

ITEM NO: 6

REPORT TO:	STANDARDS COMMITTEE
DATE:	8 April 2014
REPORTING OFFICER:	Borough Solicitor (Monitoring Officer)
SUBJECT:	WHISTLEBLOWING
REPORT SUMMARY:	<p>This Report sets out the findings of the Whistleblowing Commission, recommends that the Council signs up to the Code of Practice, which provides practical guidance to employers, workers and their representatives and sets out recommendations for raising, handling, training and reviewing whistleblowing in the workplace. Recommends reviewing the Whistleblowing Policy in light of the Code and works with the Public Concern at Work to raise awareness of Whistleblowing throughout the Council and the organisations that the Council work with.</p>
RECOMMENDATIONS:	<ol style="list-style-type: none">1. That the Council adopt the Code of Practice and sign up to be an authorised signatory and the Borough Solicitor be authorised to take the necessary steps to implement this.2. The Borough Solicitor be authorised to recommend to Council any amendments to the Whistleblowing Policy to ensure it complies with the Code of Practice subject to consultation with the Trade Unions.3. That the Borough Solicitor be authorised to work with the Public Concern at Work to raise awareness of Whistleblowing throughout the Council and the organisations that the Council work with.
RISK MANAGEMENT:	<p>Failure to have robust systems to prevent fraud and the covering up of wrongdoing increases the chance that such behaviour will occur and that the council will thereby be exposed to financial risk.</p>
LINKS TO COMMUNITY STRATEGY:	<p>Support the current arrangements for ethical and corporate governance of the Authority to ensure that the public can have confidence in local government.</p>
FINANCIAL IMPLICATIONS:	<p>There are no significant financial issues arising from this Report.</p>
(Authorised by the Borough Treasurer)	
LEGAL IMPLICATIONS:	<p>These are set out in the report.</p>
(Authorised by the Borough Solicitor)	
ACCESS TO INFORMATION	NON-CONFIDENTIAL

This report does not contain information which warrants its consideration in the absence of the Press or members of the public

REFERENCE DOCUMENTS:

Appendix 1 - Whistleblowing Policy

Appendix 2 – Whistleblowing Commission Report

Appendix 3 – Code of Practice

Any background papers or further information can be obtained from the Council's Borough Solicitor and statutory Monitoring Officer by contacting 0161-342-3028 or by e-mail sandra.stewart@tameside.gov.uk

1. BACKGROUND

- 1.1 Every employer faces the risk that something will go badly wrong in their organisation and ought to welcome the opportunity to address it as early as possible. Whenever such a situation arises the best people to know of such a risk will usually be “workers” yet while these are the people best placed to speak up before damage is done, they often fear they have the most to lose if they do (otherwise known as “whistleblowing”).
- 1.2 The Council is committed to the highest possible standards of openness, probity and accountability. In line with that commitment we encourage anyone with serious concerns about any wrongdoing in any aspect of the Council’s work to come forward with these concerns. The Council will not tolerate malpractice or wrongdoing and is determined that all instances of malpractice will be fully investigated and the appropriate action taken against all those concerned.
- 1.3 Any disclosures made by employees which are made to the Council and which are intended to shed light on fraud, corruption or malpractice will be protected in accordance with our commitment to staff set out in our Whistleblowing Policy, which has been in place since 4 July 2000 following recommendations by Standards Committee. It has since been reviewed and updated twice with the last revision in 2007 in consultation with all political groups, the relevant trade unions and professional organisations. The current version of the Whistleblowing Policy is attached at **Appendix 1**.
- 1.4 Following last revision refresher training was arranged for employees, which was delivered through online training for employees with access to computers, and workplace briefings (known as toolbox talks) for those staff who do not have access to computers will receive workplace briefings.
- 1.5 As part of the Council’s commitment to good corporate government it is appropriate that policy is reviewed.

2. WHISTLEBLOWING COMMISSION REPORT

- 2.1 Public Concern at Work, the whistleblowing charity, is the leading authority, which aims to protect society by encouraging workplace whistleblowing by:
 - **advising individuals** with whistleblowing dilemmas at work
 - **supporting organisations** with their whistleblowing arrangements
 - **informing public policy** and seek legislative change
- 2.2 An example of the sort of issues *Public Concern at Work* support employees to deal with is provided by the case study out below:

***Theft in a care home** - FA worked as a care assistant in an old people’s home. He and some of his colleagues were worried that SM, one of the managers, might be stealing cash from the residents. SM looked after residents’ pocket money and kept a record of when sums were paid out. FA was fairly sure that money was recorded as being given out to particular residents when they had received none.*

After a while, he thought he had to raise the concern as the amount involved was adding up. After he raised his concerns with the owners of the home, an investigation quickly found FA was right, SM was dismissed and the police were called in. Relations within the home were tense as some of SM’s friends strongly objected to the whistleblowing. Within weeks, FA was suspended over allegations that he had mistreated the residents. He rang Public Concern at Work

What Public Concern at Work advised - Public Concern at Work advised that he should bite his lip and deal with these allegations squarely. Although the investigation found they had no substance, the owners decided to transfer FA to another home. FA was very unhappy and rang us again. Public Concern at Work helped him draft a letter to the owners explaining that he wanted to stay at that home and that transferring him after he had blown the whistle would give out the wrong messages to other staff.

What happened - The owners reconsidered and FA stayed at the home. When FA rang to tell Public Concern at Work that SM had been convicted of stealing £1400 from the residents, he said the atmosphere in the home was now much improved.

- 2.3 In February 2013 Public Concern at Work launched the Whistleblowing Commission chaired by Sir Anthony Hooper to examine the effectiveness of whistleblowing in the workplace and to make recommendations for change. The Commission which is an independent body made up of industry and academic experts has made 25 recommendations for improving whistleblowing across UK workplaces.
- 2.4 In producing their report the Commission considered the following evidence:
- gathered evidence by launching a public consultation in March 2013. The Commission received 142 responses from employers, regulators, MPs, campaigning organisations and whistleblowers.
 - Research into 1,000 whistleblowing cases by Public Concern at Work and the University of Greenwich, "Whistleblowing: the inside story", published May 2013.
 - Research into the financial services sector by Public Concern at Work and Slater & Gordon, "Silence in the City", published June 2013.
 - The YouGov Survey into whistleblowing attitudes and experiences amongst UK workers, published June 2013.
 - A Public Concern at Work and EY business survey, published September 2013
- 2.5 The key recommendations of the Commission included:
- The Secretary of State to adopt the Commission's Code of Practice detailing whistleblowing arrangements in the workplace. This Code of Practice to be taken into account by courts and tribunals when whistleblowing issues arise. (Rec 1)
 - Regulators to require or encourage the adoption of this Code of Practice by those they regulate. (Rec 2)
 - Regulators should review the licence or registration of organisations which fail to have in place effective whistleblowing arrangements. (Rec 3)
 - Regulators to be more transparent about their own whistleblowing arrangements and annually report on their operations. (Rec 5)
 - Specific provisions against the blacklisting of whistleblowers. (Rec 10)
 - Strengthening anti-gagging provisions in the law. (Recs 17 & 18)
 - Specialist training for tribunal members to handle whistleblowing claims effectively. (Rec 21)
 - Strengthening and clarifying the legal protection for whistleblowers contained within the Public Interest Disclosure Act. (Recs 8-20)
 - Updating and broadening the definition of worker to include: student nurses, doctors, social workers and health care workers; volunteers and interns; priests; foster carers; non-executive directors; public appointments; LLP members and all categories of workers listed under the Equality Act 2010. (Rec 10)
- 2.6 A copy of the Full report can be found at **Appendix 2**.

3. COMMISSION'S CODE OF PRACTICE

3.1 The primary recommendation of the Commission is for the Secretary of State to adopt a Code of Practice that could be taken into account in whistleblowing cases before courts and tribunals. The Commission has published a draft Code, which sets out clear standards for organisations across all sectors to enable them to have clear whistleblowing arrangements and this is attached at **Appendix 3**.

3.2 The Code of Practice has 15 recommendations for raising, handling, training and reviewing workplace whistleblowing. Key requirements include:

- confidentiality will be maintained where requested;
- clear assurances are given to staff about protection from reprisal;
- specific individuals have responsibility for the arrangements;
- there is a need for greater oversight of whistleblowing arrangements by non-executive directors or equivalent; and
- there is a review of the effectiveness of the arrangements and publication of key data.

3.2 The Code of Practice is designed to help regulators to assess and inspect whistleblowing arrangements. The Code of Practice can now be adopted by organisations who are looking to achieve the highest standards in ensuring that workers are encouraged to speak up and when they do, that they are listened to.

4. The First 100 CAMPAIGN

4.1 Public Concern at Work and the Whistleblowing Commission have invited Local Authorities to be amongst the 'First 100' to sign up to the principles of their code of practice and work towards compliance with it - <http://www.pcaw.org.uk/first100>

4.2 Initially they are looking for organisations to agree to abide by the Code's principles and to work towards compliance with it. Becoming a signatory to the Code does not require compliance with the Code in its entirety; rather it signifies the commitment to strive towards best practice over time. The list of signatories will be championed by Public Concern at Work and will be published on their website.

4.3 Public Concern at Work and the Whistleblowing Commission hope that the examples set by willing organisations will encourage the Government to produce a Code of Practice; to encourage best practice whistleblowing arrangements across all sectors. This is an opportunity for employers in all sectors to lead the way in whistleblowing best practice.

4.4 The Code provides a valuable opportunity for the Council to review its practices. The Code provides a model and the Council may want to adjust it to meet its own practical arrangements.

4.5 The Borough Solicitor has been in contact with Public Concern at Work who have indicated their willingness to work with the Council to ensure we are addressing the Code of Practice and to offer practical support and assistance to advise and inform employees and ensure they feel protected and secure to raise concerns.

4. RECOMMENDATION

4.1 As set out in the front of the Report.

TAMESIDE METROPOLITAN BOROUGH COUNCIL**WHISTLEBLOWING POLICY****1. Introduction**

- 1.1 In a large organisation like Tameside MBC, employees and councillors are often the first to be aware when something is seriously wrong. However there can be a number of reasons why they might not report what they suspect; they may not know how to report a concern; they may be concerned about reprisals or they may feel that making a report would be a betrayal of confidence. If someone knows about wrongdoing and doesn't report it then the Council loses an opportunity to deal with a potentially damaging situation and gives rise to an even greater risk of financial loss, regulatory breach, higher insurance premiums and damaged reputation.
- 1.2 The Council is committed to the highest possible standards of openness, probity and accountability. In line with that commitment we encourage anyone with serious concerns about any wrongdoing in any aspect of the Council's work to come forward with these concerns. Tameside MBC will not tolerate malpractice or wrongdoing and is determined that all instances of malpractice will be fully investigated and the appropriate action taken against all those concerned.
- 1.3 Any disclosures made by employees which are made to their employer and which are intended to shed light on fraud, corruption or malpractice are in general protected under the Public Interest Disclosure Act 1998. Any employee raising concerns through this policy will be protected from reprisals or victimisation, so long as the employee is not acting maliciously or for personal gain.
- 1.4 Internal systems and procedures must seek to prevent fraud but also protect individual councillors and employees against malicious or unfounded allegations of impropriety. Internal controls are the first line of defence against fraud and malpractice and national experience shows it is often the case that where fraud and malpractice does occur the controls were circumvented or ignored.
- 1.5 Tameside already has in place documented procedures to ensure that there are proper controls in place; these procedures can be found in the TMBC Constitution. In addition each Service Unit have their own procedural manuals on how the various duties should be carried out to ensure that there are efficient and effective controls which include separation of duties.
- 1.6 This policy has been discussed with all political groups, the relevant trade unions and professional organisations.

2. Aims of the Policy

- 2.1 This policy aims to:
- Provide avenues for you to raise genuine concerns,
 - Allow you to take the matter forward if you are dissatisfied with the Council's response,
 - Reassure you that you will be protected from reprisals or victimisation for speaking up in good faith.

3. Scope of the policy

- 3.1 This policy applies to everyone with a concern about wrong doing in the council's activities, whether they are a councillor, a council employee, a contractor or a concerned member of the public.
- 3.2 There are existing and separate procedures in place to enable staff to lodge a grievance relating to their own employment. Likewise recipients of a council service can use the complaints procedure about the services they have received.
- 3.3 This policy is intended to cover concerns that fall outside the scope of the procedures mentioned above. That concern may be about something that:
- is unlawful (for example theft, fraud or corruption); or
 - breaks the Council's constitution; or
 - falls below established standards or practice; or
 - amounts to improper conduct or
 - anything that makes you feel uncomfortable or that you think is wrong.
- 3.4 If you are in doubt then raise it, you will not be criticised for raising concerns in good faith.

