DEPARTMENT FOR ENTERPRISE

REVIEW OF CONSULTATION RESPONSES

WHISTLEBLOWING

JANUARY 2023

Contents

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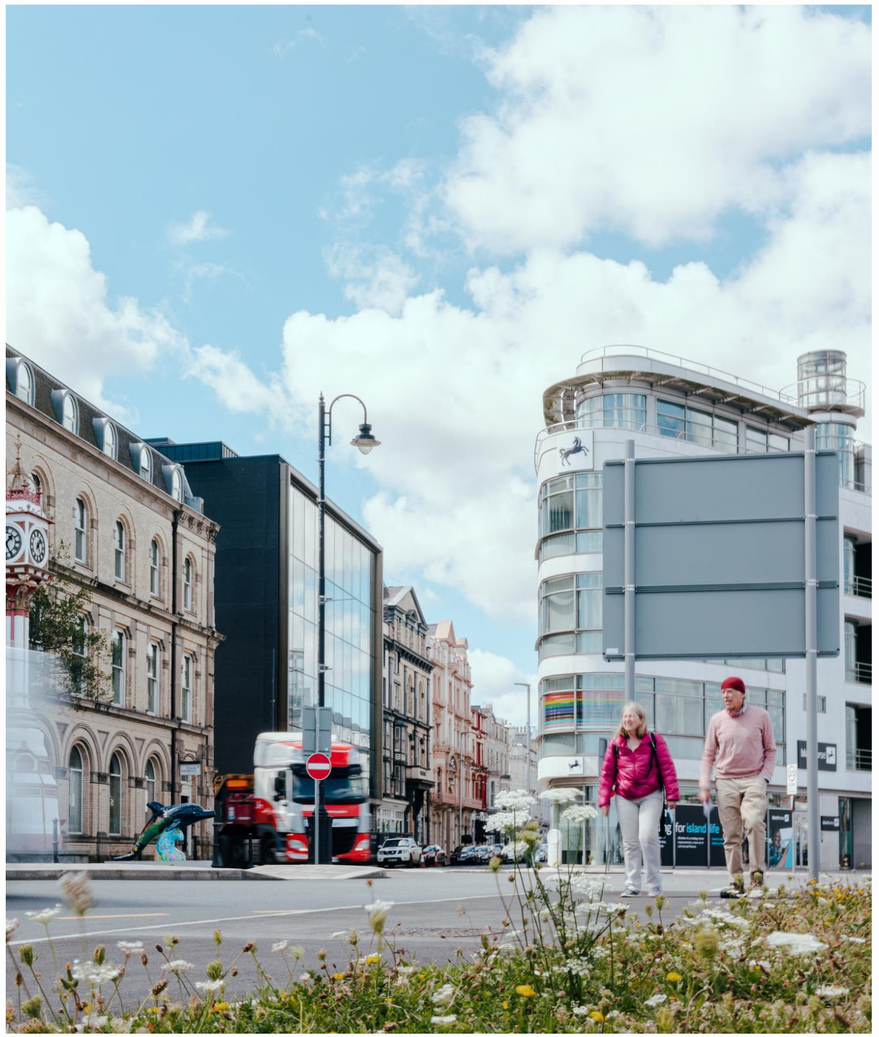
Introduction

Over summer 2022 the Department for Enterprise undertook a consultation on the legislative framework for whistleblowing. The consultation initially ran for eight weeks and was extended for another two weeks. 47 responses were received.



Section 1 Responses

The first section of consultation proposed some minor changes to the existing whistleblowing legislation.

Question 1: Do you agree with the 'public interest' amendment to section 50(1)?

Total responding to question	45	Percentage
Yes	35	78%
No	5	11%
Neither	5	11%

The proposal was that the Employment Act 2006 should be amended to insert a public interest test, as in the UK, which would make it clearer that a protected disclosure should be of wider public interest than a breach of an individual's personal contract of employment.

The proposal had strong support, though those who opposed it did so on the grounds that it might have the effect of removing protection from whistleblowers.

