AN IER RESPONSE

Whistleblowing Commission: Strengthening Law and Policy

Submission Public Concern at Work's Whistleblowing Commission

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By

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INTRODUCTION

This response reflects the view that the *Public Interest Disclosure Act 1998* (PIDA), enacted to protect and promote public interest whistleblowing, is failing in its purpose. The unique status and benefits of whistleblowing should be acknowledged by effective legal protection of this in practice. This consultation is welcomed as an urgent review of PIDA is required to provide employment security to those who act in the public interest.

Recent reports and scandals, such as the 2013 reports of the Francis Inquiry into high mortality rates and standards of care provided by Mid-Staffordshire NHS Foundation Trust[1] and the report of the Parliamentary Commission on Banking into the events leading to the rescue of HBOS by Lloyds TSB in 2008, demonstrate the continuing value of workplace knowledge. Both reports reveal that in each organisation workers were aware of the failings of management, but failed to speak up or spoke up only to be ignored. In particular the Francis report recorded incidents of workers raising unheeded concerns on numerous occasions. The focus of this response is upon the rights of workers and the need to ensure effective protection to those who raise public interest concerns.

SECTION A: ENCOURAGING WHISTLEBLOWING WITHIN ORGANISATIONS

Question 1: How can we embed good practice whistleblowing arrangements in all sectors of the UK? For example, should they be mandatory?

1.1 Whistleblowing is in the public interest and clearly for the collective good. It is therefore important that all organisations establish and maintain effective whistleblowing procedures. Although the adoption of a whistleblowing policy is not a statutory requirement, the existence of a policy is an expectation of public bodies and a requirement of a number of larger private companies. To ensure consistency and to protect every worker, PIDA should require all organisations in both the public and private sectors to implement whistleblowing guidance and procedures. A prescriptive approach has merit. A mandatory requirement upon organisations in all sectors to provide and maintain effective whistleblowing procedures would assist individuals in the raising of concerns. Other countries do require the establishment of procedures and some also provide model procedures and guidance material. This statutory role could be performed by ACAS. An authoritative guide to a standard structure and contents could also be provided by the British Standards Institute Code of Practice.

[1] Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, 2013, Volume 1, HC 898-1 and Parliamentary Commission on Banking Standards, *An accident waiting to happen': The failure of HBOS*, Volume I, Fourth Report of Session 2012-13, 2013, HL Paper 144.

1.2 The Shipman Inquiry offered for consideration the idea that all employers are required to specify a third party to receive concerns. Such a provision could promote confidence in any whistleblowing procedure and address the position of employees in a small organisation or business that feels unable to raise issues internally.

1.3 Many organisations have established whistleblowing arrangements, but to effect change it is not sufficient for companies to provide policies protecting whistleblowers if they fail to enforce them. The British Standards Institute promotes the establishment, implementation and review of an effective whistleblowing policy as a means of risk management and effecting best practice. It views whistleblowing arrangements as a vital part of governance, but recognises that they are not a substitute for strong management, compliance and effective controls[2]. Institutions need to foster a genuine culture of openness and self awareness. As shown in written evidence of the HBOS whistleblower Paul Moore in 2009 to the Treasury Select Committee in its investigation of the banking crisis, companies can disregard their own whistleblowing procedures without incurring any penalty[3]. Moore was sacked in 2004 after repeatedly raising concerns regarding regulatory failings at HBOS in his role as Head of Group Regulatory Risk. The dramatic failure of HBOS in 2008, resulting in significant financial loses for its shareholders, employees and the taxpayer, was found by the Parliamentary Commission in Banking in 2013 to be the result of senior management failings[4]. It is ironic that at the time of his dismissal Moore was the Good Practice Manager at HBOS for whistleblowing practices. At the end of his 2009 Memorandum of written evidence to Treasury Select Committee, Moore recommended that:

> *Further development of Whistle blowing rules to make sure that those who raise legitimate concerns are not just "bought off" with shareholders money … the case should be reviewed by the regulator and action taken if necessary to ensure those responsible cannot get away scot-free*

1.4 Any mandatory requirement would have to be accompanied by penalties for compliance failure. The introduction of vicarious liability by section 19 of the *Enterprise and Regulatory Reform Act 2013* (ERRA) may provide a means of ensuring compliance. The provision imposes vicarious liability upon an employer for any detrimental treatment carried out by its employees or agents, but there is a defence if the employer can show that they took 'all reasonable steps' to prevent such action. When this beneficial provision comes into force the absence of a whistleblowing procedure or a failure to act

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[2] British Standards Institute, *Whistleblowing Arrangements Code of Practice, PAS 1998:2008*, 2008, paragraph 0.9, p 6.

