.[318] Section 49(1A) permits an ET to make a declaration that a complaint brought before it under Section 48(1) is 'well-founded', but there is no statutory or *de facto* mechanism for such certification, pre-tribunal. On balance, therefore, the UK's approach does not achieve that aspect of Recital 90.[319] The research findings point to the *de facto* situation in which 7.3% and 39.7% respectively of LAPPs and non-LAPPs recognised in their policies that it is for ETs to determine detriment and unfair dismissal.[320] There is no evidence available from the research to suggest that an alternative approach to the *de jure* one is operating amongst prescribed persons.

Recital 91 deals with restrictive covenants and 'agreements' that preclude the reporting of malpractice.[321] This problem is addressed in Part IVA.[322] Whilst just two LAPPs and one non-

[315] Directive (EU) 2019/1937 (n 1).
[316] Civil Procedure Rules 1998 Rules 31.2, 31.5(d) and 31.17(1), respectively.
[317] Vol 5 Table 76 entry 118.
[318] Directive (EU) 2019/1937 (n 1).
[319] ERA 1996.
[320] Vol 5 Table 76 entry 119 R6, R8, R40, R42, R57, R63, R67, R75, R83, R86, R95, R97, R100, R136, R141, R148, R193, R214, R224, R229, R243, R244, R249, R264, R270, R305, R311, R339, R383, R393 in respect of LAPPs, and NR2, NR5, NR7, NR9, NR13, NR16, NR17, NR18, NR20, NR24, NR25, NR30, NR33, NR37, NR38, NR39, NR42, NR43, NR45, NR47, NR48, NR50, NR51, NR54, NR55, NR63, NR64, NR65, NR67, NR69, NR79 in respect of non-LAPPs.
[321] Directive (EU) 2019/1937 (n 1).
[322] Section 43J ERA 1996.

LAPP mentioned Section 43J, no evidence has been found that prescribed persons on a *de facto* basis adopt or encourage a contrary position in which such covenants or agreements are tolerated.[323] It is assessed that Part IVA and related policy implementation are compatible with the raison d'etre of the Recital. Recital 91 also emphasises that protections should apply to persons making a relevant disclosure but not for reporting 'superfluous information' and the Recital adds 'revealed without having reasonable grounds'.[324] Section 43B establishes the reasonable grounds on which a qualifying disclosure can be made, whilst subsequent sections describe how a qualifying disclosure becomes protected.[325] Recital 91 is generally addressed via Section 43, including that 'superfluous information' may not meet the Section 43 public interest test and seriousness criteria.[326] The *de facto* situation is more complicated because, as suggested in this thesis, many LAPPs include disclosures which do not meet the qualifying criteria within Section 43B, including arguably superfluous elements like the feelings of the reporting person.[327] Whilst there is no bar to local authorities providing contractual undertakings not to retaliate against those raising concerns about other matters, it is argued here that it should be made clear in policies that statutory protections under Part IVA may not be available in those circumstances.[328] The evidence suggests that the *de facto* position is inconsistent and, arguably, the aim of Recital 91 is not achieved.

Recital 92 suggests that protections should apply where documents, lawfully acquired or accessed, and containing information about an infringement or failure, are disclosed in the

[323] Vol 5 Table 76 entry 120 R31 and R313 in respect of LAPPs, and NR41 in respect of non-LAPPs.
[324] Directive (EU) 2019/1937 (n 1).
[325] Sections 43C-H ERA 1996.
[326] Vol 5 Table 76 entry 121; the introductory text to PIDA 1998 describes its purpose as an 'Act to protect individuals who make certain disclosures of information in the public interest'; ERA 1996.
[327] Regarding 'feeling uncomfortable': Vol 2 Table 19 R4, R12, R27, R28, R42; Vol 2 Table 20 R60, R83, R89, R93, R94, R95, R97, R98, R99; Vol 2 Table 21 R120, R128; Vol 2 Table 22 R168, R177, R178; Vol 2 Table 23 R240, R256, R263, R264, R265, R266, R283, R289, R297, R299; Vol 2 Table 24 R304, R307, R310, R323, R337, R339, R345, R362, R363, R373, R374, R380, R388, R391, R399, R401.
[328] Vol 5 Table 76 entry 121; ERA 1996.

public interest but in breach of contract.[329] Whilst Part IVA does not engage this issue directly, UK case law illustrates the balance that must be struck between a whistleblower taking active steps to investigate an issue (which risks undermining the protections available), and making no more than 'any disclosure of information' that 'tends to show' a failure has occurred, which is the requisite standard under Section 43B.[330] In addition to the apparent *de jure* compatibility established in case law, some evidence of *de facto* consistency with Recital 92 is available in that 3.9% and 5.1% respectively of the prescribed person groups described that it is unnecessary for whistleblowers to investigate before make a qualifying disclosure.[331] Recital 92 addresses accessing other forms of information eg colleagues' emails in the workplace. The conditions described accord with the law and facts considered under the first part of the Recital and similar conclusions are drawn about the *de jure* and *de facto* status of UK law and practice.[332] Recital 92 also recognises that there should be limitations upon when protections apply, citing as examples the commission of trespass or computer hacking to find or retrieve 'proof'. This aspect is also addressed satisfactorily by UK case law and is not contradicted by any *de facto* practice found by the research of prescribed persons' FOIA 2000 responses and policy documents.[333] Finally, Recital 92 adds a catch-all exception from protection where a whistleblower's action is not necessary to reveal the breach. Again, existing *de jure* and *de facto* arrangements in the UK appear compatible.[334]

[329] Directive (EU) 2019/1937 (n 1).
[330] Vol 5 Table 76 entry 122 and *Fincham v HM Prison Service* (EAT/0925/01 and EAT/0991/01, 19 December 2002); *Bolton School v Evans* [2006] IRLR 500; *Babula v Waltham Forest College* [2007] ICR 1026 CA; *Western Union Payment services Ltd v Anastasiou* [2014] UKEAT/0135/13/LA; *Dr Y-A-Soh v Imperial College of Science, Technology and Medicine* (EAT/03050/14/DM, 3 September 2015); *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed* [2018] ICR 731; *Twist DX Ltd v Armes* [2020] UKEAT/0030/20/JOJ; ERA 1996.
[331] Vol 5 Table 76 entry 122 R57, R68, R87, R113, R123, R157, R239, R144, R202, R239, R241, R278, R288, R290, R360, R385 in respect of LAPPs, and NR2, NR4, NR6, NR39 in respect of non-LAPPs.
[332] ibid entry 123.
[333] ibid entry 124.
[334] ibid entry 125.

Recital 93 shifts the burden of proof 'to the person who took the detrimental action' where the whistleblower establishes a prima facie case that the detrimental action arose as a result of a protected disclosure.[335] Section 48(2) ERA 1996 creates a reverse burden like this but only on the employer (including where their workers are the source of the detriment and the employer cannot demonstrate that it took reasonable steps to prevent such behaviour) or other person responsible for the alleged failure [Section 48C(1)(b)(i) or (ii), respectively]. Whilst it is possible, even likely, that the person responsible for the detriment is also the employer or person responsible for the failure, that may not be the case in every instance. Therefore, Part IVA's narrower *de jure* focus on the employer and/or person responsible for the failure does not accord with the broader approach of the Recital. The research has not identified a contrary position in the *de facto* application of policy.[336]

Recital 94 deals with remedies and compensation following retaliation, which appear adequately dealt with in ERA 1996.[337] Some LAPPs reference compensation but properly indicate that this is a matter for ETs to determine, which aligns UK *de jure* and *de facto* practice with the Recital.[338] The Recital also describes types of remedy (eg reinstatement, recovery of expenses) which appear compatible with the *de jure* position in UK law and recognised in some prescribed persons policies which mention ETs (0.5% of LAPPs' and 9.0% of non-LAPPs'), indicating alignment with the Directive's intention.[339] Recital 95 requires that 'compensation or reparation' (the latter term not found in ERA 1996) should be 'dissuasive' for those who

[335] Directive (EU) 2019/1937 (n 1).
[336] Vol 5 Table 76 entry 126.
[337] Directive (EU) 2019/1937 (n 1); Sections 47B and 112 ERA 1996 regarding the right not to be subjected to detriment as a result of making a protected disclosure, and compensation to an employee who is unfairly dismissed as a result of making a protected disclosure. Where reinstatement or re-engagement are not suitable options (Section 113 ERA 1996), an ET may order compensation (Section 118 ERA 1996). Section 49 ERA 1996 allows an ET to make an award of compensation in respect of the act or omission which comprises the detriment suffered.
[338] Section 122 ERA 1996; Vol 5 Table 76 entry 127 R40, R63, R64, R67, R148, R257, R305.
[339] Vol 5 Table 76 entry 128 R156, R259 in respect of LAPPs, and NR5, NR46, NR50, NR54, NR63, NR79 in respect of non-LAPPs.

retaliate.[340] It has been proposed that 'punitive/exemplary damages […] might serve as a deterrent to retaliation against whistleblowers', arguably a step beyond mere dissuasion.[341] In reality, Protect suggests, the prospects of a whistleblower winning their case before an ET is so low (described, variously, as 12% or 3%) that proceedings, rather than being dissuasive on the employer, actually deter potential whistleblowers.[342] The low rate of success described is corroborated by others.[343] Given the primary role of the courts in determining outcomes, there is little scope for prescribed persons to address the situation operationally and so it cannot be concluded that the *de jure* or *de facto* positions of UK law achieve the intention of Recital 95. Finally, Recital 95 warns that a systematic practice may arise where well-resourced organisations offer financial compensation as settlement to prevent reinstatement of a whistleblower. The *de jure* position of Part IVA provides ETs with power to reinstate where this is the outcome sought by the whistleblower; however, when an ET is not satisfied that reinstatement is practicable, taking into account the views of the employer, it may approve re-engagement on similar terms.[344] This appears to satisfy the *de jure* position of Recital 95. However, to assess the *de facto* situation, analysis was undertaken of ET cases (which are not whistleblowing cases) since 2017, where reinstatement was at issue. In 8 cases considered (n=15), reinstatement was not deemed practicable on the basis that there was an irretrievable breakdown in the relationship between employer and worker. It could be construed (tentatively,

[340] Directive (EU) 2019/1937 (n 1).
[341] David Lewis, 'Stigma and Whistleblowing: Should Punitive Damages be Available in Retaliation Cases?' (2022) Industrial Law Journal 51(1) 62 77.
[342] Vol 5 Table 76 entry 129; for 12% figure see Protect, 'Making whistleblowing work for society' (2020) 4 <https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf> accessed 7 November 2022; for 3% figure see Burcak Dikmen, 'Why legal aid for whistleblowers is needed now' (Protect 2019) <https://protect-advice.org.uk/why-legal-aid-for-whistleblowers-is-needed-now/> accessed 2 January 2023.
[343] In 224 'UK' (Author: actually, GB) case decisions in 2018, Feinstein and others found a 13.8% success rate: Samantha Feinstein and others, 'Are whistleblowing laws working?' (Government Accountability Project and International Bar Association 2021) 12 <https://whistleblower.org/wp-content/uploads/2021/03/Are-whistleblowing-laws-working-report-2021March.pdf> accessed 22 January 2023 [hereafter, 'Feinstein and others (n 343)'].
[344] Section 116(1)(a) ERA 1996.

from the small sample) that the employers were simply unwilling to reinstate the workers, which thereby defeats the objective of Recital 95.[345] The wording of the judgments did not convey that reinstatement was necessarily robustly pursued by the ETs as no evidence of rigorous challenge of employers' views was recorded in the judgment (which is not to say that such discourse did not happen but transcripts are not available).[346] It appears that, strategically, ETs do not establish whether former employees raising concerns are systematically 'paid-off' by the common employer rather than reinstated. Though based on a small data set, it is considered more likely than not that the *de facto* position does not accord with the Recital's objective.

Recital 96 commends timely interim relief following retaliation or dismissal.[347] Sections 128-132 ERA 1996 provide for this remedy.[348] It was established in the research that 2,730 cases involving interim relief have been pursued before ETs between 2017–2022, yet Protect reports that '[i]nterim relief is very difficult to win.'[349] Whilst both situations may be correct,

[345] Vol 5 Table 76 entry 130: According to the HM Courts & Tribunals Service and Employment Tribunal website on which can be found decisions in respect of non-whistleblowing employment cases in England, Wales and Scotland from February 2017, [HM Courts & Tribunals Service and Employment Tribunal, 'Employment Tribunal decisions' (no date) <https://www.gov.uk/employment-tribunal-decisions?keywords=s116> accessed 8 November 2022], only 15 cases since February 2017 appear to reference Section 116 ERA 1996 regarding reinstatement: where reinstatement was not found to be practical by the ET: *Dr A Plaut v Exeter University: 1400362/2020 and 1403179/2020*; *Mr G Hearne v Summerlands Lodge (Phase 1) RTM Company Ltd:* 2301714/2021; *Ms K Rogers v Picturehouse Cinemas Ltd: 2303478/2017*; *Mr R Allen v Allen Brothers (Fittings) Ltd and Ms E Adams: 3202530/2019; Mr A Gavli and Mr M Ali v LHR Airports Ltd: 3320185/2019 and 3323402*/2019 (where Mr Ali did not seek reinstatement); *Mr A Sambasivam v Playbox Technology Ltd: 3300695/2019*; *L Sabia v KeolisAmey Docklands Ltd: 3201211/2020*; *Mr S E Keable v London Borough of Hammersmith and Fulham: 2205904/2018*; *Mr S Bridges v Free Trade Wharf Management Company Ltd: 3200839/2016*; where the ET ordered reinstatement: *Mr C Pamment v Renewi UK Services Ltd: 3201672/2020; Miss C Huggins and others v Croma Vigilant (Scotland) Ltd: 2201802/2018 and others*; *Prof P Ewart v The Chancellor, Master and Scholars of the University of Oxford: 3324911/2017*; *Mr F Aziz v Jaguar Land Rover Ltd: 1301391/2017*; where reinstatement was mentioned by the ET but neither sought nor ordered: Mr D Fotheringhame v Barclays Services Ltd: 3200194/2017; *S Jenner v Brand Consulting Engineers Ltd: 3202159/2020*.

[346] Where claimants sought reinstatement: *Mr G Hearne v Summerlands Lodge (Phase 1) RTM Company Ltd:* 2301714/2021; *Dr A Plaut v Exeter University: 1400362/2020 and 1403179/2020*; *Ms K Rogers v Picturehouse Cinemas Ltd: 2303478/2017; L Sabia v KeolisAmey Docklands Ltd: 3201211/2020.*

[347] Directive (EU) 2019/1937 (n 1).

[348] Vol 5 Table 76 entry 96.

[349] Query of the ET database referenced at Recital 95 indicates that 2,730 decisions involving 'interim relief' were made between February 2017 and September 2022. It is not practicable or proportionate to establish how many are whistleblowing and non-whistleblowing cases. HM Courts & Tribunals and Employment Tribunal, 'Employment Tribunal decisions' (no date) <https://www.gov.uk/employment-tribunal-

resolution of any dichotomy falls outside the remit of this thesis and no determination is made as to whether Recital 96 is achieved on a *de facto* basis.

Recital 97 provides that whistleblowers facing proceedings for defamation, breaches of copyright, trade secrets, data protection or similar, should be able to rely on the Directive as a defence where a disclosure was necessary to reveal the breach.[350] Part IVA does not establish a similar defence but a combination of statute, common law defences and case law suggests that the *de jure* position in the UK may be commensurate with the Recital but not expressed and presented as coherently and concisely.[351] Analysis of the prescribed persons' policies and procedures indicates that a small number of LAPPs (1.2%) reference defamation (but usually as a risk arising in making a disclosure) whereas no non-LAPP makes such reference.[352] Data protection adherence is mentioned in 2.0% and 7.7% of prescribed persons' documentation but in relation to how organisations generally hold information rather than about whistleblowers' disclosures.[353] The *de facto* information does not contradict the *de jure* one and it is considered that UK law and practice are generally compatible with Recital 97.

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decisions?keywords=interim%20relief> accessed 9 November 2022; Protect, 'Interim Relief' (no date) <https://protect-advice.org.uk/interim-relief/> accessed 1 January 2023.

[350] Directive (EU) 2019/1937 (n 1).

[351] ERA 1996; potential defences available to a whistleblower in defamation cases include 'truth' (Section 2 Defamation Act 2013); public interest (Section 4 Defamation Act 2013); 'absolute privilege' and 'qualified privilege' if acting in good faith, as expounded in the case of *Adam v Ward* [1917] AC 309. 530-536 [Jeremy Lewis and others, *Whistleblowing: law and practice* (3rd edn, OUP 2017) 532].

[352] Vol 5 Table 76 entry 132 R19: 'If you make allegations which are malicious, for personal gain or you have no reasonable grounds to believe are true, then you could face defamation proceedings or a prosecution for wasting Police time.'; R34: 'If you publish information which turns out not to be true and which has the potential to damage another person's interests or reputation, there is a risk that you could be sued for defamation.'; R114: 'However, making unfounded allegations that are clearly malicious or made for personal gain may be treated as a disciplinary offence (and may give rise to an action for defamation).'; R137: '10.7 If you make allegations that you have no grounds to believe are true, or maliciously or for personal gain then you could face defamation proceedings or a prosecution for wasting police time.'; R287: 'If however you make malicious or vexatious allegations, disciplinary action may be taken against you and you may also leave yourself open to an action for defamation.'

[353] ibid entry 132 R13, R14, R55, R187, R231, R313, R384, R407 in respect of LAPPs, and NR24, NR29, NR55, NR64, NR65 in respect of non-LAPPs.

A second aspect of Recital 97 concerns placing the burden of proof on the person bringing proceedings against the whistleblower, unless the whistleblower has not met the conditions specified in the Directive. In defamation cases in England and Wales, the burden of proof is upon the defendant (where the plaintiff can demonstrate actual or potential serious financial harm) which can generate reluctance in whistleblowers, as would-be defendants in such cases, to expose wrongdoing, and has led to calls for change to Part IVA and the Defamation Act 2013.[354] Noting also the geographical limitation of the Defamation Act 2013 across the UK nations, the *de jure* and *de facto* situations do not appear to meet the expectations of this part of Recital 97.

Two aspects of Recital 98 relate to trade secrets. Firstly, expectation that protections should only apply where the Directive has been complied with and that disclosure is necessary to report an in-scope breach. Secondly, that competent authorities receiving such disclosures prevent unnecessary use or disclosure of trade secret information in following-up reports.[355] Evidence from the research suggests that the Trade Secrets (Enforcement, etc.) Regulations 2018 provide the facility to bring action for trade secret abuse whilst preserving the confidentiality of the information during investigation and proceedings.[356] No contrary indicators were found in prescribed persons' documentation to suggest a different *de facto* position. The UK's *de facto* and *de jure* approach appears compatible with Recital 98.[357]

Recital 99 exhorts Member States to fund legal support against retaliation, noting the financial straits whistleblowers may face after raising concerns.[358] This research found that, with limited

[354] The Defamation Act 2013 has limited application in Scotland and no application at the time of writing (December 2023) in Northern Ireland; David Lewis, 'Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance between the Rights of Whistleblowers, the Media and Alleged Wrongdoers?' (2018) Industrial Law Journal 47(3) 339 362; ERA 1996.
[355] Directive (EU) 2019/1937 (n 1).
[356] Section 2 defines trade secret; Section 5 penalises the unlawful acquisition, use or disclosure of trade secrets; Section 10 requires the preservation of confidentiality during proceedings.
[357] Vol 5 Table 76 entries 132, 134 and 135.
[358] Directive (EU) 2019/1937 (n 1).

exceptions in some discrimination cases, civil legal aid is not available to support a litigating whistleblower and suggests deteriorating availability of advice and support to litigants.[359] A small number of prescribed persons' policies and procedures (2.2% and 3.8%, respectively) refer to more general assistance and support from the Advisory, Conciliation and Arbitration Service (ACAS), trade unions and Protect; however, it cannot be concluded that the *de jure* or *de facto* positions systematically achieve Recital 99's aspiration.[360]

4.4.1.g Evaluating Recitals 100-110

Recital 100 addresses protecting the reputation of concerned persons ie subjects of a whistleblowing disclosure.[361] Part IVA does not engage with the rights of the concerned person and neither do the policies and procedures examined in the research. However, in the 3.7% of LAPP policies where discipline was mentioned, it was stated that proceedings would not be abated because the subject had made a whistleblowing disclosure.[362] In terms of the balance of the protection of whistleblowers and persons concerned, it is suggested here that in the UK it is more likely that the employer will be the person concerned and have access to greater resources than the whistleblower. Recital 100 also upholds the rights of defence and remedy for the person concerned. Though Part IVA is silent on this, the Civil Procedure Rules 1998 provide an 'overriding objective' of fairness towards and between the parties in proceedings, thus providing *de jure* equivalence to Recital 100.[363] As in respect of the first element of Recital

[359] Vol 5 Table 76 entry 136; Protect, 'Why legal aid for whistleblowers is needed now' (2019) <https://protect-advice.org.uk/why-legal-aid-for-whistleblowers-is-needed-now/> accessed 2 January 2023; Gov.UK, 'Official Statistics: 4. Employment Tribunal and Employment Appeal Tribunal, 2019/20' (2021) <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2020/tribunal-statistics-quarterly-april-to-june-2020#employment-tribunal-and-employment-appeal-tribunal-201920> accessed 14 November 2022; Gov.UK, 'Whistleblowing for employees' (no date) <https://www.gov.uk/whistleblowing> accessed 12 November 2022.

[360] LAPPs which refer to ACAS, Citizens Advice and trade union support are R2, R82, R109, R156, R172, R321, R344, R347, R381, whilst non-LAPPs are NR16, NR62, NR72.

[361] Directive (EU) 2019/1937 (n 1).

[362] Vol 5 Table 76 entry 137 R21, R23, R38, R112, R122, R126, R153, R182, R153, R186, R198, R218, R276, R344, R383.

[363] Section 1.1 Civil Procedures Rules 1998.

100, policies and procedures examined in this research predominantly focus on the whistleblower, in circumstances where the employer is more likely to be the person concerned and have legal etc resources available. The *de facto* position appears not in conflict with Recital 100 and the *de jure* situation, specifically regarding preserving confidentiality of information, also appears to accord.[364]

Recital 101 proposes that 'any person' suffering 'prejudice' from an inaccurate or misleading disclosure should be able to receive statutory protections and remedies.[365] These include compensation when the disclosure was misleading and deliberate. The Recital distinguishes 'any person' and 'persons concerned', with the former a broader construction that raises legal and practical implications about proximity and causation of loss and harm. Whilst in the UK the equality of arms principle between parties in proceedings and the express or implied contract of trust and confidence which requires employers to protect employees from unfounded allegations, suggest elements of adherence to Recital 101, the *de jure* evidence is not considered sufficiently explicit and compelling. Similarly, the *de facto* posture of prescribed persons is largely circumscribed to the whistleblower rather than to sources of the breach or failure, or retaliation, and does not appear analogous to the Recital.[366] Recital 102 emphasises penalisation of retaliation and deliberate reporting of false allegations.[367] Retaliation has been discussed in the preceding Recitals and, generally, is consistent with UK law and practice, though in respect of the narrower category of worker defined in ERA 1996. It was found in the research that 55.3% of LAPPs censure malicious allegations, as do 6.4% of non-LAPPs indicating a degree of *de facto* alignment.[368]

[364] Vol 5 Table 76 entry 138, and per Vol 2 Table 24 only 2.9% of LAPP policies were found not to reference 'confidentiality'.
[365] Directive (EU) 2019/1937 (n 1).
[366] Vol 5 Table 76 entry 139.
[367] Directive (EU) 2019/1937 (n 1).
[368] Vol 5 Table 76 entry 140.

Recital 103 (see also Recital 70 regarding minor breaches) explains that the decisions of competent authorities to close reports deemed minor, repetitive or not deserving of 'priority treatment' can be the subject of judicial review.[369] Decisions of UK public bodies (including prescribed persons) are also subject to judicial review which creates a similar *de jure* position to Recital 103. The grounds reported by prescribed persons upon which they will not investigate have been identified, and the potential for judicial review of decisions was mentioned by one LAPP and one non-LAPP.[370] It is concluded that the *de facto* approach does not conflict with the *de jure* one or the Recital.

