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PCaW's Contribution to the Press Recognition Panel's (PRP) consultation on proposals for recognition of press self-regulators

Introduction

1. We welcome this opportunity to contribute to discussions around how the PRP proposes to deal with the applicants for recognition. We made a submission to the Leveson Inquiry in 2012 and this is attached for reference at Annex A.

Background

2. Public Concern at Work (PCaW) is an independent whistleblowing charity that was established in 1993. The cornerstone of the charity's work is a confidential advice line for workers who have witnessed wrongdoing, risk or malpractice in the workplace but are unsure whether or how to raise their concern. The charity has advised over 18,000 individuals to date throughout the UK, in turn this informs our approach to policy and our campaigns for legal reform.

3. The charity has been closely involved in the operation of the law that protects whistleblowers, the Public Interest Disclosure Act 1998 (PIDA) since its inception. In 2012 and 2013 we campaigned for improvements to PIDA and some of our campaign points led to legislative improvements through the Enterprise and Regulatory Reform Act 2013. PIDA, while essential legislative protection, is however only one part of the whistleblowing framework in the UK that is needed to ensure whistleblowing is safe and effective.

4. In 2012/2013 Public Concern at Work established the Whistleblowing Commission to examine the effectiveness of whistleblowing in the UK and to make recommendations for change. The Whistleblowing Commission published its report in November 2013. The key recommendation of the Commission is the creation of a statutory Code of Practice which can be taken into account by courts and tribunals considering whistleblowing issues. The Code of Practice provides practical guidance to employers, workers and their representatives and sets out recommendations for raising, handling, training and reviewing whistleblowing in the workplace. The Commission also recommended that this Code of Practice could be used by regulators as part of their inspection and assessment regimes. The report of the Whistleblowing Commission can be found in Annex B and the Code of Practice can be found in Annex C.

5. With this background in mind we respond to Charter Criteria 8D which reads "A self-regulating body should establish a whistleblowing hotline for those who feel that they are being asked to do things which are contrary to the standards code." By way of a general comment we would like to make clear that this particular Charter Criteria must be broadly interpreted and not just extend to those who have been asked to do things which are contrary to the standards code, but also to those who have been witness to breaches or potential breaches of the standards code by others.

Examples of proposed indicators: Individuals are not victimised for contacting the hotline; safeguards and monitoring are in place to ensure that this does not happen.

6. We broadly agree with this indicator because victimisation of a whistleblower is not only a personal injustice for the individual but also sends a dangerous message to others in the workplace that it's not safe to raise concerns. For this reason we recommend that this indicator is broadened to include situations where the self-regulatory body (SRB) becomes aware that an organisation they regulate has victimised a whistleblower for raising a concern with their employer.

7. Though an SRB cannot stop an organisation it regulates victimising an individual who raises concerns, it should be mindful to ask the right questions of its members and review membership to the regulatory scheme 1) where an organisation has failed to put in place effective whistleblowing arrangements 2) where there is evidence that a whistleblower has been victimised for raising concerns.

8. An SRB can play a vital role in ensuring the organisations they regulate have effective whistleblowing arrangements. To do this some consideration needs to be given to what best practice looks like, and we highlight the Whistleblowing Commission's Code of Practice which both regulatory bodies and organisations can use to measure whistleblowing arrangements against. The Code of Practice builds on existing principles of best practice established by the Committee for Standards in Public Life (CSPL) [1] and the BSI Code of Practice[2]. By implementing the Code of Practice an organisation will instil confidence in staff to use the whistleblowing arrangements so incidents of wrongdoing or malpractice can be raised at the earliest opportunity. The Code of Practice also requires an organisation to make it clear to a worker what they should expect in terms of process and protection if they do come forward and equips them to deal with an issue effectively and appropriately when raised.

9. As part of our work training and assisting organisations over many years we have had sight of a number of whistleblowing policies. Many of these policies are overly legalistic or complicated, fail to outline options for raising the concern outside the line management structure, fail to provide adequate (or any) assurances to the individual about protection from reprisal, place the duty of fidelity above all else, and contain contradictory and/or poor reassurances over confidentiality.

