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Small Business, Enterprise and Employment Bill: PCaW evidence to the Public Bill Committee

Introduction

1. Public Concern at Work (PCaW) is an independent charity and legal advice centre. The cornerstone of the charity's work is a confidential advice line for workers who have witnessed wrongdoing, risk or malpractice in the workplace and are unsure whether or how to raise their concern, or have raised concerns and have been victimised as a result. PCaW has advised over 17,000 individuals to date; this experience informs our approach to policy and campaigns for legal reform.
2. We were instrumental in setting the scope and details of the law that protects whistle-blowers in the UK, the Public Interest Disclosure Act 1998 (PIDA). PIDA makes it unlawful for an employer to dismiss or victimise a worker for raising concerns about wrongdoing or malpractice in the workplace. The easiest way to gain protection is to raise the concern with the employer; PIDA also protects an individual who approaches either a regulator or even the media where the wrongdoing has been covered up, not addressed, where the individual fears victimisation, or where the concern is exceptionally serious. The law provides an incentive for organisations to deal with potential wrongdoing when first raised by a worker, and do so openly.
3. In 2012 and 2013 we campaigned for improvements to PIDA. Some of our campaign points led to legislative improvements to PIDA, through the Enterprise and Regulatory Reform Act 2013. In order to identify areas of the whistleblowing framework that are in need of reform, PCaW established the Whistleblowing Commission (the Commission) in 2012/13 to examine the effectiveness of whistleblowing in the UK and to make recommendations for change. The Commission was formed of the following members:
 - The Right Honourable Sir Anthony Hooper (Former Court of Appeal Judge and Member of Matrix Chambers (Chair))
 - Gary Walker (Former NHS Chief Executive and whistleblower)
 - Michael Woodford (Former Olympus President & CEO and whistleblower)
 - Lord Burns (Chairman of Santander UK and Channel 4)
 - The Very Revd Dr David Ison (Dean of St Paul's Cathedral)
 - John Longworth (Director General British Chambers of Commerce)
 - Michael Rubenstein (Independent legal publisher and discrimination law expert)
 - Sarah Veale (Head of Equality and Employment Rights at the Trades Union Congress)

4. The Commission considered evidence from several pieces of research including a public consultation to which there were 142 responses, a YouGov survey of public attitudes to whistleblowing and a survey of business practice with EY. Additionally the analysis of 1,000 cases from the PCaW advice line contained in the report “Whistleblowing: the inside story”¹.
5. The Commission published their report in November 2013, and its recommendations continue to inform our ongoing campaigns for the reform of whistleblowing in the UK. This submission will focus solely on the elements of the Small Business, Enterprise and Employment Bill that relate to whistleblowing.

Small Business, Enterprise and Employment Bill (SBEEB)

6. PCaW welcomes clause 135 of SBEEB, conferring a power on the Secretary of State to require prescribed persons to report annually on whistleblowing disclosures. The collection and publication of the data proposed should improve public information on how prescribed persons are dealing with whistleblowing concerns received by them, the data will give an indication of how well an industry or sector’s whistleblowing arrangements are working in practice, and provide regulators with an early warning system for potential problems in specific sectors. If effective, the understanding of whistleblowing as a tool for good governance both within prescribed persons and individual organisations, might well be improved.
7. However, we believe that the draft provisions in SBEEB do not go far enough as there are significant gaps in the protection provided by the current legal framework. Following a number of recent scandals in our banks, care homes and newspapers, this Bill offers an opportunity to improve the remedies available for whistleblowers, and in doing so, help them to protect the public interest. The Whistleblowing Commission has identified a number of areas in which the current law is failing, and proposed measures to remedy them. We urge Committee members to adopt the following measures as part of the Small Business, Enterprise and Employment Bill.

A Code of Practice with statutory underpinning

8. The Government have committed to publishing guidance for employers on dealing with whistleblowing. The Government’s position is that this guidance should be voluntary; while the Whistleblowing Commission did not advocate that whistleblowing measures should be mandatory it recommended that the Government should embed guidance in statute using the Commission’s code of practice in a similar way to existing ACAS Codes.² An extract of the Code of Practice can be found at Annex A, alongside a link to the full report.
9. There is an increasing understanding of the importance of the role of regulators in reviewing whistleblowing arrangements. For example, the Health Select Committee recommended

¹ <http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

² <http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf>

that the Care Quality Commission included an assessment of whistleblowing arrangements as part of their inspection regime³.

