

1. Protect submit this document in response to the Ministry of Justice's consultation on *Human Rights Act Reform: A Modern Bill of Rights*.
2. We will answer the following questions:

QUESTION 5: *The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?*

QUESTION 6: *What further steps could be taken in the bill of rights to provide stronger protection for journalists' sources?*

QUESTION 7: *Are there any other steps that the bill of rights could take to strengthen the protection for freedom of expression?*

### **PROTECT – THE UK WHISTLEBLOWING CHARITY**

3. 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.
4. Since 1993, Protect has operated its free, legal Advice Line offering specialist whistleblowing advice to over 3,000 workers a year. To date, Protect has individually advised more than 45,000 whistleblowers. We also 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.

### **REASON FOR SUBMITTING EVIDENCE**

5. Protect's response is focused on questions relating the right to freedom of expression outlined in Article 10. Freedom of expression is a fundamental human right underpinning the functioning of democracy and the rule of law. At the core of the right to freedom of expression is the freedom to hold your own

opinions and express views and ideas without unjustified interference or limitation, even when they may be offensive or disagreeable to others.

6. This ability to freely challenge and raise concerns without interference is an integral part of whistleblowing. Any Bill of Rights which aims to strengthen the protections set out in Article 10 should consider the role that whistleblowers have in protecting the public interest through the exercise of this fundamental right.

**QUESTION 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?**

7. Protect recognises the vital importance that freedom of expression has in ensuring greater transparency and accountability, preventing corruption and in protecting the public interest.
8. English courts have long recognised in the common law the fundamental importance of the right to hold and express opinions, and this right has influenced various decisions where judges have been tasked with considering competing rights or public interest considerations. In the case of *Attorney General v Observer* [1990] 1 AC 190, Lord Keith observed, “*I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world*” [283]
9. Freedom of expression plays an important role within employment law, particularly in relation to the rights of whistleblowers. The right to both receive and impart information has important implications for workers who wish to raise public interest concerns. By its very nature, whistleblowing involves individuals exercising their rights of freedom of expression through the act of speaking up or sharing information of wrongdoing, risk, or malpractice. In exercising this fundamental right, whistleblowers play a crucial role in highlighting misconduct, upholding democracy, and safeguarding the public interest.
10. However, there is widespread acknowledgement that the Public Interest Disclosure Act 1998 (PIDA), the law that protects workers who raise concerns from facing negative treatment or from dismissal for raising those concerns, sometimes fails those it was intended to protect. This can be put down to the fact that PIDA is now out-of-date and is struggling to reflect the changing landscape of work in the UK. Such gaps in the legislation have occasionally risked justice not being properly served where whistleblowers who have done a public service in raising their concerns face retaliation in their workplace for doing so, but do not come under the scope of statutory protection.
11. This has led to situations where the courts have been left to read in or interpret the law in such a way as to ensure that the legislation functions to protect those that raise concerns in the public interest. The

statutory rights of whistleblowers can be enhanced by freedom of expression which provides a vital additional layer of protection.

12. In the case of *Gilham v Ministry of Justice* [2019] UKSC 44, the Supreme Court read down s.230(3) of Employment Rights Act 1996 in a manner to include judicial officeholders (as opposed to just employees and workers) and read words into s.47B of the ERA, to extend whistleblowing protection to judicial officeholders. In doing so, the court cured any unlawful interference with the complainant's rights under Article 10 and Article 14.
13. Rather than criticising the Supreme Court's reading of 'worker' "much more widely than its natural meaning to include judicial office holders" (paragraph 119), the case demonstrates the positive application of freedom of expression in enhancing the rights of whistleblowers, maintaining justice, and ensuring that individuals are supported and encouraged to speak out about wrongdoing. This signals the importance of whistleblowing as an exercise of this fundamental human right.
14. However, as a qualified right, the court must carefully balance freedom of expression against competing rights and legal obligations.
15. Whistleblowing inevitably involves speaking up about concerns or sharing information which may be, in some respect, controversial, and where organisations or individuals may have an interest in interfering with the disclosure. For instance, it may involve revealing confidential information, it may impact on an organisation or individual's reputation, or it may raise data protection issues. Information that could impact on national security is also protected by other laws such as the Official Secrets Act which makes it a criminal offence to disclose some sensitive information.
16. It is a difficult balancing act to determine whether the public interest in the information and/or the fundamental right to hold and express opinions outweighs any potentially legitimate interference with those rights.