Prospect commented:

"The 'Public Interest' test would be useful provided that its application is applied consistently and fairly in all cases. Who would decide if the threshold of such a test has been reached, in effect, who decides if a disclosure is 'in the public interest'? There will need to be specific and clear requirements identified to minimise and/or stop legitimate disclosures being ruled as not being in the public interest. If any decision is taken to rule that a disclosure is 'Not' in the public interest then what mechanism is going to be put in place to appeal that decision? Would it be against an individual's 'Human Rights' to not have access to an appeal? Additionally, I would suggest any appeal would have to be referred to an independent party or body consisting of more than one adjudicator."

The Manx Industrial Relations Service commented:

"Yes. Currently every Employment & Equality Tribunal claim could be classified as "whistleblowing" as they all involve an allegation of illegality, i.e. an organisation failing to honour somebody's employment rights. This is not what the legislation was intended for."

Question 2: Do you agree with the introduction of vicarious liability?

Total responding to question	45	Percentage
Yes	42	93%
No	3	7%
Neither	0	0%

Currently the Employment Act 2006 provides that a worker has the right not to be subjected to any detriment only by his or her employer as a result of a protected disclosure. In the UK this has been extended so that the whistleblower may not be subjected to detriment by a co-worker or "an agent" of the employer. Employers are therefore "vicariously liable" if a co-worker or agent subjects the worker who has made a protected disclosure to detriment.

The consultation proposed the introduction of the vicarious liability provision in the Isle of Man.

Though by far the majority of respondents agreed to the proposal, a number disagreed, including the IOM Post Office:

"Do not agree with this insertion. If introduced there would need to be sufficient clarity/guidance for all parties as to what aspects the employer is liable for so it is known if/how to mitigate the risk(s). Would UK entities that utilise agents on island be liable to whistleblowing allegations/reporting etc. under UK or Manx Law? Greater clarity would be needed."

Question 3: Do you agree with the proposals to remove the "good faith" requirement?

Total responding to question	44	Percentage
Yes	26	60%
No	9	20%
Neither	9	20%

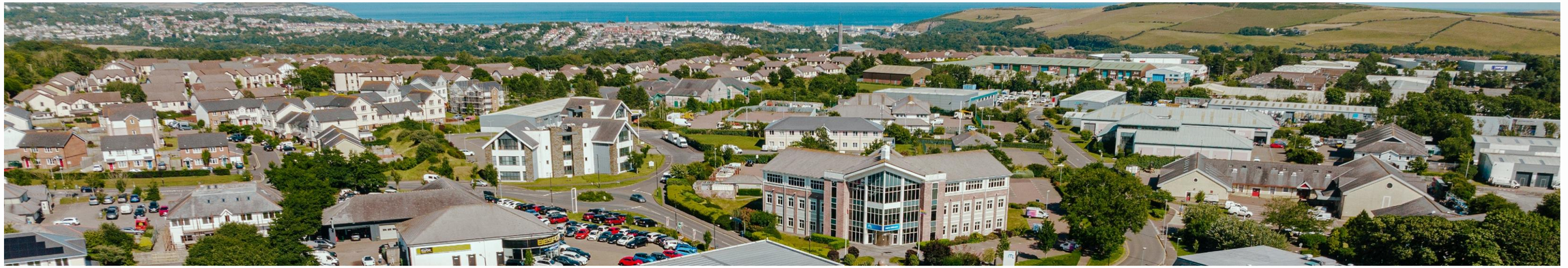
The consultation proposed that the requirement that a protected disclosure be made in "good faith" by a worker be removed, though the Tribunal would have the option to reduce compensation by up to 25% if it found that a disclosure had not been made in good faith.

There was less support for this proposal. Some thought that the good faith requirement should be retained, while others questioned why compensation should be reduced where a legitimate disclosure had been made.

One company commented:

"We do not think the faith requirement should be removed. The individual should be able to be prosecuted if a disclosure is not made in good faith. The compensation should be irrelevant in this context when specifically looking at good faith."

However one individual said: *"Yes. The primary consideration is that governance/general conduct are improved and/or malicious actions, legal breaches etc. are exposed. Secondary is the reason for exposing said issue, but if it wasn't good faith then compensation is reduced - seems fair enough!"*



Question 4: Do you agree with the proposal to clarify when a protected disclosure has been made?

