AN IER RESPONSE

The Whistleblowing Framework: Call for Evidence

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By

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The Whistleblowing Framework: Call for Evidence

INTRODUCTION

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. At present, the Act is failing in its enacted purpose of protecting and promoting public interest whistleblowing, despite the reforms enacted by the *Enterprise and Regulatory Reform Act* 2013 (ERRA). This consultation is welcomed, as further reforms of PIDA are required to provide employment security to those who act in the public interest by exposing wrongdoing.

As on the enactment of PIDA, recent reports, such as that of the Francis Inquiry into high mortality rates and standards of care provided by the Mid-Staffordshire NHS Foundation Trust[1] and the Parliamentary Commission on Banking into the events leading to the rescue of HBOS by Lloyds TSB in 2008[2], again demonstrate the significance of workplace knowledge. Whistleblowers should be protected and encouraged to raise public interest concerns. As recognised by the Foreword to the Consultation paper, legislation 'is only one way' to effect a change in workplace culture, but it is an effective tool. There is an obvious conflict between an employer's interest in maintaining confidentiality and the public scrutiny of a range of wrongdoing. 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 1: CATEGORIES OF DISCLOSURE WHICH QUALIFY FOR PROTECTION

Question 1: Are these categories sufficient to capture all potential instances of wrongdoing that may require public disclosure? Yes or No

For reasons stated below the answer to Question 1 of the Consultation paper is "No".

The categories of information that qualify for protection under PIDA are insufficient and limited. The Act does not use the widely understood term of whistleblowing in the protective provisions provided by inserting Part IVA into the *Employment Rights Act 1996* (ERA), but relies on the term 'disclosure'. The six specific categories of disclosure set out in section 43B of the ERA 1996 do not capture all potential areas of wrongdoing that may require public disclosure. If the relevant information does not fall within one of the express categories then the whistleblower will fall at the first hurdle in a claim

[1] Report of the Mid-Staffordshire NHS Foundation Trust Public Inquiry, 2013, Volume 1 HC 898-1.
[2] 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.

under PIDA. The classifications form a definitive list which does not provide a final catch-all provision that might refer to any other matter of a public nature or interest.

This proposed wording might be problematic for, as stated in the Consultation paper the ERRA 2013 introduced a 'public interest' duty into section 43B to further define those disclosures that qualify for protection. A worker now has 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 the six existing categories of qualifying information. It is noted that the Consultation paper does not request evidence on the recent reforms provided by ERRA 2013, but it should be noted that the introduction of the restrictive public interest duty presents further barriers to workers who suffer victimisation or are dismissed for raising concerns at work.

Question 2: If no, what additional categories should there be? Please provide any relevant evidence to support this.

New categories that could be included are financial irregularity as well as abuse and misuse of power. A final catch-all provision with wording such as 'any other matter of public interest' and the removal of the public interest duty would be the best means of capturing all potential instances of wrongdoing and assist whistleblowers.

SECTION 2: METHODS OF DISCLOSURE

Question 3: Do these methods of disclosure affect whether a whistleblower might expose wrongdoing? Yes or No

For reasons stated below the answer to Question 3 of the Consultation paper is "Yes".

This Response does not share the view of the Consultation paper that the existing conditions protecting the disclosure of information 'work well'. The removal of the requirement of good faith by the ERRA 2013 from the liability to the remedy stage of proceedings is noted. However, the criteria that establish whether a disclosure qualifies for protection are complex and present considerable barriers to a worker who is seeking to expose wrongdoing.

Question 4: If yes, how (or why)?

As 75% of whistleblowing claims are settled it is difficult to establish to what extent the conditions adversely impact on the decision of a worker to blow the whistle. However, the experiences of individual whistleblowers indicate that the provisions have a detrimental impact. The purpose of PIDA was to encourage workers to inform their employers about wrongdoing internally and protect them if they disclosed such information. The Act has not effectively secured either objective. Whistleblowers UK was launched in 2012 by whistleblowers and their supporters on the premise that the whistleblowing framework has failed to protect 'countless whistleblowers'. Further,

Lord Touhig, who was involved in the drafting of the 1998 Act, is of the view that the current provisions are:

'dangerous for whistleblowers because people think they have stronger protection under it than they actually do'[3]

PIDA presents a convoluted three-tiered structure in sections 43C-43H of ERA 1996 that places additional burdens on a potential whistleblower with each tier of protection. The Act's complexity results in a lack of accessibility for a worker who may be considering blowing the whistle or who seeks protection under the Act. For example, section 43F of the ERA 1996 protects disclosures to certain regulators, but only if certain conditions are fulfilled. As noted by Dame Janet Smith in her Fifth Report of the Shipman Inquiry, the wording of the section, in requiring a worker to show both a 'reasonable belief' and that the allegation is 'substantially true', is too onerous[4].