### **Instances where the Strasbourg Court may not have struck the right balance between the interference with Article 10 rights and other rights/offences**

17. In the case of *Halet v Luxembourg* (Application no. 21884/18) the Strasbourg court found that the courts in Luxembourg did not violate Article 10 by convicting a whistleblower for disclosing confidential tax documents to a journalist during the Luxleaks scandal.
18. In its decision in *Heinisch v Germany* - 28274/08 [2011] ECHR 1175, the ECtHR ruled that the 'employee's right to freedom of expression by signalling illegal conduct or wrongdoing on the part of her employer [thus has to be weighed] against the latter's right to protection of its reputation and commercial interests' [64].
19. In *Halet* the Strasbourg court applies this by suggesting that where information has been disclosed, there needs to be a proportionate balance between the whistleblower's freedom of expression and any harm to the employer. The Court accepted that the information disclosed by Halet was in the public interest but because it was not "vital, new, and previously unknown" (due to previous disclosures made by

Antoine Deltour), the Court determined that the criminal prosecution did not constitute a breach of his rights to freedom of expression.

20. Some employment law professionals argue that this case sets a dangerous precedent and weakens the protection of whistleblowers, highlighting the Strasbourg court's ambivalence between public interest disclosures and employers' interest in secrecy. Such a balancing act is excessive in the context of whistleblowing. Indeed, it requires would-be whistleblowers to independently evaluate the contribution of their disclosures to the public debate – a near impossible task. There should be no first-come-first-served whistleblowing protection under the law.
21. This case demonstrates that clear guidance is needed for courts when they are balancing freedom of expression against other competing rights and offences in order to properly and fairly serve the interests of justice.

### **How the government might confine the scope for interference with Article 10 to limited and exceptional circumstances**

22. The government proposes that the Bill of Rights provide more general guidance on how to balance the right to freedom of expression with competing rights or wider public interest considerations.
23. When weighing the rights of an individual to exercise their rights of freedom of expression against any competing civil or criminal claim lodged against them, the public interest should be paramount to avoid overly restrictive measures.
24. The UK courts have experience developing principles which define the public interest. After the implementation of the Enterprise and Regulatory Reform Act in 2013 (section 17 ERRA), the Public Interest Disclosure Act 1998 was amended to include a public interest requirement (section 43B(1) Employment Rights Act 1996). No guidance or additional information was given to courts as to how the public interest requirement was to be applied, leading to confusion for would-be whistleblowers and legal professionals alike.
25. The Court of Appeal was forced to set out its own guidance for determining the public interest and established relevant factors for future courts to consider when determining the public interest of a protected disclosure in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979.
26. When considering the exercise of freedom of expression, courts may benefit some clear guidance from the government to determine what is in the public interest to avoid similar confusion created by the implementation of section 17 ERRA.

### **Guidance on the public interest**

27. The *Chesterton* Public Interest Test provides helpful guidance for courts when deciding whether a disclosure is in the public interest, but additional guidance from government would be helpful for determining the public interest when balancing competing rights and claims.

