

Report to Audit and Governance Committee

Review of Whistleblowing Protocol

17 November 2010

1.0 Purpose of This Report

- 1.1 The purpose of this report is to update Members on the outcome of the recent review of the Whistleblowing Protocol and to obtain agreement in principle for the proposed changes required to bring the Protocol in line with best practice.

2.0 Review of Cheshire East Council Whistleblowing Protocol against Best Practice Guidance

- 2.1 In recent months a number of issues have been raised via the Whistleblowing Protocol that were subject to some discussion as to whether or not they actually constituted Whistleblowing matters. These included reports from members of the public that were more suited to the complaints process, issues involving schools that should be dealt with via the school's own policy and personnel issues that should have been addressed through the Dignity at Work policy.
- 2.2 As a result of these discussions, a review has been carried out against the Whistleblowing Arrangements Code of Practice Publicly Available Specification (PAS) 1998:2008.
- 2.3 The PAS was developed by Public Concern at Work, the independent authority on public interest Whistleblowing, in collaboration with the British Standards Institution (BSI).
- 2.4 The code of practice states that good Whistleblowing arrangements will include the following six elements and it is against these elements that the current Protocol has been reviewed;
- Provide examples distinguishing whistleblowing from grievance
 - Give employees the option to raise a Whistleblowing concern outside of line management
 - Provide access to an independent helpline offering confidential advice
 - Offer employees a right to confidentiality when raising their concerns
 - Explain how and when a concern may safely be raised outside of the organisation
 - Provide that it is a disciplinary matter (a) to victimise a bona fide whistleblower, and (b) for someone to maliciously make a false allegation

3.0 Findings and Recommended Actions

3.1 Although the Whistleblowing Protocol states that the Council has a grievance procedure and policies for dealing with harassment, it does not provide examples of the type of issues that should be reported through it. The guidance supporting the Protocol on both the intranet and internet site give a list of the type of issues that could be reported using the Protocol but these examples include bullying or abuse of employees which the code of practice advises are not issues that are effectively dealt with under Whistleblowing policies and that existing grievance/dignity at work policies should be used in these instances.

Recommendation1

The Whistleblowing Protocol should be updated to include examples of issues that should be reported and distinguish between those covered by other policies. In doing so, bullying or abuse of employees should be removed from the list of examples provided online.

3.2 Although this is covered in section 3.1.3 of the Protocol there is an anomaly in that it clearly states that the Protocol is available for members of the public to report concerns. Good practice is clear in stating that whistleblowing should be available for *employees* to raise concerns and that members of the public should utilise the established complaints process.

3.3 The online guidance provides three alternative means of reporting concerns outside of line management but the Protocol does not identify how reports will be collated to ensure consistency in the way in which they are handled.

Recommendations 2 - 4

The Whistleblowing Protocol should be updated to remove references to its use by members of the public, and, in doing so specific reference should be made to the Complaints Procedure.

Consideration should also be given as to whether appropriate processes are in place to ensure that all Whistleblowing reports received via the various means are collated and dealt with consistently.

As a result of removing access to the Protocol from members of the public it is important to ensure that the Complaints Policy covers the reports that may be received and that staff operating it are aware of the changes and how to action any such reports.

3.4 Although details of external contacts are provided in the Protocol and both of the online sites, they do not specifically mention that advice is available and also state that they should only be used once the whistleblower has attempted to resolve their issue internally.

Recommendation 5

The Whistleblowing Protocol should be updated to clearly state that confidential, independent advice is available from the Public Concern at Work helpline. A link to their website should also be provided as this contains additional information for potential whistleblowers. It should also be made clear that advice is available regardless of whether a concern has already been raised.

3.5 Although the right to confidentiality when making a report is covered in section 4.2 of the Protocol and also in both of the online resources, it is important that this right is made more explicit as this protects the authority from committing breaches of EU Data Protection regulations in relation to anonymous whistleblowing reports.

3.6 The way in which a report may be made outside of the organisation is covered in section 5.4.1 of the Protocol and also in the online pages, however, as previously indicated in regard to the independent helpline, it is stated that these routes should only be used once the internal procedure has been exhausted.

Recommendation 6

The Whistleblowing Protocol should be updated to clearly state that whilst it is hoped that in the event of someone wishing to raise a concern, they would have sufficient confidence in the internal procedures to utilise the Whistleblowing Protocol in the first instance, they also have the option of raising their issues with the stated outside bodies.

3.7 Section 4.1 of the Protocol states that the council will not tolerate any harassment or victimisation and that they will protect anyone making a concern in good faith. It does not however, state that the act of harassment or victimisation will be considered a disciplinary matter.

3.8 Section 4.4 of the Protocol confirms that disciplinary action may be taken against any employee found to have made an allegation frivolously, maliciously or for personal gain. Similarly the online resources confirm that action may be taken against anyone making vexatious reports but simply states that the council will protect whistleblowers against victimisation and harassment.

