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Response to consultation paper on the Review of No Secrets Guidance

We welcome the *Consultation on the Review of the No Secrets Guidance*. In our response we specifically address *question 2c: Are whistleblowing policies effective? What can we do to strengthen them?* Whistleblowing policies are essential for good risk management and governance. Although a good policy is a strong start for an organisation we explain below that for whistleblowing to work, what is needed is strong leadership, communication and promotion of arrangements. This will ensure employees have confidence and know how to raise their concern, so silence and secrecy are never the default position. To achieve this, employers should be encouraged to refresh and in some cases revamp their whistleblowing arrangements overall. We recommend all employers in the health and care sectors follow best practice guidance as outlined in the **British Standard Institution: Whistleblowing Arrangements Code of Practice** (Code of Practice).

There is discussion in the consultation document around the creation of a duty to blow the whistle, co-operate with an investigation and for an organisation to investigate all whistleblowing concerns. We explore the dangers of creating general or legal duties for all of those points and recommend against it. We consider the existing framework robust, but inadequately promoted. The right and most effective approach is for the Department, Regulators and Employers to remind workers that the sense of collective responsibility continues into the workplace and they are encouraged to raise their concern. Likewise, organisations receiving a whistleblowing concern owe a responsibility to deal with it properly and can be held accountable if they fail to do so.

About Public Concern at Work

Public Concern at Work (PCaW) is the whistleblowing charity - we were set up in 1993 to promote the public interest and we were instrumental in getting the whistleblowing legislation (Public Interest Disclosure Act 1998) on the statute books. We operate a helpline providing free advice to people who find themselves in a whistleblowing dilemma and are unsure whether or how to raise their concern. We have dealt with over 15,000 calls with the largest number of calls coming from the health and care sectors. We have proven expertise in dealing with the real dilemmas faced by those who have a whistleblowing concern and in helping them to raise it.

We also work with organisations, advising them about their internal whistleblowing arrangements and how to create a culture where whistleblowing will work.

Approximately 30% of the organisations who subscribe to us are local authorities¹. In April 2008 we won a tender from the NHS to provide whistleblowing support to all NHS staff in England and Wales. The experience that we have gained over the last 15 years has been crystallised in the Code of Practice, which we published in partnership with the British Standards Institution² in mid-2008. Our approach has also been endorsed by the Committee on Standards in Public Life, both of which we discuss in more detail below. To find out more about us please visit our website at www.pcaw.co.uk.

In October 2008 we carried out a 6 month review of calls we received from the Health and Social Care Sectors between 1 April and 30 September 2008. Of those calls, 42% were from employees in the care sector. Of the types of malpractice that the caller wished to raise a concern about, 24% of the calls were related to abuse in care, 18% related to risk to the public (for example patient safety risk) and 13.4% of the calls concerned financial malpractice. It is notable that we receive so many calls from the care sector even though the sector is known to be fractured in nature with many carers working in small stand alone units; there being no promotion of our services to workers in the care sector; and we have very few subscriptions from care organisations. We are concerned that this means the numbers of calls we actually receive are only tip of the iceberg in terms of potential calls and concerns.

Whistleblowing policies are an effective risk management tool

Every organisation faces the risk that something will go badly wrong and good organisations will welcome the opportunity to address risks as early as possible. Ultimately if an organisation tells its staff that it is safe and acceptable to speak up they are more likely to receive information to help them address any risk that may affect a vulnerable adult at the earliest opportunity, thus limiting or averting harm. Just ticking the box by producing a policy may well not be enough on its own. The whistleblowing policy needs to be seen as a living document which organisations need to refresh regularly and communicate well to their employees.

Whilst an effective whistleblowing policy can underpin good risk management, the presence of a whistleblowing policy is one of the performance measures the Audit Commission uses when examining public sector bodies. We recommend public sector organisations that are commissioning work from the private and voluntary sectors could require their suppliers to have whistleblowing policies and for those policies to be promoted regularly to all of their employees.

