

**Public
Concern**

at work

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**Public
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**Where's the
public interest?
The Biennial Review 2005**

Where's the public interest?....

...is the 2005 Biennial Review from Public Concern at Work.

The review looks at our activities over the last two years and explains what we do and how we can help.

Then

On Feb 28, 1973, Nixon and Dean again tagged Felt as the potential leaker. He was, Dean told Nixon, "the only person that knows" such details. But Nixon was skeptical. No one would risk his career to become an informant.

According to a tape recording from that day, Nixon said, "You know, suppose that Felt comes out and unwraps the whole thing? What does that do to him? He's in a very dangerous situation...The informer is not wanted in our society. Either way, that's the one thing people do sort of line up against. They...say, 'Well, that (expletive) informed, I don't want him around.'"

Now

"Your advice and support were invaluable at this time. When I reported the matter...I was surprised and relieved to find that I was believed and that swift action was taken to put a stop to the abuse of the residents. Although the weeks and months that followed were stressful and traumatic, I never regretted my actions...I hope others will take heart in the knowledge that there is something we can do to stop abuse...I thank you again for your time, concern and compassion...and wish you the best of luck for your organisation's continuing good work."

Public Concern at Work...

...is the whistleblowing charity.

We believe prevention is better than cure and we promote open whistleblowing rather than anonymous informing.

We cherish our independence and have three activities -

1. we offer free advice to people concerned about crime, danger or wrongdoing at work;
2. we help organisations manage risk and demonstrate good governance; and
3. we campaign on and in the public interest.

Our approach is inspired by and, we hope, inspires:

- the liberty and self-respect of individuals,
- the ethic 'do unto others as you would be done by',
- competent and confident management,
- accountable and circumspect leaders,
- successful and open organisations,
- public service over bureaucracy,
- informed and enlightening journalism,
- considered and modest government,
- rule of law (rather than of lawyers),
- a sovereign and free Parliament, and
- a secure and vibrant democracy.

In this way we hope to inform and uphold the public interest.



Welcome



Foreword

Michael Smyth *Chairman*

I hope this Review will help to explain what it is that we do.

We seek to ensure that whistleblowing in the public interest is encouraged and protected, thereby deterring and detecting, for example, the emergence of environmental or physical risks and serious wrongdoing.

It is worth remembering that, not so long ago, organisational culture was characterised by deference to management or the labour interest. In this context individual employees concerned about whistleblowing issues had a stark choice to make between anonymous disclosure and silence. More often than not they opted for silence, and who could blame them? As is apparent from Richard Nixon's quotation (reproduced on our inside cover), many who should have known better hated informers more than they hated the wrongdoing and it was this same attitude that played a part in the great corporate and public scandals of recent times.

The second quotation on our inside cover - from one of our helpline clients - illustrates that there is a practical answer to this, provided that whistleblowing is recognised as

an alternative both to silence and to anonymous informing. As the Best Practice Guide enclosed at the end of this Review makes clear, effective whistleblowing arrangements aim to give people the confidence to question or challenge wrongdoing openly. Where, notwithstanding the assurances that the law and organisations provide, employees are still reluctant to speak up, a balanced whistleblowing regime should offer them the option of raising their concerns in confidence, so that their identities are not disclosed without consent or court order.

The evidence is clear that whistleblowing laws and procedures do have a positive effect on this dilemma. Information collected from the 1,500 whistleblowing issues we have dealt with over the past two years show that 79% of those who contacted us had raised their concerns openly (i.e. identified themselves to all involved), 20% had done so confidentially (i.e. identified themselves but asked that their identity be not disclosed to others without their prior consent) and 1% had made an anonymous report. This shift away from anonymous disclosures is very welcome.

I wish to thank my fellow trustees and our Advisory Council for their help and support and I congratulate our Director and staff for their hard work and success over these two years. It remains a source of real satisfaction that our helpline secures the level of praise that it does and I am grateful to our clients for that endorsement. Last year Public Concern at Work evolved from being a charity largely dependent on grants from trusts and foundations to one which funds all its activities from subscriptions, training and consultancy.

