UK Public Interest Disclosure Act 1998

The UK's whistleblowing law in practice

Originally published by Sweet & Maxwell in its series *Current Law Statutes*, this edition sets out the revised and amended text of the Public Interest Disclosure Act 1998. It is accurate as at February 2003.

Authoritative notes - originally drawn on background papers and parliamentary debates - have been fully updated and now take account of an extensive review of one hundred legal decisions made under the Act.

Making whistleblowing work

"There are obvious tensions, public and private, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong. The enactment, implementation and application of the "whistleblowing" measures and the need for properly thought out policies in the workplace, have over the last three years, received considerable publicity from various quarters, including the valuable activities of an independent charity, Public Concern at Work, established in 1993 and experienced in providing assistance to both employers and employees."

Lord Justice Mummery - giving the judgement of the Court of Appeal - in its first consideration of the Public Interest Disclosure Act.

ALM Medical Service v Bladon (2002) IRLR 807

PUBLIC INTEREST DISCLOSURE ACT 1998

Annotated guide from Public Concern at Work

(February 2003)

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PREFACE TO THE 2003 EDITION

This edition takes account of over three years of law and practice under the Public Interest Disclosure Act (PIDA). Data at the public Register of Employment Tribunals suggests that some 1200 PIDA claims were registered in the three years since July 1999 when the Act came into force. These claims have led to one Court of Appeal decision (and one of the Scottish Court of Session), five decisions of the Employment Appeal Tribunal and around one hundred full decisions of employment tribunals.

These decisions illustrate how the Act works and why it is important. The concerns that the whistleblowers had raised ranged from serious crimes and grave dangers to the trivial. The reprisals they suffered ranged from the outrageous to the non-existent. While the large majority of the cases involved internal whistleblowing, tribunals have readily protected disclosures to regulators. Five public disclosures - including two to the media - have also been protected. Aggravated damages have been awarded to several whistleblowers and in one case compensation of £50,000 was given for injury to feelings. While the largest tribunal award to date has been £805,000, it is understood that several cases have been settled for over a million pounds.

The PIDA decisions cited in these annotations should be of general interest as they contain practical guidance on how the Act is working in practice. They give valuable illustrations of what is and is not whistleblowing, of why the 'good faith' test exists and of what evidence is needed about the wrongdoing. As to causation, these cases help to make a key legal concept more readily understandable. They also show how the approach to causation works differently where the employee has been at work for less than one year. Taken as a whole the summaries provide an interesting insight into the respective cultures in the public, private and voluntary sectors. The summaries of the seventy notable PIDA decisions cited in this text can be found on the Public Concern at Work website at www.pcaw.co.uk/policy_pub/case_summaries.html.

Neither the number of tribunal decisions nor the millions of pounds awarded, however, are the correct means to assess the success of the Act. When Public Concern at Work promoted the legislation and Parliament

passed it, the purpose was to embed a culture where employees would feel able to raise genuine concerns in a constructive way and employers would address any real danger or risk properly.

We know from our activities at Public Concern at Work that PIDA is having a beneficial effect in many workplaces and communities. The fact that well over two-thirds of the PIDA claims registered are settled is also evidence that the Act is working well in signalling how whistles can safely be blown and why employers should heed the message and not shoot the messenger.

Outside of the legal system, Government and Parliament have remained alert to the potential benefits of PIDA and have been ready to extend and consolidate them. In Parliament, the Police Reform Act 2002 was amended so police officers will soon be PIDA protected and the Employment Act 2002 was amended to ensure the new grievance regime does not undermine PIDA. In Government, the Department of Health's initial attempt to embed a responsible whistleblowing culture in the NHS appears to have fallen as much on stony as on fertile ground. Outside of Government, the most interesting regulatory initiative has come from the Financial Services Authority (see www.fsa.gov.uk/whistle).

Overseas, the PIDA legislative framework for whistleblowing has been adopted in South Africa, followed in the Netherlands and endorsed by the OECD. The European Commission's internal rules - introduced after the resignation of the Commission prompted by the whistleblowing of Paul van Buitenen - attempted to take PIDA's approach but failed to protect wider, public disclosures and so, it appears, fail to give confidence in and outside the organisation. In the USA, following the collapse of Enron and WorldCom, legislation has been passed to protect corporate whistleblowers there for the first time.

For those readers who wish to know more about the background and scope of the legislation, Public Concern at Work's website (www.pcaw.co.uk) contains a wealth of information and practical tips. It has examples and statistics from the 2500 whistleblowing concerns raised on our confidential helpline. It also contains policy papers and briefing documents; and information about the training and guidance we provide to organisations.

As well as Public Concern at Work's output, the Public Interest Disclosure Act has been considered in four monographs since it came into force in July 1999. These are John Bowers QC, Jack Mitchell & Jeremy Lewis *Whistleblowing: the new law* (Sweet & Maxwell, London, 1999); David Lewis *Whistleblowing* (Athlone Press, London 2000); Catherine Hobby *Whistleblowing and the Public Interest Disclosure Act* (Institute for Employment Rights, London 2001); and Lucy Vickers *Freedom of Speech*

and Employment (OUP, Oxford, 2002).

Our intention is that this guide to the Act should be of practical assistance to layman, manager, lawyer and policy maker alike. If you have any suggestions about how we might improve it or PIDA, these will be welcome.

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INTRODUCTION

"All organisations face the risks of things going wrong or of unknowingly harbouring malpractice. Part of the duty of identifying such a situation and taking remedial action may lie with the regulatory or funding body. But the regulator is usually in the role of detective, determining responsibility after the crime has been discovered. Encouraging a culture of openness within an organisation will help: prevention is better than cure. Yet it is striking that in the few cases where things have gone badly wrong in local public spending bodies, it has frequently been the tip-off to the press or the local Member of Parliament - sometimes anonymous, sometimes not - which has prompted the regulators into action. Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff member and the organisation."

Committee on Standards in Public Life
Second Report, Cm 3270 -1 (May 1996) p. 21

While the Public Interest Disclosure Act (cap. 23) applies across the private, public and voluntary sectors, these words from the Nolan Committee were said to best summarise the purpose of the legislation (Hansard HL 11 May 1998, Lord Borrie QC, col. 889)[1]. During the Bill's passage, Lord Nolan stated that his Committee had been persuaded of the urgent need for protection for public interest whistleblowers and he commended those behind the Bill "for so skilfully achieving the essential but delicate balance in this measure between the public interest and the interests of employers" (Hansard HL, 5 June 1998, col. 614).

[1] Parliamentary consideration of the Act can be found at
Parliamentary Debates HC, Standing Committee D, 11 March 1998;
Hansard HC, 24 April 1998, cols. 1124 -1144;
Hansard HL, 11 May 1998, cols. 888 - 904;
Hansard HL, 5 June 1998, cols. 611 - 639; and
Hansard HL, 19 June 1998, cols. 1798 - 1804.

It should be noted that where the construction of this Act may be open to more than one interpretation, these annotations draw on the statements in Parliament not only of the Minister but of the promoters of the Bill (Richard Shepherd MP and Lord Borrie QC). This is because along with Ministerial statements, those of the promoter are recognised as relevant authority for purposes of construction when permitted under the rule in Pepper v Hart (1993) 1 All ER 42, per Lord Bridge at p.49g and Lord Browne-Wilkinson at p.69e.

To achieve such a balance, the Act sets out a framework for public interest whistleblowing, which provides almost every individual in the workplace with full protection from victimisation where they raise genuine concerns about malpractice. Though the Act is part of employment legislation, no qualifying periods or age limits restrict the application of its protection (s.7).

Only a disclosure that relates to one of the broad categories of malpractice can qualify for protection under the Act. These include (s.1, s.43B) concerns about actual or apprehended breaches of civil, criminal, regulatory or administrative law; miscarriages of justice; dangers to health, safety and the environment; and the cover-up of any such malpractice. Cast so widely, and with its emphasis on the prevention of the malpractice, and with the guarantee of full compensation, the Act requires the attention of every employer in the UK. While the main issues for practitioners and their clients are set out at the end of this General Note, the key issue for employers will be to reduce any risk of creating grounds for protected public disclosures. Such steps will include (a) introducing, reviewing and refreshing a whistleblowing policy; (b) promoting the policy effectively; (c) ensuring that the workforce understands that victimisation for whistleblowing is not tolerated; and (d) making it clear that reporting malpractice to a prescribed regulator is acceptable.
The most readily available protection - described by Vickers as "virtually automatic" - under the Act (s.1, s.43C) is where a worker, who is concerned about malpractice, raises the matter within the organisation or with the person responsible for the malpractice. The intended effect of this

provision is to reassure workers that it is safe and acceptable for them to raise such concerns internally. It is thereby more likely that those in charge of the organisation (a) will be forewarned of potential malpractice, (b) will investigate it, and (c) will take such steps as are reasonable to remove any unwarranted danger. In this way, the Act aims to deter and facilitate the early detection of malpractice. Additionally, this approach furthers the principle of accountability because - should the concern subsequently prove to be well founded - the law can more readily hold people to account for their actions where it can be shown they had actual (as opposed to constructive or implied) notice of the malpractice.

As the short title (see page 12) makes clear, the Act (s.1 ss. 43E to 43H) also sets out the circumstances where the disclosure of the malpractice outside of the organisation is in the public interest and should be protected. In these provisions, the Act adopts and develops many of the signposts from the common law on whether particular information may, notwithstanding the fact it is confidential, lawfully be disclosed in the public interest. Before considering the relationship between these new statutory provisions and the common law principles, it should be noted that the common law developed in cases which focused on whether the confidential information might itself be published (usually by a newspaper) or disclosed (say, to a regulator), rather than whether the whistleblower should be protected.

In some circumstances, the Act may impose requirements additional to those in the law of confidence. For a disclosure to be protected, (a) the whistleblower must make the disclosure in good faith; (b) as to all external disclosures, he needs to show some substantive basis for his belief; and (c) as to wider public disclosures - unless there is some good reason why not - the concern should have been raised internally or with a prescribed regulator first. In other respects - such as factors to be weighed in deciding whether a public disclosure was reasonable under ss.43G and 43H - the Act requires tribunals to have regard to issues which will also be considered at common law. While relevant cases from the law of confidence may provide helpful guidance to tribunals, they are not binding. Indeed the Act only requires tribunals to consider duties of confidence where the disclosure was in breach of a duty of confidence which was owed to a third party by the employer: s.43G(3)(d). For a comprehensive analysis of the case law in this area, the reader is referred to Dr Y Cripps' monograph *The Legal Implications of Disclosure in the Public Interest*, 2nd ed. (Sweet and Maxwell, London, 1994) and, more generally, to Toulson & Phipps *Confidentiality* (Sweet & Maxwell, London, 1996).

BACKGROUND

The Act was introduced as a Private Member's Bill and promoted in the Commons by the Conservative MP Mr Richard Shepherd and in the Lords by the Labour peer Lord Borrie QC. It received strong support from the Government. The protection forms part of employment legislation and was put forward in the *Fairness at Work* White Paper (May 1998) Cm 3968 as one of the key new rights for individuals. However, it was primarily recognised as a valuable tool to promote good governance and openness in organisations, as can be seen not only from the Parliamentary debates on the Bill but from the references to it in the White Papers on Freedom of Information *Your Right to Know* (Dec. 1997) Cm 3818 and on *Modern Local Government* (July 1998) Cm 4014 and also in ministerial guidance to the NHS (*Freedom of Speech in the NHS*, letter from Health Minister to NHS Trust Chairs, 25 Sept. 1997). It was mostly on account of these wider implications for governance and their relevance across all sectors that the legislation received broad support from the Confederation of British Industry, the Institute of Directors and all key professional groups.

The legislation was closely linked to the work of the whistleblowing charity, Public Concern at Work, publishers of this text. Public Concern at Work was launched in 1993 by the author, Guy Dehn, under the guidance of, *inter alia*, Lord Borrie QC, the Rt. Hon. Lord Oliver of Aylmerton, Ross Cranston QC MP (lately the Solicitor General), Maurice Frankel (director of the Campaign for Freedom of Information) and Marlene Winfield (a health policy analyst). The present Chairman of Trustees is Michael Smyth, (litigation partner and head of public policy at Clifford Chance). Michael Brindle QC (chairman of the Commercial Bar Association) heads the Advisory Council, having succeeded Sir Ralph Gibson (a former head of the Law Commission and Appeal Court judge).

