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Fifteen years of whistleblowing protection under the Public Interest Disclosure Act 1998: are we still shooting the messenger?

Abstract:

In the wake of high-profile scandals such as the catastrophic failings of the Mid-Staffordshire NHS Trust this article contributes to the debate on the role of the Public Interest Disclosure Act 1998 (PIDA), now fifteen years in force, in promoting increased transparency in the workplace. The article briefly discusses legal protection for whistleblowers prior to the PIDA before proceeding to evaluate the development of the provisions through judicial decisions. The article considers the implications of the amendments effected by the Enterprise and Regulatory Reform Act 2013, namely the public interest and good faith requirements, protection from detriment by a co-worker and extension of the 'worker' category. In drawing on quantitative and qualitative data the article highlights the frequent disparity between an organisation's 'party line' and the cultural reality of the workplace. The article explores the difficulties inherent in evaluating the success of legislation which essentially aims to change attitudes in the workplace but contends that the PIDA continues, albeit incrementally, to move towards its intended purpose.

1. Introduction:

It is not difficult to find praise for the Public Interest Disclosure Act 1998 (PIDA)¹ which sets out a managed process to regulate the type of disclosure which may become a protected disclosure for the purpose of the PIDA² alongside providing a framework for how and to whom the disclosures may be made. A key feature of the PIDA is that the worker should initially seek to raise concerns within the organisation to their employer or other responsible person³. Consequently, workers are encouraged to report concerns internally without fear of reprisal and the relevant personnel within the organisation can investigate and address any malpractice effectively without the need for external disclosure and the perhaps inevitable defensive approach resulting from that. It has been noted that it is the PIDA, rather than US

provisions⁴, which has been substantively replicated around the world⁵. Closer to home, the European Court of Human Rights' judgment in *Heinisch v Germany*⁶ can be read, alongside the Council of Europe's Resolution in 2010⁷ (the Resolution) to which it refers, as broadly similar to UK domestic statutory interpretation with the balancing of employer / employee interests in the light of public interest considerations and the need to encourage potential whistleblowers to speak out without fear of reprisals. Indeed the Resolution calls for member states of the Council of Europe to review their provisions for whistleblowing protection⁸ and refers to the UK's 'forward-looking legislation'⁹.

However, in the domestic context there has been growing disquiet that, after fifteen years in force, the PIDA is not working as it should. With whistleblowing scandals seemingly emerging on a monthly, or even weekly basis, it would perhaps be understandable to conclude that despite the socio-political impetus, the broad cross-party, union and industry support¹⁰ and the international approbation, the PIDA has effected little, if any, change. Speaking on the Radio 4 Today programme Robert Francis QC noted the similarities between the Morecambe Bay NHS Trust scandal¹¹ and the events at Mid-Staffordshire¹² and one could be forgiven for thinking it was 'Groundhog Day' on opening a newspaper or turning on the radio. Much media coverage was given over to the recognition of whistleblowers in the 2014 New Year honours list but, commendable though this is, it is suggested that this recognition is indicative of societal aspirations rather than reflective of workplace norms¹³.

This article briefly discusses legal protection for whistleblowers prior to the PIDA; considers whistleblowing provisions in the light of the changes to the PIDA effected by the Enterprise and Regulatory Reform Act 2013 (ERRA); and notes the recommendations of the Whistleblowing Commission¹⁴. Data considered will include Ministry of Justice statistics alongside research conducted by Public Concern at Work (PCAW¹⁵) and an independent qualitative study. Finally, conclusions are offered as to the success of the PIDA in promoting greater transparency in the workplace and the need for ongoing research.

2. Legal protection for whistleblowers prior to the PIDA

Legal protection for whistleblowers prior to the PIDA can be viewed as 'wholly inadequate'¹⁶.

The common law and equitable implied contractual terms of fidelity and mutual trust and confidence respectively were highly persuasive in the area of confidential information and the threshold for the overriding public interest exception was arguably too high¹⁷. Although the public interest defence if successfully pleaded would override the implied terms, there was no real remedy for an employee who had been dismissed or received detrimental treatment following alleged breach of confidentiality which was frequently categorised as gross misconduct. Alongside that, the historical contractual principle of freedom of contract, developed by leading decisions in the eighteenth and nineteenth centuries and concurrent with the then prevailing laissez-faire economic liberalism, permeated employment contracts with parties free to agree substantially the entire arrangement¹⁸. Of course this freedom begs qualification, with the parties often on an unequal footing appearing as more a 'master-servant' relationship rather than a commercial bargain for services.

As noted above a further limit of the public interest defence in the context of whistleblowing was that external disclosure of confidential material could justify dismissal, a pertinent example being in the NHS, where breach of the contractual duty of patient confidentiality even in the public interest, could lead to a dismissal being upheld by the courts and this is still the case post-PIDA¹⁹. Another limitation of whistleblowing protection pre-PIDA was that it was only employees who could bring unfair dismissal claims rather than the more extensive category of 'worker'. Additionally the unfair dismissal qualification of one year's service precluded employees under that threshold²⁰ from even bringing a claim and the statutory cap on compensation in successful unfair dismissal claims can also be seen as weighted in favour of the employer. Whilst the UK's common law upheld, at least in part, freedom of expression prior to the European Convention on Human Rights and its incorporation into domestic law through the Human Rights Act 1998, the idea of protected speech tended to have a public rather than private focus e.g. political speech in the form of

parliamentary privilege; the State 'need' to suppress free speech in the interests of national security²¹; the suppression of 'hate' speech²² and in the context of drawing lines between art, pornography and obscenity²³.

From a human rights perspective, the arenas where the limits of freedom of expression are tested, tend to be public, such as the recent phone-hacking scandal and subsequent Leveson inquiry and criminal proceedings²⁴ and the Article 8 right to private and family life / Article 10 freedom of expression balancing exercise seen in breach of confidence case law²⁵. Vickers notes that norms of human rights tend not to extend to the workplace context and that instead employment rights are dealt with separately e.g. in anti-discrimination provisions²⁶. Vickers argues that the prevailing view of freedom of expression in the employment relationship context is that the exercise of freedom of speech in breach of the implied duty of mutual trust and confidence, may, in harming the employer's reputation, potentially jeopardise the economic wellbeing of others²⁷ and maintains that the judicial test of the balancing of competing interests 'may lead to a position where protection does not extend to the workplace *unless* the interest in speech outweighs the common law presumption of managerial prerogative.'²⁸ Whether the European Court of Human Rights case *Heinisch v Germany*²⁹ marks a shift towards increased incorporation of human rights norms into the employment context is beyond the scope of this article but would be an interesting focus for further research.

