



For whistleblowing advice

Whistleblowing: beyond the law

The Biennial Review

Foreword

Michael Smyth CBE, Chairman

Welcome to Public Concern at Work's 2011 biennial review, the publication of which coincides with our 18th anniversary.

The support available to whistleblowers has been transformed since 1993, when we were set up. The UK's Public Interest Disclosure Act now provides tangible legal protection for those who choose not to stay silent. The need for whistleblowing or speak-up policies is widely accepted throughout corporate Britain, is recognised in the UK Corporate Governance Code and in government guidance on the Bribery Act, and is reinforced by provisions in numerous other professional codes and guidelines. A British Standard Code of Practice on Whistleblowing Arrangements is available free to all,¹ while polls suggest that UK workers are more willing to speak up about malpractice in the workplace than their European counterparts.

Yet, as recent events tragically demonstrate, the need to support those who speak truth to and about power is as evident today as it was when Public Concern at Work was established. The Winterbourne View care home scandal, in which undercover filming revealed shocking abuse of vulnerable adults, and the Mid Staffordshire NHS Foundation Trust Inquiry, where the picture now emerging is of a hospital with a dangerously closed culture in which dissent was quashed, demonstrate why whistleblowing is so important. If questions had been asked before serious problems developed, and early warnings heeded, lives could have been saved, damage prevented and huge costs averted.

I hope that this review will give you a better understanding of the work we do to help ensure voices are heard in the workplace. At the heart of our endeavours is our free confidential advice line for those who have witnessed malpractice or wrongdoing at work and are unsure whether or how to raise their concern. As will be seen from page 5 of this review, we are helping more individuals than ever before, as calls to our advice line increase year on year.

We also work with many organisations across the UK and abroad that recognise how important it is to provide robust, independent and sustainable outlets for staff concerns. These organisations understand why they need to provide whistleblowing support to their employees and we are grateful for their support for our activities.

Finally, I would like to welcome Cathy James as our new Chief Executive. Cathy brings to us legal experience and unbounded enthusiasm, both important qualities for a campaigning charity. I must also record my personal thanks to Maurice Frankel OBE who has stepped down from the Board after giving years of invaluable and expert guidance to trustees and staff.

I hope you will enjoy reading this review and that you will continue to support the work of this charity to promote and protect public interest whistleblowing. It is as important now as it ever was.



Michael Smyth CBE

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Introduction

by Cathy James, Chief Executive

I am delighted to have been appointed Chief Executive of Public Concern at Work and am grateful for the many messages of support I have received. What follows is a summary of the hard work and achievements of the charity over the last two years.

Whistleblowing calls to our advice line have increased by 25% and as can be seen from the headlines on the facing page, the need for free, independent advice available to all workers who are unsure whether or how to speak up has never been greater. 24% of workers called us for advice before they raised a concern in the workplace and callers frequently say they wish they had known about us earlier as they would have been in a better, more informed position from the start. We are working hard to raise our profile generally and in the workplace and we welcome all the support you can give us to make this happen.

The care of vulnerable adults has been a particularly pressing issue with the British public and in calls to our advice line. These calls are often the most harrowing, typically involving vulnerable workers wishing to speak up for even more vulnerable adults and children. As part of our care campaign we took a closer look at what whistleblowers say in the care sector. Our first report revealed that far more needs to be done to support and encourage care workers who witness wrongdoing or malpractice (see page 12).

There is an increasingly urgent need for greater transparency in claims brought under the Public Interest Disclosure Act (PIDA). We have long said that it is simply not right for this important piece of legislation to be shrouded in secrecy. Not only does this mean public interest information is likely to be buried in settlements,² but there is also little or no chance for anyone properly to monitor and review the operation of this vital piece of legislation (see page 9).

Our research into PIDA cases has highlighted a number of worrying trends. The need for better (and cheaper) legal representation for those bringing PIDA claims is something we will examine in the coming months,³ as is the upward trend in costs awards against unsuccessful PIDA claimants. Significantly we know that just under £12 million has now been awarded to whistleblowers under PIDA. Given that 75% of cases settle before hearing with no record of the settlement reached, this figure must represent but a fraction of the valuable assistance the law has provided to those who are dismissed or victimised for raising concerns in the workplace (see pages 15 and 16).

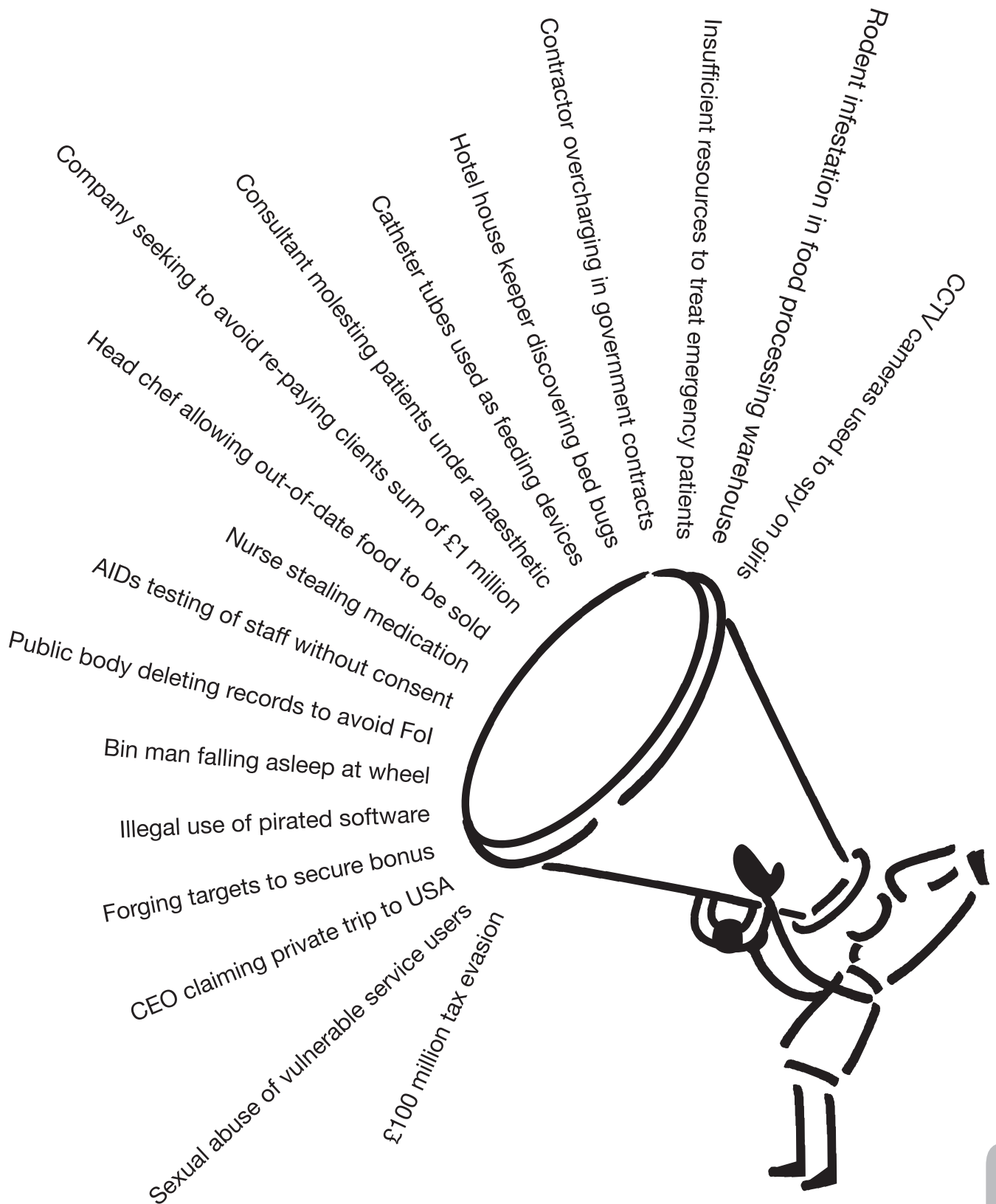
The results of our public survey (see page 17) show that the vast majority of respondents (87%) said they would blow the whistle on corruption, danger or risk internally to their employer, but fewer knew where to go if the internal option was not possible. The results also demonstrate that trust in MPs as an external option has plummeted⁴ and that awareness of the law remains too low.

