

Providing an Alternative to Silence:

Towards Greater Protection and Support for  
Whistleblowers in the EU

COUNTRY REPORT: UNITED KINGDOM

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at [www.transparency.org](http://www.transparency.org).

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## **Public Concern at Work: UK submission to Transparency International whistleblower protection research project.**

### **EXECUTIVE SUMMARY**

The UK's **Public Interest Disclosure Act, 1998** offers strong and comprehensive protection for workplace whistleblowing. It is a vital tool in the fight against corruption as it covers a wide range of wrongdoing – as explained below – but suffers from a lack of promotion and support by the UK government.

Rather than see the legislation as key in the fight against corruption the UK government views the legislation as additional red tape for UK businesses. It is for this reason that there is currently a move to amend PIDA creating an additional barrier for those wishing to seek protection from the legislation. It is because of this attitude to the legislation that the real value of the Act has yet to be realised, and we conclude that PIDA requires a thorough review and public consultation. This paper explains how the legislation works in practice as well as charting the history behind the key promoters of the UK legislation, the charity, Public Concern at Work (PCaW).

### **Overview**

Whistleblowing protection in the UK is concentrated in a single piece of employment legislation - the Public Interest Disclosure Act 1998 (PIDA). The case law shows that it will protect the reasonable and honest whistleblower who has raised an issue of genuine public interest. It has also influenced the development of laws in other jurisdictions and the 2009 Report of the Parliamentary Assembly of the Council of Europe states: 'The UK indeed appears to be the model in this field of legislation.'

However, like any other law, PIDA is in need of review to make sure that it is in keeping with the working environment. Experience has identified some weaknesses in the Act and in its interpretation. Many of the problems that have arisen are due to judicial interpretation and may have arisen as a result of there not being a specialist tribunal for whistleblowing claims and/ or the failure of Government to champion whistleblowing protection.

### **THE LAW**

#### **Background**

A series of public inquiries into disasters (for example, the Clapham rail disaster, the Piper Alpha offshore oil rig explosion and the collapse of the BCCI banking group) found a pattern emerging that workers had known about the risk or wrongdoing that had contributed to the disaster and were either too scared to speak up about it or - worse still - they had spoken up and they were ignored. The Zeebrugge ferry sinking (where 189 lives were lost) was notable as staff had raised concerns on five occasions previously but were ignored.

The lack of incentive for staff to raise concerns was recognised by a small civil society organisation, Public Concern at Work (PCaW), set up in 1993. PCaW campaigned for the protection for whistleblowers, identifying that workers need to have protection for raising concerns with their employers, regulators and also more widely in order for the public interest and society to be protected, and disasters prevented<sup>1</sup>.

The law for which PCaW campaigned has its roots in the law of confidence. In English common law there was a long-standing principle that there could be 'no confidence in iniquity' which means that employers who were engaged in wrongdoing could not hide behind confidentiality clauses and prevent workers from speaking up about wrongdoing or malpractice. Enshrining this principle in employment law was seen as an important step in the protection for whistleblowers: first of all it had a declaratory effect, so employers realise that it is in their interests to deal with whistleblowers and their concerns effectively; and secondly it provided reassurance to workers that they should not be victimised or dismissed for raising a concern about wrongdoing or malpractice - and if they are, then they will be compensated.

PCaW campaigned for a new law, and after a process of debate and consultation that lasted 4 years they devised a draft law and persuaded an MP to put it forward - as the Public Interest Disclosure Bill. After an initial failed attempt to pass the bill, it was proposed as a Private Member's Bill by a Conservative MP and supported by the then Labour Government. Unusually PIDA enjoyed cross-party, business and trade union support. It recognises that workers are in a unique position as they are often the first to know about wrongdoing or malpractice and vulnerable in that they can be deprived of their livelihood if they try to bring suspected wrongdoing or malpractice to their employer's attention or that of the appropriate authorities.

### **Content**

PIDA proceeds mainly by amendment of the Employment Rights Act 1996. Its main provisions are discussed below.

It covers all workers across all sectors - private, public and voluntary. It attracts the ordinary meaning of 'worker' under the Employment Rights Act (section 230 (3)) and extends that (in section 43 K). Its broad application includes UK workers based overseas, although it does not cover the genuinely self-employed or volunteers. Those working in the armed forces or intelligence services are not protected by the Act. (This absolute exclusion means that a worker in one of these organisations will not be protected from victimisation even where he raises a concern internally that a manager accepted a bribe to award a cleaning contract).

It covers disclosures about a wide range of acts that might constitute wrongdoing, including dangers to health and safety or the environment, criminal offences, miscarriages of justice, and a breach of a legal obligation, or attempts to conceal any of these matters (section 43B).

Where the disclosure of the information is itself a crime (e.g. if it is held to breach the Official Secrets Act), it does not qualify for protection (section 43B (3)). It should be noted that raising such a concern formally within Government or with the Civil Service Commissioners would not constitute a breach of (or disclosure under) the Official Secrets Act and so would qualify for protection in any event. Workers (apart from those working in the armed forces or intelligence services who are not protected by the Act) will only lose the protection of PIDA if they have been convicted of the offence of breaching the Official Secrets Act or an Employment Tribunal is satisfied, to a high standard of proof approaching the criminal standard, that the offence was committed. It should be noted that

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<sup>1</sup> See below Annex C for more on the history of PCaW

the current provisions of the Official Secrets Act (from 1989) cover only a limited range of secret material.