4. Safeguards

4.1 Harassment or Victimisation

- 4.1.1 The Council recognises that the decision to report a concern can be difficult, not least because of the fear of reprisal from those responsible for the malpractice. The Council will not tolerate harassment or victimisation and will take action to protect you when you raise a concern in good faith. However, the Council will take action against anyone who maliciously makes an accusation of malpractice or wrongdoing.
- 4.1.2 This does not mean that if, for example, you are already the subject of disciplinary or redundancy procedures, that those procedures will be halted as a result of you reporting a concern.

4.2 Confidentiality

- 4.2.1 The Council will do its best to protect your identity when you raise a concern and do not want your name to be disclosed. However, it must be appreciated that the investigation and/or disciplinary process may reveal the source of the information and a statement by you may be required as part of the evidence.

4.3 Raising concerns anonymously

- 4.3.1 You are encouraged to put your name to your allegations so we can take the necessary steps to protect you from victimisation should that be necessary. Anonymous allegations are more difficult to investigate as we cannot know if the allegation is made in good faith or is malicious. When an allegation is made anonymously it is also impossible to come to you for more information, and to keep you informed as to the progress of the investigation where possible. From a practical point of view it is impossible to provide protection if we do not know who you are.

4.3.2 For these reasons, anonymous allegations will not normally be investigated.

4.4 Allegations which are not found to be proven on investigation

4.4.1 If you provide information in good faith, but it is not confirmed by the investigation, no action will be taken against you. If, however, you make malicious or vexatious allegations, disciplinary, or other appropriate, action will be taken against you.

5. **How to Raise a Concern**

5.1 To whom should a concern be raised.

5.1.1 As a first step, employees should normally raise concerns with their immediate manager. Councillors should raise concerns with the Leader of their Group. Your concern will then be passed to the Borough Solicitor who is the Council's statutory monitoring officer who will conduct certain enquiries to help decide on the appropriate response.

5.1.2 Contractors and members of the public, and employees or councillors who do not wish to raise a concern as set out in 5.1.1 above, may raise the issue direct to any of the following individuals;

- Chief Executive Ext 3500
- Borough Solicitor (Monitoring Officer) Ext 3028
- Borough Treasurer Ext 3863
- Assistant Chief Executive (People and Performance) Ext 3152
- Risk and Internal Audit Manager Ext 3846

5.2 Raising a concern

5.2.1 Concerns should be confirmed in writing. You should, as far as possible, set out the background and history of the concern, giving names, dates and places where possible, and the reason why you are particularly concerned about the situation. If you do not initially feel able to put your concern in writing, you can telephone or meet the appropriate officer. Even in this case a record will be made of your discussions for the sake of ensuring an accurate record is held, and you will be asked to confirm this account.

5.3 How the Council will respond

5.3.1 Wherever you raise your concern the information will be shared with the Borough Solicitor, who will be asked to decide on the appropriate level of response to the situation, the action taken will depend on the circumstances of each investigation. The matters raised may:

- be investigated internally (this could be by internal audit)
- be referred to the Police
- be referred to the external Auditor
- form the subject of an independent inquiry
- be dealt with under the ethical framework for councillors under the direction of the monitoring officer

5.3.2 In order to protect individuals and the Council, initial enquiries will be made to decide whether an investigation is appropriate and if so, what form it should take. Concerns or allegations that fall within the scope of specific procedures (for example, child protection or discrimination issues) will normally be referred for consideration under those procedures.

5.3.3 The Council will write to you within five working days of a concern being received,

acknowledging that the concern has been received and initial enquiries are being made.

- 5.3.4 Within ten working days of a concern being received, the Council will write to you indicating how it proposes to deal with the matter, telling you whether any initial enquiries have been made, and telling you whether further investigations will take place, and if not, why not.
- 5.3.5 The amount of contact between the officers considering the issues and you will depend on the nature of the matters raised, the potential difficulties involved and the clarity of the information provided. If necessary, further information will be sought from you.
- 5.3.6 When any meeting is arranged with you, you have the right, if you so wish, to be accompanied by a Union or professional association representative or a friend who is not involved in the area of work to which the concern relates.
- 5.3.7 The Council will take steps to minimise any difficulties that you may experience as a result of raising a concern. The Council will take all reasonably practicable steps to ensure that you receive no detriment as a result of your actions. For instance, if you are required to give evidence in criminal or disciplinary proceedings, the Council will advise you about the procedure.
- 5.3.8 The Council accepts that you need to be assured that the matter has been properly addressed. Thus, subject to legal constraints, you will receive information about the outcomes of any investigations.

6. How the concern can be taken further

- 6.1 This policy is intended to provide you with an avenue to raise concerns within the Council. The Council hopes you will be satisfied. If you are not, you may feel it is right to take the matter to a law enforcement agency outside the Council. If employees take matters outside the council they may still be protected, but it is advisable to take advice about this, for example via the Audit Commission or the charity "Public Concern at Work" who operate a helpline (telephone 020 7404 6609 or email helpline@pcaw.co.uk).
- 6.2 Before doing this you may wish to discuss matters further with any member of the Standards Panel or Internal Audit.
- 6.3 If you do take the matter outside the Council, you need to ensure that you do not disclose confidential information or that disclosure would be privileged. You should consider taking advice about that.

7. Responsible Officer

- 7.1 The Monitoring Officer has overall responsibility for the maintenance and operation of this policy. That officer receives a record of concerns raised and the outcomes (but in a form which does not endanger your confidentiality) and will report as necessary to the Council.



the whistleblowing charity

The Whistleblowing Commission

**Report on the effectiveness of
existing arrangements for workplace
whistleblowing in the UK**

November 2013

Foreword

Effective whistleblowing arrangements are a key part of good governance. A healthy and open culture is one where people are encouraged to speak out, confident that they can do so without adverse repercussions, confident that they will be listened to, and confident that appropriate action will be taken. This is to the benefit of organisations, individuals and society as a whole.

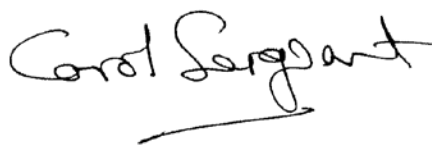
It is now some 20 years since the whistleblowing charity **Public Concern at Work** (PCaW) was established and some 15 years since the Public Interest Disclosure Act, designed to protect whistleblowers, was put on the statute book. But we are still seeing so much harm, in all parts of our society, where effective whistleblowing could have resulted in early detection and prevention. Many such examples are illustrated in this report. In most of these cases individuals did speak out but were not listened to and no actions were taken. Many of these people suffered serious personal detriment for having had the courage to speak out.

It is against this background that PCaW decided to set up an expert independent commission to review all aspects of whistleblowing, including the current legal and governance arrangements, best practice and societal attitudes. We commissioned a number of new pieces of research referred to in this report and are very grateful to all those people who responded to our consultation and supported our research. We also thank the Joseph Rowntree Charitable Trust for providing support for this report.

The Commission has conducted a very thorough review and made important recommendations, all of which we fully endorse. We will be working with key stakeholders to ensure the recommendations are implemented and will conduct and publish regular progress reviews.

There is a particular focus on the responsibilities of employers and a recommended Code of Practice which sets out the key principles and practices of effective whistleblowing. The Report recommends legislative support for this Code, which we support. However, there is no reason why responsible organisations should not implement the Code with immediate effect and we strongly urge them to do so. We also urge all regulators to use this Code in assessing whether the organisations that they oversee have adequate whistleblowing and governance arrangements to control the risks they face and to protect society. Non-compliance with the principles and practice set out in the Code should lead to further examination and challenge.

And finally my thanks go to the Commission members for such hard work and commitment in applying their considerable expertise and experience to this critical issue. Special thanks go to Sir Anthony Hooper, without whose leadership, intellect and extraordinary energy, this report would not have been possible.



Carol Sergeant
Chair
Public Concern at Work



Contents

Foreword	2
Introduction	4
The vital role of whistleblowing	5
Failure to listen	7
Obstacles to whistleblowing	8
Attitudes towards whistleblowing	9
Awareness of whistleblowing in the workplace	9
Making whistleblowing arrangements mandatory	10
Code of Practice	13
Rewards	14
The Public Interest Disclosure Act (PIDA)	15
Recent amendments to PIDA	16
Suggested PIDA Reforms	17
Categories of wrongdoing	17
Public interest test.....	17
Protection of workers	18
Overseas workers.....	20
Worker wrongly identified as a whistleblower	20
Associated persons.....	20
Prescribed persons under PIDA.....	20
Causation test	20
Interim relief.....	21
Gagging clauses.....	21
Allegations.....	23
Trade union representatives	23
Employment Tribunal Service reforms	24
Specialist tribunals or judges	24
Open register of PIDA claims	24
Mandatory regulatory referral.....	24
Employment Tribunal powers.....	24
Future issues	25
Summary of recommendations	26
Draft Code of Practice	28

Introduction

1. The Commission^[1] was established in February 2013 by the charity Public Concern at Work (PCaW) to examine the effectiveness of existing arrangements for workplace whistleblowing in the UK and to make recommendations for change. The Commissioners have a great deal of personal knowledge and experience in this complex area.
2. Whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects others.
3. In March 2013 we issued a consultation document. We received 142 responses.^[2] Those responding included a broad mix of employers, lawyers, academics, trade unions, politicians and whistleblowers. We also commissioned a survey of UK business practice which was conducted by PCaW and Ernst & Young (EY) in September 2013.^[3] Other research that has informed the Commission includes: “Whistleblowing: the inside story” a report prepared by PCaW and the University of Greenwich in May 2013,^[4] a PCaW and Slater & Gordon report “Silence in the city: whistleblowing in financial services”^[5] and a June 2013 survey of public attitudes towards whistleblowing.^[6]
4. This report represents the unanimous view of the Commissioners taking into account this material.
5. The Commission welcomes the Government’s consultation, entitled the “Whistleblowing framework: call for evidence”^[7] published in July 2013 and the Government’s commitment to “ensuring a strong legislative framework to encourage workers to speak up about wrongdoing, risk or malpractice without fear of reprisal.” The Government in its National Action Plan for Open Government has agreed to take into account the findings of the Commission and to consider “legislative change, statutory or non-statutory codes of practice, guidance or best practice measures”.^[8]
6. By virtue of the Public Interest Disclosure Act 1998 (PIDA), whistleblowers are given protection if they suffer detriment at the hands of their employers because they have spoken up. We have no doubt that PIDA provides essential protection for whistleblowers. It has rightly been described by the Council of Europe^[9] as one of the most comprehensive laws of its kind.
7. However PIDA, albeit indispensable, only provides a remedy when a worker’s rights have already been detrimentally affected. As such, PIDA only indirectly encourages employers to have effective whistleblowing arrangements in place and to treat whistleblowers well.

[1] Members of the Commission are: Chair- Sir Anthony Hooper (former Court of Appeal Judge and Member of Matrix Chambers), Lord Burns (Chairman of Santander UK and Channel 4), The Very Revd Dr David Ison (Dean of St Paul’s Cathedral), John Longworth (Director General British Chambers of Commerce), Michael Rubenstein (independent legal publisher and discrimination law expert), Sarah Veale (Head of Equality and Employment Rights at the TUC), Gary Walker (former NHS Chief Executive and whistleblower), Michael Woodford (Former Olympus President & CEO and whistleblower). The Commission is indebted to Cathy James, Shonali Routray, Francesca West and Catherine Tustin of PCaW.