[3] See House of Commons Treasury Committee, *Banking Crisis*, Volume II, Written Evidence, 2009, HC 144-II, .Ev 434.

[4] See note 1 above.

in accordance with its procedures may prevent an employer from claiming the defence. It should be noted that the provision is to come into force at a later date under delegated legislation and the Government have given no indication as to when this will be.

1.5 As recognized by the 2013 Francis Report 'openness, transparency and candour' are necessary attributes for an organisation and that a culture of openness should allow workers to raise concerns without fear. PIDA is an essential tool to promote good governance, but a legislative framework is only the beginning in establishing an open culture in the workplace and effective whistleblowing policies are a key component.

SECTION B: REWARDS

Question 2: Do you think there should be financial or other rewards for whistleblowers? What are the advantages and disadvantages? How would the rewards be funded? And what about non-financial wrongdoing?

2.1 Whistleblowing and its possible reward is an issue in a global economy in which fraud is increasingly difficult to discover. Considerable financial rewards are available under US legislation, for example the reported $104 million payment to Bradley Birkenfeld in 2012 for exposing a UBS tax evasion scheme that cost the US Government billions of dollars in lost revenue[5]. Payments to US whistleblowers by the Securities and Exchange Commission (SEC) under the Dodd-Franks financial reforms have received considerable attention as they have the potential to generate large rewards of up to 30% of the fine levied against an employer. Although such rewards are not available in the UK, the SEC could impose a fine on a UK company following a negative impact on the US financial market as in the case of Barclays which, following the Barclays Libor scandal, was required to pay $360 million in US fines. There is an argument that whistleblowers should share in any sums recovered as a result of their disclosure or any fines levied upon their organisation.

2.2 Financial rewards may be provided when any wrongdoing is on the part of a private corporation, but will be unachievable if the worker blows the whistle on Government or a Governmental body. The rewards gained by US whistleblowers contrast starkly with the treatment of the UK whistleblower, Osita Mba. In 2011 Mba, a solicitor, wrote in confidence to the National Audit Office and two Parliamentary Committees alleging that HM Revenue and Customs (HMRC) had come to a 'sweetheart' deal with Goldman Sachs resulting in the loss of £10 million interest. Despite voicing legitimate concerns regarding such schemes, the HMRC's Criminal Investigation Unit used serious tax fraud investigatory powers under the *Regulation of Investigatory Powers Act 2000* to investigate Mba and treated him as a

[5] See *The Financial Times*, 21st September 2012.

'suspect'. It searched Mba's belongings, e-mails, internet searches and phone calls, as well as the phone calls of his wife, and cross-referenced them with the phone numbers and e-mail addresses of a reporter for the Guardian, David Leigh, who had reported on the story. No evidence of any contact was found and Mba was suspended after members of the Public Accounts Committee warned Revenue officials not to victimise him. As recognised by Cathy James of Public Concern at Work:

> '*The actions of the HMRC in this case are very much a step in the wrong direction, more likely to result in a culture of silence with more anonymous leaking than anything else. It is a case of shoot – and silence – the messenger*[6]

Subsequent to the revelations of Mba, documents leaked in April 2013 revealed that four such settlements between tax officials and companies were worth £4.5 billion of lost tax. The loss of such key revenue to the taxpayer is an important concern that ultimately lost Mba his job as the HMRC investigated him rather than his concerns. Mba was offered no reward for his disclosures nor were his concerns addressed.

2.3 Offering financial rewards to whistleblowers raises the problematic issue of motive on the part of the individual making the disclosure. As recognised by Andrew Tyrie, Chairman of the Parliamentary Commission on Banking Standards, 'what incentivisation can you provide to whistleblowing without moral hazard.'[7] It may also create a disparity between those whistleblowers making financial disclosure that lead to the recovery of lost funds and those who highlight non-financial wrongdoing, such as risks to patient safety. In areas such as healthcare, there are no means to fund rewards or the payments of fines that does not impact on the public finances.