Overall the findings in this report confirm the importance of ensuring that all UK workers know and understand the legal framework for whistleblowing and the support available to them if they are to speak up promptly and safely. While responsible businesses continue to work hard to improve their whistleblowing arrangements (see page 19), it is clear that government and regulators should be doing more to ensure workplace cultures make it safe for anyone to blow the whistle.

²Over 75% of PIDA cases settle without public records
³See p14 – according to our research, PIDA Claimants are more likely to win if represented
⁴From 12% of respondents saying they would go to their MP to only 3%

Concerns

from our advice line 2009/10



The Advice Line

Doctors, nurses, cleaners, bankers, care workers and civil servants: our callers have a variety of concerns. These range from mis-selling of loans at a bank, poor care on a hospital ward, or the abuse of a vulnerable adult in a care home. Our advice focuses on the risk arising and the wider public interest in the context of the Public Interest Disclosure Act (PIDA). We aim to limit or avert harm through early advice. We outline practical options and help callers to raise their concern in the most effective manner, with the least damage to their own position.

We do not bring legal claims on behalf of our clients but we do what we can to assist those who cannot afford legal assistance. To this end we are now able to refer cases to the Free Representation Unit, the Bar Pro Bono Unit and the Employment Lawyers Association. We also assist unions, managers and lawyers on the interpretation of PIDA.

Our advice line has received over 20,000 calls since the charity was set up in 1993. 57% of these are whistleblowing calls, which means they are about a public interest issue - such as a patient safety risk or financial wrongdoing - which affects others or the organisation itself. Over the past two years whistleblowing calls have risen by 25%, from 1773 in 2007/8 to 2206 in 2009/10. This may reflect recession related workplace anxiety or an increase in the public's awareness of "whistleblowing" due to its

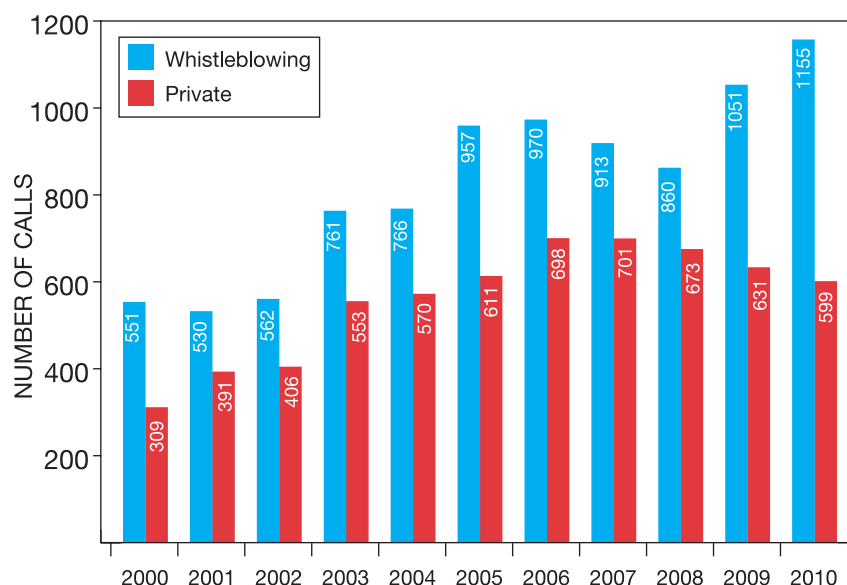
prominence in mainstream media. We have experienced a small increase in the number of workers approaching us for advice before they raise a concern - rising from 22% in 2007/8 to 24% in 2009/10.

The good news for employers is that the vast majority of our callers (71% over a ten-year period) who have already raised their concern have done so to their manager or senior manager, indicating that most employees want in the first instance to tell their employer about an issue. It also indicates that UK employers need to do more to ensure their managers know how to handle a concern in-house, limiting the need for callers to escalate their concerns or raise matters externally, and demonstrating to their workforce that they can trust management. The upward trend of individuals

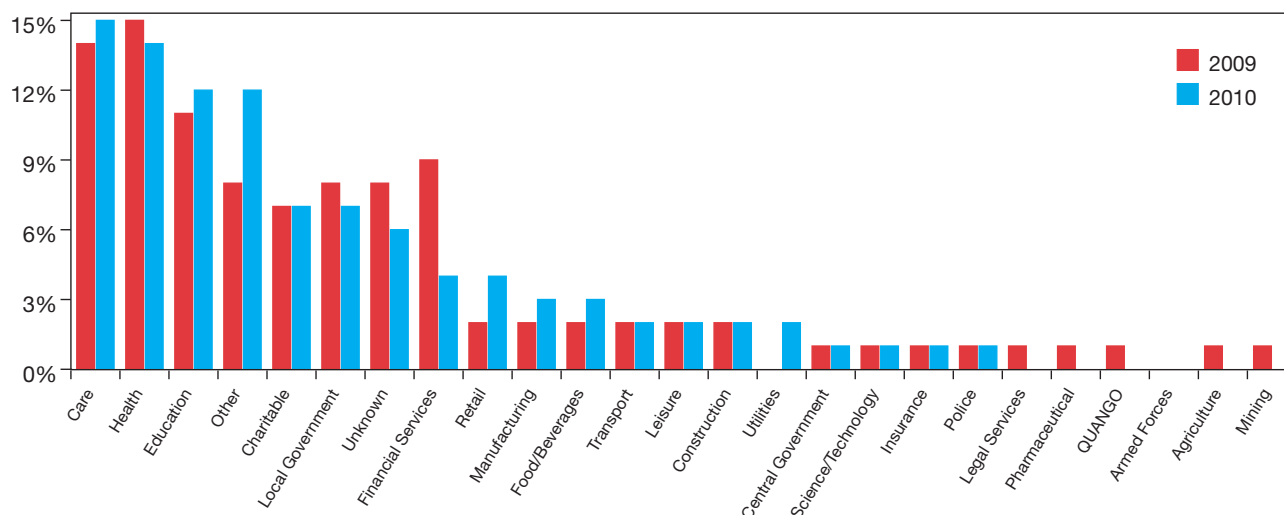
raising a concern internally dipped from 75% in 2008 to 69% in 2009, climbing back up to 72% in 2010. The fall in 2009 may be attributed to workers feeling less secure in a recession. On any view employers need to redouble their efforts to communicate with staff in troubled times if they really want to know about workplace risk.

We continue to receive the most calls from the care sector, followed by health, education, local government, and financial services. There has been an increase in calls from the educational sector in 2010 and our calls from the financial services industry have halved; on the face of it a surprising result. This decline and other trends on the advice line will inform our upcoming projects in 2012.

Advice line - whistleblowing and private calls 2000 - 2010



Advice line - whistleblowing calls by industry



Feedback

We contacted all callers to the advice line with public concerns in 2009 and 2010 who had left telephone details, seeking feedback on our services. 430 individuals agreed to take part. The results for 2010 and 2009 (in brackets) show an increasingly positive picture:

- 97% (92%) said our advice was clear and easy to understand
- 82% (75%) said our advice was helpful
- 81% (72%) said they followed our advice
- 90% (87%) said they would recommend the charity to anyone who was unsure whether or how to raise a concern.

A frequent feedback comment from callers was that they wish they had spoken to us sooner. We hear this repeatedly. Given our advice is most effective at an early stage, we will continue to do what we can to raise our profile.

The following comments were made during the feedback survey or from letters and emails from clients:

“Your organisation is absolutely brilliant and gave advice in a way that allowed me to make my own informed decision.”

“Invaluable to talk to someone and get support... It was really helpful when going through what I went through.”

“You think you are alone, and then you talk to someone and discover there are all these people who can help.”

