



House of Commons
Public Administration Select
Committee

Leaks and Whistleblowing in Whitehall

Written Evidence

This is a volume of submissions, relevant to the inquiry into Leaks and Whistleblowing in Whitehall, which have been reported to the House but not yet approved for publication in final form. Any public use of, or reference to, the contents should make clear that it is not yet an approved final record of the written evidence received by the Committee.

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Memorandum from Sir David Omand GCB (LWB 02)

Preliminary observations

We should be considering here only official information that a civil servant could reasonably be regarded as under a duty to protect, not all the possible information that might be acquired in the course of official duty, such as the colour of the office carpet.

That point is relevant to consideration of who should have the authority to agree to release of information outside official channels. There is for example a clear public interest in civil servants engaging with local government, professional groupings, academics, think tanks, industry and others in order to be able to draw on experience relevant to current agendas and to promote a more informed view of the work of the Service and of government generally. Ministers should recognise therefore that, although they hold the ultimate authority under which civil servants operate (the *Carltona* principle¹), they have to trust their senior civil servants to use their discretion in this sort of information release, without seeking to be over-controlling.

Such an approach makes it easier to narrow down the ranges of official information that in the interests of good government ought to require high-level authorization before disclosure, and should merit protection from unauthorized disclosure. Examples include (not exclusively) information about internal policy-making debate, including relations between Ministers and between Ministers and their civil servants and other advisers; information that is commercially sensitive; information about private individuals such as their tax position or medical status; and information that bears on national security, the prevention and detection of serious crime and the economic well-being of the nation. Papers dealing with such categories of information ought to be protectively marked to alert the reader to their potential sensitivity, but the duty to protect such information extends beyond the written word since even disclosing casual conversations can be damaging. Information that relates to secret intelligence is especially sensitive, and has its own classification system. Only the originator of such information may authorize its release; the recipient of an intelligence report, however senior, is very unlikely to be in a position to judge unbriefed the potential damage of disclosure.

Responses to PASC's key questions

1. What are the circumstances, if any, in which a civil servant would be justified in disclosing official information without authority?

¹ The duties imposed upon Ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department...constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority' *Carltona Ltd v. Commissioners of Works* [1943] 2 All ER.

I can envisage no circumstances in which a civil servant in post would be justified in disclosing official information, as qualified above, without authority. A civil servant who believes that the public has a right to know information which has not been released, or wishes publicly to expose suspected wrongdoing or has an issue of conscience over a policy that the Government is pursuing, must seek advice from their line management, or from the nominated officers in their Department, or if they wish from the First Civil Service Commissioner (equivalently, from the Staff Counsellor in the case of the Intelligence Agencies). If the matter remains unresolved to the satisfaction of the individual, and the individual civil servant cannot in all conscience accept the decisions of his superiors on the matter then resignation would naturally follow. The individual would then be free to pursue their case in public having taken, we must hope, legal advice about their continuing responsibilities under the Official Secrets Act 1989.

2. How appropriate and effective are the routes open to those civil servants who see a need to disclose official information beyond their management chain (for example to the Civil Service Commissioners)? How could they be improved?

There is no reason why the routes open, including to the Civil Service Commissioners, and in the case of the intelligence agencies to their Staff Counsellor, should not be both appropriate and effective. My experience is that when such avenues are properly used then most problems can be sorted out to the satisfaction both of the Department and the individual. Departments have adopted a system of “nominated officers” so that civil servants know there are experienced senior officials outside their line management chain to whom they can go privately to discuss issues of conscience or other problems they may be experiencing that they do not wish to discuss with their own managers. I would hope that such a system is adopted universally within the Civil Service.

3. What are the effects of unauthorised disclosures of information on the operations of government?

Leaks have a cumulative corrosive effect on trust between colleagues within the Civil Service, between Ministers, between Ministers and civil servants, and between the public and government. Anonymous leaking is an act of cowardice, causing suspicion to fall on the innocent. Ministers must have confidence that advice is being tendered impartially and civil servants must be confident that they can privately speak truth unto power. As Sir Warren Fisher put the point:²

‘We shall need men who have the guts to stand up to their Ministers. As English politics get increasingly Americanised, we will find Ministers more and more inclined to do shady things – and the civil servants of the day will have to have the courage to say to their political chiefs, “That is a dammed swindle, Sir, and you cannot do it”’.

4. How appropriate and effective are existing processes for investigating unauthorised

² Cited in Chapman, R.A. (1984), *Leadership in the British Civil Service*, (London: Croom Helm).

disclosures of information? How could they be improved?

It is sensible that the Cabinet Office through the Official Committee on Security (SO) maintains responsibility for leak investigation policy, and for the commissioning of leak investigations concerning several departments or cabinet and its committees, but leaves the Permanent Heads of Departments to initiate investigatory action for problems that arise in their areas. I have in the past used experienced investigators drawn from the panel maintained by the Cabinet Office with satisfactory results. However when there is suspicion that the person leaking may have access to security classified information, and thus there may be the possibility of an offence under the Official Secrets Act 1989, then it would be prudent for Departments to consult the police, who in my experience may well be content for an internal investigator employed by the Department to continue the investigation guided by legal advice so as to avoid any possible contamination of the evidential chain should it come to that. But it is a police call whether to mount a criminal investigation.

Contrary to popular belief it is often possible for an experienced leak investigator to narrow down the field of suspects so that action can be taken to stop a leak, even when there is not the evidence to institute formal disciplinary proceedings. It is also the case in my experience that many press reports that appeared to be leaks from officialdom turn out on examination to be the result of unattributable briefing from political circles. The individuals concerned may well consider themselves to be in a position to self-authorise the disclosure of official information on the old adage: "I brief, you leak".

5. What action is taken against civil servants who disclose information without authority? Is the action appropriate?

Civil Service disciplinary procedures are well understood and provide for the individual to be informed of the charge, to take legal advice and to put forward their defence. Each case has then to be considered on its merits, judging whether the breach of the conditions of employment including the Civil Service Code represents an irretrievable breakdown of trust between employer and employee in which case dismissal would normally follow.

What is never justified is for the individual to attempt to cling to the benefits of paid office, whilst covertly passing over information in breach of their duty under the Civil Service Code. To quote Sir Warren Fisher's 1928 statement of the duty of an official:³

"he is not to subordinate his duty to his private interests, nor to make use of his official position to further those interests...nor is he so to order his private affairs as to allow the suspicion to arise that a trust has been abused or a confidence betrayed". When it is established that an individual has used their position to benefit themselves then dismissal should be the outcome.

6. How appropriate and effective is the law governing the disclosure of official

³ Reproduced as an annex to FCO Historical Department Note, LRD No. 14 February 1999

information (including the Civil Service Code)? How could it be improved?

It would help reinforce Civil Service disciplinary procedures to have the Civil Service Code put on a statutory basis.

7. How appropriate and effective are the arrangements governing the disclosure of official information by ministers and special advisers? How could they be improved?

This is, in my view, a matter for the Prime Minister, in ensuring that Ministers are clear about the standards they should uphold under the Ministerial code. Ministers and special advisers are of course subject to the Official Secret Act 1989 and its sanctions in the same way as any other person subject to the Act.

January 2009

Memorandum from the Cabinet Office (LWB 04)

THE ROLE OF THE CABINET OFFICE IN LEAK INVESTIGATIONS

This memorandum sets out the roles of the Cabinet Office and the Cabinet Secretary in dealing with unauthorised disclosures of Government information (commonly referred to as leaks).

Roles and Responsibilities

2. Leaks are both a breach of Security and of the Civil Service Code. The relevant paragraphs of the Code are at Annex A. The Cabinet Office, on behalf of the Cabinet Secretary as Head of the Home Civil Service and as Chair of the Official Committee on Security, has responsibility for co-ordinating security matters across Government and for ensuring that civil servants meet the minimum standards laid down in the codes. Within Government, responsibility for ensuring compliance with the requirement of the codes and of security policy lies with Departmental Permanent Secretaries. It is for Departmental Permanent Secretaries to take decisions on whether leak investigations into the unauthorised disclosure of information originating in their Departments should be carried out. The Cabinet Secretary is responsible for this in respect of the Cabinet Office. In certain circumstances, e.g. when cases are cross-Departmental or involve especially sensitive information or where there is evidence of persistent leaking, the Cabinet Secretary may decide that it is appropriate for the Cabinet Office to take the lead. The Cabinet Secretary is supported by the Director, Security and Intelligence in the Cabinet Office in carrying out these functions.

3. Leak investigations will normally be carried out within Departments using investigators from an independent panel drawn up by the Cabinet Office. These investigations report to the Departmental Permanent Secretary who will decide what actions to take as a result. These actions might range from disciplinary action against an individual civil servant to improvements in process and procedures if weaknesses are discovered.

The Involvement of the Police

4. Occasionally it may be appropriate to involve the police in an investigation. Departmental Permanent Secretaries are responsible for taking the decision to do so. Normally, before any decision is made to involve the police, Departments will discuss the matter with the Cabinet Office. By definition such cases will always involve a serious and damaging impact on the functioning of a Department and will involve suspicion of leaking sensitive information. Given this, it is not unusual for the Cabinet Office to take the lead in such investigations.

5. If the police are invited to become involved, the final decision on whether they will investigate is always a matter solely for them. There are thresholds that have to be met before a police investigation can begin and only the police, in consultation with the Crown Prosecution Service, can make the necessary judgements. Once an investigation has begun, its course is a matter wholly for the police to determine. They will keep the Cabinet Office and Departments

informed and will liaise to make arrangements for access to Departmental premises, to interview staff, etc. Once the police have begun an investigation, its conduct is properly outside the direct control of Departments. Police investigations into leaks of government information have in the past normally been conducted by the officers of what was called Special Branch. This unit is now part of Counter Terrorism Command following internal restructuring at the Metropolitan Police.

The Role of Ministers

6. The Cabinet Secretary and Departmental Permanent Secretaries are responsible for the effective and efficient operation of their Departments. Included in these responsibilities are those for ensuring the observance of the Civil Service Code and effective security in their Departments. These responsibilities are carried out independently of Ministerial direction. Given the nature of many leaks, it would not be appropriate for Ministers to determine whether or not they should be investigated or whether or not the police should be invited to consider an investigation. It is normal for Permanent Secretaries to inform their Departmental Minister where a leak investigation is underway and whether it is an internal investigation or one carried out by the police. Depending on the seriousness of the leak, the Cabinet Secretary will judge whether the Prime Minister needs to be informed.

The Role of the Cabinet Office in the Home Office Leaks Investigation

7. In this particular case, the Home Office was faced with serial leaking. The most recent leaks pointed to an unknown source or sources close to Home Office Ministers. In addition, and increasingly over the last three years, there have been leaks of highly sensitive information from within Government, including information that was held in the Home Office which the unknown source(s) may have had access to.