PIDA establishes a tiered disclosure regime, which gives virtually automatic protection to those who raise a concern internally with their employer (section 43C), as individuals need only show that they have a reasonable belief tending to showing one of the categories of wrongdoing set out under the Act ('a reasonable suspicion of wrongdoing'). They also need to comply with the broad requirement, which applies generally to disclosures under PIDA (other than those to legal advisers- section 43D- and designed to enable whistleblowers to seek legal advice) that concerns should be raised in good faith.

Protection is also readily available for disclosures to regulators that are prescribed under PIDA<sup>2</sup> (such as the Financial Services Authority, the Health and Safety Executive or the Care Quality Commission). Individuals need to show that they have a reasonable belief and that their concern is substantially true in order to gain protection (as well as showing that they are acting in good faith) (section 43F).

In certain circumstances, wider disclosures (for example to an MP or the media) may also be protected (section 43G). The test for wider disclosures performs an important balancing act between the public interest and the need for confidentiality in certain circumstances. For a disclosure to be protected individuals must show that they have a reasonable belief that their concern is substantially true, to be acting in good faith, that they are not raising a concern for personal gain, that they have a valid cause to go wider and that their actions (in making the disclosure more widely) are reasonable in all the circumstances.

Where concerns are exceptionally serious (section 43H) individuals have a lower hurdle than that of section 43G (the 'wider disclosure'). PIDA will protect those who go straight to the media if appropriate, as was confirmed in **Collins v National Trust** (2005). In this case, the Employment Tribunal ruled that, in exceptionally serious circumstances, a disclosure to a local newspaper of a confidential report about dangers on a public beach was protected. However under 43H there is, as in 43G, the provision that the whistleblower will not be protected if the purpose of the disclosure was personal gain. This is aimed primarily at cheque book journalism. It covers not only payments of money, but benefits in kind. It would also catch a situation where the benefit did not go directly to the worker but to a member of his family, provided that its purpose was personal gain. However, this provision does not cover any reward payable by or under any enactment (section 43L(2)), such as a payment made by Customs and Excise.

PIDA makes it clear that any attempt to gag a whistleblower from raising a genuine concern about wrongdoing – which may be included in an employment contract or compromise agreement – is void in law (section 43J).

Caselaw has established that an individual does not have to be right about the substance of his concern, provided he is reasonable (**Babula v Waltham Forest College** (2006)). However it also makes it clear that an individual should be careful to avoid acting like a private detective and step over the line of what is considered to be appropriate conduct in attempting to prove he is right (**Bolton v Evans** (2006)).

There is no central organisation for the investigation of retaliation. A worker may bring a claim for unfair dismissal or victimisation within 3 months of their dismissal (section 103A) or the last detriment they have suffered (section 48) to an employment tribunal. The employment tribunal

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<sup>2</sup> A full list of the regulators that are prescribed under PIDA can be found here: <http://www.pcaw.org.uk/law>

system in the UK is designed so that cases can be taken to them relatively quickly and easily. (If claims had to be made to civil courts in the UK they would take much longer and be so costly as to deter claimants). However, due to recent cuts in the tribunal services in the UK, there are concerns that whistleblowing cases due to their complexity are taking longer. Unlike ordinary unfair dismissal claims there is no cap in the compensation and the highest single settlement is believed to be £5.2 m. (**Backs & List v Chesterton Plc** (2004)). Awards have included payments for aggravated damages and injury to feelings.

Employment tribunals were initially conceived as a forum where employers and workers could resolve disputes without the need for lawyers. In recent times, employment law in the UK has become more complicated and there is an increasing number of lawyers and consultants providing advice and representation (for a fee). Employment tribunals can be extremely expensive for individuals to pursue and there is no legal aid provided to individuals. Unlike civil courts there is no requirement that the losing party pays the costs of the winning party. However, parties may apply for costs up to a maximum of £10,000 where the other side has behaved unreasonably. The UK Government will be introducing fees in the employment tribunal service (by April 2013), and it has announced that PIDA claims will be subject to a £1,200 fee, which could be a barrier to a whistleblower who has just lost his or her job.

PIDA enables whistleblowers to apply for interim relief (section 128) allowing the claimant to ask for reinstatement of their job.

In victimisation or detriment claims (section 47B) under PIDA, the Court of Appeal ruled that the burden of proof will be if the disclosure by the employee materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower (**NHS Manchester v Fecitt & Others**). This decision changed the burden of proof in such claims, which used to be that the employer had to show that its treatment of the worker was "in no sense whatsoever", due to the whistleblowing. For unfair dismissal claims under PIDA, the dismissal is automatically unfair and the burden of proof is on the employer to show that they have not dismissed the individual for whistleblowing.

## **ISSUES FOR FURTHER CONSIDERATION**

### *The Public Interest*

There has been considerable debate over whether there should be a 'public interest' test in PIDA. The issue first arose in the case of *Parkins v Sodhexo* in 2001 in which the Employment Tribunal stated during an interim application that in PIDA reference to a breach of a legal obligation was to be interpreted widely. The case included a complaint by an individual of a breach of his employment contract. While this means that the scope of the Act is wider than was envisaged during the passage of the legislation in Parliament, its application can support individuals with limited employment rights. In one case two individuals were protected under PIDA after they were victimised for raising a grievance that the company had lured them from good jobs promising wages at a level that was then reduced once they were in post (**Grierson v Meta Management Services Limited**, 2008).