3. Implications of the ERRA 2013

i. Public interest requirement

The ERRA inserts 'is made in the public interest' after 'in the reasonable belief of the worker making the disclosure' into s43B Employment Rights Act 1996 (ERA)³⁰. The introduction of the public interest test closes the lacuna following the decision in *Parkins v Sodexho Ltd*³¹ where the EAT held that breaches of a personal contract of employment could fall within the ambit of S43B(1)(b) 'that a person has failed, is failing or is likely to fail to comply with any

legal obligation to which he is subject'. Arguably this is a positive development which reasserts the original aims of the legislation rather than being used as a mechanism to sidestep the length of service requirement, which increased in April 2012 from one to two years, in essentially private employment claims. However, an unwelcome side-effect could be that potential whistleblowers are discouraged by what could be perceived as an additional requirement for a disclosure to be protected.³² This would arguably be contradictory to renewed calls for openness and transparency as per Recommendation 8 of the recent Francis Report³³:

The Board should give priority to ensuring that any member of staff who raises an honestly held concern about the standard or safety of the provision of services to patients is supported and protected from any adverse consequences, and should foster a culture of openness and insight.

Whilst presumably disclosures regarding failures in healthcare provision would consistently meet the public interest requirement, there may be other contexts where the whistleblower is uncertain as to whether the requirement will be satisfied and will be deterred from making what could be a valid disclosure. Given that the new provisions only came into force on 25 June 2013, how this plays out will have to be evaluated in the light of subsequent case law.

ii. Good faith requirement

The ERRA sees the removal of the good faith requirement from the PIDA which it is suggested is a welcome development of the legislation. The 'good faith' requirement is reiterated throughout the PIDA³⁴ and has proved problematic for the courts. In *Street v Derbyshire UWC*³⁵, where a public disclosure had been made under s 43G(3), the Court of Appeal considered the nature of both requirements alongside 'the declared public interest purpose'³⁶ of the PIDA:³⁷

even if one defines good faith as requiring simply honesty of intention, that

still requires more than a reasonable belief in the truth of the allegations made.

The Court held that an employee could fail the good faith test despite a reasonable belief in the substantial truth of the disclosure and thus lose the automatic protection afforded by the legislation if, on assessment of the facts, employment tribunals 'are of the view that the dominant or predominant purpose of making it was for some ulterior motive'³⁸.

Concerns swiftly followed regarding the implications of this decision which can be seen as detrimental to the purpose of the legislation by shifting the emphasis from the disclosure itself to the motives of the person making the disclosure. Although the subsequent decision in *Lucas v Chichester Diocesan Housing Association Ltd*³⁹ can be seen as in some ways alleviating the concerns raised after the *Street* ruling where, like the Court of Appeal in *Street*, the Employment Appeal Tribunal drew comparisons with the finding of malice in the tort of defamation and asserted that as 'bad faith is a surprising and unusual feature of working relationships' the employer should produce 'cogent' evidence which 'should be put squarely to the claimant in advance'⁴⁰. McMullen J went on to state that the tribunal should then consider the employer's allegation of bad faith with the evidence in its entirety before finding that an ulterior dominant or predominant motive results in forfeiture of PIDA protection.

As Bowers et al point out with reference to the Shipman case 'the public policy in encouraging the disclosure of concerns may be no less compelling because there are ulterior motives'⁴¹. Notably, PCAW expressed dissatisfaction with the ruling in *Street*, fearing that 'some lawyers will be tempted to use the decision as a licence to argue over motives in every whistleblowing case'⁴² and supported the recommendation of the Shipman Report⁴³ that the good faith test be dropped from the PIDA. However, the good faith element is not entirely removed by the ERRA but rather transposed to the assessment of remedy⁴⁴, with discretionary power given to the tribunal to reduce any compensatory award by up to 25% if

'it appears to the tribunal that the disclosure was not made in good faith'⁴⁵. As with the new public interest provision above, it will be interesting to see how this discretion is applied in subsequent case law.

iii. Protection from detriment by a co-worker

Perhaps the most significant change will prove to be that introduced by s19 ERRA which gives the whistleblower an additional right of not being subjected to detriment by a colleague, as well as from the employer. By reversing the decision in *Fecitt & Others v NHS Manchester*⁴⁶ and introducing vicarious liability for the employer as well as personal liability for the workers, whistleblowing protection is brought in line with discrimination legislation more generally, with the same statutory defence of 'reasonable steps' available for the employer. Again, further research will be necessary to assess the implications of this once a body of case law is established on this point but an initial assessment is that this is a welcome step. The maltreatment of Ms Donnelly by colleagues as well as her employer was discussed in the Francis Report and it could be that giving the whistleblower a statutory right not to be subjected to detriment by a co-worker will act as a more effective deterrent than being at best subject to an organisation's disciplinary procedures.

iv. Extension of 'worker'

S20 ERRA amends the definition of 'worker' in s43K PIDA to include certain new contractual arrangements in the NHS and alongside this the Secretary of State has an additional power to make any further changes to the definition of 'worker' by secondary legislation. Although these amendments are welcome there remains a requirement of a contractual relationship which still leaves a substantial number of individuals without protection e.g. students, although it is likely a student on a placement year would be protected⁴⁷. Also notable is the much anticipated Supreme Court decision *Bates van Winkelhof v Clyde & Co LLP*⁴⁸ which reversed the Court of Appeal ruling by holding that members of LLPs are workers for the purpose of employment legislation and can therefore claim whistleblowing protection.

Predictably this decision has met with both approbation and dissatisfaction, the former substantively that the decision sits with the spirit of the legislation, the latter that the decision may open the floodgates to claims from disgruntled partners⁴⁹. The Commission recommended that the s20 powers be used to extend the protection to include LLP members as well as a number of other categories⁵⁰. Arguably a number of categories are of particular interest. By including volunteers and interns the Commission have addressed the fact that in the current economic climate increasing numbers of jobseekers find themselves taking up unpaid work placements. Another interesting category is that of priests and ministers of religion, particularly in the light of numerous revelations of historical sexual abuse in a number of religious organisations⁵¹.

The recent case of *Onyango v Berkeley Solicitors*⁵² dealt with the hitherto undetermined question of whether a claimant could rely on a protected disclosure made after the termination of the working relationship to bring a whistleblowing claim and found that on the basis that worker and employer are defined in section 230 of the ERA as ‘those who are or have ceased to be in a contractual relationship of service or core services (we paraphrase)’ the use of the present tense in sections 43 A to C did not indicate that to be protected the disclosure would have to be made whilst in the employment relationship. It can be argued that this case is an example of the purposive interpretative approach which the tribunals tend to take towards the PIDA, with Clark J stating that this decision is ‘in line with the legislative purpose of protection for whistleblowers.’⁵³

One of the amendments proposed during the debate on the ERRA was the extension of protection to jobseekers⁵⁴ with the case for this change increasingly compelling following the revelations in 2013 of the blacklisting of over 3,200 construction workers⁵⁵, many of whom have claimed they were denied work due to having raised health and safety issues on previous building sites. The Commission reported that respondents were overwhelmingly in favour of extending whistleblowing protection to job applicants and if enacted, this will mirror the provisions of the Equality Act 2010 and prevent, or at least provide legal protection

against, blacklisting of job applicants who have made protected disclosures against former employers.

