

COUNCIL

Whistleblowing Update

Meeting: 29 July 2015

Status: for noting

Lead responsibility: Nicola Ebdon (Head of Governance)

Team members: Marcus Dye, Keith Watts and Simon Grier

Purpose

1. This paper updates Council members on current reports, best practice and guidance relating to whistleblowing and how we are intending to fulfil our duties in this area.

Recommendations

2. It is recommended Council notes the content of this report, in particular:
 - 2.1 the impact of the Freedom to speak up review and the GMC whistleblowing review;
 - 2.2 the ways in which whistleblowing is relevant to our work e.g. whistleblowing by staff/members, whistleblowing by registrants in line with our standards and how we handle complaints from whistle-blowers in line with our Public Interest Disclosure Act (PIDA) duties; and
 - 2.3 our planned actions.

Strategic objective

3. Development of our approach to whistleblowing forms part of the Governance work programme in our 2015/16 business plan, specifically “Embedding an improved process for corporate and member complaints handling, to ensure complaints are dealt with quickly and we learn from feedback received”. This work supports our strategic objectives to improve complaints-handling and deliver high quality services to the public and the professions.

Risks

4. The risk associated with the issue, as identified in the Governance risk register is risk A1.03 – a governance risk of not meeting our legal responsibilities in relation to our governing legislation and an external risk of suffering reputational damage as a result. Specifically in relation to compliance with the PIDA and current best practice in relation to whistleblowing.

5. This risk is categorised as a medium likelihood but a high impact. Our whistleblowing policy is not compliant with current legislation and it does not take account of the changes which came into effect in June 2013. In addition, we do not have a policy or guidance which takes account of our responsibilities under the PIDA. Nor do we have processes in place to enable our registrants or others working in our regulatory field to make a disclosure to us as a 'Prescribed Person' other than via our FTP processes. However as we do have an interim whistleblowing policy and established FTP processes which can be used to investigate protected disclosures and have work planned to develop the required policies, our risks in this area are mitigated to a low likelihood.

Background

Whistleblowing and the Public Interest Disclosure Act (PIDA)

6. The PIDA¹ 1998 came into force on 2 July 1999 in Great Britain. Similar protection came into force on 31 October 1999 in Northern Ireland. The Act forms part of employment legislation (the Employment Rights Act 1996) and is recognised as a valuable tool to promote good governance and openness in organisations. Due to its relevance across all sectors it has received broad support.
7. The Act applies to the private and voluntary sectors as well as public bodies and protects 'workers'. This is defined as employees, contractors, trainees, agency staff, homeworkers, police officers and every professional in the NHS. The Act does not cover the genuinely self-employed (other than in the NHS), volunteers, charity trustees, non-executive directors, the intelligence services or the armed forces. The original Act listed those described as 'workers' which included "persons providing general ophthalmic services". Following the publication of the Francis Inquiry and the Government's subsequent response to the recommendations contained with the report, the Government extended the protections of the Public Interest Disclosure Act 1998 (which inserted Part 4A into the Employment Rights Act 1996) by the Enterprise and Regulatory Reform Act, to all healthcare professionals as of April 2013.
8. Whistleblowing is when a 'worker' reports suspected wrongdoing at work. This is officially known as 'making a disclosure in the public interest'. In order to be afforded protection under the Act, the concerns raised must be genuine i.e. that must not be deliberately false. Examples include:
 - 8.1 someone's health and safety is in danger;
 - 8.2 damage to the environment;
 - 8.3 a criminal offence;

¹ <http://www.legislation.gov.uk/ukpga/1998/23/contents>

- 8.4 the company isn't obeying the law (for example, not having the right insurance); and
- 8.5 covering up any of the above.
9. The emphasis of the Act is on the prevention of malpractice and with the guarantee of full compensation – the key issue is for organisations to reduce any risk of creating grounds for protected public disclosures such as introducing, reviewing and refreshing their whistleblowing policy, promoting the policy effectively, creating a culture where there is understanding that whistleblowing victimisation will not be tolerated and making it clear that reporting malpractice to a prescribed regulator is acceptable.
10. On 25 June 2013, some key changes to the PIDA came into effect. These were:
- 10.1 protected disclosures must be made in 'the public interest' (prior to this, disclosures needed to be made 'in 'good faith'). This means any disclosure of information that, in the reasonable belief of the worker, is made in the public interest;
- 10.2 as a consequence of the new 'public interest' requirement, employees will generally be precluded from being able to 'blow the whistle' about breaches of their own employment contracts'. Employers therefore should ensure that this is explained clearly in their whistleblowing policies and ensure that employees understand that making such a complaint should be done via the employer's grievance procedures; and
- 10.3 whistleblowers are now protected from suffering detriment, bullying or harassment from another employee. Prior to June 2013, employees who made protected disclosures were protected from adverse treatment only in relation to their employer's activity.