The background to the Act lies in the analysis by Public Concern at Work of recent scandals and disasters in the early 1990s. Almost every public inquiry found that workers had been aware of the danger but had either been too scared to sound the alarm or had raised the matter in the wrong way or with the wrong person.

Examples of the former included :

- the Clapham Rail crash (where the Hidden Inquiry heard that an inspector had seen the loose wiring but had said nothing because he did not want 'to rock the boat'),

- the Piper Alpha disaster (where the Cullen Inquiry concluded that "workers did not want to put their continued employment in jeopardy through raising a safety issue which might embarrass management"), and

- the collapse of BCCI (where the Bingham Inquiry found an autocratic environment where nobody dared to speak up).

Examples of where the concern was raised but not heeded included :

- the Zeebrugge Ferry tragedy (where the Sheen Inquiry found that staff had on five occasions raised concerns that ferries were sailing with their bow doors open),

- the collapse of Barings Bank (where the regulator found that a senior manager had failed to blow the whistle loudly or clearly), and

- the Arms to Iraq Inquiry (where the Scott Report found that an employee had written to the Foreign Office to tell them that munitions equipment was being produced for Iraq).

Similar messages have come out of the inquiries into the abuse of children in care (over 30 reports of concern were ignored about the serial sex abuser Frank Beck) and investigations into malpractice in the health service, one recent example being the Kennedy Inquiry into the high mortality rate amongst babies undergoing heart surgery at the Bristol Royal Infirmary.

Those behind Public Concern at Work took the view that such communication breakdowns were also likely to be a relevant issue in many of the thousands of accidents and frauds which caused death, serious injury and loss but which did not, because of their more modest scale, justify a public or judicial inquiry.

Dr Tony Wright MP initiated the idea of a legislative framework for public interest whistleblowing in a promotional Ten Minute Rule Bill in 1995. He approached Public Concern at Work and the Campaign for Freedom of Information and asked if they would prepare a draft Bill. After its publication, it received broad support from all key interest groups. As a result, fellow Labour MP, Don Touhig introduced a revised bill in 1996, after he won a place in the private members' ballot. Although that Bill was unsuccessful, it had been strongly supported in and out of Parliament. Tony Blair MP - then leader of the Opposition - pledged that a future Government of his would introduce whistleblowing legislation on these lines.

Within a few weeks of the election of Mr Blair's government in 1997, Public Concern at Work and the Campaign for Freedom of Information were asked by ministers to promote the Bill again through the private members' ballot. Conservative MP Richard Shepherd MP, a leading campaigner for openness and supporter of the earlier bills, was successful

in the ballot. He used his place to introduce the Bill which became the Public Interest Disclosure Act. The Bill was championed for the Government by Department of Trade and Industry Minister Ian McCartney MP. Following consultation on the measures - undertaken by Public Concern at Work on behalf of the Government and Mr Shepherd - the Bill passed through Parliament supported by all sides. While the legislation would never have been enacted without the support of the new Labour Government, the Act is unusual in the extent to which its scope and detail were settled outside of the machinery of government.

As is clear from the following text, a number of amendments have been made since the legislation was enacted. Prior to its commencement, the Government agreed that there would be no cap on compensation awards under PIDA (see comment on sections 4 and 8 below). More recently, Public Concern at Work and Parliament have successfully urged Government to table amendments

- extending the legislation to police officers (see comments on sections 43KA and 13 below) and

- · ensuring that the new statutory grievance regime in the Employment Act 2002 does not undermine PIDA's disclosure regime (see comments on section 43A).

OVERVIEW OF THE PROVISIONS

Malpractice

The Act applies to people at work raising genuine concerns about crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health and safety or the environment and the cover up of any of these. It applies whether or not the information is confidential and whether the malpractice is occurring in the UK or overseas.

Individuals covered

In addition to employees, it covers workers, contractors, trainees, agency staff, homeworkers, and every professional in the NHS. The usual employment law restrictions on minimum qualifying period and age do not apply to this Act. It does not cover the genuinely self-employed (other than in the NHS), volunteers, the intelligence services or the army. The new provisions extending the Act to police officers are expected to come into force in April 2004.

Internal disclosures

A disclosure made in good faith - essentially honestly - to the employer (be it a manager or director) will be protected if the whistleblower has a reasonable suspicion that the malpractice has occurred, is occurring or is likely to occur. Where a third party or person is responsible for the malpractice, this same test applies to disclosures made to him. The same test also applies where someone in a public body subject to ministerial appointment (e.g. the NHS and many 'quangos') blows the whistle direct to the sponsoring Department.

Regulatory disclosures

The Act makes special provision for disclosures to prescribed persons. These are regulators such as the Health and Safety Executive, the Inland Revenue and the Financial Services Authority. Such disclosures are protected where the whistleblower meets the tests for internal disclosures and, additionally, reasonably believes that the information and any allegation in it are substantially true.

Wider disclosures

Wider disclosures (e.g. to the police, the media, MPs, consumers and non-prescribed regulators) are protected if, in addition to the tests for regulatory disclosures, they are reasonable in all the circumstances and they are not made for personal gain.

A wider disclosure must, however, meet one of four preconditions to trigger protection. These are that either (a) the whistleblower reasonably believed he would be victimised if he had raised the matter internally or with a prescribed regulator; or (b) there was no prescribed regulator and he reasonably believed the evidence was likely to be concealed or destroyed; or (c) the concern had already been raised with the employer or a prescribed regulator; or (d) the concern was of an exceptionally serious nature.

If these provisions are met and the tribunal is satisfied that the disclosure was reasonable, the whistleblower will be protected. In deciding the reasonableness of the disclosure, the tribunal will consider all the circumstances, including the identity of the person to whom it was made, the seriousness of the concern, whether the risk or danger remains, and whether the disclosure breached a duty of confidence which the employer owed a third party. Where the concern had been raised with the employer or a prescribed regulator, the tribunal will also consider the reasonableness of their response. Finally, if the concern had been raised with the employer, the tribunal will consider whether any whistleblowing procedure

in the organisation was or should have been used.

Full protection

Where a whistleblower is victimised or dismissed in breach of the Act he can bring a claim to an employment tribunal for compensation. Awards are uncapped and based on the losses suffered. An element of aggravated damages can also be awarded. Where the whistleblower is an employee and he is sacked, he may within seven days seek interim relief so that his employment continues or is deemed to continue until the full hearing.

Confidentiality clauses

Gagging clauses in employment contracts and severance agreements are void insofar as they conflict with the Act's protection.

Secrecy offences

Where the disclosure of the information is found to be in breach of the Official Secrets Act or another secrecy offence, the whistleblower will lose the protection of the Public Interest Disclosure Act if (a) he has been convicted of the offence or (b) an employment tribunal is satisfied, effectively beyond reasonable doubt, that he committed the offence.

Whistleblowing policies

Though the Act does not require organisations to set up or promote any particular whistleblowing procedures, they are strongly recommended. The key elements of such procedures, as endorsed by the Committee on Standards in Public Life (*supra*), are

- a clear statement that malpractice is taken seriously in the organisation;
- an indication of the sorts of matters regarded as malpractice;
- respect for the confidentiality of staff raising concerns, if they wish it;
- the opportunity to raise concerns outside the line management structure;
- access to confidential advice from an independent charity;
- an indication of the proper way in which concerns may be raised outside the organisation if necessary;
- giving staff of contracting firms access to the organisation's whistleblowing policy;
- penalties for making false allegations maliciously; and
- effective promotion.

Commencement

The Act came into force on July 2nd 1999 in England, Wales and Scotland. Similar protection came into force on the 31st October 1999 in Northern Ireland.

PRACTICAL POINTS

For those who advise employers, key issues to bear in mind are:

a) employers should introduce and/or review and refresh a whistleblowing policy. For the policy to have any weight under PIDA, the employer must promote it effectively to staff;

b) employers should - whether or not as part of the policy - make it clear through the management line and across the organisation that it is safe and acceptable for workers to raise a concern they may have about malpractice;

c) where a worker raises a concern about malpractice, every effort should be made to ensure that the employer responds [and can show it has responded: s.43G(3)(e)] to the message, rather than shoots the messenger;

d) employers should recognise it is in their own interests to introduce and promote effective whistleblowing policies. This will not only help managers and staff separate the message from the messenger but will also reduce the likelihood that a public disclosure will be protected under the Act: s. 43G(3)(f);

e) where a protected disclosure has been made, employers should take all reasonable steps to try and ensure that no colleague, manager or other person under its control victimises the whistleblower: s.2;

f) the implications of the Act on confidentiality clauses [s.43J] in severance agreements and employment contracts must be borne in mind by advisers and their use by employers should be carefully reviewed;

g) employers should consider whether their arrangements with key contractors should be revised to provide that those who work for key contractors have access to the employer's whistleblowing policy insofar as the concern affects it;

h) disclosure to a prescribed regulator, though requiring a higher level of proof than internal whistleblowing, is protected [s.43F] *whether or not* the concern had first been raised internally. It is important to note that where

the worker reasonably believes he will be victimised if he goes to a prescribed regulator, he will be entitled to protection if he makes a wider, public disclosure: s.43G (2)(a). Accordingly employers should make it clear that reporting concerns to a prescribed regulator is acceptable;

i) any attempt to suppress evidence of malpractice is now particularly inadvisable since (a) a reasonable suspicion of a 'cover-up' is itself a basis for a protected disclosure: s.43B(1)(f); (b) a disclosure to the media is more likely to be protected: s.43G(2)(b); and (c) there is less scope for keeping such matters private by a gagging clause: s.43J;

j) if the employer is a public body where at least one of its Board members is a ministerial appointee, it should have a policy which authorises and facilitates whistleblowing direct to the sponsoring department: s.43E;

k) depending on the employer's particular business, it may well be advisable that - at a senior level - it reviews its relationship with any regulator prescribed in its key areas of activity; and

l) Board members and/or senior managers designated to handle whistleblowing issues should receive appropriate training.

For individuals and those who advise them, key issues to bear in mind are:

a) while the Act covers most of the workforce there are a few notable exceptions; (see overview above);

b) if the worker is seeking to engineer a claim or is seeking to misuse the Act to obtain or improve a settlement, it is unlikely he will satisfy the good faith test. If so, his disclosure will not be protected;

c) if the worker seeks advice about how to raise a concern, it is suggested that making a disclosure under s.43C should always be considered as the initial and preferred step as the Act's protection most readily applies here;

d) the worker is likely to face additional problems with causation [ss. 2, 5 and 6] if he blows the whistle anonymously. This is because for a worker to win protection the tribunal must be satisfied that the worker was victimised by the employer (and hence the employer knew) because he had blown the whistle;

e) if the worker is to disclose information externally because of fear of victimisation or fear of a cover-up or because of the seriousness of the matter, it is suggested that disclosures to ministers [s.43E] and to prescribed regulators [s.43F] are considered first, even though a wider

disclosure may also be protected [ss. 43G(2) and 43H];

f) if the worker is to make a public disclosure of information [s.43G or s.43H], there are two rules of thumb: (a) a disclosure to a body whose duty it is to investigate the malpractice is likely to be more readily protected; and (b) where the public interest will be equally protected by disclosures to two bodies, the disclosure which causes less damage to the employer is likely to be more readily protected;

g) as to media disclosures [ss.43G and 43H], these are more likely to be protected (a) where the information was not confidential; (b) where, if it was confidential, there is or was a cover-up and there is no prescribed regulator; (c) where, if it was confidential, less public disclosures had failed to secure a reasonable response; or (d) where the matter was exceptionally serious and the client can show the media was a reasonable recipient of the disclosure;

h) if the worker suffers victimisation short of dismissal, he is also protected [s.2]. Unless the detriment or damage is considerable, compensation awards under this head are likely to be modest and, accordingly, it is suggested the main object should be to stop the victimisation (see Note to s. 4);

i) if the worker is an employee and is dismissed, he can within the first seven days apply for an interim order [s.9] and this may strengthen his bargaining position; and

j) where a worker has a shopping list of concerns, an employment tribunal may take this as an indication that there is more to the case than public interest whistleblowing.

