

<b>REPORT TO STANDARDS COMMITTEE</b>		
<b>Report Title</b>	<b>WHISTLEBLOWING REVIEW</b>	
<b>Key Decision</b>	<b>N/A</b>	
<b>Ward</b>	<b>All</b>	
<b>Contributors</b>	<b>Head of Law</b>	
<b>Class</b>	<b>Part 1</b>	<b>Date 29 October 2015</b>

## **1 Summary**

This report reviews the Council's whistleblowing policy and makes proposals to amend it with a view to improving it.

## **2 Purpose of the Report**

To ensure that the whistleblowing policy remains fit for purpose and up to date.

## **3 Recommendations**

To consider whether to agree the proposed amended whistleblowing policy appearing at Appendix 2 to this report and the measures set out in this report for its operation.

## **4 Background**

- 4.1 The Council was among the very first to do so when it introduced its whistleblowing policy approximately 20 years ago. A copy of the current policy appears at Appendix 1. Under the policy, complaints of malpractice or wrongdoing by members, employees, Council contractors or suppliers can be made by any person. The policy is widely publicised, is available on the Council website and is explicitly referred to in induction for employees and in the guidance for Council contractors
- 4.2 Since the inception of the Standards Committee, an annual report has been submitted to the Committee about the cases that have been looked into under the policy. In the last 13 years, there have been 28 referrals and in 4 instances, the complaint was held to be well founded and appropriate action taken. Even where the complaint was not well

founded on two occasions the investigation led to recommendations for amended practice

- 4.3 In considering each annual report, members are also asked to consider whether to update the policy, but subject to some amendments to reflect changes in personnel and changes to the law such as the introduction of the Bribery Act in 2011, there have been few substantive changes.
- 4.4 At the most recent meeting of the Standards Committee, members asked that the policy be fundamentally reviewed. Officers have carried out that review and now make proposals for some changes to the policy to make it clearer and to deal with practical issues that have arisen in the operation of the policy to date.
- 4.5 Having reviewed a number of similar policies in other boroughs both in and out of London, there are a number of features in those policies and in Lewisham's which the Council would want to affirm strongly. These include:
- A commitment to high standards of probity
  - Encouragement to staff and others to disclose malpractice
  - A commitment to investigate thoroughly and promptly
  - The policy to be a supplement to other avenues of complaint not a substitute
  - Safeguards to protect a whistleblower who reasonably raises concerns in good faith, even if they are unfounded
  - Agreement to keep the identity of the whistleblower confidential if requested and possible, without a guarantee that confidentiality will always be possible (e.g., if referral to police is necessary)
  - Anonymous complaints are more difficult to investigate but depending on the nature of the complaint and the possibility of obtaining other evidence they may still be investigated, particularly if the allegation is serious
  - Disciplinary action to be taken against any employee who makes a vexatious complaint under the policy
  - The whistleblower to be kept informed of progress and the outcome of the investigation

The above matters are explicitly reflected both in the existing and proposed amended whistleblowing policy.

## **5. Scope**

- 5.1 The existing policy makes it clear that the Council intends that the whistleblowing policy be used as a supplement to other avenues for

complaint to enable matters not covered by other procedures to be investigated. It is also stated that the whistleblowing policy should not be used to deal with matters pertaining to an employee's own contract which would be covered under the grievance procedure.

5.2 However there have been several disclosures under the existing policy where the whistleblower has not fully appreciated this distinction, nor that the disclosure would not necessarily halt ongoing disciplinary investigation. Officers therefore suggest that this be clarified by exemplifying the sort of matters intended for investigation under the whistleblowing policy as follows:

- Conduct that is a criminal offence or a breach of law
- Disclosures relating to miscarriage of justice
- Health & safety risks to the public and/or employees
- Damage to the environment
- The unauthorised use of public funds
- Possible fraud or corruption
- Sexual or physical abuse of clients, or
- Other unethical conduct

5.3 It is proposed that any serious concerns the whistleblower may have about any aspect of service provision, the conduct of officers or members, or others acting on behalf of the Council can be reported under the policy. This would cover anything which the whistleblower believes to be against the Council's standing orders or policies, falls below established standards of practice, or amounts to improper conduct. If there is a more appropriate channel for investigation the Monitoring Officer will direct the complaint to that channel, unless for some reason it is not appropriate to do so (for example, the whistleblower fears reprisals if that were done).

