Public Concern at Work
The future of press regulation
Module four submission

Introduction

1. This submission is made on behalf of Public Concern at Work, the whistleblowing charity. We restrict the majority of our comments to the role of whistleblowing in the draft criteria for a regulatory solution. Our submission is in three parts:
    a. An overview of the "public interest" via the Public Interest Disclosure Act 1998 (PIDA) and relevant case law under Article 10 of the European Convention of Human Rights, with an analysis of how whistleblowers' rights should be observed by journalists and newsroom staff as whistleblowers
    b. Best practice whistleblowing arrangements in the workplace
    c. What the future regulatory regime should do to support whistleblowers and whistleblowing both internally and for their regulated entities and how this might be achieved.

Whistleblowing in the media and evidence to the Inquiry

2. The starting point is that journalists in the newsroom may well be the first to know when there is a breach of the Editors' Code of Practice or a potential threat to the public interest. They are best placed to raise the alarm before any damage is done, i.e. when a story is being pursued in an unethical manner or publication is likely to occur that is in breach of the Editors' Code of Practice or may cause some of the damage which has been referred to by other witnesses in this Inquiry. It is vital that they are empowered to raise the alarm to their employer or an appropriate regulator. There needs to be a concerted effort to build a 'speak up' culture in every newsroom and across the sector, where open questioning is not only permitted but actively encouraged and concerns raised and addressed.

3. We note the evidence of Michelle Stanistreet[1], Matthew Driscoll[2] and Richard Peppiatt[3] and their views of the culture that exists within some newsrooms. The cultures spoken of have obviously created an extremely challenging environment, where in some cases the chances of creating a successful speak up culture would be incredibly low. The next regulator will have to recognise the vital role whistleblowing can play in detecting and

[1] Michelle Stanistreet, Second Witness Statements http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Second-Witness-Statement-of-Michelle-Stanistreet.pdf
[2] Driscoll, M (Written Evidence to Leveson Inquiry) http://www.levesoninquiry.org.uk/wpcontent/uploads/2011/12/Witness-Statement-of-Matthew-Driscoll.pdf
[3] Richard Peppiatt, Witness Statementhttp://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Richard-Peppiatt.pdf

deterring malpractice and establish a clear programme of action to address these cultural challenges. This may take some time. Fostering and monitoring an effective speak up regime will empower journalists to take ethics back into their own hands. Clearly a number of good journalists were uncomfortable with what they witnessed, yet alongside cultural challenges, there was an absence of guidance on what to do if there was a breach or suspected breach of the Editors' Code of Practice or other substantive wrongdoing.

4. It is worth noting that of the 22,000 individuals who have contacted our advice line since 1993, journalists outside of the broadcast media are notable by their absence. This could lead to the conclusion that journalists, as the nation's watchdogs, do not view themselves as whistleblowers and only the recipients of information from whistleblowers. The absence of a press regulator who is set up to receive and respond to concerns may have contributed to this mind-set, as if the culture of the newsroom is not receptive to concerns, there is nowhere else to go to be a "whistleblower".

5. As has been highlighted by Lord Hunt[4] and the Media Standards Trust[5], in many essential ways, the Press Complaints Commission was not a regulator. It was not set up to receive concerns about breaches or potential breaches of the Editors' Code of Practice or other substantive wrongdoing from whistleblowers nor would it have the ability to follow up on concerns from the newsroom. The absence of a regulator with such powers in this area may have contributed to the sense that there was no one watching the watchdogs. It is a factor of human nature that if you are in an environment where individuals are able to question those acting unethically, this will have a powerful effect on deterring malpractice in the workplace. Additionally it will detect malpractice and is an essential part of holding individuals to account.

6. This does not mean the new regulator should have onerous powers in relation to whistleblowing or that there needs to be an overly bureaucratic response. Light touch regulation can be a reality. However, any regulator should set standards, monitor and enforce compliance in a meaningful and effective way when it comes to whistleblowing.