In May 2012 the UK Government proposed to introduce a public interest test as part of the Enterprise and Regulatory Reform Bill, whereby a claimant would have to show that they had made a protected disclosure in the public interest. PCaW opposes this provision as this is unlikely to resolve the *Parkins* problem and as drafted will be viewed as a barrier for whistleblowers by creating confusion as to the definition of the public interest and will discourage early preventative disclosures.

### *Good faith*

In the early years, decisions under the legislation had assumed that this had the ordinary legal

meaning of 'honestly'. The Government stated in one of the largest public inquiries into the health service in the UK - the Bristol Royal Infirmary Inquiry - that it had intended 'good faith' to mean 'honestly and not maliciously'. However in **Street v Derbyshire Unemployed Workers Centre** (2004) the Court of Appeal rejected the submission that the phrase meant 'honestly'. The Court decided that PIDA protection cannot be lost unless there is a predominant ulterior motive that is unrelated to the purposes of the Act. Concern that the effect of this decision discourages whistleblowers led the Shipman Inquiry (into a series of murders by a doctor) to recommend that the good faith test should be removed altogether from PIDA as this would "avoid the possibility that concerns will not come to light because an individual might lose protection if [his or her] motives can be impugned." As yet this recommendation has not been implemented.

#### *Relationship with discrimination law*

While there are significant differences between PIDA and discrimination law, the Court of Appeal has previously ruled that PIDA cases should, where possible, be approached by the courts like discrimination cases (for example, in **Melia and Ezias v N. Glamorgan NHS Trust**, Court of Appeal, (2007)). The Court of Appeal ruled in **Virgo v Fidelis** (2004) that awards for injury to feelings in PIDA claims are to be assessed in the same way as for other forms of discrimination.

The Court of Appeal also held that even if a tribunal did not accept an employer's reason for dismissing a claimant, it did not need to accept the reason put forward by the claimant (**Kuzel v Roche**, 2008). The Court of Appeal rejected the contention that the legal burden was on the claimant to prove that the protected disclosure was the reason for the dismissal: they merely had to advance evidence of it. The Court also held that to transplant the operation of the burden of proof from discrimination law would complicate rather than clarify the issue, as discrimination law and unfair dismissal law are different causes of action.

## **PRACTICE**

### *Whistleblowing arrangements*

While PIDA does not impose a specific duty on organisations to implement arrangements for staff to raise concerns safely and responsibly, in terms of providing protection against unjustified treatment or retaliation, there are a number of strong policy and legal reasons for public and private bodies in the UK to do so and some of these are listed below. Whistleblowing arrangements are also important because no matter what the law says, real protection starts with good practice in the workplace.

1. Under PIDA, an employment tribunal will look to see if an employer had whistleblowing arrangements in place that a worker could or should have used when determining whether a wider disclosure, to the media for instance, was reasonable.
2. The independent Committee on Standards in Public Life strongly recommended in its 2<sup>nd</sup>, 4<sup>th</sup> and 10<sup>th</sup> reports that all public bodies, including all government departments, local authorities, Non-Departmental Public Bodies, universities, and National Health Service organisations should implement arrangements for staff to raise concerns internally and externally, and to seek independent advice. In its 4<sup>th</sup> Report, the Committee set out the six essential elements of all good whistleblowing arrangements (reproduced below) and in its 10<sup>th</sup> report the Committee emphasised the importance of leadership and said all public bodies should reiterate their commitment to the effective implementation of PIDA.
3. The UK Corporate Governance Code (C.3.4) states for companies listed on the London Stock Exchange it is a matter for the Board, and specifically the Audit Committee, to ensure that arrangements are in place for staff to raise concerns in confidence about possible financial

and other improprieties, and for such concerns to be proportionately and independently investigated and followed-up.

4. The Bribery Act 2010 (section 7) creates a new form of corporate liability for failing to prevent bribery and makes it clear that implementing and promoting internal whistleblowing arrangements – which include access to advice – is part of a legitimate defence (Ministry of Justice, Guidance to the section 9, of the Bribery Act, 2011).

The declaratory effect of a law that protects those who blow the whistle in the public interest is important. However, real protection for workers comes from employers encouraging their staff to speak up about a concern, reassuring them that it is safe to do so and that there are safe external routes, responding effectively and proportionately to the concern, and acting swiftly to protect the reasonable and honest whistleblower from any reprisal.

The Committee on Standards in Public life identified the key elements of good whistleblowing arrangements<sup>3</sup>:

- provides examples distinguishing whistleblowing from grievances
- gives staff the option to raise a whistleblowing concern outside line management
- provides access to an independent helpline offering confidential advice
- offers staff a right to confidentiality when raising a concern
- explains when and how a concern may be safely raised outside the organisation (e.g. with a regulator)
- provides that it is a disciplinary matter (a) to victimise a bona fide whistleblower, and (b) for someone to maliciously make a false allegation

There are resources available to enlightened employers who want to implement robust internal arrangements, and in particular, the British Standards Institution's 1998 Code of Practice of Whistleblowing Arrangements, is available for free<sup>4</sup>.

