



Evidence to the Bundestag – 5 March 2012

UK approach to the protection of whistleblowers and the Public Interest Disclosure Act, 1998

1. In this short paper, I set out the way in which the UK law, the Public Interest Disclosure Act 1998, (PIDA) protects workplace whistleblowers. It is written in the light of the motion tabled by members of the Bundestag, Karin Binder, Andrej Hunko, Dr Dietmar Bartsch and other members of the Left Party parliamentary group, 17/6492, **Acknowledging the importance of whistleblowing for society – protecting whistleblowing**, and will be the basis of evidence I give at the public hearing on 5 March 2012.
2. **About Public Concern at Work**
By way of background, PCaW is an independent NGO (charity), launched in 1993, following a series of disasters and scandals such as the Piper Alpha oil rig explosion, the Clapham Rail Disaster and the collapse of BCCI. When public inquiries were set up to look into what went wrong in each of these cases and others, it was found that staff had known about the problems or risks and had either been too scared to speak up, or had raised their concern only to be ignored or, worse, sacked. The founders of the charity were keen to assist those who have witnessed malpractice or wrongdoing at work as well as to promote whistleblowing as an instrument of accountability.
3. At the heart of what we do is our free, confidential and expert advice for workers who wish to raise a public concern (such as medical malpractice, fraud, corruption or other misconduct) and are unsure whether or how to raise their concern. PCaW's advice line is staffed by lawyers and paralegals and the charity is a designated legal advice centre, regulated by the Solicitors Regulation Authority and the Bar Council of England and Wales. All advisors have legal training (2 solicitors, 1 barrister and 5 paralegals) and the advice given is covered by legal professional privilege. This means that individuals have a safe haven to receive independent advice and any discussions are not revealed without their express consent. When answering calls, our advisers focus on the risk and what is stopping the individual from raising their concern. We obtain as much information as possible from the individual about the concern and about their working environment and relationships. We help the individual to consider the options available to them for raising the concern, and where necessary can act as a conduit for the concern (that is we can raise the concern on the individual's behalf if asked to do so). Due to the sensitivity of discussions and the nature of the advice given, clients can often be reluctant to leave personal details.

4. The charity was also instrumental in setting up the legislative framework for the protection of whistleblowers in the UK under PIDA. We can help individuals to consider their legal options, although we do not litigate or take up cases under PIDA on their behalf. In addition, PCaW provides bespoke training and consultancy for organisations across the public, private and voluntary sectors. In recent years we have worked with a number of trades unions, professional bodies and regulators including the NHS, the Financial Services Authority, Ofsted and the Bank of England.

5. PIDA in Practice

PIDA recognises that workers are in a unique position as they are a) often the first to know about corruption fraud or other malpractice and b) vulnerable in that they can be deprived of their livelihood if they try to bring suspected wrongdoing to their employer's attention or to the attention of the appropriate authorities. PIDA covers most workers in the UK, is not limited by sector nor type of wrongdoing – including its cover-up – and, significantly, it protects external disclosures, to a regulator prescribed under the legislation in the first instance, but also in appropriate circumstance more widely, to the media or to the police for example.

Quick Guide to PIDA and its key provisions for workers who blow the whistle on corruption, wrongdoing or malpractice

- Covers most UK workers, including employees, contractors, trainees and agency workers, police officers, and every worker in the National Health Service (NHS)
- Defines wrongdoing broadly to include disclosures about corruption or any other crime, civil offences (including negligence, breach of contract or administrative law), miscarriages of justice, dangers to health and safety or the environment, and, importantly, a cover-up of any of these; the worker does not have to prove the wrongdoing, nor does it matter if the persons to whom the wrongdoing is reported are already aware of it
- Protects concerns raised internally with an employer (or to the Minister responsible in appropriate cases), and externally, to one of the many listed regulatory bodies, to the police in serious cases, and, importantly, to the media in certain circumstances, particularly if the other routes have been tried and failed and the wrongdoing is on-going
- Compensates for dismissal **and** detriment (i.e. victimisation) short of dismissal, including injury to feelings, and those who are dismissed can seek interim relief within 7 days to continue in employment; those found to have been unfairly dismissed for blowing the whistle are compensated for their full financial losses (uncapped) which recognises that blacklisting can occur and that high wage earners can also be whistleblowers

6. The legislation also makes it clear that any attempt to gag a whistleblower from raising a genuine concern about wrongdoing – for example in an employment contract or compromise agreement – is void. Finally, those within the scope of the Official Secrets Act (apart from those working in the armed forces or intelligence services who are not protected by the Act) will only lose the protection of PIDA if convicted of the offence of breaching the Official Secrets Act or an employment tribunal is satisfied, to a high standard of proof approaching the criminal standard, that the offence was committed.