10. A code of practice that is underpinned by statute would allow regulators to enforce good practice in whistleblowing more effectively. For example, the International Civil Aviation Organisation, the Financial Conduct Authority (FCA) and the Financial Reporting Council (FRC) require or encourage the organisations they regulate to have whistleblowing policies, yet there are no sanctions available where organisations fail to have these arrangements in place, and no framework for assessing the adequacy of those arrangements.
11. Given that so many regulators are moving in this direction, it would make sense to provide a blueprint as to what good practice looks like. A code of practice would provide a guide for individuals looking to raise their concerns in a complex regulatory environment, as well as a common set of standards which prescribed persons could use to measure organisations against. Prescribed persons could then report on how entities they regulate are performing based on their compliance with the code.
12. **The Public Interest Disclosure Act 1998 (PIDA) should be amended to give the Secretary of State the power to issue a code of practice, which can be taken into account by regulators, courts and tribunals when issues of whistleblowing arise.**

Blacklisting

13. The construction blacklisting scandal in 2009 and the experience of Sharmila Chowdhury highlight the gap in protection for job applicants.⁴ Sharmila Chowdhury's case best illustrates the issues around blacklisting.
14. Choudhry, an NHS radiographer manager raised concerns in 2009 with senior managers about the fraudulent practices of consultants, and the dangerous clinical practices of another radiographer within her department. In response false allegations were made against her and the case proceeded to employment tribunal where she won an interim relief action that proved she was unfairly treated due to blowing the whistle.
15. During this period Choudhry applied and was offered a job at a different trust. She was interviewed by a clinical panel where she was upfront about whistleblowing in her previous job. This offer was then withdrawn by the Trust's HR department when questions were asked about her ongoing legal claim against her previous employer.
16. This pattern was repeated again in 2014 when Choudhry applied, through an agency, for a temporary radiology position at the same Trust. The agency assured her that the trust were keen to hire her. Again the HR department stepped in and withdrew the job offer.

³ Para.96, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/657/657.pdf>

⁴ Blacklisting in construction- <http://www.independent.co.uk/news/uk/home-news/thousands-of-workers-blacklisted-over-political-views-8010208.html> & <http://sharmilachowdhury.com/blacklisting-of-whistleblowers/>

17. Unfortunately where a prospective employer accesses a blacklist or becomes aware of a job applicant's whistleblowing history and decides not to give them a job on this basis, they would have no cause of action.⁵ The 2010 blacklisting regulations only deal with lists of individuals that have been involved in trade union activities. The Equality Act provides protection at the point of recruitment and we think it is vital to send the message to employers that discrimination against whistleblowers at this point is also unacceptable.
18. The Government's response to these issues is to point to increases in the amount of money an organisation can be fined and the existing legal protection where a whistleblower receives a negative reference. The Government hopes that other measures proposed in their response will signal a cultural change where businesses value an employee who has blown the whistle.
19. **PIDA should be amended to include job applicants within the scope of those defined as workers, bringing whistleblowing protection for blacklisting in line with the Equality Act.**

Gagging clauses

20. As demonstrated by the furore in the NHS about gagging clauses, the law needs to be made clearer. The National Audit Office's report on severance payments identified confusion in this area with individuals feeling that they have been gagged when this might not be the case in law.⁶
21. Section 43J of the Employment Rights Act 1996 currently states:
*"(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.
(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract."*⁷
22. Section 43J provides a defence for whistleblowers who have signed a compromise agreement but feel there are public interest concerns that still need to be raised with a regulatory body, a Member of Parliament or the press. There is evidence of a perception that where compromise agreements include a non-disparagement or confidentiality clauses that these in effect amount to a gagging clause.⁸

⁵ Paragraph 37: "It is true that the statute does not prohibit action against a whistleblower should he be recognised as one when an applicant for employment, as it might have done." BP v Elstone [2010] ICR 879

⁶ <http://www.nao.org.uk/report/confidentiality-clauses-and-special-severance-payments/>