“It is because of you that I am not going to give up.”

Case Studies

All cases are anonymised to protect the identity of those involved

Misdiagnosis

Owen, a healthcare professional, was worried that a very ill patient had been wrongly informed he had terminal cancer by a consultant who had misread his file.

Owen said the patient was already on haemodialysis, and had been advised by the consultant to discontinue this treatment. Owen thought the patient might die if he came off the haemodialysis, so he and other nurses convinced him to remain on it.

Owen said that many others had concerns about the consultant but found him intimidating. They were frightened for their jobs. Owen had tried to raise a concern in the past and the consultant had ignored him. Additionally, the daughter of the patient concerned had complained about the consultant, but this had not been investigated and the complaint letter was no longer on file. Owen was particularly worried as the new diagnosis had made the patient lose hope and the change in medication was leading to dramatic weight loss.

Owen said other nurses were worried about raising issues but that two nurses and his line manager were supporting him. Owen tried to raise concerns with the Medical Director but had been told to put the matter in writing.

We advised Owen that he had acted sensibly, it was good that he had raised the matter openly and that he had the support of his line manager and others. While the response was not very encouraging, it was a very serious concern and it might help

for it to be formally recorded. We encouraged Owen to proceed. We pointed out that if the Trust handled this properly, it would give others the confidence to raise concerns. We warned Owen that he might not be kept informed regarding the investigation due to issues such as confidentiality.

When we next spoke to Owen he said that there had been a positive response. At a staff meeting management said staff should feel free to approach them if they had any concerns. Owen said that this had made a real difference and had resulted in a more collegiate working environment. Nurses had approached Owen to say that they were being listened to.

Dangerous Meat

John worked in quality control at an abattoir and factory dealing mainly with pork.

John was concerned that the abattoir was changing kill dates on the meat in order to give it a longer shelf life. This meat was then being sent to large supermarkets nationally with the wrong sell-by and use-by dates. John was particularly concerned when he realised that one kill date had been changed by up to 9 days. John knew that government regulations require all pork to be eaten within ten days of the kill date and this meat would be unsafe if sold to consumers. John had tried to speak to his manager but he had been told to mind his own business. John was unsure who at the top of the company knew about this but thought that the owners would also be aware of this practice. Although John knew other staff were worried, no one wanted to speak up.

We advised John that given the immediate risk we could contact the supermarket directly and give them the batch number and date it was sent out. This way they could ensure the meat would never reach the supermarket shelves. We said we could also let the industry regulator, the Food Standards Agency (FSA), know about the issue. John agreed and we contacted the supermarket and the FSA.

The next day the abattoir was told their contract with the supermarket had been put on red alert. As a result, the practice of changing the kill dates stopped.

Abuse in Care

Clare worked in a nursing home for residents with dementia owned by a large care provider.

She was very worried about some unexplained injuries to the residents. She thought the incidents had not been reported and the manager had a blind spot about the behaviour of one particular carer, Graham, whom she thought might be responsible. Clare had seen Graham shout at residents and on one occasion twist the arm of a resident. A cleaner at the home had also seen Graham kick a resident. Clare was clear that there should be body maps detailing injuries for these individuals and wanted someone outside the home to look at the pattern.

Clare was anxious about her position as Graham had a number of supporters in the care home. Clare asked us to see how the care provider's head office would deal with the issue on the basis that they would not reveal her identity.

We contacted the head office. They assured us it would be taken seriously and said our caller should contact them directly.

When we next spoke to Clare she told us that she had spoken to the local authority's Adult Safeguarding team and matters had improved. She said that a new system had been put in place, that head office had requested all body maps to be filed with them, and Adult Safeguarding were to be informed of all serious incidents.

Fiddling expenses

Elias was a finance manager at a small branch of a debt collection agency whose parent company was based in the USA. He was concerned that his general manager was fraudulently claiming for personal expenditure on the company credit card. Elias said that in one month the relevant credit card bill was 15 times the amount the general manager recorded in the accounts. Elias thought that head office would notice the discrepancy at year end, however he was worried that his boss would have covered his tracks by then.

We suggested that Elias contact head office, explain the problem to them and ask them to carry out a spot check or require further documentation to support accounts.

Elias called to say that the parent company had intervened soon after he raised his concerns. His boss had been immediately dismissed. Elias said his employers had wished he had come forward earlier but were grateful that he had raised his concerns.

Child protection

Anita was a health visitor for children aged 0 - 5 years and had been working in the field for a number of years with a team of health visitors. She had become increasingly concerned about the failure of a colleague (Karen) to carry out work responsibilities. Anita, together with her co-workers, had collected evidence that Karen had missed several home visits and had covered this up. Initially Anita's colleagues had been reluctant to disclose this information due to their line manager's close relationship with Karen. A client had also filed a formal complaint against Karen.

Eventually staff decided to talk to their line manager about their concerns. Karen accused the rest of the staff of bullying her. The line manager attributed various complaints to specific members of staff. Anita was upset that: 1) she was identified and 2) Karen's performance issues were not discussed.

Anita was unsure how to approach her line manager regarding the quality of Karen's care. Anita believed that Karen needed extended supervision by someone outside of the team and wanted to suggest this to her line manager. We suggested that Anita should meet with her line manager and emphasise that her concerns were not personal and should frame her suggestions constructively. We recommended that Anita could suggest that Karen needed extra help or additional training. If Anita believed that her concerns were not dealt with effectively by her line manager, she could go to her area manager.

Anita said she had a good relationship with both her line manager and the area manager and thanked PCaW for the advice.



Policy and Campaigns

We work with organisations, government departments, regulators and Parliament in order to increase recognition of the value of public interest whistleblowing and to improve support and protection for whistleblowers.

Our work involves supporting good proposals and challenging bad ones.

All our work is informed by the advice line and the whistleblowers and organisations to whom we speak.

Transparency and oversight in PIDA claims

We have long campaigned for greater transparency in Employment Tribunals (ETs) and for the principles of open justice to apply to claims under the Public Interest Disclosure Act (PIDA), the law that protects whistleblowers. At present over 75% of PIDA claims are settled before a hearing. One result of this is that we are unable to tell from the tribunal judgments exactly what happened to give rise to the claims. In our view information about PIDA claims should, as a matter of course, be publicly available. Not only does this ensure that any public interest information is brought to light but also that the law is properly monitored and reviewed.

Since 2009 we have made some progress on this. We lobbied hard during the passage of the Employment Bill 2008. However, the Government was not persuaded to agree to any of our solutions as they feared this would put “untested allegations in the public sphere”. We urged them, at the very least, to ensure regulatory oversight of PIDA claims.⁵ Following an undertaking

by the Government during the passage of the Bill, we worked with the Department for Business, Innovation and Skills (DBIS) to develop a mechanism for the ET to forward PIDA claims to prescribed regulators. A consultation on the issue followed. While we were clear that for the measure to be effective the referral to the regulator needed to be automatic, the Government’s response was that claims should only be forwarded with the claimant’s consent, and introduced a consent box on the ET1 (claim form). Regulations were drawn up and laid before Parliament in April 2010.

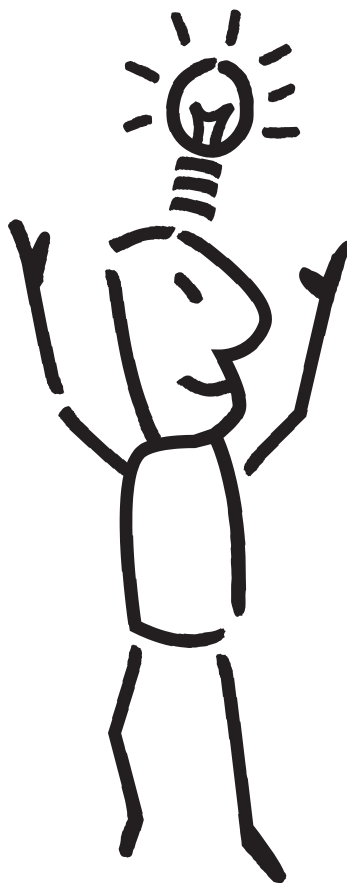
One year on, we wanted to know how the new system was working in practice and whether regulators were using this new source of intelligence. We sent a Freedom of Information Act request to all regulators prescribed under PIDA, asking how many cases they had received. We also asked the ET how many cases they had referred to the appropriate regulator.

