Protect
Speak up, stop harm
25 years

Highlights from our anniversary month

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Introduction

Protect is the UK's leading whistleblowing organisation and since we formed back in 1993, have supported approximately 40,000 cases. Every year our advice line supports 2,500 cases and as well as helping whistleblowers, our expertise is extended to organisations who wish to introduce best practice whistleblowing or speak up arrangements.

Over the last 25 years there has been progress. Protect, formerly known as Public Concern at Work, helped to shape the whistleblowing law PIDA (Public Interest Disclosure Act) and we continue to campaign for improvements to the law. We have sought to change the culture that labels whistleblowers as snitches and troublemakers. However, there is still much work to do to change outcomes for whistleblowers so all workers feel able to question wrongdoing before it's too late, and without fear of recrimination.

This report captures our 25th anniversary highlights. As part of our anniversary events, we collaborated with The Guardian to host our Protect exhibition 'Whistleblowers and their impact on society' at the Guardian Gallery. Some of those stories are captured in this report and we hope you agree the impact of their speaking up has been profound. Whistleblowers need to be valued and recognised. This report also features editorials from sector experts as well as our own spotlight on two of our key sectors, the health and charity sectors.

During our anniversary month, we also officially launched our 360° Benchmark, a unique tool to help all organisations with effective whistleblowing arrangements and culture. We are receiving fantastic feedback to date and hope to reach many more organisations across all sectors.

Lastly, we take a look at PIDA and its successes, our own interventions and some proposals for reform which are urgently needed.

Francesca West
Chief Executive, Protect

A look back over 25 years

As Protect marks its 25th anniversary, Guy Dehn, founding Director shares his thoughts on our history, PIDA and whistleblowing then, and now.

Back in 1993 whistleblowing was such an unpopular activity that the Charity Commission initially ruled there could be no public benefit in our offering confidential advice to people concerned about wrongdoing at work. Whistleblowers were assumed to be liars and malevolent traitors at worst; sneaks or losers at best.

1993 was a very different world in other ways too. Then, only a handful of people had heard of the internet, let alone had access to it: so no emails, no smartphones, no social media. There was no Parliament in Scotland, nor an Assembly in Wales. There was no voluntary code on freedom of information, not to mention a statutory right. The case we made for a new approach to whistleblowing was based on a run of disasters and scandals, including the capsizing of the ferry the Herald of Free Enterprise, the explosion at the Piper Alpha oil rig, the Clapham Rail Crash, the collapse of the bank BCCI and the pillaging of Mirror Group's pension fund by Robert Maxwell.

Inquiries

Deep in the reports of the public inquiries it was clear that workplace cultures were a serious part of the problem – some inquiries described an autocratic environment where nobody had dared to speak up, while others found a worker had tried to sound the alarm but had been ignored, sidelined or sacked. Our starting point was that if someone was prepared to tell friends or family about wrongdoing in their workplace, there was good reason they should be encouraged to raise that concern openly. While we believed such concerns should ideally be raised in the workplace if practicable, we were also clear that disclosures to regulators, the police and the wider public could also be justified.

Approach

Beyond this, we knew we had much to learn before we would have a good idea how a new approach to whistleblowing might work in practice. The research we undertook for the series Speaking up by Sector, the educational and policy work we did and the training courses we ran were all important in our learning, but the free helpline was critical to how our thinking developed.

In the early years of the helpline, clients' concerns included financial scams, dodgy food, tax frauds, safety risks and corruption, and covered schools, banks, fairgrounds, charities, public bodies, and companies large and small. We helped clients raise concerns internally, with regulators and the police; more publicly, we went to court to set aside a gagging injunction to fight libel suits and we briefed the media. In one case we had to turn away the MoD police who had turned up demanding to see a client's file; and on another we secured the first retraction and a fulsome public apology in the UK from an internet provider after false and damaging rumours about us were circulated to employment lawyers.

Inevitably many of the concerns raised through our helpline turned out to have substance and a fair few showed that the wider legal and regulatory cultures were often as much a part of the problem as the solution. Two early cases stand out – helping Adrian Schofield halt a million pound theft at a paper mill, saving several hundred jobs in the north west; and assisting nurse Judy Jones blow the whistle on the award-winning boss of a care home who was sexually abusing blind residents and subsequently jailed.

In 1995 the Nolan Committee on Standards in Public Life strongly backed our approach, pointing out that unless public servants felt able to raise whistleblowing concerns openly, they would stay silent or leak the information anonymously, fuelling the culture of sleaze.

At the same time two independent-minded backbench MPs – Labour's Tony Wright and the Conservative Richard Shepherd – asked us and the Campaign for Freedom of Information to draft a Whistleblower's Protection Bill. The MPs said that if we could help they would want to follow our recommendations but if we couldn't, they would do the best they could without us. As to how to structure the draft law, we decided to adopt the principles on public interest disclosures developed by judges as the template to encourage and protect whistleblowing.

Welcomed

Our initial proposals were widely welcomed on consultation. In 1996 Labour's Don Touhig introduced a revised draft after he won the ballot for Private Members' Bills. His Bill completed its passage through the House of Commons but, lacking Government support, got no further. Nonetheless it had shown there was strong support across Parliament for a whistleblowing law and this prompted Tony Blair to pledge that a future Labour Government would pass such a law. The need for a new culture had again been highlighted by Lord Justice Scott's Arms to Iraq Inquiry which revealed that the Government machine had not only ignored a whistleblower's letter but then sought to keep its existence secret from the courts when Matrix Churchill was prosecuted for breaching a UN embargo.

Weeks after the election of the new Labour Government in 1997, the Tory MP Richard Shepherd decided to reintroduce the Public Interest Disclosure Bill after he won a place in the ballot. Within five years of the charity's launch in 1993, and far sooner than we had ever imagined, the Public Interest Disclosure Act was on the statute books. Over the following decade we were able to help influence how the legislation took root in workplaces, was promoted in policies and applied in the courts.

The great success of the legislation has been to help change the culture towards whistleblowing. I think it was able to do this because it protects concerns raised internally and not just outside, because it applies to all workplaces in the public, private and voluntary sectors, and because – as much by accident as design – workers, employers, unions, auditors, lawyers, regulators, professional bodies, the courts, the media and Parliament all have competing roles and stakes in making it work.

Tested

But the legislation is far from perfect. I regret that PIDA's provisions on gagging clauses and official secrecy have not yet been properly tested and I still wonder whether it was a mistake to omit Tony Wright's suggestion that whistleblowing cases should be heard not by an employment tribunal but a specialist PIDA one. Had PIDA fulfilled my hopes and expectations, it would have done much more to enable the alarm to be sounded effectively on the coming financial crisis a decade ago. And in the wondrous NHS – even though a thousand whistles are successfully blown on patient safety issues every hour – work still needs to be done to reassure staff that there is an open, accountable culture and to give those in authority the confidence to address genuine concerns.

As to the charity, now known as Protect, many congratulations on your 25th birthday. I trust that you will never lose sight of your public interest bias; I hope that you will champion alternatives to anonymity whenever people speak up; and I pray that – whatever brickbats it may bring – you have the strength to continue to be a self-funding charity.

Protect 25 years
Speak up, stop harm

Exhibition:

Whistleblowers and their impact on society

Highlights from the Protect exhibition which took place at the Guardian Gallery

Thank you to the following whistleblowers who agreed to share their stories with Protect and to the many, many others who felt unable to turn a blind eye.

Photograph: Teri Pengilley for The Guardian

Antoine Deltour

PwC employee who blew the whistle on controversial tax deals

"I could have been fined a million euros," the Luxleaks whistleblower Antoine Deltour says when reflecting on his ordeal. Since passing information about controversial tax agreements to the French journalist Edouard Perrin, the former PwC employee has faced global media attention and two trials. By 2016, more than 215,000 people had signed a petition pledging support for Deltour.

It was in 2011 that Deltour first passed documents to Perrin, detailing how companies such as Amazon and Dyson struck (perfectly legal) deals with Luxembourg to avoid cross-border tax. The International Consortium of Journalists used this leaked data to unveil the extent of the tax avoidance in 2014. Many of the multinational companies involved had managed to reduce their tax to near zero by developing complex strategies with the Grand Duchy.

The data leak was denounced by Pierre Gramegna, Luxembourg's finance minister, as "the worst attack" ever experienced by his country. Indeed, Deltour grimly acknowledges the immense courage needed on his part. In 2016, he was convicted of theft, receiving a 12-month suspended sentence and a fine of €1,500. Even so, he still insists he would whistleblow again. "Democracy demands information," Deltour says. "I still believe I acted in the public interest."

In early 2018, Deltour was finally acknowledged as a whistleblower, and his conviction was quashed. But in what Deltour describes as a "smart move", a €1,000 fine against PwC employee Raphael Halet, who also passed Luxleaks information on, was upheld. "There's a message there," Deltour notes. "By recognising me, they're making out that they're open. But by condemning Raphael, they're making sure people think twice before speaking to a journalist."

Photograph: Christopher Thomond for The Guardian

Katharine Gun

Blew the whistle on a US and UK spy operation to authorise Iraq invasion

Katharine Gun was 28 when she tried to prevent one of the deadliest wars of the 21st century. Whilst working as a mandarin translator at GCHQ, Gun and her colleagues received a request from America's National Security Agency. The email requested an intelligence "surge' of diplomats attached to the UN security council, to secure crucial information on the voting intentions of member states in the run-up to the Iraq war.

Gun, horrified at these "dirty-tricks", leaked the email to the Observer, and was subsequently sacked and arrested, an ordeal which she describes as "isolating". "I felt very much alone," she says. "I didn't know whether I would be charged."

Although her leak did not halt the war, it led to worldwide outrage – a second UN resolution to authorise the war was not held. Gun's trial collapsed due to insufficient evidence, and her whistleblowing is now being immortalised in upcoming film Official Secrets. Would she blow the whistle again? "Yeah, I would," she says. "There is always a need for whistleblowers – we don't live in a society which is transparent, fair and just. Whistleblowers hold people to account."

Photograph: Christopher Thomond for The Guardian

Terry Bryan

Blew the whistle on hospital management who ignored his concerns over abuse

As a nurse with decades of experience, Terry Bryan was appalled by the abuse he witnessed at Winterbourne View, a hospital for people with learning difficulties. After his concerns were ignored by management, he raised his claims with the Care Quality Commission. In what the CQC described as an "unforgivable error of judgement", no action was taken.

Bryan then turned to BBC Panorama, whose show Undercover Care: The Abuse Exposed cast Winterbourne's conditions into the limelight. Bryan's whistleblowing led to six care workers being given prison sentences, and NHS England developing its 2011 "transforming care" agenda. The agenda aimed to reduce patient admissions to hospitals like Winterbourne.

Bryan now works for Care Inspectorate Wales, using his experience to inspect care homes and nursing homes around South Wales. When asked if he would be prepared to blow the whistle again, it was an unequivocal yes. "It's about following your conscience," he says. "How would you live with yourself if you didn't do it?"

Photograph: Teri Pengilley for The Guardian

Osita Mba
Blew the whistle on HMRC sweetheart tax deals to Goldman Sachs

Awarded whistleblower of the year by Middlesex University in 2014, Osita Mba's actions have been highly commended. In March 2011, the former HMRC solicitor contacted the National Audit Office, revealing a "sweetheart deal" between HMRC and the investment banking firm Goldman Sachs. Mba alleged that HMRC's most senior tax official had let Goldman Sachs off from paying at least £10m in interest. "I considered it my duty as a public servant to report it," Mba reflects. After feeling unsatisfied with the NAO's report in the matter, Mba then took the claims to the public accounts committee of the House of Commons. "Fortunately, my claims were taken seriously and investigated," he says.

In an action widely condemned by MPs, HMRC then used the Regulation of Investigatory Powers Act to search through the phone records and emails of both Mba and his wife. "I expected them to do it, so I wasn't surprised when I found out that they had," says Mba, who was also suspended from his job. Despite his ordeal, he is able to see the positives: "I have paid dearly in terms of my career so far, but the peace of mind I have enjoyed is priceless."

In 2013, Mba received the equivalent of three years' salary and a pension in a compromise agreement. Looking back, he describes whistleblowing as a "battle of conscience". "Only the truth will set you free," he says. "If I find myself in a situation where my conscience tells me that speaking out is the right thing to do, I will do it."

