

PARRHESIA'S VIEW: Government Guidance on Whistleblowing in the Economic Crime and Corporate Transparency Act

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The [Economic Crime and Corporate Transparency Act 2023](#)

(legislation.gov.uk) received Royal Assent on 26 October 2023. Certain provisions within the Act do not take effect until Government guidance has been published. A key provision here is the new offence of 'failure to prevent fraud' which applies only to "large organisations." The foundations for this provision are to be found in proposals made in the Law Commission's paper: [Corporate Criminal Liability - Law Commission](#) (2022), noting of course that Section 7 of the Bribery Act 2010 (failure of commercial organisations to prevent bribery) has already tried to make organisations liable for a 'failure to prevent' wrongdoing.

The new offence found in [section 199 of the Act](#) (legislation.gov.uk) states that an organisation will be guilty of an offence if a person "associated" with the organisation commits a fraud offence intended to benefit the organisation, directly or indirectly, or any person or subsidiary to whom the associated person provides services on behalf of the organisation. The organisation will not be guilty of the offence if the organisation itself was, or was intended to be, a victim of the fraud offence. It is not necessary to establish that any high-ranking individual within the company consented to or even knew of the offence in order for the organisation to incur criminal liability.

The new offence will apply only to “large organisations” as defined in [section 201](#) and [section 202](#) of the Act (adopting the standard definition set out in the Companies Act 2006). This limitation was the subject of much debate between the House of Commons and the House of Lords, as previous versions of the bill applied the new law to all organisations regardless of size. The Government pressed for an exemption for Small and Medium Enterprises (“SMEs”) on the basis that the new offence would impose a disproportionate regulatory burden on smaller organisations. Parrhesia’s view is that whilst we would prefer the provision to encompass a wider range and scale of organisations, it would be pragmatic to implement this provision now, measure its efficacy in preventing fraud and corruption and expand it to encompass SMEs when its worth has been proven. Notably, this new provision has extra-territorial reach and may be applied even if the organisation and the associated person/ persons are based outside the UK if fraud is committed under UK law or targets UK victims.

Reasonable defence of prevention procedures

An organisation must be capable of showing that, at the time the fraud was committed, it had in place such prevention procedures as were reasonable in all the circumstances, or that it was not reasonable to expect the organisation to have any prevention procedures in place. Parrhesia and Protect have submitted co-ordinated and coherent notes to the Home Office Fraud Policy Unit to urge specific inclusion of Whistleblowing within the draft guidance, to include such measures as:

- Creation of a ‘blameless reporting’^{[1][2]} culture where employees feel able to raise concerns
- Implementation of independent systems for receiving and acting upon whistleblower disclosures
- Ensuring that staff are fully aware of internal whistleblowing procedures and access to them
- Appropriate and timely investigation and response including, importantly, feedback to the whistleblower
- Effective protection for whistleblowers from reprisals and potential victimisation

Conclusion

This guidance is expected in Spring 2024 with a 4-6 month amnesty to allow for implementation of proper procedures. It should be noted of course that this initiative must be viewed in parallel to the current Government Review of the Whistleblowing Framework which is also due to report in early 2024 and which lead to an ongoing programme of work to persuade government policymakers of other measures needed to improve the protection afforded to whistleblowers in future.

If the failure to prevent fraud offence is seen as effectively changing the culture and practices of organisations for the better we may see a wider array of failure to prevent offences being considered in the future. Whilst this may only be a small step in the longer battle to protect whistleblowers across society, it is an important step forward in our effort to change culture and the regard in which whistleblowers are held for their courageous and selfless act of speaking up about wrongdoing.

[1] See [Creating a culture of blameless problem-solving - FM](https://www.fm-magazine.com/creating-a-culture-of-blameless-problem-solving) (fm-magazine.com).

[2] Amy C. Edmondson, Novartis professor of leadership and management at Harvard Business School and author of *The Fearless Organization: Creating Psychological Safety in the Workplace for Learning, Innovation, and Growth*.