The results were not encouraging. A number of regulators appeared not to understand the request and were clearly unaware of the existence of the new regulations and the important intelligence that may have been available. Many did not have systems to capture this information and a number refused our request, claiming that to answer would be disproportionate in terms of time and cost. Ironically of those who refused, four were recorded as having received the most claim forms by the ET (the Care Quality Commission, the Health and Safety Executive, HMRC and the Information Commissioner). We hope that by asking regulators annually how many claim forms are being referred to them under these regulations, we will encourage a better understanding of the vital role that regulators should play in the proper operation of the law that protects whistleblowers.

We also continue to do our best to monitor the Act in the absence of an open register. In the first 10 years of the Act, there were approximately 9,000 claims. Of these, only 3,000 odd had resulted in written judgments, all of which were sent to us by the ET. Of these, only 532 judgments contained sufficient information to identify the public concern that gave rise to the claim. We published our findings in our report *“Where’s Whistleblowing Now? 10 years of legal protection for whistleblowers”*.



⁵ A number of regulators are prescribed under PIDA for the purposes of 43F.



We also have increasing concerns that the current tribunal system is causing difficulties in pursuing PIDA claims. In April 2011 we submitted a response to the DBIS consultation on Employment Tribunals. We suggested certain improvements:

- Promotion of what constitutes good practice whistleblowing arrangements to ensure that workplace disputes are avoided or handled well.
- The production of online guidance on how to draft an ET1 (claim form), an ET3 (response form) and statements of loss for each head of claim that is within the jurisdiction of the ET.
- The establishment of an online database of employment tribunal judgments.
- The establishment of an open register of ET1s and ET3s, of PIDA claims specifically, be re-established, as exists within the civil courts.
- The exclusion of PIDA claims from the cost and settlement offer provisions proposed by the consultation.
- The revision of PIDA to include a public interest test.
- Consideration of tribunal powers for making recommendations and awarding financial penalties in PIDA claims where whistleblowing arrangements have been obviously flouted by employers.
- In relation to PIDA claims, further promotion of the principles behind s43J PIDA, which expressly says that any clause that purports to gag an individual from making a protected disclosure is void and unenforceable.

Regulators' best practice

Recognising the role of regulators under PIDA, we have also started a project to develop best practice principles for prescribed regulators. This work has been undertaken in conjunction with a working group of representatives from a wide variety of prescribed regulators.

Health

In June 2010, the Social Partnership Forum launched whistleblowing guidance for all NHS organisations in England entitled "Speak up for a healthy NHS". The guidance was drafted by us in conjunction with the Department of Health, NHS Employers and trades unions. It is intended to help NHS organisations achieve best practice whistleblowing arrangements and create a culture where staff can speak up safely. The guidance also promotes the support we provide across the NHS. The Secretary of State for Health, Andrew Lansley MP commented on the launch of the guide:

"Publication of this guide is an important step in developing a culture of patient safety. NHS staff need to be free to raise concerns and shielded from any backlash. To make sure staff know about their rights, and are supported, the local NHS must champion this guide in their own organisations."

In January 2011 the Department of Health set out the proposed changes to the NHS Constitution to highlight the expectations and responsibilities of NHS staff and NHS organisations on whistleblowing issues. While we welcomed the changes, we made suggestions that would make the wording more accessible and less legalistic.

We were asked to submit evidence to the Mid Staffordshire NHS Foundation Trust Public Inquiry. We summarised our view of good practice, highlighted potential gaps in PIDA for healthcare workers, commented on the evidence given thus far and reviewed the whistleblowing policy in place at the Trust at the relevant time. Our view of the policy was that it indicated a closed culture at the Trust which might discourage a member of staff from speaking up. We hope to work further with the Inquiry in the coming months.

Policy and Campaigns

“...the abolition of the Audit Commission... (means we) lose a regulator that has led the way on regulatory best practice for whistleblowing.”



Whistleblowing and leaking in Whitehall

In January 2009 we responded to the Public Administration Select Committee inquiry *Whistleblowing in Whitehall*. The inquiry was opened in response to the arrest of Chris Galley, the civil servant who had leaked documents to Damian Green MP. We recommended that it consider designating the Chairman of the Committee as a prescribed person under PIDA to receive substantive concerns from civil servants, as this would help re-assert Parliamentary oversight and provide a clear external route for raising concerns for civil servants.

Following our analysis of Whitehall whistleblowing policies in 2007 we have undertaken a further review and are now analysing all departmental whistleblowing policies to see if they have improved and meet best practice.

The Bribery Act 2010

We responded to the Ministry of Justice consultation on guidance on the Bribery Act for commercial organisations (section 9 of the Act). The new Act provides a defence to corporate liability if the company in question can show it had “adequate procedures” in place to prevent bribery. In so far as the guidance related to whistleblowing, we recommended a less legalistic approach and fuller guidance on best practice that would encourage staff to speak up, rather than using PIDA as a starting point. We were pleased to see the final guidance provided better information on what

“adequate procedures” might be in relation to whistleblowing. This included recommendations that organisations have a Speak-Up or Whistleblowing Policy, provide effective procedures for protecting staff, confidential reporting, access to advice and training.

The costs of cuts on whistleblowing - legal aid and the Audit Commission

The announcement in 2010 that the Audit Commission was to be abolished caused us considerable concern. We wrote to the Communities and Local Government Select Committee highlighting the gap this would introduce in the UK’s whistleblowing framework. We said that the abolition of the Audit Commission would mean that the country would lose a regulator that has led the way on regulatory best practice for whistleblowing and that a vital layer of oversight in the public sector would be lost.⁶

In our response to the Government consultation on the removal of legal aid, we argued that employment matters should not be removed from the scope of legal aid. If the Government is to limit the scope of legal aid, we argued that whistleblowing claims should be treated in the same way as discrimination claims, and legal aid support should continue to be given.

⁶ Note the Audit Commission subscribes to the PCaW advice line for their staff. Derek Elliott, Treasurer of PCaW, was previously the Head of Governance and Counter Fraud Practice at the Audit Commission

Sector Focus

on Care

Each year a large proportion of our calls come from the care sector. These are often very harrowing and involve vulnerable workers who wish to speak up on behalf of vulnerable children and adults.

In light of this we have started a campaign on how better to empower, encourage, support and protect workers in the care sector.

The first part of our campaign involved the analysis of 1,200 care cases brought to our helpline since 2002. We looked at the narrative of our cases and analysed trends.

Our research, published in April 2011, demonstrated that there are systemic deficiencies that prevent care workers from speaking up effectively to protect vulnerable adults. These range from: managers with poor training on how to handle concerns; limited or no feedback given to a worker who had raised a concern; low awareness of rights; low-level or non-existent protection by employers of workers who are victimised for raising a concern; and the absence of guidance on how and when to approach regulatory authorities, either from the employer or from the main industry regulator, the Care Quality Commission. Some concerns appeared harder for workers to raise than others and in 50% of cases where other workers also knew of a serious concern, they were not willing to come forward with information.

In such a climate the abuse of vulnerable adults at Castlebeck's care home, Winterbourne View, as exposed by Terry Bryan and BBC Panorama, seemed tragically inevitable and only served to highlight the need for greater support for whistleblowers.

We held a conference in Westminster Hall on 6 April 2011 to bring together care workers, employers, the Care Quality Commission and local authorities to discuss their views on whistleblowing. The conference provoked lively debate and marked the launch of our report.

The next phase of our project will focus on speaking to care workers to hear what they see as the challenges in their everyday working environment. Additionally we will be undertaking a review of the framework for raising concerns, from employer to regulator, to see if it is fit for purpose.

“...in 50% of cases where other workers also knew of a serious concern, they were not willing to come forward...”



