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Approaches to whistleblower legislation and the UK perspective

Cathy James
Public Concern at Work

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Why whistleblowing matters



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Public Concern at Work

PCaW is an independent charity, founded in 1993.

- provide free confidential advice to people concerned about wrongdoing in the workplace who are unsure whether or how to raise their concern
- train organisations on whistleblowing, accountability and risk management
- campaign on public policy, and
- promote public interest whistleblowing laws.

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Whistleblowing Protection: Key issues

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A workplace issue?

- CoE Convention requires protection of 'employees', UNCAC suggests States consider extending protection to 'any person'.
- Employees will usually be first to know and have most to lose. They also work under obligations of confidentiality.

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Public / Private Sectors

- Corruption is classically an illegal bargain made between someone in the private sector with someone in the public sector.
- CoE Convention covers both sectors; public interest disclosure laws often cover both sectors in the same way in the same piece of legislation; and USA covers private and public sectors but in separate schemes.

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Expression and suppression

Should the law encourage people to raise concerns

- Openly,
- Confidentially (so, if requested, the person's identity is not freely disclosed), or
- Anonymously (the person does not identify himself)?

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To whom the whistle is blown?

Should the law encourage people to raise concerns

- With the alleged wrongdoer, and/or
- With the organisation implicated, and/or
- With the authorities, and/or
- More widely – to politicians, NGOs, the media?

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Other issues

- Should it be a duty to blow the whistle?
- If not, should good faith be a requirement?
- Should the protection be under criminal or civil law?

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The UK approach

Public Interest Disclosure Act 1998

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The UK approach

UK's Public Interest Disclosure Act 1998 (PIDA), praised by Lord Nolan for '*so skilfully achieving the essential but delicate balance between the public interest and the interest of employers*'

- signalled a change in culture
- applies to public, private and voluntary sectors
- promotes & protects public interest whistleblowing
- encourages open rather than anonymous whistleblowing
- has a stepped disclosure regime that emphasises internal accountability, strengthens regulatory oversight and recognises public accountability

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The Scope of PIDA

- Covers almost every worker- there is no minimum qualifying period for protection
- Wide definition of malpractice:
  - criminal offence
  - breach of legal obligations
  - health and safety
  - environmental damage
  - miscarriages of justice
  - attempts to conceal any of the above
- All disclosures must be made in <u>good faith</u> (Street v Derbyshire)

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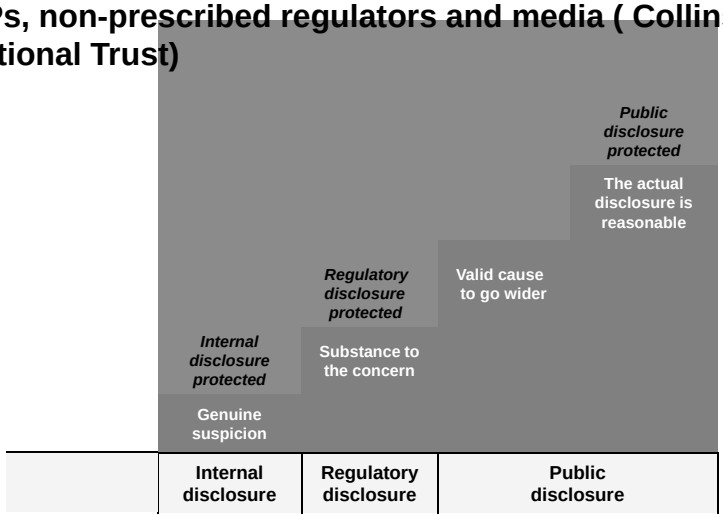
The Scope of PIDA

Covers internal, regulatory and wider disclosures to MPs, non-prescribed regulators and media (Collins v National Trust)



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The Scope of PIDA

- Reverses the burden of proof on reprisal- employers have to show the reason for dismissal
- Outlaws both victimisation and dismissal. Has been extended to cover post-employment detriment (Woodward v Abbey National)
- Provides uncapped damages
- Impacts on gagging clauses and secrecy clauses

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Practical benefits

As to purpose and effect, the legislation

- reassures workers there is a safe alternative to silence
- sees the whistleblower as a witness not a complainant
- encourages all good organisations to solicit and address concerns
- protects justifiable and reasonable media disclosures
- promotes the public interest, and
- seems to work in practice.

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Is it working?

- change in culture
- PIDA in practice
- survey evidence
- open justice
- PIDA retains support of business, unions and regulatory interests

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Best Practice: selection of UK sources

- Committee on Standards in Public Life
  - Nolan Committee (1995)
  - 10th Report, Getting the Balance Right (2005)
- Combined Code on Corporate Governance (2003)
- BSI Code of Practice on Whistleblowing Arrangements (2008)

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PCaW's approach

Whistleblowing demonstrates and reminds us



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