Mutual Learning Programme

DG Employment, Social Affairs and Inclusion

Peer Country Comments Paper – United Kingdom

Learning from scandals

Law and (in some sectors) practice have developed: collaboration less so

Peer Review on "Enhancing whistleblower protection through better collaboration between responsible authorities – a tool to prevent and tackle work-related crime"

Norway, 14-15 February 2019

Written by Paul Stephenson

January, 2019

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1 Introduction

This paper has been prepared for the Peer Review on "Enhancing whistleblower protection through better collaboration between responsible authorities – a tool to prevent and tackle work-related crime" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country (Norway) and the situation in the UK.[1] For information on the host country example, please refer to the Host Country Discussion Paper.

2 Overview of UK trends

In 2018 the Institute of Business Ethics' triennial survey found that 24% of UK employees were aware of misconduct in their workplace. The main types of misconduct observed were: the inappropriate treatment of people (48%), bullying and harassment (40%), safety violations (35%), misreporting hours worked (30%), abusive behaviour (26%), stealing (22%), improper hiring practices (21%) and fraud (20%) (Donde, 2018).

67% of those employees spoke up – an increase from 2015, when only 55% spoke up. The latter figure was close to the 2018 average for the other European countries surveyed, which was 54%. 64% of UK employees said their organisation has a confidential reporting line (compared with the European average of 43%).[2]

Indicative statistics are also available from the whistleblowing charity Protect (formerly Public Concern at Work), which has provided free legal advice to workplace whistleblowers since 1993. The number of cases they handle has grown over the years and is currently running at about 3000 per year. Many cases are from the health sector though their share has declined (from 70% in 2013 to 51% in 2018). The relatively small number of cases about malpractice in the financial services sector has also decreased (from 84 to 46). Conversely, there has been an increase in cases from the voluntary sector (from 6-9% over the period 2006-16 to 12.5% in 2018) (Protect, 2018).

In the health and finance sectors, developments in law and culture have encouraged the increasing availability and use of credible reporting avenues for whistleblowers. The pattern appears to be that sectors which have been badly shaken by public scandals are more likely to recognise the need to listen to their whistleblowers. There have been very recent scandals in the charities sector[3] and the upsurge in such cases for Protect may reflect this, together with the fact that improvements within that sector have not yet been implemented.

As in Norway, there are current concerns about working practices which evade employment protections and exploit workers (especially from overseas). Online working is a particular issue, as is the growth of 'the gig economy'. These concerns were the subject of the Taylor Review (2017). Such cases have seldom come forward as cases of whistleblowing – whether because the illegality may not be clear, or because workers do not know their rights (if indeed they exist), or because other avenues are available – such as the Advisory, Conciliation and Arbitration Service (ACAS).

[1] The writer gratefully acknowledges the help of Andrew Pepper-Parsons of Protect, Anna Myers of WIN, Guy Dehn of Witness Confident and BEIS officials.
[2] The other European countries surveyed were France, Germany, Ireland, Italy, Portugal, Spain and Sweden.
[3] Notably sexual exploitation by aid workers in Haiti, which became public in 2018.

3 Developments in law and practice

Open government is a relatively new concept in the UK. The Freedom of Information Act 2000 greatly increased transparency in government but the UK is still facing issues with the overall concept. For example, the minister for the Department for Business, Energy and Industrial Strategy (BEIS) said that 'there are negative attitudes ingrained in organisational culture that form barriers to whistleblowing working effectively' (BEIS, 2014). Some criminal offences unreasonably stand in the way of whistleblowers securing fair hearings. An ongoing case concerns Section 105 of the Utilities Act 2000, which prevented a utilities regulator from providing information to an Employment Tribunal. The final decision on the case could have far-reaching implications.

3.1 Public Interest Disclosure Act (PIDA)

The UK lacks a written constitution but as long ago as 1857 case law established the principle that: 'there is no confidence as to the disclosure of an iniquity'[4]. Unlike Norway, there are no wide obligations on employees – apart from in some special situations, notably suspicious financial transactions – to report wrongdoing. PIDA was drafted in the wake of several disasters where loss of life could have been prevented if organisations had listened to whistleblowers[5]. It was designed not by Government, but by civil society, led by the charity Protect.