4. The workplace experience

i. Quantitative data

As part of its public policy role, PCAW receives statistics on whistleblowing claims from the Ministry of Justice Statistics Analytical Services, looking at the number of claims and how they were disposed of⁵⁶. A straightforward analysis of these statistics reveals a steady year on year increase in applications under the PIDA, starting with 157 in 1999/2000 and gradually increasing to 2500 in 2011/2012¹². Claims which were successful at hearing range from 2.8% in 1999/2000, though the number of claims disposed of in this period was small, to 8.47% in 2005/2006. The last few years see an average successful at hearing rate of between approximately 3 and 5%, with 2011/2012 at 3%, the lowest rate since 1999/2000 when the PIDA came into force. The majority of claims disposed of were unsurprisingly settled via ACAS, ranging from 32% in 2001/2002 to 46% in 2008/2009, or withdrawn or privately settled, ranging from 28% in 2011/2012 to 38% in 2003/2004.

Although it is interesting to consider the statistics, it is submitted that their value is somewhat limited in relation to assessing how effective the PIDA has been in promoting transparency in the workplace. As the PIDA provides a mechanism for raising concerns internally to facilitate early remedial measures, it could be argued that the increase in whistleblowing claims is on one level an indication that the aims of the provisions are not being realised. Of course on another level the increase of claims does not necessarily evidence more instances of malpractice in the workplace but may be a result of increased awareness of whistleblowing and an indication that more people are prepared to speak out and take their issues to tribunal if they perceive they have been dismissed or suffered detriment as a result of their disclosure. Returning to the PIDA itself it must also be remembered that it did not, as

Lewis states 'set out to *encourage* whistleblowing – it merely aims to *protect* those who raise a particular type of concern (a 'qualifying disclosure') in a specified way.'⁵⁷ Lewis proceeds to discuss suggestions which could be implemented should Parliament now feel that the public interest would be better served by a more proactive approach promoting the reporting of perceived malpractice including giving workers a positive right to raise concerns and imposing a statutory duty on organisations to establish effective procedures for hearing and managing such concerns. These were areas considered by the Commission and encompassed in the draft Code of Practice⁵⁸.

Another key point is that the statistics of course do not show how many potential whistleblowing claims are dealt with internally without reaching the employment tribunal and whether those issues are resolved positively within the organisation concerned or 'silenced' by way of the employee leaving with a financial settlement likely to be in the form of a compromise agreement. Given that there is a clear anti 'gagging clause' provision in the PIDA:

Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a disclosure⁵⁹

the situation where an employee leaves in this way, should not occur. However, looking at the NHS, an organisation where few would dispute the necessity for transparent governance, despite the PIDA and the reiteration of an 'anti-gagging' policy from the outset⁶⁰, it appears from the Francis report into the mid-Staffordshire healthcare scandal that this key provision of the PIDA is being circumvented. The inquiry heard evidence that the use of 'non-disparagement' clauses in Care Quality Commission (CQC) employment contracts is widespread and the report, whilst acknowledging the inevitable need for a balancing exercise between the need to maintain confidentiality and the public interest value of disclosure, concludes that:

Any clause restricting an individual's liberty to make a disclosure or imposing a duty of confidentiality, should be limited to the minimum necessary to protect the public interest, and not the reputation of any organisation or individual⁶¹

The issue of gagging clauses also surfaced in the BBC's major review of its internal practices following the Jimmy Saville scandal which emerged in 2012, with the then BBC Trust Chairman Lord Patten saying that he welcomed the removal of such clauses⁶². One of the key recommendations of the Francis report is that gagging clauses should be prohibited in the policies of all 22 healthcare organisations, regulators and commissioners insofar as they seek, or appear, to limit bona fide disclosure in relation to public interest issues of patient safety and care and the report welcomes the assurances of the CQC that it will not use such clauses in termination agreements going forward unless there are 'exceptional circumstances'⁶³. However, it is apparent that the use of 'gagging clauses' in the NHS is not one which is easily resolved, the issue having resurfaced in June 2013 with revelations that Great Ormond Street Hospital used a confidentiality agreement in 2010 with Dr Hilary Cass, a senior child health specialist who had raised concerns with the hospital management that low staffing levels were adversely affecting patients' safety. Dr Cass stated that she had signed the agreement "under duress" and had felt "hounded out" of her position at the hospital⁶⁴. The same month had seen Sir David Nicholson, head of the NHS in England, denying being part of a cover up in relation to severance payments and notably defending the use of compromise agreements, stating that they did not 'necessarily mean someone has been stopped [from] speaking about patient safety'⁶⁵. Whilst there is not scope here to discuss this row or the Francis report in detail, it is interesting that the report notes the difference between what the clauses actually say, the CQC had made the point that the clauses did not legally prevent disclosure in the public interest, and the perception of the employee concerned which would understandably be far from clear. This disparity between the 'letter of the law' and reality in the workplace is arguably a recurrent theme of whistleblowing analysis and will be discussed below in relation to whistleblowing policies.

ii. Qualitative data

Alongside publishing and commenting on whistleblowing statistics PCAW also conducts its own research into whistleblowing. Although there is not scope here to consider the full spectrum of PCAW research, which includes areas of health and safety; financial services; the legal profession; the civil service; freedom of information and data protection and corporate governance more generally, two areas of research will be briefly considered, a 2008 survey into nursing standards⁶⁶ and a 2012 paper on whistleblowing in primary and secondary education⁶⁷. Key findings from the 2008 survey were that out of the 752 nurses who participated, two-thirds said they had had a concern about a serious risk to patient safety in the three years prior to the survey and most (87%) had raised it. 77% of the nurses said that the culture for raising concerns in their workplace (for 58% this was a hospital) was the same or better than three years previously. Another positive finding from the survey was that of the nurses who did raise their concerns, 96% had raised those concerns internally, with only 4% going outside the workplace, in line with the aims and provisions of the PIDA. For the nurses who felt their organisation took sufficient measures to encourage whistleblowing, 67% said that their concern was handled well and appropriate remedial steps taken and 81% said that they did not suffer reprisals. This can be contrasted with the response of nurses who had raised concerns in organisations which they felt did not do enough to promote whistleblowing, with only 16% saying their concern was dealt with effectively and only 52% saying they did not suffer reprisals i.e. that nearly half did.