7. Whistleblowing Arrangements

While PIDA does not impose a specific duty on organisations to implement arrangements for staff to raise concerns safely and responsibly, in terms of providing protection against unjustified treatment, detriment or dismissal, there are a number of strong policy and legal reasons for public and private bodies in the UK to do so and some of these are listed below. Whistleblowing arrangements are also important because no matter what the law says, real protection starts with good practice in the workplace.

8. Under PIDA, an **employment tribunal** will look to see if an employer had whistleblowing arrangements in place that a worker could or should have used when determining whether a wider disclosure, to the media for instance, was reasonable.
9. The independent **Committee on Standards in Public Life** strongly recommended in its 2nd, 4th and 10th reports that all public bodies, including all government departments, local authorities, NDPBs, universities, and NHS organisations should implement arrangements for staff to raise concerns internally and externally, and to seek independent advice. In its 4th Report, the Committee set out the six essential elements of all good whistleblowing arrangements (reproduced below) and in its 10th report the Committee emphasised the importance of leadership and said all public bodies should reiterate their commitment to the effective implementation of PIDA.
10. The **UK Corporate Governance Code** (C.3.4) states for companies listed on the London Stock Exchange it is matter for the Board, and specifically the Audit Committee, to ensure that arrangements are in place for staff to raise concerns in confidence about possible financial and other improprieties, and for such concerns to be proportionately and independently investigated and followed-up.
11. The **Bribery Act 2010** (section 7) creates a new form of corporate liability for failing to prevent bribery and makes it clear that implementing and promoting internal whistleblowing arrangements – which include access to *advice* – is part of a legitimate defence (Ministry of Justice, Guidance to the section 9, of the Bribery Act, 2011).

12. PIDA not yet fully implemented

PIDA can only act as an effective anti-corruption tool if employers and workers know that internal and, importantly, external disclosures are protected. Outside of the health service, PIDA has not been actively promoted by the UK government. GRECO recommended the UK government do more to promote whistleblowing in the public sector and found the UK to have only partly implemented its recommendation in 2006¹ despite implementing a new Civil

¹ GRECO (2006) *Second Evaluation Round: Compliance Report on the United Kingdom* as adopted by the GRECO at its 30th Plenary Meeting, Strasbourg, 2006.
([http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2006\)8_Add_UnitedKingdom_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2006)8_Add_UnitedKingdom_EN.pdf))

Service Code. The OECD clearly recommended the UK “pursue its efforts to make the measures of encouraging and protecting whistleblowers better known to the general public [emphasis added]”² as part of an effective anti-foreign bribery strategy. Although the Council of Europe praised PIDA in 2010³ as an example of comprehensive whistleblower legislation, the vast majority of UK adults still know nothing about it. A YouGov survey (2011)⁴ commissioned by Public Concern at Work, found that despite 85% of working adult respondents saying that they would raise a concern about possible corruption, danger or serious malpractice at work with their employer, 77% of all adult respondents did not know or thought that there was no law to protect whistleblowers⁵. The risk is that where a serious public interest concern is not properly addressed by the organisation itself, or the matter is so serious it needs to be raised externally, workers do not realise they have the power to raise it elsewhere nor who is best placed to handle their disclosure (i.e. regulator, MP, media).

13. While the number of PIDA claims increase year on year, they still make up less than 1% of all claims lodged⁶ and 74% are settled or withdrawn. The UK government refuses to open the register of PIDA claims to public scrutiny and this is another key failure in fully implementing PIDA. A new rule in 2010 allowed claimants to request the tribunal to forward a copy of their claim (with details of their concern) to the appropriate regulator, but this was a compromise measure and Public Concern at Work is still campaigning for simple open justice. The lack of transparency in the tribunal system undermines effective governance by allowing public interest concerns, to be “buried” in settlements which do not reach full legal determination. This, coupled with the lack of understanding about PIDA’s key provisions, means that the public interest can be unwittingly or deliberately traded for private gain. This should be cause for concern for anyone trying to tackle corruption, fraud, risk or malpractice in the workplace.

