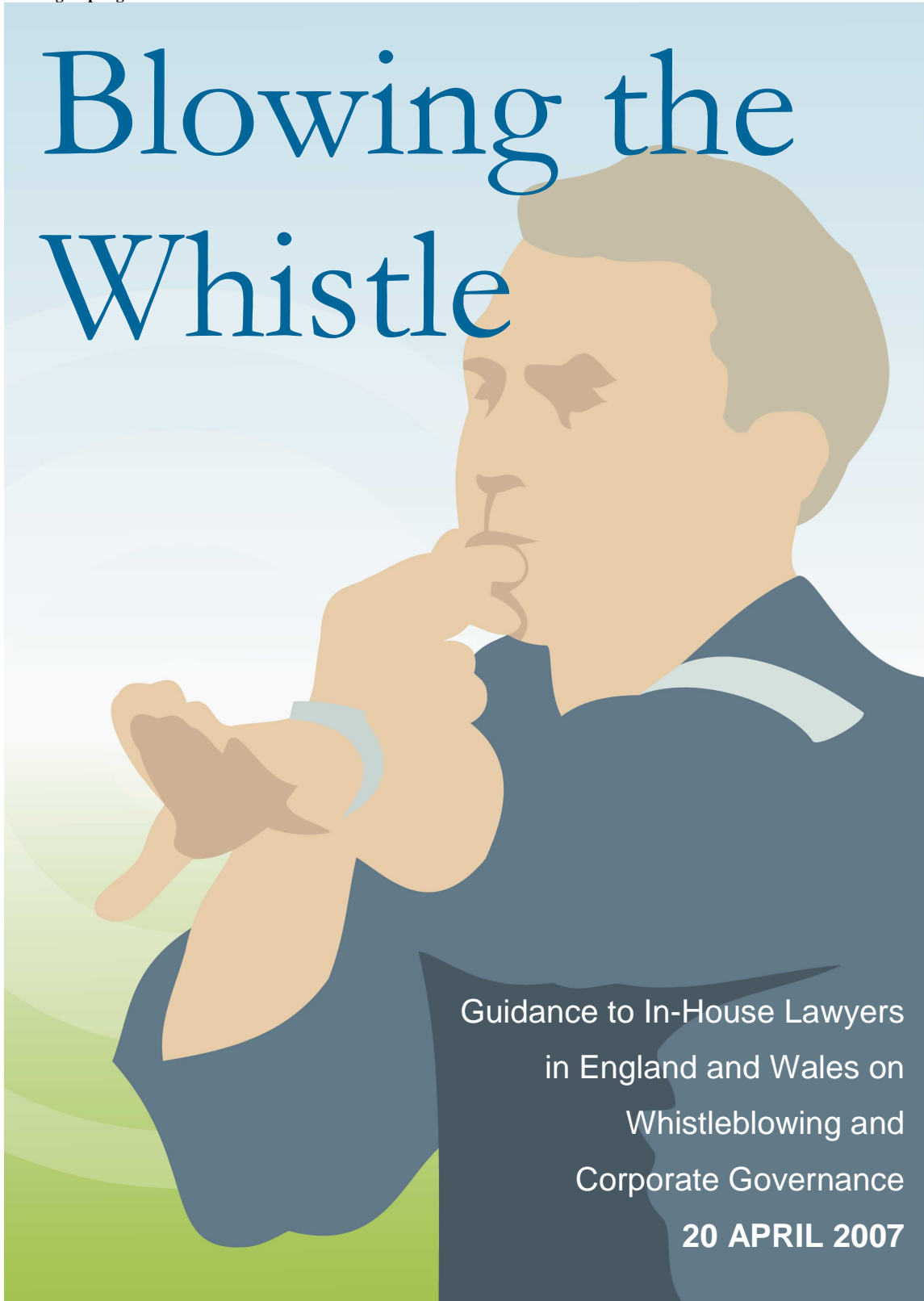




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# Blowing the Whistle



Guidance to In-House Lawyers  
in England and Wales on  
Whistleblowing and  
Corporate Governance

**20 APRIL 2007**

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# Foreword

*Reconciling the Irreconcilable?*, the first set of Guidelines published by the C&I Group's Corporate Governance Committee in March 2005, discussed the uncertainties that then existed amongst in-house lawyers and their employers about the roles that in-house lawyers play in ensuring good corporate governance in their organisations - in particular whether they should be the "conscience of the company" with a legal, professional or moral duty to keep their organisations on the right path, or alternatively trusted advisors on specific legal issues put to them by the organisation's management.

*A Fine Line*, the second set of Guidelines published by the Corporate Governance Committee in July 2006, tried to answer these questions by providing more prescriptive guidelines with a view to:

- helping you ensure good corporate governance in your organisation; and
- assisting you and your management to understand the scope and limits of your role and your responsibilities as an in-house lawyer.

We hoped that this would help in-house lawyers to foster good corporate governance practices within their areas of responsibility, and avoid becoming scapegoats if (despite their best efforts) corporate governance failures do occur.

