Title: Amendments to UK whistleblowing legislation IA No: Lead department or agency: BIS Other departments or agencies:	Impact Assessment (IA) Date: 11/03/2013 Stage: Enactment Source of intervention: Domestic Type of measure: Primary legislation Contact for enquiries:

Summary: Intervention and Options

RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
£m	£m	£m	Yes/No	In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

The Public Interest Disclosure Act 1998 was introduced to provide protection to workers who suffer detriment as a result of making disclosures in the public interest The decision in *Parkins v Sodexho Ltd [2002]IRLR 109* has widened the scope of this protection to include disclosures made only on the basis of private interest. Further issues include a lack of protection from the Act for workers who: a) are unable to establish that their disclosure was made in "good faith"; b) are healthcare professionals employed under certain contractual arrangements; or c) have suffered detriment from the actions of co-workers as a result of whistleblowing. Intervention is needed in light of the above, to redefine the scope of the Act and ensure that those who should be protected are.

What are the policy objectives and the intended effects?

The policy seeks to:
- return the scope of legislation to its original intention, to protect individuals who make disclosures in the public, rather than private, interest;
- ensure that the "good faith" test does not act as a barrier to whistleblowing or the protection of whistleblowers;
- ensure that NHS workers under certain contractual arrangements are afforded whistleblowing protection
- ensure that workers have a route of redress in the event that they suffer a detriment from the actions of their co-workers as a result of blowing the whistle.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The policy team consider the following changes necessary, in light of the amendments tabled to the whistleblowing protection framework through the Enterprise and Regulatory Reform Bill. There are no alternatives to regulation under consideration and as such the following changes will be implemented:
1) Insert a "public interest test" at the Employment Tribunal requiring individuals claiming under the Public Interest Disclosure Act to show a reasonable belief that their disclosure was made in the public interest
2) Amend the "good faith test" to affect remedy rather than liability. If a disclosure is established to have not been made in "good faith", the Tribunal claim will not fail (as it would under current legislation.) However, the Tribunal will be able to reduce any award from such a claim by 25%
3) Amend the definition of "worker" in section 43K of the Employment Rights Act 1996 to include certain new contractual arrangements within the NHS, so that these are covered by whistleblowing protection
4) Amend the Public Interest Disclosure Act to allow individuals who have suffered a detriment from the actions of co-workers as a result of blowing the whistle to bring a claim against their co-workers or employer.

Will the policy be reviewed? It will/will not be reviewed. **If applicable, set review date:** Month/Year

Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** Yes/No	**< 20** Yes/No	**Small** Yes/No	**Medium** Yes/No	**Large** Yes/No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:**	**Non-traded:**	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: Jo Swinson Date: 31 May 2013

Summary: Analysis & Evidence

Policy Option 1

Description: Amendments to UK whistleblowing legislation (listed above)

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

The proposed changes to employment legislation will cover all employers and employees should there be an instance of whistleblowing. It has not been possible to monetise these impacts.

It is not possible quantify the number of cases which

a) would have succeeded if the good faith test did not affect liability given that this is only one of a number of issues a Tribunal takes into consideration when considering PIDA claims
b) would have been brought if the protections were in place make an employer vicariously liable for the actions of the staff against other staff
c) may have been made had the scope of protection included the currently excluded group covered by the new NHS contractual arrangements.

Equally it is not possible to confirm the number of cases which may now not be covered by the protection following the introduction of the public interest test, given the number of cases which are settled outside of ET because business are not sure the existence of a public interest disclosure and therefore choose to settle to avoid the prospect of being exposed to being liable for an unlimited damages award in the event of a successful claim.

Other key non-monetised costs by 'main affected groups'

Following the extended scope, amendment to the outcome of the good faith test and the introduction of vicarious liability, employers may potentially have to defend more claims and in the event of successful claims, be exposed to the paying the compensation awards

There will be limited familiarisation costs on good faith and the public interest test because all employers are already familiar with the existing legislation. In relation to vicarious liability, business will need to familiarise themselves with the implementation date and the introduction of this measure in relation to whistleblowing.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

As above data is not available to enable sufficient analysis to quantify the effects of legislative changes. This is discussed in more detail on pages 5-12.

Other key non-monetised benefits by 'main affected groups'

Employers will face fewer claims and be subject to fewer awards at Employment Tribunal, where claims would have been made based on disclosures not in the public interest. It has not been possible to monetise this impact. Employees who were previously unable to bring a claim under the Public Interest Disclosure act will be brought into scope will be able to do so. It has not been possible to monetise this impact.

Key assumptions/sensitivities/risks **Discount rate (%)**

There has been significant pressure from opposition and stakeholders to amend the law in this area. The Act has not been reviewed since its introduction in 1998 and some of the changes being made are to ensure the law reflects changes in the changing labour market.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	**Benefits:**	**Net:**	Yes/No	IN/OUT/Zero net cost

Evidence Base (for summary sheets)

Problem under consideration

The Employment Rights Act 1996 (ERA), later amended through the Public Interest Disclosure Act 1998 (PIDA), introduced protections for workers who suffered detriment as a result of making disclosures in the public interest. The legislation allows such workers to make a claim at the Employment Tribunal. Developments since have changed the intended scope of whistleblowing protection.

The decision in Parkins vs Sodexho (2002) has widened the scope of this protection to include disclosures made only on the basis of private interest. This means that in recent years claimants have been able to pursue a whistleblowing case at the Employment Tribunal over matters of a purely private nature, such as individual contractual issues.