Prescribed persons

11. The Act also makes special provision for disclosures to 'prescribed persons'. A 'Prescribed Person' is an organisation an individual can approach if they do not wish to make an internal disclosure to their employer (or cannot), or if they have made an internal disclosure but no action has been taken. These organisations are usually regulators such as the Health and Safety Executive and the Charity Commission.
12. The original Act stated that for healthcare these 'Prescribed Persons' were the Care Quality Commission (CQC), the Healthcare Inspectorate for Wales and Monitor. The Department of Health's response to the Francis Report, '*Hard Truths, the Journey to Putting Patients First*'² recommended that employees should be able to whistle blow to health and care professional regulatory

² <https://www.gov.uk/government/publications/mid-staffordshire-nhs-ft-public-inquiry-government-response>

bodies. As a result the GOC is now listed as a 'Prescribed Person' in the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014 which came into effect on 1 October 2014. The Order does not change the legal position of the professional regulators as 'Prescribed Persons'. It includes a list of all 'Prescribed Persons' and will be updated annually by the Department for Business Innovation and Skills (BIS) to ensure it remains up to date and relevant. It enables workers to make protected disclosures to the GOC in relation to:

- 12.1 the registration and fitness to practise of a member of a profession regulated by the Council; and
 - 12.2 any activities not covered in 12.1 above in relation to which the GOC has functions.
13. It is worth noting that an Amendment Order (48) came into effect on 6 April 2014 in Northern Ireland which also added the GOC to their list of 'Prescribed Persons'.
 14. A disclosure made to a Prescribed Person is protected where the whistleblower meets the test for internal disclosures and additionally reasonably believes that the information and any allegation(s) in it are substantially true and is relevant to that regulator.

Wider disclosures

15. A 'wider disclosure' for example to the media, the police and non-prescribed regulators are also protected if:
 - 15.1 the whistleblower believes that they would be victimised if they raised the matter internally or with a prescribed person;
 - 15.2 there is no prescribed person and there they reasonably believe that evidence was likely to be concealed or destroyed;
 - 15.3 the concern has already been raised internally or with a prescribed regulator; or
 - 15.4 the concern was of an exceptionally serious nature.

Francis Review

16. In February 2014, Council received an update on the Francis Inquiry at the Public Council meeting. Council noted that there was currently no clear protocol for registrants to advise the GOC of serious adverse incidents or other concerns. Therefore it was difficult for the GOC to understand the extent of any issues in this area. Now that the Public Interest Disclosure Act has been extended to all healthcare professionals Council agreed that it would help registrants to know how to recognise, record and refer incidents.
17. In February 2015 Sir Robert Francis published his report on the Freedom to Speak Up review which is an independent review into creating an open and

honest reporting culture in the NHS. The report sets out 20 principles and actions which aim to create the right conditions for NHS staff to speak up, share what works right across the NHS and get all organisations up to the standard of the best and provide redress when things go wrong in future. The executive summary of this report³ includes a number of recommendations, principles and actions towards the end which are useful for us to consider – particularly in relation to our standards for registrants.

Hooper review of the GMC whistleblowing processes

18. The GMC requested an independent review of how they engage with individuals who regard themselves as whistle-blowers. The report⁴ includes a number of recommendations for GMC investigations to make sure that such whistleblowers are treated fairly which are useful for us to consider – particularly in relation to how we handle complaints from whistleblowers in line with our PIDA duties.
19. The report says there is evidence that those who raise concerns may suffer, or believe that they suffer, reprisals from their employer or from colleagues. The report includes a recommendation that organisations referring concerns about a doctor's fitness to practise to the GMC should declare whether the doctor has raised concerns about patient safety. In addition there is a recommendation that 'a simple, confidential and voluntary online system' to help doctors as well as other healthcare professionals to record the fact they have raised a concern with their employer is created.

