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17.06.2021

To The Office for Product Safety & Standards,

This letter is Protect's submission of evidence for the UK Product Safety Review. It answers the following questions found in the Call for Evidence (as therein numbered):

8. *What role should voluntary standards play in product safety? What are the benefits and drawbacks of linking regulation to voluntary standards?*

19. *When it comes to product enforcement, how well does the system deliver transparency and confidence while maintaining confidentiality? Please explain.*

I write to you as the Parliamentary Officer for Protect – the UK whistleblowing charity. Since 1993, Protect has operated its free, legal Advice Line offering specialist whistleblowing advice to over 3,000 workers a year. We provide consultancy and training services for employers to improve their whistleblowing arrangements and in 2020 alone the employers we worked with had between them an estimated 1.3 million employees. These experiences inform our policy work in campaigning for better whistleblowing laws and public policy.

8. What role should voluntary standards play in product safety? What are the benefits and drawbacks of linking regulation to voluntary standards?

In Protect's view, there should be mandatory standards on employers to handle properly whistleblowing concerns relating to product safety. Whistleblowers have a key role to play in the regulation of product safety because, by virtue of being employees or workers of an organisation, they have access to inside knowledge about unsafe or dangerous products and can avert harm to consumers by raising their concerns to the employer or a regulator.

The issue with regards to standards, however, is that there is currently no legal duty that an employer must meet with respect to whistleblowing[1]. That is, there is no obligation to have a whistleblowing policy, provide training to staff, offer feedback, or review internal speak up arrangements. Protect's whistleblowing bill states the minimum standards that an employer should meet (please see p 4 here).

The absence of whistleblowing arrangements has a negative consequence for a whistleblower because it means that they do not have a clear route to raise concerns nor are provided with necessary assurances, such as confidentiality. This can deter them from raising concerns altogether which means that the employer loses vital intelligence about unsafe products. This can lead to unsafe products being put on the market. Whistleblowing standards can, therefore, provide a commercial advantage to good employers by altering them of wrongdoing early and giving them the opportunity to rectify concerns.

In the financial services sector, there are legal standards on employers as set by the Financial Conduct Authority in its Handbook. Our research, Silence in the City 2 (please see here), found a 15% increase in the number of whistleblowers raising their concerns about wrongdoing or malpractice with their employer compared with our 2012 report findings.

[1] There is some exception to this rule in the financial services and health sectors.

SITC2 found 93% of whistleblowing concerns were raised internally compared to 78% in 2012. This illustrates that having internal whistleblowing arrangements gives employees and workers more confidence to raise concerns so that the employer has an opportunity to investigate.

Whistleblowing standards for employers are also in the interests of regulators. This is because it ensures that concerns are raised at the local level so that the effects of any wrongdoing are quickly minimised avoiding the need for regulatory intervention. The absence of standards, however, can mean that a whistleblower chooses not to raise concerns internally but rather directly to a regulator. The concerns at this early stage may not contain sufficient information to enable a regulator to investigate or, if the whistleblower delayed in raising concerns because they were unclear how or where to raise the issue, the damage could already be done.

The reason why these standards must be mandatory is to improve consistency across sectors dealing in product safety. The prevailing absence of mandatory standards means that whistleblowers in different organisations, or those who approach different regulators, have disjointed experiences and are unclear of what to expect from the process. It is also in the interests of employers to have mandatory standards so that concerns are more likely raised and addressed. In turn, this improves public confidence in product safety regulation because consumers will be reassured that all organisations who contribute to the design, manufacture and sale of a product have robust speak up arrangements that would have detected any concerns with the product.

One drawback of mandatory standards is that it requires an enforcement mechanism, i.e. some scheme of inspection and sanction to ensure that employers are properly complying. In our view, the OPSS can fulfil that function. Our Betters Regulators Guide[2] gives six principles for effective whistleblowing practices for regulatory bodies (please see Annex A for a list of the principles). Principles 5 states that a regulator can encourage or require organisations that they regulate to have in place internal whistleblowing arrangements. BEIS and OPSS could satisfy this principle in one of two ways. Firstly, BEIS already issues guidance to regulators, such as the Regulators' Code, so this could be amended to include provisions that require the regulators to inspect whether organisations they regulate have whistleblowing arrangements. Secondly, the OPSS could include as part of its investigation or regulatory activities an audit of an organisation's whistleblowing arrangements in order to assess their effectiveness.

In addition, Protect's whistleblowing bill sets legal standards for prescribed persons akin to the idea of standards for employers described earlier (see p 7 here). Those standards include, amongst other things, offering feedback, following-up on disclosures, and preserving confidentiality. The Regulators' Code could similarly be amended to ensure that the regulators themselves must comply with minimum legal standards when handling whistleblowing disclosures.

19. When it comes to product enforcement, how well does the system deliver transparency and confidence while maintaining confidentiality? Please explain.

A whistleblower seeking to raise concerns about product safety externally will likely, and rightly, turn to their local authority. However, the options thereafter are limited if the local authority, for whatever reason, decides not to investigate the concern or investigates poorly.

[2] https://protect-advice.org.uk/better-regulators-guide/

The OPSS presents itself as an obvious and natural regulator for whistleblowers but there are a number of issues with the current system which could be improved so as to deliver better confidence.

Firstly, the OPSS should become a prescribed person. This will give whistleblowers more confidence to raise concerns because the threshold to gain whistleblower protection is lowered.[3] It is also in the OPSS' interests to encourage whistleblowing disclosures where other avenues have been exhausted otherwise a regulatory 'vacuum' will arise within the sector. That is, the sector risks becoming replete with whistleblowers who all have concerns about product safety but no regulator with which to raise the matter.

Secondly, Principle 1 of our Better Regulators Guide states that a regulator should be accessible. The OPSS should offer multiple access points for a whistleblower to raise product safety concerns, including online forms, email or telephone. The OPSS' website should make it clear and easy for a whistleblower to raise concerns. Presently, the website seems only to contain an online form (here) for consumers which does not allow for confidential or anonymous reporting. This means that the system of product enforcement does not maintain the confidentiality of whistleblowers who will often want assurances of this nature in order to guard against the obvious risks to their employment by raising concerns.

Finally, in order to improve transparency and accountability, the OPSS should offer clear messaging as to its remit in comparison to other regulators, such as local authorities. It can be confusing for a whistleblower to decide where to raise concerns, particularly where there are multiple regulators, but a clear and easy to understand explainer on the OPSS' website would clarify who the correct regulator is. The OPSS could also use this to its advantage by explaining and justifying when it will investigate a whistleblowing disclosure (and when it will not) so as to manage its workload and direct whistleblowers towards the regulator most likely to take action.

Kind regards,

Kyran Kanda

Parliamentary Officer.

[3] A prescribed person under UK whistleblowing law is an independent body which usually has an authoritative relationship with the organisation, industry or individual worker, such as a regulator or professional body. To raise a concern to a prescribed person offers an easier route for whistleblowers to gain legal protection against detriment or dismissal than by making a disclosure to a non-prescribed person, such as the police or the media. When disclosing to a prescribed person, a whistleblower must show that they reasonably believe that the information disclosed is 'substantially true' but need not satisfy the higher and stricter tests associated with disclosing to a non-prescribed person as the OPSS currently is.

Annex A – Better Regulators: Principles for Recommended Practice

The six principles for handling a whistleblower are:

Principle 1 – Accessibility and Awareness

Principle 2 – The Importance of Confidentiality

Principle 3 – Feedback

Principle 4 – Addressing Victimisation

Principle 5 – Requirements for Regulated Entities

Principle 6 – Whistleblowing and Professional Duties