



# **THE INTRODUCTION OF A PUBLIC INTEREST DISCLOSURE REGIME IN JERSEY**

## **REPORT AND RECOMMENDATIONS OF THE JERSEY EMPLOYMENT FORUM TO THE MINISTER FOR SOCIAL SECURITY**

**JUNE 2025**

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## **Executive Summary of recommendations**

1. Jersey should introduce a statutory public interest disclosure regime (referred to in this report colloquially as “whistleblowing”) which will give legal protection to whistleblowers. Protection from unfair dismissal or detriment for an act of whistleblowing should be a Day 1 employment right.
2. The legislation should include a “public interest” test for whistleblowing protection. Those claiming protection must show that the disclosure was made in the reasonable belief that it was in the public interest.
3. “Protected activity” should include:
  - a. Instances where a whistleblower has a reasonable belief that an organisation is breaking the law, for example:
    - i. Criminal activity, such as fraud
    - ii. Breaches of health and safety legislation
    - iii. Breaches of data protection laws
  - b. Environmental damage
  - c. Miscarriages of justice
  - d. An observer believes someone is covering up wrongdoing, either for personal or organisational reasons
  - e. The organisation has demonstrated an intention to break the law
4. Protected activity should not be limited to activity within Jersey’s jurisdiction but should encompass activity witnessed or having knowledge of wrongdoing outside Jersey. Protection should be able to be claimed only when the detriment complained of is suffered in Jersey.
5. Protected activity should not include internal procedural or contractual grievances unless the person making the disclosure can demonstrate a direct connection to one or more of the qualifying criteria set out in Recommendation 3.
6. The only circumstance in which protection should be afforded to the airing of personal grievances should be where the grievance itself is directly related to the act of whistleblowing.
7. Whistleblowing protection should be introduced to all sectors at the same time.
8. A claim for unfair dismissal or detriment as a result of whistleblowing should be made within eight weeks of the date of dismissal or detriment. However, there should be no bar on the length of time that has elapsed since the wrongdoing complained of.

9. Whistleblowing protection in respect of the actions of an entity (A) should extend to:

- i. Direct employees of A
- ii. Employees of an agency/entity providing services to A
- iii. Officers of the States of Jersey Police
- iv. Officeholders in Crown employment

Protection could also be extended to the following groups, either in the initial phase of legislation or by extension after a period of time:

- v. Partners of A where A is a Limited Liability Partnership
- vi. Non-Executive Directors of A where A is a Jersey-incorporated entity, such as a company
- vii. Trustees of A where A is a charity

10. There should be the following approach to the making of a disclosure in respect of the actions of an entity A:

First: A direct approach to A, or to the person responsible for the action complained of

Where this does not result in a resolution or is not possible for whatever reason, the next step should be:

Second: To report to a prescribed person.

11. "Prescribed persons" could include (not an exhaustive list):

- Relevant Government Minister
- Relevant Scrutiny Panel Chair
- Member of the States Assembly
- Comptroller and Auditor General
- Channel Islands Financial Ombudsman
- Jersey Financial Services Commission
- Jersey Care Commissioner
- Jersey Children's Commissioner
- Jersey Office of the Information Commissioner
- Commissioner for Standards
- Jersey Charity Commissioner

12. Whistleblowing protection should not be provided in relation to disclosures made to media organisations, unless the person making the disclosure can show that it cannot be made – for good reason – either directly to entity A, to the person responsible for the action, or to a prescribed person. Protection should not be provided where a disclosure has been made for financial gain.

13. The process for making a protected disclosure should be straightforward and easy to understand and follow.

14. If deemed necessary and desirable, in the longer term, consideration should be given to the establishment of an independent overarching public body, which would have the responsibility of receiving public interest disclosures and determining whether they fall within the scope of legislation.
15. The jurisdiction of the Jersey Employment and Discrimination Tribunal should be extended to hear claims relating to both a detriment suffered because of making a protected disclosure, and unfair dismissal for the same reason.
16. The dismissal of an employee for making a qualifying public interest disclosure should be treated as an automatically unfair dismissal.
17. Legislation should provide for awards of compensation to individuals to reflect the seriousness of the behaviour of an entity. It is particularly important that available remedies include sufficient compensation for financial loss, both actual and potential in the future, and hurt and distress. Awards for financial loss and hurt and distress should initially be on a par with existing and future levels, currently set out in the Discrimination Law (and about to be increased). The remedy for detriment should reflect that set out in the Employment Law – currently a maximum of four weeks' pay but shortly to increase to a maximum of eight weeks' pay. The remedy for unfair dismissal should be on the scale set out in the Employment (Awards) Order 2009.

However, the Forum is of the firm opinion and very strongly recommends to the Minister that – as protection against detriment, unfair dismissal and discrimination for an act of whistleblowing - these levels of compensation should be transitional, leading over time to a significant increase in awards, with the ultimate aim being a system of uncapped awards for the very real damage that can be inflicted on a person's future employment prospects and their physical and mental well-being.

18. JACS role should be extended to provide advice for potential whistleblowers, with additional resources allocated as needed.
19. JACS should make available templates for employers and entities to use to develop whistleblowing policies, which should include the establishment of internal processes to enable a person to be designated to receive whistleblowing concerns.
20. JACS should have no statutory role in the reporting of whistleblowing incidents.
21. Employers and entities should not be required by law to maintain a whistleblowing policy but should be strongly encouraged to do so. Maintaining a policy will give confidence and reassurance to both employer and employee.
22. Regulatory organisations in Jersey which oversee activities which may give rise to whistleblowing disclosures should review their existing policies, to ensure they are fully aligned with any new statutory protections that are introduced, and that advice is updated as necessary and circulated widely across the businesses of which they have oversight.

23. The provisions of anonymity in respect of whistleblowing cases should mirror those already contained in the Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016 and match any additional Tribunal powers to be introduced following the Employment Forum's recent report and recommendations in relation to the compensation awards regime in Jersey.
24. A statutory public interest disclosure regime would be best served by standalone legislation. The Forum considers that it would be more helpful to have the relevant provisions of the Employment and Discrimination Laws replicated in a Public Interest Disclosure Law, rather than have the provisions of public interest disclosure legislation added to the already substantial employment law framework. This approach would also, the Forum considers, support the overriding principle of clarity.

## **Introduction to the Report and Recommendations**

On 19 July 2023, the States Assembly agreed to an amended Proposition<sup>1</sup> relating to the introduction of statutory whistleblowing protections in Jersey.

As part of the agreement to the Proposition, in May 2024 the Minister for Social Security asked the Jersey Employment Forum<sup>2</sup> to consider various issues raised by the prospect of introducing legislation to protect those who make a protected disclosure in what they believe to be the public interest – this is the accepted formal definition of “whistleblowing”.

## **Background to the Employment Forum’s whistleblowing consultation – public engagement exercises**

As part of its preliminary consultation exercise, the Employment Forum produced a short online survey and briefing note, which can be found at Annex 1 of this Report. Details of the survey were published on the Forum’s webpage on the gov.je website and were circulated widely to individuals and professional organisations in Jersey.

In addition, the Jersey Advisory and Conciliation Service sent out two flyers by email to its database of more than 1,000 subscribers and links to the survey and background briefing note were sent to the nearly 200 subscribers to the Employment Forum database.

Online and written contributions were received (see Annex 2 for details). They provided the Forum with valuable insight into the issues identified in its briefing note. The Forum is very grateful for all the responses it received.

The Forum’s Report and Recommendations have been prepared and completed by the following members of the Forum:

Carla Benest (Chair)	Mark Richardson
Claire Kingham	Maureen Byron
Dougie Gray	Graeme Stokes
Marianne Russell	

The then Forum members, Hilary Griffin and Donna Abel, took part in the early stages of the project, before stepping down from the Forum in early 2025.

The conclusions and recommendations of the Forum represent its unanimous view.

## **First principles**

### **What is “whistleblowing” and what areas does it cover?**

In short, a person can “blow the whistle” if they see something which they believe to be wrong, and the public interest is in favour of that wrongdoing being disclosed. As the background briefing note emphasises, in most jurisdictions a disclosure must be made in good faith and not for personal or ulterior motives.

The types of activity that typically might be the subject of whistleblowing include:

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<sup>1</sup> [p.47-2023 amd.pdf](#)

<sup>2</sup> [2024.05.20 - MSS letter of direction to the Employment Forum re whistleblowing.pdf](#)

- Criminal activity such as fraud or theft
- Breaches of health and safety legislation
- Breaches of data protection laws
- Environmental damage caused by a company's or individual employee's activities
- Someone covering up the wrongdoing, either for personal or organisational reasons

As will be seen later in this report, this is not an exhaustive list. Different jurisdictions take different approaches.

A complaint which would not be covered by whistleblowing legislation is one concerning bullying, harassment or discrimination (none of which is linked to an act of whistleblowing itself). These would need to be dealt with by internal grievance procedures and draw on existing legislative protections in the Employment and Discrimination Laws.

However, if the whistleblower can demonstrate that blowing the whistle has led to them becoming the victim of bullying, harassment or discrimination, then legislation in many jurisdictions ensures that a person is entitled not to suffer detriment or be treated unfairly for having blown the whistle.

The Jersey Employment Law contains a right not to suffer detriment across a relatively broad swathe of protections outlined in Article 31 of the Law, but these do not currently include statutory protection for whistleblowing.

### **Why is an effective whistleblowing regime important?**

In guidance produced by the UK Government in 2015<sup>3</sup>, the then Department for Business, Innovation and Skills summarised the benefits of employers having a robust whistleblowing policy in place:

*As an employer it is good practice to create an open, transparent and safe working environment where workers feel able to speak up. Although the law does not require employers to have a whistleblowing policy in place, the existence of a whistleblowing policy shows an employer's commitment to listen to the concerns of workers.*

*By having clear policies and procedures for dealing with whistleblowing, an organisation demonstrates that it welcomes information being brought to the attention of management.*

*This is also demonstrated by the following:*

- *Recognising workers are valuable ears and eyes: Workers are often the first people to witness any type of wrongdoing within an organisation. The information that workers may uncover could prevent wrongdoing, which may damage an organisation's reputation and/or performance, and could even save people from harm or death.*
- *Getting the right culture: If an organisation hasn't created an open and supportive culture, the worker may not feel comfortable making a disclosure, for fear of the consequences. The two main barriers whistleblowers face are a fear of reprisal as a result of making a disclosure and that no action will be taken if they do make the decision to 'blow the whistle'.*
- *Making sure staff can approach management with important concerns is the most important step in creating an open culture. Employers should demonstrate, through*

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<sup>3</sup> [Whistleblowing: Guidance for Employers and Code of Practice](#)



*visible leadership at all levels of the organisation, that they welcome and encourage workers to make disclosures.*

- *Training and support: An organisation should implement training, mentoring, advice and other support systems to ensure workers can easily approach a range of people in the organisation.*
- *Being able to respond: It is in the organisation's best interests to deal with a whistleblowing disclosure when it is first raised by a worker. This allows the organisation to investigate promptly, ask further questions of a worker and where applicable provide feedback. A policy should help explain the benefits of making a disclosure.*
- *Better control: Organisations that embrace whistleblowing as an important source of information find that managers have better information to make decisions and control risk. Whistleblowers respond more positively when they feel that they are listened to.*
- *Resolving the wrongdoing quickly: There are benefits for the organisation if a worker can make a disclosure internally rather than going to a third party. This way there is an opportunity to act promptly on the information and put right whatever wrongdoing is found.*

Following its consultation exercise and consideration of the various issues, the Employment Forum is in no doubt that effective whistleblowing policies can only help to enhance the reputation of Jersey, particularly in relation to the types of business activity carried on within the Island.

