

We are the leading independent authority on whistleblowing in the UK. We offer free advice to people concerned about crime, danger or wrongdoing at work.

We also provide expert support and consultancy services to organisations wishing to implement effective whistleblowing procedures. Our clients include Ofsted, the Serious Fraud Office, the NHS, the Home Retail Group and Lloyds Banking Group. Information on our tailored assistance packages is available on our website or you can contact a member of our Services Team.



Where's whistleblowing now?

10 years of legal protection for whistleblowers

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Foreword

Michael Smyth CBE Chairman

Welcome to Public Concern at Work's 2010 review of the legal protection available to whistleblowers in the UK.

The tenth anniversary of the Public Interest Disclosure Act ("PIDA") offered an excellent opportunity to take stock of the impact of this ground-breaking legislation. This report sets out the results of our findings.

Since our last review in 2007, there have been an extraordinary number of high-profile whistleblowing stories in the public domain. These have highlighted wrongdoing in sectors as diverse as central government¹, financial services², health³ and social care⁴. Controversies over the use of secret filming⁵ and anonymous leaking have kept whistleblowing high on the public agenda.

As a result we have experienced a record number of calls to our helpline but, as will be seen from the survey results on page 15 of this review, there is still much work to be done to publicise the help for individuals provided on our helpline and

the availability of legal protection under PIDA.

We continue our efforts to persuade leaders of public and private bodies that effective internal whistleblowing arrangements, including support for those who, in good faith, report danger, malpractice or wrongdoing, are not only good for the public interest, but also in the best interests of employers. It was with this aim in mind that we jointly published in July 2008 the BSI Code of Practice on Whistleblowing Arrangements (PAS 1998:2008) which is available for free download from our website (www.pcaw.co.uk/bsi).

None of the work we have undertaken would have been possible without the foresight, enthusiasm and commitment of our founding Director, Guy Dehn, who left the charity in robust shape when he moved on in July 2008. Guy and our long-standing Deputy Director,

Anna Myers were instrumental in securing the successes the charity has enjoyed over the past decade and we wish them much luck in their future endeavours.

We are delighted to welcome Catherine Wolthuizen as our new Director at a time when we continue to influence policy and practice in governance and accountability both at home and on the international stage.

I lead a strong board of committed individuals from a range of relevant backgrounds and I thank them and my Deputy, Maurice Frankel, for their contribution. We are always interested to hear from those who feel they could contribute as trustees or as members of our Council, so ably led by Michael Brindle QC.

We do hope you will continue to support us in this valuable work.



Contents

Contents

Foreword	01
10 years of the Public Interest Disclosure Act	03
Whistleblowing law beyond the UK	08
How we help individuals	09
Case studies from the helpline	13
Public perception: What our surveys say...	15
The media representation of whistleblowers	17
Whistleblowing best practice guide	20
People	22
Where next for whistleblowing?	23
30 PIDA cases	25



10 years of the Public Interest Disclosure Act

‘An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.’

The need for a law protecting whistleblowers became clear after a series of disasters and tragedies in the 1980s and early 1990s, such as the Zeebrugge ferry disaster, the Clapham rail crash and the Piper Alpha explosion. The time was right for legislation to protect those speaking up in the public interest and we were delighted to have been in a position to influence the nature and scope of this important move forward in public policy. PIDA received wide support from all sides of politics, unions and the business lobby. It was a rare example of a Private Member’s Bill becoming law and rarer still that it was put forward by a Conservative MP (Richard Shepherd) under the (then) new Labour Government.

PIDA came into force on 2 July 1999. The preamble describes it as:

‘An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.’

This protection results in the right to take a claim for unfair dismissal or detriment to the Employment Tribunal (ET).

At the time, Lord Nolan (former Chair of the Committee on Standards in Public Life) praised PIDA for ‘so skillfully achieving the essential but delicate balance between the public interest and the interest of employers.’ Since its introduction, PIDA has been hailed as a best practice model for whistleblower protection and its approach has been adopted around the world. In the UK, attitudes towards whistleblowers have changed. PIDA is a cornerstone of the whistleblowing framework, in the principles it crystallises, the protection it provides, and the incentive

it gives employers to get matters right or pay up. Employers are now more aware than ever of the need to develop robust whistleblowing arrangements, knowing that these may help identify problems at an early stage. As public and regulatory knowledge of the framework that supports whistleblowing increases, the deterrence and the detection of wrongdoing will inevitably rise.

Despite these achievements, our view remains that much more needs to be done to promote PIDA and the good practice principles it encourages.

Open justice and the referral of PIDA claims to regulators

Since the cross-party initiative that brought PIDA into force, there has been considerable ongoing debate and discussion around its operation and effect. This has not always been informed by reference to analysis of cases, in part because they have not been readily accessible. Claims made to the Employment Tribunal including those made under PIDA are not made public, unlike in civil courts. We say this is inconsistent with the principle of open justice.

This means that given the proportion of PIDA claims which are settled, it is entirely probable that a public concern may lie unaddressed, buried in a claim shielded from view. In response to our campaign for greater transparency of PIDA claims, the Government has laid regulations that enable the Employment Tribunal Service to forward claims to the appropriate regulator where the claimant consents. Whilst not ideal, this should raise awareness of the importance of informing a regulator about a serious matter and improve the flow of information to regulators. While we hope genuine whistleblowers will

provide their consent for information to be passed to a regulator, our fear remains that whistleblowers will find themselves under pressure to withhold consent, or will use their consent as a bargaining chip in settlement negotiations. Where consent is withheld, the Government has not said who will scrutinise the underlying concern, or whether anyone will look at it at all. Moreover, we do consider it strange that a law which is all about promoting transparency and accountability in the workplace should have its use shrouded in secrecy.

Gagging clauses

Over the past year the media has highlighted the fact that one part of PIDA may need closer observance in that there has been some concern that whistleblowers are being gagged in compromise and severance agreements. While the law is clear that clauses that attempt to gag an individual from making a PIDA-protected disclosure are void, what happens in practice may be different. Entering into a potentially void contract makes little sense on any view. We hope a better knowledge of the law might deter lawyers and employers from this approach.

PIDA Judgments

For this review, we have analysed PIDA judgments, as sent to us by the Employment Tribunal Service.⁶ However, of over 3,000 judgments (7,000 claims), only 532 had enough information to enable us to identify the nature of the concern or the issue in dispute. Those judgments reveal the serious concerns that can lie at the heart of a PIDA claim. There is no information on the underlying concern in the remaining 2,500 judgments (6,500 claims). This means the public can only see information about the concern in 8% of claims.

Despite the sparsity of available information, PIDA has generated thought-provoking and challenging cases that reveal the human dimension of whistleblowing. We have selected 30 of the most pertinent examples in the last section of this review (see page 25).

On their facts, the cases provide a telling insight into the modern workplace, labour relations and employment law. The whistleblowing concerns range from serious crimes and cover-ups to the inconsequential; the victimisation complained of covers both the outrageous and the trivial. Above all, the cases show that the Act is helping to tackle serious wrongdoing at work by providing a framework for responsible whistleblowing.

The summaries also provide an accurate picture of how the Act’s legal principles are applied by tribunals and the higher courts. In this regard they:

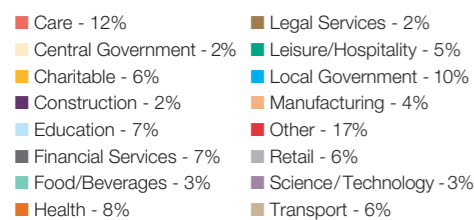
- Confirm that whistleblowers do not lose statutory protection simply because they are mistaken;
- Show the risks to individuals and others of raising a concern anonymously;
- Show the good faith test applied in a handful of cases to bar what, on the facts, appear to be unmeritorious claimants;
- Show how and when it is appropriate to engage a regulator;
- Provide examples of disclosures to the media being protected; and
- Demonstrate that causation is ultimately a matter of fact, not law.

Facts and figures to 2009:

- The number of PIDA related claims has increased from 157 in 1999/2000 to 1761 in 2009;
- Employees lodged over 9000 claims alleging victimisation for whistleblowing;
- Over 70% of these claims were settled or withdrawn without any public hearing;
- Of the remainder 78% were lost and 22% were won.

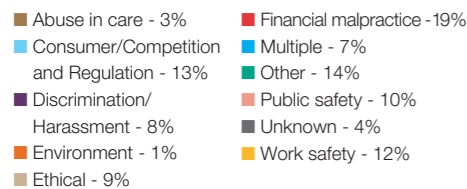
Statistics supplied by Department of Business, Innovation and Skills.

Where do the judgments come from?

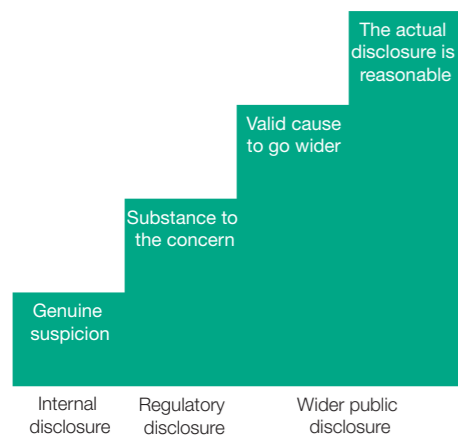


10 years of the Public Interest Disclosure Act

PCaW breakdown of types of wrongdoing in PIDA judgments



The tiered disclosure framework



PIDA in practice

We set out below the key PIDA principles that have emerged from the tribunals and courts. The cases show that the law will protect the reasonable and honest whistleblower who has raised an issue of genuine public interest.

What does the Act say?

PIDA has a tiered disclosure regime giving virtually automatic protection to those who raise a concern internally with their employer. Protection is also readily available for disclosures to prescribed regulators (such as the Financial Services Authority, the Health and Safety Executive or the Care Quality Commission). In certain circumstances, wider disclosures (for example to an MP or the media) may also be protected.

Who is protected?

The Act covers all workers across all sectors, including temporary agency staff and all NHS staff including General Practitioners. Its broad application includes UK workers based overseas although it does not cover the genuinely self-employed or volunteers. At present non-executive directors are not covered by PIDA – see Where next? on page 23.

What is wrongdoing?

PIDA covers disclosures about a wide range of what might constitute wrongdoing, including danger to health and safety or the environment, crime, miscarriages of justice, and a breach of a legal obligation, or attempts to conceal any of these matters.⁷

What is the public interest?

There has been considerable debate over whether there should be a 'public interest' test in PIDA. This was first illustrated in the

case of *Parkins v Sodhexo* in 2001 in which the ET stated during an interim application that in PIDA reference to a breach of a legal obligation was to be interpreted widely. The case included a complaint by an individual of a breach of his employment contract. While this means that the scope of the Act is wider than was envisaged during the passage of PIDA in Parliament, its application can support individuals with limited employment rights. In *Grierson v Meta Management Services Limited* in 2008 two individuals were protected under PIDA after they were victimised for raising a grievance that the company had lured them from good jobs promising higher wages that they never received.

Does motive matter?

A requirement of PIDA is that concerns should be raised in good faith. In the early years, decisions had assumed that this had the ordinary legal meaning of 'honestly'. The Government stated in the Bristol Royal Infirmary Inquiry that it had intended good faith to mean 'honestly and not maliciously'. However in *Street v Derbyshire Unemployed Workers Centre* (2004) the Court of Appeal rejected our submission that the phrase meant 'honestly'. It was however persuaded by our argument that PIDA protection cannot be lost unless there is a predominant ulterior motive that is unrelated to the purposes of the Act. Concern about this decision led Dame Janet Smith to state in the Shipman Inquiry that the good faith test should be removed altogether from PIDA as this would "avoid the possibility that concerns will not come to light because an individual might lose protection if [his or her] motives can be impugned." As yet this recommendation has not been implemented.

What proof is required?

An individual does not have to be right about the substance of his concern, provided he is reasonable (*Babula v Waltham Forest College* (2006)). However the case of *Bolton v Evans* (2006) also makes it clear that an individual should be careful to avoid acting like a private detective and step over the line of what is considered to be appropriate conduct in attempting to prove he is right.