The "public interest"

Definition within the Public Interest Disclosure Act

7. The Inquiry has asked for submissions on the definition of the public interest. The Freedom of Information Act 2000 and the Data Protection Act 198 are the only other pieces of legislation that have a public interest test that is required to be applied when disclosing information. Neither defines what is meant by the "public interest". While the Public Interest Disclosure Act does not contain a public interest test, it does outline the categories of wrongdoing or types of information that "qualify" under the act:

   43B.
   (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-
   (a) that a criminal offence has been committed, is being committed or is likely to be committed,
   (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

[4] Lord Hunt, Witness Statement http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Witness-Statement-of-Lord-Hunt.pdf
[5] Media Standards Trust, submission http://www.levesoninquiry.org.uk/evidence/?witness=media-standards-trust

> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
> *(e) that the environment has been, is being or is likely to be damaged, or*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

8. In effect, this section of PIDA sets out the types of information individuals should be encouraged to raise if the public interest objectives of the legislation were to be achieved and so one could say that this is a piece of legislation that considers what information might be included in a public interest test. It is for this reason that S43B (b) is drafted so widely. If a worker has seen a duty of care owed to a vulnerable adult being breached, or the privacy rights of a service user being ignored, then raising a concern about such a situation is in the public interest. In matters relevant to this Inquiry the latter example is particularly pertinent. Where an individual's right to privacy is going to be breached by a particular story then there must be powerful public interest grounds for proceeding with the story. The countervailing legal duty to protect privacy rights would be relevant to an editor's decision in going to print. These are clearly not easy matters to balance.

9. Under PIDA, S43B (b) has been interpreted very widely and a possible amend to this section of the legislation is currently proposed by the Government in the Enterprise and Regulatory Reform Bill 2012. If this proceeds it will limit the reach of this section. While this is outside the remit of this Inquiry, it is worth briefly highlighting here, as the proposed amend is to insert a public interest test into the legislation as follows:

   > In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure **is made in the public interest and** tends to show one or more of the following (43B (a) – (f) above)

10. We have some anxiety that this will mean that individuals will be required to assess if it is in the public interest to disclose an issue of concern in the workplace. We view this as a difficult and unnecessary barrier to an individual when it is vital that issues are raised and addressed at an early stage if damage is to be prevented. We are concerned that this may inhibit individuals from raising what may be seen as more minor issues, such as loose wiring on a train track or suspected poor practice in a newsroom. While small pieces of information may seem trivial and not in the "public interest" to one individual, they may all form part of a wider picture that if properly raised with a person in position of responsibility or passed to a competent regulator, will be a vital piece of the jigsaw. As with other areas of law, we would consider it more appropriate that the authority in receipt of the information is responsible for assessing whether there is a threat to the public interest at play and how and whether they should act.

11. This feeds into a long running campaign of the National Union of Journalists which suggests that a conscience clause should be inserted into the employment contracts of all journalists. We would support such a move on the basis that it would enshrine any future code of conduct for journalists into a legal obligation and should give journalists more confidence to raise concerns. We would suggest such a clause would also give rise to a legal obligation to comply with the code of conduct. Disclosure of a breach of this obligation would be protected under PIDA, as the law stands.

Overview of PIDA

12. PIDA most readily protects internal disclosures to “the responsible person” (43C). This is usually the employer. At this stage the individual making the disclosure needs to show that they have a reasonable belief that the information being disclosed ‘tends to show’ one of the categories of wrongdoing in 43B and that they are making the disclosure in good faith. PIDA also has a second tier of disclosure to a list of “prescribed persons” under the Act (43F). Broadly, these are systems regulators such as the Care Quality Commission, Ofsted and the Financial Services Authority. It is also relatively easy to make a protected disclosure to a prescribed person: the individual has a slightly higher test to satisfy than with an internal disclosure and must show that in the reasonable belief of the worker “the information disclosed, and any allegation contained in it, are substantially true”. If a new press regulator emerges it would be imperative for the body to be prescribed under this section. As all the currently prescribed regulators are statutory bodies it would be sensible to seek confirmation from the Department for Business Innovation and Skills that a non-statutory body can be prescribed under the Act.

13. The next step under PIDA would be to make a wider disclosure under 43G. This involves satisfying a number of additional tests for the individual and for the employment tribunal to consider. Essentially, in addition to showing that there was a valid reason to raise the concern more widely, the Tribunal has to consider whether this was objectively reasonable (see Annex A for the entire statutory wording on this regard). We highlight this provision for three reasons. First, as an example of the law striking a balance between the rights of employers and when the public has a right to know. Secondly, as guidance for a journalist who may seek to raise a concern in the absence of a prescribed person or anyway. Lastly, to draw attention to 43G (c) “he does not make the disclosure for purposes of personal gain”. This would apply to an individual who is paid money to disclose information (so called ‘cheque book journalism’). Essentially in paying an individual for a story a journalist could effectively negate a worker’s rights under PIDA. This may be the choice of many individuals who decide to sell information. However we are not sure that this is a widely understood provision of PIDA amongst journalists and in any event the law is not well known amongst workers[6]. Therefore without better education and promotion of this part of the legislation, there is a real risk that a payment may be made in ignorance and inadvertently undermine an individual’s rights.