8. The Home Office Permanent Secretary, Sir David Normington, was concerned on three counts:

- the systematic leaking of Home Office information was having a detrimental effect on the operations of his Department;
- the source or sources of the Home Office leaks was close to the heart of the Home Office where highly sensitive material is generated and received; and
- there was a danger that the Home Office's most sensitive material was at risk.

9. These matters were discussed between Sir David Normington and the Cabinet Secretary. They agreed that the Home Office should seek assistance from the Cabinet Office and, following further discussions, it was decided to seek police assistance. As a result, the Director, Security and Intelligence in the Cabinet Office wrote on 8 October 2008 to the Assistant Commissioner Specialist Operations in the Metropolitan Police to invite him to consider an investigation. A copy of that letter is attached at Annex B.⁴ Assistant Commissioner Quick responded agreeing to an investigation.

⁴ This is as the letter was sent. It should be noted that it was issued with the mistaken date of 8 September 2008, which was a mistype when the letter was created.

10. Once the police investigation was underway, the role of Cabinet Office officials has been to act as liaison between the investigating team and the Home Office in order to provide relevant information and access to Departmental premises and staff. A description of the police contacts with the Cabinet Office over the arrests of the Home Office official and Damian Green MP is at Annex C.

11. Since these arrests, the Cabinet Office has maintained its position as liaison between the Metropolitan Police and the Home Office over the investigation. There have been no discussions with the police about the current status of their investigation, which is a matter for them and the prosecuting authorities, nor any discussion of the substance of any of the interviews the police have had with either the Home Office official or Damian Green MP. Cabinet Office officials have also provided information on request to Ian Johnston, Chief Constable of the British Transport Police, in connection with the review of the case which he has been asked to undertake by the Acting Commissioner of the Metropolitan Police.

December 2008

ANNEX A

Relevant extracts from the Civil Service Code

Civil Service Code

- You must always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings. (Para 5)
- You must not disclose official information without authority (Para 6)
- You must serve the Government, whatever its political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of the Civil Service Code, no matter what your own political beliefs are. (Para 13)
- You must act in a way which deserves and retains the confidence of Ministers, while at the same time ensuring that you will be able to establish the same relationship with those whom you may be required to serve in some future Government. (Para 13)

Raising matters of concern

- The Civil Service Code (paras 16-18) provides for civil servants to raise matters of concern. It encourages individuals to raise matters with their line manager or someone else within line management chain.
- Alternatively you may report the matter direct to the independent Civil Service Commissioners. (Para 18)
- In certain circumstances, the Public Interest Disclosure Act may also apply.



CONFIDENTIAL - INVESTIGATIONS

Chris Wright

26 Whitehall
London
SW1A 2WH

[Redacted]

Jw053

AC Robert Quick
ACSO
Metropolitan Police

8 September 2008

Dear Bob,

LEAKS

I am writing to ask whether you will consider agreeing to an investigation into a series of leaks, probably originating in the Home Office, which is causing considerable concern to the Cabinet Secretary.

A number of recent leak investigations, including some conducted by your officers, have raised questions about the security of sensitive information in the Home Office. Whilst not all the leaks which concern us merit, taken individually, investigation by the police, we are concerned that there is an individual or individuals in the Home Office with access to sensitive material who is (are) prepared to leak that information. We are in no doubt that there has been considerable damage to national security already as a result of some of these leaks and we are concerned that the potential for future damage is significant. The risk of leaking is having an impact on the efficient and effective conduct of Government business, affecting the ability of Ministers and senior officials to have full and frank discussions on sensitive matters and undermining necessary trust. You will not be surprised to hear that we are also concerned that there must be risk to information about sensitive operations which, if leaked, could give rise to grave damage.

If you are content to agree to an investigation into these matters, my staff will be happy to brief your officers on the detail. Equally, I shall be happy to discuss with you any arrangements for the oversight of the investigation.

Knowledge of this request is held very tightly here, in the Home Office and in the Security Service and will continue to be so.

A copy of this letter goes on a personal basis to David Normington, Jonathan Evans and to Robert Hannigan and Ciaran Martin here.

Yours sincerely,

CHRIS WRIGHT

Information contained in this document may be subject to exemptions under the Freedom of Information Act (in particular the National Security exemptions in sections 23 and 24). Before considering information in this document for release under the Act, you should contact the Intelligence and Security Secretariat in the Cabinet Office for advice.



CONFIDENTIAL - INVESTIGATIONS

To note: Date mistyped on original letter above. This should read 8 October 2008

ANNEX C

DETAILS OF POLICE CONTACT WITH CABINET OFFICE OVER ARRESTS

1. On **17 November**, the police informed Cabinet Office officials that the early arrest of a Home Office official was likely. The Home Office Permanent Secretary was informed and he informed the Home Secretary. No Cabinet Office Minister was informed, nor was the Prime Minister.
2. On **18 November**, the police informed Cabinet Office officials that a junior Home Office official would be arrested the following morning. The police requested assistance in gaining access to the official's desk and cupboard in the Home Office.
3. On **19 November**, Mr Christopher Galley, a junior Home Office official, was arrested. The Cabinet Office and Home Office were informed once the arrest had been made.
4. On **27 November**, at approximately 1pm the Metropolitan Police informed the Cabinet Office that four properties connected with an Opposition Front Bench spokesman would shortly be searched. Three were the subject of warrants under s.8 of the Police and Criminal Evidence Act and one was to be searched with permission. The Metropolitan police told the Cabinet Office that this information was also being given to the Leader of the Opposition, to the Mayor of London in his role as Chair of the Metropolitan Police Authority and to Sir David Normington.
5. At about 2.30pm on **27 November** the Metropolitan Police informed the Cabinet Office that the MP had been arrested and that it was Damian Green. The Cabinet Secretary informed the Prime Minister just before 3pm. The Home Secretary was also informed at about 3pm.

**Memorandum from Sir Gus O'Donnell KCB, Secretary to the Cabinet Office
(LWB 05)**

PASC Appearance: Leaks and Whistleblowing in Whitehall

When I appeared before the Committee on 11 December, I said that I would write to you and provide additional information relating to the first half of the session, which was on Leaks and Whistleblowing.

Mr Liddell-Grainger asked if I could provide the number of times that the Government has asked the police to investigate a leak and they have declined. David Burrowes asked if I would provide copies of previous letters inviting the police to investigate leaks. When a referral is made to the police of a potential leak that may have resulted in criminal offences being committed, it is for the police to decide independently whether or not to pursue such an investigation. Departments refer such leaks to the police in writing after careful consideration and initial consultation with the police. Once a written referral has been made, the police can decide not to pursue an investigation after further consideration on their part after the referral. If however, the initial view of the police is that no criminal offences have been committed or a criminal investigation is not warranted then a formal referral will not be made to them and we retain the option to investigate internally with recourse to internal disciplinary procedures. However, it has been the policy of successive administrations not to publicise the independent decisions of specific police investigations into leaks nor to comment on specific outcomes where they do not result in prosecution.

January 2009

Memorandum from FDA (LWB 06)

The FDA welcomes the opportunity to respond to the inquiry into intentional unauthorized disclosures of information from within government. We have sought to answer the key questions identified by PASC, and are grateful for the invitation to supplement this written submission with oral evidence.

1. What are the circumstances, if any, in which a civil servant would be justified in disclosing official information without authority?

1.1 The FDA does not believe that there are any circumstances in which a civil servant would be justified in disclosing official information without authority. Civil servants owe a duty of confidentiality to the elected government of the day. This should be life-long, and is a core principle of the Civil Service which in turn reinforces the principle of political impartiality.

1.2 The Civil Service Code offers a mechanism for any civil servant to raise concerns, without breaching the duty of confidentiality, that something untoward is happening within their department (or in the wider Civil Service), and places an obligation on civil servants to raise any concerns they have about the actions of others. This includes the reporting of “criminal or unlawful activity to the police or other authorities” (CSCode paras 15 – 17)

1.3 It is also important in the context of this inquiry to remember that the Civil Service “supports the Government of the day in developing and implementing its policies, and in delivering public services. Civil servants are accountable to Ministers, who in turn are accountable to Parliament” (CSCode para 1). In other words, the Civil Service is not some ‘neutral umpire’ between Ministers and Opposition, and the concept of political impartiality means that all civil servants will serve the elected Government of the day with dedication and professionalism, but will serve a different political administration with equal dedication and professionalism, regardless of the personal political views of civil servants themselves.

1.4 For the Civil Service to function effectively there must be a relationship of trust between Ministers and the civil servants, which the unauthorised disclosure of information breaches. Ministers, and the wider public, must be able to rely on that duty of confidentiality. For a civil servant to disclose official information without authority means that civil servant is seeking to put their interpretation of the public interest above that of their civil servant manager (their departmental Permanent Secretary or, ultimately, the Head of the Civil Service) and above that of the judgment of Ministers.

1.5 As background, the FDA campaigned for a number of years, following the acquittal of Clive Ponting in 1985 in his prosecution under the Official Secrets Act, for the introduction of what became the Civil Service Code. As a consequence of the FDA’s campaign,

Parliament accepted and endorsed the introduction of the Code.

2. How appropriate and effective are the routes open to those civil servants who see a need to disclose official information beyond their management chain (for example to the Civil Service Commissioners)? How could they be improved?

2.1 A civil servant who is concerned about some issue, and therefore feels the need to disclose official information beyond the management chain to which they have been authorized to circulate information, has at least three options. Firstly they could take the matter through to their Permanent Secretary. If they did not feel that this was appropriate or they feel concerned by the response, the matter can be taken up with the Head of the Home Civil Service, and any civil servant can ultimately appeal to the Civil Service Commission. Although the Code explains that a civil servant should take a concern through a line management chain, it also allows an individual to take a matter direct to the Civil Service Commission (or to the police, as noted above), and individual civil servants need to be aware of this right. The FDA believes this is an appropriate and satisfactory mechanism.

2.2 An individual might also seek, on a confidential basis, to raise the matter with their trade union.

2.3 The key area of improvement would be to ensure that all civil servants are aware of the detail of the Civil Service Code, of their rights as well as obligations, and of the nominated officer within their department. We remain concerned that this is not common knowledge in all departments, and we cannot stress too strongly the importance of addressing this.

2.4 A further potential channel for unauthorised disclosure is through publication of newspaper articles or memoirs by a civil servant who has previously left civil service employment. Sir Christopher Meyer is an example. Again, the FDA believes that this is inappropriate and is supportive of recent attempts by the Cabinet Office to strengthen the rules governing such disclosure in the media. That said, the FDA believes a distinction needs to be drawn between the unauthorised disclosure of official confidential information in this way, and retired civil servants using the knowledge and experience they have gained in their careers to offer commentary and analysis of unfolding contemporary events; civil servants in this situation can add substantially to the public and political understanding of the issues in question.

