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Whistleblowing Commission Consultation: Strengthening Law and Policy

Response from the Employment Lawyers Association

21 June 2013

WHISTBLOWING COMMISSION CONSULTATION: STRENGTHENING LAW AND POLICY

RESPONSE FROM THE EMPLOYMENT LAWYERS ASSOCIATION

21 JUNE 2013

Introduction

The Employment Lawyers Association (ELA) is a non political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals.

The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation (including consultation exercises prior to legislation).

A sub-committee chaired by Anthony Korn was set up to consider the various questions posed in the consultation document produced by Public Concern at Work. The full membership of the sub-committee is set out at the end of our response. We also received comments from other ELA members who did not sit on the sub-committee.

As stated above, it is not the ELA's role to comment on the political merits or otherwise of proposed legislation but to make observations from a legal standpoint. This has presented a particular challenge in relation to some of the issues raised by the Consultation document produced by Public Concern at Work as the merits of many of the questions raise policy issues which fall outside the remit of the ELA. Bearing this in mind, we have felt unable to make representations on all of the questions raised in the consultation document and have primarily focussed on the questions which raise "pure" issues of law and addressed legal issues arising from some of the policy issues raised in the consultation document.

However, in addressing some of those questions raised in the Consultation document, we have found it helpful to draw parallels between the law relating to whistleblowing and discrimination law (as recognised by the Court of Appeal in ***North Glamorgan NHS Trust v Ezsias [2007] IRLR 603)***. This is reflected in our response where we highlight some of those areas where whistleblower protection is weaker than that under the Equality Act 2010. It is for the Commission, rather than us, to assess whether or not this can be justified in policy terms.

Question 1
How can we embed good practice whistleblowing arrangements in all sectors of the UK? For example should they be mandatory?

1.1 This is largely a question of policy beyond our remit. Many of the employers represented by our members do have express policies and procedures covering whistleblowing but this is by no means universal and of course is not mandatory.

1.2 We believe that in the current political climate there may be considerable resistance to the introduction of mandatory whistleblowing procedures, not least because of their impact on small and medium sized employers (a "one size fits all" approach). There may be less resistance to a voluntary or statutory code of practice (either through ACAS or some other qualified body) which Tribunals could take into account in deciding the reasonableness of the disclosure and reasonableness of the employer's response to the disclosure (where this is relevant). The development of such procedures may be further encouraged if Tribunals were empowered to make recommendations (see below).

Question 2
Do you think that there should be financial or other rewards for whistleblowers? What are the advantages and disadvantages? How would rewards be funded? And what about non-financial wrongdoing?

2.1 In many ways, this is also a matter of policy which goes beyond our remit. We are aware that in certain sectors in some states in the US, rewards are offered to whistleblowers as an incentive to make disclosures; for example, relating to financial irregularity. This contrasts with the position under PIDA where at least in relation to disclosure to third parties and disclosures in exceptional circumstances, it is a condition that the disclosure is not made for personal gain.

2.2 If, as a matter of policy, it was considered appropriate to offer financial rewards as an incentive to whistleblowers, it would be necessary to consider how such rewards or any other financial inducement, would interact with the existing system for resolving whistleblowing complaints. For example, would such rewards be taken into account or ignored in determining any award made by a Tribunal? If so, how? Similarly the timing and status of such rewards would need to be considered as there is potential for them to impact on the Tribunal process. It is not clear from the Consultation document who would be responsible for administering such rewards? At what point would a reward be made? How would a determination be reached? Would a reward be dependent on the successful outcome of an Employment Tribunal Hearing? If so, this may have an impact on a Claimant's willingness to settle? What would happen if the Tribunal's ruling was overturned on appeal?

2.3 As stated above, it is not our role to say whether such incentivisation would be a good or a bad thing but a first step might be to remove the statutory prohibition referred to above and provide that personal gain should no longer be a bar to the disclosure being protected as such but a factor to be considered in the overall reasonableness of the disclosure. This would at least allow certain sectors to offer rewards without penalising those who wish to bring legal proceedings against their employers.

Question 3
Do you think the Public Interest Disclosure Act is working? Are there any ways it could be simplified or improved?

3.1 The ELA is not really in a position to judge whether PIDA is working in the sense of encouraging workers to raise concerns as opposed to providing a remedy to those who do raise concerns but we are able to make some comments on the second question from our perspective as employment law practitioners. Our answers to this question should be read in conjunction with our answers to questions 5.

Generally

3.2 Whilst we understand that the framers of the legislation tried hard to balance the competing interests of potential whistleblowers and employers, the statutory rules, and in particular the conditions attached to disclosure in "other cases", are complex and arguably too prescriptive and inflexible. Such disclosures may be made to a variety of third parties ranging from a disclosure to a trade union representative to the media. One possible solution (referred to below) is to expand the list of persons who qualify as 'prescribed persons' and limit the conditions attached to disclosures in other cases to groups where the more stringent conditions are considered to be justified. Another possibility would be to limit the mandatory conditions attached to such a disclosure and widen the range of other factors going to the reasonableness of the disclosure.

The issue of 'reasonable belief' and what is required to sustain a reasonable belief?

3.3 Under section 43B of the Employment Rights Act 1996 ("ERA") a qualifying disclosure means:
"any disclosure of information which, **in the reasonable belief of** the worker making the disclosure, tends to show one or more of the following – "

3.4 For the purposes of disclosures to an employer, a belief which is genuinely held by the worker but which is wrong will be protected (***Babula v Waltham Forest College [2007] EWCA Civ 174 [2007] IRLR 346*)**. But the reasonableness of the belief is judged on an objective basis. So in ***Easwaran v St Georges University of London*** **(EAT 0176/2010)** where Mr Easwaran alleged that he suffered a detriment as a result of a disclosure that the room where he worked was freezing and he thought he would contract pneumonia was held not to be a protected disclosure on the basis that it was not reasonable for him to believe that freezing temperatures caused pneumonia.