#### *Independent Advice*

The advice service offered by PCaW has an important role in practice. It offers free, confidential advice for workers across all sectors who wish to raise a whistleblowing concern and are unsure whether or how to do it. All advisors have legal training and the advice given is covered by legal professional privilege. This means that any discussions are not revealed without the whistleblower's express consent. They help the individual to consider the options available to them, and they can raise the concern on the individual's behalf if asked to do so. They have dealt with over 22,000 cases since 1993, of which approximately 14,000 are whistleblowing cases. The majority of callers have raised their concerns with management (approximately 70%). The role of independent and confidential advice is essential in empowering potential whistleblowers to speak up and building trust and confidence (see below for more on the history and background to the creation of PCaW).

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<sup>3</sup> Committee on Standards in Public Life, Third Report (1996), page 48.

<sup>4</sup> British Standards Institution (2008) Whistleblowing Arrangements Code of Practice, PAS 1998:2008. Free download available from [www.pcaw.org.uk/bsi](http://www.pcaw.org.uk/bsi).

## ASSESSMENT

PIDA has been a model for other countries, including South Africa and Japan and most recently Ireland, where a draft law based on it is before the Parliament. PIDA has been praised by the Council of Europe because of its comprehensive scope, which provides protection to workers across all sectors for raising concerns internally, with regulators and in certain circumstances more widely with the media. Through its tiered regime PIDA recognises the various lines of accountability and promotes organisations engaging in better risk management. PIDA goes beyond financial malpractice and provides broad categories of wrongdoing, encouraging a broader interpretation of the public interest. There is no rewards regime, yet people still raise concerns.

In 2007 a survey by Ernst and Young found that 86% of UK senior executives in multinationals said they felt free to report cases of fraud or corruption, against an average of 54% across mainland Europe.

In the UK the regulatory system is sector specific and so there is not a single agency that deals with whistleblowing. PIDA recognises the importance of whistleblowers being able to raise concerns with regulators, by providing relatively easy protection to those who raise concerns with them. What this means in practice is that a whistleblower does not have a high burden of evidence in order to be protected for raising a concern with a regulator. They need to reasonably believe the information is substantially true (S43F) and be acting in good faith. A multitude of regulatory bodies across the UK are prescribed under PIDA. Given this regulatory approach, it would be difficult to have one agency for all sectors - a whistleblowing agency would have to be sector or industry specific.

That does not mean that this approach is not without difficulty as some of the following issues illustrate: i) the gaps in the regulatory system are also mirrored in the protection for whistleblowers; ii) the law does not prescribe how a regulator should deal with a concern, or give them any powers for dealing with an organisation that has attempted to silence a whistleblower or issued threats of reprisal, (a regulatory power to dispense fines and penalties in these circumstances might mitigate this issue considerably); iii) what happens when a regulator is disbanded by government (as has happened recently in the UK with the abolishment of the Audit Commission – the financial regulator for local authorities and the NHS)?

In addition, PIDA has not been as effective as it could be if all employers and workers knew that both internal and external disclosures are protected. This is especially true of the public sector: outside of the health service, PIDA has not been actively promoted by the UK government. GRECO recommended the UK government do more to promote whistleblowing in the public sector and found the UK to have only partly implemented this recommendation in 2006<sup>5</sup>. The OECD recommended the UK “pursue its efforts to make the measures of encouraging and protecting whistleblowers better known to the general public [emphasis added]”<sup>6</sup> as part of an effective anti-

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<sup>5</sup> GRECO (2006) Second Evaluation Round: Compliance Report on the United Kingdom as adopted by the GRECO at its 30<sup>th</sup> Plenary Meeting, Strasbourg, 2006.  
([http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2006\)8\\_Add\\_UnitedKingdom\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2006)8_Add_UnitedKingdom_EN.pdf))

<sup>6</sup> OECD (2005) United Kingdom: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, OECD Directorate for Financial and Enterprise Affairs, at 16.  
(<http://www.oecd.org/dataoecd/62/32/34599062.pdf>)

foreign bribery strategy. Although the Council of Europe praised PIDA in 2010<sup>7</sup> as an example of comprehensive whistleblower legislation, the vast majority of UK adults still know nothing about it.

A YouGov survey (2011)<sup>8</sup> commissioned by PCaW, found that despite 85% of working adult respondents saying that they would raise a concern about possible corruption, danger or serious malpractice at work with their employer, 77% of all adult respondents did not know or thought that there was no law to protect whistleblowers<sup>9</sup>. The risk is that where a serious public interest concern is not properly addressed by the organisation itself, or the matter is so serious it needs to be raised externally, workers do not realise they have the power to raise it elsewhere nor who is best placed to handle their disclosure (for example regulator, MP or media). The failure of the government to champion this legislation means that the law is misunderstood and organisations may be unaware of the penalties of not getting whistleblowing right.

The number of claims made under PIDA has annually increased from 157 in 1999 to 2,500 in 2011-2012 (out of a total of 186,300 claims presented to employment tribunals). During 2011-2012, 2,200 PIDA claims were disposed of, with the majority of claims being settled either privately between the parties or through the Advice Conciliation and Arbitration Service. Only a small number of claims succeed at final hearing (roughly 20%) and this largely due to high levels of conciliation and settlement of such claims.