Question 5: Do these conditions deter whistleblowers from exposing wrongdoing? Yes or No

For reasons stated below, the answer to Question 5 of the Consultation paper is "Yes".

Question 6: If yes, how (or why)?

The conditions do deter whistleblowers from exposing wrongdoing as significant barriers appear in the three-tiered legislative regime, particularly with regard to disclosures to non-prescribed persons in section 43G or section 43H. Under this third and final tier of protection, an external disclosure has to satisfy additional hurdles to those set out in previous sections including those concerning disclosures to prescribed persons. The complexity of the conditions is particularly illustrated by section 43G. This section provides a very detailed statutory checklist for a worker considering making a disclosure to a non-prescribed person of a matter that is not exceptionally serious. The malpractice, although not exceptionally serious may still raise serious issues, but the extensive conditions of section 43G preclude accessibility and would impede a worker from making an informed choice as to disclosure.

Question 7: Do these conditions encourage whistleblowers to expose wrongdoing? Yes or No

For reasons stated below (and in answers to questions above), the answer to Question 7 of the Consultation paper is "No".

[3] Interview in *The Guardian*, 10th June 2013.
[4] Shipman Inquiry, Fifth Report, *Safeguarding Patients: Lessons form the Past – Proposals for the Future*, Chapter 11: 'Raising concerns: the Way Forward', 2004, Cm 6394.

There is no evidence that the present conditions encourage whistleblowers to speak out. As discussed in answers to other questions in this Section, the evidence indicates the present whistleblowing framework is failing whistleblowers.

Question 8: If yes, how (or why)?

The existing conditions present considerable barriers to those claiming protection for blowing the whistle and exposing wrongdoing. It also fails to act as a deterrent to organisations which victimise workers for raising legitimate concerns. When the HBOS whistleblower Paul Moore gave oral evidence to the Parliamentary Commission on Banking in October 2012 its Chair, Andrew Tyrie commended him as a 'valuable whistleblower', but 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 a report of Commission in 2013 to be the result of senior management failings[5]. It is ironic that at the time of his dismissal Moore was the Good Practice Manager at HBOS for whistleblowing practices.

Question 9: How clear and understandable are the conditions that need to be met to ensure that the disclosure is protected?

As stated above, the conditions are not clear and easy to navigate. The complexity of PIDA 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 10: If you have answered yes to questions 3, 5, and 7 please provide any evidence you have to support your response.

As discussed above the criteria established in respect of disclosure by PIDA are complex and this is demonstrated by the difficulty employment tribunals and courts have in interpreting the provisions[6]. The complexity also allows a restrictive approach to be taken in the interpretation of key conditions such as 'reasonable belief'. The requirement was inserted into PIDA to strike a balance between the interests of a whistleblower who suspects wrongdoing and those of an employer who could be damaged by groundless allegations. In order to demonstrate a reasonable belief a worker may undertake actions to establish whether malpractice has occurred or that their concerns are reasonable. Such caution is responsible and should come within the protection of the Act. However, in the case of *Bolton School v Evans*[7] a fine distinction was made between the protection PIDA affords to a whistleblower who reasonably

[5] See 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.
[6] See Chapter 4 of Hobby *Public interest whistleblowing: 12 years of the Public Interest Disclosure Act 1998*, 2010, Liverpool: The Institute of Employment Rights.
[7] [2006]EWHC 1653; [2007] ICR 641; [2006] IRLR 500.

believes that there is wrongdoing and the exclusion of a worker who acts as an investigator to establish its existence or to show his or her concerns are reasonable. The Court of Appeal was of the view that the Act does not protect the actions of a whistleblower if they are directed towards establishing or confirming the reasonableness of a belief. The report of the Shipman Inquiry recommended the replacement of the word 'suspicion' for 'belief'. Its author, Dame Janet Smith, considered the requirement of a reasonable belief may operate against the public interest as it sets too high a threshold for protection and may prevent important concerns from being raised.