In this third set of Guidelines we aim to confront the very sensitive topic of whistleblowing, which only happens in an organisation when at least one person (i.e. the whistleblower) believes that there has been a serious breakdown in the organisation's corporate governance. This

may be another person in the organisation, or it may be you. How an organisation responds to this situation is the litmus test of its corporate governance arrangements, which proves whether they are genuine, or just lip service. We aim to help you to help your organisation prepare for this test (which will hopefully never arise in practice), and to help you to deal with the situation if you are unfortunate enough to have to blow the whistle yourself.

These guidelines:

- provide an overview of the law on whistleblowing, including:
  - whether employees have a legal obligation to blow the whistle; and
  - if they do so, what protection the law provides them with against victimisation or other detrimental treatment by their organisations;
- provide some guidance on how to help your organisation to implement a good whistleblowing policy;
- examine your own position as an in-house lawyer, especially:
  - whether you have a greater legal or ethical obligation to blow the whistle than other members of staff;
  - how effectively the law protects you if you blow the whistle; and

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- how, if at all, should the extent of such legal protection affect your decision whether to blow the whistle; and
- identify gaps in the law protecting whistleblowers, as a result of which individuals may find that they are required to blow the whistle but are not protected by the whistleblowing legislation.

There are indeed some cases where in-house lawyers may have greater obligations than other staff to blow the whistle, but may have less (or no) protection. These defects in the whistleblowing legislation should be of concern to anyone (including regulators and legislators) who wishes to promote good corporate governance in organisations.

This guidance relates to English and Welsh law only. Specialist and independent legal advice should be taken before taking or refraining from any action as a result of the guidance contained in this document. This is particularly important in the context of whistleblowing, given the complex interplay between the law on this and other related subjects (e.g. legal privilege, conflicts of interest and money laundering), industry regulation, foreign laws (e.g. Sarbanes-Oxley in the US, but also across Europe), and legal and reputational risks to the organisation and potentially to you personally if you make a mistake.

In order to ensure that our Guidelines reflect the views of our in-house lawyer members, please let us know what you think. Please contact us through the C&I Group website [www.cigroup.org.uk](http://www.cigroup.org.uk):

**Simon Welch** West Bromwich Building Society, Chairman  
**David Haig** Banque AIG London Branch, Deputy Chairman  
**Nina Barakzai** Towers Perrin, Forster & Crosby Inc.  
**Maxine Chow** LGC Group Holdings plc  
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# A. Introduction

## A.1 The corporate governance background

A key part of any organisation's corporate governance arrangements should be to encourage its staff to report any serious malpractices that they observe, first to their superiors within the organisation and, if that avenue fails or is for some reason not available, to external authorities. Without such reporting, the organisation's board and senior management may not be aware of malpractices committed at lower levels of the organisation, the board may not be aware of malpractices committed by the senior management itself, and (if there is a complete breakdown of corporate governance in an organisation) the organisation's owners, creditors, regulators, or other stakeholders may not be aware of the board's own complicity in the malpractice.

## A.2 What is whistleblowing?

*Whistleblowing* is a convenient if emotive description of a current or former member of staff reporting serious malpractice in his or her organisation. The reporting may take place to someone within an organisation's senior management or externally – for example, to an organisation's auditors, shareholders, regulators (if it has any), the police, or the media. Some serious malpractices have been revealed by whistleblowers (e.g. Enron), and some have occurred but have only been discovered on investigation, leading to criticism of the organisation's staff (including its in-house lawyers<sup>1</sup>) for not blowing the whistle themselves.

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<sup>1</sup> For example, in 1990, the in-house lawyer for Robert Maxwell's companies tried but failed to persuade Robert Maxwell to disclose to Maxwell Communication Corporation plc (MCC) shareholders that an affiliate held more than 3% of the MCC shares. She resigned because her advice was ignored

Sometimes whistleblowers make complaints about their colleagues or their senior management which they cannot subsequently justify, or which were not as serious as they thought at the time; and sometimes they report their concerns more broadly than they needed to (e.g. reporting them to the media without first trying to resolve them within the organisation).

Judging this balance can be difficult, but in the UK the law aims to encourage whistleblowing that is done in good faith and to the right people, and to discourage whistleblowing that is badly motivated or misdirected. The law sometimes protects a person even if it is later shown that the disclosure was factually incorrect. On the other hand, there are some situations in which a person may be required to blow the whistle but may not be protected by the whistleblowing legislation at all, for example if making disclosures to certain regulators, or in circumstances of privilege as an in-house lawyer.

There are some gaps in the protection available to whistleblowers, and these should be of concern to anyone (including regulators and legislators) who wishes to promote good corporate governance in

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but remained as a legal consultant for the subsequent flotation of Mirror Group Newspapers plc. Although the holding had by the time of the flotation been reduced below 3%, she was criticised by the Department of Trade & Industry inspectors for failing to bring the earlier breach to the attention of the advisors or the MGN board: "Any duty of confidence she owed to MCC was overridden by her duty to speak out in relation to the serious breach of the Companies Act which had occurred". See paras 6.20 to 6.23 and 22.24 of the Department of Trade & Industry report entitled *Mirror Group Newspapers plc: investigations under Sections 432(2) and 442 of the Companies Act 1985*, published on 30 March 2001, available on [www.ecdti.co.uk](http://www.ecdti.co.uk). It is not immediately obvious what duty she had to speak out: was it a legal duty or a moral or ethical duty? Readers should judge for themselves what they would have done in her situation, and if she was treated fairly or harshly.

