



## WHISTLEBLOWING BILL

Short title: A Bill to strengthen whistleblowing protection

### Contents

<b>Clause 1 – extending the scope of whistleblowing to a wider range of individuals</b>	Page 2
<b>Clause 2 – extending the range of qualifying disclosures</b>	Page 3
<b>New clause – standards on employers</b>	Page 4
<b>Clause 3 – extending legal advice to include trade unions</b>	Page 5
<b>New clause – Disclosure to The Whistleblowing Commissioner</b>	Page 5
<b>New clause – standards for regulators</b>	Page 6
<b>Clause 4 - contracts and gagging clauses</b>	Page 7
<b>Clause 5 – prohibition on discrimination for making a protected disclosure</b>	Page 7
<b>Clause 6 – test for unfair dismissal</b>	Page 8
<b>New clause – reversal of burden of proof</b>	Page 8
<b>New clause – tortious duty</b>	Page 9
<b>New clause – The Whistleblowing Commissioner</b>	Page 9
<b>New clause – Legal Aid and changes to tribunal procedures</b>	Page 10

Explanatory notes to the bill are incorporated in comments after each Clause

## **PART 1 – Amendments to the ERA 1996**

The Employment Rights Act 1996, is amended as follows

### **Clause 1 – Extending the scope of whistleblowing**

The Employment Rights Act 1996, is amended as follows

(1) Omit Section 43A and replace with:

#### **43A Meaning of “protected disclosure”**

(1) In this Act “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by any current or former employee, worker or other connected person including anyone identified in (2) below in accordance with any of sections 43C to 43H.

(2) For the purposes of this Part, any person who make a qualifying disclosure is protected against detriment and unfair dismissal in accordance with this Act and such persons include:

- (a) employees and workers including agency and contract workers
- (b) job applicants
- (c) individuals undertaking work placements and work experience
- (d) self-employed contractors
- (e) volunteers and interns
- (f) paid and unpaid trainees
- (g) non executive directors and trustees including pension trustees
- (h) shareholders
- (i) foster carers
- (j) priests and ministers of religion
- (k) crown employees and those appointed by the crown
- (l) public and private office holders
- (m) suppliers, partners and business associates of the employer and any persons working under the supervision and direction of contractors, subcontractors and suppliers
- (n) third persons connected to the reporting person including family members
- (o) trade union representatives.
- (p) partners in partnerships or limited liability partnerships
- (q) a person receiving coaching or training for sporting or recreational purposes (whether or not that person pays for such coaching or training).

(3) The Secretary of State may by order make amendments to this Section to extend the category of individuals who have protected behaviours under this Part.

(4) An order under subsection (3) may not make an amendment that has the effect of removing a category of individual unless the Secretary of State is satisfied that there are no longer any individuals in that category.”

(2) Section 43K is repealed.

*Explanation*

This clause aims to replace the current extended definition of “worker” under Section 43K with a non-exhaustive list of categories of those who should be protected under whistleblowing legislation drawing on international best practice. A non-exhaustive list is set out in Article 4 of the EU Directive. The recent Supreme Court ruling Gilham v Ministry of Justice [2019] UKSC 44 - that judges should not be denied whistleblowing rights and that the law should be interpreted to include judicial office holders - means that the legislation should be amended to ensure clarity. The Equality Act 2010 already covers employees, contract workers, applicants, police officers, partnerships, public and private office holders, barristers, advocates, qualification bodies, local authority members, employment service providers, trade associations.

If a non-exhaustive list is included in S43A, there is no need for the extended definition of worker in S43K.

**Clause 2 – Extending the range of disclosures qualifying for protection**

**Section 43B Disclosures qualifying for protection** is amended as follows:

(1) In subsection (1) after (e) insert

“(ea) gross waste or mismanagement of public funds

(eb) serious misuse or abuse of authority

(ec) a breach of employers policies and procedures

(ed) behaviour that harms or is likely to harm the reputation or financial wellbeing of the employer”

(2) Omit subsection (3) and insert

“(3) No cause of action in civil proceedings shall lie against a person in respect of the making of a protected disclosure.

(3A) In a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for the person to show that, at the time of the alleged offence, the disclosure was, or was reasonably believed by the person to be, a protected disclosure.”

*Explanation*

Subclause (1) adds new categories of concern (ea) and (eb) were identified in Protect’s Whistleblowing Commission as gaps in the current legislation. (ec) and (ed) replicate the reportable concerns which are included in the FCA’s chapter on whistleblowing.

New subclause (3) provides immunity from civil proceedings for those who make a protected disclosure and reflects the Irish legislation.

New subclause (3A) introduces a public interest defence for persons disclosing information in accordance with the act, in circumstances where they may face criminal prosecution. Wording is taken from the Irish legislation.