14. It is worth noting that PIDA covers a wide range of workers, including agency workers and contractors, but not the genuinely self-employed. We are currently campaigning to have the scope of PIDA widened to include the self-employed in order to bring the law in line with other areas of discrimination law. In the interim it is likely that some journalists will fall outside the scope of the law. This sends the wrong message at a time when the law should protect all those that wish to raise a serious concern about wrongdoing. In our experience advising individuals it is frequently “fresh eyes” or those that have not accepted the cultural norms of their employer who will notice and wish to raise a concern about malpractice. We hope the Inquiry notes our concern that the law needs improvement and must protect all those who witness malpractice in the workplace.

15. Additionally there is currently no protection in place for job applicants who may have blown the whistle in their last employment. We see this as an important safeguard in ensuring those who do raise the alarm cannot be blacklisted.

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[6] 77% of UK workers do not know or do not think there is a law that protects whistleblowers, YouGov survey May 2011.

16. While we have highlighted above a number of the most relevant aspects of our recent campaign to strengthen protection under PIDA, we have also attached our briefing on the Enterprise and Regulatory Reform Bill 2012 at Annex B for further information.

Article 10 of the European Convention of Human Rights

17. The recent case of *Heinisch v Germany*[7] outlined the European Court of Human Rights' approach to how and when a worker should be able to make a disclosure of information outside of their employment, which is comparable to the requirements of PIDA. According to the ECHR, the following have to be taken into account:
    - Whether the disclosed information is in the public interest;
    - Whether the employee had alternative channels for making the disclosure, i.e., he/she could or did seek an internal investigation of his/her allegations;
    - The reliability of the disclosed information (the person who discloses the information must be able to verify that it is accurate and reliable; allegations must be backed up with facts);
    - Whether the employee acted in good faith (the allegations must not amount to a gratuitous attack on the employer);
    - Detriment to the employer; and
    - Severity of the sanction imposed on the employee.

Best practice whistleblowing arrangements in the workplace

18. In order for the Inquiry to consider best practice guidance for whistleblowing in the workplace, we highlight the British Standard Institution (BSI) PAS 1998:2008 *Whistleblowing Arrangements Code of Practice* (CoP[8]). This was published by BSI and drafted by PCaW in conjunction with a large and widely drawn working group. It is a guide for all organisations seeking to establish, review and audit their whistleblowing arrangements. We would recommend using the CoP to both media outlets and for the internal arrangements of the future regulator. On the latter this would be to ensure the regulator leads by example.

Draft framework for regulators to support whistleblowers and whistleblowing both internally and for their regulated entities and how this might be achieved

19. The new regulator should aim to establish a robust whistleblowing regime in the newsroom, encourage responsible whistleblowing and provide an effective means for whistleblowers to contact the regulator. It should also have appropriate powers to investigate concerns, monitor compliance and enforce standards.

20. Below we outline a framework for regulatory best practice on whistleblowing, which builds on and complements the draft criteria set out by the Inquiry.

Regulatory best practice

21. We would recommend that the future regulator have a defined role in relation to establishing best practice whistleblowing. This would include the ability to check the effectiveness of whistleblowing arrangements. The Older People's Commissioner for Wales has very specific powers under the Commissioner for Older People (Wales) 2006 (see Annex C) that may be a useful example, whether this power resides in statute or forms part of the framework of the regulator.

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[7] 28274/08 [2011] ECHR 1175 (21 July 2011)
[8] Available for download here: http://www.pcaw.org.uk/bsi

22. Whistleblowing arrangements should not be complicated and in smaller organisations a formal whistleblowing policy may not be necessary. At Public Concern at Work, how we should raise concerns about malpractice forms part of our contract of employment and we have no further policy. However, staff are reminded how to raise concerns and we work hard to ensure a working environment where staff are encouraged to openly question any matter. Some account of small organisations should be taken if any of our suggestions below are implemented and the level of detailed consideration of the CoP is dependent on the size and complexity of the organisation.

23. It is vital that the new regulator takes a strong lead in the industry to establish a better framework for whistleblowing both within its regulated entities and in how whistleblowers are treated when approaching them. Below we outline the four key areas for regulatory best practice whistleblowing, from internal arrangements, guidance for regulated entities, guidance for individuals and measuring against other sources of information.