[2] Responses have been made publically available at the request of the respondent, and can be found here:

<http://www.pcaw.org.uk/whistleblowing-commission-sources-consultation-responses>

[3] Public Concern at Work and EY business survey of whistleblowing arrangements, published November 2013,

<http://www.pcaw.org.uk/whistleblowing-commission-sources-business-survey>

[4] The report examined the experiences of 1,000 whistleblowers. Public Concern at Work, “Whistleblowing: the inside story”,

<http://www.pcaw.org.uk/whistleblowing-the-inside-story>, published May 2013

[5] This report examined the financial services cases on its advice line between 2002-2007. Public Concern at Work and Slater & Gordon, “Silence in the City: whistleblowing in financial services”, <http://www.pcaw.org.uk/silence-in-the-city-whistleblowing-in-financial-services>, published June 2013

[6] PCaW commissioned a YouGov Survey in June 2013 <http://www.pcaw.org.uk/whistleblowing-commission-sources-yougov-survey>

[7] Department of Business, Innovation and Skills, “Whistleblowing Framework: Call for Evidence”

<https://www.gov.uk/government/consultations/whistleblowing-framework-call-for-evidence>, published July 2013

[8] Page 26, Commitment 11, The Government’s National Action Plan for Open Government 2013,

http://data.gov.uk/sites/default/files/library/20131031_ogp_uknationalactionplan.pdf, published October 2013

[9] Paragraph 37, Report of Pieter Omzigt MP, Rapporteur to the Parliamentary Assembly of the Council of Europe on “The Protection of Whistleblowers”, Doc. 12006, published 14 September 2009

The vital role of whistleblowing

8. There is now widespread recognition in government and public, private and voluntary organisations of the important role that whistleblowing plays in achieving effective governance and an open culture. The British Standards Institution's Code of Practice on Whistleblowing Arrangements produced by a broad working group,^[10] including PCaW, states in its introduction:

“Every organization faces the risk that something will go badly wrong and ought to welcome the opportunity to address it as early as possible. Whenever such a situation arises, the first people to know of the risk will usually be those who work in or with the organization. Yet while these are the people best placed to raise the concern before damage is done, they often fear they have the most to lose if they do speak up.

Research for the Institute of Business Ethics has shown that while one in four employees are aware of misconduct at work, more than half (52%) of those stay silent. Organizations that can overcome this culture of silence by encouraging openness are likely to benefit in a number of ways. An organization where the value of open whistleblowing is recognized will be better able to:

- deter wrongdoing;
- pick up problems early;
- enable critical information to get to the people who need to know and can address the issue;
- demonstrate to stakeholders, regulators and the courts that they are accountable and well managed;
- reduce the risk of anonymous and malicious leaks;
- minimize costs and compensation from accidents, investigations, litigation and regulatory inspections; and
- maintain and enhance its reputation.

The main reason enlightened organizations implement whistleblowing arrangements is that they recognize that it makes good business sense. On the other hand, those few organizations that deliberately engage in wrongdoing to boost profits or that routinely flout the law will not want to encourage whistleblowing.”

9. Whistleblowing is one of the most effective ways to uncover fraud against organisations, shareholders and other stakeholders. In its 2012 Report, the Association of Certified Fraud Examiners found that 50.9% of reported fraud within organisations is identified by tip-offs from employees or contractors.^[11]
10. The Committee on Standards in Public Life has highlighted the role which whistleblowing plays “both as an instrument in support of good governance and a manifestation of a more open culture”.^[12]
11. Dame Janet Smith in the inquiry which followed the conviction of Harold Shipman, a GP who had killed at least 215 of his patients over a period of 24 years, commented in her report:

“To modern eyes, it seems obvious that a culture in all healthcare organisations that encourages the reporting of concerns would carry with it great benefits. The readiness of staff to draw attention to errors or ‘near misses’ by doctors and nurses, and the facility for them to do so, could have a major impact upon patient safety and upon the quality of care provided.”^[13]

[10] The working group included Lloyds TSB, Home Retail Group, National Consumer Council, Information Commissioner's Office, Astra Zeneca, Russell Jones & Walker, the Ministry of Justice, Richmond University, Audit Commission, ITV, NHS Employers, Committee on Standards in Public Life, Institute of Chartered Accountants in England & Wales, Prudential, the Trades Union Congress and the Institute of Business Ethics amongst others. A copy of the BSI Code of Practice on Whistleblowing Arrangements can be downloaded at www.pcaw.org.uk/bsi

[11] Page 16, Association of Certified Fraud Examiners, “Report to the nation on occupational fraud abuse: 2012 Global Fraud Study”, http://www.acef.com/uploadedFiles/ACFE_Website/Content/rtn/2012-report-to-nations.pdf, published 2012

[12] Paragraph 4.31, Page 89, Committee on Standards of Public Life, “Getting the balance right: implementing standards in public life”, Tenth Report of the Committee on Standards in Public Life, <http://www.official-documents.gov.uk/document/cm64/6407/6407.pdf>, published January 2005

[13] Paragraph 11.50, Page 329, Fifth Report of the Shipman Inquiry, “Safeguarding Patients: Lessons from the Past - Proposals for the Future”, published 9 December 2004

12. Subsequently in her report, Dame Janet Smith stated:

“I believe that the willingness of one healthcare professional to take responsibility for raising concerns about the conduct, performance or health of another could make a greater contribution to patient safety than any other single factor.”^[14]

13. The Parliamentary Commission on Banking Standards was set up to consider and report on professional standards and the culture of the UK banking sector in the wake of the London Interbank Offered Rate (LIBOR) scandal. In its report “Changing Banking for Good”, the Commission stated:

“the Commission was shocked by the evidence it heard that so many people turned a blind eye to misbehaviour and failed to report it. Institutions must ensure that their staff have a clear understanding of their duty to report an instance of wrongdoing, or ‘whistleblow’, within the firm. This should include clear information for staff on what to do. Employee contracts and codes of conduct should include clear references to the duty to whistleblow and the circumstances in which they would be expected to do so.”^[15]

14. The then Prime Minister Gordon Brown in his address to the Royal College of Nursing Congress in 2009 stated:

“We have got to make it easier for people to say that something is wrong; something needs [to] change [for people to say something] without fearing of their jobs, without fear of intimidation at the point of work.”

15. In April of this year, Prime Minister David Cameron stated in the House of Commons:

“We should support whistleblowers and what they do to help improve the provision of public services.”^[16]

16. Internationally whistleblowing has been formally recognised as an effective instrument against corruption.^[17]

[14] Paragraph 81, Page 23, Ibid 13

[15] Paragraph 142, Parliamentary Commission on Banking Standards, “Changing Banking for Good”, published June 2013. We discuss the issue of duties mentioned here, in paragraph 54.

[16] HC Deb, 24 April 2013, c883

[17] The G20 Anti-corruption Action Plan 2013-2014 (<http://dialogues.civil20.org/file/301363/download/326897>), the OECD (whistleblowing toolkit: <http://www.oecd.org/cleangovbiz/toolkit/whistleblowerprotection.htm>), United Nations Convention Against Corruption (Article 33), the Council of Europe (Parliamentary Assembly of the Council of Europe passed a resolution for the protection of whistleblowers in 2010 <http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm>), and the European Union (Clause 61 of Capital Requirements Directive IV, Article 29 Draft Market Abuse Regulations)

Failure to listen

17. In 1987 the Herald of Free Enterprise sank and 193 people died because it had been sailing with its bow doors open. The Sheen Inquiry into the tragedy found that on five separate occasions staff had raised concerns about this serious safety risk but that their warnings were lost in middle management.^[18]
18. The Public Inquiry into the poor standards of care at the Mid Staffordshire NHS Foundation Trust found that staff voices had been ignored by the Trust Board. According to the Chairman of the Inquiry, Robert Francis QC:

“[The Board] did not listen sufficiently to its patients and staff or ensure the correction of deficiencies brought to the Trust’s attention. Above all, it failed to tackle an insidious negative culture involving a tolerance of poor standards and a disengagement from managerial and leadership responsibilities.”^[19]
19. In his report, Robert Francis QC recommended that the:

“Reporting of incidents of concern relevant to patient safety, compliance with the law and other fundamental standards or some higher requirement of the employer needs to be not only encouraged but insisted upon. Staff are entitled to receive feedback in relation to any report they make, including information about any action taken or reasons for not acting.”^[20]
20. Care Quality Commission (CQC) whistleblower, Amanda Pollard,^[21] in her evidence to the Mid Staffordshire NHS Foundation Inquiry raised concerns about the failings of the CQC inspection regime and stated:

“In my view, those leading [the] CQC are more concerned with how they and the organisation is presented in the press rather than listening to those working within the organisation. This is something to worry about. The organisation becomes dangerous when driven by reputation management, for example by promising to deliver annual inspections when this is simply not achievable; what suffers is the quality of the inspections.”^[22]
21. Dr Kim Holt,^[23] a consultant who blew the whistle on poor safeguarding procedures prior to the tragic death of Baby Peter has said: “If Great Ormond Street had listened to me, Baby Peter would still be alive”.^[24]
22. The Treasury Committee’s second report into the fixing of LIBOR rates found that a senior manager at Barclays had flagged the potential conflict of interest between those derivative traders with risk positions and those who submit the LIBOR rates. According to the Report: “No questions were asked of Manager E or the Submitters in relation to this issue, no action was taken by Compliance and no systems and controls were put in place to deal with the potential conflict”. The Treasury Committee noted that LIBOR fixing had continued for four years without any pressure from senior executives or compliance and that there were “serious failures of governance, for which the board is responsible”.^[25]
23. Where there is a failure to listen it is vital that individuals can safely report to a competent external authority. It is also vital that individuals can safely report to the media, parliamentarians or campaigning organisations in the appropriate circumstances.

[18] Sheen Inquiry into the sinking of the Herald of Free Enterprise,

http://www.maib.gov.uk/publications/investigation_reports/herald_of_free_enterprise.cfm, published 1987

[19] Page 9, Letter to Secretary of State, The Mid Staffordshire NHS Foundation Public Inquiry, Volume 1,

<http://www.midstaffpublicinquiry.com/sites/default/files/report/Volume%201.pdf>, published February 2013

[20] Recommendation 12, Ibid 19

[21] Winner of the inaugural whistleblowing award of Middlesex University, <http://www.mdx.ac.uk/aboutus/news-events/news/pollard.aspx>.

[22] Evidence of Amanda Pollard to the Mid Staffordshire Inquiry- WS000078138ñ139, para 93. Volume 2.

[23] Founder of Patients First- <http://www.patientsfirst.org.uk>

[24] Andrew Gilligan, “If Great Ormond Street had listened to me, Baby Peter would still be alive”, The Telegraph,

<http://www.telegraph.co.uk/news/uknews/baby-p/6739202/If-Great-Ormond-Street-had-listened-to-me-Baby-Peter-would-still-be-alive-says-consultant.html>,

published 6 December 2009

[25] Paragraph 37, House of Commons Treasury Committee, Second Report, “Fixing LIBOR: some preliminary findings”

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/481.pdf>, published 9 August 2012.

24. In 1995 consultant anaesthetist Dr Stephen Bolsin raised concerns about the very high mortality rates for children undergoing heart surgery at the Bristol Royal Infirmary. Only after nothing was done by the hospital or the Department of Health, did he raise his concerns with the media. This prompted an inquiry by the General Medical Council which struck off two of the doctors, barred a third and resulted in an overhaul of NHS rules. Dr Stephen Bolsin said he was unable to get another job in the NHS and now works in health audit in Australia. A public inquiry led by Sir Ian Kennedy recommended a new culture of openness within the NHS, with a non-punitive system for reporting serious incidents and found: "He [Dr Bolsin] persisted and he was right to do so."^[26] At a patient safety conference on 23 October 2013 Dr Bolsin was awarded the Royal College of Anaesthetists Medal in recognition of the work that he has done to promote safety in anaesthesia.^[27]
25. In 2011, BBC Panorama^[28] exposed staff mistreating and assaulting adults with learning disabilities and autism at Winterbourne View Hospital. The problems at Winterbourne View were first brought to the attention of Panorama by Nurse Terry Bryan. He had raised concerns with the owners of the hospital, Castlebeck, and also with the Care Quality Commission (CQC), the regulator of health and social care in England, to no avail. In the subsequent review, the CQC acknowledged that they failed to respond to the whistleblower.^[29]
26. There is no doubt that if effective whistleblowing arrangements had been in place both in organisations and in regulatory bodies, many of the disasters and scandals which have caused so much harm and distress could have been avoided.