Our gratitude goes not only to the enlightened organisations with whom we have the good fortune to work but to all the trusts and foundations whose support has enabled us to get to this fortunate position.

I do hope you find time to read this Review and to consider how our work can contribute to the public interest and, in the process, help you.

A handwritten signature in black ink that reads "Michael Smyth". The signature is written in a cursive, slightly slanted style.

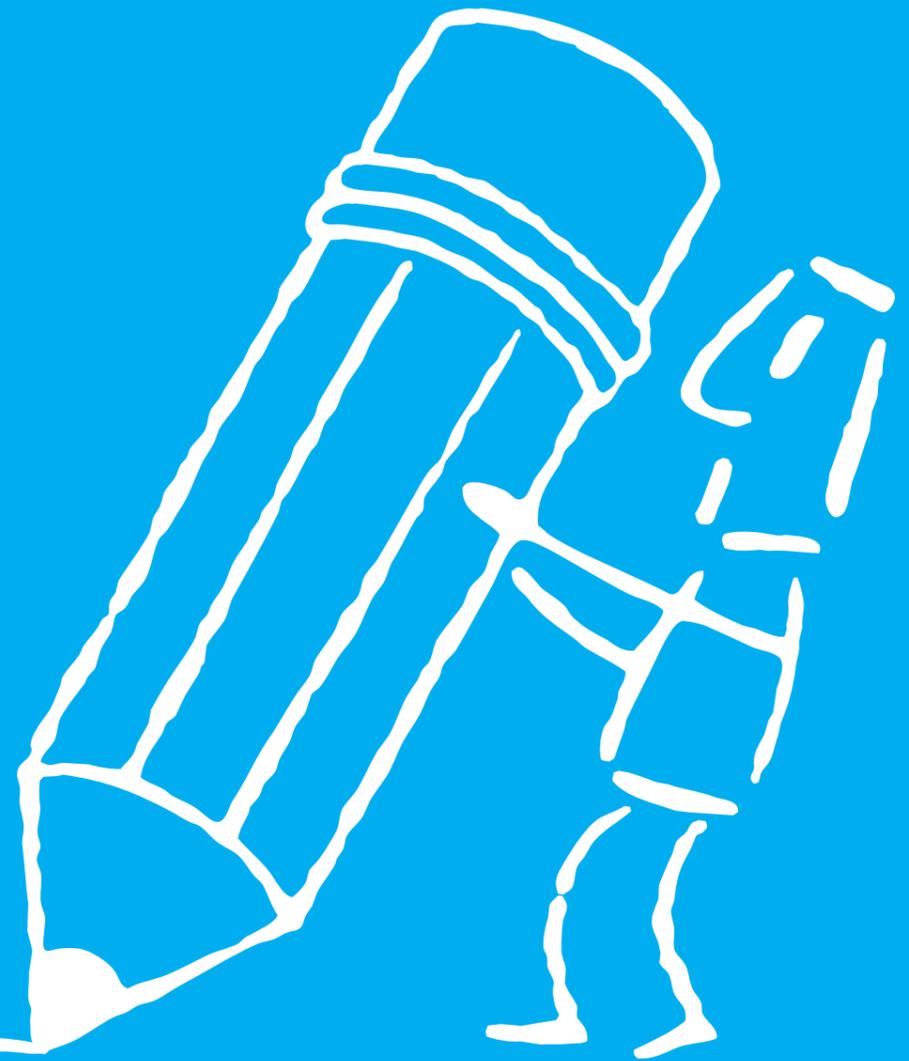
November 2005

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Insert

Whistleblowing Best Practice Guide



Two years at a glance

The helpline

- We advised on over 1500 whistleblowing concerns during 2003/4.
- 90% of clients recommend us.

