

Unpacked: The 3 bids to transform whistleblowing law PIDA

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It's widely acknowledged the UK's whistleblowing law, the Public Interest Disclosure Act (PIDA, 1998) is in urgent need of reform. More people need to be protected, victimisation of whistleblowers has to stop and – crucially – the wrong doing or concern needs to be investigated – which currently PIDA is silent on.

Whilst easy to criticise PIDA, and a lot of people do, far harder to work out is just what improvements need to be made. PIDA is widely acknowledged as the blueprint for much of the world's whistleblowing legislation, and we helped introduce it, but it now needs to be reformed to reflect the modern workplace and keep pace with international best practice.

Protect has long campaigned for improved legislation. We were part of the EU campaign for a draft EU Directive, and called for reform with the publication of the Whistleblowing Commissions report in 2013. Our interventions in prominent whistleblowing cases (Nurmohamed Chesterton, Chris Day and Claire Gilham) have also developed the law in practice.

Our campaign to reform PIDA is shared by others and we take a look at three current draft whistleblowing Bills and some of the reforms proposed.

The three draft whistleblowing bills seeking reform:

- Protect's draft Bill, launched October 2019
- Baroness Kramer's APPG (All Party Parliamentary Group for Whistleblowing) Office for the Whistleblower Bill, launched in January 2020
- Dr Whitford MP's Public Interest Disclosure (Protection) Bill, due to have its second Reading in Parliament on September 25

Protect – The UK's whistleblowing charity, Protect has been supporting whistleblowers for 27 years. Protect support around 3,000 whistleblowers each year, and in its history has supported 40,000 whistleblowers and is widely acknowledged as the leading authority on whistleblowing. We are politically neutral, but work with all parties to promote better whistleblowing laws.

Baroness Kramer, Liberal Democrat Peer and Co-Chair of the All Party Parliamentary Group on Whistleblowing (APPG) – The APPG was set up in July 2018 and Baroness Kramer's Bill has the support of the APPG.

Dr Phillipa Whitford MP, SNP Health spokesperson in the House of Commons. Dr Whitford is a long-time time campaigner for whistleblowing reform and has spoken out on whistleblowing in the NHS.

What are the stand out asks of each Bill?

All the Bills are united in that they want to see PIDA reviewed but vary in what they call for. The ‘headlines’ for each are as follows

Protect’s Bill:

- Wider protection of more people e.g. Non-executive Directors (NEDs), volunteers, self-employed workers and job applicants
- A duty on employers to prevent victimisation
- A Whistleblowing Commissioner – a new independent body to investigate a concern, or unfavourable treatment of the whistleblower, set standards and administer penalties.

Dr Whitford MP’s Bill:

- The repeal of PIDA.
- The creation of a Whistleblowing Commission with wide ranging powers to advise, investigate and provide compensation if whistleblowers are victimised.
- The victimisation of a whistleblower would be a criminal offence

Baroness Kramer’s Bill:

- Creation of an Office for the Whistleblower
- The Office for the Whistleblower would fund legal support for whistleblowers
- The Office for the Whistleblower would provide compensation for whistleblowers

Key themes:

All three Bills call for an independent body – the Whistleblowing Commissioner – or the Office for the Whistleblower, yet the proposals have differences, as well as similarities.

Whistleblowing Commissioner

Both Protect and Dr Whitford MP in their Bills call for a Whistleblowing Commissioner with its principal duty to protect the whistleblower and ensure the concerns raised are properly investigated. Both bodies have the power to set and monitoring standards for employers and regulators and to investigate concerns directly where there is no other relevant authority to do so, or where others have failed. This is an important innovation.

Baroness Kramer’s Office for the Whistleblower has a duty to administer “arrangements to facilitate whistleblowing”. These include directing “relevant bodies” (presumably employers and regulators) and acting as a point of contact for disclosures.

However, it is vital that any new body fills the current gap and investigates the concerns, where others have failed, or where there is no appropriate regulator. Both Dr Whitford MP’s Bill and Protect’s aim to do this. However, Baroness Kramer’s Bill does not detail how it will deal with the actual wrongdoing at all and the powers of the Office are focused on supporting the whistleblower.

Investigating concerns or advising the whistleblower?

While Protect's Commissioner will have a role in public education and awareness, we don't propose that the same body should provide advice to the whistleblower, as that may create internal conflicts.

Baroness Kramer's Bill proposes that the Office for the Whistleblower maintains a panel of legal firms and advisory bodies to provide advice to whistleblowers, while Dr Whitford MP's Commissioner would provide advice to the whistleblower, investigate concerns and bring prosecutions – we think that this would require very careful conflict management if all these functions are to sit in one body.

