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

Introduction

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

This loophole arose in an interim employment tribunal case, Parkins v Sodexho[1], and has watered down the public interest purpose of PIDA. There have been concerns that PIDA is being abused by City Bankers who are using it to claim that raising concerns about their bonus payments are protected disclosures under PIDA[2]. This has led some to say that PIDA cases are being dominated by "pale stale males". This affects the reputation of this key piece of legislation and is a far cry from the original purpose of the legislation and the Parliamentary debates for the first and second bills.

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

Public interest test proposed by DBIS

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

The change would have the following effect:
Employment Rights Act 1996
43B.
(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure **is made in the public interest and** tends to show one or more of the following-

[1] [2001] UKEAT 1239_00_2206
[2] A report in the *Financial Times* on 18 September 2007 quoted the city firm Nomura warning that "The whistleblowing legislation was designed to protect employees who, in good faith, raise legitimate concerns of wrongdoing in the workplace. Its growing use by white men as a litigation tactic when in dispute with the City employers, suggests the legislation is being abused."

(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.

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

1. DBIS's failure to consult

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

2. 'Field day' for lawyers

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

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

The purpose of PIDA is to prevent disaster and to encourage workers to speak up when they have suspicions. Issues that at one point seem trivial may in fact be indicative of underlying problems in an organisation and could be the tip of the iceberg. A public interest test may have the unintended consequences of focussing on how big the disaster is or was likely to be, and mean less focus on reporting early suspicions. Issues such as missed medication may seem relatively minor compared to a multi-million pound fraud such as that in the high profile Olympus case[3] but could be a matter of life and death.

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

PCaW suggested amendment:

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

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

3. A new barrier for honest whistleblowers

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

[3] http://www.independent.co.uk/news/business/news/olympus-settles-claim-with-exboss-michael-woodford-7800965.html

damning position, nearly two decades on from the Bristol Royal Infirmary Inquiry when the whistleblower, Dr Stephen Bolsin[4], was forced to leave the UK to find work.

Furthermore, Parliament when it passed PIDA did not place a public interest test in the legislation, choosing instead to define the categories of wrongdoing under which disclosures in the Public Interest Disclosure Act should fit. Good faith was seen as the appropriate safeguard. Dame Janet Smith in her report on the Shipman inquiry commented that perhaps good faith should be replaced by a public interest test. If the public interest test is to be considered at all, it really should be considered in conjunction with the test of good faith. Any attempt to add a public interest test requires wider consultation and should not be placed in the Act as an additional hurdle by the back door.

'A missed opportunity' to protect whistleblowers

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

1. **Vicarious Liability Loophole**
   This loophole has arisen in the context of three nurses from Manchester who raised a concern about a colleague lying about his qualifications. The nurses raised their concern within the service and the Primary Care Trust. Their concern was upheld. However, the nurses were subject to bullying and harassment from co-workers. One of the nurses received a telephone call threatening her daughter and to burn down her home[5]. The case proceeded as far as the Court of Appeal, which found that vicarious liability does not exist in PIDA, as it specifically does in discrimination law. Shortly after the publication of the judgment, Lord Howe, the Health Minister agreed that this area needs to be reviewed[6]. From the experience on our advice line, harassment and bullying by co-workers is not uncommon and for there to be no protection in this area is extremely problematic, as it means whistleblowers could be facing a cardboard shield in terms of the protection afforded by PIDA. It surely cannot be right that an employer can fail to do enough to protect a whistleblower from victimisation and yet altogether escape liability. To overcome this problem, we suggest transposing the existing tests from the Equality Act 2010 (sections 109-112 and section 40) into PIDA. This would also build a defence into the legislation for employers, as if they can show that they took reasonable steps to prevent the victimisation, they would not be liable.

[4] http://news.bbc.co.uk/1/hi/health/532006.stm
[5] http://news.sky.com/home/video/15385116
[6] http://www.independent.co.uk/news/uk/home-news/whistleblowers-not-protected-from-bullying-court-rules-6255015.html

It is bad news for whistleblowers everywhere if whistleblowers who are bullied by fellow staff members are not protected. Another example of this is the case of Helene Donnelly, a nurse who gave evidence to the Mid Staffordshire Inquiry and spoke of the bullying she experienced by other staff. Surely no one would suggest she should not have got protection[7].

2. **Widening the scope of PIDA to cover all GPs, student nurses, doctors, health care professionals, volunteers, NEDs (including public appointments) and prospective job applicants.**
Recent employment law cases and media stories have highlighted the difficulties of the above groups such as students on vocational placements in health and care settings, all GPs (see Anne Milton's answer to a Parliamentary question which highlighted the complicated nature of the protection of GPs at present[8]), volunteers, non-executive directors (the reluctance of Royal Bank of Scotland non-executives to question Fred Goodwin[9]), public appointments (the case of Kay Sheldon- a board member of the Care Quality Commission[10]), members of LLPs (covered by the Equality Act 2010), priests (covered by the Equality Act 2010) and foster carers.

The lack of protection for job applicants was highlighted in an Employment Tribunal Appeal case, BP v Elstone[11], where an employee was protected from victimisation by his current employer, having raised a concern with his previous employer. The tribunal commented that had the claimant been a job applicant he would not have been protected. On our advice line, discrimination at pre-employment stage is a worry for workers considering whether and how to raise a concern. It can be daunting for an individual who has raised a genuine concern about a danger, risk or malpractice in the workplace and has left the organisation, to know what to say about why they left their last job. This presents a very difficult dilemma for a whistleblower who has acted in the public interest and it is important to build some protection into the system so that whistleblowers are not fearful in such situations. In research that we have conducted for the Older People's Commissioner for Wales, we found that the second most common negative response from an employer was refusing to provide a good reference.