This view is generally borne out by responses to the consultation exercise.

In this report the Forum considers some of the existing whistleblowing structures that exist currently in Jersey and the way in which the scope of a statutory regime can serve to support those making protected disclosures. The Forum also considers the position in other jurisdictions.

In whistleblowing legislation, the scope of protections can vary widely, both in terms of what employees can be protected from – for instance, unfair dismissal, other detrimental behaviour by an employer and victimisation – and in the range of people qualifying for protection by whistleblowing legislation.

### **The position on statutory whistleblowing protections in other jurisdictions and the recommendations of international bodies**

In the following section, the Employment Forum has focused on a few examples of whistleblowing legislation to highlight some of the important issues which those pieces of legislation are designed to address – in particular, in the United Kingdom – as well as a short examination of the position in smaller jurisdictions within the Common Travel Area.

- 1) In 2023 the then United Kingdom Government embarked on a review of statutory whistleblowing protections in legislation which was originally introduced in 1998.<sup>4</sup> The UK Government provides a range of guidance for employees on what is and is not covered by whistleblowing legislation.<sup>5</sup>

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<sup>4</sup> [Review of the whistleblowing framework: terms of reference - GOV.UK](#)

<sup>5</sup> [Whistleblowing for employees: What is a whistleblower - GOV.UK](#)

- 2) In the Republic of Ireland, workers have a high degree of protection in legislation when making a protected disclosure. The linked document demonstrates the detail of protective legislation.<sup>6</sup>
- 3) In the Isle of Man, the Government has produced a brief guide to protection available under the 2006 Employment Law.<sup>7</sup> An important distinction in Manx law is that “employees” and “workers” have different remedies available to them depending on the type of detriment suffered. In Jersey, all those in work, regardless of the type of contract under which they are employed, are classed as “employees” and have the same levels of protection. In its recommendations the Forum bears this right in mind.
- 4) In addition, in all three Crown Dependency jurisdictions, the public service operates a whistleblowing policy for staff.

### **Example: Statutory whistleblowing provisions in the United Kingdom**

The Forum considers it useful to refer to public interest disclosure legislation in the United Kingdom. The legislation has been in existence for many years now.

In United Kingdom legislation, the Public Interest Disclosure Act 1998 (inserted into the Employment Rights Act 1996 as Part IVA) sets out:

- the types of disclosure which qualify a worker for protection under the legislation;
- to whom a protected disclosure may be made;
- examples of the meaning of “worker” in the legislation, which set out the scope of protection across a range of employment activity.<sup>8</sup>

In essence, the types of disclosure which qualify for protection are a useful template for considering the potential scope of protection in Jersey. The Forum’s briefing note contains a reference to the different scenarios which might be covered by legislation in Jersey. These are not unlike the present scope contained in UK legislation.

### **Summary of the Forum’s conclusions on the breadth of protection for whistleblowers**

What seems to be clear is that there is a core set of principles which are generally accepted internationally. What seems equally clear is that there is no lack of momentum within jurisdictions to continue to implement whistleblowing protections. This is particularly so in the case of the European Union’s 2019 Directive, whose key feature is the protection of whistleblowers from retaliation, such as by dismissal or demotion, by employers.<sup>9</sup>

In many jurisdictions, particular emphasis is placed on the reporting of economic crime. Given the scale of Jersey’s involvement in financial services activity, it seems sensible to the Forum to flag, as part of the development of a statutory whistleblowing regime, the internal processes operated by regulators in the Island.

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<sup>6</sup> [Protection of Whistleblowers - Workplace Relations Commission](#)

<sup>7</sup> [whistleblowing-a-brief-guide-november-2023-091123.pdf](#)

<sup>8</sup> [Employment Rights Act 1996](#)

<sup>9</sup> [Protection for whistleblowers - European Commission](#)

## **The introduction of statutory whistleblowing protections in Jersey**

The focus of the Employment Forum's considerations has been on the appropriate scope of public interest disclosures; the structures required to support public interest disclosure legislation; and the remedies available to those individuals who make a qualifying protected disclosure but suffer a detriment for doing so.

In reflecting on the appropriate way forward, the Forum has been very grateful for the detailed submissions received. The following paragraphs provide an analysis of these contributions.

### **Responses from stakeholders**

Eleven questions were posed for respondents to consider. A summary of responses to each of the questions is set out below:

#### **1. Should there be legislation in Jersey to protect those who blow the whistle for public interest reasons?**

Respondents overwhelmingly considered that legislation should be brought forward to protect those who make a disclosure in the public interest. That protection should apply to those in both the public and private sectors.

Respondents also considered that it can only be helpful as a matter of good governance for whistleblowing legislation to be brought forward. The point was also made that the disclosure should be made in good faith and that criteria should be set out which define the scope of the protection and to ensure that no detriment is suffered by the person making the disclosure.

A point was made that the ethos of whistleblowing should be promoted to employers as a good and balanced thing which ultimately protects the business as well.

The Chair of the Employment and Skills Committee of the Jersey Chamber of Commerce indicated that Chamber broadly supports the introduction of whistleblowing legislation.

In its response, the trustees of the Jersey Community Relations Trust (JCRT) set out their support for the principle of whistleblowing protections in Jersey and view this as essential protection for vulnerable individuals in society. The trustees note that the absence of statutory whistleblowing legislation continues to undermine protection for people who are left in a difficult position when they come across wrongdoing.

Unite the Union said that they have long held the view that the lack of whistleblowing protections in Jersey has represented a significant legislative gap in the employment protections that exist. The right to not suffer a detriment because of making a protected disclosure is, in their view, a key right, as it would encourage the exposing of what they describe as "nefarious activities" while protecting the individual making the disclosure.

The Union emphasises that in a jurisdiction that has a significant financial services footprint, these protections are crucial in terms of providing confidence to whistleblowers in this and other sectors.

Unite also expressed the view that the lack of whistleblowing legislation in Jersey represents a conspicuous gap in employment legislation. Their view is that it takes a significant amount of bravery to step forward and blow the whistle; however, where there is no protection from detriment, workers are less likely to come forward and raise issues. The introduction of robust legislation would provide employees with additional protections and recourse to a remedy in

the event of detriment. Unite hope that legislation would act more as a deterrent to causing a detriment rather than employees having to rely upon the protections, because of a detriment, after the event.

A Jersey law firm expressed the view that the current lack of express whistleblowing protection places Jersey out of step with comparable legal systems and, as such, is inconsistent with Jersey's otherwise justified reputation as offering a well-regulated corporate governance framework. With the necessary precondition that whistleblowing protection is intended to shield individuals who make disclosures in the public interest, the law firm indicated that it is difficult to see a principled basis for objecting to an appropriately framed regime in Jersey.

The point was made to the Forum that whistleblowing and whistleblowers have the potential to provide benefits to the Island and employers generally, but that the imperative is to identify and put in place a statutory scheme that is accessible, understandable and which does not impose undue regulatory or financial burdens on Jersey businesses or increase the amount of unnecessary litigation in the Tribunal. The Forum strongly endorses this view.

To this end, the Forum also strongly endorses the view expressed by respondents about the importance of giving employees the confidence to speak up about any wrongdoing they witness or become aware of, by ensuring that appropriate speak up mechanisms are promoted by employers, particularly those in the various regulated sectors, such as the Jersey Financial Services Commission, the Care Commission (whose processes in this respect are highlighted later in this report) and the Health and Safety Inspectorate, as well as governmental organisations such as Health and Care Jersey (formerly Health and Community Services).

One of the respondents to the consultation exercise made the following point about the benefits of effective speak up mechanisms, which the Forum commends:

*“A speak up culture in the workplace is essential for fostering an environment where employees feel valued, respected and empowered to voice their concerns.....a speak up culture is key to developing organisational resilience, employee engagement and satisfaction.....and it promotes ethical behaviour.”*

The respondent concluded this part of their submission in this way:

*“In our view, whistleblowing legislation should be seen in the broader context of encouraging and engendering speak-up cultures more generally within Jersey workplaces.”*

Such benefits also have the potential to minimise litigation, by addressing (for example) issues of poor regulatory or ethical behaviour internally within an organisation, with organisations promoting a culture of openness and transparency. The Forum addresses this specific point in its conclusions and recommendations below.

The submission also expressed the point that there should be a clear separation between conduct which impacts an individual (or group of individuals) for which an employment grievance procedure should be followed, and disclosures of illegality or improper behaviour made in the broader public interest. The Forum is clear that this is an important principle to apply when considering what types of disclosure should qualify for protection under public interest disclosure legislation and this is highlighted in several contributions to the consultation exercise.

A Jersey law firm agreed that there should be legislation in Jersey to protect those who blow the whistle for public interest reasons, in appropriate organisations and/or within the public sector. However, the law firm did not think the same is true of every organisation, particularly very small private sector businesses outside of financial services, healthcare, and care of the vulnerable, as examples.

It is the view of the law firm that new legislation will need to be drafted, rather than amending the Employment and/or Discrimination Laws.

A respondent told the Forum they had run a session with a number of clients from the financial services sector to obtain their views on whistleblowing protection in Jersey. They reported that there was unanimous support for whistleblowing protections in principle; overall it would be positive for Jersey's standing as an international finance centre to have formal statutory whistleblowing structures in place. A key view was that, increasingly, employees want to know that employers will support a positive culture – which includes protecting whistleblowers – and that these structures would be a positive benefit.

The Employment Forum endorses the generally expressed view that formal whistleblowing protections would be of benefit to the Island. In some circumstances that benefit would likely express itself in a desire for Islanders to remain in Jersey, working in a jurisdiction that values the worth of employees, the contributions they make to business and maintaining high ethical and transparency standards.

**2. In terms of the scope of whistleblowing protection under the law, what kinds of activity should or should not qualify for protection if someone makes a disclosure they believe is in the public interest?**

Respondents considered that the list outlined in the Employment Forum's briefing note was a good starting point for consideration in the legislation. The point was made that any legislation brought forward should be right for Jersey, given its relatively small employment base, rather than simply mirroring what the position is in other jurisdictions – particularly the UK.

The Chamber of Commerce Committee told the Forum that they fully agree that whistleblowers should be protected. The proposed list of protected disclosures set out in the Forum's briefing note appears comprehensive. Personal grievances, such as bullying and harassment, should remain outside scope unless clearly linked to the public interest/good faith criteria.

Unite the Union considered that protection should extend beyond employees to include contractors, volunteers, agency workers, and suppliers of goods or services. However, there should be a time limit for making a disclosure.

Unite considered that, as stated in the Forum's briefing note, any list would not be an exhaustive one and the examples in the list provided are all relevant. In addition to that non-exhaustive list, the following are additional examples where protection should be afforded:-

- i) Mis-selling in the financial services. This would not be limited to banks and insurance companies, but any organisation involved in providing credit or finance
- ii) Issues of Institutional Discrimination/Bullying
- iii) Issues of Modern-Day Slavery
- iv) Minimum Wage Breaches and other Statutory Employment Breaches

Unite's view is that, whilst the issues set out above would be captured by some of the examples on the list provided, these are specific disclosures which could assist in identifying the nature of whistleblowing.

