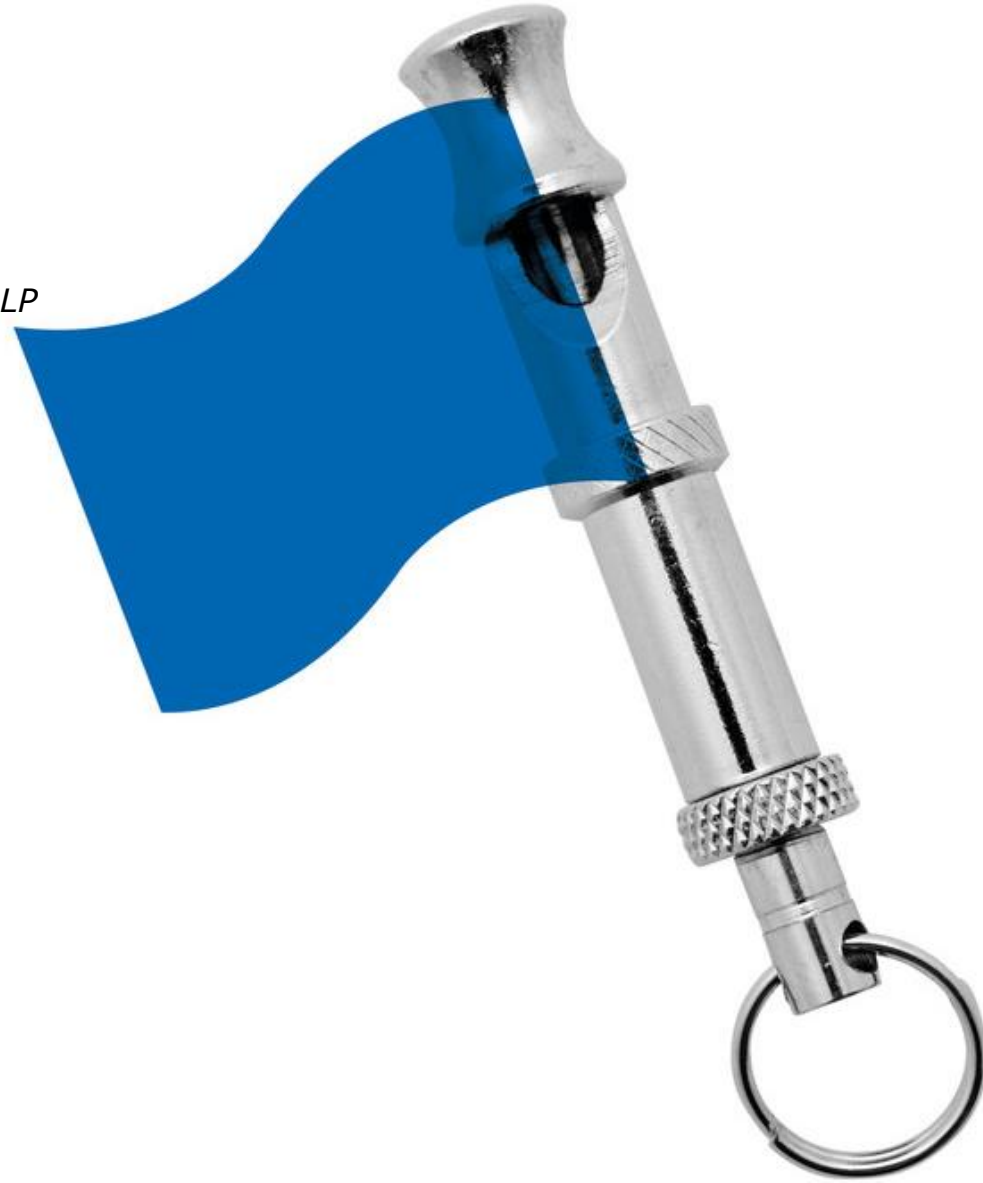


# Whistleblowing: Legal and Regulatory Framework

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# Legal framework

# Background

PIDA 1998

- Protection for workers if they have made a **protected** disclosure
- Employees protected from **dismissal** if protected disclosure is reason or principal reason for dismissal
- Workers protected from being subjected to **detriment** on ground of having made protected disclosure
- No cap on compensation or qualifying service requirement



## Public Interest Disclosure Act 1998

1998 CHAPTER 23

An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.  
[2nd July 1998]

## Who is protected?

YES

Employees,  
contractors, agency  
staff, home workers,  
police officers, NHS  
practitioners, LLP  
members

NO

Job applicants,  
volunteers, interns,  
self-employed,  
intelligence services,  
armed forces and  
more...