In addition, the Act does not currently provide protection for certain types of individual. These include:

- **Those are unable to establish that their disclosure was made in "good faith"**

  The legislation as it stands requires claimants to the Employment Tribunal under PIDA to establish that their disclosure was made in "good faith". If a claimant fails to do so, their claim will fail. (We do not have the data to precisely quantify the number of current cases where the claimant fails to establish "good faith").

- **NHS workers employed under certain contractual arrangements**

  Provisions inserted on 1 April 2004 into the NHS Act 1977 redefined the contractual arrangements for certain NHS workers, including GPs, in such a way that those individuals are no longer considered to fulfil the definition of "worker" provided in section 43k of the Employment Rights Act. These individuals are therefore not covered by the whistleblowing protections afforded in the ERA.

- **Those who have suffered detriment from the actions of co-workers as a result of whistleblowing**

  Individuals are able to make Employment Tribunal claims under PIDA if they have suffered detriment from the actions of their employer as a result of whistleblowing. However, the recent inquiry into Mid Staffordshire NHS trust established that workers were unwilling to make protected disclosures for fear of suffering a detriment at the hands of a co-worker for doing so. Current whistleblowing protections do not afford the individual a route of redress on the grounds of suffering a detriment from a co-worker following the individual making a protected disclosure. .

Rationale for intervention

Existing government intervention, in the form of the protections in law around whistleblowing, is being updated following a ruling in the case of Parkins v Sodexho which widened the scope of protections beyond its original remit, and a significant amount of pressure from both Houses during the passage of the Enterprise and Regulatory Reform Bill.

Current legislation is failing because:

1. In the context of recent case law, protection has been extended to disclosures made in private interest. ET cases for matters that are not in the public interest are a costly and unnecessary exploitation of the law. The amount of compensation that can be awarded by the Employment Tribunal for a successful whistleblowing claim is unlimited. Employment law practitioners have informed Government that they sometimes advise clients to add whistleblowing into an existing claim as a tactic for reaching a settlement with an employer as the employer is likely to take the settlement option to avoid being exposed to an unlimited damages award in the event of a successful claim.

2. The "good faith test" was originally intended to exclude whistleblowers with predominantly ulterior motives from qualifying for whistleblowing protections. However, there is concern that coupled with the introduction of the proposed "public interest test", Government will create a "double barrier" to potential whistleblowers in the sense that potential whistleblowers will need satisfy both the "public interest" and "good faith" tests.. Government is of the view that the "good faith test" should be retained as it serves a legitimate purpose, but recognises that it should not act as a barrier to protections when bringing a claim. Having the test apply to remedy rather than liability, will complement the introduction of a public interest test, while also retaining the scrutiny of an individual's motives for blowing the whistle.
3. Certain NHS workers are currently not afforded whistleblowing protection due to new contractual arrangements placing them out of scope for protection. Amending the legislation will bring these workers within scope.
4. Whistleblowers can suffer a detriment at the hands of their co-workers and have no access to redress through the whistleblowing framework. The Government is of the view that individuals have a personal responsibility to make sure they act appropriately towards co-workers whilst in the workplace. This includes not carrying out actions which cause a detriment to someone who has blown the whistle and, if they do cause such a detriment, being held accountable for those acts.

Policy objective

The intention of these proposals is ensure the protections afforded by the whistleblowing framework operate within the originally intended scope and ensure that those who should be protected are. We believe that this can be achieved through the combination of interventions in the following four areas:

- insert a public interest test to so the protections apply to disclosures made in the public, rather than private, interest
- ensure that the "good faith" test does not act as a barrier to bringing a whistleblowing claim
- ensure that NHS workers under certain contractual arrangements are afforded whistleblowing protection
- ensure that workers who have made aprotected disclosure, have a route of redress if they suffer a detriment from co-workers because of that disclosure

Description of options considered

(A) Do Nothing

The legislation surrounding whistleblowing protection will remain unchanged. It will remain possible to bring a claim under PIDA that relates to disclosures made in private, not public interest. Certain individuals may lose a PIDA claim if they a) are unable to establish that their disclosure was made in "good faith"; or be unable to bring a PIDA claim if b) are employed under certain NHS contractual arrangements; or c) have suffered a detriment from the actions of co-workers as a result of whistleblowing.

Due to case law and recent report findings, the option to do nothing is untenable.

(B) Make proposed changes to whistleblowing legislation

The following changes to whistleblowing legislation are being proposed. The preferred option (B) is the combination of all of these changes.

1. **Insert a "public interest test"** requiring Employment Tribunal to establish if individuals claiming under the Public Interest Disclosure Act can show a reasonable belief that their disclosure was

made in the public interest. If a claimant cannot establish this at the Tribunal, their claim will not proceed to a hearing. This change will make explicit the intention of the legislation, to protect disclosures in the public interest.

2. **Amend the "good faith test" to affect remedy rather than liability**. If a disclosure is established to have not been made in "good faith", the Tribunal claim will not fail (as it would under current legislation.) However, the Tribunal will have the discretion to reduce any subsequent compensation award where the claim is successful by up to 25%, if the Tribunal is of the view that the claim was brought predominantly in bad faith, or with malicious intent
3. **Amend the definition of "worker"** in section 43K of the Employment Rights Act 1996 to include certain new contractual arrangements within the NHS, so that these are covered by the whistleblowing protections. This amendment also takes a power to make changes to the definition of worker by secondary legislation so that in the event further changes are needed in the future these can be achieved quickly and without the need for primary legislation.
4. Amend the Public Interest Disclosure Act to **introduce "vicarious liability"**, allowing individuals who have suffered a detriment from the actions of co-workers as a result of blowing the whistle to bring a claim against their co-workers or employer. The amendment also creates a defence for employers who take all reasonable steps to protect workers from actions of their co-workers.

