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Public Concern at Work briefing for Members of the Health Select Committee

Whistleblowing in Care and Health

July 2011

This is a briefing for members of the Health Select Committee on whistleblowing in the care and health sectors.

1. **Background note on Public Concern at Work (PCaW)**
   PCaW was set up in 1993 following a series of disasters and scandals. Inquiries into each disaster revealed that staff were aware of problems but were either too scared to speak up or were not able to sound the alarm loud enough to avert harm. PCaW's core activity is our free, confidential Whistleblowing Advice Line, for individuals who have witnessed wrongdoing in the workplace and are unsure how or whether to raise their concern. We also lobby on relevant public policy and provide professional support to business, regulators and government. All our work is funded by businesses and organisations which subscribe to our services, but our duty is to the individual caller and our advice is free to all.

2. **Background note on Public Interest Disclosure Act 1998 (PIDA)**
   The Public Interest Disclosure Act 1998 (PIDA) provides protection for employees who raise concerns about wrongdoing. PIDA has a wide definition of wrongdoing, including crime, health and safety, a risk to the environment, a miscarriage of justice, a breach of a legal obligation or a concealment of any of the above.

3. There are three levels of disclosure the Act protects, to a responsible person (i.e. the employer), to a prescribed person (a regulator) or a wider disclosure (an MP, the media, an NGO etc.).

4. At all stages the law requires a worker to have a reasonable belief in the information and good faith. The law most readily protects those who raise a concern with their employer. At this point a worker need not be right provided they have a reasonable belief that the information tends to show wrongdoing, meaning that a worker can be protected for raising a genuine suspicion that later proves to be wrong.

5. PIDA also protects workers who raise a concern with a regulator. Protection at this second level requires reasonable belief the information is substantially true. As with a disclosure to an employer, the worker need not be right to be protected at this stage.

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6. Finally a worker is also protected for making a wider disclosure if they have a reasonable belief the information is substantially true and they do not act for personal gain. The worker must satisfy one or more of the following conditions:

    i. the worker reasonably believed that he or she would be victimised if he or she had made the disclosure to the employer or to a prescribed person;
    ii. there was no prescribed person and the worker reasonably believed that disclosure to the employer would result in the destruction or concealment of evidence;
    iii. the worker had already disclosed substantially the same information to the employer or a prescribed person.

7. Additionally it must also be reasonable for the worker to make the wider disclosure. In determining the reasonableness of the disclosure, an employment tribunal will consider all the circumstances. This will include the identity of the person to whom the disclosure was made, the seriousness of the concern, whether the failure is continuing or likely to occur, whether the disclosure breached a duty of confidentiality which the employer owed a third party, what action has been taken or might reasonably be expected to have been taken if the disclosure was previously made to the employer or a prescribed person, and whether the worker complied with any approved internal procedures if the disclosure was previously made to the employer.

8. The Act has an extended definition of worker, designed to include amongst others: agency workers, contractors, GPs and students on work placements.

9. PIDA is ultimately about accountability and it follows that for this to work it must be possible for those responsible to be held to account for their conduct. This provides an incentive for organisations to deal openly and well with any potential wrongdoing when first raised by a worker.

10. In our view the Government's lack of promotion of PIDA and of the good intentions behind the Act has meant PIDA has yet to achieve its public policy goals. Low awareness of the provisions of PIDA, specifically in relation to gagging clauses – which are prohibited under s43J, has been particularly damaging to PIDA's purpose of protecting the public interest. We will return to this point.

CARE

11. **Speaking up for Care – our campaign**
    Due to the high number of calls we receive on our helpline from the care sector (16%) we have commenced a campaign to better encourage, empower, support and protect workers in care who speak up. To this end we hosted a conference in April 2011 and published a study of cases on our helpline – *Speaking up for vulnerable adults: What the whistleblowers say*. We are currently running a national survey of care workers and working with providers

for further qualitative research with their staff on what the barriers are to speaking up. In the upcoming months we will be undertaking a review of local and national systems for whistleblowers to report abuse and what guidance to organisations is available or being implemented.