Photograph: Linda Nylind for The Guardian

District Judge Claire Gilham

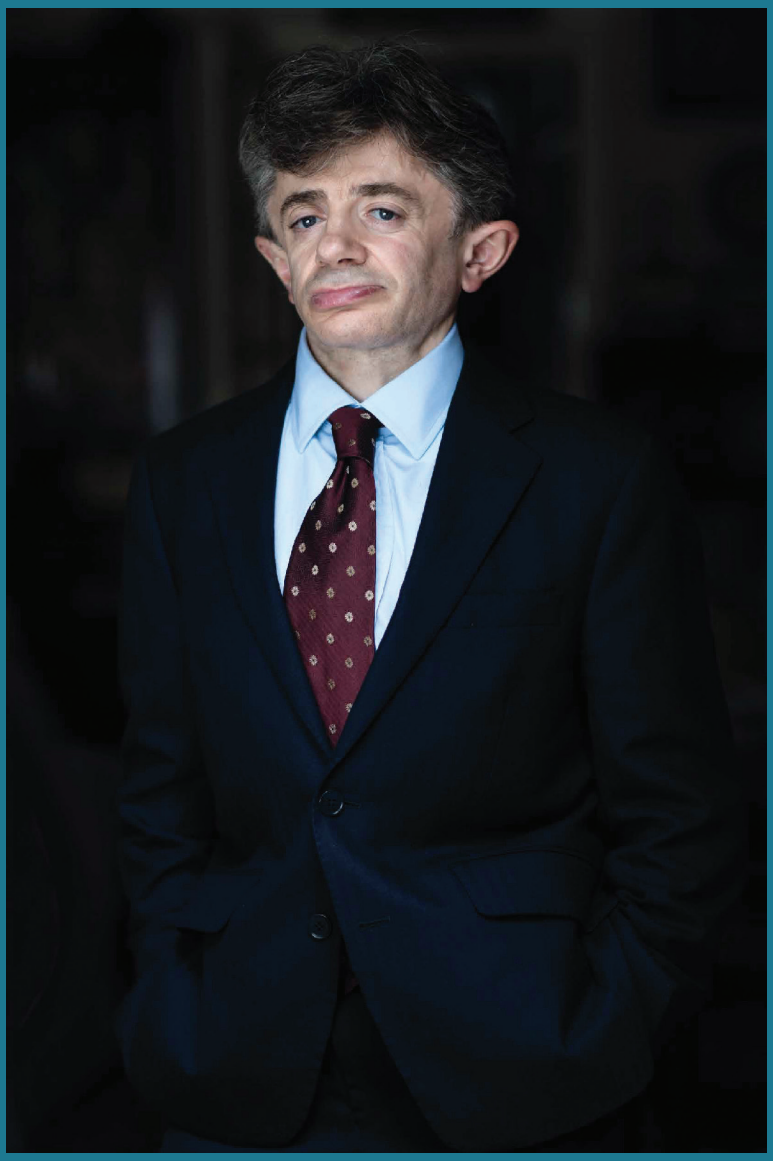
Blew whistle on 'systemic failings'

Claire Gilham was a district judge at Warrington county court when she first raised her complaints. Working in family courts, she witnessed hostage-taking and violence, and was even alerted by the police that someone was threatening to kill her. Initially, she was encouraged to speak out, but gradually support for her waned. Isolated and excluded, she recalls telling her human resources team: "I can't stand this, I'm going to break down."

Gilham's case remains unique among the other whistleblowers. Judges are not classed as workers, and so aren't entitled to the legal protections usually given to whistleblowers. "I think it's dangerous to exclude people from statutory protection," Gilham says, when asked about her determination to take her case to the supreme court. It was previously dismissed by an employment tribunal and the appeals court, which upheld the ruling that judges are not workers.

Working with Protect (formerly Public Concern at Work) throughout her case, Gilham remembers their ability to reflect critically on her case. "It was reassuring to find that whistleblowers aren't crazy, resentful people," Gilham adds. Rather, they are simply people unwilling to assist in the concealment of mistakes.

"If judges, the most privileged people in the country, can't speak out, then who can?" says Gilham, who feels a sense of responsibility for those less able to speak out. She is adamant that she would be prepared to blow the whistle again. "You have to reflect on what you're doing and walk forward. You have to be ethical."



Photograph: Teri Pengilley for The Guardian

Lord Shinkwin

Blew the whistle on the approval of invoices in the charity sector

In a 2016 speech in the Lords, discussing his whistleblowing experience, the Conservative peer Kevin Shinkwin described it as the saddest moment of his career. Does he still view it this way? "Yes, it's still the saddest moment," he says. "It completely shattered my trust."

The incident in question happened in 2010, before Shinkwin entered the Lords and when he was working as the head of public affairs at the Royal British Legion. He was asked to sign an invoice of almost £10,000 for work done by an MP's researcher, who was using his privileged access as a passholder to moonlight as a public affairs consultant. Shinkwin and his then boss both refused to sign it and recommended it should not be paid. They were over-ruled by the then Director General who only informed them he had personally approved payment retrospectively. "The issue of trust was paramount," he says.

"People give money to charities in the good faith that it will be spent properly." Although Shinkwin notes that there is no evidence the money was ever paid, he emphasises that the way he was treated for raising concerns is what matters. He was bullied by a senior director, who demanded that he approve the invoice. The then director general even led Shinkwin to believe a payment had been made. He says he was eventually eased out of his role at the Legion. "I knew that by speaking up, I was sacrificing my career," he says.

Now, he is adamant that more protection for whistleblowers is needed, especially in the charity sector. "When charities suffer [as a result of the activity which gave rise to the whistleblowing], it is the people who depend on them who suffer more," he says, before insisting he would be prepared to blow the whistle again. "My conscience wouldn't let me not. I would not be able to sleep."

Shinkwin is keen to emphasise that the Royal British Legion is a different place today. "I don't believe what happened to me would happen at the Legion now," he says, noting that the Legion has a completely new senior management team.

Photograph: Teri Pengilley for The Guardian

Shahmir Sanni

Blew the whistle on Vote Leave campaign tactics

The past few months have been rough for Shahmir Sanni. Since March, he's been alienated by those he trusted, fired from his job at the TaxPayers' Alliance and outed as gay by Downing Street. All this stems from an interview published in the Observer – an interview in which Sanni alleged that the leave campaign broken campaign rules to win the Brexit vote.

"I was traumatised," says Sanni of the moment that a rival revealed his sexuality. "I thought, you know what, screw these guys. I realised I had a moral duty to bring light on each and every individual. It was about justice for the British electorate, but also justice for LGBTQ+ people and people of colour, bigger than Brexit."

Sanni's interview revealed that Vote Leave were close to exceeding their £7m spending budget. They received a donation of £1m a couple of weeks before the referendum that would have tipped them over. They decided to "donate" £625,000 to BeLeave, a youth group founded by Darren Grimes. Initially ecstatic, Sanni quickly realised they would never see any of the money. Instead, it was ploughed back into Vote Leave's campaign.

"What's the point of democracy if you're going to cheat?" asks Sanni, who still remains a committed Eurosceptic. "Justice comes when people are being investigated and fined."

When asked if he would blow the whistle again, Sanni is unsure. "Short answer: yes. But I do often say probably not." Sanni advises those who have had any minor or major mental illness, particularly people of colour, to think twice before whistleblowing.

"When you whistleblow as a minority, there are massive implications," says Sanni, who recalls both Brexiters and remainers doubting his integrity. Despite this, he remains upbeat. When asked for a final statement, he jokes: "Follow me on Instagram."

Quickly becoming serious again, he is keen to emphasise the gravity of the situation. "It was a huge electoral scandal. It's about more than Brexit now. It's about ensuring that our democracy is retained."

Photograph: Murdo MacLeod for The Guardian

Harry Templeton

Blew the whistle on Robert Maxwell pension fund fraud scandal

When the media mogul Robert Maxwell died in 1991, he was mourned as the Daily Mirror's "saviour". Yet, in the wake of his death, a vast pension fraud was revealed. In all, some £400m was found to have been taken from the Mirror's pension fund, leaving employees facing a bleak future. For Harry Templeton, who initially blew the whistle on this in 1988, the revelations came "too late".

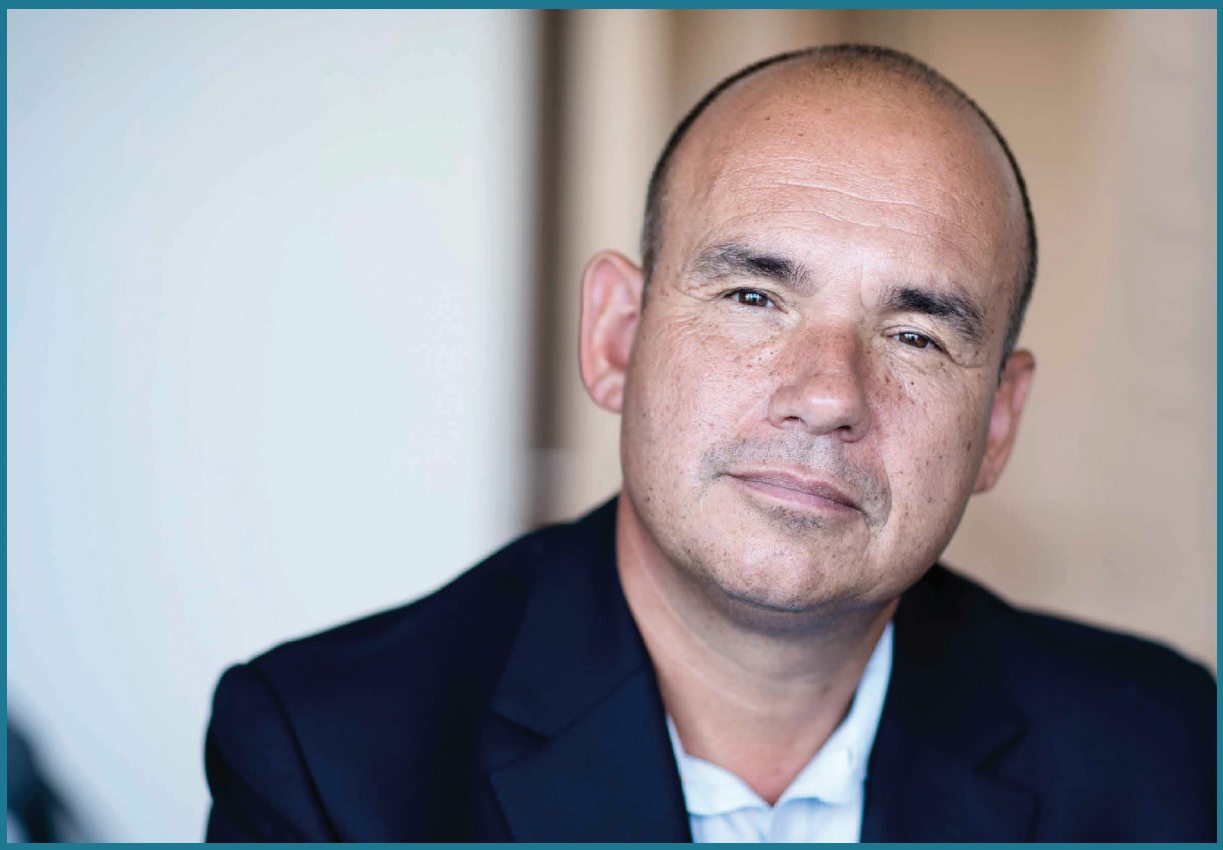
Templeton, a printer for the Mirror Group newspapers, sat on the board of trustees for the Mirror's pension scheme. A union-approved trustee, he challenged Maxwell about the way he planned to use the pension funds. In a vote about the scheme, Templeton found himself outnumbered 13-1. The seven management-approved trustees on the board wouldn't dare vote against Maxwell, Templeton recalls. The six other union-approved trustees were simply "very naive".

"I had to bring my problems home to my family," says Templeton, remembering his experience as demoralising. "It was like banging your head against a brick wall."