Public Interest Disclosure Act 1998

Chapter 23

An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.

[2nd July 1998]

Section 1 PIDA *Protected disclosures*

1. - After Part 4 of the Employment Rights Act 1996 (in this Act

referred to as "the 1996 Act") there is inserted-

PART 4A

PROTECTED DISCLOSURES

Section 43A ERA *Meaning of protected disclosure*

43A. - In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

EXPLANATORY NOTE

This section makes the whistleblowing law part of the UK's employment legislation. It does so by inserting the main provisions of the Public Interest Disclosure Act (PIDA) into a new part, Part 4A, of the Employment Rights Act 1996. The first section of Part 4A explains that for the whistleblowing protection to apply (a) the information must concern some wrongdoing (s.43B) and (b) the disclosure must be made in one of more than six ways (s.43C-43H). These key issues are considered in the following pages.

Because PIDA is part of employment law, many of the legal and procedural issues that will be relevant for tribunal claims are to be found in the main body of employment law. While in these annotations we try to summarise how these inter-relate with this whistleblower protection, if any of these consequential issues is not clear you should check a standard employment law text or seek advice from a lawyer or advice agency.

Employment disputes and whistleblowing
Employment legislation sets the framework in which the rights of an employee who believes he has been wronged can be determined and independently reviewed. Consideration of these rights is normally triggered when an employee seeks remedy or redress for harm or damage he believes he has personally suffered or been caused by his employer. Accordingly where an employee is harmed or damaged because he has blown the whistle, he has a claim under this legislation which he can bring in an employment tribunal.

It may be helpful to note that whistleblowing itself does not justify a legal claim by an employee - there can be no PIDA claim until and unless the employer has victimised the employee because he made a protected disclosure. So in considering PIDA it may be worth bearing in mind the distinction that while a grievance or tribunal claim seeks to remedy or redress some harm or damage the employee has *personally* suffered,

whistleblowing is the means by which a worker can alert (or put on notice) the employer or authorities about a wider danger or risk primarily so that it can assess and take what action is appropriate to remove or reduce the danger or risk.

This distinction is also apparent in many of the summaries of PIDA cases cited in and accompanying this text. The point was also considered during the passage of the Public Interest Disclosure Act - Lord Borrie (Hansard HL 5 June 1998, col. 627) - and is also recognised in the ACAS Code of Practice on Disciplinary and Grievance Procedures (September 2000). See further the comments on pages 20 and 21 below.

The Employment Act 2002
This distinction was confirmed and clarified in Parliament when it addressed how these whistleblowing provisions should relate to the statutory dispute resolution provisions in Schedule 2, Part 2 of the Employment Act 2002

These new provisions - which are expected to come into force in spring 2004 - set minimum standards for grievance procedures which will address whether the grievance should be in writing, with whom it must be raised and how and by when the employer should respond. The 2002 Act provides that an employee who does not meet these prescriptions may be barred from bringing a claim based on a grievance he has not previously raised with the employer, and if not will have any compensatory award he receives reduced by between 10-50%.

Parliament and Government made it clear that they did not want these new provisions to undermine the Public Interest Disclosure Act by deterring employees from raising whistleblowing concerns with their managers, the authorities or more generally. Parliamentary consideration of the issues can be found at Grand Committee in Hansard HL 11 April 2002, from col. CWH461 and at Report Stage in Hansard HL 11 June 2002, col. 186-189. As a result, the Bill was amended and the Employment Act 2002 now provides in Schedule 2 that -

15 (1) The procedures set out in Part 2 are only applicable to matters raised by an employee with his employer as a grievance.

(2) Accordingly, those procedures are only applicable to the kind of disclosure dealt with in Part 4A of the Employment Rights Act 1996 (protected disclosures of information) if information is disclosed by an employee to his employer in circumstances where -

(a) the information relates to a matter which the employee could raise as a grievance with his employer, and

(b) it is the intention of the employee that the disclosure should

constitute the raising of the matter with his employer as a grievance.

The intended effect is that in those cases where there may be some overlap between a whistleblowing concern and a grievance - such as on health and safety where the risk may be wholly or exclusively to the employee himself - the procedural requirements of the dispute resolution regime will only apply where the employee intended to raise that issue as a grievance. If in such a case there is any doubt about the employee's intention, the employer would be well advised to ask him what outcome he is seeking.

It is important to note that where an employee has made a protected disclosure and he believes he has suffered a detriment as a result, he should notify his employer and seek its assistance in ending the detriment. If this request is unsuccessful, the Employment Act 2002 provides strong reasons why the employee should consider lodging the issue as a formal grievance with his employer without undue delay.

While Parliament has clarified the relationship between the whistleblowing and forthcoming grievance regimes, it should be stressed that as the 2002 Act does not itself define a grievance this is to be addressed, after consultation, in regulations. While those regulations will be drafted in the shadow of paragraph 15, their detail may yet be relevant to some whistleblowing issues. Further information will, when available, be posted at www.pcaw.co.uk.

Section 43B ERA *Disclosures qualifying for protection*

43B. - (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-

- **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
- **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
- **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
- **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
- **(e) that the environment has been, is being or is likely to be damaged, or**
- **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is**

being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

EXPLANATORY NOTE

Section 43B sets out the information, which is subject to protection, provided that the particular disclosure meets the other conditions of the Act. It covers a wide class of information, applying to most malpractice and it does not matter whether the person to whom the disclosure is made is already aware of the information: s.43L(3).

It is important to note that these provisions apply to all such information, whether or not it is confidential. However this does not mean that trade secrets can be disclosed lightly, as is clear from Aspinall v MSI Mech Forge. There the Employment Appeal Tribunal (EAT) held that, while a disclosure about health and safety had been protected, the employer's consequent inquiry into a perceived breach of its highly secret manufacturing process had not caused Aspinall's resignation.

Subs. (1)
The degree of belief - the requirement that the worker has a 'reasonable belief' means that the belief need not be correct but only that the worker held the belief and it was reasonable for him to do so. Accordingly, it can be a qualifying disclosure if the worker reasonably but mistakenly believed that a specified malpractice was occurring: see Darnton v University of Surrey. There the EAT observed that a qualifying disclosure might include what a worker had seen or heard or what had been reported to him by others. It also held that an assessment of the factual accuracy of the concern would be no more than an important tool in determining whether the belief was reasonable. Equally, if some malpractice were occurring

which did not involve a breach of a legal obligation, the disclosure would still qualify if the worker reasonably believed it was such a breach. The test in the Act is lower than a straight "reasonable belief" that the malpractice is occurring - due to the phrase "tends to show" - and the test is more akin to one of reasonable suspicion. This approach was taken in the Employment Tribunal [ET] decisions in Brown v Welsh Refugee Council and Leonard v Serviceteam where the concerns tended to show the possibility of fraud and corruption respectively. A similar approach was taken in Frost v Boyes where the ET held that reporting on rumours came within this section. However the worker's belief should still have a reasonable basis, see Donovan v St John's Ambulance where the Applicant had worked himself into such a state of high suspicion that his concern had no reasonable basis. See also Chubb v Care First Partnership where a disclosure was held to be qualifying even though it had been exaggerated.

Malpractice - for the information to come within the definition of a qualifying disclosure, it matters not whether the malpractice was past, present or prospective. Nor does it matter whether the concern related to particular conduct or to a state of affairs.

It will be noted that there is scope for considerable overlap between the six categories and that most examples of what will normally be considered to be malpractice are covered. As examples of the limits of this approach, it should be noted that ETs have held that the following concerns are not included: a nun visiting psychiatric patients while wearing a habit (Bright v Harrow & Hillingdon NHS Trust); a decision not to fill a vacant post (Douglas v Birmingham CC); the routine concerns of an accountant which arise in the performance of day to day duties (Bill v Morgan and Mustapha v ProTX).

As to the scope of several of the categories of information, the following points should be noted:

Failure to comply with a legal obligation includes a breach of any statutory requirement; contractual obligation; common law obligation (e.g. negligence, nuisance, defamation); or an administrative law requirement. Examples from ETs include a breach of a duty of care owed to a resident in a care home (Chubb v First Care Partnership) and a breach of consumer rights (Staples v Royal Sun Alliance). However, a concern about a failure to comply with an accountant's professional obligation in itself was held not to qualify (Butcher v Salvage Association). As to government and public authorities, this subsection would include an official's reasonable belief that a decision of the authority could be overturned at judicial review (for example because of a procedural impropriety). It is submitted it would also cover the concern of a public servant that he had been asked to act in a way which breached a provision of the Civil Service Code (e.g. the

requirement to act with "integrity, impartiality and honesty"). The Government confirmed by letter to Richard Shepherd MP that compliance with such codes is a contractual requirement binding on public servants.

Private concerns - There has been some comment about the decision in Parkins v. Sodexho Ltd where the EAT held that there had been an error in law when, on considering a claim for interim relief, the tribunal had said that a disclosure about a breach of the applicant's own employment contract did not come within s.43B(1)(b). Parkins, who had three months service, had claimed he had been dismissed for raising concerns about health and safety and also about his own employment contract. He lost his claim for interim relief and was ordered to pay £500 in costs as the claim was deemed frivolous and vexatious. The EAT construed section 43B(1)(b) in the broad sense in which it was drafted and allowed the appeal and remitted the application for interim relief to a fresh tribunal.

The effect is that dismissing or victimising an employee because he has raised a concern in good faith about his own employment contract can be the basis of a PIDA claim. Bearing in mind that the existing protection in section 104 ERA (against reprisals for asserting in good faith a statutory right) is rarely used and uncontroversial, the extension through this EAT decision of this same principle to non-statutory rights should be kept in perspective. It can only be applied where someone is victimised *because* he has questioned the legality of his employment. Where the actual or alleged breach he is concerned about continues, and there is no additional reprisal in response to the employee's question or challenge, then a PIDA claim cannot successfully be made. While some commentators have questioned the application of PIDA to what may essentially be a private - rather than a public - concern, others have noted that there is a legitimate public interest in employees being able to safely question the legality of their own employment arrangements in the workplace, rather than wait to litigate the issue when the employment relationship has ended.

Miscarriage of justice would include matters likely to lead to a wrongful conviction, such as reliance on unsound forensic techniques, failure to disclose evidence to the defence, or perjury (though this would come both under this heading and that covering crimes). As to cases at common law, reference may be made to the case of Lion Laboratories v Evans [1985] QB 526 on suspect breathalyser equipment. The potential application of this provision will be significantly greater once section 43KA of the ERA (inserted by the Police Reform Act 2002), bringing police officers within PIDA, has come into force. At the time of writing this is expected to be April 2004.

Health and safety risks apply whether they threaten a worker or any individual. As such, this provision includes risks to patients in a hospital,

passengers on a train, children in care, consumers of electrical products or customers in a restaurant. It should be noted that the Act leaves in place the existing provisions in the ERA (ss.44 and 100) on victimisation for health and safety matters.

'*Cover ups*' - this category provides that qualifying disclosures include information not only about the substantive malpractice, but information which tends to show the deliberate concealment of information about the malpractice. A concern that a care plan had been altered as to the drugs dispensed in an old people's home came under this head, see the ET decision in Chubb v First Care Partnership.

Subs. (2)
The Act applies regardless of the geographical location of the malpractice and subsection (1) applies regardless of whether the offence or breach of a legal obligation arises under UK law or the applicable law of another country. See Bhatia v Sterlite Industries where the disclosures concerned breaches of Australian and US listing rules. Additionally it should be noted that, as explained in the Note to s.12 below, the removal of s.196 of the Employment Rights Act 1996 means that issues of jurisdiction are now governed by the principles of private international law.

