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### **BRIEFING ON WHISTLEBLOWING CLAUSE 15 AND OTHER RELATED CLAUSES IN THE ENTERPRISE AND REGULATORY REFORM BILL FOR REPORT STAGE ON 26 FEBRUARY 2013**

This briefing is being provided by the whistleblowing charity, Public Concern at Work (PCaW). During its 20 year existence PCaW has advised over 14,000 whistleblowers, helped draft the whistleblowing law and works with organisations in all sectors to embed better whistleblowing cultures. This briefing is intended to provide members with background information in advance of the report stage of the Enterprise and Regulatory Reform Bill (ERRB) on 26 February 2013. This briefing takes into account the recommendations from Robert Francis QC's report into Mid Staffordshire NHS Foundation Trust and includes case studies which reveal the need for stronger whistleblower protection.

#### **The Mid Staffordshire NHS Foundation Trust Public Inquiry - chaired by Robert Francis QC**

The recent publication of Robert Francis QC's report into the high mortality rates in Mid Staffordshire NHS Foundation Trust considers whistleblowing and finds that more needs to be done to create a culture of openness and transparency in the NHS, where the patient is put first. The report makes recommendations for workers, providers, commissioners, regulators and student medical and health professionals. Recommendation 12 of the Francis report states: *"Reporting of incidents of concern relevant to patient safety, compliance with fundamental standards or some higher requirement of the employer needs to be not only encouraged but insisted upon. Staff are entitled to receive feedback in relation to any report they make, including information about any action taken or reasons for not acting."*

#### **Whistleblowing Protection - background of the Public Interest Disclosure Act 1998 (PIDA)**

The framework of whistleblower protection is set out in the Public Interest Disclosure Act 1998 (PIDA) and is incorporated into the Employment Rights Act 1996. PIDA covers workers in all sectors, providing uncapped compensation, in cases where workers have been dismissed or suffered a detriment for having raised a concern about malpractice or wrongdoing to their employer, to a regulator or in certain circumstances more widely to an MP to a campaigning NGO or to the media. PIDA was introduced as a consequence of disasters such as Piper Alpha, the collapse of BCCI and the sinking of the Herald of Free Enterprise, where Public Inquiries found that either workers were too scared to speak up because of fear of reprisal or had raised a concern, only to be ignored. PIDA was introduced by a Private Members Bill introduced by the Conservative MP, Sir Richard Shepherd, and received cross-party support. The law has been in place for over a decade, and we are calling for a review of the scope, reach and effectiveness of its provisions.

#### **Public Interest Test**

As part of Clause 15 (set out in full below), the Government is intending to incorporate a public interest test into PIDA, which on its own will create confusion around the protection afforded to whistleblowers as they would have an additional legal test to meet. However, the incorporation

making **whistleblowing** work

of a subsequent amendment, initially laid by Lord Wills at Committee Stage, will act to transpose the test of good faith from the liability to remedy stage, thereby clarifying and simplifying the protection for whistleblowers by ensuring motive can no longer be a barrier to protection. This was a point also raised by Dame Janet Smith in the Fifth Report of the Shipman Inquiry<sup>1</sup>.

Please note the Polkey reductions, relevant to ordinary unfair dismissal damages and which permit damages to be reduced where there has been contributory negligence, already provide a precedent for this type of clause.

## Clause 15

VISCOUNT YOUNGER OF LECKIE

1 Divide Clause 15 into two clauses, the first (*Disclosures not protected unless believed to be made in the public interest*) to consist of subsection (1) and the second (*Extension of meaning of .worker.*) to consist of subsections (2) to (11).

### After Clause 15

VISCOUNT YOUNGER OF LECKIE

2 Insert the following new Clause.

#### **Power to reduce compensation where disclosure not made in good faith**

(1) Omit the words in good faith in the following provisions of Part 4A of the Employment Rights Act 1996 (protected disclosures)

(a) subsection (1) of section 43C (disclosure to employer or other responsible person);

(b) paragraph (b) of section 43E (disclosure to Minister of the Crown);

(c) subsection (1)(a) of section 43F (disclosure to prescribed person).

(2) In section 43G of that Act (disclosure in other cases), in subsection (1).

(a) omit paragraph (a);

(b) in paragraph (b), for he substitute the worker.

(3) In section 43H of that Act (disclosure of exceptionally serious failure), in subsection (1).

