

TITLE OF REPORT: WHISTLEBLOWING POLICY REVIEW 2015-2016

REPORT OF THE ACTING SENIOR LAWYER

1. SUMMARY

- 1.1 The purpose of the report is to provide the Finance, Audit & Risk ('FAR') Committee with an opportunity to comment on the attached draft amendments to the "Confidential Reporting (Whistleblowing) Policy" prior to consideration by Cabinet on 30 March.

2. RECOMMENDATIONS

- 2.1 That FAR Committee provides any comments on the draft changes to the Policy (**Appendix B**) and that these (and any further suggested amendments) be recommended to Cabinet for consideration and (where relevant) incorporation into the Policy.

*[NB as a number of amendments have been made as tracked changes a **clean version of the Policy (with amendments accepted) is at Appendix A, as well as the tracked version with the proposed changes at Appendix B]***

3. REASONS FOR RECOMMENDATIONS

- 3.1. For the reasons set out in section 9, a clear Policy promotes and helps to ensure consistency and good governance within the Council.
- 3.2. The amendments have been made following the publication of the Whistleblowing Guidance for Employers and Code of Practice from the Department of Business Innovation & Skills (the 'BIS Code') in March 2015, and Public Concern at work – 'PCaW' Best Practice Guide in November 2015. The changes reflect recommendations in the Code, Guidance, updated Whistleblowing Policy templates and recent case law.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1 None.

5. CONSULTATION WITH EXTERNAL ORGANISATIONS AND RELEVANT MEMBERS

- 5.1 As part of the review, comments on the draft changes were sought from: the Corporate Human Resources Manager and Senior HR & Contracts Manager and the Leader.

- 5.2 Comments/ changes have been incorporated where possible (if compliant with the BIS Code and PCaW recommendations). Note: two issues raised:

a) *The style of the Policy* and the comment that this appeared to depart from a question and answer (Q&A) format.

Whilst there is more content in the Policy, the existing Q&A format has been retained. Further advice on the process is covered in the Manager's Guidance.

b) *How the Council should address the wider "worker" group in the Policy:*

There appeared to be concern that including reference to agency workers would provide them with the false impression that they were employed by the Council. The inclusion of other “non-employees” in the Policy is to reflect the Employment Right Act 1996 definition of workers (employees/ trainees – to the extent they are not employees and agency workers). Their insertion reflects Good Practice and enables the Council, as the BIS Code puts it, to:

- be able to respond to any disclosure raised by a worker, verses just an employee;
- better control information and risk; and
- resolve wrongdoing quickly internally *rather than going to an external third party* as this enables the Council to act promptly.

The more generic wording, including agency worker has therefore been retained in the revised draft.

- 5.4 Following SMT consideration on 23 February, the report and Policy documents were referred to Unison and the Staff Consultation Forum for comment.

6. FORWARD PLAN

- 6.1 This report does not contain a recommendation on a key decision and has not been referred to in the Forward Plan.

7. BACKGROUND

- 7.1. The Policy sets out the Council’s arrangements for handling disclosures.

- 7.2. Since this Policy was last reviewed (in 2014) there has been:

- developments in case law (interpretation of the statutory provisions);
- new Whistleblowing Guidance for Employers and Code of Practice from BIS in March 2015;
- PCaW new Best Practice Guide November 2015;
- The Small Business, Enterprise and Employment Act 2015 (Commencement No.3) Regulations 2015¹. Regulation 2 brought section 148² of the Small Business, Enterprise and Employment Act 2015 into force. This gives the Secretary of State the power to make regulations requiring prescribed persons to produce annual reports on the whistleblowing disclosures made to them by workers.

- 7.3. In preparing the revised draft Policy, various precedents have been reviewed (from legal knowledge websites and Best Practice/documents from PcaW). The form of the Policy aims to incorporate necessary changes resulting from bullet points 1-3 of 7.2 and best Whistleblowing practice.

- 7.4. The Guidance to Managers; “Handling Whistleblowing: Practical Tips for Manager” has also been updated and once the Policy is approved that will supplement the Policy and be available on the intranet.