2.4 Most whistleblowers do not appear motivated by financial gain, but rather by a need to expose misdeeds or illegality. A very recent example is the case of Edward Snowden, the whistleblower who leaked documents to two newspapers apparently revealing the US National Security Agency (NSA) is running a programme called Prism that directly accesses systems of internet companies, search engines and social media including Google and Facebook to collect data on individuals. The documents appear to show that GCHQ has been supplied with intelligence from this covert operation and that Prism allows it to gain personal material such as e-mails, photos and videos without proceeding through the required legal process from internet companies based outside the UK. These allegations have implications for the accountability and transparency of Government and its intelligence services, as well as the protection of fundamental human rights such as the right to privacy. In defence of his actions Snowden stated that

[6] Reported in The Guardian, 30th April 2013.
[7] Reported in *The Financial Times*, 29th October 2012.

'*My sole motive is to inform the public as to what is done in their name and that which is done against them*[8]

He claims his actions were to stop the US Government from destroying 'privacy, internet freedom and basic liberties' and that his 'greatest fear' regarding the outcome of his disclosures is that nothing will change. Snowden fled to Hong Kong after disclosing the documents and is currently in hiding.

2.5 The most appropriate reward for workers exposing wrongdoing would be first to protect them from victimisation or dismissal and even prosecution and extradition in the case of some whistleblowers such as Edward Snowden. Secondly, the most substantial reward would be to ensure their concerns are heeded and acted upon. As shown by a recent research project by the University of Greenwich and Public Concern at Work, the most likely response to the typical whistleblower who raises a concern internally is 'no response from management'. A junior worker is more likely to be ignored and those in a senior role are more likely to be dismissed.[9]

SECTION 3: LAW

Effectiveness of PIDA

Question 3: Do you think the Public Interest Disclosure Act is working? Are there any ways in which it can be simplified or improved?

3.1 After 15 years there are calls for the overhaul of PIDA on the grounds that it is failing to protect whistleblowers. The purpose of the Act was to encourage workers to inform their employers about wrongdoing internally and protect them if they did so. The legislation has failed in both its objectives. The founders of Whistleblower UK, an organisation launched by whistleblowers and supporters in December 2012, are of the view that the 1998 Act has failed to protect 'countless whistleblowers'. Further, Lord Touhig, who was involved in the drafting and consultation stages of the 1998 Act, is of the view that the current legislation is

'dangerous for whistleblowers because people think they have stronger protection under it than they actually do'.[10]

3.2 The Act does not use the more widely understood term whistleblowing in its protective provisions provided by inserting a Part 1VA into the *Employment Rights Act 1996* (ERA 1996), but relies on the term 'disclosure'. This is a problematic term and the intricacy of the public interest principle is reflected

[8] Interview in The *Guardian*, 10th June 2013.
[9] University of Greenwich and Public Concern at Work, *Whistleblowing: The Inside Story*, 2013.
[10] Reported in *The Guardian*, 16th February 2013.

in a convoluted three-tiered structure of the Act that places additional hurdles on a potential whistleblower with each tier of protection. The Act's complexity impedes the raising of legitimate concerns as workers are unable to understand the legislation and its application to them. In light of widespread acceptance that whistleblowing is a valuable resource any protective provisions should be accessible.

Question 4: Should wrongdoing be more broadly defined within PIDA? Are there any other categories which should be added?

4.1 The six categories of wrongdoing protected under section 43B of the ERA 1996 form a restricted list. If information does not fall within one of the categories then it will not be a protected disclosure and a whistleblower will fail at the first hurdle in a claim under PIDA. The classification sets out a definitive list which does not provide a final catch-all provision that might refer to 'any other matter of public interest'. As discussed below, a test of public interest has now been enacted by the ERRA not to extend the protected categories of wrongdoing, but to provide further restrictions upon whistleblowing claims. By inserting a 'public interest' duty into section 43B of the ERA 1996 which defines those disclosures that qualify for protection, 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* that it falls into one of six existing categories of qualifying information. A better reform might have been simply to require a worker to show the disclosure was in the public interest without also relating to a specific area of information. However the benefit of providing express categories is that they provide certainty and some guidance to a worker who is unsure whether their concern is a public interest matter. A better provision would be the use of specific categories followed by 'or any matter of public interest' and the removal of the preceding public interest requirement.