**After Section 43C insert**

**New Clause: Standards on employers**

(1) All employers, whether in the public or private sector, which have

- a) 50 or more employees; or
- b) an annual business turnover or annual balance sheet total of £10 million or more; or
- c) operate in the area of financial services or are vulnerable to money laundering or terrorist financing,

shall be required to establish internal channels and procedures for reporting and managing qualifying disclosures.

(2) Employers procedures shall include:

- a) channels for receiving the disclosures which are designed, set up and operated in a manner that ensures the confidentiality of the identity of the person making the disclosure and prevents access to non-authorized staff members;
- b) the designation of a senior individual who has responsibility for the effectiveness of reporting channels and following up on disclosures
- c) the designation of a person or department competent for following up on the disclosures;
- d) diligent follow up to the disclosures by the designated person or department;
- e) a reasonable timeframe, not exceeding three months following the disclosure, to provide feedback to the person making the disclosure about the follow-up to the report;
- f) clear and easily accessible information regarding the procedures and information on how and under what conditions disclosures can be made externally to competent authorities including prescribed persons under Section 43F.

(3) Notwithstanding any duty to third parties, unless a risk assessment identifies a serious risk of harm to any person, the employer shall inform the person making the disclosure of all progress taken in response, including any action taken by a prescribed person, and where there has been no action, to explain in writing the reasons every 14 days.

(4) All employers shall be under a duty to take reasonable steps to prevent detrimental treatment by the employer, the employer's officer or agent, or by any third party to someone who has made, or is believed to have made a protected disclosure.

(5) The Secretary of State shall consult with interested parties and require ACAS to produce a statutory code of practice on receiving protected disclosures.

*Explanation*

This clause follows the EU Directive in setting standards for employers of 50 or more employees or those with £10m turnover, or those in financial services and prescribes some detail of how the organisation should respond to disclosures. It also proposes a statutory code of practice, which could follow the best practice already developed by the Whistleblowing Commission to establish whistleblowing procedures. Some of the provisions in (2) go beyond the EU directive's requirements and are highlighted in comments below.

The requirement in (2)(b) of a designated senior individual follows the requirements in some sectors eg FCA to have a "whistleblowing champion" at Board level to ensure that there is strategic oversight.

Subclause (3) obliges an employer to provide feedback of action they take, or a prescribed person takes in response to the disclosure (subject to a risk assessment that this will not cause serious risk of harm to any person). Where no action is taken, the employer should provide fortnightly updates in writing to the whistleblower explaining why.

Subclause (4) introduces a mandatory duty on employers to take reasonable steps to prevent detrimental treatment.

### **Clause 3 – Extension of legal advice to include trade union advice**

**Section 43D Disclosure to legal adviser** is amended as follows:

After "advice" insert

"(1A) A qualifying disclosure is made in accordance with this section if it is made to a trade union representative."

*Explanation*

At present only a trade union lawyer is likely to be covered by the section, but it is likely that a worker would initially discuss their concerns with a TU rep, with a view to obtaining legal advice

**After Section 43F insert**

**New Clause: Disclosure to The Whistleblowing Commissioner**

(1) A qualifying disclosure is made in accordance with this section if the person making the disclosure

- a) makes the disclosure to The Whistleblowing Commissioner, and
- b) reasonably believes that
  - (i) the relevant failure falls within the scope of what The Whistleblowing Commissioner may investigate, and
  - (ii) that the information disclosed, and any allegation contained in it, are substantially true.

*Explanation*

This new clause allows a disclosure to be made to The Whistleblowing Commissioner – a new independent body set out in a new clause below. A failure to investigate a concern, or unfavourable treatment of the whistleblower can be raised with the new Commissioner. This is not intended to replace the prescribed person route or the disclosure in other cases in current S43G. However, a whistleblower should also be protected if they approach the Commissioner.

**After Section 43FA insert**

**New Clause: Duties on prescribed persons to set standards on protected disclosures**

- (1) The Secretary of State shall make regulations requiring all persons prescribed for the purposes of Section 43F to:
- a) establish independent and autonomous reporting channels, which are both secure and ensure confidentiality, for receiving and handling information provided by the person making a protected disclosure;
  - b) keep records of all protected disclosures made to them;
  - c) give feedback to the person making a protected disclosure about the follow-up of the disclosure within a reasonable timeframe not exceeding three months or six months in duly justified cases;
  - d) follow up on disclosures by taking the necessary measures and investigate, as appropriate, the subject-matter of the concerns. Where the prescribed person is not competent to investigate, they shall inform the person making the protected disclosure of their intention to pass the concern to the appropriate body.
  - e) where the prescribed person receives a disclosure from another body under (d) above, they shall take the necessary measures and investigate, as appropriate, the subject matter of the concerns.