Internal arrangements – policy, practice and review

24. We see a great number of whistleblowing policies through our work assisting and training organisations. Many policies are too legalistic, complicated, fail to give options outside line management, do not provide assurances to the individual, place the duty of fidelity above all else, contain contradictory or poor reassurances on confidentiality.

25. As outlined above, a regulator should lead by example and ensure its own internal whistleblowing arrangements achieve best practice. Getting the whistleblowing policy right is a crucial first step. The Committee on Standards in Public Life has informed and influenced practice on whistleblowing across and beyond the public sector. The Committee has recommended that good whistleblowing policies:

    a. provide examples distinguishing whistleblowing from grievances;
    b. give employees the option to raise a whistleblowing concern outside of line management;
    c. provide access to an independent helpline offering confidential advice;
    d. offer employees a right to confidentiality when raising their concern;
    e. explain when and how a concern may safely be raised outside the organisation (e.g. with a regulator); and
    f. provide that it is a disciplinary matter (a) to victimize a bona fide whistleblower, and (b) for someone to maliciously make a false allegation.

    To be effective, the Committee has stated that it is important that those at the top of the organisation show leadership on this issue and ensure that the message that it is safe and accepted to raise a whistleblowing concern is promoted regularly.

26. A good policy will mean little if it is left to gather dust in a draw. A policy must be actively promoted and communicated, managers trained on their role and on how to handle concerns, arrangements are reviewed regularly, trust and confidence of staff is tested and arrangements refreshed. Buy-in at the top of the organisation is key and a good audit committee or board will want to know how the arrangements are working. The Institute of

Chartered Accountants for England and Wales has devised a list of questions that a good audit committee might ask[9]:

- Is there evidence that the board regularly considers whistleblowing procedures as part of its review of the system of internal control?
- Are there issues or incidents which have otherwise come to the board's attention which they would have expected to have been raised earlier under the company's whistleblowing procedures?
- Where appropriate, has the internal audit function performed any work that provides additional assurance on the effectiveness of the whistleblowing procedures?
- Are there adequate procedures to track the actions taken in relation to concerns made and to ensure appropriate follow up action has been taken to investigate and, if necessary, resolve problems indicated by whistleblowing?
- Are there adequate procedures for retaining evidence in relation to each concern?
- Have confidentiality issues been handled effectively?
- Is there evidence of timely and constructive feedback?
- Have any events come to the (audit) committee's or the board's attention that might indicate that a staff member has not been fairly treated as a result of their raising concerns?
- Is a review of staff awareness of the procedures needed?

Guidance for organisations

27. The above (paragraphs 24 and 25) should be mirrored in guidance produced by the regulator for organisations or as part of a compliance framework. The CoP is now recognised, both in the UK and abroad, as a key piece of guidance. The adoption of the CoP by local authorities is recommended by the National Fraud Authority in their guidance *Fighting Fraud Locally*[10]. The future regulator could recommend this guidance to all regulated entities or adapt it for its own sector, making reference to the Editors' Code of Practice or any future code of conduct for journalists.

28. The questions in paragraph 25 are useful in testing internal arrangements and as guidance for any regulated entities, for the latter this could form part of an annual self-assessment that is filed with the regulator. This can be measured against other sources of information that the regulator has.

Guidance for individuals

29. The future regulator should be able to receive and respond to concerns from individual whistleblowers. We would suggest specific guidance be issued by the regulator for those that are raising a concern about malpractice in the workplace. Some key areas to cover would be:
    a. A good explanation of what whistleblowing is, giving examples of the type of information to be raised;
    b. An explanation of the role of the regulator;
    c. Referral to the employer's internal processes or an outline of what an internal process should look like (see paragraph 24);
    d. Reference to independent advice (whether that is from a union, solicitor or Public Concern at Work);

[9] Institute of Chartered Accountants in England and Wales (ICAEW) Guidance for Audit Committees: Whistleblowing arrangements (2004) www.icaew.com.
[10] http://www.homeoffice.gov.uk/publications/agencies-public-bodies/nfa/fighting-fraud-locally-strategy/

e. Clear statements on confidentiality and the limitations of the regulator on this point;
f. What to expect when an individual calls, giving examples of the questions the regulator might ask;
g. An overview of the Public Interest Disclosure Act and the regulator's role in relation to the Act; and
h. An outline of the feedback process.

30. The guidance should be clearly displayed on the regulator's website. Additionally we would recommend that a designated contact centre or reporting line is run by the regulator with call handlers that are appropriately trained on the issues and sensitivities surrounding whistleblowing and how and when workers should seek independent advice.

