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## Response to the Public Administration Select Committee's Inquiry into Whistleblowing and Leaks in Whitehall

This paper should be read in conjunction with our paper Whistleblowing in Whitehall<sup>1</sup> which reviewed whistleblowing policies of government departments in detail against the criteria for best practice as set out by the Committee for Standards in Public Life.

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<sup>1</sup> The paper can be found on the following page <http://www.pcaw.co.uk/policy/civilservice.htm>

## **1 Introduction**

- 1.1 The Government has long grappled with how to prevent leaks from the civil service. In the past, even the most draconian measures have failed and it is unlikely that leaks will ever be completely preventable. In this submission, we seek to explain how good whistleblowing arrangements can assist in reducing their occurrence. As such our comments to the inquiry are focussed on answering questions 1, 2, 5, 6 and 7 asked by the Committee.
- 1.2 There will inevitably be circumstances when information may come across a civil servant's desk that will give them cause for concern. Whilst we would hope that in most cases this could be raised internally with the appropriate person within the Department, there will be times where this is not a feasible option. How can the matter then be handled so that damaging disclosures (to the press or for political purposes for example) are less likely?
- 1.3 At present there is a risk that a civil servant, fearing their concern will not be addressed internally sees an anonymous leak to the media as the safest form of protection. Ultimately, whilst the media may not be the starting point, it is vital in a functioning democracy and can be very effective in encouraging people to regulate their behaviour or to answer difficult questions if they fail to do so. However the media is a means of exposing and may not be the most effective way to resolve or prevent wrongdoing. This is why if the Government is serious about a culture that does not lend itself to leaking in a way that is unnecessarily damaging to Government and the public, the value of making whistleblowing work has to be understood.

## **2 The current law**

- 2.1 At present the Official Secrets Act 1989 (OSA) imposes criminal sanctions on the unauthorised disclosure of certain categories of "official" information. There is no justification or defence in the OSA for disclosing this information without authority.
- 2.2 However, the catalyst for this inquiry was a series of disclosures which fell outside what would be considered official information under the OSA and some of this information may have been disclosable under the Freedom of Information Act 2000 (FOI).
- 2.3 We are not of the view that the existing legal framework for when information can be disclosed, consisting principally of the FOI and the Public Interest Disclosure Act 1998 (PIDA), needs readjusting. However, it does need further promotion, closer observance and a less protectionist response from Whitehall. Ensuring the legislation works as a system of checks and balances for good government is about embedding the principles of the legislation in the culture in which civil servants operate.
- 2.4 Parliament specifically included crown servants when enacting PIDA and PIDA treats crown servants no differently from any other employee, civil

servants no differently to special advisers. So the framework is there, the question is whether it has been given effect.

- 2.5 PIDA does not encourage the anonymous leaking of information because (a) such action may raise questions about whether the disclosure was made in good faith and (b) anonymity makes it harder to establish any reprisal was because of raising the concern as this would require evidence the employer knew the official had made the disclosure. On this basis alone it is clear that if whistleblowing arrangements are working well, raising a concern openly and internally, with the protection of PIDA, should be a more attractive option to an individual who might be worried about their own position.

### 3 Good Practice

- 3.1 The key questions we suggest Government Departments should be asking when a leak occurs are as follows:
  - a) Had the matter already been raised internally?
  - b) If not, why not?
- 3.2 Whilst PIDA provides the framework for protection of an individual, it is the backstop for when whistleblowing has resulted in reprisal. Good whistleblowing arrangements should ensure no reprisal against a civil servant who raises a concern in good faith, but they are dependent on strong leadership from the top. Without this there is a risk that whistleblowing arrangements just consist of a policy: all too often ill thought through, legalistic and/or difficult to understand, and under promoted. Senior management must understand the importance of establishing good whistleblowing arrangements and recognise that the failure to do so can only be detrimental to the organisation that they are responsible for.
- 3.3 The Government acknowledged this in its White Paper Response on Standards in Public Life<sup>2</sup> and stated it recognised the “importance of ensuring that staff are aware of and trust the whistleblowing process and for the need for boards of public bodies to demonstrate leadership on this issue”. If those at the heart of Government do not make it clear how seriously they take whistleblowing and lead by example it is unlikely that a civil servant will raise their concern internally or with a regulator and more likely that they will stay silent or make an anonymous leak.
- 3.4 Good whistleblowing arrangements will help detect and deter wrongdoing at the earliest opportunity. If staff know that it is safe and acceptable to speak up, this will deter serious wrongdoing in the first place. Ultimately an individual who is looking for information that can be traded for private gain is assisted by a culture of silence: the information is an exclusive, no one else has raised the concern so there has been no opportunity for the organisation or Department to address the wrongdoing. Such a culture of secrecy provides fertile ground for malpractice and this is what can be addressed by fostering an open and accountable culture.
- 3.5 Whilst the first step is for those at the top of an organisation to take the issue in hand, the next is clear and coherent guidance. Public Concern at Work conducted a review of Government guidance on whistleblowing and all Government Departments’ whistleblowing policies in 2007.<sup>3</sup> What our analysis revealed is a gap in leadership had resulted in many Departments falling short of good practice. The report is relevant to the Committee’s inquiry and contains detailed commentary on how Departments might improve their policies and sets out how to best comply with the six criteria

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<sup>2</sup> Cm 6723 Dec 2005

<sup>3</sup> I understand the committee has a copy of our report entitled *Whistleblowing in Whitehall*. This can also be found at <http://www.pcaw.co.uk/policy/civilservice.htm>.

for good practice as outlined by the Committee of Standards in Public Life (CSPL).

