



The Bar Council

Whistleblowing as an employed barrister

Purpose:	To assist employed barristers in any decision to whistle blow and the particular considerations arising due to Legal Professional Privilege.
Scope of application:	Employed barristers
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Status and effect:	Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

Introduction

1. Where a worker exposes illegal, illicit or dangerous activity happening in their workplace they may qualify as a ‘whistle-blower’ and have some limited legal protections under the Public Interest Disclosure Act 1998. Section 1 of the Act inserts Part IVA ‘Protected Disclosures’ into the Employment Rights Act 1996. The effect of the provisions is that the employed barrister has the right not to be subjected to any detriment by his employer done on grounds of his protected disclosure.
2. There is every reason to believe employed barristers are workers for the purposes of the legislation, and so this protection applies to the employed bar just as it would to any other worker.
3. If you are contemplating disclosing information as a whistle-blower there are a number of issues you will need to consider. Firstly, do you reasonably believe that the

information tends to show that one of the categories of wrongdoing listed in section 43B of the 1996 Act has been or is likely to occur – namely: criminal offences; a failure to comply with a legal obligation; a miscarriage of justice; dangerous health and safety practices; environmental damage; concealing any of these types of wrongdoing? You will want to consider the precise wording of section 43B to ensure the information you propose to disclose falls within one or more of the categories.

4. Additionally, to benefit from this legal protection, you must act in good faith and reasonably believe that the disclosed wrongdoing has happened or is likely to happen; that the information disclosed is true and that it is in the public interest to make the disclosure: see section 43G.

5. As to how you make the disclosure, it is important to make sure you identify and use the correct procedures and channels for whistle-blower disclosures at your firm or organisation. It is a requirement of the Act.

6. Barristers employed by the government are likely to be subject to the Civil Service Code.¹ This has specific protection for whistleblowing in a civil service context, and there is a route for whistleblowing directly to the Civil Service Commission.²

Legal Professional Privilege

7. As an employed barrister the issue of legal professional privilege (LPP) is highly likely to arise. In particular the Employment Rights Act 1996 s. 43B(4) provides that:

“A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.”

8. There is no authority on the application of this sub-section so you will want to consider the wording of it carefully. The section appears to involve a two part test: if (i) the information was disclosed in the course of obtaining legal advice and (ii) a claim

¹ <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code#rights-and-responsibilities>

² <https://civilservicecommission.independent.gov.uk/code/civilservicecodecomplaints/>

to LPP could be maintained in legal proceedings, it is not a qualifying disclosure and you are bound not to disclose it. The ordinary principles of LPP apply.

9. The first issue you will need to consider is the circumstances in which you came to have the information you propose to disclose and whether it was disclosed in the course of obtaining legal advice.

10. In relation to the second limb, maintaining a claim for LPP in legal proceedings, in general communications with in-house counsel are protected by LPP. However, you should first consider whether LPP does apply, including in particular who is your 'client' and whether you are acting as their lawyer rather than just as, say, their 'man of business'; see, for example, R. (on the application of Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA Civ 35. There are also some notable exceptions such as cartel investigations by the European Commission - see Akzo Nobel (Case C-550/07P), [2011] 2 AC 338 where the ECJ rejected claims of privilege in relation to communications with in-house counsel on the basis that an in-house lawyer does not enjoy the same level of professional independence as an external or independent lawyer. You will need to consider whether the proposed disclosure is *prima facie* protected by privilege having regard to the subject matter and the terms of your employment.

11. However, that may not be the end of the matter, as several of the categories of wrongdoing listed in section 43B ('qualifying disclosure') involve criminal offences or other criminal conduct. You will need to consider the crime/ fraud exception and whether any claim for LPP could be maintained in legal proceedings in light of the principles and case law defining and delimiting that exception to LPP.

12. You will want to ask yourself whether your communications were for the purpose of the employer (your client so to speak) committing a crime or fraud for which the information disclosure to you forms part of a fraudulent act. If so any claim of LPP could not be maintained in proceedings, and provided the other conditions of the Act are met, you may make the disclosure.

13. These issues are not straightforward and you will no doubt consider taking your own legal advice.

Important Notice

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