The treatment of urologist surgeon, Ramon Niekrash is just one case study that demonstrates the shortcomings of PIDA. Niekrash raised concerns about patient care as a result of a ward closure at Queen Elizabeth Hospital, Woolwich in 2005. His reporting was not welcomed and he was suspended. Although he had an unblemished career he was suspended for ten weeks while he was investigated. He was only reinstated after a vote of no confidence was threatened by senior doctors. He won a case claiming victimisation suffered following his return to work. His case demonstrates the positive impact of PIDA in that he won his case, but also the limitations of the Act. In an interview Niekrash said, with regard to his actions of informing the relevant authorities of his concerns: "It cost me £180, 000, my reputation and two years of my life". Despite winning his case, Niekrash warned people to think very carefully before blowing the whistle:

> *'Your employer won't thank you, the law won't protect you. You're on your own'.*[8]

Even if workers are able to satisfy the complex conditions of PIDA and win a claim, they have lost their job and may not work within their chosen industry again. Making a claim to an employment tribunal is not the objective of any whistleblower who seeks to have their concerns heard. PIDA provides limited incentives to organisations to heed the concerns of workers and too often whistleblowers are sacked or victimised.

The answers to all the above questions in this section reflects the view of this Response paper that PIDA is complex and this allows a judicially restrictive interpretation of the legislative provisions. Further, it fails to deter employers from victimising or dismissing their workers for blowing the whistle.

Question 11: What changes, if any, do you think are needed to the qualification conditions?

To be effective, PIDA must be accessible to all workers who are considering raising concerns regarding misdeeds or illegality within their organisation. Rather than minor amendments to Part IV of the ERA 1996, a review of all sections is required to ensure

[8] Quoted in *The Independent*, 11th April 2010.

that the correct threshold is set in respect of both accessibility and the criteria to be satisfied to gain protection under the Act.

The role of trade unions in encouraging the exposure of wrongdoing should be recognised within the provisions of PIDA. A trade union official may be the first person with whom a worker raises an allegation of illegality or misdeeds. Officials may even be victimised for voicing the concerns of their 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 allow 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 extend to 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 important part trade unions play in advising their members and the raising of worker concerns.

SECTION 3: PRESCRIBED PERSONS (I)

Question 12: Should this system be amended, to one where the prescribed person/body list can be updated by the Secretary of State without the need for statutory instrument? Yes or No

For reasons stated below the answer to Question 12 of the Consultation paper is "No".

Disclosure to a prescribed person or body is the most effective means of external disclosure. The exhaustive Schedule lists both the prescribed person to whom the disclosure may be made and the specified area of responsibility in respect of disclosures, but it does not embrace all regulators. The names and responsibilities of regulators are fluid and susceptible to reform. As discussed below a more flexible definition of a prescribed person may be a more appropriate means to access protection than a closed list.

Question 13: Do you foresee any problems with a system where the prescribed person/body list can be updated by the Secretary of State? Yes or No

For reasons stated below, the answer to Question 13 of the Consultation paper is "Yes".

An amendment to allow the prescribed persons list to be updated without the need for statutory instrument would provide a means to ensure the list is contemporary, but this

power would also empower a Secretary of State to delete prescribed persons and restrict the list without good reason.

Question 14: If yes, please explain why.

Extending the powers of the Secretary of State to update the list in the absence of a statutory instrument raises issues of accountability. Although there are limits to the scrutiny of secondary legislation, allowing amendments to be made without a statutory order would weaken scrutiny further. The more practical issue of maintaining an accurate list is also relevant but not one that should undermine these safeguards.

Question 15: Are there any other ways to accurately reflect prescribed persons/bodies? (For example, a general description with general characteristics which a prescribed person/body can be recognised by)

A definitive list provides certainty and is transparent to workers, but maintaining it requires constant review and amendment, even if undertaken without enacting secondary legislation. A better means of ensuring workers raise their concerns with the relevant body may be to provide a flexible definition that allows a body to fall within the relevant provisions if it is in possession of the relevant characteristics of a prescribed person for the purposes of PIDA. It is recognised that this approach requires a purposive interpretation by the courts. If a national body, as discussed in the answer to question 30, was established one of its functions could be the annual review of PIDA and the power to make recommendations for reform including the amendment of the Schedule of prescribed persons.

Trade unions should be expressly included within any reformed definition of a prescribed person. Trade unions can be a means of 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 the meaning of prescribed person should include trade unions in general who could than properly raise concerns on behalf of their members.