12. **Winterbourne View and the CQC**
    Panorama's exposé of Castlebeck's care home, Winterbourne View, has quite rightly shocked the UK. From our experience, the problems that Terry Bryan experienced in flagging his concerns with the CQC are not an isolated incident. On our Whistleblowing Advice Line we help individuals raise their concern with the appropriate person. How this is achieved varies according to our advice and what the caller then decides. With some callers they are happy to raise their concern directly. Others may need some reassurance on how their concern might be handled, which we can check for them. Some may be very worried about their personal position and ask us to communicate their concern on their behalf.

13. We have had a number of cases where reaching the right person within the CQC or finding any form of reassurance has been frustrating, long winded or unproductive. This will range from a refusal to give the name of the local inspector as a contact to a lack of information, specifically around appropriate and safe staffing levels. The only guidance on the latter has been that as little as two members of staff to 40 patients with dementia would be unsafe. This has given little assistance to nurses and care workers at the coal face who see management shaving staff levels to breaking point.

14. In our view the CQC should have a dedicated hotline for whistleblowers with appropriate trained staff who know how to handle thorny issues such as confidentiality, feedback, concerns about reprisal and to give the appropriate reassurance to anxious workers who are trying to raise the alarm. More recently, we note that the CQC has taken some steps to improve information about whistleblowing on their website by providing direct links and guidance. However, the document is overly focussed on PIDA, is at points inaccurate, and uses quite legalistic language. Given that most employees will want to know who they can speak to and what will happen, focussing on whether or not they can sue their employer if they are sacked should not be the starting point. We are not convinced the guidance will either motivate or reassure workers looking to raise a concern with the CQC. Given their remit and recent events this is all the more worrying.

15. Furthermore, in a recent Freedom of Information request, the CQC refused to provide the number of claims under PIDA, referred to them by the employment tribunals on request of the claimant (a new mechanism introduced last year). From this it is clear the CQC have no specific system for monitoring claims which indicate an organisation is failing to properly deal with whistleblowers. We know from the Employment Tribunals that the CQC received 29 claim forms. This is the second highest number of PIDA claims forwarded to any of the prescribed persons. In comparison the Health and Safety Executive received 32 and the Financial Services Authority received 13.

HEALTH

16. **The Health Committee's report on their annual accountability hearings with the GMC and the NMC**
    While we do not disagree that doctors and nurses have a clear and important professional obligation to report colleagues whose practice is of concern, we are anxious that the focus needs careful nuancing and clarification.

17. We speak to professionals in and outside of the NHS on a daily basis. These individuals are keenly aware of their professional duties. Yet they may be working in an environment where they have seen individuals raising concerns, only to be damaged or ignored. Recent media coverage of the issue suggests that any doctor who speaks up will be ignored, suspended or dismissed. This does not wholly correspond with the experience of every professional who calls us, but it is a sadly familiar story. Raising concerns will never be risk - free but it needs to be made safer. Pertinently surveys frequently reveal the reason that most prevents workers from speaking up is the perception that nothing will be done.[1] As such we consider the following points have precedence over the need to identify and investigate individual professionals who may or ought to have known and did not report:

    i. It is a more serious issue for a senior doctor or manager to fail to address a concern or fail to escalate it appropriately.
    ii. The strongest emphasis for the organisation, GMC or the NMC in and around the reporting of malpractice should be a very hard line on doctors or nurses who have victimised genuine whistleblowers. In our view this should be treated as a disciplinary offence by the trust or an issue of professional misconduct by the professional regulators. This would send out a strong policy message across the NHS that victimisation is taken seriously and whistleblowers will be supported by their professional body. This would be a significant step forward in making it safer to speak up and report poor practice when required.
    iii. Establishing a safe environment in which to raise a concern should be a clear responsibility of any NHS trust and the professionals working there. There is a substantial amount of guidance on what constitutes best practice in whistleblowing arrangements[2], which we have summarised in Annex A. Whether or not this is translated into good practice on the ground is a moot question.