3. What are the effects of unauthorised disclosures of information on the operations of government?

3.1 The FDA believes that unauthorised disclosures of information ('leaks' in other words) are corrosive of trust and the effective operations of any government department. If the leaks are from civil servants, and Ministers lose confidence in the confidentiality of civil servants within their department, it damages, potentially for the long term, the civil service

as a whole and can raise questions about the political impartiality of the Civil Service, which is one of its core principles.

3.2 However, as explained below, the FDA believes that most unauthorised disclosures of information in fact stem from political sources within government, that is, from Ministers or special advisers. Special advisers are of course civil servants themselves but unless otherwise stated they are excluded from the term civil servant used in this document.

4. How appropriate and effective are existing processes for investigating unauthorised disclosures of information? How could they be improved?

4.1 The existing processes for investigating unauthorised disclosures are in the main relatively ineffective. This is primarily because most such unauthorised disclosures stem from political sources and in these circumstances there is little real desire to identify the source of any such leak. Even where such a leak has potentially come from a civil servant it can be a very time consuming and difficult process to identify the individual concerned. Experience suggests that this is only occasionally possible unless the individual chooses to identify themselves by one means or another, or is the author of a series of such leaks (which in turn assists any leak enquiry by allowing the potential identification of those who would have had access to the breath of information being disclosed).

4.2 There are occasions when, to be frank, a leak inquiry is launched purely as a gesture. It can be questioned whether there is any value in such action, even as a deterrent. At the same time, even when there are grounds for believing that a civil servant may have leaked information, it is important that individuals receive a fair hearing, and departments do not simply seek to scapegoat people. This is particularly important where there is media interest in the issue, and one should not underestimate the pressure that the glare of publicity can bring upon an individual who is not used to being in the 'public eye'.

4.3 It should also be noted that in some limited circumstances leaks have stemmed from individuals whose primary reason for seeking civil service employment was to gain access to information. There have been incidences of national newspapers directing the purloining of information in this way although the FDA is not aware that any formal action against an individual or media outlet has ever resulted.

5. What action is taken against civil servants who disclose information without authority? Is the action appropriate?

5.1 The FDA accepts that unauthorised disclosure of information is a serious disciplinary offence that can warrant dismissal. However, a criminal prosecution of a civil servant who has leaked information should be contemplated only in the most serious of circumstances (for example when it can be clearly shown that national security is potentially undermined).

6. How appropriate and effective is the law governing the disclosure of official information

(including the Civil Service Code)? How could it be improved?

6.1 The FDA considers that the Civil Service Code provides an effective mechanism for governing the duty of confidentiality owed by civil servants to Ministers (albeit with concerns about how effectively this has been communicated as we set out above). However the FDA considers that at present the Civil Service Code is essentially in the gift of Ministers and considers that incorporating it into statute (whether through a stand alone Civil Service Act or as part of a wider Constitutional Renewal Act) would be desirable.

7. How appropriate and effective are the arrangements governing the disclosure of official information by ministers and special advisers? How could they be improved?

7.1 The FDA believes that the majority of leaks in fact occur through political sources. There are a variety of motives for such leaking. On some occasions it would appear that the leaking has been done to, in effect, test public reaction to a proposed initiative by allowing its disclosure in the media at an early stage. It can also be undertaken for short term political advantage, when information is released earlier than would have been the case. The deliberate disclosure of partial and misleadingly selected statistics about knife crime in November 2008 is a case in point, which the Government might well have 'got away with' had it not been for the vigilance of the UK Statistics Authority. It is also apparent that some leaking takes place on a purely malicious basis to cause damage to other Ministers. There is a widespread view in the Civil Service that the 'Downing Street machine' plays an important role in many politically inspired leaks (although this raises the issue of what should be regarded as 'unauthorised' since, except where constrained by statute, it is surely not possible to speak of the Prime Minister not being authorised to deal with government information as he sees fit).

7.2 The effect of all such behaviour by political sources within government can be damaging to morale across government in the round, and it is certainly regarded as corrosive by many departments. In addition, it may well add unnecessarily to the burdens on hard pressed officials.

7.3 However, there appears little action that the Civil Service itself can take in such circumstances. Although as noted above special advisers are technically civil servants and therefore under the authority of the departmental Permanent Secretary, in practice she or he is almost powerless to act unless the Minister concerned or the Prime Minister is willing to sanction such action. The FDA is not aware that this has ever been sanctioned. It is hard to envisage a way in which this matter can be addressed as it is a question of political culture, not of sanction.

7.4 A further disturbing trend has been the tendency in recent years for both Ministers and special advisers to publish memoirs soon after leaving office, and whilst the Cabinet Office has sought to 'edit' such publications, individuals have not always agreed changes. This deliberate and self-interested behaviour by politicians sets an unwelcome example to civil

servants, and has the potential to undermine trust more generally in government. In principle, the approach to the memoirs of civil servants and of Ministers should be on a comparable basis.

8. Is there anything that Whitehall can learn from the approaches of other sectors or countries?

8.1 Civil servants, particularly in the core government departments, work in a highly political environment where information is always a valuable currency. The Civil Service has a high standard of professional conduct and integrity, and leaks by civil servants are rare. We believe that the civil service acts, by and large, fairly and promptly where leaks are identified as having a civil service source, and that the main problem that needs to be addressed is a political culture of systematic leaking.

8.2 That said, the FDA campaigned long and hard for the introduction of the Civil Service Code and we believe that it is matter that requires a continuing and continual vigilance on the part of the senior management of the Civil Service, the Civil Service Commissioners and Parliament to ensure that every civil servant understands both understands their obligation of confidentiality but also their rights if they believe that a breach of the Code is or has occurred.

Memorandum from Public Concern at Work (LWB 07)

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

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.
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?
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.

The current law

4. 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.
5. 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).
6. 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.

7. 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.
8. 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 if 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.

Good Practice

9. 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?
10. 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.
11. The Government acknowledged this in its White Paper Response on Standards in Public Life⁵ 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

⁵ Cm 6723 Dec 2005

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 wider disclosure.

12. 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 needs to be addressed by fostering an open and accountable culture.
13. 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 2007.⁶ 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 is attached at appendix A. It contains detailed commentary on how Departments might improve their policies and sets out how to best comply with the six criteria for good practice as outlined by the Committee on Standards in Public Life (CSPL).
14. 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.
15. 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. 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.

⁶ 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>.

Independent Advice

16. Where staff are worried about what to do if they suspect wrongdoing in the work place, 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.

External Oversight

17. 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.
18. 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.⁷ Clearly there is a gap in external oversight if this remains the position.
19. 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 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.
20. 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.

⁷ Letter of 25 July 2003 from Baroness Usha Prashar CBE to Guy Dehn, Public Concern at Work

Assurances against reprisal

21. 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.
22. 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.
23. 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.
24. 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.

Promotion and monitoring

25. 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.⁸ 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.
26. We note in addition the Civil Service Commissioners have surveyed Departments on how well they promote the Code. We suggest as part of a 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?

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.

⁸ Civil Service Commissioners Annual Report 2007/8.

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.

February 2009

Appendix 1

WHISTLEBLOWING AND WHITEHALL

A review of how the policies of Government Departments
comply with accepted good practice on whistleblowing

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WHISTLEBLOWING AND WHITEHALL

A review of how the policies of Government Departments comply with accepted good practice on whistleblowing

Introduction

This paper reviews the advice that Government Departments give their staff on whistleblowing, in the light of the good practice set out by the Committee on Standards in Public Life and accepted by Government (set out in Annex A). The time is right for such a review as the value of whistleblowing in promoting accountability and deterring malpractice is now being recognised at the top of Whitehall. The new Civil Service Code issued in June 2006 - the relevant sections of the Code are set out at Annex B - for the first time mentions the Public Interest Disclosure Act 1998 (PIDA).

The purpose of the review is to assess where good practice in Whitehall is on this issue and to inform the work of Departments as they develop their whistleblowing arrangements. It should be stressed that the review looks only at the content of Departmental policies and it does not assess the extent to which those policies are promoted by Departments or work in practice. This is something that we will return to in the light of the Government's recognition – stated in its White Paper Response on Standards in Public Life (Cm 6723, Dec 2005) – of 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.'

As the League Table on page 12 shows, while the majority of Government Departments offer their staff some helpful guidance on whistleblowing, few policies fully comply with accepted good practice and some fall far short of it. The major flaw stems from what appears to be a concerted desire and intent that whistleblowing concerns should be kept internal in all circumstances. The origins of this flaw lie in the Directory of Civil Service Guidance (extracts of which are in Annex B) which is used by Government departments to comply with the law and good practice. The result of its errors are that a good many policies flout accepted good practice on whistleblowing, ignore the Civil Service Code and are misleading about the statutory scheme for whistleblowing in the Public Interest Disclosure Act.

Methodology

In August 2006 we wrote to Government Departments asking them to send copies of their current whistleblowing policies or to confirm that the policies we had collected in 2005 were still current. We were grateful for the co-operation we received from most Departments. We should record however that, despite reminders, we received no reply from the Cabinet Office, the Department of Trade and Industry (DTI), the Department of

Constitutional Affairs (DCA) or the Department for the Environment, Food and Rural Affairs (DEFRA). We have in these cases assumed that the policies they supplied to us in 2005 remain operative.

We reviewed each Department's policy against six criteria, based on the good practice recommendations of the Committee on Standards in Public Life, set out in Annex B. After a draft of this paper and the rankings were supplied to those departments that had participated in the survey, we reviewed the analysis in the light of comments received and added one additional criterion – rating how well we consider the policy would give reassurance to an official unsure whether or how to raise a concern. The overall rankings we gave each Department are set out in the league table on page 12 (which also explains the abbreviations used here for Departments' names). These rankings represent our estimate of how far Departments meet the basic requirements of setting out advice to staff on policy. As stated above, this was a paper review and did not cover key issues such as how the guidance is communicated to staff, how it actually works in practice and whether staff are aware of it.

THE SEVEN CRITERIA

1. Commitment & clarity

Leadership is paramount. In order to deter and detect malpractice, it needs to be made clear at the highest levels of the organisation that it treats malpractice seriously and welcomes employee concerns. If employees are unsure of their organisation's commitment to these two points, it is unlikely they will raise concerns about malpractice. The same principle applies to Government departments.

It is good practice to make clear at the outset that the Department is committed to achieving the high standards of conduct. For example:

The Department of Health is committed to achieve the highest possible standards of service and ethical standards in public life. Members of staff should not feel intimidated in reporting wrongdoing that should be disclosed or raising matters that they feel concerned about.