The trustees of the JCRT told the Forum they would be concerned if whistleblowing protection is limited to just financial services. There are a number of sectors - where there are significant physical risks - that would benefit from effective whistleblowing protection, including construction, utilities, ports and harbours. These sectors, the trustees contended, are also more likely to contain employees with lower incomes and so the impact of any loss of income could be more significant for them and their families. Similarly, employees in hospitality, retail and agriculture face issues with workplace practices, including health and safety, immigration and work permits, and withholding of pay.

The JCRT trustees also noted that the States Employment Board is the biggest employer in the Island, and there are areas where increased protection for whistleblowing is essential. The trustees point to the area of health; standards in healthcare, they contend, should be driven up if there is effective whistleblowing protection in place.

A Jersey law firm told the Forum that the examples given in the Forum's briefing paper are apposite. However, with reference to the fifth example given ("the company the employee works for is breaking the law as an entity"), it would be preferable to broaden the scope.

The law firm pursued two aspects to this issue.

First, they contended, it should not be a requirement that the disclosure is actually true – that would place a heavy and disproportionate burden on the whistleblower.

Second, an individual may well be raising a concern about a breach by an organisation other than their employer – such as a client entity or individual, or an entity or individual elsewhere in the corporate group in which they are employed. By way of comparison, under the UK regime, a disclosure may qualify for whistleblowing protection if it tends to show (i.e. relates to) a breach of a legal obligation.

A second Jersey law firm told the Forum that, although statutory protections range rather widely across different jurisdictions, there does appear to be alignment on the types of complaint which are typically covered by such legislation. Examples included:

- a serious and relevant criminal offence, for example fraud
- material breaches of health and safety legislation
- risk of or actual material damage to the environment
- an employee believing that someone is covering up material wrongdoing, either for personal or organisational reasons, within a relevant organisation

In the view of this law firm, where the complaints related to potential misconduct which is serious and material and it is within one of the relevant areas, then potentially complaints regarding these matters should qualify for protection if someone makes a disclosure which they genuinely believe is in the public interest.

In such cases, relevant points are likely to include:

- the subject matter or area to which the complaint relates (eg financial services, healthcare, and care of the vulnerable are areas where, for example, whistleblowing legislation may be appropriate);
- the level of materiality or seriousness; and
- what is objectively considered “in the public interest”. In the UK, whistleblower protection is not afforded to complaints in relation to personal grievances (e.g. bullying, harassment and discrimination). The Forum agrees that such complaints should not be covered by Jersey whistleblowing legislation, unless the complaint in question also meets other applicable criteria

Within organisations, complaints which are purely personal should normally continue to be reported under an employer’s internal policies, or if applicable, employees can raise claims under the current provisions of the Employment and Discrimination Laws.

In relation to the criterion that the company is breaking the law, the law firm told the Forum that they did not consider that an allegation that “the company is breaking the law” is ever going to be sufficient in terms of whistleblowing protection. There is some conduct which may amount to breaking the law which is of no real material impact for the wider community, and the law firm did not consider that this should therefore be covered by whistleblowing legislation, and not in such terms.

From its roundtable session with clients, a respondent told the Forum that the preference was to mirror, as much as possible, the protected disclosure regime in the UK. The session had explored some of the issues with the definition in the UK, including the breadth of potential disclosures, how the public interest test was hard to pin down, and the subjective elements of that definition.

They told the Forum that whether the “public interest” test was suitable for a small jurisdiction like Jersey is a moot point. The roundtable attendees felt that having a requirement that a disclosure had to be made in the public interest may be a step too far and that, as such, the preference was that the disclosure should have been made in “good faith”.

The Forum sets out a comparison of the features of “public interest” and “good faith” tests at Annex 3 of this report.

The Forum recognises that there is something of a division of opinion as to whether the scope of protection should be focused on an “activity-based” list, such as that set out in the Forum’s briefing note and reflected largely in UK law, or a “sector-specific” list, which would reflect the provisions of the EU 2019 Whistleblowing Directive. Sectors might include financial services, transport safety, procurement and consumer protection.

A respondent told the Forum that its view is that the UK approach (that of an “activity-based” list of criteria) could usefully be adopted in Jersey, provided that it was made clear that breaches of individual contracts of employment – or workplace policies or benefits – were expressly excluded from protection.

The overwhelming view, with which the Forum agrees, is that personal grievances should not be covered by whistleblowing legislation, unless the disclosure meets one or more other criteria and can be directly linked to witnessing wrongdoing which prompts that disclosure.

Finally, the Forum acknowledges that most respondents considered (again) that, if any whistleblowing legislation is to be contemplated, it should be right for Jersey.

**3. Thinking about the types of activity that might qualify for protection, how far do you think protection should be extended in Jersey legislation? Are there issues specific to Jersey that need to be considered?**

Several respondents considered that weight should be given to the fact that most businesses in Jersey are small employers. This has a knock-on effect in terms of protecting a whistleblower if they wish to remain anonymous and the potential for detriment to be suffered by an employee.

Respondents also highlighted the need for care to be taken to ensure that future legislation is not so complex that employers are not able easily to understand and take on board the new requirements. Consideration should be given to restricting sector-specific legislation (at least initially) to areas such as financial services, healthcare and the public sector.

Some respondents identified what they considered a tension between providing legal protection to a whistleblower if they fulfil certain criteria and any reportable activity which extends to duties imposed by a regulatory authority.

A Jersey law firm told the Forum that the Forum's briefing paper had noted the potential importance in this jurisdiction (as elsewhere) of the reporting of economic crime. The law firm agreed with the Forum that this should be an integral feature of any Jersey regime.

However, a key issue is likely to be the extent to which reportable activity should extend to duties which are imposed by a regulatory authority (e.g. the Jersey Financial Services Commission) but which do not have the status of legal obligations. This issue would require care from a drafting perspective since there is no universal definition of a "regulatory obligation", and also because the JFSC (and other regulatory authorities) may impose a number of obligations which are important but which, without more, may not warrant the protection that is otherwise afforded to a public interest disclosure. One suggestion made by the law firm would be to frame this duty to report in terms of an obligation imposed by law or regulatory code of practice.

One respondent considered that Jersey should be *“bold, robust and adopt the best practices [contained in global legislation].”*

Unite the Union told the Forum that any legislation should not be limiting and that a whistleblower in any event would have to demonstrate that a protected disclosure has been made and that a detriment has been experienced in the event of bringing a claim. Any Jersey legislation should be enabling and provide the necessary degree of confidence to employees to raise issues either internally or externally where appropriate.

The union told the Forum that, in its view, there are not really examples that are unique to Jersey, but clearly there would be elements that are more prevalent than others within the jurisdiction.

Another respondent told the Forum that the key issues here *“relate to the potential complexity of any law and the ability of often small Jersey employers to be able to get to grips with a highly*



*complex piece of legislation.*” Thus, they would be concerned if Jersey adopted the UK legislation wholesale.

They also made the point that the Tribunal would expect to require additional resources to enable it to cope with what may prove to be many complex employment claims.

The Forum has attempted, in its conclusions and recommendations, to devise a public interest disclosure regime that is as straightforward as possible, and as easy to understand, consistent with the need to ensure that, whatever structure is finally agreed on, it does justice to the parties involved.

**4. Who should be covered by statutory whistleblowing protections? Should protection be restricted to direct employees? Should those who provide services to a business be included?**

It was pointed out that any legislation in Jersey should cover all employees who provide a service to an employer in Jersey – in other words, those not only directly employed by a business where wrongdoing is suspected or witnessed, but also those witnessing wrongdoing when providing services to that business.

One respondent made the point that protection is particularly important for employees reliant on a licence to work, who may be afraid to blow the whistle and if they do, may suffer the repercussions of that disclosure, which may lead to the loss of a job and their enforced departure from the Island.

Although there is a division of opinion among respondents about the scope of protection as far as different persons are concerned, there is general agreement to make the protection from suffering a detriment for blowing the whistle wide enough to encompass not only direct employees but those employees in the course of their employment, be it on a temporary or agency basis.

The same point was made that protection should extend to both public sector and private sector employees. Any legislation should make clear the categories of people to whom the protection should apply, and that protection should apply equally between them.

A respondent told the Forum in its submission that it would be helpful for any Jersey legislation in this respect to make explicit the categories of individual who are to be protected. In its conclusions and recommendations, the Forum deals with this point specifically.

A Jersey law firm told the Forum that its experience is that the direct employer/employee model should not be assumed to be the only or principal method by which an individual may be engaged to provide services. The law firm therefore suggested that individuals working as non-executive directors, consultants and contractual service providers, secondees and agency workers should be covered. Such types of engagement, it noted, are widely used, including for individuals performing senior and business critical roles.

Since partner-led organisations are also common, especially in financial and professional services, the law firm suggested that partners and members of limited liability partnerships should also be included. In each such example, the core tenets of a statutory whistleblowing protection regime – namely, that individuals who raise public interest disclosures should be protected from reprisals – should apply equally as in the employer/employee context.

Another Jersey law firm suggested to the Forum a more restrictive approach to this issue. It noted that different jurisdictions take different approaches to this point. Some jurisdictions extend protection widely, covering not only employees, but also former employees, contractors and suppliers. Other jurisdictions only extend protection to employees, some even to only public employees.

The law firm contended that, as the introduction of a statutory public interest disclosure framework would be such a huge legislative change in Jersey, the protection initially should only extend to employees and former employees, with a view to protection potentially being extended over time. This, the law firm argues, would be particularly true in relation to former employees, who may leave organisations because of behaviour they consider is wrong or harmful.

At the same time, in the view of the law firm, great care would be needed in drafting, as former employees who have left an organisation in circumstances where the former employees' own conduct or misconduct was under scrutiny, may have a particular axe to grind. It may even be the case that protection should be limited to certain employees in the first instance, before protection is extended to all employees.

Employees in the financial sector, the law firm argues, are an obvious initial focal point, due to the size and importance of the sector in Jersey and the bolstering this would likely provide to Jersey's reputation. In the law firm's view, it may also be appropriate to cover those employees who work within Health and Care Services operated by the Government of Jersey.

In discussions arising from its roundtable exercise, a respondent told the Forum that the view was that whistleblowing protections should not be limited to financial services. There is, in the view of its clients, a wider public interest in having effective whistleblowing legislation in place, in particular in government and the health and construction industries. It would, they contended, be unfair to single out financial services when this is an issue of wider importance to employers and employees across the Island.

Consideration should be given to extend coverage to Non-Executive Directors, directors, consultants and partners – to cover the different ways individuals are engaged with businesses and organisations.

Unite the Union told the Forum that statutory provisions should cover all employees. This is important, the union said, in terms of the fragmentation of workforces now, with outsourcing of services which means that many employees on site will not necessarily be employed directly by the employer. The increase in agency workers also means that it is important that the protections are wide ranging and protect all employees and all employment relationships in terms of those directly and indirectly employed.

- 5. What steps should a potential whistleblower have to take in order to qualify for protection? Should the law set out those steps in detail?**
- 6. To whom should a disclosure about suspect activity be made, and in what circumstances?**

The Forum has taken its analysis of Questions 5 and 6 together. There is thus some crossover in the responses received.

Some respondents considered that any legislation should set out a process, to the extent that it is clear what steps need to be taken and the remedies available if detriment is suffered.

Another respondent considered that a whistleblower should have exhausted all internal avenues to have their concerns dealt with, before making a disclosure public. Proper advice from an independent source should be available to those considering blowing the whistle.

Unite considered that any legislation should not be too prescriptive as to how a disclosure should be made. Placing too many statutory hurdles in front of them could result in the most vulnerable losing any protection, especially if it is not clear to them what their rights are.