## Recent changes

Enterprise and Regulatory Reform Act 2013

For qualifying disclosures made on or after 25/6/13:

- disclosure not protected unless worker reasonably believes made “**in the public interest**”
- no need for disclosure to be made in **good faith**, but lack of good faith can lead to compensation reduction of up to 25%

From 25/6/13 employers can be **vicariously liable** for whistleblowing victimisation by workers/agents, as well as workers/agents being found personally liable

## Qualifying disclosures

If made on or after 25 June 2013...

Any **disclosure of information** which...

in **reasonable belief** of worker making the disclosure..

is made in the **public interest**...

and tends to show one or more of the following...

# Qualifying disclosures

Criminal  
offence

Failure to  
comply with  
legal obligation

Miscarriage of  
justice

Endangering  
someone's  
health and  
safety

Damage to  
environment

Covering up  
wrongdoing in  
any of these  
categories

## In the public interest?

Chesterton Global v Nurmohamed, EAT, 2015

- N dismissed as Director of Mayfair branch of estate agents
- Alleged he had made 3 protected disclosures (2 to his Area Director; 1 to HR Director) stating:
  - employer deliberately mis-stating £2-3m costs and liabilities in its accounts;
  - affected commission of 100 senior managers, including himself
- Did these disclosures qualify for PIDA protection, or were they purely of a personal nature?





## In the public interest?

Chesterton Global v Nurmohamed, EAT, 2015

- EAT – Agreed with ET’s conclusion that it was N’s reasonable belief that his disclosures were in interest of other 100 managers and this was sufficient group to amount to being a matter in the public interest
- Test is not whether disclosure is of real interest to the public, but:
  - worker must genuinely (subjectively) believe disclosure is in the public interest, and
  - must be objectively reasonable, judged from worker’s perspective, to hold that belief
  - a relatively small group can be sufficient to satisfy “public interest” test
- Appeal due to be heard by Court of Appeal in October 2016

## Protected disclosures

A qualifying disclosure becomes **protected** when it meets prescribed conditions

- Disclosure to employer/responsible persons/legal advisers
- Disclosure to “prescribed persons” (i.e. regulators/MPs)
- Wider disclosures, e.g. to media

PCAW research based on tribunal judgments 2011-13

- 91% whistleblowers first raised their concern with employer (line or senior manager)
- just 2% first raised concern with regulator