The costs and benefits of the proposed changes

Due to the limited nature of the available evidence, we are unable to monetise the expected costs and benefits of the proposed changes. We therefore begin with a qualitative discussion of the types of costs and benefits that can be expected, before providing what evidence we can on the likely magnitude of the impacts.

Qualitative description of expected costs and benefits, by those affected

Employers

Employers may benefit from the proposed changes if there is a reduction in claims, or in awards as a result of claims, being brought against employers, where claims are currently being brought on the basis of disclosures made in private, not public, interest. (Note that while the proposed change to the "good faith test" allows judges to make up to a 25% reduction to awards if they fail the "good faith test", this cannot be counted as a benefit to employers as these claims would currently fail automatically, leading to no award at all.)

Where PIDA claims are currently being brought in combination with claims under other jurisdictions, these cases may continue to take place, but without the PIDA jurisdiction. As there is no cap on the level of award for claims under PIDA, as there is for some other jurisdictions, this may lead to a reduction in awards where the current awards lie above the cap for the other jurisdictions being claimed under.

However, employers may face additional costs due to an increase in claims or awards, where claims are currently not being made (or are not succeeding) because individuals fail the "good faith test", are not considered to be a "worker" due to their contractual arrangements, or have no route of redress having suffered detriment from the actions of their co-workers. It is not clear what the overall effect of these proposals on claims or awards will be, or even to be confident about the direction of the effect. The available evidence is discussed in more detail below.

Employers will face familiarisation costs from the proposed changes, but this is expected to be minimal, as these are relatively small changes to existing legislation, with which employers will already be familiar.

Employees

Employees and workers may benefit from the proposed changes where they are now able to bring an Employment Tribunal claim under PIDA, and potentially gain an award, where previously they could not (or would not succeed in doing so.) Again, this will be where claims are currently not being made (or not succeeding) because individuals fail the "good faith test", are not considered to be a "worker" due to their contractual arrangements, or have no route of redress having suffered detriment from the actions of their co-workers.

However, some individuals will no longer to be able to successfully bring a claim under PIDA, if they cannot satisfy the "public interest test". These individuals may still bring claims under any other Employment Tribunal jurisdictions where appropriate. However, these other jurisdictions may have a cap on the possible level of awards. If this is the case, then these individuals may receive a lower award as a result of this change. Again, it is not clear what the overall direction or extent of the above effects will be.

Some workers may face claims from whistleblowing co-workers as a result of the introduction of vicarious liability. As such, a successful claim would mean they would incur the costs associated with defending an Employment Tribunal case, and possibly be liable for the cost of fees[1] paid by the claimant and any money awarded to the claimant in compensation. The available evidence on the impact of the introduction of vicarious liability on total PIDA claims is discussed below.

Exchequer

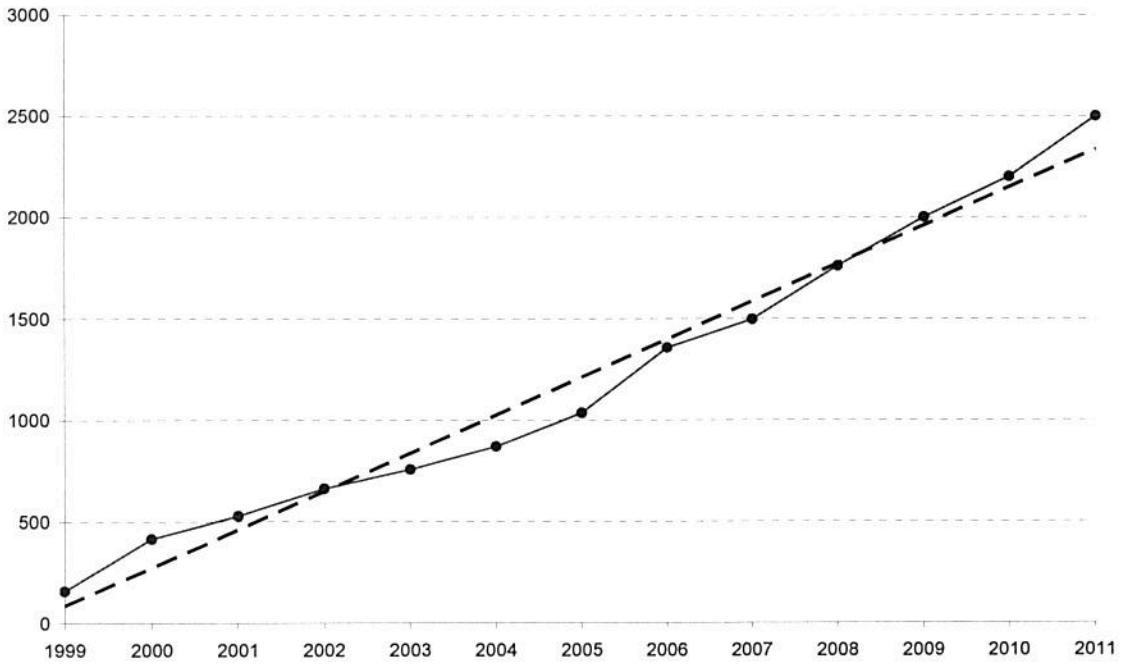
The exchequer will face additional benefits or costs depending on the overall effect of the proposed changes on the number of Employment Tribunal claims under PIDA, as the exchequer provides the Employment Tribunal system. Again, it is not clear what this overall effect will be. It should also be noted that HMCTS are introducing a fees system in Summer 2013 which will charge claimants fees that will partly offset the costs of providing the Employment Tribunal system.