Total responding to question	45	Percentage
Yes	29	64%
No	8	18%
Neither	8	18%

One of the current difficulties of the present framework for protected disclosure is identifying when an employee intends to make a protected disclosure. It has been identified by, for example, the Employment and Equality Tribunal, that there is no requirement for a whistleblower to make clear that he or she is making a whistleblowing disclosure. Employers and other bodies therefore may not be clear about the seriousness of such a communication. It was therefore proposed that the legislation is amended in order to make such a change.

Most respondents agreed with the proposal. For example Prospect stated:

"Yes. A simple written statement indicating that the individual making the disclosure is doing so in the belief that such a disclosure should be deemed as being protected should suffice. Many individuals who wish to make a disclosure, and do so, do not necessarily have the necessary skills to make such disclosures in a structured and detailed manner. Often the information they provide initially is basic and requires further more detailed supporting evidence. Informing the recipient that any disclosure made should be taken as being a protected disclosure should suffice in the first instance."

However one individual commented: *"This issue is a little more complex, as it may be that the Whistleblower may intend it to be a protected disclosure, but later proven not to be a protected disclosure. This in itself may lead to further complications. However, I think it would be clearer if the initial complaint explained the intent, this does not necessarily mean it will be dealt with any more 'seriousness'.*

…clarification is always beneficial, but requires both parties to be aware of the concept and process - which I feel is not the case."

A number of respondents argued that requiring an individual to make clear that a particular communication of information about alleged wrongdoing would tip the balance in favour of employers rather than employees in whistleblowing cases.

Question 5: Do you agree with the proposed duty of prescribed persons to report on disclosures?

Total responding to question	43	Percentage
Yes	40	93%
No	1	2%
Neither	2	5%

In the UK, a duty for "prescribed persons" (i.e. bodies with regulatory or other responsibility for specific matters to which a disclosure can be made by whistleblowers) to report on disclosures was introduced by the Small Business, Enterprise and Employment Act 2015.

This followed feedback that there was a lack of consistency in the approach taken by prescribed persons and a lack of communication by them in following up disclosures and reporting back on any actions taken.

There was widespread support for this proposal in our consultation, though some respondents commented that caution should be taken in releasing information on disclosures. One respondent commented:

"Further clarity would be required on what this data would be used for, what it should capture and in what format and to whom it should be reported. In the event that releasing data may inadvertently reveal the identity of the whistleblower, how will this data be sanitised but still provide the requisite information? For example, if a concern has been raised regarding a small and niche team, it could be easier to trace where that disclosure may have originated than if it concerns a wider Departmental matter.
Clear guidelines will need to be laid out for the collection and processing of data relating to whistleblowing, including clear retention schedules."

In the Bank of England's reporting in the UK, the overall level is felt to be too much to replicate on the Island. We have much fewer entities / individuals and therefore by publishing summaries of anonymised cases it may be possible to deduce who and what was involved!"

Question 6: Do you agree with the introduction of powers for interim relief?

Total responding to question	43	Percentage
Yes	28	65%
No	5	12%
Neither	10	23%

Some respondents questioned whether it was worth introducing interim relief given that the evidence suggests that it is not often used in the UK.

One business commented: *"It is acknowledged that in the UK interim orders are rarely made and there is a particularly high threshold to be met should the order be granted in favour of the claimant, whereby it must be shown that the claimant has a pretty good chance of success on the merits of the case. In almost all cases it is not possible to establish this without a substantive hearing on the merits…Interim relief is expensive for employers to defend as it requires a time-intensive and fast response, and could also mean that a claimant remains on full pay until the final disposal of their claim many months into the future, even if the claimant ultimately loses at the final hearing… as the cost to employers could be onerous if such legislation is introduced, clear guidance should be issued as to the exceptional circumstances in which such orders are made. Consideration should also be given as to what remedies or redress are available to employers that are forced to defend meritless proceedings and incur unrecoverable costs as a result."*

However a significant number of respondents supported introduction of interim relief, even if it might be used only rarely.