Other general comments included the emphasis that any disclosure should be made in good faith, and that legislation should be equally clear about what type of disclosure is not protected by law. Employers should have clear internal whistleblowing policies which are well-understood by employees and those organisations with which the employer does business. The law, though, should stop short of requiring an employer to maintain a whistleblowing policy (also see responses to Question 10 below).

The Chamber of Commerce Committee told the Forum that clear guidelines are essential to establish a structured process for making disclosures. Whistleblowers should have a reasonable belief that their disclosure is in the public interest. Wherever possible, disclosures should initially be made internally within an organisation. If this is impractical or ineffective, whistleblowers should have access to an independent body.

Another respondent told the Forum that, in order to qualify for protection, a disclosure must be in the public interest; one that the employee **either** must reasonably believe to be true – a subjective test (such as that contained in UK legislation); **or** have reasonable grounds to believe is true (an objective test, such as that contained in the 2019 EU Whistleblowing Directive).

Disclosure should, they contended, also be made to an “appropriate person”, defined by the respondent as:

- The employer
- The person believed to be responsible for the relevant failure to have acted appropriately
- A legal adviser
- A Government Minister (in the case of whistleblowing by employees of the States Employment Board)
- A prescribed person – for example, where an employee has reason to believe the information they possess is substantially true and concerns a matter within their area of responsibility - Revenue Jersey, the Health and Safety Inspectorate, the JFSC, and so on

The respondent also considered that wider disclosure should also attract protection, but subject to stringent requirements which could include:

- The employee having reasonable grounds to believe in the truth of the disclosure
- The disclosure not being made for personal gain
- Save where the disclosure is exceptionally serious (which should attract its own definition), the employee should be required to have already disclosed an issue to the employer, unless the employee had reasonable grounds to believe that, if they did disclose, they would, among other things, suffer reprisals

Disclosure to an external person or entity should also have to be reasonable in the circumstances.

Some relevant points have been made in response to Question 5 above. In addition, most respondents pointed to the regulatory and enforcement entities that exist in Jersey. Where an employer is not held to account by regulatory or enforcement functions (such as those exercised by the Jersey Financial Services Commission (JFSC)) then employers should be encouraged to maintain internal disclosure policies – overseen formally by a company whistleblowing officer properly trained - which prioritise the protection of the whistleblower. Some respondents made a broader point about the need for a relevant authority – outside the scope of the responsibility of, for example, the JFSC or the Law Society – to receive and investigate disclosures made in the public interest.

Some respondents suggested that there should be an overarching statutory body which would be responsible for monitoring compliance with whistleblowing policies (formal or informal) and receiving public interest disclosures. The Forum considers this issue in its conclusions and recommendations below.

Some respondents referred to the use of a “speak up” confidential service, such as that operated in Health and Care Jersey in the public service.

Respondents also made the point that having a visibly independent source to seek advice from or go to in order to make a disclosure is the most important criterion – a view was expressed that raising serious issues with line management is potentially a deterrent to legitimate whistleblowing activity, particularly if line management is equally reluctant to raise actual or perceived wrongdoing further up the internal management chain.

On the other hand, a suggestion was made that the disclosure should be made to the employer or “responsible person” in the first instance (as happens in the UK), with other avenues available to a whistleblower, either in addition to that initial disclosure, or as an alternative step.

One respondent suggested that an independent body such as a trade union or the Jersey Advisory and Conciliation Service (JACS) should have the power to receive allegations of wrongdoing, though it is not clear what specific powers the respondent considers this type of body should have to deal with such allegations. It is also suggested that JACS be given an enhanced statutory role, with appropriate additional funding, as an independent receiving body. Again, the Forum discusses this aspect in its conclusions and recommendations below.

Reference is also made in the responses to the need generally for an “independent third party” to hold the responsibility for receiving public interest disclosures. It was also suggested that there should be a prescribed list of recipients to receive protected disclosures and a clear, stepped approach to be taken.

The JCRT trustees told the Forum that, as well as the usual reporting channels, they would like to see Customs and Immigration and the Employment, Social Security and Housing Department listed as potential reporting channels. The trustees said that they are aware of numerous issues in recent years with poor practice and conduct towards migrant employees. The trustees expressed the firm view that it is essential that the Immigration Service can be approached by individuals, and that individuals know that they will then be protected as whistleblowers.

In the alternative, the trustees suggested the creation of an independent whistleblowing ombudsman. Their reasoning is that there is a concern that multiple reporting channels could be challenging or confusing for individuals. Jersey is a small enough jurisdiction that consideration could be given to a single designated reporting channel, such as the ombudsman, that would then feed down to the JFSC, Health & Safety, Immigration and so on.

A balance could be to allow both – a single easy channel and direct reporting to the relevant enforcement body/agency/Minister. The trustees told the Forum that they recognise that the JFSC should be the designated channel for financial services, whichever structure is eventually decided upon.

Finally, the trustees told the Forum they would like to ensure that States Employment Board employees can report appropriately, whether to the Commissioner for Standards, the relevant Scrutiny Panel, or the relevant Minister.

Unite the Union told the Forum that, ideally, employees would escalate disclosures in the first instance internally through the employer's whistleblowing policy. There would be occasions, however, where the disclosure must be made externally, either due to the seriousness of the issue, the lack of confidence that the employer will deal with the disclosure effectively, or because it has been raised internally and not dealt with. Once the disclosure has been made to a relevant authority - either the employer or an external body - then whistleblowing protections should apply. Legislation should set out these steps to avoid any ambiguity or alternatively be contained in a separate Code of Practice.

A Jersey law firm told the Forum that it would support a prescribed list of appropriate recipients, in order to set acceptable limits around whistleblowing protection, proportionate for an individual to expect, and also to ensure the law remains closely focused on the protection aspect of the regime (i.e. the potential reprisals which might follow from the disclosure being made). The law firm considered that it would be reasonable to expect that an individual should, in the first instance - and barring a tangible reason why this would not be reasonably possible in the circumstances - make their disclosure to their employer or contracting organisation and/or the party to whom the disclosure relates.

Beyond that, the law firm suggested it would expect that a relevant government minister and/or regulatory authority would be the next appropriate tier of recipient. Finally, and potentially depending on whether the disclosure relates to a potential criminal offence, the respondent suggested they would expect the law to allow for a disclosure to be made to relevant law enforcement authorities.

The second law firm respondent suggested to the Forum that, in their view, this is a particularly difficult question to answer. In the UK, they said, the first port of call for employees is to report a concern to their employer. If they do not want to report a concern to their employer, they are able to get legal advice or tell a prescribed person or body. The UK has an extremely long list of prescribed persons/bodies, which cover a whole host of different sectors. At present in Jersey, some employers have internal whistleblowing policies, which means that employees can report concerns internally. The law firm also noted that the JFSC has both a confidential whistleblowing line and the ability to file a report with it. At present, however, it is not clear what happens if someone within the JFSC need to make a disclosure about the JFSC – to whom would this be made?

The law firm considers that there may be a need to create a separate body/organisation for the sole purpose of dealing with whistleblowing reports. However, it acknowledges that this would be costly and would likely take some time to create and implement correctly and effectively. Alternatively, perhaps it could be an add on to something like JACS (the Jersey Advisory and Conciliation Service), if the role was appropriately and independently funded.

A respondent told the Forum that their roundtable session agreed that the UK whistleblowing regime provides a good model for making disclosures to the appropriate body. Authorised bodies in Jersey should include Revenue Jersey, the JFSC, the Jersey Office of the Information Commissioner and the Health & Safety Inspectorate.

A Jersey law firm told the Forum that it would also support a basic formula, as in the UK model, along the following lines:

- The disclosure falling into one of the prescribed areas of activity;
- The disclosure meeting certain further qualifying conditions, namely –
- there being reasonable grounds to support the subject matter of the disclosure, and
- the individual having a reasonable belief that the disclosure is in the public interest; and
- The disclosure having been made to an appropriate recipient

Its view is that the law (or at least supporting Regulations) should set out the essential steps that are required for a particular disclosure to qualify for protection. Without those steps being prescribed, the law firm contends, it is unlikely to be sufficiently clear for individuals, organisations or the court or tribunal to be able to determine whether a disclosure does, in fact, qualify.

There is, in addition, some difference of opinion on the specific point about the test to be applied when making a public interest disclosure, namely:

- Should the disclosure attract the requirement that it be made in the public interest or in good faith, and
- Should the person making the disclosure reasonably believe it to be true, or have grounds to believe it to be true

The Forum discusses this aspect in more detail in its conclusions and recommendations below and provides a comparison of the two types of test at Annex 3 of this report.

## **7. What form should remedies and compensation for complaints of detriment suffered as a result of whistleblowing take? In particular, should the Employment Tribunal have the power to hear such complaints and provide remedies?**

Some respondents said that providing the Tribunal with the necessary powers to determine remedies and compensation for unfair or constructive dismissal or other detriments such as loss of promotion or job opportunities is a sensible choice, and that compensation should reflect that which is available in the unfair dismissal regime.

One trade union respondent considered that compensation awarded by the Tribunal should be unlimited, given the potential for a disclosure made in the public interest to have negative consequences for the whistleblower concerned, and to act as a deterrent for employers from behaving in a way that deters employees from voicing concerns.

Another respondent suggested that dismissal for whistleblowing should be treated as automatically unfair, and thus a Day 1 employment right. It was also suggested that a percentage uplift could be applied to compensation by the Tribunal in particularly bad conduct by the employer.

Other respondents suggested that remedies could include orders for reinstatement and further financial compensation to a whistleblower if such an order were not complied with. The Forum notes that the Employment Law already contains a provision relating to the ability of the Tribunal to consider the question of reinstatement (Article 77A of the Law).

One respondent compared the statutory protection of a whistleblower with the provisions in the Discrimination Law relating to protected characteristics and suggested it would be a natural extension of the list of protected characteristics to include protection for those making a disclosure in the public interest.

The trustees of the JCRT suggested to the Forum that they fully support an effective remedy for whistleblowers who are dismissed or face a detriment because of an act of whistleblowing. The trustees contend that a capped damages regime would not adequately compensate whistleblowers for the losses they would suffer. Therefore, the damages regime should be uncapped but based on ordinary contractual principles of loss.

The Chamber of Commerce Committee suggested to the Forum that compensation awards should be capped at a reasonable level.

Unite the Union expressed the view that the Jersey Employment and Discrimination Tribunal would be the most appropriate forum to hear claims, and that these could be standalone whistleblowing claims or linked to another claim such as unfair dismissal, constructive dismissal, discrimination or wages, where the stoppage of wages is the detriment. The union noted that the remedies for whistleblowing claims in the UK are based around the Vento Bands. The union also noted the recent recommendations of the Employment Forum around increasing the financial loss and injury to feeling limits to the greater of £50,000 or 52 weeks' pay and £30,000 respectively in relation to discrimination claims.

The Forum's recommendations in relation to amendments to the scale of compensation in discrimination claims were debated by the States Assembly on 22 April 2025. The Assembly decided that the maximum award for financial loss should be increased to £30,000 or 52 weeks' pay, whichever is the lesser amount; and compensation for hurt and distress should be increased from £5,000 to £30,000.

What that means in the context of compensation for suffering a detriment as a result of an act of whistleblowing is discussed in the Forum's conclusions and recommendations below and reflected in the comments of respondents to this question.

The union contends that it would appear to make sense to align any remedies to this compensation regime; however, there is technically no limit on remedies in the UK, notwithstanding adhering to the Vento Bands. Given the potentially ruinous nature of detriment

to whistleblowers, Unite argues that there should be scope to go beyond those remedy limits. It should be a day one right as well, and a dismissal because of making a protected disclosure should be an automatic unfair dismissal and therefore not require the 52 weeks of service to bring a claim.