(a) omit paragraph (a);

(b) in paragraph (b), for he substitute the worker

(4) In section 49 of that Act (remedies for detriment suffered in employment), after subsection (6) insert

(6A) Where

(a) the complaint is made under section 48(1A), and

(b) it appears to the tribunal that the protected disclosure was not made in good faith, the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%.

(5) In section 123 of that Act (compensatory award for unfair dismissal), after subsection (6) insert.

(6A) Where

<sup>1</sup> Dame Janet Smith states: "If the words 'in good faith' were removed from the PIDA, the test under the PIDA would be brought more closely into line with the test for malice in defamation proceedings. It would seem to me to be desirable that the tests should be as close as possible so that a person thinking of making a report can be safely advised about his/her position in respect of both types of proceedings."

The Fifth Report of the Shipman Inquiry, Chapter 11 paragraph 124

(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and  
(b) it appears to the tribunal that the disclosure was not made in good faith, the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.

### **Vicarious Liability**

The amendment (set out below) tabled by Lords Low and Young is designed to address a gap in the legislation around vicarious liability in the protection for whistleblowers, and was previously laid at Committee Stage by Lord Wills. This gap in protection was highlighted by the case of three nurses from Manchester who raised a concern about a colleague having lied about his qualifications. The nurses raised their concern within their employer organisation and the Primary Care Trust. Their concern was upheld by the service, however the nurses were subject to bullying and harassment by co-workers. One of the nurses received a telephone call threatening to burn down her home and threatening the safety of her daughter. The case (*NHS Manchester v Fecitt & Others*<sup>2</sup>) proceeded as far as the Court of Appeal, which found that vicarious liability does not exist in whistleblowing, as it does specifically in discrimination law. Lord Justice Elias made the following comment in the Court of Appeal judgment:

“61. In my judgment, there is nothing surprising in Parliament considering that the principal protection which needs to be afforded to whistleblowers is from retribution by the employer. It may be that the particular interest groups with an interest in this legislation could agree protection to that extent but no further. This is of course mere speculation but in my view it shows why it would be inappropriate to assume that Parliament intended a fuller protection than naturally arises on the words of the statute. I therefore reject the submission that the Employment Tribunal erred in failing to give this construction to section 47B. I recognise why the claimants feel aggrieved. I accept too that Mr Allen may be right to say that if the Tribunal decision is allowed to stand, it means that on one view of the matter whistleblowers are inadequately protected. If so, for reasons I have given, any remedy must lie with Parliament.”

Shortly after the publication of the judgment, Health Minister Lord Howe agreed that this area needs to be reviewed<sup>3</sup>.

Robert Francis in his report of the Mid Staffordshire Inquiry specifically identified the example of Staff Nurse Helene Donnelly, who after raising serious patient safety concerns about poor practice and wrongdoing in the A&E unit of Mid Staffordshire was subjected to harassment by co-workers. The following extract from the Francis Report provides further detail:

“2.374 Ms Donnelly was a most impressive and courageous witness to the Inquiry, visibly still suffering from the effects of what she had experienced while employed by the Trust. As described in *Chapter 1: Warning signs*, she had witnessed repeated poor and even fraudulent practice in A&E, but ascribed her initial reluctance to report it or complain about it to fear of the repercussions and a lack of visible support or feedback when concerns were

<sup>2</sup> [2012] ICR 372, [2012] IRLR 64, [2011] EWCA Civ 1190

<sup>3</sup> <http://www.independent.co.uk/news/uk/home-news/whistleblowers-not-protected-from-bullying-court-rules-6255015.html>

raised: *The fear factor kept me from speaking out, plus the thought that no one wanted to know anyway, due to the lack of response to the Incident Report forms I had logged. I felt that external bodies would have told me that it was necessary to exhaust all internal mechanisms first before they would fully consider my complaints.*

2.375 When she did summon up the courage to raise her serious concerns, initially the response was positive, but the way in which the investigation was conducted was not encouraging to potential complainants and witnesses. Obvious invitations for interview were left in nurses' pigeon holes and they had to leave shifts in front of colleagues to attend. Little thought was given to the effective protection of anonymity.

2.376 The sisters against whom she complained were returned to the department and were publicly described by the Director of Operations (Karen Morrey) as the "A-team", although apparently Ms Morrey remained in ignorance of the investigation or the disciplinary process. The Trust accepts that there is no complete record of the disciplinary process and no formal determination appears to have been made about whether Staff Nurse Donnelly's allegations were accepted or not. The evidence before the Inquiry suggests that the Trust did not take her complaint seriously. Even if that was not in fact the case, it was inevitable that the impression given to those who knew a complaint had been made was that it was not worthwhile doing so.