Recital 104 describes how the Directive sets minimum standards for Member States to meet or exceed in respect of reporting persons.[371] In that regard, this Chapter assesses how the UK compares, with conclusions drawn in Section 4.5 of the thesis.[372] Recital 105 describes the purpose of the EU internal market as including the free movement of goods and services.[373] This Recital is not relevant as the EU and UK have agreed that there will not be free movement between them, except while the Northern Ireland protocol applies.[374]

Recital 106 commits to an evidence-based approach to future changes to the Directive.[375] Whilst a *de jure* mechanism for changes to whistleblowing legislation is not included in PIDA

[369] Directive (EU) 2019/1937 (n 1).
[370] Vol 3 Table 39 (regarding LAPPs), Vol 4 Table 63 (regarding non-LAPPs) and Vol 5 Table 76 entry 141 regarding prescribed persons referring to judicial review - R72: 'If the complaint was closed following consideration of allegations by an investigating committee panel (ICP) then the only recourse would to be to apply for judicial review of how the decision was reached.'; NR48: 'a person has committed a breach of law, for example; breach of a statutory requirement, contractual obligations, or common law obligations such as negligence, nuisance, or defamation (in Government and public authorities, it could also include an official's reasonable belief that a decision of the authority could be overturned by judicial review).'
[371] Directive (EU) 2019/1937 (n 1); Vol 5 Table 76 entry 142.
[372] Also, Vol 5 Tables 77 and 78.
[373] Directive (EU) 2019/1937 (n 1).
[374] In respect of the Northern Ireland Protocol, HM Revenue & Customs, 'Guidance: Changes to accounting for VAT for Northern Ireland and Great Britain from 1 January 2021' (2020) https://www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021 accessed 2 January 2023.
[375] Directive (EU) 2019/1937 (n 1); in respect of subsidiarity, European Parliament, 'Fact Sheet on the European Parliament: The principle of subsidiarity' (no date) <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-

1998, adjustments to this legislation have been made over time. Most notably, PIDA 1998 was amended by ERRA 2013 and at the time of writing, the UK Parliament's APPG on Whistleblowing is commending changes to Part IVA.[376] Thus, it can be said that there is a *de facto* route for amendments to the primary statute.[377] Recital 107 describes how consequential changes are made to other legislation affected by amendment of the Directive.[378] There is a well-proven approach in the UK to amending laws, and the expectations of the Recital are met in that regard.[379]

Recital 108 formalises the application of the principle of subsidiarity to the operation of the Directive.[380] The UK, as a single state, does not operate a supra-national body like the EU and therefore, distinct from the operation of devolved powers, subsidiarity does not operate on a *de jure* basis. One would therefore expect to see consistency in the application of laws on a *de facto* basis but that is not the case [eg an equivalent of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 adopted in Northern Ireland]. Also, Welsh Ministers and government departments are exempt from the requirements of the 2017 Regulations.[381] Together, these national differences illustrate the uneven operating environment of the whistleblowing legal framework within the UK.[382] However, it is concluded that Recital 108 is not relevant to *de facto* and *de jure* arrangements in the UK.[383]

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subsidiarity#:~:text=When%20applied%20in%20the%20context,central%2C%20regional%20or%20local%20level> accessed 25 June 2023.

[376] Extant as at December 2023.

[377] Vol 5 Table 76 entry 144; Enterprise and Regulatory Reform Act 2013; ERA 1996; September 2023; Georgina Halford-Hall, 'The Whistleblowing Bill' (2022) <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_ffa164221ae540bfafdeb8206a0274db.pdf> accessed 5 June 2022.

[378] Directive (EU) 2019/1937 (n 1).

[379] Cabinet Office, Guide to Making Legislation (2022) 1 69 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf> accessed 25 June 2023; Vol 5 Table 76 entry 145.

[380] Directive (EU) 2019/1937 (n 1).

[381] Reports on Disclosures of Information Regulations 2017 (n 33).

[382] Vol 4 Table 60 entries NR44, NR45, NR46; Vol 5 Table 76 entry 146 NR44: 'Welsh Ministers, and therefore CIW, are exempt from the 2017 Reporting Regulations so does not need to report.'

[383] Vol 5 Table 76 entry 146.

Recital 109 describes 9 fundamental rights of individuals which the Directive should uphold.[384] Individually, these obligations have been evaluated throughout this Chapter except 'freedom to conduct a business' and 'right to good administration'.[385] It is to be noted that the freedom to conduct a business and right to good administration are not included in the material scope of Article 2 of the Directive.[386] However, for completeness' sake, examination of the *de jure* position in the UK establishes that similar guidance and laws exist which appear compatible with the Recital's expectations regarding business freedoms and good administration.[387] However, whether the absence of good administration could amount to a qualifying disclosure under Section 43B ERA 1996 is not clear cut. The research identified 7.1% and 7.7% respectively of prescribed persons' policies and procedures cited 'maladministration' or 'misadministration' as a ground for disclosure.[388] Only two LAPPs (R81 and R392) added to the criterion 'which may amount to a breach of the civil or criminal law' thus potentially bringing maladministration within the ambit of Section 43B(1)(a) or (b) and thereby qualify for protection.[389] Overall, it is concluded that the *de facto* and *de jure* arrangements could satisfy the intentions of Recital 109 regarding business and administration rights (albeit those freedoms and rights are not directly referred to in the material scope of the Directive).[390] The

[384] Directive (EU) 2019/1937 (n 1); in summary, freedoms of: expression and information, and to conduct a business; rights to: protection of personal data, consumer protection, health protection, environmental protection, good administration, effective remedy, and legal defence.'

[385] ibid Recital 109.

[386] Directive (EU) 2019/1937 (n 1).

[387] Vol 5 Table 76 entry 147. Post Brexit, the UK introduced guidance to assist businesses to navigate legal requirements [Competition & Markets Authority, 'CMA guidance; Vertical Agreements Block Exemption Order', (2022) 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf> accessed 2 January 2023; local government ombudsmen have been established in each of the four constituent nations in the UK through the following legislation; England (Local Government Act 1974), Northern Ireland [Public Services Ombudsman Act (Northern Ireland) 2016], Scotland (Scottish Public Services Ombudsman Act 2002), Wales [Public Services Ombudsman (Wales) Act 2005, as amended].

[388] Vol 5 Table 76 entry 147 R9, R22, R35, R47, R57, R63, R73, R81* (*'which may amount to a breach of the civil or criminal law.'), R123, R126, R141, R146, R147 R194, R195, R211, R235, R242, R258, R292, R346, R366, R370, R382, R383, R384, R392*, R400, R402 regarding LAPPs, and NR2, NR8, NR60, NR70, NR71 NR74 in respect of non-LAPPs.

[389] ERA 1996. However, it has been noted in this thesis that prescribed persons can include matters in their policies and procedures which may not be qualifying disclosures.

[390] Directive (EU) 2019/1937 (n 1).

final Recital, 110, is purely administrative and is not relevant to Part IVA and UK operating practices.[391]

4.5 Analysis

A summary of the qualitative analysis of the *de jure* and *de facto* alignment of UK whistleblowing and other relevant laws with the Directive was prepared in which it was assessed that, together, UK laws arguably meet 55.4% of the *de jure* intentions described in the Recitals, and exceed some of these expectations (2.0% of the *de jure* and 0.8% *de facto*).[392] Conversely, UK law does not meet 35.8% (*de jure*) and 35.1% (on a *de facto* basis) of outcomes, a sizeable variation with contemporary EU whistleblowing legislation. Earlier chapters noted incoherent application of UK law by some prescribed persons, mainly amongst LAPPs.[393] However, the research has identified that some of the inconsistencies, principally those relating to the inclusion of non-workers and *prima facie* non-qualifying disclosures included in prescribed persons' responses and policies, unwittingly bring the UK's *de facto* approach closer to the Recitals' intended outcomes than the UK's *de jure* position (56.8% v 55.4%).[394] Also, the 'does not meet' value is evaluated as being lower in *de facto* application than *de jure* conception (35.1% v 35.8%).[395] Of most significance to the research is understanding those aspects where the UK legal framework differs from the more contemporary perspective of the Directive, taking account of its particular political and economic context, and how international practice, if adopted, could improve the UK's approach. These issues are considered further in Chapter 5.

[391] ibid; ERA 1996; Vol 5 Table 76 entry 148.
[392] Vol 5 Table 77's summary of Vol 5 Table 76's entries (n=148).
[393] Chapter 2 Section 2.16 and Chapter 3 Section 3.11.
[394] Vol 5 Table 77. NB when 'exceeds the Directive' is taken into account, the proportions of *de jure* and *de facto* compliance are the same at 57.4%.
[395] Vol 5 Table 77.

The areas of divergence observed in the research between the Recitals and Part IVA were divided into three strata for further analysis.[396] In the first stratum, the 'top 3' issues identified (59.4%; n=32) were: achieving effective communications with the whistleblower; the persons and organisations to be protected; and the consistent application of common minimum standards, including exchanging information and learning between competent authorities. The second group of differences (31.3%) was expectations as to follow-up; support and remedies for affected persons; and whistleblowers' ability to resort to 'protected' public reporting. The third stratum (9.4%) was the enhanced enforcement ethos ie holding to account those who retaliate, and the application of a just culture approach (Vol 5 Table 78).[397]

From this analysis, it appears that more than 60% of the issues identified could be addressed without the need for law change in the UK. These elements are improved communication with whistleblowers (25%); consistent application of the law, and co-operation and reviews (18.8%); follow-up of disclosures (12.5%); and an enforcement mind-set (6.3%). However, the remainder would require law change - persons and organisations that should be protected (15.6%); and support and remedies for affected persons (ie persons other than workers) (9.4%). In respect of just culture, it is difficult to countenance when the commission of, for example, a criminal offence or breach of civil law [Section 43B(1)(a) and (b)] could be regarded as an honest mistake in which a just culture outcome could be contemplated.[398] That area of divergence between Part IVA and the Directive is not considered further in this thesis.[399]

4.6 Conclusions

The main conclusions drawn from the analysis in Chapter 4 are:

[396] Directive (EU) 2019/1937 (n 1); ERA 1996.
[397] 'Just culture' raised in Recital 9 Directive (EU) 2019/1937 (n 1).
[398] Vol 5 Table 78 final row.
[399] ERA 1996; Recital 9 Directive (EU) 2019/1937 (n 1).

12. UK law meets the majority of the intended outcomes expressed in the Recitals of the Directive and in a small number of instances, exceeds the Directive's expectations.

13. A higher level of 'cohesion' with the Recitals is noted in the *de facto* arrangements implemented by prescribed persons than the *de jure* position of UK law.

14. Where differences are observed between the Directive and UK law, some are profound; most notably the broader range of persons making material disclosures (and their organisations, in some instances) which receive the protection of the Directive, and the statutory support and remedies available to this wider group. These can only be addressed by changes to UK law. However, law change in the UK is not straightforward particularly where, as found, there is no review mechanism in-built to PIDA 1998 or Part IVA ERA 1996 to provide an evidence-base to support change.

15. Other significant differences observed (improved communication with whistleblowers; consistent application of the law; co-operation and reviews; follow-up of disclosures; and an enforcement mind-set) probably could be improved in the UK without recourse to law change.

(Conclusions and recommendations have a running number from the preceding Chapter)

4.7 Recommendations

The principal recommendations arising are:

7. Pragmatic mechanisms, which do not require law change, should be found to include the additional, value-adding aspects of Directive EU 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law in the *de facto* arrangements implemented by prescribed persons.

8. A system of oversight should be identified and designated to ensure that where Part IVA ERA 1996 and approved relevant international practice are not being followed, credible means to challenge and secure improvement are available.

Chapter 5: International practice from a selection of countries with similar legal traditions to the UK

5.1 Introduction

Chapter 5 considers how some jurisdictions selected for research because they have a historical, cultural and legal affinity with the UK, address the principal gaps of inconsistency and lack of oversight raised in this thesis and observed in other research about whistleblowing in the UK. The logic employed is that where 'similar' countries may have alighted on a solution through their laws, it is appropriate to assess its possible application to the UK. However, and as will be seen in the Chapter, no perfect solution presents itself, but relevant practice is identified which may help mitigate some of the weaknesses observed in the UK, and without the need for law change.

5.1.(a) Objective

The objective of this Chapter is to identify countries where the democratic-legal context is similar to that of the UK; where whistleblower laws post-date those of the UK (with the inference that they are more contemporary); where evaluated good practice might be found, and where the application of that practice in the UK is feasible without recourse to law change.

5.1.(b) Methodology

In Chapters 2 to 4, the research identified weaknesses to be addressed if UK whistleblowing legislation is to be more effective. The first major weakness is that there is inconsistent, and even confused, application of the law as described in some prescribed persons' whistleblowing policies, processes and procedures. Secondly, there is no oversight of whistleblowing arrangements which, whilst a defect in its own right, exacerbates the first problem of

inconsistency. Thirdly, there is no adequate mechanism to hold prescribed persons to account for ensuring that their policies, processes and procedures are adequate for their purpose. Fourthly, the problems of inconsistency and non-accountability are found to be worse amongst LAPPs as compared to non-LAPPs. These conclusions suggest lines of inquiry in respect of other jurisdictions' arrangements and which are examined in this Chapter.

5.2 Law change

At the time of writing, the APPG is proposing substantial changes to UK law in the form of a new Act to address the deficits identified in their research.[1] Amongst the APPG's contentions is an observation about adherence to the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 that '[t]these reports demonstrate not only a fundamental failure of the law but a failure by the prescribed persons to understand their role and responsibility, thereby undermining the very purpose of the legislation.'[2] Separately, a draft Private Member's bill, 'Protection for Whistleblowing Bill', proposes an 'Office of the Whistleblower', the functions of which would include setting minimum standards for whistleblowing policies, procedures and reporting structures, and to monitor and enforce compliance with the standards.[3] More radically, the APPG proposes criminalising whistleblowing detriment, the

[1] December 2023; All Party Parliamentary Group, 'Whistleblowing Bill' (2022) Section 4(6)(a)-(c) <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_4490728b5bc747e28770ed8efbe475e3.pdf> accessed 19 February 2023; Georgina Halford-Hall, 'The Whistleblowing Bill' (2022) https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_ffa164221ae540bfafdeb8206a0274db.pdf> accessed 19 February 2023.

[2] Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 [hereafter, 'Reports on Disclosures of Information Regulations 2017 (n 2)']; Georgina Halford-Hall, 'The Whistleblowing Bill' (2022) 5 https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_ffa164221ae540bfafdeb8206a0274db.pdf> accessed 19 February 2023.

[3] Claire Brader, 'Protection for Whistleblowing Bill [HL]: HL Bill 27 of 2022-23' (House of Lords 2022) <https://researchbriefings.files.parliament.uk/documents/LLN-2022-0044/LLN-2022-0044.pdf> accessed 3 April 2023.

making of false statements, and the destruction or concealment etc. of relevant information required by the Office of the Whistleblower.[4]

If progressed, many of the proposals envisaged would probably place UK law to the fore of international practice, and address many of the concerns identified in this thesis. However, rational consideration entails evaluating how likely it is that UK law will be changed in the way proposed by these groups whose laudable intentions and efforts, it must be noted, have no statutory locus. In March 2023, the UK Government announced a review to 'examine the effectiveness of the whistleblowing framework in meeting its original objectives' that 'will consider how the whistleblowing framework currently operates, including PIDA and subsequent legislative and non-legislative interventions'.[5] However, it is expected that the research 'will be concluded by Autumn 2023', which suggests only a 6 to 9-month project.[6] Whilst the law change that the APPG and Private Member's bill hope for may come about, or materialise as a result of the Government review, it is realistic to consider a non-statutory approach which is evolutionary in seeking to leverage current know-how, as explained below.

The first step in that regard is to identify and evaluate other international practice, in addition to the Directive discussed in Chapter 4.[7] The rationale behind the choice of which practice should be considered hinges principally on two factors; relevancy and affinity, where 'relevancy' means that the body of non-UK law considered has been implemented or substantially amended since 2nd July 1998 (when PIDA 1998 received Royal Assent); and where 'affinity' means the state has a demonstrable cultural and/or legal connection with the

[4] All Party Parliamentary Group, 'Whistleblowing Bill' (2022) Section 4(6)(d), Sections 22 and 23 <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_4490728b5bc747e28770ed8efbe475e3.pdf> accessed 19 February 2023.

[5] Department for Business & Trade, 'Review of the whistleblowing framework: terms of reference' (2023) <https://www.gov.uk/government/publications/review-of-the-whistleblowing-framework/review-of-the-whistleblowing-framework-terms-of-reference> accessed 3 April 2023.

[6] No published indication is available as at 1 January 2024 that the review has been concluded.

[7] Directive EU 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law [hereafter, 'Directive EU 2019/1937 (n 7)'].

UK. With these criteria in mind, Australia, Canada, Ireland, New Zealand, and South Africa were chosen for evaluation.

The next step in this methodology is to compare these jurisdictions' models with a body of research capable of evaluating and discriminating their adherence (along with that of the UK) to effective practice. The Government Accountability Project and International Bar Association have produced regular overviews (most recently by Feinstein and others) of the protection of whistleblower litigants afforded by whistleblower legislation through comparison with a 'checklist' of 20 factors assessed as good practice over 40 years of research.[8] From these overviews, it is possible to describe how the nominated countries fare in comparison with the evaluation checklist.[9] The UK is included in the analysis to provide comparison with the other jurisdictions, as is the Directive given its significance in this thesis.[10] Other sources identify similar outcomes to those distinguished in the overviews such that a degree of consensus can be observed about how to assess whistleblowing legislation through judicial outcomes.[11] A hierarchy of alignment of countries' laws (and the Directive) with good practice (per Feinstein

[8] The 20 factors are (i) Broad whistleblowing disclosure rights with 'no loopholes' (ii) Wide subject matter scope, with 'no loopholes' (iii) Right to refuse violating the law (iv) Protection against spillover retaliation at the workplace (v) Protection for those beyond the workplace (vi) Reliable identity protection (vii) Protection against full scope of harassment (viii) Shielding whistleblower rights from gag orders (ix) Providing essential support services for paper rights (x) Right to a genuine day in court (xi) Option for alternative dispute resolution with an independent party of mutual consent (xii) Realistic standards to prove the violation of rights (xiii) Realistic time frame to act on rights (xiv) Compensation with 'no loopholes' (xv) Interim relief (xvi) Coverage for legal fees and costs (xvii) Transfer option (xviii) Personal accountability for reprisals (xix) Credible internal corrective action process (xx) Transparency and review, per Samantha Feinstein and others, 'Are whistleblowing laws working?' (Government Accountability Project and International Bar Association 2021) 13 <https://whistleblower.org/wp-content/uploads/2021/03/Are-whistleblowing-laws-working-report-2021March.pdf> accessed 22 January 2023 [hereafter, 'Feinstein and others (n 8)'].

[9] Vol 5 Table 79.

[10] Directive (EU) 2019/1937 (n 7).

[11] Daniel Kim, 'Transparency International Canada: Report on Whistleblower Protections in Canada' (TI 2015) 3 <https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5e3afd01c8261f7ac1c71b6b/1580924161466/TI-Canada_Whistleblower-Report_Final1.pdf> accessed 4 March 2023 [hereafter, 'Daniel Kim (n 11)']; Organisation for Economic Co-operation and Development, 'G20 Anti-corruption Action Plan: Protection of Whistleblowers, Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (OECD 2011); Transparency International, 'International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest (TI 2013) <https://www.transparency.org/en/publications/international-principles-for-whistleblower-legislation> accessed 13 February 2022.

and others' approach) is presented and from which it can be seen that the Directive and Australian laws are foremost, with Canada's legislation least compatible (Vol 5 Table 80).[12] The national legislation of the selected countries is considered in alphabetical order below.

5.3 Australia: The Public Interest Disclosure Act 2013 (PIDA 2013)

This section examines Australia's federal whistleblowing law, the Public Interest Disclosure Act 2013 (PIDA 2013), but not the laws operating at state and territory level.[13] Australia's federal legislation, along with the Directive, is in the top echelon of observed good practice as evaluated by Feinstein and others, and the analysis below seeks to identify which aspects of Australian law could be adopted in the UK without law change.[14] By way of context, Marcia Miceli and Janet Near placed research survey respondents in Australia in the upper margin of workers who perceived wrongdoing and retaliation in the workplace when compared to respondents in Norway and the USA.[15] According to David Lewis, AJ Brown and Richard Moberly, the Fitzgerald Inquiry into political and police corruption in the late 1980s was a powerful driver of whistleblowing reform because it was found that police officers who were aware of corruption around them felt powerless to act.[16] Fitzgerald's recommendations were

[12] Directive (EU) 2019/1937 (n 7).

[13] Australia's six states' and two territories' whistleblowing laws are: New South Wales [Protected Disclosures Act 1994 (NSW)]; Queensland [Public Interest Disclosure Act 2010 (Qld)]; South Australia [Public Interest Disclosure Act 2018 (SA)]; Tasmania [Public Interest Disclosures Act 2002 (Tas)]; Victoria [Public Interest Disclosures Act 2012 (Vic)]; Western Australia [Public Interest Disclosure Act 2003 (WA)]; Australia Capital Territory [Public Interest Disclosure Act 2010 (ACT)]; Northern Territory [Public Interest Disclosure Act 2008 (NT)].

[14] Of the 20 factors, 16 factors were said to apply to Australia (i) Broad whistleblowing disclosure rights with 'no loopholes' (ii) Wide subject matter scope, with 'no loopholes' (iii) Protection against spillover retaliation at the workplace (iv) Protection for those beyond the workplace (v) Reliable identity protection (vi) Protection against full scope of harassment (vii) Shielding whistleblower rights from gag orders (viii) Providing essential support services for paper rights (ix) Right to a genuine day in court (x) Realistic standards to prove the violation of rights (xi) Compensation with 'no loopholes' (xii) Interim relief (xiii) Coverage for legal fees and costs (xiv) Personal accountability for reprisals (xv) Credible internal corrective action process (xvi) Transparency and review [Feinstein and others (n 8)]; Directive (EU) 2019/1937 (n 7).

[15] Marcia P Miceli and Janet P Near, 'An International Comparison of the Incidence of Public Sector Whistle-Blowing and the Prediction of Retaliation: Australia, Norway, and the US' (2013) 72(4) Australian Journal of Public Administration 433 438.

[16] David Lewis, AJ Brown and Richard Moberly, 'Whistleblowing, its importance and the state of the research' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 17; Queensland Government, 'Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of

far-reaching and included the establishment of a Criminal Justice Commission 'permanently charged with the monitoring, reviewing and initiating reform of the administration of criminal justice.'[17] Evidence of the need for improved whistleblower protections continued to manifest in the early 2000's following whistleblower revelations of sub-standard healthcare in some Australian hospitals.[18] The Act came into effect on 15 January 2014, but its application only to public officials has been subject of subsequent review and recommendation, and there remains no consolidating national legislation to bring equivalence in Australia's private sector.[19] However, some developments in extending whistleblower protection to the private sector are notable in amendments to the Corporations Act 2001 and the Taxation Administration Act 1953.[20] Australia was ranked 13 out of 180 countries evaluated in TI's 2022 Corruption Perceptions Index, an improvement of two places over its 2021 position, whilst the UK was ranked 18.[21]

5.3.1 Transposing salient features of Australia's PIDA 2013 to the UK context without law change

Inquiry into Possible Illegal Activities and Associated Police Misconduct' (Brisbane 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989) <https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/The-Fitzgerald-Inquiry-Report-1989.pdf> accessed 4 March 2023.

[17] Queensland Government, 'Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct' (Brisbane 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989) 308 <https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/The-Fitzgerald-Inquiry-Report-1989.pdf> accessed 4 March 2023.

[18] Thomas A Faunce and Stephen N C Bolsin, 'Three Australian whistleblowing sagas: lessons for internal and external regulation' (2004) 181(1) MJA 44 46.

[19] Australian Research Council, 'The Public Interest Disclosure Act 2013' (2022) <https://www.arc.gov.au/about-arc/corporate-policies/public-interest-disclosure-act-2013> accessed 22 September 2023; Commonwealth of Australia, Parliamentary Joint Committee on Corporations and Financial Services, 'Whistleblower Protections' (2017) x <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report> accessed 5 March 2023.

[20] Amendments to the Corporations Act 2001 (Cth) Section 9.4AAA and the Taxation Administration Act 1953 (Cth) Part IVD, were introduced by the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth) which received Royal Assent on 12 March 2019 and came into effect on 1 July 2019.

[21] Transparency International, 'Corruption Perceptions Index' (2022) <https://www.transparency.org/en/cpi/2022/index/aus> accessed 18 March 2023.