A respondent highlighted what they describe as a structural difficulty in terms of the current unfair dismissal compensation regime when it comes to compensation for acts of whistleblowing, given the potential for greater consequences for individuals in their careers than others. It would also be “out of kilter” with discrimination legislation, under which remedies are based on financial loss and injury to feelings.

They suggested to the Forum that remedy for acts of whistleblowing could take the form of compensation for dismissal being treated as automatically unfair and imposing an uplift in any compensation, depending on the seriousness of the issue. In the recent States debate on compensation awards, the Assembly agreed that the Tribunal should have the power to impose an uplift of up to 25% in compensation for unfair dismissal where an employer had behaved particularly badly when dismissing an employee.

An alternative approach might be to treat whistleblowing as a separate type of claim to unfair dismissal and provide for remedies along the lines of the provisions contained in the Discrimination Law – financial loss and hurt and distress. This structure might also be used to compensate for detriment short of dismissal.

A Jersey law firm told the Forum that it considered that, as under the UK model, the potential reprisals that could follow from a particular disclosure could conveniently be grouped under the concepts of “detriment” and/or “dismissal”. Those categories would, in its view, be sufficiently wide to cover a scenario where an employer acts against an employee because of concerns which the employee raised about the employer's client (i.e. where the retaliation is in response to a disclosure not directly about the employer itself).

Whether or not a whistleblowing protection claim is brought by an employee or by another protected category of individual, such as a partner, the Jersey Employment and Discrimination Tribunal would be the appropriate forum for such a claim. Concepts such as dismissal and detriment (in the sense of a wrong linked to an individual action) are already considered by the Tribunal (the latter perhaps most analogously in the context of victimisation claims under the Discrimination (Jersey) Law 2013). The Tribunal, accordingly, will be best placed to determine the factual and legal issues involved.

Drawing on the existing legal frameworks for employment and discrimination claims, a dismissal claim brought on protected disclosure grounds would be a natural extension of the existing provisions relating to “automatically unfair dismissal” (Articles 65 to 70A, Employment (Jersey) Law 2003).

As noted above, a claim that a detriment has been suffered as a result of a protected disclosure could be dealt with on similar grounds to a victimisation claim (Article 27, Discrimination (Jersey) Law 2013). The law firm suggested that, if the Forum was minded to adopt that approach, the remedies available could reflect the existing provisions for compensation in relation to dismissal and discrimination claims.

However, given the particular public policy significance of whistleblowing protections for public interest disclosures, the law firm suggested that the Forum may wish to consider



recommending removing the cap for dismissal claims in this context, especially to avoid a scenario where (given the changes to compensation levels in Jersey) a whistleblowing dismissal claim is of less monetary value than a discrimination claim. The Forum addresses these suggestions in its conclusions and recommendations below.

Another law firm suggested to the Forum that It is vital that when new legislation is introduced it is clear and transparent. They suggested that something like a simple table format might perhaps be considered, at least in the first instance.

One huge benefit of Jersey's unfair dismissal compensation regime, they contended, has been the clarity of possible awards, which makes things very clear, reducing administrative and advisory cost.

From the results of its roundtable exercise, a respondent suggested that any remedies regime should be effective. The meeting had considered that damages should be meaningful and be uncapped, albeit with claimants required to prove future loss of earnings under standard principles of damages. They recognised that in a small jurisdiction like Jersey, the consequences of whistleblowing for an individual could be particularly significant and possibly lead to them never working in the Island again. Therefore, they conclude, damages could and should protect people who make a "good faith" disclosure.

## **8. What support services should be available to whistleblowers?**

Many respondents agreed that support for those contemplating or making disclosures in the public interest is essential. Various suggestions were made about the most appropriate way to achieve this aim.

Reference was made to charities that provide advice and assistance to employees involved in protected disclosure actions, such as the long-standing charity **Protect** in the UK.<sup>10</sup>

Other respondents suggested an enhanced role for the Jersey Advisory and Conciliation Service in providing advice to such employees, including advice about whether a potential public interest disclosure fell within the criteria set out in legislation.

Some respondents felt that human resources functions had an important part to play in establishing a level of confidence for employees to blow the whistle in appropriate circumstances.

Some respondents suggested that the relevant regulatory bodies should be encouraged to provide greater resources to support whistleblowers.

The Chamber of Commerce Committee told the Forum that whistleblowers should have access to free support services that are independent of government, particularly in cases involving public sector entities.

Unite the Union suggested that clearly trade unions will provide support, advice, representation and, where appropriate, legal assistance. The union notes that there are also key whistleblowing charities in the UK that provide confidential advice, such as Protect. The union also suggests that the creation of an "Office of the Whistleblower" could also be considered, to provide

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<sup>10</sup> [Protect - Speak up stop harm - Whistleblowing Homepage](#)

support and advice along the same lines as the Jersey Office of the Information Commissioner. Employers should also clearly provide support to whistleblowers; however, this will not always be appropriate or possible.

A Jersey law firm suggested that JACS already provides an invaluable source of support for employment-related matters. It would be desirable for that support to be extended to include support for whistleblowers, with the benefit of additional funding to avoid diminishing the existing support it already provides.

In relation to the financial and professional services sectors, the firm expects that the JFSC would be interested in providing some form of dedicated resources for individuals who raise concerns about matters within the remit of the JFSC. However, to avoid a fragmented or disproportionately sector-specific approach, the firm would support the creation of an independent office or agency to provide resources and support to individuals who believe they have disclosures to make or who consider that they have suffered any form of detriment following a disclosure.

Another respondent suggested to the Forum that JACS might operate an anonymous advice line, and that existing regulators such as the JFSC and the Jersey Care Commission should be encouraged to provide appropriate resources to support whistleblowers.

**9. Should businesses be required by law to maintain a whistleblowing policy? Should a requirement to maintain a whistleblowing policy be restricted to organisations which have a particular number of employees?**

Requiring a mandatory whistleblowing policy is generally thought to go a little too far for many employers in Jersey. The argument was made that, if there is to be a mandatory requirement, it should be restricted to the largest organisations.

Some respondents suggested that there should be no lower limit on the number of employees an organisation should have to be required to maintain a whistleblowing policy by law. It was pointed out that, in Jersey, most businesses have five employees or fewer, and that a level playing field should apply across the board in terms of access to safe and secure whistleblowing protections.

Other respondents pointed to the fact that many of the larger organisations already have mature internal whistleblowing policies in place and that the protection of an organisation's reputation for fair dealing was uppermost in supporting its employees (direct or indirect), giving them the confidence that exposure of wrongdoing would be supported.

One respondent said that the elements of a whistleblowing policy should be encompassed in any changes to the Employment Law and Discrimination Law, so that organisations were aware of the minimum that they needed to comply with in terms of upholding the employment rights of their employees. Another supported this approach, but said that in the initial phase, employers should adopt whistleblowing criteria as a "best practice" approach, prior to any legislation being introduced. In other words, allowing time for employers to get to grips with any new whistleblowing regime before it comes into force.

A trade union respondent said that JACS might be responsible for publishing a minimum standards code which employers would be free to implement as part of a legal requirement to maintain a whistleblowing policy, and that a failure to implement a whistleblowing policy could

form part of any compensation to an employee who suffers a detriment by reason of making a public interest disclosure.

Alternatively, one respondent said that to have to maintain a policy by law would be unduly burdensome for small businesses, which lacked the capacity to maintain a policy. Equally, to have an arbitrary lower limit on the number of employees would fail to consider the risks in different sectors of the economy; the appropriate scale might be different across different sectors.

There is an argument, suggests the respondent, that since the Law would apply to more than just direct employees, a threshold based on employee numbers might be flawed if a business had few employees but a significant number of contractors and sub-contractors.

The Chamber of Commerce Committee expressed the view that many businesses in Jersey already have whistleblowing policies in place, particularly in regulated sectors such as financial services and care, where such policies are mandatory. However, it said, not all Committee members agree that maintaining a policy should be a legal requirement, as it could place an undue burden on small businesses.

Unite the Union considered that any legislation will be ineffective if not backed up by a requirement for employers to have a policy which signposts employees on how to raise protected disclosures. The union's view is that, while there is an argument that the legal requirement should only apply to employers with a certain number of employees, all employers should be mandated to bring to the attention of employees the mechanism for whistleblowing and to signpost any support that is in place.

A Jersey law firm said that their experience is that many larger organisations or organisations with a wider global presence will already operate a whistleblowing or "speaking up" policy. The law firm is supportive of the value of such policies, but would be sceptical of requiring a policy by law; would a failure to maintain an appropriate policy be a stand-alone breach? The law firm invited the Forum to consider that the lack of an appropriate policy could be more aptly framed as a potential aggravating factor relevant to the award of compensation in a successful whistleblowing dismissal or detriment case.

In relation to the number of employees as a threshold for a policy requirement, the law firm told the Forum that a number of clients in Jersey form part of large organisations but operate a relatively small (or even de minimis) physical presence in the island itself and that, too, should be a consideration.

A second Jersey law firm said that it should not be a requirement, at least in the first instance. They suggested a two-year lead in time, and then only businesses within specified industries or areas (eg financial services, healthcare, and care of the vulnerable).

The firm makes this suggestion in a reference to the 2023 'Barriers to Business Report' prepared by Jersey Business, which stated that: *"...small businesses said the requirements for employee handbooks and other employment law protections for employees who are not meeting the job requirements are significantly decreasing their desire to expand."*

In the firm's view, it is critically important for Jersey's economy that there is a balance between the potential negative impact on employers in making such a legislative change and the need to

protect employees in those specified areas where there is a particular need to provide such protection.

The view was expressed that there should be a requirement to have a policy, and to implement regular and mandatory training, such as that which already applies to Anti-Money Laundering and funding for terrorism activities. However, consideration should be given to exempting small employers, who are outside the ambit of financial services regulation, from the need to maintain a policy. The threshold is one the Forum should consider. The respondents note that, for health and safety policies, the relevant threshold is five or more employees, and this might also be the appropriate threshold for maintaining a whistleblowing policy.

Another respondent shared the concern that a mandatory requirement for a business or organisation to maintain a whistleblowing policy might go too far. They suggested to the Forum that Jersey regulators should be encouraged “*to require such policies as part of their regulatory requirements in appropriate circumstances.*”

#### **10. What procedures should be in place to preserve anonymity?**

Some respondents said that reasonable measures should be put in place to preserve a whistleblower’s anonymity, but that in a small jurisdiction like Jersey it would be more difficult to satisfy the requirement.

Others said that having a formal, independent whistleblowing guardian, or an independent third-party facility such as those which exist in the public service might be helpful. But again, while preserving anonymity is important, it might be difficult to uphold in Jersey given the number of small businesses with few employees.

The Chamber of Commerce Committee told the Forum that while it recognises that many of the provisions outlined in the consultation align with the UK Public Interest Disclosure Act 1998 (PIDA), one issue it believes warrants closer scrutiny is how confidentiality in whistleblowing disclosures is to be preserved, particularly in the context of Jersey’s legislative framework.

There is, as the Committee sees it, a potential tension between enabling whistleblowing to take place - leading to necessary action against the subject of the disclosure - while at the same time preserving confidentiality in the disclosed material, especially when such material might not otherwise enter the public domain. This is particularly relevant where evidence arising from whistleblowing could be introduced in open court.