Like Norway's 2007 Act, PIDA sits within the framework of employment law (the Employment Rights Act 1996), and is based on similar principles. It was designed to encourage responsible whistleblowing and to hold employers to account if they take any actions to prevent whistleblowing. It applies to a broad range of workers – essentially to any worker who has a UK contract, whether permanent or temporary, wherever he is working. It covers agency workers, and workers provided via an intermediary; non-employees undergoing training or work experience; and self-employed health professionals who work in the NHS. It does not apply to the genuinely self-employed; nor does it apply to 'posted' workers if they are working under a foreign contract.

PIDA sets out in section 43B a list of wrongdoing to which it applies, which also includes miscarriages of justice. The list includes 'any failure to comply with a legal obligation', which would catch all failures to comply with employment law. However, unlike in Norway, the law does not cover all 'censurable conditions', including 'breaches of ethical conduct'. Nor does it cover abuse of power or gross mismanagement, in so far as the conduct is not illegal. The UK Government recently rejected proposals to extend the list to cover these latter on the view that this would introduce legal uncertainty (BEIS, 2014).

If a worker suffers any 'detriment' (meaning any kind of disadvantage) after blowing the whistle he/she can take his/her case to an Employment Tribunal. The Tribunal will assume that the detriment was a consequence of the whistleblowing unless the employer can show otherwise. Unlimited damages may be awarded, though private sector employers do not always pay up. The Taylor Review proposed a 'naming and shaming' scheme to tackle this.

3.2 The regulators

Section 43F enables the Secretary of State to make an order setting out a list of 'prescribed persons'. These are generally the authorities who regulate the various sectors and in this paper they are referred to as the 'regulators'. A whistleblower will be protected if he/she reports an issue to them, even if he/she has not raised it internally, as long as he/she reasonably believes that his/her report (a) falls within the regulator's remit and (b) is 'substantially' true. As Norway's law recognises, it is vital that the whistleblower should have such unfettered access to regulators. Understandably,

[4] Gartside v. Outram [1857] 26 LJ Ch (NS) 113.
[5] Notably the shipwreck of the 'Herald of Free Enterprise' in 1987

employers wish to encourage 'speaking up' within the organisation in the first place, and Protect's statistics over the years show that this is what has happened in most of the cases they deal with (69% in 2015 (Protect, 2016)). But this may not always be possible and, in the absence of free access to regulators (which is a major flaw in the draft EU Directive) those whistleblowers who do not feel able to approach their employers may not raise the issue at all.

Unlike Norway (and most European countries), the UK lacks a single labour market authority, though since 2017 there has been a Director of Labour Market Enforcement, who publishes an annual strategy to guide the three agencies in the field – which are the Employment Agency Standards Inspectorate (within the BEIS), who could look into any report from agency workers; the Gangmasters and Labour Abuse Authority (set up to oversee a licensing scheme established in the wake of the tragic deaths of 23 Chinese cockle-pickers); and the National Minimum Wage/National Living Wage unit in HMRC (Her Majesty's Revenue and Customs). None of these three agencies are listed regulators. Among about 80 listed regulators are the Health and Safety Executive and the Secretary of State for BEIS, who is an avenue for reports about 'fraud and other misconduct in relation to companies'. The HMRC are also listed, for tax issues.

3.3 Changes to PIDA in 2013

The Shipman Inquiry[6] expressed concern that staff who had suspicions had not come forward earlier. The inquiry judge questioned the 'good faith' requirement in PIDA. She said 'The public interest would be served, even in cases where the motive of the messenger had not been entirely altruistic' (Shipman Inquiry, 2004). The Government made that and other changes to PIDA in the Enterprise and Regulatory Reform Act 2013. Since then, lack of 'good faith' is no longer a ground for cases to fail, though a 'bad faith' whistleblower may have compensation reduced by up to 25%.

At the same time a 'public interest' test was introduced, in response to a tribunal ruling which found that a single worker's complaint about his own contract could be the subject of a whistleblowing case. That was not the original intention of the law.

Other changes made in 2013 were:

- 'vicarious liability'-making employers responsible for any detriment to a whistleblower caused by his co-workers;
- Power for the Secretary of State to alter, by order, the categories of worker covered. This could help ensure that employers cannot evade PIDA protections by new ways of classifying workers, though its application to those with foreign contracts would be very difficult.

