

**Public Concern at Work**  
Suite 301  
16 Baldwins Gardens  
London EC1N 7RJ  
Tel. 020 7404 6609  
Fax 020 7404 6576



Karl Holden  
Conduct and Council Constitutions Team  
Communities and Local Government  
Zone 5/B2, Eland House  
Bressenden Place  
London  
SW1E 5DU  
Email: [conductcode@communities.gsi.gov.uk](mailto:conductcode@communities.gsi.gov.uk)

**SENT BY EMAIL & POST**

29<sup>th</sup> January 2009

Dear Mr Holden,

**RE: Communities in control: Real people, real power**  
**Codes of conduct for local authority members and employees**  
**A Consultation**

We are grateful for an opportunity to respond to this consultation. Our comments are confined to the proposed core values for all employees, particularly the sections on accountability and whistleblowing. We are concerned the core values are in danger of creating a legal duty on employees to blow the whistle and we comment on the difficulties that are likely to arise if this is imposed. The core value on whistleblowing as it stands is overly-legalistic and in fact gets the law wrong. We suggest alternative wording below and strongly recommend local authorities be encouraged to revamp and refresh their whistleblowing policies.

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 on our helpline from all sectors and 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 whistleblowing friendly culture. Approximately 30% of the organisations who subscribe to us are local authorities<sup>1</sup>. 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 Code of Practice on Whistleblowing Arrangements that we published in partnership with the

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

**Making whistleblowing work**

British Standards Institute<sup>2</sup>. To find out more about us please visit our website at [www.pcaw.co.uk](http://www.pcaw.co.uk).

We welcome the spirit that lies behind the proposed core values. As stated earlier we are confining our comments to the sections dealing with Accountability and Whistleblowing. For ease of reference those sections are set out below:

*“Accountability*

*Employees are accountable, and owe a duty to, their employing authority. They must act in accordance with the principles set out in this Code, recognising the duty of all public sector employees to discharge public functions reasonably and according to the law.*

*Whistleblowing*

*Where an employee becomes aware of activities which that employee believes to be illegal, improper, unethical or otherwise inconsistent with the model code of conduct for employees, the employee should report the matter, acting in accordance with the employees rights under the Public Interest Disclosure Act 1998 and with the authority’s confidential reporting procedure or any other procedure designed for this purpose.”*

One of the emerging conclusions from the recent Baby P case in Harringey, is the need for local authorities to create an open culture where employees feel able to raise concerns about malpractice and have access to the various avenues for raising a concern. It is important for the consultation to note that having a model code encouraging employees to speak up is only one side of the coin. Local authority employers should also make sure they provide workable whistleblowing policies. Employers should be referred to the above-mentioned Code of Practice on Whistleblowing Arrangements which explains and expands upon the recommendations of the Committee on Standards in Public Life. Please see Annexe A for a comprehensive guide.

**The problem of creating a legal 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. Some staff may feel they have to wait for proof because they are under a duty and the stakes are then higher for their own employment position. In addition 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<sup>3</sup>.

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<sup>2</sup> 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>.

<sup>3</sup> A detailed discussion of legal duties, including the opinion of Tim Kerr QC can be found at <http://www.pcaw.co.uk/policy/speakup.htm>.

## The law

At present the section on whistleblowing is overly legalistic - the code needs to encourage employees to raise their concern. Moreover the reference to raising concerns in accordance with the employee's rights under the Public Interest Disclosure Act 1998 is incorrect. The Public Interest Disclosure Act acts as a failsafe where individuals raise a concern and are later sacked, victimised or suffer a detriment in the course of their employment. If this is the case, they are able to bring a claim at an employment tribunal. The Act does not state employees have to raise their concern or set out a procedure. A reference to PIDA will focus employees on how they can sue the local authority if things go wrong after raising their concern rather than providing the assurances needed to make the employee feel safe in raising the concern in the first place. For these reasons, we believe the reference to the law should be removed or put into an annex to the code.

It is important the code be used to encourage employees to speak up where they witness or suspect wrongdoing. Imposing requirements on the employees and using overly-legalistic wording in the code will not achieve this. Our experience in working with organisations is that whistleblowing policies are there to communicate to the silent majority who, when faced with the dilemma of whistleblowing, are unsure what to do. It is important that employees feel able to raise their concern internally but where for some reason they feel unable to do this that they be encouraged to use external routes and get advice from either their trade union, employee assistance program or from PCaW.

## Recommendations

1. In the light of what we have said above, we suggest the wording should be changed to:

### **Accountability**

**“Employees are accountable to their employing authority. They should act in accordance with the principles set out in this Code, recognising the duty of all public sector employees to discharge public functions reasonably and according to the law”.**

### **Whistleblowing**

**“If you come across activities that are illegal, improper, unethical or those which are inconsistent with the model code of conduct for employees, you are encouraged to raise your concern with your employer and to use their whistleblowing arrangements/policy. There may be instances where you may consider it appropriate to raise your concern outside your employer, for example with bodies such as the Health and Safety Executive or the Audit Commission. If you are unsure about what you should do, we suggest getting independent advice from your trade union, employee assistance program or the whistleblowing charity, Public Concern at Work.”**

2. We recommend the Department remind employers of the need to revamp and refresh their whistleblowing policies. We urge the Department to encourage local authorities to look at the guidance contained in the BSI Code of Practice. We are happy to talk to the Department in order to suggest ways in which the BSI Code can be promoted and local authorities be encouraged to review their whistleblowing policies so as they encourage a culture whereby employees feel able to raise their concern and stop “preventable disasters”. The Department can also remind Local Authorities that the Audit Commission includes the existence of a whistleblowing policy as one of its performance measures.

I have taken the opportunity to enclose a hard-copy of the BSI Code which is a comprehensive guide on whistleblowing arrangements. Should you have any questions arising out of this response, or would like more information, please do not hesitate to contact me at [cw@pcaw.co.uk](mailto:cw@pcaw.co.uk).

Yours sincerely,

Catherine Wolthuizen  
Director

## Annexe A

### 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”*<sup>4</sup>. 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.”*<sup>5</sup>

In making this work, the Committee has said that *“leadership, in this area more than in any other, is paramount”*<sup>6</sup> and that the promotion of the whistleblowing arrangements is critically important.<sup>7</sup> The Committee has helpfully distinguished a ‘real’ internal whistleblower from someone who takes a story directly to the press<sup>8</sup> 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.<sup>9</sup>

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

#### The key elements of good practice

<sup>4</sup> Committee on Standards in Public Life Tenth Report **“Getting the Balance Right”** (2005) p 92

<sup>5</sup> Third Report (1996) p 48

<sup>6</sup> Tenth Report (2005) p 92

<sup>7</sup> Fourth Report, (1997) p 23 and see note 8 below

<sup>8</sup> Second Report (1995) p 22.

<sup>9</sup> Tenth Report (2005) p 92

<sup>10</sup> 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

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”.*<sup>11</sup>

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.<sup>12</sup>

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

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<sup>11</sup> [Tenth Report](#) (2005) p 91

<sup>12</sup> [Ibid](#) p 89.