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## **Protect's Response to the Law Commission Response Ideas for the 14<sup>th</sup> Program**

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This is a short submission from the UK whistleblowing charity Protect making the case for why whistleblowing reform should be one of the key projects for The Law Commission to consider for the 14<sup>th</sup> Programme of work.

We note the criteria used by The Law Commission and suggest that the impact of whistleblowing law reform is far reaching across many government departments. Speaking out about wrongdoing ranges from raising concerns about PPE in hospitals and care homes to toxic environments in schools and colleges, from environment protection to local government fraud. Whistleblowing has never been an issue that divides along party political lines, so is well suited to a Law Commission Review. BEIS Ministers in the government department responsible for this area of law are supportive of reform in principle, and there is considerable Parliamentary support. In our view, the introduction of an EU Directive makes reform of the UK's law more urgent, and our evidence of whistleblowing during the pandemic reveals both the flaws in the current law, and the need for standards to be imposed on all employers to develop effective whistleblowing arrangements. Finally, Protect has already proposed reform in our draft bill [HERE INSERT LINK](#), and two Private Members Bills have been introduced to Parliament. There is, therefore, a sound basis on which the Law Commission could build.

We set out below the benefits of whistleblowing reform: to businesses (who will be able to detect and respond to wrongdoing sooner reducing financial and reputational risks), to individuals (who need better access to justice), and to wider society as working cultures where speaking up is acceptable and encouraged will better protect the public interest.

### **An introduction to Protect**

1. Protect's aim is to protect the public interest by helping workers to speak up to stop harm and wrongdoing. We support whistleblowers by providing free and confidential legal advice. We support employers to implement effective whistleblowing arrangements. We campaign for legal and policy reform to better protect whistleblowers. We want a world where no whistleblower goes unheard or unprotected.
2. Since 1993, Protect has operated its free, legal Advice Line offering specialist whistleblowing advice to over 3,000 workers a year. We provide consultancy and training services for employers to improve their whistleblowing arrangements and in 2020 alone the employers we worked with had between them an estimated 1.3 million employees. These experiences inform our policy work in campaigning for better whistleblowing laws and public policy.
3. Protect was heavily involved in the drafting of what became the Public Interest Disclosure Act 1998 (PIDA) – the current law which gives rights to whistleblowers in the UK. Our Advice Line gives us first-hand knowledge of the gaps in the current whistleblowing legislation and our campaign, Let's Fix UK Whistleblowing (please see [here](#)), proposes solutions to those gaps.

## The impact whistleblowing reform will have on the UK

### Overview

Considering the criteria put forward by the Law Commission (LC) we believe there is a strong case for an examination of the legal framework which both protects whistleblowers and supports whistleblowing. The legal protection that exists for whistleblowing is based in employment law via the Employment Rights Act 1996, where the Public Interest Disclosures Act 1998 (PIDA) inserted whistleblower protection measures. The law is now 23 years old and has only been amended in a piecemeal fashion: it needs a more detailed review to bring it up to date with the modern workplace.

PIDA is essentially an anti-victimisation measure where it awards compensation if a whistleblowers is dismissed, forced to resign or suffers some kind of detriment (e.g. bullying and harassment from management or co-workers) after they have raised whistleblowing concerns (“disclosures”) that are seen to be in the public interest. The act defines “protected disclosures” which cover a wide range of wrongdoing that may have happened or is anticipated. Disclosures may be protected where they are made to an employer (from a line manager up to the chief executive), regulator, law enforcement body, MP or the media, with different legal tests applied, depending on where the disclosure is made.