10. Getting the whistleblowing policy right is a crucial first step. The CSPL has informed and influenced practice on whistleblowing across all sectors and has recommended that good whistleblowing policies:

    a. provide examples distinguishing whistleblowing from grievances;
    b. give employees the option to raise a whistleblowing concern outside of line management;
    c. provide access to an independent helpline offering confidential advice;
    d. offer employees a right to confidentiality when raising their concern;
    e. explain when and how a concern may safely be raised outside the organisation (e.g. with a regulator); and
    f. provide that it is a disciplinary matter (a) to victimize a bona fide whistleblower and (b) for someone to maliciously make a false allegation.[3]

[1] Paragraph 4.31, Page 89, Committee on Standards of Public Life, "Getting the balance right: implementing standards in public life", Tenth Report of the Committee on Standards in Public Life, http://www.officialdocuments.gov.uk/document/cm64/6407/6407.pdf published January 2005.
[2] The British Standards Institution's Code of Practice on Whistleblowing Arrangements
[3] Paragrah 4.31, Page 89, Committee on Standards of Public Life, "Getting the balance right: Implementing standards in public life", Tenth Report of the Committee on Standards in Public Life, Publish January 2005.

11. The CSPL has also stated it is important that those at the top of an organisation show leadership on the issue of whistleblowing and ensure the message that it is safe and accepted to raise a concern is communicated regularly.[4]

12. Even a good policy will mean little if it is left to gather dust in a draw, but too often organisations see having a whistleblowing policy as a tick-box exercise. A recent survey of senior managers with responsibility for their organisations' whistleblowing policies revealed that despite 90% of companies adopting whistleblowing policies, only 1 in 3 thought their policies were effective and 1 in 10 said their arrangements were not clearly endorsed by senior management. [5]

13. A policy must be actively promoted and communicated, managers must be trained on their roles and on how to handle concerns, arrangements must be reviewed and the trust and confidence of staff must be tested regularly. Buy-in at the top of an organisation is key and a good audit committee or board will want to regularly evaluate how the arrangements are working. The Code of Practice identifies the following items that need to be reviewed as part of an independent assessment of the organisation's whistleblowing arrangements by the board, the audit or risk committee, or an equivalent:

    - a record of the number and types of concerns raised and the outcomes of investigations;
    - feedback from individuals who have used the arrangements;
    - any complaints of victimisation;
    - any complaints of failures to maintain confidentiality;
    - a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety;
    - a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
    - a review of any relevant litigation; and
    - a review of staff awareness, trust and confidence in the arrangements.[6]

14. All of these measures will help to protect journalists from suffering victimisation for using whistleblowing arrangements, but there should also be strengthened legal protection for journalists who suffer for speaking out. This will have the effect of both encouraging journalists to voice concerns when they come across them and ensuring that those who are victimised have the greatest prospect of receiving full compensation.

15. Journalists are already included within the scope of PIDA which provides compensation through the employment tribunal where they have been dismissed, forced out or suffered some other form of victimisation for raising a public interest concern with their employer, a 'prescribed person' (e.g. a regulatory body) or a wider disclosure (any non-prescribed organisation e.g. the media). PIDA most readily protects disclosures made to their employer; there are further legal tests when a disclosure is made to a prescribed person, and even more stringent tests for making a wider disclosure. PIDA encourages internal disclosure as the most efficient way to deal with wrongdoing or malpractice, but it does not require it before an individual approaches either a regulator or the media, who can both be approached in the first instance if the concern is deemed sufficiently serious. For an organisation to be considered a prescribed person they need to be part of the prescribed person list which is overseen by the Department for Business Innovation and Skills, who update it regularly.

16. As it stands a journalist raising a concern with an SRB will be considered to have made a wider disclosure, and therefore the journalist would have a more stringent test to meet to gain the protection of the law. Adding SRBs to the list of prescribed persons under PIDA would mean a more

[4] Paragrah 4.31, Page 89, Ibid.
[5] http://www.pcaw.org.uk/files/01%20EY%20Research%20Release%20FINAL.pdf
[6] Paragraph 53, page 13, The Whistleblowing Commission, November 2013.

lenient legal test is applied where a whistleblower approaches these bodies, potentially enabling a journalist to gain the protection of the law more easily.