Services and good practice

- Subscribers to our helpline included leading companies, the NHS, public bodies and charities large and small.
- We provided training and support to major retailers, banks, utilities and producers in the UK and began to work in Ireland.
- We revised our compliance toolkit and drafted a mini-version for GP practices.
- Our good practice recommendations on whistleblowing for organisations were 'emphatically endorsed' by the Committee on Standards in Public Life and also promoted to the private sector under the Combined Code on Corporate Governance.
- With Audit Scotland we produced guidance leaflets on whistleblowing for managers and for staff across Scotland's public sector.

Public interest

- We persuaded the Government to reverse an ill-considered health & safety law that damaged both employers and employees and that Parliament had not been told about.
- We intervened with partial success in a Court of Appeal case on the meaning of 'good faith' in the Public Interest Disclosure Act 1998 (PIDA), the UK whistleblowing law we promoted through Parliament as a private member's bill.
- We successfully complained to the Ombudsman that the DTI had repeatedly misled us in order to stop its damaging and ill-considered policy being scrutinised by Parliament or the courts. The DTI is now compensating us for the time and expense wasted and the trouble we were put to in trying to uphold the public interest.
- The Shipman Inquiry recommended that there should be greater public awareness of the role of whistleblowing and the availability of advice, and proposed an enhanced role for this charity.

Overseas

- We advised the Japanese Government on its new whistleblowing law which is closely based on PIDA.
- We co-wrote and published "Whistleblowing Around the World – law, culture and practice", commended in one review for its 'treasure of information'.
- Our work also took us to Germany, Japan, Lithuania, South Africa and the USA.

"The adviser was very authoritative and practical in his approach and very generous in the amount of time that he gave to my case. I believe that my discussions with PCaW have been extremely useful in helping me to avoid a number of very tricky pitfalls in the face of some rather difficult and powerful forces...

In short, PCaW is a unique and very important resource for people in my position, and I am very grateful that they are there when we need them."

Helpline client



"I believe that the willingness of one health care professional to take responsibility for raising concerns about the conduct, performance or health of another could make a greater contribution to patient safety than any other single factor."

Dame Janet Smith
Chair of the Shipman Inquiry

How we help individuals

We operate a confidential helpline that provides clients with free impartial advice on how to raise a whistleblowing concern in a way that best enables the concern to be properly addressed by those in charge while minimising any risk the client may fear. Because of the clear public interest in such a service, this legal advice is free to all individuals.



*Don't get lost
- give us a call
on 020 7404 6609*

For the first ten years of its operation, the helpline's costs were met by charitable funds. As our second decade gets underway, its costs are covered by modest subscriptions taken out by employers, small and large, from across the private, public and voluntary sectors.

During 2003/4 our helpline received over 1500 calls about whistleblowing issues, of which 14% came from people who said they worked for organisations that subscribed to the helpline. These calls can be analysed as follows -

Concern

- 34% Safety
- 30% Financial malpractice
- 22% Misc. (trading, consumer, environment, discrimination)
- 14% Abuse in care

Sectors

- 53% Private sector
- 35% Public sector
- 12% Voluntary sector

Source of contact

The two main ways people now find out about our helpline are from the Internet (31%) and from information provided in their workplace (30%). This contrasts with a decade ago when the main sources were advice agencies (51%) and the media (29%).

Our approach

We have no doubt that our support and advice is of greater value the earlier we are contacted for three reasons. First, once something has got off on the wrong foot it is much harder for everyone to focus on the message. Secondly, as people are not taught to question suspect conduct in a constructive way, they will often underestimate their ability to influence events. Thirdly, a good many people – unwittingly or otherwise – can confuse public and private interests without early independent advice.

Does it work?

We approached all those clients who had left telephone details seeking feedback on our service. We successfully contacted 377 and they all agreed to give feedback. The results were that:

- 95% said the advice we gave was clear
- 90% said they would recommend us
- 79% said the advice was helpful

The following two written thanks give an idea of the approach we take and why some people say they value it.

“Thank you all for all the help that you gave to me. It is an experience I would not want to repeat but I was very impressed with the support that I received.”

and...

“Our conversation yesterday was immensely valuable...I know that the others will appreciate your time and thought as much as I do. I feel secure in the view that there is now nothing sensible to be done but to move on.”