There are other omissions from the Schedule of prescribed persons. 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 a valuable means of investigating important concerns. The denial of the status of a prescribed person to the police, Crown Prosecution Service and Members of Parliament is significant as these are appropriate persons with whom to raise concerns. The exclusion of the police is particularly difficult to justify when disclosures relating to crimes are a protected area of disclosure. Further a number of bodies that regulate legal, medical, nursing and financial professions are also omitted. Recent reports such as those into Mid-Staffordshire NHS Foundation Trust and the collapse of HBOS have

highlighted the importance of workers being able to raise concerns externally when their employer will not listen.

SECTION 4: PRESCRIBED PERSONS (II)

Question 16: Should the referral of whistleblowing claims to prescribed persons/bodies be made mandatory? Yes or No

For reasons stated below the answer to Question 16 of the Consultation paper is "Yes".

This Response welcomes the view of the Consultation paper that a mandatory referral system could provide regulators with important information to assist with their oversight role. The *Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010* allows an employment claim, or part of it, to be sent to a prescribed regulator, but only if the claimant consents. There is a clear public need for transparency regarding public interest claims under PIDA and the voluntary referral means that important information may not be passed to the regulator for investigation. 75% of PIDA claims are settled and so important concerns may never be discussed. Consent needs to be actively indicated by ticking a 'yes' box 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, 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.[9]

Question 17: If yes, please provide any evidence you have to demonstrate that this could support the regulator's role.

Regulators need to take a more proactive role with regard to the investigation allegations underlying PIDA claims 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 management of HBOS and this had disastrous consequences.

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

Question 18: What should the prescribed person/body do with the information once received?

If the mandatory referral of PIDA claims is enacted then there should be uniform principles for the investigation and feedback of these claims. Any allegation of wrongdoing should be investigated thoroughly.

Question 19: Should prescribed persons/bodies be under a reasonable obligation to investigate all disclosures they receive? Yes or No

For reasons stated below the answer to Question 19 of the Consultation paper is "Yes".

PIDA claims raise issues that affect the wider public interest beyond the individual claim of a worker blowing the whistle and so it is important that concerns passed to a regulator are investigated. Allegations underlying PIDA claims will only come to the attention of a regulator because a worker was sufficiently concerned about wrongdoing to blow the whistle and was victimised for it. The brave actions of the worker should be acknowledged by a full examination of the claim.

SECTION 5: DEFINITION OF WORKER

Question 20: Does the current definition of worker exclude any group that may have need of the protections afforded to whistleblowers? Yes or No

For reasons stated below the answer to Question 20 of the Consultation paper is "Yes".

The current definition of a worker in section 43K of the ERA 1996 excludes a number of groups who may be the recipients of important concerns. The labour market is constantly adapting, requiring a broader and more flexible definition of worker to accommodate different working arrangements and work practices to ensure PIDA has maximum coverage and protects all those at work.

Question 21: If yes, what groups are these?

This Response recognises that the ERRA 2013 amended the definition of worker in section 43K of the ERA 1996 to include certain NHS contractual arrangements within the group of workers protected, but a number of special groups are still excluded who may have particular knowledge. Groups that form important omissions from PIDA are foster carers and ministers of religion as they may be the recipients of important concerns. In the recent case of *Clyde & Co LLP v Bates van Winkelhof*[10] the Court of Appeal decided

[10] [2012] EWCA Civ 1207.

limited liability partners were not within the definition of worker for the purposes of the 1998 Act.

The blanket exclusion of the intelligence and security services, GCHQ and armed forces is unwarranted as it is without reference to national security and fails to distinguish between internal or external disclosures. The omission of these groups from the protective provisions of PIDA is significant as it impedes the discovery of wrongdoing within Government and prevents its accountability.

The civil service does come within the provisions of PIDA, but a civil servant will not be protected by the Act if they commit an offence under the *Official Secrets Act 1989* by making a disclosure. This is particularly harsh as the complex and restrictive 1989 Act fails to provide a public interest defence. Recently whistleblowers have also been prosecuted for the common law offence of misconduct in public office. Adherence to the Civil Service Code expressly precludes the disclosure of information without authority. This may conflict with the civil service values of 'integrity, honest, objectivity and impartiality' that may compel a civil servant to disclose information of malpractice within Government. PIDA must provide protection for all those who make wrongdoing public and so should extend to civil servants.

Question 22: Please provide any evidence to demonstrate these groups require protection.