Evidence for expected costs and benefits, by proposed change

Background – historical PIDA claim statistics

Claims under PIDA jurisdictions make up a very small proportion of Employment Tribunal claims as a whole. On average since 1999 (the year following the Public Interest Disclosure Act itself), there has been just over 1,200 PIDA claims each year[2]. This is less than 1% of the average number of Employment Tribunal claims over the same period.

Figure 1: Number of PIDA claims, 1999 to 2011 (with trend line)



Source: Public Concern at Work, http://www.pcaw.org.uk/pida-statistics, based on HMCTS data

[1] Fees are due to be introduced to Employment Tribunals in summer 2013.

[2] PIDA claim numbers from http://www.pcaw.org.uk/pida-statistics, BIS calculations. Overall ET claim numbers taken from annual Employment Tribunal reports published by HMCTS.

However, the number of PIDA claims has been increasing over time, with a clear linear upward trend visible in Figure 1. Despite this, even in 2011, with PIDA claim numbers at the highest they have ever been (2,500) PIDA claims made up only 1.3% of overall ET claims (186,300). As ET claim numbers overall make up a very small proportion of the working population (29.7m in March 2013,) PIDA claim numbers are extremely small relative to the number of people in employment. In terms of awards, in 2011/12 there were 2,200 PIDA claims resolved, of which only 94 (less than 5%) were successful at hearing. Again, this is a very small number, and an extremely small proportion of people in employment.

Evidence on the impact of a "public interest test"

Since the Parkins vs Sodexho decision in 2002, it has been possible for individuals to successfully bring an Employment Tribunal claim under PIDA over matters of a private nature. Such cases would be prevented, or at least deterred, by the introduction of the proposed "public interest test". Anecdotally, the Government understand that claiming for PIDA over private matters does occur in practice; however, we do not have detailed data on every case brought under PIDA and are therefore unable to precisely quantify the number of these cases that do occur.

Given the linear trend in the data, we can use linear regression analysis to try to identify if there is a noticeable change to the trend in PIDA claims following the Parkins vs Sodexho decision. In other words, we calculate the trend in PIDA claims both before and after the decision. If the trends are significantly different we will ascribe the difference to the decision.

We would expect the decision to have increased the number of PIDA claims being brought to the Employment Tribunal. If we can identify a significant increase in the trend in claims after the decision, this may enable us to provide an indication of the size of the effect of the decision on the number of claims. [We would expect a change that reverses the Parkins vs Sodexho decision to have an impact on claims in the opposite direction, and of a similar magnitude – although such a change might take some time to emerge.

As the claims data is collected over financial years and the decision was made prior to 1 April 2002, we look for a change from 2002 onwards. The result is a linear model of PIDA claims regressed on a time variable, which also includes a dummy variable equal to 0 prior to 2002 and equal to 1 from 2002 onwards. This dummy variable allows for a step change (controlling for the time trend) in the number of PIDA claims each year after this point. The results are reported as Model 1 below:

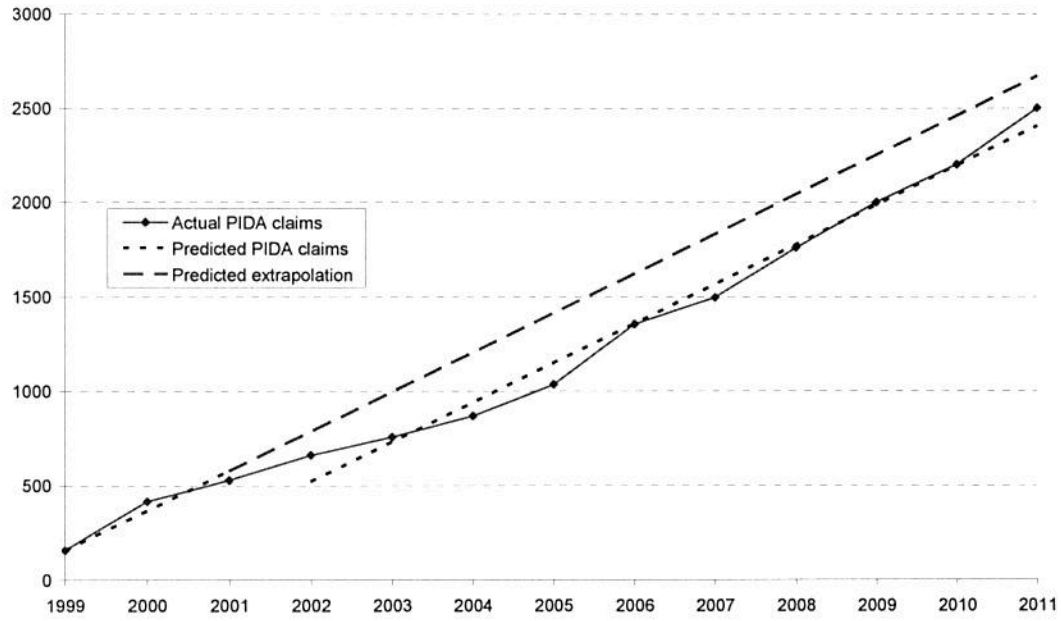
Model 1: Number of PIDA claims, with a break at 2002

Variable	Coefficient (standard error)
Intercept	157.7** (44.6)
Time	209.3** (8.3)
2002-and-after Dummy	-264.3** (73.4)

Notes: based on PIDA claim numbers above. Time variable starts at 0 in 1999, 1 in 2000 and so on. ** indicates that a variable is significant at the 1% level. An alternative specification allowing for an interaction between the time and dummy variables was tested, but the interaction variable was found to be insignificant at the 5% level.