2.377 Ms Donnelly was offered no adequate support. She had to endure harassment from colleagues and eventually left for other employment. Clearly such treatment was likely to deter others from following her example, and she was aware of colleagues on whom her experience had this effect. *...threats were made, both directly and indirectly, friends of hers and the other sisters would make threats to me. People were very often coming up to me in – trying I think in a helpful way to tell me to, I quote "watch my back", ... and people were saying, "Oh, you shouldn't have done this, you shouldn't have spoken out". And then physical threats were made in terms of people saying that I needed to – again, watch myself while I was walking to my car at the end of a shift. People saying that they know where I live, and basically threats to sort of my physical safety were made, to the point where I had to at the end of a shift ... at night would have to have either my mum or my dad or my husband come and collect me from work because I was too afraid to walk to my car in the dark on my own.*

2.378 This behaviour continued even after she reported it: *It was slightly more subversive and I think people were slightly more guarded in how they were doing it. You know, on one particular occasion another staff nurse followed me into the toilet which was also our locker room and locked the door behind her, locking me in, and demanded to know if I had a problem with her and if I was going to say anything about her, and basically threatening me not to do so if I did. And I immediately then reported that to Paula Gardner at the time, saying that this had happened. So people were still doing things, but not so publicly, in terms of sort of in the middle of the department where other people could perhaps hear. They were doing it slightly more discreetly, I suppose."*

From our experience on the Public Concern at Work advice line, bullying and harassment by co-workers is not an issue confined only to the NHS, nor is it uncommon. It is extremely worrying for there to be no legal protection against this form of victimisation; it means the protection afforded to whistleblowers by the Public Interest Disclosure Act (PIDA) may be in effect little more than a

cardboard shield. Employment law practitioners regularly argue about vicarious liability issues in whistleblowing cases before the employment tribunal. It surely cannot be right that an employer can fail to do enough to protect a whistleblower from victimisation and yet altogether escape liability. A simple answer to this problem would be for PIDA to mirror the equality legislation, which this amendment seeks to achieve.

The Government has argued that protection from harassment from co-workers already exists as part of the Protection from Harassment Act 1997, legislation intended to address the issue of stalking which requires individuals to take a civil claim. This is however at odds with the Government's aim to reduce red tape for employers as it would mean that an organisation could face two claims in two different courts from a whistleblower. It should be noted here that Lord Marland during Committee Stage agreed to produce guidance on this issue, but there is no timetable for this as yet.

**Before Clause 15**

LORD LOW OF DALSTON

LORD YOUNG OF NORWOOD GREEN

Insert the following new Clause—

“Personal liability for victimisation on the ground that a worker has made a protected disclosure  
After 47B of the Employment Rights Act 1996 (protected disclosure) insert—

“47BA Liability of employees and agents

(1) A worker has the right not to be subjected to any detriment by any act by an employee or agent of his employer, done on the ground that the worker has made a protected disclosure.

(a) it does not matter whether in any proceedings the employer is found not to have contravened this Act by virtue of section 47BB(4).

(2) A does not contravene this section if—

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so.

47BB Liability of employers and principals

(1) Anything done by person A in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer B in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.”

### **Extension of protected categories of workers and inclusion of job applicants**

The Government has laid an amendment which gives the Secretary of State the power to include other categories of workers. The current amendment also takes into account the different contracts which GPs, dentists and optometrists have with NHS bodies, however, it is incredibly difficult to follow without a detailed knowledge of health service statutes. It fails to include a range of individuals that we believe should fall within PIDA, most notable are those that are included under the Equality Act 2010, with which PIDA should be in line. These are partners (of a firm), limited liability partners, job applicants (extremely important for safeguarding against blacklisting), students, non-executive directors, public appointments and the self-employed. Other categories that may also warrant inclusion are foster carers, volunteers, interns and priests.

The amendment tabled by Lord Young specifically requires the Secretary of State to include job applicants within the category of ‘worker’. This proposal would seek to address the problem of ‘blacklisting’ job applicants, as highlighted by the exposure of the blacklisting scandal within the construction industry in 2009. At present if a prospective employer accesses a blacklist or becomes aware of a job applicant’s whistleblowing history and decides not to give them a job on that basis, the applicant has no cause of action in law, a problem highlighted by Mr Justice Langstaff in the case of **BP v Elstone [2010]**<sup>4</sup>.