Subs. (3)
Where the disclosure of the information is itself a crime (e.g. it is held to breach the Official Secrets Act), it does not qualify. First it should be noted that raising such a concern formally within Whitehall or with the Civil Service Commissioners would not constitute a breach of (or disclosure under) the Official Secrets Act and so would qualify for protection in any event.

Where the disclosure was unauthorised and criminal proceedings were in progress or anticipated, it is expected that an employment tribunal would postpone any hearing under this Act. If the worker were acquitted at trial, he would then be able to invoke PIDA's protection. Where no such proceedings were in prospect, the standard of proof the tribunal should apply is effectively a criminal one. This was the view of Lord Nolan (Hansard HL 5 June 1998, col. 614) and Lord Borrie QC (*ibid*., cols. 616 / 7), both of whom based their comments on the decision in In Re A Solicitor [1992] 2 AllER 335. The Government spokesman, Lord Haskell, (*ibid*., col. 616), while pointing out that the effects of such a finding would not be the same as in a criminal court, stated that a 'high standard of proof' would be required. Reference may also be made to Hornal v Neuberger (1957) 1QB 76.

Subs. (4)
This provision means that if a legal adviser cannot be compelled in court to

give evidence about a matter, neither he nor the staff in his office can make a protected disclosure about it. Naturally, this does not affect the lawyer's ability to make disclosures on the instructions of a worker who is his client. This provision needs to be considered along with s.43D below.

For an analysis of the effect of this provision where concerns about wrongdoing by a law firm or a client are raised by a lawyer in private practice with a senior partner or with the client itself see www.pcaw.co.uk/policy_pub/legal_professional_privilege.html

DEFINITIONS
"disclosure" : s.43L(3)
"worker" : s.43K(1)

Section 43C ERA *Disclosure to employer or other responsible person*

43C. - (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith-

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to-

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

EXPLANATORY NOTE

This section is, in the words of Lord Borrie, "absolutely at the heart" of the Act (Hansard HL, 19 June 1998 cols. 1801/2) as it emphasises the vital role of those who are in law accountable for the conduct or practice in question. It does this by helping ensure that they are made aware of the concern, so they can investigate it. It sets out the wide circumstances in which a worker is protected if he raises the concern with his employer or the person responsible. No additional evidential test applies in this section beyond that in s.43B, that the worker 'reasonably believes the information tends to show' the malpractice.

Subs. (1)
Good faith -- this requirement also appears in ss.43E to 43H. A disclosure is made in good faith if it is made honestly, even where it is made negligently or without due care. This interpretation was recently endorsed by the Government in its formal response to the Kennedy Inquiry into children's heart surgery at the Bristol Royal Infirmary (see Hansard HC, 17 January 2002, col. 508). However, subsequently repeating a grossly overstated concern without regard to assurances that the concern was misconceived has been held by an ET as not in good faith, see PC v CCC.

Where the disclosure is demonstrably made for an ulterior and undesirable purpose (e.g. something approaching blackmail), it is submitted it would not be made in good faith. This approach has been taken in several ETs: Aziz v Muskett & Tottenham Legal Advice Centre where the disclosure made as a means to exert pressure for a pay rise; Hassan v YAFA where the concern was known to be untrue and disclosure was for an ulterior motive; and in Gulwell v Consignia where the purpose was to secure the Applicant's own way by bullying tactics. See also the comments in the EAT decision in Darnton v University of Surrey.

It should be pointed out that the issue of 'good faith' also arises in discrimination legislation and in the provisions in s.104 ERA on the assertion of statutory rights. As to good faith generally, see Central Estates v Woolgar (1971) 3 AllER 647 and Medforth v Blake (2000) Ch 86 where the Vice Chancellor said "In my judgement the breach of a duty of good faith should in this area as in all others require some dishonesty or improper motive, some element of bad faith to be established".

Subs. (1)(a)
To his employer - this would, it is submitted, include a disclosure to any person senior to the worker, who has been expressly or implicitly authorised by the employer as having management responsibility over the worker. It would not cover a disclosure to a colleague. As to whistleblowing procedures, see the Note on subs. (2) below.

Subs. (1)(b)
This subsection protects, for instance, a nurse employed by an agency who, in the care home where she works, raises a concern about malpractice. It would also protect a worker in an auditing firm who raises a concern with the client. It would also cover someone who works for a local authority highway contractor raising a concern with the local authority that the performance of the contract exposes the authority to negligence claims from injured pedestrians. This was the approach taken in Azzaoui v Apcoa Parking where serious concerns about the way parking tickets were issued by a contractor were raised with the local authority.

It is important to note that while a disclosure under subsection 1(b) is protected, (a) it does not amount to raising the matter with the employer for the purposes of a subsequent wider disclosure (under s.43G); (b) this Act does not place any obligation on the person responsible to respond to the concern; and (c) if the worker is victimised for making a disclosure under this subsection, any claim he may have is against his employer and not against the person to whom he made this disclosure.

Subs. (2)
Where the organisation has a whistleblowing procedure which authorises raising the concern with someone other than the employer (for example authorising a disclosure to a health and safety representative, a union official, its parent company, a retired non-executive director, its lawyers or external auditors, or to a commercial reporting hotline) a disclosure to that person will be treated as if it were a disclosure to the employer. See Brothers of Charity Services Merseyside v Eleady-Cole (EAT) where Mr Eleady-Cole reported misuse of drugs and the internet at his workplace to a confidential telephone support service (commonly known as an Employee Assistance Programme). This service was offered to employees of the Brothers by an independent agency and it was a term of the agreement that the agency would report to the Brothers any allegation of criminal activity, while preserving the confidentiality or anonymity of the informant. The EAT held that such a procedure was an authorised one within PIDA and that "if despite the attempts to maintain confidentiality, the employer subsequently became aware which employee had been responsible for the matters coming to light and that employee was then immediately dismissed for that reason, we have little doubt that such a dismissal [would be] contrary to section 103A". See also Chubb v Care First Partnership where an ET held that a disclosure to local authority inspectors about a care home was protected as the employer's policy statement had authorised such communications.

It should be noted that the reasonableness of the response to the concern is relevant in determining whether a subsequent wider disclosure may be protected: s.43G(3)(e). While the Act does not require employers to set up whistleblowing procedures, a worker who makes a wider, public disclosure is more likely to be protected if there was no such procedure, or he was unaware of it, or it was not reasonable to expect him to use it: s.43G(3)(f). For key components of such whistleblowing policies see the comment on p. 9.

Grievances and whistleblowing - As indicated in the comments on the Employment Act 2002 on p. 13 there can be some confusion between grievances and whistleblowing. Essentially whistleblowing is the raising of a concern about a danger or risk so that it may be investigated, while a grievance seeks redress for a wrong done to oneself. The nature and

relevance of this difference is also apparent from the Statutory Code of Practice on Disciplinary and Grievance Procedures produced by ACAS (where paragraph 47 confirms that whistleblowing procedures should not be confused with grievance procedures).

This distinction is also apparent from Chambers' dictionary which defines

Grievance	"cause or source of grief; ground of complaint; condition felt to be oppressive or wrongful; distress; burden; hardship"
Whistleblowing	"giving information (usually to the authorities) about illegal or underhand practices".

DEFINITIONS
"disclosure" : s.43L(3)
"employer" : s.43K(2)
"qualifying disclosure" : s.43B
"relevant failure" : s.43B(5)
"worker" : s.43K(1)

Section 43D ERA *Disclosure to legal adviser*

43D. - A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

EXPLANATORY NOTE

This provision enables a worker to seek legal advice about a concern and to be fully protected in doing so. It should be noted that this is the only disclosure within the Act which does not have to be made in good faith to be protected. This signals that someone with a concern who is intending to disclose it solely for some ulterior motive or leverage is safely able to obtain advice that such conduct jeopardises the protection in PIDA.

The lawyer, in turn, cannot of his own volition make a protected disclosure of the information: s.43B(4). Of course, he can make such disclosure as the client instructs him to make on his behalf. As such, the disclosure will be judged as made by the client and it will only be protected if it is made in accordance with the other provisions of this Act. In terms of helping the client to raise the matter internally with the employer, the experience of Public Concern at Work is that this is best done by the client himself, rather than by the lawyer as this may unnecessarily suggest an adversarial

stance. If the client does need some reassurance or backing, this may better be achieved by his mentioning that he has sought, and is following, legal advice.

While it is expected that, where a union is recognised in a workplace, disclosures to trade union officials will be protected under the whistleblowing procedures in s.43C(2), the implications of this provision (and others) for general disclosures to union officials was considered at some length in the House of Lords at the Committee and subsequent stages. Lord Borrie did make the point (Hansard HL 5 June 1998, col. 624) that a disclosure by a union member for the purpose of obtaining legal advice from the union solicitor will, in any event, be protected under this section.

DEFINITIONS
"disclosure" : s.43L(3)
"qualifying disclosure" : s.43B

Section 43E ERA *Disclosure to Minister of the Crown*

43E. - A qualifying disclosure is made in accordance with this section if-

(a) the worker's employer is-

(i) an individual appointed under any enactment [including any enactment comprised in, or an instrument made under, an Act of the Scottish Parliament] by a Minister of the Crown [or a member of the Scottish Executive], or

(ii) a body any of whose members are so appointed, and

(b) the disclosure is made in good faith to a Minister of the Crown [or a member of the Scottish Executive].

EXPLANATORY NOTE

Section 43E provides that workers in Government appointed bodies are protected if they report their concerns in good faith to the sponsoring Department rather than to their employer. Legally a disclosure to a Department is what this section refers to as a disclosure to a Minister. This section provides a statutory framework for the recommendations that the *Committee on Standards in Public Life* made in its First Report (May, 1985) Cm 2850-I pp 60 and 91-92 and Second Report (May, 1996) p.22.

The words in square brackets - effective as from 27th July 2000 - provide that workers in government bodies appointed under an Act of the Scottish Parliament are also able to disclose matters falling under this Act to a

member of the Scottish Executive (SI 2000 No. 2040).

This section applies to bodies where the employer is an individual appointed under statute by a Minister (e.g. the utility regulators), or where one or more of the members of the body are appointed by a Minister (e.g. NHS Trusts, tribunals and non-departmental public bodies). While no requirement is placed on the Minister to respond to the concern, it does strengthen the accountability of Ministers for the conduct of bodies for which they are responsible. It is also reasonable to expect that they will ensure the matter is investigated and any malpractice corrected.

As under section 43C(1)(b), a disclosure under this section is not treated as one to the employer for the purposes of any subsequent, wider disclosure (s.43G). It is also important to note that if the worker is victimised for making a disclosure under this subsection, any claim he may have is against his employer and not against the Minister to whom he made the disclosure.

Subs. 1(b)
Good faith : see note on s.43C(1)

DEFINITIONS
"disclosure" : s.43L(3)
"employer" : s.43K(2)
"qualifying disclosure" : s.43B
"worker" : s.43K(1)

Section 43F ERA *Disclosure to prescribed person*

43F. - (1) A qualifying disclosure is made in accordance with this section if the worker-

(a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes-

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

EXPLANATORY NOTE

Section 43F protects a worker who makes a qualifying disclosure to a person prescribed by the Secretary of State for Trade and Industry by Order (SI 1999/1549). There is a separate list for Northern Ireland (SI 1998/1763 (NI 17).

Where a regulator has been prescribed, it is important to note that there is no requirement that (a) the particular disclosure was reasonable; (b) the malpractice was serious; nor (c) the worker should have first raised the matter internally. However, the worker must meet a higher evidential burden than in s.43C, which protects internal whistleblowing - see note on subs. (1)(b)(ii) below - and the disclosure must be made in good faith.

Decisions on disclosures under this section suggest that employment tribunals find the facts more straight forward than those in many of the cases under section 43C - see for example Bailey v Arrow Consultants, Robinson v Hartland Forest Golf Club and Vaux & McAuley v Bickerton. See also the EAT decision in Hossack v Kettering Borough Council and that of the Court of Session in Miklaszewicz v Stolt Offshore.