Question 7: Do you have any views as to whether the maximum amount of compensation for unfair dismissal should be increased?

Total responding to question	43	Percentage
Yes	30	70%
No	4	9%
Neither	9	21%

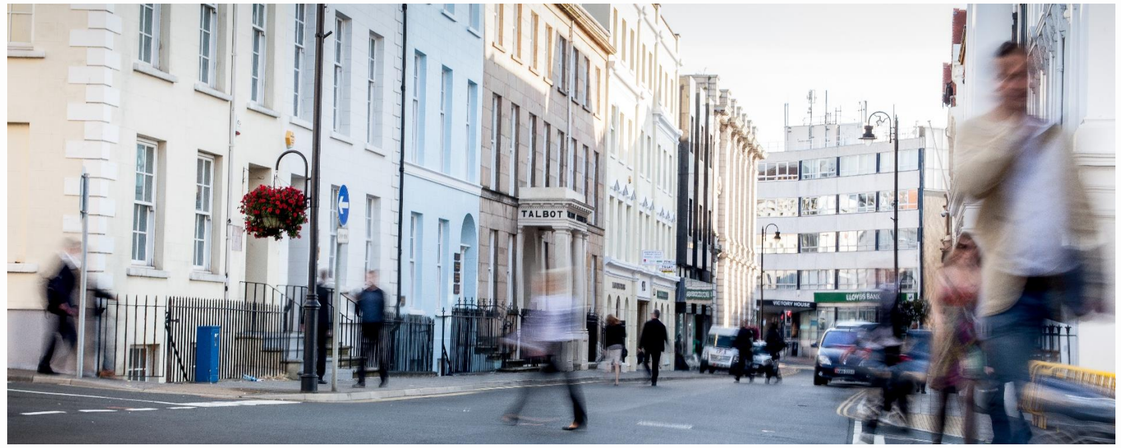
One business commented:

"We consider that the current maximum amount of compensation of £56,000 for unfair dismissal in whistleblowing and health and safety cases should be increased. Often due to the nature of whistleblowing we have seen there is a real opportunity for the complainant to be castigated and shunned by future employers until any public announcements are made."

On the other hand, the IOM Chamber of Commerce commented:

"We acknowledge that the compensatory limit has remained static for some time and that it may be appropriate to review such a limit and revise upwards.

However, this question is not at all related to whistleblowing cases which this particular consultation is focussed on. Our view is that it is not appropriate for this distinct question to be slipped into this consultation as this may have been missed by those impacted by any change in this regard. Therefore, we submit that the Department should separately consult on any changes to the ordinary unfair dismissal legislation to ensure that all feedback in this regard is received.



Further, we would also suggest that a review of the eligibility period to claim unfair dismissal should be undertaken at the same time. In the UK, the eligibility period was increased from 1 year to 2 years in 2012 in order to 'provide more time for employers and employees to resolve difficulties, give employers greater confidence in taking on people and ease the burden on the employment tribunal process'. If there is to be any change to the long-established compensation limits (which could have a significant impact on employers and businesses, there needs to also be consideration to increasing the qualification period for unfair dismissal to be claimed in the first place. Given the cost burdens and pressures currently on employers in relation to doing business on the Island, it is important that any developments in employment legislation should be balanced."

Section 2 Responses

Questions eight to 18 asked for comments on the proposals rather than whether respondents agreed or disagreed, so the following analysis gives only a summary of the points made rather than quantitative numbers which agreed or disagreed with a particular proposal.

Question 8: Do you have any comments on the addition of volunteers, shareholders, board members and job applicants to those who are covered in making a protected disclosure and whether it would be appropriate for the Isle of Man?

There was strong support for this proposal among many of the respondents on the grounds that expanding the categories of individuals who could be covered would help to prevent wrongdoing in businesses, the public sector and other organisations.

On the other hand the IOM Chamber of Commerce commented:

"We do not consider that the Isle of Man should deviate from the UK Whistleblowing legislation…The Isle of Man has generally chosen to align much of its employment law with UK legislation including the whistleblowing legislation and in doing so will benefit from using the UK's precedent cases which will be of persuasive authority in the IOM Employment and Equality Tribunal."