Placing a whistleblowing policy in this context is helpful as it gives the right signals and helps embed a positive approach to accountability. It is useful to go on to say that staff are encouraged to raise concerns even if they have only a suspicion – 'if in doubt, raise it' is an encouraging message which some Departments make explicit (DfES). The Department for Culture, Media and Sport (DCMS) elaborates as follows:

If something is troubling you which you think we should know about, please tell us straight away. We would rather that you raise the matter when it is

just a concern rather than wait for proof.

We think this strikes the right tone: it is misguided for employers to suggest to staff that whistleblowing is confrontational. Nor is it desirable to urge whistleblowers to keep silent until they have proof. In this context statements like ‘the more evidence you can present the better’ (MOD), though not untrue, might encourage amateur investigation and prove unhelpful to the Department and indeed to the whistleblower (as the courts have held an overzealous investigation can jeopardise protection under PIDA⁹). The message ‘You do not need proof; that is our responsibility’ (DTI, FCO) is better.

It is important that the policy distinguishes between public concerns (whistleblowing) and private grievances and gives practical examples of each. Some Departments have done this, and the following useful examples of public concerns have been given:

- fiddling expenses claims (MOD)
- rigging a contract for personal gain (MOD)
- misuse of official information to further private interests (DfES)
- bias in the public appointments process (DfES)

as against examples of grievances:

- not having been promoted (MOD)
- harassment/bullying (MOD/DH)

In our view it is unhelpful and counterproductive to mix in with concerns about wrongdoing matters of individual conscience – such as the options for an official who is strongly against abortion when his or her policy work takes the official into this field.

Cabinet Office advice to staff is in need of amendment. It is headed ‘Procedure for use by Cabinet Office staff who wish to make an appeal under paragraph 11 of the Civil Service Code’. This is hardly inviting or reassuring to an official who is concerned about some possibly serious wrongdoing but is unsure to whom they should talk. Additionally it is unsatisfactory because the term ‘appeal’ is overly formal, if not adversarial and inaccurately describes the purpose of those who raise whistleblowing concerns.

While supporting documents and FAQs can be very helpful, clarity is not aided where there is an inconsistency between these documents. For example, the FCO supplied staff with a circular, a chapter of guidance, a leaflet and a sheet of ‘Frequently asked questions’ which are not always consistent with each other.

⁹ Bolton School v Evans (Court of Appeal) [2006] EWCA Civ 1653

2. Offering an alternative to line management

It is right to encourage staff to see their line manager as the normal first port of call. However there will be cases where staff do not wish or think it appropriate to use the line management chain. Their concern may relate to the behaviour of an immediate manager and in some cases they may be reluctant to refer the matter further up the management chain. The option of by-passing this chain is consistently made available, but there are a variety of approaches. These are the contacts within Departments, but outside line management, which are named in policies:

- Nominated Officers (generally)
- Officers with professional responsibility for standards (MOD)
- Departmental advisers specialised in whistleblowing (DfES, MOD, DTI)
- Internal audit (DH, DCLG, DCMS, DCLG)
- HR (DCMS, DfID, DfES, FCO, DCA)
- Welfare Officers (HO, DCA, DFID)
- A Risk Assurance Division (DWP)
- A Departmental whistleblowing hotline (DWP, DEFRA)
- Special routes for particular issues – notably special contacts (sometimes a hotline) for suspicions of fraud (DFID, HO, DH, MOD, FCO).

Trade Unions and the Civil Service Commissioners are also mentioned in this context. This will be confusing to some as they are not part of the Department's command and control. In our view they each fall more properly under other sections and we deal with them below.

Usually more than one of these options is available. However in a few cases, Nominated Officers are the only contact mentioned (SE, HMT, DCA, Cabinet Office). As they tend to be very senior officials, who may not be or be seen to be readily approachable, that may prove counter-productive - particularly if the single Nominated Officer is also the source for advice on how to approach the Civil Service Commissioners if the official is dissatisfied with his/her response (SE). Now that the role of the Commissioners, including their willingness to consider taking reports direct, and their contact details, are clearly spelt out in the Civil Service Code, there seems no need to interpose anybody between the civil servant and the Commissioners.

3. Access to independent advice

In situations where staff feel unsure whether or how to raise a concern or where they suspect the overall management may condone or not wish to learn about some improper conduct, staff will find themselves in a dilemma about raising the concern with internal contacts. For this reason, they need to be able to discuss their concerns with an independent body.

Not all policies address this point. Where they do, they mention one or more of the following possibilities:

- Trade Unions (DCMS, DfES, DH, DFID, HO, DTI, Cabinet Office, DCA, DEFRA)
- Public Concern at Work (PCaW) (DCMS, DfES, DH, DFID, DWP, HMT, DTI, DEFRA)
- An independent professional external provider (the Employment Assistance Programme) (FCO, DFID)
- Legal advisers (DCMS, DH, DTI, DEFRA)
- A named contact at the NAO (FCO, DCLG)
- The Financial Services Authority's helpline (DH)

The last two of these are external regulators and are unlikely to hold themselves out as being a source of confidential advice – they fall more properly under the section which deals with raising concerns externally (see section 5 below). Departmental legal advisers will have a primary duty to their Department rather than to the individual official and so should fall more properly under section 2 above.

4. Openness & confidentiality

Several policies contain sensible statements about respecting whistleblowers' confidentiality. One good example is DCMS:

The Department recognises that you may want to raise a concern in confidence under this policy. If you ask us to protect your identity by keeping your confidence, we will not disclose it without your consent. However, in some circumstances, this may make it more difficult to fully investigate the matter. If the situation arises where we are not able to resolve the concern without revealing your identity, we will discuss with you how we can proceed.

This statement is helpful. The assumption is that concerns are raised openly but where confidentiality is requested, it makes clear there will be advance consultation if it proves difficult to resolve the concern without revealing the whistleblower's identity.

Conversely, whistleblowers, especially in cases where they are only voicing suspicions, may not be encouraged to come forward by policies which:

- make clear that in any case, their report, and the conclusions of the Nominated Officers on it, will go to the Permanent Secretary (HMT).
- state starkly that confidentiality 'cannot be protected where this would have

an adverse effect on any disciplinary, civil, or criminal proceedings' (DH).

On the other hand, policies should not encourage staff to assume or seek anonymity. On this issue, the DCMS policy is again worth quoting as a good example:

Remember that if you do not tell us who you are, it will be much more difficult for us to look into the matter or to give you feedback. Accordingly, while we will consider anonymous reports, this policy is not designed to deal with concerns expressed anonymously.

Anonymous disclosures will also raise immediate questions about the motivation, good faith and reliability of the whistleblower. One policy (DfES) states that whistleblowing covers certain cases of discrimination 'where the whistleblower has good reason to preserve their anonymity'. The difficulty here is that in cases of specific sexual discrimination or harassment it is very difficult for an employer to proceed lawfully or effectively without the evidence of the victim and to imply otherwise can only sow confusion and raise expectations that cannot be delivered.

While there is nothing in the legislation about respecting whistleblowers' confidentiality, one policy (FCO) claims the Act 'gives an assurance of confidentiality' for disclosures made in the right way.

We believe open reporting should be encouraged, that staff should understand that their identity may be deduced even if it is not disclosed, and that withholding their identity can increase the focus on the messenger, rather than the message. DCA's policy is strong on open reporting, saying 'you are encouraged to put your name to any disclosures you make. Concerns expressed anonymously are much less credible and more difficult to investigate fully....'. While this is good, it does not mention the option of raising the concern in confidence should an official be worried, with good reason or not, about possible reprisals from a manager or colleagues.

One policy states 'if you raise a concern in good faith, i.e. not maliciously.... your discussions with any of the above officers/units remains completely confidential' (FCO). This is an undeliverable promise: the content of the discussion, at least, will need to be revealed if any action is to be taken by the Department on any serious wrongdoing.

5. Whistleblowing outside

Staff need to be aware of when and how they may properly raise concerns outside the Department - for example with an external auditor, a regulatory body or a law enforcement agency. Not only is this an obligation on officials, where there is evidence of a criminal or unlawful act, under paragraph 17 of the Civil Service Code, but it is a key aspect of the statutory scheme in PIDA. This is the main area where Departments seem to have real

difficulty, caused largely, we assume, by the inaccurate advice given in the Directory of Civil Service Guidance. This Guidance sets out a purely internal procedure, with the possibility of reporting to the Civil Service Commissioners if the whistleblower is unhappy with the response, and then states that ‘these procedures should also be followed if you wish to make any other disclosure covered by the 1998 Act’. This advice conflicts with PIDA’s approach and has the unintended effect of triggering the protection for media disclosures (because it will give officials reasonable cause to believe they will be victimised for going to a prescribed regulator). Not surprisingly, some Departments have been misled by this central advice and their policies are seriously defective as a result (e.g. FCO, DCMS, SE, DCA, Cabinet Office).

While internal reporting should be encouraged and is the most readily protected form of disclosure under PIDA, some Departments go beyond encouraging it by making general statements implying it is the only option. As we have said, not only does this flout good practice accepted by Government for the whole of the public sector, it ignores the Civil Service Code, and fundamentally misunderstands and misdescribes PIDA. Examples include:

- whistleblowing..... enables staff to be protected while reporting unethical, criminal or unlawful activity to employers (DfES)
- a person is protected if they make a disclosure in good faith to their employer or to a person appointed by their employer to receive disclosures (FCO)
- staff are encouraged to raise matters through internal procedures where appropriate and practical, and the legislation specifically refers to compliance with internal procedures authorised by an employer (HO)
- two conditions must be met. The first is that the disclosure is of a certain type – i.e. what is known as a ‘qualifying disclosure’. The second is.... to make a disclosure internally in the Department (MOD).

In the absence of other advice, staff reading these statements are unlikely to understand that external reporting is also protected in a wide range of circumstances. If they are unsure whether their department will deal with the issue or will protect them from reprisals, this approach leaves staff with two simple options – the first is silence and the second is the anonymous leak. While some policies (DfES, DEFRA, DTI) suggest that whistleblowers should seek advice from their Trade Union or from PCaW on when to raise concerns externally, best practice as set out by the Committee on Standards in Public Life, accepted by Government and reflected in the Civil Service Code is that policies should address the options for external disclosure.

Some policies mention the Civil Service Commissioners, but usually emphasise only their role as a final appeal when the whistleblower is not satisfied with the outcome of the internal procedures (HMT, DfES, DCMS, Cabinet Office, DCA). In fact the Commissioners have recently been allowed to accept a case which has not been raised locally first and so they no longer exercise what is purely an appeal or review function.

