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Public Concern at Work's Response to the consultation "how fair and effective are the fixed income, foreign exchange and commodities markets?"

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1. We welcome this opportunity to make this short contribution to the consultation. Our submission will focus on how the proposed amendments will impact whistleblowing.

Introduction

2. As way of introduction Public Concern at Work is an independent charity and legal advice centre. 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 advice line has advised over 18,000 whistleblowers to date; this unique insight into the experience of whistleblowers informs our approach to policy and campaigns for legal reform.

3. In 2012 and 2013 we campaigned for improvements to the Public Interest Disclosure Act 1998 (PIDA), the legislation which protects whistleblowers in the UK. Some of our campaign points led to legislative improvements to PIDA, through the Enterprise and Regulatory Reform Act 2013. PIDA, while essential legislative protection, is only one part of the framework in the UK that is needed to ensure whistleblowing is safe and effective. To this end in 2012/2013 PCaW established the Whistleblowing Commission to examine the effectiveness of whistleblowing in the UK and to make recommendations for change.

4. 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 Commission also recommended that this Code could be used by regulators as part of their inspection and assessment regimes.

5. Our short response will focus on questions 41 (in particular the whistleblowing element: "what role could the industry play in helping to explore best practices on how to make whistleblowing and other similar regimes more effective?") and question 42.

Q41: What role could the industry play in helping to explore best practices on how to make whistleblowing and other similar regimes effective?

6. We welcome the consultation's focus on what role industry can play in embedding best practice among firms. If whistleblowing arrangements are seen by staff as effective, it will drive up standards in two ways. First, it will encourage staff to raise concerns at the earliest opportunity and secondly, it will act as a deterrent for those willing to commit wrongdoing as they may risk detection via other staff reporting their activities.

7. Before outlining what best practice looks like it's worth spending a moment to consider what issues and barriers staff face within the financial sector. In 2013 PCaW conducted research into the

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experiences financial sector whistleblowers who contacted the advice line between 2007 and 2012.[1]

8. From this research we know that those who contact us for advice on how to raise concerns about wrongdoing are usually professionals who have been in banking for less than two years. They raise concerns about an ongoing wrongdoing, which has been occurring for less than six months and affects the wider public.[2]

9. Our data shows 62% of financial service whistleblowers raise their concerns once, 20% raise a concern for a second time.[3] These results are a contrast to the average across all sectors which showed 44% raise a concern once and 39% raised their concerns a second time.[4] This indicates that financial organisations have a small but significant opportunity to capture information from staff if they have a concern about wrongdoing. However 77% said they were ignored. This suggests that in many cases, this opportunity is being missed. This is likely due to lack of training and awareness at key levels of management.[5]

10. As part of our methodology we coded the different routes a whistleblower could use to raise their concerns, comparing this with the number of times the concerns were raised. The following categories were used in the coding:
    - line manager
    - senior manger
    - director or executive
    - compliance, risk legal or audit functions
    - whistleblowing hotline or designated officer within a whistleblowing policy
    - Financial Services Authority (FSA) and other regulators
    - professional body[6]

11. Internal arrangements are those functions that are part of the financial institution's own whistleblowing arrangements. A distinction can be made between management structures such as line manager, senior manager and director or executive from compliance, risk, legal or audit functions. Whistleblowing hotline or designated officers are specialist reporting mechanisms that sit outside the management structure. Specialist functions are an important mechanism for disclosure of concerns where approaching management would not be appropriate e.g. where local managers are involved in the wrongdoing or where the whistleblower has a bad relationship with the local managers.

12. External routes are those outside the financial institution, the majority of these disclosures are made to the regulatory bodies, with the Financial Services Authority (FSA)[7] making up the majority of this category.[8] Disclosures made to professional bodies were coded separately.