Obstacles to whistleblowing

27. Evidence suggests that workers fail to speak up because of fear of reprisal and/or a concern that they will not be listened to and that nothing will be done. Too often, those who speak up are ignored or their concerns do not come to the attention of management. In the YouGov survey commissioned by PCaW in 2013, of those that had a serious concern, 66% said they had raised it. When asked about the most likely barrier to raising a concern this was stated as the fear of reprisal or the response of colleagues.^[30] Further cases analysed in "The inside story" revealed that 74% of whistleblowers said they were ignored when they first raised a concern.^[31] This research also established that it is likely individuals only raise a concern once (44%) or twice at most (39%) before giving up.^[32]
28. In its March 2013 report into out-of-hours GP services in Cornwall run by Serco, the National Audit Office found that whistleblowers felt inadequately protected and were therefore reluctant to raise concerns internally. To counter this reluctance, the National Audit Office made the following recommendation:

"The Department of Health should take the lead in making sure that whistleblowers are, and feel, protected throughout the NHS. Whistleblowers are a valuable source of intelligence and should be encouraged to come forward. To help reassure whistleblowers, the Department should instruct NHS bodies to publish their whistleblowing policies. This would help ensure that local policies are transparent, consistent and fully compliant with national policy. The Department should also make sure local NHS bodies hold managers to account if whistleblowers suffer reprisals."^[33]

[26] Claire Dyer, Bristol inquiry condemns hospital's club culture, British Medical Journal, published 28 July 2001

[27] Vicki Mathias, "Bristol heart scandal whistleblower honoured for work on patient safety", Bristol Post, published 23 October 2013 <http://www.bristolpost.co.uk/Bristol-heart-scandal-whistleblower-honoured-work/story-19975765-detail/story.html>

[28] BBC Panorama, "Undercover Care: The Abuse Exposed", Aired 31 May 2011

[29] South Gloucestershire Safeguarding Adults Board, Serious Case Review: Winterbourne View, <http://www.southglos.gov.uk/Pages/Article%20Pages/Community%20Care%20-%20Housing/Older%20and%20disabled%20people/Winterbourne-View-11204.aspx#.UoiPx8Q72Ow>, published November 2011

[30] Ibid 6

[31] Page 4, Ibid 4

[32] Page 4, Ibid 4

[33] Page 7, "Memorandum on the provision of the out-of-hours GP service in Cornwall: Summary", Report by the Comptroller and Auditor General, HC 1016, Session 2012-13, <http://www.nao.org.uk/wp-content/uploads/2013/03/Out-of-hours-GP-services-Cornwall-Executive-Summary.pdf>, published 7 March 2013

Attitudes towards whistleblowing

29. Surveys show that the attitudes to whistleblowing in the UK are positive: the YouGov survey found 74% of UK workers view the term as positive to neutral.^[34] Similarly a Comres survey commissioned by the University of Greenwich in October 2012 also found that 81% thought that whistleblowers should be supported.^[35]
30. Research commissioned by PCaW in 2010 and carried out by the Department of Journalism at Cardiff University found that whistleblowers are viewed in a positive light in the media, with negative coverage of the whistleblower being virtually nil since the introduction of PIDA.^[36]

Awareness of whistleblowing in the workplace

31. The evidence shows that less than half of UK employees are aware of a whistleblowing policy in their workplace^[37] and while 93% of respondents in the PCaW business survey said they have whistleblowing arrangements in place, one third of all respondents did not think or did not know whether those arrangements were effective.^[38]

[34] Ibid 6

[35] Wim Vandercerkhove, "UK Public Attitudes to Whistleblowing", published 15 November 2012. Available at SSRN: <http://ssrn.com/abstract=2176193> or <http://dx.doi.org/10.2139/ssrn.2176193>

[36] This contrasts with headlines prior to the launch of PIDA, for example the Sunday Times described the emergence of legal protection for whistleblowers as our "new community heroes are the people who snitch." Research can be found Page 17, Public Concern at Work, "The media representation of whistleblowers", "Where is whistleblowing now? Ten years of legal protection for whistleblowers", published March 2010

[37] Ibid 5

[38] Ibid 3

Making whistleblowing arrangements mandatory

32. Although there is agreement about the need for whistleblowing arrangements, the law does not make it mandatory. There are, however, a number of examples where regulators require or encourage whistleblowing arrangements to be in place.
33. The International Civil Aviation Organisation requires whistleblowing procedures (referred to as internal reporting systems) as part of mandatory safety reporting systems. In order to be licensed within the aviation industry, organisations and individuals must comply with mandatory reporting system regulations.
34. In the financial services industry, the handbook issued by the Financial Conduct Authority encourages organisations to have whistleblowing arrangements in place, but there are no formal sanctions for a failure to do so. The draft European Union Market Abuse Regulations being considered by the European Parliament require financial service organisations and their regulators to have whistleblowing arrangements in place.^[39]
35. The Financial Reporting Council in its UK Corporate Governance Code 2012 recommends that listed companies should have whistleblowing policies in place, or explain why they do not have them. There are however no sanctions for a failure to comply with this provision.^[40]
36. The Bribery Act 2010^[41] creates a new offence under Section 7 of failing to prevent bribery. Commercial organisations will commit the offence if employees or other associated persons commit offences of bribery. It is a defence if the organisation proves that it had adequate procedures in place. In the government guidance accompanying the Bribery Act 2010 whistleblowing or 'Speak Up' policies are recommended^[42] as part of the adequate procedures to prevent bribery. The British Standards Institution has published a standard for Anti-Bribery Management Systems and whistleblowing arrangements are included as part of this.
37. Lord Justice Leveson in his recent report into the role of the press and police in the phone-hacking scandal stated, in relation to police officers and police staff:

“My overall assessment is that a series of pragmatic solutions need to be devised to maximise the chance that genuine whistle-blowers will use confidential avenues in which they may have faith ...” ^[43]
38. Lord Justice Leveson recommended that there should be a whistleblowing hotline in the new regulatory structure for those journalists who feel that they are being asked to do things which are contrary to the Editors' Code.
39. Regulators can play a vital role in ensuring that those they regulate have effective whistleblowing arrangements in place.
40. As part of the consultation, we asked: should regulators take an interest in the whistleblowing arrangements of the organisations that they regulate; do regulators make adequate use of information from whistleblowers; and should they do more to protect whistleblowers? An overwhelming majority of respondents agreed that regulators should take an interest in the arrangements and that regulators need to do more to protect whistleblowers. The majority of respondents did not think that regulators make adequate use of the information they receive from whistleblowers.

[39] Article 29 Market Abuse Regulations. Available at: <http://register.consilium.europa.eu/pdf/en/13/st11/st11384-ad02re01.en13.pdf>

[40] The UK Corporate Governance Code (C.3.5) states for companies listed on the London Stock Exchange it is a matter for the Board, and specifically the Audit Committee, to ensure that arrangements are in place for staff to raise concerns in confidence about possible financial and other improprieties, and for such concerns to be proportionately and independently investigated and followed up. Available at: <http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>

[41] Bribery Act 2010, <http://www.legislation.gov.uk/ukpga/2010/23/content>

[42] Bribery Act 2010: Guidance about commercial organisations preventing bribery <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

[43] Paragraph 8.9, page 992, Second Volume of Leveson Report, http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_ii.pdf

41. Respondents to our consultation (including the Bank of England, the Civil Aviation Authority, the Financial Conduct Authority and the Wales Audit Office) were overwhelmingly supportive of regulators taking more of an interest in the arrangements of the organisations they regulate.

42. The Parliamentary Commission on Banking Standards (PCBS) in its report, “Changing Banking for Good” recommends that the Financial Conduct Authority (FCA) has a more pro-active role in this area. The PCBS stated:

“A poorly designed whistleblowing regime could be disruptive for a firm but well designed schemes can be a valuable addition to its internal controls. The regulator should be empowered in cases where as a result of an enforcement action it is satisfied that a whistleblower has not been properly treated by a firm, to require firms to provide a compensatory payment for that treatment without the person concerned having to go to an employment tribunal.”^[44]

43. The PCBS criticised the FCA for having “little appreciation of the personal dilemma that whistleblowers may face”. The PCBS recommended that the FCA should:

- a) “periodically examine” a firm’s whistleblowing records, both in order to inform itself about possible matters of concern and to ensure that firms are treating whistleblowers’ concerns appropriately;
- b) determine the information banks should report on whistleblowing in their annual reports;
- c) require senior persons within banks to have an explicit duty to be open with regulators where they become aware of possible wrongdoing regardless of whether they are in direct contact with the FCA; and
- d) provide feedback to the whistleblower, ask financial firms to tell them if a claim is taken to employment tribunal and to consider enforcement action against an individual or firm if a whistleblower is victimised.^[45]

44. The Health Select Committee recommended that the CQC, as part of its regulatory activities, reviews the whistleblowing arrangements of those that are registered with it:

“While it is essential that proper procedures are established to support whistleblowers who report cases to the CQC, in most circumstances it will be important for staff in the first instance to raise issues through accessible procedures at their place of work. We have noted earlier in this report the importance which CQC inspectors should attach to making an assessment of the professional culture of organisations which provide health and social care. A key element of this assessment should be a judgement about the ability of professional staff within the organisation to raise concerns about patient care and safety issues without concern about the personal implications for the staff member concerned. An organisation which does not operate on this principle does not provide the context in which care staff can work in a manner which is consistent with their professional obligations. It should therefore be refused registration by the CQC.”^[46]

45. The Health Select Committee repeated that the CQC needs to take a further interest in whistleblowing arrangements in its “After Francis” report:

“The Committee recommends that the CQC should, in all its inspections of providers, satisfy itself that arrangements are in place to facilitate and protect the position of any member of staff who wishes to raise concerns about the quality of care provided to patients. As part of this process, the CQC should satisfy itself that proper safeguards are in place for whistleblowers who may provide an additional safeguard for patient interests.”^[47]

46. These examples illustrate a movement towards requiring organisations to have effective whistleblowing arrangements in place.

[44] Paragraph 805, Parliamentary Commission on Banking Standards, “Changing Banking for Good”, published June 2013

[45] Paragraphs 786-805, Parliamentary Commission on Banking Standards, “Changing Banking for Good”, published June 2013

[46] Paragraph 58, “Report of Accountability Hearing of CQC 2012”, Health Select Committee,

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/news/13-01-03-cqcpublication>, published 13 January 2013

[47] “After Francis: making a difference”, Health Select Committee, published 18 September 2013,

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/657/657.pdf>

47. The Commission has reached the conclusion that it would be undesirable, at least at the present time, to require employers by statute to have in place whistleblowing arrangements. But the Commission believes that the Government should take further steps to make it more likely that employers have effective whistleblowing arrangements.
48. The Commission believes that those further steps should include an amendment to PIDA, to authorise the Secretary of State to issue a code of practice, to be taken into account by courts and tribunals when issues of whistleblowing arise.^[48]
49. The Commission also believes the government should do more to persuade regulators to require or encourage those they regulate to have in place effective whistleblowing arrangements in accordance with this code.

Recommendation 1: The Commission recommends that PIDA be amended to authorise the Secretary of State, after consultation, to issue a code of practice on whistleblowing arrangements, and provide that such a code must be taken into account by courts and tribunals wherever it is relevant to do so.

Recommendation 2: The Commission recommends that the Government should do more to persuade regulators to require or encourage those they regulate to have in place effective whistleblowing arrangements in accordance with the code issued under PIDA.

50. The Commission makes the following further recommendations to achieve better regulatory oversight of whistleblowing arrangements.

Recommendation 3: The Commission recommends that the licence or registration of organisations which fail to have in place effective whistleblowing arrangements should be reviewed.

Recommendation 4: The Commission recommends that regulators have a clear procedure for dealing with whistleblowers who come to them, including the provision of feedback and explaining when it is not possible or reasonable to do so.

Recommendation 5: The Commission recommends that regulators include whistleblowing in their annual reporting mechanisms, including in accountability hearings before parliament. The information to be provided or published annually should include:

- a) the number and type of concerns received by regulators from whistleblowers;
- b) the number of enforcement actions that have been triggered or contributed to by whistleblowers;
- c) the number of PIDA claims that have been referred by the employment tribunal service;^[49]
- d) the number of organisations which failed to have in place effective whistleblowing arrangements and what action was taken as a result; and
- e) what action has been taken to promote and enforce the Code.

[48] The use of codes of practice authorised by primary legislation is now common. Section 199 Trade Union Labour Relations (Consolidation) Act 1992 (TULRCAA 1992) authorises ACAS to create Codes of Practice for the improvement of industrial relations. ACAS has, for example, issued a code of practice on disciplinary and grievance procedures. A similar provision is found in section 203 of the same Act which allows the Secretary of State to create such codes. Section 207 TULRCAA 1992 deals with the failures to comply with a Code of Practice. The Equality Act 2010 also provides for the Equality and Human Rights Commission to issue codes of practice, to be approved by the Secretary of State.