Whistleblowing policies reassure staff

From the experience gained on our helpline, we can make a number of observations about whistleblowing in these sectors. What is encouraging is the overwhelming impression that carers are very committed to improving the lives of people who they care for and how many callers express how satisfying their work is. Many have a clear sense they have a responsibility to speak up if they have a concern about the treatment of those they care for.

¹ To find out more about the subscription packages available for organisations please visit <http://www.pcaw.co.uk/organisations/supportpackages.htm>

² A copy of the BSI Code of Practice on Whistleblowing Arrangements is available for single use download on our website at <http://www.pcaw.co.uk/bsi/index.php>.

However, callers often express real difficulty in either raising a concern about malpractice effectively or being assured their concern has been addressed properly. Individuals contact us because they do not know how to go about raising their concern for the following reasons:

- they fear reprisals if they speak up;
- they do not understand how to use the policy;
- they are unaware of their organisation's whistleblowing policy; and/or
- there is no such policy to refer to.

We have attached three case summaries at Appendix 1 to illustrate the difficult dilemmas individuals face; the importance of being able to know how to bypass line management and the importance of the safe haven of independent advice for concerned individuals. Our case summaries show that it is not good enough to just have a policy, for it to be effective the policy should provide the reader with the reassurance they need to empower them to speak up.

How whistleblowing can work in practice

A good policy will be far more effective if whistleblowing arrangements are underpinned by the right culture and good leadership on the issue. This engenders an environment where staff know they will be listened to if they raise a concern and will learn to trust the arrangements by seeing them work in practice. Creating this culture entails dealing with every concern in an appropriate manner, and showing that any reprisal against staff who raise the alarm on potential malpractice will not be tolerated.

In conjunction with *Nursing Standard* magazine³, PCaW recently conducted a survey of nurses across sectors from community care to acute care. The survey demonstrated the correlation between good whistleblowing arrangements and the saving of lives.

In healthcare organisations which respondents said promoted whistleblowing the difference was startling: fewer patients were harmed, the vast majority of concerns were handled well and twice as many nurses reported no reprisals for speaking up. Of 752 responses 87% said they would blow the whistle next week even if they had suffered reprisals in the past. The good news is that nurses say the culture is improving year on year, though 47% still said the concern was handled badly. Where a trust promotes whistleblowing well, 67% of nurses say the concern was handled well. In trusts where whistleblowing is not promoted this figure collapses to 16%.

The positive results from those organisations that give an effective lead on whistleblowing is good news for patients, the public and taxpayers. However, only 20% of nurses say their organisation does enough to promote whistleblowing. This is indefensible when the costs of putting good practice in place are minimal, and the potential benefits so great. In our view, it is appropriate that guidance be provided to organisations to strongly encourage them to take advantage of the benefits offered by good whistleblowing policies.

³ Article on survey findings: *Nursing Standard* , Volume 22 No 37 May 21-27 2008

Existing guidance

The Code of Practice (see above) builds on existing recommendations of the Committee on Standards in Public Life (CSPL) on how to make whistleblowing policies and arrangements work. CSPL has helped inform and influence practice on whistleblowing across sectors. We have attached a summary of all the recommendations from the Committee at Appendix 2.

The Code of Practice is a comprehensive guide covering how to implement good whistleblowing arrangements which underpin and promote good governance and illustrates what is needed alongside a good policy. We strongly recommend that the Department consider how this guidance might be absorbed and promoted to organisations and relevant regulators to assist in getting whistleblowing arrangements right.

A feature of the health and care sectors is the number of smaller organisations providing services. The Code of Practice recognises the different needs of smaller and bigger organisations- a tiered whistleblowing policy will not be appropriate for a small stand alone residential home and we encourage the Department to read this guidance and recognise the distinction.

External Oversight

The role of external oversight is important in reassuring employees and stakeholders that organisations intends to deal with any malpractice properly. Whilst it is hoped that concerns will be raised and addressed internally, it is important that employees know when it is appropriate to contact an external body. Some organisations send out a strong message by stating in their policies that they would rather employees went to a regulator or the police than stay silent. On this basis we recommend that the relevant regulators issue clear guidance as to when an employee may want to raise a concern with them and recommend employers including this in their whistleblowing policies.