Whilst the general tenor of this research is perhaps not surprisingly that the more effectively the organisation promotes whistleblowing, the more likely nurses are to raise concerns internally and have those concerns dealt with well, it is notable that 38% of the nurses who spoke out felt that they have suffered serious or lasting damage to their career as a result. Thinking back to the socio-political impetus for the PIDA whilst noting that it is important to recognise that this is only a small sample of nurses, it is suggested that the PIDA has not

effected sufficient change and that further changes, whether legislative or cultural, are needed to ensure that a worker can have confidence that speaking out will not harm their career. The Francis report discusses at length the issue of whistleblowing and in particular the treatment of Helene Donnelly, who repeatedly raised concerns, later substantiated, against certain members of the nursing team, but whose concerns were at first met with no response and later with hostility and harassment from members of the team once, the report notes, her anonymity was compromised due to the mishandling of the matter by the management team. Unsurprisingly, Ms Donnelly left the Mid Staffordshire NHS Foundation Trust and sought employment elsewhere, where she found a much more open and supportive culture. The report notes Ms Donnelly's courage in the face of total lack of support, including from her RCN union officer who, once the nurses she had raised concerns about were reinstated after investigation, advised her to "keep her head down"⁶⁸. Again, recalling the background to the introduction of the PIDA, in particular Dr Bolsin's experience at the Bristol Royal Infirmary in the wake of the infant mortality scandal⁶⁹, Ms Donnelly's 'story' seems an all too familiar one.

After identifying a lack of clarity regarding whistleblowing provision in the education sector from monitoring calls to its advice line, PCAW published its statistics and findings in 2012⁷⁰. Noting a 40% increase in calls from workers in the education sector between 2011 and 2012, totalling 14% of calls in 2012, exceeded only by the care sector at 19%, PCAW conducted a review into 100 cases between 1 March 2011 and 30 June 2012. Teachers followed by teaching assistants were most likely to have called the advice line and the split between primary and secondary education establishments was equal, including local authority schools; academies; SEN schools; independent schools and pupil referral units. The most common concerns were regarding the health and safety of a child and physical or emotional abuse of a child (66 of the cases) but people also discussed concerns on perceived HR malpractice such as pre-determined redundancy selection procedure and concerns regarding misuse of funds. The paper notes in particular a lack of clarity as to the

process for raising concerns in academies or in organisations which were in the process of becoming academies and calls for this to be addressed as a matter of urgency. Also rather worrying is the finding that the most common response to a concern was that nothing was done (28) followed by an investigation which the caller felt to be inadequate (17). However, it is important to bear in mind that this paper is not, unlike the nursing standards survey discussed above, the product of research *per se*, but rather the analysis of calls to an advice line which means that positive outcomes following a raising of concerns are unlikely to be reported, the caller no longer in need of advice.

As part of its evidence gathering the Commission commissioned a YouGov survey, which was undertaken between 7th and 9th June 2013, on the attitudes of adults in Great Britain to whistleblowing⁷¹. The sample size was 2,017 adults with 1,178 of those in employment. Some of the key findings are encouraging, e.g. 42% of respondents said their employers had a whistleblowing policy compared with 29% in 2007; 72% of respondents viewed the term ‘whistleblower’ as positive or neutral and the majority of respondents (83%) said that if they had a concern about possible corruption, danger or serious malpractice at work they would raise it with their employer. However, other findings were less encouraging, e.g. 22% of respondents said that fear of reprisal would prevent them from raising a concern and 20% believed that their concern would not be dealt with appropriately. Interesting, particularly given the ubiquitous media coverage of public scandals brought to light by whistleblowers, when asked if they knew of legal protection for whistleblowers 55% of respondents did not know whether or not there was a law protecting whistleblowers.

Nielsen suggests that the most effective legal research uses a variety of methodologies ‘to provide a more nuanced understanding of law, legal institutions, and legal processes than can be provided by any one methodology alone due to the complex nature of the social world in which they operate’⁷² To complement the textual analysis of the legislation, judicial decisions and quantitative and qualitative data discussed above, research was undertaken into the perspectives of twenty workers employed at varying levels of seniority within a range

of organisations⁷³. The organisations were selected to provide the broadest range possible in such a small-scale study and are both public and private sector and include an NHS trust; financial institutions; a law practice; large retail companies; a local council; a state primary and secondary school; an academy; a reinsurance company; a health insurance company; a tree surgery practice; an airline; a technology solutions provider and a gas detection design and manufacturing company. The number of employees at the various organisations ranged from five (the tree surgery practice) to 30,000 (major retail company). The interviewees were asked to complete a questionnaire consisting of seven open questions with a follow-up interview to explore in more depth issues highlighted by the questionnaire responses. Interviews lasted between forty-five minutes and an hour and notes were taken⁷⁴. The focus of this exploratory study was to consider the whistleblowing policies, if any, of the organisations in question alongside the perceptions of the employees primarily into whether they were aware of legislative whistleblowing protection; whether they were aware of any whistleblowing policies within their organisation; whether they would feel able to raise concerns they may have and whether they felt the culture of their organisation was one of openness and transparency. This last question was perhaps the key to the research in that in many ways it could be argued that the significance of an employee being familiar with whistleblowing procedures is limited compared to an employee's perception that if they did have concerns they would be able to access the procedures and act accordingly, without fear of personal detriment.

The role of the PIDA in promoting greater transparency in the workplace is undoubtedly difficult to gauge and the small sample of interviews and the variety of workplaces would arguably make any attempt to identify trends within this research unfeasible. However, whilst acknowledging the limitations of this study, it is suggested that its value lies in providing an insight into the perceptions of twenty employees as to the status of whistleblowing, and more significantly, whistleblowers in their organisations. Considered as part of the multi-method approach discussed above, it is suggested that the study

contributes towards an understanding of the success or otherwise of the PIDA in practice. Whether the views of the interviewees in this study are representative more widely would need to be the subject of further research.

That being said, some interesting observations can be made. Perhaps not surprisingly, respondents within the larger organisations and public sector organisations were either aware of a whistleblowing policy or if not, able to access the policy easily through the staff intranet. However, Respondent 15, who had worked in an administrative role in planning at a local council for six years had not received any training on whistleblowing and was not aware of any policy, although they did say that there may well be one 'as there is a policy on everything else'. Regardless of whether they were aware of any whistleblowing policy in their organisation, the majority of the respondents (fourteen) were not aware of any **legal** protection for whistle-blowers, in line with the YouGov survey mentioned above. Of the twenty respondents, only eight had had training on whistleblowing and only two of those had had training within the previous year, both as part of their induction process on commencement of their posts. Those who were aware of the legal protection were either in senior positions or had had personal experience of the whistleblowing process e.g. Respondent 4, an Operations Director (Careers in the education and employment technology solutions provider who had worked for the organisation since 2004), when asked whether they were aware of legal protection for whistleblowers stated: 'Yes. I became aware of this as one of my staff recently blew the whistle on a colleague and I was part of the investigation'.