5.4 It is also suggested that the exclusion of grievance procedure matters be given more prominence in the whistleblowing policy to prevent any further misunderstanding.

5.5. For the amendments relating to the scope of the policy, members are referred to paragraphs 4.1 and 4.2 of Appendix 2.

## **6. Initial Review**

6.1 The existing policy provides for initial review by the Monitoring Officer to establish whether the matter ought to be investigated and if so how. In practice, the Monitoring Officer has passed all complaints for investigation to the person appointed to look into the matter (often a senior manager in the relevant service directorate). In future it is

proposed that the Monitoring Officer conduct this initial review herself, or ask the Deputy Monitoring Officer to do so. This will ensure that she is in a position to advise whether the matter should be investigated and if so how, with potential timescales. It would also enable her to advise whether there are elements of the complaint that do not fall within the ambit of the policy. Members' attention is drawn to paragraph 8.2 of Appendix 2 where this is dealt with.

## **7. Timescales and Informing the whistleblower**

- 7.1 The existing policy states that investigations will normally be completed within 28 days. Depending on the complexity of the investigation and the commitments of the investigating officer, this may not always be possible. Officers suggest that the Monitoring Officer inform the whistleblower in writing when an investigation is being undertaken and that the intention is that it be completed within 28 days. If however that proves not to be possible, it is proposed that the investigating officer will write to the whistleblower before the expiry of that 28 day period to update on progress and offer an updated estimated date for completion of the investigation. The investigating officer will update the whistleblower in writing at least every 28 days if there is further delay. Copies of all such correspondence must also be sent to the Monitoring Officer.
- 7.2 Once the investigation is complete, the Monitoring Officer will inform the whistleblower of the outcome in writing and will ask for feedback about the way their referral has been handled.

Section 8 of Appendix 2 applies.

## **8. Register of referrals**

- 8.1 In practice, the Monitoring Officer has kept a file containing the paperwork relating to disclosures under the policy and used this as a "register" of referrals and the source documentation for annual reports to the Standards Committee. Though this is comprehensive it is not the most useful management tool to enable her to check on the progress of ongoing investigations. There have been several instances where investigations by some managers asked by the Monitoring Officer to investigate on her behalf have taken longer than would be expected and in one most recent case not been pursued at all before the annual report to the Standards Committee. Though this latter case involved a whistleblowing matter in a school and arguably did not fall completely within the remit of the policy, it is unacceptable that there was no response to a request to investigate. The regular use of a formal register should enable a more systematic check on progress by

providing a more effective management tool to monitor progress of investigations. Also the proposals set out in paragraph 7 above should ensure that there is no repetition of this failure.

## **9. Spreading awareness among senior managers**

- 9.1 As the whistleblowing policy has been in place for several years it is appropriate now that its profile, especially given any amendments made, is re-emphasised. It is proposed that the Monitoring Officer carry out a refresher seminar for all service heads to highlight the existence of the policy and their duties under it. It is also proposed that an annual report on the implementation of the whistleblowing policy be submitted not only to the Standards Committee as now, but also to the Council's executive management team to ensure that it is given support at the highest officer level.

## **10. Other avenues for complaint**

- 10.1 Whilst many internal avenues for complaint remain the same as in the current policy, some amendments are needed to reflect changed circumstances. Paragraph 11.1 and 11.2 of Appendix 2 refers. Changes to external avenues for complaint in the event of a whistleblower being dissatisfied with the outcome of any investigation are also reflected in Appendix 2 at paragraph 11.3.

## **11. Schools**

- 11.1 Some referrals under the whistleblowing procedure relate to activities within schools. In these cases it is proposed that the Monitoring Officer will conduct a preliminary investigation into the complaint and then refer the matter, if it warrants investigation and depending on the nature of the complaint, either to the Headteacher or Chair of Governors of the school and to the Executive Director for Children & Young People. If the complaint exposes a potential safeguarding issue in any event it would be referred through the Council's safeguarding procedures. Where investigations involve schools it will be for CYP to report on progress of the investigation to the Monitoring Officer as set out in paragraph 7 above.

## **12. Anonymity**

- 12.1 The proposed policy as in the existing one will emphasise that anonymous complaints are more difficult to investigate. However, where a serious complaint is raised anonymously every effort will be made to investigate it. In deciding whether to investigate it will be important to consider whether it is possible to obtain other evidence in relation to the complaint without knowing the identity of the person

raising it. This is dealt with in the policy at paragraph 10 of Appendix 2.