Attempting to preserve confidentiality in these circumstances could clash with the fundamental principle of justice being open and transparent. The Committee considers that it is crucial that this tension is carefully examined and addressed as part of the preparation of any legislation, ensuring that both whistleblowers and the parties involved are appropriately protected while maintaining the integrity of Jersey’s justice system.

Unite the Union told the Forum that it is understood that the Jersey Employment and Discrimination Tribunal already has the power to make orders dealing with anonymity in respect of claims, where this is deemed appropriate.

Employers should be on notice as to the strict confidentiality around whistleblowing and the JOIC could be provided with further powers where there are data breaches in respect of whistleblowers. The union’s view is that if an employer wilfully breached personal data or

compromised anonymity because of someone making a protected disclosure then that in and of itself would potentially attract a whistleblowing claim.

A Jersey law firm said that it is unsure of the value of the law being prescriptive as to anonymity in whistleblowing cases. While organisations whose actions expose individuals to detriment by failing to preserve confidentiality may, as a result, be liable because of those failings, the issue of whether the identity of a whistleblower can – or should – be kept anonymous is highly fact dependent.

The firm's view is that, whilst an express request by an individual to remain anonymous will require careful consideration by the organisation acting on a disclosure, an anonymous disclosure may carry less evidential weight when the claim comes to be determined.

The view was expressed that anonymity is very difficult to preserve in Jersey. There is a thought that whistleblowers should be able to request and retain confidentiality as far as possible, and therefore to be able to raise issues anonymously.

A respondent recognised the challenges for employers in managing internal complaints processes. Ordinarily, anyone accused of misconduct would be entitled to know who is making the allegation against them. Clearly, so the argument goes, if confidentiality is protected then this would not be possible.

It was said that the Forum should consider recommending an amendment to the Employment Law which would protect employers in such a situation from a claim of unfair dismissal or constructive unfair dismissal, where a process is commenced following a public interest disclosure, and, because of the requirement for confidentiality, only limited information can be provided to the employee. To do otherwise would, the roundtable argues, create too great a burden on employers, in terms of managing the risks of whistleblowing and unfair dismissal.

A view is that the Tribunal should be able to make appropriate orders where required.

As the Forum has previously noted, it is a recognised fact in other jurisdictions that have statutory whistleblowing arrangements that insistence by an employee on anonymity can make the resolution of whistleblowing complaints more difficult, and that the emphasis should be on having secure protections in place for whistleblowers and appropriate and effective remedies for compensation in the event of an employee suffering any detriment. Anonymity in some jurisdictions is positively discouraged.

#### **11. To what extent do the Employment Law and Discrimination Law currently provide an adequate level of protection to a whistleblower?**

Some respondents said that, because there was no legislation that related specifically to the protection of whistleblowers, current protections are inadequate.

Others pointed to the provisions in the Employment and Discrimination Laws on which employees could rely in cases of unfair or constructive dismissal. One respondent thought that the Laws currently provided a measure of protection, but that public interest disclosure provisions were necessary to “square the circle” and prevent detriment (or at least afford adequate compensation to an employee who suffers a detriment by reason of whistleblowing).

There is, say some respondents, a strong case for separating out for additional compensation successful claims for detriment based on an act of whistleblowing (also see reference in the analysis of Question 7 above).

Unite the Union considered that the existing legislation provides some relief, for example if someone is dismissed unfairly, but they would only have the capacity to bring an ordinary unfair dismissal claim. An employer could dismiss a whistleblower and currently only have to pay up to six months wages, which would be deemed cheap to remove a whistleblower. Also, the union argues, there will be detriments that are not currently actionable in the Tribunal. For example, a whistleblower could be denied a promotion as a detriment, so the current provisions are inadequate and require a further layer of protection specific to detriment arising from a protected disclosure.

The Forum notes that, while Jersey does not have comprehensive statutory protection for whistleblowers, the Employment Law does provide protection for employees who are dismissed, who claim that their employer has breached specific statutory rights.

These rights include the right not to be discriminated against or to be victimised for speaking up on behalf of someone else who is being discriminated against (Article 70A of the Employment Law), the right to take maternity leave and other forms of family leave (Article 67 of the Employment Law), and the right to be paid the minimum wage (Article 69 of the Employment Law). If a person's complaint relates to such a right and they are dismissed because they raised it, they will have been automatically unfairly dismissed and be entitled to the full unfair dismissal award. If the dismissal had a discriminatory element, they will also be entitled to a discrimination award.

There is also the claim of 'discrimination by way of victimization' under Article 27 of the Discrimination Law, which protects an employee who is treated less favourably if they have made a complaint under the Discrimination Law, instituted proceedings against a person, or given information or evidence in connection with proceedings brought under the Discrimination Law.

There are some limited protections in place for breach of statutory rights. However, it is the view that these protections do not go far enough in relation to whistleblowing specifically. Any new legislation, it is said, should be clear about what constitutes a protected disclosure and what remedies/compensation are specifically available for those who are then treated unfairly or who suffer because of whistleblowing.

A respondent pointed out to the Forum that, in the case of employees with low levels of continuous service, the Employment Law provides little, if any, protection, and the Discrimination Law provides limited protection against victimisation for those asserting that discrimination has occurred. As a result, the respondent would not regard current remedies as providing adequate protection for whistleblowers.

### **Summary of written submission from the Jersey Financial Services Commission**

The JFSC whistleblowing policy has been in place for some years now. As part of the commitment to confidentiality, there is no chance to identify whistleblowers.

Details of whistleblowing are recorded on a secure system.

The JFSC does encourage meetings in person where possible, and protocols for the way such meetings are held are in place.

Safeguards around the conversations that are recorded exist, and whistleblowers are advised that there are currently no statutory protections in place. The biggest challenge for the JFSC is the fact that there is no statutory protection of the identity of a whistleblower.

As a regulator, the JFSC website highlights the types of circumstance in which a whistleblower can make a protected disclosure<sup>11</sup>.

- **The breach of a legal obligation:**

For example, an employer has neglected their reporting obligations under the Money Laundering Order (Jersey) 2008, by encouraging the money laundering reporting officer to not file suspicious activity reports.

- **A miscarriage of justice**

For example, a member of staff has been fired for something that turned out to be a computer error.

- **A company or person is carrying out unauthorised business in Jersey**

For example, a business does not have the correct licences to carry out certain business.

- **A company or a person is not meeting regulatory requirements**

For example, a company or business does not meet requirements in the relevant codes of practice.

### **Summary of the views of the Jersey Care Commission**

The Jersey Care Commission (JCC) supports whistleblowing as vital for maintaining care standards and protecting vulnerable individuals. The Commission encourages reporting concerns about malpractice, ensures whistleblower protection and confidentiality, and requires all care providers to have supportive whistleblowing policies. The JCC monitors compliance and may take action if concerns are not addressed, emphasizing the importance of transparency and accountability in care settings.

In its Complaints Policy document<sup>12</sup>, the Commission outlines the scope of the type of issues alleged in a complaint which would be within its remit to investigate. These include:

- Alleged breaches of Regulations or Standards
- Care being delivered in a way which is not safe for the person in receipt of the service
- Evidence that the rights of a person receiving a service are not being upheld
- Behaviour, practice or conduct of staff relating directly to the provision of care or suitability to provide care

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<sup>11</sup> [Examples of whistleblowing — Jersey Financial Services Commission](#)

<sup>12</sup> [Complaints-about-Provision-of-Care-Policy-September-2023.pdf](#)

- Evidence that the quality of staff training is not of a sufficient standard
- Concerns relating to the number of staff being inadequate to meet the needs of residents/those in receipt of services
- Matters relating to the environment, use of equipment, and concerns relating to moving and handling safety

The Commission would not normally consider the following within its remit to investigate:

- Staff Grievances/HR issues
- Whistleblowing where it does not relate to care or other requirements directly stipulated in the Standards published on the Commission's website
- Complaints about how a Regulated Provider has treated those other than care receivers. However, if providers have failed to provide appropriate information and support to family members, carers or care receivers or other agencies where this is stipulated in the Standards, this will be considered.



## **CONCLUSIONS AND RECOMMENDATIONS OF THE EMPLOYMENT FORUM**

The Employment Forum acknowledges that the consideration of, and drafting of, statutory public interest disclosure legislation will be a complex exercise, capable of stimulating a wide cross-section of views – as can be seen by the analysis of the various responses considered by the Forum in this Report.

The Forum's approach to its recommendations is therefore not to be too prescriptive in detail about the approach that might be taken by the Minister, but rather to present a framework within which the Minister can lead the development of a public interest disclosure regime which, above all, is appropriate for Jersey and its citizens.

These recommendations also highlight areas which might be the subject of a phased approach in the creation of a public interest disclosure regime.

The Forum presents its conclusions and recommendations using the series of questions in its consultation exercise with stakeholders and in the online survey.

### **Question 1: Do you think there should be legislation in Jersey to protect those who blow the whistle for public interest reasons?**

1. The overwhelming number of respondents indicated a desire to see a statutory public interest disclosure regime legislated for
2. Criteria should be established so that draft legislation makes clear the scope of protection for a whistleblower.
3. Deciding whether a disclosure made by an individual is to be protected is finely balanced between the "good faith" test and the "public interest" test. On balance the Forum recommends the introduction of a "public interest" test rather than a "good faith" test. Annex 3 of this report contains a comparison of the criteria to be considered when deciding between a "public interest" and a "good faith" disclosure test.
4. Clear advice should also be made available which sets out the elements of a "public interest" test to be satisfied, in order for protection to be provided. Such advice should be provided both by statutory bodies and by employers as part of their whistleblowing policies.

These conclusions led to Recommendations 1 and 2.

#### Recommendation 1

- **Jersey should introduce a statutory public interest disclosure regime which will give legal protection to whistleblowers. Protection from detriment and unfair dismissal should be a Day 1 employment right**

#### Recommendation 2

- **The legislation should include a "public interest" test for whistleblowing protection**

**Question 2: In terms of the scope of whistleblowing protections under the law, what types of activity should or should not qualify for protection if someone makes a disclosure they believe is in the public interest?**

5. There is a division of opinion among consultees as to whether the scope should focus on an “activity-based” list (such as that set out in the Forum’s briefing note and reflected largely in UK legislation), or a “sector-specific” list, which reflects the provision of the 2019 EU Whistleblowing Directive. These might include financial services, transport safety, procurement and consumer protection
6. The Forum considers that the simplest and most appropriate approach for Jersey should be the UK model. An “activity-based” approach is more sensible than the approach taken by the EU. The Forum sees no good reason – in terms of the appropriate approach for Jersey – to single out some sectors from others. See paragraph 8 below.
7. Such an “activity-based” approach should include:
  - Criminal activity, such as fraud
  - Breaches of health and safety legislation
  - Environmental damage
  - Miscarriages of justice
  - The company the employee works for is breaking the law
  - An observer believes someone is covering up wrongdoing, either for personal or organisational reasons
  - Breaches of data protection laws
  - The organisation has demonstrated an intention to break the law
  - Knowledge of breaches outside Jersey’s jurisdiction

The Forum is clear that internal procedural or contractual grievances that an employee might have against their employer should be specifically excluded from the scope of whistleblowing protection, unless they can demonstrate a direct connection to one or more of the qualifying criteria which are set out in Recommendation 3.

Otherwise, the resolution of such grievances falls properly within the existing scope of the Employment and Discrimination Laws.

These conclusions led to Recommendations 3 to 6.