⁷ Section 43 J the Public Interest Disclosure Act 1998

⁸ P.g 22 The Whistleblowing Commission Report

23. Two recent cases highlight this problem. The first case is that of Gary Walker, the NHS whistleblower and former Chief Executive of United Lincolnshire NHS Trust, who broke his gag live on Radio 4's Today programme. He was then threatened by NHS lawyers even though his disclosure was protected in law.⁹ The second case is of former inspectors at the Care Quality Commission giving evidence to the Mid Staffordshire Inquiry who were so concerned about breaching the compromise agreements they had signed prior to giving evidence, that they required specific assurance from the chairman of the Inquiry before they felt able to provide their evidence to give to the Inquiry.
24. Our recommendation to the committee is that the wording of Section 43J is simplified using the wording suggested by the Whistleblowing Commission-
- “No agreement made before, during or after employment, between a worker and an employer may preclude a worker from making a protected disclosure”.
- We also recommend that when a worker receives legal advice on a settlement agreement, as is required under Section 203 of the Employment Rights Act 1996, this should be extended to include advice on section 43J.
25. **Section 43J of the Employment Rights Act 1996 should have a clearer wording as to the full rights and protection for those who sign compromise or settlement agreements.**
26. **Section 203 of the Employment Rights Act 1996 should be extended to provide legal advice on 43J in the event of a compromise or settlement agreements.**

Definition of a worker

27. PIDA protection extends to those who are considered workers under the Act. The law has not been updated despite changes in the way many professionals are now trained, within Universities with attendance accompanied by periods of practical experience gained in the workplace. For example student nurses, doctors and social workers are not covered by PIDA when their training takes place in a work setting because they are not considered workers.
28. The Government proposed in their response to the consultation on whistleblowing to extend the definition of a worker to include student nurses, and they will “also consider other student arrangements similar to student nurses”.¹⁰
29. It should be noted that under the Employment Rights Act the Secretary of State already has the power to extend the category of workers through existing statutory instruments. Further changes would not require further legislation, yet the Secretary of State is being overly cautious. The narrow definition of a worker does not only exclude students; there are many other excluded groups including volunteers, non-executive directors (consider the

⁹ <http://www.bbc.co.uk/news/uk-18639088>

¹⁰ P.24 [The Governments Response to the Whistleblowing Framework Call for Evidence](#)

reluctance of Royal Bank of Scotland non-executives to question Fred Goodwin)¹¹ , public appointments (as in the case of Kay Sheldon- a board member of the Care Quality Commission)¹², partners, priests (covered by the Equality Act 2010) and foster carers.

30. There is also confusion regarding whether or not all GPs are covered. The Department of Health states that all those on NHS contracts are covered by amendments to a collection of other laws which has created a maze of legislation which is hard for GPs and their legal representatives to decipher.¹³ Guidance giving clarity on this point is required.

31. The statutory instrument should be used to include workers:

- **student health care professionals**
- **volunteers**
- **interns**
- **non-exec directors**
- **public appointments**
- **priests and ministers of religion**
- **foster carers**
- **members of armed forces**
- **all categories of workers listed under Equality Act**

Greater protection for those seeking advice from a Trade Union

32. From our experience on the charity's whistleblowing advice line, many individuals seek advice from their trade unions and early advice can help individuals raise concerns constructively, allowing the public interest to be addressed. At present, seeking advice from a trade union would be considered as a wider public disclosure (carrying the highest burden of proof for the individual to gain protection) unless it is authorised by an employer (i.e. where reference is made to the trade union in the employer's whistleblowing policy).

33. It is clearly sensible for individuals to be protected when seeking advice from a trade union in the same way as they would be when seeking legal advice and an amendment of 43D of PIDA would achieve this. This is a view that was backed by both the Whistleblowing Commission and the Trade Union Congress in its submission to the Whistleblowing Commission's consultation.

34. PIDA should be amended to place trade union advice on the same level of protection as seeking legal advice.

Extension of the law to include victimisation of a worker wrongly identified as a whistleblower

¹¹ <http://www.theguardian.com/business/2009/mar/22/rbs-threats-directors-lord-foulkes>

¹² <http://www.telegraph.co.uk/journalists/laura-donnely/10156161/CQC-whistleblower-re-appointed.html>

¹³ See former health minister Anne Milton's answer to a Parliamentary question which highlighted the complicated nature of the protection of GPs at present- HC Deb, 9 March 2011, c66WS

35. PIDA does not offer protection to workers who have been dismissed, forced out of their job or victimised in some other way where they are wrongly identified as a whistleblower. In these circumstances a worker may not have any legal protection if they lack the required two year service period for normal unfair dismissal claims.
36. We have experience of this situation arising on PCaW's whistleblowing advice line. Our recommendation would be to amend PIDA to include protection against dismissal or victimisation where a worker has made, *or is thought to have made* a protected disclosure.
37. **Workers wrongly identified as having made a protected disclosure should be protected under PIDA.**