The Equality Act 2010 provides protection at the point of recruitment and we think it is vital that PIDA should be brought in line with the Equality Act to convey a clear message to employers that discriminating against whistleblowers at the point of recruitment is unacceptable, and workers who blow the whistle on either their current or previous employers will be protected by law.

#### **Clause 15**

LORD YOUNG OF NORWOOD GREEN

Page 12, line 28, at end insert—

“(4A) The Secretary of State shall make amendments to this section under the powers of subsection (4), to provide for the definition of “workers” to include applicants.”

### **Whistleblowing Amendments during the progress of the ERRB**

During Committee Stage<sup>5</sup> at the House of Lords, a number of additional whistleblowing amendments were suggested and they were as follows:

- **Anti-gagging provisions**

Robert Francis QC makes a specific recommendation regarding gagging clauses<sup>6</sup>. The case of Gary Walker, a former NHS Chief Executive of United Lincolnshire NHS Trust prevented by a gagging clause from raising concerns about poor patient care and waiting time

<sup>4</sup> Paragraph 37: “It is true that the statute does not prohibit action against a whistleblower should he be recognised as one when an applicant for employment, as it might have done.” [2010] ICR 879

<sup>5</sup> <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121210-gc0001.htm#12121016000174>

<sup>6</sup> Recommendation 179, <http://www.midstaffspublicinquiry.com/sites/default/files/report/Volume%203.pdf>

infringements at the trust<sup>7</sup>, does require closer examination. Section 43J of PIDA makes it clear that any contractual clause that prevents a worker from raising a public interest concern is unlawful. This provision also covers settlement and compromise agreements. An amendment requiring legal advisers in settlement agreements to advise on section 43J was laid by Lords Young and Stevenson but was rejected by Government.

- **Open Justice**

Robert Francis QC identifies that better corporate governance requires a culture of openness and honesty. Three quarters of PIDA claims settle in private, with no information about the underlying wrongdoing reaching the public domain. This lack of openness is exacerbated by the widespread concern that many employers seek to gag employees from making protected disclosures. It is frequently reported in the public sector that independent reports into concerns raised by a whistleblower are kept from the public eye. Opponents of open justice may argue that this will allow untested allegations to be in the public domain, however open justice is the normal course in county courts and high courts, and it is vital in PIDA claims that such information is accessible to the public. The effects for individual claimants, who may be concerned about the impact of an open register on their future careers, could be minimised by including job applicants within the scope of worker thereby mitigating against blacklisting. An amendment for increasing the transparency in all claims was laid by Lords Young and Stevenson but was rejected by Government.

### **Whistleblowing Review**

It was reported in the Guardian on 16 February 2012<sup>8</sup> that the Minister for Employment Relations Jo Swinson has written to Katy Clark MP (Labour) stating the Government will review the law. Additionally on the Today programme on 19 February 2013<sup>9</sup>, the Chair of Public Concern at Work announced the formation of an independent Whistleblowing Commission that will examine workplace whistleblowing and make recommendations for change. Members of the Commission are as follows:

**The Right Honourable Sir Anthony Hooper** - Former Court of Appeal Judge (Chair)

**Michael Rubenstein** - independent legal publisher and discrimination law expert

**Sarah Veale CBE** - Head of Employment Rights at the TUC

**Gary Walker** - Former NHS Chief Executive and whistleblower

**Michael Woodford** – Former Olympus President & CEO and whistleblower

**The Very Revd Dr David Ison** - Dean of St Paul's Cathedral

**John Longworth** - Director General British Chambers of Commerce

**Lord Burns GCB** - Chairman of Santander UK and Channel 4

The Whistleblowing Commission will launch a public consultation in March looking at whistleblowing from many angles: the individual, organisations, regulators, rewards, the role of wider society and the effectiveness of the current legislation. Too often the success stories are not told and we will be listening closely to individuals and organisations for examples of how to get this right.

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<sup>7</sup> <http://www.bbc.co.uk/news/health-21455553>

<sup>8</sup> <http://www.guardian.co.uk/politics/2013/feb/15/whistleblowing-laws-overhauled-nhs-trust?INTCMP=SRCH>

<sup>9</sup> <http://www.telegraph.co.uk/news/politics/9879319/Whistleblowing-doctors-fear-for-their-careers.html>

**Further information**

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