The model suggests that there was a *drop* rather than the expected rise in PIDA claims from 2002 onwards of over 260 claims per year, taking into account the existing upward trend. This is illustrated in Figure 2 below.

Figure 2: Number of PIDA claims, 1999 to 2011 – Actuals and Predicted values (Model 1)



Source: Actuals from Figure 1; Predictions based on Model 1

Figure 2 shows that extrapolating from the pre-2002 trend would yield higher PIDA claim numbers than the 2002-and-after trend which tries to take account of the decision. This goes against the expected rise in PIDA claims following a widening in the scope of the protections. It is possible that the rise in claims due to the Parkins vs Sodexho decision was absorbed into the overall upward trend in claims, or that the model above is incorrectly specified. In any case, it is not possible to conclude from this model that PIDA claims rose significantly above trend following the Parkins vs Sodexho decision.

Based on the evidence available, we are therefore not able to isolate or quantify the effect of the introduction of the "public interest test" on the numbers of (successful and unsuccessful) PIDA claims, or therefore its effect on awards in PIDA cases. However, the direct impact of this change would be expected to decrease these numbers, as the scope of the protection is being narrowed.

Evidence on the impact of moving the "good faith test"

Under current legislation a claimant that is unable to demonstrate that their disclosure was made in "good faith" will fail in their claim. Removing the "good faith test" would allow such claimants to successfully bring a case, and potentially encourage more whistleblowers to claim under the protections of the Act.

We do not have the information to precisely quantify the number of current cases where the claimant fails to establish "good faith" as a claim can fail for a number of reasons and could therefore be one of a number of reasons. It should also be noted that 'good faith' is rarely considered in isolation and therefore not a common stand alone reason for PIDA claims failing. Further, it is not possible to establish how many individuals do not blow the whistle, or do not claim having blown the whistle, due to the current deterrent effect of the "good faith test".

It is therefore not possible to quantify the effect of the introduction of the "good faith test" on the numbers of (successful and unsuccessful) PIDA claims – though the direct impact of this change would be expected to increase these numbers, as the scope of the protection is being widened.

Similarly, it is not possible to quantify the expected effect of allowing judges to reduce awards by up to 25% where the "good faith test" is not satisfied. Under the current legislation, such cases fail automatically, and we are unable to observe the awards that they would have received. We also do not

have sufficient data on historical awards in successful PIDA claims to draw any conclusions on the expected impact[3]. (DN bring footnote up into main text)

Evidence on the impact of widening the scope of protection to include NHS workers

Following changes to their contractual arrangements on 1 April 2004, certain NHS workers had been excluded from whistleblowing protections. The proposed amendment will bring these workers back into the scope of the protection. As this is the reverse of the change that happened in 2004, it may be possible to investigate the impact of the proposal by examining any change in the trend of PIDA claim numbers from 2004 onwards – all else being equal, we would expect there to have been a fall in PIDA claims from 2004 onwards, and reversing the change would be expected to have approximately the same impact but in the opposite direction.

Again, we use a linear regression model, including dummies to allow for a change to the trend in PIDA numbers from 2004 onwards, in order to identify the trend in PIDA claims both before and after the changes to contractual arrangements. However, for this model, an additional interaction term combining the time variable and the 2004-and-after dummy is found to be significant – the slope of the trend also changes from 2004 onwards. The results of this regression are reported as Model 2 below and illustrated in Figure 3 below.

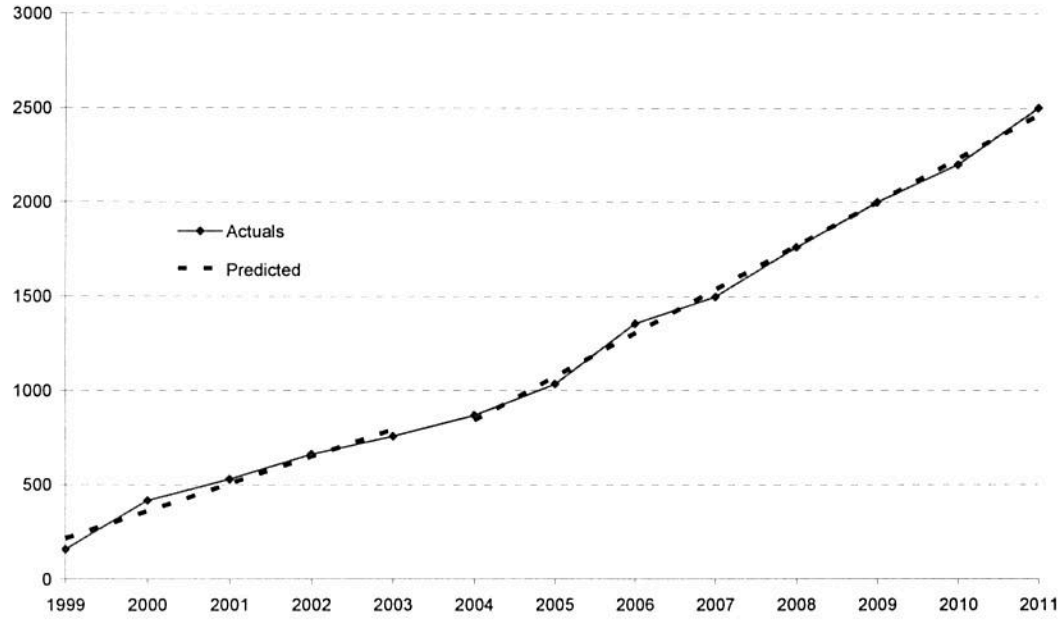
Model 2: Number of PIDA claims, with a break at 2004

Variable	Coefficient (standard error)
Intercept	215.00** (34.2)
Time	144.30** (14.0)
2002-and-after Dummy	-530.32** (69.0)
Interaction term (time and 2002 dummy)	87.16** (15.5)

Notes: based on PIDA claim numbers above. Time variable starts at 0 in 1999, 1 in 2000 and so on. ** indicates that a variable is significant at the 1% level.