How we see the public interest

In this section, we summarise the key pieces of policy and educational work we have done to promote and safeguard what we see as the public interest.

Our fundamental message is that it is in the public interest that concerns about wrongdoing affecting others should be raised so they can be addressed. We see little merit in a culture where people will discuss with spouses and close friends a concern about wrongdoing that threatens the public but will not raise it with anyone able to assess its validity and act to prevent any unnecessary harm. Furthermore, we see no merit in a culture where those workers who do raise genuine concerns about such wrongdoing are dismissed or victimised.

We believe that unless society encourages and the law protects people who raise whistleblowing concerns openly, they will stay silent or at best will leak information anonymously. Rather than impose another legal duty on people, we believe whistleblowing should be a protected right which encourages good citizenship.

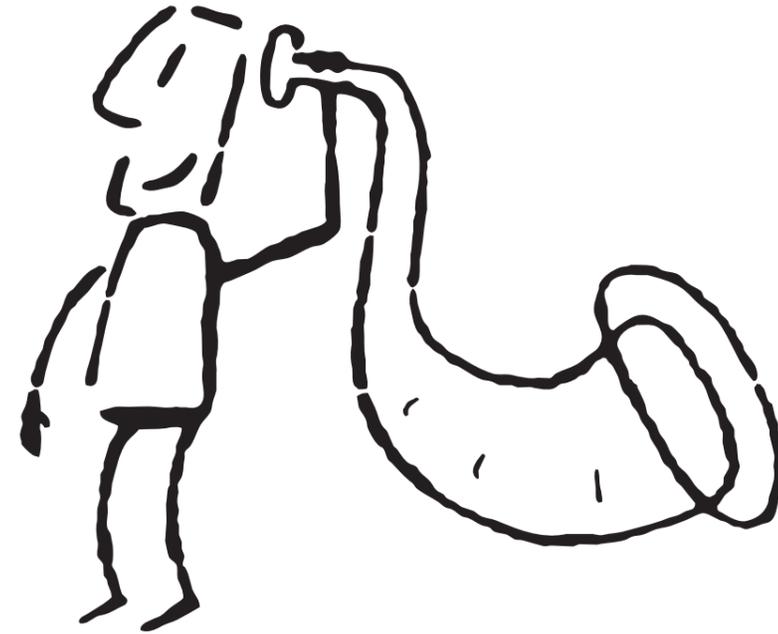
It is for these reasons that we believe the protection afforded by the Public Interest Disclosure Act 1998 (PIDA), which we helped to devise and consult on, is so important and needs to be promoted and monitored.

Monitoring the whistleblowing law

As the Public Interest Disclosure Act did not emerge from the machinery of government in the usual way, responsibility for promoting and monitoring it has fallen on this charity. One effect of the new secrecy rule – see ‘Distracted by the DTI’ below – is that it is now very difficult for us or anyone else to monitor how the Act is working in practice. This is because of the 800 or so PIDA claims made each year, 70% settle – with the result that currently, no information is available about any of these claims.

How many of these involved issues of real public danger or risk which were raised internally but remain unaddressed, and how many were settled for their nuisance value, is now secret. As such it is virtually impossible for us or anyone else to say with any confidence how the legislation is used in litigation and whether it needs revising to reduce the risk of abuse – be it by wayward employees, employers or their advisers – or to better protect the public.

Apart from the problem with PIDA claims being secret, the evidence from the workplace the media and tribunal decisions clearly suggest that legislation is proving its worth. On pages 15 and 16, we summarise some recent tribunal decisions.



with possible links to a suspect organisation, laundering money through a major financial services company • Faulty electrical

Speak Up or Pay Up

A new health and safety law was passed in 2003 which made employees liable to compensate anyone injured in an accident if the employee had not reported a risk they should have seen. When we first heard of the new law, we thought it was a mistake as it (a) put employees centre stage after every accident, (b) probably made employers – contrary to Government assurances – strictly liable to members of the public for accidents, and (c) undermined the pragmatic and cultural approach to whistleblowing in the Public Interest Disclosure Act.