The following are examples of some of the key regulators prescribed under the Act:

1. *Health & Safety risks*: HSE and relevant local authority
2. *Utilities/Sectors*: OFTEL, OFGEM, OFWAT, Rail Regulator, Charity Commission
3. *Financial Services*: Financial Services Authority, HM Treasury (insurance), Occupational Pensions Regulatory Authority, Serious Fraud Office
4. *Tax irregularities*: Inland Revenue, Customs & Excise
5. *Public finance*: National Audit Office, Audit Commission, Audit Scotland
6. *Company law*: Department of Trade & Industry
7. *Competition & consumer issues*: Office of Fair Trading and relevant local authority
8. *Environmental issues*: Environment Agency

A complete list of the prescribed persons for England, Scotland and Wales and for Northern Ireland is available at www.pcaw.co.uk.

The preferential position this section affords to disclosures made to prescribed regulators over other external disclosures reflects the position under the law of confidence. For example, in In Re A Company (1989) 3WLR 265, Mr Justice Scott, as he then was, said:

"It may be the case that the information proposed to be given, the allegations to be made by the defendant to FIMBRA (Commentator's note: whose functions are now performed by the Financial Services Authority), and for that matter by the defendant to the Inland Revenue, are allegations made out of malice and based upon fiction or invention. But if that is so, then I ask myself what harm will be done. FIMBRA may decide that the allegations are not worth investigating. In that case no harm will have been done. Or FIMBRA may decide that an investigation is necessary. In that case, if the allegations turn out to be baseless, nothing will follow from the investigation. And if harm is caused by the investigation itself, it is harm implicit in the regulatory role of FIMBRA."

It should be noted, however, that not all regulators are prescribed and that disclosures to such other regulators (and incidentally those to the police) will need to satisfy the provisions in ss.43G or 43H if they are to be protected.

An amendment was made to this clause in Committee (Parliamentary Debates HC, Standing Committee D, 11 March 1998, col. 8) for the purposes of enabling classes of persons to be prescribed so as to ensure the possibility that health and safety representatives might be prescribed, should it transpire that employers were not including them within internal reporting procedures. Other classes of persons capable of being prescribed under this section could include certain trade union officials (Hansard HL, 5 June 1998, col. 623).

If it is not clear whether the matter should be raised internally or with a prescribed person, one practical approach to bear in mind will be for the worker or his adviser to contact the particular regulator informally first. They can then check if it is prescribed and, without initially identifying the employer, discuss the nature of the concern and explore what action the regulator considers appropriate. If the matter is to be pursued internally, the worker may wish to point out that he has spoken to the regulator without identifying his employer.

Subs. (1)(a)
As to "*good faith*", see note on s.43C(1), *supra*.

Subs. (1)(b)(i)
The worker must reasonably believe that the malpractice falls within the matters prescribed for that regulator.

Subs. (1)(b)(ii)
To be protected under this section, the worker must reasonably believe "that the information disclosed, and any allegation in it, are substantially true". While this is a higher evidential burden than that required for raising

the concern internally (under s.43C), provided the belief was reasonable the worker will not lose protection if his belief was mistaken - see Holden v Connex (where the ET rejected Connex's claim that Holden had not met this test, in part because it had failed to produce evidence that the concerns were not true and also because it had failed to respond when Holden had raised the concern internally). The distinction between the evidential test under s.43C and under this section was considered by the EAT in Darnton v University of Surrey. It should also be noted that this subsection refers to a reasonable belief that any allegation made is also substantially true. This means that it will be advisable for any worker making a disclosure other than to his employer or a minister, to avoid exaggerating the nature of any wrongdoing and to let the facts speak for themselves.
It should be noted that if the concern had been raised internally beforehand, the reasonableness of the worker's belief would be expected to take account of any response he then received.

DEFINITIONS
"disclosure" : s.43L(3)
"qualifying disclosure" : s.43B
"relevant failure" : s.43B(5)
"worker" : s.43K(1)

Section 43G ERA *Disclosure in other cases*

43G. - (1) A qualifying disclosure is made in accordance with this section if-

(a) the worker makes the disclosure in good faith,

(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are-

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information - (i) to his employer, or (ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to-

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

EXPLANATORY NOTE

This section sets out the circumstances in which other disclosures, including those to the media, may be protected. Such disclosures must meet three tests to be protected. The first of these (s.43G(1)(a)-(c)) deals with the evidence and motive of the whistleblower. The second (s.43G(2)) sets out three preconditions, one of which must be met if the disclosure is to be subject to protection. Finally, to be protected the disclosure must be reasonable in all the circumstances (s.43G(1)(e) and (3)).

Subs. (1)(a)
Good faith - See comment on subsection 43C(1), *supra*.

Subs. (1)(b)
reasonable belief - See comment on ss.43F and 43F(1)(b)(ii), supra. If the concern had been raised internally beforehand or with a prescribed

regulator, the reasonableness of the worker's belief would be assessed having regard to any response he had received from management or the prescribed regulator.

Subs. (1)(c)
personal gain - This provision - that the whistleblower will not be protected if the purpose of the disclosure was personal gain - is aimed primarily at cheque book journalism. It covers not only payments of money, but benefits in kind. It would also catch a situation where the benefit did not go directly to the worker but to a member of his family, provided that its purpose was personal gain. However, this provision does not cover any reward payable by or under any enactment (s.43L(2)), such as a payment made by Customs and Excise.

Subs. (1)(e)
In all the circumstances of the case - In determining whether the disclosure was reasonable in all the circumstances, the tribunal will have regard to the factors in s.43G (3).

Subs. (2)
The presumption is that, before any wider disclosure is protected, the concern will have been raised with the employer or with a prescribed regulator. This is reflected in three preconditions in this subsection, one of which must be met if a public disclosure under this section can be protected. These are that the worker reasonably believes he will be victimised; or that he reasonably believes there is likely to be a cover-up; or that the matter had previously been raised internally or with a prescribed regulator.

Subs. (2)(a)
The first precondition is that the worker reasonably believes he will be victimised were he to raise the matter internally or with a prescribed regulator. See for example Everett v Miyano Care Services where the Applicant stated she had not raised her concern internally because she had not thought of telling her employers and that, had she thought of it, she would have done so as they had always been approachable. The belief must exist at the time he makes the external disclosure, it must be objectively reasonable, and it must be that he *will* be victimised (note, by contrast, in subs. 2(b) that the test is reasonable belief that there is *likely* to be a cover-up).

To reduce the risk that this precondition is easily satisfied, it is suggested that organisations should (a) establish, deliver and promote a whistleblowing procedure; (b) ensure that everyone knows victimisation is unacceptable; and (c) make it clear that going to a prescribed regulator is acceptable. It is also suggested that organisations review how they have

handled any such matter in the recent past. This is because a worker is more likely to be able to satisfy this precondition if he can show, by reference to a previous whistleblowing incident, that the employer's conduct could reasonably be seen as victimisation.
For those advising workers before any disclosure is made, it is important to note that - even though reasonable fear of victimisation may justify the protection of a wider disclosure - reporting to a prescribed regulator in such circumstances more readily secures protection for the client. However, where the worker has good reason to believe that, as a result of the unacceptably close relationship between the prescribed regulator and the employer, he will be victimised, a wider disclosure will be protected provided it is reasonable in the circumstances.

Subs. (2)(b)
This precondition deals with circumstances where the worker reasonably believes a cover-up of the malpractice is likely to occur.

It can only be satisfied where there is no appropriate regulator prescribed under s.43F. Accordingly where there is a prescribed regulator, the Act suggests that a concern about a cover-up be raised with that regulator before any wider disclosure might be capable of protection (see subs. 2(c), below) unless the matter is exceptionally serious (s.43H).

Subs. (2)(c)
This provides that wider disclosures may be protected where the matter has previously been raised internally or with a prescribed regulator. However, for such disclosures to be protected the tribunal must have particular regard to the reasonableness of the response of the employer or regulator (s.43G(3)(e)). It should be noted that the disclosure does not have to be of exactly the same information, provided it is substantially the same. In ALM Medical Services v Bladon the EAT - though overturned on other grounds - urged tribunals "to adopt a common-sense broad approach" to this question.

Subs (2)(c)(i)
Where the concern had previously been raised with the employer, in determining whether the particular disclosure should be protected, the tribunal must have particular regard (s.43G(3)(f)) to whether the worker had complied with any whistleblowing procedure the organisation had.

Subs. (3)
In deciding whether the disclosure was reasonable in all the circumstances, the tribunal should have particular regard to the issues set out in this subsection. Where the disclosure was of non-confidential information, it is submitted that this reasonableness test should be more readily satisfied. (Reference may be made to the Human Rights Act 1998 which, in the

context of freedom of expression, distinguishes confidential from non-confidential information).

Where the information was confidential, it may be helpful to bear in mind the way the courts have weighed the same issue under the law of confidence. However, while the Act does not require that these are followed, it is submitted that tribunals should not apply this reasonableness test more restrictively than the courts permit disclosures of confidential information. This is because to be protected under this Act, the worker must meet certain criteria (good faith; some reliable evidence; and one of the preconditions in subs. (2) above) which do not apply to the decisions at common law. If the tribunal is satisfied that these criteria are met, the Act does no more than require the tribunal to consider whether the disclosure was reasonable in all the circumstances. The only explicit reference in the Act to any confidentiality in the information is where the confidences of a third party have been breached: s.43G(3)(d).

Subs. (3)(a)
The range of people to whom such a disclosure might be made is potentially vast. It could include the police, a professional body, a non-prescribed regulator, a union official, an MP, the relatives of a patient at risk, a contracting party whose rights were being flouted, shareholders or the media.

In ALM Medical Services v Bladon the EAT - though overturned on other grounds - accepted that a disclosure of concerns about the care of residents to the Social Services Inspectorate (which was not prescribed under s.43F), made nine days after the matter had been raised internally, was reasonable.

As to the identity of the recipient, in Staples v Royal Sun Alliance an ET held it was reasonable to tell a customer of a breach in consumer law. As to media disclosures, tribunals have decided three cases, all involving the NHS. In Bright v Harrow & Hillingdon NHS Trust a disclosure to the press of a concern, that a nun who saw psychiatric patients while wearing her habit was a safety risk, was held to be unreasonable, the Applicant having asserted that it was for her, not her employer, to decide what was in the public interest. In Kay v Northumberland Healthcare NHS Trust a media disclosure was held reasonable where the Applicant wrote a satirical open letter to the Prime Minister in his local press about the shortage of beds for elderly patients. In Mounsey v Bradford NHS Trust it was held that it was reasonable for the Applicant to go on television to rebut criticisms of a colleague which she considered to be unfair.

On the basis that the identity of the recipient of the disclosure may be in contention between the parties, we also summarise the decisions where this issue has been considered in the courts under the law of confidence. In

1984 the Court of Appeal, in Francome v Daily Mirror [1984] 1WLR 892, held that the Daily Mirror could not publish confidential information which suggested that a jockey had been engaged in misconduct as the public interest would be just as well served by a disclosure to the police or the Jockey Club. This position was explained in Spycatcher no. 2, [1987] 3WLR p 776, (per Lord Griffiths p 794): "In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry."

As to cases where disclosures of confidential information to the media were justified, the following may be noted. In Initial Services v Putterill [1968] 1QB 396 a disclosure to the Daily Mail about price-fixing was held to be lawful by the Court of Appeal because the public were being misled. Similarly in Lion Laboratories v Evans [1984] 3 WLR 539 a case about suspect roadside breathalysers, the Court of Appeal held the press was an appropriate recipient of the information as it was important that people had the information needed to challenge criminal charges and it seemed that the Home Office - which had approved the breathalyser - was an interested party. In Cork v McVicar [1985] TLR 31/10/1985, the High Court allowed the Daily Express to publish allegations of corruption in the Metropolitan Police.

Subs. (3)(b)
It is submitted that a lower level of seriousness would be expected where a disclosure of confidential information was made to the police or a non-prescribed regulator, than if the same information was disclosed to the media (see reference above to Spycatcher no. 2).

