

**Whistleblowing Reforms: Are Whistleblowers Better Protected?**

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IER Conference: The Enterprise and Regulatory Reform Act: impacts and effects  
London, 15<sup>th</sup> July 2014

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Nolan 'Second Report of the Committee on Standards in Public Life', 1996.

All organisations 'face the risk of things going wrong or unknowingly harbouring malpractice'

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**Definition of Whistleblowing**

The deliberate non-obligatory disclosure of public interest information by a worker, whether internally or externally, by voicing concerns or making an allegation of serious malpractice or wrongdoing

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### YouGov Poll 2013

In a poll commissioned by Public Concern at Work:

- In a two year period to 2013 – One in 10 workers (10% ) said they had concerns about possible corruption, danger or serious malpractice at work
- Of these workers – 66% raised their concern with their employer

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### Response to BIS Consultation November 2013

“The unique status and benefits of whistleblowing should be acknowledged by effective legal protection for those workers who expose wrongdoing. This Response reflects the view that although the *Public Interest Disclosure Act 1998* (PIDA) was enacted to provide a ‘comprehensive whistleblowing protection framework’, it is in need of reform.”

IER Response to BIS Consultation

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### Protection from Disclosure: Public Interest Disclosure Act 1998

The *Public Interest Disclosure Act (PIDA) 1998*, came into force on 2 July 1999 and amended the *Employment Rights Act (ERA) 1996* to provide statutory protection to whistleblowers against dismissal and victimisation if they disclose information in respect of their employer’s criminal, dangerous or damaging activities.

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### Protected Disclosure (as enacted by PIDA)

- A 'protected disclosure' is a 'qualifying disclosure' under s 43B of the Employment Rights Act 1996.
- A qualifying disclosure is a **disclosure of information** which, in the **reasonable belief** of the worker making the disclosure, **relates to the following** –
  - (a) a **criminal offence**
  - (b) failure to comply with a **legal obligation**
  - (c) a **miscarriage of justice**
  - (d) **health or safety**
  - (e) **environment**
  - (f) deliberate concealment of **any matter falling within any one of the preceding paragraphs**

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### Remedies

- Not to be subjected to a detriment
- Automatic Unfair Dismissal
- Unlimited Compensation

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### Enterprise and Regulatory Reform Act 2013

- Three main reforms:
- Section 17 – Introduction of Public interest duty (amends section 43B ERA 1996)
  - Section 18 – Removal of condition of 'good faith' from liability to remedy stage of proceedings (amends sections 49 & 123 ERA 1996)
  - Section 19 – Vicarious liability – protects whistleblowers from victimisation by co-worker or agent of an employer for making a protected disclosure (amends section 47B ERA 1996)

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### Public Interest Duty

A worker will now have to show that they have a 'reasonable belief' that the disclosure of information –

- 'was made in the public interest' and
- it falls into one of the six protected categories of information.

The restrictive public interest duty presents further barriers to workers who suffer victimisation or are dismissed for raising concerns at work

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### Section 43(B) as amended by ERRA 2013

■ A 'protected disclosure' is a 'qualifying disclosure' under s 43B of the Employment Rights Act 1996.

■ A qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making the disclosure, was made in the public interest and relates to the following –

- (a) a criminal offence
- (b) failure to comply with a legal obligation
- (c) a miscarriage of justice
- (d) health or safety
- (e) environment.
- (f) deliberate concealment of any matter falling within any one of the preceding paragraphs

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### Reduction for bad faith

Sections 49 and 123 of the ERA 1996 (as amended) allow an employment tribunal to reduce compensation for victimisation or unfair dismissal by up to 25% if the protected disclosure 'was not made in good faith'.

A whistleblower may have mixed motives in raising a concern, but the fundamental issue is whether a disclosure is in the public interest.

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### Vicarious Liability

Section 47B of the ERA 1996 is amended to impose vicarious liability upon an employer for any detrimental treatment carried out by its employees or agents. It is immaterial whether the action was taken with the knowledge or approval of the employer, but there is a defence if the employer can show that they took 'all reasonable steps' to prevent such action.

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### The Public Interest Disclosure (Prescribed Persons) Amendment Order 2014

- Came into force on 6<sup>th</sup> April 2014
- amends the Schedule to *the Public Interest Disclosure (Prescribed Persons) Order of 1999* (List of Prescribed Persons)
- List of Prescribed Persons to whom a whistleblower can make a protected disclosure now includes Members of Parliament

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### Clyde & Co LLP v Bates van Winkelhof

On 21<sup>st</sup> May 2014 the Supreme Court held a solicitor, Bates van Winkelhof, a member of a Limited Liability Partnership (a fixed-share equity partner of a firm of solicitors) was a 'worker' within the meaning of section 230(3)(b) of the ERA 1996 for the purposes of the whistleblowing provisions within the ERA 1996.

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### Lady Hale (Leading judgment)

“In my view, the appellant clearly is a “worker” within the meaning of section 230(3)(b) of the Employment Rights Act 1996 and entitled to protection of its whistleblowing provisions.

That conclusion is to my mind entirely consistent with the underlying policy of those provisions, which some might think is particularly applicable to businesses and professions operating within the tightly regulated fields of financial and legal services.”

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### Consultations 2013

- Whistleblowing Commission: Strengthening Law and Policy, - consultation completed June 2013 (Report November 2013)
- Department for Business Innovation & Skills, *The Whistleblowing Framework: Call for Evidence*, July 2013 – consultation completed November 2013

IER responded to both Consultations – Response papers available on IER Blog

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### BIS ‘Whistleblowing Framework: Call for Evidence’, Government Response, June 2014

“The Government has recognised the importance of whistleblowing in the workplace to raise concerns about wrongdoing and as an effective tool in the fight against fraud, corruption and malpractice.”

(BIS *Whistleblowing Framework: Call for Evidence*, Government Response, Introduction, page 8)

But has it in its limited and weak response?

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## Lord Touhig 2013

“In its current form, PIDA is dangerous for whistleblowers because people think they have stronger protection under it than they actually do.”

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## Conclusion

“The unique status and benefits of whistleblowing should be acknowledged by the law and the judiciary.”

Hobby, 2010 *Public interest whistleblowing: 12 years of the Public Interest Disclosure Act 1998*

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