

# LEGAL THREATS TO WHISTLEBLOWERS



## Misuse of legal powers

PCaW has noted a worrying tendency for certain laws to be misused to target whistleblowers, often in the case of those who make disclosures to the media.

From criminal and civil lawsuits, to abuse of power and threats of litigation, these actions – often taken by states or organisations with deep pockets – undermine public policy and negatively impact whistleblowing. This undermines the public policy objective of whistleblowing protection as a form of promoting wider accountability and specifically for workers who raise concerns with the media.

## MISCONDUCT IN PUBLIC OFFICE

**MIPO is a criminal offence that applies to public officials who wilfully neglect to perform their duty or wilfully misconduct themselves. The offence carries a maximum sentence of life imprisonment. Recently the number of prosecutions has risen exponentially, from two in 2005 to 135 in 2014. Unfortunately, we have also seen the offence being used against public officials to penalise unauthorised disclosures of what could be considered public interest information.**

### Case Study

Following the closure of the News of the World, News Corp set up a Management and Standards Committee which revealed identities of a number of confidential sources to the police. This saw the launch of Operation Elveden. During the course of the investigation over 90 arrests were made resulting in 34 convictions, the majority of whom were public officers found to have taken money from journalists in exchange for information.

Ranging from government misspending to salacious gossip, the public interest in each disclosure varied considerably. While morally questionable, receiving money in return for information in many of these cases may have been secondary to the officer's primary intention to act as a whistleblower. As a result of the investigation, over 30 journalists were also arrested on suspicion of conspiracy to commit misconduct in public office for their role in providing payment for this information.

Whether morally bankrupt or ultimately serving the public interest, the selling of information to the press was widespread prior to the Leveson Inquiry. The Elveden cases show just how ambiguous the offence is, with many individuals unaware of their status as a public official and journalists as their proxy in committing the offence.



### What PCaW is doing:

- **PCaW is campaigning for a public interest defence for whistleblowers to be included in relevant legislation that prohibits disclosures. In 2015, the Law Commission undertook a review of the MIPO offence. We have contributed to this process and are awaiting their final report.**



## COUNTER-TERRORISM MEASURES

**The use of the counter-terrorism legislation and the Regulation of Investigatory Powers Act 2000 (RIPA) by police to intercept journalists' and whistleblowers' phone records was exposed following the Plebgate and Chris Huhne scandals.**

### Case Study

Osita Mba blew the whistle on a £10 million sweetheart deal between Goldman Sachs and his former employer HM Revenue and Customs, exempting the bank from paying its taxes. Osita informed the auditor general of the National Audit Office and two parliamentary committees of the wrongdoing. In the meantime, his identity was revealed to HMRC who banned Osita from entering the workplace, initiated an investigation and disciplinary proceedings against him, and threatened him with the possibility of prosecution. More than a year later, it came to light that HMRC had used the powers under RIPA to search Osita's belongings, emails, and both his and his wife's phone records.

MPs severely criticised HMRC for using these powers against Osita, and praised him for bringing his concerns to light. Osita left HMRC and filed a PIDA claim.



### What PCaW is doing:

- **PCaW has been lobbying for better whistleblower protection in the Investigatory Powers Bill for intelligence services staff (who are currently excluded from PIDA protection) and those working for communications service providers. PCaW supports the Press Gazette 'Save Our Sources' campaign to end public authorities accessing journalists' phone records. The campaign has resulted in the Acquisition and Disclosure of Communications Data Code of Practice (which is now underpinned by law). This gives explicit protection to journalists and their sources for the first time in RIPA.**



## TRADE SECRETS

**In April 2016 the European Parliament passed the Trade Secrets Directive by a large majority. The new Directive seeks to harmonise trade secrets laws across the EU Member States. Under the law, individuals who reveal a trade secret may be subject to civil penalties.**

### Case Study

In 2014 the LuxLeaks papers revealed how Luxembourg has been sanctioning corporate tax avoidance by some of the world's biggest companies. It soon emerged that two former employees of PricewaterhouseCoopers had leaked the information. Antoine Deltour and Raphaël Halet face charges of theft, violating Luxembourg's professional secrecy laws, violation of trade secrets, and illegally accessing a database. If found guilty they face up to ten years in jail and a fine of up to €1,250,000 (US\$ 1.4 million). At the trial, the prosecutor cited the new Trade Secrets Directive as a legal basis for pursuing such matters in future – raising suspicions that the new Directive may well be used as a tactic to intimidate whistleblowers.<sup>13</sup>



### What PCaW is doing:

- **PCaW advocated for better protection for whistleblowers and there is now an exception in the Trade Secrets Directive to this effect. However, the burden of proof still remains on the individual to show that they did not reveal a trade secret. PCaW is supporting an initiative to introduce a European Directive on whistleblower protection to promote minimum standards across the Member States and mitigate some of the problems foreseen with the new Trade Secrets Directive.**

<sup>13</sup> Since publication Deltour and Halet were convicted and sentenced to 12 and 9 months suspended sentences respectively.