



GREY AREAS NEWSLETTER

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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Whistleblowers and Regulators Part 1

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Whistleblowers are insiders within an organization who disclose apparent wrongdoing to outsiders because the organization is unable or unwilling to address the issue. The motivation of the whistleblower can be altruistic, for personal advantage, or to be disruptive (or a combination thereof). Often, but not always, whistleblowers want to keep their identities confidential.

The relationship between whistleblowers and regulators is often ambiguous. Conceptually the three most common contexts are:

1. Whistleblowers who make disclosure to regulators about a regulated person or entity.
2. Regulated entities who report whistleblowers to the regulator for improper whistleblowing activities.
3. Insiders within a regulator who blow the whistle about the actions of the regulator.

This article contains reflections on the first context, disclosure to regulators. A subsequent *Grey Areas* will discuss the other two contexts.

Whistleblower Disclosure to Regulators

Regulators have a strong interest in receiving reports of unprofessional behaviour by registrants. Such information enables the regulator to investigate and address concerns that might harm the public.

In fact, many regulators have provisions requiring registrants to report some or all instances of professional misconduct coming to their attention. Some regulators even have provisions requiring certain non-registrants (e.g., employers in cases of sexual abuse) to report misconduct to the regulator. Indeed, some registrants have a duty to report

themselves in certain circumstances (e.g., criminal charges or findings), although self-reports are beyond the scope of this article.

While this article focuses on voluntary reports by whistleblowers, some of the points also apply to mandatory reports.

Confidentiality Expectations

Issues arise when a whistleblower, who has no duty to make a report voluntarily, discloses misconduct to the regulator. Many whistleblowers have a high expectation that their identity will be protected to avoid repercussions or retaliation. Regulators are often unable to provide assurances of complete confidentiality because of their disclosure obligations to registrants who are the subject of regulatory action. It is important for regulators, in their initial communications, to clearly and accurately convey the limits of the confidentiality they can provide. In fact, it might be prudent to present this information on the regulator's website in an easily located place for potential whistleblowers.

Regulators who anticipate frequent whistleblower reports might seek legislative amendments or other mechanisms (e.g., a confidential informant program) to enhance the degree of confidentiality that can be offered.

Alternatively, regulators could develop processes to receive whistleblower reports anonymously. Anonymous reports are much more challenging to rely on. However, if there is sufficient detail contained in the report, it could form reasonable and probable grounds to

appoint an investigator. In addition, the information could remain available in case new concerns arise in the future.

Managing Retaliation Against Whistleblowers

Another issue is where the whistleblower experiences repercussions or retaliation. This can take many forms including terminating the whistleblower's employment, making a formal complaint against them, issuing statements attacking their credibility or character, or commencing civil proceedings against them (e.g., for defamation).

It is important that regulators do not provide assurances to the whistleblower that they might ultimately be unable or unwilling to fulfil. For example, advising a whistleblower that they will pay to defend them in civil court is expensive and may, with the discovery of additional information, be imprudent. Regulators might develop, in advance, the wording of any assurances that they will offer.

However, regulators do have some options that they may wish to pursue where there is retaliation. Many regulators consider it to be professional misconduct for registrants to threaten or implement retaliatory measures. Some regulators proactively inform registrants of the duty not to retaliate. Regulators might even publish this obligation to the profession. In exceptional circumstances a regulator can act as an intervenor in any proceedings brought by the registrant or might even provide or fund legal counsel for the whistleblower.

Payment to Whistleblowers

A few regulators pay a reward to whistleblowers. This is most common where misconduct occurs in secret, especially if the misconduct might never otherwise become known. For example, [some securities regulators](#) offer such rewards.

Where the whistleblower is paid, their value as a witness may diminish in light of their non-altruistic motivation. Thus, such rewards are more common where the whistleblower can point the regulator to other evidence, such as documents, that can establish the misconduct.

Needless to say, some registrants can develop a less collaborative attitude towards their regulator when it pays whistleblowers for information.

Transparency

There is value in regulators collecting and publishing aggregate data on their whistleblower activities. In the United Kingdom, such reports are mandated for health and care regulators. The purpose of such a report, as stated in their [2023 joint report](#), is described as follows:

The aim of this duty is to increase transparency in the way that whistleblowing disclosures are dealt with and to raise confidence among whistleblowers that their disclosures are taken seriously. Producing reports highlighting the number of qualifying disclosures received and how they were taken forward will go some way to

assure individuals who blow the whistle that action is taken in respect of their disclosures.

For example, the report from the dental regulator stated in part:

Of the 82 whistleblowing concerns we received:

- 31 cases were closed with no further action. Of these 31 cases, nine were merged with other live cases, and 22 were closed with no further action as there was not enough information provided to progress further.
- 9 cases have been referred to the Case Examiners.
- 42 cases are still at Assessment stage.

Of the 82 cases received, 47 were received from dental professionals, 16 were from non-registrants (who were employed in dentistry) and 19 were anonymous.

Conclusion

There are advantages to regulators formalizing their process for receiving and acting on whistleblower reports. Such policies and procedures can assist whistleblowers in coming forward, foster fewer unexpected repercussions for whistleblowers, and enable better use of the information obtained.

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