When asked what kinds of wrongdoing and malpractice they would expect someone to 'blow the whistle' on, responses unsurprisingly related to the respondents' type of work e.g. breach of child safeguarding procedures, inappropriate touching, cheating in the delivery of exams were mentioned by respondents working in education; poor quality of care was mentioned by Respondent 19, a senior nurse in an NHS trust; legal or financial irregularities or breach of confidentiality or data protection by the respondents working in the legal sector and financial

services, and breach of Health and Safety regulations and Tree Preservation Orders by Respondent 7, a tree surgeon. Half of the respondents also stated that bullying and/or poor management could constitute wrongdoing / malpractice for the purpose of whistleblowing. Bullying and poor management are not however, covered by the provisions of the PIDA and the ERA has closed the *Parkins v Sodexho* lacuna as discussed above by adding a public interest requirement. Commentators have however noted that this may need to be addressed by the courts when applying the ERA if a claim is made that bullying and/or poor management constitutes a breach of the employment contract thus coming within the ambit of s43B(b)⁷⁵ and that the 'public interest' requirement⁷⁶, which has not been defined within the ERA and can be seen as somewhat nebulous, is satisfied due to a significant number of employees being affected⁷⁷.

Having recognised the impossibility of drawing definitive conclusions from this small sample, it is notable that one trend that cannot be drawn from this research is a correlation between an organisation having a whistleblowing policy and the organisation having a culture of openness and transparency. Respondents from the three organisations with the smallest number of employees in this sample stated that their organisations did not have a whistleblowing policy, yet all three answered positively in response to the question as to whether there was a culture of openness and transparency. This corresponds with the findings of a number of studies discussed by Edwards that *inter alia* workers in small firms do not feel disadvantaged in terms of employment rights⁷⁸. Whilst four further respondents gave a positive response to this question, the majority were non-committal 'not sure' 'not particularly' or negative. Somewhat depressingly given the discussion of the various failings within the NHS throughout this article, Respondent 19, a senior nurse in an NHS trust who has been working in the same hospital for the past thirteen years and was well-informed as to legal protection for whistleblowers and had received ongoing training, replied 'No way' to the final question as to openness and transparency and to the question as to whether they would feel able to raise any concerns replied: 'No. Seen 3 colleagues victimised /

persecuted after raising concerns'. Of the twenty respondents, apart from Respondent 4, who had been part of a team investigating a whistleblower's concerns and Respondent 19 mentioned above, only Respondent 18, a teacher at a state secondary school had personally blown the whistle and in response to the question as to whether they would feel able to raise their concerns replied: 'I have raised things before regarding cheating by a manager. Nothing was done. I probably wouldn't bother to raise it again, unless their behaviour got significantly worse or I felt I would be compromising my own professional standards if I didn't.' It is interesting that this experience mirrors that of the PCAW analysis discussed above.

Several of the respondents provided their whistleblowing policy, and many whistleblowing policies, particularly of public sector organisations, are freely accessible on the internet. The policies are broadly similar and follow the statutory provisions of the PIDA by detailing the areas of concern which will be protected, stating that the concern should be made in good faith, though, as discussed above this requirement has been removed by the ERRA, and outlining the internal whistleblowing process, very much in line with the PIDA. There is a recognition within all the policies which have been considered for this article that it may not always be appropriate to raise concerns with a line manager and alternatives are given with several of the organisations providing a confidential reporting line or directing the potential whistleblower to the PCAW helpline. Whilst having an effective, easily accessible whistleblowing policy in place is undoubtedly beneficial to the employee, who can access information as to how to raise concerns and how those concerns will be investigated, and for the management, which has the opportunity to address those concerns at an early stage, it may be the case that the policy is simply one of many and resonates little with employees if their organisation does not have a culture of openness and transparency. This was highlighted by the Francis Report in its discussion of the treatment of Ms Donnelly noted above:

Her evidence exposed the hollowness of the promises in the whistleblowing policy:

“Even perhaps being aware of a Whistleblowing policy, it’s all very well to write that down and have that as a policy, but my experience and their witnessing my experience was such that what actually happened in reality wasn’t what was, I suppose, offered within the Whistleblowing policy...You can have those policies in place, but if they don’t actually act in reality, then people are not ever going to feel that they can come forward and voice concerns without fear of repercussions”⁷⁹

Ms Donnelly’s experience seems very much in line with that of Respondent 19 and it is apparent from this research that the poor governance at Mid-Staffordshire was and is not anomalous.

5. Moving towards increased transparency in the workplace?

The question as to whether the PIDA has promoted greater transparency in the workplace is difficult to gauge. Although analysis of case law and of the quantitative and qualitative research discussed above can help to form an assessment, much of the evidence is anecdotal and identifying trends from the infinite variety of working environments and relationships runs the risk of generalisation. Furthermore, the influence of the media needs to be considered. As seen above, with whistleblowing scandals seemingly emerging on a monthly, or even weekly basis, it would perhaps be understandable to conclude that the PIDA has effected little, if any, change. The question of whether, for example, had the PIDA been in place, the Clapham rail crash would not have happened, is arguably unanswerable. However, it is not difficult to find similarities between pre and post-PIDA ‘disasters’ and ‘scandals’, namely employees fearful of speaking out and detrimental consequences for those who do⁸⁰.

In his analysis of the first ten years of the PIDA, Lewis states: 'We cannot conclude that the first 10 years of PIDA has been either a success or failure'⁸¹ and it can be argued that this view is equally applicable to the current period, fifteen years in force. However, it is submitted that evaluating the role of the PIDA in **promoting** greater transparency in the workplace is more nuanced. Whilst the complexities of the inter-relationship between the statutory provisions of the law on whistleblowing and the wider socio-political and economic context need to be recognised, this gap between the 'letter' of the law and the norms of society is perhaps inevitable in any legislation which aims, as the PIDA does, to change human behaviour. Simply put, the PIDA and the amendments effected by the ERRA cannot make organisations open and transparent in the same way that the Equalities Act 2010 cannot prevent someone from acting or thinking in a discriminatory manner. What the legislation can do though is to provide some protection for the whistleblower or person who has been discriminated against and give an indication of what society aspires to, even if those aspirations are not yet being achieved. In this sense it is submitted that the question as to whether the PIDA promotes greater transparency in the workplace can be answered positively and that the changes made by the ERRA are likely to continue that process. The reporting structure set out in the PIDA promotes a managed approach to whistleblowing where concerns can be addressed internally which can only be beneficial for the organisation concerned. Whilst, as discussed above, a whistleblowing policy is only effective if employees are not only aware of it but believe in it, it is significant that many whistleblowing policies replicate the provisions and purposive intent of the PIDA in setting out procedures for employees to raise concerns internally and encouraging them to speak out⁸².