28. The government may look to international examples such as the Tshwane Principles<sup>1</sup> on National Security and the Right to Information. The Principles were influenced by both national and international law and practices to establish concrete guidance for those engaged in drafting, revising and implementing relevant laws and policies “on the appropriate limits of secrecy, protections for whistleblowing, the parameters of the public’s right to information about human rights violations and other issues.”<sup>2</sup>
29. Principle 43 outlines criteria for prosecutors and judges in criminal proceedings to consider when deciding whether the public interest in disclosure outweighs the risk to national security. Similar criteria could be applied in cases where the public interest in exercising freedom of expression is being weighed against civil wrongdoing:
- a. whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;
  - b. the extent and risk of harm to the public interest caused by the disclosure;
  - c. whether the individual had reasonable grounds to believe that the disclosure would be in the public interest;
  - d. whether the individual has raised their concerns internally or with an external oversight body;
  - e. the existence of other demanding circumstances justifying the disclosure.<sup>3</sup>
30. Since not every piece of legislation will necessarily benefit from an express consideration as to how it restricts freedom of expression, having a more systematic approach such as clear public interest guidance supplementing the Bill of Rights, will protect against overly restrictive measures ending up on the statute books without an ability for the courts to judge their proportionality.

**QUESTION 6: What further steps could be taken in the bill of rights to provide stronger protection for journalists’ sources?**

**AND**

**QUESTION 7: Are there any other steps that the bill of rights could take to strengthen the protection for freedom of expression?**

31. Questions 6 and 7 will be answered in conjunction as a strengthened protection for freedom of expression of whistleblowers will also impact on stronger protection for whistleblowers as important sources of intelligence for journalists.
32. The category of journalist’s sources is potentially very wide. We hope that others will outline to the Government the need for journalists and source protection to be part of the Bill of Rights, but it’s important to also consider the needs of whistleblowers in this area.

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<sup>1</sup> [OSJI-Global Principles on National Security.indd \(justiceinitiative.org\)](https://www.justiceinitiative.org/documents/osji-global-principles-on-national-security)

<sup>2</sup> [tshwane-principles-15-points-09182013.pdf \(justiceinitiative.org\)](https://www.justiceinitiative.org/documents/tshwane-principles-15-points-09182013.pdf)

33. Whistleblowers are a vital source of information for journalists. As the eyes and ears of an organisation, employees and workers are in a unique position to witness and challenge wrongdoing within their workplace.
34. Whilst it is hoped that in most cases this could be raised internally with the appropriate person in their department or organisation, there will be times when this is not feasible. This may be because, for example, the whistleblower raised concerns internally but was ignored, they have little confidence in the internal processes, or they have been or fear victimisation for raising the concerns. In such circumstances, a whistleblower may decide to exercise their rights of freedom of expression to raise their concerns, if significant, to an external body, such as to journalists/the media.
35. Whistleblowing cannot work effectively without having these external routes available to raise concerns. However, doing so presents a number of risks to a whistleblower such as dismissal, victimisation or other forms of employment-related detriment. This is where current UK whistleblowing protection, the Public Interest Disclosure Act 1998 (PIDA), provides a cause of action.
36. However, whistleblowing protections say nothing of detriments outside of the scope of employment such as the threat of being pursued through a civil or criminal court for blowing the whistle outside the employer. This threat may discourage whistleblowers from raising legitimate concerns, thus leading wrongdoing to go unprevented, unaddressed or even to escalate.
37. A Bill of Rights should address this gap by including a defence to civil proceedings or criminal prosecutions for those who blow the whistle or make 'protected disclosures' in accordance with the PIDA. Such a defence for whistleblowers would do much to reassure those coming forward with concerns about wrongdoing or corruption.
38. For example:
  - a. "No cause of action in civil proceedings shall lie against a person in respect of the making of a protected disclosure.
  - b. In a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for that person to show that, at the time of the alleged offence, the disclosure was, or was reasonably believed by the person to be, a protected disclosure."<sup>4</sup>

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<sup>3</sup> [OSJI-Global Principles on National Security.indd \(justiceinitiative.org\)](#) p56

<sup>4</sup> Wording taken from [Protect's Draft Whistleblowing Bill](#) adapted from sections 14 and 15 of Protected Disclosures Act 2014 in Ireland

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