

Written evidence submitted by Public Concern at Work (IPB 44)

Introduction

1. By way of introduction, Public Concern at Work (PCaW) is an independent charity and legal advice centre. The cornerstone of the charity's work is a confidential advice line for workers who have witnessed wrongdoing, risk or malpractice in the workplace but are unsure whether or how to raise their concern. The advice line has advised over 20,000 whistleblowers to date; this unique insight into the experience of whistleblowers informs our approach to policy and campaigns for legal reform.
2. The charity has been closely involved in the operation of the law that protects whistleblowers, the Public Interest Disclosure Act 1998 (PIDA) since its inception and campaigned to put it on the statute books in the 1990's.
3. PIDA, while essential legislative protection, is only one part of the framework in the UK that is needed to ensure whistleblowing is safe and effective. To this end in February 2013 PCaW established the Whistleblowing Commission to examine the effectiveness of whistleblowing in the UK and to make recommendations for change.
4. The Whistleblowing Commission published its report in November 2013. The key recommendation of the Commission is the creation of a statutory Code of Practice which sets out the key principles for effective whistleblowing which can be taken into account by courts and tribunals considering whistleblowing claims. The Commission also recommended that this Code could be used by regulators as part of their inspection and assessment regimes.
5. This short response will focus on whistleblowing as a key element of the oversight framework within the bill, and will propose amendments that will strengthen the bill's protection.

Background

6. Last year PCaW submitted evidence to the Joint Committee examining the draft Investigatory Powers Bill (IPB). Our submission recommended that the bill should be amended to include protection for whistleblowers working in the intelligence service who raise concerns about the misuse of any powers contained in IPB.
7. The current situation is that there is long established legal protection for whistleblowing in the UK which covers every sector and industry.
8. PIDA protects internal disclosure (i.e. to the employer), disclosures to prescribed bodies (i.e. regulatory bodies including MPs) and crucially it also protects wider disclosures to bodies and organisations not prescribed (i.e. to the police, NGO's or to the media for example). These wider disclosures involve stringent legal tests in order to be justified in the legislation.
9. There are two exceptions to this protection that are relevant to the IPB. The first is that members of the intelligence service (and of the armed services) are completely excluded from the legal protection¹, and secondly PIDA protection does not extend to workers in any sector where the disclosure would breach the Official Secrets Act 1989 (OSA).²

¹ S.c. 193 the Employment Rights Act 1996

² S.c. 43B the Public Interest Disclosure Act 1998

10. In our last submission, we pointed out there is uncertainty for a member of the intelligence services where they are concerned about potential abuse of the powers proposed in IPB. We have a number of concerns about the current protections and arrangements:
- 1) It is hard to judge whether there are effective arrangements in place for intelligence personnel to raise concerns internally (to managers within their place of work) and whether these are periodically reviewed, as these arrangements are neither publically available nor accessible via Freedom of Information laws.³
 - 2) There is further uncertainty regarding whether intelligence personnel are protected from criminal prosecution under the OSA for raising concerns with existing external channels such as the Intelligence and Security Committee of Parliament (ISC).⁴ The ISC has power to protect a witness that appears before the committee but this does not appear to extend to the initial contact or where the individual raises a concern with the ISC but doesn't appear before them as a witness.⁵
11. Our submission to the Joint Committee recommended improvements to the accountability framework in the Bill by putting in place internal procedures and designated persons for those who witness malpractice, risk or wrongdoing arising out of the use of the powers in the Bill. Additionally, that where the whistleblower's concerns fall within the scope of the categories of wrongdoing set out by the Tshwane Principles, intelligence or other public personnel should be able to report to the Commissioners without being at risk of prosecution for breaching the OSA.⁶
12. We refer here to comments by the leading legal charity, JUSTICE. In their submission, they refer to workers in a communication service provider (CSP) and the fact that they could be prosecuted for criminal offences outlined in the IPB around the disclosure of information about warrants issued or the use of powers in the Bill, even when concerns over the misuse of these powers are being highlighted to the Judicial Commissioners (JC) or Investigatory Powers Commissioner (IPC).⁷
13. As the law currently stands these workers could also fall foul of the OSA, and would not be protected under PIDA if their employer dismissed them for approaching the JC or IPC.
14. The Joint Committee recommended that there should be an explicit provision for CPS workers and staff in public authorities to refer directly to the Judicial Commissioners any complaint or concern they may have with the use of the powers under the Bill or any request for clarification on the use of those powers. According to the Committee this will enable better compliance with the provisions of the Bill and will help to reduce costs.
15. The Joint Committee also noted that there was a strong argument for a review wider reform of whistleblowing protection for those working in the intelligence service.
16. The Government's response was to amend clause 203 to allow those exercising powers under the IPB to discuss concerns with either the JC or the Investigatory Powers Commissioner. The explanatory note in the IPB states- *"This clause allows people to provide information to the Investigatory Powers Commissioner, regardless of any other legal restrictions that might exist. This means that, for example, someone whose work relates to*