Shortly after, he was fired from the company under the pretext of threatening another worker. "You have to remember, companies don't sack someone for blowing the whistle," Templeton says.

"They find other reasons to, and they offer people incentives to keep their mouths shut."

Templeton recognises the challenges that whistleblowers and their supporters face. "You have to try to do something about it, but the other side doesn't stick to the rules, they find every method they can."



Photograph: Teri Pengilley for The Guardian

Michael Woodford

Blew the whistle on suspicious acquisitions at Olympus

From humble beginnings in Liverpool, Michael Woodford quickly rose through the ranks at camera company Olympus, before becoming the company's first non-Japanese president in 2011. Just weeks later he became suspicious of several acquisitions the company had made in what turned out to be a £1bn fraud scandal. "I could look away, but if I did that I would become part of it. Once you've crossed that bridge, there's no going back."

However, the meeting Woodford called to address the claims quickly backfired. The board turned on him and he was fired. But when the fraud was linked to the Japanese mafia, Woodford realised his problems were only just beginning. "I thought I was going to be assassinated," recalls Woodford, who was forced by the company to give up his apartment and return to the UK. "At times I felt I was in Alice in Wonderland and I questioned my sanity. I was completely isolated."

Fearing for the lives of both himself and his family, Woodford decided to seek safety through publicity. His actions led to two senior Olympus board members being sentenced to three years in prison. In 2012, Woodford won a £10m out-of-court settlement after suing Olympus. Now a patron of the whistleblowing charity Protect,

Woodford recommends that whistleblowers act with caution. "If you are going to take on a large company, make sure you seek advice, talk to people you trust and seek legal advice," he says. He admits that whistleblowing isn't easy, but is adamant he would be prepared to do it again.

Photograph: Sarah Lee for The Guardian

Howard Shaw

Blew the whistle on Met Police interview process

Howard Shaw, a former detective sergeant at the Metropolitan Police, describes his experience as a whistleblower as a "lonely two years". Now chief compliance officer at Joules Africa, Shaw blew the whistle after alleging that a former colleague cheated in a job interview that led to his promotion. Shaw raised concerns with his superiors that the colleague had seen interview questions in advance. His claims were ignored and the individual was then appointed as his line manager. False allegations were made against Shaw and he was subsequently removed from his unit.

"I was under the care of my doctor and on medication, I had counselling," Shaw remembers. Shaw brought a claim to an employment tribunal. He was awarded £30,000 for injury to feelings and extremely rare aggravated damages. Despite his success, Shaw says regrettably that he would not blow the whistle again, but instead calls for reform of whistleblowing laws. "The law needs to be more user-friendly, more accessible and less judicial."

Photograph: Murdo MacLeod for The Guardian

Amy McDonald

Blew the whistle on payments to senior figures within the Scottish Police Authority

Amy McDonald was the Director of Financial Accountability at one of Scotland's largest public institutions, the Scottish Police Authority (the SPA), overseeing an annual budget of £1 billion.

She raised concerns over tens of thousands of pounds being sanctioned by the SPA for severance and expenses payments to senior figures within the SPA and Police Scotland.

This year a Glasgow employment tribunal heard Amy's concerns were ignored by the SPA for a long period of time and that she was subjected to a "significant detriment" by her employers who accused her of acting unprofessionally for formalising her concerns.

Amy's Solicitor, Margaret Gribbon of Bridge Litigation Solicitors said, "You have to question the judgement of any public organisation, who, when accused of financial wrongdoing, then uses further vast amounts of tax payers' money alleging it did nothing wrong.

Ironically, the SPA have an excellent written Whistleblowing Policy but where whistle blowers are ignored, isolated and criticised for raising concerns then, sadly, such policies are not worth the paper they are written on".

Amy is still employed by the SPA doing a job that she loves but according to her Solicitor it will take some time before she is likely to fully recover from the bruising and costly legal claim she successfully pursued.

Amy's Solicitor believes that Amy would whistleblow again; but fears the SPA's handling of her concerns and defiant approach to her legal claim sends the wrong message to would be whistle blowers and that the case can act as a catalyst for one of Scotland's largest public sector organisations to improve their practices and cultures around this extremely important issue.

Protect provided invaluable assistance and guidance to Amy and her legal team and their support played a pivotal role in Amy's successful legal claim.

The interview has been conducted through Amy's solicitor, Margaret Gribbon at Bridge Litigation UK Ltd as Amy is still employed by the Scottish Police Authority after successfully winning her case at employment tribunal.

Photograph: Protect/Chris Renton

Chris Day

Junior doctor blew the whistle on patient safety at a south London hospital

Chris Day was a junior doctor on the way to becoming a consultant when his career progress was cut short. While working on a south London hospital's intensive care unit, Day became increasingly concerned regarding staffing levels. "One of my principal disclosures was made in real time at the beginning of the night shift," he remembers. "I had no choice – the consequences of not making the disclosure might have been even more scary."

Yet Day's allegations had life-changing consequences for him. His whistleblowing cost him his consultancy career and he now works as a locum doctor in A&E departments while he fights his case. Instead of acting on his safety concerns, Health Education England attempted to argue they were not his employer.

"I don't know why there is such resistance to culture change and meaningful legal protection for whistleblowers," says Day, whose case has since succeeded, granting 54,000 junior doctors whistleblowing protection. "Maybe they think the public cannot cope with the truth about what is happening in the NHS."

Day remains a vocal supporter of the NHS, and he has since mounted campaigns to keep it public. Reflecting on his experience, he says: "I would only whistleblow again if a person's life was in immediate danger. Politicians want healthcare staff to keep quiet and get on with the job."

Maggie Oliver

Blew the whistle on Greater Manchester Police

Maggie Oliver remembers her experience as a whistleblower as one defined by stress, sleepless nights and fear. “They were the worst two years of my life,” says the former detective constable. “I truly believed I may be prosecuted for simply telling the truth and trying to expose the neglect of the authorities.”

While working with Greater Manchester police (GMP), Oliver had been central to uncovering a Rochdale paedophile ring. By interacting with the group’s victims nearly every day for six months, Oliver gradually gained the trust of the vulnerable girls. The girls eventually agreed to come forward, which led to nine members of the gang being sentenced in 2012.

For Oliver, though, the actions of the police were not sufficient to safeguard the victims. One of the girls, who had been abused since the age of 14, was named in court as someone who had helped the groomers. Disgusted, Oliver took her complaints to various departments of GMP, and even the Home Office, before resigning in 2012.

“All public organisations like the police are interested in is protecting the organisation [rather] than listening to what a troublesome member of staff says, even if they are telling the truth,” Oliver says, who still feels protective of the girls she helped free from abuse.

“I have no regrets about the action I took,” she claims. “I feel proud to know I was strong enough to stand up for what I believed in, and fight to give these kids a voice.”

Governance & Whistleblowing: Encouraging a Speak Up Culture

As Director of the Institute of Business Ethics, Philippa Foster Back, CBE, is responsible for implementing strategy, leading the team and ensuring that the Institute meets its charitable aims of raising awareness and spreading best practice in the field of business ethics.

When Sepp Blatter, former president of football's governing body, was interviewed by David Conn, author of The Fall of the House of FIFA, Conn was struck when Blatter sneered: "'Because if you are a whistleblower, it's not correct as well.'"
Conn asked him to clarify; "was he saying whistleblowers are not correct?
'No,' he confirmed. 'At school, if you had somebody who was a whistleblower towards the tutor, then'.and he trailed off, as if it was obvious.
'Do you still think that?' I asked.
'Yes.'
'That they are like a snitch in school?'
'Yes, yes,' he said."

Wrongdoing

Sepp Blatter is not alone in his view of whistleblowers. The work of Protect highlights the continued negative perception of those who speak up about wrongdoing. From the tattle-teller at nursery to the snitch at school or mafia super-grass, the cultural narrative is that those who speak up are sneaks and spoilsports to be vilified. Whistleblowing is seen as a breach of confidentiality, a conflict between private and public, a betrayal of the tribe, disloyal, and only done by trouble-makers.
This seems perverse, as many who raise concerns do so out of loyalty, compelled by a sense of justice and a desire to 'do the right thing'. Effective Speak Up arrangements assist with good governance and can act as an early warning system for potential risks. It makes good business sense that those who lead organisations should welcome and encourage employees to do so.

The terms 'whistleblowing' or 'Speak Up' are often used interchangeably and can cover disclosure of a wide range of legal and ethical issues. But at the IBE, we differentiate between the two terms. 'Blowing the whistle' externally can be considered a last resort, occurring when concerns have not been listened to or acted upon internally. Speaking up implies raising a concern internally so that it can be remedied, hopefully before it becomes a bigger problem.

The IBE prefers the term Speak Up as it has more positive and constructive connotations for organisations. This change of language can mark the beginning of fostering an 'open' culture, one where employees feel confident that their concerns will be taken seriously and handled sensitively internally.

Recent scandals, such as the collapse of Carillion, highlight the need for appropriate oversight by boards seeking to ensure the stabililty and sustainability of the businesses they run. Indeed, the new UK Corporate Governance Code cites this as a core principle:
"The board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned."

The IBE recently undertook some research asking boards how they were currently assuring themselves that they understood their corporate culture. At number one position was Speak Up and whistleblowing data, highlighting its importance as a significant potential source of information about behaviour, culture and fraud. Reliable Speak Up arrangements are an important support for a board and senior management. However, it

is not always easy to tell whether the arrangements are effective. In terms of raw data, the number of calls to the system may fluctuate for a number of reasons.

Increased anxiety by employees that they may face reprisals for speaking up will cause the volume of calls to fall, but the same effect might be felt as a result of a more open culture, when employees did not feel the need to call the hotline and issues were dealt with satisfactorily by local management. The volume of calls may fluctuate in line with employee familiarity with and confidence in the process, or in response to an awareness campaign.

The level of data which boards examine varies from number of calls and how many were substantiated to information about investigations and the number of dismissals or disciplinary outcomes. Some boards only require information about the most serious cases, while others ask for more granular details – for example, the proportion of allegations versus enquiries, how many were anonymous or the job level of those implicated. An engaged board will analyse this data and use it to improve the effectiveness of the Speak Up policy and procedure. Leading organisations are developing dashboards to monitor reporting levels, for example per 1,000 people across different locations country by country or site by site. The organisations use this data to benchmark the performance of their regions or sites. The data from, for example, the number of ethics contacts; the number of grievances and HR investigations and/or the number of safety incidences can all be looked at together to develop a holistic picture of the ethical health of the organisation. Comparative data also provides the opportunity to talk to local management about why their numbers may differ from that of other sites or regions.

Important

It is important, however, to look behind the figures. A key question for boards to ask is how Speak Up arrangements are organised and managed, as well as the use being made of them. An important point to make is that monitoring culture frequently involves oversight of processes, not just outcomes. Boards need to know if their Speak Up arrangements are fit for purpose and whether they are operating in the intended way. This involves a qualitative judgement as well as a selection of quantitative indicators. Directors need periodically to gain some first-hand experience as part of their site visits and other familiarisation exercises. Without that, it is very difficult to judge the data the board receives.

Every three years, the IBE surveys employees in the UK and across Europe about their experiences of ethics at work. In 2018, consistent with previous years, a third of employees have witnessed some form of misconduct. The 30% of respondents in Europe who have been aware of misconduct in the workplace were asked whether they raised – or decided to speak up about – any of their concerns directly to management, to another appropriate person or through any other mechanism. On average, only 54% did so, while 43% did not.

In each country surveyed just under half or more of those who have been aware of misconduct decided to report their concerns, which represents an improvement compared to 2015. Employees in the UK are more likely to have reported misconduct than those in any other country (67%) whilst respondents in Portugal are least likely to have done so (49%).

In order to explore further what the barriers might be to speaking up, those respondents who said they had not raised their concerns about misconduct were asked what had stopped them. The most prominent reasons given were that they did not believe that corrective action would be taken (28%), closely followed by they felt they might jeopardise their job (27%). Only 7% did not know who to contact.

Reasons

These two reasons have significant implications for any organisation wishing to establish an effective Speak Up culture. Employees are now more aware than ever of the means at their disposal to raise concerns. However, it was also clear that three parts of the process – effective protection for those that speak up and monitoring of potential retaliations; robust investigations and communication of outcomes – still need attention if Speak Up processes are to be considered credible.