3.4 Sectoral action: finance and health

Guy Dehn, the founding Director of Protect, says 'had whistleblowing fulfilled my hopes and expectations, it would have done much more to enable the alarm to be sounded on the coming financial crisis' (Protect, 2018). The crisis struck in 2008 and led to a Parliamentary Commission, which reported in 2013. It referred to a 'culture of fear' in some banks and proposed a tough package of measures to be overseen by the Financial Conduct Authority (FCA) (Banking Commission, 2013). These requirements are now enshrined in FCA rules which represent a beacon of good practice among regulators, and are dealt with in Annex 2.

In the health sector, drastic failings in patient treatment[7] led to the Mid-Staffordshire Hospital Inquiry which reported in 2013. Questions arose about how reports about the failings had either not been made or not acted upon, and the result was the Freedom to

[6] Into the murders by Dr Harold Shipman of about 250 patients over the period 1971-98.
[7] It is estimated that 400-1200 patients died as a result of poor care in Stafford Hospital over the period 2005-09.

Speak Up Review (2015). The review recommended the appointment of 'Freedom to Speak Up' Guardians in every NHS Trust. A recent survey found that 73% of NHS workers were aware that their employer had a whistleblowing policy (Protect, 2018). The Guardians received training on their role from Protect. Despite these improvements, results remain patchy: the National Guardian's 2017-18 Report welcomes the fact that the Guardians dealt with over 7000 cases but mentions that six Trusts sent no data or reported that they had received no 'speak up' cases. She also expressed concern that nearly one-fifth of workers felt the need to remain anonymous and 5% experienced detriment after speaking up (NGO, 2018).

3.5 The Whistleblowing Commission and the 2017 changes to PIDA

An independent Commission, set up by Protect to review the operation of PIDA, reported in 2013. It concluded that PIDA was not working as intended and its main proposal was to better involve the regulators, as they are best placed to drive change. The regulators have a powerful dual role: as doctors to the law-abiding and policemen to the miscreant.

The Commission's report fed into the first Government consultation on whistleblowing, conducted by BEIS in 2013-14. The Government recognised that 'there is a lack of confidence that issues are considered or investigated [by regulators]' (BEIS, 2014). The 2017 Act therefore implemented the recommendation that all regulators should have a duty to report annually on the number of whistleblowers who approach them and on the action they took on the issues. That duty was fleshed out in the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017. The first regulators' reports, for the financial year 2017-18, have been issued and a compilation has been presented to Parliament (BEIS, 2019). The results are very patchy – some regulators provide a lot of information on the action they took, some next to nothing. The highest number of reports were received by the Care Quality Commission (8449), the Pensions Regulator (3648) and the Health and Safety Executive (3500). The Charity Commission received 101 reports (up from 88 in the previous year) and made clear its intention to improve its services for whistleblowers in 2018-19.

While the Commission's idea of a statutory code of practice on whistleblowing has not been pursued, the detailed code that they recommended is now obligatory, under FCA rules, in the financial services sector and it is also the model code for NHS trusts. Unlike in Norway, there is no general obligation on employers to establish whistleblowing systems. However, BEIS issued guidance to employers in 2015 which recommended the Commission's code.

BEIS take the lead in co-ordinating the activity of UK regulators as regards whistleblowing, and they issued a first guide for regulators in 2017. BEIS are also responsible for ensuring the order which lists the regulators is kept up to date. They issue a new version annually, the latest in October 2018.

4 Assessment of public policy implications and success factors

4.1 Proposals for the future

In the UK, action on whistleblowing disclosures is sector-based. Most regulators have sufficient powers to ensure systems exist in their sector to encourage workers to speak up and that action follows. The drive is to ensure that all regulators use their powers, rather than wait for disaster to strike in their sector. There is little co-ordination, though within the employment field the Government's plans to create a single labour market enforcement agency should help (BEIS, 2018). The initiative of the Norwegian Labour Inspectorate to co-ordinate the work of regulators and to create 'shared principles for appropriate receipt and handling of notifications' should prove instructive for the UK. Protect have mooted the idea of a regular meeting of the main regulators to discuss

whistleblowing. It might be timely to hold such a meeting in the wake of the mixed results from the new reporting duty, and to consider new guidance.