17. Prescribed persons are a mix of different organisations that all play a role in holding decision-makers to account. The list is largely made up of systems regulators such as the Care Quality Commission, the Financial Conduct Authority or the Health and Safety Executive; the list also includes professional bodies such as the General Medical Council, and non-statutory bodies such as the NSPCC as well as MPs who have recently been added. The running theme for all these bodies is they have a scrutinising role, a role that an SRB will also be fulfilling. Being part of the list will potentially make a claim for victimisation for approaching an SRB easier and so will increase the whistleblowing protection for journalists.

18. Alternatively, we would recommend that organisations regulated by an SRB are required to include the SRB as a responsible person with whom staff can raise concerns within their whistleblowing arrangements. The concept behind this is that an individual who, in accordance with their employer's whistleblowing arrangements, raises a concern to a person authorised by their employer can be treated by the tribunal as having effectively made a disclosure to his employer. A disclosure of this type would attract the least stringent legal test and therefore would afford greater legal protection for journalists.

19. The downside of this option compared to SRBs becoming prescribed persons is that it requires organisations to proactively include SRBs in their whistleblowing policies rather than it being contained within PIDA itself. This is problematic because awareness and understanding may be low and for the protection to work in practice it will require the employer, journalist and the tribunal to all be aware of the requirement. On balance we feel including SRBs on to the prescribed person list is a more straightforward approach which will provide much greater clarity overall.

Examples of proposed indicators: The Regulator ensures that the hotline is easily accessible and available to anyone who might reasonably want to access it.

20. We fully support this approach. From experience we know that there is a risk of a regulator focusing on whether the individual approaching them is considered a worker under PIDA. This can cause confusion as the 'worker' definition is a legal test applied by the employment tribunal to ascertain whether they have jurisdiction to hear the claim being brought before them, and is not relevant to someone's ability to report to a regulator. For example a volunteer in an organisation will not be considered a worker under PIDA for protection, but may nevertheless have concerns that may require investigation. In practice a regulator will want to encourage any worker to report to them to maximise the potential information they will receive in order that they may properly oversee the organisations they regulate.

21. One caveat to this point is that an SRB should be aware that whistleblowers are in a more vulnerable position than members of the public due to the dynamic of the relationship under an employment contract. They should consider ensuring that staff working on the hotline is trained appropriately so they understand these issues.

Examples of proposed indicators: Confidentiality and anonymity are assured at all times.

22. A whistleblower raises a concern confidentially if he or she gives his or her name on condition that it is not revealed without their consent. A whistleblower raises a concern anonymously if he or she does not give his or her name.

23. We are concerned that this indicator implies that confidentiality can be guaranteed. The SRB should always seek to maintain confidentiality where this has been requested. However, there will be times when confidentiality cannot be guaranteed (for example where legally they have to disclose the

identity of the whistleblower or where independently the employer guesses the whistleblower has raised their concerns externally). The SRB needs to be clear and open about the limitations of confidentiality, and they must ensure that their staff are trained to understand these issues so that whistleblowers' expectations can be effectively managed.

24. Anonymity also raises a host of other issues. More often than not anonymous allegations are assumed to be malicious or are considered to be less credible by those who receive them. Anonymous disclosures can also be much more difficult to investigate and even impossible to remedy. Nevertheless the SRB should be open to individuals who report a concern anonymously to the hotline, and should be aware of the difference between this and reporting confidentially. Whistleblowers should be made aware that anonymity is not a guarantee that the source of the information will not be unmasked, particularly if others are likely to guess at the possible source. Furthermore anonymity increases the risk of another person being wrongfully identified as the whistleblower by those guessing at who the source could be. Again these are all issues that the hotline staff should be trained on.

Examples of proposed indicators: The Regulator demonstrates clear leadership and commitment to whistleblowing.

25. We agree that the regulator should lead by example. The regulator should ensure that it has effective whistleblowing arrangements in place for its staff, and that it follows best practice. SRBs should also be transparent about their own whistleblowing arrangements and annually report on their operations.