Reporting concerns can require courage, particularly in an unsupportive environment. Employees won't take the risk if they believe that nothing will be done about it. Where local whistleblowing protection is poor or lacks definition in legal terms, it is good practice for organisations to establish their own higher protections for employees who Speak Up, whatever the local legal requirements. Ethics starts where the law ends and as more organisations realise the benefits of encouraging an open culture, they are looking into better ways to protect those who speak up from detriment.

As Oscar Wilde said: "No good deed goes unpunished" and this is no more true than when it comes to whistleblowers. Despite explicit assurances by companies that retaliation against those who speak up will not be tolerated, fostering an open culture where employees are able to voice their concerns confidently and without fear of reprisal remains a challenge for many organisations.
Retaliation can take many forms and is not always easy to identify. From failing to be promoted to being ignored in the canteen, it can manifest as the kind of low-level bullying that often falls under the radar of Audit and HR. Retaliation may spill out of the workplace and into the pub, the school playground and the community.
Practical steps in the Speak Up process can go some

way to protect those who raise concerns, for example by ensuring that as few people as possible have access to reports and by preserving confidentiality in investigations and anonymity where requested. Companies are beginning to do more to monitor detriment by examining career paths of those who speak up, keeping in touch periodically with those who raise concerns and introducing care plans and welfare checks. Those who are found to retaliate should face misconduct and disciplinary proceedings.

Journey

The journey to establishing an open culture is a long one and it requires commitment and leadership. The implementation of a Speak Up programme can be part of a culture change that, although positive, may be considered as threatening to the status quo. Staff may feel cynical about a new initiative if there is little trust within the organisation, while managers may view those who speak up as undermining their authority. Top management do not always recognise the role of staff in guarding corporate reputation and can be susceptible to the 'say/do' gap where they say one thing but do another.

An example is that of Jes Staley, CEO of Barclays Bank. In June 2016, two anonymous letters had been sent from the US to some Barclays' board members about a senior executive. Barclays' compliance team treated them as a whistleblowing matter and set about investigating the letters. Staley, instructed the bank's information security team to investigate the author of the anonymous letters that made allegations about a long-term associate whom Staley had brought to the Bank. Staley admitted wrongdoing, his bonus was cut, and he was fined by the regulator. However, despite his attempts to unmask the whistleblower, he was thwarted, which showed the robustness of Barclays' Speak Up system. Anecdotally, his poor leadership in this regard has only served to improve the reputation of the bank's procedure, and calls to their hotline have gone up.

As part of financial regulations in the UK, financial services companies must appoint a 'whistleblowers' champion' – a non-executive director with responsibility and oversight for Speak Up within their firm. The aim of these rules is to encourage a culture within financial services where individuals feel able to raise concerns and challenge poor practice and behaviour.

The appointment of a non-executive director to be a 'Speak Up Champion' is not limited to financial services and this model is being replicated in other industries.

Some organisations, such as aerospace firms UTC and Lockheed Martin, have an organisational ombudsman who provides a neutral and impartial listening ear and helps resolve conflicts and concerns in an informal way. The ombudsman is distinctive from a Speak Up helpline as they are neutral; independent of all management structures; guarantee confidentiality and are available to any stakeholder (for example employees, customers, suppliers, contractors and shareholders). Unlike with a Speak Up line, the ombudsman provides coaching and support to the individual who raises a concern. The ombudsman does not have the authority to overturn managerial decisions but is there to outline the options and develop potential solutions.

This is a particularly helpful model for smaller organisations, where an independent non-executive director who is perceived to have a level of impartiality can champion the Speak Up programme and employee concerns.

A key element in encouraging a Speak Up culture is to observe key trends and to continuously review performance. Using data in this way helps organisations apply pattern recognition to spot potential issues and underlying concerns, even if those concerns have not been fully substantiated. In this way, the Speak Up process can help organisations mitigate risks and improve internal controls before there is a serious problem.

The freedom to raise concerns is a core component of an ethical business culture where employees are confident they will be supported to 'do the right thing'. Effective Speak Up procedures help boards to understand and improve organisational culture and as such they are useful tools in the bid to follow the principles of the new UK Corporate Governance Code.

Concerns

A Speak Up procedure provides a mechanism for employees to raise concerns about anything they find unsafe, unethical or unlawful. If companies do not offer this support to their employees, or only pay nominal lip service to it, concerns that are not dealt with may become a crisis, threatening the stability – and profitability – of the organisation.

It is one thing asking employees to speak up, but quite another to listen to what they are saying. If employees repeatedly speak up and don't feel heard, they might stop talking. And that silence can be dangerous.

The 10 Dos and Don'ts for today's corporate whistleblower

By Protect Patron Michael Woodford

Michael Woodford, former President and CEO of Olympus Corporation exposed a £1.1bn scandal and left in fear for his life after unearthing a web of corruption within the company just weeks after being appointed as chief executive in 2011.

His actions led to two senior Olympus board members being sentenced to three years in prison. In 2012, he reached a settlement after suing Olympus and now advises on corporate governance and campaigns to protect whistleblowers.

Dos

1 Ensure that you obtain:
- good independent advice and there is nowhere better than Protect!
- qualified legal opinion and your lawyer has a complete dossier of all the evidence you have assembled.

2 Take your time to be clear on as many facts as you can as you need to be detailed and specific throughout the process of raising concerns. If you can report internally, consider your options or seek advice.

3 Consider contacting your regulator and reporting wrongdoing, and consider doing likewise in other jurisdictions. This action will ensure you are in line with statutory whistleblower protection (Public Interest Disclosure Act – PIDA).

4 If appropriate, find a journalist(s) whom you can trust. It is a basic rule that, if requested, a journalist will protect their source. Furthermore, sometimes the investigative ability of media organisations can compare with, and in some circumstances be superior, to law-enforcement or regulatory agencies. Respected media outlets understandably won't publish or broadcast anything without some evidence, they are a vital measure that can ensure wrongdoing is eventually exposed.

5 Remain focused and determined – your family will be put under extreme emotional strain and this is painful to witness, but you must always remember if you know of wrongdoing and then don't report it, you become complicit and put yourself and your family at risk.

Don'ts

6 Don't lose sight of your own moral compass – you will receive a lot of opinions but ultimately trust your own judgement as in the end most of us know what is right and wrong.

7 Maintain your health and wellbeing. It can be stressful.

8 Don't expect too much of others – becoming a whistleblower is not like Noah's Ark where you go around in twos. It inevitably means you will be on your own, and you need to prepare yourself psychologically for a disturbing sense of isolation.

9 Don't be surprised by close colleagues you considered friends distancing themselves from you and when they do, don't let this affect your resolve. If you think you are right and have the information then you are doing nothing wrong – quite the reverse.

10 Don't give up!

Industry stats

Protect's advice line stats over the last five years.

Health:

· Overall, the majority of calls we have received are from the health sector – 18%.

18%

· The biggest concern for the health sector overall is patient safety. 31% of callers from the health sector have had concerns of patient safety.

31%

· The largest percentage of calls for patient safety concerns was in 2013 – 70%, which has since decreased and (in 2018) is now at 51%.

70%

Care:

· 17% of all calls we have received are from the care industry.

17%

· The biggest concern for the care industry overall is the abuse of a vulnerable person. 21% of callers from the care industry have had concerns of abuse of a vulnerable person.

21%

· Whereas overall most callers escalated their concerns to senior management, in the care industry most callers escalated their concerns to their manager – 49%.

49%

Education:

· 16% of all calls we have received are from the education industry.

16%

· The biggest concern for the education industry overall is ethical. 28% of callers from the education industry have had ethical concerns.

28%

· The largest percentage of calls in the education industry with ethical concerns is 43% which has since steadily decreased and is currently at 22% in 2018. The biggest concern in this industry currently is Abuse of a vulnerable person which is 23%.

Charity:

· 9% of all calls we have received are from the charitable industry.

9%

· The biggest concern for the charitable industry overall is financial malpractice. 35% of callers from the charitable industry have had financial malpractice concerns.

· The number of calls we have received from the charitable sector have surged from 6%-9% in 2006-2016 to 12%-13% in 2017 - 2018.

Financial services:

· 7% of all calls we have received are from the financial services industry.

7%

· The biggest concern in the financial services industry overall is financial malpractice. 44% of callers from the financial services industry have had financial malpractice concerns.

44%

· The largest percentage of calls for financial malpractice concerns was in 2013 – 84%, which has since decreased and (in 2018) is now at 46%.

84%

Local Authorities:

· 7% of all calls we have received are from local authorities.

7%

· The biggest concern in local authorities overall is financial malpractice. 30% of callers from local authorities sector have had financial malpractice concerns.

30%

· From 2014-2016, ethical concerns overtook financial malpractice concerns as the biggest concern (25%-29%). Currently, working practices is the biggest concern; at 26% in 2017 and 33% in 2018.

Whistleblowing in Schools

By Chief Executive of the National Governance Association, Emma Knights

Since whistleblowing legislation was introduced under the Public Interest Disclosure Act 1998, employees have been encouraged to come forward with disclosures of dangerous or criminal behaviour, without fear of reprisal or dismissal.

Arguably the need to speak out against such activity is especially pertinent to the education sector, which deals with young and vulnerable people to whom there is an overriding duty of care. But despite the legislation and what appears to be an increase in disclosures, whistleblowing remains a sensitive, almost taboo, subject that is also accompanied by a great deal of confusion and concern about repercussions.

We have no comprehensive statistics to give us the full picture about the extent of whistleblowing in the education sector. We are grateful to Protect for not only raising the importance of whistleblowing, but also for providing us with some numbers: they have seen an increase in the number of cases brought to their free confidential advice line for workers by people working in education, from 243 in 2012 to 382 last year.

An increase in whistleblowers could be telling us that there is growing confidence within our education sector to report wrong doing which will have always existed and needs rooting out. However, the National Governance Association's (NGA) experience of state schools at present is a sector better characterised by a climate of fear, rather than confidence. This may seem counter intuitive given there are more good schools (as categorised by Ofsted's inspections) than ever before, but there is now a broad consensus that the accountability system is driving unnecessary workload and some negative behaviours in schools. This not only can have detrimental effects on pupils, but is also contributing to the teacher shortage the many schools across the county are having retaining teachers.

The Secretary of State for Education, Damian Hinds MP, addressed NGA's summer conference this year, saying: "Vital as accountability is, the current system that we have can lead to stress and anxiety for some teachers, leaders and governors - the fear of inspection, of a single bad results year, the fear of the school being made to convert to an academy. I want to recast accountability not as something to be feared, or a blame game - but rather analysing what's not working and then fixing it, collaboratively."

This is an important time for rethinking school accountability and I was pleased to serve on the National Association of Headteacher's Accountability Commission which reported this September in time to feed into Damian Hinds' deliberations. However, the scope of that Commission was limited to those parts of the accountability system which most worry our professional senior leaders – Ofsted and performance measures – and did not cover the other levers of public accountability, such as the role of governing boards and accountability to stakeholders.

More generally, the state schools sector has failed to think carefully enough about the role of the whistleblower, and their place in an intelligent accountability system. Protect has also reported that many teachers had been left unsure about whom to approach when they saw something wrong at work. This has been exacerbated by the widespread conversion of local authority maintained schools to academy status which has taken place since 2010 and the growth of multi-academy trusts. There is considerable confusion over the way different types of schools are regulated, and changes have left some school staff, as well as parents unclear, about the official routes for complaints and who, exactly, is responsible for looking into accusations of malpractice. Different agencies are responsible for different aspects of the operations of academies, some are not clear about who they should approach if they have financial concerns, while others are unaware that local authorities remain responsible for safeguarding children.

An increase in whistleblowing has therefore been linked by some commentators to both a lack of local authority oversight and more opportunities within the academy structure for wrongdoing. We do not have the information to make this assessment. However investigative journalists do report higher numbers of staff bringing them stories from academies, accompanied often by a sense of frustration that the system of oversight is not working. There is also increased risk in that many academy trusts are growing and thereby responsible for very large numbers of pupils and thus greater amount of public funding that ever before.