² OECD (2005) *United Kingdom: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, OECD Directorate for Financial and Enterprise Affairs, at 16. (<http://www.oecd.org/dataoecd/62/32/34599062.pdf>)

³ Council of Europe Resolution 1729 (2010) *Protection of “whistleblowers”* (<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm>)

⁴ For more details see http://www.pcaw.org.uk/news_attachments/Results%20for%20PCAW-YouGov%20Survey.pdf.

⁵ 21% of respondents thought that there was no law to protect whistleblowers (Ibid, Note 5).

⁶ Employment Tribunal figures reveal that 2000 PIDA claims were lodged in 2009-2010 as compared to 236,100 claims lodged altogether. Of the 2000 PIDA claims, 1600 are settled or withdrawn (see <http://www.pcaw.org.uk/law/pidalatestfigures.htm>).

14. There is also a strong case to suggest that the legislation should be reviewed now that we are more than a decade on from implementation. From a policy perspective, we do not expect the UK government to undertake this review, hence we plan to launch a consultation in 2012 seeking the views of a wide range of stakeholders (trades unions, the business community, regulators and politicians). This review is all the more necessary given the UK Government's recent proposals which reduce individuals' employment rights (introducing fees at employment tribunal, changing cost provisions and requiring settlement negotiations), as we have become increasingly concerned that cracks are beginning to form in PIDA, which means that it is not providing adequate protection to those who have spoken out in the public interest. Among the issues we would suggest a review should consider are:

- 'Public Interest' test – as a result of case law it is now possible for workers to use PIDA to claim compensation for a breach of their own employment rights, which threatens to undermine the law, as it is designed to protect those who raise issues in the public interest. Conversely the wording of the act may mean a worker could raise a concern that is in the public interest, but which does not fit within one of the categories of wrongdoing listed in PIDA. As a result they would not be protected.
- The use of gagging clauses in settlement agreements to try and prevent workers raising public interest concerns after they have left employment. We would aim to increase awareness of the provision in PIDA which renders these clauses void.
- Vicarious liability – a recent case at the Court of Appeal seriously undermined the protection for whistleblowers through ruling that an employer was not liable for the acts of victimisation of whistleblowers carried out by its employees.
- Open justice – (see above) external oversight of the claims reaching the employment tribunal is necessary for PIDA to achieve its true potential to ensure accountability.

15. We plan to use the responses to compile a report which we will use to lobby the Government to make changes to strengthen PIDA. We also intend to use the consultation process to educate policy and law-makers about PIDA and its role in promoting open and accountable workplaces.

16. Law & Practice

Clearly the declaratory effect of a law that protects those who blow the whistle in the public interest is important and is another reason why promoting PIDA should be seen as a vital component in protecting whistleblowers. However, real protection for workers comes from employers encouraging their staff to speak up about a concern, reassuring them that it is safe to do so and that there are safe external routes, responding effectively and proportionately to the concern, and acting swiftly to protect the reasonable and honest whistleblower from any reprisals.

The Committee on Standards in Public life: Key elements of good whistleblowing arrangements⁷

- provides examples distinguishing whistleblowing from grievances
- gives staff the option to raise a whistleblowing concern outside line management
- provides access to an independent helpline offering confidential advice
- offers staff a right to confidentiality when raising a concern
- explains when and how a concern may be safely raised outside the organisation (e.g. with a regulator)
- provides that it is a disciplinary matter (a) to victimise a bona fide whistleblower, and (b) for someone to maliciously make a false allegation

There are resources available to enlightened employers who want to implement robust internal arrangements, and in particular, the British Standards Institution's *Code of Practice of Whistleblowing Arrangements*, is available for free⁸.

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Public Concern at Work
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⁷ Committee on Standards in Public Life, Third Report (1996), page 48.

⁸ British Standards Institution (2008) Whistleblowing Arrangements Code of Practice, PAS 1998:2008. Free download available from www.pcaw.org.uk/bsi.