BY EMAIL

Dr Henrietta Hughes
National Freedom To Speak Up
Care Quality Commission

13 April 2018

Dear Dr Hughes,

Your question: Why is whistleblowing law reform important to whistleblowers?

As per our discussion of 27 March 2018, I write as promised to provide some of the background data on why UK whistleblowing law, the Public Interest Disclosure Act (PIDA), is fundamentally flawed and needs wholesale reform.

These are some of the salient issues:

1. PIDA does not compel anyone to investigate whistleblowers' concerns

2. PIDA does not confer protection. It only allows whistleblowers to sue for compensation after serious harm.

   There is no evidence that the prospect of being sued for compensation deters reprisal by employers. As long as employers have the means to pay compensation, they can easily rid themselves of whistleblowers by unfairly dismissing them.

3. PIDA does not confer personal jeopardy for those who cover up and victimise whistleblowers. There is no formalised penalty for betrayal of the public interest.

4. Under PIDA, whistleblowers personally carry the burden of risky litigation, even though the matters in question concern the public interest.

The cost of litigation can be ruinous. Even on the rare occasions when whistleblowers 'win', the legal fees can swallow up much of what is already inadequate compensation for loss of livelihood and a future of long term unemployment. ETs seem also to be increasingly awarding costs against whistleblower claimants. Equally, ETs may also dock compensation on the basis of alleged contributory fault by whistleblowers, that may in fact stem from inexperienced litigants in person being outgunned in court and thus making tactical mistakes, or the result of deliberate employer provocation to muddy the waters.

5. It is very hard to win PIDA cases.

This is due to the nature of the legal tests that must be satisfied and the inequality of arms between employers and whistleblowers. Many cases are simply settled (usually to the whistleblower's disadvantage) or they are withdrawn. Only approximately 3% of all whistleblowing PIDA claims eventually succeed at hearing.

6. PIDA is narrowly constructed to focus on employment issues, and PIDA cases are handled by Employment Tribunals, despite the fact that Employment Tribunals are not equipped to deal with whistleblowers' concerns and struggle with the complexity of some of these cases.

This perpetuates a focus on personal conflict and deflects attention away from the public interest and policy issues that provoke whistleblowing in the first place. It helps to continue the narrative by successive governments that whistleblowers are troublemakers, and neatly avoids the need to address the underlying risks to the public.

7. PIDA does not compel employers to improve their governance following whistleblowing failures.

8. PIDA focuses on whistleblowing governance failure by employers but not by regulators and government departments, when the latter are in fact much more serious and important. For example, the ET clarified that it had no jurisdiction for hearing Helen Rochester's complaint about detrimental actions by the CQC towards her as a whistleblower.

This a comprehensive report by Blueprint for Free Speech which categorises in detail PIDA's substantial flaws and shows how badly PIDA compares to legislation from other jurisdictions:

Protecting Whistleblowers in the UK

This is a very recent case example, of Helen Rochester's care home whistleblowing case, which clearly illustrates the weaknesses of PIDA and the ET system:

UK Whistleblowing Law is an Ass: Helen Rochester v Ingham House Ltd and the Complicit CQC

Helen Rochester proved the facts of her claim but still lost because the ET chose to give her former employer extraordinary latitude and the benefit of the doubt as to whether the detriment that it inflicted was motivated by her whistleblowing.

Her case is particularly cogent because she was twice betrayed by a regulator (the Care Quality Commission) which has since refused to transparently review its processes, further highlighting the folly of tolerating weak UK whistleblowing law in a system which is subverted by politicisation and various degrees and types of corruption.

Given such repeated and very substantial failures of PIDA over twenty years, it is not sustainable for the DHSC, Sir Robert Francis and your Office to maintain the position that law reform is merely secondary, and that a programme of nudging and soft culture change is more important.

Daily serious breaches of the Nolan standards - introduced over twenty years ago - in our public services amply demonstrate that soft codes of conduct and exhortation are no substitute for legislation, such as for example USA legislation, which governs conflicts of interest and prohibited personnel practices by federal employers.

Good law, which is accompanied by an appropriate enforcement infrastructure, will enforce better practice and drive culture change much more effectively and quickly. It is time for the government to act upon this and to finally and properly protect whistleblowers.

Please let me know if you require any further details, or if you have opposing evidence, I would be grateful if you would share this.

Yours sincerely,

Minh

Dr Minh Alexander

cc Lord Bew Committee for Standards in Public Life

Steve Barclay Minister of State Department of Health and Social Care
Dr Sarah Wollaston Chair of Health and Social Care Committee
Meg Hillier Chair of Public Accounts Committee
Bernard Jenkin Chair of Public Administration and Constitutional Affairs Committee
Robert Neill Chair of Justice Committee
Harriet Harman Chair of Joint Committee on Human Rights
Sir Amyas Morse NAO