8. ISSUES

- 8.1. The proposed changes are to reflect requirements in paragraphs 7 and 9, and ensure consistency.

- 8.2. In terms of employment law, there have been a number of cases since 2014. A key case - *Nurmohamed v Chestertons* in April 2015 was the first appellate court decision

¹ Regulation 2 as from 1 January 2016

² which inserts a new section 43FA into the Employment Rights Act 1996

to review when 'speaking out' was in the "public interest". Whilst a number of employees would have been affected by the disclosure made by Mr Nurmohamed, the more important issue was whether he was entirely self-interested or could demonstrate a reasonable belief in a wider purpose. The EAT supported this wider interpretation. Going forwards, institutions were advised³ to carefully review the potential impact of an alleged disclosure. This will remain the position for the time being, pending the appeal by Chestertons, which will be heard in the Court of Appeal in October 2016 (with Public Concern at Work intervening). It remains to be seen whether better guidance is then provided on the public interest test.

8.3. In the meantime, in the light of the case, the Policy has been slightly amended to provide a more detailed explanation of what protected disclosures are, with a change of emphasis on the public interest test.

8.4. In terms of other drafting/ BIS Code and PCaW issues:

8.4.1 the Policy name has been changed - as it was sometime referred to as a 'Confidential reporting Code'/ Confidential Reporting (Whistleblowing) Policy, to the 'Whistleblowing Policy'. This reflects the normal description of such policies.

8.4.2 References have been changed from employee and staff to "workers" to reflect the legal wording in the Employment Rights Act 1996 (which covers employees, agency staff or trainees).

8.4.3 Members are encouraged to use the Policy and reporting systems (to provide a more comprehensive Council reporting system) and this is reflected in the redrafting.

8.4.4 More detailed information has been provided to explain what the Policy covers and what a protected disclosure would be (with references to the ACAS guidance⁴). Some further direction is given on relevance of personal grievances and the use of the Council's Complaints Resolution Policy if a worker believes they have a grievance or suffer a detriment/ or are dismissed as a result of a whistleblowing incident.

8.4.5 Updated the 'ppcworldwide' helpline reference to confidential employee assistance programme provider.

8.5 What the Council still needs to consider under the BIS Code and PCaW is:

- a) training and support provided to employees; and
- b) the monitoring mechanisms we have in place to review the Policy and effectiveness.

Training/ retrain/ support:

8.6 BIS and PCaW recommend ongoing education/ train and re-train as part of induction for new starters and E-learning or other types of training for the wider staff group.

8.7 SMT intend to review corporate training and are committed to providing appropriate Whistleblowing awareness and training.

Monitoring/ reporting:

8.8 The Whistleblowing Policy is currently reviewed by FAR Committee as part of its Governance remit. It is then considered and approved by Cabinet.

³ Evershed's Education HR e-briefing 616.

⁴ As per BIS Code page 5

- 8.9 The role and extent of Whistleblowing monitoring and reporting may change under the new section 43FA Employment Right Act 1996. The provision provides that the Secretary of State may make Regulations requiring a 'prescribed person' to produce an annual report on disclosures made to that person by workers. The Council is not a 'prescribed person'⁵, but may have to provide a report to the prescribed person.
- 8.10 Once any Regulations are published, a small amendment can be made, if necessary, to the Policy (under delegated authority) by the Executive Member and potentially the Constitution (in terms of approval/ reports) by the Monitoring Officer, if required.
- 8.11 The revised Manager's Guidance also includes a Whistleblowing complaint record and this will assist with monitoring relevant whistleblowing reports.

Steps taken since the review and further consultation/ approval process:

- 8.12 Since the review process has commenced, further PCaW Posters have been put up around the building (in November 2015) as part of the communications refresh for Whistleblowing. PCaW recommends that organisations "*Tell them the good news: Communicate positive outcomes of whistleblowing to staff (eg. 'You said, we did...')*". This may be difficult, given the level of disclosures received (one in 2015) but needs to be considered.
- 8.13 PCaW and BIS also recommend engagement with staff on the whistleblowing arrangements. Unison and the Staff Consultation Forum have been consulted. No comments were received.