However, while we accept the Commissioners have an important and welcome role to play, we do not think they should be the sole external body mentioned in a policy. First, their remit at present appears more akin to reviewing how a concern has been handled or how a whistleblower has been treated rather than whether the concern about malpractice has been substantiated and needs to be addressed. Secondly, while the Commissioners are independent of Departments, that may not be the impression that all civil servants have. For these reasons, there seems to us to be a need to mention other external contacts such as those statutory bodies prescribed under PIDA.

This does not imply that policies should spell out exactly when going to the media is allowed – indeed policies can sensibly say they should not be read as authorising media disclosures. However in our view it is counter-productive and extreme to say that going to the media would almost certainly constitute a disciplinary offence. We agree that going direct to the media is unlikely to be helpful or a sensible first port of call in almost all cases. The circumstances in which PIDA protects media disclosures – essentially where they are both justified and reasonable - are uncontroversial and Departments should recognise the balance in the Act. What is important is that the policies should clearly set out independent external bodies that can be contacted and it is this we now consider.

Under PIDA, staff are protected if they report to a prescribed regulator. PIDA protects disclosures to specified regulators because the existence of such protection makes it more likely that concerns will be properly raised and addressed internally and far more likely staff will have the confidence that they will. This beneficial effect can only be achieved if staff and managers are aware of the external route. MOD has made this clear to their staff in these terms:

PIDA also offers legal protection if you should make your disclosure to a relevant regulatory body – such as, for example, the NAO or the HSE – provided that you have a genuine and reasonable belief that something is wrong.

It is not the case, as DEFRA's policy states, that the whistleblower must have a 'good reason' before raising the matter outside the organisation. DEFRA's policy defines 'good reason' as including cases where employees reasonably believe they will be victimised, or that the organisation will cover up the matter. This is wrong and shows they are confusing the conditions for reporting to a regulator with those for making a wider disclosure (e.g. to the media).

The National Audit Office will have a clear interest in any financial matters likely to be raised under whistleblowing policies and it is for this reason that it is prescribed under PIDA in respect of 'the proper conduct of public business, value for money, fraud and corruption in relation to the provision of centrally funded public services'. But the helpful role of the NAO and of prescribed regulators in general is not well explained and is an area where most Departments could improve their guidance.

In this context, some misleading advice is given about compliance with confidentiality requirements. The Civil Service Code makes it clear that disclosures to appropriate authorities is authorised and PIDA itself makes it clear such disclosures are protected, notwithstanding any duty of confidence. It is therefore misleading to say that 'A civil servant choosing to make a disclosure externally..... would need to take account of their duty of confidentiality in regard to information not in the public domain' (HO). This is not a relevant factor under PIDA or the Civil Service Code where a civil servant approaches a regulator.

6. Sanctions

As part of the critically important protection for bona fide whistleblowers, policies should make clear to both management and staff that victimising employees or deterring them from raising a concern about fraud or abuse may be a serious disciplinary offence. Equally, it should make clear that abusing the whistleblowing process by raising unfounded allegations maliciously may also be a serious disciplinary matter.

We think that the DCMS policy gets it right by assuring whistleblowers that they will not be subject to disciplinary action if they raise a matter in good faith, but adding:

this assurance does not extend to someone who maliciously raises a matter they know is untrue.

It is important that Departments recognise that the fact a concern may not turn out to be well-founded does not mean it was not raised in good faith. Accordingly it is counterproductive for a policy to state this may be so by saying 'staff who make claims which are untrue, vexatious or malicious may be subject to disciplinary action' (DH). The same policy says elsewhere, confusingly, that staff may be disciplined for making 'mischievous, malicious or vexatious complaints which they know to be untrue'. The latter seems to us the correct statement: the public interest is served if staff come forward with concerns that are honestly believed, even if they turn out to be untrue. It is also served if staff come forward with true concerns even if their motives may be mixed. We think it self-evident that it is only if a report is both untrue and maliciously motivated that there may be a need to invoke disciplinary procedures.

Another policy (MOD) states that whistleblowers qualify for protection provided the disclosure 'is not knowingly false or malicious and you have no vested interest in the outcome'. This takes an erroneous view of the statutory regime and, we believe, of the wider public interest. While there is no public interest in encouraging staff to raise concerns that they know are false, there could yet be in cases where they themselves are motivated by malice or where the whistleblower may be seen to have an interest in the outcome – for example the dismissal of a corrupt and disliked boss.

Some policies state that ‘if you make a disclosure to someone outside the internal whistleblowing procedure and if what you say breaches the Official Secrets Act, then you may be subject to criminal and/or disciplinary procedures’ (DEFRA, DTI). It is true that under PIDA a disclosure is not protected if the whistleblower is shown to have committed a criminal offence by making it, but this does not hinge on whether the disclosure is internal (within the Department) or external (e.g. to a regulator). As the Official Secrets Act is limited to cases where damaging disclosures are made which affect security, defence, criminal investigations or international relations, it is unlikely to be breached by whistleblowers other than in rare cases. This will be worth making clear, since there remain myths in and out of Whitehall about the scope of the 1989 Official Secrets Act, deriving from memories of the obsessively insecure 1911 Act.

7. Reassurance

After the initial consultation with the participating departments on the draft report, an additional criterion has been included in the assessment of departmental whistleblowing policies. This criterion addressed how well we rated the policy as giving reassurance to a staff member who read it so that he or she would raise a concern in line with it. In performing this, we drew on the experience generated from our helpline which enables us to pick up on issues and common problems that whistleblowers face when they first come across potential wrongdoing and are unsure whether or how to raise their concerns.

The Department of Health policy is an example of a weak policy in this respect. Its use of confusing flowcharts and the section entitled “Interaction With Legislation” does little to reassure the reader. This policy also confuses the legal test for prescribed bodies with wider tests. The policy of the Ministry of Defence deals both with handling concerns and raising concerns – resulting in a document that has two different purposes and two distinct readers.

OTHER ISSUES

In an attempt to assist Departments review their whistleblowing arrangements, we set out below other issues which they should also be considering.

Staff awareness

Staff should be informed of the policy and the contact points in induction packs and as part of training courses. They should also be regularly reminded of them by such means as emails and posters. It is vital that staff trust the contact points and they should be assured of their discretion and probity. Telling good stories will help –all too often it is only negative whistleblowing stories that become known.

We have little information on how Departments ensure awareness, though we know most have placed their policies on their websites. This is a helpful step, but not sufficient to

ensure awareness. We are aware that dissemination of the policies is patchy in practice, and that GRECO, the Council of Europe's anti-corruption body, recommended in its Second Report on the UK published in 2004 that the issue should be covered in in-service training. We also note that the Government agreed, in its response to the Tenth Report of the Committee on Standards in Public Life, that there is a need for regular communication to staff about the avenues open to them for raising concerns. It will be important for the Cabinet Office to follow up these points.

Review

There is evidence that many Departments revised their guidance during 2006, whether in response to the new Civil Service Code or as a result of the review of policies by the NAO. In general these changes have been positive. Nevertheless we encourage Departments not to leave the matter there but to monitor their procedures regularly. Ideally Departments should annually review how the procedures work in practice, check levels of staff awareness and trust, and refresh the policy as needs be.

By contrast, the absence of any reply to or acknowledgment of this research from the Cabinet Office, the Department of Trade and Industry, the Department of Constitutional Affairs or the Department for the Environment, Food and Rural Affairs paints another picture. It suggests that in these leading departments there has been no review and none is planned to ensure departmental policies comply with the statutory scheme, Government policy and the Civil Service Code.

Public Interest Disclosure Act 1998 (PIDA)

We are glad that all the guidance we have seen shows some awareness of PIDA and we are pleased that this recognition of the statutory scheme is now picked up in the new Civil Service Code. Indeed, if anything, we feel there may be too much emphasis on PIDA in the policies of the Department of Health and the Ministry of Defence as the law is only an safety net to a good policy which comes into play when things have gone wrong. As an example, policies occasionally refer to the concept of reporting 'under PIDA' (FCO, DCMS). This phrase seems to be based on a misunderstanding: it makes no difference whether or not the whistleblower says they are reporting under PIDA. The Act protects disclosures which comply with its tests, even if the person making the disclosure is unaware of its existence.

Summary and recommendations

As this review shows, while the clear majority of Government Departments offer their staff helpful guidance on whistleblowing, few policies fully complied with accepted good practice and some fell far short of it. The league table on page 12 rates the whistleblowing policies of Government departments against each of the six criteria of accepted good practice and against a seventh, the reassurance the policy would give an official unsure whether to raise a whistleblowing concern or not.

While congratulations are due the top scoring departments on the content and tone of their

whistleblowing policy, the performance of the bottom three departments places them firmly in the relegation zone. There is one important caveat to this exercise – it is a review of the policies as stated, it does not assess how each department does in practice encourage or discourage its staff to raise concerns and how well its staff and managers are aware of and confident in the arrangements.

As this review shows a major flaw in many of the policies stems from what appears to be a concerted desire to insist that whistleblowing concerns should be kept internal in all circumstances. Such misplaced and counter-productive advice appears to be the result of the erroneous provisions in the Directory of Civil Service Guidance (extracts in Annex B). By suggesting – albeit wrongly – that the legislative framework creates a hermetically sealed internal process for public interest whistleblowing, the Guidance gives managers little encouragement to address any substantive concern which may cause disruption or embarrassment. This is especially the case where an organisation’s hierarchical style means a senior manager’s default is to back his manager or where the rotation of posts means there is a good chance that by the time the risk does eventuate it will be someone else’s problem.

With the new Civil Service Code expressly citing the protection in the Public Interest Disclosure Act, its referral to the Directory of Civil Service Guidance as a source of valid information suggests a lack of coherence and leadership at the centre. The fact that the Cabinet Office languishes at the foot of the league table reinforces that impression.

We recommend that

- The Cabinet Office should amend the Directory of Civil Service Guidance without delay so it provides accurate and helpful guidance on the Public Interest Disclosure Act and reflects the new Civil Service Code;
- The Departments at the foot of the league table (Communities & Local Government, the Scottish Executive and the Cabinet Office) should urgently upgrade their whistleblowing arrangements;
- All Departments should annually review their whistleblowing arrangements in the light of any serious incidents that have occurred where it is reasonable to assume that an official should have had a genuine concern about the issue ; and
- All Departments should ask staff about their awareness of and confidence in the whistleblowing arrangements as part of their annual staff surveys.