4.2 New categories that could be included are financial irregularity and misuse and abuse of authority but a key reform would be a final catch-all provision of 'any other matter of public interest'.

Recent Reforms

Question 5: Do the Government's amendments to the public interest test and to good faith achieve a fair balance between employer and employee interests?

6.1 There is an obvious conflict between the employer's interest in confidentiality of organisational affairs and the exposure of wrongdoing. PIDA was designed to achieve a balance between the employer's interest in maintaining confidence and the public scrutiny of a range of malpractice and illegality. Before the enactment of the ERRA the balance was clearly tilted in favour of the employer and the

enactment of the 'public interest' test and the amendments to the good faith requirements enacted by the 2013 Act are significant changes to PIDA. The provisions in sections 17 and 18 of the ERRA are piecemeal and were undertaken without a full review of the 1998 Act. Overall the worker is disadvantaged by the changes.[11]

Public Interest

6.2 Whistleblowing is in the public interest but demanding workers overcome an additional statutory definition of public interest results in a number of problems. It will generate considerable uncertainly as the test further exposes a claimant to the dangers of restrictive judicial interpretation that often fails to act in accordance with the spirit of PIDA. A whistleblower will now have to show that their disclosure is both in the public interest and falls within one of six specified categories of protected information. The classifications all cover public interest concerns relating to a criminal offence, a breach of a legal obligation, a miscarriage of justice, risk to the health and safety of an individual, damage to the environment and the deliberate concealment of information. The overlap between these and the public interest obligation will create further confusion regarding the complex three-tiered legislative regime that already sets out a number of procedural burdens for claimants to overcome. It is recognised that the new condition of public interest seeks to overturn the 2002 Employment Appeal Tribunal judgment in *Parkins v Sodexho* which broadly interpreted the 'failure to comply with a legal obligation' category to include legal obligations arising from a contract of employment. The Explanatory Notes to the ERR Bill justified the imposition of this new requirement as a means of excluding personal rather than public interest disclosures. However a concern arising out of an individual contract term may still raise public interest issues regarding an employer's compliance with employment or safety laws. The restrictive public interest duty presents further barriers to workers who suffer victimisation or are dismissed for raising concerns at work.

Good faith

5.3 The duty of good faith has been much criticised and its repeal has been called for by both academics and professionals. Dame Janet Smith in the Shipman Inquiry questioned whether good faith should be omitted as the 'incrementally exacting requirements' of PIDA were sufficient discouragement to malicious and unfounded claims. The partial removal of the condition of good faith to the calculation of compensation is an advance although its total repeal would be more welcome. The focus should be on the value of the information disclosed and not the motive of the whistleblower. A whistleblower may have mixed motives in raising a concern, but the fundamental issue is whether a disclosure is in the public interest. If a tribunal allows employers to challenge the motives of the messenger then important warnings of wrongdoing may be lost.

[11] See The Institute of Employment Rights, *The Enterprise and Regulatory Reform Act Res*ource, 2013

5.4 The ERRA also introduced personal liability for co-workers and agents by amending section 47B of the ERA 1996 to provide a right not to be subjected to any detriment by any act, or failure to act, on the part of another worker or agent of the employer. As discussed above, the provision also imposes vicarious liability upon an employer for any detrimental treatment carried out by its employees or agents. It is notable that the imposition of the public interest test and the reduction of damages for bad faith, both of which restrict the rights of whistleblowers, will be effective from 25th June 2013; however, no date has yet been set for the introduction of vicarious liability that benefits those who raise concerns in the workplace.

5.5 For reasons stated above the answer to Question 5 of the Consultation Paper is "no".

Definition of Worker

Question 6: Should there be a broader, more flexible definition of worker within PIDA to deal with the many different types of worker and working arrangements? Are there any categories of persons not now covered which ought to be?

6.1 A broader and more flexible definition of worker is required to meet increasingly flexible working arrangements and work practices to ensure PIDA has maximum coverage and protects all those at work. As identified by the Consultation Paper the failure to include special groups who may be the recipients of important concerns such as foster carers and ministers of religion are 'potentially significant omissions'.