PIDA Judgments

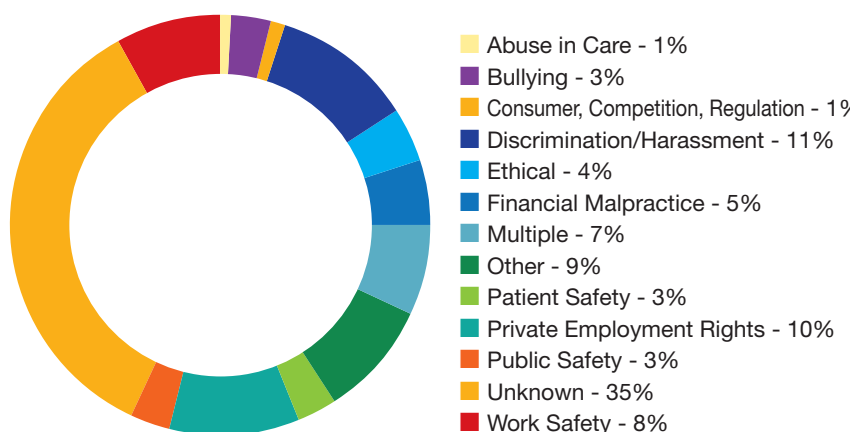
2009-2010: An Overview

At the time of writing, the Department for Business, Innovation and Skills (DBIS) has said that there were 2,000 PIDA claims between 1 April 2009 and 31 March 2010. 1,600 of those claims were disposed of with 74% withdrawn, settled by ACAS or by the parties. The remaining 26% proceeded to a hearing at which 20% (or 85 cases) were successful.⁷

As part of our public policy objectives, we track these judgments. We are reliant on the Employment Tribunals (ET) providing these to us every six months. Despite the judgments being public, they remain difficult to access and we have recommended that the Government introduce an online system for all ET judgments in order to increase transparency and knowledge of the law (see page 10).

We reviewed a total of 884 judgments for 2009 and 2010, which covered both full and interim rulings. 464 of these were final judgments following a substantive hearing. Of these, only 10% of cases were successful on PIDA grounds, 31% were won on other grounds, and the remainder were lost or struck out. As shown by the above chart, the categories of wrongdoing raised in PIDA claims is wide and ranged from security breaches in Afghan military bases, fake invoicing, bid-rigging, restructuring of health services and breach of private employment rights (see pages 15 and 16 for our summaries of interesting PIDA cases).

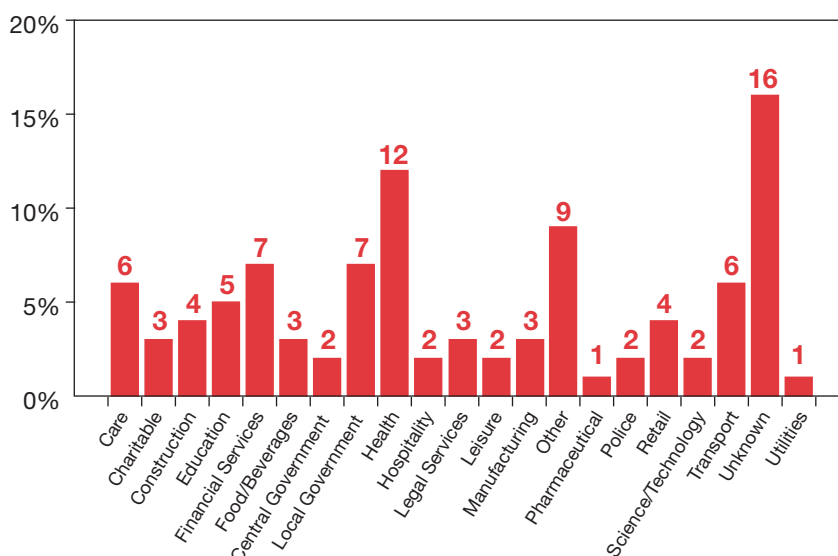
PIDA Judgments 2009-2010 by type of malpractice



Likewise the types of organisation against which claims are being taken is varied, with 12% of claims coming from the health sector, 7% from financial services, 6% from care and 7% from local government. It is worth noting that the number of cases from the care sector has dropped from 12% in the last two years to 6%.

The total amount of damages awarded under PIDA in 2009 and 2010 was £2.3 million with the highest award being £800,000 in the case of John Watkinson v Royal Cornwall Hospitals NHS Trust. (summarised at page 16). This brings the total amount of damages awarded to whistleblowers under the legislation to just under £12

PIDA Judgments 2009-2010 by Industry



million. As this represents only the small number of claims that reach final judgment, it must be the case that this is but a fraction of the total amounts received in settlement of PIDA claims.

We have also noticed a worrying trend in costs orders against claimants. Costs are capped at £10,000 against a party in the Employment Tribunal. The highest single award we have come across was £40,000, in a claim where there were 4 respondents (see *Shamsian v Salisbury NHS Foundation Trust & Ors*). The total amount of costs ordered against claimants bringing PIDA claims was just over £123,000, while the total amount of costs ordered against respondents was less than £12,000. This deserves closer analysis and will form the basis of further research in the coming months. The average award for costs against either party in PIDA claims is £4,210. This is double the average award for other employment tribunal claims.⁸

“The total amount of damages awarded under PIDA in 2009 and 2010 was £2.3 million...”

Key facts and figures 2009 & 2010

- 68% of PIDA cases were from the private sector, 26% were from public sector, 4% from the voluntary sector and 2% unknown.
- Whistleblowing policies were mentioned in 5% of cases.
- Claimants were more likely to raise a concern initially with their line manager (found in 43% of cases).
- Claimants were more likely to escalate their concern to senior management or executives (31%), while in only 5% of cases had they escalated their concern to prescribed regulators.
- Bad faith⁹ was raised in 4% of cases.
- Claimants had legal representation in 32% of cases; 27% were litigants in person, 5% were assisted by CABs and 2% were represented by friends.
- Claimants were more likely to win where they had representation.
- The average award under PIDA was £58,000 compared to average awards of £18,584, £19,499 and £52,087 in race, sex, and disability discrimination cases respectively.



⁸ ET annual report 2009 - 2010.

⁹ In nearly all circumstances, for a disclosure to be protected under PIDA it must be made in good faith. Bad faith is when a disclosure is made with a predominant ulterior motive that is unrelated to the purposes of PIDA – see *Street v Derbyshire Unemployed Workers Centre* 2004 EWCA Civ 964.

PIDA Case Studies

Grimes v Big Pictures (UK) Ltd (2009)

Grimes was a photographer for a celebrity picture agency and was assaulted by a photographer from a rival agency when taking photos of the late Amy Winehouse. He sustained a gash to the head. Grimes returned to the office and told his managers, who said that they would deal with this at 'street level' and afterwards spoke to other photographers including the perpetrator, concluding that this was a 'silly spat' typical between rival photographers competing for the same shot. Grimes was warned that he should not involve the police. Three days later, Grimes' injury had not improved. He attended hospital and reported the assault to the police. They later spoke to his managers. Six days after the police involvement, Grimes was dismissed for substandard work including poor time-keeping, poor communication skills and a negative attitude. None of these issues had been previously mentioned to Grimes. The Employment Tribunal found that the real reason for Grimes' dismissal was his contacting the police, which was very close in time to the dismissal, and that the reasons given by his employer were a sham. Grimes was awarded £9,711.