(2) The regulations must require a person prescribed for the purposes of Section 43F to publish on their websites in a separate, easily identifiable and accessible section at least the following information:

- a) the conditions under which persons making a protected disclosure qualify for protection under this Act;
- b) the communication channels for receiving and following-up disclosures;
- c) the confidentiality regime applicable to disclosures;
- d) the nature of the follow-up to be given to reported concerns;
- e) the remedies and procedures available against retaliation and possibilities to receive confidential advice for persons contemplating making a disclosure;
- f) a statement clearly explaining that persons making information available to the competent authority in accordance with this Part are not considered to be infringing any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and are not to be involved in liability of any kind related to such disclosure.

*Explanation*

This new clause follows the wording of Article 6 and Article 10 of the EU Whistleblowing Directive. Subsection (1) sets out the requirements for regulators to establish confidential reporting channels and to provide feedback. Subsection (2) requires all prescribed persons to provide information about their whistleblowing processes on their website, including information explaining that there will be no liability for people making disclosures.

#### **Clause 4 – Contractual duties of confidentiality (Prohibition of “Gagging” clauses)**

In Section 43J omit subsection (1) and insert

“(1) No agreement made before, during or after employment between an individual and an employer may preclude that individual from making a protected disclosure.

(2) Any settlement agreement must contain

(a) a clear statement that nothing in the agreement affects the rights of an individual to make a protected disclosure and stipulate the types of disclosures that can be made and to which categories of authorities; and

b) certification by the independent adviser that the effect of any requirements of confidentiality and the limitations on those requirements have been explained to the employee.”

#### *Explanation*

The current wording of Section 43J is unclear and has been the subject of considerable debate. The Government has also suggested amendments to NDAs in their recent consultation response. Subclause (2) adds a requirement that settlement agreements cover what may be properly reported.

#### **Clause 5 – Prohibition on discrimination for making a protected disclosure**

##### **After Section 47B insert new clause**

(1) An employer must not discriminate, harass or victimise any individual because it appears to the employer that the individual has made or may make a protected disclosure.

(2) For the purposes of this Act,

(a) A person (A) discriminates against another (B) if, because of a protected disclosure, A treats B unfavourably

(b) A person (A) harasses another (B) if—

A engages in unwanted conduct related to B’s protected disclosure and the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(c) In deciding whether conduct has the effect referred to in subsection (2)(b), each of the following must be taken into account—

(i) the perception of B;

(ii) the other circumstances of the case;

(iii) whether it is reasonable for the conduct to have that effect.

d) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (i) B has made a protected disclosure, or
- (ii) A believes that B has made, or may make, a protected disclosure.

*Explanation*

This clause imports the language of the Equality Act and makes it unlawful to discriminate, victimise or harass an individual for a protected disclosure. It should be seen as additional to the right not to suffer detriment and covers circumstances of perceived or anticipated whistleblowing. The language of discrimination is already used in regulations for NHS employers and widely understood by workers:

“3. An NHS employer(1) must not discriminate(2) against an applicant(3) because it appears to the NHS employer that the applicant has made a protected disclosure(4).” The Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018.

**Clause 6 – test for unfair dismissal**

In Section 103A of the Employment Rights Act 1996 (Protected Disclosure) leave out “the reason (or, if more than one, the principal reason) for the dismissal is that ” and insert “the dismissal is on the grounds that”

*Explanation*

This clause imports the lower test “on the grounds that” for an unfair dismissal claim (which the courts have interpreted as meaning “ a material factor in”) This new language is used in PIDA for bringing a detriment claim, but PIDA currently sets a higher hurdle for an unfair dismissal claim for making a protected disclosure – it has to be the “ main or principal reason” for a dismissal.

**New clause – reversal of the burden of proof**

In proceedings before a court or tribunal relating to a detriment under Section 47B of the Employment Rights Act 1996, or dismissal under Section 103A of the Employment Rights Act 1996, and subject to the person making the disclosure establishing that he or she made a qualifying disclosure and suffered a detriment or dismissal, it shall be presumed that the detriment or dismissal was made in retaliation for disclosure. In such cases, it shall be for the person who has taken the detrimental measure or dismissed the person to prove that that measure or dismissal was based on duly justified grounds.

*Explanation*

This new clause ensures that the burden of proof in any tribunal or court proceedings for whistleblowing detriment or dismissal shifts to the employer. Once it is established that the whistleblower has made a qualifying disclosure and suffered detriment, it is for the employer to prove that they had a justifiable reason for their action. The wording follows that in the EU directive.

### **After Section 47B insert New Clause – Tort action for suffering detriment for making a disclosure**

- (1) If a person causes detriment to another person because the other person or a third person made a protected disclosure, the person to whom the detriment is caused has a right of action in tort against the person by whom the detriment is caused.