3.5 The case of ***Bolton School v. Evans [2006] EWCA Civ 1653*** (**[2007] IRLR 140, EAT [2006] IRLR 500**) highlights that whistleblowers will have protection if they can show that their reasonable belief in the information disclosed falls within one or more of the qualifying disclosures recognised by statute but the whistleblower's actions in seeking to establish that their concerns were reasonably held will not always be protected by the legislation.

The key facts of the case are summarised below.

- Mr Evans was employed as a technology teacher at Bolton School between 1996 and 2003. He was involved in the Information and Communication Technology ("ICT") project group in relation to which he was seeking to ensure that the school's new network was appropriate.
- Mr Evans expressed concerns that security issues were not satisfactorily addressed and those concerns were shared by his head of department.
- On 5 September 2003 Mr Evans informed Mr Edmundson (the staff member designated by the headmaster as the relevant contact person) that he was attempting to gain access to the system in order to test security and demonstrate what he perceived to be its failings. Mr Evans also discussed potential security weakness with the Head of Computing, Mr Humphreys. Mr Humphreys was content for a simple test to be conducted to see if Mr Evans could gain administrative access from resources available to pupils.
- On 8 September 2003, Mr Evans gained access to the system from a student PC and disabled some of the user accounts. He did not affect any data on the system and staff still had access to it. Mr Evans then informed Mr Edmundson, Mr Humphreys and the headmaster what he had done.
- The ICT services team subsequently spent some hours repairing the system and it was alleged that financial losses in the region of £1,000 were incurred.
- Following an investigation by the headmaster, a disciplinary hearing was held on 11 September 2003. The headmaster concluded that Mr Evans had deliberately hacked into the network and issued him with a written warning. The headmaster nevertheless accepted that Mr Evans had acted in good faith and later conceded at the Employment Tribunal that Mr Evans may have been justified in his belief that his concerns were not being properly listened to.
- Mr Evans appealed. His appeal was dismissed. The following day, the headmaster invited Mr Evans to discuss matters further but he was of the opinion that his position was untenable and he resigned.

3.6 The decision distinguished Mr Evans' disclosure of information from his actions in seeking to show his reasonable belief in that disclosure. Consequently, it was found that Mr Evans had been disciplined for the act of hacking into his employer's IT system, not for having made a protected disclosure about his concerns regarding the IT system. However Mr Evans had only hacked into the system for the purpose of demonstrating his reasonable belief in his disclosure to his employer. Mr Evans' argued and the tribunal accepted that his actions were intrinsically linked to his disclosure.

3.7 Elias J in the EAT disagreed and stated "*It seems to us that the law protects the disclosure of wrongdoing, or anticipated wrongdoing, which is covered by Section 43B. It does not protect the actions of the employee which are directed to establishing or confirming the reasonableness of that belief*".

3.8 The Court of Appeal upheld the EAT's finding that the protection from detriment given to workers under Section 47B of the Employment Rights Act 1996 applied only to the disclosure of the relevant information itself, and not to the worker's actions and behaviour in connection with that disclosure.

3.9 Whilst we would not condone employees hacking into their employer's computer system, the outcome means that workers who suspect wrongdoing on the part of their employers may be unable to establish reasonable grounds for that belief. It may be argued that in cases where a disclosure and acts to establish reasonable belief in that disclosure are intrinsically linked, both events should be protected. Further, the absence of a statutory requirement for employers to undertake any investigation following a worker's protected disclosure can lead whistleblowers to want to undertake their own investigations. But there is a real risk that the whistleblower's actions in doing so are not protected and the fear of repercussions by their employer may discourage workers from making disclosures in the first place.

3.10 In addition, it may be argued that the requirement for "reasonable belief" does not work effectively with the overall public interest objective if a worker does not have conclusive evidence to support their belief in the information, for example if they have second-hand or incomplete information. This may discourage workers making disclosures. If the purpose and spirit of the whistleblowing legislation is to encourage disclosures of matters in the public interest, gaps in the protection afforded to whistleblowers may have the opposite effect.

Possible ways of addressing these concerns:

- Amend the legislation so that reasonable investigations or acts undertaken by workers to support their belief are treated as part of the disclosure itself and consequently are also protected.
- Consider whether a different test for "reasonable belief" is appropriate. For example, in the case of disclosures to an employer or to regulators, by replacing "reasonable belief" with "reasonable suspicion". This was contemplated as part of the Shipman Inquiry. (The reasonable belief requirement may however still be appropriate for wider disclosures).

The worker must reasonably believe that the information disclosed and any allegations contained in it are substantially true

3.11 This is a statutory requirement in relation to disclosures to a prescribed person (Section 43F of the ERA), Disclosure to third parties (Section 43G(1)(b) and disclosures of exceptionally serious failure (Section 43H(1)(b)) but it is likely as a result of the EAT's ruling in ***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4*** that a worker who makes a number of disclosures may be in difficulties if there are no reasonable grounds to support each of those disclosures or the totality when read as a whole even though there may be reasonable grounds to support parts of that disclosure. So, in the ***Korashi*** case, the ET was persuaded that the substance of Dr Korashi's complaint was that a consultant, known in those proceedings as Dr A, had led to the premature death of 4 patients whereas Dr Korashi had also complained that the consultant lacked the necessary training and qualifications to have carried out the operations he had performed for the Health Board's predecessor. The ET's ruling was upheld by the EAT.

3.12 The case was complicated by the fact that one of the alleged protected disclosures was to South Wales Police which raises the separate question of who should be included in the list of prescribed persons and what conditions should be attached to such disclosures. Nonetheless there is a quite separate issue as to the test which should apply to multiple disclosures and whether the current statutory provisions are too restrictive.

Question 4
Should wrongdoing be more broadly defined within PIDA? Are there any other categories which should be added?

4.1 The consultation paper has suggested improving PIDA by introducing a catch-all category under Section 43B covering disclosure of any information in the public interest.