# A. Introduction

organisations, and we discuss these gaps in more detail below.

## A.3 The role of the in-house lawyer

In-house lawyers can help to ensure that their organisations have good whistleblowing arrangements, so that the organisation's staff know that they can escalate their concerns without fear of victimisation or detriment. In addition, because of the central position that in-house lawyers occupy, they may also find themselves needing to consider how to escalate their own concerns about any serious malpractices.

## A.4 Two illustrative scenarios

The following two scenarios illustrate some whistleblowing issues. By necessity we have been selective, and of course many other, and far more complex, situations can arise.

### **An employee scenario:**

*A company manufactures widgets. An employee tells her manager that the organisation is deliberately infringing the health & safety regulations on a production line. She makes the disclosure in good faith and believes reasonably that the facts show the health and safety failure. The manager rejects her report, and subsequently persecutes her. She leaves the company, and brings various employment tribunal claims.*

- (a) *What rights does the worker have as a whistleblower?*
- (b) *How (if at all) would the answer differ if she had made her disclosure outside of the organisation?*

### **Answer:**

- (a) *If she brings her claim within three months of leaving the company, she may have a good claim against the company for compensation and other relief arising from the treatment she received because of the disclosure.*
- (b) *In order to benefit from the same level of protection as outlined in the answer to (a), the employee would need to have satisfied some extra requirements before making the disclosure externally (see section C.3 below).*

### **An in-house lawyer scenario:**

*The CEO (to whom you report) tells you about a proposed transaction. He asks you for your legal advice on it and to work on the documentation. You believe that this transaction would be illegal, and you inform the CEO accordingly. The CEO tells you that he is going to conclude the transaction despite your advice, and you then raise your concerns with the Board. The CEO victimises you for doing so.*

- (a) *What rights do you have as a whistleblower?*
- (b) *What if the transaction was only proposed (and not necessarily going ahead) at the point that you made the disclosure?*
- (c) *What if you did not hear about the transaction from the CEO but from a colleague who mentioned it in passing?*

### **Answer:**

- (a) *The organisation may say that it is your duty to inform the board of such issues and to advise it of the implications, and that you were merely doing your job – and not blowing the whistle at all. This is not a valid defence for the organisation, as the whistleblowing legislation does not require the disclosure to be outside of the organisation and, indeed, anticipates that whistleblowing will, ordinarily, be an internal exercise. However, the organisation has a better defence in these circumstances: namely that you obtained the information about the transaction in the course of providing legal advice to the organisation, and that the information would be covered by legal advice privilege (see sections C.4 and E.2 below).*
- (b) *The whistleblowing legislation protects employees who make a disclosure of information which tends to show that certain wrongdoing has been, is being or is likely to be committed (see section C.1 below). So you would have protection if you had a reasonable belief (on the information available to you at the time) that the proposed transaction was likely to happen.*
- (c) *If you were informed about the transaction when not in the course of providing legal advice to your “client”, the information would not be covered by legal advice privilege. This means that the organisation would not have the privilege defence mentioned in the answer to (a) above (see section E.2 below).*

## B. Is there a legal obligation for employees to blow the whistle?

There are some specific situations in which the law imposes an obligation either on all staff, or on particular staff, to blow the whistle. For example:

- **Financial Services:** Firms which are regulated by the Financial Services Authority (FSA) are required to report to it any significant breaches of its rules, and other matters which it would be reasonable to assume would be of material significance to the FSA. Within a firm, however, the reporting obligation falls only on the approved persons who are responsible within the firm for reporting matters to the FSA: normally, this would include the compliance officer<sup>2</sup>.
- **Anti-money laundering:** Subject to certain exceptions, staff of businesses which are in the “regulated sector” for purposes of the Proceeds of Crime Act 2002 have an obligation to report knowledge or suspicion of money laundering activity to their Money Laundering Reporting Officer (MLRO) or directly to the Serious Organised Crime Agency (SOCA); and the MLRO has an obligation to forward such reports to SOCA if he or she thinks there may be substance to them<sup>3</sup>.

In situations where there is no such specific obligation to report wrongdoing, is there a general legal obligation for employees to blow the whistle if their organisation engages in some serious malpractice? Even in the absence of a specific contractual

obligation, an employee may have a duty to disclose under his or her duty of fidelity and loyalty owed to the organisation. The duty of fidelity and loyalty means that an employee must be honest in performing his or her duties. Under this obligation an employee may sometimes (depending on the facts and the seniority of the employee) be under a duty to draw their line manager’s attention to any serious actual or potential malpractice in order to prevent or expose the malpractice, or (in case they fear victimisation) to blow the whistle in accordance with their organisation’s whistleblowing policy.

However, employees may in practice escape criticism if they show they thought they were not obliged to blow the whistle, or that they feared that they would be victimised if they did so. More junior employees may have more latitude in this respect, as expectations will be higher for more senior employees, particularly if they are in control positions (e.g. accountants and lawyers).