### Falling behind internationally

For many years the law when passed in 1998 has been seen as the benchmark, where it has been used as a source of inspiration for similar laws in [Ireland](#) and the recent [EU Directive](#). Yet the failure of successive Governments to amend and reform PIDA has meant that the law now is looking dangerously out-of-date internationally. Both the Irish law and the EU Directive on whistleblowing have exposed gaps in the current UK legal framework and means that whistleblowing protection in the UK is falling behind international trends. In terms of impact this falls within point D of the review document where consideration of whether international efforts at whistleblowing protection would improve *‘the efficiency and/or simplicity of the law, for example ensuring the law is clearly drafted and coherent to those who need to use it’*. An example here would be whether there now needs to be legal requirements on organisations to have whistleblowing procedures and arrangements that meet a minimum standard. PIDA currently only deals with the victimisation of a whistleblower where it steps in and compensates where the whistleblowers can show they been mistreated or unfairly dismissed for raising concerns. The law is silent, however, on what is expected from employers in terms of having a structure in place to listen to and then deal with whistleblowing, or how they should interact with the whistleblower (i.e. for instance when and how they communicate conclusions from the concerns often referred to as feedback to the whistleblower).

The approach from successive governments in this area has been to leave it to the regulators in each sector to either craft rules on these issues (such as the [Financial Conduct Authority](#)) or to persuade employers in the sector to implement standards (such as in the [NHS](#)). More worryingly there are some sectors where there are no requirements set in place, and no regulatory body pushing forward best practice. As a result, we have seen via research we conducted with YouGov in 2021 that knowledge and ability of whistleblowers to raise concerns may suffer as a result. Table A shows this in more detail. Where financial services and health services are heavily regulated, employers in retail and construction have no regulator setting whistleblowing standards and so perform worse.

### [Question: How many workers know how to raise a whistleblowing concern at work?](#)

Sector	Yes	No, but I could find out if I needed to	No, I don't know

All sectors	31%	38%	31%
Financial Services	50%	36%	14%
Medical and health services	43%	38%	19%
Construction	27%	45%	27%

Our research, [The Best Warning System: Whistleblowing During Covid-19](#), demonstrates why standards are an important aspect of successful whistleblowing. We found, for example, that over 40% of callers to Protect's advice line raising Covid-19 cases were ignored by their employer and only in 1% of cases was the concern resolved. This was the case even when callers were raising concerns about public safety during a pandemic. During Covid-19 we had hundreds of calls about furlough leave fraud, yet many callers worked in businesses with no whistleblowing arrangements and had nowhere internally to raise concerns.

The absence of standards means workers across different sectors have varying experiences of blowing the whistle. This is damaging for the public interest as it makes the process frustrating for whistleblowers (which can deter them from raising concerns altogether) and risks concerns escalating into a more serious matter. It is also bad for business: good employers want to hear about wrongdoing in their organisations and provide multiple channels for workers to speak up. Poor employers either hear nothing because their workers are afraid to speak, and wrongdoing goes unchecked, or they hear first from the regulator or the Press when a scandal breaks.

Minimum legal duties of the kind we suggest would provide a clear route for the whistleblower to raise concerns and give employers the competitive advantage of robust channels that identify risks to business early so that any wrongdoing can be investigated and addressed. This is not a form of burdensome regulation: well-run organisations recognise that whistleblowing is an effective and cheap form of risk management.

#### *Unprotected whistleblowers*

A further area where PIDA needs to be both updated and simplified is the scope of the Act's protection. Since the Act was passed in 1998 the world of work has changed. The rise of the gig economy where large parts of the UK economy have workers in insecure work has raised profound questions around whistleblowing protection. This has caused considerable confusion in the workplace, where there are groups of workers who want to be considered self-employed and other groups who believe they are being exploited for tax or to avoid employment rights unfairly. This debate has an effect on whistleblowing protection as whether someone is defined as a worker is the line at which the protection becomes applicable.

Whistleblowing protection has long been seen in the same light as equality protection in there is an inherent public interest in providing protection in equality and whistleblowing beyond the impact on the individual involved, for equality protection employment is a major part of combating racism and discrimination, for whistleblowing society benefits if everyone can raise concerns safely. To carry this argument forward, PIDA was drafted using the wider legal definition of worker as opposed to employee to ensure that as many people in a workplace are covered by the protection as possible so that concerns about wrongdoing, risk or malpractice can be raised at the earliest opportunity to ensure the issue is dealt with before it becomes serious. This means there is space here for the Law Commission to lead a debate on whether the protection needs to be a lot wider than the current law envisages. For instance, it is not just that there is a degree of