4.2 For the reasons referred to in reply to question 5 below, we would suggest that the reference to 'public interest' in the new statutory provisions is likely to give rise to great uncertainty and we fear that the same would be true if a catch-all category was introduced. It is also difficult to envisage how a catch-all

category would operate in practice, particularly if the current provisions are retained and all qualifying disclosures were conditional on the disclosure being in the public interest in any event.

4.3 One possible option would be to limit the "catch-all" category to those which were objectively in the public interest. In other words, to apply a different test to the "catch-all" category to the overriding test. This would not entirely address our concerns about uncertainty but would at least address categories of potential wrongdoing which may not be covered by the present categories; for example mismanagement of public funds by public bodies, or private bodies in receipt of Government funding, but it may be considered more appropriate to address this issue by adding this kind of potential wrongdoing to the list of qualifying disclosures.

Question 5

Do the Government's amendments to the public interest test and to good faith achieve a fair balance between employer and employee interests?

5.1 The Committee was divided on this issue between those who support the proposition that disclosures relating to private contractual obligations should not fall within the scope of PIDA and those who argue that the consequences of the EAT's ruling in ***Parkins v Sodhexho [2002] IRLR 109*** have been overstated and that workers should be able to enjoy protection if they raise concerns relating to contractual matters to encourage a culture of whistleblowing. For the reasons explained above, it is not for ELA to seek to reconcile these disparate views.

5.2 However, ELA both can make, and already has made, representations on the manner in which the changes have been brought about by the Enterprise and Regulatory Reform Act 2013. Further, we consider that the introduction of an overriding "public interest" requirement raises quite separate issues from the removal of the "good faith" condition which previously applied to certain types of protected disclosure. In our view, these matters raise quite separate issues of law and policy and cannot really be seen as some kind of trade off balancing the employer's interest against those of employees.

The 'public interest' requirement

5.3 In the course of the Parliamentary Debates on the new Act, Viscount Younger of Leckie, Parliamentary Under Secretary in BIS stated that "it was not the Government's intention to make it harder for whistleblowers to speak out" and that the new test was an "acceptable compromise" (41 HL Deb 26 February 2013 c1008).

5.4 For the reasons set out in ELA's representations to the Public Scrutiny Committee on what was then the Bill (relevant extract copied at Appendix 1 below), we believe that the introduction of the requirement that the disclosure must be in the public interest is likely to lead to considerable uncertainty not least because, as drafted, this will be depend on the "reasonable belief" of the whistleblower as to what is and what is not in the public interest. As stated above, it is well established that such a belief may still be reasonable even if it is mistaken. Perhaps most significantly this is likely to be considered primarily a matter of fact for Employment Tribunal's to determine and, as is well established in other areas, it may be quite reasonable for one Tribunal to reach a particular conclusion that a disclosure is in the public interest and another Tribunal, on identical facts, to reach the opposite conclusion. By definition, this will make it harder for whistleblowers to speak out with any certainty as to what will and what will not be regarded as being in the public interest. It may add to the length and complexity of Tribunal hearings. This cannot be in the interest of employers or employees.

5.5 Further, even if Tribunals were invited to consider the issue of what is and what is not in the public interest on an objective basis, this may raise issues as whether such a provision would be in breach of Article 10 (the right to freedom of expression) of the Human Rights Convention. Indeed, there is no reason in principle why the whistleblower may not rely on this provision in support of his or her subjective belief that the disclosure was in the public interest and it is clear from both ***Babula*** (ante) and

Bolton School (ante) that this could apply even where the individual had misunderstood the rights conferred by Article 10.

5.6 We also have doubts as to whether the 'problems' raised by the ***Sodhexo*** case justifies an overriding requirement that all disclosures should, 'in the reasonable belief of the worker' be in the public interest as this goes well beyond the so called mischief of the ***Sodhexo*** case. It is almost inconceivable that any qualifying disclosures under Section 43(1) (a), (c), (d), (e) or (f) would be held not to be in the public interest. Similarly some disclosures under Section 43(B)(1)(b) are likely to be in the public interest, for example a disclosure in breach of certain statutory obligations. This example however, highlights the problem with applying the 'public interest' test to subsection (b) as it is hard to believe, in the light of existing case law, that a disclosure that the employer had acted in breach of the Equality Act 2010 would not be in the public interest. On the other hand, it might be argued that a breach of an individual's right not to be unfairly dismissed is less likely to be in the public interest and that an individual has an adequate remedy for any such breach in any event. This may also extend to a breach of a common law obligation, for example where the whistleblower believes that the employer's conduct amounts to a potential breach or actual breach of an employer's duty of care could be in the public interest but not necessarily as it would depend on the circumstances. We would therefore suggest that the law would be clarified if the overriding "public interest" disclosure requirement was limited to cases where the disclosure related to a genuine breach of a private contractual obligation or statutory obligation.

5.7 We note that in the consultation paper it is suggested that this issue may be addressed by excluding disclosures which arose as a result of a "private contractual obligation owed to the worker". As stated above, whether or not such disclosures should be excluded is primarily a matter of policy beyond our remit but we would suggest that the distinction between private contractual obligations (which would be excluded) and matters of wrong doing which may still be in public interest is not quite as clear cut as it may appear. For example, an individual may wish to raise a concern about a culture of bullying and harassment within his or her employer's organisation. There may be an issue as to whether such behaviour amounted to a breach of an employer's duty of care or was actionable under the Protection from Harassment Act 1977 but it may be considered to be a legitimate concern to raise even though technically it might simply amount to a breach of a private contractual obligation alone. Similarly an individual or a group of individuals may wish to raise concerns about the operation of a bonus scheme. This might not amount to legal wrongdoing, let alone a breach of the criminal law, but may nonetheless amount to a 'legitimate' concern in the way the organisation is run. The proviso as formulated in the Whistleblowing Commission's consultation paper might mean that concerns of this kind are excluded.

5.8 A possible resolution to this problem is that separate conditions should apply to disclosures in the nature of a breach of a private contractual or statutory obligation owed to the worker and that such disclosure could be potentially protected only if it was shown to be in the public interest, although there are some members of the Committee who favour the removal of the public interest test altogether.