Manx Utilities also commented that: *"Manx Utilities feels that for this to happen the statutory provisions would probably sit outside the Employment Act and is probably straying from the original intent."*

Question 9: Do you have any comments as to protections and compensation for volunteers, shareholders, board members and job applicants if they are to be covered by the protected disclosure framework?

Again there was strong support for whistleblowing protection to be extended to a number of roles other than that of worker. One individual commented:

"Yes, it would seem to be appropriate for the Island subject to the comments below.

Shareholders would seem to have other options for claiming redress directly with the company, given their status as shareholder. If that is not feasible (e.g. for a minority shareholder without voting rights and no legal claim to bring before the Court) then there may be the case.

For volunteers and board members, who either get no pay or a nominal amount, I would highlight they gain a reputational benefit for their work from society as whole. Removing their status as such unfairly thus attracts a reputational damage that should be compensated for. This is difficult to calculate, though the Irish model seems like a good starting point (although libel and slander case law may provide good guidance in this regard as well).

With respect to job applicants, they should be eligible for the same compensation benefits as an employee. The same logic applies to both, albeit in the case of the job applicant it is loss of future earnings (if they had got the job) that are the only factor here."

Question 10: Do you have any comments on the provisions relating to anonymity?

The proposal here was that a worker who makes an anonymous disclosure but is subsequently identified and suffers penalisation, qualifies for protection, though there would be no obligation on an employer or other body to accept or follow up on an anonymous disclosure.

Though the majority of responses to the answer supported protection for anonymous disclosure where an individual is subsequently identified and then suffers penalisation, many respondents also argued that anonymous disclosures should also be followed up on.

Question 11: Do you have any comments as to whether the requirement that all public sector bodies and private sector employers with 50 employees or more establish procedures for reporting and managing qualifying disclosures is appropriate for the Isle of Man?

Only one respondent disagreed with the proposal that all public sector bodies and private sector employers with 50 employees or more establish whistleblowing procedures – though a number of respondents commented that the employee threshold of 50 should be reduced.

Question 12: Do you have any comments on proposals around external reporting channels?

The proposal for external reporting channels is that prescribed persons (i.e. bodies prescribed as those to whom a protected disclosure can be made) must establish reporting channels for handling protected disclosures.

The majority of responses to this question supported the proposal.

Question 13: Do you have any comments on the ministerial reporting channels?

The proposal was that there should be protection in some circumstances where a worker is employed by a public body and the disclosure is made to a Minister with responsibility for the public body concerned. This depends on the worker:

- Having previously disclosed to their employer or a prescribed person and no action has
- been taken;
- Where the worker believes the head of the relevant public body is "personally complicit" in the wrongdoing reported; or
- The disclosure concerns "an imminent or manifest danger to the public interest".

Though there was generally support for the proposal there were also some comments around this. For example:

"…the Cabinet Office must put in place a support and advice structure to assist Ministers, who otherwise may have no experience of employer management to effectively deal with the situation.

If taken forward, legislation would need to be clear as to whether Ministers for sponsoring departments would be the point of escalation for statutory boards. Would there need to be an update to the Statutory Board Act?"

Question 14: Do you have any comments on the proposal on public disclosures?

There is already, in the Manx legislation, provision for public disclosures (e.g. to the media), but there are a number of requirements attached to a "public" protected disclosure which are more onerous than in other cases of protected disclosure. However the consultation sought views on a number of different conditions for disclosure to the media:

- The worker has made a disclosure to their employer or to a prescribed person and no action has been taken;
- There is imminent danger or an emergency; or
- If the worker were to disclose to a prescribed person there is a risk of retaliation or a low prospect of the wrongdoing being addressed.

There were mixed views on this provision – though many agreed with the proposal, some disagreed on the basis that there should be full protection for those who disclosed to the media, without any criteria. Other responses for example highlighted that risk of danger or emergency might be subjective.

Question 15: Do you have any comments on the requirement that public and private sector bodies must keep records relating to all protected disclosures and whether this is appropriate for the Isle of Man?