The more autonomous legal structure of academy trust does provide more potential for wrong doing. This should however be mitigated by strong trust governance, but until recently, this was not properly accepted and acknowledged within the system. And even though it has now been accepted by powers that be – from the Government minister to the National Schools Commissioner to the chief inspector – that trust governance is a challenge which needs more attention, there is still not the knowledge embedded within the system as to what this means in practice or how to achieve it.

Financial

Whistleblowing by staff has in recent years been important in raising the financial mismanagement of public funding within schools; however sometimes the term has been wrongly assigned to others external to the school or academy trust. For example, it has been reported that almost every investigation into academy trusts by the Education and Skills Funding Agency (ESFA) between the years 2013 and 2017 was prompted by a whistleblower as opposed to the direct oversight activities of ESFA. However the financial irregularity or fraud was more frequently detected - or at least reported - by external auditors, not whistleblowers, whose professional yet independent status placed them in a good position to spot irregularities that may otherwise have flown under the radar of the ESFA.

The auditing of academy trust accounts is in fact part of the oversight and accountability system – that is why accounts are called accounts! The requirement for academy trusts to publish audited annual accounts, which does not apply to local authority maintained schools, is providing a much needed higher level of scrutiny and transparency, and it is therefore more likely to expose financial wrongdoing than if they were not subject to a professional independent audit.

On the other hand, teaching unions have argued that such revelations offer a damning indictment of the current system of academy oversight, accusing it of lacking the capacity to prevent wrongdoings, as opposed to just dealing with them once they have been exposed by others. The system should not need to rely on whistleblowers, and I agree there is a need for the ESFA to improve its own checks. However we are also aware that many local authorities are not able to carry out the financial oversight they once did, largely due to reduced funding available to employ the specialist staff needed. Similarly, unless the ESFA receives more funding, it is difficult to see how it has the capacity to gain significantly more intelligence to inform its oversight role. The last ESFA Chief Executive, Peter Lauener, affirmed his commitment to hearing out whistleblowers, thus appearing to award them a significant role in the accountability system.

NGA has been arguing that the EFSA should be merged with the National Schools Commissioner's directorate of the Department for Education (DfE) in order to improve the oversight of academies. It makes little sense for financial oversight to be separated from educational oversight with the consequence that governance oversight is not owned nor fully understood by either arm of the DfE. Every maintained school should have a whistleblowing policy, with the governing body responsible for agreeing and establishing this. Similarly, academy trusts must have appropriate procedures in place for whistleblowing, making it clear all concerns will be responded to properly, consistently and fairly. Communicating the policy to staff is vital, emphasising that whistleblowing legislation aims to protects workers from victimisation.

I have been told on numerous occasions the fear of reprisal and victimisation prevents individuals speaking out. It has been reported that a teacher has been suspended after using whistleblowing procedures to raise concerns about a failing school with Ofsted, and that other potential whistleblowers have not come forward for fear of triggering an Ofsted inspection of the school they work in. Not enough has been done in the schools sector to acknowledge and value the role of whistleblowers. We would like to see whistleblowers thanked and commended, not condemned, for bravely speaking up on public interest issues.

Currently missing from the debate on this subject within schools is the critical engagement on the part of school leaders, who can find themselves in an uncomfortable position.

The best leaders should treat crisis as a catalyst for constructive, creative change. Whistleblowing can identify risks and emerging trends, and it can ultimately improve sector-wide resilience in the context of disruptive changes. Secondly, policy on whistleblowing is a touchstone for organisational culture, providing school leaders with the opportunity to create a safe space for employees to speak out against bad practice and unethical behaviour. This requires bravery to see whistleblowers not as a threat but as part of an effective learning environment.

Leaders

I am pleased to serve on the Association of School and College Leaders (ASCL)'s Ethical Leadership Commission which has just published an Ethical Framework for Educational Leadership. It builds on the Nolan principles for public service, exploring in more detail what these mean for school leaders, including those serving on governing boards. The same principles are also designed to give concerned colleagues confidence in calling out unethical behaviour. Courage is included in the framework as one of the virtues against which to test ethical dilemmas: 'leaders should work courageously in the best interests of children' and 'we should hold one another to account courageously'.

There is a challenge to ASCL's Commission to help change the culture in the sector to one in which people are not afraid to call out unethical and inappropriate behaviour, in the same way leaders of schools and academy trusts need to do this at institutional level. NGA is pleased to be working with schools and their governing boards during 2019 on a pathfinder project to explore how the Ethical Framework for Educational Leadership can be used well and as part of this work, we hope to have those conversations about whistleblowing.

Whistleblowing in the sport sector

By Sir Anthony Hooper, QC, who has investigated corruption for the International Association of Athletic Federations (IAAF)

My view on whistleblowing is that it is a worldwide problem, and in a commissioned Protect report, ('Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK') gives recommendations about how whistleblowers should be treated.

Whistleblowing plays a vital role in the achievement of good governance in sport as in every other governmental or non-governmental organisation. It is my view that whistleblowing is a worldwide problem. In a commissioned Protect report the then Chair wrote in her forward to ('Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK') :"Effective whistleblowing arrangements are a key part of good governance. A healthy and open culture is one where people are encouraged to speak out, confident that they can do so without adverse repercussions, confident that they will be listened to, and confident that appropriate action will be taken. This is to the benefit of organisations, individuals and society as a whole."

Scandals

Recent scandals in sports show once again that whistleblowers play a vital role in uncovering wrongdoing and that they are likely to suffer seriously detrimental consequences from those on whom the whistle has been blown.

The findings by a Court of Arbitration for Sport appellate panel (CAS) and in various reports prepared for the World Anti-Doping Agency (WADA) and the International Olympic Committee (IOC) have demonstrated wide spread state sponsored doping in Russia. Without the revelations of four Russian whistle blowers, two of whom were athletes and two involved with testing, it seems likely that the world would have known nothing of what, according to these findings, has been going on in Russia.

In the first WADA Independent Commission Report, dated November 9, 2015, the authors wrote:

Concurrent with the enforced silence/omerta imposed, when those [persons] involved in doping activities are exposed, they almost invariably attempt to attack, discredit, marginalize and intimidate any whistleblowers. It is well known that many sport organizations treat whistleblowers more harshly than they treat the dopers on whom they inform. Whistleblowers know this, but they are nevertheless willing to endure such treatment.

Those who are, or have been, dopers may revolt against the system of which they have been part. Those who may have been caught and sanctioned may also hope to achieve a reduction in whatever sanction may have been imposed.
Those words sound very familiar to those involved with the protection and support of whistleblowers, like Protect.

One of the first important whistleblowers in point of time was Lilya Shobukhova, a world class and very successful marathon runner. Her revelations to WADA and to the International Association of Athletic Federations (IAAF) in early 2014 directly led to an order by the IAAF Ethics Commission suspending the President of the Russian Athletic Federation, a Russian long distance coach and the son of the president of the IAAF "for life from any further involvement in any way in the sport of track and field". An IAAF official was also suspended for five years. The life suspension orders were upheld on appeal by CAS. The IAAF official did not appeal.

In 2011 the IAAF Anti-Doping Department concluded from an analysis of her "athletic biological passport" that it was highly likely, absent a satisfactory explanation from Shobukhova, that she had been using a prohibited substance or a prohibited method. She gave no such explanation. She was told by the long distance coach that she could avoid suspension if she paid money. In what CAS called an "extortion scheme" Shobukhova paid a total of €450,000 to have her doping results suppressed and to be able to compete in the 2012 London Olympics and Chicago marathons.

In 2014 when told that action would have to be taken to suspend her, she demanded back the money she had been paid. Subsequently via an account in Singapore she was paid back €300,000, for which she kept the accompanying emails and bank records. There is, according to the findings of the Ethics Commission and of CAS, documentary evidence that five other Russian athletes had also paid to be allowed to compete, two of whom won medals at the London Olympics. Shobukhova gave evidence for the IAAF n proceedings before the IAAF Ethics Commission and CAS. Shobukhova also gave detailed evidence to the WADA Independent Commission of the assistance given by the long distance coach and a doctor in her personal doping programme, assistance for which she had to pay.

Indication

Like many whistle blowers Shobukhova cooperated with the IAAF at least in part because of an indication that, if found to have committed a violation, her cooperation would be taken into account when deciding what would be the appropriate sanction. The IAAF Disciplinary Tribunal Rules (like the rules of many other athletic organisations including WADA) now provide that, in determining sanction, the fact that a person has provided substantial assistance to the IAAF Integrity Unit is a mitigating factor. Shobukhova continues to live in Russia.

Yuliya Stepanova, an 800 meter runner, and her husband Vitaliy Stepanov, a former employee of the Russian Anti-Doping Agency, were major whistleblowers in the uncovering of what was described in the WADA Independent Commission Report as a "Systemic Culture of Doping in Russian Sport". It was they, along with Shobukhova, who gave vital information to Hajo Seppelt whose documentary aired on 3 December 2014 on the German television channel ARD revealed publicly for the first time the extent of this "Systemic Culture". At great personal risk to herself Stepanova made covert recordings of conversations with Russian coaches which revealed the wide spread nature of what was going on in Russia.

The documentary directly led to the establishment of the WADA Independent Commission to which they gave evidence. Understandably fearful of their lives, they fled Russia.
The fourth whistleblower is Grigory Rodchenkov, the former head of Russia's national anti-doping laboratory. Fearful for his life (two colleagues died in Russia in mysterious circumstances), he fled to the USA where he lives in hiding. Rodchenkov was the subject matter of the award winning Netflix documentary "Icarus". His astonishing revelations were accepted and corroborated by Richard McLaren in two reports published in 2016 for WADA and in the 2017 Schmid report for the IOC. The Reports revealed that sample bottles containing urine for drug testing were opened and the contaminated urine replaced with clean urine. Amongst those involved in the "institutional conspiracy" were members of the Russian FSB, the successor to the KGB.

Most large sport governing bodies now have in place whistleblowing policies and arrangements, but it is clear the culture of whistleblowing within sport needs to change and this is further highlighted by a report published in May 2018 by UK Sport (Culture Health Check Report, May 2018), which found nearly one in three British Olympic and Paralympic athletes have experienced or witnessed "unacceptable behaviour" and feared speaking up and the risk of being deselected.

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The good work of Protect has a key role in helping to transform the culture of whistleblowing in sport.

The Third Sector:

By Louise O'Neill, Head of Communications, Protect

Recognising the value whistleblowing plays in preventing harm could transform the battered and bruised third sector

Public trust in the third sector is at an unprecedented rock bottom. The public trust charities no more than the average stranger they meet on the street. This from research published in July this year by charity regulator the Charity Commission, which also found on a scale of 0-10, the public scores a 5.5 out of 10 when it comes to trust in charities.

The Charity Commission accepts people have seen some charities displaying uncharitable behaviour – whether that be aggressive fundraising practices, exploitation of vulnerable people, a single-minded pursuit of organisational growth – and they have become less inclined to trust them unquestioningly.

A look back at news headlines over the past few years has seen the sector lurching from one scandal to another. Still wounded from the horror of the Jimmy Savile revelations, the sector was further damaged by controversy around pensioner Olive Cooke, who before taking her own life, told of being deluged by 3,000 calls a year from charities. Her contact details had been sold on by database companies.

Serious

More scandal followed with Kids Company which went into liquidation following serious concerns over mismanagement, misspending public money and abuse allegations. And then, more recently, came the Oxfam sex scandal with headlines revealing staff paid for prostitutes whilst working overseas in Haiti. This was later followed by revelations of aid for sex by Oxfam workers and abuse in Oxfam charity shops towards teenage volunteers. Baronness Stowell, in her first speech as new Chair of the Charity Commission in April this year, said, "We need to examine the problem through the same lens that we use to understand the decline in trust in big business and politics. People clearly are less trusting of institutions and of those in positions of authority than they once were."

With 168,000 registered charities in England and Wales, varying in size, governance and speciality, not all will be well run. There will inevitably be problems, but what is perhaps surprising is why lessons are not being learnt following so many high-profile problems. Are charities themselves doing enough to mitigate and stop risk, harm and danger?

Advice

At Protect, calls to our advice line from people wanting advice on how to raise a concern has risen year-on-year for the past five years. Starting at 104 cases in 2013, last year the figure jumped to 241 cases and this number will rise even further given that we have a month left of 2018 with cases standing at 271 cases. This represents a threefold increase in calls from the sector.