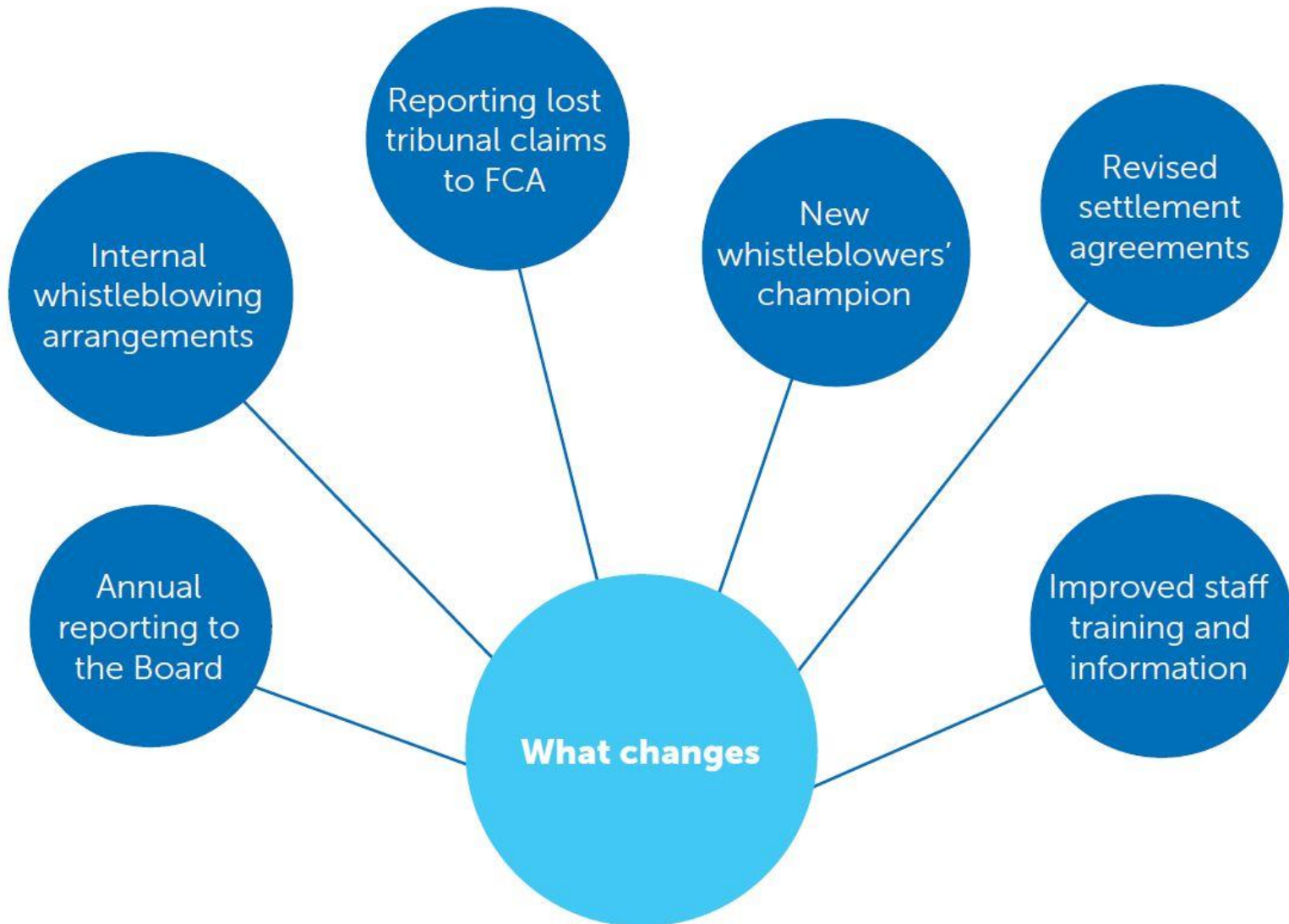
# Regulatory framework

# Background

## Policy Statement PS15/24

- 2013 Parliamentary Commission on Banking Standards recommended that banks:
  - put in place mechanisms to allow employees to raise concerns internally
  - appoint senior person to take responsibility for effectiveness of whistleblowing arrangements
- February 2015 PRA/FCA issued consultation paper (CP15/04)
- October 2015 PRA/FCA issued policy statement (PS15/24) with final rules
- Effective from 7 September 2016 (although whistleblowers' champion must be in place by 7 March 2016)

# Whistleblowing and PS15/24



# Scope of the rules

## Who is affected?

- UK deposit-takers with assets of £250m+ including banks, building societies, credit unions
- PRA-designated investment firms
- Insurance and reinsurance firms within the scope of Solvency II and the Society of Lloyd's and managing agents

## Who is not affected?

- UK deposit-takers with assets of less than £250m
- UK branches of overseas banks
- Other FCA-regulated firms such as stockbrokers, mortgage brokers, insurance brokers, investment firms and consumer credit firms

# Whistleblowers' Champion

## Who should WC be?

- Senior Manager or Director subject to SMR/SIMR
- Expectation that WC will be non-executive director, although no requirement to appoint one if none exists
- Should have level of authority and independence and access to information and resources (including independent legal advice & training)
- May be based overseas provided can perform function effectively

## What are WC's responsibilities?

- Oversight of firm's transition to new whistleblowing arrangements
- Responsible for ensuring/overseeing integrity, independence and effectiveness of policies & procedures on whistleblowing (including policies/procedures to protect whistleblowers)
- Oversight of preparation of annual report
- Need not have day-to-day operational role handling disclosures

# Internal Arrangements

Firms must establish, implement & maintain appropriate and effective arrangements for disclosure of “reportable concerns” by “whistleblowers”:

- Allow for disclosure through range of methods
- Ability to handle anonymous whistleblowers and whistleblowers requesting confidentiality
- Effective assessment and escalation including to FCA/PRA
- Ensure that whistleblowers are not victimised
- Provision of feedback (where feasible)
- Record keeping
- Procedures kept up to date and made accessible
- Provision of training



# Definitions

## Reportable Concerns

*"A concern held by any person in relation to the activities of a firm, including:*

- (a) anything that would be the subject matter of a protected disclosure, including breaches of the rules*
- (b) a breach of the firm's policies and procedures*
- (c) behaviour that harms or is likely to harm the reputation or financial well-being of the firm"*

## Whistleblower

*"Any person that has disclosed, or intends to disclose, a reportable concern:*

- (a) to a firm*
- (b) to the FCA/PRA*
- (c) in accordance with Part 4A (Protected Disclosures) of the Employment Rights Act 1996"*

# Reporting

Firms must:

- prepare annual report to the board on operation and effectiveness of whistleblowing systems and controls
  - must maintain confidentiality of whistleblowers
  - must be made available to FCA/PRA on request
  - no requirement to make report public
- promptly report to FCA if firm loses whistleblowing case
  - disincentive to contest whistleblowing claims?
  - leverage for claimants?
- communicate to all UK-based employees that they can make disclosures to PRA/FCA and the methods for doing so

# Training

Firms should provide training to:

–UK-based employees on:

- fact the firm takes disclosures of reportable concerns seriously
- means of reporting reportable concerns
- examples of events that might prompt reporting & actions firms may take after receiving reportable concern
- sources of external support

–Managers of UK-based employees on how to:

- recognise disclosures of reportable concerns
- protect whistleblowers and preserve confidentiality
- provide feedback
- treat those accused of wrongdoing fairly

–Employees responsible for arrangements on how to:

- protect whistleblowers' confidentiality
- assess significance of information disclosed
- assist WC when requested

## Other points

- Outsourcing of arrangements to third parties
- Appointed representatives and tied agents
- Fitness and propriety

*“The FCA would regard as a serious matter any evidence that a firm had acted to the detriment of a whistleblower. Such evidence could call into question the fitness and propriety of the firm or relevant members of staff ...”*

### – Settlement agreements

- must include wording that the agreement does not prevent worker from making protected disclosure
- firms must not include warranties requiring workers to disclose that they have made protected disclosure or that they know of no information which could form the basis of a protected disclosure

## Wording for settlement agreements

*"For the avoidance of doubt, nothing precludes [name of worker] from making a "protected disclosure" within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures made about matters previously disclosed to another recipient"*

# **Whistleblowing Policy**

# What to include in your whistleblowing policy?

- Government guidance for employers sets out tips on policy content and how disclosures should be dealt with
- Whistleblowing Commission Code of Practice

WHISTLEBLOWING

Guidance for Employers and  
Code of Practice

MARCH 2015

# What to include in your whistleblowing policy?

- Firm takes making of reportable concerns seriously
- Firm encourages workers to “speak up” and evidence/proof is not required for them to do so
- Explanation of what whistleblowing is and what is a protected disclosure/reportable concern with examples
- Role of Whistleblowing Champion
- Set out list of persons/bodies with whom workers can raise concerns, e.g.
  - line manager
  - more senior managers
  - internal audit?
  - the Whistleblowing Champion?
  - whistleblowing hotline?
  - the PRA/FCA (or other regulators)
- Worker’s identity will be kept confidential if he/she requests (so far as practicable/unless required by law)
- On making disclosure, worker will be told how matter will be dealt with and anticipated timescales
- Where appropriate, employee will receive feedback and be informed of outcome
- Victimization of whistleblowers will not be tolerated and that anyone victimising a whistleblower will face disciplinary action
- Whistleblowers should make report if they believe they are being victimised
- How disclosures made anonymously will be dealt with
- Workers making malicious allegations may be subject to disciplinary action
- Information about external sources of support (e.g. Public Concern At Work helpline)
- Scope/application of policy and that it is not contractual
- When other policies should be used (e.g. grievance procedure or anti-bullying/harassment policy)



**Any Questions?**



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