[3] Case by case data is unavailable. The Survey of Employment Tribunal Applications 2008 contains some data on awards for each Employment Tribunal jurisdiction – however, it contains fewer than 10 PIDA claims where an award was given.

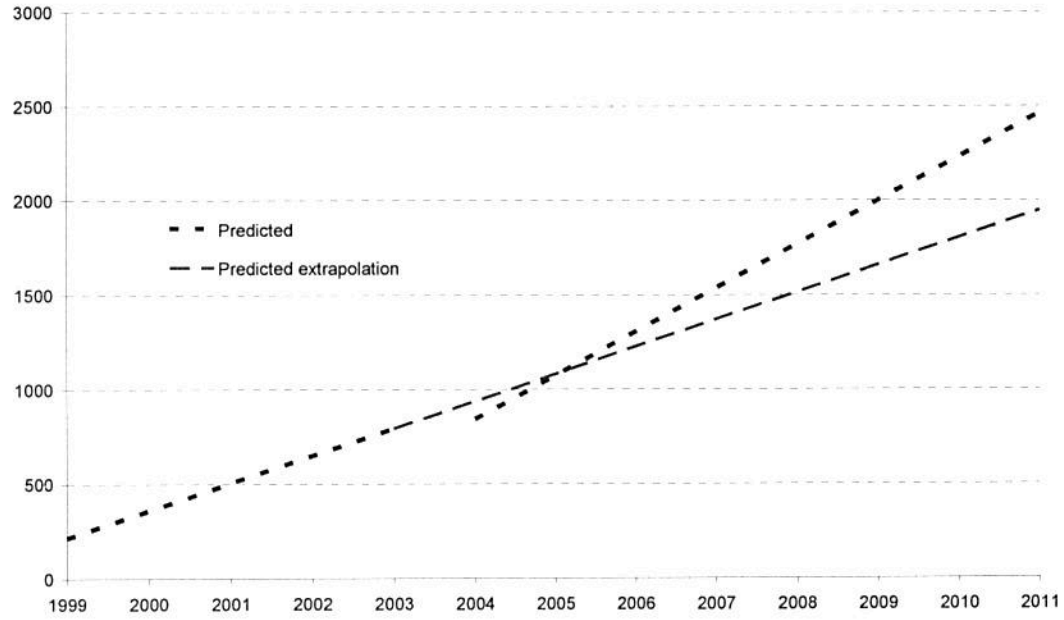
Figure 3: Number of PIDA claims, 1999 to 2011 – Actuals and Predicted values (Model 2)



Source: Actuals from Figure 1; Predictions based on Model 2

Figure 3 shows that the predicted trends from Model 2 are a closer fit to the actual numbers than those from Model 1. The figure also shows that the trend from 2004 onwards is steeper than the previous trend. Figure 4 illustrates the difference between these trends by extrapolating the pre-2004 trend until 2011.

Figure 4: Number of PIDA claims, 1999 to 2011 – Predicted and Extrapolated values (Model 2)



Source: Actuals from Figure 1; Predictions based on Model 2

Figure 4 shows that the predicted trend from 2004 onwards falls beneath the previous trend in 2004, is approximately equal to it in 2005, and then rises above it from 2006 onwards. As the area between the trends is greater when the 2004-and-after trend is above the extrapolated pre-2004 trend, overall numbers of PIDA claims increased from 2004, compared to the previous trend.

Again, this model goes against the expected impact on PIDA claims of the 2004 change. As before, it may be that the expected fall as a result of the narrowed scope was absorbed into an overall change in trend that occurred as a result of other factors, or that the model is incorrectly specified. In any case, it is not possible to conclude from this model that PIDA claims fell significantly below trend following change in NHS contractual arrangements.