Civil penalties and criminal sanctions

Both Dr Whitford MP's Bill and Protect's Bill gives the new regulator the power to issue civil fines. Dr Whitford MP's proposal gives the power to the Whistleblowing Commissioner, while Protect's Bill gives the power to create civil penalties to the Secretary of State, but the Commission would be able to administer the penalties – either against the employer or a regulator. Protect would like the fines to be linked to an organisation's turnover. Dr Whitford MP's Bill proposes a maximum of £50,000, though we think this may not be enough to deter big employers. Baroness Kramer's Bill is silent on penalties for employers, but proposes that the Office for the Whistleblower should be able to provide financial redress to whistleblowers.

Neither Baroness Kramers' Bill nor Protect's Bill introduce criminal sanctions. However, Dr Whitford MP's Bill would make it a criminal offence for someone to victimise a whistleblower. This is not a development Protect supports – we fear that this may go against the aims of the Commissioner in Whitford's Bill to “normalise” whistleblowing – and the burden of proof “beyond reasonable doubt” may make such offences hard to establish. Civil sanctions are generally more appropriate in the context of workplace relationships – and criminal sanctions are available in very serious matters (such as bribery, fraud, serious harassment). Criminal sanctions were introduced in Australia in 2014 but have yet to result in prosecutions. Worse, the person who fails to adequately investigate a concern may be imprisoned – which may make recruitment to employers' whistleblowing teams very unattractive.

Duty on employers

A key ask in Protect's draft Bill is the duty on employers to step up and do more to prevent victimisation of whistleblowers. At present it can be a defence against a whistleblowing claim for an employer to show that they did take all reasonable steps, but few cases reach the tribunal and we think it should be a proactive duty on all employers to prevent victimisation. Our Bill states: All employers shall be under a duty to take reasonable steps to prevent detrimental treatment by the employer, the employer's officer or agent, or by any third party to someone who has made, or is believed to have made a protected disclosure (blown the whistle).

Repeal of PIDA

Both Baroness Kramer's Bill and Protect's envisage a powerful Commissioner/Office alongside PIDA (which we'd want to see strengthened). However, Dr Whitford MP's Bill would repeal PIDA and replace it wholesale with the Whistleblowing Commission. This may mean we lose the thinking and case law built up in the employment tribunal system. It also creates a conflict of interest within the

Commissioner itself – if it advises a whistleblower, investigates the concern and determines any redress.

It may also make it difficult for employees to know where to go to seek redress – whistleblowing detriment claims are often brought alongside other claims (unpaid wages, discrimination etc.) and having to go both to tribunal and Commission may be costly and duplicate resources. This final issue is a key difference between Protect's Whistleblowing Commissioner and Baroness Kramer's Office of the Whistleblower in that the latter offers a route to compensation for the whistleblower, while not looking to amend PIDA. Protect's Bill creates a powerful whistleblowing regulator while reforming PIDA without throwing the whole protection regime out of the window, as Dr Whitford MP's Bill does.

We believe both PIDA and the Commissioner can co-exist together, in fact a reformed set of legal protections with a powerful independent regulator would deliver more robust legal protection for whistleblowers. We are also concerned that legislation may be passed repealing PIDA but without the new Commission yet formed – leaving whistleblowers in a worse position than now.

Wider scope – protecting more people

Protect's Bill and Dr Whitford MP's Bills extend the protection to groups of workers currently excluded such as job applicants, non-executive directors, foster carers, priests and clergy, volunteers. These are groups of workers (even though many are unpaid) who are encouraged to raise whistleblowing concerns yet lack a path to protection under PIDA.

However, Protect remain sceptical about extending the definition of whistleblowing beyond the workplace – as called for in Dr Whitford's Bill. Parents, relatives, customers and service users may lack that inside knowledge which a whistleblower has access to, and are not vulnerable to retaliation or losing their jobs in the same way that workers are. Including non-worker groups may completely undermine current protections or systems designed that currently exist for these groups. However, we do recognise that those related to or connected with a whistleblower may suffer as a result and believe that they too should be able to seek redress.

Protect's Bill offers a solution by having a separate legal action for third parties affected by a whistleblower's disclosure: we believe this would cover circumstances where family members, partners etc. are victimised for the disclosure a whistleblower connected to them personally.

Widening the definition of wrongdoing

We also fully support the extension of the wrongdoing covered by whistleblowing protection so that it would also cover reckless financial speculation, the gross waste or mismanagement of public funds and a serious misuse or abuse of authority. These kinds of concerns are often raised by callers on Protect's advice line, but are not covered by PIDA – both Dr Whitford MP and Protect's Bills seek to extend the scope of *what* a whistleblower can raise, as well as *who* can be a whistleblower.

Conclusion

This article aims to highlight where there are similarities in the approaches taken in the bills (e.g. the creation of a regulator for whistleblowing) and where there are differences (e.g. criminal sanctions, repeal of PIDA). Protect is willing to work with others on their proposals for reform to whistleblowing law and protection.

Protect will be briefing MPs in advance of the Second Reading of Dr Whitford MP's Bill (Public Interest Disclosure (Protection) Bill) on 25 September. We are also grateful to those of you who have made comments and suggestions on our draft Bill. We're looking at taking the best comments and proposals in these draft Bills and hope to relaunch our own draft this autumn.