Who can you tell?

As outlined above, individuals are protected if they raise a concern with their employer or a prescribed regulator. PIDA will also protect those who go straight to the media if appropriate, as was confirmed in *Collins v National Trust* (2005). In this case, the ET ruled that, in exceptionally serious circumstances, a disclosure to a local newspaper of a confidential report about dangers on a public beach was protected. This can be contrasted with the case of *Holbrook v Queen Mary's Sidcup NHS Trust* (2008) in which a radiographer was concerned that a police officer who had been brought in as a patient was drunk. Holbrook's action in anonymously calling 999 without consulting senior staff was found to be unreasonable, and 'a serious error of judgment' by the tribunal. Although clearly a serious breach of confidentiality the decision appears to suggest that all disclosures should first be raised internally – an interpretation which in our view may be wrong in law.⁸

Ten years after PIDA came into force, the Employment Appeal Tribunal (EAT) confirmed in *Hibbins v Hesters Way Neighbourhood Project* (2008) that whistleblowers are protected even when the information they disclose to their

current employer involves wrongdoing by a third party. In *Elstone v BP plc* in 2009 the ET held a worker could be protected if his current employer victimises him for a disclosure made to a previous employer. The ET said: "what must be borne in mind is the purpose of the legislation – which is to protect employees and workers whoever they work for".

Is PIDA like discrimination law?

While there are significant differences between PIDA and discrimination law, the Court of Appeal has previously ruled that PIDA cases should, where possible, be approached by the courts like discrimination cases (see for example, *Melia and Ezias v N. Glamorgan NHS Trust*, Court of Appeal, (2007)). The Court of Appeal ruled in *Virgo v Fidelis* (2004) that awards for injury to feelings in PIDA claims are to be assessed in the same way as for other forms of discrimination (see *Vento v Chief Constable of West Yorkshire Police* (2002) which identified three bands of compensation, ranging up to £25,000 for the highest and that the upper band should only be exceeded in exceptionally serious cases).

The Court of Appeal in *Kuzel v Roche* (2008) held that even if a tribunal did not accept an employer's reason for dismissing a claimant, it did not need to accept the reason put forward by the claimant. The Court of Appeal rejected the contention that the legal burden was on the claimant to prove that the protected disclosure was the reason for the dismissal: they merely had to advance evidence of it. The Court agreed with the EAT that to transplant the operation of the burden of proof from discrimination law would complicate rather than clarify the issue, as discrimination law and unfair dismissal law are different causes of action.

Where do people go?

8 out of 10 claimants first raised their concern internally with their employer. This is good news for employers who want to know about their risks and underscores the value of robust whistleblowing arrangements to risk management and good governance. As employees are giving their employer an opportunity to address the concern first, more needs to be done to make whistleblowers feel supported, avoiding the necessity of a PIDA claim.

Where next?

8% of claimants raised their concern with a regulator. This highlights the need to raise awareness of the role of regulators in public interest matters. We are only aware of one claimant who took his concern to the media direct (see *Collins v National Trust*, above). This dispels the myth that whistleblowing automatically involves public revelations. Only 1% of individuals initially raised their concern either internally or with a regulator and subsequently went to the media.

• Charity chief executive claiming for building work on his home • Company chairman making loans to himself prior to takeover • Care assistant physically abusing elderly patients in residential home • Waste disposal firm stealing

7. These legal definitions cover a wide range of issues. For a more detailed and illustrative breakdown of the types of concerns raised in the workplace in the PIDA judgments, see page 9.

8. ERA 1996 section 43H – does not require that a concern be raised internally if it is exceptionally serious.

10 years of the Public Interest Disclosure Act

The law will protect the reasonable and honest whistleblower who has raised an issue of genuine public interest.

Damages under PIDA are uncapped. Overall £9.5 million has been awarded to successful PIDA claimants.

What's the damage?

Damages under PIDA are uncapped. From the tribunal awards that we have seen, over £9.5 million has been awarded to successful PIDA claimants. The highest award was over £3.8 million, the lowest £1,000. The average award is £113,677.

The early years of PIDA saw some high awards for aggravated damages and injury to feelings, reflecting the seriousness of the wrongdoing at the heart of some PIDA claims. The case of Bhadresa v Strategic Rail Authority (2002) was about a barrister who witnessed her line manager destroying prosecution case files and reported the matter to the appropriate authority. Her consequent victimisation led to an award of £274,504 which included £10,000 for aggravated damages and £50,000 for injury to feelings. In Howie v HM Prison Service (2008) the tribunal awarded £22,500 and an additional £10,000 for aggravated damages due to the conduct of the employer. Howie was a witness in Lingard v HM Prison Service (2004) in which the tribunal awarded £477,602 – the highest compensatory award in the public sector under PIDA.

Post employment

In a landmark decision, the Court of Appeal ruled in Woodward v Abbey National (2006) that PIDA protection applies to post-employment victimisation. This is intended to discourage employers from trying to make things difficult for a whistleblower after they have left (such as by denying them a reference).

PIDA beyond the employment tribunals

In Cream Holdings v Banarjee (2004) PIDA provided a useful framework for commercial cases about breach of confidence, showing that, where its principles are followed, PIDA will assist in defending against injunctions seeking to restrain publication of matters of serious public interest. This emphasises the core common law principle echoed in PIDA that there is no confidence in iniquity. In other words, courts will not permit attempts to cover up illegality or wrongdoing.

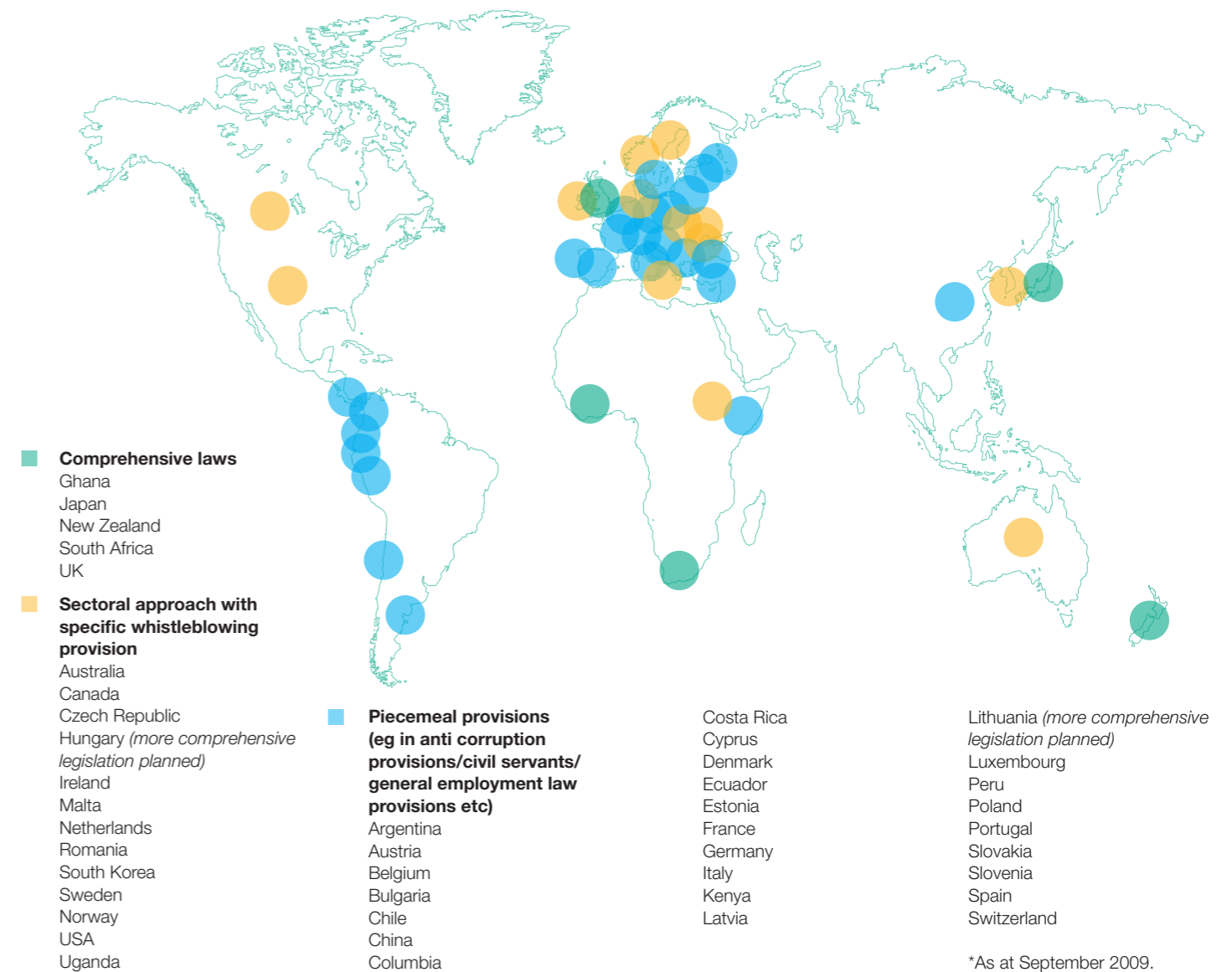
More recently the PIDA framework was considered in April 2009 in the controversial decision of the Nursing and Midwifery Council to remove Margaret Haywood from the nursing register for secretly filming the neglect of elderly patients for the BBC Panorama programme. While the fitness to practice panel looked at the principles of PIDA and confirmed that this was an exceptionally serious concern, they did not apply those principles to establish whether it was reasonable for her to breach patient confidentiality as PIDA itself would have required. This raises the question whether PIDA should be extended to apply to proceedings before a professional body when an individual may be at risk of losing not just their job, but their career – for our recommendations on this see Where next? on page 23.

Whistleblowing law beyond the UK

As can be seen from the graphic below*, PIDA is one of the few comprehensive whistleblowing protection laws, covering all sectors and a wide range of malpractice and wrongdoing. Even in countries where there is some protection it is often piecemeal in approach.

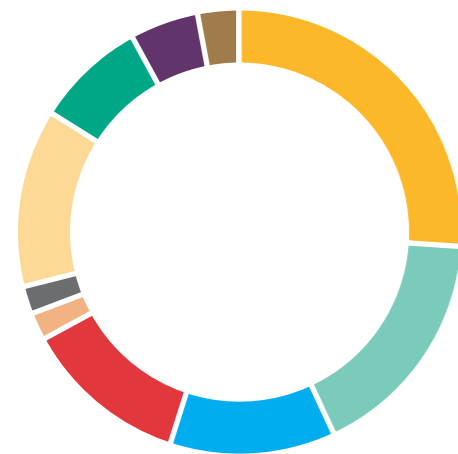
This research has been helped by the recent work undertaken by Transparency

International in which preliminary guiding principles for legal protection were developed after an expert roundtable in the summer of 2009. We were delighted to participate in this work. We hope that further progress in formulating international guidance is forthcoming, adding to the existing international conventions in the UN Convention against Corruption and the Council of Europe draft resolution.⁹



How we help individuals

Overall types of concern recorded on the helpline



Since we launched in 1993 we have taken over 17,000 calls from individuals seeking assistance. Our helpline provides free confidential advice to those who witness wrongdoing or malpractice at work and are unsure whether or how to raise their concern. The advice aims to help callers to speak up at the earliest opportunity, protecting the public interest by preventing damage while minimising the risk to the individual's own position. What follows is our summary of some of the trends that we have seen on our helpline since the introduction of PIDA.

What types of concern do we deal with?

We classify all calls involving a whistleblowing issue as public, and those that involve employment rights issues, including bullying and harassment, as private. Overall 56% of our calls have been public. In 2009 this rose to 65%, possibly due to the increased media focus on whistleblowing which may have indirectly drawn attention to our helpline.