<i>Department</i>	<i>Commit & clarity</i>	<i>Options outside line manager</i>	<i>Independent advice</i>	<i>Openly & confident</i>	<i>External o'sight</i>	<i>Sanction</i>	<i>Reassu- rance</i>	Total
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Culture, Media and Sport (DCMS)	3	4	4	4	4	4	2	25
International Development (DFID)	3	4	4	4	4	3	2	24
Education and Skills (DfES)	4	3	4	3	2	4	3	23
Home Office (HO)	3	3	3	4	2	4	2	21
Trade and Industry (DTI)	3	2	4	3	2	4	4	20
Department of Health	3	4	4	2	3	3	0	19
Environment, Food and Rural Affairs	3	3	4	3	2	2	2	19

(DEFRA)								
Transport (DfT)	3	2	2	3	2	4	3	19
Work and Pensions (DWP)	3	3	4	2	1	2	2	17
Foreign and Commonwealth Office (FCO)	2	3	3	3	1	2	2	15
Defence (MOD)	3	4	0	3	2	2	0	14
HM Treasury (HMT)	3	2	3	1	1	2	1	13
Constitutional Affairs (DCA)	1	1	2	1	1	1	2	9
Communities & Local Government (DCLG)	2	2	0	0	1	0	1	6
Scottish Executive (SE)	0	1	1	0	2	0	0	4
Cabinet Office	0	1	1	0	1	0	0	3

**LEAGUE TABLE OF WHITEHALL DEPARTMENTS
ON WHISTLEBLOWING GOOD PRACTICE**

ANNEX A

GOOD PRACTICE ON WHISTLEBLOWING

Since its launch under the chairmanship of the late 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”. Its approach and recommendations have been adopted by the Combined Code and regulatory bodies as relevant to organisations in all sectors. 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.”

In making this work, the Committee has said that “leadership, in this area more than in any other, is paramount” and that the promotion of the whistleblowing arrangements is critically important. The Committee has long distinguished a ‘real’ internal whistleblower from an anonymous leaker to the press and has recently stressed that the Public Interest Disclosure Act should be seen as a ‘backstop’ for when things go wrong and not as a substitute for an open culture. The Committee’s early recommendations were accepted in the 1997 White Paper on The Governance of Public Bodies.

Drawing in part on the practical experience of Public Concern at Work, the Committee has recommended that a whistleblowing policy should make the following points clear:

- 1. The organisation takes malpractice seriously, giving examples of the type of concerns to be raised, so distinguishing a whistleblowing concern from a grievance.*
- 2. Staff have the option to raise concerns outside of line management.*
- 3. Staff are enabled to access confidential advice from an independent body.*
- 4. The organisation will, when requested, respect the confidentiality of a member of staff raising a concern.*
- 5. When and how concerns may properly be raised outside the organisation (e.g. with a regulator).*
- 6. It is a disciplinary matter both to victimise a bona fide whistleblower and for someone to maliciously make a false allegation.*

However good the written policy is, how it works in practice is critical. As the Commerce & Industry Group state: “How an organisation responds to a whistleblowing situation is the litmus test of its corporate governance arrangements which proves whether they are genuine or just lip service”. In its most recent report the Committee on Standards in Public Life “emphatically endorsed” additional elements of good practice drawn from Public Concern

at Work's evidence that organisations should:

- (i) *ensure that staff are aware of and trust the whistleblowing avenues;*
- (ii) *make provision for realistic advice about what the whistleblowing process means for openness, confidentiality and anonymity;*
- (iii) *continually review how the procedures work in practice;*
- (iv) *regularly communicate to staff about the avenues open to them.*

In its 2005 White Paper on Standards in Public Life, the Government responded that “*it agrees on the importance of ensuring that staff are aware of and trust the whistleblowing process, and on the need for the boards of public bodies to demonstrate leadership on this issue. It also agrees on the need for regular communication to staff about the avenues open to them to raise issues of concern.*”

EXTRACTS FROM EXISTING CENTRAL ADVICE TO CIVIL SERVANTS

The Civil Service Code

The new CSC, issued 6 June 2006, includes the following:

15. Your department or agency has a duty to make you aware of this Code and its values. If you believe that you are being required to act in a way which conflicts with this Code, your department or agency must consider your concern, and make sure that you are not penalised for raising it.

16. If you have a concern, you should start by talking to your line manager or someone else in your line management chain. If for any reason you would find this difficult, you should raise the matter with your department's nominated officers who have been appointed to advise staff on the Code.

17. If you become aware of actions by others which you believe conflict with this Code you should report this to your line manager or someone else in your line management chain; alternatively you may wish to seek advice from your nominated officer. You should report evidence of criminal or unlawful activity to the police or other appropriate authorities.

18. If you have raised a matter covered in paragraphs 15 to 17, in accordance with the relevant procedures [1], and do not receive what you consider to be a reasonable response, you may report the matter to the Civil Service Commissioners. The Commissioners will also consider taking a complaint direct. Their address is:

3rd Floor, 35 Great Smith Street, London SW1P 3BQ.

Tel: 020 7276 2613

email: ocsc@civilservicecommissioners.gov.uk

If the matter cannot be resolved using the procedures set out above, and you feel you cannot carry out the instructions you have been given, you will have to resign from the Civil Service.

¹The whistleblowing legislation (the Public Interest Disclosure Act 1998) may also apply in some circumstances. The Directory of Civil Service Guidance gives more information: www.cabinetoffice.gov.uk/propriety_and_ethics.

The Directory of Civil Service Guidance

The Directory of Civil Service Guidance dates from 2000. The existing text (vol 2 pp 54-56) summarises the 1998 Act effectively. It then goes on to state that:

6 The Civil Service Code advises that you should report any actions that are inconsistent with its provisions (paragraph 11). First you should raise the issue with your line manager. If for any reason you would find that difficult you should report the matter to the nominated appeals officer within your department.

7 If you are unhappy with the response you receive, you may report the matters to the Civil Service Commissioners (paragraph 12 of the Civil Service Code). Exceptionally the Civil Service Commissioners will consider accepting a complaint direct.

These paragraphs are more introspective than PIDA and difficult to reconcile with the Civil Service Code which states (now in para 17) that evidence of criminal or unlawful activity should be reported to 'the police or other appropriate authorities'.

PIDA protects disclosures to statutory regulators such as the National Audit Office because the existence of such protection makes it more likely that concerns will be properly raised and addressed internally. However this beneficial effect can only be achieved if staff and managers are aware of the external route. Contrary to the spirit and letter of PIDA, paragraph 8 of the Guidance then states

8 These procedures should also be used if you wish to make any other disclosure covered by the 1998 Act.

The final section of the Guidance emphasises this different approach and is difficult to reconcile with the legislation:

Will I be protected if I blow the whistle before going through the internal procedures?

9 Only you can make this judgement, and in doing so you will need to consider the preceding paragraphs carefully. It is preferable and this is at the heart of the Public Interest Disclosure Act to raise the matter internally if appropriate and practical. It is after all in the interests of the organisation and its workforce that issues and concerns are aired in this way. If you are in any doubt you should speak to your departmental nominated officer. Your conversation will be treated in absolute confidence

First, this implies that internal disclosure is not whistleblowing. Secondly, it gives an overly complicated and negative impression of the protection available where an official goes, say, to the National Audit Office, the Information Commissioner or another prescribed regulator. Thirdly, as expressed it appears to put the departmental nominated officer in an impossible position if he is told of some serious malpractice as he is expected to keep it confidential rather than see that it is dealt with in the Department's interests.

Memorandum from the Civil Service Commissioners (LWB 08)

Introduction

1. The Civil Service Commissioners welcome the Public Administration Select Committee's inquiry into unauthorised disclosure in government. The Commissioners work with departments and agencies to help them promote the Civil Service values expressed in the Civil Service Code. We believe it is important that the values enshrined in the Code, and the routes open to civil servants to raise concerns when faced with ethical dilemmas, are well known and understood throughout the Civil Service and by the public.

2. To assist the inquiry we thought that the Committee might find it helpful if we briefly set out our role; explain how we hear appeals from civil servants under the Civil Service Code; outline the work we do in helping departments promote the Code; describe our on-going work in relation to the Code; give some thoughts on the unauthorised disclosure of information; and finally set out some conclusions.

Role of the Civil Service Commissioners

3. The Commissioners are independent of the Civil Service and of Government. We are appointed by the Crown on merit following public advertisement and a fair and open selection competition.

4. The Civil Service Commissioners have two primary functions, as detailed in the Civil Service Order in Council, 1995, as amended. First, we are responsible for upholding the principle that selection to appointments in the Civil Service must be on merit on the basis of fair and open competition.

5. Second, we hear and determine appeals raised by civil servants under the Civil Service Code. We were given this role when the Code first came into effect on 1 January 1996. The Code is part of the contractual relationship between civil servants and their employer. Although the Commissioners have important functions relating to the Code, responsibility for the Civil Service Code rests with the Cabinet Office. We worked closely with the Cabinet Office to revise and refocus the Code in 2006, but the Code is not 'owned' by the Commissioners.

Hearing appeals from civil servants under the Civil Service Code

6. The role of the Civil Service Commissioners in hearing appeals under the Civil Service

Code is outlined in the Civil Service Order in Council:

The Commissioners may hear and determine appeals to them by a member of the Service under the Civil Service Code and for this purpose

- *may regulate their own procedure; and*
- *may require the parties to any appeal or to any investigation occasioned by an appeal to provide such information and other assistance as the Commissioners shall think necessary or appropriate; and*
- *may make recommendations.*

7. When a civil servant has concerns that they have been asked to do something which goes against the values described in the Civil Service Code, or believes that they have witnessed the actions of others which go against the values, they should first raise it within their own line management chain.

8. As an alternative to this, or if the concern cannot be resolved within the line management chain, the matter can be raised with a Nominated Officer within the department. Nominated Officers are appointed in all departments and agencies to help civil servants with issues under the Code and to provide a route outside of the management chain for them to raise concerns.

9. The Nominated Officer may help the civil servant to resolve the issue or may offer advice and assistance to help the civil servant pursue the matter further. If the issue has been considered within the civil servant's own department but he or she is still not satisfied then they can approach the Civil Service Commissioners. The Commissioners may also decide to accept an appeal that has not gone through departmental processes.

10. The ability to hear appeals direct from civil servants, without the necessity to go through departmental processes first, was given to the Commissioners at the time of the introduction of redrafted Code in June 2006.

11. The Commissioners pressed for this change, arguing that it was important that there should be a direct route to us for situations in which appeal through the line management chain was impractical; or in situations where the urgency or importance of the appeal meant that it was desirable that it should be considered by independent regulators as soon as possible.

12. Not all approaches to the Commissioners requesting investigations of appeals under the Code are taken forward, for example, when the appellant is not a civil servant, or because the matter is not one that falls under the Code.

13. If the Commissioners accept an appeal then we will launch an investigation. The Commissioners tailor their approach to the appeal to the needs of the individual case. For the most complex cases Commissioners may convene separate evidence gathering sessions with the appellant and the department and might also call upon outside experts.