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[1] "Silence in the City?" Whistleblowing in the Financial Services, a research project by PCaW supported by Slater & Gordon, 2013.
[2] Page 4, Ibid.
[3] Page 15, Ibid.
[4] Page 16, Ibid.
[5] Page 7, Ibid.
[6] Page 20, Ibid.
[7] Now the Financial Conduct Authority (FCA)

13. From our analysis internal arrangements are used in 66% of cases when the concerns are raised for the first time, with line manager making the largest portion of this figure at 27%.[9] Use of internal arrangements then halves to 35% if the concern is raised for a second time.[10] This is very different from other sectors where the average shows 91% of concerns were raised internally for the first time. This figure falls to 73% if the concerns are raised internally for a second time.[11]

14. Specialist functions, those which are alternatives to the management structure, make up 10% of those concerns raised for the first time with compliance, risk, legal or audit functions and 5% when a concern is raised a second time. Hotlines or designated officers received 8% of concerns where the concern is raised for the first or a second time.[12]

15. Disclosures to a regulatory body make up 18% of concerns raised for the first time, rising to 39% if the concern is raised for a second time. [13] In other sectors 7% raise their concern with regulators at the first attempt. This increases to 23% if the concern is raised for a second time. Despite 58% of whistleblowers identifying themselves as members of professions, very low numbers (almost nil) raise their concerns with professional bodies.[14]

16. These results suggest that line managers are the most popular route to raise a concern when raising for the first time. This is not surprising as a whistleblower may feel more confident approaching someone they know in the management structure.

17. What is surprising is that so few individuals seem to trust the specialist internal functions (compliance, risk, legal, audit, whistleblowing hotline or designated officer). We would expect these functions to be used more where the concern has not been addressed after raising it for the first time. Instead whistleblowers are more likely to approach a regulatory body if the concerns are not addressed by the management structure at the first attempt to raise the concern. These results suggest financial services organisations only have a limited opportunity to capture and resolve concerns internally before they are escalated to a regulator. The low use of these specialist internal functions could be due to a lack of awareness, lack of confidence that action will be taken, or a lack of trust due to the poor handling of a whistleblowing concern in the past.

18. The consultation sensibly points out there is a limit to what regulations and enforcement bodies can do to encourage and protect staff coming forward with concerns. Real cultural change can only be effective if it flows from firms within the industry. A starting point for this is embedding best practice for whistleblowing arrangements so that this is standard practice across the industry.

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[8]Other regulators included the Financial Reporting Council, HMRC, Information Commissioner's Office, Office of Fair Trading, Serious Fraud Office, and the Securities and Exchange Commission.
[9] Page 21, "Silence in the City?" Whistleblowing in the Financial Services, a research project by PCaW supported by Slater & Gordon, 2013.
[10] Page 21,Ibid.
[11] Page 12, Whistleblowing the Inside Story, a research project by PCaW and the University of Greenwich.
[12] Page 21, "Silence in the City?" Whistleblowing in the Financial Services, a research project by PCaW supported by Slater & Gordon, 2013.
[13] Page 21, Ibid.
[14] Page 21, Ibid.

19. Our suggestion is that the Whistleblowing Commission's Code of Practice should either be promoted as best practice, or form the basis for consultation/discussions on best practice within the industry. This Code was the major recommendation of the Whistleblowing Commission and builds on the foundations for best practice established by the Committee for Standards in Public Life (CSPL) [15] and the BSI Code of Practice[16].

20. From our experience training and working with organisations we have seen a number of whistleblowing policies. Many of these policies tend to be 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, place the duty of fidelity above all else, and contain contradictory and/or poor reassurances over confidentiality.

21. Getting the policy right is a crucial first step and the CSPL has informed and influenced best practice on whistleblowing across all sectors.

    The CSPL 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.[17]

    To be effective, the CSPL has stated that it is important that those at the top of the organisation show leadership on this issue and ensure that the message that it is safe and accepted to raise a whistleblowing concern is promoted regularly.[18]

22. A good policy needs to be actively promoted and communicated to staff. Managers need to be trained in their role and on how to handle concerns raised through the policy. There needs to be buy-in at the top of the organisation with periodic reviews by the audit committee or board checking to see how the policy is working in practice. Without this activity there is always a danger that they policy will not live up to expectation in practice.

23. Recent research underlines this point showing too often organisations see whistleblowing policies as a tick box exercise. A recent survey of senior managers in charge of their organisations whistleblowing arrangements revealed that despite 90% of companies adopting whistleblowing

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[15] 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.
[16] The British Standards Institution's Code of Practice on Whistleblowing Arrangements
[17] 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.
[18] Paragrah 4.31, Page 89, Ibid.

arrangements, only 1 in 3 thought their arrangements were effective and 1 in 10 said their arrangements were not clearly endorsed by senior management.[19]

24. 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. a record of the number and types of concerns raised and the outcomes of investigations;
    b. feedback from individuals who have used the arrangements;
    c. any complaints of victimisation;
    d. any complaints of failures to maintain confidentiality;
    e. a review of other existing reporting mechanisms, such as fraud, incident reporting or health and safety;
    f. a review of other adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties);
    g. a review of any relevant litigation; and
    h. a review of staff awareness, trust and confidence in the arrangements.[20]

25. Whistleblowing can be an effective barometer of whether an organisation has an open culture that encourages staff to raise concerns at the earliest opportunity to minimise the risk of harm.