[49] UK Statutory Instrument 2010 No 131 (http://www.legislation.gov.uk/ukSI/2010/131/pdfs/ukSI_20100131_en.pdf) enables the Employment Tribunal Service to send Employment Tribunal claim forms, where individuals give their consent, to prescribed regulators as described in PIDA.

Code of Practice

51. The Commission has given much thought to the contents of a code of practice suitable for adoption by the Secretary of State.
52. Such a code of practice must clearly set out principles enabling workers to raise concerns about a danger, risk, malpractice or wrongdoing that affects others without fear of adverse consequences. Any such arrangements must be proportionate to the size of the organisation and the nature of the risks faced. A code of practice should set out the requirements for arrangements covering the raising and handling of whistleblowing concerns and should include a written procedure for the raising of concerns. This procedure should include: clear assurances about protection from reprisal; that confidentiality will be maintained where requested; and should identify appropriate mechanisms for the raising of concerns, as well as, identifying specific individuals with responsibility for the arrangements.
53. A code of practice should further identify the need for independent oversight and review of whistleblowing arrangements by the board, the audit or risk committee or equivalent. The review should include:
- a) a record of the number and types of concerns raised and the outcomes of investigations;
 - b) feedback from individuals who have used the arrangements;
 - c) any complaints of victimisation;
 - d) any complaints of failures to maintain confidentiality;
 - e) a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety;
 - f) a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
 - g) a review of any relevant litigation; and
 - h) a review of staff awareness, trust and confidence in the arrangements.
54. We have asked ourselves whether a code of practice should require workers to blow the whistle. The PCBS^[50] (among others) have suggested that a duty to blow the whistle should be imposed on workers, as it would encourage more individuals to speak up. Commission members see difficulties with such a suggestion. While it is commonplace to see duties to report malpractice or wrongdoing attached to certain professions (e.g. doctors, nurses, lawyers, accountants) an overarching ‘duty to blow the whistle’ can cause more problems than it solves. This is because it might encourage over-reporting, allow scapegoating and lead to organisations focussing on who did not speak up rather than the concern itself or the effectiveness of the whistleblowing arrangements.^[51] We therefore recommend that any code of practice should not contain a duty to blow the whistle.
55. The Commission has drafted a suggested code of practice which is attached to this report.^[52]

Recommendation 6: The Commission recommends to the Secretary of State, as a basis for consultation, the Code of Practice attached to this report.

[50] Paragraph 784 of the Parliamentary Commission on Banking Standards report is quoted above at paragraph 13. The FCA in its response to the PCBS (published on 7 October 2013) states that staff have a duty to report and are considering building this into the Individual Standards Rules.

[51] The Commission notes that the NHS Constitution creates an expectation for NHS staff to raise concern. The Commission considers the creation of an expectation to be at the correct level to encourage workers to raise concerns (page 15, NHS Constitution for England, published <https://www.gov.uk/government/publications/the-nhs-constitution-for-england>)

[52] In drafting the code, we have been helped by the British Standards Institution’s Code of Practice (CoP) on Whistleblowing Arrangements. www.pcaw.org.uk/bsi

Rewards

56. There are examples of financial rewards or incentive programmes in the US under the False Claims Act and the Dodd Frank Act.^[53] They provide the claimant or informant with a percentage share of financial penalties.
57. The American model allows for monetary awards where there has been significant financial loss to the government which is identified and redressed as a result of whistleblowing. Typically the whistleblower receives between 15-30% of monies recovered and the remainder is returned to the government.
58. The Home Office is considering financial incentives for those who blow the whistle on fraud, bribery and corruption, as part of its Serious and Organised Crime Strategy alongside the Ministry of Justice and Department of Business, Innovation and Skills.^[54] However, the Financial Conduct Authority stated in their response to the Parliamentary Commission on Banking Standards that they have concerns over the impact of incentivising whistleblowers. They are conducting further research into the issue of rewards for whistleblowers with the Prudential Regulation Authority and plan to report on this in 2014.
59. The Commission notes that there are a number of discretionary reward mechanisms operating in the UK by the Office of Fair Trading,^[55] by the HMRC^[56] and by the police^[57] for information which leads to a conviction. There is no information published about the value or the numbers of rewards, or even the criteria for giving a reward.
60. The majority of respondents to our consultation (including whistleblowers) were not in favour of rewards. The reasons given were multiple and in summary were as follows:
 - a) inconsistent with the culture and philosophy of the UK
 - b) undermines the moral stance of a genuine whistleblower
 - c) could lead to false or delayed reporting
 - d) could undermine credibility of witnesses in future criminal or civil proceedings
 - e) could result in the negative portrayal of whistleblowers
 - f) would be inconsistent with current compensatory regime in the UK.
61. The provision of a reward may well incentivise those who would not normally speak out. However, it may also encourage individuals to raise a concern only when there is concrete proof and monetary reward. This could reduce the opportunity to detect malpractice early and prevent harm. Additionally, it is difficult to use the model in sectors other than the financial sector, such as care or health.
62. Rewards are not a substitute for strong legal protection. There is no reason why whistleblowers should not be recognised and rewarded in the workplace via remuneration structures, promotion or other recognition mechanisms including by society at large (e.g. the honours list).
63. None of the money recovered under the rewards systems above is used to promote whistleblowing or in the provision of better support for whistleblowers (such as counselling and legal advice). The Commission suggests that if the government adopts a reward system following its review, this system should provide additional support for whistleblowers.

Recommendation 7: The Commission does not recommend the introduction of financial rewards or incentives for whistleblowing.

[53] False Claims Act (31 USC 3729) also known as “qui tam” empowers whistleblowers to sue a contractor on behalf of the Government in return and for a percentage of the monies recovered. The Dodd Frank Act (H.R. 4173) gives whistleblowers an incentive to blow the whistle to the Securities and Exchange Commission and the Commodities and Futures Trading Commission, by awarding the whistleblower a percentage of the monies recouped in enforcement actions.

[54] Paragraph 6.44, Page 61, Serious and Organised Crime Strategy,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf, published October 2013

[55] OFT process <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards#.UnJAPk72fw>

[56] The HMRC offers rewards for information that leads to fraud and conviction.

<http://www.hmrc.gov.uk/reportingfraud/help.htm>. In an article from the Independent published on 30 July 2012, the process was described as “lumpy” by an HMRC spokesperson. <http://www.independent.co.uk/news/uk/politics/recession-brings-out-the-snitches-as-hmrc-pays-whistleblowers-1-million-over-last-three-years-for-providing-information-on-tax-cheats-7987757.html>

[57] The police have two mechanisms for offering rewards: Crimestoppers and rewards for human intelligence sources. The latter is governed by the ACPO Guidance on Human Intelligence Sources.

The Public Interest Disclosure Act (PIDA)

64. PIDA makes it unlawful for an employer to dismiss or victimise a worker for having made a 'protected disclosure' of information. Richard Shepherd MP introduced PIDA as a Private Member's Bill in 1997^[58] and during its introduction, he commented:

"The Bill is, as its name implies, a public interest measure. Were it merely an employee rights measure, I doubt that I would be able to inform the committee that its objectives are supported by the Institute of Directors, the Confederation of British Industry and the Committee on Standards in Public Life as well as the Trades Union Congress."^[59]

65. The protection provided by the Act is not subject to any qualifying period of employment and so is referred to as a 'day one' right in employment law. By contrast under ordinary unfair dismissal, there is a two year qualifying period.

66. A disclosure will not 'qualify' for protection unless, in the reasonable belief of the worker, the information is in the public interest^[60] and tends to show one or more of a number of listed 'wrongdoings'.^[61] The qualifying disclosure will not be protected if by making the disclosure the worker commits an offence such as breaching the Official Secrets Act or misconduct in public office.

67. *Disclosure to an employer*: Disclosure of information by a worker will be protected if the worker makes a qualifying disclosure to the employer or, in certain circumstances, to a Minister of the Crown.

68. *Disclosure to a regulator*: Disclosure of information by a worker will also be protected if the worker makes a qualifying disclosure to a 'prescribed person', reasonably believing that the information and any allegation contained within it are substantially true. The Secretary of State (in practice the Secretary of State for Business, Innovation and Skills) prescribes by list both the identity of the prescribed person (usually a regulatory body) and its remit. The list can be found in a series of statutory instruments. Disclosure to Members of Parliament is not covered by this section. The worker wishing to make a protected disclosure risks losing protection if the report is to a regulatory body not on the list and/or the worker makes a report in respect of a matter outside the prescribed remit.

69. *Disclosure to the wider public*: Disclosure of information by a worker will also be protected if the worker makes a qualifying disclosure to any person or body provided that a number of detailed and complex conditions are satisfied. These conditions include a requirement that the worker does not make the disclosure for purposes of personal gain and a requirement that it is reasonable to make the disclosure in the circumstances. A further section makes provision for a qualifying disclosure of an exceptionally serious failure to any person or body. Again, a number of detailed conditions apply.

70. *Disclosure in the course of obtaining legal advice*: Disclosure of information by a worker will also be protected if the worker makes a qualifying disclosure in the course of obtaining legal advice.

[58] There were two previous attempts to introduce such legislation by Tony Wright MP (1995) and Don Touhig MP (1996).

[59] Public Interest Disclosure Bill Deb 11 March 1998

[60] A new provision brought in by section 17 of the Enterprise and Regulatory Reform Act 2013, <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>

[61] Categories of wrongdoing set out in section 43B of the Public Interest Disclosure Act 1998 are as follows:

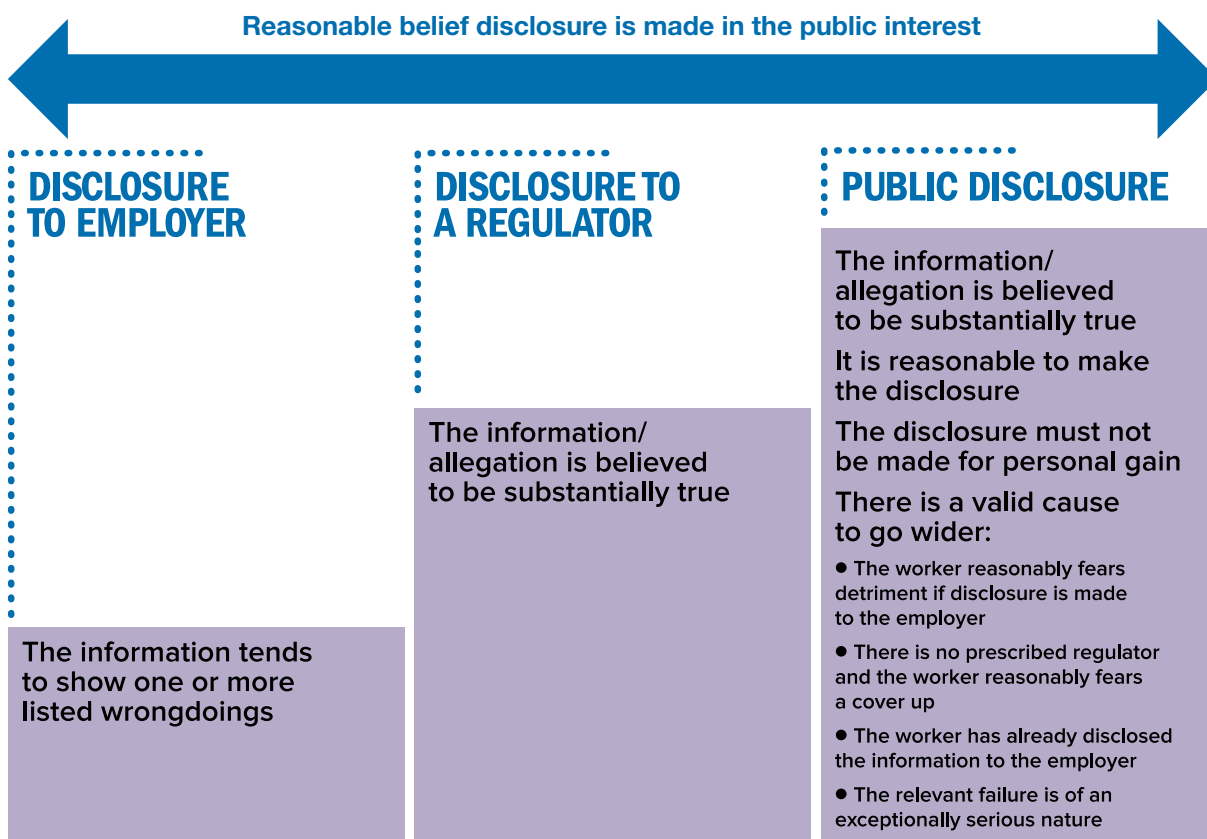
(a) criminal offences; (b) failure to comply with legal obligations; (c) miscarriages of justice; (d) dangers to health or safety; (e) dangers to the environment; (f) deliberate concealment of any of the above categories