It was concluded from the research that elements of the Australian law could be suitable for inclusion in the UK context without law change (Vol 5 Table 81). Section 12 of PIDA 2013 makes plain that a whistleblower remains culpable for their own wrongdoing. There would be no requirement for a law change in the UK for this principle to be included in prescribed persons' guidance. Section 15 sets out the wide-ranging civil powers available to some federal courts to issue injunctions against persons victimising a whistleblower, and those who aid, abet, counsel, conspire or otherwise induce detriment against a whistleblower.[22] Whilst similar powers are available to UK courts, it has already been discussed that lack of funds can inhibit whistleblowers from taking early action to prevent or curtail victimisation.[23] Setting out more clearly in UK guidance what legal interventions may be available would not require law change. Section 19 creates an offence of taking, or threatening, a reprisal.[24] The inclusion of such an offence in UK criminal or employment law would require law change but, as a minimum, it should be clear in any guidance that the taking etc. of reprisals against whistleblowers is forbidden and such action as the organisation can take against those responsible will be taken (including dismissal where the prescribed person is the employer). Section 20 makes it an offence to disclose information that would identify a whistleblower.[25] In some circumstances this may amount to an offence in the UK but in others, not; so published guidance should state clearly and simply that identifying workers who have made a whistleblowing disclosure is not acceptable (except for specified purposes such as in the interests of justice or the investigation of a crime) and employers are expected to act to challenge, and sanction where appropriate, those responsible.[26] Section 28 provides that a

[22] PIDA 2013.
[23] Burcak Dikmen, 'Why legal aid for whistleblowers is needed now' (Protect 2019) <https://protect-advice.org.uk/why-legal-aid-for-whistleblowers-is-needed-now/> accessed 2 January 2023.
[24] PIDA 2013.
[25] ibid.
[26] Article 12 Directive (EU) 2019/1937 (n 7); Section 20 of Australia's Public Interest Disclosure Act 2013; Section 16A of Ireland's Protected Disclosures (Amendment) Act 2022; Section 17 of New Zealand's Protected Disclosures (Protection of Whistleblowers) Act 2022; Sections 22 and 44 of Canada's Public Servants Disclosure Protection Act 2005.

disclosure can be accepted where made anonymously, and even where it is not asserted formally by the discloser that the 'disclosure is made for the purposes of the Act'.[27] As noted, some UK prescribed persons suggest that they will not accept anonymous disclosures whereas others do accept them, suggesting why a consistent position should be set out in guidance.[28] Section 48(i)(i) and (ii) PIDA 2013 affords discretion to the investigator not to investigate where it is impractical to do so (eg where contact details of the discloser are not available), so revised UK guidance could allow for this, but after the matter has been initially assessed as a qualifying disclosure (where there is sufficient information to make that determination). Section 48 also sets out other bases to support a discretion not to investigate, and to curtail an investigation.[29] Grounds include that the person is not a relevant person (a 'worker' in the UK context), the matter raised is not a qualifying disclosure, the matter is already under investigation, the discloser does not wish it to be investigated, or its 'age' makes investigation unfeasible or disproportionate.[30] With minor adjustment for the UK context, non-statutory guidance could help bring a degree of consistency to the myriad and imprecise criteria offered by some prescribed persons.[31] Section 53 makes an obvious but arguably necessary statement that the investigator (of the disclosure) can make enquiry, and seek as well as receive information from anyone considered relevant to the investigation.[32] Such a statement could be particularly pertinent where, for example, an employer may be tempted to limit or curtail investigation. Although the 'search for the truth' may be an axiom, no evidence was found in this research that this principle is articulated in the UK policies, procedures and processes examined. Section 61 sets out the reciprocal requirement upon the discloser to use their 'best endeavours' to assist the investigation (albeit the discloser in the PIDA 2013 context will be a

[27] PIDA 2013.
[28] Vol 2 Table 9 item Q.
[29] PIDA 2013.
[30] ibid.
[31] Detailed in Vol 2 Tables 9 and 10, and Vol 3 Tables 39 and 40.
[32] PIDA 2013.

public official).[33] Non-statutory guidance in the UK could express this simple but important expectation (noting that existing Government guidance is also non-statutory).[34]

In respect of consistency and a structured approach to investigations, Section 51 requires that the investigator prepares a report which includes what was investigated, the duration, findings, action taken, and any evidence of detriment identified.[35] Some redaction would be appropriate where sensitive information is involved. These criteria appear logical and relevant and, indeed, are similar to aspects of the requirements of Sections 3 and 5 Prescribed Persons (Reports on Disclosure of Information Regulations) 2017.[36] UK guidance should set out the areas to be covered in an investigation, and where a prescribed person is a regulator or otherwise has powers to investigate a disclosure, preparing a report which meets the criteria (and of Sections 3 and 5 of the 2017 Regulations) should be feasible without law change.[37]

5.3.1.a Keeping disclosers informed

Logically, whistleblowing procedures and processes should describe what will happen when a disclosure is made. Section 59 places this requirement on an organisation's 'principal officer', as well as creating obligations to preserve confidentiality (with certain caveats), to protect against unlawful detriment, and to respond appropriately to recommendations made by the investigator.[38] It is feasible to include these points (to the extent that UK prescribed persons' existing remits permit) in non-statutory guidance.

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[33] PIDA 2013.
[34] Department for Business Innovation & Skills: 'Whistleblowing: Guidance for Employers and Code of Practice' (2015) <https://assets.publishing.service.gov.uk/media/5a819ef5e5274a2e87dbe9e3/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf> accessed 22 December 2022; Department for Business, Energy & Industrial Strategy: 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf> accessed 22 December 2022.
[35] PIDA 2013.
[36] Reports on Disclosure of Information Regulations 2017 (n 2), in particular, Section 5(a)-(c).
[37] ibid.
[38] PIDA 2013.

A theme which appears regularly in PIDA 2013 is the statutory requirement to keep stakeholders, particularly the discloser, informed at all stages from first report to conclusion. According to the evidence gathered in this research, the content and timing of communications with whistleblowers are not mandated, or consistent in UK policies and processes evaluated.[39] It is desirable that workers who have made a disclosure, and those who may be the object of it, receive updates at agreed waypoints between initiation and determination of the disclosure.

In addition to Section 48, Section 50 determines that the discloser must be informed (where possible) of a decision not to investigate and the reasons for it, or where it is to be investigated the estimated duration of the investigation.[40] Such a structured approach was rarely identifiable in the whistleblowing policies, procedures and processes examined in this research, but would not require law change to recommend in guidance.

5.3.1.b Undertaking a reprisal risk assessment

In discharging the statutory obligation to prevent detriment, Section 59(1)(a) requires that published procedures include that a risk assessment should be made of the likelihood and nature of reprisals against the discloser.[41] There is no requirement in UK law for prescribed persons to undertake a similar exercise though some suggest that they do, albeit in respect of public interest harm rather than the likelihood of reprisal against the discloser.[42] Again, there will be a resource implication both in undertaking this exercise and where risks are identified which may require action. Resource-constraint is a realistic inhibitor according to the concerns expressed by some prescribed persons.[43] Nevertheless, it appears reasonable that a prescribed person would wish to assess the vulnerability of the whistleblower if for no other reason than

[39] Vol 2 Table 7 FOIA 2000 Question 7 responses.
[40] PIDA 2013.
[41] ibid.
[42] Vol 2 Table 9 items R and T; Vol 2 Table 10 item 6; Vol 3 Table 39 items R and T; Vol 3 Table 40 item 5.
[43] Robert Baldwin and Julia Black, 'Really Responsible Regulation' (2008) 71 Modern Law Review 59 59.

to ensure the continuing engagement of, potentially, a primary witness. Guidance about how to undertake such an assessment would not require law change; indeed, such guidance already exists under Australia's PIDA 2013 and has been in operation for almost a decade.[44] The principal consideration for a UK prescribed person is likely to be what to do about identified risks. It is suggested here that a prescribed person should advise the whistleblower of the risks and the reasonably evaluated likelihood of the risks materialising, takes such steps as the prescribed person is able to within its powers to mitigate those risks, particularly where it is feasible and appropriate to engage with the worker's employer, and to signpost where the whistleblower may seek advice and support which the prescribed person cannot provide.

5.3.1.c Time limits

Section 52 requires that the investigation of a disclosure should be concluded within 90 days of allocation.[45] As was observed in Chapter 4, even when timescales were indicated in UK policies, procedures and processes examined, there was wide variation in the periods suggested and it was noted that Government guidance on timescales only suggested that prescribed persons should be '[m]anaging the whistleblower's expectations.'[46] Whilst there are clearly resource implications in setting any indicative timeline, it must be reasonable to do so given the significance of investigations for those affected. Without recourse to law change, guidance provided to prescribed persons should include establishing and communicating to those affected a timeline for the management of the disclosure with objective bases for any reasonable deviation from it.

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[44] Commonwealth Ombudsman, 'Agency Guide to the Public Interest Disclosure Act (2013) 27 https://www.ombudsman.gov.au/__data/assets/pdf_file/0026/29339/agency_guide_to_pid_act_v1_dec_2013.pdf accessed 20 February 2023.

[45] PIDA 2013.

[46] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 3 March 2023.

PIDA 2013 distinguishes supervisors and managers as having a special responsibility to raise with the organisation (albeit in the public sector) information received by them which could amount to 'disclosable conduct'. Holly Brower and others examine trust between subordinates and managers and posit that the extent of trust shown by managers to their workers 'will also independently predict subordinate outcomes'.[47] A positive benefit of this reciprocity is that workers will increase their discretionary effort beyond their role requirements.[48] However, in its own-motion investigation into compliance with PIDA 2013, the Commonwealth Ombudsman recognised that the 'special obligation' placed on supervisors reinforced the need for '[m]andatory, stand-alone PID training' for them.[49] Reporting in a healthcare context, Pattison and Kline found that trust violations were more likely to be forgiven by workers where the cause was a lack of ability on the part of the manager rather than a lack of integrity.[50] Other research concludes that 'trusting and trustworthy persons are more likely good managers or supervisors (that is, they have probably gained their position because of these traits).'[51] It may follow from the foregoing that where trust is reciprocal between workers and their supervisors, and where supervisors display competence (through training or otherwise), supervisors may be an influential medium in eliciting and referring-on worker insights like public interest disclosures. In the 2016 review of PIDA 2013 the Commonwealth Ombudsman noted the important gatekeeper role played by supervisors but observed that 'supervisors are generally

[47] Holly H Brower and others, 'A Closer Look at Trust Between Managers and Subordinates: Understanding the Effects of Both Trusting and Being Trusted on Subordinate Outcomes' (2009) Journal of Management 35(2) 327 329.
[48] ibid 343.
[49] Commonwealth Ombudsman, 'Investigation into compliance with the Public Interest Disclosure Act 2013 Report no. 03/2022 (2022) 12 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0021/115266/Investigation-into-compliance-with-the-PID-2013.pdf> accessed 22 February 2023.
[50] Jill Pattison and Theresa Kline, 'Facilitating a just and trusting culture' International Journal of Health Care Quality Assurance (2015) 28(1) 11 19.
[51] Anneli Kaasa, Eve Parts, 'Honesty and Trust: Integrating the Values of Individual, Organizations, and the Society' in Tiia Vissak, Maaja Vadi (eds), (*Dis)honesty in Management* (Advanced Series in Management) (Emerald 2013) 37 45.

unaware of their obligations or role under the PID Act'.[52] Non-statutory guidance in the UK should highlight the significant influence that junior managers and supervisors can have in bringing qualifying disclosures to light and maintaining the worker's engagement during the whistleblowing process.

PIDA 2013 applies to disclosable conduct made by public officials only, and Section 61(1) creates a requirement that an official 'use his or her best endeavours to assist the principal officer of an agency in the conduct of an investigation.' No crime is created in failing to do so and neither is there indication in the Ombudsman's 2016 and 2022 annual reports that it was necessary to invoke disciplinary proceedings against staff for not using best endeavours, or that public officials were over-zealous in their willingness to make disclosures.[53] Although no measurable value can be discerned from this exhortation, its inclusion may help set expectation of reasonable co-operation by the discloser with the investigators. From the organisation's point of view, non-cooperation without good cause may afford defensible grounds not to investigate, or to cease investigating, a disclosure. Reference to an ethos of mutual expectation is considered appropriate for inclusion in non-statutory guidance in the UK, noting that employers' duty of care and employees' duties of fidelity to, and co-operation with, the employer are well-recognised as, at least, implicit elements of employment contracts in the UK.[54]

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[52] Commonwealth Ombudsman, 'Submission by the Commonwealth Ombudsman: Review of the Public Interest Disclosure Act 2013 (Cth) (2016) 10 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0020/37442/Submission-to-Public-Interest-Disclosure-Act-2013.pdf> accessed 22 February 2023.

[53] ibid; Commonwealth Ombudsman, 'Investigation into compliance with the Public Interest Disclosure Act 2013 Report no. 03/2022 (2022) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0021/115266/Investigation-into-compliance-with-the-PID-2013.pdf> accessed 23 February 2023.

[54] For 'duty of care and 'duty of fidelity': Acas, 'Employment contracts and the law' (no date) <https://www.acas.org.uk/employment-contracts-and-the-law/employer-and-employee-duties> accessed 22 September 2023; for duty to co-operate, for example, Violence at Work (UK), 'Contract law, (no date) <https://violenceatwork.co.uk/duties-of-employees/> accessed 30 November 2023 regarding implied contractual obligations; Section 7(b) Health and Safety at Work etc. Act 1974 regarding a statutory duty to co-operate with an employer regarding health and safety in the workplace.

Section 72 obliges the Ombudsman to conduct educational programmes for the organisations and officials over which the Office has jurisdiction.[55] Under Section 74, the Ombudsman may determine legislative standards through statutory instruments and set out procedures with which relevant organisations must comply.[56] No such remit exists in respect of the role of the local government ombudsmen in the UK in respect of LAPPs and it is unclear why they do not have a more discernible role in ensuring that LAPPs comply with the Public Interest Disclosure (Prescribed Persons) Order 2014 and the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.[57] The potential role of local authority ombudsmen in those regards is considered further in Chapter 6.

5.4 Critique of Australia's PIDA 2013

Feinstein and others concluded that Australia's federal laws comply with all but four of the twenty areas within the 'scope of coverage' of good practice.[58] However, that is not to suggest that there is no basis upon which to critique the national legislation. This section of the thesis considers reviews of the operation of the legislation by relevant commentators.

5.4.1 Commonwealth Ombudsman's 2016 report

The Ombudsman's 2016 report (covering the first two years of the operation of PIDA 2013 from 15 January 2014 – 14 January 2016) proposed 24 amendments of which 23 entailed law change.[59] The Ombudsman contextualised proposals in this way: 'In some cases, we consider

[55] PIDA 2013.
[56] ibid.
[57] Public Interest Disclosure (Prescribed Persons) Order 2014, and the Reports on Disclosures of Information Regulations 2017 (n 2).
[58] Feinstein and others (n 8); the four factors are (i) Right to refuse violating the law (ii) Option for alternative dispute resolution with an independent party of mutual consent (iii) Realistic time frame to act on rights (iv) Transfer option.
[59] Feinstein and others (n 8) 13; Commonwealth Ombudsman, 'Submission by the Commonwealth Ombudsman: Review of the Public Interest Disclosure Act 2013 (Cth) (2016) 55 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0020/37442/Submission-to-Public-Interest-Disclosure-Act-2013.pdf> accessed 23 February 2023.

changes may be necessary to enhance and improve the effectiveness of the PID Act in delivering its legislated objects.'[60] In terms of the embeddedness of the law amongst public bodies, the Ombudsman described a continuum along which some organisations 'have done excellent work to raise awareness with their staff about the PID Act…' while '[o]thers have been less enthusiastic.'[61]

5.4.2 The 'Moss Review' of Australia's PIDA 2013

The Moss Review was commissioned in 2017 under Section 82A to review the operation of the Act and was led by Phillip Moss MP.[62] It presented evidence to support 33 recommendations for improvements in oversight, greater focus on significant wrongdoing, simpler legislative procedures, enhancing the balance between transparency, confidentiality and procedural fairness, easier access to advice and help, elucidating the coverage of the legislation, and clarifying the arrangements between different investigation regimes.[63] Of these, in 2020 the Australian Government accepted 30, 'noted' one recommendation and disagreed with two (Recommendation 10, relating to a principles-based approach to regulation, and Recommendation 11 which would 'fall' if Recommendation 10 was not agreed).[64] The Public Interest Disclosure Amendment (Review) Bill 2022 proposed the implementation of 21 of the 33 'Moss Review' recommendations through amendments of PIDA 2013.[65]

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[60] Commonwealth Ombudsman, 'Submission by the Commonwealth Ombudsman: Review of the Public Interest Disclosure Act 2013 (Cth) (2016) 2 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0020/37442/Submission-to-Public-Interest-Disclosure-Act-2013.pdf> accessed 23 February 2023.

[61] ibid.

[62] PIDA 2013.

[63] Commonwealth of Australia, 'Parliamentary Joint Committee on Corporations and Financial Services: Whistleblower Protections' (2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report> accessed 2 March 2023.

[64] Australian Government, 'Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM' (2020) <https://www.ag.gov.au/system/files/2020-12/government-response-to-the-review-of-the-public-interest-disclosure-act-2013.pdf> accessed 3 March 2023.

[65] James Prest, 'Public Interest Disclosure Amendment (Review) Bill 2022: Bills Digest No 58, 2022-23', (Parliament of Australia 2023) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2223a/23bd058#:~:text=The%20Bil

5.4.3 The Commonwealth Ombudsman's investigation 2022

The Ombudsman's 2022 report was an own-motion investigation, though the reason for it is not articulated in the document.[66] The investigation highlighted 5 areas where improvements could be made by agencies, including adding detail to decision-making (especially decisions not to investigate), report-writing, handling reprisal risk-assessments, and the related issues of record-keeping and dialogue with disclosers.[67] The report included reference to practical resources such as how to use decision-making templates, e-learning material and guidance on undertaking risk assessments.[68]

5.4.4 The Commonwealth Ombudsman's Annual Report 2021-2022

The Ombudsman's annual report for 2021-2022 noted that maladministration continued to be the most common type of allegation received, at 29% in that year.[69] The report suggested that an important output of a whistleblowing reporting mechanism is to have the scale and nature of alleged reprisals and trends clearly articulated, a position which sits in contrast with the UK's *de facto* position.[70] Finally, another aspect of non-statutory good practice that could be adopted from the Australia experience is the inclusion (from a 2015 information sheet) of a simple explanation of the obligations on the discloser, including being discreet and confidential, providing reasonable assistance to investigators, alerting management to 'any

l%20proposes%20amendments%20to,wrongdoing%20or%20'disclosable%20conduct'> accessed 31 May 2023; following assent on 19th June 2023, the Bill became the Public Interest Disclosure Amendment (Review) Act 2023.

[66] Commonwealth Ombudsman, 'Investigation into compliance with the Public Interest Disclosure Act 2013 Report no. 03/2022' (2022) 3 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0021/115266/Investigation-into-compliance-with-the-PID-2013.pdf> accessed 23 February 2023.

[67] ibid.

[68] ibid 12.

[69] Commonwealth Ombudsman, 'Annual Report 2021-2022' (2022) 37 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0032/116996/Commonwealth-Ombudsman-Annual-Report-2021-22..pdf> accessed 25 February 2023.

[70] Ibid 41.

problems' encountered as a result of making the disclosure, and avoiding false or misleading statements.[71]

However, despite the example set by Australia, cognisance should be taken that even dedicated whistleblowing legislation which creates criminal offences and duties on officers does not by default lead to Utopia. No matter how carefully law is crafted, it is usually only following its operational use and review that its effectiveness can be evaluated and proposals for change advanced, involving a body responsible for describing how the law is operating derived from evidence-based and experienced insight.[72]

5.5 Canada: The Public Servants Disclosure Protection Act 2005 (PSDPA 2005)

This section examines Canada's federal Public Servants Disclosure Protection Act 2005 (PSDPA 2005) which is distinguished from laws operating in the ten provinces and three territories, where available.[73] Feinstein and others observe that Canada's federal law meets only one of the twenty elements in the 'scope of coverage' of good practice found in their research, namely 'transparency and review'.[74] PSDPA 2005 received Royal Assent in 2005

[71] Commonwealth Ombudsman, 'Public Interest Disclosure Scheme: Information Sheet (2015) 2 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0030/29874/ombudsman_how_to_make_a_pid_final.pdf> accessed 25 February 2023.

[72] Section 76A of Australia's Public Interest Disclosure Amendment (Review) Act 2023 includes these requirements in the duties of the Ombudsman.

[73] Province of Alberta [Public Interest Disclosure (Whistleblower Protection Act) Alberta Regulation 71/2013]; British Columbia (Public Interest Disclosure Act [SBC 2018] c.22); Manitoba [Public Interest Disclosure (Whistleblower Protection) Act C.C.S.M. c.P217]; New Brunswick [Public Interest Disclosure Act (RSNB 2012, c.112)]; Newfoundland and Labrador [Public Interest Disclosure and Whistleblower Protection Act (SNL2014 c. P-37.20)]; Nova Scotia [Public Interest Disclosure of Wrongdoing Act (SNS 2010, c.42)]; Ontario (Securities Act, R.S.O. 1990, c. S.5; Commodities Futures Act, R.S.O. 1990, c.20); Prince Edward Island (Public Interest Disclosure and Whistleblower Protection Act 2017 c.11 R.S.P.E.I.); Quebec (Act to Facilitate the Disclosure of Wrongdoing Relating to Public Bodies 2016 C.34 c.1); Saskatchewan (Public Interest Disclosure Act 2011 c.P-38.1); Northwest Territories [no legislation found but there is policy: Government of Northwest Territories, 'Safe Disclosure' (no date) <https://my.hr.gov.nt.ca/safe-disclosure> accessed 8 April 2023]; Nunavut [no legislation found but there is policy: Government of Nunavut, Department of HR, 'Reporting Wrongdoing' (no date) <https://www.gov.nu.ca/finance/information/reporting-wrongdoing> accessed 8 April 2023]; Yukon (Public Interest Disclosure of Wrongdoing Act SY 2014 c.19).

[74] Feinstein and others (n 8) 34.

and came into effect on 15 April 2007.[75] As with Australia's PIDA 2013, the legislation relates only to protections for public officials, a position which does not represent contemporary good practice in whistleblowing jurisprudence, which is one of the numerous criticisms of Canada's approach, discussed below. PSPDA 2005's legislative history reveals that Private Member's Bill S-13 was introduced in the Senate in December 1999 building on trade union demands led by the Professional Institute of the Public Service of Canada for effective legislation, and noting the weaknesses of continuing reliance on common law.[76] A theme is observed below in the perceived tardiness of the Canada Government to adopt and revise whistleblowing law despite evidence-based calls for it to do so. In 2022, Canada was ranked 14 out of 180 countries evaluated in TI's Corruption Perceptions Index, equal to its 2021 position.[77]

5.5.1 Transposing salient features of Canada's PSDPA 2005 to the UK context without law change

Though some aspects of the implementation of Canada's approach may be criticised (see Section 5.5.2), analysis of the legislation suggests ideas for the potential enhancement of UK whistleblowing practice (Vol 5 Table 82). Section 2(1) provides that a reprisal includes acts or omissions against not only the official making the disclosure, but also any other public official who has co-operated in the investigation of the disclosure.[78] This appears both desirable to support evidence-gathering and to uphold the public interest. There is no bar in the UK's ERA 1996 Part IVA to more than one worker making a whistleblowing disclosure about the same

[75] Public Servants Disclosure Protection Act 2005; Government of Canada, 'Frequently asked questions on the Public Servants Disclosure Protection Act' <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/disclosure-protection/frequently-asked-questions-public-servants-disclosure-protection-act.html> accessed 8 April 2023.

[76] David Johansen, 'LS-354E Bill S-13: Public Service Whistleblowing Act' (Parliamentary Research Branch 2000) <https://publications.gc.ca/Collection-R/LoPBdP/LS/362/s13-e.htm#A.%20Introductiontxt> accessed 5 March 2023.

[77] Transparency International, 'Corruption Perceptions Index' (2022) <https://www.transparency.org/en/cpi/2022/index/can> accessed 19 March 2023.

[78] Public Servants Disclosure Protection Act 2005 Section 2(1).

matter, and it is possible that each person making a disclosure could be a witness in the other's case. Whilst they would not attract protection because they are a witness, they could do so as a worker making a protected disclosure. Without changing UK law, non-statutory guidance could reflect the importance of corroboration by ensuring that cases involving multiple whistleblowers are understood to require careful engagement, particularly where the confidence of each whistleblower witness may be predicated on knowledge of the on-going commitment of another whistleblower in the same case. Section 2(2) establishes that those who direct that a reprisal be taken against a whistleblower share equal culpability with those who undertake it.[79] Section 8 also attributes personal responsibility to those who knowingly direct or counsel others to commit relevant wrongdoing.[80] In existing UK Government guidance little is said about investigation standards and nothing about personal culpability for wrongdoing. The non-statutory guidance envisaged here should frame expectations about the reasonable ambit of inquiries into whistleblowing disclosures, including about persons responsible for qualifying wrongdoing or failures and the outcomes expected, having regard to the powers available to the prescribed person.[81]

5.5.1.a Promoting Ethical Practices

The research underpinning this thesis suggests low levels of public education and awareness-raising by prescribed persons.[82] Section 4 PSDPA 2005 places a duty on the competent authority to promote knowledge of the Act and dissemination of its purposes and processes. In the UK, Government guidance contains no such insistence, so it seems reasonable that the non-

[79] Public Servants Disclosure Protection Act 2005 Section 2(2).
[80] ibid Section 8.
[81] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 3 March 2023.
[82] Question 14 in Vol 2 Table 7 and Vol 3 Table 37.

statutory guidance proposed includes similar encouragement of prescribed persons to educate stakeholders about whistleblowing law, practice and guidance.[83]

5.5.1.b Protecting the identity of whistleblowers, witnesses and persons concerned

Existing UK Government guidance makes no reference to protecting the identity of a person about whom wrongdoing or failure is alleged, even though not protecting their identity may breach the implied contractual term of trust and confidence between them and their employer. Section 11 PSDPA 2005 requires each chief executive to take steps to ensure confidentiality of the identity of disclosers, witnesses and persons concerned. Similarly, Section 22 directs that the duties of the Public Sector Integrity Commissioner include protecting the identity of involved parties and ensuring fairness in the application of procedures for processing disclosures.[84] Whilst confidentiality features regularly in the analysis of existing whistleblowing policies and procedures in the UK, such references were found generally to relate to whistleblowers and less so to witnesses and persons concerned.[85] Non-statutory guidance should include reference to whom confidentiality is owed and in what circumstances.[86]

5.5.1.c Time limits

Section 19.4 expects that a decision to deal with a complaint of a reprisal is made within 15 days of being filed.[87] As with Australia's PIDA 2013, and in contrast with UK's Part IVA, the importance of timescales for action and, in turn, for effective communication with disclosers

[83] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 3 March 2023.
[84] Public Servants Disclosure Protection Act 2005.
[85] Vol 2 Table 8 and Vol 3 Table 38.
[86] Public Servants Disclosure Protection Act 2005.
[87] ibid Section 19.4.

and others is evident in PSDPA 2005. UK non-statutory guidance should set out a consistently-applied 'what by when' communication timeline that prescribed persons should follow.[88] Section 19.7(2) proposes that investigations should be informal and expeditious, criteria which go to the merit of prompt investigations.[89] UK non-statutory guidance should also encourage prompt inquiries balanced against their rigour.