³ <https://www.leighday.co.uk/News/2014/September-2014/Five-Eyes-Surveillance-treaty-challenged-at-the-EC>

⁴ 3, p.g. 1, Rv Shayler [2001] EWCA Crim 1977

⁵ Schedule 1 (7) Protection for Witnesses, the Justice & Security Act 2013.

⁶ For more information about the Tshwane Principles see: <https://www.opensocietyfoundations.org/publications/global-principles-nationalsecurity-and-freedom-information-tshwane-principles>

⁷ [Investigatory Powers Bill 2016, Briefing for House of Commons Second Reading, March 2016](#)

*the use of investigatory powers may tell a Judicial Commissioner about their work, and any concerns they may have, without being censured for doing so.*⁸

For ease of reference we have included clause 203 below:

203 Information gateway

(1) A disclosure of information to the Investigatory Powers Commissioner or another Judicial Commissioner for the purposes of any function of the Commissioner does not breach—

(a) an obligation of confidence owed by the person making the disclosure, or

(b) any other restriction on the disclosure of information (whether imposed by virtue of this Act or otherwise).

(2) But subsection (1) does not apply to a disclosure, in contravention of any provisions of the Data Protection Act 1998, of personal data which is not exempt from those provisions.

Freedom from censure is not the same as protection

17. Clause 203 states that approaching either JC or IPC will not breach “an obligation of confidence” or restrictions imposed by other laws. We are concerned that this clause represents a freedom from censure rather than protection.
18. The clause in our opinion falls short of the protection recommended by the Joint Committee that “members of the intelligence services should be able to contact the Investigatory Powers Commissioner with concerns over the misuse of surveillance powers without being at risk of prosecution for breaching the Official Secrets Act”.
19. This lack clarity also means it’s unclear whether workers in a CSP would also be free from prosecution under OSA where they to use this clause to raise concerns with either the IPC or JC.
20. We recommend that clause 203 should be redrafted to include a public interest defence against breach of the OSA for all workers in public authorities and any worker in a CSP, where concerns about the use of powers conferred in IPB are raised with either the IPC or the JC.
21. We are also concerned that the clause still provides no protection or recourse for members of the intelligence service if they are victimised, disciplined or dismissed for raising such concerns with the IPC or JC. If Clause 203 is to encourage disclosure of concerns around the misuse of, or problems with the execution of the powers proposed under IPB, then the bill needs to provide a public interest defence for CSP workers and workers in public authorities, and recourse from victimisation for whistleblowers in the intelligence service.

At what point can concerns be raised

22. The clause is vague on when a concerned worker in the CSP or the intelligence service can approach either the JC or IPC. The clause talks about how concerns can be raised “for the purposes of any function of the commissioner”. This wording is not at all clear as to whether

⁸ The Investigatory Powers Bill Explanatory Note, the House of Commons, 1st March 2016 p.g. 70

an individual can only approach to a commissioner if they are being asked for information or in the process of an investigation, or whether an unsolicited disclosure can be made.⁹

23. We also feel that the Government's response falls short of the Joint Committee's recommendation that "Communication Service Providers and staff in public authorities to refer directly to the Judicial Commissioners any complaint or concern they may have with the use the powers under the Bill or any request for clarification on the use of those powers".