Cases such as that of Katherine Gun, Derek Pasquill and David Keogh demonstrate the necessity of protection for those working in the intelligence and security services, GCHQ and armed forces. All three were dismissed and prosecuted under the *Official Secrets Act 1989* for disclosing information relating to legitimate matters of public interest. Charges were dropped against Gun and Pasquill but Keogh was convicted to six months imprisonment. The disclosure in 2003 by Katherine Gun of an e-mail regarding a request by the United States of America for GCHQ to spy on six non-permanent members of the Security Council raised issues regarding the surveillance methods of GCHQ. This is a public interest issue that is again receiving considerable attention following the disclosures of Edward Snowden. Despite this, Gun was dismissed and has not worked since. A distinction should be made between information the disclosure of which causes embarrassment to the Government and that which damages national interest.

SECTION 6: JOB APPLICANTS

Question 23: What impact does whistleblowing have on the individual's future employment, e.g. if there are issues around 'blacklisting' or other treatment?

Blacklisting is a significant area of concern for whistleblowers who risk being blacklisted for blowing the whistle. This can be damaging economically and end a career within an industry or profession. By failing to prohibit blacklisting, PIDA allows an employer to refuse employment to a prospective applicant with a history of whistleblowing and the whistleblower will have no means of redress. Ward LJ recognised in the case of

Woodward v Abbey National plc[11], that it would be 'palpably absurd and self-evidently capricious' to protect a worker only in respect of retaliatory acts during employment and not afford protection against detrimental treatment after termination of employment.

Question 24: Please provide any relevant evidence to confirm whether these practices are taking place.

The experience of individual whistleblowers reveals the practice of blacklisting. The treatment of Gary Walker, a former chief executive of the United Lincolnshire Health Trust (ULHT), demonstrated the difficulty an individual can face after raising important concerns. Following the scandal at Mid-Staffordshire, ULHT was one of 14 English NHS Trusts investigated for high death rates. Following the publication of the final report of the Mid-Staffordshire NHS Foundation Trust Inquiry, Walker gave an interview to the BBC Radio 4 Today programme. He revealed that he was gagged, threatened and prevented by ULHT from raising concerns about patient safety. He spoke out despite signing a confidentiality clause in April 2011 in settlement of his case for unfair dismissal. His case shows that even if whistleblowers do settle their claims there are continuing consequences as many are unable to work again within their chosen career or profession. As Walker stated:

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

Reprisals can continue after employment. Threats of legal action by ULHT to enforce Walker's gagging clause following his appearance on the Today programme were only halted by the intervention of the Secretary of State for Health. Such treatment of whistleblowers is undertaken even though any clause in a settlement agreement preventing a protected disclosure is void under section 43J of the ERA 1996.

SECTION 7: FINANCIAL INCENTIVES

Question 25: Would a system of financial incentives be appropriate in the UK whistleblowing framework? Yes or No

For reasons stated below the answer to Question 25 of the Consultation paper is "No".

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. There are some benefits to providing a system of financial incentives. It may encourage some to expose wrongdoing as they will be compensated for loss of earnings or career if this results from disclosure. Other countries have taken a different approach to the United Kingdom and enacted a legislative system of rewards for wrongdoing. As noted in the Consultation paper, the United States of America (US) has offered financial incentives to

[11] [2006] EWCA 822.

encourage whistleblowing, most recently in the financial sector with the *Dodd-Franks Act 2010*. However, as discussed in the answer to question 27 there are difficulties with such an approach.

Question 26: If yes, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrongdoing?

Overall, as stated in answers to questions 25 and 27, a system of financial incentives is not appropriate for the UK.

Question 27: If no, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrongdoing?

A system of financial incentives would raise the problematic issue of motive on the part of the whistleblower making the disclosure of wrongdoing. As recognised by Andrey Tyrie, Chairman of the Parliamentary Commission on Banking Standards, 'what incentivisation can you provide to whistleblowing without moral hazard'.[12] If a worker discovers wrongdoing within an organisation the knowledge they may gain a financial reward may impact on their decision whether to raise a disclosure internally or externally. There is less incentive to protect the confidentiality of an organisation by raising the matter internally if they could secure a reward by disclosing externally to a regulator. A system of financial incentives could undermine PIDA which places the emphasis on internal disclosure as the appropriate means to raise concerns within the workplace.