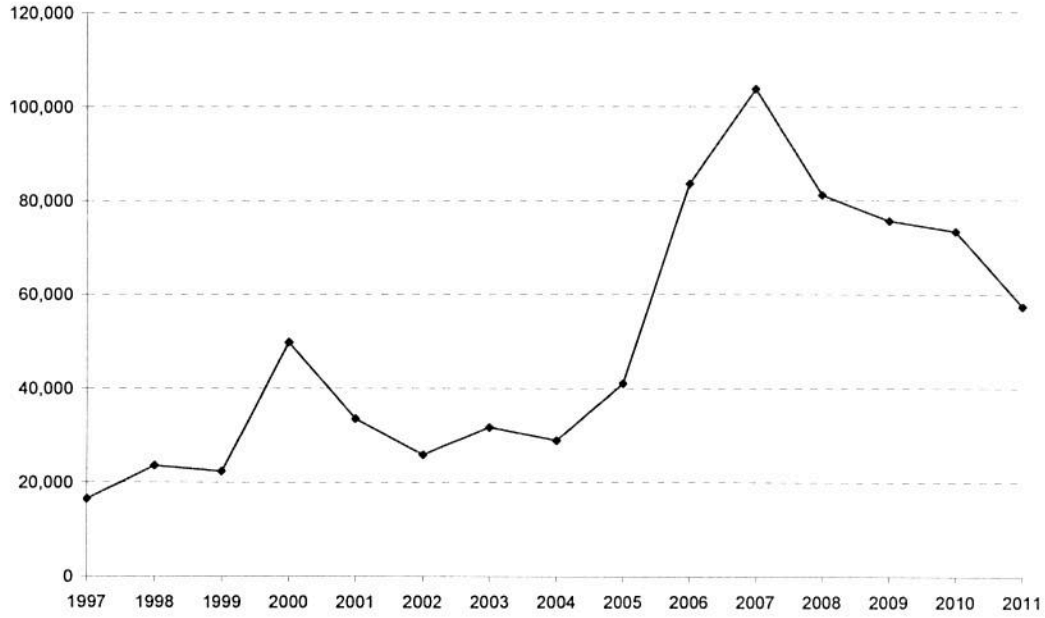
Based on the evidence available, we are therefore not able to isolate or quantify the effect of expanding whistleblowing legislation to re-include certain NHS workers on the numbers of (successful and unsuccessful) PIDA claims, or therefore its effect on awards in PIDA cases. However, the direct impact of this change would be expected to increase these numbers, as the scope of the protection is being widened.

Evidence on the impact of introducing "vicarious liability"

The introduction of "vicarious liability" will allow individuals under certain circumstances to successfully bring Employment Tribunal claims under PIDA where previously they were unable to do so. We do not have data on how many such individuals exist under the current system.

However, the concept of "vicarious liability" has existed in equality/discrimination legislation as early as 1975, and was included in the Equality Act 2010, which brought together the pre-existing[4] equality legislation into one Act. Figure 5 plots the numbers of Discrimination claims over time.

Figure 5: Number of Discrimination claims, 1999 to 2011



Source: HMCTS data

Figure 5 shows that there is no clear trend in the numbers of Discrimination claims over time. Further, the data available only goes as far back as 1997 and therefore does not provide a counterfactual period when "vicarious liability was not in effect. We are therefore unable to isolate the impact "vicarious liability" had on Discrimination claims.

We therefore do not have sufficient evidence to quantify the effect of introducing "vicarious liability" under PIDA on the numbers of (successful and unsuccessful) PIDA claims, or therefore its effect on awards in PIDA cases. We can, however, probably conclude that the direct impact of this change would be expected to increase these numbers, as the scope of the protection is being widened. In addition, as the existing presence of "vicarious liability" under Discrimination jurisdictions it is possible that familiarisation costs to businesses will be very low.

[4] Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (age) Regulations 2006, Equality Act 2006 (Parts 2 & 3), Equaltiy Act (Sexual Orientation) Regulations 2007.

Summary of costs and benefits, and OIOO implications

Can the cost /benefit column be circled accordingly?

Table 1: Summary of costs and benefits

Proposed Change	Expected Direct Impact(s)	Cost / Benefit
Introduce "public interest test"	Reduce PIDA claims	Employer Benefit / Employee Cost / Exchequer Benefit
	Reduce PIDA awards	Employer Benefit / Employee Cost / Exchequer Benefit
Amend "good faith test"	Increase PIDA claims	Employer Cost / Employee Benefit / Exchequer Cost
	Increase PIDA awards	Employer Cost / Employee Benefit / Exchequer Cost
Re-include certain NHS workers	Increase PIDA claims	Employer Cost / Employee Benefit / Exchequer Cost
	Increase PIDA awards	Employer Cost / Employee Benefit / Exchequer Cost
Introduce "vicarious liability"	Increase PIDA claims	Employer Cost / Employee Benefit / Exchequer Cost
	Increase PIDA awards	Employer Cost / Employee Benefit / Exchequer Cost
	Allow PIDA claims against co-workers	Employee Cost / Employee Benefit / Exchequer Cost

Table 1 shows the directions of the expected direct impacts of each proposed change on employers, employees and the exchequer. However, as none of these impacts have been monetised, we are unable to quantify the overall impacts of the combined proposals. Specifically, we are unable to provide a figure for the net annual cost to business.

Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)

There are a relatively small number of employment tribunal claims, compared to the number of workers in the UK. Only a very small proportion of these are PIDA claims, and even fewer receive awards. The proposed changes are therefore likely to affect an extremely small number of cases.

Risks and assumptions;

We have been unable to quantify the individual or overall impacts of the proposed changes to UK whistleblowing legislation. As the proposed changes are able to influence PIDA claim numbers and PIDA claim awards in both directions, it is possible that the changes will result in significant, unforeseen changes in claims and/or awards. However, given the extremely small number of PIDA claims, it is unlikely that the changes will directly impact many individuals or employers.

Wider impacts

Based on the available data it is not possible to conclude that any of the proposed changes will have a disparate impact on any particular group which shares a protected characteristic. An Equalities Impact Assessment is included at Annex A.

We do not have any evidence to suggest that the proposals would impose disproportionate costs on small business. As a result a micro-business exemption is not considered.

Summary of changes

UK whistleblowing law is not currently in line with the original intention of the legislation. The following changes are therefore proposed:

1. Insert a "public interest test" at the Employment Tribunal
2. Amend the "good faith test" to affect remedy rather than liability.
3. Amend the definition of "worker" in section 43K of the Employment Rights Act 1996 to include certain new contractual arrangements within the NHS, so that these are covered by whistleblowing protection.
4. Amend the Public Interest Disclosure Act to introduce “vicarious liability”.