uncertainty around who within the gig economy is a worker and who is genuinely self-employed, there is also a strong argument that sole traders (i.e. consultants who work for their own company but come across wrongdoing in another organisation where they are contracted to work) should also be protected as whistleblowers. They can be vulnerable if they are trying to raise concerns regarding a large contractor on whose business the consultant, as a sole-trader, heavily relies. The difficult point here, however, is whether there is a way of creating targeted whistleblowing protection for these individuals without blurring the lines of contract, which would otherwise bring in wider employment rights that are unneeded and unwanted. The EU Directive has attempted to define a wide range of people who may need workplace protection and who should be covered by national laws. The Law Commission are perfectly placed to carry out this important debate, wading through some complex legal arguments while reaching out to different affected parties.

The Tribunal system has seen a number of whistleblowing cases testing who is and is not seen as a worker whether they are trainee doctors in the form of [Chris Day](#), or a [district judge such as Claire Gilham](#). There are other groups such as volunteers, interns, governors, non-executive directors, and foster carers who were not debated in the scope of the law during PIDA's passage through Parliament due to it being a private members bill and so lacked the time to fully debate all these groups. There has been little reform of this area by successive Governments and so this area has not kept pace with the changing workplace in the UK, hence the case law development. Development through the court system though is a patchwork process and more importantly puts a lot of pressure on whistleblowers to bring test cases, as well as respondents who have to defend these cases, into a tribunal system that is positively creaking under the weight of massive delays. This fits squarely in our view of impact section C in that it would assist many whistleblowers with 'fairness, for example supporting individual and social justice'. From the respondent's point of view, as employers, they want clarity on these situations and that is better achieved at the moment through statutory intervention rather than case law development.

There is also an urgency for such reforms given that EU member states will move to a more sophisticated version of whistleblowing protection, while the UK law sits unreformed save small changes made in 2017, and large parts of the Act have been left untouched since 1998.<sup>1</sup>

### [Access to Justice](#)

We would also like to see any review of the legal framework on whistleblowing include a look at the question of access to justice, where such an important law for the public interest is often fatally undermined by delays and lack of legal representation at employment tribunal.

We have seen some worrying research from Greenwich University's report [Making Whistleblowing Work for Society](#) commissioned by the *All Party Parliamentary Group on Whistleblowing* where they examined employment tribunal outcomes between 2015-18. They found just 12% of whistleblowers whose cases go to preliminary hearing at employment tribunals in England and Wales are successful, and that women who whistleblow are less likely to be represented or succeed.

Other findings included:

- There is an important gender dimension for whistleblowers. Compared to male whistleblowers, female whistleblowers are: more likely to report health issues; less likely to have legal representation; and even when the judge upholds the protected disclosures, they are less likely to see their unfair dismissal claim upheld.
- Whistleblowers suffer more and longer than before. In 2018, nearly 40% of whistleblowers reported going on sick leave, an increase of 15% since 2015. Whistleblowers also take longer than before to go to tribunal. In 2018, nearly half of them took longer than two years, and more than one in five took longer than three years. Post-Covid this is likely to almost double because of the backlog with

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<sup>1</sup> We argue this fits within point 4 of the impact section of the guidance document.

employment tribunals now listing new hearings from February 2022.

- Legal support matters for whistleblowers but fewer whistleblowers than before have access to legal representation. Whistleblowers are getting less expert support at employment tribunal than ever before. More whistleblowers self-represent than get legal representation. In contrast, employers secure more expert legal representation than ever before.

[The employment tribunal was already suffering backlogs before the pandemic and a recent report by the House of Lords Constitution Committee](#) found by late February 2021 there was a 45% increase in the number of outstanding cases, in part due to complications arising from the pandemic.

We are worried that the delays and issues we have seen at employment tribunals will undermine the legal protection available to whistleblowers. If this becomes a theme that is more visible to the public then it may present a barrier for those looking to raise concerns in the future.