In Section E, we consider whether in-house lawyers have a legal or ethical obligation to blow the whistle, beyond other members of staff.

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<sup>2</sup> See paragraph APER 4.4.7E of the FSA Handbook.

<sup>3</sup> See Sections 330 and 331 of the Proceeds of Crime Act 2002, and the C&I Group Guidance Note on Money Laundering published July 2006 and available on [www.cigroup.org.uk](http://www.cigroup.org.uk).

# C. What protection does the law provide for whistleblowers?

## C.1 The Public Interest Disclosure Act 1998

Such legal protection as exists is contained in the Public Interest Disclosure Act 1998 (“PIDA”), which amends the Employment Rights Act 1996. PIDA is short but complex, and the following summary is necessarily selective.

PIDA encourages employees, contractors and other staff and workers in an organisation to raise their concerns about a malpractice by protecting them from dismissal, victimisation or other detriment, provided they have acted in good faith.

If they suffer a detriment for making a “protected disclosure”, there is no qualifying period of service and there is no limit to the amount of compensation they may be awarded.

To be protected in this way, the individual must have made a disclosure, in good faith, of information which, in their reasonable belief, “tends to show” that one or more of the following has been, is being, or is likely to be, committed:

- (i) a criminal offence;
- (ii) a failure or likely failure to comply with any legal obligation;
- (iii) a miscarriage of justice;
- (iv) putting the health and safety of any individual in danger;
- (v) damage to the environment; or
- (vi) deliberate concealment relating to any of (i) to (v).<sup>4</sup>

## C.2 PIDA and internal disclosures

PIDA encourages staff first to voice their concerns about a malpractice within their organisation, and encourages organisations to establish internal procedures that staff can follow if they have a concern (e.g. appointing a Whistleblowing Officer to whom staff may go, and providing them with training on the procedures).

Accordingly, if the disclosure is made to the employer itself, or to a third party in accordance with the employer’s own procedures, the only conditions are that the worker made the disclosure in good faith, had a reasonable belief and followed the PIDA regime (which is explained below). The worker’s allegation may subsequently be shown to be unfounded, but so long as these conditions are satisfied, he or she should benefit from PIDA protection. In practice it is often quite difficult for the organisation to prove that the worker was not acting in good faith or did not have a reasonable belief.

What if the malpractice is already known? There is no protection under PIDA unless one makes a qualifying disclosure. Thus if a member of staff informs the organisation’s CEO of a malpractice, but the CEO is already aware of it, it will still be a qualifying disclosure, since PIDA does not *disqualify* disclosures which are made to parties who are already aware of the malpractice. To “disclose” the information, the whistleblower simply needs to tell another person in the organisation – it is irrelevant that the information may not come as a surprise to that other person.

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<sup>4</sup> See Sections 43B and 43C of PIDA.

# C. What protection does the law provide for whistleblowers?

## C.3 PIDA and external disclosures

PIDA makes it progressively more difficult for workers to raise their concerns outside their organisations, by imposing additional requirements over and above those for internal disclosure.

Section 43F of PIDA protects the disclosure in good faith of a malpractice to an appropriate regulator or government body (a “Prescribed Person” which is listed in the Public Interest Disclosure (Prescribed Persons) (Amendment) Orders 2003<sup>5</sup>, 2004<sup>6</sup>, and 2005<sup>7</sup>) provided that the worker has a reasonable belief that the information disclosed and any allegations contained in it are substantially true.

Disclosure to any other party (e.g. the police, the media or even the organisation’s external auditors) must be viewed as a last resort, as stringent additional conditions must be satisfied. Under Section 43G of PIDA, the worker will have to show that he/she had tried to make the disclosure internally or to a prescribed regulator, or that it was reasonable for them not to do so (e.g. because they reasonably believed that they would be victimised or that evidence would be concealed or destroyed). The hurdles to be overcome by an employee trying to prove this are high.

If the various conditions for making a protected disclosure are satisfied, confidentiality clauses in employment contracts are overridden. However, a disclosure does not qualify as a protected disclosure if a criminal offence is committed

by making it (such as a breach of the Official Secrets Act<sup>8</sup>), or if the information disclosed is subject to legal privilege<sup>9</sup>. (See Section E for further discussion of legal privilege.)

## C.4 A defect in PIDA

The law sometimes requires particular individuals to report malpractices directly to external bodies, such as the FSA or SOCA (see Section B). It would therefore be logical for PIDA to provide these individuals with the protection they would have had if they had been making an internal, rather than an external report.

Unfortunately, it does not. Instead it imposes an important additional burden on the whistleblower, if he or she has to blow the whistle to an external regulator or government body such as the FSA, by requiring him or her to show that they had a reasonable belief that the information disclosed and that any allegations contained in it are substantially true. Consequently, compliance officers may be required to report matters to the FSA before they have sufficient information to be sure that they

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<sup>8</sup> Section 43(B)(3) of PIDA.