The UK government refuses to open the register of PIDA claims to public scrutiny and this is another key failure in fully implementing PIDA. A new rule in 2010 allowed claimants to request the tribunal to forward a copy of their claim (with details of their concern) to the appropriate regulator, but this was a compromise measure and open justice has still not been achieved. The lack of transparency in the tribunal system undermines effective governance by allowing public interest concerns, including those about wrongdoing or malpractice, to be 'buried' in settlements, which do not reach full legal determination. PCaW argues that even if the register of tribunal claims is not opened up, all whistleblowing claims should be forwarded to appropriate regulators in order to avoid the public interest being unwittingly or deliberately traded for private gain.

PCaW considers that it is problematic that PIDA has remained static since 1998 despite a changing workplace. This demonstrates the value of having a system for oversight and review of law. Some of the main issues that need to be addressed in a full consultation about the structure and force of PIDA are set out below:

#### *Vicarious Liability*

This loophole has arisen in the context of a case involving three nurses<sup>10</sup> who raised a concern about a colleague lying about his qualifications, which was upheld. Then the nurses were subject to bullying and harassment from co-workers. One of them received a telephone call threatening her daughter and to burn down her home. The case proceeded as far as the Court of Appeal, which found that vicarious liability does not exist in PIDA, as it specifically does in discrimination law. From the experience of PCaW harassment and bullying by co-workers is not uncommon in whistleblowing

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<sup>7</sup> Council of Europe Resolution 1729 (2010) Protection of "whistleblowers"  
(<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm>)

<sup>8</sup> For more details see [http://www.pcaw.org.uk/news\\_attachments/Results%20for%20PCAW-YouGov%20Survey.pdf](http://www.pcaw.org.uk/news_attachments/Results%20for%20PCAW-YouGov%20Survey.pdf).

<sup>9</sup> 21% of respondents thought that there was no law to protect whistleblowers (Ibid, Note 8).

<sup>10</sup> Fecitt and others v NHS Manchester (supra)

cases and for there to be no protection in this area means whistleblowers could be facing a 'cardboard shield' in terms of the protection afforded by PIDA, and that employers who do not do enough to protect whistleblowers can escape liability altogether.

#### *Widening the coverage of individuals*

Recent employment law cases and media stories have highlighted the difficulties of groups such as students on vocational placements in health and care settings, doctors who work as General Practitioners, volunteers, non-executive directors of companies, public appointees to Commissions, priests, partners in accountancy, law and other professions, and foster carers. The lack of protection for job applicants was highlighted in an Employment Tribunal Appeal case (**BP v Elstone**), where an employee was protected from victimisation by his current employer, having raised a concern with his previous employer. The tribunal commented that had the claimant been a job applicant he would not have been protected. Discrimination at pre-employment stage is a worry for workers considering whether and how to raise a concern. It can be daunting for an individual who has raised a genuine concern about a danger, risk or malpractice in the workplace and has left the organisation, to know what to say about why they left their last job. This presents a very difficult dilemma for a whistleblower who has acted to protect others and it is important to build some protection into the system, so that whistleblowers are not fearful in such situations. Moreover protection at pre-employment stages would overcome issues to do with black-listing, which is a fear in some industries. In research conducted by PCaW it was found that the second most common negative response to whistleblowing from an employer was refusing to provide a good reference.

#### *Extending the categories of wrongdoing*

Gross waste, gross mismanagement and abuse of authority are not included in PIDA but are included in equivalent US legislation. At a time of austerity and the abolition of the UK's Audit Commission (the financial regulator for local government and the National Health Service), PCaW have proposed that these categories should be included, particularly as what may be deemed as a waste of money may not in fact be illegal but the public interest would be served if such concerns are raised and those who raise them are protected. For example it could be a way to encourage workers to raise concerns about mass over-expenditure in public spending projects. PCaW have suggested a public interest category would be useful to cover these types of wrongdoing which may not be covered by the other categories. This would also ensure that PIDA evolves and covers serious ethical concerns that fall short of a breach of legal obligation.

#### *Gagging clauses*

In the PCaW's experience, little attention has been paid to the anti-gagging provision in PIDA: that is, section 43J which outlaws any contractual clause that prevents workers from raising a public interest concern. Case law has highlighted the need for greater attention to be drawn to section 43J and for there to be tougher enforcement. PCaW's proposal is for a positive requirement to be placed on lawyers advising in the settlement of claims, that they advise claimants about their rights under PIDA and that any such gagging clauses are void.

See below for a quick reference guide to the key provisions of PIDA:

#### **Quick Guide to PIDA and its key provisions for workers who blow the whistle on corruption**

- Covers most UK workers, including employees, contractors, trainees and agency workers, police officers, and every worker in the National Health Service (NHS)
- Defines wrongdoing broadly to include disclosures about corruption or any other crime, civil offences (including negligence, breach of contract or administrative law), miscarriages of justice, dangers to health and safety or the environment, and, importantly, a cover-up of any

of these; the worker does not have to prove the wrongdoing, nor does it matter if the persons to whom the wrongdoing is reported are already aware of it

- Protects concerns raised internally with an employer (or to the Minister responsible in appropriate cases), and externally, to one of the many listed regulatory bodies, to the police in serious cases, and, importantly, to the media in certain circumstances, particularly if the other routes have been tried and failed and the wrongdoing is on-going
- Compensates for detriment (i.e. victimisation) short of dismissal, including injury to feelings, and those who are dismissed can seek interim relief within 7 days to continue in employment; those found to have been unfairly dismissed for blowing the whistle are compensated for their full financial losses (uncapped) which recognises that blacklisting can occur and that high wage earners can also be whistleblowers

For a snapshot of some of the decisions under PIDA, see Annex A. We have attached at Annex B the completed table outlining the provisions of PIDA in accordance with the required format for this piece of research and at Annex C a background note on the creation of PCaW in the early 1990s.