Kapoor v ICICI Bank (2009)

Kapoor worked in the Proprietary Trading Group (PTG) of ICICI Bank and was concerned that his line manager was manipulating profit and loss accounts to show a profit when in fact losses were being made. Kapoor raised his concern confidentially to the Head of

Compliance of the Bank. During a subsequent investigation, Kapoor's identity was revealed, despite assurances in the whistleblowing policy that this would not happen. The Bank's investigation failed to find wrongdoing. Kapoor raised his concern with the FSA, who ordered an independent investigation, which cost the Bank £100,000. This investigation identified wrongdoing by Kapoor's line manager. Shortly after the FSA's involvement, a decision was made to close the PTG. As Kapoor had recently transferred from India and was an Indian national, he was repatriated to India. He brought a claim for unfair dismissal and detriment suffered because of his disclosures. The Employment Tribunal found that Kapoor had made protected disclosures to the Bank and the FSA, and that the suddenness of the closure of the PTG was a detriment. The Employment Tribunal made awards for injury to feelings and an award for stigma, as it recognised the difficulties faced by those working in the financial sector who seek re-employment if it becomes known they are whistleblowers. He was awarded £21,960.

Niekrash v South East London Healthcare NHS Trust (2010)

Between 2005-2008, Niekrash, a consultant urologist, raised concerns about the failure of management to consult clinicians regarding the restructuring and closure of wards within South East London Healthcare NHS Trust and the negative impacts that followed. He raised further concerns about poor management

“ The Employment Tribunal made an award for stigma as it recognised the difficulties faced by those working in the financial sector who seek re-employment if it becomes known they are whistleblowers.”

controls in clinics that led to patient overloads, and junior doctors working without supervision. The Trust's management proposed altering Niekrash's timetable to allow for better supervision. Niekrash made further disclosures stating that the Trust had taken a unilateral decision to change his job description and that he was being harassed. A grievance investigation followed and found in favour of some of the issues raised by Niekrash, but also raised concerns about his attitude. Niekrash was also subject to a further investigation and vindicated, but was then excluded from work. The Employment Tribunal found that Niekrash had made protected disclosures and that he had suffered a number of detriments flowing from his exclusion, which included loss of private income and

damage to reputation. The tribunal awarded Niekrash £17,568.

Shaw v The Commissioner of Police for the Metropolis (2010)

Shaw was a long-serving police officer in the Metropolitan Police Service (MPS) and was well-respected for his work in fraud detection and prevention. He was seconded to a team tasked with creating a new national unit dealing with internet crime. Shaw raised a concern about a colleague trying to gain an unfair advantage in an interview by having sight of questions beforehand, and concerns regarding the recruitment and procurement procedures of the unit. Disciplinary proceedings were instigated against Shaw on trumped up charges about an external business interest. The Employment Tribunal found Shaw had made a protected disclosure regarding his colleague's cheating in the run-up to interview. The tribunal also concluded that investigating officers were so intent on disciplining Shaw that they failed to carry out a proper investigation, and had frog-marched Shaw out of his unit which seriously damaged his reputation. The tribunal concluded Shaw had suffered detriment and he was awarded £38,000, which included £17,000 for injury to feelings and £20,000 in aggravated damages.

Shepherd v Phoenix Contracts (Leicester) Limited (2009)

Shepherd was a director and shareholder of a construction company, which was already involved in a large Office of Fair Trading (OFT) investigation into

bid rigging and cover pricing in the construction industry.¹⁰ Shepherd was in the process of selling his shares. At a monthly management meeting to discuss upcoming contract opportunities, another director suggested the company should take part in bid rigging on a £3 million hotel project. Shepherd objected and later left an anonymous voice message with the hotel project manager explaining his concern. The project manager reported this to Phoenix Contracts and Shepherd became involved in a protracted dispute. He brought a claim for detriment. The Employment Tribunal found he had made two protected disclosures: one at the meeting, and the other a wider disclosure to the project manager. Shepherd won his claim and was awarded £59,534.64, including £18,000 for injury to feelings and £5,000 for aggravated damages.

Watkinson v Royal Cornwall Hospitals NHS Trust (2010)

In 2007, Watkinson began working as Chief Executive of Royal Cornwall Hospitals NHS Trust (RCHT) which had in the previous year been assessed as the worst performing hospital trust in England. Watkinson's tenure was difficult initially due to low morale and began with a conflict with a number of non-executive directors, resulting in five of them resigning. Within a year of his starting the fortunes of RCHT began to change and having been in deficit, made a surplus in the financial year 2007/2008. Compliance with regulatory standards also improved. During this same period, the Strategic

Health Authority was proposing the reconfiguration of the upper gastro-intestinal cancer service and centralising it across the region, which would have meant that certain patients would no longer be able to get treatment at their local hospital in Truro. Watkinson was concerned that before a reconfiguration could take place RCHT was required to carry out a public consultation. Watkinson sought the opinion of Counsel who agreed. He raised his concern with the Board. At the same time, Watkinson's previous employers, Bromley NHS Trust, had produced a report without allowing a right of reply to Watkinson that attributed its budget deficits to his tenure at Bromley. In response to this, Watkinson's new employers and the Strategic Health Authority issued a press release stating that they were reviewing his conduct. Watkinson was suspended and was later dismissed without notice. The Employment Tribunal found that Watkinson had made a protected disclosure about the change in services and a further one when he raised a concern that his employers had breached their legal obligations to him by suspending him. The Employment Tribunal concluded Watkinson was unfairly dismissed for having made a protected disclosure, as well as suffering the following detriments: suspension, libellous publicity and failure to implement a salary increase. Given that Watkinson's career was effectively over, he was awarded the sum of £1.2 million which was reduced on appeal by the respondents to £800,000.

¹⁰ Bid rigging involves collusion on tendering, where one company places an unrealistic bid without the genuine intention of bidding, in order to make another company's bid more competitive

Attitudes and Awareness

Attitudes to whistleblowing

Since 2007¹¹ we have commissioned YouGov biennially to carry out a survey examining public attitudes to whistleblowing, asking whether individuals would raise a concern, with whom they would raise it and what they knew about the law. We set out below the results from this survey comparing 2007, 2009 and 2011.

Where do whistleblowers raise their concerns?

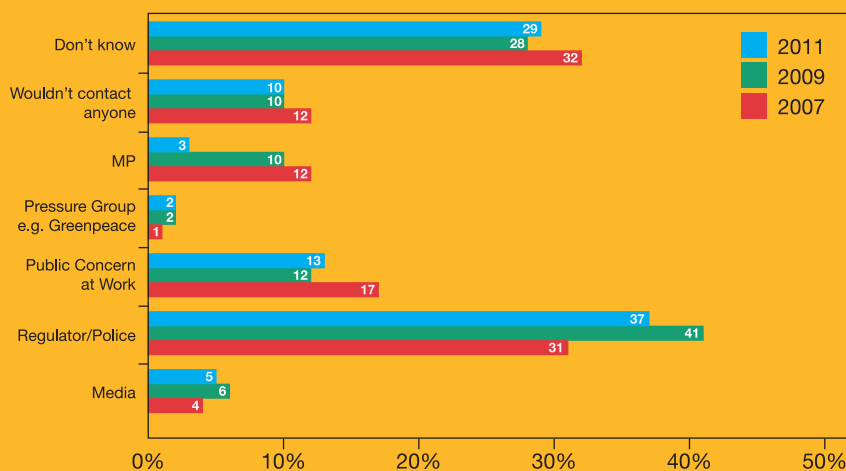
In the 2011 survey, 85% of respondents said they would raise a concern about possible corruption, danger or serious malpractice at work with their employer, 5% said they would not and 8% didn't know. The 2011 figures broadly compared to figures from earlier surveys.

The picture becomes more worrying and confused when participants were asked who they would contact

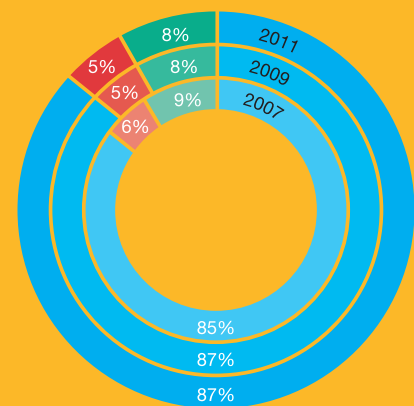
if they didn't feel confident about telling their employer. In the 2011 survey 39% of participants said they would not contact anyone or did not know to whom they would go. This shows that, despite PIDA being in operation for over 10 years and an increasingly positive attitude to whistleblowing (see below), many individuals do not know where they can raise a concern, demonstrating we need to do more to promote safe alternatives to silence.