Subs. (3)(c)
This provision implies it is more likely to be reasonable if the disclosure is about an on-going or future threat. This picks up a theme from the jurisprudence on the law of confidence (Weld-Blundell v Stephens [1919] 1 KB 520; Malone v Met Police [1979] 2WLR 700, p 716; Initial Services v Putterill [1968] 1QB 396, p 405; Schering Chemicals v Falkman [1981] 2WLR 848, p 869). Where the threat is passed, there needs to be a clear public interest in any confidential information being disclosed. In Spycatcher no 2 [1987] 3WLR p 776, Lord Griffiths (at p 804) said such a public interest might be to bring those responsible to account.

Subs. (3)(d)
This provision was inserted at Committee in the Commons to ensure that tribunals took account of the interests of a third party about whom confidential information had been disclosed. In moving the amendment,

the Minister explained (Parliamentary Debates HC, Standing Committee D, 11 March 1998, cols. 8 / 9) that it was to deal with information subject to a banker-client or doctor-patient confidence. In such cases, tribunals would - it is submitted - do well to have close regard to the decision that would be reached if the third party sued the employer for breach of confidence. At Report stage in the Commons, the Minister (Hansard HC 24 April 1998, col. 1137) stated that "it is certainly not the intention that, where a bank has acted diligently, it should be liable for a breach of confidence by a client when a bank employee has made a public interest disclosure."

Its effect is not that the disclosure of such information should not be protected, rather that it is material in determining the reasonableness of the particular disclosure. A helpful example of this is in W v Egdell [1990] 2 WLR 471, where the Court of Appeal held that it was lawful for a consultant psychiatrist to disclose information about an in-patient to the medical director at the patient's hospital, where the consultant genuinely believed that a decision to release the patient was based on inadequate information and posed a real risk of danger to the public. However the court held that the sale of his story to the media would not have been justified, nor would an article in an academic journal unless it had concealed the patient's identity.

Where the disclosure did breach a duty of confidence owed by an employer to a third party, in determining the reasonableness of the disclosure it will be important to assess the effect of the breach on the rights of the third party and, in particular, any unjustifiable damage it caused him (Mr Shepherd, Parliamentary Debates HC Standing Committee D, 11 March 1998, col. 9).

Subs. (3)(e)
If the employer has investigated the concern and taken all reasonable action in respect of it but has left the whistleblower in ignorance of this, this may allow the worker to reasonably believe that no appropriate action was taken and to make a further disclosure. It is therefore desirable that the whistleblower is given feedback on, or is made aware of action taken as a result of, his concern and that this is provided within a reasonable period of time.

It is important to note that this section also applies where the concern has been raised with a prescribed regulator. As this has implications for employers, it is suggested that the organisation might sensibly request or instruct the prescribed regulator to communicate its findings to any whistleblower and to seek confirmation that this has been done.

Turning to the implications for prescribed regulators, this means that they

too should be willing to consider providing the whistleblower with any appropriate feedback. If so, it would be sensible that they advise the organisation that they propose to do this. Insofar as the secrecy offences which govern parts of the work of prescribed regulators may inhibit the provision of such feedback, it should be noted that most such offences permit disclosures to be made with the consent of the person from whom the information has been obtained (and hence the employer can authorise the regulator to give feedback to the whistleblower). For these reasons, it is suggested that the prescribed regulator and the organisation should co-operate on how to ensure that reasonable feedback is made known to the whistleblower.

Subs. (3)(f)
As to the key elements of a whistleblowing procedure, see the reference in the section entitled Overview in the Explanatory Note to this Act and also the comments on s.43A and 43C(2), *supra*. Under a grievance procedure it is for the worker to prove his case. Under a whistleblowing procedure, however, the worker raises the matter so that others may investigate it; it is not for the worker to prove the case or to dictate what the response should be from those in charge. One of the main benefits of such a procedure is that it helps workers and managers understand that a whistleblower is a witness rather than a complainant.

It will not be enough to introduce such a procedure in a workplace if reasonable steps are not also taken to promote it to the workforce: see Kay v Northumberland Healthcare NHS Trust. Ideally once such a procedure is introduced, its use should be monitored and its role should be highlighted to the workforce (routinely depending on the size of the organisation), for example through team briefings, newsletters or posters.

Subs. (4)
This means that the worker will not lose protection if - in addition to disclosing the original concern - he comments on why he considers the initial response (be it of the employer or a prescribed regulator) was inadequate or unreasonable. See also the comment above on s.43G(2)(c) from the EAT decision ALM Medical Services v Bladon.

DEFINITIONS
"disclosure" : s.43L(3)
"employer" : s.43K(2)
"personal gain": s.43L(2)
"qualifying disclosure" : s.43B
"relevant failure" : s.43B(5)
"worker" : s.43K(1)

Section 43H ERA *Disclosure of exceptionally serious failure*

43H. - (1) A qualifying disclosure is made in accordance with this section if-

(a) the worker makes the disclosure in good faith,

(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

EXPLANATORY NOTE

This section provides that other disclosures of exceptionally serious matters may be protected, even though they do not meet the conditions in the previous section.

Subs. (1)(a)
See comment on subsection 43C(1), *supra*.

Subs. (1)(b)
See Explanatory Note on s.43F and comment on subsection 43F(1)(b)(ii), *supra*.

Subs. (1)(c)
See comment on 43G(1)(c), *supra*.

Subs. (1)(d)
This means that, if substantiated, the concern would be of an exceptionally serious nature.

Subs. (1)(e) and Subs. (2)
When these provisions were inserted by a Government amendment (Parliamentary Debates HC, Standing Committee D, 11 March 1998), the Minister said "The Government firmly believe that where exceptionally serious matters are at stake, workers should not be deterred from raising them. It is important that they should do so, and that they should not be put off by concerns that a tribunal might hold that they should have delayed

their disclosure or made it in some other way. That does not mean that people should be protected when they act wholly unreasonably: for example, by going straight to the press when there could clearly have been some other less damaging way to resolve matters".

It is submitted that a care worker genuinely concerned that a child was being sexually abused would be protected under this section if he went direct to the police. The EAT suggested a similar approach be adopted in ALM Medical Service v Bladon.

DEFINITIONS
"disclosure" : s.43L(3)
"relevant failure" : s.43B(5)
"worker" : s.43K(1)

Section 43J ERA *Contractual duties of confidentiality*

43J. - (1) 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 protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

EXPLANATORY NOTE

This provides that any clause or term in an agreement between a worker and his employer is void insofar as it purports to preclude the worker from making a protected disclosure. The agreement may be in an employment contract, in a contract of a worker who is not an employee or in any other agreement between a worker and employer. In particular it should be noted that it covers settlement or compromise agreements.

The section applies to 'gagging clauses' only insofar as they preclude a protected disclosure. In practical terms, their most significant effect will be in clauses in settlement agreements where the employer seeks to stop the worker from contacting a prescribed regulator under s.43F. This provision would apply with equal strength where a public body sought to stop workers contacting the sponsoring department under s.43E.

Where important issues are at stake and the employer is seeking an injunction to restrain the disclosure of confidential information, it is

suggested that the key issue for the court will be the identity of the recipient of the disclosure. This is because under the common law, courts are most unlikely to restrain a worker disclosing confidential information to a regulator or to the police, even where it is unclear the worker is acting in good faith or with reliable evidence (see Note on s.43F, *supra*). Where the employer fears the worker will make a media disclosure, it will be open to the employer to seek an order or a declaration from the court that such a disclosure was not a protected one within this Act, even assuming the worker met the conditions in s.43G(1) and (2).

Insofar as media disclosures go, this section will (obviously) have no application where a media disclosure has already been made or where a tribunal's decision has been published that some other disclosure was protected. However, it might apply where a worker was dismissed in a particularly unpleasant way for making a protected disclosure to a prescribed regulator and where the employer, in settling the claim included a clause preventing the whistleblower from repeating his concern publicly. While employers and their advisers will recognise that such a clause can, even when lawful, be difficult to enforce in practice, the effect of this section is that it may not even be possible to enforce such a clause in law. This is because if the whistleblower did tell the media, the clause would be invalid if it was found this subsequent disclosure would have been PIDA protected.

The risk to (and in) such gagging clauses is particularly clear where the employer's response to a concern raised internally is to dismiss the whistleblower and to cover-up the malpractice. If there was no prescribed regulator, then there is a high chance that a clause in the settlement of the whistleblower's claim which sought to prevent him telling the media would be unenforceable.

Section 43K ERA *Extension of meaning of "worker" etc. for Part IVA*

43K. - (1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who-

(a) works or worked for a person in circumstances in which -

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom

he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

(c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services in accordance with arrangements made-

(i) by a [Primary Care Trust or] Health Authority under section 29, 35, 38 or 41 of the National Health Service Act 1977, or

(ii) by a Health Board under section 19, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, or

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than-

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

(2) For the purposes of this Part "employer" includes-

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

(b) in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph, and

(c) in relation to a worker falling within paragraph (d) of that subsection, the person providing the work experience or training.

(3) In this section, "educational establishment" includes any university, college, school or other educational establishment.

EXPLANATORY NOTE

This provides an extended meaning to the definition of 'worker' and, as such, the scope of this Act goes beyond much of existing employment law. Under section 230(3) of the ERA, a worker includes an employee and an independent contractor who himself provides services other than in a

professional/client or a business/client relationship. In addition to these, this Act protects certain agency workers, homeworkers, NHS doctors, dentists, optometrists and pharmacists, and trainees on vocational or work experience schemes.
Tribunals have held that it does not, however, include the president of a union branch Dring v GMB ; a doctor seconded to work unpaid at a charity Sims v MASH; (2002) - nor a volunteer at a charity Smart v Citizens Advice Bureau.

Subs. (1)(a)
This covers agency workers, where the agency introduces them to or finds them the post and the terms of employment are substantially determined by the agency or the organisation where he performs the work. In this case, the 'employer' will include the person who substantially determined the terms of engagement (see subs. (2)(a)). It is anticipated that this will normally be the organisation on whose instructions the person performs the work. However, under PIDA a worker may have more than one employer: see the ET decisions in Hayes v Reed Social Care & Bradford MDC (where the agency was the classic employer and Bradford MDC was also an employer for PIDA as it had substantially determined the terms of the engagement) and also Hittinger v St Mary's NHS Trust & Imperial College.

Subs. (1)(b)
This covers a homeworker, namely an independent contractor who provides services whether personally or otherwise from their home.

Subs. (1)(c)
This ensures that the Act applies across the NHS. Doctors, dentists, optometrists and pharmacists in the NHS are usually independently contracting professionals and hence would not come under the definition of employee or worker in the ERA. Under this provision, for these professionals the Primary Care Trust or Health Authority (or in Scotland, the Health Board) with which they contract is deemed to be their employer for the purposes of this Act (see subs. 2(b)). It should be noted that the extension to Primary Care Trusts - which take over responsibilities of a number of health authorities - was made by way of an amendment in the NHS Reform Bill 2002, schedule 2 para 63.

Subs (1)(d)
This provision ensures that trainees on work experience or vocational schemes will be protected against victimisation where they raise concerns within this Act. It does not cover students in education. For trainees covered by this section, the person providing the training is deemed to be the employer for the purposes of this Act (see subs 2(c)).

DEFINITIONS
"contract of employment" : ERA s.230(2)
"employer" : subs. 2 and ERA s.230(4)
"worker" : subs. 1 and ERA s.230(3)

43KA ERA *Application of this Part and related provisions to police*

(1) For the purposes of-
- **(a) this Part,**
- **(b) section 47B and sections 48 and 49 so far as relating to that section, and**
- **(c) section 103A and the other provisions of Part 10 so far as relating to the right not to be unfairly dismissed in a case where the dismissal is unfair by virtue of section 103A,**

a person who holds, otherwise than under a contract of employment, the office of constable or an appointment as a police cadet shall be treated as an employee employed by the relevant officer under a contract of employment; and any reference to a worker being "employed" and to his "employer" shall be construed accordingly.