It is surprising then, given the amount of charities in England and Wales, and the high rise in calls to our advice line, that many more charities fail to engage with our whistleblowing support services. Of the 300 organisations that do engage with us on an ongoing basis for support, just 7% (15 organisations) are charities.

Jon Cunningham, Protect's Business Development Director says, "It's clear that more needs to be done to bring it home to the charities that whistleblowers are not a threat to the charity but a great risk governance resource who can flag problems early – or prevent them ever happening in the first place."

Along with the Charity Commission, we know only too well the potential risk and wrongdoing that can happen in any organisation. Sadly, limited budgets and resource tends to be the main reason many charities give for failing to find the budget for addressing a whistleblowing strategy, but if it saves a charity's very existence, the good work it does, and keeping safe vulnerable adults, is it really a cost that can't be afforded?

In February 2018, (following the Oxfam scandal) the Charity Commission published the findings from a safeguarding report and announced measures to help ensure charities, and the Commission itself, learned wider lessons from safeguarding revelations involving Oxfam and other charities. One of these measures was the establishment of an internal taskforce with two main purposes. These were to: (i) respond robustly and consistently to the significantly increased volume of serious incident reports on safeguarding matters submitted by charities to the Commission following the safeguarding revelations involving Oxfam and (ii) undertake a 'deep dive' of the Commission's serious incident reporting records dating back to April 2014, to identify any gaps in full and frank disclosure by charities and ensure charities and the Commission had taken appropriate follow-up actions to deal with the incident reported.

Reports

It found between February and September 2018 charities submitted a total of 2,114 reports of serious incidents relating to safeguarding incidents or issues. This compared to 1,580 serious incident reports about safeguarding received in the whole of 2017-18, and 1,203 received in 2016-17. The Commission found only 1.5% of registered charities have submitted any kind of serious incident report since 2014 and is concerned under-reporting is prevalent amongst certain groups of charities.

The low numbers are deeply troubling. It is vital that charities, whether they work domestically or around the world, report serious incidents to the regulator. But the regulator itself needs to take appropriate action and acknowledges a greater need to be more 'purposeful and efficient'. We at Protect have unfortunately heard of cases where whistleblowers have had ineffective action from the Charity Commission, or worse, have been told it does not fall within their remit to deal with their case.

This is not good enough and we at Protect are glad to see the Commission is taking a tougher line and are encouraged to see the Charity Commission take a long hard look at proposals to the way it regulates.

The Commission has, it says, been working to improve the experience of whistleblowers in raising concerns and reviewing the way it responds to whistleblowers to strengthen confidence among whistleblowers who wish to make a protected disclosure and to receive appropriate feedback. The Commission should also look at ways that it can improve the whistleblowing arrangements by driving up standards in the sector more generally.

Baronness Stowell said: "From now on, the Commission is a purpose-driven regulator.... I want to ensure that no complaint about a charity is ignored, so that those that don't result in regulatory action do inform our trend data, and in turn help us become more proactive in preventing problems in charities in the first place. I hope charities come to see that promoting the public interest is to their benefit."

Whistleblowing in the health sector

By Andrew Pepper Parsons Head of Policy, Protect

The majority of cases our advice line manages come from the health sector (18%) with just under 3,000 cases a year, followed closely by cases from the care sector (17%). The biggest cause for concern are patient safety issues. In 2013, 70% of cases related to patient safety, which has since decreased to 51% in 2018.

Following the Mid Staffordshire Hospital inquiry chaired by Sir Robert Francis (February 2013), was the Freedom to Speak Up Review in 2015. In this report, Sir Robert set out 20 Principles and Actions to create the right conditions for NHS staff to speak up, share what works right across the NHS, get all organisations up to best standard and provide redress when things go wrong in future. One of the recommendations was to introduce 'whistleblowing ambassadors', now better known as Freedom to Speak Up Guardians, at every NHS Trust in England and a NHS National Guardian, who is currently Dr Henrietta Hughes. The National Guardian's Office is an independent, non-statutory body with the remit to lead culture change in the NHS. The office is not a regulator, but is sponsored by the CQC, NHS England and NHS Improvement. Protect conducted the whistleblowing training for all Freedom to Speak Up Guardians as they were appointed.

The National Guardian's Office, in a report published in September this year, stated 7,000 cases were brought to Freedom to Speak Up Guardians in NHS trusts and foundation trusts last year (1 April 2017 to 31 March 2018). Bullying and harassment featured prominently among the issues raised, with patient safety also high on the list. In total 45% of cases handled by Freedom to Speak Up Guardians included an element of bullying and harassment and nearly a third included an element of patient safety and quality of care.

Of those workers speaking up, nurses were the largest professional group, at nearly a third of cases. Worryingly there are still some organisations where this new route for speaking up is not being used – in six trusts either no data returns were made, or it was reported that no one had spoken up to a Freedom to Speak Up Guardian, in all four quarters.

Dr Henrietta Hughes, National Guardian for the NHS, said, "Speaking up can take courage and it's imperative that workers are thanked, listened to and their concerns are swiftly acted upon. The increase in the number of cases, quarter on quarter, that are being brought to guardians is encouraging as workers become more familiar with and confident in this new route for speaking up. It is very positive that so many of the workers who have given feedback have said that they would speak up again.
"It is worrying, however, that nearly a fifth of cases were from workers that felt the need to remain anonymous and that 5 per cent of workers have described detriment after speaking up. There is still much more to do to change the culture about speaking up from career limiting to business as usual.

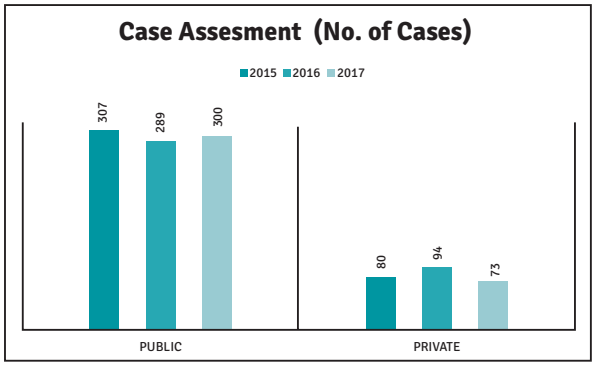
"I would like to thank the workers who spoke up for their bravery and compassion which speaks volumes about the values of the NHS workforce. I would also like to thank all Freedom to Speak Up Guardians for their commitment to this challenging but important role. Speaking up improves the care of patients and service users, protects our loved ones and improves the working lives of staff in the NHS."

Protect advice line statistics since the Freedom to Speak Up review

Protect charted key advice line statistics since the launch of the report Freedom to Speak Up review in 2015. The data set used includes whistleblowing cases to the Protect advice line for 2015, 2016 and 2017.
The health sector cases include both primary and secondary care, it also covers the public sector (77%), private sector (20%) and the voluntary sector (2.5%).

- Protect categorises cases as either "private" or "public". Public cases will include situations where the whistleblower will want advice on raising or escalating a concern that effects the public interest or they will want advice on being victimised for raising concerns. While private cases will purely be about their personal employment position unrelated to whistleblowing.
- The graph below will give you an idea of the consistent number of public we have received over the three-year period. There have been no large rises or falls over this period. Calls have not gone backwards, or forwards,

and we would (largely) expect call volumes to rise when whistleblowing arrangements are working well in an organisation.



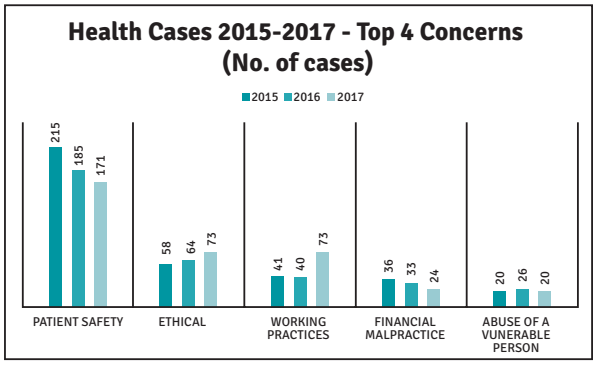
The profile of NHS whistleblowers to the Protect advice line

- 52% of callers to the advice line were either doctors (23%) or nurses (29%). 10% of whistleblowers were described as being managers while only 3% were Health Care Assistants. This is a more varied workforce compared to the numbers proportions reported by the National Guardian Office figures.

The types of concerns raised by whistleblowers

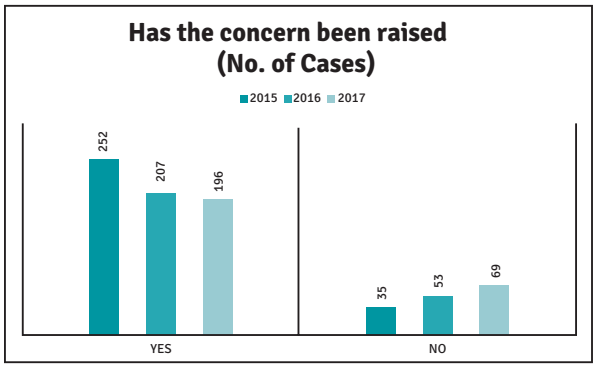
- Unsurprisingly patient safety concerns (e.g. concerns over a colleague's conduct, unsafe medical procedures on the ward, a policy decision that affects patients etc.) make up the majority of the concerns raised at 46%.

- Protect has seen a small drop in the number of patient safety concerns from 216 in 2015, to 185 in 2016, and 171 in 2017.



How many whistleblowers raise their concerns?

- An increasing number of whistleblowers calling us have not raised their concerns prior to contact – we are the first port of call. This indicates a higher proportion of people calling us for advice before raising their concerns. This could be viewed as a positive as our own research into our advice line has shown better outcomes can be achieved where advice is acquired at the earliest possible stage.



Response to the concerns raised

- In total 25% of whistleblowers felt their concerns were ignored which is too high. Over the three-year period though there was a fall between 2015 where 63 cases reported having their concerns ignored by managers while in 2016 this fell to 47 cases but has now risen again to 62 cases in 2017. This shows a persistent problem with either the response to the concerns raised or a lack of feedback to the whistleblower.

Response to the whistleblower

- We also record the response from the employer towards the whistleblower in cases where they have raised concerns before contacting us for advice. The most common response is nothing, no retaliation and equally no thanks for raising the concerns at 36%

- In terms of trends though there has been a fall in acts of victimisation from managers (this can include bullying, harassment, closer monitoring, use of performance or disciplinary measures etc.). In 2015, in 85 cases this response was reported, while this fell in 2016 to 37 and only rose slightly to 42 cases.

- There was a smaller fall for co-workers. This fall though was not replicated in dismissals where we had a slight increase in cases where individuals stated this was the outcome from 24 cases in 2015, to 27 cases in 2016 and 34 cases in 2017.

Health workers very knowledgeable about whistleblowing

We commissioned a YouGov survey looking at UK workers' attitudes to whistleblowing. We were able to extrapolate from these findings results from those who identified themselves as working in the health sector (this covers both the public and the private sector).
The results reveal health to be a highly knowledgeable work force when it comes to whistleblowing and found:

- 73% confirmed their employer had a whistleblowing policy, whereas the average across all sectors is 46%.

- Health workers are also potentially more knowledgeable about their employment rights with 53% correctly identifying the existence of a law in the UK that protects whistleblowers, while the average is 38%.

We hope the introduction of Freedom to Speak Up Guardians does help to transform the whistleblowing or speak up culture in the NHS. It is early days, and still very much in its infancy, but we know from experience there does have to be top down buy in from senior management, the Board as well as obviously the day to day workforce.

Care sector

Care is the second largest sector, totalling 17% of all cases we receive.

The biggest concern for the Care industry overall is the abuse of a vulnerable person, with 21% of callers from the care industry having had concerns of abuse of a vulnerable person. In contrast to the health sector the whistleblowers seeking advice from us tend to be more junior staff with 58% of callers describing themselves as either carers or support staff.