One way in which access to justice may be improved is by introducing new means for enforcing whistleblower protection. For example, if an employer is legally required to have standards to introduce arrangements and protect whistleblowers from detriment, then regulators can enforce those standards without an individual having to bring a tribunal claim. This has the additional advantage of whole workplaces benefitting from effective enforcement, rather than an individual fighting for a remedy which, even if successful, benefits just that individual and leaves a poor employer out of pocket, but under no obligation to change their arrangements.

#### *Government and Parliamentary support*

Reform has support both in Government and Parliament. [The Government have stated that they are considering a review of the whistleblowing framework but are waiting for more data from regulators who are legally obliged to publish anonymised data each year.](#) This was part of the last set of reforms in 2017, and the Government are saying that they are waiting for this reporting duty to be embedded before considering a review.

In Parliament there have been two ballots running private members bills in both the [House of Lords](#) and [House of Commons](#) addressing the need for legal reform in this area<sup>2</sup>. Neither bill is likely to be made into law but both efforts attracted cross-party support and there is an active All Party Parliamentary Group on whistleblowing that has produced reports on the issues. The Government are being slow to respond to the calls for reform even though there is calls from MPs to carry out key reforms.

Here are some selected quotes from MPs and Peers in recent debates and question arguing for a review of whistleblowing laws:

This explains the Government's current position:

- Parliamentary Questions 19th April 2021:

#### **Kevin Hollinrake Conservative, Thirsk and Malton**

*To ask the Secretary of State for Business, Energy and Industrial Strategy, what recent improvements he has made to the whistleblowing regime; when he plans to begin his review of whistleblowing legislation; and what plans he has for a public consultation once that review has been completed.*

<sup>2</sup> These were the Public Interest Disclosure (Protection) Bill introduced by Dr Philippa Whitford MP in the 2019-2021 parliamentary session; and the Office of the Whistleblower bill introduced by Baroness Susan Kramer in the 2019-2021 and 2021-2022 parliamentary session.

**Paul Scully Parliamentary Under-Secretary (Department for Business, Energy and Industrial Strategy),  
Minister of State (London)**

*The Government remains committed to reviewing the UK whistleblowing framework and will carry this out once sufficient time has passed for there to be the necessary evidence available to assess the impact of the most recent reforms. The scope and timing of such a review will be confirmed in due course.*

*The most recent change introduced in 2017 was a new legislative requirement for most prescribed persons to produce an annual report on whistleblowing disclosures made to them by workers.*

- Lord Bassam of Brighton (Labour Spokesperson) during the Second Reading of the Office of the Whistleblower in the House of Lords a private members bill:  
*‘Whistleblowers play an important role in protecting the public and consumers, and they could do much more with protection. They can ensure that businesses and services operate more effectively and efficiently and stop serious incidents from occurring. We need to ensure that they receive the right and proper support. To do that, action is needed, and I look forward to hearing what the Minister proposes in his response. This is too important to be left for long, and I should like to see legislation brought forward as a matter of urgency, if the Government are not prepared to support the Bill proposed by the noble Baroness, Lady Kramer, which has so much going for it and many merits.’*
- Lord Sharkey (Liberal Democrat) speaking during the Second Reading of the Office of the Whistleblower in the House of Lords:  
*‘As my noble friend Lady Kramer noted, two weeks ago, the Minister for BEIS, Paul Scully, acknowledged the need for review of the whistleblowing framework, but he qualified that by saying: “we will do that once we have sufficient time to build the necessary evidence of the impact of the most recent reforms”.—[Official Report, Commons, 8/6/21; col. 846.]*  
*The reforms he refers to took place in 2017 and were essentially confined to establishing the publication of annual incident reporting. That was four years ago—plenty of time to assess the impact of these relatively minor new requirements. I hope the Minister will not argue the need for more time or evidence. I hope he recognises both the need for rapid action and the merits of the approach proposed by the Bill.’*

The Law Commission as an independent expert legal body could fill the gap by reviewing the UK whistleblowing framework.