When we looked into the matter we found that the consultation paper had not considered whether such a law could lead to an explosion in reports by nervous employees or to a hunt for scapegoats after every accident. It was also clear that there was confusion in and out of government whether employees would have to take out insurance or whether they would be able to pass

all the bills to their employer. We were certain it was a mistake when we saw that Parliament had not been told the regulations had any such effect.

After considering our submission and taking advice from their own QC, we were pleased when the Government accepted we were right.

Blowing the whistle in the NHS

Whistleblowing policy and practice in the NHS came under close scrutiny at the Public Inquiry into how Dr Shipman had been able to murder over 250 of his patients. We were asked to make a written submission, which drew on the experience from our helpline, our work with various NHS trusts and a survey we conducted with UNISON which suggested NHS staff are increasingly willing to raise patient safety concerns. We also spent a day giving oral testimony, sometimes under cross-examination.

The Inquiry recommended significant structural, regulatory and legislative changes for the NHS. Significantly, however, its Chair, Dame Janet Smith, wrote in her Introduction:

“I believe that the willingness of one health care professional to take responsibility for raising concerns about the conduct, performance or health of another could make a greater contribution to patient safety than any other single factor.”

The Report recommended that there should be increased awareness, among both workers and the public generally, of the role of whistleblowing and also of the availability of free, independent advice. While it saw PCaW as well placed to fulfil this role, it suggested that if we were unwilling or unable to take a larger role, a new public agency should be established.



How we see the public interest

Continued

Distracted by the DTI

When Parliament passed the Public Interest Disclosure Act (PIDA), the public had a right to know about whistleblowing claims that were made under it. Apart from the wider interests of open justice, this meant that concerns about public dangers and fraud would be on the public record and would be less likely to go undetected.

The Department of Trade & Industry (DTI) did not want the public to know about PIDA claims and denied us our right to the information. After the High Court ruled in our favour that there was a public interest in such information being available, the DTI changed the law in secret during recess and subsequently embarked on a specious consultation.

The Parliamentary Ombudsman seriously criticised the DTI for failing to consider the public interest in PIDA claims and for repeatedly misleading us to try and escape scrutiny in the courts and Parliament. The DTI has now agreed to compensate us for the time, expense and trouble it put us to as we sought to uphold and protect the public interest. However, it has not as yet agreed to put right this unjustified and damaging secrecy.

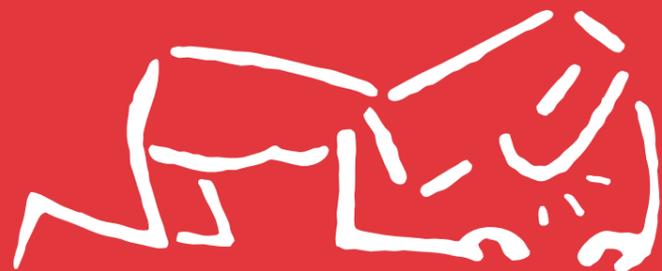
In good faith

One key aspect of PIDA is that disclosures should be made 'in good faith'. Early decisions had held, as we had assumed, that this phrase had its normal legal meaning, which is that the disclosure should be made 'honestly'. The Government, responding to the Inquiry into child deaths at the Bristol Royal Infirmary, stated that it had intended the good faith requirement in PIDA to mean 'honestly and not maliciously'.

However, in a difficult case about a long running dispute in an unemployed workers' centre, the Employment Appeal Tribunal held that the advancement of personal antagonism was 'inimical to the public interest', with the result that a disclosure so motivated failed the good faith test in PIDA. When we heard the case was going to the

Court of Appeal in 2004, we put in a written brief, arguing that this decision went much too wide and risked undermining the Act.

Although the Court of Appeal did not ask us to make oral representations, it rejected our primary submission that the phrase meant 'honestly'. It was, however, persuaded by our brief that PIDA protection cannot be lost unless there is a predominant ulterior motive that is unrelated to the purposes of the Act. Concern that this decision could discourage people from whistleblowing prompted the Shipman Inquiry to suggest that the good faith test be removed altogether from PIDA.