Any system of financial incentives could create a disparity between those whistleblowers making financial disclosures that lead to the recovery of lost funds and those who highlight non-financial wrongdoing such as risks to patient safety. Financial rewards may be provided when wrongdoing is on the part of a private corporation and could be in the form of a fine levied by a regulator, but a system of financial rewards is more problematic if it involves a public authority. In areas such as healthcare, there are no means to fund rewards that does not impact on public finances. Ultimately, it will be a question of appropriate use of resources.

Further, there is no evidence that such a system would necessarily encourage whistleblowing. Most whistleblowers do not appear to be motivated by financial gain but by a need to expose misdeeds or illegality. This is evidenced by the fact many whistleblowers speak out despite clear disincentives to do so, including possible victimisation and even dismissal. The most appropriate reward for workers exposing wrongdoing would be to protect them against such reprisals. Secondly, a significant reward would be to ensure that their concerns are heeded and acted upon.

[12] Reported in *The Financial Times*, 29th October 2012.

Question 28: Where are financial incentives used as an effective measure to prevent wrongdoing/illegal activity? For example, in certain industries.

Although financial incentives are not available in the UK, a payment could be made to British whistleblowers by the US Securities and Exchange Commission (SEC) under the above mentioned Dodd-Frank provisions if it fined a British company following a negative impact on the US financial market. A reward payable to a whistleblower can be up to 30% of the overall fine. Whistleblowing and the possible reward of it is an issue in a global economy in which fraud can be difficult to discover and wrongdoing by companies can impact on economies. The use of financial incentives within certain industries, such as the financial sector, may be an effective means of regulation. However, as stated in the answer to question 27, the possibility of financial gain may have a negative impact upon whom a worker decides to disclose their concern to[13]. A significant financial reward may encourage a worker to raise the matter externally and deny their organisation the opportunity to deal with the wrongdoing internally and without damage to its reputation.

SECTION 8: NON-STATUTORY MEASURES

Question 29: How would the introduction of non-statutory measures make a difference?

As recognised by the Consultation paper, legislative reform is only one measure to effect a change in workplace culture so that workers feel able to voice concerns without fear of reprisal. A Code of Practice setting out best practice could be useful, but it should be underpinned by a statutory requirement that an organisation implements procedures to establish good practice. 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 currently 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.

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

[13] See Howard *Whistleblowing incentives just got international*, The Financial Times, 21st September 2012.

recognises that they are not a substitute for strong management, compliance and effective controls[14]. Institutions need to foster a genuine culture of openness and self awareness. As shown in the 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[15]. At the end of his 2009 Memorandum of written evidence to Treasury Select Committee, Moore recommended:

Further development of Whistleblowing 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

Any mandatory requirement would have to be accompanied by penalties for compliance failure. The introduction of vicarious liability by section 19 of the ERRA 2013 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. The absence of a whistleblowing procedure or a failure to act in accordance with its procedures may prevent an employer from claiming the defence.

As recognised by the 2013 Francis Report 'openness, transparency and candour' are necessary attributes for an organisation and a culture of openness should allow workers to raise concerns without fear. PIDA is an essential tool to promote good governance and requiring effective whistleblowing policies are a key component.

Question 30: What types of non-statutory measures could Government consider to support the statutory framework?

As stated in the Foreword of this Consultation document, 'legislative change is only one way of encouraging culture change within the workplace'. An effective legislative framework is only the beginning in establishing an open culture in the workplace.

A key recommendation of the Shipman Inquiry was that a national service advising potential whistleblowers be established. This is clearly desirable in light of the complexity of the whistleblowing provisions and their inconsistent application by the courts. Public Concern at Work is a successful organisation offering advice and Whistleblowers UK is another established to assist whistleblowers, but both have limited resources. A national whistleblowing agency could also undertake the role of monitoring and reviewing the operation of PIDA as well as promoting an awareness of

[14] British Standards Institute, *Whistleblowing Arrangements Code of Practice, PAS 1998:2008*, 2008, paragraph 0.9, p6.
[15] See House of Commons Treasury Committee, *Banking Crisis*, Volume II, Written Evidence, 2009, HC 144-II, Ev 434.

the legislative provisions. At present, there is a limited awareness of PIDA and a national agency could generate knowledge and understanding. A poll commissioned by Public Concern at Work in 2011 found 85% of people polled said they would raise a concern regarding possible corruption, danger of or serious malpractice with their employer, but 56% did not know if there was law protecting whistleblowers and a further 21% claimed no knowledge of such law.