18. On the final point above, we would welcome a robust focus on what NHS organisations are doing in this regard and what system regulators are doing to guide and police the

[1] See our survey of nurses http://pcaw.org.uk/pressrelease_pdf/WBsurvey_summary.pdf and the recent NHS staff survey in which 74% of respondents said they would feel safe raising a concern but only 54% of respondents said they would feel confident their trust would address the concern.
[2] See Speak Up for a Healthy NHS – http://www.pcaw.org.uk/policy/policy_pdfs/SpeakupNHS.pdf and the BSI Code of Practice on Whistleblowing Arrangements.

establishment of good whistleblowing arrangements. Both the CQC and Monitor and prescribed persons under the whistleblowing legislation have a clear regulatory role.

19. Focusing only on a blanket duty before establishing a safe culture to raise a concern risks the following issues:
    i. Over reporting for fear of disciplinary or professional sanction
    ii. Trusts or the professional regulators focussing on those who did not speak up rather than those that failed to act on the concern itself.
    iii. An NHS organisation is provided with professional scapegoats rather than having to answer questions about what steps they have taken to provide a safe culture in which to raise concerns.
    iv. A heavy burden on individuals rather than the responsible organisation to address malpractice
    v. An inherent lack of accountability within the system meaning professionals take the brunt of organisational failure.

In summary: if a trust has taken clear steps to follow guidance and implement robust whistleblowing arrangements and has a demonstrable track record of dealing well with whistleblowing concerns and firmly with those who victimise genuine whistleblowers, it is then legitimate and proportionate for a regulatory body to question a professional who fails to report a serious concern that they knew or ought to have known about.

20. **GPs and protection under S43K PIDA**
    Particularly in light of the above, we draw your attention to a potential gap in the law regarding the protection of GPs. It is vital that GPs are able to raise concerns and not fear reprisal from the PCT or other professionals. As such they were covered by the extended definition of "worker" under PIDA, initially those "providing general medical services" (43K(1)(c)) . Unfortunately there has been some confusion on this point further to comments in the house by Anne Milton Health Minister, possibly due to later amendments to the law that may have overlooked all those "performing services" (43K(1)(ba), while GPs who are providing services are protected. We are not confident that as the law stands all GPs are protected and we have set out below the relevant provisions. We hope this will be helpful in clarifying the point if the issue arises at the Health Select Committee and the members put pressure on the Department of Health to rectify the situation as soon as possible.

21. **Section 43K ERA**
    Extension of meaning of "worker" etc. for Part IVA

    43K.
    (1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who-
    ...

(ba) works or worked as a person performing services under a contract entered into by him with a Primary Care Trust [under section 84 or 100 of the National Health Service Act 2006 or with a Local Health Board under section 42 or 57 of the National Health Service Act (Wales) Act 2006],]
(c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services in accordance with arrangements made-
(i) by a [Primary Care Trust or] Health Authority under section 29, 35, 38 or 41 of the National Health Service Act 1977, or
(ii) by a Health Board under section 19, 25, 26 or 27 of the National Health Service (Scotland) Act 1978,

22. **Student health professionals and 43K**
A student may often be the newest individual at a hospital, having come from an environment where they are being taught professional ethics. As such they are most likely to have "fresh eyes" and be worried by what may be seen to be accepted practices within an organisation. It is vital such individuals, at a vulnerable point in their career, are afforded the protection of the law.