26. We also support reporting by SRB of the types and outcomes of whistleblowing concerns received by the hotline as an example of evidence that the performance indicators are being achieved. If the SRBs were prescribed under PIDA then they would be subject to a reporting duty around whistleblowing which is due to be introduced by April 2016. That said, even if SRBs do not become prescribed persons, the PRP should still look to the Government's proposals as a sensible approach in this area. The Government have stated (after consultation) that the following areas should be publicly reported by prescribed persons:

    - An explanation of the functions, objectives and statutory powers of the body producing the report;
    - The number of concerns that have been raised with that body in a twelve month period;
    - The number of concerns that can be reasonably identified as whistleblowing;
    - Commentary on what types of action were taken in response to whistleblowing disclosures;
    - The number of disclosures where no further action was taken (unsubstantiated claims)
    - Commentary on how the information from whistleblowers has impacted on the prescribed body's activity in their relevant sector.[7]

27. The approach proposed by the Government would require the recording and reporting of 'concerns' raised with them (public interest issues highlighted to them about an organisation they regulate from a member of the general public, or from a worker within the organisation), and then how many of this number could be identified as whistleblowing. Making a distinction where possible is a sensible way forward given the sensitives around dealing with whistleblowing.

28. Another sensible element of the Government proposal is the adoption of commentary on the information that will outline any impact the concerns have had on their regulatory activities, which will give context to the statistical information. We would add to this that SRBs should be reporting

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411894/bis-15-2-whistleblowing-prescribed-bodies-reporting-requirements-government-response.pdf

on the number of organisations which failed to have in place effective whistleblowing arrangements and what action was taken as a result.[8] We feel strongly that SRBs being required to report in the way suggested would help increase openness and transparency in the industry generally.

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[8] P.g. 10, The Whistleblowing Commission Report, 2013.

Annex

Annex A – Submission to Leveson Inquiry – see separate document or follow this link.

Annex B – Whistleblowing Commission Report – see separate document or follow this link.

Annex C – Whistleblowing Commission Code of Practice

Every employer faces the risk that something will go badly wrong in their organisation and ought to welcome the opportunity to address it as early as possible. Whenever such a situation arises the first people to know of such a risk will usually be "workers"[1] yet while these are the people best placed to speak up before damage is done, they often fear they have the most to lose if they do (otherwise known as "whistleblowing").

This Code of Practice provides practical guidance to employers, workers and their representatives and sets out recommendations for raising, handling, training and reviewing whistleblowing in the workplace.

1. This Code sets out standards for effective whistleblowing arrangements. It is designed to help employers, workers and their representatives deal with whistleblowing.
2. Whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects others.
3. When developing whistleblowing arrangements employers should consult staff and their representatives.
4. As part of the whistleblowing arrangements, there should be written procedures covering the raising and handling of concerns. These procedures should be clear, readily available, well-publicised and easily understandable.
5. The written procedures for raising and handling concerns:
   a) should identify the types of concerns to which the procedure relates, giving examples relevant to the employer;
   b) should include a list of the persons and bodies with whom workers can raise concerns, this list should be sufficiently broad to permit the worker, according to the circumstances,[1] to raise concerns with:
      i. the worker's line manager;
      ii. more senior managers;
      iii. an identified senior executive and /or board member; and
      iv. relevant external organisations (such as regulators);
   c) should require an assurance to be given to the worker that he/she will not suffer detriment for having raised a concern, unless it is later proved that the information provided by the worker was false to his or her knowledge;
   d) should require an assurance to be given to the worker that his or her identity will be kept confidential if the worker so requests unless disclosure is required by law;
   e) should require that a worker raising a concern:
      i. be told how and by whom the concern will be handled;
      ii. be given an estimate of how long the investigation will take;
      iii. be told, where appropriate, the outcome of the investigation [2]
      iv. be told that if the worker believes that he/she is suffering a detriment for having raised a concern, he/she should report this; and
      v. be told that he/she is entitled to independent advice.