### **13. Feedback**

- 13.1 In response to a recent request by the Standards Committee officers on completion of an investigation now ask the whistleblower for their views about the way the matter they raised was handled. This is already practice and it is now proposed that it be reflected in the amended policy. This is dealt with at paragraph 6.6 in appendix 2.

### **14. Financial Implications**

- 14.1 There are no specific implications arising from this report.

### **15. Legal Implications**

- 15.1 The Public Interest Disclosure Act 1998 (PIDA) as amended sets out a framework for public interest whistleblowing which protects workers from reprisals because they have raised a concern about malpractice. The Act provides protection where a disclosure relates to one of the broad categories of malpractice qualifying for protection under the Act. For a disclosure to be protected the whistleblower must make the disclosure in good faith and before making any external disclosure the concerns should have been raised internally or with a prescribed regulator. The Council's whistleblowing policy and the procedures for dealing with disclosures made under it are designed to comply with PIDA.
- 15.2 Disclosures about the actions of Councillors can be made under the whistleblowing policy. However, in accordance with the with the statutory framework for doing so, the Council has a Member Code of Conduct and a procedure for handling allegations of breach of that code. There is a statutory element to investigations of breaches of the Member Code of Conduct, including the involvement of an Independent Person. Any complaints about member conduct made under the whistleblowing policy will be dealt with under those procedures.
- 15.3 Similarly, there are statutory procedures in relation to vulnerable children and adult services and, where appropriate, allegations made under the whistleblowing policy will be directed for investigation in accordance with those statutory requirements.
- 15.4 The Equality Act 2010 (the Act) introduced a new public sector equality duty (the equality duty or the duty). It covers the following nine protected characteristics: age, disability, gender reassignment,

marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

15.5 In summary, the Council must, in the exercise of its functions, have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- advance equality of opportunity between people who share a protected characteristic and those who do not.
- foster good relations between people who share a protected characteristic and those who do not.

15.6 The duty continues to be a “have regard duty”, and the weight to be attached to it is a matter for the Mayor, bearing in mind the issues of relevance and proportionality. It is not an absolute requirement to eliminate unlawful discrimination, advance equality of opportunity or foster good relations.

15.7 The Equality and Human Rights Commission has recently issued Technical Guidance on the Public Sector Equality Duty and statutory guidance entitled “Equality Act 2010 Services, Public Functions & Associations Statutory Code of Practice”. The Council must have regard to the statutory code in so far as it relates to the duty and attention is drawn to Chapter 11 which deals particularly with the equality duty. The Technical Guidance also covers what public authorities should do to meet the duty. This includes steps that are legally required, as well as recommended actions. The guidance does not have statutory force but nonetheless regard should be had to it, as failure to do so without compelling reason would be of evidential value. The statutory code and the technical guidance can be found at: <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice-and-technical-guidance/>

15.8 The Equality and Human Rights Commission (EHRC) has previously issued five guides for public authorities in England giving advice on the equality duty:

- The essential guide to the public sector equality duty
- Meeting the equality duty in policy and decision-making
- Engagement and the equality duty
- Equality objectives and the equality duty
- Equality information and the equality duty

15.9 The essential guide provides an overview of the equality duty requirements including the general equality duty, the specific duties and who they apply to. It covers what public authorities should do to

meet the duty including steps that are legally required, as well as recommended actions. The other four documents provide more detailed guidance on key areas and advice on good practice. Further information and resources are available at:

<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

15.10 There are no specific equality implications arising from this report.

## **16. Crime & Disorder Implications**

16.1 The whistleblowing policy is designed to enable anyone to bring to the surface any allegation of malpractice or wrong doing so that it can be investigated thoroughly and appropriate action can be taken. This is consistent with the Council's duties under the Crime & Disorder Act as amended. By keeping the profile of the policy high and encouraging complaints to come forward the intention is to create a culture which promotes the highest standards of probity.

## **17. Environmental Implications**

There are no specific implications arising.

## **18. Conclusion**

18.1 It is clear that the whistleblowing policy has been used since its introduction. This is evidenced by the number of cases that have been referred and the fact that, where appropriate, action has been taken to rectify malpractice. However, officers recognise that the time is ripe for the Council's approach to whistleblowing to be reinvigorated and for an amended policy to be relaunched with training for senior officers and members as well as a series of publicity initiatives. Members are asked to consider the contents of Appendix 2 and to approve it, subject to any amendments the Committee may approve.