The types of concerns witnessed are incredibly serious with 48% of concerns witnessed by whistleblowers is some kind of safeguarding issue involving the vulnerable person whether that's physical or sexual abuse or neglect. Whereas overall most callers in other sectors escalated their concerns to senior management, in the Care industry most callers - 49% - escalated their concerns to their direct line manager.

With so many care homes rated inadequate or in need of improvement, Protect believes residents and staff face risk, danger and malpractice. The Care Quality Commission regulator says almost one in four care homes are inadequate or require improvement, while Age UK says 1.2 million people over 65 had some level of unmet care needs in 2016-17.

The 400 annual calls to our whistleblowing advice line from the care sector are, we suspect, just scratching the surface of the problems facing care homes. We conducted a survey earlier this year to gain a clearer picture of whistleblowing in care homes and below are some of the responses we received in free text.

We asked care home workers ranging from managers, care home owners, to care workers if they felt enough was being done to support whistleblowing in the care industry.

Whilst a few said, yes, the majority disagreed and had the following recommendations:

"A CQC inspector designated for each home who is responsible for raising whistleblowing issues from staff members and monitoring their resolution and spot checking that they do not recur."

"Improved protection for the person raising the concern, better training for managers to enable them to deal with concerns, to be believed and listened to. Reduce the clique culture in care homes, for professional status for care workers, transparency, to be informed of the outcome, to ensure managers refrain from "circling the wagons" and to sweep concerns under the carpet."

"I personally think there needs to be a CQC to keep a check on the CQC, inspections are hit and miss and falsified documents go unnoticed, and the night team do not exist. I mean, who cares for residents from 8pm until 8am? No one seems to concern themselves with our conduct or performance, if I was an area manager that would be my first task; seeing what really happens on the nightshift."

"Higher wages, more staff checks, training."

"The sector needs a strong drive to empower and support staff to whistle blow and not fear recrimination. Training to encourage this is needed for all working in care."

"Anonymity and support for the whistleblower, otherwise management and staff can ostracise the whistleblower."

"More protection for whistleblowers. I recently had to go to board members to whistle blow. I am experiencing reprisals for this as I have been suspended and have threats of disciplinary and dismissal hanging over me. Of course they won't admit this is because I made a protected disclosure but I know that is the case. I am worried about my future career now and this has caused me severe stress. However I would whistle blow again if I had to as client care and safe practice must come first. It's very sad that whistle blowers are seen as a problem."

There are clearly some challenging issues for the care sector to tackle when it comes to whistleblowing. The sector as a whole, from policy makers to care home owners, should consider the following policy responses:

- A frame work that assists care providers with their whistleblowing arrangements that meet a minimum set of standards. To this end Protect have launched a benchmarking product – our 360° Benchmark - that will assist organisations in creating, implementing and monitoring their whistleblowing arrangements and test their efficacy.

- Give regulators powers to withdraw licenses where companies have shown to fail for whistleblowing

- Consider the implementation of either board champions and/or whistleblowing guardians or ambassadors

25 years of whistleblowing legal developments

In the 25 years since Protect was established (previously known as Public Concern at Work) we have had many successes to celebrate in the development of the legal framework for whistleblowing:

- Drafted the pioneering legislation on whistleblowing – the Public Interest Disclosure Act 1998 (PIDA) which has been used as the model for legislation across the globe
- Lobbied successfully for amendments to improve PIDA such as the introduction of vicarious liability for employers, moving good faith to be relevant to remedy only, and a requirement for regulators to publish annual reports
- Established the Whistleblowing Commission in 2013 who made a number of recommendations, including the development of a Code of Practice for Employers.
- Intervened in landmark Court of Appeal and Supreme Court cases leading to further amendments to the law, for example extending the definition of worker and defining the public interest test.
- Influenced the introduction of whistleblowing policy development in many sectors including financial services and the NHS
- Contributed to the development of an EU Whistleblowing Directive

However, there is much more to do. The profile of whistleblowing has never been higher, but the challenges in protecting whistleblowers or bringing legal action are many and complex. Our services are crucial as they assist individuals in navigating the law and regulatory landscape, but the law also needs to change to keep pace with the changing workplace. Piecemeal changes to PIDA, have led to inconsistencies and differences by sector, which is confusing for whistleblowers and employers alike. Beyond the employment rights of PIDA there are many other aspects of the legal framework that need to be established. Recent developments in other jurisdictions now leave the UK behind on best practice.

What needs to change:

- **Key whistleblowers are excluded from PIDA:** while there is a wide definition of worker in the Act, the law in this area is complex, and many individuals are excluded including foster carers, non-executive directors, clergy, volunteers, trustees, public appointments and job applicants other than NHS staff.
- **PIDA suffers if access to legal advice and representation is limited:** a low level awareness of the law, combined with a lack of affordable access to representation at employment tribunal, means many whistleblowers don't bring claims. Those that do face a disparity of arms between themselves and their former employer. Representation has a real effect on the outcome of the case: our research found 68 per cent of those lacking representation lost their case, while this falls to 53 per cent with representation.
- **PIDA is silent on standards expected from employers, limiting its effects on the behaviour of employers:** PIDA is not proactive; it can only be relied on in the aftermath of victimisation. While it should provide a deterrent for employers who badly treat whistleblowers, there are no common standards for employers. This can limit its effectiveness in preventing victimisation against whistleblowers.
- **PIDA is silent on standards expected of regulators:** There are inconsistencies between different prescribed persons under the Act in how they receive, manage and respond to whistleblowers and their concerns. There are no requirements of regulators to put in place guidance for those they regulate and detailed guidance has only been provided by the Financial Conduct Authority.
- **The public interest can be lost:** PIDA claims do not have their own distinct tribunal or regulatory structure –claims are considered as part of an employment

dispute and the distinct public interest element of these claims is not the focus of the employment tribunal. Neither does the employment tribunal have the power to make recommendations to regulators or other bodies where the public interest remains at risk. This is one of the reasons named by callers to our advice line as contributing heavily to their disappointment in the law and legal process. There is no information available on claims that settle prior to a hearing, shrouding in secrecy public interest concerns at the heart of these cases. This also limits the ability to assess which sectors have the highest volume of whistleblowing, or whether the law is being used appropriately.

- **Legal threats to whistleblowers:** There are a number of laws that make it an offence to disclose certain information (for example, Section 105 Utilities Act 2000 and the Official Secrets Act). Such laws contain no public interest defence or gateway and will also mean that PIDA protection is not available. There is a worrying tendency for such laws to be used in the workplace as a means of suppressing concerns, pursuing or threatening whistleblowers. There is a danger that such practices undermine the policy aims of PIDA to ensure concerns are raised by workers at the earliest opportunity.

- **Lack of understanding of non-disclosure agreements (NDAs).** Recent media discussion of NDAs has revealed a lack of clarity about what issues may be disclosed where a settlement has been reached between employer and employee. Under section 43J of PIDA, whistleblowing concerns cannot be gagged: the legislation allows individuals to raise public interest concerns outside the employment relationship where they would be protected under PIDA, but this is a little known or used section of the law.

The future of whistleblowing: moving from adjusting PIDA to wider reform

The era of piecemeal reform of PIDA should come to an end. We have seen more appetite for change and reform from the courts than from either Parliament or Government, but this is not sustainable if PIDA needs a more fundamental shift. A root and branch review needs to look beyond the protection of the whistleblower to consider how employers, regulators and Government respond to whistleblowing concerns and whistleblowers.

Protect's proposals for change: Rethinking who should be covered by PIDA

The protection provided by PIDA has always been tied to the workplace. This should continue but a rethink is needed about who is covered by the Act in terms of the concept of who is a worker.

Whistleblowers should be protected from victimisation by other parties who are not the employer. PIDA currently protects whistleblowers from victimisation or dismissal by their employer. There have been instances where regulators, professional bodies and training bodies have victimised whistleblowers. As such bodies are unlikely to be seen as employers, whistleblowers have not been able to pursue them through the employment tribunal.

The perception problem with NDAs

To counteract a perception among whistleblowers that NDAs will prevent them from raising concerns once a settlement agreement is in place, more needs to be done:

1) Clearer wording for 43J of PIDA which should read: "(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."

2) Ensure that all NDAs contain a set wording which should be: "for the avoidance of doubt, nothing shall preclude [the employee's name] from making a "protected disclosure" within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures about topics previously disclosed to another recipient."

3) Lawyers should be required, when advising whistleblowers, to give advice on what information can be disclosed to external bodies.

Does PIDA need its own tribunal?

The experience of whistleblowers going through the tribunal process is often seen a difficult experience. This effects the appetite of potential claimants and may deter genuine public interest claims. One solution is to create either a legal fund for whistleblowers or to extend legal aid to include whistleblowing claims. Another option is the creation of an independent whistleblowing or public interest tribunal. This body could, for instance:

- Make recommendations for organisations on how they should improve their whistleblowing policies and arrangements
- Make referrals to regulators or other authorities
- Have specialist tribunal judges

Standards for employers

The law should have explicit standards for employers when dealing with both the whistleblower and the concerns they are raising. These standards should include:

- A statutory code of practice, potentially as an ACAS Code of Practice, that would set principles of best practice for internal whistleblowing arrangements that courts, tribunals and regulators can use when judging whistleblowing issues.

- A nominated director or non-executive director should have responsibility for the whistleblowing policy and arrangements.

- There should be a requirement for organisations to train staff and managers.

- There should be a duty on both employers and regulators to protect workers who raise concerns.

Standards for regulators

Though the duty on prescribed persons to produce annual reports is welcome, this alone is unlikely to drive up standards. We need a code of practice for regulators that sets clear standards for how to develop guidance for regulated entities as well as how regulators encourage and respond to whistleblowers and whistleblowing.

The case for an overall whistleblowing regulator or central body

To drive improved performance and uphold the importance of whistleblowing among regulators, there may be a need for an overall regulator for whistleblowing. This independent body should at the very least provide oversight and guidance to regulators. This body would need to ensure it neither undermines nor duplicates the work of other regulatory bodies, whilst having sufficient powers to hold them to account.

A public interest defence for whistleblowers

There should be a general defence for whistleblowers against the use of legal measures that threaten a whistleblower who wishes to disclose information in the public interest.

Reforming whistleblowing through the courts

Protect has sought permission to intervene in a number of cases at the Court of Appeal and Supreme Court. This provides us with an opportunity to present arguments which give a wider public interest perspective on the issues being considered, as well as an ability to help shape the law around whistleblowing going forward.
In recent years, in the absence of legislative opportunity to achieve change, Protect has placed a greater emphasis on intervening in key cases to address the problems with whistleblowing law it has identified above.
Below are some examples of our recent interventions.

Protection for Limited Liability Partners (LLPs)

Clyde & Co LLP v Bates van Winkelhof [2014] {SC}

What happened?

The claimant was a partner in the respondent law firm. She joined Clyde and Co in February 2010 after it took over parts of the firm of which she was previously a partner, including a joint venture with a Tanzanian law firm. In November 2010, the claimant reported to Clyde and Co's money laundering reporting officers that the managing partner of the Tanzanian firm had paid bribes to secure work and certain outcomes in cases. The claimant alleged that, as a result of disclosing this information, she was suspended, accused of misconduct and ultimately removed from the firm.

Prior to Protect's intervention in the Supreme Court, the Court of Appeal ruled that Bates van Winkelhof could not bring a claim for unfair dismissal under the provisions for whistleblowing because she did not have the requisite 'worker' status. The Court reached that decision on the basis that it was a legal impossibility for a partner simultaneously to be employed by and a member of the partnership. The claimant appealed to the Supreme Court.

Why did we intervene?

Protect took the decision to intervene at that point because the inclusion or exclusion of a large number of professionals from whistleblowing protection depended on the Supreme Court's decision. Protect was concerned that the Court of Appeal's ruling represented a serious blow to whistleblowing in sectors where LLPs dominate. Lawyers, such as the claimant, accountants and many other professionals work as members of partnerships. It would discourage these workers from speaking up about wrongdoing they witness in their workplace if they knew the law would not protect them in the event they were mistreated as a result of doing so.

What did we argue?

We argued in the Supreme Court that there is nothing in the legislation on the employment status of LLP partners that prevents a partner also being an employee or worker. We further submitted that to exclude partners from whistleblowing protection would be a breach of these workers' right to freedom of expression under the European Convention of Human Rights. Freedom of expression in the workplace requires the provision of safeguards against being victimised for speaking up about wrongdoing.