(2) In this section "the relevant officer" means-
- **(a) in relation to a member of a police force or a special constable appointed for a police area, the chief officer of police;**
- **(b) in relation to a person appointed as a police member of the NCIS, the Director General of NCIS;**
- **(c) in relation to a person appointed as a police member of the NCS, the Director General of NCS;**
- **(d) in relation to any other person holding the office of constable or an appointment as police cadet, the person who has the direction and control of the body of constables or cadets in question**

EXPLANATORY NOTE

This section extends the protection of PIDA to police officers. It was inserted by section 37 of the Police Reform Act 2002 and is expected to come into force in Spring 2004. The relevant Parliamentary consideration can be found at Hansard (HL) 5 March 2002 cols 215-220 and Parliamentary Debates (HC) Standing Committee A 27 June 2002, cols 425-7. It is expected that the new Independent Police Complaints Commission will be made a prescribed regulator. Further information, when available, will be posted on www.pcaw.co.uk

The exclusion of police officers from the original Bill had been justified by the fact that police officers had always been excluded from standard employment rights. Nevertheless their exclusion from PIDA was criticised by almost all those consulted in 1997/98, particularly as miscarriages of justice were a type of wrongdoing the Act specifically covered in section 43B(1)(c). The Association of Chief Police Officers had maintained that if civilian police staff were to be protected so should their officer colleagues. As a result of these criticisms, the Government gave "an absolute commitment" in 1998 that police officers would be given equivalent protection and this new section delivers on that promise.

Section 43L ERA *Other interpretative provisions*

43L. - (1) In this Part-

"qualifying disclosure" has the meaning given by section 43B;

"the relevant failure", in relation to a qualifying disclosure, has the meaning given by section 43B(5).

(2) In determining for the purposes of this Part whether a person makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.

EXPLANATORY NOTE

These are interpretative provisions.

Subs. (2)
Disclosures for personal gain only arise under ss.43G and 43H. The effect of this provision is where a regulator who is not prescribed under s.43F makes a reward, it shall not be a bar to protection. Such rewards are occasionally made by statutory agencies in return for information supplied.

Subs. (3)
This makes clear that the worker does not unwittingly lose protection against victimisation where the recipient of the information was already aware of the situation. It avoids any argument that in such a case there could in law be no disclosure.

Section 2 PIDA *Right not to suffer detriment*

2. - After section 47A of the 1996 Act there is inserted-

47B. - *Protected disclosures*

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
(2) Except where the worker is an employee who is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where -
(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of that Part).
(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

EXPLANATORY NOTE

This section protects employees from action short of dismissal and protects other workers (who cannot be dismissed, as they are not technically employees) from any victimisation, including the termination of their contract. Protection for employees against dismissal and redundancy is provided in ss.5 and 6, below. Note that no qualifying period or upper age limit applies to this protection (see s.7 below).

The section does not confer a right of action against any third party who victimised the worker, such as fellow employees, individual managers or clients of the employer (unless that third party comes within the extended definition of employer in s.43K(2)). However, the failure of the employer to protect the worker against such action by others might itself be a detriment.

Subs. (1)
detriment
An employer subjects a worker to a detriment not only if he acts to the worker's detriment (for example, offering less work to a casual worker, Almond v Alphabet Children's Services; disciplining the whistleblower, Kay v Northumberland Healthcare NHS Trust; threatening to destroy the whistleblower, Bhatia v Sterlite Industries; re-advertising of the whistleblower's job, Brown v Welsh Refugee Council; withdrawing the promise of a permanent post, Bhadresa v SRA; or disclosing the

whistleblower's identity contrary to assurances, Carroll v Grt. Manchester County Fire Service) but also if he causes him detriment by deliberately failing to act. Examples of the latter have included failing to investigate a concern (see A v B & C and Boughton v National Tyres) and failing to inform the whistleblower of the progress of the investigation (Knight v LB Harrow).

Tribunals have held the following did not on their facts amount to a detriment: moving the whistleblower to an open plan office, Chattenton v Sunderland CC; the continuation of bad relations with a manager, Allison v Sefton MBC; or the demotion and transfer of the manager complained about, Chubb v Care First Partnership.

Detriment, it is submitted, also includes the threat of a detriment. As the Government spokesman (Hansard HL, 5 June 1998, col. 634) said "An employee who has made a disclosure to his employer could be threatened with relocation to a remote branch of a company, for instance, where promotion prospects are poorer. That kind of threat is a detriment and even though the worker can be assured that the employer could not lawfully carry out the threat, the fear of the threat may well amount to detrimental action. Any threat which puts a worker at a disadvantage constitutes in itself detrimental action". See also Mennell v Newell & Wright [1997] IRLR 519 where the Court of Appeal agreed with the EAT (while allowing an appeal on other grounds) that asserting a threatened infringement of a statutory right came within s.104 ERA.

Causation: 'on the ground that'
Under this section, it is for the employer to explain the reason for any detrimental action and so there is an evidential presumption on it. The same test on causation exists in discrimination law and its application there was clarified by the House of Lords in Chief Constable of West Yorkshire Police v Khan (2001) ICR 1065. In Aspinall v MSI Mech Forge, the EAT held that as to causation issues under PIDA, tribunals should adopt the same approach, that the disclosure has to be the "real reason, the core reason, the causa causans, the motive for the treatment complained of". As to causation generally, see the notes on section 5.

This issue was considered in Hayes v Reed Social Care & Bradford MDC where the tribunal stated "there may be cases in which an employer has a number of grounds for taking action detrimental to an employee which include the making of a protected disclosure. What matters is whether the ground was significant or substantial. Given that the phrase 'on the ground' in section 47B is identical to the phrases used in the Race Relations Act and the Sex Discrimination Act, we ignore any question of motive." It was also considered in Borley v Suffolk CC, where the tribunal stated that to establish causation under this provision it was not necessary to prove that

reprisal was the employer's motive or its intention.

Subs. (2)
This provides that an employee who is dismissed cannot claim under this section but must claim under ss.5 and 6 PIDA (ss.103A and 105(6) ERA). However, the single exception to this is where an employee is on a fixed term contract of more than a year and he has agreed in accordance with s.197 ERA to waive any claim for unfair dismissal if his contract is not renewed. In such a case, an employee can bring a claim that his employment contract was not renewed because he had made a protected disclosure.

DEFINITIONS
"employee" : s.230(1) ERA
"protected disclosure" : s.1 PIDA, s.43A ERA
"worker" : s.1 PIDA, s.43K(1) ERA

Section 3 PIDA *Complaints to employment tribunal*

3. - In section 48 of the 1996 Act (complaints to employment tribunals), after subsection (1) there is inserted-

"(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."

EXPLANATORY NOTE

This enables a worker to make a complaint to an employment tribunal that he has been subjected to a detriment in breach of s.2 PIDA, s.47B ERA. Claims of an infringement of this right are not enforceable in any other forum. Under this provision, it is for the employer to show the ground on which he subjected the worker to detriment: s.48(2) ERA.

Under s.48(3) claims should be brought within three months of the act or the deliberate failure, or the last act or failure if the worker was subjected to a series of detriments. Where it was not reasonably practicable to claim within three months, the period may be extended to such extra time as is reasonable to bring the claim. This provision is the same as applies for unfair dismissal and a generally common approach has been taken to extensions, which is that they are not freely given.

Under s.48(4) where the complaint relates to a deliberate failure to act, time runs from the date that the employer decided not to act. In the absence

of evidence of this, it is the date the employer did an act inconsistent with the failed act or, in the absence of such evidence, the date by when the employer might reasonably have been expected to have acted. It should be noted that time runs from the date of the detriment, not the date of disclosure - see Miklaszewicz v Stolt Offshore Ltd (Court of Session).

DEFINITIONS
"worker" : s.1 PIDA, s.43K(1) ERA

Section 4 PIDA *Limit on amount of compensation*

4 - (1) Section 49 of the 1996 Act (remedies) is amended as follows.
(2) At the beginning of subsection (2) there is inserted "Subject to subsection (6)".
(3) After subsection (5) there is inserted-
"(6) Where-
(a) the complaint is made under section 48(1A),
(b) the detriment to which the worker is subjected is the termination of his worker's contract, and
(c) that contract is not a contract of employment,
any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A".

EXPLANATORY NOTE

The heading is misleading, in that there is no limit on compensation (the heading refers to subsection 3 of this section which is redundant, for the reasons given below).

Where a tribunal has found that a worker was victimised in breach of s.2 (s.47B ERA), it must make a declaration to that effect and may make an award of compensation: s.49(1) ERA. Compensation awards are assessed based on what is "just and equitable in all the circumstances", having regard to the infringement complained of and any loss suffered by the worker as a result of the detriment: s.49(2). These losses specifically include expenses reasonably incurred by the complainant and the loss of any benefit he might otherwise have expected: s.49(3). The worker is under a duty to mitigate his losses (s.49(4)) - which, if his contract is terminated, includes obtaining or seriously seeking another job. Finally the tribunal has to reduce the award by such sum as it considers just and equitable where it finds the worker himself had contributed to or caused the detriment: s.49(5).

Subs. (3)
This subsection has no effect as there will be no limit on compensatory awards where an employee is dismissed (see the Note to section 8 below). Had there been such a limit, this subsection would have ensured that a worker who was not an employee could not have received a larger award where his contract was terminated than if he had been an employee who had been dismissed in breach of this Act.

DEFINITIONS
"contract of employment" : s.230(2) ERA
"employee" : s.230(1) ERA
"worker" : s.1 PIDA, s.43K(1) ERA

Section 5 PIDA, *Unfair dismissal*

5.- After section 103 of the 1996 Act there is inserted-

"103A. *Protected disclosure*

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

EXPLANATORY NOTE

This provision makes the dismissal of an employee because or principally because he made a protected disclosure automatically unfair, see ss.99-103 ERA. The effect is that the tribunal is not to consider whether or not the employer's actions were reasonable.

Causation: If there were a number of reasons for the dismissal, it is still automatically unfair if the protected disclosure was the principal or core reason - see Aspinall v MSI Mech Forge where the EAT adopted the causation approach from discrimination law and said that for PIDA to apply the protected disclosure must be "the real reason, the core reason, the causa causans".

Burden of proof: If the worker has been employed for one year or more, the burden of proof rests with the employer to show the reason, or principal reason, for the dismissal was an admissible reason within s.98(1)(b) or (2) of the ERA. See, for example, Fernandes v Netcom where the ET found that the employer's reasons were a smokescreen; Leonard v

Serviceteam where the employer gave no adequate explanation for the dismissal; Lewer v Railtrack where the employer failed to provide evidence for its stated reason; and Pipes v Brideford Lodge where the employer failed to attend the hearing.

Dismissal within first year: Where an employee has been employed for less than one year, however, he needs to establish the jurisdiction of the tribunal to hear the complaint. This means the burden rests with the employee to establish, on a balance of probabilities, that the reason or principle reason for dismissal was because he or she made a protected disclosure (see Smith v. Chairman & Councillors of Hayle Town Council [1978] IRLR 413). In Brothers of Charity Services Merseyside v Eleady-Cole the EAT said that where the tribunal rejects the employer's stated reason for a dismissal within the first year, it should set out clearly its reasons and the facts relied on. Examples from ET decisions include Azmi v Orbis Charitable Trust (where the evidence conflicted with the alleged poor performance); and Scott v Building Management Service (where the employer had responded angrily to the disclosure).

Several reasons: Where there is more than one reason for the dismissal, what matters is what was the real reason (see Aspinall, *supra*) and this will be a question of fact. Guidance can be found in the approach of the EAT in Hossack v Kettering Borough Council (where the manner in which a protected disclosure had been made was cited as one of several examples of conduct justifying dismissal). See also the ET decisions in Hayes v Reed Social Care & Bradford MDC and Pimlott v Meregrove.

Interesting points on causation :

- *anonymity*: Where a concern had been raised anonymously and there was no evidence that the employer knew of the disclosure, the tribunal was unable to infer that the disclosure had been the cause of the dismissal, Eastelow v Taylor

- *several whistleblowers*: Where no action had been taken against colleagues who had blown the same whistle more vociferously, causation was not established, March v The Holiday Place (redundancy within 12 months).