Other sources of information

31. If a system of self-assessment of whistleblowing systems is to be adopted then using other sources of information to test the veracity of reports is recommended. Alongside powers to investigate the effectiveness of whistleblowing arrangements this should create a good system of compliance, enforcement and redress. The following are possible sources:
    - Volume and nature of complaints from the public may indicate internal systems are not working. This would particularly be so if there are a high number or very serious cases where it is likely that workers would have known and no concerns were raised. This should trigger an investigation or health check of arrangements by the regulator with recommendations and timeframes for improvement.
    - In April 2010 the Employment Tribunals were given the power to refer ET1s (claimant forms) to the appropriate prescribed person, where the claimant consents. This consists of the individual claimant ticking a box to say that they are making a claim under the Public Interest Disclosure Act and consent to their form being sent to an appropriate regulator. The future regulator should establish a system that maximises intelligence from this source.
    - Judgments of the Employment Tribunal where one of their regulated entities is the respondent. Such judgments may highlight weaknesses in whistleblowing frameworks or other substantive wrongdoing relative to the remit of the regulator.

We hope our comments and suggested framework are of use to the Inquiry. We are happy to assist in any further elaboration required or in providing information to organisations on how to get whistleblowing right.

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Policy Director
PUBLIC CONCERN AT WORK

Statement of Truth

I believe the facts stated in this witness statement are true.

Signed

Date 23 July 2012

ANNEX A
Section 43G ERA
Disclosure in other cases

43G.
(1) A qualifying disclosure is made in accordance with this section if-
(a) the worker makes the disclosure in good faith,
(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are-
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c) that the worker has previously made a disclosure of substantially the same information -
(i) to his employer, or
(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to-
(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

ANNEX B

Briefing on Enterprise and Regulatory Reform Bill:
Section 14 Disclosures not protected unless believed to be made in the public interest

Introduction
DBIS have announced that they will be introducing a public interest test in the whistleblower protection law known as the Public Interest Disclosure Act (PIDA) in order to overcome a legal loophole whereby individuals are able to claim protection for raising concerns about their own personal employment contract. We are deeply concerned that they are doing so without thorough public consultation, the amendment suggested will not overcome the problem and will result in a field day for lawyers and that this is a missed opportunity for addressing problems which have arisen in the legal protection for whistleblowers.

This loophole arose in an interim employment tribunal case, Parkins v Sodexho[11], and has watered down the public interest purpose of PIDA. There have been concerns that PIDA is being abused by City Bankers who are using it to claim that raising concerns about their bonus payments are protected disclosures under PIDA[12]. This has led some to say that PIDA cases are being dominated by "pale stale males". This affects the reputation of this key piece of legislation and is a far cry from the original purpose of the legislation and the Parliamentary debates for the first and second bills.

DBIS are proposing to remove this loophole in the following way:

Public interest test proposed by DBIS

Enterprise and Regulatory Reform Bill
14. Disclosures not protected unless believed to be made in the public interest
In section 43B of the Employment Rights Act 1996 (disclosures qualifying for protection), in subsection (1), after "in the reasonable belief of the worker making the disclosure," insert "is made in the public interest and".

The change would have the following effect:
Employment Rights Act 1996
43B.
(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure **is made in the public interest and** tends to show one or more of the following-
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

[11] [2001] UKEAT 1239_00_2206
[12] A report in the *Financial Times* on 18 September 2007 quoted the city firm Nomura warning that "The whistleblowing legislation was designed to protect employees who, in good faith, raise legitimate concerns of wrongdoing in the workplace. Its growing use by white men as a litigation tactic when in dispute with the City employers, suggests the legislation is being abused."

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

We agree that something has to be done to address this loophole but we find we cannot support the DBIS amendment on three grounds:

1. DBIS's failure to consult

First, DBIS propose including a public interest test in PIDA without considering the wider problems with the law and the need for a public consultation. The timing of an amendment to the law also does not seem prudent given the on-going Mid Staffordshire NHS Foundation and Leveson Inquiries, both of which will have important outcomes for the public interest and will likely have conclusions that will deal with whistleblowing. The failure to undertake a wider, comprehensive review, will be a 'missed opportunity' to address some of the legal loopholes that exist which include a gaping hole in protection if workers are victimised by co-workers for raising a concern (no vicarious liability mechanisms), making sure all workers are adequately covered, clarifying protection for GPs, and ensuring that workers who raise concerns with all statutory bodies including the police and professional regulators are readily protected. We set out case studies and examples of these problems under the heading of 'a missed opportunity' below.

