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Protect's submission to the Law Commission's consultation on corporate criminal liability

This submission seeks to answer the following questions listed in the discussion paper (as therein numbered):

6. If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

10. In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

PROTECT – THE UK WHISTLEBLOWING CHARITY

1. Protect's aim is to protect the public interest by helping workers to speak up to stop harm and wrongdoing. We support whistleblowers by providing free and confidential legal advice. We support employers to implement effective whistleblowing arrangements. We campaign for legal and policy reform to better protect whistleblowers. We want a world where no whistleblower goes unheard or unprotected.

2. 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.

6. If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

3. Whether corporate bodies should have the defence proposed requires an examination of criminal law on which Protect does not claim expertise. However, if such a defence were created then whistleblowing should form a part of it.

4. Whistleblowing is an effective mechanism for an employer to identify and address public interest wrongdoing. Whistleblowers are a low-cost method of risk management who are in a good position to raise concerns of unlawful behaviour at an early stage. It is in an employer's interest to ensure that it has robust and effective whistleblowing arrangements to facilitate the speak up process.

5. Whistleblowing can be used in the corporate criminal liability context. For example, if a senior manager or other employee commits unlawful behaviour, such as insider dealing or money laundering, it is likely that other employees of the organisation will be aware of this and wish to raise it as a concern. The responsible employer will want to hear and take seriously a whistleblower with these concerns so that it can be investigated and disciplinary action taken against the culprits. The employer will need to ensure that their whistleblowing arrangements meet best practice to enable reporting.

6. Protect's legal reform campaign, Let's Fix UK Whistleblowing Law, requires certain employers (those with 50 or more employees) to implement minimum whistleblowing standards within their organisation. This includes establishing whistleblowing channels, designating a senior manager with responsibility for whistleblowing, providing feedback, training staff and managers and proactively preventing victimisation. These standards are necessary because there is currently no requirement on employers in law to properly engage with whistleblowers, which means they are more likely to be ignored and their concerns unresolved. The exception to this is in the financial services and health care sectors where whistleblowing forms a part of the regulatory framework.

7. In the financial service sector, for example, the Financial Conduct Authority imposes rules on whistleblowing found in its Handbook. Our research, Silence in the City 2, investigated whistleblowing in financial services. We found that 93% of whistleblowing concerns were raised internally compared to 78% in our earlier research conducted in 2012 (Silence in the City 1). This demonstrates greater trust in internal whistleblowing arrangements and indicates that whistleblowing standards do encourage a positive speak up culture.

8. As such, the reason why whistleblowing should form a part of the proposed defence is because strong whistleblowing arrangements demonstrate to a court that the employer values the intelligence that whistleblowers bring and is seeking to act honestly and responsibly by investigating concerns of unlawful behaviour. Whistleblowing arrangements are evidence of good corporate governance where an employer can show it is taking reasonable steps to create a workplace that is free of illegal activity. Indeed, a requirement to introduce effective whistleblowing arrangements has featured in one of the deferred prosecution agreements mentioned in the consultation[i], with the reviewer required to assess the extent that such arrangements have been put in place.

9. In the corporate criminal liability context, whistleblowing assists an employer to show the court that it had robust processes in place to detect and resolve illegal behaviour and, as such, it should not be held liable for the actions of rogue employees. Whistleblowing arrangements help to delineate the actions of a responsible employer from those of criminal employees.

10. In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

10. Protect does not support the introduction of criminal sanctions against an individual or organisation for victimising or otherwise poorly handling a whistleblower in breach of any standards imposed by a regulator (although there may be occasions where the poor treatment itself reaches standards of criminal liability and results in prosecution, such as cases of physical harm to the whistleblower). We fear that creating criminal liability will hinder the public policy objective of raising standards among organisations in how they deal with whistleblowing concerns. It can make processes overly bureaucratic and defensive, and piles the pressure on those who run internal whistleblowing arrangements. As such, we agree that a sensible alternative to commencing a criminal case is to give regulators more powers to impose civil penalties on employers who breach whistleblowing standards.

11. In order for whistleblowing standards to be effective (such as those suggested in answer to Question 6 above), there must be an enforcement mechanism. This both sanctions bad employers who maltreat whistleblowers and incentivises good employers who act responsibly. The enforcement mechanism can be found in regulators administering warning notices and redress orders as a preliminary sanction and, where these are not complied with, civil penalties.

12. Whilst some regulators currently have powers to issue civil penalties in the course of their ordinary enforcement activity, rarely are they applied in the context of whistleblowing. The Financial Conduct Authority (FCA) is one of the few regulators that does investigate and sanction whistleblower victimisation. For example, in 2016 Barclays became embroiled in a scandal as a result of CEO Jes Staley's attempts to identify a whistleblower who had raised concerns through the bank's internal speak up programme. The FCA took action against Mr Staley personally on the grounds that he failed to act with due skill, care and diligence. He was fined £650,000. It is positive that the FCA recognised that Mr Staley's actions were inappropriate and we wish to see more regulators take a similar approach.

13. One criticism made against regulators imposing sanctions for whistleblower victimisation is that their remit and powers to take disciplinary action are limited given that they are not the employer. One answer to this criticism is that regulators can set whistleblowing rules that regulated entities must comply with and then oversee progress on implementing those standards. Where the employer has failed to comply or mishandles a whistleblower, a regulator can consider issuing a fine.

14. The topic of civil penalties inevitably generates discussion of how the quantum of penalties will be calculated. Civil penalties must be effective, proportionate and dissuasive and, to that extent, it may be possible to use a model similar to the Information Commissioner's Office. It has powers to issue an employer with a maximum fine of £17.5 million or 4% of the employer's total annual worldwide turnover in the preceding financial year, whichever is higher (please see here for more detail).

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[i] https://www.judiciary.uk/wp-content/uploads/2020/07/Tab-C-SFO-v-G4S-Care-Justice-Services-UK-Limited-Deferred-Prosecution-Agreement-1.pdf