BIS consultation: prescribed persons reporting requirements

20. BIS consulted on the practical implications of a legal power contained in the Small Business, Enterprise and Employment Bill to require certain prescribed persons to report annually on public interest disclosures that they received. Following the consultation on how BIS exercise a power in the Small Business Enterprise and Employment Bill to require prescribed persons to report annually on whistleblowing disclosures made to them, the Government published a formal response to the consultation - Prescribed Bodies: Annual Reporting Requirement on Whistleblowing.⁵
21. The purpose of this reporting requirement is to:
 - 21.1 ensure more systematic processes across all prescribed bodies in the way public interest disclosures are handled, thereby working towards a consistent standard of best practice for handling disclosures; and

³ https://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_Executive-summary.pdf

⁴ http://www.gmc-uk.org/Hooper_review_final_60267393.pdf

⁵ <https://www.gov.uk/government/consultations/whistleblowing-prescribed-persons-reporting-requirements>

- 21.2 provide greater assurance to the whistleblower that action is being taken by the prescribed person and as a result increase the confidence in the actions of the prescribed person.
22. The response states that reports will not provide detail enabling the identity of the worker who made the disclosure or the employer to which the disclosure relates to be identified. The outline regulations show BIS intends for the reports to cover the following:
- 22.1 an explanation of the functions, objectives and statutory powers of the body producing the report;
 - 22.2 the amount of concerns that have been raised with that body in a twelve month period;
 - 22.3 the amount of concerns that can be reasonably identified as whistleblowing;
 - 22.4 commentary on what types of action were taken in response to whistleblowing disclosures;
 - 22.5 the number of disclosures where no further action was taken (unsubstantiated claims); and
 - 22.6 commentary on how the information from whistle-blowers has impacted on the prescribed body's activity in their relevant sector.
23. In addition, prescribed persons may choose to supplement the report with further information that they believe would be helpful for example:
- 23.1 the numbers of concerns raised where further action was taken and why this was;
 - 23.2 the numbers of concerns that were referred to an alternative body; and
 - 23.3 how employers in the sectors they regulate/oversee respond to whistleblowing in their organisations.
24. We currently gather some of this data but this is not currently published. Our figures show that we had ten such protected disclosure cases during 2014/15.
25. We responded to the consultation (which closed on 30 September 2014). Our response was published on 6 November 2014 on our website⁶.
26. The response includes the draft regulations which will enable a power in the Small Business Enterprise and Employment Bill to grant the Secretary of State a power to require persons prescribed under section 43F of the Employment Rights Act 1996 to report annually on whistleblowing issues.
27. There was general support for the reporting duty as a means to drive up transparency and consistency. It is believed that greater transparency from

⁶ <https://www.optical.org/en/get-involved/consultations/our-responses-to-other-consultations.cfm>

prescribed persons about how they handle whistleblowing disclosures will drive up standards across prescribed persons so that a greater number are demonstrating good practice.

Our current employee policy on whistleblowing

28. Our whistleblowing policy⁷ was approved by Council in November 2013. The policy is an interim measure – it was recommended for approval by the ARC who were concerned that the GOC had no policy in place after Council rejected the approval of the policy in February 2013 in light of the findings of the Francis Inquiry.
29. There have been no cases of whistleblowing since the policy was approved.
30. The Senior Council Member (SCM) is Brian Coulter. The role description (last approved by Council in July 2014) requires the SCM to “act as a last resort internal contact point for whistleblowers who feel unable to raise concerns through such channels as are set out in the GOC Whistleblowing Policy”.

Best practice and guidance

31. There is a significant amount of best practice and guidance surrounding complaints and whistleblowing.
32. In November 2008, the Parliamentary and Health Service Ombudsman (the ‘Ombudsman’) published the ‘Principles of Good Complaint Handling’⁸ which are intended to promote a shared understanding of what is meant by good complaint handling and to help public bodies to deliver first-class complaint handling to all their customers. These principles are:
 - 32.1 getting it right;
 - 32.2 being customer focused;
 - 32.3 being open and accountable;
 - 32.4 acting fairly and proportionately;
 - 32.5 putting things right; and
 - 32.6 seeking continuous improvement.
33. The Ombudsman has also published two other guides to assist public bodies in developing and delivering first-class complaint handling: the ‘*Principles of Good Administration*’⁹ and the ‘*Principles for Remedy*’¹⁰.