Organisations caring or providing support for vulnerable adults could be required to state in their annual reports what they have done to strengthen their whistleblowing arrangements or state why they believe they are currently fit for purpose. If their arrangements are deemed unsatisfactory, a number of possible consequences could follow. These could include a drop in rating by the Commission for Social Care Inspectorate - or more likely the newly created Care Quality Commission - or recommendations on how to improve, potentially within a stipulated time.

In line with existing guidance we would recommend the Department introduce a comply or explain policy for whistleblowing arrangements to assist in the protection of vulnerable adults. We suggest the Department consider the approach of the Combined Code on Corporate Governance with respect to whistleblowing arrangements (see ICAEW Guidance for Audit Committees - http://www.icaew.com/inder.cfm/route/118068/icaew_ga/pdf).

The dangers of creating duties

We recommend no duty be imposed on staff to blow the whistle or to cooperate in investigations. Many staff already have a sense of responsibility towards those they care

for and this could unintentionally be undermined by creating a formal process of reporting rather than building good workplace cultures. Most people would agree for civil society to function we all owe a responsibility to others and sometimes this may mean speaking up when we witness wrongdoing not only in the workplace. It is important that organisations reinforce this message to their employees that the responsibilities of being a good citizen continue into the workplace. We recommend organisations be encouraged to communicate to staff that they want them to speak up if they are concerned and that their concern will be listened to or the organisation will be accountable.

A general duty

Requiring staff to blow the whistle when they come across malpractice is unlikely to bolster staff confidence in the whistleblowing arrangements and will not encourage a workplace culture of transparency and accountability. More dangerously, it may actually have a 'chilling' effect on whistleblowing. Some staff may feel the duty obliges them to wait for proof before raising their concern, mindful of the stakes being higher for their own employment position.

Moreover, the law is likely to say that such a duty is unfair if it is not enforced consistently. This would mean where an employee does correctly blow the whistle, employers would have to examine whether any other employees knew of the situation and had decided not to blow the whistle, and then carry out an exercise to decide whether to take action against those employees for failing to blow the whistle. This would unnecessarily remove the focus away from the risk identified (the message) and onto the person raising - or not raising - the concern (the messenger), an unwelcome distraction when difficult issues are already being dealt with. There may also be practical difficulties in the operation of such a duty as it could lead to some employees feeling they have to report every infraction they see or suspect.

A legal duty

We are also concerned that the creation of a legal duty could give rise to a complex legal situation if a member of staff fails to report. At present there is no common law duty to report a concern. There is protection under Public Interest Disclosure Act 1998 (PIDA) for employees who choose to do so and are victimised as a consequence. In 2004 we responded to health and safety legislation which mistakenly extended liability for workplace accidents to employees who failed to report health and safety concerns. The legislation was deeply flawed in how it approached the issue of legal duties and resulted in an amendment to the legislation in 2006. In our report *Speak Up or Pay Up (2004)* (see <http://www.pcaw.co.uk/policy/speakup.htm>) we outlined a number of policy implications of imposing a duty and the same implications may hold true in this context as well.

If such a duty exists will a failure to comply be actionable? If so, there may be an increase in litigation, a deterioration of workplace relations and the creation of a culture of blame amongst staff and management. Another implication of imposing a legal duty is that it could undermine PIDA. The Act does not impose a duty on anyone to report; it simply encourages reporting of a genuine concern both internally, to a

regulator and in certain circumstances a wider disclosure, by protecting workers if they suffer reprisal as a result.

To whom should a staff member report a concern? If the duty is to report to your manager, this does not tackle the problem of a serious concern being lost in middle management. Paradoxically, it could also mean that organisations might be held vicariously liable for an employee's failure to report a concern - meaning that they would still be responsible for harm done when they were not informed that there was ever any risk.