2. 'Field day' for lawyers

Secondly, we are concerned that the above amendment will not address the legal loophole (see our suggested amendment below) and will instead become a field day for lawyers who will spend time arguing whether or not something is in the public interest, increasing litigation, costing employers and the taxpayer more; all of which the Government has sought to address in recent consultations on employment law reforms.

As it currently stands PIDA identifies broad categories of public interest issues- criminal offences, dangers to the environment, miscarriages of justice, health and safety concerns and breaches of legal obligations. The drafting suggested by DBIS is clumsy and nonsensical- the public interest test imposed will cut across all the categories of wrongdoing which means, for example, when raising a concern about a criminal offence an individual would have to show that it is in the public interest. It is common sense that issues that are criminal offences, dangers to the environment, miscarriages of justice and dangers to health and safety, are public interest issues and so should not be subject to an additional public interest test.

The purpose of PIDA is to prevent disaster and to encourage workers to speak up when they have suspicions. Issues that at one point seem trivial may in fact be indicative of underlying problems in an organisation and could be the tip of the iceberg. A public interest test may have the unintended consequences of focussing on how big the

disaster is or was likely to be, and mean less focus on reporting early suspicions. Issues such as missed medication may seem relatively minor compared to a multi-million pound fraud such as that in the high profile Olympus case[13] but could be a matter of life and death.

We suggest the amendment below, which would have the effect of dealing with the Parkins v Sodexho issue without imposing an additional barrier for the genuine whistleblower, as an alternative to the one presently suggested by DBIS:

PCaW suggested amendment:

43B. - (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject **(*other than a private contractual obligation which is owed solely to that worker*)**,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

3. A new barrier for honest whistleblowers

Thirdly, the perception will be that this test is a barrier to individual whistleblowers. When this is added to the fact that PIDA is little known and often misunderstood, we believe that the legislation will be undermined by this approach. It will also add to the idea promulgated in the media that if you are whistleblower, you will be burned and that the law is too complicated to protect you. In sectors such as health and care, where whistleblowing can save lives and taxpayers' money, and where gagging clauses and hierarchical professions and workplaces impose real obstacles for the individual, such an amendment will be seen as another obstacle. The honest and reasonable whistleblower, faced with an increasingly complex piece of legislation to navigate should they be poorly treated, may choose not to speak up. This is a rather damning position, nearly two decades on from the Bristol Royal Infirmary Inquiry when the whistleblower, Dr Stephen Bolsin[14], was forced to leave the UK to find work.

Furthermore, Parliament when it passed PIDA did not place a public interest test in the legislation, choosing instead to define the categories of wrongdoing under which disclosures in the Public Interest Disclosure Act should fit. Good faith was seen as the

[13] http://www.independent.co.uk/news/business/news/olympus-settles-claim-with-exboss-michael-woodford-7800965.html
[14] http://news.bbc.co.uk/1/hi/health/532006.stm

appropriate safeguard. Dame Janet Smith in her report on the Shipman inquiry commented that perhaps good faith should be replaced by a public interest test. If the public interest test is to be considered at all, it really should be considered in conjunction with the test of good faith. Any attempt to add a public interest test requires wider consultation and should not be placed in the Act as an additional hurdle by the back door.

'A missed opportunity' to protect whistleblowers

The lack of consultation means that this will also be a missed opportunity to deal with some of the problems that have arisen since PIDA's introduction over a decade ago. These problems include:

1. **Vicarious Liability Loophole**

   This loophole has arisen in the context of three nurses from Manchester who raised a concern about a colleague lying about his qualifications. The nurses raised their concern within the service and the Primary Care Trust. Their concern was upheld. However, the nurses were subject to bullying and harassment from co-workers. One of the nurses received a telephone call threatening her daughter and to burn down her home[15]. The case proceeded as far as the Court of Appeal, which found that vicarious liability does not exist in PIDA, as it specifically does in discrimination law. Shortly after the publication of the judgment, Lord Howe, the Health Minister, agreed that this area needs to be reviewed[16]. From the experience on our advice line, harassment and bullying by co-workers is not uncommon and for there to be no protection in this area is extremely problematic, as it means whistleblowers could be facing a cardboard shield in terms of the protection afforded by PIDA. It surely cannot be right that an employer can fail to do enough to protect a whistleblower from victimisation and yet altogether escape liability. To overcome this problem, we suggest transposing the existing tests from the Equality Act 2010 (sections 109-112 and section 40) into PIDA. This would also build a defence into the legislation for employers, as if they can show that they took reasonable steps to prevent the victimisation, they would not be liable.