Whether there is generally a more open culture within the UK workplace than prior to the PIDA is arguably impossible to quantify but it can be submitted that many organisations, particularly those which have been the subject of unwelcome revelations such as the NHS and banking institutions, are at the very least now 'talking the talk'⁸³ It would be unrealistic to

imagine that malpractice in organisations can be eradicated, but it is evident that what is needed is a move away from a seemingly perpetual cycle of media revelations of cover-ups and the high-profile sacking, or not, of those deemed to be culpable. The appointment of Delilah Hesling, a former RGN and RGN representative, to the new post of Safety Ombudsman at Brighton and Sussex University NHS Trust following the expose by Margaret Haywood of sub-standard care of elderly patients is a positive move⁸⁴. In acting as an intermediary between staff, patients and their carers, Ms Hesling's remit is to work "to foster an open, transparent, responsible and accountable culture that acknowledges failings and uses lessons learned to prevent reoccurrences". This role, the first within the NHS, aims to give potential whistleblowers the assurance that they may come forward, may be one which could be replicated more widely and it is asserted that it is steps such as this which will help to promote increased transparency within the NHS rather than political soundbite measures such as publishing league tables of surgical statistics⁸⁵. It is perhaps beyond the scope of any legislation to effect the institutional and cultural shift necessary to realise the aims of the PIDA but it can be asserted that the PIDA, and the judicial decisions arising from it have, at the very least, provided the setting for a move towards greater transparency in the workplace. Whether in another ten years we will be 'walking the walk' remains to be seen.

6. Conclusions

It is suggested that the PIDA has promoted greater transparency in the workplace in providing for the first time statutory protection for whistleblowers which prior to this was inadequate. This tenor of this article is that the PIDA remains an essential tool in moving towards responsible governance in both private and public sector organisations and that the amendments effected by the ERRA 2013 should help to ensure that the legislation remains fit for purpose. However, the PIDA's achievements in effecting a tangible, sustainable cultural shift towards transparency in the UK workplace appear incremental at best. The research discussed above demonstrates the need for a transparent workplace culture with

whistleblowing policies only being effective in conjunction with ongoing training and a belief by workers that raising concerns will be viewed positively by their organisation.

The impact of the Whistleblowing Commission's report will need to be considered, in particular whether its key recommendations are implemented: that the Secretary of State adopts the draft Code of Practice which the Commission recommends should be taken into account by courts and tribunals (Recommendation 1) ; enhanced regulatory oversight of whistleblowing arrangements (Recommendations 3, 4 and 5); legislative provision against the blacklisting of whistleblowers (Recommendation 10); clarification of anti-gagging provisions (Recommendations 17 and 18) and extension of category of worker (Recommendation 10). Interestingly, the Commission does not recommend a mandatory duty on workers to speak out on the basis that this could lead to over-reporting and organisations potentially focusing on those who did not speak out rather than ensuring effective arrangements are in place and concerns addressed⁸⁶. Recently, in the wake of the Jimmy Savile revelations and the inquiry into child sexual exploitation in Rotherham, there has been a call, including by Keir Starmer, former director of public prosecutions, for teachers and other professionals to be under a duty to report suspicions of child abuse whereby failure to do so could result in prosecution and a possible prison sentence⁸⁷. At the 2014 Liberal Democrat party conference a policy motion was passed calling for mandatory reporting to be on their 2015 general election manifesto⁸⁸, a move already supported by the Labour Party but which has yet to win full support⁸⁹.

The impact of the changes to protection for whistleblowers introduced by the ERRA 2013 and whether those changes are in practice an improvement to the PIDA will need to be the subject of further research once a body of case law has been established. How the 'public interest' element is satisfied and whether the approach to the requirement of 'reasonable belief' will be broadly similar to the previous position will need to be evaluated in light of subsequent case law. The removal of the 'good faith' requirement would seem to be a positive step, particularly in the light of criticism that the 'good faith' requirement inevitably

led to cases focusing on the messenger's motives, rather than the message and subsequent handling of it. However, having not abolished the concept of 'good faith' entirely, but rather transposed it to the assessment of remedy, it may still be an area of legal wrangling albeit in a quantum rather than probative context, as a deduction of up to 25% in any compensatory award, for which there is no statutory cap, could represent a significant sum in a high value claim⁹⁰.

Perhaps the more significant change will prove to be that introduced by s19 ERA which gives the whistleblower an additional right of not being subjected to detriment by a colleague, as well as from the employer. Again, further research will be necessary to assess the implications of this once a body of case law is established on this point but an initial assessment is that this is a welcome step. Whether this results in a positive cultural shift where whistleblowing will be seen by peers as a positive contribution to the governance of the organisation will need to be assessed in time and may depend on whether workers receive meaningful rather than tick-box training. It is submitted that this area necessitates ongoing research from a socio-political and economic perspective and that the legislative protection be subject to ongoing review to ensure its effectiveness.

¹See for example Lord Nolan's praise during the Bill's passage through the House of Lords for 'so skilfully achieving the essential but delicate balance in the measure between the public interest and the interests of employers' *Hansard* HL vol 590 col 614 (5 June 1998).

² S43B(1)PIDA (a) commission or likely commission of a criminal offence; (b) failure or likely failure to comply with any legal obligation; (c) miscarriage of justice or likely miscarriage of justice; (d) danger or likely danger to health or safety of an individual; (e) damage or likely damage to the environment; (f) concealment or likely concealment of (a) to (e).

³ S43C.

⁴ Discussion of the US provision is outside the scope of this piece but see e.g. the Sarbanes- Oxley Act 2002, introduced following the Enron scandal, exposed in 2001.

⁵ e.g. South Africa, Japan, Ireland and the Netherlands see Wim Vanderkerchove, *Whistleblowing and Organizational Social Responsibility: A Global Assessment* (Ashgate Publishing Ltd. 2006) pp 293 -294.

⁶ (28274/08) [2011] IRLR 922 (ECHR).

⁷ Resolution 1729 (2010).

⁸ *ibid* at point 6.

⁹ *ibid* at point 3.

¹⁰ L Vickers *Freedom of Speech and Employment* (Oxford University Press 2002) pp 5-6.

¹¹ <http://www.independent.co.uk/news/uk/politics/andy-burnham-denies-pressuring-cqc-to-tone-down-morecambe-bay-criticism-8670002.html> where it was revealed that the then Health Secretary Andrew Lansley wrote to CQC board member and whistle-blower Kay Sheldon warning her that he was considering her dismissal from the board though Ms Sheldon was not in fact dismissed from the board and Mr Lansley denied that the letter had been a threat (accessed 24 June 2013).