We advise on a wide spectrum of issues. Over the last decade the top five types of concern reported to the helpline have consistently been the same: financial malpractice, work safety, public safety (including patient safety in healthcare), abuse (of vulnerable adults or children for example) and calls we classify as ethical namely issues such as nepotism, conflicts of interest or what to do when colleagues have drug and/or alcohol problems.

When do people call?

The great majority of calls to our helpline take place after a concern has been raised. In 1999 82% of individuals had already raised their concern. This has fallen to 66% in 2009. Our advice is of most assistance when an individual is first considering how best to raise a concern. So while we believe it is good news that more people are calling us at this stage, we hope to do more by increasing awareness of the support we can provide and raise the proportion of callers coming to us earlier, when we can be of most help.

Who do individuals tell?

Our files show that, where people have already raised their concern before contacting us, most (69%) have raised the matter internally with their immediate manager. Over the years there seems to be an increasing propensity to go to senior management in the first instance.

Openness, confidentiality and anonymity

Openness makes it easier for the organisation to assess the issue, work out how to investigate the matter, get more information, understand any hidden agenda, and avoid witch-hunts. A worker raises a concern confidentially if he gives his name on the condition that it is not revealed without his consent. A worker raises a concern anonymously if he does not give his 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. If no-one knows who provided the information, it is not possible for an organisation to reassure or protect him.

How do individuals raise their concern?

75% of those callers with public concerns who had already raised their concern said they did so openly, 10% confidentially and 2% anonymously. The trend away from anonymous reporting is welcome.

Comments from helpline callers

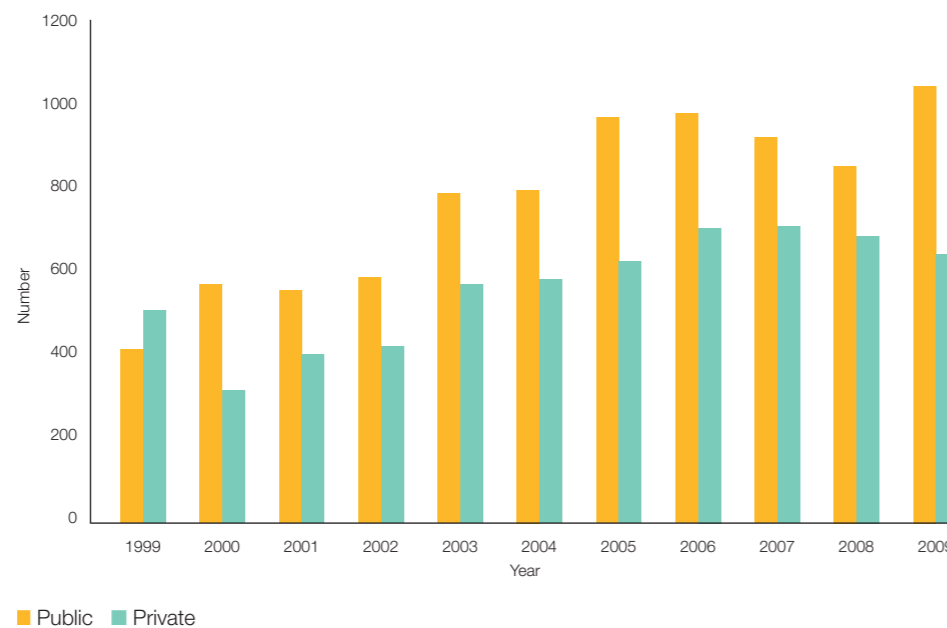
"Thank you again for all your help and support, without it I would probably have put up a fight but just allowed myself to be sacked, which would have done no good for my CV or self esteem! You do a wonderful job and I hope the next person you help is as satisfied with the outcome as I am."

"The advice Anna gave to me at what was a very difficult time proved invaluable. The direct but kind approach must also be a difficult one to master and yet it is so important for the role you all play."

"I feel much calmer and more in control of my future now and wanted to let you know."

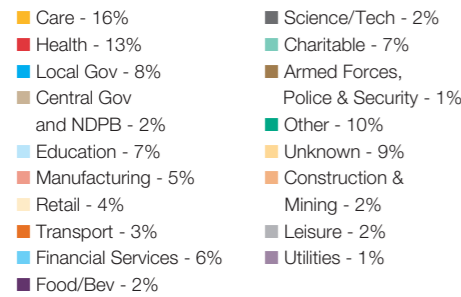
"I am very thankful for you and your colleagues' advice and support through a lifetime experience and once again I do appreciate all you and your organisation have done for me."

Number of calls to the helpline



How we help individuals

Public calls: industry type



Where do the calls come from?

By sector

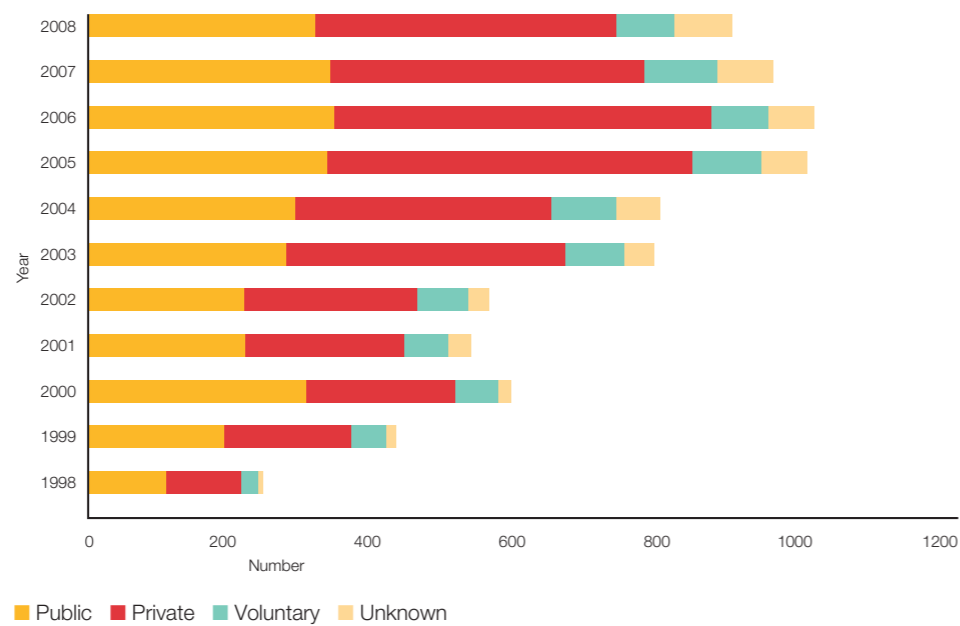
In 2001 there was an equal spread of calls from the private and public sectors at 41% each, though prior to this the majority of calls had come from the public sector. After 2001 the majority of the calls have come from those working in the private sector. Overall 35% of our calls have been public sector, 44% from the private sector with the remainder from the voluntary sector.

By industry

On average 29% of our calls have been from the health and social care sector (16% care, 13% health). 8% were from local government, 7% education, 7% charitable and 6% financial sector.

The number of calls from both the financial and education sectors has increased year on year – rising to 8% and 9% respectively in 2009.

Public calls: sectoral breakdown



What has happened to the concern?

We ask individuals if they know whether any action has been taken in response to their concern when they first call us. Since 2001 we have captured this information on our database. A large majority say that their concern had been ignored. This reflects our own surveys: time and time again people don't speak up because they do not think it will make a difference. We often advise individuals to seek feedback as action may have been taken without the organisation letting them know.

What has happened to the individual when they call?

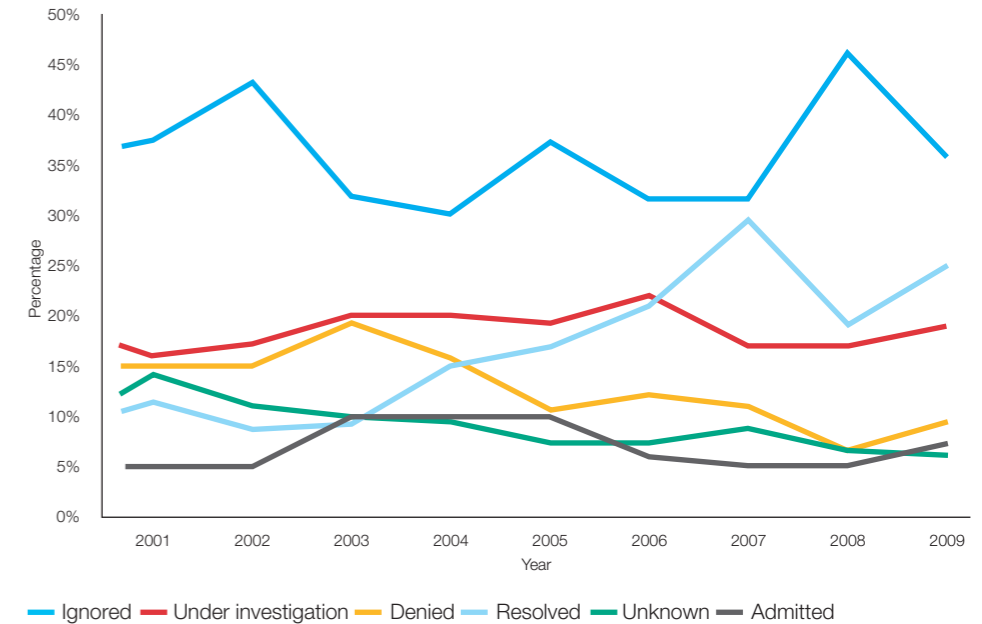
35% of callers with public concerns came to us after they had suffered reprisals (e.g. they were victimised, disciplined or bullied). 2% had already resigned. 15% had been dismissed. 34% of callers said there had been no consequence and only a small proportion received thanks. This may suggest there is still much work to be done by employers to protect workers from reprisals and to demonstrate approval of their actions.

Feedback

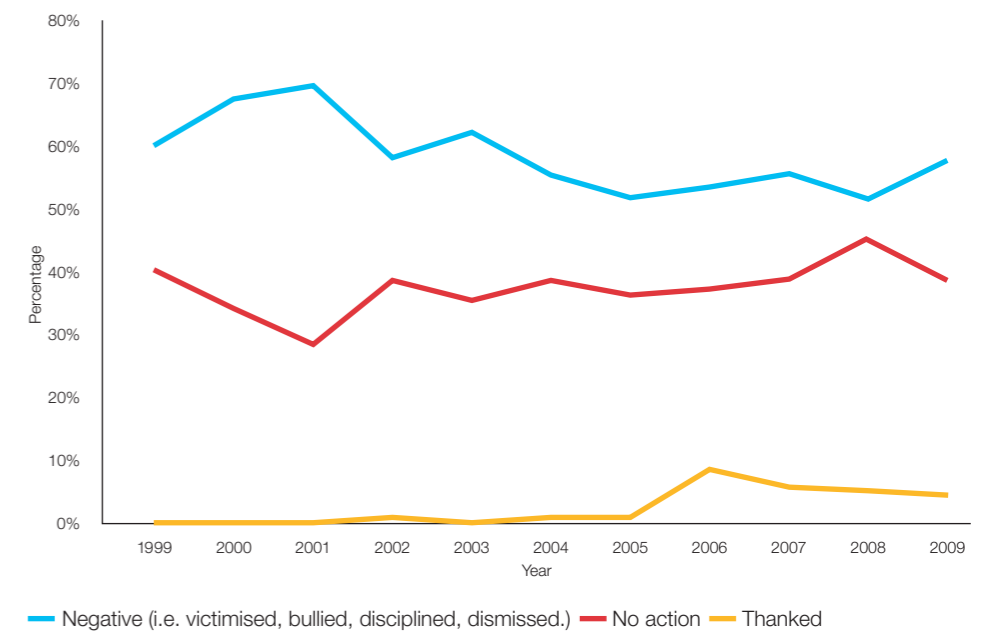
We periodically undertake surveys of those clients who provide telephone details, seeking feedback on our service. We have aggregated these results over an 8-year period. Of those we successfully contacted:

- 95% said the advice was clear and easy to understand;
- 77% said the advice was helpful;
- 71% said they had followed the advice;
- 80% said they would recommend the service to someone with a public concern.