6.2 The exclusion of the intelligence and security services, GCHQ and the armed forces is unwarranted, particularly as it is a blanket exclusion without any reference to national security or whether the disclosure is internal or external. Cases such as that of Katherine Gun, Derek Pasquill and David Keogh, as well as the recent revelations of Edward Snowden, have shown that workers in these areas can be aware of substantial wrongdoing and illegality. The omission of the intelligence and security services or GCHQ from the protective provisions of PIDA may prevent Government misdeeds being subjected to public scrutiny.

6.3 While the civil service does come within the provisions of PIDA, a civil servant will lose the protection of the Act if they commit an offence under the *Official Secrets Act 1989* by making a disclosure. The complex and detailed 1989 Act is unduly harsh upon civil servants by not providing a public interest defence. Recent cases have shown that whistleblowers can also be prosecuted for the common law offence of misconduct in public office. All civil servants must adhere to the statutory Civil Service Code that expressly provides that they may not disclose information without authority. This may conflict with the civil service values requiring all civil servants to carry out their duties with 'integrity, honesty, objectivity and impartiality' as these values may compel a civil servant to disclose

the misdeeds of Government. Leaks may be an expected hazard for Government, but it must be recognised that those who disclose official information, despite fear of dismissal and prosecution, do so because they believe it is justified in the public interest to do so. At times those in Government may be in error or guilty of incompetence, misconduct, dereliction of duty, malpractice, breach of human rights, misdeeds and even illegality. PIDA must provide protection for those who make wrongdoing public and should extend to civil servants.

Question 7: Should a worker who has been wrongly identified as having made a protected disclosure be entitled to a claim under PIDA?

7.1 If whistleblowing is of value then PIDA should provide extensive protection to all those workers who are victimised on the grounds of whistleblowing whether wrongly or correctly identified by an employer for having made a protected disclosure. There is no reason to distinguish between a genuine whistleblower and a worker wrongly accused if the worker suffers detrimental treatment. Employers should not be permitted to inflict reprisals for whistleblowing nor defend their actions by arguing that they targeted the wrong worker.

7.2 For reasons stated above the answer to Question 7 of the Consultation Paper is "yes"

Blacklisting

Question 8: Should a job applicant be entitled to claim against a prospective employer if refused employment because of a previous protected disclosure?

8.1 Blacklisting is a significant employment issue that has received limited attention. The Institute for Employment Rights have campaigned on the issue of the blacklisting of trade unionists for some time[12]. Whistleblowers also face being blacklisted for blowing the whistle. The treatment of the whistleblower Gary Walker demonstrates the difficulty whistleblowers can face in finding another job within their profession or industry. On publication of the final report of the Inquiry into high mortality rates and standards of care provided by Mid-Staffordshire NHS Foundation Trust, Gary Walker, the former chief executive of United Lincolnshire Health Trust (ULHT) gave an interview to BBC Radio 4 Today programme. Walker revealed that he was gagged, threatened and prevented by ULHT from raising patient safety concerns. ULHT is one of 14 English NHS trusts being investigated for high death rates following the scandal in Mid-Staffordshire. He spoke out despite signing a confidentiality clause in April 2011 in settlement of his case for unfair dismissal. Even if whistleblowers do settle their claims there are continuing dramatic consequences as many are unable to work again within their industry or profession. As Walker said:

[12] See Ewing, *Ruined Lives – Blacklisting in the Construction industry*, A Report for UCATT, 2009.

So I spent 20 years in the health service and I'm blacklisted from it. I can't work in the health service again

8.2 In its failure to cover blacklisting, PIDA allows an employer to refuse employment to a prospective applicant with a history of whistleblowing and the whistleblower will have no cause of action. As recognised by Ward LJ in Woodward v Abbey National plc[13], it would be 'palpably absurd and self-evidently capricious' to protect a whistleblower only in relation to acts done in retaliation during employment and not afford protection from detriment after employment has been terminated. Whistleblowers need to be protected from post-termination victimisation by former employers, but also from prospective employers.

8.3 For reasons stated above the answer to Question 8 of the Consultation Paper is "yes"

Prescribed Persons

Question 9: Should there be a broader, more flexible definition of prescribed persons within PIDA? Are there any types of prescribed persons not now covered that ought to be?