Recent amendments to PIDA

71. The Government has implemented a number of amendments to PIDA through the Enterprise and Regulatory Reform Act 2013 (ERRA). These changes, described by the Government ‘as measures for improving the legislation’, are as follows:

- a) a public interest test inserted in Section 43B of PIDA requiring individuals bringing a claim at the Employment Tribunal to show a reasonable belief that their disclosure was made in the public interest.^[62]
- b) an amendment to the good faith test so that if a worker lacks good faith when making a disclosure it will affect the worker’s remedy. If a disclosure is found to have been made in bad faith the claim will not fail (as it would have done previously), but the Employment Tribunal will be able to reduce any compensatory award in respect of that claim by 25%.^[63]
- c) an amendment to provide that an individual who has suffered a detriment from a co-worker as a result of blowing the whistle may bring a claim against the employer.^[64]
- d) the definition of “worker” in section 43K of PIDA was amended to include certain new contractual arrangements within the NHS so that individuals working under such contracts are covered by the whistleblowing protection. Alongside this, a power was introduced to enable the Secretary of State to make any further changes to the definition of ‘worker’ by secondary legislation.^[65]

72. The following diagram takes into account the more recent changes to PIDA:



[62] Section 17 of Enterprise Regulatory Reform Act 2013 (Disclosures not protected unless believed to be made in the public interest), <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>

[63] Section 18 of Enterprise Regulatory Reform Act 2013 (Power to reduce compensation where disclosure not made in good faith), <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>

[64] Section 19 of the Enterprise Regulatory Reform Act 2013 (Worker subjected to detriment by co-worker or agent of employer), <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>

[65] Section 20 of the Enterprise Regulatory Reform Act 2013 (Extension of meaning of “worker”), <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>

Suggested PIDA Reforms

73. The vast majority of respondents to our consultation thought that PIDA is not working as intended. The Commission considers that there is much Government can do to improve the situation and a number of amendments that can be introduced with relative ease. We deal with these suggested reforms below.
74. It remains the case however that PIDA is a complex piece of legislation which is very difficult to understand.

Recommendation 8: The Commission recommends a simplification of PIDA.

Categories of wrongdoing

75. The current categories of wrongdoing are set out in Section 43B of PIDA as follows:

“(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,
- 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”.

76. As part of our consultation we asked whether the categories of wrongdoing could be extended. The majority of respondents were in favour of wrongdoing being more widely defined. We agree. The Commission favours the inclusion of a non-exhaustive list which provides helpful examples of the types of wrongdoing.
77. The Commission recommends that two further categories are added: gross waste or mismanagement of funds and serious misuse or abuse of authority. These additional categories are found in equivalent legislation in Australia and the USA. The Irish Government is also considering their inclusion.^[66] We accept that these categories may be interpreted broadly and would welcome drafting that limited their reach to operational rather than policy issues.

Recommendation 9: The Commission recommends PIDA contains a non-exhaustive list of the categories of wrongdoing, including gross waste or mismanagement of funds and serious misuse or abuse of authority.

Public interest test

78. Section 43B, as already noted, has been amended to include a public interest test so that a qualifying disclosure is one which ‘in the reasonable belief of the worker making the disclosure, is made in the public interest...’. This came into force on 25 June 2013.
79. The Commission is concerned that the introduction of this additional requirement will lead to uncertainty and unpredictability and thus an increase in litigation.
80. We take an example of a claim before an Employment Tribunal. The worker says “I believed that it was in the public interest to make the disclosure of information because ... and my belief was reasonable.” The employer replies: “You did not have that belief or, if you did, the belief was not reasonable.”

[66] Section 5, Protected Disclosures Bill 2013, <http://www.oireachtas.ie/documents/bills28/bills/2013/7613/b7613s.pdf>

81. The Tribunal will have to decide first whether the worker had the belief. If the Tribunal decides that the worker had the belief, then the Tribunal must decide whether the belief was reasonable. If the disclosure of information was, in the view of the Tribunal, in the public interest, then the Tribunal would presumably conclude that the belief was reasonable. But what happens if the Tribunal concludes that it was in the public interest to make the disclosure of information but not for the reasons given by the worker? It is to be hoped that in those circumstances the Tribunal would still find that the disclosure was protected.^[67]
82. In deciding whether it was in the public interest to make the disclosure of information, the Tribunal would identify the category of wrongdoing now to be found in section 43B (1) (a) to (f) and which the information “tended to show”. The fact that the information disclosed related to a category of wrongdoing listed in (a) to (f) would be a strong but not conclusive reason for saying that it was in the public interest to make the disclosure. If the Tribunal decides that the disclosure of information was not made in the public interest, the Tribunal will still need to decide whether the worker reasonably believed, on the facts as he thought them to be, that it was in the public interest.
83. The Commission believes that it would reduce uncertainty if either the Government or the Employment Appeal Tribunal in an appropriate case gave guidance as to what factors would tend to indicate that a disclosure of information was made in the public interest. That guidance might helpfully extend to providing examples of disclosures of information that would, and would not, generally be regarded as being in the public interest. The guidance would also make clear that the facts of individual cases may well justify departing from the guidance as the circumstances dictate.

Protection of workers

84. The Act covers all workers as defined by section 230(3) of the Employment Rights Act 1996 (ERA 1996). Additionally, by virtue of section 43K, a number of other categories of worker are covered including contractors, agency workers and trainees. The section also extends the meaning of the word employer. Section 43K (1)(c) refers to workers in the National Health Service, and this has been the subject of recent reform in the ERRA, including the power to amend the provision in PIDA relating to workers (Section 20 ERRA).^[68]
85. The Commission asked whether there should be a broader more flexible definition of worker within PIDA to deal with the many different types of worker and working arrangements in the modern workplace. We also asked whether there are persons not now covered that ought to be. The overwhelming majority of respondents to this question agreed that the definition of worker should be extended.
86. As part of the consultation, the Commission asked whether there should be provisions within PIDA to protect against blacklisting. Respondents were overwhelmingly in favour of the extension of the blacklisting provisions for whistleblowers.
87. There are serious concerns that a whistleblower will not be able to find subsequent employment. This may be due to the fact that the worker is not given a good reference or because the worker is employed in a close knit industry or lives in a small community. This has been a concern in the construction industry, where blacklisting of workers who have raised health and safety issues is thought to be commonplace, and has been the subject of a report by the Scottish Affairs Select Committee^[69] and investigations by the Information Commissioner’s Office.^[70]

[67] That involves giving a purposive interpretation to the words so that they cover the situation where the disclosure is in the public interest and the situation where the worker reasonably believes that it is in the public interest.

[68] Referred to in paragraph 71(d) in this Report.

[69] Scottish Affairs Select Committee, “Blacklisting in employment: interim report”, <http://www.parliament.uk/business/committees/committees-a-z/commons-select/scottish-affairs-committee/inquiries/parliament-2010/blacklisting-in-employment/>, published 26 March 2013

[70] Information Commissioner’s Office, “The Consulting Association” http://www.ico.org.uk/news/current_topics/consulting_association

88. Since 2010 legislation has prevented the blacklisting of employees who have engaged in trade union activities.^[71] Recently in recognition of the fact that blacklisting can have severe financial consequences for workers, eight UK construction groups have agreed to compensate unlawfully blacklisted workers.^[72] The Information Commissioner's Office has announced that it is to expand its project to identify blacklisted construction workers, which initially looked at those unlawfully listed.^[73] This decision follows confirmation by the Independent Police Complaints Commission in October 2013 that special branch police were involved in providing information to facilitate the blacklisting of up to 3,200 construction workers, which has led to calls by the Blacklist Support Group for an independent inquiry into blacklisting.^[74]
89. Blacklisting can occur in other sectors. Lisa Martin, who exposed serious abuse in the Orchid View care home revealed that she has not been able to get a job in the care sector, since reporting her concerns to the police in 2011.^[75]
90. On 26 February 2013 the Government agreed to consider the issue of blacklisting and the lack of protection for job applicants on the basis of new evidence provided.^[76] The Commission hopes that the continuing problems with blacklisting highlighted by our respondents and this report will be considered by Government, and they will extend the scope of PIDA to include job applicants.

Recommendation 10: The Commission recommends that the Secretary of State uses the powers set out in Section 20 of the Enterprise Regulatory Reform Act 2013 to add the following categories of workers to PIDA:

- a) job applicants
- b) student nurses, doctors, healthcare professionals and social workers
- c) General Practitioners in the health service, regardless of their contractual arrangements
- d) volunteers and interns
- e) non-executive directors
- f) public appointments
- g) partners (including LLP partners)
- h) priests and ministers of religion
- i) foster carers
- j) all categories of workers listed under the Equality Act 2010 ^[77]

[71] The Employment Relations Act 1999 (Blacklists) Regulations 2010 <http://www.legislation.gov.uk/ukdsi/2010/9780111490457/contents>

[72] "UK construction groups are to compensate blacklisted workers", Jim Pickard, <http://www.ft.com/cms/s/0/2abeaa92-318c-11e3-817c-00144feab7de.html#axzz2hhCu7nqT>, published 10 October 2013.

[73] David Smith, "Pilot project extended to help identify blacklisted workers", Information Commissioner's Office blog, <http://www.ico.org.uk/news/blog/2013/pilot-project-extended-to-help-identify-blacklisted-workers>, published 12 April 2013

[74] Daniel Boffey, "Police colluded in secret plan to blacklist 3,200 building workers", The Observer, <http://www.theguardian.com/business/2013/oct/12/police-blacklist-construction-workers-watchdog>, published 12 October 2013

[75] "Orchid View scandal: Whistle-blowing inquiry call", BBC News, <http://www.bbc.co.uk/news/uk-24600613>, 20 October 2013

[76] Hansard 26 February 2013, Column 1007, <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130226-0002.htm>

[77] Such as barristers, advocates, office holders and local authority members

Overseas workers

91. The Commission notes there is no longer any express territorial limitation provision in the Employment Rights Act (ERA) 1999 since the abolition of section 196 of the ERA 1999. The case of *Foxley v GPT Special Project Management Ltd*^[78] illustrates that territorial jurisdiction can prove a barrier to workers seeking PIDA protection when raising concerns about UK registered companies overseas. This contrasts with the approach taken in the US as evidenced by the US Department of Labor's decision in *Walters v Deutsche Bank et al.*^[79] Most recently the Supreme Court held in the case of *Ravat v Halliburton Manufacturing and Services Ltd*^[80] that the relevant jurisdictional test should be whether the worker has a sufficiently strong connection with Great Britain.

Recommendation 11: The Commission recommends that it would be in the public interest to extend PIDA to cover overseas workers raising concerns about their UK employers and subsidiaries.

92. The Commission has not addressed the protections of those who work in the intelligence and security services and the armed forces in this report. Much of what we recommend in the report in the form of a Code of Practice (see paragraph 49) could be relevant to these organisations. The Commission hopes that consideration will be given to those parts of this report which are relevant to the special circumstances of those organisations.^[81]

Worker wrongly identified as a whistleblower

93. The Act does not offer protection to workers who have been dismissed or victimised because it is wrongly believed by the employer that the worker is a whistleblower. In these circumstances, a worker may not necessarily have the protection of the unfair dismissal provisions, if they do not have the required qualifying period of service (two years).
94. As part of the consultation, we asked whether PIDA should be extended to protect those who have been wrongly identified by the employer as a whistleblower. Respondents were overwhelmingly in favour of the extension of PIDA in this way.
95. The Commission suggests that a worker is protected against detriment or unfair dismissal on the ground that the worker made, or is thought to have made, a protected disclosure.

Recommendation 12: The Commission recommends workers wrongly identified as having made a protected disclosure should be protected.

Associated persons

96. A small number of respondents to our consultation suggested that persons associated, or thought to be associated with the whistleblower should also be protected from victimisation. A similar provision exists within the Equality Act 2010.^[82] The Commission does not make a recommendation on this issue but recommends that further research be carried out in this area.