**Public Concern at Work  
October 2012**

**Whistleblowing Case Studies**

**Over the years there been a number of cases that have put pressure on PIDA and the protection for whistleblowers. We highlight some of the cases below which show some of the weaknesses in PIDA:**

**NHS Manchester v Fecitt & Ors [2011] EWCA Civ 1190**

Mrs Fecitt and two of her colleagues raised concerns about a fellow employee, Mr Swift, misrepresenting his professional qualifications to other members of staff at an NHS walk-in centre in Manchester. Mr Swift admitted that he had misrepresented his qualifications to his colleagues and apologised. As Mr Swift had not misrepresented his qualifications to the employer and had given assurances that he would not repeat his behaviour, Mrs Fecitt's manager decided to take no action. Mrs Fecitt and her colleagues were not happy with the outcome and persisted with their complaint to successively more senior levels of management. Relations within the walk-in centre deteriorated, with some members of staff siding with Mrs Fecitt and her colleagues and others siding with Mr Swift. All three nurses were subjected to workplace bullying. Mrs Fecitt received an anonymous telephone call in which the caller had threatened to burn down her house unless she withdrew her complaint against Mr Swift and a photograph of Mrs Fecitt had been displayed on Facebook which had caused her distress. Management attempted to encourage the employees at the walk-in centre to work together, but without success. Eventually, Mrs Fecitt and a colleague were relocated while another colleague was no longer offered shifts at the walk-in centre, as management believed this was the only way to resolve the conflict at the site. The Court of Appeal found that because there is no provision making it unlawful for employees to victimise whistleblowers and since the employees who had allegedly victimised the Claimants could not themselves be personally liable under the whistleblowing legislation, no vicarious liability could attach to the employer, NHS Manchester.

*Comment: This case identifies a glaring hole in PIDA with there being no vicarious liability mechanisms. Moreover it sends the wrong messages to poor managers that they can get away with doing little or nothing where employees are being bullied by fellow workers.*

**Street v Derbyshire Unemployed Workers Centre [2004] 4 All ER 839, [2004] IRLR 687, [2005] ICR 97, [2004] EWCA Civ 964**

A disclosure must be made in good faith to be protected under the whistleblowing provisions of PIDA. In this case the Court of Appeal examined what is meant by "good faith". The Court of Appeal agreed with the EAT and concluded that a disclosure would not be made in good faith if an ulterior motive was the predominant purpose of making it, even if the person making the disclosure reasonably believed that the disclosure was true.

*Comment: This case brings motive into good faith and in our submission to the Court of Appeal we argued that the interpretation of good faith should be 'making the disclosure honestly'. Dame Janet Smith in the Shipman Inquiry argued for the removal of good faith. See annex B to PCaW statement to the Committee for further exploration of this issue.*

**Cavendish Munro Professional Risks Management v Geduld [2010] ICR 325, [2009] UKEAT 0195\_09\_0608, [2010] IRLR 38**

In March 2007, Mr Geduld was a director and employee of Cavendish Munro Professional Risks Management Limited (Cavendish). Following a shareholding dispute, Mr Geduld contacted a solicitor who in turn wrote to the company stating that Mr Geduld sought legal advice and had been unfairly prejudiced as a shareholder. Mr Geduld was dismissed and then brought a claim under PIDA. Mr Geduld won in the employment tribunal but lost in the EAT because the Solicitor's letter did not contain a disclosure of information but only an allegation.

*Comment: This case has led to confusion existing between disclosures of information and allegations. This case has meant that a worker who may have a genuine concern and says to his manager that he has concern about fraud or health and safety etc. may not be protected because they have not disclosed any further information. It is especially confusing as the test used in PIDA for a disclosure to a regulator (s43F), the statutory language refers to 'the information and any allegation in it'. This anomaly should be clarified by amendment.*

**Wearn v Care Companions 2802033/2007**

Mrs Wearn worked in a nursing home owned by the respondents and raised concerns about staff shortages and unsuitable equipment amongst other health and safety concerns with the homeowners. At the same time there was an on-going story in the media about the eviction of one of the residents as Social Services were refusing to increase their payments to the Home to cover higher levels of care required. A story appeared in the Sunday People. The respondents believed that Mrs Wearn was the source of the story and dismissed her for that reason. The ET found that Mrs Wearn had made internal disclosures to the respondent, but the reason for her dismissal is that the respondent believed that Mrs Wearn had made disclosures that were damaging to the Home. Mrs Wearn won her claim for automatic unfair dismissal for breach of the statutory disciplinary and dismissal procedures but lost her claim on whistleblowing.