<sup>9</sup> Legal advice privilege protects from disclosure communications between a lawyer in his professional capacity and his client, provided they are confidential and for the purposes of giving or seeking legal advice. Communications with an independent third party (even if created with the purpose of providing legal advice to the client) are not covered by this head of privilege which applies whether or not there is any litigation. Legal advice privilege therefore attaches to confidential communications between a client and his lawyer (but not third parties) made for the purposes of giving legal advice to the client. Litigation privilege attaches to confidential communications between a client and his lawyer (or between one of them and a third party) where the dominant purpose of the communication is obtaining legal advice where the litigation already exists or is in reasonable prospect.

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<sup>5</sup> SI 2003 No 1993.

<sup>6</sup> SI 2004 No 3265.

<sup>7</sup> SI 2005 No 2464.

## C. What protection does the law provide for whistleblowers?

are within the safe harbour provided by Section 43F of PIDA.

The situation is even worse for MLROs, who are required to report “suspicions” of money laundering to SOCA. As SOCA is not a Prescribed Person, PIDA’s Section 43F safe harbour will not be available, and it may be difficult to satisfy the stringent additional conditions imposed by Section 43G of PIDA.

In short, PIDA was not designed to protect compliance officers and MLROs from potential victimisation by their organisations as a result of making reports to the FSA and SOCA respectively in the course of their duties.

This is a defect in PIDA, and we think that PIDA should be amended to protect individuals who are complying in good faith with their obligations under separate regulations to make external reports.

Note that this defect in PIDA impacts on anyone who has an obligation to report matters to the FSA or SOCA, not just in-house lawyers. We discuss another defect in PIDA, which impacts mainly on in-house lawyers, in Section E.2 below.

### C.5 PIDA case law

The majority of cases relating to whistleblowing are heard in employment tribunals, the judgements of which are not published widely. There have been several cases before the Employment Appeals Tribunal and the Court of Appeal (and the Scottish Court of Session), and many of these are summarised by the charity Public Concern at Work (“PCaW”) on its website<sup>10</sup>.

In particular, the Court of Appeal in *Street v Derbyshire UWC*<sup>11</sup> held that an employee can fail the good faith test and lose PIDA protection where the dominant or predominant motive for making the disclosure was unrelated to PIDA’s public interest objectives.

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<sup>10</sup> See [www.pcaw.co.uk](http://www.pcaw.co.uk).

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<sup>11</sup> [2004] EWCA Civ 964.

# D. Implementing a whistleblowing policy

## D.1 Helping your organisation to establish a whistleblowing policy

Potential whistleblowers in any organisation can feel very lonely and vulnerable: they worry about what to do if they blow the whistle, what to do if they don't, and what will happen to them either way. It is very much in the organisation's interests to encourage its staff to raise their concerns about actual or potential malpractices in the organisation at an early stage – while they can still be rectified or prevented. Thus a key part of any organisation's corporate governance arrangements is a policy which encourages staff to raise their concerns about malpractices within the organisation in good faith, without fear of being victimised for doing so.

You can help your organisation to establish and implement such a policy by:

- Advising senior management: Informing the Board and the senior management about PIDA and the other relevant legislation, advising them how it impacts on the organisation, and periodically updating that advice; and
- Putting together a whistleblowing policy: Drafting a whistleblowing policy for the organisation, in consultation with the organisation's HR function, and agreeing it with the Board and senior management<sup>12</sup>.

This Section deals with the issues to consider if you are helping to establish a whistleblowing policy.

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<sup>12</sup> A wealth of information and services are available from PCaW (see [www.pcaw.co.uk](http://www.pcaw.co.uk)). Advice and consultancy services are also available from the Institute of Business Ethics (see [www.ibe.org.uk](http://www.ibe.org.uk)).

## D.2 Appointing a Whistleblowing Officer

The Whistleblowing Officer is a person appointed by the organisation for staff to report their concerns to. This person may be within the organisation (e.g. the chairman of the Audit Committee, the Head of HR or the Head of Legal), or external (e.g. an organisation like PCaW). Regardless, he or she will need to be sufficiently senior, credible and independent to command the respect of both staff and senior management, and be given adequate authority and independence to carry out his or her duties. If you, as in-house lawyer, are asked to take on this role, you should ensure that you are capable of fulfilling it, and in particular that you have been given adequate authority and independence by the organisation.

The Whistleblowing Officer's role and responsibilities may include:

- authority to investigate reports independently, and to make recommendations to the senior management (or, in certain cases, the Chairman or the non-executive directors) as to how to deal with the complaint. In investigating any report, the Whistleblowing Officer should be careful not to commit any act of misconduct (e.g. by gaining unauthorised access to the organisation's systems), as PIDA will not protect the Whistleblowing Officer if he or she is dismissed or subjected to a detriment by the organisation because of that misconduct<sup>13</sup>;
- access to such staff and documents as the Whistleblowing Officer considers appropriate;

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<sup>13</sup> *Bolton Schools v Evans* [2006] EWCA Civ 1653.