9.1 A broader and more flexible definition of prescribed persons under PIDA would be beneficial to whistleblowers, as existing arrangements are complex and confusing for a potential claimant. The Consultation paper recognises that a number of regulatory bodies are not included in the current list provided under Regulations. Parliamentary Committees are excluded, but as demonstrated by the case of Osita Mba who passed his concerns about tax deals struck by HMRC to two parliamentary committees, they are valuable means of investigating important concerns. The omission of the police, Crown Prosecution Service and Members of Parliament is significant as these are all appropriate persons with whom to raise concerns. The exclusion of the police in particular is difficult to justify when the disclosures relating to crimes are a protected area of disclosure. A number of bodies are also omitted that regulate legal, medical, nursing and financial professions. Recent reports such as those into Mid-Staffordshire NHS Foundation Trust and the collapse of HBOS have demonstrated the importance of a worker being able to raise concerns externally when their employer will not listen. In the Fifth Report of Shipman Inquiry[14], its author Dame Janet Smith recommended that the General Medical Council be included in the list of prescribed persons. She also expressed concern that the wording of section 43F of the ERA 1996, in its requirements that a worker demonstrate 'a reasonable belief' and that the allegation is 'substantially true' in disclosing to a prescribed

[13] [2006] EWCA Civ 822.

[14] Shipman Inquiry, Fifth Report, *Safeguarding Patients: Lessons from the Past – Proposals for the Future*, Chapter 11: 'Raising Concerns: the Way Forward', 2004, Cm 6394.

person, are too onerous. The list of prescribed persons should not be a closed list that requires constant updating, but instead a more flexible and inclusive definition should be provided.

9.2 Trade Unions should be expressly included within any definition of prescribed persons. Trade unions can provide significant support and advice to a member who is considering blowing the whistle. As a trade union is not a prescribed person, any worker expressing concerns to a union official will be deemed to have made an external disclosure which will have to satisfy the onerous conditions of section 43G or section 43H of the ERA 1996. Any proposed extension of prescribed person should include trade unions in general who could then properly raise concerns on behalf of their whistleblower.

9.3 Further, the role of trade unions should be recognised by other provisions of PIDA. A trade union official may be the first person with whom a worker raises a concern. Indeed officials may even be victimised for voicing the concerns of its trade union members. A disclosure to a third party in accordance with a whistleblowing procedure established by an employer would only extend to a trade union representative if this is expressly stated in the procedure. If the trade union is not recognised at the workplace or the procedure does not include a role for officials then a disclosure will not be protected. Also, in relation to disclosures made by a worker in the course of obtaining legal advice, under section 43D of the ERA 1996 protection may not cover advice given by a trade union. It is not clear that the legal professional privilege provisions extend to trade union officials unless they are legally qualified. Before the enactment of PIDA, the TUC recommended that section 43D cover both 'legal and professional' advice and so include advice by a union representative. This simple amendment would protect trade unions and members. PIDA should also provide a right not to be victimised for officials who voice concerns on behalf of their members. The Act should recognise the part trade unions play in advising their members and the raising of worker concerns.

Disclosures to the Media

Question 10: Should there be different protection for those who go to the media?

10.1 As shown by the case of Edward Snowden discussed above, some whistleblowers believe they have no option but to take their concerns to the media. Snowden considered he had to make his concerns public as he raised them at work, but they were 'shrugged off'. He states he 'carefully evaluated every single document' he disclosed to ensure it was 'legitimately in the public interest'[15] and that there were other documents he did not disclose that would have created a big impact but would have harmed individuals.

[15] Interview in The *Guardian*, 10th June 2013.

10.2 It can be argued that raising a concern internally is not whistleblowing, and a distinction should be made between internal and external disclosures. However, external disclosure is at times justified and the complex and detailed provisions of sections 43G and 43H of the ERA 1996 preclude accessibility and impede a worker from making an informed choice whether to disclose.

Causation

Question 11: Should the causation test for unfair dismissal be the same as the test for detriment in whistleblowing cases?

11 Cases have demonstrated that the issue of causation has caused difficulties for claimants. A single test for both detriment and dismissal would simplify the proceedings and provide clarity.

Interim Relief

Question 12: Should a worker be able to obtain interim relief in detriment claims?

12 As stated above with regard to causation, a distinction should not be made between a worker who suffers detriment or dismissal and interim relief should be available to both.

Gagging Clauses

Question 13: Is the protection related to gagging clauses in section 43J PIDA clear enough? Are people appropriately advised about this aspect of compromise agreements?