PIDA at tribunal



Lucas v. Chicester Diocesan Housing Society

Robin Lucas worked for a housing association on a major urban renewal project in Brighton & Hove. After she raised concerns with the funder about financial irregularities, her manager became 'extremely angry' and reduced her hours. Their working relationship deteriorated so rapidly that Lucas was dismissed within a month.

When she claimed under PIDA, the tribunal found she was right to raise her concerns and said it was so dismayed by the lack of controls over such substantial amounts of public money, it exceptionally recommended that the local council 'look very seriously at the whole question of accountability in this kind of undertaking', so prompting a public inquiry.

However, citing a recent Court of Appeal ruling on good faith, the tribunal then decided Lucas' claim failed as she was motivated by spite about her reduction in hours. Lucas challenged this decision and her appeal succeeded as it was clear that her disclosure preceded her anger and so could not have been motivated by it. The Employment Appeal Tribunal said any question about good faith should require cogent evidence and be raised squarely in advance.

Johnson v. Powerworld Ltd

Nick Johnson worked at a music club in Newcastle, which served food and drinks. After he had been there a couple of months, he noticed that the freezers were switched off at night. He raised this with a director of the company, who told him that the food would be safe as long as the freezer doors remained closed for 24 hours.

A week later, after a colleague said the food smelled off, Johnson found evidence it was being refrozen and smelled bad. After he raised his concern again and got no response, he contacted the local Environmental Health who told him that the food should be disposed of under supervision. When he relayed this to his boss, Johnson was told the food was not to be thrown away.

The next day after Environmental Health visited and disposed of the food, Johnson was challenged by his boss about the cleanliness of the club and some transactions he had made, and was then dismissed. An employment tribunal found this was in breach of PIDA and awarded him £12,789.

Backs & List v. Chestertons

Backs and List were appointed to senior executive and chief operating officers of Chestertons when a takeover bid was submitted for the firm and several other expressions of interest were made.

When the Board decided to put the firm offer to shareholders, Backs and List argued the other expressions of interest should be flagged up as these could generate a higher price. The Chairman of the Board disagreed. With lawyers involved on both sides, Backs and List said that they would contact the Takeover Panel and the Stock Exchange because not citing the other interests was likely to breach City rules.

After the Chairman had sought to dissuade them, they went ahead anyway and then were dismissed. Backs and List brought and won a PIDA claim, the tribunal finding their disclosures to the Takeover Panel and the Stock Exchange were reasonable and protected as wider disclosures.

Lingard v. HM Prison Service

Carol Lingard, a prison officer at Wakefield Prison, raised concerns with senior managers that a fellow officer had arranged a bogus assault charge to be filed against a prisoner and had heard colleagues say he had asked them to plant pornography in the cell of a convicted paedophile.

Without telling her, Lingard's managers identified her publicly as the source. She was then ostracised by colleagues and offered no support by the Prison Service, even when the situation was clearly causing her stress. An enquiry by outside officers seemed indifferent when key documents went missing and a senior manager argued Lingard's whistleblowing showed she was disloyal.

Eventually Lingard was forced out. When she took and won a PIDA case, the Employment Tribunal found that the Governor of the prison was "dripping with hostility" to Lingard and that his claim that he was not aware that whistleblowers in the prison service were victimised was "simply not credible". She was awarded £477,000. The Director-General of the Prison Service told the BBC's 'Today' the case was indefensible and that lessons needed to be learned from it.

Herron v. Wintercomfort for the Homeless

Herron worked for a hostel helping the homeless. One day an agitated client arrived and said her partner had threatened to set her on fire. Not long after, the client was admitted to hospital with serious burns, but died before she could give any information to the police.

Although Herron's boss told her not to contact the police but to wait and see if they contacted her, Herron told the police what the client had said. Pressured by the police and, with her boss away, Herron gave the police the client's file. Herron, who was by then working out her notice, was charged with gross misconduct, transferred to a distant office and made to work under tight supervision.