For the remaining participants, 3% said they would go to an MP (a drop of 7%-9% from previous years), 2% said they would go to a pressure group, 13% would come to us, 37% would go to a regulator or the police and 5% would go to the media. Apart from the loss in confidence in MPs, the graph below shows that the survey results have not changed significantly since 2007.

If you didn't feel confident about telling your employer your concern, which one of the following would you be most likely to contact?¹²



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



■ Yes, I would
■ No, I would not
■ Don't know

With individuals not being clear where they can raise a concern outside their organisation, it becomes important for employers to provide clear whistleblowing policies which include a variety of routes by which individuals can raise their concern. While there has been an upward trend in the number of respondents who said their employer had a whistleblowing policy, in the 2011 survey, only 45% of respondents answered this question positively.

Despite PIDA being more than a decade old, promotion of the law is low, with 77% of individuals stating that either there is no law to protect workers who blow the whistle or they didn't know if there was such a law.

¹¹ A full breakdown of the surveys can be found at www.pcaw.org.uk. All figures, unless otherwise stated, are from YouGov Plc The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+). In 2011, the total sample size was 2023 GB adults of which 1191 are working. Fieldwork was undertaken between 8th-10th June 2011. In 2009, the total sample size was 2,083 adults. Fieldwork was undertaken between 3rd – 5th June 2009. In 2007, the total sample size was 2,256 adults. Fieldwork was undertaken between 25th – 29th May 2007.

¹² In 2007 this question referred to Public Concern at Work as “the whistleblowing charity”. This was removed in subsequent surveys.

Perceptions of whistleblowers

Our surveys show that the word “whistleblower” is increasingly seen as a neutral or positive term in the UK.

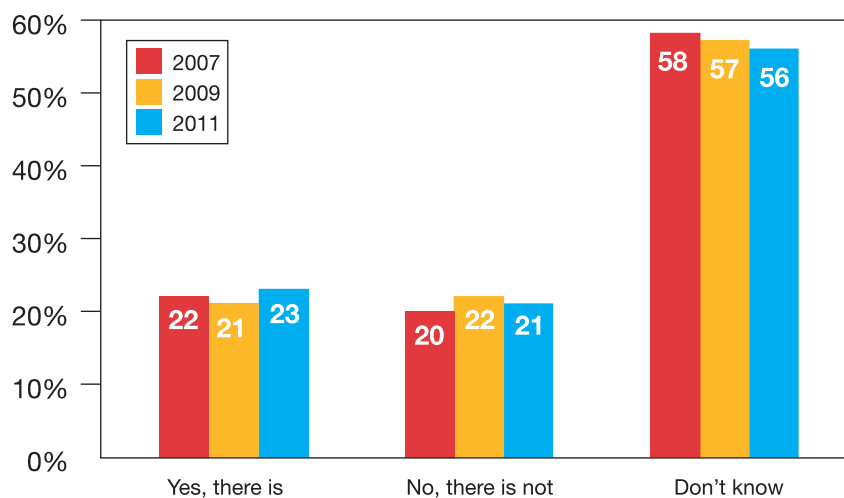
Has Wikileaks changed attitudes?

There has been much controversy around the mass, unmediated release of US diplomatic cables by Wikileaks. A recent Ipsos-Mori survey showed that the activities of Wikileaks has resulted in some considerable confusion over the rights and wrongs of anonymous leaking platforms. The survey examined attitudes towards Wikileaks and its founder Julian Assange and was based on 18,829 interviews in 24 countries around the world. It examined the respondents’ assessment of the Wikileaks website and its actions. Interestingly, 62% of UK respondents supported Wikileaks or an equivalent website (36% were opposed). The international average was 76% supporting and 24% opposing.

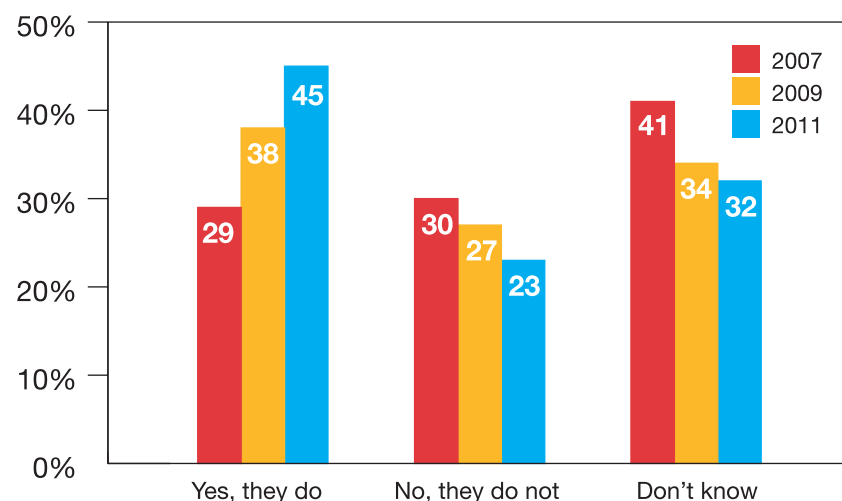
When interviewees were asked what they thought of whistleblowers who sent confidential diplomatic information from their country to Wikileaks, UK respondents (international averages in brackets) said:

- 21% (36%) thought they were heroes or public servants
- 45% (33%) thought they were either mischief makers or criminals
- 34% (31%) of respondents were either unsure or described their actions in a different way

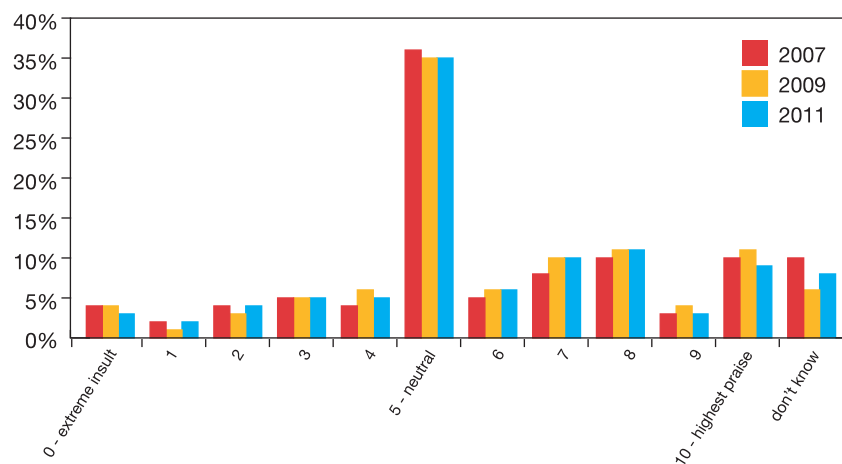
To your knowledge, is there a law that protects workers who ‘blow the whistle’?



Does your employer have a ‘whistle blowing policy’?



How would you rate the word “whistleblower”?



Working with Organisations

Our Subscription Services

A positive whistleblowing culture is the lifeblood of good governance arrangements in any organisation. As a not-for-profit organisation, our focus is on safeguarding the public interest and stopping preventable disasters. We work hard to get the balance right between law, culture and practice. Subscribing to our advice line ensures that we are a resource for all workers, providing safe and confidential advice should they ever find themselves in a dilemma about what to do if they witness wrongdoing in the workplace. Our support for organisations helps them address their risks responsibly and proportionately and our unique approach is designed to emphasise and underpin internal management processes.