13.1 Although any clause in a settlement or compromise agreements preventing protected disclosures is void under section 43J of the ERA 1996, there is a lack of clarity and even confusion regarding 'gagging clauses'. In recognition of this confusion the ERRA provides the word 'settlement' should be substituted for 'compromise' agreements or contracts in a number of legislative provisions including the ERA 1996[16]. The renaming of the relevant document will not ensure whistleblowers can raise their protected concerns despite settling their case. Few whistleblowers appear aware of section 43J. Both Gary Walker and Paul Moore were of the view that they were breaking the confidentiality clause in their settlements of unfair dismissal claims by speaking out. They took the brave step despite their belief they had breached their agreements. Other whistleblowers may not break silence even if entitled to do so. The lack of understanding regarding the status of gagging clauses is shown by many and is

[16] Section 23 of the ERRA 2013.

demonstrated by the threats to Walker by his former employer after speaking out.

13.2 This is a significant issue as gagging clauses are widely used in settlement of whistleblowing claims. Figures released by the Conservative MP, Steve Barclay, reveal that £2 million has been spent on gagging NHS workers since 2008. In 2011/12 there were 2,500 PIDA claims to an employment tribunal but it appears that over 75% were settled with the result that relevant underlying allegations were not exposed or addressed.

SECTION D: REGULATORS

Question 14: Should regulators take an interest in the whistleblowing arrangements of the organisations they regulate? Do they make adequate use of information brought to them via whistleblowing? Should regulators do more to protect whistleblowers?

14 Regulators need to take a more proactive role with regard to overseeing whistleblowing procedures and acting upon information they receive from whistleblowers. The report of the Parliamentary Commission into Banking highlighted the failure of the Financial Services Authority to act upon concerns relating to the managements of HBOS and this had disastrous consequences. The 2010 *Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations* (2010 Regulations) allow an employment claim, or part of it, to be sent to a prescribed regulator if the claimant consents. If a claimant takes this step then PIDA should ensure uniform principles for the investigation and feedback of these claims.

SECTION E: OMBUDSMAN

Question 15: Should the UK set up a whistleblowing ombudsman service? If yes, what could this look like (an ombudsman for each sector or an overarching ombudsman)?

15.1 A key recommendation of the Shipman Inquiry was that a national service advising whistleblowers be established. This is clearly appropriate in light of the complexity of the provisions of PIDA and its inconsistent judicial application. This could take the form of an ombudsman, but if this route is taken then there should be a single ombudsman established as providing ombudsmen for different sectors will be inaccessible. The creation of an ombudsman would be important as there is a clear role for one central body to receive disclosures and oversee the investigation of them. As well as providing a means to report and investigate concerns, whistleblowers should be able to rely upon any agency to also access advice and counselling in respect of any action taken against them. An ombudsman may not be the appropriate body to provide this.

15.2 There is clearly a role for a national whistleblowing agency that performs the functions discussed above, but which also monitors and reviews the law, as well as promoting awareness of it. There is already a limited awareness of PIDA and a national agency could generate knowledge and understanding. In a poll commissioned by Public Concern at Work in 2011 85% of people polled said they would raise a concern regarding possible corruption, danger or serious malpractice at work with their employer but 56% did not know if there was a law that protected whistleblowers and a further 21% claimed no knowledge of such law.

SECTION F: TRIBUNALS

Specialist Tribunals

Question 16: Should there be specialist tribunals or specialised judges for PIDA claims?

16 Claims under PIDA are relatively rare. As recognised by the Consultation Paper, claims under the Act constitute less than 1% of all claims to employment tribunals, but they are 'usually complex and lengthy'. A number of judgments demonstrate a judicial restriction of the provisions of the 1998 Act designed to promote public interest whistleblowing. There is an argument for the use of specialist judges within a specialist tribunal to hear complaints, but the different treatment of such claims will have to be justified by the special nature of deliberate non-obligatory disclosure of public interest information by a worker. PIDA claims raise issues that affect the wider public interest beyond the individual claim of a worker blowing the whistle, but this Response recognises this can be claimed by other areas such as equality.

Open Register of Claims

Question 17: Should there be an open register of PIDA claims?