¹² <http://audioboo.fm/boos/1467080-robert-francis-qc-evidence-of-closed-culture-at-cqc> (accessed 25 June 2013).

¹³ <http://www.bbc.co.uk/news/health-25549054> (accessed 3 March 2014).

¹⁴ An independent commission established by Public Concern at Work to review all aspects of whistleblowing in the UK including statutory provisions, governance and societal attitudes which reported in November 2013 <http://www.tuc.org.uk/sites/default/files/Whistleblowing%20Commission%20Report%20Final.pdf>

¹⁵ An independent charity launched in 1993 by Guy Dehn, a practising barrister, following a series of disasters in the 1980s and 1990s where subsequent inquiries found that an employee had knowledge of malpractice but was fearful of the personal consequences of disclosure or that an employee did raise concerns but these were not acted upon. These include the Clapham Rail crash which resulted in the deaths of 35 passengers where the Hidden Inquiry found that a supervisor had noticed the loose wiring in the junction box a couple of months earlier but said nothing as he did not want to 'rock the boat' and the infant mortality scandal at the Bristol Royal Infirmary where Dr Stephen Bolsin, an anaesthetist, raised concerns internally about surgical techniques used on babies during heart surgery, concerns which were not followed up but were confirmed at a subsequent inquiry. Other examples where employees were too fearful of the personal consequences to speak out include the Piper Alpha disaster in 1988 and the collapse of BCCI, where the Bingham Inquiry found a culture where employees dared not speak out. For discussion of the Hidden Inquiry see John Bowers QC, Martin Fodder, Jeremy Lewis, Jack Mitchell, *Whistleblowing: Law and Practice* (Oxford University Press, 2007) p 3. For further discussion of the Bristol Royal Infirmary scandal see L Vickers, *Freedom of Speech and Employment* (Oxford University Press 2002) pp5-6.

¹⁶ Hugh Collins, KD Ewing and Aileen McColgan *Labour Law Text and Materials* 2nd edn (Hart Publishing 2005) p636.

¹⁷ See e.g. *Re Company's Application* [1989] Ch 477, [1989] IRLR 477 where the court refused to grant an injunction to prevent a former employee from disclosing confidential information to the employer's regulatory body as this would be contrary to the public interest. However, an injunction was granted to prevent disclosure elsewhere.

¹⁸ Laurence Koffman & Elizabeth Macdonald *The Law of Contract* 7th edition (OUP 2010) pp 4-5.

¹⁹ Consider the post-PIDA case of Margaret Haywood who was struck off by the Nursing and Midwifery Council for breaching patient confidentiality by providing undercover footage to the BBC's Panorama programme to expose the maltreatment of elderly patients at the Royal Sussex County Hospital in 2005 after the concerns she raised internally were not acted upon.
http://news.bbc.co.uk/panorama/hi/front_page/newsid_8013000/8013221.stm (accessed 13 February 2014).
 Following substantial public support Ms Haywood was reinstated on appeal
<http://www.guardian.co.uk/society/2009/nov/14/margaret-haywood-double-agent> (accessed 13 February 2014).

²⁰ Currently two years for employees who started their employment on or after 6 April 2012.

²¹ See e.g. *Chandler v DPP* [1964] AC 763 and *R v Ponting* [1985] Crim LR 318.

²² See e.g. *R v Burns* (1886) 16 Cox 355.

²³ See e.g. Andrea Dworkin *Pornography: Men Possessing Women* (London: The Women's Press, 1981) and the Obscene Publications Acts 1959 and 1954.

²⁴ <http://www.levesoninquiry.org.uk/>.

²⁵ See e.g. *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 where the court held that the newspaper was entitled to disclose that the model Naomi Campbell was receiving treatment for drug addiction but not the details of the treatment and JK Rowling's case *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481.

²⁶ n10 p 15.

²⁷ *ibid* pp 29-30.

²⁸ *ibid* p 37.

²⁹ 28274/08 [2011] IRLR 922 (ECHR).

³⁰ s17 ERA 2013 which amends s43B PIDA 1998.

³¹ [2002] IRLR 109 (EAT).

³² See PCAW 'Briefing on Whistleblowing Clause 15 and other related clauses in the Enterprise and Regulatory Reform Bill for Report Stage on 26 February 2013' <http://www.pcaw.org.uk/files/Briefing.pdf>.

³³ Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005 – March 2009 by Robert Francis QC, Volume I, p410 published 6 February 2013.

³⁴ Ss 43C, F, G, H.

³⁵ *Street v Derbyshire Unemployed Workers Centre* [2004] 4 All ER 839 (CA).

³⁶ *ibid* at 56.

³⁷ *ibid* at 48.

³⁸ *ibid* at 56.

³⁹ [2005] WL 460717 (EAT).

⁴⁰ *ibid* at 39.

⁴¹ John Bowers QC, Martin Fodder, Jeremy Lewis, Jack Mitchell, *Whistleblowing: Law and Practice* (Oxford University Press, 2007) p 131.

⁴² <http://www.pcaw.co.uk/goodfaith/>.

⁴³ Fifth Report of the Shipman Inquiry by Dame Janet Smith (9 December 2004, Cm 6394) at para 11.106.

⁴⁴ s18(4)-(5) ERA 2013 which amends s49 PIDA 1998.

⁴⁵ Part 2 s18(4).

⁴⁶ [2011] EWCA Civ 1190.

⁴⁷ John Bowers QC, Martin Fodder, Jeremy Lewis, Jack Mitchell, *Whistleblowing: Law and Practice* (Oxford University Press, 2007) p131.

⁴⁸ [2012] EWCA Civ 1207.

⁴⁹ See e.g.
http://www.lawgazette.co.uk/5041365.article?utm_source=dispatch&utm_medium=email&utm_campaign=G_AZ230514 (accessed 1 July 2013).

⁵⁰ Recommendation 10 'Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK', November 2013.

⁵¹ See for example <http://www.telegraph.co.uk/news/uknews/10164972/Church-to-vote-on-making-unreserved-apology-to-sexual-abuse-victims.html> (accessed 25 April 2013).

⁵² [2013] IRLR 338 (EAT).

⁵³ *Ibid* Clark J at 6 to 8.

⁵⁴ Amendment 31 HL Deb 26 Feb 2013, cols 1006-7. The amendment was withdrawn on the basis that the government has agreed to consider the scope of the definition of 'worker'; to consider evidence on the

problem of 'blacklisting'; to meet Sir Anthony Hooper, the chair of Public Concern at Work to discuss the issue and to make any necessary amendments to Section 43K through secondary legislation.