⁷ https://www.optical.org/en/about_us/our-governance/index.cfm

⁸ http://www.ombudsman.org.uk/_data/assets/pdf_file/0005/1040/0188-Principles-of-Good-Complaint-Handling-bookletweb.pdf

⁹ http://www.ombudsman.org.uk/_data/assets/pdf_file/0013/1039/0188-Principles-of-Good-Administration-bookletweb.pdf

¹⁰ http://www.ombudsman.org.uk/_data/assets/pdf_file/0009/1035/0188-Principles-for-Remedy-bookletweb.pdf

34. The Francis Inquiry endorsed the Patients Association standards¹¹ for good complaints handling (which are based on the Ombudsman's principles) which were developed as a part of the Health Foundation funded 'Speaking Up' project. The Standards are:
- 34.1 Standard One: the complainant has a single point of contact in the organisation and is placed at the centre of the process. The nature of their complaint and the outcome they are seeking is established at the outset;
 - 34.2 Standard Two: the complaint undergoes initial assessment and any necessary immediate action is taken. A lead investigator is identified;
 - 34.3 Standard Three: investigations are thorough, where appropriate independent evidence and opinion is obtained, and are carried out in accordance with local procedures, national guidance and within legal frameworks;
 - 34.4 Standard Four: the investigator reviews, organises and evaluates the investigative findings;
 - 34.5 Standard Five: the judgement reached by the decision maker is transparent, reasonable and based on the evidence available;
 - 34.6 Standard Six: the complaint documentation is accurate and complete. The investigation is formally recorded and the level of detail is appropriate to the nature and seriousness of the complaint;
 - 34.7 Standard Seven: both the complainant and those complained about are responded to adequately;
 - 34.8 Standard Eight: the investigation of the complaint is complete, impartial and fair
35. Public Concern at Work (PCAW)¹² is a whistleblowing charity and a leading authority in the field. Their aim is to protect society by encouraging workplace whistleblowing, advising individuals with whistleblowing dilemmas, supporting organisations with their whistleblowing arrangements and informing public policy and seeking legislative change.
36. In March 2014, PCAW launched their First 100 campaign¹³ and began appealing to organisations across all sectors to sign up as one of the first 100 signatories to the principles of their Code of Practice, which sets out a number of principles to which signatory organisations should aspire to adhere to. The Nursing and Midwifery Council (NMC) is a signatory of the campaign. In addition, PCAW have recently assisted the General Osteopathic Council

¹¹ <http://patients-association.com/Portals/0/Good%20Practice%20Standards%20for%20NHS%20Complaints%20Handling,%20Sept%202013.pdf>

¹² www.pcaw.org.uk

¹³ <http://www.pcaw.org.uk/first100>

(GOsC) with the development of their whistleblowing guidance.

37. On 1 June 2015 the Government published updated guidance - *Blowing the whistle to a prescribed person*¹⁴- following an exercise to ensure the guidance remained accurate and up to date. This guidance accompanies the Public Interest Disclosure (Prescribed Persons) Order 2014.
38. Jeremy Hunt MP, Secretary of State for Health, has recently announced new measures aimed at improving safety across the NHS, as a result of the Morecambe Bay Investigation which are aimed at increasing professionalism and transparency in healthcare. Measures announced include whistleblowing training for all healthcare workers and a national 'whistleblowing' lead to be located in the Care Quality Commission.
39. As part of its duty to encourage dental professionals to raise whistleblowing concerns the General Dental Council published research on 22 June 2015 which it had commissioned from Community Research¹⁵. The GDC hoped the research would enable it to:
 - 39.1 identify the barriers and enablers which affect registrants who want to raise concerns;
 - 39.2 provide clear guidance/advice for registrants who may want to raise a concern, taking into account the identified barriers and enablers; and
 - 39.3 ensure that the GDC's internal processes enable it to deal effectively and efficiently with registrants when they raise concerns, taking into account the identified barriers and enablers.