17 An open register of PIDA claims should be restored. As mentioned above, the 2010 Regulations do allow underlying allegations in a PIDA claim to be referred to a prescribed regulator with the consent of a complainant. However the necessity of consent for the forwarding of claims by actively ticking a 'yes' box means that the important information contained in a PIDA claim may be lost. As also stated above, 75% of PIDA claims are settled and so important concerns may never be examined. There is a clear public need for transparency regarding public interest claims under PIDA and an open register would promote open justice and the addressing of worker concerns.

Mandatory Referral

Question 18: Should the referral of PIDA claims to a regulator be mandatory?

18 As discussed above, at present the referral of PIDA claims is voluntary with the result that important information may not be passed to the regulator for investigation. The necessity of consent and guidance accompanying the claim form makes it clear that an individual can preserve confidentiality. A claimant may simply forget to tick the box with the result that their investigations are not addressed. One option would be for there to be an 'opt out' box to generate transparency and still retain the right of the claimant not to raise the matter with the regulator. However, the mandatory referral of PIDA claims would guarantee all concerns are investigated. Requiring consent to a referral is contrary to the objectives of the 2010 Regulations. In consultation on proposals to introduce the Regulations in 2009, the Department for Business, Innovation and Skills acknowledges that while an employment tribunal hears an employment claim and passes judgment, it 'does not make any assessment or take any action on the issue of the underlying PIDA allegation' which could relate to a number of areas of wrongdoing including fraud, health and safety and financial irregularities.[17]

Exemption from fees

Question 19: Should PIDA claims be exempt from employment tribunal fees?

19 The new mandatory fees for claimants to employment tribunals are high and impede claimants. Tribunals were originally created as a 'simple, cheap and accessible'[18] forum for workers to bring claims to, but this is completely undermined by the employment tribunal reforms of the Coalition Government. If whistleblowing is to be regarded as in the public interest there is a strong argument for exempting PIDA claims from employment tribunal fees.

Question 20: Should the Employment Tribunal have the power to make recommendations and levy fines in PIDA claims? If so, how?

20 If specialist tribunals are established there are arguments that they should be given powers to make recommendations and levy fines.

Question 21: Should the ET have the power to refer regulatory or criminal matters to the appropriate authority(ies)?

[17] Department of Business, Innovation & Skills, *Consultation: Employment tribunal claims and the Public Interest Disclosure Act*, 2009, p 3.

[18] See Renton & Macey, Justice Deferred: a critical guide to the Coalition's employment tribunal reforms, 2013.

21 If transparency is to be ensured there are strong grounds for employment tribunals, particularly if specialist, to have the powers to refer regulatory or criminal matters to the appropriate body for investigation.

CONCLUDING COMMENTS

Please let us know if you have any other comments about whistleblowing or the consultation itself. The Commission would be very interested if you have any positive examples of where whistleblowing has worked well from the perspective of the whistleblower or the organisation receiving the whistleblowing report.

A radical reform of PIDA is required to provide effective safeguards to those who blow the whistle[19]. The 1998 Act may have given some assistance to workers victimised for raising public interest concerns, not least in the settlement of claims, but amendments are required to ensure the protective provisions are effective. If workers are not fully protected they will fear blowing the whistle and allegations of malpractice, illegality, abuse, financial irregularity, and misdeeds will be lost.

The Consultation Paper is extensive, but it does not examine whistleblowing from a human rights perspective. The Convention right to freedom of expression (Article 10 of the European Convention on Human Right (ECHR)) is a qualified right which is subject to a number of restrictions and conditions, and the Leveson Inquiry has highlighted its conflict with the Convention right to respect for a private life (Article 8 of the ECHR). However, recent case law from the European Court of Human Rights is very supportive of the essential democratic qualities of the right to freedom of expression, and this may allow some impetus to the advancement of a right to disclose. The promotion of whistleblowing as a human right should be explored.

This response welcomes this consultation as a means to inform policy and legislative changes but in the current political climate it is doubtful whether the necessary reforms will be undertaken, as it appears that the Coalition Government lacks a commitment to worker rights. Indeed, it is enacting a number of reforms that make the position of whistleblowers, and other workers, more vulnerable.

[19] See Hobby, *Public interest whistleblowing: 12 years of the Public Interest Disclosure Act 1998*, *2010,* Liverpool: The Institute of Employment Rights.