Extension of the categories of wrongdoing in PIDA

38. For a whistleblower to gain protection under PIDA they need to have made a "protected disclosure" about something that is included within the categories of wrongdoing contained within the Act. The categories are as follows-
- That a criminal offence has been, is being or is likely to be committed,
 - That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
 - That a miscarriage of justice has occurred is occurring or is likely to occur
 - That the health and safety of any individual has been, is being or is likely to be endangered,
 - The environment has been, is being or is likely to be damaged, or
 - That information tending to show any matter falling within any of the preceding categories has been, or is likely to be deliberately concealed.¹⁴
39. One of the difficulties with the current drafting is the fact that the categories of wrongdoing are finite and are then also subject to a public interest test. We support the Whistleblowing Commission's suggestion that PIDA should contain a non-exhaustive list of wrongdoing that includes gross waste or mismanagement of funds and serious misuse or abuse of authority. Equivalents of these two extensions can be found in US Australian and Irish whistleblower protection laws. This change is also supported by the Whistleblowing Commission.¹⁵
40. The Government's response to these arguments is to acknowledge that the wrongdoing covered by these two categories could be missed by the current categories of wrongdoing, yet no alternative wording was proposed on the basis that legal advice indicated that it would cause too much uncertainty in the law.¹⁶ Given that these two categories have worked internationally, it would be possible to draft an amendment that would extend the legal protection while keeping the definition of what is in the public interest flexible.

The Categories of wrongdoing in PIDA should be extended to include gross waste or mismanagement of funds and serious misuse or abuse of authority and they should be non - exhaustive

¹⁴ 43B the Public Interest Disclosure Act 1998

¹⁵ P.g. 17 [The Whistleblowing Commission Report](#)

¹⁶ P.g. 10 [The Governments Response to the Whistleblowing Framework Call for Evidence](#)

Simplification of concepts of “allegation” and “disclosure of information”

41. The courts have made an artificial distinction between making an allegation and disclosing information, which means that individuals are not protected if they make statements such as “you are not complying with health and safety requirements”.¹⁷ From the experience on PCaW’s advice line, there have been numerous cases where individuals have stated to their employers that they would like to raise a health and safety concern, only to be dismissed before they have the opportunity to disclose further information.
42. **PIDA should be amended to ensure protection applies to allegations.**

Victimisation of overseas workers raising concerns about their UK subsidiaries

43. The Commission notes there is no longer any express territorial limitation provision in the Employment Rights Act (ERA) 1999 since the abolition of section 196 of the ERA 1999. The case of *Foxley v GPT Special Project Management Ltd* illustrates that territorial jurisdiction can prove a barrier to workers seeking PIDA protection when raising concerns about UK registered companies overseas.¹⁸ This contrasts with the approach taken in the US as evidenced by the US Department of Labor’s decision in *Walters v Deutsche Bank et al.*¹⁹ Most recently the UK Supreme Court held in the case of *Ravat v Halliburton Manufacturing and Services Ltd* that the relevant jurisdictional test should be whether the worker has a sufficiently strong connection with Great Britain.²⁰
44. **PIDA should be extended to cover overseas workers raising concerns about their UK employers and subsidiaries.**

Summary of PCaW Recommendations

1. PIDA should be amended to give the Secretary of State the power to issue a code of practice, which can be taken into account by regulators, courts and tribunals when issues of whistleblowing arise.
2. PIDA should be amended to include job applicants within the scope of those defined as workers, bringing whistleblowing protection for blacklisting in line with the Equality Act.
3. PIDA should be amended to include categories of workers currently excluded from the acts protection.
4. Section 43J of the Employment Rights Act 1996 should have a clearer wording as to the full rights and protection for those who sign compromise or settlement agreements.
5. Section 203 of the Employment Rights Act 1996 should be extended to provide legal advice on section 43J in the event of a settlement or severance agreement.
6. PIDA should be amended to place trade union advice on the same level of protection as seeking legal advice.
7. PIDA should contain a non-exhaustive list of the categories of wrongdoing, including gross waste or mismanagement of funds and serious misuse or abuse of authority.