What has happened to the concern?



What has happened to the individual when they call?



Case studies from the helpline

Explosive problem

Greg, a chemical engineer, explained that he worked for a short time at a factory located near a primary school. At a meeting, another engineer had reported that the circuits had failed tests (required by regulation) to ensure that in an explosive atmosphere when certain chemical vapours were present there could not be any sparks. This engineer admitted privately to Greg that, if there was an inspection the HSE would close the plant. Greg feared an accident, given that the works engineer (to whom his line manager reports) said that the issue might be looked into in a couple of months and had said before that he 'couldn't give an f... about health and safety'.

We advised Greg to speak to the health and safety manager as soon as possible about his concerns. Greg rang back to say that he had done so, his concerns had been taken seriously and the H&S manager was going to speak to the engineer who had done the original testing.

The wrong ticket

Mary worked for a subcontractor for a parking enforcement agency and said tickets were being sent out by the computer incorrectly with the wrong fine attached. Mary said her manager had told staff to enforce the tickets unless someone complained and that she had been 'told off' for being too helpful to members of the public about ways to appeal. Mary said she had raised this with the agency direct but had been ignored. She admitted she did not get on well with her manager because she was 'too vocal'. She said staff had been sacked recently for no reason and now wanted to go to the papers.

We advised that going to the press was an option but not necessarily the best for her or for addressing the problem. As Mary had not talked to anyone senior at the agency, we suggested she might try this route first. She said she wanted to leave and found it helpful to talk through her options with us. Mary called back to say she had raised the issue at a higher level and that a note had been sent to all staff to ensure that individuals who had received the wrong ticket were told how to appeal. Mary was pleased and thought this was because she had raised it with the agency.

Working at height

Harry works for a company which processes nuts. He said that in the past, cleaning of a storage silo had been outsourced until the system changed and two staff were trained to do it. Harry said the training was inadequate because staff had never been shown how to use the harnesses necessary to complete the task – the silo can only be accessed some 30 feet above ground level. Harry refused to allow his staff to clean the silo. His manager disagreed with his decision saying he had risk-assessed the task as being safe. Harry was facing disciplinary action.

We suggested that Harry make it clear to the manager that he was genuinely worried about staff safety and state his willingness to find a solution. We suggested he contact the trainer to see how staff could be trained with a harness as soon as possible. Harry realised that he had engaged in an argument about his decision not to let staff clean the silo rather than finding a safe way to get the job done.

Numbers for sale?

Vince works in a small restaurant and became worried when his boss asked him to jot down the security number from the back of customers' bank and credit cards, out of sight of the customer. This was to be done even though the customer was present and had given the PIN number or signed the account.

We agreed with Vince that this practice was worrying and suggested Vince check with the bank whether this is an acceptable or normal security measure and come back to us. Vince later called back and said he had called the bank and they had taken a statement from him.

Damned if you do, damned if you don't

Sanjay recently began to patrol his local area as a new member of his local community warden team. He rang for advice after reporting a colleague for lying on an incident form. The incident involved youths misbehaving on a housing estate. Sanjay's colleague had included names of a few known troublemakers who were not present at the time. Sanjay refused to countersign the report and then discovered that his colleague had filed it and appeared to have signed it in Sanjay's name. After reporting it to his manager, Sanjay was warned by a team supervisor that he was not likely to "get on" if he carried on reporting to managers rather than coming to the supervisors first.

We reassured Sanjay that he had done the right thing and how important it was to lead by example. We advised Sanjay that if he did suffer any reprisals from colleagues, he should raise this with his manager immediately and could ring us for advice. Sanjay said he was confident the manager was taking the matter seriously.

A private dilemma

Jane works as a medical secretary in an NHS trust and told her employer that the vast majority of a colleague's work was for a consultant's private practice rather than the NHS. Jane was asked to attend an interview, as part of an overall investigation, to discuss the colleague's working practices and Jane was now worried her colleague was going to find out she was the one who blew the whistle.

We persuaded Jane the hospital was clearly taking the matter seriously and wanted to investigate it. We reminded Jane that it would be odd if all staff were interviewed and Jane wasn't. If Jane was really worried about her own position, we suggested that she explain this to the manager with whom she first raised the matter and seek some reassurance.

Clinical trials

George said he and a number of consultants were worried about a colleague, Helen, who was taking excessive liver samples from patients during a clinical trial. Helen was going outside the terms approved by the hospital ethics committee and taking larger samples for an unapproved purpose. Though the hospital was in the process of investigating the matter and Helen was on gardening leave, George wanted to inform a relevant health regulator.

We suggested George wait for the outcome of the investigation as it was clear the Trust was taking the matter seriously. Helen was not working at the moment so the practice had stopped. George agreed this seemed sensible and that once he knew the outcome he may ring back.

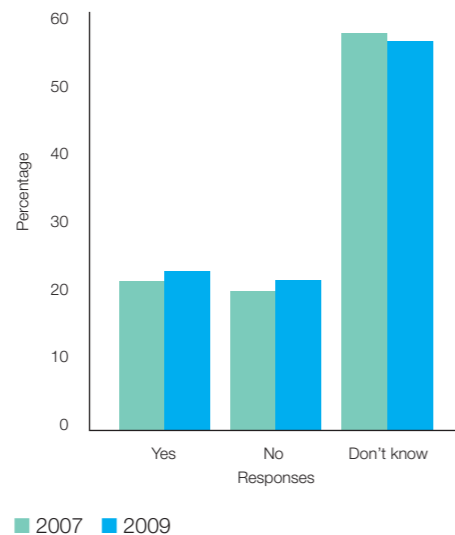
Flushing it out

Derek was a senior care co-ordinator in a care home for the elderly. He was on duty one day when he found that the carers had forgotten to give some residents their medication which included tablets for water retention, blood pressure and some heart conditions. Derek immediately told the home's manager who took the unused medication and flushed it down the toilet. Derek came across another incident where medication was missed and was unsure what to do. He decided to contact head office to tell them what he had witnessed. The matter was investigated and the home's manager was taken through a disciplinary process. Derek then contacted PCaW because he was worried about being revealed as the whistleblower.

We worked through the situation with Derek. As he was the sole witness of the manager's actions, it was more than likely the manager would work out that Derek was the source of the concern. We advised him to be open with head office and explain his anxieties to them, particularly as they were taking the concern seriously. We reassured Derek that he could ring back if he had any questions or concerns. A couple of months later Derek advised us that the concern had been resolved. He had followed the advice and when he spoke to head office, they had taken his worries about confidentiality seriously and found another way to deal with the situation. Derek was still at the same home. He was relieved that no-one had been fired, the manager was still in post and there had been a change in the medicine protocols and in the culture at the home.

Public perception: What our surveys say...

To your knowledge, is there a law that protects workers who 'blow the whistle'?



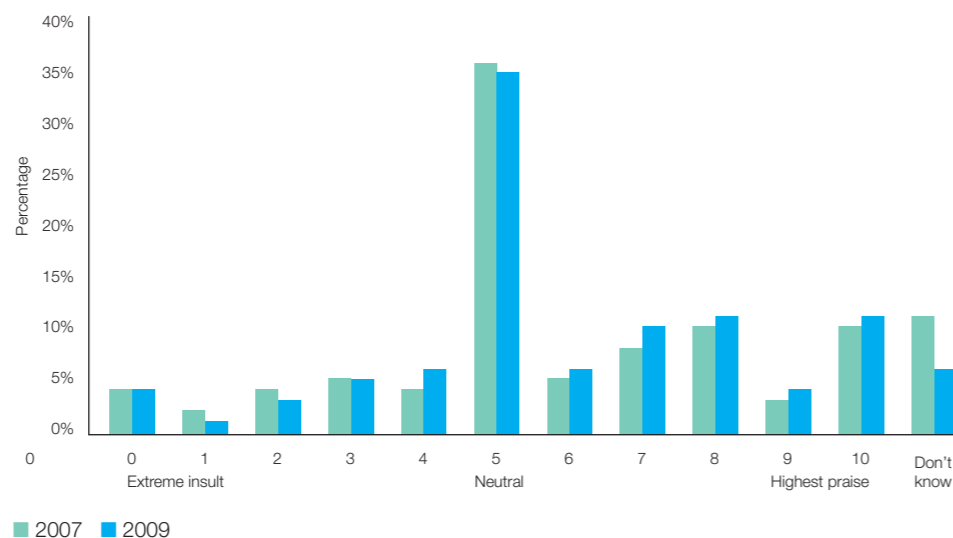
In 2007 and 2009¹⁰ we commissioned YouGov to survey people across the country about their attitudes to and knowledge of whistleblowing. Those surveyed who were in work (1,451 in 2007 and 1,314 in 2009) were also asked whether they would be prepared to blow the whistle if necessary and to whom.

The online surveys show that individuals are willing to raise their concerns and that whistleblowing is viewed as a positive term, though many still do not know about PIDA and the protection that it offers. Only 23% of respondents in 2009 (and 22% in 2007) said they know that there is a law that protects whistleblowers.

How do people feel about the term 'whistleblower'?

'Whistleblowing' is increasingly being seen in a positive frame: on a scale of 1-10, 5% more in 2009 (41%) viewed the word positively than in 2007 (36%); roughly the same (35% in 2009 and 36% in 2007) viewed the word as neutral and 19% in both 2007 and 2009 viewed the word negatively.

How would you rate the word 'Whistleblower'?



This is consistent with the analysis of media coverage of whistleblowing (see page 17) and suggests the former perjorative connotations of the word are disappearing.

Knowledge of the whistleblowing law

In 2009 23% (22% in 2007) of the respondents said that to their knowledge there is a law that protects whistleblowers, 22% (20% in 2007) said there is not and 56% (57% in 2007) said they do not know either way.

Would you blow the whistle to your employer?

Most individuals would raise a concern with their employer. 87% in the 2009 survey (85% in 2007) said they would raise a concern about possible corruption, danger or serious malpractice with 5% saying they would not raise it with their employer and 8% not knowing what they would do.

Externally?

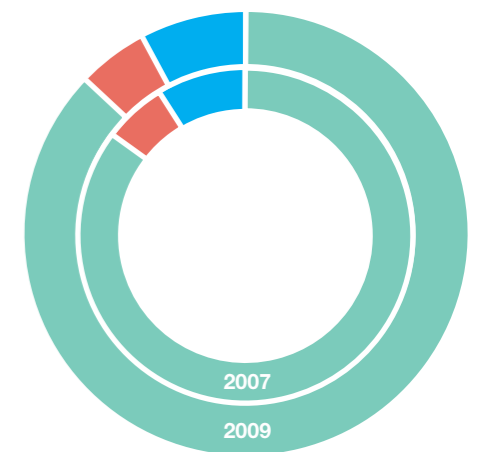
When asked what they would do if they did not feel confident about telling their employer their concern, the majority of respondents said they would raise their concern with the regulator or police. In both surveys a large number (28% in 2009, 32% in 2007) did not know where they could raise their concern externally.

Does your employer have a policy?

In the 2009, 38% said their employer has a whistleblowing policy, an increase of 9% from 2007. There was also a sectoral split with 33% of private sector employees saying that their employer has a whistleblowing policy compared with 47% from the public sector in 2009.

By way of comparison, in March 2007 Ernst & Young asked 1,300 senior executives in European countries who worked for multinationals that had promoted whistleblowing if they felt free to report a case of suspected fraud, bribery or corruption: across mainland Europe 54% said yes. By contrast in the UK, the figure was 86%. We found the same to be true in our 2008 survey with Nursing Standard magazine: where a trust promotes whistleblowing well, 81% of nurses said they suffered no reprisal and 67% said the concern was handled well. In trusts where whistleblowing is not promoted, this latter figure collapses to 16%.