*Comment: Unlike discrimination cases, there is no protection for workers where they are perceived to have a particular characteristic. This could be rectified by allowing wrongly identified whistleblowers to be protected.*

**BP v Elstone [2010] ICR 879, [2010] IRLR 558, [2010] UKEAT 0141\_09\_3103**

Mr Elstone worked for Petrotechnics and his job involved evaluating safety processes for clients, including BP. While at Petrotechnics, he made a protected disclosure about safety processes to BP managers. Petrotechnics found out about this and dismissed the employee for disclosing confidential information to BP. Mr Elstone then began working as a consultant at BP, but was not offered further consultancy agreements after the first agreement, because BP became aware that he had been dismissed from Petrotechnics for disclosing confidential information.

Both the Employment Tribunal and Employment Appeal Tribunal extended PIDA protection to a whistleblower who had raised a concern in his previous employment and had been victimised by his current employer when they discovered this. Interestingly, the judgment points out that had the whistleblower been victimised at point of recruitment, he would not have been protected.

*Comment: This case identifies that PIDA protection does not apply at the pre-employment stage and this needs to be rectified to avoid issues such as blacklisting.*

## **Private employment rights**

### **Parkins v Sodexho [2001] UKEAT 1239\_00\_2206**

This was an interim relief hearing, Mr Parkins worked for the Respondents for less than a year and brought a claim for automatic unfair dismissal on the grounds of having made a protected disclosure. The Claimant argued he had been dismissed for raising concerns about lack of supervision and that he had to phone an off-site supervisor when he left, and that this was a breach of contract and the Health and Safety at Work Act 1974. The initial claim failed at Employment Tribunal (ET) who stated that “an allegation of breach of an employment contract in relation to the performance of duties comes within the letter or spirit of the statutory provision”. On appeal, the Employment Appeal Tribunal (EAT) found that this was a breach of legal obligation and that there is no reason to distinguish a legal obligation which arises under an individual's contract of employment from any other form of legal obligation.

*Comment: Interestingly the ET and EAT could have found that this a protected disclosure on the ground that the health and safety of any individual has been, is being or is likely to be endangered (section 43B (1)(d)).*

### **Bengochea M v Citibank 3202885/06**

Mr Bengochea was a long standing employee of Citibank and employed as a development director at the Bank. The claimant moved to different roles within the Bank but in the restructuring there was confusion about his job title- whether it was Vice President or Managing Director. The claimant said that he had been dismissed because he had made protected disclosures about his job title. The ET found the claimant had made a protected disclosure when he raised his concern regarding his job title, as this was found to be a breach of a legal obligation. The PIDA claim failed because no detriment was established and the claimant won on the grounds that his dismissal had been procedurally unfair.

*Comment: The ET noted that Counsel for the Respondent argued that it “was difficult to imagine disclosures with less to do with the public interest than those alleged in the present case”.*

In PCaW's analysis of employment tribunal decisions the failure to investigate grievances has often been cited as a breach of a legal obligation see:

### **Hage v Camelon Clinic Ltd 3304511/2009**

Ms Hage was a nurse employed at the respondent's clinic. She started working at the clinic in 2008 and in 2009 reduced her hours. The respondents said Ms Hage was not entitled to have paid rest breaks. The ET found that raising a concern about failure to deal with the claimant's grievance is a protected disclosure.

### **Kowalska v NKB Ltds**

Ms Kowalska worked in a small hotel owned by respondents. The claimant was not given holiday pay, contractual sick pay and her accommodation pay was more than allowed for a person on minimum wage. The Claimant was dismissed and took an interim relief claim which she won.

*Comment: Claims for the above could be dealt with under wrongful dismissal or breach of contract claims.*

**TI Research project: Public Interest Disclosure Act**

	Yes	No	Partial	Notes
Broad definition of whistleblowing	X			
Broad definition of whistleblower	X			No specific definition – covers all UK workers as part of UK employment protection legislation
Broad definition of retribution protection	X			Very broad in accordance with case law.
Internal reporting mechanism	X			
External reporting mechanism	X			
Whistleblower participation	X			In the sense that the whistleblower has a forum for the resolution of his claim for compensation. Weak in relation to the issue raised (the substance of the protected disclosure) and any legal sanction relating thereto
Rewards system		X		But law does provide full and uncapped compensation
Protection of confidentiality		X		Law is silent on this, but case law suggests that where confidentiality is not maintained that will increase likelihood of reprisal
Anonymous reports accepted		X		As law requires whistleblower to establish causal link between disclosure and reprisal, in effect it is incredibly difficult to be protected for an anonymous disclosure
No sanctions for misguided reporting	X			The law is silent on this but case law has allowed a whistleblower to be protected when raising concern that is misguided (see Babula v Waltham Forest)
Whistleblower complaints authority		X		Although UK regulatory system is included in statutory framework
Genuine day in court	X			Right to proceed to employment tribunal
Full range of remedies	X			
Penalties for retaliation		X		Save that if a whistleblower succeeds then there is an unlimited compensatory award - highest to date is £5 million
Involvement of multiple actors	X			

## BACKGROUND TO THE CREATION OF A DEDICATED WHISTLEBLOWING CHARITY IN THE UK

By the end of the 1980s, public confidence in the ability of British institutions - whether private or public - to deliver their services safely had suffered. The British public were shocked when it was revealed that children in care had been abused over a 13-year period by those employed to protect them; that serious lapses in safety standards had been common prior to the explosion on a north sea oil rig that killed 167 men; and that a top UK insurance company could collapse leaving behind £34 million in unpaid debts<sup>11</sup>. In 1990 the Public Interest Research Centre (PIRC) - through its publishing arm, Social Audit - published the findings of a research project it had conducted into self-regulation and whistleblowing in UK companies<sup>12</sup>. The report was the seed from which the first serious civil society initiative to address whistleblowing in the UK would grow.