Removal of the good faith condition

5.9 The removal of the 'good faith' condition in Section 42 (c) (1) where the disclosure is to an employer or other responsible person, Section 43E(b) where the disclosure is to a Minister of the Crown, Section 43F(1) where the disclosure is to a prescribed person, Section 43G disclosure in other cases and Section 43H, disclosures, of an exceptionally serious nature addresses the issues highlighted in ***Street v Derbyshire Unemployed Workers Centre [2004] IRLR 687***, a Court of Appeal decision which was subject to some criticism by Lady Smith in the Shipman report.

5.10 However, we share some of the concerns raised by Daniel Stilitz QC set out in a paper he delivered to the ELA Annual Conference on 22 May 2013 (attached to covering email with this response) that there is a danger that the legislation may be brought into disrepute as a result of the rather limited power to reduce compensation by only 25% in such circumstances. In many ways these concerns all are relevant to the issue of rewarding whistleblowers when they have acted maliciously or sought to use the legislation to blackmail their employers. A balance needs to be struck between the undoubted public interest in the exposure of wrongdoing and the need for the legislation not to be seen as a "rogue charter".

5.11 We acknowledge that a difficult balance has to be struck here, and it may well be that in appropriate cases, an Employment Tribunal may consider that it is not 'just and equitable' to award compensation in such circumstances under Section 123(1) of the Employment Rights Act 1996 and this is likely at least where the conduct is of a criminal nature. However, this provision does not apply where the act complained of amounts to a pre-dismissal detriment.

5.12 It is possible that Tribunals might seek to mitigate the potentially far reaching effects of the statutory change by altering the test of causation to be applied in whistleblowing cases. As Mr Stilitz points out, there is already some evidence of this happening for example see ***Korashi*** [ante] and ***Hossack v Kettering BC EAT/1113/02.*** It may be that the courts and tribunals will seek to develop the law on causation so that where the *manner* of the disclosure rather than its content is the principal reason for dismissal (or the ground for detriment), the test of causation will not be satisfied reflecting similar developments in health and safety dismissals and victimisation under the Equality Act 2010.

5.13 We believe that it would be unfortunate if the removal of the 'good faith' condition led to such a development for two reasons: first, this would largely turn on credibility of the evidence given at the Tribunal and would create further uncertainty and secondly, it would raise complex arguments based on legal causation which may well bring the law into disrepute.

5.14 For all these reasons, we believe that the implications of the removal of the good faith condition have not been properly addressed and that the current law may lead to substantial awards being made to undeserving claimants and whether, rightly or wrongly, this may bring the law into disrepute.

Question 6
Should there be a broader, more flexible definition of worker within PIDA to deal with the many different types of worker and working arrangements? Are there categories of persons not now covered which ought to be?

6.1 The scope and ambit of the legislation is largely a matter of policy but in this context we note that the definition of 'worker' for the purpose of whistleblowing protection under Section 43K of the Employment Rights Act 1996 is already wider than the definition of 'worker' which applies to other statutory rights: it extends to agency workers, self employed doctors, dentists and other professionals providing their services to the NHS. This suggests that the policy underlying the statutory provisions is that the ambit of whistleblowing protection should be as wide as possible. On this basis, it could be argued that the legislation should cover all individuals who perform roles within a working environment.

6.2 In this context we note that the following 'workers' currently fall outside the scope of the current legislation namely:

- partners of solicitors Firms and, subject to appeal, LLP members (***Bates van Winkelhof v Clyde and Co LLP [2012] IRLR 992***);
- Office holders;
- Civil servants;
- Members of the armed forces;
- Volunteers.

6.3 We would point out that most, though not all, of these groups, are expressly covered by the Equality Act 2010 in one way or another (and in policy terms, it may seem strange that, for example, an LLP member can pursue a claim of pregnancy discrimination but cannot pursue a whistleblowing claim).

6.4 Section 20 of the Enterprise and Regulatory Reform Act 2013 gives the Secretary of State the power to make amendments as to "what individuals count as 'workers' for the purpose of the statutory provisions".

6.5 The Consultation papers invites us to put forward a more flexible definition of worker to deal with the many different types of worker and working arrangements but we doubt that it is possible to come up with a definition of worker which covers all these groups (for example, it has been held that a volunteer is not a worker). Furthermore, special considerations may apply to groups like the armed forces and senior civil servants which would need to be reflected in the statutory provisions. We would therefore suggest that the Equality Act model is a better way forward than seeking to come up with a broader and more flexible definition of 'worker'.

Question 7
Should a worker who has been wrongly identified as having made a protected disclosure be entitled to a claim under PIDA?

7.1 It is well established that protection against discrimination and victimisation under Equality Act 2010 (and its predecessors) extends to those who support those who have made complaints of discrimination and those who are wrongly identified as having made such complaints. By analogy, workers whom an employer wrongly believes have made a protected disclosure should be protected against action short of dismissal and dismissal. The absence of such protection in the current statutory provisions may be considered to be a weakness in the statutory scheme.

7.2 For example, where an employer receives a complaint from one of two managers and accordingly dismisses them both, it does not appear to be correct that the person making the protected disclosure has a claim, but the other manager does not and therefore (assuming that the dismissal of the other manager is unfair under ordinary principles) cannot recover compensation above the statutory cap and cannot apply for interim relief.

7.3 One consequential issue that would need to be considered is whether such protection should arise where the original disclosure does not satisfy the statutory requirements and therefore does not qualify for protection under the PIDA. It may be difficult to justify protecting the victim who has wrongly been identified as having made a protected disclosure in circumstances where the primary whistleblower would not be protected. However, it may be argued that the protection against in effect victimisation in such circumstances should depend on the employer's perception of whether there has been a protected disclosure and not on whether the statutory requirements have been met. On balance, we favour the view that protection should only apply where the primary disclosure is a protected disclosure because it might appear somewhat incongruous that the protection given to a third party is greater than the protection given to the primary whistleblower.