SECTION 9: FURTHER EVIDENCE

Question 31: Please provide any further evidence in support of any issues you feel should be reflected through this call for evidence but have not been captured in the main document.

The promotion of whistleblowing is also a human rights issue. The Convention right to freedom of expression, and the right to impart information in particular (Article 10 of the European Convention on Human Rights) is a qualified right but is recognised as a fundamental foundation of democracy. Recent case law from the European Court of Human Rights is very supportive of the essential qualities of the right to freedom of expression and this could allow some impetus to the advancement of a right to disclose. In *Heinisch v Germany*[16], the court found the dismissal of a worker without notice for raising issues about the unsatisfactory conditions in the care of the elderly at a home owned by her employer was 'disproportionately severe' and a violation of Article 10 of the Convention. It was also of the view that this sanction would have a 'chilling effect' on other workers and discourage them from reporting to the detriment of society as a whole.

Question 32: Please provide any case studies of situations where a whistleblower has a positive outcome with their employer after blowing the whistle.

If a successful outcome results from a whistleblower raising concerns with their employer then confidentiality will be maintained and the details of the wrongdoing will not be made public. Such a positive outcome is one that PIDA promotes and should be supported by employers establishing effective whistleblowing procedures and then heeding the concerns raised. The publicity generated by the claims of workers whose concerns were not listened to, or even suffer victimisation, for blowing the whistle has a negative impact by discouraging others from speaking up.

CONCLUSION

This Response does not concur with the view of the Consultation paper in respect of the provisions provided by PIDA that the 'overall framework works well'. A radical reform of the 1998 Act is required to ensure effective safeguards are guaranteed to those who blow the whistle. The current provisions may have given some assistance to workers

[16] Application no. 28274/08 21st July 2011.

victimised for raising public interest concerns, not least in the settlement of claims, but amendments are required to ensure the protective provisions are effective. The onerous conditions set out in sections in sections 43C-43H of the ERA 1996 should be simplified so the qualifying thresholds do not deny whistleblowers a remedy, and the classifications of protected disclosures in section 43B are widened. A broad definition of workers should be provided and the blacklisting of whistleblowers prohibited. A statutory duty should be imposed on all organisations to establish and maintain whistleblowing procedures to allow workers to voice concerns internally for the benefit of all in the organisation and society. PIDA claims should involve a mandatory referral to the relevant regulator who should be under an obligation to investigate. The establishment of a national whistleblowing agency would provide workers with a source of advice and assistance. Such a body could also monitor PIDA and make recommendations for its reform and updates to the list of prescribed persons. A right to disclose reflecting the human right of freedom of expression should underpin the reforms.

The first report of the Mid-Staffordshire NHS Foundation Trust Inquiry found a 'culture of fear, lack of insight, or sufficient self-criticism … and above all fear' where staff kept a low profile and were disengaged from the Trust. Although concerns were raised individually and collectively, they did not receive an adequate response. The destructive element of fear, particularly of losing work, can affect an organisation from top to bottom. As shown by Mid-Staffordshire NHS Foundation Trust, such a culture is significant in the development of wrongdoing. Without its workers raising concerns an organisation will go unchecked. Whistleblowing is a deliberate non-obligatory public interest act on the part of a worker and the unique status and benefits of whistleblowing should be acknowledged by a full review of PIDA and the enactment of necessary reform.

This consultation is welcomed as a means to inform policy and legislative change but the author of this Response is concerned that it takes place within a programme of employment reform that seeks to remove regulation and restrict the rights of workers. The new mandatory fees for claimants to employment tribunals are high and impede claimants. Tribunals were devised as a 'simple, cheap and accessible'[17] forum for workers to bring claims, but this is undermined by recent employment tribunal reforms. This will adversely affect whistleblowers seeking redress in an employment tribunal. The Consultation paper states its aim is to strike the right balance between a flexible and efficient labour market whilst maintaining essential protections for whistleblowers. At present, the law governing whistleblowing favours employers at a considerable expense to workers. It is hoped the Government will take this opportunity to redress the imbalance and effectively safeguard the rights of whistleblowers. If workers are not fully

[1717] See Renton & Macey *Justice Deferred: a critical guide to the Coalition's employment tribunal reforms*, 2013, Liverpool : The Institute of Employment Rights.

protected they will fear blowing the whistle and important allegations of malpractice, illegality, abuse and misdeeds will go undiscovered.