¹⁷ [2010] IRLR 38

¹⁸ Employment tribunal case no. 220087931/2011

¹⁹ <http://www.kmblegal.com/wordpress/wp-content/uploads/Walters-v.-Deutsche-Bank-et-al.-ALJ-decision1.pdf>

²⁰ [2012] UKSC1

8. Workers wrongly identified as having made a protected disclosure should be protected under PIDA.
9. PIDA should be amended to ensure protection applies to allegations.
10. PIDA should be extended to cover overseas workers raising concerns about their UK employers and subsidiaries.

For further information on any of the above issues, please contact our Policy Officer, Andrew Parsons at ap@pcaw.org.uk.

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Annex A

Extract from the Whistleblowing Commission Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK, pages 28 – 29, published November 2013

“Draft Code of Practice Whistleblowing Arrangements

Introduction

Every employer faces the risk that something will go badly wrong in their organisation and ought to welcome the opportunity to address it as early as possible. Whenever such a situation arises the first people to know of such a risk will usually be “workers”²¹ yet while these are the people best placed to speak up before damage is done, they often fear they have the most to lose if they do (otherwise known as “whistleblowing”).

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

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

The Code of Practice

1. This Code sets out standards for effective whistleblowing arrangements. It is designed to help employers, workers and their representatives deal with whistleblowing.
2. Whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects others.
3. When developing whistleblowing arrangements employers should consult staff and their representatives.

²¹ Worker is defined in section 230 of the Employment Relations Act 1996

4. As part of the whistleblowing arrangements, there should be written procedures covering the raising and handling of concerns. These procedures should be clear, readily available, well-publicised and easily understandable.
5. The written procedures for raising and handling concerns:
 - a) should identify the types of concerns to which the procedure relates, giving examples relevant to the employer;
 - b) should include a list of the persons and bodies with whom workers can raise concerns, this list should be sufficiently broad to permit the worker, according to the circumstances,²² to raise concerns with:
 - i. the worker's line manager;
 - ii. more senior managers;
 - iii. an identified senior executive and /or board member; and
 - iv. relevant external organisations (such as regulators);
 - c) should require an assurance to be given to the worker that he/she will not suffer detriment for having raised a concern, unless it is later proved that the information provided by the worker was false to his or her knowledge;
 - d) should require an assurance to be given to the worker that his or her identity will be kept confidential if the worker so requests unless disclosure is required by law;
 - e) should require that a worker raising a concern:
 - i. be told how and by whom the concern will be handled; ii. be given an estimate of how long the investigation will take;
 - ii. be told, where appropriate, the outcome of the investigation[3]
 - iii. be told that if the worker believes that he/she is suffering a detriment for having raised a concern, he/she should report this; and
 - iv. be told that he/she is entitled to independent advice.
6. The employer should not only comply with these procedures but should also sanction those who subject an individual to detriment because he/she has raised a concern and should inform all workers accordingly.

²² By "according to the circumstances" we mean workers should be able to bypass their manager, where they fear that they will suffer a detriment or that their concern will not be listened to.

7. In addition to the written procedure for raising and handling concerns, the employer should:
- a) identify how and when concerns should be recorded;
 - b) ensure, through training at all levels, the effective implementation of the whistleblowing arrangements;
 - c) identify the person with overall responsibility for the effective implementation of the whistleblowing arrangements;
 - d) conduct periodic audits of the effectiveness of the whistleblowing arrangements, to include at least:
 - i. a record of the number and types of concerns raised and the outcomes of investigations;
 - ii. feedback from individuals who have used the arrangements;
 - iii. any complaints of victimisation;
 - iv. any complaints of failures to maintain confidentiality;
 - v. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety reports;
 - vi. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
 - vii. a review of any relevant litigation; and
 - viii. a review of staff awareness, trust and confidence in the arrangements.
 - e) make provision for the independent oversight and review of the whistleblowing arrangements by the Board, the Audit or Risk Committee or equivalent body. This body should set the terms of reference for the periodic audits set out in 7(d) and should review the reports.
8. Where an organisation publishes an annual report, that report should include information about the effectiveness of the whistleblowing arrangements, including:
- a) the number and types of concerns raised;
 - b) any relevant litigation; and
 - c) staff awareness, trust and confidence in the arrangements.”

The full report is available on the PCAW website, <http://www.pcaw.org.uk/whistleblowing-commission-public-consultation>