Analysis

40. Following consideration of the legislation and best practice guidance in this area the following actions are proposed.
41. **Guidance on raising concerns** – we intend to improve our accessibility to workers by reviewing our website. We will also produce and publish guidance for workers (persons providing general ophthalmic services) to enable them to make a protected disclosure to us in our role as a prescribed person. We aim to have such guidance ready for consideration by Council in November 2015. In drafting this guidance we will give consideration to relevant recommendations from the Francis and Hooper reviews.
42. **Policy and process for handling protected disclosures** – we intend to produce and publish a policy and process which identifies how we will handle

¹⁴ <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2>

¹⁵ <http://communityresearch.co.uk/researching-barriers-to-whistleblowing/>

such concerns when raised with us, both as part of our FTP process and outside of our FTP process. We aim to have such guidance ready for consideration by Council in November 2015. In creating this process we will give consideration to relevant recommendations from the Francis and Hooper reviews.

43. **Individual Registrant Standards** – we have reviewed the guidance in developing our standards for individual registrants, which has been subject to public consultation. Our aim is to ensure that our standards for individual registrants appropriately reflect best practice guidance in relation to whistle-blowing.
44. **Business Registrant Standards** – we will review the guidance in developing our standards for business registrants, which will be subject to public consultation. Our aim is to ensure that our standards for business registrants appropriately reflect best practice guidance in relation to whistle-blowing.
45. **Standards Guidance** - we intend to develop guidance for individual and business registrants in relation to our standards in this area. Our aim is to ensure that our guidance appropriately reflects best practice guidance in relation to whistle-blowing, including relevant recommendations from the Francis and Hooper reviews.
46. **Internal Whistleblowing Policy** – we intend to review our whistleblowing policy to ensure that our policy appropriately reflects best practice guidance in relation to whistle-blowing. We aim to complete this review for consideration by Council in February 2016. In reviewing the policy, it is important that we demonstrate the same commitments that we will actively expect of other organisations and will give consideration to relevant recommendations from the Francis and Hooper reviews.
47. **Standards of Competence** – we intend to review our standards of competence to ensure that our standards appropriately reflect best practice guidance in relation to whistle-blowing, including relevant recommendations from the Francis and Hooper reviews.
48. **Education and Qualifications** – whistleblowing is covered within the professional conduct module which a compulsory element of all accredited education and training programmes. Within the revised handbook, whistleblowing is also covered under our public protection requirement which requires providers to ensure students are given clear information about the complaints process and how to raise and report a concern when undertaking practical training. We will ensure that our processes appropriately reflect best practice guidance in relation to whistle-blowing, including relevant

recommendations from the Francis and Hooper reviews, specifically that appropriate training is provided by accredited institutions to students to ensure that new professionals are aware of their whistleblowing obligations and that the principles should be applied to students as well as fully qualified practitioners.

49. **OCCS** – we intend to check that the OCCS, who assist practitioners and consumers to resolve complaints which cannot be satisfactorily concluded within the practice on our behalf, have policies which are consistent with our duties as a prescribed body and with good practice.
50. **Training** – we intend to train our employees and members in our approach to raising concerns and in receiving and acting on them. We also intend to train our employees, case examiners, Investigation Committee members and hearing panel members in our approach to handling protected disclosures to understand “whistleblowing”, particularly in the context of the GOC. The provision of training is included as a recommendation in the Francis and Hooper reviews. We aim to provide such training once our own whistleblowing policy and our Policy and process for handling protected disclosures has been approved.
51. **Annual Reporting** – we will develop the information included in our annual report on protected disclosures in accordance with BIS Guidance. We will also consider collecting statistics on those who are unable to return to work after whistleblowing and whether they are able to find alternative employment in our role as a prescribed person to promote whistleblowing, once our processes are established. We will also feed into any reviews of the Secretary of State for Health regarding progress made, as required.
52. **Engagement** – we will continue to engage with other healthcare regulators and the Government so we are aware of our duties and engage with joint initiatives, in line with the recommendations from the Francis and Hooper reviews in relation to engagement.

Impacts

53. The following implications in relation to the issues and recommendations contained within this paper have been identified:
 - 53.1 GOC’s reserves – none;
 - 53.2 GOC budget – none;
 - 53.3 Legislation – our work must be in compliance with the Public Interest Disclosure Act and related legislation;
 - 53.4 Resources – none;
 - 53.5 Equality, Diversity and Inclusion – anyone raising a concern must be treated equally;
 - 53.6 Human Rights Act – none; and

53.7 Sustainability – none.

Devolved Nations

54. Whistleblowing legislation in Northern Ireland differs from the rest of the United Kingdom. We will research the legislation and ensure our procedures are compatible with any differences between the devolved nations.

Attachments

None