9. LEGAL IMPLICATIONS

- 9.1 The Public Interest Disclosure Act 1998 amended the Employment Rights Act 1996 and was introduced to offer employment protection to any "workers" (employees/ agency staff and trainee) who raised concerns. Under its provisions, employers are made liable for any acts of their workers which lead to a worker being victimised or dismissed as a result of a protected disclosure. The disclosure qualifies for protection if the worker had a reasonable belief that (one or more) issues⁶ have taken place that have a wider (public) interest at the time (versus just a personal interest/ grievance).
- 9.2 This Council should therefore ensure that the manner in which it deals with such issues is clear. This also ties in with the systems the Council is required to have in place under the Bribery Act 2010 to prevent bribery, and the Council's commitment, in its Anti-Fraud & Corruption Policy, to abide by the Policy and investigate disclosures.
- 9.3 Whilst employers are not required to have a whistleblowing policy in place, as per the BIS Code: "*the existence of the Policy shows an employer's commitment to listen to concerns of workers...by having clear policies and procedures.. an organisation demonstrates that it welcomes information being brought to the attention of management.*" This, BIS indicates, is also demonstrated by the following:
- Recognising workers are "valuable ears and eyes";
 - Getting the right culture;
 - Training and support;
 - Being able to respond to reports;
 - Better control of information and control of risks;
 - Resolving any wrongdoing quickly.

⁵ In a Local Authority situation, the Comptroller and Auditor General of the National Audit Office.

⁶ Summary: has or likely: criminal offence; failed to comply with a legal obligation; miscarriage of justice; health and safety endangered; environment damaged; deliberate concealment of any of these.

9.4 Further (statutory) changes to the manner that the Council monitors/ reports such issues may be forthcoming. These will be incorporated into the Policy at a later date if necessary as explained above (in 8.10).

10. FINANCIAL IMPLICATIONS

10.1 There are no capital or revenue implications arising from the content of this report.

11. RISK IMPLICATIONS

11.1 Appropriate policy frameworks help to ensure good governance of the Council and therefore reduce risk of poor practice or unsafe decision making.

12. EQUALITIES IMPLICATIONS

12.1 The Equality Act 2010 came into force on the 1st October 2010, a major piece of legislation. The Act also created a Public Sector Equality Duty, which came into force on the 5th April 2011. There is a General duty, described in 12.2, that public bodies must meet, underpinned by more specific duties which are designed to help meet them.

12.2 In line with the Public Sector Equality Duty, public bodies must, in the exercise of its functions, give **due regard** to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. The contents of this report do not directly impact on equality, in that it is not making proposals that will have a direct impact on equality of access or outcomes for diverse groups.

13. SOCIAL VALUE IMPLICATIONS

13.1 As the recommendations made in this report do not constitute a public service contract, the measurement of 'social value' as required by the Public Services (Social Value) Act 2012 need not be applied, although equalities implications and opportunities are identified in the relevant section at paragraph 12.

14. HUMAN RESOURCE IMPLICATIONS

14.1 Whilst the Policy falls within the remit of the Monitoring officer, employee support and training falls within the remit of Human Resources. As indicated above, further training/ level of training for employees is an issue for consideration for SMT.

15. APPENDICES

15.1 Appendix A – Clean version of the amended Policy with tracked changes accepted.

15.2 Appendix B – *tracked version of the amended Policy showing the changes proposed.*

16. CONTACT OFFICERS

16.1 Jeanette Thompson, Senior Lawyer and Deputy Monitoring Officer
jeanette.thompson@north-herts.gov.uk; ext 4370

16.2 Anthony Roche, Acting Corporate Legal Manager and Monitoring Officer
anthony.roche@north-herts.gov.uk; ext 4588

17. BACKGROUND PAPERS

17.1 Whistleblowing: Guidance for Employers and Code of Practice March 2015.

17.2 PCaW new Best Practice Guide November 2015.