26. Our research shows that financial sector organisations have a limited opportunity to capture whistleblowing concerns internally, possibly due to a lack of awareness or trust in internal arrangements. To encourage staff to raise concerns a whistleblowing policy on its own is not enough, regular promotion and monitoring is needed to ensure the policy works in practice. Too often organisations see this process as a tick box exercise rather than an ongoing process.

27. Adopting the Code as best practice will show that ethics are now at the heart of banking and will aid the recovery of confidence lost as a result of the recent scandals. More importantly the Code will make it clear to staff what duties and protection are expected from the arrangements giving them the confidence to raise their concerns at the earliest opportunity. For firms a Code will add clarity as to what their arrangements should be on paper and how they should operate in practice.

Q42: Are there processes or structures that can allow firms to punish malpractice by their own staff more effectively (for example, penalties for breaching internal guidelines)?

<u>Victimisation of a Whistleblower</u>

28. The victimisation of a colleague who has raised concerns about wrongdoing or malpractice, whether by management or by co-workers, is not only an unacceptable act against the individual but can deter other members of staff coming forward in the future. Fear of victimisation or reprisals for raising concerns has been identified in research as a primary barrier that stops workers from raising concerns they have witnessed in the workplace.[21]

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[19] http://www.pcaw.org.uk/files/01%20EY%20Research%20Release%20FINAL.pdf
[20] Paragraph 53, page 13 , The Whistleblowing Commission, November 2013.
[21] Ibid p.g.8

29. Firms should be encouraged to take an attitude of zero tolerance towards the victimisation of a whistleblower whether these acts come from a junior or senior member of staff. We highlight the text from the Code of Practice which underlines this point:

    "The employer should not only comply with these procedures (the Code of Practice) but should also sanction those who subject an individual to detriment because he/she has raised a concern and should inform all workers accordingly."[22]

Failure to investigate concerns raised by whistleblowers

30. So far our answer to question 42 has focused on the damage that can be caused by a failure to sanction those who victimise a whistleblower, but the failure of managers to adequately deal with concerns raised with them by concerned staff can also have a detrimental effect on staff coming forward in the future.

31. A failure to investigate or escalate a concern can have serious repercussions if malpractice or wrongdoing is not exposed and addressed, a concern that may seem small on the surface could lead to the discovery of a more serious situation. Secondly the failure of managers to adequately deal with concerns can have a detrimental effect on attempts to foster a more open culture in the workplace. Staff will be less likely to come forward if they see inaction over concerns raised by their colleagues in the workplace. Research has shown that next to fear of reprisals a perception that nothing will be done if you raise a concern is the most significant barrier to speaking up about wrongdoing, malpractice or a risk in the workplace.[23]

32. Firms should be encouraged to think about when disciplinary action should be taken against managers in this scenario. A distinction should be drawn between mangers who fail to investigate, from one where they have failed to appropriately deal with a concerns. Failure to investigate should apply where it would be reasonable to expect managers to investigate the concern e.g. where the manager is a named contact for staff to approach on a whistleblowing policy, or where their role due to seniority means they are expected to investigate the concern. A failure to deal with a concern includes a situation where a manager fails to escalate a concern through the management structure because it would be inappropriate for them to carry out an investgiation e.g. a situation where the concern raised is about a serious issues of wrongdoing or malpractice or where the concern raised is in a department not directly under the manager's responsibility.

Conclusion

This is a summary of PCaW's recommendations:

- The Whistleblowing Commissions Code of Practice should either be promoted as best practice, or form the basis for consultation/discussions on best practice within the industry.

- Firms should be encouraged to take a zero tolerance attitude towards any member of staff who victimises a colleague for raising concerns.

[22] Ibid p.g.28
[23] Ibid p.g.8

- Firms should also be encouraged to sanction managers where it is found that they have failed to investigate a concern raised (where this is part of their role within the firm), or where a manager fails to escalate a concern though the whistleblowing arrangements brought to their attention by another member of staff.

Public Concern at Work

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