5.5.1.d Keeping disclosers and others informed

Sections 19.4(2) requires that a written notice of the decision to deal with a complaint of reprisal is sent to the discloser and to each person who has engaged in a reprisal.[90] Whilst prescribed persons in the UK are not usually empowered to take action against those who victimise, there is no good reason why whistleblowers should not be kept apprised of other key decisions and developments following a disclosure. Section 20.6 includes reference to stakeholders who should be regularly updated about relevant developments, and that individuals likely to be adversely affected by a report or finding should be given 'full and ample opportunity' to answer allegations [Section 27(3)].[91] The importance of maintaining effective communications with those affected by whistleblowing disclosures should feature prominently in UK guidance which prescribed persons should be expected to follow.

5.5.1.e Reasonable assistance and co-operation

Section 19.9(1) and (2) respectively require that investigators should be provided assistance (eg access to premises) and co-operation, and where the latter is not forthcoming, a report raised with the competent authority.[92] Section 40 goes further and stipulates that knowingly

[88] ERA 1996.
[89] Public Servants Disclosure Protection Act 2005.
[90] ibid.
[91] ibid.
[92] ibid.

making a false statement in a disclosure or investigation is a criminal offence.[93] Section 42.3 penalises reprisal, retaliation, causing detriment or threatening the same.[94] Section 51 deals with the sometimes-difficult issue of managing parties (disclosers, witnesses and persons concerned) in the workplace and empowers organisations to re-deploy public officials to other duties.[95] In the UK, care would be required that such re-deployment is not evidence or further evidence of victimisation by an employer against a worker. Whilst the specific measures described above are not available in the UK, they are indicators of the kind of reciprocity and facilitation and associated conduct expected of the parties, and of relevant principles which could be adopted in non-statutory guidance.

5.5.1.f Grounds not to investigate

Section 24(1) sets out 6 grounds, one or more of which could provide a reasonable basis not to investigate, or to cease an extant investigation.[96] However, amongst them is a 'good faith' criterion which is not considered good practice, but the broader and relevant point is the need for consistent application of reasonable grounds not to proceed. It was established in the research that UK prescribed persons employed diverse and inconsistent criteria in deciding whether or not to investigate disclosures.[97] It is proposed that relevant factors as to the basis for commencing or terminating investigations, including appropriate criteria derived from international practice, should be included in non-statutory guidance available to all prescribed persons and which they would be expected to follow.

5.5.1.g Requests for information by the national authority

[93] Public Servants Disclosure Protection Act 2005.
[94] ibid.
[95] ibid.
[96] ibid.
[97] Vol 2 Tables 9 and 10.

Section 36 enables the Integrity Commissioner to call for reports on action taken by a relevant chief executive, whilst Section 38 requires the Commissioner to publish annual reports in respect of disclosure-related activities.[98] It has been commented upon extensively in this thesis that UK prescribed persons' incomplete compliance with the Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 is one impediment to an efficient and effective whistleblowing framework.[99] Ensuring effective oversight of whistleblowing arrangements, a theme manifest in both Australia's PIDA 2013 and Canada's PSDPA 2005, is considered in the UK context in Chapter 6.

5.5.1.h Periodic Review

Just as Article 14 of the EU Directive requires Member States to undertake a triennial review of their whistleblowing procedures, Section 54 PSDPA 2005 requires a 5-year review.[100] It was not until February 2017 that the first statutory review was instigated which subsequently proposed 15 recommendations for improvement.[101] The Canada Government's short, undated letter of response stated that it was committed to 'move forward to implement improvements to the administration and operation of the internal disclosure process and the protection from acts of reprisal against public servants.'[102] The delay in undertaking the review, the perfunctory reply and its reference not to the report being the first review of PSDPA 2005 but to the 'ninth report of the Standing Committee' may create an impression that the Government did not

[98] Public Servants Disclosure Protection Act 2005.
[99] Reports on Disclosure of Information Regulations 2017 (n 2).
[100] Directive (EU) 2019/1937 (n 7).
[101] (Canada) House of Commons Standing Committee on Government Operations and Estimates, 'Strengthening the Protection of the Public Interest Within the *Public Servants Disclosure Protection Act'* (2017) 95 <https://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf> accessed 4 March 2023.
[102] (Canada) House of Commons Standing Committee on Government Operations and Estimates, 'Government Response to the Ninth Report of the Standing Committee on Government Operations and Estimates' (no date) 2 <https://www.ourcommons.ca/content/Committee/421/OGGO/GovResponse/RP9156489/421_OGGO_Rpt09_GR/421_OGGO_Rpt09_GR-e.pdf> accessed 4 March 2023.

consider its federal whistleblowing legislation to be of high significance. In November 2022, a further review of PSDPA 2005 was announced by the Government and which 'is expected to take 12 to 18 months.'[103] However, annual reviews of the legislation have been conducted by the Treasury Board of Canada which record, amongst other matters, the number of allegations under the Act and year-on-year comparison, with the largest rise noted in 2021-2022 when compared with the preceding 5 years.[104]

5.5.2 Critique of Canada's PSDPA 2005

Just as Feinstein and others assess Canada's laws as exhibiting limited facets of good practice, others criticise Canada for failing to keep pace with contemporary developments most notably in respect of protections for private sector employees, where the principal safeguards lie in the Criminal Code and Labour Code.[105] TI censures Canada's law because where perpetrators leave public service, the Integrity Commissioner is said not to bring relevant information about perpetrators to the attention of subsequent employers.[106] However, this criticism of PSPDA 2005 could be equally levelled at Part IVA, albeit it is not intended to be perpetrator-focused.[107] TI also draws attention to the low number of tribunal proceedings in Canada contrasting the position with UK volumes but, as discussed, whilst UK ET case numbers are relatively high according to Feinstein and others, the success rate for whistleblowers in proceedings remains low.[108]

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[103] Government of Canada, 'Review of the *Public Servants Disclosure Protection Act'* (2023) <https://www.canada.ca/en/treasury-board-secretariat/topics/values-ethics/disclosure-protection/review-public-servants-disclosure-protection-act.html> accessed 4 March 2023.

[104] Treasury Board of Canada, 'Annual Report on the Public Servants Disclosure Protection Act' (2022) 3 <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/disclosure-protection/annual-report-public-servants-disclosure-protection-act-2021-2022.html> accessed 4 March 2023.

[105] Brooke Neal, 'Ontario Securities Commission Whistleblower Protection Program' (2016) 22 Law and Business Review of the Americas 271 274; Marie-Yosie Saint-Cyr, 'The State of Whistleblowing in Canada (Slaw 2013) <https://www.slaw.ca/2013/06/06/the-state-of-whistleblowing-in-canada/> accessed 4 March 2023; Daniel Kim (n 11); Section 425.1 Criminal Code.

[106] Daniel Kim (n 11) 10.

[107] ERA 1996.

[108] Feinstein and others (n 8) 12; Daniel Kim (n 11) 10.

Other analysis offers a damning critique of the effectiveness of PSDPA 2005 claiming that it fails to protect whistleblowers, expose misconduct, is not trusted by public officials, is held in low repute by 'international experts', its performance measurement is inadequate, Parliamentary oversight and Integrity Commissioner motivation are deficient, and successive governments have failed to address myriad legislative and operational deficiencies.[109] Whilst many of the criticisms relate to the failure to adapt to empirical evidence, some structural defects in the legislation are also noted which should temper its applicability to the UK environment (however, uncorroborated international practice is not suggested for inclusion in the non-statutory guidance proposed in this Chapter).

5.6 Ireland: Protected Disclosures Act 2014 (PDA 2014)

As with some other nations' whistleblowing laws, revelations of serious wrongdoing in public institutions overcame some historical and cultural reservations about the role of whistleblowers in Irish society. A case in the 1980s involving alleged corruption by members of An Garda Síochána, Ireland's police, became totemic and galvanised public and political opinion about the need for improved protection of whistleblowers.[110] As will be seen, since 2014 Ireland has enthusiastically engaged with whistleblowing law and is now considered by Feinstein and others to be a highly-regarded international good practitioner.[111] Lauren Kierans' analysis of the Protected Disclosures Act 2014 (PDA 2014) reveals that Ireland's legislature drew on the UK's PIDA 1998 legislation making the intention of PDA 2014 'to act as a deterrent to

[109] Centre for Free Expression, 'What's wrong with Canada's Federal Whistleblowing System: An analysis of the Public Servants Disclosure Protection Act (PSDPA) and its implementation' (Ryerson University 2017) 4 <https://cfe.torontomu.ca/publications/whats-wrong-canadas-federal-whistleblower-legislation> accessed 5 March 2023.

[110] Seán Guerin, 'Report to An Taoiseach, Enda Kenny TD on a Review of the Action Taken by An Garda Síochána Pertaining to Certain Allegations Made by Sergeant Maurice McCabe' (2014) <https://s3.amazonaws.com/s3.documentcloud.org/documents/1156948/final-redacted-guerin-report1.pdf> accessed 5 March 2023.

[111] Vol 5 Tables 79 and 80.

employers and others from taking retaliatory action against […] workers'.[112] Kierans, whilst noting international plaudits for Ireland's whistleblowing law, observed that PDA 2014 needed to be amended to bring it in line with European legislation.[113] Following the implementation of the EU Directive in 2019, and the two-year transposition period, Ireland has amended its 2014 legislation to provide a Directive-compliant new statute.[114] The country fares well in TI's 2022 Corruption Perceptions Index achieving a ranking of 10 out of 180 countries evaluated, improving its position by 3 places since 2021.[115]

5.6.1 Transposing salient features of Ireland's PDA 2014 to the UK context without law change

It is concluded from the research that elements of Ireland's PDA 2014 could be suitable for inclusion in the UK context without law change (Vol 5 Table 83). Section 12(1)(a) and (b) relate to workers under 18 years who are presumed incapable of making a protected disclosure or of bringing matters before a labour court, and in such circumstances their parent or guardian or trade union may do so on their behalf with the young worker's consent.[116] This perspective is not addressed in Part IVA and whilst it is not known how many disclosures are made by non-adult workers in the UK, it would appear sensible for the issue of capacity and informed consent to be considered in the proposed non-statutory guidance.[117]

5.7 Ireland: The Protected Disclosure (Amendment) Act 2022 [PD(A)A 2022]

[112] Lauren Kierans, 'Whistleblowing Litigation and Legislation in Ireland: Are There Lessons to be Learned?' (2023) Industrial Law Journal 1 2.
[113] ibid 3.
[114] Directive (EU) 2019/1937 (n 7); Protected Disclosures Act 2014.
[115] Transparency International, 'Corruption Perceptions Index' (2022) <https://www.transparency.org/en/cpi/2022/index/irl> accessed 19 March 2023.
[116] PDA 2014.
[117] ERA 1996.

The Act entered into force on 1 January 2023 for the purpose of transposing the Directive into Irish law.[118] This followed the EU Commission opening proceedings against some Member States, including Ireland, in 2022 for failing to incorporate the Directive within domestic law by 17 December 2021, as required by Article 26 of the Directive.[119]

5.7.1 Transposing salient features of Ireland's PD(A)A 2022 to the UK context without law change

It is considered that elements of Ireland's PD(A)A 2022 could be appropriate for inclusion in the UK context without law change (Vol 5 Table 84). Section 8 requires the relevant Minister to conduct a risk assessment of organisations with less than 50 employees to determine whether the entities should be subject of the Directive-compliant legislation.[120] More broadly, and in the UK context, risk assessments appear to represent good practice in consideration of the application of law and policy, and non-statutory operational guidance should encourage this, particularly in regard to the risk of detriment to the discloser.[121]

5.7.1.a Keeping disclosers informed

Section 8 obligates a public body to provide a worker who requests it in writing, no later than three months after the date of the request, an indication of action taken or to be taken in respect of their disclosure.[122] Section 9 requires that receipt of the disclosure shall be acknowledged in writing within 7 days, as well as a regimen of three-monthly updates to the discloser in respect

[118] PD(A)A 2022.
[119] European Commission, 'Infringement decisions' (no date) <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=27%2F01%2F2022&decision_date_to=&EM=IE&DG=JUST&title=32019L1937&submit=Search> accessed 6 March 2023; Directive (EU) 2019/1937 (n 1).
[120] PD(A)A 2022.
[121] As observed in Section 59(1)(a) PIDA 2013 (Australia).
[122] PD(A)A 2022.

of relevant developments, along with the provision of 'clear and easily accessible information' (also addressed in Section 11).[123] Section 14 outlines that the newly-established Office of the Protected Disclosures Commissioner, as 'recipient of last resort in respect of certain reports', should ordinarily acknowledge receipt of disclosures within 14 days.[124]

5.7.1.b Follow-up

Section 11 sets out activities construed as representing reasonable practice, including an initial assessment of whether a relevant wrongdoing has occurred and its relative seriousness, which may provide a transparent basis for conducting an investigation.[125] Section 11 includes the additional requirement that those handling reports are adequately trained for the purpose.[126] The Section also provides for measures intended to help the discloser understand how their disclosure will be treated. Lastly, Section 11 empowers the Commissioner to seek information and take copies of records from any person, and to obtain and act upon a search warrant to discover relevant material.[127] Additionally, Section 14 places responsibility on the Protected Disclosures Commissioner to ensure that external reporting channels are compliant with the requirements of the Act, whilst Section 19 sets an obligation to maintain adequate records of reports received, including anonymous reports.[128] The Minister is required under Section 28 to issue guidance to assist prescribed persons and the Commissioner in the execution of their duties, and to which they must have regard; also, the Minister must make publicly available at no-cost, advice about making a disclosure, and the protections and remedies available.[129] As

[123] PD(A)A 2022.
[124] ibid.
[125] ibid.
[126] ibid.
[127] ibid.
[128] ibid.
[129] ibid.

previously highlighted in this Chapter, an expectation of reasonable and timely follow-up, which is consistent amongst prescribed persons, should be set in UK non-statutory guidance.

5.7.1.c Perpetrator focus

Part IVA does not include a perpetrator focus and thereby, arguably, its deterrent value as a law may be limited.[130] Some prescribed persons have regulatory powers but these were not always clearly and consistently set-out in some of the relevant whistleblowing policies, processes and procedures examined. No offences directly arising from and linked to Part IVA are created whereas, in contrast, some international practice places greater value on deterrence and criminalisation.[131] Section 11 PD(A)A 2022 establishes a revised Section 10F to punish through a two-year prison sentence the destruction, concealment or withholding of records etc, or obstructing the Commissioner, while Section 19 treats hindering or penalising a would-be discloser as a criminal offence.[132] UK non-statutory guidance could not replicate such perpetrator focus but could state clearly an expectation that, using the powers available to them, prescribed persons hold to account those responsible for failures and wrongdoing.

5.7.1.d Confidentiality

Section 11 amends Section 7 of the 2014 Act to create Section 7A.(10) wherein prescribed persons should establish a 'confidentiality regime'.[133] Section 16 makes similar requirements of the Commissioner notably in respect of the identity of the person concerned, but establishes statutory exceptions to confidentiality, provided the affected person is informed in writing before their identity or their disclosure is revealed.[134] A breach of confidentiality by the

[130] ERA 1996.
[131] Section 19(1)-(5) PIDA 2013 (Australia), Section 42 PSDPA 2005 (Canada).
[132] PD(A)A 2022.
[133] ibid.
[134] ibid.

Commissioner (outside the statutory caveats) is treated as a tort under the Act.[135] It appears reasonable that the principles underpinning this practice should be articulated in non-statutory guidance for UK prescribed persons.

5.7.1.e Periodic Review

Section 11 further mandates that three-yearly reviews shall be undertaken by prescribed persons of external reporting channels and associated procedures, while Section 26 requires the responsible Minister to review the legislation within 12 months of the 5-year anniversary of its commencement.[136] Currently, there is no body in the UK charged with strategic overview and the role of the UK's local authority ombudsmen is discussed in Chapter 6 as a potential means to address this deficit in respect of LAPPs.

5.7.1.f Records and Information

As noted, Section 19 requires adequate record keeping which, in turn, supports Sections 29 and 30 wherein, respectively, competent courts and the Minister can seek relevant information.[137] As observed, the failure of many UK prescribed persons to comply with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 is a fundamental weakness, compounding other weaknesses in failing to gather relevant information about whistleblowing (eg demarcating external from internal whistleblowers). Explicit reference to gathering relevant data should be incorporated in the envisaged non-statutory guidance, even though mention of the 2017 Regulations is already included in UK guidance. It would appear that more specific reference to information gathering is required, particularly for LAPPs.[138]

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[135] PD(A)A 2022 Section 16(5).
[136] PD(A)A 2022.
[137] ibid.
[138] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 8

5.7.2 Critique of Ireland's PDA 2014 and PD(A)A 2022

Like UK legislation, Ireland's PDA 2014 is reactive in that it provides *post facto* protection to whistleblowers after harm to them is occurring or has occurred.[139] Under Irish law, timescales in which to bring proceedings are short and do not provide arrangements like those under Section 48(4)(a) ERA 1996 where the date of a detriment, if it has continued over a period of time, includes the last date of the act or acts, rather than within 6 months of the first contravention as is the position under Section 41(6) of Ireland's Workplace Relations Act 2015. Although PDA 2014 is highly regarded in Feinstein and others' analysis, several of the shortfalls identified in respect of Part IVA and described in this thesis, are observable in PDA 2014.[140] These include the absence of obligation upon most employers to maintain a whistleblowing policy.[141] Ireland's Government's 2018 review of PDA 2014 found that 'while there are some challenges in implementation and some follow up actions are proposed, in general the implementation of the Act is considered to be effective.'[142] Areas nevertheless considered suitable for action were a requirement for public sector organisations to establish internal procedures in contemplation of the (forthcoming, at that time) EU Directive, clarifying that anonymous disclosures should be treated like other disclosures, and commending the provision of guidance to ensure consistency in annual reports of the reporting of disclosures received and action taken.[143]

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> (accessed 3 March 2023).

[139] PDA 2014, the title of which is: 'An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.'

[140] UK ERA 1996; Vol 5 Table 80.

[141] Protect, 'A legal duty on all employers: The issue' (no date) <https://protect-advice.org.uk/reform-2-standards-on-employers/> accessed 8 April 2023.

[142] Department of Public Expenditure and Reform, 'Statutory Review of the Protected Disclosures Act 2014' (DPER 2018) 45 <https://assets.gov.ie/8765/7e1f2c66e7c04062a25561a848e17943.pdf> accessed 7 March 2023.

[143] ibid; Directive (EU) 2019/1937 (n 7).

PD(A)A 2022 commenced in January 2023 and it is too early to critique its effect upon whistleblowing in Ireland. However, some of the criticisms of the Directive, which PD(A)A 2022 transposed into Irish law, are likely to pertain.[144] Simon Gerdeman's and Ninon Colneric's reproval includes that 'the problem of erroneous assumptions by the whistleblower was overlooked' because the inclusion of an 'honest mistake' criterion was made late in the legislative process.[145] The authors also suggest that the inclusion of sanctions in the Directive [and hence PD(A)A 2022] may have little relevance because of the difficulty in establishing that retaliation is deliberate.[146] Protect observes that under PD(A)A 2022, a 'financial award cap' has been imposed of up to 5 years' pay for salaried whistleblowers and a maximum of €15,000 for non-salaried whistleblowers' which compares less favourably with the UK where ET awards are potentially unlimited. [147]

5.8 New Zealand: Protected Disclosures Act 2000 (as amended by the Protected Disclosures Amendment Act 2009)

Feinstein and others identify that New Zealand's Protected Disclosures Act 2000 (PDA 2000) law demonstrates positive alignment with aspects of their continuing evaluation of good practice.[148] The legislation applies to a public or private body if the latter 'comprises members of a particular profession or calling and which has power to discipline its members.'[149] According to Gehan Gunasekara, UK and New Zealand law have a common intention of seeking to protect whistleblowing employees whereas, additionally, New Zealand's law

[144] Directive (EU) 2019/1937 (n 7).
[145] Simon Gerdeman and Ninon Colneric, 'The EU Whistleblower Directive and its Transposition: Part 1' (2020) European Labour Law Journal 12(2) 193 209. (Author's note: 'honest mistake' in this context should be distinguished from an 'honest mistake' by the person responsible for the failure.)
[146] ibid 196.
[147] Protect, 'New Update to Ireland's Whistleblowing Legislation' (2023) <https://protect-advice.org.uk/reform-of-ireland-legislation/> accessed 8 March 2023; PD(A)A 2022 Section 25(a).
[148] Achieving 12 of 20 'scope of coverage' criteria – Vol 5 Tables 79 and 80.
[149] PDA 2000 Section 3(1)(c).

'purports to facilitate the investigation of the matters brought to attention by the whistleblower', which is not a designated purpose of UK's PIDA 1998.[150]

5.8.1 Transposing salient features of New Zealand's PDA 2000 to the UK context without law change

5.8.1.a Requests for information by the national authority

Some elements of PDA 2000 could be considered suitable for inclusion in the UK context without law change (Vol 5 Table 85). Section 6C empowers an Ombudsman to seek information from public sector organisations about the availability and operation of their internal procedures.[151] Section 15C fulfils some of the annual reporting function expected under the UK's Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 but places the reporting requirement on the Ombudsman unlike in the UK where the obligation falls, arguably less than effectually according to the evidence, on hundreds of individual prescribed persons.[152] Ensuring that statutory reports are completed and available to the public should be reinforced in any non-statutory guidance and oversight arrangements. The proposals outlined here for the creation of operationally-focussed non-statutory guidance are synthesised in Chapter 6 towards a model of oversight (hence the references in this Chapter to the role of ombudsmen and other national mechanisms in the jurisdictions cited).

5.8.1.b Referrals between authorities

Section 16 formalises the arrangements whereby investigating authorities agree to consult with each other, and transfer disclosures between them based on appropriateness of remit.[153] Section

[150] Gehan Gunasekara, 'Whistleblowing: New Zealand and UK Solutions to a Common Problem (2003) 24(1) Statute Law Review 39 39.
[151] PDA 2000.
[152] ibid; Reports on Disclosures of Information Regulations 2017 (n 2).
[153] PDA 2000.

16(2) requires that the new recipient authority must promptly advise the discloser of the transfer.[154] These aspects of good practice should not require law change in the UK as some prescribed persons claim to do this, and could be included in non-statutory guidance.

5.8.1.c Confidentiality

Section 19 is a 'best endeavours' exhortation on authorities not to disclose identifying data without the written permission of the subject, except in the belief that it is necessary for investigation of the disclosure, to avoid serious risk of harm or in the interest of fairness.[155] This section appears relatively weak compared to international comparators, but the principle of confidentiality is a consistent one in most jurisdictions assessed and should be accentuated in non-statutory guidance.[156]

5.8.1.d Those voluntarily providing supporting information

Section 19A(2)(a) extends protections to those who voluntarily provide evidence in connection with the investigation of a disclosure, provided they are 'an employee of the organisation in respect of which the disclosure was made'.[157] UK protections do not apply to workers other than those making a protected disclosure. However, where a worker has witnessed a qualifying failing but only makes a disclosure about it when approached (eg by an investigator following a disclosure by another worker) there appears a basis upon which they could be treated as a whistleblower in their own right (provided that the requirements of Section 43B and the public interest 'test' are met).[158] It is suggested here that UK non-statutory guidance should describe

[154] PDA 2000.
[155] ibid.
[156] Australia PIDA 2013 Section 59; Canada Public Servants Disclosure Protection Act 2005 Section 11; Ireland PD(A)A 2022 Section 11 creating Section 7A.10 Public Disclosure Act 2014.
[157] PDA 2000.
[158] On analysis of the conditions established by Sections 43A and 43B ERA 1996.

this scenario, noting the potential for multiple workers treated as whistleblowers to corroborate each other.

5.9 New Zealand: Protected Disclosures (Protection of Whistleblowers) Act 2022

With effect from 1 July 2022, the 2000 Act was repealed by the 2022 Act.[159] The new legislation relates to 'any organisation – large or small, public, private or voluntary sector'.[160] In 2017, New Zealand's State Services Commission reported on its investigation into how disclosures from Ministry of Transport employees had been handled after they had raised concerns about the conduct of a senior manager, Joanne Harrison, who had been sentenced to three years' imprisonment for stealing from the Ministry over a protracted period.[161] The investigation concluded that potential opportunities to intercede had been missed, and in respect of the operation of PDA 2000 that '[i]t may also be appropriate to consider how well this piece of legislation is meeting its purpose.'[162] In 2018, the Chief Ombudsman concluded a review of the Act, making 11 recommendations and highlighting the need for continuing oversight of the effectiveness of the law whether under new or amended legalisation.[163] A draft bill of the 2022 legislation was received by Parliament's Education and Workforce Committee in June 2020. The Committee proposed a series of changes to address perceived shortfalls raised during consultation (ie the meaning of serious wrongdoing, what a receiver should do about a disclosure, what should be included in internal procedures for public sector

[159] Protected Disclosures (Protection of Whistleblowers) Act 2022 Section 2; PDA 2000.