Conclusion

24. We believe that the limited scope of section 203 does not go far enough in protecting whistleblowers either within public authorities (especially those working in the intelligence service) or those that work for CSP's.
25. We believe protection for whistleblowers should be explicitly set out. In this way the accountability mechanisms will have greater clarity. To this end we have drafted an amendment that creates a robust framework for whistleblowing protection for those in the intelligence service and a public interest defence that can be used by all workers in public authorities and workers in CSP (see Annex 1 for full details).

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⁹ This point has also been highlighted by JUSTICE in their briefing to MPs for Second Reading, p.g.27 *Investigatory Powers Bill 2016 Briefing for House of Commons Second Reading March 2016*.

Annex 1 Amendments to the Information gateway

203 Information gateway

- (1) In this act a “protected disclosure” means any disclosure of information by a member of the intelligence service, regardless of its classification, in accordance with section 203-209.
- (2) A “protected disclosure” means any disclosure of information which may pertain to the wrongdoing that has occurred, is occurring or is likely to occur:
 - (a) criminal offenses;
 - (b) human rights violations;
 - (c) international humanitarian law violations;
 - (d) corruption;
 - (e) dangers to public health and safety;
 - (f) dangers to the environment;
 - (g) abuse of public office;
 - (h) miscarriages of justice;
 - (i) mismanagement or waste of resources;
 - (j) retaliation for disclosure of any of the above listed categories of wrongdoing; and (k) deliberate concealment of any matter falling into one of the above categories.
- (3) For the disclosure of information, as defined by section 2, to be considered a “protected disclosure”, the member of the intelligence service, needs to:
 - (i) Have reasonable grounds to believe that the disclosure of information tends to show wrongdoing that falls within one of the categories within subsection (2);
 - (ii) The disclosure complies with conditions set forth in section 203.
 - (iii) The member of the intelligence service has not knowingly made a false disclosure of information;
 - (iv) A person making a protected disclosure should not be required to produce supporting evidence or bear the burden of proof in relation to the “protected disclosure”.

204 Internal Disclosures

- (1) A protected disclosure is made in accordance with this section if a member of the intelligence service makes a disclosure to his or her employer.
- (2) The intelligence service shall establish internal whistleblowing procedures and designate a named person to receive protected disclosures.

205 Disclosures to Independent Oversight Bodies

- (1) A protected disclosure is made in accordance with this section if a member of the intelligence service makes a disclosure to either the:
 - (a) The Judicial Commissioner;

- (b) The Investigatory Powers Commissioner or;
 - (c) The Intelligence and Security Committee of Parliament.
- (2) The Independent Oversight Bodies should when receiving disclosures of information from an intelligence service personnel:
- (i) Investigate the disclosure and take prompt action with a view to resolving the matter, or, after having considered the matter and consulted the person making the disclosure, to refer it to a body that is authorised and competent to investigate;
 - (ii) Where requested protect the identity of the intelligence service personnel who seek to make the disclosure in a confidential way;
 - (iii) Anonymous disclosures of information should be considered on their merits;
 - (iv) Protect the information disclosed and the fact a disclosure has been made except to the extent that further disclosure of information is necessary to remedy the matter;
 - (v) Feedback to the person making the disclosure of the progress and completion of an investigation and, as far as possible, the steps taken or recommendations made.

206 Public Disclosures

- (1) A public disclosure of information is considered a protected disclosure if made in accordance with this section where:
- (i) A disclosure of information is made in accordance with section 203;
 - (ii) The person made a disclosure of the same or substantially similar information internally or to an Independent Oversight Body and: 1) the body to which the disclosure was made refused to investigate the disclosure effectively; 2) the person did not receive a reasonable and appropriate outcome; OR
 - (iii) a member of the intelligence service reasonably believed that there was a significant risk that making the disclosure internally and/or to the Independent Oversight Bodies would have resulted in the destruction or concealment of evidence, interference with a witness or victimisation against the person or a third party; OR
 - (iv) there was no established internal body or Independent Oversight Body to which a disclosure could be made; OR
 - (v) the disclosure related to an act or omission that constituted a serious and imminent risk of danger to the life, health and safety of persons, or the environment and;
 - (vi) a member of the intelligence service in making the disclosure only disclosed the amount of information that was reasonably necessary to bring to the light the wrongdoing and;
 - (vii) If a member of the intelligence service when making a disclosure also discloses documents or information that are not relevant to showing wrongdoing, the person should nonetheless be protected from victimisation, in accordance with section 203-208, unless:
 - a) non-disclosure of the information outweighs the public interest in making the disclosure and;

- b) the member of the intelligence service reasonably believed that the public interest in revealing the information outweighs any harm to the public interest that would result from the disclosure.