Recommendation 7

The Protocol should be updated to clearly state that anyone found to be subjecting a bona fide whistleblower to any form of victimisation or harassment will be dealt with under the council's disciplinary procedure.

4.0 Further areas for improvement identified during the review

4.1 In carrying out the review of the Protocol the following areas for improvement were identified and should be addressed as part of the exercise to bring the Protocol in line with the PAS.

4.2 Although the Protocol states that people are encouraged to put their name to reports it does not actively discourage the making of anonymous reports and the online guidance provides suggestions as to how anonymous reporters may still be able to receive feedback by providing an email address or telephone number. This is not in line with good practice and has, it would appear, been included to comply with the Sarbanes-Oxley Act. Unfortunately, this act covers American organisations and contradicts EU Data Protection authorities' guidance on Whistleblowing schemes;

"As far as data protection rules are concerned, anonymous reports raise a specific problem with regard to the essential requirement that personal data should only be collected fairly. As a rule, the Working Party considers that only identified reports should be communicated through whistleblowing schemes in order to satisfy this requirement...(and) that whistleblowing schemes should be built in such a way that they do not encourage anonymous reporting as the usual way to make a complaint. In particular, companies should not advertise the fact that anonymous reports may be made through the scheme."

Article 29 Guidance on Whistleblowing Schemes (2006) WP117, para.119

4.3 The PAS states that the additional obligations set out in guidance issued by the EU data protection authorities is not intended to apply to schemes that do not promote anonymous reporting but build on existing management, audit and compliance controls.

Recommendation 8

The Protocol and online guidance should be amended to actively discourage anonymous reports by providing additional assurances that reports will remain confidential unless;

- *The whistleblower wishes their name to be divulged, or*
- *The report is found to be clearly false or malicious, or*

- *Disclosure is ordered by the courts.*

4.4 It should also be clear that anonymous reports may not be acted upon, no feedback will be given and that the person will be informed that an anonymous report has been made about them and that it is usually possible for them to work out who the report is off.

4.5 The Protocol fails to define Whistleblowing and the description of its purpose is incorrect as it states that it is for people who do not feel that they can use other reporting means to raise concerns.

Recommendation 9

The Protocol should clearly state its purpose and signpost employees to alternative policies such as Complaints, Grievance and Dignity at Work. This should address the issues that are currently arising whereby concerns are being raised through Whistleblowing rather than the most appropriate reporting lines.

4.6 The Protocol does not clearly allocate responsibility for the management and investigation of concerns and the multiple contacts provided may lead to an inconsistent approach to decision making and investigations.

Recommendation 10

A decision should be made as to who is responsible for the receipt and allocation of concerns raised. This responsibility should extend to ensuring that all reports are recorded centrally and a consistent approach is taken to the handling of reports.

4.7 The Protocol does not contain a lot of detail and as such is not sufficiently robust to provide assurance to potential whistleblowers that appropriate action will be taken to investigate their concerns. In addition it does not provide details of how to access other policies should the reader decide that their concern should be reported via other means.

Recommendation 11

The Protocol should be updated to include additional detail and links to alternative ways of reporting concerns. In addition, members of the public should be advised that they should use the Complaints process for raising issues.

4.8 There have been a number of reports received about issues at schools which should have been dealt with via the individual school's Whistleblowing Policy. Several of these reports were in relation to personnel matters which should have been raised with either HR, or the Union, if the employee was dissatisfied with the way in which the school handled their complaint.

Recommendation 12

The section of the Protocol, and online guidance, relating to schools should be updated to provide additional details as to the way in which reports regarding schools should be made. This should include giving advice that for personnel related issues it may be advisable to contact the union who have established links with HR to take such issues forward.

5.0 **Conclusion**

5.1 The current Whistleblowing Protocol does not meet best practice guidelines and is not operating effectively which is demonstrated by the fact that reports are being received via the Protocol that are either from members of the public, schools or simply aren't Whistleblowing matters. In addition, the failure to actively discourage anonymous reports leaves the Council at risk of breaching EU data protection regulations.

5.2 In order to ensure that the Protocol is fit for purpose it is recommended that it is subject to a rewrite in line with the PAS and that the online guidance is updated to reflect the new Protocol. Upon completion of this exercise the updated Protocol will be subject to consultation with the unions with a view to presenting it at the 25 January 2011 Audit and Governance Committee.

5.3 As the whistleblowing Protocol is part of the Constitution the new Protocol will also need to be presented to Constitution Committee and ultimately receive approval from Council.

5.4 Once the Protocol has been approved it is proposed that it be re-launched to ensure that all staff, members and contractors are aware of the changes and to raise awareness of the way in which concerns can be reported.