We offer training and consultancy and three different levels of subscription:

Basic

A self-help package which includes the following:

- advice line subscription
- compliance toolkit (including our model policy, our Best Practice Guide for Subscribers and a whistleblowing presentation)
- promotional materials
- one hour's consultancy or one place at one of our expert whistleblowing training workshops

Enhanced

This package is ideally suited to medium-sized organisations. It includes:

- advice line subscription
- compliance tool-kit (including our model policy, our Best Practice Guide for Subscribers and a whistleblowing presentation)
- promotional materials
- annual anonymised helpline report

Annually a choice of two of the following options:

- two places at our whistleblowing training workshop
- three hours' consultancy
- written briefings for managers and staff
- policy review

Our clients include:

Basic: Abbeyfield Homes; The Audit Commission; Brighton & Hove City Council; Cancer Research UK; Centrica plc; Bepak plc; Cumbria Constabulary; Department for Finance & Personnel for Northern Ireland (DPFNI); Derbyshire Fire and Rescue; East Midlands Housing; Emap; Higher Education Funding Council for England (HEFCE); Hiscox plc; ICICI Bank; Independent Parliamentary Standards Agency (IPSA); Isle of Wight Council; ITV;

John Lewis; Joseph Rowntree Foundation; Liberal Democrats; Notting Hill Housing Trust; OGC Buying Solutions; Older People's Commissioner for Wales; Pandora; Perth & Kinross Council; Serious Fraud Office; Travelex; Yorkshire Building Society

Enhanced: A4E Limited; Anglo Irish Bank; Birmingham International Airport; Central Bank of Ireland (CBFSAI); Cofunds Limited; Equitable Life; LCH Clearnet; MacIntyre; Ofsted; Sense; Speedy Hire

Bespoke: NHS; AIB; Bank of Ireland; Care UK; Cattles; CIMA; Home Retail Group; Irish Life & Permanent; Lloyds Banking Group; Royal Berkshire NHS Foundation Trust

We extend our thanks to all the organisations who have helped support the work we do.

“Relevant, articulate presentation, excellent case description”¹³

Bespoke

This is designed for large/complex organisations and those who work in high-risk areas or require further support and contains:

- advice line subscription
- freephone number
- bespoke email facility
- 7 hours' consultancy
- annual anonymised review of the organisation's whistleblowing arrangements for audit committees or boards and in line with the UK Corporate Governance Code. This includes an advice line report
- periodic advice line briefings
- compliance toolkit (including our model policy, our Best Practice Guide for Subscribers and a whistleblowing presentation)
- licence to reproduce PCaW intellectual property in print and on intranet
- two training places

“Very informative and useful...Good combination of legal information and practical”

¹³ client feedback from training workshops 2009/10

Money

Who pays?

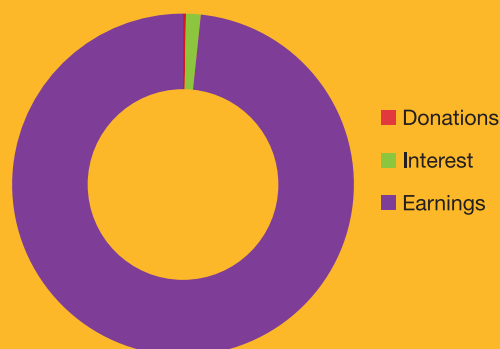
We are currently in the fortunate position of being a self-funding charity. Throughout our first decade we depended almost exclusively on the support of charitable foundations. In 2010 we drew on our reserves to allow us to expand and raise our profile and fund other activities summarised in this report.

Over these two years the income we raised was £845,231. The money we earn comes from subscriptions taken by employers, professional bodies and regulators as well as talks at various conferences and seminars. Over these two years our expenditure was £850,603.

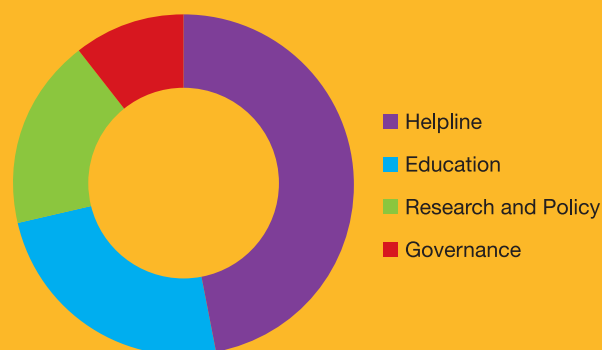
The charts below summarise our income and expenditure over the two accounting years covered in this report.

Copies of our audited accounts are available on request.

**Income
2009-2010**



**Expenditure
2009-2010**



Public Education

At home...

In the last year we have re-invigorated our schools project.

We have extended our schools materials to include a real-life case study of the sinking of the Herald of Free Enterprise in 1987. Students were given a role-playing opportunity to be lawyers at the Inquiry into the sinking, cross-examining witnesses including the company director, the ship's captain and survivors. We ran a pilot session for Year 10s at Norwood School which was well-received and which we hope to repeat five or six times in the coming school year.

We also held a lively debate, "This House believes that whistleblowers should be rewarded", for law students at BPP Law School

sponsored by Russell Jones Walker. We wish to thank the SOAS and UCL debating societies for fielding the skilled and entertaining debaters. Dania Harleston and Nicola Kohn won the awards for best floor and panel speeches respectively.

We spoke at conferences and education sessions for NHS Employers, the National Clinical Advisory Service, the Fraud Advisory Panel, the Royal College of Nursing, the Royal Pharmaceutical Society, NHS Counter Fraud, Westminster Industry Group, the Institute of Employment Rights, the International Whistleblowing Conference at Middlesex University, King's College Dental Nurse Training and Chartered Institute of Public Finance Accountants.

...and away

We continue to work with not-for-profits, international organisations and governments abroad.

Since our last review, whistleblowing continues to remain high on the international agenda. The G20, the Organisation for Economic Co-operation and Development (OECD) and the EU Commission are all looking at it. The Council of Europe adopted a resolution recommending all member states to have laws that protect whistleblowers. We worked closely with Transparency International, developing guiding principles for whistleblower protection. We provided consultancy and training to a number of international organisations and agencies including representatives from the Japanese Government, the South Korean Anti-Corruption and Human Rights Commission, the UNDP in Serbia and Morocco, the International Anti-Corruption Conference in Thailand and Open Democracy and Advice Centre (ODAC) in South Africa. Our staff have spoken at events in Strasbourg, Brussels, Poland, Prague, Lithuania, Hungary and India.



People

As at 13 October 2011 our staff were:

Chief Executive
Cathy James

Legal Director
Shonali Routray

Policy Director
Francesca West

Policy Officer
Andrew Parsons

Services Manager
Olabisi Porteous

Helpline Advisers
Sam Bereket
Alexandra Smith
Katie Greer

Senior Consultant
Anna Myers

Office Manager
Martina Lewis-Stasakova

Volunteers and interns

Alexander Cavell
Erim Tuc
Kerry Weir
Michelle Alexander
Tiffany Kwok
Katie Hewson
Alexandra Kinraid
Smita Nadkarni

Our Board members are:

Mr Michael Smyth CBE (Chair)
Mr Derek Elliott (Treasurer)
Mr Peter Connor
Mr Martin Le Jeune
Ms Carol Sergeant CBE
Mr James Tickell
Ms Amanda Pursey
Ms Joy Julien
Ms Rachael Tiffen

Our Patrons are:

Lord Borrie QC

Council:

Michael Brindle QC (Chair)
Mr Roger Bolton
Mr Gerald Bowden
Sir Ross Cranston
Dr Yvonne Cripps
Mr Guy Dehn
Mr Maurice Frankel OBE
Ms Zerbanoo Gifford
Mr Edwin Glasgow QC
Ms Rosalie Langley Judd
Mr David Owen
Dr Elaine Sternberg
Dr Marie Stewart MBE
Ms Marlene Winfield OBE
Mr Stephen Whittle

In 2009 we said goodbye to our Director Catherine Wolthuizen. In 2010 Cathy James was appointed by the trustees as our Chief Executive.

We wish to extend a huge thanks to those who have worked so hard in helping the charity support whistleblowers. Special thanks to our former Director, Catherine Wolthuizen, former trustees Maurice Frankel OBE and Gary Brown, former Helpline Advisers, Ashley Savage and James Hurst. Additionally, thanks go to our committed volunteers whose assistance has been invaluable in tasks great and small over the past two years.





For **whistleblowing** advice

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