207 Protection against Victimisation

- 1) The member of the intelligence service should not be subjected to victimisation where:
 - (i) the person making the disclosure had reasonable grounds to believe that the information disclosed tends to show wrongdoing that falls within one of the categories set out in section 203; and (ii) the disclosure complies with the conditions set forth in 203-206.
- 2) Victimisation is prohibited against any member of the intelligence service who has made, or has wrongly been identified as having made, or may make a disclosure in accordance with section 203-206.
- 3) Victimisation includes, but is not limited to, the following:
 - (i) Disciplinary action or administrative measures that include: letters of reprimand, retaliatory investigations, demotion, transfer, reassignment of duties, failure to promote, termination of employment, actions likely or intended to damage a person's reputation, or suspension or revocation of a security clearance;
 - (ii) Physical or emotional harm or harassment or;
 - (iii) Threats of any of the above.
 - (iv) Action taken against individuals other than intelligence service personnel making the disclosure may, in certain circumstances, constitute prohibited retaliation.

208 Investigation of Victimisation

- 1) The Judicial Commissioner will have the power to investigate allegations of victimisation, or a threat of victimisation, relating to a protected disclosure as outlined in section 207.
- 2) The Judicial Commissioner will investigate a reported act or threat of victimisation when:
 - (i) A member of the intelligence service reports a complaint of victimisation in accordance with section 207 or;
 - (ii) When the Judicial Commissioner believes that there are reasons to investigate allegations of victimisation, in the absence of a complaint from a member of the intelligence service.
- 3) Where the Judicial Commissioner as instigated an investigation in line with subsection 2, they have the power, where they judge appropriate, to instigate, but not limited to, the following actions:
 - (i) They may reinstate or redeploy a member of the intelligence service;
 - (ii) They may award compensation, loss of wages, loss of holiday benefits, travel expenses, payment of legal fees or any other reasonable cost or expense;
 - (iii) They may recommend disciplinary action to any intelligence service personnel who has been judged to have been responsible for victimisation of an individual who has made a protected disclosure;

- (iv) They may take action to stop or prevent the intelligence services from committing acts of victimisation;
- 4) In executing these powers the Judicial Commissioner will make every effort to ensure the proceedings are fair and in accordance with due process standards.
- 5) The investigation will either be completed over a six week period, or the parties will be notified of how long the Judicial Commissioners believe it will take to complete the investigation.
- 6) The Judicial Commissioner will notify the parties to the investigation of their decision in the form of a written report.
- 7) An appeal can be lodged against a decision made by the Judicial Commissioner who is subject to it.

209 Public Interest Defence for Intelligence Service Personnel

- 1) If a member of the intelligence services is subject to criminal or civil sanction relating to making a disclosure made in accordance with section 203-206, which is not otherwise protected under section 207, then a public interest defence can be sort, where the disclosure outweighs the public interest in non-disclosure.
- 2) The court or tribunal in deciding whether the public interest defence should be applied should consider:
 - (i) Whether it was reasonably necessary to make the disclosure in the public interest;
 - (ii) the extent and risk of harm to the public interest caused by the disclosure;
 - (iii) whether the person had reasonable grounds to believe that the disclosure would be in the public interest;
 - (iv) whether the person attempted to make a protected disclosure through internal procedures and/or to an independent oversight body, and/or to the public, in compliance with the procedures outlined section 203-206; and
 - (v) Whether there were exigent circumstances justifying the disclosure.
- 3) Section 209 is also applicable to workers in public authorities, telecommunication operators and postal operators who make a disclosure of information relating to powers used, or warrants obtained in this bill to the Independent Oversight Bodies as set out in section 205.