14. At the end of the appeal process the Commissioners make recommendations. The Commissioners are free to decide what recommendations they make, and to who.

15. We recognise that there may be cases where our investigations lead us to believe that there may be evidence of a major and/or systematic failing of the Civil Service values that warrants in-depth and extensive investigation, of the nature and scale of an official inquiry. We consider that one possible recommendation from any appeal we hear might be that there should be an independent investigation of this scope and significance, armed with sufficient resources and powers. It may be that a body other than us would be best placed to conduct such an inquiry, and this might be the substance of our recommendation.

Helping departments promote the Civil Service Code

16. Since 2003 the Commissioners have, at the suggestion of the Committee on Standards in Public Life, and with the agreement of the Cabinet Secretary, been working with departments to help them promote the Code. We have also been surveying them on their efforts to promote the Code, especially through their induction and training processes. The Commissioners give the findings of these surveys in our Annual Report and also record information supplied to us by departments on the number of appeals under the Code that have been resolved at departmental level.

17. A new edition of the Civil Service Code was drafted in 2006. We worked closely on the new text with a group of Permanent Secretaries supported by the Cabinet Office. The new text was intended to be more relevant to all civil servants and focused specifically on four core Civil Service values: Honesty, Integrity, Objectivity and Impartiality. The Cabinet Office conducted a three month consultation exercise on this text, during which nearly 2,000 comments by civil servants and relevant organisations were received. The revised text was launched by Sir Gus O'Donnell in June 2006.

18. The working group of Commissioners and Permanent Secretaries that had drafted the

new Code continued to meet to consider how best it could be promoted. In July 2007 the Cabinet Office and the Commissioners jointly issued the Best Practice Checklist to assist departments and agencies in their promotion of the values in the Civil Service Code. [Copy attached.]

19. In addition, we have sought to find imaginative and engaging ways to help promote the values in the Civil Service Code to civil servants. We sponsor the Cabinet Secretary's Award at the Civil Service Awards, which goes to the individual or team that have most clearly demonstrated the Civil Service values in their work. The Civil Service Commissioners were also active participants in the Civil Service Live event in April 2008. We ran a lively 'Question Time' debate on Civil Service Values. We also had a stall for the three days of the event and were pleased to meet many civil servants from around the country and to share insights and experiences.

20. Possibly as a result of the enhanced activity on promotion of the Code, the Commissioners have noted an increased number of approaches from civil servants seeking to raise issues under the Code with us.

Commissioners' on-going work on the Civil Service Code

21. The Civil Service Commissioners have heard appeals under the Civil Service Code since it was first introduced in 1996. The numbers of full appeals that have come to the Commissioners since then have not been great. Nor have departments reported significant numbers to us that have been formerly raised and resolved at departmental level.

22. In our Annual Report for 2006-07 we noted the very small number of formal appeals that reached us or were formerly raised and dealt with by departments; and expressed some concern that this might indicate that civil servants were not clear or confident about issues that might be raised under the Code or that appeals might not be centrally recorded by departments.

23. Therefore, in our Annual Report for 2007-08 we reported on two voluntary surveys we had undertaken (http://www.cscannualreport.info/Our_surveys/). One asked all departments and agencies how many appeals had been resolved at departmental level. We received information on 27 cases which was a significant increase from the three cases that had been reported to us in the previous year. The second survey was sent to the major employing departments and agencies and asked them what they were doing to promote the Code in line with the recommendations in the Best Practice Checklist. The responses indicated a great deal of positive activities within departments to promote the values in the Code.

24. Building on the survey work we did last year, we have now agreed with the Cabinet Secretary that we should introduce a more systematic audit of departments and agencies policies and procedures for the promotion of the values in the Code and their handling and recording of concerns raised under it. We will publish the results in our Annual Report in July.

25. We are also progressing through a re-assessment of all our policies and practices in handling Civil Service Code appeals. We want to benchmark ourselves against best practice. A result of this will be new information for civil servants and the public explaining clearly what our role is, how we will going about fulfilling it, and the standards that we set ourselves and against which we can be judged.

Unauthorised disclosure of information

26. The Commissioners believe that a fundamental cornerstone of the constitutional settlement in this country is that there is a permanent Civil Service which serves and is loyal to the government of the day but acts in such a way that it can maintain the same relationship with future governments, whatever their political colouring. It is fundamental to our system that governments trust the Civil Service to serve them fully and effectively, whatever the personal political convictions that individual civil servants may hold.

27. One of the Code's illustrations of the core value of Integrity is that a civil servant must not disclose official information without authority, both when in the service and also after having left. The Commissioners believe that the unauthorised disclosure of information by civil servants undermines the notion of an impartial Civil Service. As the Civil Service Code says, civil servants must;

act in a way which deserves and retains the confidence of Ministers, while at the same time ensuring that you will be able to establish the same relationship with those whom you may be required to serve in some future Government

28. It is extremely unlikely that the Civil Service as a whole will be able to retain the confidence of Ministers, or potential future Ministers, if those Ministers believe that members of the service are likely to systematically release information without authorisation.

29. This is not to say that there are absolutely no circumstances at all in which unauthorised release of information is justifiable, but that the bar must be set very high. As is noted in the Committee's Invitation to Submit Written Evidence, in certain

circumstances the Public Interest Disclosure Act 1998 (PIDA) provides protection against victimisation for disclosures of information in the public interest. We believe that PIDA has struck the appropriate balance in protecting six specific and manifestly important areas of disclosure.

30. We are not convinced, given the routes available to civil servants to raise issues under the Civil Service Code, that there are circumstances wider than these that would justify unauthorised disclosure.

31. In principle, the Commissioners believe that ethical issues, including situations where information is being withheld and an individual civil servant believes it should be released, should be handled within the organisation where they arise, if this can be achieved.

32. A healthy organisational culture coupled with good management should allow an organisation to resolve most ethical issues that arise. If this is done within an open and trusting working environment then the organisation will also be able to learn from the experience of resolving the issue.

33. However, even within the healthiest of organisations, there will be times when an individual is not satisfied with the way that an issue has been handled internally. In these circumstances it is important that they have a clearly signposted route to a body outside their organisation, and independent of it, that is empowered and resourced to investigate. This is the role the Civil Service Commissioners can play in the Civil Service.

34. We believe that it is right that, in most cases, ethical issues, including concerns about information that a department holds and is not publishing, should be considered through a department's own internal processes before an appeal is brought to the Civil Service Commissioners. However, we believe it is also right that the Commissioners have the discretion to take appeals direct if we consider that this is the appropriate thing to do.

The broader context of information release

35. The Commissioners believe that the Freedom of Information Act 2000 is a significant and welcome piece of legislation. It establishes the principle that information should be made available to the public proactively; and also on request, unless specific factors argue that it should be exempt. And even then, for most exemptions, the public authority holding the information needs to carry out a public interest balancing test. Unless the reasons for withholding the information outweigh the reasons for release then the information should be released, even though it is potentially exempt.

36. Decisions made by the Information Commissioner and the Information Tribunal suggest that in some cases government departments may have been overly cautious in applying exemptions. But we share the Information Commissioner's hope that as the Act beds in and public authorities become more used to living with it, more and more information will be proactively made available to the public.

37. It appears to us that a properly enforced Freedom of Information regime severely weakens any suggested justification for unauthorised release of information in the public interest.

Some conclusions

38. We believe that the current Code does fulfil the ambitions of the working party that drafted it. It is a clear statement of the core Civil Service values, with relevant examples of what they mean in practice.

39. The role of the Civil Service Commissioners is a vital part of the structures that allow civil servants to raise, and have considered, matters of concern relating to the values of the Civil Service.

40. Unauthorised disclosure of information by civil servants threatens to undermine the value of impartiality, which is one of the foundations of the relationship between the Civil Service and government which has evolved over the last 150 years.

41. We believe that the limited circumstances in which it may be justifiable for a civil servant to reveal information without authority are provided for in the Public Interest Disclosure Act 1998.

42. Ultimately, it seems to us that the issue of unauthorised disclosure of information highlights the vital importance of a healthy organisational culture. If an organisation values its staff and their ideas and encourages them to raise issues and concerns in a trusting environment; if it clearly communicates to its staff that it wants them to raise issues of concerns and clearly signposts how that can be done; if it provides mechanisms for its staff to discuss concerns within and also outside the management chain; and if it provides access to an outside and independent body to hear appeals if internal mechanisms have not produced a resolution; then we believe the motivation for unauthorised release of information will be very greatly diminished. It may not be possible to stop such disclosures altogether. But we believe that no civil servant should ever feel that they have no alternative but to leak.

43. Finally, we share, and have been long-term supporters, of the Committee's view that

the values of the Civil Service and the independent role of the Civil Service Commissioners would be further strengthened if they were established in statute. We remain hopeful that the Civil Service legislation contained in the Draft Constitutional Renewal Bill will be introduced during this parliamentary session.

February 2009

Memorandum from the Public and Commercial Services Union (LWB 09)

Introduction

PCS welcomes the opportunity to make a written submission to the Public Administration Select Committee. PCS – a union representing over 300,000 members, the majority of whom work in government departments, agencies and public bodies - also welcomes the invitation to give oral evidence as the inquiry topics are issues that are of concern to our union.

Leaks and Whistleblowing in Whitehall

PCS does not encourage or support intentional unauthorised disclosures of information from within government, especially where they are likely to have adverse impact on the operations of government.

However, it is important to differentiate between information leaking for personal and political gain and whistleblowing which is more difficult to deal with because of the apparent overlap and or contradiction, in some cases, between the Official Secrets Act and the Public Interest Disclosure Act.

This tension has been played out in recent times in the cases of Derek Pasquill (FO), Katherine Gun (GCHQ) and David Keogh (MOD), all of whom were covered by the Official Secrets Act at the time they carried out whistleblowing. Charges against Mr Pasquill and Ms Gun have been dropped but Mr Keogh was convicted under the Official Secrets Act despite arguing that he felt he had a moral duty to make the disclosure as it was in the public's interest.