Norwegian regulators have an obligation to treat whistleblowing reports confidentially. There is no such obligation in the UK, though it is recognised good practice. It would be useful to develop standard advice on how to handle reports so that they remain confidential and in what circumstances it might be appropriate or necessary to share the reports (e.g. with the police).

An effort needs to be made to ensure that all relevant regulators are listed in PIDA, irrespective of their wishes in the matter. If they are not listed, not only is there a risk that whistleblowers will be discouraged from approaching them, but they will not be subject to the obligation to produce annual reports on whistleblowing. There is no labour market enforcement regulator on the list.

There is no requirement in UK law for feedback to whistleblowers (though there is in Article 6 of the current draft EU Directive) and Protect say that feedback is generally not good. BEIS guidance states that, for reasons of confidentiality, regulators are often restricted from providing whistleblowers with any [sic] information about the progress of investigations (BEIS, 2017).

15% of Norwegian whistleblowers approach trade unions or their workplace HSE representative in the first instance. The UK lacks workplace HSE representatives and its workforce is less unionised than Norway's. It was proposed by the UK Whistleblowing Commission in 2013 that seeking advice from a trade union should be protected in the same way as seeking legal advice. This proposal has not been implemented.

Norwegian enterprises with more than 5 employees are obliged to establish procedures for internal reporting. There is no such general obligation in UK statute law, though there is a requirement in the Corporate Governance Code (which applies to companies listed on the London Stock Exchange), and as discussed special measures have been taken in the finance and health sectors. Aviation is another sector in which procedures have been well established for many years: aviation cannot afford mistakes. Overall the practice is increasingly widespread, with staff awareness of such policies at a similar level to Norway.

As mentioned, the 2013 Commission proposed a statutory code of practice setting standards for internal whistleblowing arrangements that tribunals and regulators could refer to when deciding issues. Developments since then in the financial services and health sectors have demonstrated that positive results can be achieved by regulators acting without a statutory code. However, this approach is likely to continue to produce patchy results unless it is followed up energetically.

There is a question about which organisation is best placed to co-ordinate, and the idea of an overall regulator for whistleblowing has been proposed (Protect, 2018). As things stand in the UK, regulators and professional bodies have been known to harass whistleblowers and there is no remedy under PIDA against them.

In this context there is also a question as to whether whistleblowing law is best served by being part of employment law, as it is in the UK and in Norway. Protect have noted the inherent structural problem, as employment law inevitably focuses on the worker, and not on the issue he has raised. A split develops, as the issue of the treatment of the worker goes to the Employment Tribunal (ET), whilst his concern will be pursued, if at all, through the regulator. Regulators only have automatic access to the issues raised in ET cases if the whistleblower so wishes. The 2013 Commission proposed an open register of PIDA claims.

A related issue concerns 'gagging clauses'. Often a whistleblower reaches an out-of-court settlement with his employer under which he receives compensation but agrees not to disclose his concern. PIDA states (in s 43J) that such agreements are void in so far as they concern a public interest disclosure. However such agreements are still

signed, and both parties usually seem to act as if s 43J did not exist. This issue has been addressed by FCA in its own sector (see Annex 2). The Government recognises there is malpractice and is committed to reviewing the issue more widely (House of Commons, 2018). .

The Whistleblowing Commission argued the case – also argued in Norway - for a specialist tribunal, where the judges would be well versed in whistleblowing law and practice.

4.2 Positive results from the UK

The considerable throughput of cases under PIDA and the associated body of emerging case law means that the issues are constantly under scrutiny and gaps in the law and any need for practical innovation can be, and have been, identified.

The issue of 'good faith' is no longer a bar to claims and a 'public interest' test has been inserted to avoid workers raising issues which concern only themselves. All imprecise phrases can create problems in law, but a recent ruling provides some clarity on the 'public interest' test[8].

Partly because of their wish to avoid PIDA cases, and because of the increasing pressure from regulators, employers are increasingly installing credible internal reporting systems. These systems should – and many do - make clear that immediate access to listed regulators is an option.

The involvement of regulators has been increasing recently and it appears employees are far more likely to approach them in the UK than in Norway (where the figure given is 2%).