Annex A: Equality impact assessment

Equalities

The Department for Business, Innovation and Skills (BIS) is subject to the public sector duties set out in the Equality Act 2010. Equality Impact Assessments are an important mechanism for ensuring that we gather data to enable us to identify the likely positive and negative impacts that policy proposals may have on certain groups and to estimate whether such impacts disproportionately affect such groups. In developing policy the Government is legally required by the Equality Act 2010 to consider the impact on individuals with protected characteristics: age, disability, gender, pregnancy and maternity, race and nationality, religion or belief, transgender and sexual orientation.

Scope of the EQIA

This Equality Impact Assessment accompanies the Economic Impact Assessment looking at the changes to UK whistleblowing legislation.

Current whistle blowing legislation already provides protection to individuals with protected characteristics: age, disability, gender, pregnancy and maternity, race and nationality, religion or belief, transgender and sexual orientation.

We have been unable to quantify the impact of the proposed changes. However, we are aware of that the changes may have an impact on the numbers of Employment Tribunal claims brought under PIDA jurisdictions.

Background

The personal characteristics of employment tribunal claimants were collected in the Survey of Employment Tribunal Applications (SETA) 2008. Results from SETA are compared to the Labour Force Survey employee results[5] to see how the characteristics of PIDA claimants differ to the general population of employees. As there are very few PIDA claimants in SETA, we also look at the characteristics of Employment tribunal claimants in general.

To put into context the following information there were 2,500 PIDA claims in 2011/12. This works out as 1.3% of Employment Tribunal claims, and less than 0.01% of all those in employment.

Gender

60% of employment tribunal claimants and 54% of PIDA claimants in SETA 2008 were male. This is higher than the proportion among employees as a whole (51%), as given in the LFS. However, the male proportion of PIDA claimants is not significantly different from that for employees overall (see Table A1).

[5] Labour Force Survey data on employees, Quarter 3 of 2008.

Table A1: Gender – test if sample proportion significantly different from population proportion	
Proportion who are male – PIDA claimants	54.1%
Standard Error – PIDA sample	8.2%
Proportion who are male – LFS employees	51.3%
z statistic (95% critical value)	0.33 (1.96)

Ethnicity

81% of PIDA claimants in 2008 were white. This is lower than the workforce in general in 2008 where 91% of LFS respondents reported being white, 5% of PIDA claimants were black, compared to 1% in the workforce, 3% asian compared to 5% in the workforce and 8% mixed race compared to 2% in the workforce. Eighty-six per cent of employment tribunal claimants across all jurisdictions were white, 5% black, 5% asian, 2% mixed race and 2% other. However, the white proportion of PIDA claimants is not significantly different from that for employees overall (see Table A2).

Table A2: Ethnicity – test if sample proportion significantly different from population proportion	
Proportion who are white – PIDA claimants	81.1%
Standard Error – PIDA sample	6.4%
Proportion who are white – LFS employees	90.9%
z statistic (95% critical value)	1.53 (1.96)

Disability

In SETA 2008 30% of PIDA claimants and 22% of employment tribunal claimants overall had a long-standing illness, disability or infirmity at the time of their employment claim, compared to 22% of LFS respondents. 24% had a long-standing illness, disability or infirmity that limited their activities in some way, and 15% of employment tribunal claimants overall, compared to 11% of LFS respondents. On neither measure was the proportion of PIDA claimants significantly different to that among LFS employees.

Table A3.1: Long standing illness, disability or infirmity – test if sample proportion significantly different from population proportion	
Proportion of PIDA claimants	29.7%
Standard Error – PIDA sample	7.5%
Proportion of LFS employees	22.3%
z statistic (95% critical value)	0.98 (1.96)

Table A3.2: Long standing illness, disability or infirmity that limits activity – test if sample proportion significantly different from population proportion	
Proportion of PIDA claimants	24.3%
Standard Error – PIDA sample	7.1%
Proportion of LFS employees	11.1%
z statistic (95% critical value)	1.88 (1.96)

Age

The average age of respondents to the SETA (2008) claimant survey was 43, compared to 40 for respondents to the Labour Force Survey and this was higher still for PIDA claimants at 46. However, the difference between the average age of PIDA claimants is not significantly different that for employees overall (see Table A3).

Table A3: Age – test if sample mean significantly different from population mean	
Mean age – PIDA claimants	46.1
Standard Error – PIDA sample	10.0
Mean age – LFS employees	39.54
Degrees of Freedom (sample size minus 1)	36
Student t statistic (95% critical value)	0.65 (2.03)

Religion/belief

SETA 2008 results showed that 46% of claimants regarded themselves as belonging to a religion. Forty per cent of all claimants regarded themselves as Christian. Six per cent of all claimants regarded themselves as belonging to a religion other than Christianity (Muslim 2.4%, Hindu 1.2%, Sikh, Jewish, Buddhist and other answers were all under 1%). Among PIDA claimants, 44% regarded themselves as belonging to a religion, 40% Christianity, 4% other and 54% no religion, 1% refused to answer. Comparisons with LFS cannot be made because of the difference in phrasing of the questions about religion/religious beliefs between the two surveys.

Other characteristics

It is not possible to look at employment tribunal claimant characteristics in terms of gender reassignment, marriage and civil partnership, pregnancy and maternity, and sexual orientation because the data is not available to make comparisons.

Summary

Based on the available data it is not possible to conclude that any of the proposed changes will have a disparate impact on any particular group which shares a protected characteristic.