Termination of a worker's contract
Where the worker was not an employee (or if he was an employee on a fixed term contract and s.197 ERA applies), and his contract was not renewed because he made a protected disclosure his protection is set out under ss.3 and 4, *supra*.

DEFINITIONS

"employee" : s.230(1) ERA
"protected disclosure" : s.1 PIDA, s.43A ERA

Section 6 PIDA *Redundancy*

6. - After subsection (6) of section 105 of the 1996 Act (redundancy) there is inserted-

"(6A)This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A".

EXPLANATORY NOTE

This confers a new right on employees not to be selected for redundancy for making a protected disclosure. Note that no qualifying period or upper age limit applies to this section (see s.7 below).

The effect is that the dismissal is unfair (s.105(1) ERA) if (a) the principal reason for it was redundancy; (b) other employees in a similar position were not dismissed in the same circumstances; and (c) the reason or the principal reason the employee was selected was because he had made a protected disclosure.

Helpful ET decisions include Daniel v Toolmex Polmach (where the restructuring of that part of the business was well in hand before the disclosure); Durrant v Norfolk Sheet Metal and O'Connor v MIND (where the concerns were raised on being told of redundancy); and Saunders v Westminster Dredging (where the redundancy policy was not followed).

Where the worker was not an employee (or he was and he was on a fixed term contract and s.197 ERA applies), and his contract was not renewed because he made a protected disclosure his protection is set out under ss.3 and 4, supra.

Section 7 PIDA *Exclusion of restrictions on right not to be unfairly dismissed*

7 - (1) In subsection (3) of section 108 of the 1996 Act (cases where qualifying period of employment not required), after paragraph (f) there is inserted-

"(ff) section 103A applies"

(2) In subsection (2) of section 109 of the 1996 Act (disapplication of upper age limit), after paragraph (f) there is inserted-

"(ff) section 103A applies".

EXPLANATORY NOTE

This provides that neither the minimum one-year qualifying period nor the upper age limit applies to claims under this Act for unfair dismissal or unfair selection for redundancy.

Subs. (1)
The effect is that rights in respect of dismissal for making a protected disclosure arise on the first day of employment, but see notes to section 5 supra as to the different burden of proof that applies in this situation. It should be noted that rights in respect of victimisation short of dismissal (see s.2 *supra*) also arise on day one.

Subs. (2)
The effect is that the rights against unfair dismissal are not lost where the employee makes a protected disclosure after he has reached normal retirement age or, where there is none, the age of sixty-five.

Section 8 PIDA *Compensation for unfair dismissal*

[This section has been repealed]

EXPLANATORY NOTE

Compensation under PIDA is uncapped - the maximum award at January 2003 has been £805,000 (Bhatia v Sterlite Industries). Awards can include not only loss of past earnings, but future losses occasioned by damage to the whistleblower's career (see Fernandes v Netcom), injury to feelings (Bhadresa v SRA and Holden v Connex) and aggravated damages (see A v X, Bhadresa v SRA and Holden v Connex).

It may be of interest to explain the background to this issue and this section (which was repealed by section 44 and Schedule 9 Part 11 of the Employment Relations Act 1999). As the Government and Mr Shepherd were unable to agree on the correct approach to compensation for unfair dismissal at the time the Bill was introduced, a wide regulation-making

power was introduced in this section and Public Concern at Work was asked to consult on the options. These were (a) applying the normal regime on unfair dismissal; (b) awarding compensation for losses, without any ceiling; or (c) extending the provisions for special awards (which hitherto applied to health and safety representatives, pension fund trustees and dismissals for union activities) to whistleblowers.

An overwhelming consensus among business, unions and professional interests favoured full compensation for whistleblowers. The Institute of Directors - which alone favoured normal awards - felt the precedent of special awards was "wholly inappropriate," while the Confederation of British Industry expressed reservations about the high minimum and the low maximum awards attached to special awards. As the issue of compensation awards was being considered under all employment law, the Government reserved its position during the passage of this legislation. Early in 1999 it announced that awards under PIDA would be uncapped and repealed this section through the Employment Relations Act.

Section 9 PIDA *Interim relief*

9 - In sections 128(1)(b) and 129(1) of the 1996 Act (which relate to interim relief) for "or 103" there is substituted ", 103 or 103A".

EXPLANATORY NOTE

This provides that employees (but not other workers) who are dismissed because they made a protected disclosure are able to claim interim relief. This is a potentially significant provision because, if the tribunal finds that the employee is likely to win at the full hearing, it will order that, *pro tem*, the employee is re-employed or that his employment is deemed to continue and so he will receive his salary. If, after the full hearing, the tribunal finds in favour of the employee, such an interim order (a) is likely to increase the chances that the tribunal find it is practicable for the employer to comply with any re-employment order made at the full hearing and (b) will strengthen the employee's bargaining position in negotiations.

However the practical value of this provision is somewhat limited in the light of the Court of Appeal's decision in Taplin v. C Shippam Ltd. *[1978] IRLR 450* on the application of this section. There the court ruled that to meet the section's test of likelihood, there must be more than a reasonable chance of success. As to the application of this test to a PIDA claim, see the ET decisions in Fernandes v Netcom (interim relief) and Llewelyn v Carmarthenshire NHS Trust.

It is submitted that interim relief claims under PIDA are more likely to succeed in cases involving a s.43C disclosure (to an employer), a s.43E disclosure (to a Minister of the Crown) where the threshold for the applicant is fairly low, or a s.43F disclosure (to a prescribed person) where the evidential burden is slightly higher. Where the case involves a wider disclosure under s.43G and the applicant must demonstrate that the disclosure was reasonable in all the circumstances, it will be more difficult for a tribunal to determine that an applicant is likely to be successful at full hearing. See Parkins v Sodexho where the EAT stressed that at interim relief hearings, tribunals should not prejudge issues which were properly for the full hearing where evidence would be heard and tested.

Interim relief is available if the claim is made within 7 days of the dismissal (s.128(2)); and the tribunal shall determine the application as soon as practicable thereafter (s.128(3)); but giving the employer not less than 7 days notice of the hearing (s.128(4)). The tribunal cannot postpone the hearing of an application for interim relief unless it is satisfied there are exceptional circumstances (s.128(5)).

If at the interim relief hearing (s.129(1)), the tribunal considers it "likely" that at full hearing it will find that the reason or the principal reason for the dismissal was because the employee made a protected disclosure, then a series of provisions are triggered. Briefly, these are that the tribunal first explains its powers (s.129(2)) and asks the employer if he will re-employ the employee, pending the full hearing (s.129(3)). If the employer is willing, then an order is made to that effect: s.129(4)-(6). If the employee does not accept re-engagement (that is a different post, though on terms no less favourable: s.129(3)(b)) then the tribunal decides whether that refusal is reasonable. If it is reasonable then the employee's contract is deemed to continue until the full hearing. If the refusal is not reasonable then no order is made pending full hearing: s.129(8). If, however, the employer fails to attend the hearing for interim relief or says he is unwilling to re-employ the employee (s.129(9)), then the tribunal makes an order under s.130 that the employee's contract is deemed to continue until the full hearing.

Section 10 *Crown employment*

10. - In section 191 of the 1996 Act (Crown employment), in subsection (2) after paragraph (a) there is inserted-

"(aa) Part IVA,"

EXPLANATORY NOTE

The effect of this section is to apply this Act to people who are employees of, work for or are in the service of the Crown (s.191 ERA). It does not, however, extend to those in the armed forces (s.192 ERA) or to those involved in national security (s.11, below).

Section 11 *National security*

[This section has been repealed]

EXPLANATORY NOTE

The relevant current provision on national security is section 193 Employment Rights Act (as amended by the Employment Relations Act 1999). This makes clear that the Public Interest Disclosure Act protections do not apply to people who work for the Security Service, Security Intelligence Service and GCHQ. This absolute exclusion means that a worker in one of these organisations will not be protected from victimisation even where he raises a concern internally that a manager accepted a bribe to award a cleaning contract.

Section 12 *Work outside Great Britain*

[Substantive provision repealed]

EXPLANATORY NOTE

This section originally amended section 196 of the 1996 Act but is now of no effect as s.196 of the ERA was repealed by s.32(3) Employment Relations Act 1999. The issue of whether someone who ordinarily works outside Great Britain is protected under the Act is now to be determined under the rules of private international law. This was considered in the context of PIDA as a preliminary point in Bhatia v Sterlite Industries.

Section 13 *Police officers*

[This section is being repealed]

EXPLANATORY NOTE

This section had the effect of excluding police officers (though not civilian

staff in the police service) from the Public Interest Disclosure Act. It is being repealed by the Police Reform Act 2002 which, as explained in the notes on section 43KA *supra*, will extend PIDA protection to police officers from Spring 2004.

Section 14 *Remedy for infringement of rights*

14. - In section 205 of the 1996 Act (remedy for infringement of certain rights) after subsection (1) there is inserted-

"(1A) In relation to the right conferred by section 47B, the reference in subsection (1) to an employee has effect as a reference to a worker."

EXPLANATORY NOTE

The effect of this is that complaints under this Act can only be brought to an employment tribunal. It also provides that those covered by the extended meaning of "worker" in s.43K(1) can bring claims to an employment tribunal (which they would do under s.2, *supra*).

Section 15 *Interpretative provisions of 1996 Act*

15 - (1) At the end of section 230 of the 1996 Act (employees, workers etc) there is inserted -

"(6) This section has effect subject to sections 43K and 47B(3); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker", "worker's contract" and, in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by section 43K."

(2) In section 235 of the 1996 Act (other definitions) after the definition of "position" there is inserted-

"protected disclosure" has the meaning given by section 43A,"

EXPLANATORY NOTE

This provision amends the interpretative provisions in the ERA to provide that the definition of "workers" in s.230 is given the extended meaning in s.43K (*supra*) for the purposes of this Act.

It also provides that the term "protected disclosure" which is inserted (by ss.2 and 5 supra) into other parts of the ERA has the meaning given by s.1 PIDA, s.43A ERA.

Section 16 *Dismissal of those taking part in unofficial industrial action*

16 - (1) In section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal of those taking part in unofficial industrial action), in subsection (1A) (which provides that the exclusion of the right to complain of unfair dismissal does not apply in certain cases)-

(a) for "or 103" there is substituted ", 103 or 103A", and
(b) for "and employee representative cases)" there is substituted "employee representative and protected disclosure cases)".

EXPLANATORY NOTE

While s.237(1A) TULRA 1992 provides that generally an employee who is taking part in unofficial industrial action at the time of his dismissal cannot bring a claim for unfair dismissal, this amending provision means that this bar will not apply where the employee was dismissed or made redundant because he had made a protected disclosure.

Section 17 *Corresponding provision for Northern Ireland.*

17. - An Order in Council under paragraph 1(1)(b) of Schedule 1 to the Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which states that it is made only for purposes corresponding to those of this Act-

(a) shall not be subject to paragraph 1(4) and (5) of that Schedule (affirmative resolution of both Houses of Parliament), but
(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament

EXPLANATORY NOTE

The Act applies only to England, Scotland and Wales. This section enabled its provisions to be extended to Northern Ireland by Order in Council, and this was done by statutory instrument 1998 No.1763 (NI. 17) which was

brought into force on 31st October 1999 by SRNI 1999 No. 400.

Section 18 *Short title, interpretation, commencement and extent.*

18. - (1) This Act may be cited as the Public Interest Disclosure Act 1998.

(2) In this Act "the 1996 Act" means the Employment Rights Act 1996.

(3) Subject to subsection (4), this Act shall come into force on such day or days as the Secretary of State may by order made by statutory instrument appoint, and different days may be appointed for different purposes.

(4) The following provisions shall come into force on the passing of this Act-

(a) section 1 so far as relating to the power to make an order under section 43F of the 1996 Act,
(b) section 8 so far as relating to the power to make regulations under section 127B of the 1996 Act,
(c) section 17, and
(d) this section.

(5) This Act, except section 17, does not extend to Northern Ireland.

EXPLANATORY NOTE

The substantive provisions of the Act came into force on 2nd July 1999 in England, Wales and Scotland.