[160] Transparency International New Zealand, 'Protected Disclosures Act Passed' (2022) <https://www.transparency.org.nz/blog/protected-disclosures-act-passed> accessed 11 March 2023.

[161] New Zealand Parole Board, 'Decisions' (2018) <https://www.paroleboard.govt.nz/decisions/2018/harrison_-_joanne_-_07032018> accessed 2 June 2023.

[162] Sandie Beatie, 'Report of investigation into whistleblower treatment within the Ministry of Transport' (State Services Commission [New Zealand] 2017) 11 <https://apo.org.au/sites/default/files/resource-files/2017-07/apo-nid100316.pdf> accessed 10 March 2023.

[163] Ombudsman, 'Chief Ombudsman's submission: Review of the Protected Disclosures Act 2000' (2018) 11 <https://www.ombudsman.parliament.nz/sites/default/files/2022-02/Chief%20Ombudsman%27s%20Submission%20-%20Review%20of%20the%20Protected%20Disclosures%20Act%202000.pdf> accessed 10 March 2023.

organisations, forms of adversity a discloser could face, and allowing direct reporting to an appropriate authority), remedies for which were incorporated into the 2022 Act.[164] A quote attributed to the sponsoring Minister, Chris Hipkins MP, as to the reasons for change (and which should be considered in the above context in respect of the 2022 Act), stated that it 'makes the disclosure process easier, extends and clarifies the grounds under which protected disclosures can be made and provides increased protection for whistleblowers.'[165]

5.9.1 Transposing salient features of New Zealand's Protected Disclosures (Protection of Whistleblowers) Act 2022 to the UK context without law change

5.9.1.a Timescales

Several elements of the Protected Disclosures (Protection of Whistleblowers) Act 2022 could operate in the UK context without law change (Vol 5 Table 86). Section 13 mandates that within 20 working days of a disclosure being received, a contactable discloser must receive an acknowledgment.[166] As previously argued, consistent application of reasonable timescales should be included in non-statutory guidance to UK prescribed persons and for the information of other stakeholders, especially whistleblowers, persons concerned, and witnesses.

5.9.1.b Keeping disclosers informed

Section 13 also requires that the recipient of the disclosure must assess it and decide whether to investigate, refer the disclosure, or take no action, advising the discloser of the decision,

[164] Protected Disclosures (Protection of Whistleblowers) Act 2022; New Zealand Parliament, 'Protected Disclosures (Protection of Whistleblowers) Bill: Final Report (Final report (Protected Disclosures (Protection of Whistleblowers) Bill) 294-2)' (2021) <https://selectcommittees.parliament.nz/v/6/9bfda3d9-a05d-40fb-a7f0-43fe34af9a5b> accessed 11 March 2023.

[165] Ana Popovich, 'Updated Whistleblower Law Enacted in New Zealand' *Whistleblower Network News* (Washington DC, 16 May 2022) <https://whistleblowersblog.org/global-whistleblowers/updated-whistleblower-law-enacted-in-new-zealand/> accessed 18 March 2023.

[166] Protected Disclosures (Protection of Whistleblowers) Act 2022.

with reasons.[167] Where it is not possible to decide what course to take within 20 days, the discloser must be updated and apprised of a revised timeline.[168] The expectation of an update and communication timeline could be transposed into the UK system without law change.

5.9.1.c No retaliation or victimisation

Sections 20 and 22, respectively, prohibit retaliation against a discloser, and treating or threatening to treat less favourably another person who has made or intends to make a disclosure, including an associate or relative of the discloser or would-be discloser.[169] It is not clear why two terms, retaliation and victimisation, are used in the Act, other than Section 22 includes persons contemplating a disclosure ie *before* it is made, whereas Section 20 appears to relate to circumstances *after* a disclosure has been made. David Lewis, Tom Devine and Paul Harpur note that under the Human Rights Act 1993 (NZ), protections against 'victimisation' are available when contemplating or making a relevant disclosure to the employer or Human Rights Commission (but no reference to retaliation is found in that Act).[170] UK legal protections do not include relatives or associates of a whistleblower; however, setting out clearly that detriment, victimisation or retaliation, however expressed, towards whistleblowers and those contemplating a disclosure, is not acceptable and will be challenged to the extent permissible through the available powers of the prescribed person, should be included in non-statutory guidance.[171]

5.9.1.d Requests for information by the national authority

[167] Protected Disclosures (Protection of Whistleblowers) Act 2022.
[168] ibid.
[169] ibid.
[170] David Lewis, Tom Devine and Paul Harpur, 'The key to protection: Civil and employment law remedies' in AJ Brown and others (eds), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 371.
[171] ERA 1996 Section 43A; 'third persons who are connected with reporting persons' are referred to in Article 4.4.(b) Directive (EU) 2019/1937 (n 7) refers.

Under Section 31, the Ombudsman can request information about the availability, content and operation of a public body's internal whistleblowing procedures.[172] Under Section 35(1), the Ombudsman 'may receive' reports in respect of cases involving public bodies that it has decided to investigate, has taken over wholly or jointly with a public sector organisation, or has otherwise provided guidance about.[173] Were a body to exist in the UK which had oversight of prescribed persons' activities, its role should be described and explained in formal guidance. An approach is mooted in Chapter 6.

5.10 Critique of New Zealand's PDA 2000 and Protected Disclosures (Protection of Whistleblowers) Act 2022

Criticism remains that a disclosure to the media is not included as a protected disclosure.[174] One reason for its omission may be the view held by some opinion-formers that New Zealand is such an ethical society that it has no need for the media to act as an appropriate authority.[175] This may be a well-founded disposition (New Zealand was ranked 2 out 180 countries evaluated in TI's 2022 Corruption Perceptions Index) but that self-view, if held, may become a hostage to fortune where a significant channel to identify problems via the media is closed-off.[176] Other jurisdictions, such as the UK, have established public reporting as an option of

[172] Protected Disclosures (Protection of Whistleblowers) Act 2022.
[173] ibid Section 35(1) per Sections 32 and 33.
[174] RNZ, 'Whistleblower law leaves media out of the loop' (2022) <https://www.rnz.co.nz/national/programmes/mediawatch/audio/2018845069/whistleblower-law-leaves-media-out-of-the-loop> accessed 12 March 2023.
[175] ibid; Chris Hipkins, 'Government bolsters protection for whistleblowers' (Beehive.govt.nz 2022) <https://www.beehive.govt.nz/release/government-bolsters-protection-whistleblowers> accessed 12 March 2023; Institute of Directors New Zealand, 'The Protected Disclosures Act 2022' (2022) <https://www.iod.org.nz/resources-and-insights/policy-and-legal/legislation/the-protected-disclosures-act-2022/#> accessed 12 March 2023; Ombudsman, 'Annual Report 2021/2022' (2022) 14 <https://www.nzdoctor.co.nz/sites/default/files/2022-10/Chief%20Ombudsman%20Annual%20Report%202021-2022.pdf> accessed 12 March 2023; Open Government Partnership New Zealand, 'OGPNZ Update: long-term insights briefing, whistleblowers Act & Speaking Up standards (2023) <https://ogp.org.nz/latest-news/ogpnz-update-long-term-insights-briefing-whistleblowers-act-and-speaking-up-standards/> accessed 12 March 2023.
[176] Transparency International, 'Corruption Perceptions Index' (2022) <https://www.transparency.org/en/cpi/2022/index/nzl> accessed 18 March 2023.

last resort.[177] Overall, it is too early to tell whether the 2022 Act will improve the lot of whistleblowers in New Zealand.

5.11 South Africa: Protected Disclosures Act 2000 (PDA 2000)

Multiple contexts are noted in how the Protected Disclosures Act 2000 (PDA 2000) is expected to operate in South Africa and which are not explicit in Part IVA.[178] For example, the South African Government highlights whistleblowing as a means to prevent 'squandering, maladministration, and misuse of your taxes'; also, that 'Government has the responsibility to remain transparent and accountable to you on the use of public funds and service delivery at all times.'[179] An anti-corruption perspective is suggested by the above whereas South African jurisprudence positions PDA 2000 in the context of 'democratic values of human dignity, equality and freedom', whilst another important case accentuates duty to raise malpractice:

> In the mind of its drafters, it was emphasized that every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace and that every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure.[180]

The PDA 2000 refers both to public and private sector employees.[181] Section 6 defines that a protected disclosure is one made in good faith but, as noted, much international practice no longer includes a good faith criterion given that its focus on the motivation of the discloser is a distraction from the wrongdoing or failure disclosed and may deter potential

[177] ERA 1996 Section 43H.
[178] ERA 1996.
[179] South African Government, 'Whistle blowing' (no date) <https://www.gov.za/anti-corruption/whistle-blowing> accessed 2 June 2023.
[180] *Tshinga v Minister of Justice and Constitutional Development and another* (JS898/04) [2006] ZALC 104; [2007] 4 BLLR 327 (LC); 2007 (4) SA 135 (LC) (26 December 2006); *Ngobeni v Minister of Communications and Another* (J08/14) [2014] ZALCJHB 96; (2014) 35 ILJ 2506 (LC) (3 April 2014) at [10].
[181] Under Section 3(1) PDA 2000.

whistleblowers.[182] In TI's Corruption Perceptions Index of 2022, South Africa was ranked 72 out of 180 countries, a fall of one place over the preceding year.[183]

5.11.1 Transposing salient features of South Africa's PDA 2000 to the UK context without law change

It was considered that elements of the PDA 2000 could be suitable for inclusion in the UK context without law change (Vol 5 Table 87). Section 10 requires relevant Ministers to consult with each other and then publish guidelines which explain provisions and procedures to 'employees who wish to report or otherwise remedy an impropriety'.[184] Section 10(4)(c) sets the expectation that every employee of 'organs of state' must receive a copy of the guidelines (although the Act relates to both the public and private sector) whilst Section 6 establishes equivalent requirements for 'every employer'.[185] It is to be noted that Section 11 of the Protected Disclosures Amendment Act 2017 amends Section 10 PDA 2000 to include workers as well as employees. The UK Government has published guidance to 'employees', employers and prescribed persons; even so, the guidance does not comprehensively 'explain provisions and procedures' as proposed under Sections 6 and 10 of PDA 2000. Non-statutory guidance could do more to achieve this aim, and be presented to explain how workers', employers' and prescribed persons' contributions to the public interest through effective whistleblowing are inter-connected, rather than discrete.[186]

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[182] Section 6 PDA 2000; b

[183] Transparency International, 'Corruption Perceptions Index' (2022) <https://www.transparency.org/en/cpi/2021?gclid=Cj0KCQjwwtWgBhDhARIsAEMcxeBbdHzDXfGYgDNSIBEO_MRh7pjYZNoFuulMLgZJHAnQKunQFuXXNW4aAnkCEALw_wcB> accessed 18 March 2023.

[184] PDA 2000.

[185] ibid.

[186] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Guidance for Employers and Code of Practice' (2015) <https://assets.publishing.service.gov.uk/media/5a819ef5e5274a2e87dbe9e3/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf> accessed 22 December 2022; Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 19 January 2022; GOV.UK, 'Whistleblowing for employees' (No date) <https://www.gov.uk/whistleblowing> accessed 12 March 2023.

5.12 South Africa: Protected Disclosures Amendment Act 2017 (PDAA 2017)

Section 5 PDAA 2017 accounts for employees who are unable to act in their own name. Whilst young employees are not specifically designated, as with Section 12 of Ireland's PDA 2014, the wording of Section 5 appears to include this group of workers, which are not considered in Part IVA.[187] The Ireland and South Africa legislation draw attention to the desirability of including in the proposed UK non-statutory guidance arrangements regarding workers who do not have legal capacity. Several amendments to PDA 2000 implemented by PDAA 2017 would be suitable for consideration in the UK context.[188] Section 4 adds an investigation imperative into the receipt of disclosures' process, Section 10 emphasises that making false allegations should receive opprobrium, whilst Sections 11 and 13 relate respectively to the provision of readily available guidelines for potential whistleblowers, and '[statutory] guidelines for the disclosure of such information.' (Vol 5 Table 88).[189] These elements (except where a statutory requirement is entailed), supporting similar intent in other jurisdictions mentioned, could be suitable for inclusion in the proposed UK guidance.

5.12.1.a Timescales

Section 4 PDAA 2017 amends Section 3 of PDA 2000 to create a new Section 3B requiring that, within 21 days, the recipient of a protected disclosure should decide whether to investigate and if not, to record the rationale. Where it has not been possible to reach a decision whether to investigate, Section 3B(3)(b) requires that after 6 months the discloser must be advised in writing of that position and, thereafter, updated at two-monthly intervals.[190] Establishing a

[187] ERA 1996.
[188] PDA 2000 (South Africa).
[189] ibid.
[190] ibid.

communications protocol is a theme already noted in other jurisdictions mentioned here and could be included in UK prescribed persons' guidance without law change.[191]

5.12.1.b Keeping disclosers informed

As noted above, Section 4 establishes a timeframe for maintaining contact with the discloser, including when the disclosure is transferred between recipients [Section 3B(1)(ii)].[192] The communication obligation also extends to informing the discloser of the outcome of the investigation, except where the identity of the discloser is not known, or to prevent undermining a criminal investigation [Section 3B(5)].[193] Again, this issue can be included in UK practice without the need for law change.

5.12.1.c Reasonable assistance and co-operation

Section 10 penalises with up to two years' imprisonment employees or workers who make a false statement knowing or believing it to be false, which causes and is intended to cause harm to the affected party.[194] Whilst there is no immediate prospect of law change in the UK which would include this perpetrator focus, it is considered appropriate here that any non-statutory guidance should repudiate malicious false allegations whilst also allowing for an honest mistake by the discloser.[195] Section 13 amends the preamble to the 2000 Act to describe an

[191] Australia's PIDA 2013 Section 52; Canada's Public Servants Disclosure Protection Act 2005 Section 19.4; Directive (EU) 2019/1937 (n 7) Recitals 58, 63, 67; New Zealand's Protected Disclosures (Protection of Whistleblowers) Act 2022 Section 13.
[192] PDAA 2017.
[193] ibid.
[194] ibid.
[195] Proposed UK legislative change where malicious statements would be criminalised is described in the All Party Parliamentary Group, 'Whistleblowing Bill' (2022) Section 23 <https://www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_4490728b5bc747e28770ed8efbe475e3.pdf> accessed 19 February 2023; legislative change may also arise from the forthcoming Department for Business & Trade review ('Review of the whistleblowing framework: terms of reference' (2023) <https://www.gov.uk/government/publications/review-of-the-whistleblowing-framework/review-of-the-whistleblowing-framework-terms-of-reference> accessed 3 April 2023); also, in some circumstances, making false statements can be penalised under the criminal law eg perverting the course of justice, and perjury.

operating culture for employees, workers and employers whereby each is expected to disclose 'criminal and other irregular conduct in the workplace', where employers take responsibility for protecting disclosers from reprisals, and where 'comprehensive statutory guidelines' support these goals.[196] Whilst a statutory, or professional-membership, or contractual obligation may place some workers in the UK under a duty to report wrongdoing or failures, there is no overarching legal duty on all workers to make a disclosure. Whilst it may be said that a moral duty exists upon members of any organisation to expose wrongdoing, that perspective is contestable: 'This is the best way to think about whistleblowing: it involves a kind of moral risk taking, and it can be justified only after the fact, if other citizens recognize its morality.'[197] Nevertheless, it seems reasonable that non-statutory guidance should set the moral compass towards disclosure; of 'right doing in the face of wrongdoing.'[198]

5.13 Critique of South Africa's PDA 2000 and PDAA 2017

Section 5 PDAA 2017 sets-out the purpose of the amendments to PDA 2000. Changes were intended to protect a broader range of workers, regulate joint liability as between employers and their clients, create a duty to advise disclosers about misconduct towards them, protect disclosers from criminal and civil liability arising from their disclosure where it relates to the commission of a criminal offence, and to punish deliberately providing false information. These amendments infer areas where the principal legislation was found to contain weaknesses but it has also been observed that PDA 2000 excludes parties to a procurement which is seen as a 'serious flaw, given the extent of procurement corruption in the country'.[199] Since the

[196] PDAA 2017 Section 13.
[197] Michael Walzer, 'Just and Unjust Leaks: When to Spill Secrets' (2018) 97(2) Foreign Affairs 48 55.
[198] Protect, 'When we Speak, Whistleblowers respond' (2022) <https://protect-advice.org.uk/when-we-speak-whistleblowers-respond/> accessed 12 March 2022.
[199] The Conversation, 'Whistleblowers in South Africa have some protections but gaps need fixing' (2022) <https://theconversation.com/whistleblowers-in-south-africa-have-some-protection-but-gaps-need-fixing-183992> accessed 12 March 2023.

introduction of PDAA 2017, critical comment has been made that employers' adoption of the amendments 'are the exception rather than the rule'.[200] One reason advanced for limited uptake is that employers are perceived to be more responsive to legislative change led by the Department of Employment and Labour whereas PDAA 2017 is led by the Department of Justice and Constitutional Development which, it is said, does not have the same repertoire of communication with employers.[201] It is to be noted that the 2018 Commission led by Acting Chief Justice Raymond Zondo into 'allegations of state capture, corruption and fraud in the public sector' (the Zondo Commission) reported on its work in 2022.[202] Notable amongst the recommendations was

> [t]hat the Government [should] introduce legislation or amend existing legislation: to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in Article 32(2) of the United Nations Convention Against Corruption.[203]

This recommendation would appear to call into question judicial confidence in PDAA 2017.

5.14 Proposed content of UK non-statutory operational guidance on the management of whistleblowing disclosures

From the evidence gathered in the research, a matrix has been prepared of practice commonly observed in the five countries selected for comparison. Significantly for the purposes of this thesis, the issues included, if adopted, should not entail a requirement for law change in order to derive improvements in standards and consistency of approach, particularly amongst

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[200] Whistleblowers, 'Guide to compliance: 3B of the Protected Disclosures Act of South Africa as amended' (no date) <https://www.whistleblowing.co.za/guide-to-compliance-3b-of-the-protected-disclosures-act-of-south-africa-as-amended/> accessed 12 March 2023.

[201] ibid.

[202] Judicial Commission of Inquiry, 'Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State' (2022) <https://www.statecapture.org.za/> accessed 14 March 2023.

[203] UN General Assembly, 'United Nations Convention Against Corruption' (adopted 31 October 2003, entered into force 14 December 2003) A/58/422; Judicial Commission of Inquiry, 'State Capture Report: Part VI Vol. 4: All the Recommendations' (2022) 23 <https://www.statecapture.org.za/site/files/announcements/672/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_IV_-_Recommendations.pdf> accessed 14 March 2023.

prescribed persons. According to the research, what appears less well developed in the UK's approach to guidance for prescribed persons is a clearer description of the outcomes expected of them, and sufficient tactical detail to inform them how those outcomes can be achieved, leading to greater consistency of approach (Vol 5 Table 89).

The draft 'heads' of guidance proposed below also include contemporary practice gleaned from the Directive, but only those elements which could be incorporated into the UK context without law change.[204] Noting the foregoing, it is suggested that operational guidance could include the following, and be available to support both LAPPs and non-LAPPs:

5.14.1 Workers' commitment to exposing wrongdoing

5.14.1.a Whilst for some workers a legal or professional obligation to disclose suspected work-related failures or wrongdoing may exist, arguably a moral obligation rests on all workers to do so.

5.14.1.b Workers have a duty of reasonable co-operation with their employer which workers demonstrate through (i) their 'best endeavours' to assist an investigation into a qualifying wrongdoing or failure (ii) being discreet about the fact that they have made a protected disclosure (iii) eschewing deliberate or reckless reports of false information (iv) raising with the approved channels acts or omissions which are suspected reprisals following the making of a disclosure by a worker.

5.14.2 Confidentiality

[204] Considered here to be: Recital 5 and Recital 108 (common minimum standards), Recital 58 and 67 (reasonable time to complete an investigation is three months, extendable to six months where the facts of the case require it), Recital 64 (indication of bodies which are appropriate to be competent authorities), Recital 66 (upon request, a whistleblower can meet investigators in person), Recital 70 (vexatious and repetitive reports which offer no new evidence may be unsuitable for investigation), Recital 72 (transfer of a disclosure between competent authorities), Recital 78 (exchange of good practice), Recital 82 (confidentiality does not accrue to whistleblowers who deliberately self-identify), Recital 89 (sources of independent advice should be clearly sign-posted by competent authorities) [Directive (EU) 2019/1937 (n 7)].

5.14.2.a Assurances as to confidentiality (with the primary objective of preventing detriment) are offered to whistleblowers, persons concerned and witnesses, and are observed, except where the conditions described in Section 5.14.2.c. apply.

5.14.2.b Deliberately disclosing the identity of a whistleblower, a person concerned or a witness without good and sufficient cause (per Section 5.14.2.c.) should be subject of sanction to the extent that the available powers of the employer, prescribed person or other investigating body permit.

5.14.2.c Exceptions to the confidentiality rule are: revelation is necessary for (i) the purpose of investigation of the disclosure (including where the identity of the source will be evident from the facts) (ii) the investigation of a criminal offence associated with the disclosure (iii) the prevention of serious harm to any person (v) upholding fairness towards the person(s) concerned (vi) complying with the order of a competent court or tribunal.

5.14.2.d Where the identity of a whistleblower, witness or person concerned is to be revealed, or is apparent from the facts, that person should be informed of the proposed revelation, the reason(s) for it, when it is proposed to take place, and to whom. Where possible, representations should be invited from the person whose identity is to be revealed, and fairly considered before the revelation is made.

5.14.2.e Confidentiality should not accrue to whistleblowers who deliberately reveal themselves as the source of the disclosure, or to persons concerned, or to witnesses who actively self-identify.

5.14.3 Perpetrator focus

5.14.3.a A whistleblower who is involved in a qualifying wrongdoing or failure is considered *ab initio* culpable for their own mis-deeds.

5.14.3.b It is expected that those responsible for a qualifying wrongdoing or failure are held to account to the extent that the powers of the employer, prescribed person or other investigating body permit.

5.14.3.c Persons directing, encouraging, conspiring about, or otherwise assisting in reprisals or threats of reprisals against whistleblowers or witnesses in an investigation (where a witness is not a whistleblower), are held to account to the extent that the powers of the employer, prescribed person or other investigating body permit.

5.14.4 Timeline and communications

5.14.4.a A timeline of relevant actions by the recipient of the disclosure should be provided to the whistleblower, including (i) a written acknowledgement within 5 days of receipt of the disclosure (where contact details are available) (ii) a decision as to whether the recipient is the appropriate recipient, within 7 days of receipt (iii) a decision to transfer the disclosure to another body (after consultation with that body) within 10 days of receipt from the whistleblower (iv) the new recipient's acknowledgment (to the whistleblower and body transferring) of receipt of the disclosure within 5 days of the date of agreement (v) a decision to investigate or not to investigate (with reasons in the latter case) within 10 days of receipt of the disclosure (vi) where it is not possible to make a decision to investigate or not to investigate within 10 days of receipt of the disclosure, notification (within the 10 day period) to the whistleblower of a revised timescale for that decision (vii) a risk assessment of the likelihood and nature of reprisals against the whistleblower within 10 days of making contact with the

whistleblower (where contactable) (viii) how the recipient intends to deal with identified reprisal risks (a) within its powers to act (b) or where not within its powers to act, suggestions for the whistleblower as to independent sources of advice (ix) a decision to terminate an on-going investigation (with reasons) within 5 days of that decision being made (x) where a decision to investigate is made, an estimation of the likely duration of the investigation (to be communicated within 15 days of the disclosure being received) (xi) where that estimation is likely to be exceeded, and prior to the estimated due date, a revised estimation as to the likely completion date (xii) a decision as to the outcome, with reasons (but which do not breach principles of confidentiality or investigative modus operandi) within 90 days of the receipt of the disclosure, which may be extended to up to 180 days where the facts of the case require such an extension (xiii) when the fact of the investigation is raised with a concerned body or person, communication in writing of as many of the steps at (i) – (xii) as are appropriate according to the principles of natural justice and upholding the public interest.

5.14.5 Investigation standards

5.14.5.a Investigations should be as expeditious and informal as possible but without compromising rigour.

5.14.5.b An investigation should not be improperly truncated or impeded, and should proceed to a logical and proportionate conclusion according to the reasonably available evidence.

5.14.5.c Adequate records must be maintained by the recipient of any disclosure which appears to emanate from a whistleblower.

5 .14.5.d Adequate records must be maintained by investigators and others involved in communication with whistleblowers, persons concerned and witnesses.

5.14.5.e A written report of sufficient detail should be compiled in each case where an investigation is undertaken comprising (i) what was investigated (ii) its duration (iii) its findings (iv) action taken and (v) any evidence of identified detriment to the whistleblower.

5.14.5.f Reports prepared under Section 5.14.5.e. should meet the relevant criteria required under the Prescribed Persons (Reports on Disclosure of Investigations) Regulations 2017.

5.14.5.g Written reports prepared under Section 5.14.5.e. should be available to support the identification of whistleblowing trends, patterns, and other significant changes, so as to alert prescribed persons and any oversight mechanism(s).

5.14.5.h Where a person concerned may face criticism in any investigation report, they should be provided with a reasonable opportunity to comment on any allegations made.

5.14.5.i An anonymous disclosure should be accepted for consideration of investigation where it appears to be a qualifying disclosure.