Again, there was general agreement to this proposal. However some respondents raised concerns. For example:

"This is reasonably impractical for a process where the disclosure only becomes deemed to be protected during an adversarial process. Manx Utilities for instance receives hundreds of health and safety concerns every year, all of which may be deemed to be "protected disclosures" dependent on treatment and circumstance but which are business as usual for a heavy engineering/utility business. There is a real danger of over burdening employers with heavily bureaucratic requirements which are of limited practical value."

Question 16: Do you have any comments or views on the powers provided to the Protected Disclosure Office and whether these would be suitable for an Isle of Man Concerns at Work Office?

Question 16 sought views on the proposed Protected Disclosure Office in the Republic of Ireland and whether a similar office would be appropriate to the Isle of Man.

There were a range of views on this proposal. A significant number of respondents commented that creating a special body would be "overkill" or that the functions of such a body could be carried out by an individual or body with a similar role. Examples given included the Tynwald Auditor General and the Manx Industrial Relations Service. Some, though, commented that the body should be independent of Government.

Question 17: Do you have any comments as to whether the offences listed above would be appropriate for the Isle of Man?

Question 17 sought views on a number of offences in connection with whistleblowing. These are:

- Hindering or attempting to hinder a worker in making a protected disclosure;
- Penalising or threatening to penalise a worker or a facilitator, or causing or permitting any other person to penalise or threaten penalisation against a worker or a facilitator for having made a protected disclosure;
- Bringing vexatious proceedings against a worker for having made a protected disclosure or a facilitator for assisting a worker in making a protected disclosure;
- Breaching the duties around keeping the identity of those who have made protected disclosures confidential.

Such offences might result in either a fine or up to two years' imprisonment.

Again, though there was much support for the proposals for offences, a number of respondents raised concerns. One commenter wrote: *"This requires much more detailed discussion at a level above and outside of this consultation process. This should be discussed within the legal profession and subsequently put out to separate consultation".*

Another wrote: *"Whilst I support the expanding of the range of offences, I do not agree that these should attract a custodial sentence."*

Question 18: Do you have any other comments on any of the above proposals, or the statutory framework for whistleblowing in general?

Examples of some of the comments received are as follows:

"Many employees simply do not have the knowledge as to how to access support services (Union or otherwise) when it comes to making a disclosure. In short, employees lack the resources or resilience to bring claims as a result of making a protected disclosure. The "Legal Aid" system needs to be revived in order to facilitate better access to legal representation."

"We are happy with the framework and supportive of the recommendations made, however we do not believe a government office to oversee the private sector is required as there is already sufficient oversight through regulators etc.".

Next Steps

As this review demonstrates, there is strong support for a number amendments to the existing whistleblowing framework to clarify and improve the law for whistleblowers and employers.

Many respondents also expressed support for the proposals based on the Irish Protected Disclosures Bill, however overall support was mixed. The feedback has raised some significant concerns with the proposals based on the Irish Bill, and it is likely that the practicalities of the proposals will require further consideration as to whether they are appropriate to the Isle of Man's circumstances. Further, some of the proposals, such as the creation of an Office for Whistleblowers, would require specific resources to be identified by Government.

Therefore, the Department for Enterprise intends to bring forward the following changes in an Employment (Amendment) Bill:

- Public interest test for protected disclosures;
- Vicarious liability to prevent detrimental treatment of whistleblowers by employees etc. on behalf of an employer;
- Remove the requirement that a disclosure be made in good faith, but enable Tribunal to reduce compensation where it is determined that the disclosure was not made in good faith;
- Provision to make clear that a protected disclosure has been made;
- Power to make regulations to require prescribed persons to report on whistleblowing cases;
- Power for interim relief.

These changes require primary legislation and will be included in the same Bill that includes the proposals regarding family leave.

The Department will however further consider, and discuss with interested parties, the proposals contained in Section Two of the consultation. Therefore legislation relating to these distinct proposals will not be brought forward at this time.

Similarly, recognising the comments made in connection with increasing the maximum compensatory award, the Department accepts that this requires further consideration as part of a separate consultation process which may extend to broader matters around unfair dismissal.

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