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

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[7] http://www.nursingtimes.net/nursing-practice/clinical-specialisms/accident-and-emergency/whistleblowing-mid-staffs-nurse-too-scared-to-walk-to-car-after-shift/5036466.article
[8] HC Deb, 9 March 2011, c66WS
[9] http://www.ft.com/cms/s/0/3776f564-02de-11de-b58b-000077b07658.html#axzz1tp9gA7M2
[10] http://www.guardian.co.uk/society/2012/jan/24/kay-sheldon-whistleblower-care-quality-commission
[11] [2010] IRLR 558, [2010] UKEAT 0141_09_3103

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

3. Extending the categories of wrongdoing

Gross waste, gross mismanagement and abuse of authority are not included in PIDA but are included in equivalent US legislation. At a time of austerity and the abolition of the Audit Commission, we suggest that these categories should be included, particularly as what may be deemed as a waste of money may not in fact be illegal but we would still hope that such concerns are raised. For example it could be a way to encourage workers to raise concerns about mass over-expenditure in public spending projects such as the waste of public money in the NHS IT system[12]. We suggest a public interest category would be useful to cover these types of wrongdoing which may not be covered by the other categories. This also ensures that PIDA evolves and covers serious ethical concerns that fall short of a breach of legal obligation.

4. Gagging clauses

Little attention has been paid to the provision in PIDA section 43J which outlaws any contractual clause that prevents workers from raising a public interest concern. The cases of Dr Kim Holt and Great Ormond Street Hospital, and former inspectors at the Care Quality Commission[13] giving evidence to the Mid Staffordshire Inquiry highlight the need for greater attention to be drawn to section 43J of PIDA and for there to be tougher enforcement. We recommend a positive requirement is placed on lawyers advising in the settlement of claims, that they advise claimants about their rights under the Public Interest Disclosure Act and that any such gagging clauses are void.

5. Disclosures to all statutory bodies are protected

PIDA identifies a list of prescribed regulators and protection is relatively easy for individuals who raise concerns with them. Given that statutory bodies are changing we would suggest that the specific provision in PIDA dealing with this point (section 43F) be widened to cover a disclosure to a relevant statutory body whether or not it is prescribed. An amendment along these

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

lines has been suggested by the DTI (as was) as it is administratively cumbersome to have to prescribe new regulators. The amendment includes not only regulators such as the HSE or FSA but also the relevant local authority enforcement authorities. Given that there are changes to the regulatory activities in financial services, it may be prudent to allow this change and to ensure protection can flow seamlessly. This also means that individuals who raise concerns with professional regulators such as the Nursing and Midwifery Council, General Medical Council and the Health Professions Council would be more easily protected. More importantly this would be a smart way to deal with international criticism from the OECD that disclosures to the police have to satisfy higher tests than disclosures to prescribed regulators. We recommend that the power to prescribe persons as this is something HMG may wish to use (e.g. in 1997/8 the Minister Ian McCartney MP suggested union officials might be prescribed at some point).

6. **Tackling the good faith test**

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

We have proposed three options for addressing the good faith point. Option (i) is to remove the test altogether. Options (ii) and (iii) both clarify the purpose of PIDA protection is that wrongdoing can be addressed. Option (ii) follows the approach taken by the Court of Appeal in Street v Derbyshire UWC[14] that (a) good faith means with the honest purpose of raising the concern so it can be addressed, but (b) that an ulterior predominant motive can negate good faith. Our suggested amendment clarifies this by stating that a predominant ulterior motive should only negate PIDA protection where it is malicious. This reflects the meaning the Government intended the term 'in good faith' in PIDA should have, as confirmed by the DTI in its comments of 31 August 2001 on the report into the Bristol Royal Infirmary that 'in good faith' in PIDA "simply means that the disclosure was made honestly, not maliciously." In clarifying the honesty of purpose on the face of the Act, this amendment helps reduce the risk (increased by the abolition of the register of employment tribunal applications) that an employee might be tempted to make an internal disclosure to blackmail the employer by offering to keep the wrongdoing secret if he is given an undue benefit. While Option (iii) includes a public interest test which means that the worker would have to show that the predominant motive for raising their concern is in the public interest.

If the legislation is to include a public interest test then it would be appropriate to consider this in conjunction with the good faith requirement in PIDA, rather than placing an additional hurdle on would be whistleblowers.

[14] [2004] EWCA Civ 964

To address this finely nuanced issue properly requires consultation and the current proposed amendment would need to be reversed.

International Considerations

While PIDA is viewed positively internationally and when the G20 is asking member countries to commit to providing whistleblower protection, we are in danger of losing our leading edge on whistleblowing protection in the UK by failing to address some of the loopholes which have arisen over time in the law. It should also be noted that in the more recent UNCAC and GRECO reviews, the UK has lost points for the Government's failure to champion whistleblower protection.

What have we done so far?

PCaW has written to Norman Lamb (Minister for Employment Relations) and copied the communication to the Secretary of State detailing the above concerns.

The bill was published in the House of Commons on 23 May 2012 and second reading will be 11 June. Prior to its publication Lord Don Touhig spoke about the bill during the debate on the Queen's Speech. His speech can be found here: http://www.theyworkforyou.com/lords/?gid=2012-05-16a.495.0

Separately we have been in touch with a small group of MPs/ Lords who are PCaW supporters or have a significant interest in whistleblowing. We are also coordinating a civil society response, and contacting relevant stakeholders such as trades unions and CBI.

How can you help?

We are looking for interested MPs to speak at the second reading on 11 June or to put forth amendments at Committee Stage. Above we have identified key issues that will strengthen whistleblowing and public accountability. We are able to brief you on them in more detail and provide suitable wording for amendments.

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