   It is bad news for whistleblowers everywhere if whistleblowers who are bullied by fellow staff members are not protected. Another example of this is the case of Helene Donnelly, a nurse who gave evidence to the Mid Staffordshire Inquiry and spoke of the bullying she experienced by other staff. Surely no one would suggest she should not have got protection[17].

2. **Widening the scope of PIDA to cover all GPs, student nurses, doctors, health care professionals, volunteers, NEDs (including public appointments) and prospective job applicants.**

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[15] http://news.sky.com/home/video/15385116

[16] http://www.independent.co.uk/news/uk/home-news/whistleblowers-not-protected-from-bullying-court-rules-6255015.html

[17] http://www.nursingtimes.net/nursing-practice/clinical-specialisms/accident-and-emergency/whistleblowing-mid-staffs-nurse-too-scared-to-walk-to-car-after-shift/5036466.article

Recent employment law cases and media stories have highlighted the difficulties of the above groups such as students on vocational placements in health and care settings, all GPs (see Anne Milton's answer to a Parliamentary question which highlighted the complicated nature of the protection of GPs at present[18]), volunteers, non-executive directors (the reluctance of Royal Bank of Scotland non-executives to question Fred Goodwin[19]), public appointments (the case of Kay Sheldon- a board member of the Care Quality Commission[20]), members of LLPs (covered by the Equality Act 2010), priests (covered by the Equality Act 2010) and foster carers.

The lack of protection for job applicants was highlighted in an Employment Tribunal Appeal case, BP v Elstone[21], where an employee was protected from victimisation by his current employer, having raised a concern with his previous employer. The tribunal commented that had the claimant been a job applicant he would not have been protected. On our advice line, discrimination at pre-employment stage is a worry for workers considering whether and how to raise a concern. It can be daunting for an individual who has raised a genuine concern about a danger, risk or malpractice in the workplace and has left the organisation, to know what to say about why they left their last job. This presents a very difficult dilemma for a whistleblower who has acted in the public interest and it is important to build some protection into the system so that whistleblowers are not fearful in such situations. In research that we have conducted for the Older People's Commissioner for Wales, we found that the second most common negative response from an employer was refusing to provide a good reference.

In order to overcome this problem we propose the definition of worker in section 43K of PIDA is extended to include:

- Student nurses, doctors, healthcare professionals and social workers
- General Practitioners in the health service , regardless of their contractual arrangements
- Volunteers and interns
- Non-Executive Directors
- Public Appointments
- Members of LLPs
- Priests
- Foster carers
- Job applicants
- All categories covered in the Equality Act 2010

[18] HC Deb, 9 March 2011, c66WS
[19] http://www.ft.com/cms/s/0/3776f564-02de-11de-b58b-000077b07658.html#axzz1tp9gA7M2
[20] http://www.guardian.co.uk/society/2012/jan/24/kay-sheldon-whistleblower-care-quality-commission
[21] [2010] IRLR 558, [2010] UKEAT 0141_09_3103

3. **Extending the categories of wrongdoing**
   Gross waste, gross mismanagement and abuse of authority are not included in PIDA but are included in equivalent US legislation. At a time of austerity and the abolition of the Audit Commission, we suggest that these categories should be included, particularly as what may be deemed as a waste of money may not in fact be illegal but we would still hope that such concerns are raised. For example it could be a way to encourage workers to raise concerns about mass over-expenditure in public spending projects such as the waste of public money in the NHS IT system[22]. We suggest a public interest category would be useful to cover these types of wrongdoing which may not be covered by the other categories. This also ensures that PIDA evolves and covers serious ethical concerns that fall short of a breach of legal obligation.

4. **Gagging clauses**
   Little attention has been paid to the provision in PIDA section 43J which outlaws any contractual clause that prevents workers from raising a public interest concern. The cases of Dr Kim Holt and Great Ormond Street Hospital, and former inspectors at the Care Quality Commission[23] giving evidence to the Mid Staffordshire Inquiry highlight the need for greater attention to be drawn to section 43J of PIDA and for there to be tougher enforcement. We recommend a positive requirement is placed on lawyers advising in the settlement of claims, that they advise claimants about their rights under the Public Interest Disclosure Act and that any such gagging clauses are void.