#### Recommendation 3

- **Protected activity should include:**
  - a. **Instances where an organisation is breaking the law, for example:**
    - i. **Criminal activity, such as fraud**
    - ii. **Breaches of health and safety legislation**
    - iii. **Breaches of data protection laws**
  - b. **Environmental damage**
  - c. **Miscarriages of justice**

- d. **An observer believes someone is covering up wrongdoing, either for personal or organisational reasons**
- e. **The organisation has demonstrated an intention to break the law**

#### Recommendation 4

- **Protected activity should not be limited to Jersey's jurisdiction, but should encompass activity witnessed, or having knowledge of, outside the jurisdiction. In such cases protection should be able to be claimed only when the detriment complained of is suffered in Jersey**

#### Recommendation 5

- **Protected activity should not include internal procedural or contractual grievances unless the person making the disclosure can demonstrate a direct connection to one or more of the qualifying criteria set out in Recommendation 3**

#### Recommendation 6

- **The only circumstance in which protection should be afforded to the airing of personal grievances should be where the grievance itself is directly related to the act of whistleblowing**

**Question 3: Thinking about the types of activity that might qualify for protection, how far do you think protection should be extended in Jersey legislation? Are there issues specific to Jersey that need to be considered?**

8. The Forum considers that there is a good and strong argument for a broad scope of protection for whistleblowers.
9. Leading on from its conclusion in Question 2, the Forum considers that it is not equitable or in the public interest to create a legislative framework that protects one group of employees and not another, even in the initial stages of dealing with a disclosure. The scope of protection should apply across the board. There should be no incremental approach to legislating for protection. Legislation should not designate certain sectors for statutory protection before others.
10. There should be no time limit imposed in legislation for a whistleblower to have to comply with when considering whether or not to make a disclosure, but the 8-week time limit within which a claim for unfair dismissal or detriment as a result of making a protected disclosure should be made, should apply.

These conclusions led to Recommendations 7 and 8.

#### Recommendation 7

- **Whistleblowing protection should be introduced to all sectors at the same time**

#### Recommendation 8

- **A claim for unfair dismissal or detriment as a result of whistleblowing should be made within 8 weeks of the dismissal or detriment complained of. However, there should be no bar on the length of time that has elapsed since the wrongdoing complained of**

**Question 4: Who should be covered by statutory whistleblowing protections? Should protections be restricted to direct employees? Should those who provide services to a business be included?**

11. The consultation exercise revealed a diversity of views about the most appropriate way to provide protection, and to which groups.
12. The Forum considers that the most appropriate way to develop whistleblowing protections is to provide that protections can be made in a phased or incremental way. Phase 1 should focus on the protection of
  - direct employees
  - those agency employees providing services to an entity
  - Officers of the States of Jersey Police
  - Officeholders in Crown employment
13. If it is not thought appropriate to widen the scope of protection in the first phase, then the option of a further phase should be explored. Phase 2 should focus on Limited Liability Partnerships, Non-Executive Directors and charity trustees.
14. While the first two of these may be regarded as relatively straightforward, the Forum recognises that to incorporate protection for charity trustees may pose more significant complications.
15. In arriving at its conclusions, the Forum has borne in mind how other jurisdictions approach the issue of protection by sector or group.
16. Protections should ultimately encompass a comprehensive list that should be wider than just direct and agency employees and those working in the Police Service and Crown appointment sectors.
17. Protection should be afforded to an agreed list, to be set out in legislation.

These conclusions led to Recommendation 9.

#### Recommendation 9

- **Whistleblowing protection in respect of the actions of an entity (A) should extend to:**
  - i. Direct employees of A**
  - ii. Employees of an agency/entity providing services to A**
  - iii. Officers of the States of Jersey Police**

**iv. Officeholders in Crown employment**

**Protection could also extend to the following groups, either in the initial phase of legislation or by extension after a period of time:**

- v. Partners of A where A is a Limited Liability Partnership**
- vi. Non-Executive Directors of A where A is a Jersey-incorporated entity, such as a company**
- vii. Trustees of A where A is a charity**

Questions 5 & 6 are taken together by the Forum.

**Question 5: What steps should a whistleblower have to take in order to qualify for protection? Should the law set out these steps in detail?**

**Question 6: To whom should a disclosure about suspect activity be made and in what circumstances?**

18. Whenever possible, the approach to the making of a disclosure should be:

- i. The entity (which should be the preferred initial route), or the person responsible for the failure complained of; then
- ii. A relevant prescribed person

19. In the longer term, consideration should be given to the establishment of an independent overarching public body, which would have the responsibility of receiving public interest disclosures and determining whether they fall within the scope of legislation.

20. Protection should not be provided for in relation to disclosures to media organisations, unless it has not been possible or practicable for the person making the disclosure to make it either directly or to a prescribed person. Protection should not be given where the disclosure is made for financial gain.

21. The only circumstance in which protection should be afforded to the airing of personal grievances should be where the grievance itself is directly related to the act of whistleblowing.

22. Whatever process is provided for, it should be capable of being clearly and easily understood.

These conclusions led to Recommendations 10 to 14.

**Recommendation 10**

- **There should be the following approach to the making of a disclosure in respect of the actions of an entity A:**

**A direct approach to A, or the person responsible for the failure**

- **Where this does not result in a resolution, or is not possible for whatever reason, the next step should be to report to:**

**A “prescribed person”**

#### Recommendation 11

- **“Prescribed persons” should include (not an exhaustive list):**
  - **Relevant Government Minister**
  - **Relevant Scrutiny Panel Chair**
  - **States Assembly Member**
  - **Comptroller and Auditor General**
  - **Jersey Financial Services Commission**
  - **Jersey Care Commissioner**
  - **Jersey Children’s Commissioner**
  - **Jersey Office of the Information Commissioner**
  - **Commissioner for Standards**
  - **Jersey Charity Commissioner**

#### Recommendation 12

- **Protection should not be provided in relation to disclosures made to media organisations, unless the person making the disclosure can show that it cannot be made – for good reason – either directly to A, to the person responsible for the failure complained of, or to a prescribed person. Protection should not be provided where a disclosure has been made for financial gain.**

#### Recommendation 13

- **The process for making a protected disclosure should be straightforward and easy to understand and follow.**

#### Recommendation 14

- **If deemed necessary and desirable, in the longer term, consideration should be given to the establishment of an independent overarching public body, which would have the responsibility of receiving public interest disclosures and determining whether they fall within the scope of legislation.**

**Question 7: What form should remedies and compensation for complaints of detriment to the employee, unfair treatment, unfair or constructive dismissal as a result of whistleblowing take? Should the Jersey Employment and Discrimination Tribunal have the power to hear such complaints and decide remedies?**

23. The Forum considers that the Tribunal is best placed but may need additional resources. The Tribunal is very experienced in dealing with questions of detriment and unfair treatment related to the Employment and Discrimination Laws.
24. The Tribunal should be able to hear claims relating to dismissal and detriment suffered because of making a protected disclosure.
25. The law should provide that dismissal of an employee for making a public interest disclosure should be treated as an example of automatically unfair dismissal.
26. The Forum notes that compensation awards for dismissal for making a public interest disclosure in other jurisdictions are particularly significant. In the United Kingdom, for

example, compensation for unfair dismissal on the grounds of whistleblowing is uncapped

27. The Forum considers that any compensation framework should reflect the seriousness of the entity's behaviour, as it may be found by the Tribunal, at least comparable to the current remedies. It is particularly important, in the Forum's view, that a remedy includes sufficient compensation for financial loss, both actual and potential in the future, and hurt and distress. This should be the case in a small jurisdiction such as Jersey, where current and future prospects may be particularly badly damaged for those who legitimately makes a valid public interest disclosure.

These conclusions led to Recommendations 15 to 17.

#### Recommendation 15

- **The jurisdiction of the Jersey Employment and Discrimination Tribunal should be extended to hear claims relating to dismissal or a detriment suffered because of making a protected disclosure**

#### Recommendation 16

- **The dismissal of an employee for making a valid public interest disclosure should be treated as an automatically unfair dismissal.**

#### Recommendation 17

- **Legislation should provide for awards of compensation to reflect the seriousness of the behaviour of an entity. It is particularly important that available remedies include sufficient compensation for financial loss, both actual and potential in the future, and hurt and distress. Awards for financial loss and hurt and distress should be on a par with existing and future levels. currently set out in the Discrimination Law (and about to be increased). The Forum notes that the imminent Discrimination Law changes dealing with compensation levels will be subject to review every three years. The remedy for detriment should reflect that set out in the Employment Law – currently a maximum of four weeks' pay but shortly to increase to a maximum of eight weeks' pay. The remedy for unfair dismissal should be on the scale set out in the Employment (Awards) Order 2009.**

However, the Forum is of the firm opinion and very strongly recommends to the Minister that – as protection against detriment, unfair dismissal and discrimination for an act of whistleblowing - these levels of compensation should be transitional, leading over time to a significant increase in awards, with the ultimate aim being a system of uncapped awards for the very real damage that can be inflicted on a person's future employment prospects and their physical and mental well-being.

**Question 8: What support services for whistleblowers should there be? How should they be provided?**

28. Consideration should be given to extra support for the Jersey Advisory and Conciliation Service (JACS). JACS is a respected and independent body; its functions could be supported to expand to provide advice and assistance to whistleblowers. Options, including additional funding, should be considered
29. The Forum considers that JACS should be the principal advice service, since this question is about to whom a whistleblower can turn for advice on Employment Law-related issues of unfair dismissal and detriment, and not to whom a disclosure is made. This might be part of an enhanced role for JACS, besides its duties under the Employment Law. Non-statutory support services should also be highlighted e.g. trade unions or professional bodies.
30. However, for the sake of equality and fairness, employers should also have the same access to support services. Again, the Forum notes the responsibilities of JACS to help both sides.
31. The Forum considers it would be helpful for JACS to maintain a template policy for employers to be able to use. The Forum commends JACS in this regard. JACS has a library of current templates, which, in the Forum's view, are an essential resource to aid good employment relations. Such a template could include advice on the establishment of internal processes which identify an appropriate person to receive public interest disclosures.
32. However, the Forum is very clear that JACS should not take on the function – either in statute or voluntarily – of determining the appropriateness of an act of whistleblowing or the protection of the whistleblower. JACS should not become a repository for claims of detriment, unfairness or victimisation in relation to acts of whistleblowing.

These conclusions led to Recommendations 18 to 20.

Recommendation 18

- **JACS role should be extended to provide advice for potential whistleblowers, with additional resources allocated as needed**

Recommendation 19

- **JACS should make available templates for employers and entities to use to develop whistleblowing policies, which should include the establishment of internal processes to enable a person to be designated to receive whistleblowing concerns**

Recommendation 20

- **JACS should have no statutory role in the reporting of whistleblowing incidents**



**Question 9: Should organisations be required by law to maintain a whistleblowing policy? Should a requirement to maintain a whistleblowing policy be restricted to organisations which have a particular number of employees?**

33. The majority of respondents to the consultation exercise suggested that having a policy should not be mandatory and the Forum agrees. The Forum considers that whistleblowing policies should be maintained on a voluntary basis.
34. The Forum refers to the initial part of this Report, which highlights the benefits of maintaining a public interest disclosure policy. From its consultation exercise, the Forum understands that policies are already common in the financial services and care sector, as well as in the public sector, and recommends that, as a matter of good employment practice, the maintenance of a policy should be regarded as generally desirable.
35. The Forum encourages regulatory organisations in Jersey to review their existing policies, to ensure they are fully aligned with any new statutory protections, and that advice is updated as necessary and circulated widely across the businesses of which they have oversight.