23. PIDA took this into account at inception and made provision for students on work placements to be seen as part of the extended definition of "worker". Under this provision the hospital/establishment in which they had undertaken their work placement would be deemed their employer. However the provisions of the Act may no longer be adequate given the change in the structure of training, particularly for nurses, as the qualification is now degree based. The relevant excerpt is below:

24. **Section 43K ERA**
Extension of meaning of "worker" etc. for Part IVA

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who-

……

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than-
(i) under a contract of employment, or
(ii) by an educational establishment on a course run by that establishment;
and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

(2) For the purposes of this Part "employer" includes-
(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,
(b) in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph, and

(c) in relation to a worker falling within paragraph (d) of that subsection, the person providing the work experience or training.

(3) In this section, "educational establishment" includes any university, college, school or other educational establishment.

25. Our anxiety is that the employer under this provision will now be the educational establishment. This means that if a student raises a concern at the hospital where she is undertaking a work placement, she will not be protected from any subsequent bad treatment by that hospital, i.e. poor appraisals or asking her not to return (which would probably have a serious effect on her completing her qualification). The added worry is that the hospital has one less incentive to deal well with the concern and the individual, if no potential claim can arise as they are not deemed to be the employer.

26. We have seen cases where the education establishment has removed a student nurse from a course after they raised concerns on a ward and neither the hospital nor the university would accept responsibility. As such she was unable to qualify as a nurse and was effectively deprived of her career choice.

27. It should not be possible for hospitals to have a "get out", where they have attacked a student via poor recommendations to the university, to say that due to the fact that nursing is now degree based they have no responsibility. For this reason we would recommend making clear that student nurses are deemed workers and an exception to (d) (ii) above.

28. **Health and Social Care Bill**
Given the above, the Health and Social Care Bill could provide a vehicle for an appropriate amendment under PIDA to ensure student nurses are protected. Additionally to ensure in the passage of the Bill that GP protection is not compromised.

29. **Inquiry into gagging, limitation of rights (Fecitt) and litigation costs in the NHS**
The committee stated in para. 44 of their recent report on their annual accountability hearings with the GMC

> *44. The Committee recognises, however that doctors and other practitioners who have raised concerns by other staff have sometimes been subject to suspension, dismissal or other sanctions.[50] The Committee therefore intends to examine this issue in more detail in due course.*

30. If the committee is to examine this issue, we would urge them to widen their remit and examine the prevalence of gagging clauses in compromise agreements within the NHS as well as the issue of litigation costs. We are aware of a number of individuals who feel they have been gagged by their organisation and fear speaking out. A hearing with further evidence on the issue would enable individuals to speak under the umbrella of parliamentary privilege, thus ensuring no legal action could be taken by former employers for breaching the gagging clause. The added benefit of this is it would make a lawyer instructed by an NHS organisation think very carefully before trying to impose a gag that would be void under PIDA.

31. Additionally we have noticed a trend in recent times that trusts engage expensive lawyers and top QCs to put forward arguments that attempt to undermine PIDA. Firstly this means large sums of public money are potentially being used to fight those who have spoken up and in some cases even limit the rights of whistleblowers. We refer to the case of Fecitt (and others) v NHS Manchester[3], which is pending at the Court of Appeal. One premise of the Appellant's (NHS Manchester's) argument is that employers should not be vicariously liable for the actions of employees who victimise a whistleblower. If this argument succeeds, PIDA would cease to provide adequate protection.

32. The use of expensive lawyers is an extremely troubling trend. To reach an even playing field claimants are forced to spend vast amounts of money to bring their claim. This has inevitably led to PIDA being criticised as a remedy that is too expensive to pursue. The risk is that a good, world leading, piece of legislation and a vital part of the framework that protects whistleblowers, will be undermined. This in no way serves the public interest and could take us back 10 years in our progress towards properly protecting those who speak up and challenge wrongdoing. Organisations should be working harder to resolve whistleblowing concerns before the need to issue a claim arises.

Public Concern at Work
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[3] UKEAT/0150/10/CEA – pending to be heard in the Court of Appeal 5 and 6 October 2011