5.14.5.j Transferring disclosures between prescribed persons should be formalised and documented, following the basic principles of ‘most appropriate remit’ and the ‘best evidence’ rule. Where agreement cannot be achieved, the first recipient of the disclosure should take responsibility for communication with the whistleblower.

5.14.5.k In addition to the first or primary whistleblower, a worker who is a witness to an alleged qualifying disclosure (which is the same as, or part of a pattern, of wrongdoing or failures identified by the primary whistleblower) should also be treated as a whistleblower, provided the disclosure is a protected disclosure.

5.14.5.l If requested by the whistleblower, the investigator(s) should meet the whistleblower in person on at least one occasion in circumstances which protect confidentiality.

5.14.5.m A decision to investigate should be predicated on the public interest, a risk of harm continuing, the seriousness of the matter(s) under consideration, the assessment of available evidence, and the likelihood of securing adequate evidence through the proportionate use of available resource.

5.14.5.n Grounds not to investigate a disclosure comprise that: (i) a qualifying disclosure is not established (having regard to the work/employment status of the whistleblower and the matter disclosed) (ii) the matter is already under investigation by another prescribed person or competent authority (iii) the age of the matter disclosed makes the investigation impractical (iv) the matter is trivial (v) the matter is repetitive (and no new evidence is provided) and/or vexatious (vi) a balanced view is taken as between the public interest requiring an investigation, and the willingness of the whistleblower to support the investigation (vii) there is some other important public interest consideration that can be explained objectively as to why investigation is not appropriate.

5.14.5.o Reasonable and relevant recommendations from the investigator requiring action should be addressed by the employer or prescribed person.

5.14.6 Awareness-raising

5.14.6.a Employers and prescribed persons, in particular, have a responsibility to prepare guidance which draws the attention of workers, whistleblowers, witnesses and persons concerned to relevant legislation, guidance and other resources which would raise awareness of whistleblowing law, policy, procedure and process. These materials should be readily accessible including as a bespoke part of an organisation's website.

5.14.6.b Consistent terminology should be adopted to describe policies, procedures and processes. 'Whistleblowing' and 'whistleblower' are probably the best-known descriptors and are suitable for the purpose.

5.14.6.c Workers who are unable to provide informed consent in their own right, eg young workers, should be able to nominate appropriate adults to make a disclosure on their behalf and also to bring relevant matters before an ET or facilitated process eg ACAS.

5.14.7 Supervision and training

5.14.7.a Employers' and prescribed persons' policies, processes and procedures should recognise and support the special position of trust in which many first-line supervisors and managers are held by workers noting that it is to such managers that whistleblowers may turn in the first instance.

5.14.7.b Employers should ensure that supervisor and manager selection and training equips them to recognise and handle whistleblowing disclosures as an expected element of their duties.

5.14.7.c Personnel deputed to receive and manage whistleblowing disclosures should receive adequate training for the purpose, noting the potential vulnerabilities of whistleblowers and their need for confidentiality.

5.14.8 Oversight and governance

5.14.8.a Available governance mechanisms should ensure that prescribed persons, unless statutorily exempt, produce publicly available annual reports compliant with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017. An annual report should be published even when no reports are received.

5.14.8.b Available governance mechanisms should undertake 3-yearly reviews of the effectiveness of whistleblowing arrangements and make recommendations as to how such arrangements can be improved.

5.14.8.c Periodically, and at least annually, available governance mechanisms should request relevant information from prescribed persons to facilitate independent quality assurance of the operation of whistleblower arrangements.

5.14.8.d Available governance mechanisms should encourage the adoption of this guidance as a common minimum standard and audit against it, where their powers permit or influence allows.

5.14.8.e Available governance mechanisms should expect and encourage the systematic exchange of good practice between prescribed persons.

5.14.9.f Available governance mechanisms should promote awareness of relevant law, guidance, process and procedures amongst workers, employers, prescribed persons and the public.

5.14.9 Conclusions

The main conclusions drawn from the analysis in Chapter 5 are:

16. Approaches can be identified from evaluation of the whistleblowing laws of Australia, Canada, Ireland, New Zealand, and South Africa which may improve consistency in how prescribed persons manage whistleblowing disclosures in the UK.

17. Because it is uncertain whether meaningful revision of UK whistleblowing law will happen imminently or at all, it is possible to identify potentially beneficial measures in the whistleblowing laws of Australia, Canada, Ireland, New Zealand, and South Africa which could be adopted in the UK without the need for law change.

18. This international practice, along with that previously identified in Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law, could be included in non-statutory operational guidance to help manage whistleblowing disclosures in the UK, and which could complement existing Government guidance.

(Conclusions and recommendations have a running number from the preceding Chapter)

5.14.10 Recommendations

9. Publicly-available, non-statutory operational guidance is developed building on the outline provided in paragraph 5.14 *et seq*.

10. Available governance mechanisms which exercise oversight of prescribed persons, particularly LAPPs, adopt the non-statutory operational guidance described at Recommendation 9 above and provide governance against it.

Chapter 6 – A role for local authority ombudsmen in enhancing consistency of approach

6.1 Introduction

Chapter 6 considers how to address the principal shortfalls in the UK whistleblowing framework identified from the research and described in Chapters 2 and 3; weaknesses which particularly affect LAPPs. These are, firstly, the inaccurate, imprecise and inconsistent content and application of whistleblowing policies, procedures and processes and, secondly, the failure to comply with the national legislation which requires prescribed persons to report on whistleblower disclosures received, and how followed-up (except in Northern Ireland where the legislation does not apply).[1] The research suggests that the degree of self-determination afforded LAPPs is one factor underpinning the lack of consistency observed. The Chapter examines whether there is an available mechanism which could be harnessed to improve consistency of approach, infuse good practice, and which is achievable without recourse to law change. If so, the envisaged benefits to the public interest could include comprehensive and reliable publicly-available data regarding how whistleblowing disclosures are managed, thereby increasing transparency and accountability, as intended by Parliament.[2] Of greater significance, is the potential benefit of more people feeling confident to make protected disclosures in the public interest, averting harm or loss to others.[3]

6.1.1 The Prospective Oversight Model: Local Authority Ombudsmen

Consideration was given to whether ACAS could provide the oversight which the evidence suggests is required for the effective management of the whistleblowing framework by

[1] Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 [hereafter, 'Reports on Disclosures of Information Regulations 2017 (n 1)'].
[2] Per Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, Margot James' comments on the Reports on Disclosures of Information Regulations 2017 (n 1); HC Deb 22 March 2017, vol 623 cols 1-6.
[3] ibid.

prescribed persons. Although ACAS has already published (non-whistleblowing) codes of practice 'used by employment tribunals when deciding on relevant cases', and in furtherance of ACAS' purpose of 'mak[ing] working life better for everyone in Britain', ACAS has no pre-existing role in oversight of any of LAPPs' functions, a fact considered here to be an important selection criterion in identifying a suitable and available oversight body.[4] Similarly, an oversight role for the Equality and Human Rights Commission (EHRC) was contemplated given that it publishes a statutory code of practice regarding the Equality Act 2010.[5] However, as with ACAS, the slender nexus between EHRC's primary goal of preventing discrimination, and its relationship with prescribed persons, especially LAPPs, mitigates against the appropriateness of it fulfilling the envisaged oversight function.

Noting the above, and for the reasons set out below, and cognisant of some variation in the description of their roles, the existing bodies which appear most suitable to provide oversight of whistleblowing arrangements for LAPPs are certain ombudsmen already established in each of the constituent nations of the UK. These bodies, which have responsibility for complaints against local authorities, are the Local Authority and Social Care Ombudsman (for England), the Northern Ireland Public Services Ombudsman, the Scottish Public Services Ombudsman, and the Public Services Ombudsman for Wales.

6.1.1.a What is an ombudsman?

[4] ACAS, 'Acas Codes of Practice,' (no date) <https://www.acas.org.uk/codes-of-practice> accessed 1 December 2023; Acas, 'Our purpose and ambitions' (2022) <https://www.acas.org.uk/about-us/our-purpose-and-ambitions> accessed 1 December 2023.

[5] Equality and Human Rights Commission, Equality Act 2010 Code of Practice: Employment Statutory Code of Practice' (2011) <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 1 December 2023.

The term itself is said to be a translation of the Swedish 'umbuds man', a descriptor of a representative or proxy.[6] Dolan and Bennett suggest that an ombudsman acts as 'the neutral and disinterested party who could intervene and redress situations of unfairness arising from decisions taken by the state'.[7] However, this broad description of the purpose of ombudsmen allows for a proliferation of variants, and the authors' category of the 'classical or legislative' ombudsman is distinguished here given its purpose to protect citizens from maladministration by the state.[8] The International Ombudsman Institute, with more than 200 member organisations from over 100 countries, describes the role of ombudsmen as being to

> consider individual complaints and correct injustices caused by maladministration. They improve public services by ensuring that systemic failings are identified, that actions of governments become more transparent and their administrations more accountable.[9]

In the UK, the Ombudsman Association (formerly the United Kingdom Ombudsman Association, and then the British and Irish Ombudsman Association), with over 50 member organisations, similarly adopts a broad description of the role:

> An ombudsman is an independent service that investigates and resolves complaints. Ombudsman schemes are free to use and impartial in their investigations – so they don't take sides. They make decisions based on what is fair. As well as providing redress for an individual, an ombudsman also identifies any systemic issues and provides feedback to help improve services and complaint handling.[10]

6.1.1.b How maladministration is defined in UK local authority ombudsmen's jurisdictions

Central to the role of the four UK local authority ombudsmen is the concept of maladministration, a term which is interpreted differently by each ombudsman.

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[6] Norman J Dolan and Colin J Bennett, 'What is an Ombudsperson? Global Diffusion, International Standardization, and Institutional Diversification' (2019) Political Studies Review 17(4) 370 373.
[7] ibid.
[8] ibid 374.
[9] International Ombudsman Institute, 'About the IOI' (no date) <https://www.theioi.org/the-i-o-i#anchor-index-2018> accessed 23 April 2023.
[10] Ombudsman Association, 'What is an Ombudsman?' (no date) <https://www.ombudsmanassociation.org/what-ombudsman> accessed 23 April 2023.

6.1.1.b.i England

The Local Government and Social Care Ombudsman (LGSCO), established under the Local Government Act 1974, defines maladministration in the following way:

> Maladministration in broad terms might include:
> - flaws in policies or decision making
> - poor administrative practice
> - failure to adhere to or consider properly statutory guidelines
> - failing to consider properly the exceptional circumstances of an individual or a situation
> - not properly considering statutory powers or duties
> - failing to give an adequate service.[11]

In this definition, bullet points 1-3 and 5 appear most relevant to the findings in this research. In respect of point 1, many of the whistleblowing policies examined contain flaws as to their legal precision in that they do not include statutory disclosure criteria, do not differentiate statutory disclosure criteria from disclosure criteria of local concern, and/or include persons who are not workers, and/or include a redundant 'good faith' requirement in respect of the whistleblower's motive (but which remains relevant in respect of compensation).[12] Of the 409

[11] Local Government & Social Care Ombudsman, 'Guidance on Jurisdiction: 2.2 What is maladministration?' (no date) <https://www.lgo.org.uk/information-centre/staff-guidance/guidance-on-jurisdiction?chapter=2#22+What+is+maladministration> accessed 27 April 2023.

[12] Vol 2 Table 19 entries R4, R5, R6, R12, R14, R15, R16, R17, R18, R19, R20, R21, R22, R24, R25, R26, R27, R29, R30, R32, R33, R34, R35, R36, R37, R38, R39, R40, R41, R42, R43, R44, R45, R46, R47, R49, R50; Vol 2 Table 20 entries R51, R52, R53, R54, R55, R58, R60, R62, R63, 6R4, R65, R66, R67, R68, R69, R70, R71, R72, R76, R77, R78, R80, R83, R84, R85, R86, R87, R88, R89, R90, R91, R92, R93, R94, R95, R96, R97, R98, R99; Vol 2 Table 21 entries R101, R102, R103, R104, R105, R108, R110, R111, R113, R114, R117, R119, R120, R121, R122, R123, R124, R125, R126, R127, R128, R129, R130, R132, R133, R136, R137, R138, R139, R140, R141, R142, R143, R144, R146, R148, R149, R150; Vol 2 Table 22 entries R151, R152, R153, R154, R155, R156, R157, R158, R159, R160, R161, R162, R164, R165, R166, R167, R169, R171, R172, R173, R174, R175, R176, R177, R178, R179, R180, R181, R182, R184, R185, R187, R188, R189, R190, R191, R192, R193, R194, R195, R196, R197, R198, R200; Vol 2 Table 23 entries R201, R202, R205, R206, R207, R208, R209, R210, R211, R212, R213, R214, R215, R216, R217, R218, R219, R220, R221, R222, R223, R224, R225, R227, R228, R229, R231, R233, R234, R235, R237, R238, R239, R240, R241, R244, R246, R247, R248, R249, R250, R252, R253, R254, R255, R256, R257, R258, R259, R260, R261, R262, R263, R264, R265, R266, R267, R270, R271, R273, R275, R276, R277, R278, R280, R281, R282, R283, R284, R287, R288, R289, R290, R291, R292, R293, R294, R295, R296, R297, R298, R299, R300; Vol 2 Table 24 entries R301, R302, R303, R304, R305, R307, R308, R309, R310, R311, R312, R314, R315, R316, R317, R319, R320, R321, R322, R323, R324, R325, R326, R328, R329, R330, R331, R333, R334, R335, R336, R337, R338, R339, R340, R341, R342, R345, R346, R347, R348, R349, R350, R351, R352, R353, R354, R355, R356, R357, R359, R360, R361, R362, R363, R364, R365, R366, R367, R368, R369, R370, R371, R372, R373, R374, R377, R378, R379, R380, R381, R382, R383, R384, R385, R386, 3R87, R388, R390, R391, R393, R394, R395, R396, R397, R 398, 3R99, R400, R401, R402, R403, R404, R405, R407, R408, R410, R411.

local authority whistleblowing policies available and examined in this research, 348 (85%) were found to include one or more of the defects described above.[13] Regarding bullet point 2 ('poor administrative practice'), many LAPPs did not have a system to identify external whistleblowers such that they were unable to fulfil adequately their function under Section 43F ERA 1996.[14] In respect of the third ('failure to adhere to or consider properly statutory guidelines') and fifth bullet points ('not properly considering statutory powers or duties'), most LAPPs were found not to comply with the requirements of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.[15]

6.1.1.b.ii Northern Ireland

The Northern Ireland Public Services Ombudsman describes maladministration in the following terms:

> The term 'maladministration' is not legally defined but it is generally taken to mean poor administration or the wrong application of rules. Some things that we may regard as maladministration include:
> - avoidable delay
> - faulty procedures or failing to follow the correct procedures
> - not telling you about any rights of appeal you have
> - unfairness, bias or prejudice
> - giving advice that is misleading or inadequate
> - refusing to answer reasonable questions
> - discourtesy and failure to apologise properly for errors
> - mistakes in handling your complaints[16]

Bullet points 2 ('faulty procedures'), 5 ('advice that is misleading') and 8 ('mistakes in handling complaints') resonate with the research findings regarding LAPPs' whistleblowing policies, procedures and processes. In respect of Northern Ireland LAPPs' whistleblowing

[13] Vol 2 Table 19.
[14] Vol 2 Table 11 column 4.
[15] Vol 3 Table 30 summary of column 4.
[16] Northern Ireland Public Services Ombudsman, 'How will NIPSO deal with my complaint?: What can the Ombudsman investigate?' (no date) <https://nipso.org.uk/nipso/making-a-complaint/how-will-nipso-deal-with-my-complaint/#:~:text=We%20can%20look%20at%20complaints,the%20wrong%20application%20of%20rules> accessed 1 May 2023.

policies, the rate of error identified by the research was 100% across the 11 local authorities ie each local authority demonstrated at least one relevant 'defect' in its whistleblowing policy, procedure or process.[17] The situations described in bullet points 5 and 8 would apply where a local authority's policy failed to identify that a public complaint is, in fact, a protected disclosure from an external whistleblower who may face detriment or unfair dismissal as a result of making the disclosure.

6.1.1.b.iii Scotland

The Scottish Public Services Ombudsman offers the following explanation of maladministration:

> While the SPSO Act does not give a definition of maladministration, we use the following as examples of the kind of failings that come under the heading of maladministration:
> • unreasonable delay
> • rudeness
> • failure to apply the law or rules properly.[18]

In respect of the flaws identified by this research, it can be argued that legal inaccuracies in whistleblowing policies, procedures and processes, and the complete or partial failure to implement the requirements of the Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 meet the criterion in bullet point 3 of 'failure to apply the law or rules properly.' Specifically, relevant weaknesses were identified in local authorities' whistleblowing policies in 26 of 32 Scotland councils, a rate of 81.2%.[19]

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[17] Vol 2 Table 19 entries R8 (Ards and North Down), R10 (Armagh Banbridge Craigavon), R23 (Belfast City); Vol 2 Table 20 entries R57 (Antrim and Newtownabbey), R59 (Causeway Coast and Glens), R100 (Derry City and Strabane); Vol 2 Table 22 entry R186 (Lisburn Castlereagh); Vol 2 Table 23 entries R226 (Mid and East Antrim), R230 (Mid Ulster), R243 (Newry Morne and Down), R268 (Fermanagh Omagh).

[18] Scottish Public Services Ombudsman, 'What does maladministration mean?' (2018) https://www.spso.org.uk/what-does-maladministration-mean#:~:text=While%20the%20SPSO%20Act%20does,the%20law%20or%20rules%20properly>accessed 1 May 2023.

[19] Vol 2 Table 19 entries R3 (Aberdeenshire), R9 (Argyll and Bute); Vol 2 Table 20 entries R74 (City of Edinburgh), R75 (Glasgow City), R79 (Clackmannanshire), R81 (Comhairle nan Eilean Siar); Vol 2 Table 21 entries R106 (Dumfries and Galloway), R107 (Dundee City), R109 (East Ayrshire), R112 (East Dunbartonshire), R118 (East Renfrewshire), R134 (East Fife); Vol 2 Table 23 entries R232 (Midlothian), R236

6.1.1.b.iv Wales

Neither the Public Services Ombudsman (Wales) Act 2019 nor the Public Services Ombudsman Wales's website provides a definition of maladministration. In the Wales context, former Ombudsman for the Republic of Ireland and President of the International Ombudsman Institute, Peter Tyndall, writing about the Public Services Ombudsman for Wales, explains that maladministration 'can be caused by a non-compliance with the law, but can equally be a product of unfairness, delay, sloppy procedures or human error'.[20] In respect of Tyndall's comment about 'a non-compliance with the law,' this research has identified that 19 of the 22 Welsh local authorities' whistleblowing policies, procedures and policies (86.4%) contain legal inaccuracies potentially amounting to the 'non-compliance' suggested by him.[21] Overall, and in consideration of each national ombudsman's definition of maladministration, there appears justification from the research to suggest that relevant failings amounting to maladministration are occurring in each UK country of a kind which could fall within the ambit of the ombudsmen.

6.1.2 Local Government and Social Care Ombudsman (England)

The LGSCO accepts jurisdiction, in principle, for investigating complaints about most services provided by local authorities in England.[22] Local authorities are defined under Section 34(1)

(Moray), R243 (North Ayrshire), R251 (North Lanarkshire), R269 (Orkney Islands), R274 (Perth and Kinross), R285 (Renfrewshire); Vol 2 Table 24 entries R306 (Scottish Borders), R313 (Shetland), R318 (South Ayrshire), R327 (South Lanarkshire),R 344 (Stirling), R389 (West Dunbartonshire), R392 (West Lothian).

[20] Peter Tyndall, 'The Public Services Ombudsman for Wales: A consideration of its current status and possible future development' (2015) Cambrian Law Review 43 44; Parliament.UK, 'PHSO Annual Scrutiny 2017/18: Towards a Modern and Effective Ombudsman Service 2. Independent Peer Review' (no date) <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1855/185505.htm> accessed 24 July 2023.

[21] Vol 2 Table 4 and Table 19 entries R28 (Blaenau Gwent), R38 (Bridgend), R48 (Caerphilly); Vol 2 Table 20 entries R54 (Cardiff), R56 (Carmarthenshire), R61 (Ceredigion), R82 (Conwy), R96 (Denbighshire), R135 (Flintshire), R147 (Gwynedd); Vol 2 Table 23 entries R225 (Merthyr), R235 (Monmouthshire), R237 (Neath Port Talbot), R242 (Newport), R272 (Pembrokeshire), R279 (Powys), R286 (Rhondda-Cynon-Taff); Vol 2 Table 24 entries R375 (Vale of Glamorgan), R406 (Wrexham).

[22] Local Government & Social Care Ombudsman, 'Welcome to the Local Government & Social Care Ombudsman' (no date) <https://www.lgo.org.uk/> accessed 20 May 2023.

Local Government Act 1974 (LGA 1974), and many such authorities are prescribed persons for the purpose of the Public Interest Disclosure (Prescribed Persons) Order 2014, thus establishing a nexus between LGSCO, local authorities and LAPPs.[23] Section 26(1) LGA 1974 sets out the matters which the LGSCO can investigate which include 'alleged or apparent maladministration in connection with the exercise of the authority's administration functions.'[24] LGSCO describes administrative functions as meaning '[a]ll functions that are not exclusively judicial or legislative.'[25] However, caveats are included within LGSCO's remit including that it will not investigate where 'the matter has not affected you personally or caused you an injustice'.[26]

In February 2023, as part of this research, LGSCO was subject of a FOIA 2000 request regarding the number of complaints it investigated which involved a whistleblower. Vol 6 Appendix IX contains the LGSCO response in which it stated its position as being '[f]rom 01 January 2018 to 13 February 2023, we received 85,319 complaints and enquiries and we do not have a category or marker for complaints raised by whistle-blowers.' Following this response, analysis was undertaken of LGSCO's publicly available decisions database where, using the term 'whistle' (to identify various derivatives of 'whistleblowing'), 37 entries were found (0.04%; n=85,319) in which failing to address whistleblowing or to comply with whistleblowing policy was cited by the complainant. Examination was then made (to the extent possible from information contained in the database) of the decisions taken by LGSCO in respect of those complaints involving whistleblowers.[27] In 10 of the 37 cases identified (27%),

[23] Public Interest Disclosure (Prescribed Persons) Order 2014.
[24] Section 26(1) LGA 1974.
[25] Local Government & Social Care Ombudsman, 'Guidance on Jurisdiction' (no date) <https://www.lgo.org.uk/information-centre/staff-guidance/guidance-on-jurisdiction?chapter=4#43%2bWhat%2bare%2badministrative%2bfunctions> accessed 24 April 2023.
[26] Local Government & Social Care Ombudsman, 'What we cannot investigate' (no date) <https://www.lgo.org.uk/make-a-complaint/what-we-can-and-cannot-look-at> accessed 24 April 2023.
[27] Local Government & Social Care Ombudsman, 'Decisions Search' (no date) <https://www.lgo.org.uk/Decisions/SearchResults?t=0&fd=0001-01-01&td=2023-03-

the LGSCO found a degree of fault or error by the local authority relating to its whistleblowing policy, whether through failing to comply with it or in keeping it up to date.[28] In the other cases, the LGSCO found no fault with the council's actions, but some of the reasons for the decisions made by the LGSCO as to why it chose not to inquire may not have been made with a thorough understanding of whistleblowing (in the absence of further detail).[29] Also, it is unclear in the decisions database whether a determination is made by the LGSCO that the complainant is a whistleblower. This is relevant because, firstly, the LGSCO is not a prescribed person for the purposes of Section 43F ERA 1996 (though local authorities' referral to the LGSCO of 'complaints' about the handling of internal whistleblowing disclosures is raised in 7.1% of the FOIA 2000 responses received in this research).[30] Secondly, in some circumstances, a disclosure by a whistleblower to the LGSCO may fulfil the criteria required under Section 43G (or Section 43H) ERA 1996, but in none of the 37 cases examined did the LGSCO establish whether the 'complaint' was a protected disclosure to it under Section 43G (or Section 43H), or consider itself to be acting in the capacity as the recipient of a protected disclosure. Overall, the point can be made from the analysis that through its activities the LGSCO appears familiar with whistleblowing procedures in English local authorities but the extent of its knowledge of the subject could be questionable (albeit that assessment is based on a limited number of cases).

13&q=raising%20concerns%20policy&dc=c%2Bnu%2Bu%2B&sortOrder=ascending> accessed 15 March 2023.

[28] Vol 5 Table 90 entries 4, 9, 17, 20, 23, 24, 31, 32, 33, 37.

[29] ibid entry 25 '9. I will also not investigate the Council's decision to consider Mr C's concerns under its whistle blowing procedure, and its subsequent decision not to share the outcome with Mr C. This is because it is unlikely we would find fault with the Council's approach.'; entry 29 states 'We will not investigate this complaint about the Council's response to her complaint under whistleblowing legislation. This is because the Council is not a prescribed body that can deal with such complaints and so it is unlikely we would find fault in its response to the complaint.'; entry 30 states '7. The LGSCO is not a prescribed body and we are not the body best placed to consider such matters. So even if Ms X's complaint had not been made late, we would not investigate the complaint made against the Council.'