An employment tribunal held Herron's disclosures to the police were reasonable under PIDA and awarded her £2,500 for the distress she had suffered.

How we help organisations

“...best training in anything I've had in a long time”.

Peter Clarke

Children's Commissioner for Wales

Across the private sector we provided advice on whistleblowing policies, communication strategies, and audit arrangements. Our clients included Argos, Canada Life, Centrica, Christian Salvesen, the Co-Op Group, Dixons, George Wimpey, GUS, Homebase, Imperial Tobacco, KPMG, mmo2, Nirex, Royal Bank of Scotland, Severn Trent, Smith & Nephew and Tate & Lyle.

To encourage good practice, we sponsored a whistleblowing friendly culture award as part of the Great Place to Work awards, based on how staff view the arrangements and culture for whistleblowing. The judges gave the 2004 award to Procter & Gamble.

We revised our compliance toolkit in 2003, making it available on CD-Rom and produced a bespoke version for the NHS which the Department of Health distributed to all hospital trusts in England. We then produced a smaller version aimed at primary care which the NHS distributed to every GP surgery in England in the summer of 2005. We advised the Home Office and the Independent Police Complaints Commission on the new whistleblowing arrangements for the police. The DTI asked us to address a business forum on good governance and we provided training to the Treasury's Debt Management Office.

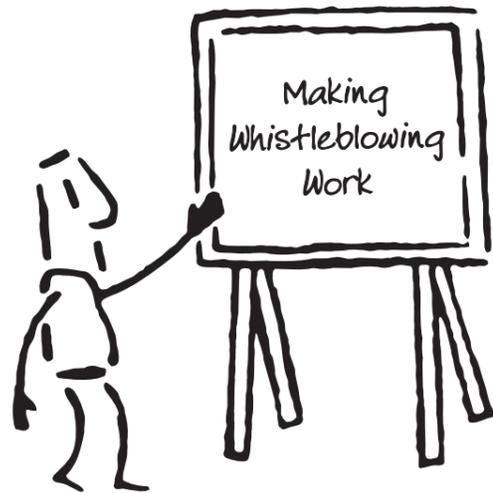


For local government and other public bodies, we ran six workshops for CIPFA's Better Governance Forum. We trained the Children's Commissioner in Wales and his staff, and worked closely with Care & Health on providing practical guidance to care providers.

We addressed the Annual Conference of the Employment Lawyers' Association and delivered sessions for the Fraud Advisory Panel and the Police Federation. For the Institute of Chartered Accountants in England & Wales we trained ethics advisers on the confidential service they offer their members.

Audit Scotland, the main public sector regulator in Scotland, commissioned us to produce leaflets for employees and managers about good practice on whistleblowing. The leaflet for employees contains a checklist of "do's and don'ts" and the one for managers sets out key aspects of an effective whistleblowing policy.

Although there is currently no whistleblowing legislation in Ireland, there is a growing recognition among corporations of the good sense in introducing effective whistleblowing arrangements. We helped two major Irish companies – AIB and Irish Life & Permanent – to develop, promote and introduce sound policies and train their key staff.



How we help around the world

As part of our international work, we published *“Whistleblowing Around the World”* which looks at differing laws, cultures and practices and explains why whistleblowing is set to become a key area in governance and accountability through the 21st Century. The book was produced with South Africa’s Open Democracy Advice Centre and the support of the British Council. It also included input from experts in Australia, Japan and the USA. A review in ‘The Law Teacher’ said:

“In the last years much has been written on whistleblowing, in English and in other languages but, until now, I missed an overview as comprehensive as that provided in this book. The book offers a treasure of information... It helps understand the dilemmas connected with the phenomenon of whistleblowing. Which would be better: that employees keep silent about wrongdoings or imminent disasters connected with their job, that they feed the rumour mill and so undermine public confidence, or that a fair and efficient opportunity will be created to raise their worries without a risk of retaliation?”



We advised both the Japanese Government and its Bar on their proposals for legislation (now enacted) which is closely based on the Public Interest Disclosure Act. We trained business, professions and NGOs there on how such legislation can work in practice.