7.4 Closely related to this issue is the failure of the statutory provisions to adequately protect other workers 'associated' with the disclosure against victimisation. For example, if a colleague provides information to another colleague to support the protected disclosure that has been made, or acts as a witness in support of such employee. Under the Equality Act 2010, employees who give evidence in support of discrimination claims are afforded protection in such circumstances under the victimisation provisions, and we consider that whistleblower protection should mirror this approach, although again such protection should only apply where the primary disclosure is a protected disclosure.

7.5 In the above example, the worker who is victimised has a direct involvement (and connection) with the disclosure. There are some members of the working party who believe that the statutory provisions should go even further and extend to those who are 'associated' with those who have made a protected disclosure by analogy to the Equality Act 2010 which is also intended to protect "associated" discrimination. For example, where an individual is dismissed by their employer as a result of a disclosure made by a close family member to a separate employer (by association) but it may be questioned whether automatic protection against dismissal or action short of dismissal and unlimited compensation should apply in these circumstances.

7.6 We would also observe that in each of the above examples, it will still be necessary to show that there is a causal link between the disclosure and the detriment or the dismissal. Whilst the scope of protection would be extended, there would be a natural limit to how far it could be taken.

7.7 Further, as stated above, the protection should only apply where there is a genuine protected disclosure that has been made.

Question 8
Should a job applicant be entitled to claim against a prospective employer if refused employment because of a previous protected disclosure?

8.1 PIDA has been held to protect workers who are dismissed as a result of protected disclosures made to their previous employers (***BP plc v Elstone [2010] IRLR 558***) but the EAT held that the Claimant does have to be a worker at the time the disclosure was made.

8.2 It should be noted that in the ***Elstone*** case, Mr Elstone had already started working for BP as a consultant before his consultancy was terminated. It is more debatable whether the Claim could have been brought if he had not been offered the consultancy or, in the case of an employee, where employment is refused because the job applicant had made a protected disclosure to a previous employer and therefore was seen as a trouble maker. It is arguable that if a worker was refused employment because of a previous protected disclosure (assuming that this could be proved), this would amount to a detriment for the purpose of Section 47B of the Employment Rights Act 1996 and a claim could be brought under the existing provisions but the issue is by no means clear.

8.3 It would therefore appear arbitrary not to afford protection immediately before the commencement of employment where it would be available immediately afterwards and therefore we would suggest that protection under PIDA should be extended to job applicants who suffer discrimination as a result of a previous protected disclosure.

8.4 Therefore it should be made clear that where an individual commences work for a new employer, they are protected against both dismissal and detriment if the employer subsequently discovers a protected disclosure they had made against a previous employer. The ERA does not require the disclosure to relate to the current employer in order to qualify for protection. This would more closely mirror the protection given to job applicants in relation to victimisation that is provided by the Equality Act.

8.5 It would of course still be necessary for the Claimant to establish a causal link between the disclosure and the refusal of employment which would be an important safeguard to the scope of the protection offered

8.6 Indeed in the course of our discussions, it was suggested that such protection should be extended to anyone who suffers a detriment or is dismissed as a result of making a protected disclosure even if they were not a worker at the time the disclosure was made. For example, a student who raised a concern about the activities of a drug company whose subsequent application for employment was unsuccessful for that reason.

8.7 We acknowledge that there is a case for making the scope of such protection as wide a possible but, on balance, we have concluded that extending the law to anyone who has raised complaints against a prospective employer at any time during their lives in any capacity would be fraught with difficulties.

Question 9
Should there be a broader, more flexible definition of prescribed persons within PIDA? Are there types of prescribed persons not now covered that ought to be?

9.1 In an ideal world, it is not unreasonable to expect workers to raise their concerns with their employers but the statutory provisions recognise that for many reasons workers may be unwilling to do this and therefore disclosures to prescribed persons are protected if the conditions in Section 43F of the

Employment Rights Act 1996. Our observations on those conditions are set out in our answers to the question 3 above.

9.2 The list of ‘prescribed persons’ is laid down by way of statutory instrument. The current version is the Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549). In this context, it is important to note that disclosure to other third parties is protected under Section 43G of the Employment Rights Act 1996 but the conditions that have to be satisfied are more exacting and onerous.

9.3 It is not for the ELA to say who should and who should not be a ‘prescribed person’ within the meaning of the regulations but there have been some surprising omissions. For example, the omission of certain professional regulators in the health sector, notably the General Medical Council, the Nursing and Midwifery Council and the Health and Care Professions Council. This leaves a gap in the current protection that should be addressed, either by making the list of prescribed regulators more comprehensive or by including a catch-all provision for the health sector**.** We believe that the extension of the list of prescribed persons to cover these categories is consistent with the government policy of encouraging responsible whistleblowing in the NHS. It is also arguable that the list should include the police and the legal sector.

9.4 It is also unclear as to why (and how) certain persons in the current list have been identified as ‘prescribed persons’ and why others have not. We would suggest that there should be a statutory duty to review the list of prescribed persons each time a new statutory regulatory body is established. The new NHS Commissioning Board/NHS England is an example of a body that now needs to be included.

9.5 We also note that special provision is made for the purpose of obtaining legal advice in Section 43B(4) of the Employment Rights Act 1996 but there are no equivalent provisions for other advisors such as trade union representatives. Whilst we acknowledge that the issue of including trade union representatives in the list of prescribed persons is a matter of policy, it is questionable whether such disclosures, or indeed disclosures for the purpose of taking advice more generally, should be subject to the more stringent requirement of Section 43G. Similar considerations apply to disclosures to other advisory bodies such as Public Concern at Work itself.

Question 10
Should there be different protection for those who go to the media?

This is a policy matter on which the ELA is unable to comment.

Question 11
Should the causation test for unfair dismissal be the same as the test for detriment in whistleblowing cases?

11.1 As a result of the Court of Appeal ruling in ***NHS Manchester v Fecitt [2012] IRLR 64***, a different test of causation applies under Section 48(2) of the Employment Rights Act 1996 to the one that applies under Section 103A of the Employment Rights Act 1996.