## D. Implementing a whistleblowing policy

- authority to appoint independent external advisors such as lawyers or accountants (and a budget for doing so) to assist with the investigation;
- authority to report in confidence any complaints that relate to executive management to, for example, the Chairman, the Head of the Audit Committee or a non-executive director;
- if the Whistleblowing Officer is not the Head of Legal, a requirement to notify the Head of Legal promptly of any reports and thereafter to keep the Head of Legal informed of developments; and
- other internal reporting requirements which may also be appropriate in more serious cases (e.g. in order to establish a team that can handle disciplinary issues, announcements, insurance notifications, media relations etc).

### D.3 Staff confidentiality

Emphasising staff confidentiality in relation to whistleblowing reports is critical. However, a whistleblowing policy should also clarify that there may necessarily be some limitations that staff can expect as to the confidentiality of the process. You should try to protect the individual by deleting his or her name from reports. However, their identity may have to be revealed for internal disciplinary purposes, or to report the results of the investigation to the police (including SOCA) or to a regulator.

### D.4 Educating staff about the policy

Once a policy has been developed, it is of course necessary to educate staff in relation to it, both in terms of making disclosures and how disclosures should be treated. For example:

- remind staff that they are only protected by PIDA if they raise their concerns in good faith (and satisfy all of the other conditions under PIDA), and may be subject to disciplinary proceedings if they do not act in good faith;
- clarify that the Whistleblowing Officer is not giving, and is not authorised to give, legal advice to the whistleblower. This is particularly important if an in-house lawyer is the Whistleblowing Officer (see below); and
- ensure that the organisation (and individuals employed by it) shall not take any retributive action against any individual who has blown the whistle appropriately.

### D.5 The in-house lawyer as Whistleblowing Officer

If you are nominated as the Whistleblowing Officer, perform the role fairly, impartially and discreetly, with reference to the organisation's whistleblowing policy (if any). Keep good notes of your investigations and recommendations, as your actions may well be scrutinised if there is litigation or publicity later. Remember that your notes and communications (in this capacity) are likely to be disclosable, except when you are yourself obtaining legal advice. In addition, take special care if you have any personal involvement with the whistleblower (e.g. they are a friend as well as a colleague), or their complaint involves you in some way. If there is a conflict of interest, you should declare it to both the senior management

# D. Implementing a whistleblowing policy

and the whistleblower, and be prepared to step down if either of them objects to the potential conflict<sup>14</sup>.

## D.6 Advising the Whistleblowing Officer

If you are not nominated as the Whistleblowing Officer, but are asked to advise the Whistleblowing Officer in a particular case, remind them of their duty to perform the role fairly, impartially and discreetly, and ensure that you also act similarly. Take care to ensure that your notes and communications (in this capacity) are and remain legally privileged. It may be appropriate for the Head of Legal to assume responsibility for more serious issues, especially if litigation or criminal proceedings seem likely.

## D.7 Dealing with informal approaches

If a member of your organisation's staff complains to you informally about some actual or potential malpractice, remind them that your duty is to act in the best interests of the organisation, that they should consider obtaining their own legal advice – as you cannot advise them – and that if they are serious about the matter, they should follow the procedure set out in the organisation's whistleblowing policy (if any) or that you will have to report their complaint to the senior management. You should also avoid undertaking any personal obligation of confidence and point out at the earliest possible time that if you receive material information you may be obliged to act on it even if the source of the information does not wish you to do so. Situations where the identity of the source is easy to deduce must obviously be handled with great sensitivity.

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<sup>14</sup> Solicitors' Practice Rules 1990: Rule 1.

## D.8 Conducting litigation

If, in spite of all of these procedures, a whistleblower's complaint is not resolved and litigation or criminal proceedings ensue, ensure that the process is conducted in accordance with all applicable rules and ethical requirements. Such proceedings may be bitter and divisive, and may well be exposed to media scrutiny – or the threat of it. Remember your professional and ethical duties, and your duty to act in the interests of the organisation – which is not necessarily the same as the interests of senior management or at least certain members of it.

## D.9 Reviewing the whistleblowing policy

Help your organisation to review the effectiveness of its whistleblowing policy periodically. If your organisation is a UK listed company, it is likely to have an audit committee which “...*should review arrangements by which staff of the company may in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee's objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action.*”<sup>15</sup>

The Institute of Chartered Accountants has provided guidance for audit committees on how they should carry out such a review, and if you are the company secretary, you should assist the audit committee to carry out that review. Even if your organisation is not a UK listed company, it would be good practice for it to carry out a periodic review of the whistleblowing arrangements, and if you are the senior in-house lawyer you can assist with that.

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<sup>15</sup> See paragraph C.3.4 of the Combined Code.

## E. The in-house lawyer as whistleblower

### E.1 Do in-house lawyers have a legal or ethical obligation to blow the whistle, beyond other members of staff?

Although employees have a general duty to escalate their concerns about malpractices, or (in case they fear victimisation) to blow the whistle in accordance with their organisation's whistleblowing policy, in practice, expectations of employees' compliance with this duty vary depending on their seniority and their position within the organisation. However, high expectations are placed on in-house lawyers, and especially the Head of Legal, as they are reasonably expected to know what their duties are, and to act with independence and integrity, and in accordance with their professional codes of conduct.