**How whistleblowing fits in with the Law Commission’s identified themes**

*Leaving the EU*

Leaving the EU has meant the [Whistleblowing Directive](#), which has a deadline for member states to implement by the end of the year, will not be implemented in the UK. This represents a challenge to the UK in that the EU Directive is so much more sophisticated in the two areas identified in this response, namely duties on employers and the scope of protection position. In a number of other ways the Directive goes further than PIDA – for example, reversing the burden of proof. This strikes us as undesirable from the competitive point of view – UK whistleblowers will be less protected than their counterparts in member states. A better whistleblowing framework, especially one that has minimum standards on employer arrangements, may impact on fraud and corruption detection rates. For there to be no reform of whistleblowing may also undermine the Government’s commitment to ensure that UK workers have comparable rights compared to EU member state workers. Finally, without reviewing whistleblowing rights it may well harm the ability for whistleblowers to raise cross border cases, whether that concerns corruption or safety issues. This can be seen in issues such as the withdrawal of the UK from the Lugano Convention

with no obvious plan to replace it, making cross border whistleblowing cases even harder to resolve.

### *The Environment*

Whistleblowing has a key part to play in the climate crisis as our economy moves rapidly into a state where it needs to de-carbonise and organisations will need to comply with standards that massively reduces their carbon footprint. PIDA covers concerns about damage to the environment, and we anticipate an increase in whistleblowing in this area: as companies are required to demonstrate and report their impact on the environment, so they may be under pressure to produce ever better statistics and the dangers of “greenwashing” (where businesses make claims about their environmental credentials which are not matched by practice) have been well explored. Without robust whistleblowing laws that covers both the rights of a whistleblower but also ensures effective whistleblowing systems in employers and regulators to deal with urgent global concerns, such as the environment, there is a risk that we see a repeat of the Volkswagen emission scandal. We argue it is not just the unearthing of these scandals where whistleblowing is so key, but also the speed with which these concerns are exposed. The quicker the disclosures can be made the quicker action can be taken so that any wrongdoing or damage can be prevented at an early stage. This supports the argument that minimum legal standards are important because, by offering a clear and accessible route to raise concerns, employers will become aware of wrongdoing early.

### *Legal Resilience*

The pandemic has exposed in our view the fragility of the whistleblowing framework, less in terms of workers raising their concerns where we saw a huge rise in calls to the Advice Line and [Slater & Gordon/YouGov research showed 46% of key workers surveyed raised concerns about safety issues, but more in terms of how those concerns are responded to by employers and regulators.](#)

We analysed the cases to our Advice Line covering issues related to the pandemic. Broadly speaking, most of the concerns were either about an employer potentially defrauding the coronavirus job retention scheme or the safety of the workplace during the pandemic. We found 93% of whistleblowers calling Protect for advice raised their concerns with their employer but most then believed their concern was ignored:

- 41% of whistleblowers raising concerns with their employer about issues relating to the pandemic generally felt ignored.
- 43% of whistleblowers raising concerns about the safety of their workplace specifically felt ignored.

What worried us at Protect was how this finding - that whistleblowers feel ignored - seems to be a systematic issue. We published research looking at whistleblowing in the financial sector from 2017-2019 called [Silence in the City 2](#) that attempted to measure the effectiveness of whistleblowing rules set on firms regulated by the FCA and Prudential Regulation Authority. We found 33% of whistleblowers felt their concerns were ignored (although the introduction of rules and arrangements meant that 93% raised their concerns with their employer in the first instance, giving the employer an opportunity to address the wrongdoing).

- Though we found that overall victimisation was lower when whistleblowers raise issues relating to the pandemic compared to concerns raised in 2019 we still found 20% of whistleblowers raising pandemic related concerns were dismissed from their employment.
- Managers were more likely to be dismissed (32%) compared to workers who did not have management duties (21%).

This research shows that the way whistleblowers are responded to, and how the legal framework is currently operating, is poor so should be part of any debate about learning lessons about dealing with the pandemic.

### **Conclusion**

We believe there is a very strong case for whistleblowing to be considered as a project for the 14<sup>th</sup> programme. Whistleblowing as a legal framework needs to be examined and modernized to ensure it is fit for the modern workplace, fulfils its potential to protect the public interest, and keeps pace with international developments.