11.2 The burden of proof for a detriment claim is set out at Section 48(2) Employment Rights Act 1996 (“ERA”) as follows: “On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.”

11.3 In ***Fecitt & others v NHS Manchester [2012] IRLR 64***, the court ruled that a detriment claim will succeed if “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.”

11.4 This contrasts with the test in Section 103A ERA which provides that “An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

11.5 In ***Kuzel v Roche Products Ltd [2008] IRLR 530***, the Court of Appeal upheld the Employment Appeal Tribunal's approach to the burden of proof in automatic unfair dismissal claims, as follows: (1) has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason? Has she raised some doubt as to that reason by advancing the s103A reason? (2) if so, has the employer proved his reason for dismissal? (3) if not, has the employer disproved the s103A reason advanced by the Claimant? (4) if not, dismissal is for the s103A reason."

11.6 The Court of Appeal in ***Fecitt*** recognised the inconsistency between the two types of claim but clearly felt that this was an issue for parliament to resolve if it saw fit.

11.7 It follows that under the current statutory provisions it is easier for a Claimant to succeed in a detriment claim than an automatic unfair dismissal claim; in a detriment claim because a detriment will be established if the employer's treatment of the Claimant is "materially influenced" by the disclosure, whereas the dismissed Claimant needs to show that the disclosure was the reason or principal reason for the dismissal.

11.8 We find it hard to see any justification in policy terms for distinguishing between the two and in effect making it more difficult for an employee who is dismissed to challenge the fairness of the dismissal than a worker, or employee, who suffers a detriment. This is well illustrated by the following example: two employees subjected to disciplinary proceedings, where one was dismissed and the other given a final written warning and where a protected disclosure materially influenced but was not the only or principal reason for the employer's treatment. It is likely that the dismissed employee would not succeed whereas the employee who remains in employment would.

11.9 It is not for the ELA to say which of the two tests of causation should be adopted but the present situations cannot be just and that the causation test for unfair dismissal and detriment cases should be the same.

11.10 We believe that in policy terms it would be more consistent if the causation test applied in ***Fecitt*** – that of material influence – is applied to both types of claim, although we note that the wording in discrimination cases on which the Court of Appeal's ruling is based has now been change from "on the grounds of" [the prohibited act] to "because of [the prohibited act] and it may be more consistent to use the same wording in whistleblowing cases.

Question 12
Should a worker be able to obtain interim relief in detriment claims?

12.1 At present, interim relief is available (under s.128 ERA 1996) only when an employee has presented a complaint to an employment tribunal that he has been unfairly dismissed for one of a limited number of prohibited reasons (section 100 (1)(a) and (b) ERA (Health and Safety); section 102 (1) ERA (Trustees of Occupational Pension Schemes), Section 103 ERA (Employee representatives), Section 103A ERA (Whistleblowing) or Section 161 of TULCRA 1992 (Dismissal on grounds related to Union Membership or activities). Each of these provisions has an equivalent provision giving employees (and also in some instances workers) the right not to be subjected to any detriment. Interim relief is not an available remedy in any of these (detriment) cases.

12.2 Apparently, the right to seek interim relief was first introduced in 1975 in order to deal with a significant number of working days being lost through industrial action following the dismissals of shop stewards or other work place representatives who found themselves with no job and no income which naturally provoked strong reactions. Interim relief provided a potential remedy for those dismissed employees who could satisfy the relevant criteria thus alleviating the risk of industrial action.

12.3 Section 129 ERA provides that [interim relief may be ordered] where on hearing the application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find that the reason or principal reason is (one of the prohibited

reasons eg whistleblowing). “Likely” means “has a pretty good chance” or the case “looks like a winner”, the degree of chance of success involves a significantly higher degree of likelihood than a 51% chance of success (***Ministry of Justice v Safraz [2011] IRLR 562***).

12.4 An interim relief order will be for reinstatement or re-engagement or, if the employer refuses, an order that the employee’s contract continues in force for the purposes of pay or other benefits derived from the employment, seniority, pension rights and other similar matters and for the purposes of determining continuous employment. Interim relief thus can provide the employee with his normal salary and benefits during a difficult time when the employee is likely to have considerable difficulty finding any other means of support. Orders for interim relief are rare and the bar is deliberately set high. Unsurprisingly, tribunals are encouraged to list the underlying unfair dismissal claims promptly - although with the current backlog of cases in some Tribunals, delays do occur. The right to seek interim relief is limited to employees and to this extent it may be argued that an extension of interim relief in detriment cases would provide additional protection to workers.

12.5 Cases involving detriment alone are uncommon and extending interim relief to them may be considered unnecessary as compensation can be recovered for any loss suffered by the worker as a result of the detriment if the Claim is ultimately successful. Further, the employee still has his job and is usually still receiving his salary and benefits.

12.6 The detriment would appear to fall into one of two categories:

First, where the detriment which does not have a direct financial impact - e.g. loss of status. It is difficult to see why a worker would need an immediate order to restore his status. If an employee is sufficiently dissatisfied with his situation and it is sufficiently serious, then it is always open to an employee to resign and claim constructive dismissal when an interim relief application would potentially be available to him - although this would raise some interesting factual and legal questions.

Second, where the detriment has an immediate direct financial effect. If that effect is relatively modest, then interim relief seems to be a disproportionate remedy as the worker will be able to recover his losses if successful on the conclusion of his claim. It is effectively a cash flow issue. If the financial disadvantage is more significant or of particular concern to the employee, then, it is again open to an employee to resign and claim constructive dismissal (although this would not be available to a worker).

12.7 There may also be some very real practical difficulties in applying interim relief to detriment cases; it is hard to conceive how a bonus, for example, could be awarded on an interim basis or a worker could be ‘promoted’ on an interim basis.

12.8 Overall, we believe that, whilst again this is a matter of policy, if interim relief were to be extended to whistleblowing detriment cases, not only would that be a significant extension of the remedy in principle, it would also be out of kilter with claims in respect of the other prohibited reasons. In this context, we also note that interim relief is not available in discrimination cases.