The various departments and agencies have their own internal policies on whistleblowing but all of them flow from the standard of behaviour set out in the Civil Service Code, and based on the Civil Service core values of impartiality, honesty and objectivity. Whilst civil servants are expected to abide by the Code and the core values, special advisers, who are also classified as civil servants, are expected to abide by the Code but *“do not have to show their political impartiality or objectivity”*. Instead, the *“Ministerial Code and the Code of Conduct for Special Advisers place duty on Ministers and Special Advisers to uphold the political impartiality of the Civil Service and not to ask civil servants to act in a way which would be inconsistent with this Code”*. This guidance gives rise to a number of questions which the Select Committee may wish to examine in terms of whether it helps generate a climate in which leaks and whistleblowing can occur. For example:

- Why do the core values set out in the Civil Service Code not apply to all civil servants? If it is not possible for the core values to apply to all civil servants, then the Code needs to give a clear definition as to who a civil servant is.
- Does the exemption of special advisers from the core values in the Civil Service Code encourage actions on the part of special advisers which can lead to leaks or whistleblowing by civil servants covered by the Code? PCS has expressed concerns in the past, and remains concerned at repeated attempts by some ministers to expand the role of special advisers.
- Do ministers and special advisers in reality refrain from asking civil servants to act in ways which would be inconsistent with the Civil Service Code?
- In cases where ministers and special advisers do not, do civil servants feel able to resist without any repercussions, especially those in the middle and lower grades?
- Does the Code provide clear guidance for departments on whistleblowing? This is a crucial question in view of the fact that a survey of departments carried out by *Public Concern at Work* in 2007 using good practice criteria endorsed by the Committee on Standards in Public Life and the Government itself identified the Cabinet Office as the worst amongst government departments.

Once again, whilst we do not support intentional unauthorised leaks of information nor encourage whistleblowing, our general advice to members is that anyone considering making disclosures about their employer's activities should first seek union advice. We are also concerned that many civil servants are not made aware of how the legislation to protect "whistleblowers" is implemented in the Civil Service and how that implementation may differ from elsewhere. This is part of a general concern we have about the lack of any service wide programme to make civil servants and recruits to the Civil Service aware of its standards and values such as those set down in the Civil Service Code, although we understand that a programme is now being planned.

March 2009

Memorandum from Ken Evans (LWB 10)

I have just been watching the broadcast of your committee's interviews of Katharine Gun et al.

You and your colleagues asked questions related to what procedures should exist to allow the legitimate concerns of civil servants to be drawn to the attention of "those who can do something about it".

In particular, Ms Gun said that in her experience, her introduction to GCHQ DID NOT contain any explanation of what action she should take if she found something that was against the law.

Watching the exchanges brought to mind my service as a Royal Air Force Officer and as a pilot of nuclear bombers during the 1960's.

The RAF required us to attend formal courses on law and on the contents of the "Manual of Air Force Law" (MAFL).

In particular, I recall that we were told that each individual officer had a DUTY to obey ONLY those orders which he or she judged to be LAWFUL. We were well schooled in the procedures required to judge whether an order was lawful or not and instructed to act accordingly.

After watching the aforementioned broadcast I am appalled that no such code appears to exist within the Civil Service.

I hope that you and your colleagues will take appropriate action to ensure that the Civil Service Code is "upgraded" in a way that puts duty as a citizen BEFORE duty as an employee of the Civil Service.

March 2007

Memorandum from Derek Pasquill (LWB 11)

I would like to make the following observations with regard to questions 306 and 307 (copied below) - I understand that these comments may fall outside the guidelines you have attached, but from my perspective, I think it would be discourteous of me not to make the attempt to correct a potential misunderstanding on the part of the Committee due to misleading statements I may have made.

“Q306 **Mr Prentice:** On your own admission, in 2005, when you joined the unit in the Foreign Office, you said in your article in *The New Statesman*, “I did not have a great deal of knowledge about British Muslim politics.” So, unlike Mr Jones, you were not an expert at all. You just happened to be working in this unit, picking things up as you were going along.

Mr Pasquill: I think that is the value. I think that is because I did not have expert knowledge. I was in a position---

Q307 **Mr Prentice:** Oh, Mr Everyman!

Mr Pasquill: No, I was in a position not to be blinded by the trees and still see the wood.”

The point here, which is one I also made in answer to question 305 “I had a special insight into this problem” is that over a period of six months, February to July 2005, and sitting at the desk of the FCO’s Islamic Issues Adviser for part of this period, I had direct experience, resulting from exposure to documents as well as attendance at meetings of the Whitehall-wide cross-departmental working group/steering group on preventing radicalisation among British Muslims, far in excess of that available to any hypothetical ‘Mr Everyman.’

When I leaked documents to a journalist I was in no doubt that I was acting against the received wisdom of many at the FCO, however, this is what whistleblowing is about: taking a critical look at received opinion, finding it lacking, and alerting the public. If whistleblowers are in the market as Dr Wright suggested, then I think whistleblowers intervene in the market to give the organisation for which they work the opportunity to pause and think.

The key document which I found most surprising and shocking in August 2005 was the powerpoint presentation ‘Working with the Muslim Community: Key Message’, Strategic Policy Team, Home Office/FCO, July 2004, (Document 8: Policy Exchange pamphlet, “When Progressives Treat with Reactionaries”) containing this insert, and from which I

believe all the Government's policy confusion flows:

" *The root of the reformist movement can be traced to the Muslim Brotherhood (Hasan Al Banna) and Jamaati Islam (Maulana Maududi), which was orthodox but pragmatic. * However the reformist trends have evolved into a progressive and liberal movement, adapting to their own socio-political context, especially those in Britain."

The reason I found this document shocking was that by August 2005 I had made sufficient progress in my reading, and experience, to be in a position to recognise what was being proposed here (the mainstreaming of political Islam in the UK by the Home Office/FCO); and the surprise resulted from the perception that I had been extraordinarily dense over the preceding six-month period in not linking the Muslim Council of Britain to the Jamaati Islam/Muslim Brotherhood prior to reading Martin Bright's article in the Observer, 14 August 2005. In other words, the Observer article was the prompt which gave me the opportunity to reconsider the information I had in my possession at the time.

I have no doubt the Government's policy of supporting the Jamaati Islam/Muslim Brotherhood in the UK over the past few decades has been damaging to the long-term public interest - the scandal is that the government department, namely the Foreign and Commonwealth Office, which could have supplied valuable expertise and guidance in preventing radicalisation of British Muslims, was pursuing objectives not necessarily coterminous with the interests of the UK. The mystery remains as to why the FCO should think its policy of using the Muslim Brotherhood as peace-brokers has any hope of long-term success - a mystery which Parliament might consider following-up through various Select Committees and other forms of inquiry.

Note 1: I would hope that the reformist trends of the Jamaati Islam/Muslim Brotherhood construction are never mistaken for either a liberal or progressive movement while its leaders and members continue to be guided by the writings of Al Banna and Maududi. It is the responsibility of those in Government making decisions in this sphere to inform themselves of the nature of this reform movement, which I believe remains deeply antagonistic to pluralistic and liberal democracy as it is understood in the UK.

March 2009

Memorandum from Dr Brian Jones (LWB 12)

I had the privilege of giving evidence to the Committee as part of its consideration of "Leaks and Whistleblowing in Whitehall". Having read the uncorrected transcript of my evidence I offer the following additional comments in further clarification, and hope they may be useful.

Point 1

I am not sure I made the circumstances of my own case completely clear, especially when answering questions about why I did not speak out before the war, at least to MPs. There are a number of issues I should explain.

Perhaps the most important contextual issue was the combined culture and nature of both Whitehall and the "intelligence community". Civil servants in Whitehall (and elsewhere) are required to act in accordance with and in support of government policy. However, intelligence analysts must not allow the analysis itself to be influenced by policy. There is, therefore, a degree of separation between what an analyst produces and the related policy of the Government and, after many years in the job I developed an approach of avoiding close scrutiny of the policy issues relating to my work. This will have been a factor that affected my thinking, or lack of it, about any future policy decisions the Government might make on Iraq. It is always the right of politicians to make decisions that do not obviously reflect intelligence assessments, so long as they are prepared to accept the consequences if their judgements are in error.

The dossier "Iraq's Weapons of Mass Destruction" was, of course, unique in bringing intelligence and policy so close together although our perceptions of that closeness are to some degree retrospective. The document did not, in so many words, advocate a specific policy and, although many believe it made a case for war, the Government argued at the time and continue to argue, that it did not. (And the Butler review supported the Government position on this). Also, the assessment of the dossier (as opposed to the Foreword¹⁰) did not offer certainty. We (the DIS analysts) argued that, in the context of the Foreword, the lack of certainty should have been made more obvious in the main document. Further, as I discussed, it was suggested that there was information which was not available to us that reduced the degree of uncertainty.

¹⁰ Indeed I felt the provenance of the Foreword was uncertain. I tended to look upon it as an "add-on" for which No 10 was responsible. My colleague who also wrote a memo expressing concern included direct criticism of the Foreword. In evidence to the FAC, Sir Peter Ricketts, then Policy Director at the FCO and a member of the JIC, said the Foreword had the approval of the JIC, whilst Sir Joe French, who had been Chief of Defence Intelligence and a member of the JIC, told Hutton that he saw it as a political statement rather than an intelligence statement.

I considered at this time *not* whether I should take my concerns outside the system (leak or blow whistles), but whether I should raise them with the Permanent Under Secretary, as would have been the official way. I concluded my case was not strong enough for that and I thought no further on the matter. (I could not have contemplated taking my concerns outside the system until I had exhausted all official channels). Because I felt the case was not strong enough to do this, seeking an alternative means of expressing my concern was not a factor, and I resorted to the defence against scapegoating which I explained. There was no impediment, such as consideration of future career prospects, to dissuade me from raising my concerns within the system vigorously because of my age, and my declared wish to take early retirement for personal reasons. However, had I been younger and in mid-career, I may well have judged the likely negative impact of making life difficult for so many senior people would not have been a wise course to follow. That impact would, of course, have had implications for the whole of my family.

When I referred in my evidence to timing, you should be clear that the publication of the dossier (Sep 02) was well separated from the war (Mar 03 - almost 6 months), and I retired in mid Jan 03. In the meantime there had been a JIC paper that seemed to cast doubt on the unseen intelligence and which I assumed would be taken into account in any future policy decision. By the time of the war vote I could not know whether more definitive intelligence had been obtained and was in no position to make an authoritative statement. (Q 286)

The Committee should be clear that up to and beyond the war, I was prepared to give senior (JIC level) officials the benefit of the doubt with regard to the totality of the intelligence they had seen, their interpretation of it, and their view of the bigger picture. However, government evidence to the Foreign Affairs Committee after the war caused me to be suspicious that a cover-up might be in process, and the first two weeks of evidence to Hutton convinced me of the intention of either the Government or officials, or both, to avoid the revelation of important elements of evidence. It was the failure of any witness before me to raise the issue of the extra intelligence that was most convincing. **It was this failure of anyone to accept responsibility either for incompetence or, more likely, a failed gamble, that prompted my subsequent actions.**

Point 2

The first few weeks of my retirement saw the focus of my attention on many other things and the obviously "dodgy", plagiarised dossier was not an issue that I thought much about. (Q 291/2) Not least because its subject matter - methods of concealment - was not a mainstream area of analysis for my experts. Other parts of the DIS studied this. (Q 290)

I hope these comments are helpful.

March 2009