What was the outcome?

The Supreme Court decided that Bates van Winkelhof was a worker and could, therefore, bring herself within the protections for whistleblowing. The Court found that the Court of Appeal was wrong to treat subordination as

an essential part of the employment relationship. The result is that LLP members benefit from the full extent of protections in the event that they are victimised for raising concerns in their partnership.

The Public Interest Test

Chesterton Global Limited & Anor v Nurmohamed [2017] {CA}

What happened?

This case was the first opportunity that the senior courts had to consider the meaning of the Public Interest Test introduced in the 2013 amendments to PIDA. Mohamed Nurmohamed was employed as an estate agent at the respondent company. In 2013, the claimant took to a director of the estate agency a number of what he identified as discrepancies in the accounts for the branch in which he worked. These discrepancies misrepresented the profitability of the branch as lower than it was in reality. Crucially for the claimant, the company's commission payments to staff were determined according to the profitability of their branch. The employment tribunal found that it was the reasonable belief of the claimant that these discrepancies were manipulations for the purpose of reducing the level of commission owed to staff.

Why did we intervene?

Protect intervened in the Court of Appeal to ensure the new Public Interest test was interpreted so as to maintain protection of workers raising concerns in their workplace. Protect was concerned that this new test would introduce complexity and uncertainty into the law, which would have the effect of leaving potential whistleblowers not knowing if they would be protected when they spoke up about wrongdoing. We highlighted to the court that the history of this new test was not to re-cast the type of concerns covered by the legislation, but simply to stop a manipulation of the law where it was being used by people to enforce their own contracts of employment.

On that basis, Protect argued before the Court that a disclosure should be considered in the public interest if the impact of the concerns raised goes further than the individual making the disclosure, such that it affects at least one other person. Chesterton argued that mere numbers of affected individuals could never, by itself, transform a personal issue into an issue in the public interest; what matters is the nature of the concerns.

What was the outcome?

The Court accepted Protect's position that the "public interest test" was designed to stop backdoor arguments in contractual disputes but took a middle position – between the extremes that had been argued – as to when private interests could also be in the public interest. It took the view, put forward by Mr Nurmohamed, that the question of what is in the public interest in this context is not amenable to absolute rules. It involves consideration of a number of factors, including the number of individuals concerned, the nature of the wrongdoing and the identity of the alleged wrongdoer. In this case, the fact that the wrongdoing affected only the personal interests of managers did not prevent it from being in the public interest, since the number of employees affected was large (100 employees) and the wrongdoing involved a national estate agent company misstating accounts by £2-3 million.
The impact of the case has been to bring some clarity to the question of when workers' concerns will satisfy the public interest requirement and therefore fall within the scope of protection.

What is the public interest?

There are no hard and fast rules but should consider:

- Number of individuals concerned
- Nature of wrongdoing
- Identity of wrongdoer
- The type of organisation

NB just because a concern only affects private interests, this does not necessarily mean it is not in the public interest

Unprotected NHS workers

Day v Health Education England & Lewisham and Greenwich NHS Trust [2017] {CS}

What happened?

Dr Day was accepted to train towards becoming a consultant physician by South London Health Education Board, which is part of Health Education England ("HEE"), the national body responsible for coordinating the training of doctors. He was placed in the respondent NHS Trust. While at the Queen Elizabeth Hospital, Dr Day reported concerns to HEE and the Trust that understaffing was putting the safety of patients at risk. Soon after, his performance was questioned and, in the resulting disagreement, his NHS training number was deleted. Following this, he was no longer allowed to continue his training towards becoming a consultant.

In a preliminary hearing, the employment tribunal decided that it could not hear Dr Day's claim as against HEE, because he was not in a "worker" relationship with them. He was, however, a worker vis a vis the Trust. The employment appeal tribunal interpreted the legislation to mean that Dr Day could not hold HEE liable for the mistreatment that he claimed he had suffered by them. He argued that this effectively left doctors in training without whistleblowing protection since, in the realities of their situation, it was HEE who held power over them, rather than the NHS Trust.

Why did we intervene?

Protect was concerned that this interpretation of the legislation would leave junior doctors without whistleblowing protection because of the legally

unusual structure of their employment. Given the health sector's history of whistleblowing failures, culminating in the Francis Report in 2015, Protect felt it particularly important to uphold the whistleblowing protections for health workers.
We argued in the Court of Appeal that already existing provisions in whistleblowing law allow a claimant who is a worker vis a vis an immediate employer to establish a claim against a third party, where that third party holds power over them.

What was the outcome?

The Court of Appeal agreed with this interpretation of the law and allowed Dr Day's appeal. This decision not only meant that junior doctors retained protection against victimisation for raising concerns in a sector where speaking up is especially vital, but that potentially many other complex employment relationships would also find themselves protected by whistleblowing law. In a world of work that is constantly evolving and shifting, Protect considered this of profound importance.

Office holders

Gilham v Ministry of Justice [2017] {CA}

What happened?

Claire Gilham was a District Judge at Warrington Country Court. She raised concerns about systemic failures of judicial administration, following which she experienced bullying and mistreatment for which it appeared she had no adequate legal defence against. The question for the Court of Appeal was whether a judicial officeholder, such as a District Judge, could be construed as having "worker" status so as to be entitled to whistleblowing protections. Historically, UK law has distinguished between those working under a contract, and those whose work was the exercising of an office; in the latter category, the individual's rights and responsibilities were dictated by statute laid down by Parliament, rather than the terms of the contract.

Judge Gilham had argued that her terms and conditions so closely resemble those of a worker with an explicit contract, that judges should be treated as working under a contract. In the absence of this, her rights under Article 10 of the European Convention on Human Rights ("ECHR") meant that she had a right not to be left defenceless against whistleblowing victimisation.

Why did we intervene?

Protect took the decision to intervene in the Court of Appeal in order to urge the upholding of whistleblowing protection in the judiciary. It is crucial that those individuals at the heart of our justice system are encouraged to responsibly speak up about wrongdoing or malpractice in the knowledge that the law protects them if they suffer mistreatment as a result.

Beyond supporting Judge Gilham's arguments, Protect further argued that the ECHR required that – where the State provides a certain legal right – it should not discriminate in who this is provided for unless it has good reason to. There was no reason why the State should provide a full suite of whistleblowing rights to those working under a contract, but not those fulfilling the role of an office. Further, there were even inconsistencies in how it had given out rights to different office hodlers; members of the police (who are office holders) did have whistleblowing rights, but judicial office holders did not. The Ministry of Justice had not even attempted to justify this divergence in treatment.

What was the outcome

The Court of Appeal agreed with the approach of the Tribunal that there was not a sufficient basis to construe Gilham as having worked under a contract, nor were her Article 10 rights breached when she theoretically could bring a Human Rights Act claim in the civil courts. On Protect's discrimination point, the Court took the view that Parliament had in fact clearly delineated – and consequently justified – its whistleblowing protection for those working under contracts, and for those not doing so.

District Judge Gilham has been granted permission to appeal to the Supreme Court and Protect has sought permission to intervene again.

The causation test, and unusual circumstances where whistleblowers would be denied protection

Timis and anor v Osipov [2018] {CA}

What happened?

The claimant, Alexander Osipov, was CEO of the respondent company, International Petroleum. The second and third respondents, Mr Timis and Mr Sage, are non-executive directors on the board of the company. In the lead up to his dismissal, Mr Osipov raised concerns about a number of issues to the respondents, which he considered to be breaches of the company's obligations. The most serious breaches related to corruption, and potential bribery, in the tendering process for contracts with the company. Soon after, Mr Osipov was dismissed.

The employment tribunal took a dim view of International Petroleum's behaviour against Mr Ospiov and consequently ordered that the company pay him substantial damages. It soon became apparent, however, that International Petroleum had ceased trading and its assets had dwindled to a point well below what would be needed to pay Mr Osipov his rightful compensation. It was suggested that this was an intentional trick to avoid paying him. Mr Osipov then sought to hold Mr Timis and Mr Sage accountable for the money instead.

With the exception of discrimination, a unique feature of whistleblowing protections is that a worker who mistreats a whistleblower worker can be held liable in their own right for losses flowing from that mistreatment. The central question in Osipov is the extent of an individual worker's liability for dismissal of a whistleblower. Both lower courts had found in Mr Osipov's favour, holding that the right not to suffer detriment at the hands of a co-worker is without restriction. The Respondents however appealed.

Why did we intervene?

Protect was concerned that if the Court of Appeal allowed the respondents' appeal, many whistleblowers would be denied compensation for dismissal where a claim against the employer itself is not possible. That situation might arise where an employer has become insolvent, as was the case here. Another situation where this route would be important is where an employer acts honestly in dismissing a whistleblower for a particular reason, but unbeknownst to the employer, this reason has been fabricated by a co-worker seeking to victimise the whistleblower. Protect urged the Court of Appeal to take a purposive approach to the legislation which ensures dismissed whistleblowers are protected in these scenarios.

The case also presented an opportunity to address the overly burdensome causation test for some whistleblowing cases. By extending the scope of individual, and vicarious, liability provisions (which require a lower, and in Protect's opinion, more appropriate standard of causation) whistleblowers are provided with an alternative route to remedy in circumstances where the very high level of causative link ordinarily required is unsuitable.

What happened?

The Court of Appeal reaffirmed the position of the lower courts and Mr Osipov was successful.

In coming to this decision, though, The Court had to grapple with several apparent inconsistencies in the scheme for whistleblower protection. Lord Justice Underhill commented

"I accept that this approach to the meaning of section 47B (2) does not produce a particularly elegant result. It is clumsy that an employee dismissed on whistleblower grounds should be able to pursue distinct causes of action, with significant differences as regards the conditions of liability and (perhaps) compensation, against his or her employer and against the co-worker(s) responsible for the dismissal. It may well be that Parliament did not really think through the technical challenges of inserting into the framework of the 1996 Act a scheme of individual liability largely borrowed from the discrimination legislation."

Protect hopes to use this decision to illustrate how PIDA has inherent structural problems that will only be worsened by piecemeal amendment. The law is in need of holistic reform.

360° Benchmark launches at 'Whistleblowing in the Modern Workplace' event at Howard Kennedy law firm

Developed with a financial working group, Protect's 360° Benchmark works by identifying gaps in whistleblowing or speak up arrangements and provides organisations with an action plan on how to improve.

The 360° Benchmark has three key areas:

- Governance: Ensuring the structure and oversight of whistleblowing, arrangements meet best practice
- Engagement: How you engage with staff to encourage them to raise concerns and with managers to help them handle whistleblowing concerns
- Operations: How whistleblowing works in practice in your organisation, from how staff are supported to providing feedback

Developed over a two year period with a working group from the financial services sector, the 360° Benchmark is now being rolled out to all sectors.

Around 50 delegates from varied sectors attended the official launch of our 360° Benchmark in October at Howard Kennedy which included a panel debate led by Jane Amphlett, Head of Employment Team at Howard Kennedy.

Delegates heard contributions from panel members Georgina Charlton, Deputy Freedom to Speak up Guardian at Guy's and St Thomas' NHS Foundation Trust, compliance consultant Laura Davies who helped develop the Protect 360° Benchmark, and Simon Rhodes, Head of HR for Kinapse Ltd.

It was an interesting debate and points raised included the cultural differences HR has to manage when working with global teams, the confusion over grievances and whistleblowing, and how the independent role and remit of the Freedom to Speak up Guardian.

Protect Chief Executive Francesca West gave an overview of the 360° Benchmark and said , "With our 25 years' expertise we have found numbers alone are not an effective measure of arrangements. The 360° Benchmark is unique. It focuses instead on how your arrangements are structured, how you engage with staff and how whistleblowing works in practice in your organisation."

Simon Bleckly, Audit and Counter Fraud Manager, Corporate Services, Warrington Borough Council, who piloted the Benchmark, said, "The 360° Benchmark enabled us to identify where we need to improve, and identify the key actions that we need to carry out in order to improve, but also to obtain assurance in those areas where we are performing well. The ability to compare ourselves with other local authorities is very useful – this is the first time that we have been able to do this."

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Protect
Speak up, stop harm
25 years

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