On the other hand, in-house lawyers have an important duty of client confidentiality towards the organisation (in addition to their normal duty of trust and confidence as employees). For example, Rule 16E(2) of the Solicitors' Practice Rules states:

*"You and your practice must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by your client or former client."*

The Law Society has helpfully provided guidance on some exceptional situations in which you may disclose your client's information without their permission. These *"largely concern situations where a solicitor is given information by a client which indicates that there is a very real risk of harm, usually physical, to another person"*. In case of uncertainty, the Law Society encourages you (as do we) to consider seeking legal advice or to telephone its Professional Ethics Helpline for advice.

If the malpractice is very serious, the in-house lawyer's general duty as a senior employee and their professional or ethical duty as a lawyer are together likely to outweigh any duty of confidentiality that they may have to the organisation.

### E.2 How effectively does PIDA protect an in-house lawyer who blows the whistle?

We explained in Section C above that the protection PIDA provides to whistleblowers is subject to several conditions and caveats, and that the conditions become more stringent if the disclosure is made to a prescribed regulator or government body, and much more stringent if the disclosure is made to any other external party.

A number of factors come into play when considering whether and to what extent PIDA applies if the in-house lawyer has to blow the whistle:

- What is the nature of the malpractice?  
To be protected by PIDA, the malpractice must fall within one of the six categories mentioned in Section C.1 above. This may be fairly clear if it involves a criminal offence, a danger to an individual's health and safety, or damage to the environment. But what if it is something less tangible, like a failure by the senior management and the Board to implement good corporate governance arrangements? Would this constitute a failure to comply with a legal obligation, so as to fall within the scope of PIDA? Most likely it would if the organisation is authorised and regulated by the FSA; but in other situations it is only by looking at the nature of the failure, and its seriousness, against the

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relevant legislative framework that this can be assessed.

- Is the disclosure made in good faith?  
There is no protection under PIDA if you are not acting in good faith when you raise your concern. You must therefore ensure that your dominant purpose for the disclosure is to prevent or expose a proscribed malpractice and thereby benefit the organisation and its stakeholders. You should try to avoid any suggestion that you are acting in interests other than those of the organisation and its stakeholders. You must weigh up the seriousness of the malpractice against the steps which you would like to take to combat or expose the malpractice, and avoid any actual or potential conflict of interest.
- What are the circumstances in which the in-house lawyer learned of the malpractice? Disclosures of information obtained in circumstances of legal privilege do not attract the protection of PIDA. Section 43B(4) of PIDA states that:

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

This provision is intended to preserve the fundamental principle of confidentiality that clients expect when they consult their legal advisors on a delicate legal issue, and is entirely logical when applied to external law firms – which are only likely to learn

about malpractices in their clients’ organisation if they are specifically consulted about them by their clients.

However, in-house lawyers may learn about malpractices in their organisations from any number of sources, and in both privileged and non-privileged circumstances.

If you are told about a malpractice in the course of providing legal advice to the organisation, and the subject matter attracts privilege<sup>16</sup>, your disclosure of it is unlikely to be protected by PIDA. In-house lawyers will be worse off in this respect, than if they had not been legally qualified, as similar information given to company secretaries or compliance officers who are not legally qualified would not be privileged. This would apply even though your disclosure of the malpractice is made within the organisation (for example, to the board). This is another defect in PIDA, which could be amended by legislation.<sup>17</sup>

Conversely, not everything you have learned about your organisation in the

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<sup>16</sup> This will depend on whether the information was disclosed to you within the lawyer/client relationship - this turns upon whether the person who gave you the information was specifically designated to instruct or receive legal advice.

<sup>17</sup> PCaW have recognised this defect in PIDA. In 2002, they submitted a proposal to the Department of Trade & Industry that they should support an amendment to Section 43B(4) so that it is clear that disclosures of information subject to privilege are protected by PIDA where that disclosure does not breach the privilege. They commented, “There are sound ethical and public interest reasons why lawyers should be protected under PIDA for raising concerns where privilege is not breached.” See *In the Public Interest - legal professional privilege*, at [www.pcaaw.co.uk/policy\\_pub/legal\\_professional\\_privilege.html](http://www.pcaaw.co.uk/policy_pub/legal_professional_privilege.html).

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course of your employment is covered by legal privilege (i.e. so that you would not be protected by PIDA if you reveal a malpractice). If you learn about a malpractice in circumstances where you are not being asked for legal advice (for example you observe the malpractice for yourself, or hear about it at a business or board meeting, or you are told about it by a colleague where the information is not privileged), then you should be protected under PIDA if you disclose it<sup>18</sup>.