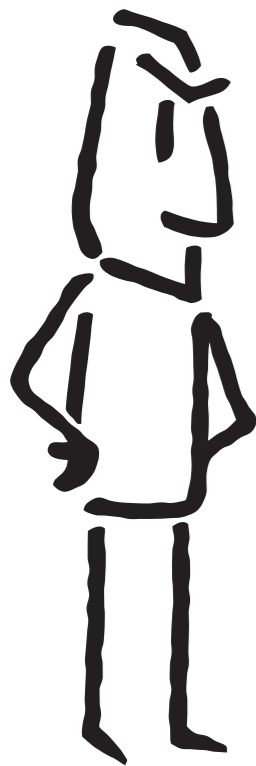
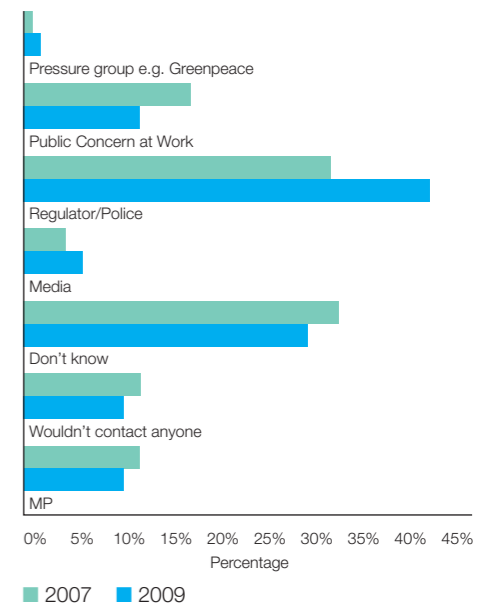
Would you raise a concern about possible corruption, danger or serious malpractice at work with your employer?



2007
Yes - 85% No - 6% Don't know - 9%

2009
Yes - 87% No - 5% Don't know - 8%

If you didn't feel confident telling your employer your concern, which one of the following would you be most likely to contact?



• Staff sewing 'Made in UK' labels on clothes imported from overseas • Financial adviser churning an elderly client's investments to generate commission • A company forging documents to make bogus foreign VAT refund claims

10. A full breakdown of the surveys can be found at www.pcaw.co.uk. All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 2,083 adults. Fieldwork was undertaken between 3rd - 5th June 2009. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+).

In 2007 a total sample size was 2,256 adults. Fieldwork was undertaken between 25th - 29th May 2007. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+).

The media representation of whistleblowers

Over the past decade whistleblowing has been reported almost entirely within a neutral to positive frame.

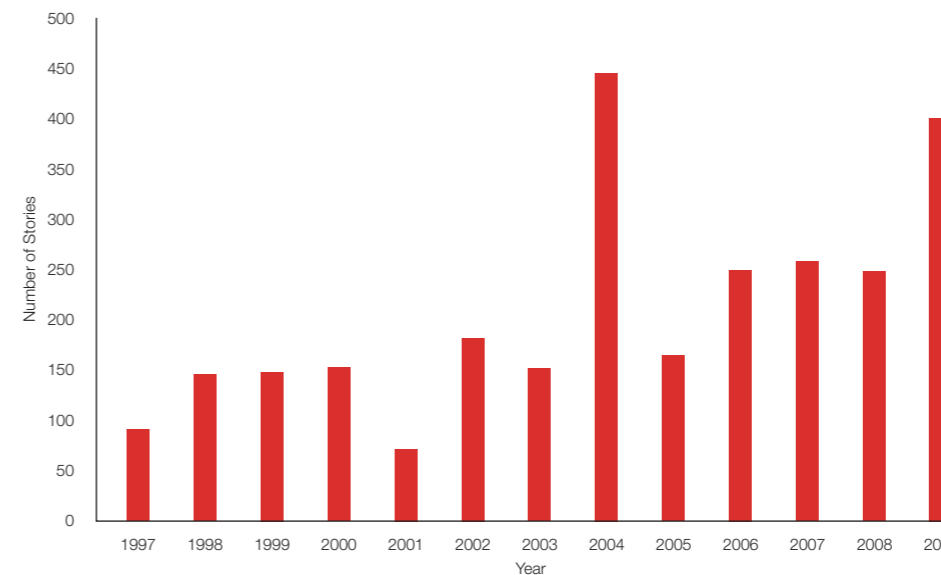
Blowing the whistle on corruption and malpractice is increasingly seen as a brave act in the public interest, according to a study we commissioned from Cardiff University.¹¹ The research project examined national newspaper reporting on whistleblowing and whistleblowers over the past 12 years, covering the period from 1st January 1997 to 31st December 2009. This includes the period immediately before the introduction of PIDA and tracks how the culture has changed since then.¹²

The study found that whistleblowers are overwhelmingly represented in a positive light in the media. As the graphic below shows, whistleblowing is rarely reported as a negative act. Over half (54%) of the newspaper stories represented whistleblowers in a positive light, whilst only 5% of stories were negative. The remainder (41%) were neutral.

The graph demonstrates that negative coverage of whistleblowing was relatively high (10%) in 1997, before the passage of PIDA. Some of this negative coverage appeared as a consequence of concern over the upcoming legislation. For example, a Sunday Times feature suggested that, with the emergence of legal protection for whistleblowers, our “new community heroes are the people who snitch.” In 1998, negative coverage of whistleblowing was completely absent, which the researchers considered indicated that a cultural change was in process. Over the past decade whistleblowing has been reported almost entirely within a neutral to positive frame.

Whistleblowers have received ample media attention: the research found a total of 2,454 stories on the topic from 1997 to early 2009, with a gradual increase in the number of stories year on year.

Stories per year



The number of stories was anomalously high in 2004 due to the high-profile and widely reported story of Harold Shipman, the Yorkshire GP believed to have murdered at least 218 of his patients. Similarly, in 2009, the high number of stories on whistleblowing can be in part attributed to coverage of the credit crunch and patient care problems at Mid Staffordshire NHS Foundation Trust.

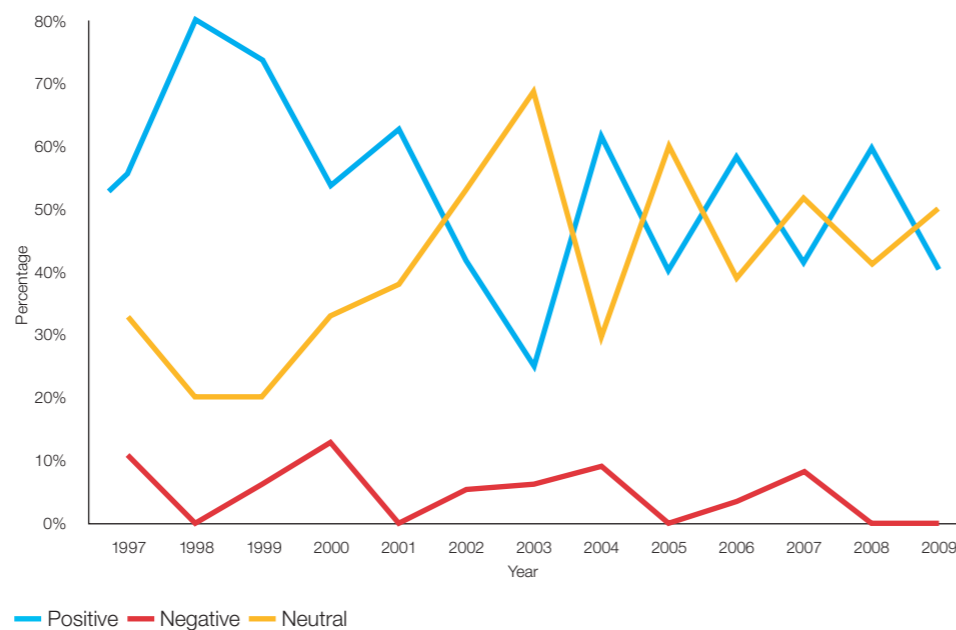
In many cases (33.7%) the reports do not reflect on the outcome for the whistleblower. Where outcomes were reported, they were generally presented in a negative light, describing the whistleblower being dismissed (18.7%) or jailed (13%). However, a large number of stories about jailed whistleblowers focused on two prominent cases: those of Mordechai Vanunu in Israel and MI6 employee David Shayler, demonstrating how the media's attention to more dramatic stories may skew overall representations. Other prominent categories included

whistleblowers who had been disciplined or suspended (8.1%), or who had resigned from their jobs (4.9%). In 6.5% of stories, there were no consequences of the action taken, whilst the whistleblower was reported as being thanked in just 3.3% of cases.

The research showed that the most frequently reported type of malpractice was financial, accounting for 27% of the newspaper articles. Reporting of financial malpractice was most frequent in 2009 (79%). The intense focus upon financial malpractice during 2009 follows a series of high-profile whistleblowing cases, including that of Paul Moore at HBOS, who was sacked after warning about the bank's excessive risk-taking. The reporting of financial malpractice also follows the news media's established frame of reporting which is currently heavily focused on the economy, finance and the activities of banks during the global economic downturn.

The research showed that the most frequently reported type of malpractice was financial, accounting for 27% of the newspaper articles.

Portrayal of whistleblowers by year



- Catering butchers fiddling the weighing scales to overcharge customers
- A contractor lying about the cause of a gas leak to safeguard bonuses
- Untrained care assistants performing medical tasks risking infection
- A private nursery

11. Karin Wahl-Jorgensen and Joanne Hunt, Cardiff School of Journalism, Media and Cultural Studies.
12. The reports findings are based upon the analysis of 246 articles; a 10% sample of the total. 2,454 newspaper articles returned in the Nexis UK search. Nexis UK search terms 'whistleblower' OR 'whistleblowing' OR 'Public Interest Disclosure Act' as major mention.

Whilst the study took note of the number of stories for all of 2009, only stories up until 20th March 2009 are included in the sample for our content analysis.

The media representation of whistleblowers

The acts of whistleblowing which receive the most media attention are those that fit the existing news agenda and prevailing social and economic trends.

The media do, of course, have a role to play in the shaping the consequences of whistleblowing insofar as they publicise the whistleblowers' claims. The whistleblower is named in a majority (64%) of articles, and remains anonymous in 23%.

Types of malpractice

Malpractice which jeopardises public safety accounted for 20% of the articles in the sample, peaking during 2000 and 2001. Public safety became a prominent theme following publicity around a number of public safety issues, including the creation of a confidential hotline for railway workers to improve safety on the rail network, and NHS employees alleging that the public were at risk due to unfair treatment of patients, incompetent surgeons and poor hospital conditions.

Media coverage of whistleblowing generally focuses more upon malpractice or wrongdoing in the public sector (63%) than in the private sector (31%). It would appear that malpractice within the NHS, social services, the army and civil service is reported more often than exposing fraud within a private corporation. The focus on whistleblowing within the public sector became most intense in 2004 after a series of high-profile stories about alleged malpractice within government.

These revelations included Clare Short's allegations of the government's illegal surveillance procedures at the UN, Katherine Gun's¹³ suggestions of a "dirty tricks" campaign against UN Security Council members in the run-up to the Iraq War, and Steve Moxon's¹⁴ claims of government immigration failings.

Media coverage suggests a growing acceptance of whistleblowing over time following the introduction of PIDA, but also demonstrates that the acts of whistleblowing which receive the most media attention are those that fit the existing news agenda and prevailing social and economic trends.



Whistleblowing best practice guide

One of PCaW's key messages is that when properly designed and implemented, good whistleblowing arrangements should foster a more open and safe workplace culture.

Since the introduction of PIDA, many organisations have considered what arrangements they should have in place to encourage staff to speak up about wrongdoing or malpractice. Recognising that having robust whistleblowing arrangements can be in their own best interests, good organisations will regularly review and audit their arrangements to check that they are working. In addition, as the case studies at the end of this report illustrate, the existence of a whistleblowing policy can help avoid unnecessary disclosures to the media (see Smith v Ministry of Defence (2004) page 29).

It is worth noting that PIDA does not require an organisation to do anything or mandate that a policy should be in place. Best practice in this area is built upon the recommendations made by the Tenth report of the Committee on Standards in Public Life in 2005. The Committee accepted our recommendations on good practice and in particular that there should be a clear route for by-passing line management.