To a certain extent, similar concerns are associated with a duty to cooperate with the investigation. A whistleblower is merely passing on information of malpractice that they have witnessed and may be in a very difficult situation. If staff believe that raising a concern will then compel them to co-operate despite a risk to their own position, there is a high chance this will create a chilling effect and thus prevent an individual coming forward, as they cannot be assured that their confidentiality will be protected. This contradicts the recommendations of CSPL (see Appendix 2). Additionally this may mean that organisations do not sensitively handle difficult situations, knowing that they can compel a whistleblower to give evidence. The result in such situations may well be the sudden onset of amnesia for the whistleblower as a means of protecting their own position.

If workers report concerns because of a duty and are disciplined for some other reason, they may claim it was a reprisal for their report. It may encourage unscrupulous organisations to point the finger at a failure to report by an individual, leading nervous employees to over report on all issues to ensure compliance, unnecessarily diverting an organisation away from concentrating on good practice and delivering an effective service. This leads to our worry that imposing a duty on organisations to investigate may be misused by employees as a vehicle for malicious complaints and could lead to difficulties in a sector where such complaints can have very serious consequences for the accused. Instead, organisations should look to the substance of the concern raised and investigate as appropriate. If a concern has been raised and an organisation has failed to handle the situation, they will ultimately be accountable for that failure and we can see no benefit but only unnecessary complication of imposing a duty in these circumstances.

Summary of recommendations

1. The Department of Health demonstrates strong leadership by providing organisations with guidance on effective whistleblowing arrangements as outlined by the Code of Practice
2. Organisations commissioned to provide health and social care services should be required to have a whistleblowing policy in place and to annually review the

- efficacy of their whistleblowing arrangements or explain why they do not need to do so.
3. Regulators should review the efficacy of an organisation's whistleblowing arrangements during inspections.
 4. Regulators should give clear guidance as to when employees may come to them as an external route for raising their concern and encourage employers to make this clear in their whistleblowing policies.
 5. No duties be imposed on employees or employers, but the existing framework for good practice for employers and protection for whistleblowers be further promoted.

If you have any further queries about any of the above please do not hesitate to contact me at fw@pcaw.co.uk.

Francesca West
Senior Policy Officer
28 January 2009

Appendix 1

Here are some examples of the common dilemmas individuals face when they come to us for advice.

Case Study no. 1

M said he is a care assistant at a home for the elderly with dementia. He witnessed a resident acting in an indecent sexual way towards other residents of the home. He raised this concern with his manager and deputy manager on two occasions but no action was taken. In the end, he brought her concern to the attention of senior management. As a result, they involved CSCI, suspended the manager who in turn resigned and gave the resident notice to leave. However, three weeks on the resident still had not left and the deputy did not seem to be held to account, making staff anxious. M asked what more could be done?

Case study no. 2

G said he is an administrator for a centre for young people. One of his roles is to manage the petty cash. Both he and his manager are the authorised receivers of the cheques from head office. He said a cheque for £200 was authorised to redecorate one of the rooms of the centre. G never saw the cheque and made enquiries to head office who told him the cheque had been cashed. When he approached his manager about it, he said he had left the money at home. G noticed more money was missing from the petty cash. G's situation was made worse because his manager allowed him unauthorised time off to look after an ailing parent. G was concerned this would be used as leverage to prevent him from speaking up about his concern. He said head office has emailed him asking for an update on the £200. G said he was unsure where to go and the company had no whistleblowing policy. He asked us for help on how to handle the situation fearing he may be accused of being complicit in his manager's bad practice.

Case study no. 3

B said he is a care assistant for an elderly care home. He was concerned nurses were refusing to help residents after a certain time at night and detailed a specific incident where they had been a significant delay in calling an Ambulance and the resident dying a couple of hours later in hospital. He raised his concern in confidence with CSCI, who are about to conduct an investigation of the home. He had been previously warned by her manager that if he went to CSCI she would be fired. He asked for our advice on how to handle the investigation and the possible fallout if the home discovers that he was the whistleblower.