Question 13
Is the protection relating to gagging clauses in Section 43J PIDA clear enough? Are people appropriately advised about this aspect of compromise agreement?

13.1 Section 43J is clear in that it states *any provision* is void which precludes a worker from making a protected disclosure however, based on compromise agreements which are being drafted and signed to date, Section 43J PIDA is not preventing such provisions forming part of compromise agreements. Assuming the intention of Section 43J PIDA is to prevent workers from being “gagged” the Section is not currently achieving this. Limits are placed either in the form of simple confidentiality clauses and/or more elaborate warranties. An absolute ban on provisions of this kind may be needed as an alternative means of controlling “gagging clauses”.

13.2 To illustrate this, currently within a compromise agreement a simple form of confidentiality clause, in which the person being compromised agrees to keep the fact of the compromise agreement and the facts leading up to the termination confidential in return for the settlement money, is a gagging clause. This would be the case if one of the facts leading up to termination includes the worker making an internal protected disclosure. If that disclosure was not dealt with satisfactorily by the employer but the worker is now being paid under a compromise agreement to end all claims, the person may believe the disclosure cannot be spoken of again, unless advised otherwise.

An example of a simple confidentiality clause is:

"*The Employee agrees to keep the circumstances of the termination of her employment and the fact and terms of this Agreement confidential and will not disclose or reveal the same to any person (other than her spouse, professional advisors or the HM Revenue & Customs or as required by law).*"

13.3 Section 43J as currently drafted renders this clause void in so far as it cannot prevent her from "blowing the whistle" despite the fact on the face of it, it would be reasonable to assume the worker could say nothing outside of the exceptions, the person will not know this unless advised. The phrase "as required by law" does not cover the point as blowing the whistle is not *required by* law, it is *allowed in* law. In addition to this simple confidentiality clause you will often see in the list of claims being waived:

> *"any claim under the Public Interest Disclosure Act 1998";*

Hand in hand with:

> "*Nothing in this Agreement prevents the Employee bringing a claim under the Public Interest Disclosure Act 1998*".

13.4 The initial waiver is void but the departing worker may not be advised of this and believe otherwise, unless advised. A blanket ban on any such waiver would mean the person is not relying on receiving appropriate advice from her advisor.

13.5 Compromise Agreements may also contain warranties which, unless advised otherwise the person leaving their job could consider limits their right to blow the whistle, an example is:

"*The Employee confirms that on leaving the Company she has been given the opportunity to make disclosures about misconduct within the Company. The Employee confirms that she knows of no information relating to any individual or organisation within the Company whose behaviour or action might be deemed to be a criminal offence, a failure to comply with legal obligations, a miscarriage of justice, a cause of damage to the environment, and/or an unethical business practice that she has not already disclosed to the Company.*"

13.6 This drafting, coupled with any breach of warranty triggering a repayment of the settlement money as a debt is arguably a fetter on the right to make a public disclosure provided the requirements of PIDA are met.

Questions 14 and 15

These questions are matters of policy on which ELA is unable to comment.

Question 16
Should there be specialist tribunals or specialised judges for PIDA claims?

16.1 Current statistics suggest that whistleblowing cases account for less than 1% of the tribunal workload. Nonetheless, as the courts have recognised, whistleblowing cases are fact sensitive and sometimes raise complex issues of law and fact.

16.2 Given the relatively small number of cases that are brought, there is a concern that many tribunals (and Employment Tribunal Judges) have limited experience in dealing with such cases and, in the case of employment judges, managing such cases in an appropriate manner.

16.3 We therefore believe that it would be advantageous for tribunals and/or judges to be given specialist training in order to sit in such cases both at interlocutory hearings and merits hearings (as currently applies in discrimination cases and cases involving national security).

16.4 We also believe that there should be power under the tribunal rules to appoint an independent expert to assist tribunals in cases of complexity, for example in the financial or health sector.

Questions 17 and 18

These questions are matters of policy on which ELA is unable to comment.

Question 19
Should PIDA claims be exempt from employment tribunal fees?

19.1 ELA has made representations to the Ministry of Justice on the proposed introduction implementation of employment tribunal fees generally.

19.2 Whilst many of our members are opposed to the introduction of employment tribunal fees, we believe that it is most unlikely that whistleblowing claims could be treated as a special category given that claims under the Equality Act 2010 are not exempt but of course if the Government was to take a different view, this would be welcomed by many of our members.

Question 20
Should employment tribunals have the power to make recommendations and levy fines in PIDA cases. If so how?

20.1 The Committee are somewhat divided on this issue given that the Government has decided to repeal the power to make ‘wider’ recommendations in discrimination cases pursuant to Section 124 of the Equality Act).

20.2 Nonetheless, feedback from Claimants in discrimination cases indicates support for Tribunals retaining the ability to make recommendations despite the Government’s stance.

20.3 Studies of discrimination cases suggest that where recommendations are made, the most common recommendation is that the employer is required to introduce, review or update its equal opportunities policy.

20.4 Given that there is no statutory requirement on an employer to have a whistleblowing policy, it could be argued that the power to make a recommendation that such a policy should be introduced would be a more flexible way of addressing this issue than a general requirement of the kind contemplated by Question one as any recommendation would be discretionary and could reflect the circumstances of a particular case. Another situation where a recommendation may be appropriate is where the employer has not carried out a detailed investigation into the complaint(s) raised by the whistleblower.

20.5 On balance, we would suggest that in this context whistleblowing does raise unique issues of public interest which could be addressed by the use of recommendations. Even if this power was rarely used, it would nonetheless be available in appropriate cases and would prove an additional remedy to workers who are not employees.

20.6 We believe that the current statutory provisions in Section 124 of the Equality Act (or, if the wider power was considered unnecessary, the previous provisions in discrimination legislation) would be a suitable template.