The Committee identified the following key elements for good practice in organisations:

- (i) Ensure that staff are aware of and trust the whistleblowing avenues;
- (ii) Make provision for realistic advice about what the whistleblowing policy means for openness, confidentiality and anonymity;
- (iii) Continually review how the procedures work in practice; and
- (iv) Regularly communicate to staff about the avenues open to them.

Having a good policy is only part of developing good whistleblowing arrangements. For a policy to be more than a tick-box exercise, it is vital that those at the top of the organisation take the lead on the arrangements and conduct a periodic review. Strong leadership promoting an open and accountable culture will set the tone for how an organisation deals with whistleblowing. Particularly if it is made clear that whistleblowing concerns will be taken seriously, this will help to embed a better culture where risks to the organisation, their employees and the public will be tackled early. It is worth remembering that, although the whistleblowing policy at Enron was held up as best practice, the culture created by those in charge was so poor that no-one spoke up about the very serious problems in the company.

13. Katherine Gun: news.bbc.co.uk/1/hi/uk_politics/3659310.stm
14. Steve Moxon: news.bbc.co.uk/1/hi/uk_politics/3589261.stm

People

Going beyond a tick-box exercise is important. Organisations need to check whether their arrangements are working. In 2003 the Institute of Chartered Accountants in England & Wales produced a useful framework for assessing the efficacy of whistleblowing arrangements for companies subject to the Combined Code on Corporate Governance. They suggest reviewing the following:

- Are there issues or incidents which have otherwise come to the Board's attention which they would expect to have been raised earlier under the company's whistleblowing procedures?
- Are there adequate procedures to track the actions taken in relation to concerns raised and to ensure appropriate follow-up action has been taken to investigate and, if necessary, resolve problems indicated by whistleblowing?
- Have confidentiality issues been handled effectively?
- Is there evidence of timely and constructive feedback?
- Have any events come to the Committee's or the board's attention that might indicate that a staff member has not been fairly treated as a result of their raising concerns?
- Is a review of staff awareness of the procedures needed?

Comprehensive guidance for organisations can be found in the PAS: Code of Practice on Whistleblowing Arrangements which we produced in partnership with the British Standards Institution. The Code of Practice builds on and provides further detail about how to meet the standards set out by the Committee on Standards in Public Life. It sets out what organisations need to consider when devising, implementing and reviewing their whistleblowing arrangements. It can be downloaded for free from our website at www.pcaw.co.uk/bsi. Recently, the Civil Service Commissioners developed their guidance for appeals based on the BSI Code of Practice. We hope it will continue to be a useful document and reference tool for any organisation looking to get whistleblowing right.

In 2008 we said goodbye to our founding Director, Guy Dehn, who set us up and established us as a sustainable organisation. We also said goodbye to four other longstanding members of our team – Anna Myers (Deputy Director), Evelyn Oakley (Company Secretary), Sohrab Goya and Gemma Amran (Helpline Advisers). We thank them for all their excellent work over the years.

We have also had several new additions to our team. Our Director Catherine Wolthuizen was appointed in September 2008 and returned to us in November 2009 after her maternity leave. We are delighted that Shonali Routray has rejoined us after completing her pupillage in 2008. Additionally, four new helpline advisers have been appointed: Andrew Parsons, Ashley Savage, James Hurst and Katie Greer. Finally Martina Lewis-Stasakova joined us in December 2008 as our new Office Manager.

Our Board members are:

Michael Smyth CBE (Chair), Maurice Frankel OBE (Deputy Chair), Peter Connor, Derek Elliott, Chidi King, Martin Le Jeune, Carol Sergeant CBE, James Tickell, Joy Julien, Mandy Pursey and Rachael Tiffen.

Our Patrons are:

Lord Borrie QC and Sir John Banham.

Our Advisory Council members are:

Michael Brindle QC (Chair), Roger Bolton, Steve Burkeman, Gerald Bowden, James Clarke, Tony Close CBE, Ross Cranston QC, Dr Yvonne Cripps, Baroness Dean, Zerbanoo Gifford, Edwin Glasgow QC, Roger Jefferies, Rosalie Langley Judd, David Owen, Mike Sibbald, Dr Elaine Sternberg, Dr Marie Stewart, Stephen Whittle and Marlene Winfield OBE.

At 24 March 2010 our staff were:

Director

Catherine Wolthuizen

Deputy Director

Cathy James

Company Secretary & Senior Policy Officer

Francesca West

Client Services Manager

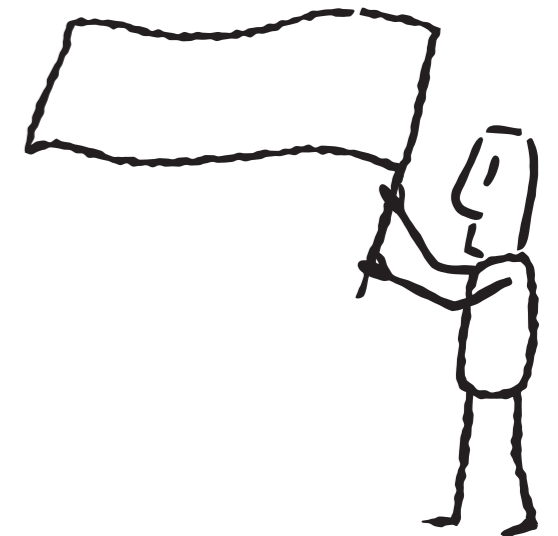
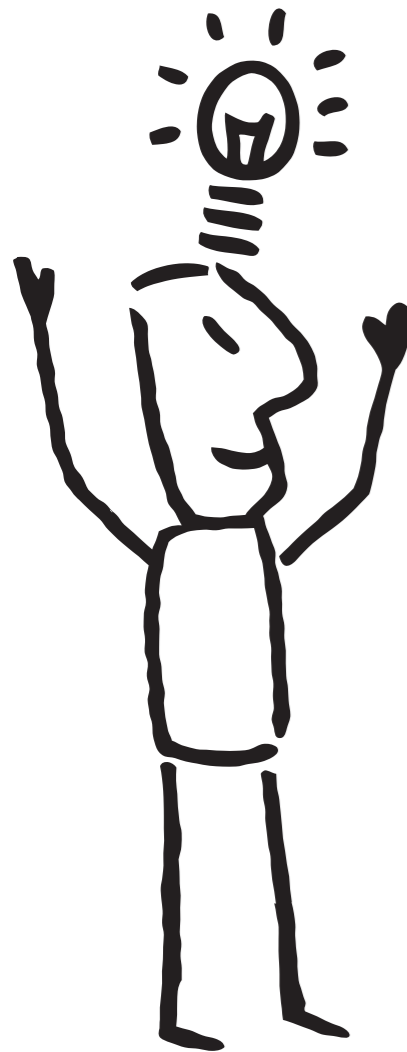
Shonali Routray

Helpline Advisers

Olabisi Porteous
Andrew Parsons
Ashley Savage
James Hurst
Katie Greer

Office Manager

Martina Lewis-Stasakova



Where next for whistleblowing?

The law

PIDA continues to provide a framework for policing how, when and with whom information about wrongdoing should be raised. This requires a delicate balancing act. From our examination of the cases and the development of the principles of PIDA we believe that the law is effective in striking the right balance between employers' interests and the public interest. By and large, the cases reveal that, if you are honest and reasonable, the law will protect you. But the law is a remedy and plays only one part in making whistleblowing work.

That is not to say we think the law is perfect. There are concerns that the requirement of good faith can place too much emphasis on motive. Employment relationships are complicated and a focus on why someone acted in the way they did rather than the wrongdoing raised may muddy already murky waters. This, coupled with concerns that PIDA is being used to complain about an individual's own employment rights, creates a compelling argument in our view for replacing the good faith test with a public interest test. This is an argument put forward by Dame Janet Smith in her report on the Shipman inquiry and one with which we agree.

Further, we would suggest the following small but necessary amendments to the law:

- Professional bodies should be required to apply the principles of PIDA, when considering fitness to practice issues, when appropriate;
- Non-executive directors should be specifically covered by PIDA to encourage effective boardroom whistleblowing;
- Individuals should be protected from victimisation if, on making a claim, the claim form is automatically forwarded to the relevant regulator *without* requiring consent (as the law stands consent is required). This would go some way to restoring much needed oversight in PIDA claims.

The secrecy surrounding PIDA claims is such that we have no ability to monitor the kinds of claims that are settled, any outstanding public risk that the Act was designed to bring to light or any abuse of the Act. The fact that all of this is hidden from view is bad for workers, businesses and the public interest. We shall continue to lobby the government on this point and hope business sees the advantage of our bid for open justice.

To aid a more informed consideration of how PIDA is working, we are looking at whether we can publish all decisions on our website.

Knowledge of the law

Awareness of PIDA is low and needs to be addressed. Workers need to know their rights and we hope to work with Government, unions and businesses to ensure enough is done to promote the law so it is an effective right.

PCaW

This year, PCaW concluded its Strategic Plan for 2010-2013. Recognising the vital importance, unique nature and continued relevance of our work, it re-emphasised the charity's focus on working to protect the public interest by ensuring that whistleblowers are able to raise a matter of genuine public concern without fear of reprisal in the workplace.

The Plan identifies four key strategic objectives:

Protection: Campaigning for a framework of appropriate and effective legislative and regulatory safeguards to provide protection to individuals in the workplace who raise a matter of public concern.

Acceptance: Fostering a culture which respects and appreciates the important role workplace whistleblowers play in bringing impropriety to light, safeguarding the public interest and promoting accountability.

Support: Providing expert advice and assistance to those who wish to raise a matter of public concern in the workplace and to organisations wishing to implement good whistleblowing practice.

Awareness: Raising awareness of the availability of support and protection for whistleblowers, particularly across high-risk sectors.

The Plan identifies a new area of work for us. In recent years, PCaW has worked closely with the Department of Health and the NHS to provide support to the NHS to improve access to whistleblowing support. While there is much work yet to be done in this area and it remains a high priority for the charity, we intend to apply a similar sector-wide approach to social care. This decision reflects the need to support whistleblowers and assist organisations providing social care services, and the importance of ensuring vulnerable users of social care services receive the best possible protection.

We will continue to maintain the momentum in other significant sectors, such as financial services and central and local government.

It is an exciting time for the charity and we look forward to working with existing and new partners to promote best practice in whistleblowing across British workplaces.

As the leading authority on whistleblowing in the UK, we also provide expert support and consultancy services to organisations wishing to implement effective whistleblowing procedures. Our clients include Ofsted, the Serious Fraud Office, the NHS, the Home Retail Group and Lloyds Banking Group. Information on our tailored assistance packages is available on our website or you can contact a member of our Services Team on 020 7404 6609.

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

The Department of Health subscribes to the charity Public Concern at Work which runs an advice line for anyone concerned about any issue in the workplace. That's one way of doing it and they're advertised throughout the National Health Service.

If a member of staff does not feel comfortable about raising concerns with their employer, there are a number of other options. I know this is difficult, I know this puts pressure on the individual but we will do everything to support you if you raise the matter with a legal advisor, union official, the RCN, your MP or the independent regulator the Care Quality Commission. I believe the culture of the NHS must change and it's not about hiding things under the table, this does no one any good. If there's a problem we have to deal with it together."

Gordon Brown¹⁵



30 PIDA cases



Boughton v National Tyres (2000)

Detriment: Failure to investigate and cold-shouldering by colleagues were detriments justifying resignation.

After a break-in at the branch where Boughton worked, he overheard colleagues suggesting that losses at another branch should be written down against the break-in. Boughton taped subsequent conversations to this effect and supplied the tape to his regional manager. Rather than investigate the matter, the regional manager returned the tape to Boughton's manager. Boughton was cold-shouldered at work and then resigned. He brought a PIDA claim. The tribunal found for him, as the regional director had failed to 1) properly investigate the disclosure and 2) show Boughton the "objective support" he deserved. It stressed employers must make it clear to staff that there are no adverse repercussions for *bona fide* whistleblowing. Award not known.