[78] Employment tribunal case no. 220087931/2011

[79] *Walters v Deutsche Bank et al.*, (2008 SOX 70), Available here:

<http://www.kmblegal.com/wordpress/wp-content/uploads/Walters-v.-Deutsche-Bank-et-al.-ALJ-decision1.pdf>

[80] [2012] UKSC 1

[81] The Commission also refers these organisations to the Open Society Justice Initiative The Global Principles on National Security and the Right to Information (Tshwane Principles) 12 June 2013, for the protection of public personnel who make disclosures of classified information. Available here:

<http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf> These principles were adopted by the Parliamentary Assembly of the Council of Europe on 2 October 2013, 'Council of Europe Parliamentarians Endorse Tshwane Principals', Open Society Justice Initiative, published 2 October 2013. Available here: <http://www.opensocietyfoundations.org/press-releases/council-europe-parliamentarians-endorse-tshwane-principals>

[82] Section 13 Equality Act 2010, <http://www.legislation.gov.uk/ukpga/2010/15/contents>

Prescribed persons under PIDA

97. Section 43F of PIDA lists “prescribed persons” to whom individuals can raise concerns. These organisations all have a regulatory function and examples include the National Audit Office, the Care Quality Commission, the Financial Conduct Authority and local authorities. The earlier recommendations made for regulators should apply to these organisations.^[83]
98. At present the list of prescribed persons can be amended by the Secretary of State through statutory instrument. The Commission considered a number of ways by which the list could be simplified. This could be done by including prescribed functions instead of naming particular organisations in the statutory instrument. For example, the Care Quality Commission and Monitor are the only health regulators listed. This excludes professional regulators such as the Nursing and Midwifery Council, the General Medical Council and the Health Professions Council. All of these professional regulators could be included if the specified function is being a regulator responsible for health matters.
99. Alternatively Section 43F could be amended to include all statutory bodies, resulting in organisations such as the police being listed. The Commission considers prescription by function to be a better route as it would help individuals identify to whom they can go to, when they are trying to raise a concern externally.

Recommendation 13: The Commission recommends that the Government reviews the process for prescribing organisations and the types of organisations listed in PIDA.

Causation test

100. At present the causation test for detriment and dismissal are different in PIDA, an anomaly stressed in the Court of Appeal decision of *Fecitt v NHS Manchester & Others*.^[84]
101. As part of the consultation, the Commission asked whether the causation tests for detriment and dismissal should be the same. The majority of respondents were in favour of this being simplified and the same test applying.
102. The Commission is in favour of the test for dismissal mirroring the test used for detriment. The Commission suggests that Section 103A of the Employment Rights Act 1996 is redrafted as follows:

‘an employee who is dismissed shall be regarded as having been unfairly dismissed if the dismissal was on the ground that the worker made, or is thought to have made, a protected disclosure.’

Recommendation 14: The Commission recommends that the causation tests for dismissal and detriment in PIDA should be the same.

Interim relief

103. The consultation asked about the interim relief provisions in PIDA which allow a dismissed worker to seek interim relief within 7 days of their dismissal, so that their employment continues or is deemed to continue until the full hearing. The consultation asked whether interim relief should apply to detriment claims under PIDA. The majority of respondents were in favour of this. The Commission agrees. The Commission considers that the extension of interim relief in detriment cases would provide a remedy to those in protracted disputes (e.g. long term suspensions). The alternative is for the worker to resign and claim constructive dismissal.

[83] See recommendations 2-5 of this Report

[84] [2011] IRLR 111

104. A number of respondents raised concerns about the time limits for interim relief and it was suggested that this be extended from 7 days to 21 days. The Commission agrees.

Recommendation 15: The Commission recommends the interim relief provisions in PIDA apply to detriment as well as dismissal.

Recommendation 16: The Commission recommends that the interim relief provisions in PIDA are extended from 7 days to 21 days.

Gagging clauses

105. Gagging clauses are those that prevent workers from speaking up about wrongdoing, malpractice or risk whether in a settlement agreement or otherwise. Section 43J of PIDA states:

“(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker’s contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.”

106. There are frequent reports that gagging clauses are widely used in all sectors.^[85]
107. As part of our consultation, we asked whether the provisions set out in section 43J are clear enough and whether people were appropriately advised about these provisions. The majority of respondents believed the drafting of section 43J is unclear. We did not receive a single positive response as to whether people received clear advice on this matter.
108. The National Audit Office is taking an interest in the issue of compromise agreements and reviewing the use of gagging clauses in public sector organisations. In June 2013, Amyas Morse, the Comptroller and Auditor General of the National Audit Office stated:

“Compromise agreements are widely, and often legitimately used. But the lack of transparency, consistency and accountability is unacceptable. With the public purse under sustained pressure and services increasingly delivered at arm’s length, it is important that compromise agreements do not leave staff feeling gagged or reward the failure either of an employee or an organization. The centre of government should get a grip on the use of compromise agreements in the public sector.”^[86]

109. The Commission believes that the anti-gagging provision in PIDA (Section 43J of PIDA) should be redrafted to add clarity to this provision and suggests alternative wording:

“No agreement made before, during, or after employment, between a worker and an employer may preclude a worker from making a protected disclosure”

Recommendation 17: The Commission recommends that the anti-gagging provision in Section 43J PIDA is amended to make it clearer.

[85] “Watchdog warning over ‘unnecessary’ gagging clauses”, BBC News, <http://www.bbc.co.uk/news/uk-politics-24441882>, published 8 October 2013

[86] Press release from the National Audit Office, <http://www.nao.org.uk/press-releases/confidentiality-clauses-and-special-severance-payments-2>, published 21 June 2013

110. Section 203(3)(c) of ERA requires that the employee or worker must have received advice from an independent adviser as to the terms and effect of a proposed compromise or settlement agreement and, in particular, its effect on his or her ability to pursue an employment tribunal claim.
111. The Commission suggests that Section 203 of ERA be amended to include a requirement that those advising workers about settlement agreements should explain the meaning of Section 43J PIDA.

Recommendation 18: The Commission recommends that when workers receive advice from an independent adviser on settlement, they also receive advice about the effect of section 43J PIDA.

Allegations

112. Some of the respondents to our consultation drew our attention to the confusion created by the Employment Appeal Tribunal decision of *Cavendish Munro Professional Risk Management v Geduld*.^[87] The EAT drew a distinction between (i) a disclosure of information which is protected and (ii) the making of an allegation, which was held not to be protected under section 43B PIDA. The EAT held that a statement to the effect of “you are not complying with health and safety requirements” is an allegation and is therefore not protected. The Commission notes that in Section 43F PIDA an allegation of this kind would be protected if made to a prescribed person. In the view of the Commission the distinction drawn by the EAT is artificial and undermines the purpose of the law.

Recommendation 19: The Commission recommends that the decision of Cavendish Munro Professional Risk Management v Geduld is overturned.

Trade union representatives

113. Section 43D provides that “a qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice”. A number of respondents recommended that the section should be amended so that trade unions also be included as a source of advice.
114. A similar provision was suggested by Lord McCarthy during the passage of the Public Interest Disclosure Bill. He also suggested that section 43D could be amended to include “obtaining advice from a recognised trade union”.^[88]
115. The Commission suggests that PIDA is amended to include trade union representatives as follows:

After Section 43D, Insert (1A) “A qualifying disclosure is made in accordance with this section if it is made to a trade union representative”

Recommendation 20: The Commission recommends that PIDA is amended to include obtaining advice from trade unions.

[87] [2010] IRLR 38

[88] HL Deb 11 May 1998 vol 589 cc904

Employment Tribunal Service reforms

Specialist tribunals or judges

116. The majority of respondents to our consultation considered there should be a degree of specialism in the Employment Tribunal Service. This already exists in discrimination and equal pay cases whereby judges who have received training are ‘ticketed’ to deal with the more complex discrimination cases.

Recommendation 21: The Commission recommends that tribunal members hearing PIDA cases must have specialist training.

Open register of PIDA claims

117. The majority of respondents thought there should be an open register of PIDA claims, as the public interest lies at the heart of these claims. Those that were not in favour were concerned that an open register would give employers material to target or blacklist those raising concerns.

Recommendation 22: The Commission invites the government to consider whether it would be in the public interest to have a register of PIDA claims available to the public or at least for research purposes.

Mandatory regulatory referral

118. A majority of respondents were in favour of mandatory referral of PIDA claims forms by the Employment Tribunal to regulators. Included among those respondents who were in favour of mandatory referral are regulators such as the GMC, Ofwat, Scottish Social Services Commission and the Wales Audit Office. The Employment Tribunal’s Rules of Procedure currently allow a claimant to choose whether or not the claim form is sent to a regulator.^[89] This carries with it the risk that information which regulators ought to have is kept from them.
119. Responses to freedom of information requests made by Public Concern at Work to both the Employment Tribunal Service and relevant regulators show that there has been a marked decrease in the number of claimants asking the Employment Tribunal Service to forward their case to the relevant regulator.^[90] They also showed a disparity between what the Employment Tribunal Service say they sent and what the regulators say they received.

Recommendation 23: The Commission recommends that the referral of PIDA claims to prescribed regulators by the Employment Tribunal Service should be mandatory and that individuals are given the option to opt out of this referral process.

Employment Tribunal powers

120. A majority of respondents were in favour of Employment Tribunals having the power to make recommendations and appropriate referrals to regulators.

[89] The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010. Available here: <http://www.legislation.gov.uk/uksi/2010/131/regulation/2/made>

[90] Public Concern at Work made a freedom of information request in 2011 which found that 46% of PIDA claimants were referred to the appropriate regulator. This request was repeated in 2013 and found that only 10% of claims are referred to a regulator.

121. In discrimination cases, Employment Tribunals currently have the power to make general recommendations to employers going beyond remedying the effect of the discrimination on the individual claimant where a discrimination claim is successful. The Government is proposing to remove this power.
122. The Commission thinks that the power to make such recommendations would be extremely valuable.

Recommendation 24: The Commission recommends that where a claim under PIDA is successful, Employment Tribunals should have the power to make both recommendations affecting the individual claimant and more general recommendations as to the employer's whistleblowing arrangements.

Future issues

123. As part of our consultation, a question was asked about whether or not an ombudsman should be created. There was wide support for this idea but no agreement as to what such a body would look like.
124. The Commission has not made any recommendations on this issue as there needs to be further research into the regulatory process and whether an ombudsman (or similar) would assist.
125. In addition we have recommended that the provisions relating to regulatory oversight be reviewed.

Recommendation 25: The Commission recommends that the Government undertake research to assess:

- a) whether there needs to be a central system for the reporting of concerns;
- b) whether there could be a state sponsored advice agency (as exists in the Netherlands);
- c) whether a state sponsored agency could carry out investigations into retaliation and provide an alternative system of dispute resolution (as exists in the Office of Special Counsel which handles whistleblowing for federal employees in the USA);
- d) whether a state sponsored agency could carry out strategic litigation and give legal support to whistleblowers (similar to the model of the Equality and Human Rights Commission and its work in discrimination cases);
- e) whether a state sponsored agency could make payments in cases of extreme hardship;
- f) whether a state sponsored agency could give awards to whistleblowers who have made a difference;
- g) whether a state sponsored agency could provide training, public awareness and public education on whistleblowing; and
- h) the provision of additional support services for whistleblowers.^[91]

[91] Examples include the House of the Whistleblower initiative being considered in the Netherlands and the Office of Special Counsel in the USA

Summary of recommendations

Recommendation 1: The Commission recommends that PIDA be amended to authorise the Secretary of State, after consultation, to issue a code of practice on whistleblowing arrangements, and provide that such a code must be taken into account by courts and tribunals wherever it is relevant to do so.

Recommendation 2: The Commission recommends that the Government should do more to persuade regulators to require or encourage those they regulate to have in place effective whistleblowing arrangements in accordance with the code issued under PIDA.

Recommendation 3: The Commission recommends that the licence or registration of organisations which fail to have in place effective whistleblowing arrangements should be reviewed.

Recommendation 4: The Commission recommends that regulators have a clear procedure for dealing with whistleblowers who come to them, including the provision of feedback and explaining when it is not possible or reasonable to do so.

Recommendation 5: The Commission recommends that regulators include whistleblowing in their annual reporting mechanisms, including in accountability hearings before Parliament. The information to be provided or published annually should include:

- a) the number and type of concerns received by regulators from whistleblowers;
- b) the number of enforcement actions that have been triggered or contributed to by whistleblowers;
- c) the number of PIDA claims that have been referred by the employment tribunal service;^[92]
- d) the number of organisations which failed to have in place effective whistleblowing arrangements and what action was taken as a result; and
- e) what action has been taken to promote and enforce the Code.