20.7 The introduction of fines is more of a policy matter on which the ELA would not comment. However, we would observe that a more generalised system of fines would raise a number of practical concerns. First, there would be a real risk of “double jeopardy” if fines were introduced in employment tribunals as the employer may also be exposed to fines from statutory or other regulatory bodies for the same wrongdoing. This may have the knock on effect of prolonging tribunal proceedings as we would anticipate that there may be applications to “stay” tribunal proceedings in such circumstances. In policy terms, it may be felt that organisations which breach regulatory or criminal laws should be prosecuted by the appropriate authorities. Secondly, tribunals whose primarily role is to compensate the victim of unlawful conduct rather than punish the wrongdoer, may find it difficult to assess the level of fine which should be imposed and thirdly the risk of fines may discourage settlement.

20.8 In this context we would also note that as a result of the measures introduced by the Enterprise and Regulatory Reform Act 2013, Tribunals will have power to levy limited fines of up to £5000.00 for a breach of the relevant provisions of the Employment Rights Act 1996 (which would include the whistleblowing provisions).

Question 21

This question is a matter of policy on which ELA is unable to comment.

Question 22

All our comments have been made in response to the other questions posed in the Consultation Document.

ELA Sub-Committee Members

Anthony Korn, No5Chambers – Chair

James Arnold, Outer Temple
Lydia Christie, HowardKennedyFsi LLP
Arpita Dutt, Brahams Dutt Badrick French LLP
Jonathan Exten-Wright, DLA Piper LLP
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Appendix 1

Extract from ELA's Response to Call for evidence to the Public Scrutiny Committee in respect of the Enterprise and Regulatory Reform Bill 2012-13

Clause 14 – Qualifying Disclosures

38. Clause 14 proposes amendment to section 43B of the Employment Rights Act 1996 to include a new requirement that, to be a "qualifying disclosure", a disclosure has to be made in the public interest. This reflects previous statements by the Department and in wider commentary that the judicial interpretation of the existing provisions, principally in the ***Parkins v Sodexho*** decision, had inadvertently widened the scope of the Act, such that disclosures received the protection of the law despite having no link with matters of public interest. This is a policy issue and our remarks are directed to the way in which it is sought to implement that.

39. The proposed wording seeks to achieve the objective of re-establishing a link between the enhanced protection afforded to those making protected disclosures and such disclosures being in the public interest. We have two main comments on this.

Subjective nature of test as drafted

40. First, the amended wording still retains the element of "reasonable belief (with the proposed amended wording in bold):

    "43B (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure **is made in the public interest and** tends to show one or more of the following…"

    The impact of this amendment means that Tribunals, workers and employers are required to assess not just whether the issues **is** (presumably objectively assessed) in the public interest, but also that the individual worker **subjectively believed** that the issue was in the public interest. Therefore, under the test as currently proposed, an employee could still bring a whistleblowing claim where there was no public interest, but the individual genuinely believed that the issues raised were in the public interest. So, an Employment Tribunal might be satisfied that the employee had a reasonable belief that the disclosure made was in the public interest without itself concluding that the disclosure in question was a matter of public interest. For example the belief might be reasonably held based on information believed to be true, but in fact mistaken.

41. In addition, it would as we see it, almost always be necessary for the entirety of the evidence to be heard before the Employment Tribunal could reach a conclusion on the issue. As protected disclosure cases tend by their very nature to be lengthy it may be a very costly exercise for all concerned to take a case to a conclusion, only to find that the disclosure in question was not protected after all as the Employment Tribunal finds that there was no reasonable belief in the subject matter being in the public interest.

42. An alternative would be to move the amendment to an earlier part of the section, as follows:

    "43B (1) In this Part a 'qualifying disclosure' means any disclosure of information **made in the public interest** and which, in the reasonable belief of the worker making the disclosure tends to show one or more of the following…"

    This ensures that the decision as to whether a matter is in the public remains an objective one for the Tribunal to determine. It also does not materially limit the protection afforded to workers when read alongside the legislative intent. If a worker genuinely (and subjectively) believes a matter to be in the public interest, this would still form part of the Tribunal's assessment of whether a matter is in the public interest. The claims which would then be excluded would be those claims where a worker, genuinely, believes that the issue he has raised is in the public interest but the Employment Tribunal

does not agree. In such circumstances the individual employee would still have the remedies available under the unfair dismissal legislation to protect his or her rights.

43. Such an amendment is helpful to workers, employers and the Tribunal alike, as removing a subjective element of the tests gives greater certainty to all parties to any form of dispute. Were this issue not addressed, we fully expect it would be fertile ground for future litigation which could undermine the purpose of the amendment. If one takes the decision in **Sodexho** as an example, one can see how Tribunals will be forced to deal with claimants who are convinced the breach of their employment contracts is a matter of public interest. Although the Tribunal would still have to make a finding as to whether or not the disclosure was a matter of public interest,

    (i) this would be an objective decision for it to reach without having to make any assessment as to the Claimant's state of mind and/or knowledge; and

    (ii) it could be dealt with as a preliminary issue (in the same way as, for example, the question of whether or not a person is "disabled" within the statutory definition might be decided in a disability discrimination case), thus saving on the cost of a full hearing of the evidence,

Definition of 'public interest'

44. The amendment does not seek to define what will be deemed to be within the 'public interest'. ELA appreciates the difficulties of including an exhaustive definition, and does not suggest that this would be useful for workers, employers or the Tribunal.

45. However, putting this in context:

    (i) the need to amend the legislation arose from a lack of clarity following on from case law decisions; and

    (ii) case law on the meaning of 'public interest' is inevitable (and would be useful) going forward.

46. One issue which ELA believes the Government should consider is whether it is appropriate at this stage to consider including any guidance or parameters on such a definition. This would align with the overall purpose of the amendment to the legislation – providing clarity and focus to employment law, for all participants.

47. We consider that such parameters need not be prescriptive or exhaustive but could cover a number of areas including:

    (i) impact on a material number of or section of the public; such a definition could align with the test used for indirect discrimination under the Equality Act 2010;

    (ii) impact on individuals as members of the public and not, by way of example, as workers of a particular employer;

    (iii) impact which is substantial and adverse, and not trivial in nature, again aligning with existing tests in discrimination law.