Fernandes v Netcom (2000)

Causation: Complaints about whistleblower were a smokescreen.

Fernandes was finance officer for a subsidiary of a US telecoms company. In 1997 when Fernandes told a contact in the US about large and suspect expense claims made by his CEO, he was told to turn a blind eye. In late 1999 when the CEO's expenses had exceeded £300,000, Fernandes raised his concerns with the US Board. He immediately found himself under pressure to leave and when he refused to resign, he was disciplined and dismissed for authorising the CEO's expenses. Fernandes brought a PIDA claim. The CEO remained in-post until Fernandes had won his claim

for interim relief. At the full hearing the ET decided that the complaints about Fernandes were a smokescreen and that he had been sacked for whistleblowing. As Fernandes was 58 and unable to secure similar work, the award was £293,000.

Azzaoui v APCOA Parking (2001)

Disclosure by contractor's staff to Council: Obligations of whistleblower to assist with investigation considered.

Azzaoui was a parking attendant for APCOA in Westminster. In late 2000 he raised a concern that pressure to meet targets meant false penalty notices were issued. In January 2001, when nothing had been done, Azzaoui wrote to Westminster Council setting out 'very serious allegations'. He was suspended and pressed to name implicated colleagues. He declined, claiming APCOA already had enough information to investigate. APCOA dismissed Azzaoui for gross misconduct. The ET held his concerns were raised in good faith with Westminster Council as it had a legal responsibility for the matter in question. Further it found that APCOA had sufficient information to investigate and it was not a breach of trust for Azzaoui not to name names. Award not known.

Bhatia v Sterlite Industries (2001)

Constructive dismissal; detriment.

Bhatia, the new vice-president at Sterlite Industries responsible for mergers and acquisitions, raised concerns with his Chairman and Sterlite's investment bank that a prospectus for listing on the New York Stock Exchange would mislead investors. Although his concern was heeded, when Bhatia later queried the

legality of a transaction in Australia, the Chairman threw a digital diary at him and threatened to destroy his career. This led Bhatia to resign. He sued under PIDA and was awarded over £800,000 in compensation.

Eastelow v Taylor (2001)

Causation: No inference that employer knew of anonymous disclosures.

Shortly after starting work at a care home, Eastelow made complaints about her pay and conditions. She made anonymous calls to local social services inspectors about quality of care and fire risks. When a resident died and Eastelow's own conduct came under scrutiny, she was asked to an interview. At the interview Eastelow got angry and then took time off sick. The owner then dismissed Eastelow for unreliability, disruptive conduct, sleeping on duty and taking time off without notice. Eastelow claimed the reason was her disclosure to the social services inspectors. The ET found no evidence that her employer knew Eastelow had made the disclosures and, as they were anonymous, it was unable to infer that the employer knew. PIDA claim lost.

Kay v Northumberland Healthcare NHS Trust (2001)

Public disclosure: Reasonable to go to media with serious public concern, Human Rights Act.

Kay managed a ward for the elderly and raised concerns about bed shortages internally but was told there were no resources. The problem worsened and some elderly patients were to be moved to a gynaecological ward. Kay wrote a satirical open letter to the Prime Minister for his local paper. With the Trust's agreement,

Kay was photographed for the local press. When the letter was published, the Trust gave him a final written warning for unprofessional and unacceptable conduct. Kay succeeded in his PIDA claim as the disclosure was protected because 1) section 43G PIDA must be interpreted in a manner consistent with the Human Rights Act; 2) there was no reasonable expectation the Trust would act if his concern had been raised internally; and 3) it was a serious public concern.

Mustapha v ProTX (2001)

Causation less than 1 year: accountant not protected where disclosures were part and parcel of his job.

Mustapha, an accountant, was dismissed after being employed for just over a month. She claimed her dismissal was because she had raised concerns about tax irregularities. On the facts, the ET found that (a) Mustapha had been content with the draft accounts that went to the external auditors, (b) there was no evidence that she had made any disclosure of concern about tax irregularities, and (c) the evidence was inconsistent with the view that her employer was trying to cook the books. The ET held Mustapha had made no disclosure other than routine differences of view that were part and parcel of her job. The ET said that, as an accountant, if there were genuine concerns, she would and should have raised them specifically.

ALM v Bladon (2002)

External disclosure protected.

Within months of starting a new job at a care home Bladon, an experienced nurse, had genuine concerns about standards of care. When he tried

30 PIDA cases

to raise them with the Managing Director's PA, he was asked to put them in writing and told they would be dealt with on the CEO's return from holiday. As the problems continued, Bladon rang the Social Services Inspectorate (SSI) 9 days later. They inspected the home and found most of his concerns substantiated. Bladon was disciplined and sacked for breach of his professional duties. He brought a PIDA claim. The tribunal held that his internal and external whistleblowing were both protected. Even though a short time had elapsed before he contacted SSI, his actions were reasonable because of the nature of the concerns and as the home had no whistleblowing policy. Bladon, who had found another job, was awarded £23,000.

Miss A Balmer v Church View Ltd (2002)

Dismissal: award for injury to feelings.

Balmer was a young, junior member of staff in a care home who witnessed three co-workers repeatedly hit an elderly resident and refuse to feed him when he complained. Shortly after reporting this incident, Balmer met her manager who pressured her to state she was mistaken regarding the abuse. Balmer refused and was then dismissed for 'gross misconduct' in making a false report. The ET found an obvious inference in the dismissal letter that her release was 'inextricably linked' to her having made the protected disclosure. The employer failed to show that there was any investigation into the incident, and that the appeal hearing it conducted

took no notice of Balmer's grounds for appeal. The ET awarded Balmer £4,871 which included an award for injury to feelings because 'the sense of injustice [Balmer] must have felt was a damaging blow to her self esteem and confidence and understandably caused her to be injured, not just irritated.'

Bhadresa v SRA (British Transport Police) (2002)

Damages: aggravated damages and injury to feelings – Detriment: unfairly rejected for permanent post after whistleblowing.

Bhadresa was a senior barrister. British Transport Police (BTP) wanted her to run its legal department but, due to a recruitment freeze, this initially had to be done through an agency. Bhadresa was assured of a permanent post, her contract was renewed and she was given a 25% pay rise. BTP then advised Bhadresa that it had to advertise the post under its rules but assured Bhadresa the position was hers. Before the interviews, Bhadresa discovered her line manager disposing of prosecution files. Bhadresa reported this to the appropriate internal authority and was assured of confidentiality. Bhadresa's manager was suspended and the files were recovered from the rubbish bins. Bhadresa was cold-shouldered by colleagues and allies of her manager. BTP appointed a less qualified lawyer and Bhadresa claimed under PIDA. The ET held that Bhadresa was a worker subjected to a detriment and awarded her £274,500, including £10,000 for aggravated damages and £50,000 for injury to feelings.

Holden v Connex SE (2002)

Disclosure to prescribed regulator. Aggravated damages and injury to feelings.

Holden, a train driver, was made a health & safety representative from 1993. Holden took his duties seriously and raised concerns about public and workplace safety. Denied sight of the risk assessment of a new rota for drivers in 1999, Holden sent two reports to the Health & Safety Executive (HSE), believing there was an increased risk that signals would be passed at red. A copy of each report was made available to colleagues and, following the Ladbroke Grove crash, someone – but not Holden – told the media about them. Holden was charged with sending an emotive and inaccurate report to the HSE. After he was given a final written warning, Holden resigned. The ET held that it was not necessary under PIDA that all the allegations in the report to HSE had to be accurate. It also found that Connex paid lip-service to safety concerns and had embarked on a campaign against Holden to deter him from speaking out and to force him to resign. An award of £55,000 was made, of which £13,000 represented injury to feelings and £5,000 was for aggravated damages.

Backs and List v Chesterton Plc (2004)

Damages.

Backs and List were appointed as senior executive and chief operating officer of Chestertons. A take-over bid was made for the firm and several other expressions of interest were received. The Board decided to put a firm offer to shareholders and Backs

and List argued that other expressions of interest should be flagged as these could generate a higher price. The Chairman of the Board disagreed. With lawyers involved on both sides, Backs and List said that they would contact the Takeover Panel and the Stock Exchange because not citing the other interests was likely to breach City rules. After the Chairman had sought to dissuade them, they went ahead anyway and then were dismissed. Backs and List brought and won a PIDA claim, the tribunal finding their disclosures to the Takeover Panel and the Stock Exchange were reasonable and protected as wider disclosures. Out of court settlement – in excess of £5 million.

Herron v Wintercomfort for the Homeless (2004)

External Disclosure to police protected.

Herron worked in a hostel helping the homeless. One day an agitated client arrived and said her partner had threatened to set her on fire. Not long after, the client was admitted to hospital with serious burns, but died before she could give any information to the police. Although Herron's boss told her not to contact the police but to wait and see if they contacted her, Herron told the police what the client had said. Asked by the police and, with her boss away, Herron gave the police the client's file. By then working out her notice, she was charged with gross misconduct, transferred to a distant office and made to work under tight supervision. An ET held Herron's disclosures to the police were reasonable under PIDA and awarded her £2,500 for the distress she had suffered.

30 PIDA cases

Lingard v HM Prison Service (2004) *Detriment: Claimant's identity revealed.*

Lingard, a prison officer at Wakefield Prison, raised concerns with senior managers that a fellow officer had arranged a bogus assault charge to be filed against a prisoner and had heard colleagues say he had asked them to plant pornography in the cell of a convicted paedophile. Without telling her, Lingard's managers identified her to staff as the source. She was ostracised by colleagues and offered no support by the Prison Service, even when the situation was clearly causing her stress. An enquiry by outside officers seemed indifferent when key documents went missing and a senior manager argued Lingard's whistleblowing showed she was disloyal. She was forced out. When she took and won a PIDA case, the ET found that the governor of the prison was 'dripping with hostility' to Lingard and that his claim that he was not aware that whistleblowers in the prison service were victimised was 'simply not credible'. She was awarded £477,602. The Director General of the Prison Service told the BBC the case was indefensible and that lessons needed to be learned from it.

Lucas v Chichester Diocesan Housing Society (2004) *Good faith, cogent evidence required, EAT.*

Lucas worked for a housing association on a major urban renewal project in Brighton and Hove. After she raised concerns with the funder about financial irregularities, her manager became 'extremely angry' and reduced her hours. Their working relationship

deteriorated so rapidly that Lucas was dismissed within a month. When she claimed under PIDA, the tribunal found she was right to raise her concerns and said it was so dismayed by the lack of controls over such substantial amounts of public money, it exceptionally recommended that the local council 'look very seriously at the whole question of accountability in this kind of undertaking', so prompting a public inquiry. However, citing a recent Court of Appeal ruling on good faith, the tribunal then decided Lucas's claim failed as she was motivated by spite about her reduction in hours. Lucas challenged this decision and her appeal succeeded as it was clear that her disclosure preceded her anger and so could not have been motivated by it. The Employment Appeal Tribunal said any question about good faith requires cogent evidence and should be raised squarely in advance.

Smith and others v MoD (2004) *Disclosure to the media not protected, whistleblowing policy available but not used.*

T, who worked at an MoD site as a security guard, was convicted of kissing a child 13 years earlier and sentenced to 90 hours community service. When the MoD said he could return to work, seven out of his seventy five colleagues objected. They said that as the site was 50 yards from a nursery, T could be needed to evacuate children if there was a fire. The MoD stood by its decision that T was not a risk. After the seven gave an interview to the media about their concern, they were dismissed for gross misconduct. Their PIDA claim failed as the tribunal held that (a) there

was no rational basis for their belief and (b) it was unreasonable to go to the media. On this point, the Tribunal said it was relevant that the seven had failed to follow the MoD's whistleblowing policy.