Some whistleblowers have received substantial awards under PIDA, though these are limited to compensation for the 'detriment' they have suffered. The average award in 2010 was £58k (Protect, 2011). Exemplary damages may also be ordered against employers but this option is rarely exercised.

5 Questions

- Would the proposed whistleblowing Ombudsman (2.5) be limited in his role to advice and support? Should he not also act as a regulator of the regulators?
- 2.5 might imply that the 2018 Norwegian Commission propose to require internal whistleblowing first. That would introduce a regrettable new restriction on access to regulators.
- Only 2% of Norwegian whistleblowers approach regulators (2.4). Would it help to have an obligation for employers to inform workers of their right to do so?
- To what extent is feedback given to whistleblowers? Are there any relevant obligations?
- Are trade unions effective in their role as recipients of notifications?

[8] Chesterton Global Ltd and Anor v. Nurmohamed [2017] (CA)

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Small Business, Enterprise and Employment Act 2017 (c 26)

Statutory Instruments

The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2018 (SI 2018 No 795)

The Prescribed Persons (Reports on Disclosure of Information) Regulations 2017 (SI 2017 No 507).

International instruments

Council of Europe Recommendation on the Protection of Whistleblowers. CM/Rec (2014) 7 of 30 April 2014

Proposal for a Draft Directive on the protection of persons reporting on breaches of Union law. COM (2018) final, Brussels 23.4.2018.

Annex 1 Summary table

The main points covered by the paper are summarised below.

Overview of key trends
• UK employees increasingly likely to speak up about wrongdoing • Responsible UK employers increasingly likely to have confidential reporting lines • These trends are particularly developed in finance and health sectors, as a response to crises over the last decade. • Some modern working practices are aimed at evading employment rights and these have seldom given rise to whistleblowing cases
National policy / measures
• Since 1998, whistleblowers are easily protected if they go to listed regulators, even without approaching their employers. • The list has gaps as regards employment regulators which should be fixed. • Listed regulators have a new duty to report annually on whistleblowing. First reports are of variable value. • Guidance to regulators issued by BEIS in 2017 rather soft compared with sectoral action in finance and health. • Variable results in different sectors suggest need for more central co-ordination/oversight
Assessment of public policy implications and success factors
• Constant throughput of cases under 1998 Act ensures law is kept under spotlight and need for change identified. • 2013 model code of practice increasingly used • Question of whether cases might be better heard by specialist tribunals • The treatment of the issues of 'good faith' and 'public interest' in the UK may provide pointers for Norway in considering these issues • Norwegian obligation for companies to establish reporting procedures might be worth considering in UK
Questions
• Would the proposed whistleblowing Ombudsman (2.5) be limited in his role to advice and support? Should he not also act as a regulator of the regulators? • 2.5 might imply that the 2018 Norwegian Commission propose to require internal whistleblowing first. That would introduce a regrettable new restriction on access to regulators. • Only 2% of Norwegian whistleblowers approach regulators (2.4). Would it help to have an obligation for employers to inform workers of their right to do so? • To what extent is feedback given to whistleblowers? Are there any relevant obligations? • Are trade unions effective in their role as recipients of notifications?

Annex 2 Example of relevant practice

Name of the practice:	FCA Handbook Chapter 18 on Whistleblowing
Year of implementation:	2016
Coordinating authority:	Financial Conduct Authority (FCA)
Objectives:	To ensure regulated firms establish and maintain effective channels for whistleblowing, which is 'a key source of intelligence about financial crime' (FCA, 2015)
Main activities:	Rules require: appointment of a 'whistleblowing champion' as a non-executive director in each firm (18.4); staff to be informed of the right of direct access to the FCA (18.3.6); annual reports on how concerns have been investigated to the governing body and to the FCA (18.3.6); obligatory reporting to FCA about any Employment Tribunal whistleblower case that it loses (18.3.6); the whistleblower's confidentiality to be respected (18.3.4); the provision of feedback to the whistleblower where 'feasible and appropriate' (18.3.1); settlements to expressly state that they do not affect workers' right to make protected disclosures (18.5).
Results so far:	The FCA managed 1106 cases in 2017-18 (down from a peak of 1376 in 2014). Intelligence was shared in appropriate cases with other regulators, law enforcement and overseas regulators (FCA, 2018).


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