One of the report's key findings was that staff often knew of problems or risks but few organisations provided adequate mechanisms for staff to raise their concerns in the workplace. Case studies showed how the absence of such mechanisms often led to misunderstandings, confrontations, victimisation of the employee and adverse publicity if the concern was unnecessarily aired outside the company. In the worst cases - as public inquiries into disasters and scandals demonstrated - genuine opportunities were missed to prevent damage being done. Launched during a press conference at the Confederation of British Industry in 1990, the CBI's Director-General Sir John Banham recommended the PIRC report *Minding Your Own Business* as "essential reading for all corporate managers."

PIRC and others identified the need for an independent body to address accountability in the workplace in the public interest. As originally conceived, a new organisation could advise individuals, help employers, conduct research and promote good practice. The Joseph Rowntree Charitable Trust offered £250,000 start-up funding in the form of a five-year challenge grant for the new organisation<sup>13</sup>.

In 1990 a steering committee<sup>14</sup> was set up and consulted widely to determine what, if any, support existed for such an initiative. The committee spoke to British business and professional organisations, corporate executives, lawyers, individual whistleblowers and public interest groups in Britain and the United States. The consultation revealed great interest in the issues of organisational accountability and whistleblowing, and support for an independent body to address it.

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<sup>11</sup> The police inquiry into the abuse of children in care led to the conviction in 1991 of three men employed by Leicestershire County Council including the Officer in Charge of Children's Homes, Frank Beck. The Cullen Inquiry not only identified the causes of the explosion on the Piper Alpha oil platform but found that "workers do not want to put their continued employment in jeopardy through raising a safety issue that might embarrass management." After the collapse of the Roger Levitt's Group - a top UK life insurance company - Levitt was charged with fraud worth £90 million but pleaded guilty to a lesser charge and served only 180 hours community service.

<sup>12</sup> The project was supported by the Nuffield Foundation.

<sup>13</sup> A challenge grant required the new body to raise a further £250,000 - either in earned income or by securing other charitable funds.

<sup>14</sup> This steering committee included Marlene Winfield, freelance social policy specialist and author of the PIRC report, Maurice Frankel of the Campaign for Freedom of Information, Guy Dehn, Legal Officer of the National Consumer Council (NCC), and Charles Medawar, Director of PIRC.

It was decided that the new body would obtain charitable status, incorporate as a limited company and seek designation from the Law Society of England and Wales and the Bar Council as a legal advice centre. As a charity and limited company, the new body could seek the funding it needed, be a separate legal entity and limit the liability of its executive – a voluntary Board of Trustees who would commit their time and expertise to the new venture. As a designated legal advice centre individuals could seek help in the context of lawyer-client confidentiality. This latter point was extremely important if the new body was to reassure individuals that it was safe to seek advice about their concerns outside the workplace.

Surprisingly, charitable status was initially refused by the Charity Commission on the basis that “such a service would not be in the public interest.” After a year of argument and persuasion<sup>15</sup>, charitable status was finally granted in September 1993<sup>16</sup> and in October 1993, Public Concern at Work – the whistleblowing charity - was officially launched.

At the heart of the charity’s work is the provision of free legal advice to workers who have witnessed wrongdoing, malpractice or serious risk in the workplace. This involves helping workers to raise a concern clearly, constructively and responsibly. PCaW also works with organisations to establish robust whistleblowing arrangements that strengthen accountability and transparency in the workplace. All income the charity receives is used to support this work.

In almost 20 years of operations, PCaW has established itself as the leading independent authority on public interest whistleblowing in the UK and has been instrumental in establishing best practice in the UK and abroad on this vital anti-corruption issue. The charity campaigned and drafted the UK whistleblowing law, the Public Interest Disclosure Act. Its best practice model for organisations is outlined in the British Standards Institution PAS 1998:2008 *Whistleblowing Arrangements Code of Practice* (BSICoP), drafted by the charity in conjunction with a large working group drawn from a wide variety of sectors and interests. PCaW has also built a reputation for providing high quality consultancy services to UK and international organisations<sup>17</sup>.

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<sup>15</sup> Advocating for the new charity, Michael Brindle QC and Christopher McCall QC provided invaluable assistance free of charge to persuade the Charity Commission to grant charitable status.

<sup>16</sup> Ironically, soon after this the Chief Charity Commissioner delivered a public address on the future of UK charities and selected PCaW as a model of the new breed of charity that meets and develops the public interest.

<sup>17</sup> Clients include Lloyds Banking Group, Equitable Life, Bank of England, ITV and the Serious Fraud Office. We have also provided advice on whistleblowing and legal best practice internationally, including to the governments of Holland, Nigeria, Canada, Ukraine, South Korea and Japan, World Bank, and UNDP.