5. **Disclosures to all statutory bodies are protected**
   PIDA identifies a list of prescribed regulators and protection is relatively easy for individuals who raise concerns with them. Given that statutory bodies are changing we would suggest that the specific provision in PIDA dealing with this point (section 43F) be widened to cover a disclosure to a relevant statutory body whether or not it is prescribed. An amendment along these lines has been suggested by the DTI (as was) as it is administratively cumbersome to have to prescribe new regulators. The amendment includes not only regulators such as the HSE or FSA but also the relevant local authority enforcement authorities. Given that there are changes to the regulatory activities in financial services, it may be prudent to allow this change and to ensure protection can flow seamlessly. This also means that individuals who raise concerns with professional regulators such as the Nursing and Midwifery Council, General Medical Council and the Health Professions Council would be more easily protected. More importantly this would be a smart way to deal with international criticism from the OECD that disclosures to the police have to satisfy higher tests than disclosures to prescribed regulators. We recommend that the power to prescribe persons as this is something HMG may wish to use (e.g. in 1997/8 the Minister Ian McCartney MP suggested union officials might be prescribed at some point).

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[22] http://www.guardian.co.uk/society/2011/sep/22/nhs-it-project-abandoned
[23] http://www.telegraph.co.uk/health/healthnews/9170951/Health-regulator-gagged-own-staff-against-speaking-of-failures.html

6. **Tackling the good faith test**

Dame Janet Smith in the Shipman Inquiry stated that good faith was a barrier to whistleblowers. This is being borne out by recent reports in the Mid Staffordshire and Leveson Inquiries.

We have proposed three options for addressing the good faith point. Option (i) is to remove the test altogether. Options (ii) and (iii) both clarify the purpose of PIDA protection is that wrongdoing can be addressed. Option (ii) follows the approach taken by the Court of Appeal in Street v Derbyshire UWC[24] that (a) good faith means with the honest purpose of raising the concern so it can be addressed, but (b) that an ulterior predominant motive can negate good faith. Our suggested amendment clarifies this by stating that a predominant ulterior motive should only negate PIDA protection where it is malicious. This reflects the meaning the Government intended the term 'in good faith' in PIDA should have, as confirmed by the DTI in its comments of 31 August 2001 on the report into the Bristol Royal Infirmary that 'in good faith' in PIDA "simply means that the disclosure was made honestly, not maliciously." In clarifying the honesty of purpose on the face of the Act, this amendment helps reduce the risk (increased by the abolition of the register of employment tribunal applications) that an employee might be tempted to make an internal disclosure to blackmail the employer by offering to keep the wrongdoing secret if he is given an undue benefit. While Option (iii) includes a public interest test which means that the worker would have to show that the predominant motive for raising their concern is in the public interest.

If the legislation is to include a public interest test then it would be appropriate to consider this in conjunction with the good faith requirement in PIDA, rather than placing an additional hurdle on would be whistleblowers. To address this finely nuanced issue properly requires consultation and the current proposed amendment would need to be reversed.

Next Steps

We have contacted you as an interesting

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[24] [2004] EWCA Civ 964

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ANNEX C

Commissioner for Older People (Wales) Act 2006

Section 5

Review of arrangements

(1)The Commissioner may review—

(a) any arrangements mentioned in subsection (2), and

(b) the operation of any such arrangements,

for the purpose of ascertaining whether, and to what extent, the arrangements are effective in safeguarding and promoting the interests of relevant older people in Wales.

(2)The arrangements are—

(a) advocacy arrangements;

(b) complaints arrangements;

(c) whistle-blowing arrangements.

(3)The Commissioner may also assess the effect on relevant older people in Wales of a person's failure to make any such arrangements.

(4)Advocacy arrangements are arrangements made by a person for making persons available—

(a) to represent the views and wishes of relevant older people in Wales;

(b) to provide relevant older people in Wales with advice and support of a prescribed kind.

(5) Complaints arrangements are arrangements made by a person falling within section 6(3) for dealing with complaints or representations which are made—

(a) by or on behalf of a relevant older person in Wales, and

(b) in respect of relevant services provided to relevant older people in Wales by or on behalf of the person who has made the arrangements.

(6)Whistle-blowing arrangements are arrangements made by a person falling within section 6(3) for ensuring that proper action is taken in response to a disclosure of potentially adverse information.

(7)Information is potentially adverse if it may tend to show that, in the course of, or in connection with, the provision of relevant services, any of the following has occurred—

(a) a criminal offence has been committed;

(b) a person has failed to comply with a legal obligation to which he is subject;

(c) the health or safety of a person has been endangered;

(d) the dignity of a person has been violated;

(e) information tending to show a matter falling within any of paragraphs (a) to (d) has been deliberately concealed.