6. The employer should not only comply with these procedures but should also sanction those who subject an individual to detriment because he/she has raised a concern and should inform all workers accordingly.
7. In addition to the written procedure for raising and handling concerns, the employer should:
   a) identify how and when concerns should be recorded;
   b) ensure, through training at all levels, the effective implementation of the whistleblowing arrangements;
   c) identify the person with overall responsibility for the effective implementation of the whistleblowing arrangements;
   d) conduct periodic audits of the effectiveness of the whistleblowing arrangements, to include at least:
      i. a record of the number and types of concerns raised and the outcomes of investigations;
      ii. feedback from individuals who have used the arrangements;
      iii. any complaints of victimisation;
      iv. any complaints of failures to maintain confidentiality;
      v. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety reports;
      vi. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
      vii. a review of any relevant litigation; and
      viii. a review of staff awareness, trust and confidence in the arrangements.
   e) make provision for the independent oversight and review of the whistleblowing arrangements by the Board, the Audit or Risk Committee or equivalent body. This body should set the terms of reference for the periodic audits set out in 7(d) and should review the reports.
8. Where an organisation publishes an annual report, that report should include information about the effectiveness of the whistleblowing arrangements, including:
   a) the number and types of concerns raised;
   b) any relevant litigation; and
   c) staff awareness, trust and confidence in the arrangements.

Anonymity and confidentiality

9. The best way to raise a concern is to do so openly. Openness makes it easier for the employer to assess the issue, work out how to investigate the matter and obtain more information. A worker raises a concern confidentially if he or she gives his or her name on the condition that it is not revealed without his or her consent. It is important that this is a clear option for anyone to use when raising a concern.
10. A worker raises a concern anonymously if he or she does not give his or her name at all. If this happens, it is best for the organisation to assess the anonymous information as best it can to establish whether there is substance to the concern and whether it can be addressed. Clearly if no-one knows who provided the information it is not possible to reassure or protect them.

Examples of Detriment

11. The code at paragraph 5(c) requires an assurance that a worker will not suffer a detriment for having raised a concern. Paragraph 6 of the code states that an employer should also sanction those who subject an individual to detriment. Subjecting a worker to a detriment means subjecting the worker to "any disadvantage" because they blew the whistle. This could include (but is not limited to) any of the following:
    a) failure to promote;
    b) denial of training;
    c) closer monitoring;
    d) ostracism;
    e) blocking access to resources;
    f) unrequested re-assignment or re-location;

g) demotion;
h) suspension;
i) disciplinary sanction;
j) bullying or harassment;
k) victimisation;
l) dismissal;
m) failure to provide an appropriate reference; or
n) failing to investigate a subsequent concern.

Part IV of the Employment Rights Act 1996 – The Public Interest Disclosure Act

12. PIDA sets out a framework for a worker to make disclosures about the following categories of wrongdoing, provided that they reasonably believe it to be in the public interest to do so:
    a) criminal offences,
    b) failure to comply with legal obligations,
    c) miscarriages of justice,
    d) dangers to health or safety,
    e) dangers to the environment,
    f) deliberate concealment of any of the above categories.
13. This disclosure will be protected if the workers discloses:
    a) in course of obtaining legal advice;
    b) to the employer;
    c) in certain circumstances, to a Minister of the Crown;
    d) to a 'prescribed person', reasonably believing that the information and any allegation contained within it are substantially true. The Secretary of State (in practice the Secretary of State for Business, Innovation and Skills) prescribes by list both the identity of the prescribed person (usually a regulatory body) and its remit;
    e) to any person or body provided that a number of detailed conditions are satisfied. Those conditions include a requirement that the worker does not make the disclosure for purposes of personal gain and a requirement that it is reasonable to make the disclosure in the circumstances. A further section makes provision for a disclosure of an exceptionally serious failure to any person or body.
14. The Act makes it unlawful for an employer to dismiss or subject a worker to a detriment for having made a 'protected disclosure' of information. The protection provided by the Act is not subject to any qualifying period of employment and so is referred to as a 'day one' right in employment law. By contrast under ordinary unfair dismissal, there is a two year qualifying period.

Settlement agreements

15. In the light of section 43J ERA 1996 (anti-gagging provisions in PIDA) employers drafting settlement agreements should not include a clause which precludes a worker from making a protected disclosure.

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[1] Worker is defined in section 230 of the Employment Relations Act 1996

[2] By "according to the circumstances" we mean workers should be able bypass their manager, where they fear that they will suffer a detriment or that their concern will not be listened to.

[3] The Data Protection Act, on-going investigations, or the rights of third parties may impact the ability to provide feedback.