[30] Vol 2 Tables 5A and 5B entries 8, 18, 24, 50, 51, 53, 65, 118, 126, 132, 166, 173, 199, 207, 215, 269, 270, 271, 281, 318, 320, 329, 335, 344, 378, 397 (7.1% where n=367).

In three of the 37 cases the LGSCO declined jurisdiction on the basis of Section 26(6)(a) LGA 1974 which provides that the LGSCO shall not investigate matters that can be considered by a tribunal. However, a Court of Appeal decision in 2023 has affected this position. In *R (Milburn) v Local Government and Social Care Ombudsman* (the facts of which relate to the provision of support to a child with special educational needs), the Court affirmed that the Ombudsman should not stray into considering matters within the jurisdiction of the courts. However, in the instant case, the Court found on examination of the wording of Section 26(6) that the Ombudsman had a locus in respect of apparently spurious claims made by the Council in its handling of the *Milburn* family, but not in respect of the central tenet that the council had failed to seek the views of the child, which was a disputed issue properly for the courts to resolve.[31] What this may mean in the context of the cases under consideration in this section (complaints rejected for investigation by LGSCO as described in Vol 5 Table 90), is that where a local authority claim is disputed that it had abided by its whistleblowing policy, that dispute could be a matter for the ombudsman to investigate; but where a whistleblower alleged harm as a result of the absence of policy or in spite of policy, that issue would remain the preserve of an ET. *Milburn* may therefore affect LGSCO decisions about its jurisdiction and may entail more complaints being investigated (of which a number could, in fact, be qualifying disclosures).

In terms of proposing a more systematic role for the LGSCO in bringing consistency to the 'system' of whistleblowing across LAPPs in England, LGSCO insists that complaints about councils should relate to an injustice or harm to an individual, rather than any broader category of persons.[32] However, in its annual report of 2021-22, LGSCO signalled that it had 'decided to place an increasing focus on issues that have a wider public interest, such as those extending beyond the individual complaining, or those which have caused significant or long-term

[31] *R (Milburn) v Local Government and Social Care Ombudsman* [2023] EWCA Civ 207; LGA 1974 [hereafter, '*Milburn* (n 31)'].
[32] Section 26A LGA 1974.

impact'.[33] A situation likely to affect the broader public interest, and a wider group (eg more than the individuals involved in the 37 cases cited from the decisions database), is that identified in this research whereby 95.4% of local authorities do not appear to have whistleblowing policies, processes and procedures which are compatible with the law.[34] Also, the general failure by LAPPs to maintain and publish records required by the Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 may provide a reasonable archetype of 'wider public interest' and extended scope alluded to in its 2021-22 Annual Report.[35]

6.1.3 Northern Ireland Public Services Ombudsman

The Public Services Ombudsman Act (Northern Ireland) 2016 established the Northern Ireland Public Services Ombudsman (NIPSO), and Section 5(1) permits NIPSO to investigate a complaint from a member of the public who claims to have suffered an injustice in respect of action taken by a relevant authority, which includes local authorities.[36] Unlike the position in England under LGA 1974, Section 8 of the Northern Ireland Act provides NIPSO 'power to investigate on own initiative.'[37] In its 2021-2022 annual report, NIPSO stated that '[it is] able to launch investigations where there is a reasonable suspicion of systemic maladministration. The issue of concern needs to be in the public interest and affect a number of people or a particular group of people.'[38] There is an arguable case that whistleblowers who are asked to follow inaccurate policy are both a 'number of people' and a 'particular group of people'. The

[33] Commission for Local Administration in England, 'Local Government and Social Care Ombudsman: Annual Report & Accounts For the period 1 April 2021 to 31 March 2022 HC 924' (OGL 2022) 51 <https://www.lgo.org.uk/assets/attach/6354/Annual-Report-2021-22-FINAL.pdf> accessed 23 April 2023.
[34] Vol 4 Table 64.
[35] Commission for Local Administration in England, 'Local Government and Social Care Ombudsman: Annual Report & Accounts For the period 1 April 2021 to 31 March 2022 HC 924' (OGL 2022) 2 <https://www.lgo.org.uk/assets/attach/6354/Annual-Report-2021-22-FINAL.pdf> accessed 23 April 2023.
[36] Section 5 Public Services Ombudsman Act (Northern Ireland) 2016.
[37] ibid Section 8.
[38] Northern Ireland Public Services Ombudsman, 'Ombudsman's Report 2021-2022' (2023) 11 <https://www.nipso.org.uk/about-us/annual-reports> accessed 23 April 2023.

own motion capability is particularly relevant in respect of the hypothesis that the UK ombudsmen could provide the mechanism to achieve greater consistency amongst LAPPs through an oversight role. Under Section 8(4), NIPSO needs only reasonable suspicion of widespread maladministration in order to investigate.[39] Further, Section 51(3)-(4) enables the Ombudsman to co-operate with the other local authority ombudsmen in England, Scotland and Wales in disclosing information relating to a complaint or investigation, in the conduct of an investigation, and in content and publication of a report.[40]

As previously observed, the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 do not apply in Northern Ireland because there continues to be no appointed ministers to consider and implement equivalent legislation to that in the UK.[41] NIPSO's database did not reveal any cases involving the search parameter 'whistle'; indeed, no reference to 'public interest disclosure' or 'speaking-up' could be found, although one Northern Ireland LAPP did suggest that a source of redress in respect of whistleblowing 'complaints' was NIPSO.[42] However, in respect of the wider aspect of the erroneous and inconsistent application of whistleblowing policy and procedure, there is an arguable case that the provisions of Section 8(1) or 8(4) could apply given that all 11 Northern Ireland LAPPs' whistleblowing policies and procedures included one or more defects. These included absence of process to identify and distinguish external whistleblowing disclosures from public complaints, continuing to include a good faith criterion in assessing whistleblowing disclosures, failure to differentiate matters of local or contractual concern from statutory qualifying disclosures, or holding-out that an internal whistleblowing policy was suitable to deal with disclosures from external

[39] Public Services Ombudsman Act (Northern Ireland) 2016.
[40] ibid.
[41] This remains the position as at December 2023; Institute for Government, 'Northern Ireland: Functioning of government without ministers' (2022) <https://www.instituteforgovernment.org.uk/article/explainer/northern-ireland-functioning-government-without-ministers> accessed 29 April 2023.
[42] Northern Ireland Public Services Ombudsman, 'Local Government' (no date) <https://nipso.org.uk/finding_type/local-government/> accessed 29 April 2023; Vol 2 Table 5A entry 8.

whistleblowers.[43] Overall, however, according to the available evidence, it cannot be said that NIPSO has demonstrable familiarity with local authority-related whistleblowing in Northern Ireland in comparison with the apparent experience of the other local authority ombudsmen in the UK.

6.1.4 Scottish Public Services Ombudsman

The principal legislation which provides the Scottish Ombudsman with its powers is the Scottish Public Services Ombudsman Act 2002 where Section 5(3) provides that a member of the public who claims injustice or hardship as a result of maladministration or service failure by a listed authority can make complaint. Unlike the NIPSO legislation, the Scottish Act does not allow for own initiative inquiries where a case suggests injustice or harm affecting more than one aggrieved person.[44] However, the Ombudsman appears minded to re-consider its approach given the following statement in its 2020-2021 Annual Report:

> The pressure on resources and the impact on parliamentary business meant we did not publish a report calling for a review and extension to our powers (in particular the ability to take complaints in any format and to conduct investigations under our own initiative without the need for a complaint) as planned. This was carried forward to 2021-22.[45]

The Ombudsman's 2021-2022 Annual Report revealed that its intention to engage in own motion investigations had not reached fruition. The Ombudsman reported that '[w]hilst we raised this verbally when giving evidence to the Local Government, Housing and Planning Committee, we are still to submit a written report.'[46]

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[43] Public Services Ombudsman Act (Northern Ireland) 2016; Vol 2 Table 19 entries 8, 10, 23, 57, 59, 100, 186, 226, 229, 243, 268.

[44] Scottish Public Services Ombudsman Act 2022.

[45] Scottish Public Services Ombudsman, 'SPSO Annual Report and Accounts 2020-2021' (no date) 17 <https://www.spso.org.uk/sites/spso/files/communications_material/annual_report/SPSO-Annual-Report-2020-21_0.pdf> accessed 30 April 2023.

[46] Scottish Public Services Ombudsman, 'SPSO Annual Report and Financial Statements 2021-22: Facing the future together' (no date) 15 <https://www.spso.org.uk/sites/spso/files/communications_material/annual_report/SPSO%20Annual%20Report%202021-22_%20Performance%20report.pdf> accessed 30 April 2023.

The Scottish Public Services Ombudsman also maintains a publicly-available database of its complaint decisions. As part of the research, searches were made to identify cases involving whistleblowing issues (using the 'whistle' search convention) since 2017. No cases were found but a pre-formatted message on the database front page stated '[y]ou can find our whistleblowing complaint findings on the INWO website', even though the Independent National Whistleblowing Officer (INWO) only relates to health-settings and not local authorities.[47]

Unlike the other ombudsmen, the Scottish Ombudsman has specific legal capacity in respect of whistleblowing in health settings. Section 6A of the 2002 Act entitles the Ombudsman to investigate whether public health service-related whistleblowing disclosures have been managed appropriately according to the health body's procedures for handling whistleblowing cases.[48] Specifically, since April 2021, the Scottish Ombudsman has hosted the INWO function in respect of whistleblowing by NHS personnel in Scotland pursuant to Section 6A.[49] INWO publishes reports using its powers under Section 15(1) about its handling of complaints concerning whistleblower concerns of which there were two each in 2022 and 2023 (as at September). INWO subsequently upheld aspects of all four complaints.[50] This dimension of the Ombudsman's responsibility and experience has obvious significance for a potential role in oversight of LAPPs' application of adequate whistleblowing policies and procedures.

[47] Scottish Public Services Ombudsman, 'Decision Reports' (no date) <https://www.spso.org.uk/decision-report-search?field_body_complained_about_value=&combine=public+interest&field_sector_target_id=5&field_outcome_target_id=All&field_report_date_value%5Bmin%5D=&field_report_date_value%5Bmax%5D=&field_case_ref_number_value=> accessed 21 May 2023.

[48] Section 6A Scottish Public Services Ombudsman Act 2002.

[49] Scottish Public Services Ombudsman, 'SPSO Annual Report 2020-21' 42 <https://www.spso.org.uk/sites/spso/files/communications_material/annual_report/SPSO-Annual-Report-2020-21_0.pdf> accessed 23 April 2023; Scottish Public Services Ombudsman Act 2002.

[50] Scottish Public Services Ombudsman Act 2002; Independent National Whistleblowing Officer, 'Our findings' (no date) <https://inwo.spso.org.uk/our-findings> accessed 30 April 2023.

In support of the potential LAPP oversight hypothesis suggested here, Section 21 of the Act permits the Ombudsman to consult and co-operate with other ombudsmen in the conduct of an investigation and the content and publishing of an investigation report, specifying in that regard local commissioners (within the LGSCO in England) and the Public Services Ombudsman for Wales, but not NIPSO.[51] However, consultation and co-operation with NIPSO is not precluded by Section 21.[52] From all of the foregoing, it can be asserted that the Scottish Ombudsman has knowledge and experience of whistleblowing requirements and arrangements.

6.1.5 Public Services Ombudsman for Wales

Section 7 of the Public Services Ombudsman (Wales) Act 2019 establishes that a member of the public claiming injustice or hardship in consequence of maladministration by a listed authority (which includes a local authority) can complain to the Ombudsman. Section 4 enables the Ombudsman to undertake own initiative investigations, a capability also available to the Northern Ireland Ombudsman.[53] The Wales Ombudsman's Annual report for 2021-2022 stated that

> [w]e can undertake two different types of 'own initiative' investigations:
> • extended investigation – when we are already investigating a problem and we extend the investigation to other issues or complainants
> • wider investigation – when we conduct a stand-alone investigation which does not relate to a complaint made by an individual.[54]

The Wales Ombudsman also publishes reports on its website. The format of data on the site does not readily permit searches to identify whistleblowing complaints; however, the search facility does already include a category of 'Public Interest Reports' but examination of the five

[51] This may be because the Scottish legislation pre-dates the 2016 legislation which established NIPSO.
[52] Scottish Public Services Ombudsman Act 2002.
[53] Public Services Ombudsman (Wales) Act 2019; Section 8 Public Services Ombudsman Act (Northern Ireland) 2016.
[54] Public Services Ombudsman for Wales, 'Annual Reports and Accounts 2021/2022' (2022) 64 <https://www.ombudsman.wales/wp-content/uploads/2022/08/ANNUAL-REPORT-2021-22-Signed-Version.pdf> 1 May 2023.

reports that appear to relate to local authority services since 2017 do not identify any obvious whistleblowing-related issues.[55]

Sections 65(2), (3) and (5)(a) enable the Ombudsman to consult, co-operate, and conduct joint investigations, with other ombudsmen.[56] The legislation references the local commissioners (which would include England's LGSCO), the Scottish Public Services Ombudsman, but not NIPSO, as ombudsmen for the purposes of Section 65. However, as noted, Section 51(4) of the Public Services Ombudsman Act (Northern Ireland) 2016 enables NIPSO to co-operate with the equivalent Wales Ombudsman under the Public Services Ombudsman (Wales) Act 2005 (which was repealed and replaced by the 2019 Act when it came into force on 22 May 2019).[57]

6.2 Employment Tribunals, Employment Appeal Tribunals, and Industrial Tribunals and the Fair Employment Tribunal cases

This section of the research focuses on ET cases brought against local authorities where public interest claims involving whistleblowing were made. The aim of the analysis is to appreciate the scale of litigation and its outturn, noting *Milburn*.[58] The data collected relate to cases in England and Wales since 2017 during which 117 cases were considered at ET.[59] In 50.4% of local authority cases, the claim was withdrawn by the claimant for reasons not always cited. In 44.4% of cases, the claim was dismissed by the ET and in only 5.1% of cases was the claim or

[55] Public Services Ombudsman for Wales, 'Our Findings' (no date) <https://www.ombudsman.wales/findings/?datefrom=&datefrom_submit=&dateto=&dateto_submit=&case_ref=&body=0&subject=0&outcome=Public+Interest+Report> accessed 1 May 2023.

[56] Public Services Ombudsman (Wales) Act 2019.

[57] ibid; Welsh Government, 'Law Wales: Public Services Ombudsman for Wales' (2022) <https://law.gov.wales/constitution-and-government/public-administration/public-services-ombudsman-wales#:~:text=The%20Public%20Services%20Ombudsman%20for,force%20on%2022%20May%202019> accessed 1 May 2023.

[58] *Milburn* (n 31).

[59] To May 2023; Gov.UK, 'Employment tribunal decisions' (no date) <https://www.gov.uk/employment-tribunal-decisions?keywords=local%20authority&tribunal_decision_country%5B%5D=england-and-wales&tribunal_decision_categories%5B%5D=public-interest-disclosure> accessed 11 April 2023.

application allowed in whole or part (Vol 5 Table 91).[60] This section also considers cases brought before the Employment Appeal Tribunal (EAT) since 2015 involving whistleblowing cases and local authorities (Vol 5 Table 92).[61] Only two cases can be identified from the EAT decisions database website and whilst appeals were successful, the number as a proportion of the 15 cases (described as 'public interest' cases on the website) is small at 13%.[62] No cases brought against local authorities by whistleblowers could be found at industrial tribunals and Fair Employment Tribunals in Northern Ireland since 2017 (Vol 5 Table 93).[63] In respect of whistleblowing claims since 2017 against Scotland's local authorities, no complaint involving an allegation apparently involving whistleblowing was upheld by the ET (Vol 5 Table 94) though in several cases, tangential matters were identified (eg under-calculation of payment owed) and addressed to the claimants' benefit. Claims were withdrawn in 3 of 12 cases (25%).[64]

It would appear that the number of whistleblowing-related claims against local authorities coming before ETs is small and the prospects of success for the claimant, limited. In addition to the general difficulties in bringing ET claims (because of the absence of civil legal aid and lack of advice), there are two reasons why caution should be exercised before concluding that these data suggest that there is no unresolved problem about maladministration by local authorities in respect of whistleblowing claims.[65] The first ground for caution is the relatively

[60] Gov.UK, 'Employment tribunal decisions' (no date) <https://www.gov.uk/employment-tribunal-decisions?keywords=local%20authority&tribunal_decision_country%5B%5D=england-and-wales&tribunal_decision_categories%5B%5D=public-interest-disclosure> accessed 23 April 2023. As at 23 April 2023, the database included 5,983 decisions in respect of protected interest cases. The research has not sought to identify the number of claims brought against each local authority; rather the overall number of local authorities against which claims have been brought (117), so it is not possible to say what proportion of all claims relate to local authorities.

[61] ibid.

[62] ibid.

[63] Office of the Industrial Tribunals and the Fair Employment Tribunal, 'Tribunal Decisions' (no date) <https://oitfet.employmenttribunalsni.co.uk/DecisionSearch.aspx> accessed 20 May 2023.

[64] GOV.UK, 'Employment appeal tribunal decisions' (no date) <https://www.gov.uk/employment-appeal-tribunal-decisions?keywords=council&tribunal_decision_categories%5B%5D=whistleblowing-protected-disclosures> accessed 20 May 2023.

[65] Burcak Dikmen, 'Why legal aid for whistleblowers is needed now' (Protect 2019) <https://protect-advice.org.uk/why-legal-aid-for-whistleblowers-is-needed-now/> accessed 2 January 2023.

high proportion of cases where local authority employees or workers are withdrawing claims. Whilst some of these claims may be without merit, some cases of merit may be settled outside the ET meaning those claims are withdrawn; however, confidentiality agreements about such cases make further research difficult.[66] The second ground involves an appreciation of the proportion of all local authorities which have faced ET claims by their employees or workers where it was found that a range between 30.8% of local authorities (England) and 50% (Wales) have been subject of ET claims, with an overall average of 31.8% (Vol 5 Table 95). By contrast, Northern Ireland councils do not appear to have been subject of any claims before equivalent tribunals.[67] Overall, it is suggested here that there is a reasonable basis upon which to propose an oversight role for ombudsmen of local authority whistleblowing arrangements; however, care would be required to ensure that ombudsmen do not unwittingly interfere in the judicial process, per *Milburn*.[68]

6.3 Workers and the public: distinguishing ombudsmen's responsibilities from Part IVA Employment Rights Act 1996

The role of the local government ombudsmen is to address relevant complaints by members of the public whether as individuals or in some circumstances, wider groups, according to the powers available to the ombudsmen. The defects commented upon in this thesis include inappropriate inclusions in policies and procedures of categories of people and types of disclosure, omissions of relevant people and disclosures, and unclarified 'blends' of these statutory and non-statutory criteria. As such policies relate to workers not members of the public, an argument arises whether there is an 'in principle' preclusion for the role of

[66] It has been reported that 'only 7% of disputes notified to Acas result[ing] in an ET hearing' [ACAS, 'Call for evidence on dispute resolution in England and Wales – Acas response' (2021) <https://www.acas.org.uk/call-for-evidence-on-dispute-resolution-in-england-and-wales-acas-response> accessed 20 May 2023].
[67] Vol 5 Table 95.
[68] *Milburn* (n 31).

ombudsmen in oversight of whistleblowing arrangements. The research revealed that only 4.6% of LAPPs' policies, procedures and processes would meet the needs of external whistleblowers, as compared to workers of the local authorities.[69] It is apparent from consideration of the ombudsmen's decisions' databases that the ombudsmen are, in fact, already addressing complaints from whistleblowers and it is noted that some LAPPs actually include the ombudsman as a source of 'appeal' against the handling of a whistleblowing complaint.[70] It can be argued therefore that the UK ombudsmen's investigation role in respect of complaints from members of the public is already an active process and would appear conducive to addressing deficits noted in respect of whistleblowers, particularly external whistleblowers.

6.4 Resources to support UK ombudsmen in oversight of LAPPs' whistleblowing role

Each local authority ombudsman has warned about the impact of resource constraints upon its ability to discharge its functions. Capacity concerns were expressed by England's LGSCO in its 2021-2022 Annual Report:

> In 2022-23, we have received a 'flat budget': the same amount as in 2021-22. This is now a significant, real terms cut to our resources, given that we must continue to meet considerable cost increases from this static budget.[71]

Similarly, NIPSO cautioned about its capacity to achieve its goals by expressing in its 2021-22 Annual Report that:

> the predominant risk factors that are of relevance to NIPSO's complaints case handling performance are: (i) The long term increase in complaints (125% since NIPSO was created in 2016) which has the potential to place significant demands

[69] Vol 4 Table 64.

[70] Local Government & Social Care Ombudsman, 'Decisions Search' (no date) <https://www.lgo.org.uk/Decisions/SearchResults?t=0&fd=0001-01-01&td=2023-03-13&q=raising%20concerns%20policy&dc=c%2Bnu%2Bu%2B&sortOrder=ascending> accessed 15 March 2023; R18, R24, R50, R53, R65, R118, R126, R132, R166, R199, R207, R215, R269, R270, R271, R281, R320, R329, R335, R344, R378, R397 which reference local authorities that include local government ombudsmen as a source of complaint resolution regarding whistleblowing.

[71] Commission for Local Administration in England, 'Local Government & Social Care Ombudsman: Annual Report & Accounts 2021-22 (for the year ended 31 March 2022) HC 924' (OGL 2022) 29 <https://www.lgo.org.uk/assets/attach/6354/Annual-Report-2021-22-FINAL.pdf> accessed 6 May 2023.

> on limited resources […] and (iii) Uncertainty over future years' resources and inability to identify and mitigate future financial pressures, threatening the achievement of key business objectives.[72]

The resource constraints upon the Scottish Public Services Commissioner were also cited as a reason why it had not been able to pursue its intention of adopting own motion investigations, seen in this thesis as important to achieving enhanced governance of disparate local authority whistleblowing arrangements:

> The most significant strategic risk to the organisation in 2021-22 remained the adequacy of resources to provide a quality service that delivers our statutory functions, in particular our public service complaint handling.[73]

The Public Services Ombudsman for Wales accepted in its 2021/2022 Annual Report that it had taken too long to investigate some cases and that '[t]his was in part because of our workload – there were simply too many cases for us to consider speedily with the resources we have.'[74] With these limitations in mind, consideration has been given here to an approach which may help alleviate any new burden arising from a proposed LAPP oversight function, by drawing on the capacity and expertise in the private sector and having regard to the relative budgets available to LAPPs and the UK ombudsmen. It would seem reasonable that financial accountability for the remediation of formally proven defects amounting to maladministration of whistleblowing laws and policies should fall on the LAPPs which have statutory responsibility for adherence and reporting.[75] According to published data, budgets for local authorities in England for 2022-23 were projected to be £108.3 billion, whereas the budget for

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[72] Northern Ireland Public services Ombudsman, 'Annual Report & Accounts: For the year ended 31 March 2022' (OGL 2022) 9 <https://www.nipso.org.uk/about-us/annual-reports> accessed 6 May 2023.

[73] Scottish Public Services Ombudsman, 'SPSO Annual Report 2021-2022: Facing the future together' (no date) 78 <https://www.spso.org.uk/sites/spso/files/communications_material/annual_report/SPSO%20Annual%20Report%202021-22_%20Performance%20report.pdf> accessed 21 May 2023.

[74] Public Services Ombudsman for Wales, 'Annual Report and Accounts 2021/2022' (2022) 51 <https://www.ombudsman.wales/wp-content/uploads/2022/08/ANNUAL-REPORT-2021-22-Signed-Version.pdf> accessed 6 May 2022.

[75] Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) 10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf> accessed 16 July 2023.

the LGSCO – the largest UK local authority ombudsman - was set at £16.3 million; a 6,600% disparity.[76]

6.4.1 A role for the private sector where ombudsmen's resource is inadequate

According to the evidence identified here, there are grounds to doubt that all UK local authorities and, indeed, ombudsmen have the combination of capability and capacity to carry out effective audits of the whistleblowing arrangements in local authorities, against an agreed standard. As an illustration of contemporary practice, the outline non-statutory operational guidance suggested in Chapter 5 could provide the criteria against which assessments of local authority whistleblowing arrangements are made, pertaining both to internal and external whistleblowers or, on the basis of larger risk/lower resource requirement, just to external whistleblowers. It is suggested that such an assessment service could be provided by the private sector, but any body undertaking the role would not act as decision-maker in lieu of the relevant ombudsman. Rather, private sector bodies would gather and present evidence to a consistent standard and in a consistent format to enable the relevant ombudsman to decide whether LAPP arrangements are adequate or not and agree, amend, or reject any of the recommendations as to action proposed by the private sector body directed at bringing the LAPP's whistleblowing arrangements to an acceptable standard. The legal basis for the ombudsman intervening in this way would be because of the maladministration identified in this and other research, as well as the 'complaints' already investigated or under investigation by ombudsmen.

[76] Department for Levelling Up, Housing & Communities, Statistical release – Local Government Finance, 'Local Authority Revenue, Expenditure and Financing: 2022-23 Budget, England' (no date) 1 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092756/Local_authority_revenue_expenditure_and_financing_in_England_2022_to_2023_budget.pdf> accessed 6 May 2023; Commission for Local Administration in England, 'Local Government & Social Care Ombudsman: Annual Report & Accounts 2021-22 (for the year ended 31 March 2022) HC 924' (OGL 2022) 24 <https://www.lgo.org.uk/assets/attach/6354/Annual-Report-2021-22-FINAL.pdf> accessed 6 May 2023.