These conclusions led to Recommendations 21 and 22.

Recommendation 21

- **Employers and entities should not be required by law to maintain a whistleblowing policy but should be strongly encouraged to do so. Provision of such a policy would assist both employer and employee to understand rights and responsibilities, and support a confident working relationship**

Recommendation 22

- **Regulatory organisations in Jersey which oversee activities which may give rise to whistleblowing disclosures should review their existing policies, to ensure they are fully aligned with any new statutory protections and that advice is updated as necessary and circulated widely across the businesses of which they have oversight**

**Question 10: What procedures should be in place to preserve anonymity in whistleblowing cases?**

36. The Forum recommends that any new provisions in relation to the protection of whistleblowers by anonymity orders made by the Tribunal should mirror the provisions which currently exist in the Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016 and those which will be introduced in the coming months, following the Forum's recommendations in its report and recommendations in relation to the compensation awards regime in Jersey as set out below:

*“As the law currently stands, there is no formal provision in the Tribunal’s rules of procedure for its judgments to be anonymised. The Forum recommends that the rules be amended so that, in appropriate cases as the Tribunal sees fit, it may anonymise its judgments. The Forum’s view is that, in such a small jurisdiction and labour market, it may, in some circumstances, disadvantage an employee’s future employment*

*prospects for their details to be made public. The Forum considers that the Tribunal should have greater powers to redact judgments in circumstances where it finds there is a real risk of harm or disadvantage to an employee (or, in some cases, to an employer)."*

These conclusions led to Recommendation 23.

#### Recommendation 23

- **The provisions of anonymity in respect of whistleblowing cases should mirror those already contained in the Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016 and match any additional Tribunal powers to be introduced following the Employment Forum's recent report and recommendations in relation to the compensation awards regime in Jersey**

**Question 11: To what extent do you consider the current protections of the Employment Law and Discrimination Law provide a level of protection for whistleblowers? Are they adequate?**

37. The Forum notes the general view from respondents that current protections ultimately do not provide a level of protection and are not adequate. This is a view with which the Forum strongly agrees.
38. There is a strong and compelling case for the States to legislate to provide the necessary protections for those who make public interest disclosures within the scope of any legislation.
39. The Forum has considered whether it should recommend either that legislation should form part of a standalone Public Interest Disclosure Law or be subsumed into the Employment and/or Discrimination Laws. Either has its advantages, considering that, for example, issues of unfair dismissal and detriment are a feature of the Employment Law, and the Discrimination Law contains provisions in relation to compensation for proven discriminatory behaviour. This latter could encompass the treatment of those beyond direct employees who have made public interest disclosures.
40. On the other hand, the Forum's full recommendations extend beyond the employer/employee relationship that lies at the heart of employment legislation in Jersey. Likewise, the act of a public interest disclosure is an act to be protected but does not fall comfortably into the definition of a protected characteristic that forms the basis of the protection provided under the Discrimination Law. On balance, the Forum favours a standalone approach.

These conclusions led to Recommendation 24.

#### Recommendation 24

**A statutory public interest disclosure regime would be best served by standalone legislation. The Forum considers that it would be more helpful to have the relevant provisions of the Employment and Discrimination Laws replicated in a Public Interest Disclosure Law, rather than have the provisions of public interest**

**disclosure legislation added to the already substantial employment law framework. This approach would also, the Forum considers, support the overriding principle of clarity**

## Annex 1

### STATUTORY WHISTLEBLOWING PROTECTIONS IN JERSEY

#### A SHORT BRIEFING NOTE

## Introduction

On 18 July 2023, the States Assembly agreed the following Proposition

[p.47-2023 amd.pdf \(gov.je\)](#)

The link to the Hansard of the debate is here: [2023.07.18 States - edited \(KL\).pdf \(gov.je\)](#)

The debate starts at p.77.

This is a short briefing note, which focuses on the types of whistleblowing protections in other jurisdictions (notably the UK) and poses some high-level questions about the possible scope and application of a statutory whistleblowing scheme in Jersey.

If your business or organisation has a whistleblowing policy currently in place, the Forum would be keen to understand how it is promoted and policed. In addition to considering the questions posed in this note, the Forum would be grateful for a brief summary of your policy.

Responses will form the basis for face-to-face meetings later in the consultation exercise.

## General background to whistleblowing

A generally accepted definition of whistleblowing (or more formally, making a protected disclosure) is a situation in which someone observes something they think is wrong and the public interest is in favour of disclosing what they see or know. The important point in many jurisdictions is that a whistleblower must make a disclosure in “good faith”, rather than for ulterior motives.

## Application of whistleblowing laws

1. The types of complaint that are typically covered by whistleblowing legislation include:

- Criminal activity, such as fraud
- Breaches of health and safety legislation
- Environmental damage
- Miscarriages of justice
- The company the employee works for is breaking the law as an entity

- An observer believes someone is covering up wrongdoing, either for personal or organisational reasons
- Breaches of data protection laws

This is not an exhaustive list.

2. The types of complaint that are not typically covered by whistleblowing legislation include:

- Personal grievances such as bullying, harassment and discrimination – these would need to be dealt with by internal workplace grievance procedures, unless a link could be demonstrated to any of the activities outlined above

3. As a whistleblower, legislation tends to provide that someone is entitled not to be treated unfairly or suffer any detriment because of their whistleblowing. In the UK cases can be taken to an Employment Tribunal if a person suffers unfair treatment or detriment.
4. In many jurisdictions, particular emphasis is placed on the reporting of economic crime and, given the scale of Jersey's involvement in financial services, this may be a natural starting point for scoping out the range of activities that might be caught by any whistleblowing provisions in Jersey legislation.
5. In whistleblowing legislation, the scope of protection can vary widely. Whistleblowing laws in some countries, such as India, only protect public employees. In other countries, such as Japan and South Korea, both public and private employees are protected.
6. Jurisdictions also differ about who qualifies as a public or private sector whistleblower. In some countries, only government employees may qualify as public sector whistleblowers, while in countries such as Mexico, Portugal and Norway, a wide range of individuals, including former employees, contractors, or suppliers, can qualify as public sector whistleblowers.
7. Having said that, there appears to be a core set of general principles that are accepted internationally.
8. Jurisdictions around the world continue to implement whistleblowing legislation at pace, particularly since the EU introduced a Directive in April 2019. A key feature of the Directive is its protection of whistleblowers from retaliation by employers, such as termination of employment or demotion.

9. This is a complicated area, but the Forum considers that there appears to be no reason in principle why Jersey should not adopt what, in essence, seems to be a general standard operated in other jurisdictions. Respondents may consider it might ultimately be to Jersey's reputational advantage to have a clear statutory whistleblowing structure in place.

## Next steps – questions for consideration by respondents

10. The Employment Forum would be grateful if respondents would consider the following questions. Responses will help to form the basis of the next stage of the Forum's work:

- The scope of protected whistleblowing activity - what should/should not count as a protected disclosure?
- How far should that protection be extended (if at all) in Jersey legislation? What are the pros and cons of the "wider scope" approach?
- Who should be covered? Should protection be restricted to employees, or should it cover individuals who provide services to a public and/or private body?
- What procedures should be followed to qualify for protection?
- To whom may a disclosure be made and in what circumstances?
- What sort of arrangements should be in place in terms of access to a Tribunal for complaints of detriment, unfair treatment, unfair dismissal or constructive dismissal?
- What form should remedies and compensation awards take?
- How would/should access to support services for whistleblowers (either internal, external or Government-provided) be provided?
- Should employers be required by law to maintain a whistleblowing policy?
- How should anonymity be preserved in whistleblowing cases?
- How can the best result for Jersey be achieved? Amending the Employment Law or, for example, drafting a standalone Public Interest Disclosure Law?

- To what extent do the current provisions of the Employment and Discrimination Laws in Jersey provide a level of protection for employees who blow the whistle? Are they adequate?
11. In the UK, the Public Interest Disclosure Act 1998 (PIDA) provisions on protected disclosures are inserted into the 1996 Employment Rights Act. PIDA's provisions mirror the protections which exist in UK employment legislation in terms of unfair dismissal, right not to suffer detriment, complaints to an Employment Tribunal and compensation awards, among other issues
12. The provisions in PIDA in terms of protections go wider than in other areas of UK employment law, which means they provide for a wider range of workers. ERA 1996 sets out which other types of workers are protected by the PIDA provisions from victimisation or dismissal when they blow the whistle (Section 43K of ERA 1996).

### **Examples of the end-to-end process for making a protected disclosure**

The Forum offers examples of the protected disclosure regimes in Guernsey:

[CHttpHandler.ashx \(gov.gg\)](#)

and the Isle of Man:

[whistleblowing-policy-v12-final-220623.pdf \(iomfsa.im\)](#)

## **Conclusion**

The Forum welcomes views on the best way to design a system of statutory whistleblowing protections in Jersey. It also welcomes examples of whistleblowing policies being operated already by businesses and organisations in the Island and how they are working in practice.

The Forum would be grateful for comments by 22nd November 2024.

## **Annex 2**

### Consultation responses:

Eleven responses were received to the online survey, though not all respondents answered all the questions. The survey concluded on 22 November 2024.

Those respondents break down as follows:

- 4 employees
- 3 employers
- 1 Human Resources representative
- 1 Business organisation
- 1 trade union respondent
- 1 other respondent

Written responses were received from:

- Unite the Union
- Jersey Community Relations Trust
- Jersey Financial Services Commission
- Jersey Care Commission
- Jersey Chamber of Commerce
- Carey Olsen LLP
- Walkers LLP
- Two further law firms who preferred to make their contributions unattributed

In addition to considering the written responses and responses to the online survey, the Forum held a face-to-face meeting with the Jersey Financial Services Commission, which also provided views. In addition, the Speak-Up Champion in Health and Care Jersey, the Chief Internal Auditor of the Jersey Public Service, the Jersey Advisory and Conciliation Service and the Jersey Care Commission contributed views.



### Annex 3

In whistleblowing legislation, a "good faith" test and a "public interest" test have distinct criteria used to assess the validity of a disclosure. A good faith test primarily focuses on the whistleblower's intent and motivation behind the disclosure, while a public interest test focuses on whether the disclosure itself is of sufficient importance to be disclosed publicly.

#### Good Faith Test:

- **Focus:** The whistleblower's sincerity and belief in the wrongdoing. It examines whether the disclosure was made for legitimate reasons or if there were ulterior motives.
- **Example:** If a whistleblower discloses information to protect their own job or to retaliate against someone, a good faith test might find the disclosure invalid.
- Historically, good faith tests were common. However, in some jurisdictions, they have been replaced by or supplemented by public interest tests.

#### Public Interest Test:

- **Focus:**  
Whether the disclosed information is significant or important to the public, regardless of the whistleblower's motivations.
- **Example:**  
A disclosure about an illegal act, even if the whistleblower's motivation is partly personal, might be considered in the public interest.

#### Key Differences:

Feature	Good Faith Test	Public Interest Test
Focus	Whistleblower's intention	Disclosure's significance to the public
Criteria	Sincerity, lack of ulterior motives	Impact on public, severity of wrongdoing
Effect	Can exclude disclosures with personal motives	Can protect disclosures even with personal motives, as long as the public interest is met

#### In essence:

- A good faith test examines why the whistleblower acted, while a public interest test examines the what and why of the disclosure itself
- A good faith test can be more difficult to prove, requiring a detailed consideration of the whistleblower's motivations
- A public interest test is broader, focusing on the impact of the disclosure on the public, which can be easier to establish