Appendix 2 Summary of the Nolan Report recommendations

Since its launch under the chairmanship of Lord Nolan, the Committee on Standards in Public Life has continued to highlight the role whistleblowing plays *"both as an instrument of good governance and a manifestation of a more open culture"*⁴. To help organisations make whistleblowing work, the Committee has made recommendations about what organisations should do both as to good policy and good practice.

Emphasising the important role whistleblowing can play in deterring and detecting malpractice and in building public trust, the Committee has explained

*"The essence of a whistleblowing system is that staff should be able to by-pass the direct management line, because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course."*⁵

In making this work, the Committee has said that *"leadership, in this area more than in any other, is paramount"*⁶ and that the promotion of the whistleblowing arrangements is critically important.⁷ The Committee has helpfully distinguished a 'real' internal whistleblower from someone who takes a story directly to the press⁸ and has also stressed that the Public Interest Disclosure Act should be seen a 'backstop' for when things go wrong and not as a substitute for an open culture.⁹

The key elements of a good policy

The Committee recommends that an organisation should make clear in its policy and whistleblowing arrangements that

- (i) it takes malpractice seriously, giving examples of the type of concerns to be raised, so distinguishing whistleblowing from grievances;*
- (ii) its staff have the option to raise concerns outside of line management;*
- (iii) its staff are enabled to access confidential advice from an independent body;*
- (iv) it will, where requested, respect the confidentiality of a member of staff raising a concern;*
- (v) when and how concerns may properly be raised outside the organisation (e.g. with a regulator); and*

⁴ Committee on Standards in Public Life *Tenth Report "Getting the Balance Right"* (2005) p 92

⁵ *Third Report* (1996) p 48

⁶ *Tenth Report* (2005) p 92

⁷ *Fourth Report*, (1997) p 23 and see note 8 below

⁸ *Second Report* (1995) p 22.

⁹ *Tenth Report* (2005) p 92

*(vi) it is a disciplinary matter both to victimise a bona fide whistleblower and for someone to maliciously make a false allegation.*¹⁰

The key elements of good practice

The Committee also recommends that to comply with good practice the organisation should:

- (i) “Ensure that staff are aware of and trust the whistleblowing avenues. Successful promotion of awareness and trust depend upon the simplicity and practicality of the options available, and also on the ability to demonstrate that a senior officer inside the organisation is accessible for the expression of concerns about wrongdoing, and that where this fails, there is recourse to effective external and independent oversight.*
- (ii) Make provision for realistic advice about what the whistleblowing process means for openness, confidentiality and anonymity. While requests for confidentiality and anonymity should be respected, there may be cases where a public body might not be able to act on a concern without the whistleblower’s open evidence. Even where the whistleblower’s identity is not disclosed, ‘this is no guarantee that it will not be deduced by those implicated or by colleagues’.*
- (iii) Continually review of how the procedures work in practice. This is a key feature of the revised Code on Corporate Governance, which now places an obligation on the audit committees of listed companies to review how whistleblowing policies operate in practice. The advantage of this approach is that it ensures a review of action taken in response to the expression of concerns about wrongdoing; it allows a look at whether confidentiality issues have been handled effectively and whether staff have been treated fairly as a result of raising concerns.*
- (iv) Regular communication to staff about the avenues open to them. Creative approaches to this include the use of payslips, newsletters, management briefings and Intranets, and use too of Public Concern’s helpline, launched in 2003 and also available through subscription”.*¹¹

The Committee also observes that a well-run organisation will review its whistleblowing arrangements to ensure they work well and that staff have confidence in them where a case is brought against the organisation under the Public Interest Disclosure Act or if there has been a damaging unauthorised public disclosure.¹²

NB The Committee’s reports can be found at www.public-standards.gov.uk. This summary was produced by Public Concern at Work (www.pcaw.co.uk) in April 2005.

¹⁰ 5 of these 6 recommendations are based on those in *Second Report* (1995) p 22, revised as necessitated by the Public Interest Disclosure Act. The third recommendation is from the *Third Report* (1996) p 49

¹¹ *Tenth Report* (2005) p 91

¹² *Ibid* p 89.