What can be envisaged is an approach whereby private sector organisations with relevant experience in audit, under the aegis of the ombudsmen, undertake periodic assessments of local authorities' whistleblowing arrangements (for example, using the non-statutory guidance described in Chapter 5) and report their findings to the sponsoring ombudsman and the individual local authority. The assessment could find that the co-operating local authority meets the relevant standards, or where it does not, includes appropriate recommendations for action with an indicative timescale for completion. The provisions of FOIA 2000 mean that the audit findings are likely to become public. There are a number of Ofqual-regulated awarding bodies which could provide this function; a register of which is maintained by Ofqual.[77] It is estimated here that four days of engagement between the auditing body and LAPP would be required to prepare an assessment and to report this to the ombudsman and local authority at a cost of about £1,350 (+VAT).[78]

6.5 Conclusions

The main conclusions drawn from the analysis in Chapter 6 are:

19. Statutory bodies already exist with the remit to inquire into complaints from the public where local authorities are alleged to engage in maladministration and/or service failure. These terms are not consistently defined, but could include a failure to articulate the law accurately in whistleblowing policy, procedure and process thereby creating a misleading impression as to what amounts to a qualifying disclosure and who may receive statutory protections, or to fail to produce the annual whistleblowing reports required by the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.

[77] Including Skills for Justice Awards, British Standards Institute, VTCT; GOV.UK, 'Awarding organisations: scope of recognition' (2023) <https://www.gov.uk/government/publications/awarding-organisations-scope-of-recognition> accessed 14 June 2023.

[78] Vol 6 Appendix X sets out in more detail what activity would be undertaken during each day of the audit, and the basis for fees charged.

20. Local authority ombudsman either have the power, or aspiration, to adopt a more strategic approach to problem prevention through engaging with categories of complaint which affect multiple individuals. There are reasonable grounds to suggest that widespread misapplication of aspects of the UK's whistleblowing framework should trigger the ombudsmen's 'class failure' involvement.

21. Resource availability is raised as a strategic and operational constraint by all UK local authority ombudsmen and it is concluded that adding duties within the same resource-base would be likely to exacerbate ombudsmen's challenges and the risks to some whistleblowers. A role for private sector auditors operating under the direction of ombudsmen, at LAPPs' expense, may provide a solution.

22. However, the multiplicity of stakeholders (ombudsmen, LAPPs, UK and devolved governments, potential audit providers), along with the need to agree assessment criteria, serve as a reminder of the complexity of the UK's arrangements and are likely to temper ease of implementation, even without law change.

(Conclusions and recommendations have a running number from the preceding Chapter)

6.6 Recommendations

11. Where practicable, and subject to the availability of competent audit resource, the UK's local authority ombudsmen adopt a role wherein they investigate maladministration involving external whistleblowing to local authorities.

12. Where individual complaint findings suggest a wider problem with the administration of whistleblowing arrangements, ombudsmen engage with and report on the strategic

implications for the UK whistleblowing framework, co-operating in investigations where appropriate.

13. Ombudsmen agree an approach to co-operate in identifying and promulgating good practice, including: the content of operational guidance, and the appointment of accredited auditors with the requisite skills and experience to undertake whistleblowing assessments on behalf of the ombudsmen, nationally.

Chapter 7: Conclusion

7.1 Introduction

The main research questions assessed in this thesis were: (i) Do prescribed persons meet the requirements of the UK's whistleblowing framework, including government guidance? and (ii) where not, how can identified incompatibility be addressed, where possible without recourse to law change and having regard to contemporary international practice? Through examination of 7,691 data points (including 450 whistleblowing policy documents), deficits in prescribed persons' approaches through policy, procedure and process have been identified which are likely to inhibit Parliament's intention in drafting the whistleblowing laws to protect the public interest. The research findings were compared and contrasted with the available literature and contemporary practice from the EU and five countries with a similar legal 'profile' to the UK in order to establish whether validated solutions are available elsewhere. This Chapter summarises the findings of the research and how, particularly in respect of LAPPs where issues are considered to be more acute, the provision of clearer operational guidance and focused oversight could improve alignment both with UK law and relevant international practice.

7.2 Summary and evaluation

The research found that the majority of local authorities in the UK have not distinguished their statutory responsibilities as a prescribed person under Section 43F ERA 1996 to external whistleblowers, from their responsibilities as an employer to internal whistleblowers under Section 43C ERA 1996. An inconsistent approach to managing whistleblowing disclosures was found in FOIA 2000 responses received during the research and from examination of available whistleblowing policies, procedures and processes. Inconsistencies included the use of terminology which is not found in the fundamental legislation, is imprecise or ill-defined and

is otherwise potentially misleading about the law's requirements. Many local authorities conflated within the same policy statutory qualifying disclosures and other matters, which though of local concern and significance, are not included within the description of qualifying disclosures outlined in Section 43B ERA 1996, meaning that most whistleblowing policies contain inaccurate representations of the law. A significant number of local authorities' whistleblowing policies were found still to include a good faith criterion in respect of the motive of whistleblowers despite this not being a lawful requirement since the enactment of the Enterprise and Regulatory Reform Act in 2013. In addition, between 2017-2021, LAPPs had largely failed to implement the requirements of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017. The combination of these factors would be likely to undermine Parliament's intention to increase the confidence of whistleblowers to make qualifying disclosures in the public interest, and undermine some whistleblowers' opportunity to secure statutory protections.

A group of non-LAPPs, often regulators, were also included in the research. Here, a higher degree of compliance and a lower degree of inconsistency were found when compared with the LAPPs. However, gaps were still observed, particularly around the basis upon which whistleblowing cases were chosen for investigation. Where non-LAPPs are regulators, non-harmonised criteria were seen in respect of their separate roles as regulators and prescribed persons, in laws, codes and guidance. Whilst no direct conflicts were evident as between these functions, it is speculated that this duality could contribute to aspects of the inconsistency of approach observed in some non-LAPPs' ways of working. Overall, the disparity between LAPPs and non-LAPPs could not be explained readily according to the evidence. A small number of non-LAPPs were able to pay rewards for information received but the available evidence about the value-adding contribution that paying whistleblowers could bring to the whistleblowing 'system' is found to be contentious and immediate efforts to broaden the

availability of rewards could distract from more fundamental problems raised here. Nevertheless, it is illustrative of the inconsistency of approach identified from the research.

The research also noted that whistleblowing law, principally Part IVA of ERA 1996, had changed little since its creation via PIDA 1998 (save for the insertion of a public interest test and removal of a good faith requirement for qualifying disclosures in ERRA 2013), and that potentially relevant alternatives had been adopted in other jurisdictions since. Notable amongst contemporary international law change is Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law which, but for the UK's exit from EU membership, would have been binding law in the UK by 2021.[1] A *de jure* comparison of UK law with the Recitals of the Directive found that UK law, including whistleblowing legislation, could satisfy the majority of the Recitals' intended outcomes and in a small number of instances even exceeded them. Of note, and somewhat perversely, a greater degree of alignment was noted in respect of the *de facto* application of the very policies which in this research appear inconsistently designed and applied by LAPPs, and the Directive. The reason for this closer *de facto* alignment is the inclusion of wider groups of people and additional matters of concern in many LAPP whistleblowing policies which, whilst beyond the scope of Part IVA, nevertheless align more closely with the broader cohort of person protected by the Directive.[2]

Whilst the Directive is contemporary, its legal, social and cultural context is in some significant respects different to that of the UK's. To enable a more rounded appraisal of the research

[1] The UK remains a member of the 46-state Council of Europe where non-EU Members are invited 'to revise their relevant legislation or pass new laws that draw on the proposal for a European directive and paragraph 11 of this resolution, in order to grant whistle-blowers in their countries the same level of protection as those from an EU member State;' Council of Europe Parliamentary Assembly, Resolution 2300 (2019) Improving the protection of whistle-blowers all over Europe.

[2] ERA 1996; Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [hereafter, 'Directive (EU) 2019/1937 (n 2)'].

questions, the thesis also included comparisons with post-1998 whistleblowing legislation in Australia, Ireland, New Zealand, Canada and South Africa; countries which share some common history and heritage with the UK.

One of the analytical design features considered in assessing international practice was to identify potential enhancements to UK law and policy which would not entail a requirement for new UK legislation or amendment to existing law (noting the few such changes since 1998). With this in mind, 8 areas of enhancement (comprising 32 elements) were identified, namely: the arguably moral expectation that workers should expose wrongdoing; the reasonable expectation that the confidentiality of sources should be maintained; communication strategies adopted that also embrace witnesses and alleged perpetrators; perpetrators held to account for wrongdoing including reprisals etc against whistleblowers; timelines routinely adopted as to follow-up of disclosures and associated communications; investigations conducted to a reasonable standard and without improper interference; employers and prescribed persons undertaking awareness-raising activities with those who may be affected by whistleblowing; recognition of the special role of first-line supervisors; and, finally, that whistleblowing arrangements receive effective oversight. These areas of enhancement could be included in non-statutory operational guidance for both LAPPs and non-LAPPs.

From analysis of the evidence gathered which suggested that inconsistencies were more common and acute amongst LAPPs, a proportionate and pragmatic view was taken in the thesis that the focus for improvement should be directed towards LAPPs and particularly their management of external whistleblowers. Therefore, the role of ombudsmen with responsibility for local authorities in each of the four constituent UK nations was examined. It was confirmed that, of course, they were familiar with the role of local authorities and, with the possible exception of the Northern Ireland Ombudsman, also had experience of investigating complaints

emanating from or concerning whistleblowers. A potential area of difficulty in commending that these ombudsmen adopt oversight of arrangements to bring consistency of approach, promulgation of good practice, and compliance with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 (except Northern Ireland), arises from the fact that in respect of each ombudsman, the foundational legislation relates to a complaint from or on behalf of an individual member of the public who has suffered injustice or harm as a consequence of maladministration or service failure by the local authority. However, the research found that either by available law, or as a matter of strategic intent, each ombudsman could, or wanted to, expand their remit to include 'own-motion' investigations where maladministration adversely affected more than one member of the public. It was argued here that ombudsmen provide a suitable and available mechanism to provide much-needed oversight of whistleblowing arrangements where noted defects could meet the maladministration or service-failure criterion within the ombudsmen's statutory remits. Finally, as each ombudsman in its formal reports has alerted stakeholders to resource constraint inhibiting activity, a model was proposed in the thesis as to how accredited private sector bodies could undertake the assessment of local authorities' whistleblowing arrangements at their expense, reporting assessment findings to the relevant ombudsman and local authority in a way intended to minimise the bureaucratic burden upon both.

An evaluation of the nature and scale of the identified weaknesses in the existing arrangements suggested that they were pervasive, systematic and with no mechanism for resolution. Without a force for change entering the equation, it could be expected that the situation will not improve and may deteriorate further as existing inconsistencies of approach engender further contrarieties amongst prescribed persons. At the time of writing, political effort is being applied to the political hiatus in Northern Ireland which may see an operating national government

return to exercise its devolved powers, including law-making.[3] If so, a Northern Ireland equivalent of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 may be enacted, but unless there is effective oversight not only in Northern Ireland but all constituent nations, benefit may not accrue. Also, the UK Government's review of whistleblowing arrangements may herald changes to the deficit in governance and oversight identified here.[4] In the event that such beneficial changes like those envisaged for Northern Ireland and the Government review do not arrive soon or at all, the changes proposed here in respect of focused operational guidance and local government ombudsmen engagement appear a feasible option to encourage improvement. But there are caveats; firstly, that a 'complaint' by a whistleblower (about the handling of a disclosure to a LAPP) to the relevant ombudsman which reveals maladministration or service-failure resulting in harm or injustice to the whistleblower (and others, by implication), would need to invoke own initiative investigations from which a 'super resolution' could be imposed on the LAPP to address the broader issue identified in the complaint. Secondly, that where the attention of the ombudsmen has been drawn to one complaint-related whistleblowing defect, the ombudsmen would need to be disposed to examine the wider whistleblower policy failings and weaknesses identified in this and other research. Thirdly, that ombudsmen would need to co-operate and co-ordinate where a whistleblowing complaint in one geographical area could initiate inquiry in another area. Fourthly, ombudsmen would need to agree what 'good service' in respect of whistleblowing looks like, noting the absence of adequate existing guidance which describes good service.[5] Finally, adequate resource would be required to address the situation whereby ombudsmen

[3] December 2023.

[4] GOV.UK, 'Government reviews whistleblowing laws' (2023) <https://www.gov.uk/government/news/government-reviews-whistleblowing-laws#:~:text=A%20review%20of%20the%20whistleblowing%20framework%20%E2%80%93%20the%20laws%20that%20support,key%20charities%2C%20employers%20and%20regulators> accessed 17 May 2023.

[5] It has been argued in this thesis that existing guidance is tentative and does not provide adequate operational detail (Department for Business, Energy & Industrial Strategy, 'Whistleblowing: Prescribed persons guidance' (2017) <https://assets.publishing.service.gov.uk/media/5a823e4c40f0b62305b93400/whistleblowing-prescribed-persons-guidance.pdf> accessed 5 November 2023.

accepting responsibility for LAPPs' adherence are without the means to act. For the reasons set out in Chapters 5 and 6, an arguable case is proposed as to how these caveats can be addressed; however, difficulties in changing the status quo are not underestimated.

7.3 Recommendations and proposed outcomes derived from the research findings

Table 96 below represents the nexus between the research questions posed and the recommendations arising from the 22 conclusions derived according to the analysis of the research and other evidence. The recommendations are addressed by the principal outcomes proposed, namely, of enhanced guidance and improved oversight, within an assumed context of a limited likelihood of law change.

Table 96 - Recommendations and proposed outcomes derived from the research findings

Research Question	Recommendation	How addressed in the thesis
Chapter 2		
• Do UK prescribed persons meet the requirements of the whistleblowing framework, including government guidance?	1. Reports compliant with the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 are produced in a format from which data can be used to analyse performance, patterns and trends using the statutory criteria mandated in the above Regulations.	Noting the lower levels of compliance amongst LAPPs, and their reported resource constraints, support by private sector auditors to local authority ombudsmen is directed towards LAPPs to assess their compliance with the law. See Chapter 6.
	2. Locally and nationally, governance arrangements are reviewed and revised to ensure that reports compatible with Regulations 3 – 5 of the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 are produced which can support effective performance and accountability of prescribed persons, as well as promulgating identified good practice.	As Recommendation 1.
	3. Consideration is given to the establishment of an oversight mechanism with the remit to co-ordinate activity intended to achieve the strategic outcomes	It is proposed that local authority ombudsmen in the four nations of the UK assume responsibility for oversight where any complaint from or

	described in Recommendations 1 and 2 above.	relating to whistleblowers is found to involve maladministration or service failure. See Chapter 6.
Chapter 3		
	4. As recommended in Chapter 2, and for the same reasons, consideration is given to the establishment of an oversight body or mechanism with the remit to co-ordinate activity and the obligation to achieve consistency of approach predicated on good practice, though the evidence suggests that a focus on LAPPs would be more proportionate.	As Recommendation 1.
	5. Criteria are developed and implemented to bring consistency to the rationale underpinning decisions to investigate.	Drawing on international practice from similar jurisdictions and the EU, investigation standards have been proposed which should be considered for inclusion in non-statutory operational guidance for UK prescribed persons (both LAPPs and non-LAPPs). See Chapters 5 and 6.
	6. In respect of financial payments to incentivise or reward some potential whistleblowers, a clear policy position should be considered by the UK Government, having regard to the available evidence which tends to support or reject the concept.	This Recommendation is not included in the proposed non-statutory guidance or oversight role for local authority ombudsmen as the available evidence is equivocal, particularly in the UK context.
Chapter 4		
• Where not, how can identified incompatibility be addressed, where possible without recourse to law change and having regard to contemporary international practice?	7. Pragmatic mechanisms, which do not require law change, should be found to include the additional, value-adding aspects of Directive EU 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law in the *de facto* arrangements implemented by prescribed persons.	As Recommendation 5.
	8. A system of oversight should be identified and designated to ensure that where Part IVA ERA 1996 and approved relevant international practice are not	As Recommendation 1 in respect of LAPPs.

	being followed, credible means to challenge and secure improvement are available.	
Chapter 5		
	9. Publicly-available, non-statutory operational guidance is developed building on the outline described in [Chapter 5] paragraph 5.14 *et seq*.	As Recommendation 5.
	10. Available governance mechanisms which exercise oversight of prescribed persons, particularly LAPPs, adopt the non-statutory operational guidance described at Recommendation 9 above and provide governance against it.	As Recommendation 1 in respect of LAPPs.
Chapter 6		
	11. Where practicable, and subject to the availability of competent audit resource, the UK's local authority ombudsmen adopt a role wherein they investigate maladministration involving external whistleblowing to local authorities.	As Recommendation 1 in respect of LAPPs.
	12. Where individual complaint findings suggest a wider problem with the administration of whistleblowing arrangements, ombudsmen engage with and report on the strategic implications for the UK whistleblowing framework, co-operating in investigations where appropriate.	As Recommendation 1 in respect of LAPPs.
	13. Ombudsmen agree an approach to co-operate in identifying and promulgating good practice, including: the content of operational guidance, and the appointment of accredited auditors with the requisite skills and experience to undertake whistleblowing assessments on behalf of the ombudsmen, nationally.	As Recommendation 1 in respect of LAPPs.

7.4 Limitations

As with most research which involves FOIA 2000 requests, the response rate was less than 100% which limits the strength of conclusions drawn; however, the overall response rate of 89.7% is considered robust. Even so, where a FOIA 2000 response was provided by a prescribed person, not every question in the set of 14 (15 in the case of non-LAPPs) was answered by all respondents. Further, not every whistleblowing policy, procedure and process for each prescribed person could be located via open-source research, or where the documents could be found some website links were inoperable. Finally on this aspect, it was found from examination of the literature and documentation that various terms were used to describe whistleblowing such that there is a risk that the research has not captured all expressions used by *dramatis personae*. Nevertheless, a reasonable baseline is available from which conclusions are drawn.

Another limitation identified is that the Directive is new legislation where transposition by Member States was required by December 2021 but which a number have yet to complete (as at September 2023).[6] Similarly, Ireland's Protected Disclosures (Amendment) Act 2022 which transposed the Directive, only came into effect on 1 January 2023. In both instances, the contemporaneous timeframes to this research have limited the ability to comment on the operational impact of the Directive in the EU and in comparison with the UK.[7]

7.5 Future research

Several areas have been identified in this thesis which would be suitable for further research. A body of case law should begin to emerge in the EU as the Directive is transposed into national law by Member States and which will provide for international comparisons and EU-wide analysis of adherence. Similarly, analysis of the impact of the Directive on EU case law, in

[6] Directive EU 2019/1937 (n 2).
[7] ibid.

comparison with UK case law, would provide opportunities for research as to the nature and rate of divergence between EU and UK case law. In that regard, one specific area for future research would be analysis of whistleblowing cases involving transnational companies where workers operate both in the UK and one or more EU States, and how cases are treated in those circumstances.

It is unclear why there is marked disparity between LAPPs' and non-LAPPs' adherence to the relevant legislation as assessed through examination of their FOIA 2000 responses and published whistleblowing policies, procedures and processes. A potentially fruitful line of future research would be to establish what factors may be contributing to this such as the relative size and complexity of LAPPs as compared to non-LAPPs, the more specialised and focused role of non-LAPPs, particularly regulators, and whether the political character of local authorities has any impact on their role as prescribed persons. In that regard, it was also observed in the research that non-LAPPs which are regulators operate under the requirements of the Regulatory Reform Act 2006 which sets different expectations as to how regulators should engage with regulated entities, as compared with how non-LAPPs might engage with organisations about which a qualifying disclosure has been made. The nature of this dual-relationship appears sparsely explored in the research literature and could be investigated as a potential factor leading to the inconsistency of approach noted nationally amongst prescribed persons.

Finally, another area considered appropriate for research arises from a theme found in the research where identical or very similar phrases are used in the whistleblowing policies of different LAPPs, even including legally inaccurate or imprecise phrases. It is not clear what formal and informal communication channels exist between LAPPs which may facilitate the

phenomenon observed, and which potentially could be positively harnessed to ensure that legally accurate and precise wording is included in LAPPs' policies.

7.6 Original contribution to knowledge

There are five ways in which the research adds to knowledge in the field. Firstly, it is noted that there is relatively limited professional literature on the impact of the legal requirements arising from the Public Interest Disclosure (Prescribed Persons) Order 2014 and the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 on prescribed persons, particularly local authorities, and how they have responded to these significant regulatory requirements since inception. This research is believed to contribute to the body of research through a detailed study of how the 2014 Order has been applied almost a decade after its passing into law and, in particular, how the public reporting requirement contained within the 2017 legislation has been implemented by prescribed persons in the UK.[8] This is important given the significance placed by the UK Government on the role of the 2017 Regulations in upholding public confidence and ensuring the effectiveness of prescribed persons in discharging their obligations.[9] The second area where the research adds to knowledge is in enabling a comparison between the *de facto* position of UK prescribed persons' approach to managing whistleblowing disclosures (arising from the observed operation by prescribed persons of relevant statutory duties, regulations and government guidance), and contemporary international legislation as included in the Directive adopted by the Member States of the EU.[10] Thirdly, the research has identified that the existing government guidance for prescribed persons is limited in setting an expectation of standards for prescribed persons to follow. Noting this, the research has identified international practice from similar jurisdictions to the

[8] Public Interest Disclosure (Prescribed Persons) Order 2014; Prescribed Persons (Reports on Disclosure of Information) Regulations 2017.
[9] Prescribed Persons (Reports on Disclosure of Information) Regulations 2017.
[10] Directive EU 2019/1937 (n 2).

UK which could be included in whistleblowing guidance and arguably without the need for law change. The fourth significant finding and contribution to knowledge is that the overwhelming majority of LAPPs have no policy to identify external whistleblowers, which immediately limits the LAPPs' ability to distinguish workers in potentially vulnerable positions from ordinary members of the public making complaints who do not usually face the potential jeopardy of repercussions from colleagues or their employer. Lastly, the research also contributes to knowledge in positing a model of oversight of whistleblowing arrangements in the UK given the current system of dispersed autonomy amongst prescribed persons. The detailed examination of the role of UK local authority ombudsmen in the context of whistleblowing, oversight and resolution of the problems identified is understood to be a novel research focus.

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Appendix XI - Table 1 Freedom of Information Act 2000 Questions Sent to UK Prescribed Persons

Question Number	Question
1.	Does your organisation take action to protect external whistleblowers from unjustified treatment by their employers or others? i. Yes (please explain what action is taken) ii. No iii. Not known
2.	Does any protection against unjustified treatment provided by your organisation extend to persons reporting on behalf of whistleblowers? i. Yes (please explain what action is taken) ii. No iii. Not known
3.	Does any protection extend to proposed or intended action against an external whistleblower contemplated by their employer or another? i. Yes (please explain what action is taken) ii. No iii. Not known
4.	Does your organisation offer any reward or bounty for information received from an external whistleblower in respect of information about which you are the prescribed body or person? i. Yes (please explain what action is taken) ii. No iii. Not known
5.	Does your organisation publish a step by step guide on how it follows up on external whistleblower information? i. Yes (please explain what action is taken) ii. No iii. Not known
6.	Where your organisation does not feel itself to be legally competent to engage with a disclosure made by an external whistleblower, do you have a policy and process to refer that disclosure to another prescribed body/person/regulator or other agency better placed to deal with it? i. Yes (please explain what action is taken) ii. No iii. Not known
7.	Where in the circumstances described in Q6 above, your organisation passes information to another prescribed body etc., do you have a policy and process to advise the external whistleblower that the disclosure has been passed to another body etc? i. Yes (please explain what action is taken) ii. No iii. Not known
8.	Where an external whistleblower may be dissatisfied with his/her dealing with your organisation, is there an appeals policy and process which engage someone who is independent of the investigating department?

	i. Yes (please explain what action is taken) ii. No iii. Not known
9.	Does your organisation publish FAQ to advise and assist external whistleblowers considering making a disclosure to you? i. Yes (please explain what action is taken) ii. No iii. Not known
10.	Does all your staff which communicate with or otherwise manage external whistleblowers receive specialist and on-going training for that purpose? i. Yes (please explain what action is taken) ii. No iii. Not known
11.	Where, after a disclosure to your organisation by an external whistleblower about a matter for which you are prescribed, an alleged act of retaliation occurs against the external whistleblower by the employer or another person, does your organisation investigate the alleged act of retaliation? Yes (please explain what action is taken) i. No ii. It would depend on the facts iii. Not known
12.	Please describe what criteria you consider in deciding whether to investigate information received from an external whistleblower about a matter in respect of which you are prescribed?
13.	Does your organisation distinguish between public complaints and external whistleblowers? i. Yes (please explain what action is taken) ii. No iii. Not known
14.	Apart from any information on your website, does your organisation undertake any public awareness programme(s) regarding whistleblowing? i. Yes (please explain what action is taken) ii. No iii. Not known

UK Non-Local Authority Prescribed Persons Only:

15.	In respect of Article 5(c)(ii), Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, please disclose any and all reports (suitably redacted, where appropriate) which describe how disclosures from workers in other organisations (not your Organisation) have impacted on your Organisation's ability to perform its functions and meet its objectives during the reporting periods 2017 – 18, 2018 – 19, 2019 – 20.