- 3.6 Our recommendations in this regard remain the same. There is still the need for an urgent review of the Directory of Civil Service Guidance to ensure consistent and clear messages are given to departments on whistleblowing policies.
- 3.7 As the Committee has already noted, guidance on good whistleblowing arrangements has been set out by the CSPL. Further guidance on how to get it right can be found in the recently published British Standards Institution Whistleblowing Arrangements: Code of Practice (The Code of Practice). This can be downloaded at [www.pcaw.co.uk/bsi](http://www.pcaw.co.uk/bsi). The Code of Practice incorporates guidance from CSPL and 15 years of our experience in public interest whistleblowing. The Code of Practice is designed to help organisations understand the benefit and importance of good whistleblowing arrangements. We recommend the guidance be endorsed as a means of informing good practice throughout Whitehall. We would be pleased to discuss how we may assist in this regard.

#### **4 Independent Advice**

- 4.1 Where staff are worried about what to do if they suspect wrongdoing in the workplace, access to independent advice is invaluable. This will provide them with a safe haven to discuss their concern and receive advice on how to proceed sensibly and responsibly. Such advice can be sought from a union or Public Concern at Work, who provide free confidential advice to individuals faced with such a dilemma.

#### **5 External Oversight**

- 5.1 We welcome the revised Civil Service Code and the clearer guidance given to civil servants if they believe they are being asked to act in breach of the code and that, where necessary, a civil servant can approach the Civil Service Commissioners directly.
- 5.2 The Code is overarching guidance for civil servants and provides some routes to external oversight in relation to criminal matters. We understand from our correspondence with the Civil Service Commissioners that their remit is to look into matters concerning the behaviour of civil servants and not to receive substantive concerns about wrongdoing. On this basis they have said it would not be appropriate for the Civil Service Commissioners to become a prescribed regulator under PIDA 43F.<sup>4</sup> Clearly there is a gap in external oversight if this remains the position.
- 5.3 As our report revealed, the guidance for civil servants who might wish to raise a concern externally is unclear. Who should they go to outside the Department? A lack of such guidance may well mean the default is to resort to a media disclosure. The impression that a concern can only be raised

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<sup>4</sup> Letter of 25 July 2003 from Baroness Usha Prashar CBE to Guy Dehn, Public Concern at Work

internally may also trigger protection for a media disclosure as the individual may have reason to believe they will be victimised for raising a concern with a regulator.

- 5.4 To provide sufficient clarity as to routes outside of the Department we suggest that the Chairman of an appropriate Select Committee, such as the Public Administration Select Committee, could be the prescribed person under PIDA 43F for civil servants. Not only will this ensure the Civil Service Commissioners' role remains intact under the Code but it will re-establish parliamentary oversight without the interference of party politics. It will provide further reassurance as this provides access to an independent body that is clearly distinct from the civil service.

## **6 Assurances against reprisal**

- 6.1 The very first step in this process is to ensure the systems exist and that they are trusted - for this to work, civil servants need to see the arrangements working in practice, with no reprisal. That way the internal route will be the default in almost all cases.
- 6.2 Whistleblowing arrangements can make clear that assurances in the policy will not apply to a member of staff who maliciously raises a matter they know to be untrue or discloses information for personal gain. In such circumstances disciplinary action may well be appropriate.
- 6.3 However few situations are clear cut. As such, we believe that any action taken against an individual for whistleblowing should be very carefully considered in light of the potential chilling effect both on whether an individual might raise a concern in future.
- 6.4 Recent events have caused much confusion over when and how civil servants may disclose information. Now more than ever, clear guidance is needed to ensure that silence does not become the preferred option regardless of the risk.

## **7 Promotion and monitoring**

- 7.1 We note that since the revised Civil Service Code has been actively promoted the Civil Service Commissioners have received significantly more contacts they deem legitimate under the Code than in years past and put this in part down to the promotion of the Code.<sup>5</sup> We recommend that once good whistleblowing arrangements are in place they are included as part of staff induction, that staff receive training on the arrangements and that they are regularly promoted and annually refreshed.
- 7.2 We note in addition the Civil Service Commissioners have surveyed Departments on how well they promote the Code. We suggest as part of a

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<sup>5</sup> Civil Service Commissioners Annual Report 2007/8.

health check on whistleblowing arrangements, Departments annually survey their nominated officers and ask:

- a) How many whistleblowing concerns have you received?
- b) How many were partly or wholly well-founded?

7.3 We suggest Departments publish these results and give a gist of the kinds of concerns that were raised and where possible indicate success stories. All too often it is only those that end in disaster that people know and talk about.

#### **Summary of recommendations**

1. A Chairman of an appropriate Select Committee becomes a prescribed person for civil servants under 43F PIDA.
2. The Cabinet Office demonstrates leadership and issue guidance on best practice for whistleblowing arrangements.
3. Such arrangements include clear guidance for staff on how and when they may approach the relevant regulator.
4. Departments revamp and refresh their whistleblowing arrangements to ensure they meet good practice.
5. All departments be required to report on the efficacy of their whistleblowing arrangements in their annual report.
6. Training be given to management and nominated officers on handling a concern.
7. Annual surveys of nominated officers on the number and types of concerns received.
8. Periodic surveys of all staff to promote whistleblowing and gauge staff awareness.
9. New staff be issued the revised whistleblowing guidance alongside the Civil Service Code.

Public Concern at Work  
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