In the light of concerns about Sarbanes Oxley, the US post-Enron legislation, and its emphasis on anonymous whistleblowing, we were asked by the American Bar Association to address its business section on the UK’s approach, with its tiered disclosure regime and encouragement of open whistleblowing.

We also briefed a delegation of Chinese journalists, gave workshops in South Africa, addressed an international conference in

Germany, trained Iraq’s Inspectors General and advised Lithuania on the role whistleblowing can play in transitional economies. We advised policy makers from Canada, the Council of Europe, the Netherlands, India, Mozambique and Uganda and hosted an international conference on whistleblowing in Edinburgh. We delivered training sessions for public servants from overseas for both RIPA and Trust in Government.

We successfully lobbied the OECD to amend its proposals and ensure that its Principles of Corporate Governance recognised that it can be legitimate and acceptable for an employee to raise a whistleblowing concern with the authorities.

On our helpline we handled 50 public concerns which came from outside the UK.

Who pays and who we are

What it costs

The cost of activities and work detailed in this review was just over £616,000. Our helpline and our services work took respectively 32% and 31% of the total, with public policy and educational work taking 27%, and management 10%.

Where the money comes from

The income we received over this period was just over £746,000 and in 2004 our earnings and subscriptions met the costs of all our activities. We now hold reserves equivalent to twelve months' costs.

Audited accounts are available on request.

Who's involved?

Our current staff are:

Director
Guy Dehn

Deputy Director
Anna Myers (maternity leave)
Kirsten Trott (maternity cover)

Scottish Director
Harry Templeton

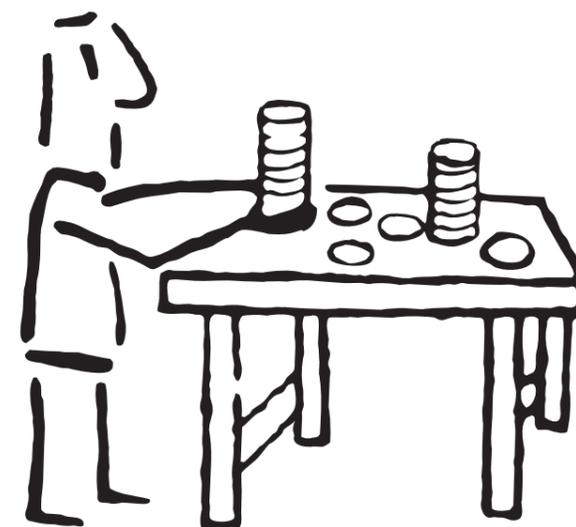
Legal Officers
Cathy James
Fatima Shah

Policy Officer
Robin Van den Hende

Helpline Adviser
Shonali Routray

Company Secretary
Evelyn Oakley

Volunteer
Jean Brown



Whistleblowing Best Practice

Public
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Our board members are:

Michael Smyth (Chair), Gary Brown, Peter Connor, Derek Elliott, Maurice Frankel OBE, Chidi King, Martin Le Jeune, Carol Sergeant CBE and James Tickell.

Our Advisory Council members are:

Michael Brindle QC (Chair), Roger Bolton, Steve Burkeman, Gerald Bowden, James Clarke, Tony Close CBE, Ross Cranston QC, Dr Yvonne Cripps, Baroness Dean, Zerbano Gifford, Edwin Glasgow QC, Roger Jefferies, Rosalie Langley Judd, David Owen, Chris Price, Dr Elaine Sternberg, Dr Marie Stewart and Marlene Winfield OBE. John Bowers QC is Honorary Legal Adviser.

Our Patrons are:

Lord Borrie QC, Lord Oliver of Aylmerton, and Sir John Banham.

Thanks to the following who worked or volunteered at Public Concern at Work during this period: Rosie Beauchamp, Yvette Bude, Amy Bush, Stephen Kamugasa and Bruce Robin.

Finally, we record the sad passing of Sir Ralph Gibson, Anthony Sampson and David Wellings, three members of our Council whose advice and support was greatly valued and is now missed.