- To whom did the in-house lawyer report his or her concerns? PIDA is designed to encourage whistleblowing within an organisation, before resort is made to whistleblowing externally – for example, to a regulator, the police or the media. PIDA does not take account of the fact that in-house lawyers may in some circumstances be obliged to make an immediate disclosure outside the organisation. For example:

- Financial services: The FSA is a Prescribed Person for the

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<sup>18</sup> You will need to consider the circumstances of the situation carefully. Recent case law makes it clear that legal advice privilege will attach to advice around what should prudently and sensibly be done in a relevant legal context. Provided you have put on your “legal spectacles” and are not simply advising the client “as a man of business”, your advice may attract privilege. This will depend upon whether your advice is given within a lawyer/client relationship. There may be grey areas around who in your organisation is your “client”. Current case law tends towards a relatively narrow definition of “client”, limited to only those employees in the organisation who are specifically designated to instruct or receive legal advice. See *Three Rivers District Council & Others –v- The Governor & Company of the Bank of England Rev 1* [2003] EW CA Civ 474 (Three Rivers (No. 5)).

purposes of PIDA, so you should normally be protected if your organisation is FSA-regulated and you report a malpractice to it, provided that you reasonably believed that the information and any allegations in it are substantially true, the malpractice falls with the matters in respect of which the FSA is prescribed, and the information is not legally privileged. Lack of protection by PIDA will not excuse you for failing to report a malpractice to the FSA, if you are obliged by the FSA rules to do so.

- Anti-money laundering: On the other hand, SOCA is not a Prescribed Person, so you may not be protected by PIDA if you are your organisation’s MLRO and report to them a transaction which you suspect involves money laundering, as you would have to satisfy the more stringent tests that justify a disclosure to a third party other than a Prescribed Person. Again, lack of protection by PIDA would not excuse you for failing to report suspected money laundering if you are obliged by the anti-money laundering legislation to do so. (Similarly with terrorist financing.)

In analysing what protection is available under PIDA, you therefore need to consider to whom you have reported, or to whom you intend to report, the malpractice. However, this analysis should not delay or distract you from complying with your obligations.

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### E.3 How should your assessment of the protection available to you under PIDA affect your decision whether or not to blow the whistle?

You should normally escalate any concerns you have about malpractices in the organisation in accordance with your normal reporting lines. For example, the Head of Legal should inform the CEO or whoever he/she normally reports to. If you have tried this route but been rebuffed, or if you reasonably believe that you will be victimised if you try this route, you will need to consider reporting your concerns to the Board or beyond it.

This decision, and the subsequent decision of how to make the disclosure (for example, to the Audit Committee, the full Board, or an outside regulator etc), can be very difficult, as both require a weighing up of conflicting duties (to protect the organisation, its stakeholders and sometimes the broader community on the one hand, and to preserve confidentiality on the other).

Inevitably any decision will be highly subjective, depending upon the facts and circumstances of the particular situation.

At this point, it is only human nature to consider what (if any) protection PIDA will provide to you if you decide to escalate your concerns beyond your immediate reporting line. As explained in Section C above and in this Section, PIDA certainly does not provide you with protection in all circumstances in which you must blow the whistle.

Our view is that you should *not* allow the question of PIDA protection to affect or delay your decision whether or not to blow the whistle. If you believe that your organisation has committed, or is about to commit, a malpractice that is sufficiently serious to justify reporting it directly to the Board, and still more so to justify reporting it externally, then you must do this regardless of any concerns you may have about preserving your own job or obtaining compensation if you are victimised. You may be heavily criticised if you decide not to blow the whistle because of concerns for your own position.

## F. Conclusion

Although the Board (or its equivalent) is primarily responsible for ensuring that an organisation has good corporate governance, it cannot achieve this by itself, and it cannot rely entirely on senior management and/or its control functions (such as internal audit and the legal and finance departments) to implement the corporate governance arrangements. Staff at every level in the organisation must contribute to corporate governance, and a key part of this is that they should be able to escalate their concerns about possible malpractices in the organisation without fear that they will be victimised for doing this.

A large part of the in-house lawyer's job is to advise the organisation on how to stay within the law and, if their immediate superior (for example, the CEO) rejects their advice about a serious corporate governance issue, they must decide whether to escalate their concerns to the Board and/or (in the worst cases) externally. For this reason, in-house lawyers may be more likely than others to become whistleblowers, even if they do not think of themselves in these terms.

The law may in certain circumstances impose a duty on staff to report their concerns about malpractices, and in some cases (such as MLROs and compliance officers) imposes criminal or regulatory sanctions on them if they do not report their concerns outside of their organisations.

PIDA generally protects genuine whistleblowers who report their concerns responsibly within the organisation or, in the last resort, externally. In-house lawyers can assist their organisations to adopt and implement whistleblowing policies in order to encourage staff to escalate their concerns about potential malpractices promptly and responsibly.

One must be careful not to equate whistleblowing obligations with the protection available under PIDA, as PIDA certainly does not protect individuals in all circumstances where they have legal or ethical obligations to report their concerns.

Compliance officers and MLROs are particularly exposed, because they may have to make external disclosures to the FSA and SOCA respectively, and this was not contemplated when PIDA was drafted. We suggest that this is a defect in PIDA that should be amended to protect individuals who are complying in good faith with their obligations under separate regulations to make external reports.

In the case of in-house lawyers, there is a particular problem with the "legal advice privilege" exception to PIDA, which would apply even though their disclosure of a malpractice is made within the organisation (for example, to the board). We suggest that this defect should also be amended by legislation.

Despite these gaps between your legal and ethical obligations to report your concerns about malpractices on the one hand, and your protection under PIDA on the other hand, you should not allow the question of PIDA protection to affect or delay your decision whether or not to blow the whistle.

# Disclaimer

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