Recommendation 6: The Commission recommends to the Secretary of State, as a basis for consultation, the Code of Practice attached to this report.

Recommendation 7: The Commission does not recommend the introduction of financial rewards or incentives for whistleblowing.

Recommendation 8: The Commission recommends a simplification of PIDA.

Recommendation 9: The Commission recommends PIDA contains a non-exhaustive list of the categories of wrongdoing, including gross waste or mismanagement of funds and serious misuse or abuse of authority.

Recommendation 10: The Commission recommends that the Secretary of State uses the powers set out in Section 20 of the ERRA 2013 to add the following categories of workers to PIDA:

- a) job applicants
- b) student nurses, doctors, healthcare professionals and social workers
- c) General Practitioners in the health service, regardless of their contractual arrangements
- d) volunteers and interns
- e) non executive directors
- f) public appointments
- g) partners (including LLP partners)
- h) priests and ministers of religion
- i) foster carers
- j) all categories of workers listed under the Equality Act 2010^[93]

Recommendation 11: The Commission recommends that it would be in the public interest to extend PIDA to cover overseas workers raising concerns about their UK employers and subsidiaries.

Recommendation 12: The Commission recommends workers wrongly identified as having made a protected disclosure should be protected.

[92] UK Statutory Instrument 2010 No 131

[93] Such as barristers, advocates, office holders and local authority members

Recommendation 13: The Commission recommends that the Government reviews the process for prescribing organisations and the types of organisations listed in PIDA.

Recommendation 14: The Commission recommends that the causation tests for dismissal and detriment in PIDA should be the same.

Recommendation 15: The Commission recommends the interim relief provisions in PIDA apply to detriment as well as dismissal.

Recommendation 16: The Commission recommends that the interim relief provisions in PIDA are extended from 7 days to 21 days.

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Recommendation 18: The Commission recommends that when workers receive advice from an independent adviser on settlement, they also receive advice about the effect of section 43J PIDA.

Recommendation 19: The Commission recommends that the decision of *Cavendish Munro Professional Risk Management v Geduld* is overturned.

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Recommendation 24: The Commission recommends that where a claim under PIDA is successful, Employment Tribunals should have the power to make both recommendations affecting the individual claimant and more general recommendations as to the employer's whistleblowing arrangements.

Recommendation 25: The Commission recommends that the Government undertake research to assess:

- a) whether there needs to be a central system for the reporting of concerns;
- b) whether there could be a state sponsored advice agency (as exists in the Netherlands);
- c) whether a state sponsored agency could carry out investigations into retaliation and provide an alternative system of dispute resolution (as exists in the Office of Special Counsel which handles whistleblowing for federal employees in the USA);
- d) whether a state sponsored agency could carry out strategic litigation and give legal support to whistleblowers (similar to the model of the Equality and Human Rights Commission and its work in discrimination cases);
- e) whether a state sponsored agency could make payments in cases of extreme hardship;
- f) whether a state sponsored agency could give awards to whistleblowers who have made a difference;
- g) whether a state sponsored agency could provide training, public awareness and public education on whistleblowing; and
- h) the provision of additional support services for whistleblowers.^[94]

[94] Examples include the House of the Whistleblower initiative being considered in the Netherlands and the Office of Special Counsel in the USA

Introduction

Every employer faces the risk that something will go badly wrong in their organisation and ought to welcome the opportunity to address it as early as possible. Whenever such a situation arises the first people to know of such a risk will usually be “workers”^[1] yet while these are the people best placed to speak up before damage is done, they often fear they have the most to lose if they do (otherwise known as “whistleblowing”).

This Code of Practice provides practical guidance to employers, workers and their representatives and sets out recommendations for raising, handling, training and reviewing whistleblowing in the workplace. The Code is issued under section X of the Employment Rights Act 1996 and it was laid before both houses of Parliament on X. It comes into effect by order of the Secretary of State on X.

A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, courts and tribunals must take the code into account when considering issues of whistleblowing.

The Code of Practice

1. This Code sets out standards for effective whistleblowing arrangements. It is designed to help employers, workers and their representatives deal with whistleblowing.
2. Whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects others.
3. When developing whistleblowing arrangements employers should consult staff and their representatives.
4. As part of the whistleblowing arrangements, there should be written procedures covering the raising and handling of concerns. These procedures should be clear, readily available, well-publicised and easily understandable.
5. The written procedures for raising and handling concerns:
 - a) should identify the types of concerns to which the procedure relates, giving examples relevant to the employer;
 - b) should include a list of the persons and bodies with whom workers can raise concerns, this list should be sufficiently broad to permit the worker, according to the circumstances,^[2] to raise concerns with:
 - i. the worker’s line manager;
 - ii. more senior managers;
 - iii. an identified senior executive and /or board member; and
 - v. relevant external organisations (such as regulators);
 - c) should require an assurance to be given to the worker that he/she will not suffer detriment for having raised a concern, unless it is later proved that the information provided by the worker was false to his or her knowledge;
 - d) should require an assurance to be given to the worker that his or her identity will be kept confidential if the worker so requests unless disclosure is required by law;
 - e) should require that a worker raising a concern:
 - i. be told how and by whom the concern will be handled;

[1] Worker is defined in section 230 of the Employment Relations Act 1996

[2] By “according to the circumstances” we mean workers should be able bypass their manager, where they fear that they will suffer a detriment or that their concern will not be listened to.

- ii. be given an estimate of how long the investigation will take;
 - iii. be told, where appropriate, the outcome of the investigation^[3]
 - iv. be told that if the worker believes that he/she is suffering a detriment for having raised a concern, he/she should report this; and
 - v. be told that he/she is entitled to independent advice.
6. The employer should not only comply with these procedures but should also sanction those who subject an individual to detriment because he/she has raised a concern and should inform all workers accordingly.
7. In addition to the written procedure for raising and handling concerns, the employer should:
- a) identify how and when concerns should be recorded;
 - b) ensure, through training at all levels, the effective implementation of the whistleblowing arrangements;
 - c) identify the person with overall responsibility for the effective implementation of the whistleblowing arrangements;
 - d) conduct periodic audits of the effectiveness of the whistleblowing arrangements, to include at least:
 - i. a record of the number and types of concerns raised and the outcomes of investigations;
 - ii. feedback from individuals who have used the arrangements;
 - iii. any complaints of victimisation;
 - iv. any complaints of failures to maintain confidentiality;
 - v. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety reports;
 - vi. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
- vii. a review of any relevant litigation; and
 - viii. a review of staff awareness, trust and confidence in the arrangements.
- e) make provision for the independent oversight and review of the whistleblowing arrangements by the Board, the Audit or Risk Committee or equivalent body. This body should set the terms of reference for the periodic audits set out in 7(d) and should review the reports.
8. Where an organisation publishes an annual report, that report should include information about the effectiveness of the whistleblowing arrangements, including:
- a) the number and types of concerns raised;
 - b) any relevant litigation; and
 - c) staff awareness, trust and confidence in the arrangements.

Anonymity and confidentiality

9. The best way to raise a concern is to do so openly. Openness makes it easier for the employer to assess the issue, work out how to investigate the matter and obtain more information. A worker raises a concern confidentially if he or she gives his or her name on the condition that it is not revealed without his or her consent. It is important that this is a clear option for anyone to use when raising a concern.
10. A worker raises a concern anonymously if he or she does not give his or her name at all. If this happens, it is best for the organisation to assess the anonymous information as best it can to establish whether there is substance to the concern and whether it can be addressed. Clearly if no-one knows who provided the information it is not possible to reassure or protect them.

Examples of Detriment

11. The code at paragraph 5(c) requires an assurance that a worker will not suffer a detriment for having raised a concern. Paragraph 6 of the code states that an employer should also sanction those who subject an individual to detriment. Subjecting a worker to a detriment means subjecting the worker to “any disadvantage” because they blew

[3] The Data Protection Act, on-going investigations, or the rights of third parties may impact the ability to provide feedback.

the whistle. This could include (but is not limited to) any of the following:

- a) failure to promote;
- b) denial of training;
- c) closer monitoring;
- d) ostracism;
- e) blocking access to resources;
- f) unrequested re-assignment or re-location;
- g) demotion;
- h) suspension;
- i) disciplinary sanction;
- j) bullying or harassment;
- k) victimisation;
- l) dismissal;
- m) failure to provide an appropriate reference; or
- n) failing to investigate a subsequent concern.

Part IV of the Employment Rights Act 1996 – The Public Interest Disclosure Act

12. PIDA sets out a framework for a worker to make disclosures about the following categories of wrongdoing, provided that they reasonably believe it to be in the public interest to do so:
- a) criminal offences,
 - b) failure to comply with legal obligations,
 - c) miscarriages of justice,
 - d) dangers to health or safety,
 - e) dangers to the environment,
 - f) deliberate concealment of any of the above categories.

13. This disclosure will be protected if the workers discloses:

- a) in course of obtaining legal advice;
 - b) to the employer;
 - c) in certain circumstances, to a Minister of the Crown;
 - d) to a 'prescribed person', reasonably believing that the information and any allegation contained within it are substantially true. The Secretary of State (in practice the Secretary of State for Business, Innovation and Skills) prescribes by list both the identity of the prescribed person (usually a regulatory body) and its remit;
 - e) to any person or body provided that a number of detailed conditions are satisfied. Those conditions include a requirement that the worker does not make the disclosure for purposes of personal gain and a requirement that it is reasonable to make the disclosure in the circumstances. A further section makes provision for a disclosure of an exceptionally serious failure to any person or body.
14. The Act makes it unlawful for an employer to dismiss or subject a worker to a detriment for having made a 'protected disclosure' of information. The protection provided by the Act is not subject to any qualifying period of employment and so is referred to as a 'day one' right in employment law. By contrast under ordinary unfair dismissal, there is a two year qualifying period.

Settlement agreements

15. In the light of section 43J ERA 1996 (anti-gagging provisions in PIDA) employers drafting settlement agreements should not include a clause which precludes a worker from making a protected disclosure.

About the Whistleblowing Commission

The Commission has been set up by Public Concern at Work (PCaW) and has the following terms of reference:

The Commission will examine the effectiveness of existing arrangements for workplace whistleblowing and make recommendations for change.

The Commission members are independent of PCaW and are:

The Right Honourable Sir Anthony Hooper

Former Court of Appeal Judge and Member of Matrix Chambers (Chair)

Lord Burns

Chairman of Santander UK and Channel 4

The Very Revd Dr David Ison

Dean of St Paul's Cathedral

John Longworth

Director General British Chambers of Commerce

Michael Rubenstein

Independent legal publisher and discrimination law expert

Sarah Veale

Head of Equality and Employment Rights at the Trades Union Congress

Gary Walker

Former NHS Chief Executive and whistleblower

Michael Woodford

Former Olympus President & CEO and whistleblower

For further information about the Whistleblowing Commission, please visit www.pcaw.org.uk/whistleblowing-commission.

About Public Concern at Work

Public Concern at Work, the whistleblowing charity, aims to protect society by encouraging workplace whistleblowing. We operate a free, confidential advice line for workers with whistleblowing dilemmas, support organisations in establishing effective arrangements for staff to speak up, inform public policy and campaign for legislative reform. Please see our website for further details: <http://www.pcaw.org.uk>.

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- a) the number and types of concerns raised;
- b) any relevant litigation; and
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Further information

If you want to learn more about the Code of Practice and how Public Concern at Work can help you please contact services@pcaw.org.uk or **020 3117 2520**.

The report of the Whistleblowing Commission can be found here: www.pcaw.org.uk/whistleblowing-commission.

The Whistleblowing Commission

Code of Practice

The Whistleblowing Commission, established in 2013 by whistleblowing charity

Public Concern at Work, developed a Code of Practice for effective whistleblowing arrangements. The Commission recommended that this is rooted in statute, can be taken into account in court cases and by regulators.

To find out more about the code, contact Public Concern at Work on 020 3117 2520.

The Code of Practice

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Training, Review and Oversight

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8. Where an organisation publishes an annual report, that report should include information about the effectiveness of the whistleblowing

raised and the outcomes of investigations;

- ii. feedback from individuals who have used the arrangements;
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- iv. any complaints of failures to maintain confidentiality;
- v. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety reports;
- vi. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
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