⁵⁵ <http://www.channel4.com/news/construction-blacklist-fund-compensation-secret-list> (accessed 25 April 2013).

⁵⁶ <http://www.pcaw.org.uk/pida-statistics>

⁵⁷ Lewis 'Ten years of Public Disclosure Act 1998 claims: what can we learn from the statistics and recent research?' (2010) 39(3) ILJ 325-328.

⁵⁸ <http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf> pp28-31.

⁵⁹ s43J(1).

⁶⁰ See Health Service Circular 1999/198 'The Public Interest Disclosure Act 1998 Whistleblowing in the NHS' Action point 5 which states that every NHS Trust and Health Authority 'should prohibit confidentiality "gagging" clauses in contracts of employment, and compromise agreements which seek to prevent the disclosure of information in the public interest'. Also see the 2012 'Speaking up Charter' which states 'Whilst the existence of compromise agreements between employer and employees generally should not be a cause for concern, compromise agreements containing clauses seeking to prevent disclosures protected under the PIDA 1998 are not acceptable.'

⁶¹ n33 p1458.

⁶² <http://www.independent.co.uk/news/media/tv-radio/bbc-issues-antiharassment-guidelines-to-combat-a-strong-undercurrent-of-fear-and-bullying-8600905.html> (accessed 10 June 2013).

⁶³ n33 p1460.

⁶⁴ <http://www.guardian.co.uk/society/2013/jun/26/great-ormond-street-hospital-gagging-doctor-cass> (accessed 27 June 2013).

⁶⁵ <http://www.bbc.co.uk/news/uk-politics-22868913> (accessed 27 June 2013).

⁶⁶ http://www.pcaw.org.uk/files/WBSurvey_summary.pdf

⁶⁷ <http://www.pcaw.org.uk/files/PCaWReportEducationFINAL.pdf>

⁶⁸ n33 p236.

⁶⁹ Discussed in Vickers n10. Dr Stephen Bolsin, an anaesthetist at the hospital, raised concerns internally about surgical techniques used on babies during heart surgery, concerns which were not followed up but were confirmed at the subsequent inquiry. Although not dismissed, Dr Bolsin found his position untenable and after his attempts to find an alternative post within NHS were unsuccessful, he left the NHS and took up a post in Australia.

⁷⁰ n67.

⁷¹ <http://www.pcaw.org.uk/files/PRYouGovFINAL%202013.pdf>.

⁷² *The Oxford Handbook of Empirical Legal Research*, eds Cane and Kritzer (Oxford University Press 2010) 39 Nielsen 'The Need for Multi-Method Approaches' p955. For a defence of interdisciplinary and multi-method approaches more generally see Poteete, Janssen and Ostrom *Working Together: Collective Action, the Commons and Multiple Methods in Practice* (Princeton University Press, 2010).

⁷³ M Denscombe *The Good Research Guide for small-scale social research projects* (Oxford University Press 2007) pp 153-204.

⁷⁴ A snowball sampling technique was utilised, whereby an initial group of 12 employees, known to the author and who had agreed to participate, were asked to provide details of one or two further potential participants. This resulted in a total of 30 employees being approached, 20 of whom were willing to participate in the study, a response rate of 66.6%. For a useful discussion of qualitative approaches to empirical legal research see *The Oxford Handbook of Empirical Legal Research*, eds Cane and Kritzer (Oxford University Press 2010) 38 Webley 'Qualitative Approaches to Empirical Legal Research' pp926-950.

⁷⁵ 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject'.

⁷⁶ Part 2 s17.

⁷⁷ <http://www.thelawyer.com/news-and-analysis/opinion/redefining-unfair-dismissal/3006192.article> (accessed 25 June 2013).

⁷⁸ *Making Employment Rights Effective*, ed Linda Dickens (Hart Publishing 2012) 8. Edwards 'Employment Rights in Small Firms' p140

⁷⁹ n33 pp236-7.

⁸⁰ For pre-PIDA disasters see e.g. Investigation into the Clapham Junction Railway accident, Cm.820(1989) cited in John Bowers QC, Martin Fodder, Jeremy Lewis, Jack Mitchell, *Whistleblowing: Law and Practice* (Oxford University Press, 2007) at p 3; the infant mortality scandal at Bristol Royal Infirmary discussed in Vickers (n10) p5-6 and the 1988 Piper Alpha disaster.

⁸¹ Lewis 'Ten years of Public Interest Disclosure Act 1998 claims: what can we learn from the statistics and recent research?' (2010) 39(3) ILJ 325-328.

⁸² See for example the policy of Brighton and Sussex University Hospitals NHS Trust 1.3 'The Trust Board is committed to running the organisation in the best way possible and to do so this requires the help of all staff. The Trust has introduced this policy to reassure staff that it is safe and acceptable to speak up and to enable them to raise any concern at an early stage and in the right way. Rather than wait for proof, the Trust would prefer staff to raise the matter when it is still a concern.' bsuh.nhs.uk (accessed 1 July 2014).

⁸³ See e.g. speech given by Donald Kohn, Member of the Financial Policy Committee, Bank of England in 2011 'Enhancing financial stability: the role of transparency' <http://www.bankofengland.co.uk/publications/Documents/speeches/2011/speech516.pdf> (accessed 15 June 2013) and the Francis Report n33 on the need for transparency within the NHS.

⁸⁴ <http://uk.linkedin.com/pub/delilah-hesling-patient-safety-ombudsman/9/b78/799> (accessed 21 April 2013).

⁸⁵ <http://www.independent.co.uk/news/uk/hospital-league-tables-lowscoring-units-may-not-survive-statistics-released-yesterday-show-that-the-national-health-service-is-a-lottery-celia-hall-and-graham-moorby-report-1426017.html> (accessed 28 June 2013).

⁸⁶ n14 p13.

⁸⁷ <http://www.bbc.co.uk/news/uk-24772777> (accessed 30 October 2014).

⁸⁸ http://www.libdems.org.uk/f18_tackling_child_abuse (accessed 30 October 2014).

⁸⁹ Including from the Conservative Party. David Cameron, whilst not opposed to the introduction of mandatory reporting in the context of child abuse *per se*, indicated in July 2014 that no legislation would be introduced until the government's inquiry into historical child abuse had reported <http://www.theguardian.com/society/2014/oct/05/schools-care-home-staff-legal-duty-to-report-child-abuse> (accessed 30 October 2014). The implications for the current legal regime governing whistleblowing protection should mandatory reporting be introduced are beyond the scope of this paper but would be an interesting area for further research.

⁹⁰ Unfortunately the Ministry of Justice Statistics Analytical Services does not hold information on compensation awarded for PID claims, only publishing information on compensation awarded for Unfair Dismissal and the Discrimination jurisdictions.