Collins v The National Trust (2005) *Disclosure to the media protected.*

Collins was a National Trust (NT) warden in charge of a stretch of north east coastline, which included the site of a former quarry. Coastal erosion had created a real risk that chemicals and waste from the quarry would leak on to the beach. The NT and the local council had long been in dispute about what should be done and by whom. Collins was shown in confidence by the NT a report the council had obtained which highlighted the risks of further erosion. As the report was already a year old, Collins thought the site should be closed. Two weeks later he passed the report to the local media, who wrote it up and quoted Collins. As a result, he was dismissed. He made a successful PIDA claim. The tribunal found that the disclosure was protected as an 'exceptionally serious' concern because children played on the beach and the public, relying on the NT's reputation, would think it safe. Award not known.

Crangle v Chubb Security Personnel Ltd (2006) *Wider disclosure protected.*

Crangle worked as a security guard and told his manager about CCTV footage that showed a cleaner stealing from a Sainsbury's store. His manager chose to ignore this. A month or so later two of Crangle's colleagues gave

him a copy of the CCTV footage. Crangle in turn gave this to another colleague (D) working for another company, but who was also involved in an organisation which shared information to prevent crime (City Link Crime Directive). D gave the footage to the police. Crangle was then dismissed. The ET found in Crangle's favour commenting that the disclosure of confidential information to prevent crime is reasonable.

Harper v Torbay Council (2006) *Detriment: suppression of internal audit report.*

Harper questioned the Council's tendering process for new refuse lorries and was criticised for doing so. An internal audit report found that the process was seriously deficient, but Harper, who was not shown the report, was asked to sign a letter confirming that he agreed there was no wrongdoing. Harper refused and raised the issue with external auditors. He was then subjected to numerous detriments and was eventually dismissed. The ET found in Harper's favour, citing as examples of detriment the excessive criticism, a failure to provide a reference, a transfer out of his department, stress, and a refusal to allow him to return to work. The ET included the fact that the Council insisted that he sign a two-line false summary of the audit report and suppression of the internal report as further examples of detriment. The ET mentioned that even though Harper had become intransigent in the later stages of the dispute, everything flowed from the Council's actions or inactions. It said: "from the moment Mr Harper made disclosures his job

30 PIDA cases

was, as he unfortunately correctly predicted, in jeopardy. There was a cover-up, there was a failure to manage, there was deception". An award of £208,356 including £10,000 for aggravated damages was made.

Holbrook v Queen Mary's Sidcup NHS Trust (2006)

Wider external disclosure; patient confidentiality.

Holbrook worked as a radiographer for QMS NHS Trust and was on duty when two patients were brought in to A&E following a road traffic accident. Patient A had serious injuries and patient B, a police officer, on duty and in uniform, had suffered a head injury. Holbrook was called to A&E to take x-rays of patient A and while speaking to her became aware from colleagues that there was a suspicion that B had been drinking – he had the smell of alcohol on his breath and appeared to be behaving erratically. After some discussion with colleagues about whether or not patient B had had a breath test, Holbrook decided to call the police anonymously, using his mobile phone. While he did not identify the patient, he did identify the hospital and it was easy for the police to identify the officer involved in those circumstances. The police traced Holbrook's mobile and he was then called by a police inspector to whom he repeated his concern. Unbeknown to Holbrook patient B had undertaken a breath test and a blood sample had been taken: both were negative. Holbrook was disciplined and dismissed for breaching patient confidentiality. The ET found that, even though the respondent conceded that this was a disclosure made in good faith and of

an exceptionally serious nature, and that Holbrook had a reasonable belief that the allegations he made were substantially true, it was nevertheless unreasonable for Holbrook to have called the police without checking with senior colleagues first. It was found to be relevant that in relation to clinical decisions, Holbrook had readily checked with senior colleagues and yet had failed to do so about this issue.

Milani v Medirest (2006)

Disclosure to responsible person; reinstatement.

Milani worked for Medirest, a cleaning contractor, and was in charge of laundry for elderly patients at Charing Cross Hospital. In mid-2005, her bosses ordered that new mops and cloths were to be disinfected by thermal washing (i.e. without detergent) in the same machines used for the patients' laundry. As it turned out, the mops were washed at 60° and not the 90° needed because they had been wrongly labelled. Milani feared these new arrangements risked infecting the patients' clothes and padlocked her machines. When her bosses threatened her with a charge of gross misconduct, Milani removed the padlocks and then wrote to the hospital's CEO. He was very concerned and launched an investigation. Milani was then dismissed. An ET held that Milani's concerns were well-founded and, entirely unpersuaded by the reasons Medirest claimed for Milani's dismissal, found her letter to the CEO was the real reason for her dismissal. Encouraged by the hospital, Medirest then agreed to reinstate Milani and also gave her £7,000 compensation.

Stuart-Gausden v Bello System Services & Graham Rowlands (2006)

Aggravated damages.

The heating had broken in the First Respondent's office in cold weather. One member of staff went anonymously to the local Environmental Health Officer (EHO). When the EHO officer arrived on site the Second Respondent reacted angrily. The First Respondent then brought in gas heaters but staff complained of drowsiness, dizziness and nausea to Stuart-Gausden, one telling her that the Second Respondent and Human Resources were uninterested in taking accident reports. Stuart-Gausden smelt gas fumes on arriving at work the following day and based on the Second Respondent's previous responses immediately called the EHO. Later that day a colleague collapsed with breathing difficulties, chest pains and nausea. Stuart-Gausden called an ambulance. The EHO officer arrived at the same time as the ambulance and Stuart-Gausden told him what had happened. EHO found that the heaters should have been tested though it was later discovered they were legal. The First Respondent installed infrared heating which then overloaded the electrical system and shut down the computers causing further inconvenience. Stuart-Gausden was later called in and subjected to aggressive questioning. The following day Stuart-Gausden was suspended for allegations relating to incidents that the tribunal found the First Respondent had known about already and which had not previously given them cause for concern. The tribunal found the real reason for dismissal was because of the protected disclosures to the

EHO. Aggravated damages were awarded partly as a result of the manner in which unnecessary details of Stuart-Gausden's personal life were mentioned during the hearing. Award not known.

Bandy v West Norfolk Community Transport Limited (2007)

Causation; no proper investigation; external disclosure to school; parent and local authority.

Bandy was an escort on a minibus which transported disabled children from various villages to schools. Bandy had concerns about the bus driver who appeared to have an unhealthy interest in a 14 year old girl, drove recklessly and often smelt of alcohol. Bandy raised her concerns with the Respondent but they did not investigate, merely giving a warning to the driver. The driver's behaviour towards Bandy then deteriorated. Bandy broke down and told the deputy head of a local school and a parent of her concerns. The parent removed her child from the bus. Bandy went on to raise her concerns with the local authority and was dismissed the same day. The ET found the dismissal was because of her disclosure to the parent, school and local authority. Award not known.

Connolly v Q Healthcare Ltd (2007)

Constructive dismissal and injury to feelings.

Connolly was financial controller of the Respondent, a dental and facial plastic surgery clinic in Harley Street. Connolly discovered numerous problems with tax and PAYE payments. The Respondent suggested hiding its true tax liability by destroying and re-creating invoices, hiding invoices

30 PIDA cases

and telling investigators their server was down. Connolly refused to do so, informed his employer that such conduct was illegal, and was subsequently locked out of the computer system and had various responsibilities taken from him. He was also denied the 5% shareholding in the company that he had previously been offered. Connolly resigned. The tribunal held he was unfairly dismissed for making a protected disclosure. Award: £21,700 including £10,000 for injury to feelings.

Fraser v The Royal Free Hampstead NHS Trust (2008)

Danger of anonymous disclosure.

Fraser was a social worker employed by an agency and not the Trust. He was concerned that his manager, Ms Ross, was not fulfilling her contractual duties in relation to time keeping, seeing patients and filling in a movement book. He raised this with Ms Ross' manager. This manager subsequently left without passing on the concern. Fraser further complained that a report prepared by him had been buried by the department. An anonymous letter complaining about Ms Ross was then sent to the Trust. Ms Ross believed the letter was sent by Fraser. Ms Ross then failed to inform Fraser of a permanent job at the Trust and fired him on performance issues a few weeks later in what the tribunal described as a high-handed and vindictive manner. While the tribunal sympathised with Fraser as to the manner in which he had been treated, they concluded that he had been sacked due to Ms Ross's mistaken belief he was responsible for sending the letter and could not make out a causal link between his genuine disclosures and the detriments suffered.

Laing v London City Airports (2008)

Successful interim relief application.

Laing reported that a colleague was asleep whilst operating the X-ray security machine at London City Airport. Laing was then bullied and harassed and submitted a grievance. This was dismissed. Laing appealed and said she would have to take an ET claim for detriment. Laing was then summarily dismissed for a fundamental breakdown in relationships and successfully applied for interim relief.

Glencross v Network Rail Infrastructure (2008)

Correction of a false statement a protected disclosure.

Glencross worked for Network Rail Infrastructure Ltd and was involved in the maintenance of the overhead lines using a wooden cut-off ladder instead of the correct piece of equipment – an 'acro-jack'. Glencross described the use of a ladder as a 'fast but dangerous way of doing work'. In March 2004 Glencross' colleague, Taylor, slipped, fell off the ladder and broke his ankle. Their manager pressurised them into giving false statements saying that the proper equipment had been used. Matters came to a head when a personal injury solicitor hired by Glencross' colleague provided the company with true statements from Glencross and Taylor describing the accident. Glencross became subject to disciplinary proceedings for, amongst other matters, changing his statement. Glencross was sacked. The ET found that changing the statement amounted to a protected disclosure and awarded Glencross £203,000.

Lake v British Transport Police (2008)

Delay in disclosure irrelevant.

Lake worked as a police officer for the British Transport Police (BTP). In 1997 Lake attended a fatality with two colleagues. One of the colleagues, a sergeant, found a piece of skull and retained it as 'a trophy' before giving it to the other colleague. In December 2001 this colleague showed the piece of skull to Lake who chose not to report the incident until May 2002. The sergeant and the other colleague were soon arrested but the Crown Prosecution Service decided not to prosecute. The relationship between Lake and the sergeant became hostile, and each filed a series of complaints against the other. The BTP then initiated an investigation of Lake who was sacked for not reporting the original incident sooner. The ET found that Lake had made a protected disclosure and awarded him over £280,000.

Lees v Abbey Dale Care Homes (2008)

Constructive dismissal; causation.

Lees worked as a nurse at a care home and raised concerns with the Respondent that two carers were providing inadequate care to two residents. Lees arrived at work one morning and was informed a resident had died and the undertakers were on their way. Lees's understanding was that, in the event of a sudden death, the police and GP on call were to be informed and no one was to touch the body. Lees then called to cancel the undertakers and reported the incident to the police. She told the police she and other staff were concerned as this was the second sudden death in a month and the residents were literally

"dying in their chairs". She asked the police to inform the coroner. Lees told her employer that she had said this. Her relationships with the carers she had criticised deteriorated. Lees later spoke to her employer about the health and safety of the residents and stated she would be unable to continue to work if matters did not improve. Lees resigned shortly after – her letter made no mention of the resident's death and her conversation with the police. The ET commented that the employer had taken steps in relation to advice from the coroner and individual residents' care plans and had addressed each of the concerns that Lees raised. Lees could not show that she was constructively dismissed as there was 1) no detriment resulting from her disclosure and 2) no breach of the employment contract.

Geduld v Cavendish Munro Professional Risks Management Ltd (EAT 2009)

Bare allegation does not amount to a disclosure.

Geduld worked as a director of an insurance brokerage. After relations between Geduld and the other directors deteriorated, discussions took place between the parties to buy out Geduld's shareholding. Geduld then contacted a solicitor who sent a letter to the company saying that Geduld had suffered unfair prejudice as a minority shareholder. Geduld was then sacked the next day. The EAT found that the solicitor's letter set out a statement of his position in share negotiations rather than conveying information which amounted to a protected disclosure. The EAT also suggested that employee allegations unsupported by specific information are not qualifying disclosures under PIDA. Geduld's claim failed.