#### *Explanation*

This clause allows a third party to bring a claim in tort for any discrimination or detriment. It may allow family members, those associated with the whistleblower or even other corporate or public bodies to take action against detrimental treatment. This may also allow a tortious action against a regulator if they cause detriment to the whistleblower (e.g. breach of confidentiality or blacklisting). This wording is taken from Irish law.

### **New Clause – The Whistleblowing Commissioner**

- (1) The Secretary of State shall establish a Whistleblowing Commissioner.
- (2) The Secretary of State shall ensure that there is an efficient and effective system to support the carrying out of the business of the Commissioner.
- (3) The Whistleblowing Commissioner shall have the following functions:
  - a) to act as an investigator of alleged maladministration or a failure to investigate a protected disclosure either by an employer or by a prescribed person
  - b) to set standards about protected disclosures expected of prescribed persons and employers and issue guidance of such standards
  - c) to improve public awareness and education of individual's rights regarding protected disclosures
  - d) to administer civil penalties where they judge appropriate against employer or prescribed persons for breaches of function (a) or (b) above.
- (4) Where an employer or prescribed person is found to be in breach of (3) a) or b) above The Whistleblowing Commissioner:
  - i) will issue a public report detailing the findings of any investigation carried out under (3)( a)
  - ii) shall, where appropriate, make recommendations for improvements to be made by the employer or prescribed person in line with standards to internal arrangements or practice as outlined in (3)( b)
- (5) The Whistleblowing Commissioner shall provide the person making the protected disclosure to them with the proposed findings of fact and legal conclusions before concluding any investigation. The person making the protected disclosure may submit written comments about the report which will be considered by The Whistleblowing Commissioner in the final outcome of the investigations.
- (6) For the purposes of subsection 3 the functions of The Whistleblowing Commissioner will apply to employers as set out in Section 43FA of this Act and prescribed persons as defined in Section 43F of the Employment Rights Act 1996.

- (7) The Secretary of State shall establish a civil penalty fine regime where an employer or prescribed person is found to be in breach of function (3) (a) or( b) above.
- (8) Prescribed persons shall provide the Whistleblowing Commissioner with relevant information on request. The Secretary of State may by Order identify information that a prescribed person may decline to provide for the purposes of safeguarding national security or where such information would prejudice a police investigation.

*Explanation*

This clause will establish a new independent body to set standards expected of employers and regulatory bodies and to investigate complaints from whistleblowers where an employer or prescribed person has failed to investigate properly or at all or adhere to the requirements under this Bill. This clause also introduces a civil penalties regime that The Whistleblowing Commissioner should administer. An additional element has been imported from the Office of the Special Council in US – providing the whistleblower a right to reply before a report is concluded. Experience in the US is that whistleblower’s evaluation comments can improve or even change conclusions It is NOT intended that this body should itself be a prescribed person, or that there should be changes to Section 43G which makes provision for wider disclosures (eg to the press)

**Part 2 – Amendments to other acts and procedures**

**New clause: Legal aid and changes to Employment Tribunal procedures**

1. In the Legal Aid Sentencing and Punishing of Offenders Act 2012 in Schedule 1 after paragraph 43 insert  
“43A Protected disclosures  
(1) Civil legal services provided in relation to contravention of the rights not to suffer detriment or be dismissed on the ground that the worker has made a protected disclosure under the Employment Rights Act 1996”
2. In Section 48 of the Employment Rights Act 1996 (Complaints to employment tribunal) in subsection (3) for all occurrences leave out “three” and insert “six”.
3. In Section 111 of the Employment Rights Act 1996 (Complaints to employment tribunal) in subsection 2(a) leave out “three” and insert “six”.

4. In Section 128 of the Employment Rights Act 1996 (Interim relief pending determination of complaint) in subsection (2) and in subsection (4) leave out “seven” and insert “twenty-one”.

*Explanation*

Subclause 1 adds to the list of civil legal services for which legal aid may be provided under Schedule 1 to LASPO. Subclause 2 extends the time limit for bringing a detriment claim to the ET to six months. Subclause 3 extends all time limits for bringing unfair dismissal claims to the ET similarly to six months. Three months is insufficient when claims are often complex, grievances may be ongoing, and the whistleblower may be off work with stress as a result of the victimisation that they have experienced. (For simplicity, time limits for all ET claims are extended, not just whistleblower detriment and dismissal). Subclause 4 extends the period for bringing an interim relief claim from 7 days from the date of dismissal to 21 days (Whistleblowing Commission). The opportunity to bring a claim for interim relief is hampered by the very short timeframe for presenting what needs to be a near complete ET1 in order for a judge to make a determination on the papers. Few cases are brought as a result, but it is a potentially powerful deterrent for employers to dismiss whistleblowers.

**Further information from Elizabeth Gardiner:** [elizabeth@protect-advice.org.uk](mailto:elizabeth@protect-advice.org.uk) 020 3117 2520 ext 1011