



WikiLeaks, Whitehall and Whistleblowers



Following WikiLeaks, Shonali Routray examines the position of UK civil servant whistleblowers. Are there safe routes for whistleblowers to raise their concerns rather than having to rely on anonymous leaks, she asks

The dramatic twists and turns in the story of WikiLeaks and the release of over 250,000 US diplomatic “cables” – secure communications between the US State Department and American embassies around the globe dating back 50 years – raise some fundamental questions about the workings of Government. When is the release of confidential information in the public interest? Is there a difference between the public interest and what the public is interested in? As members of the public do we need to know that Mervyn King, the Governor of the Bank of England, had a low opinion of George Osborne and David Cameron before the General Election? Are we surprised that as part of US diplomatic relations, Hillary Clinton asked all of her diplomats to gather as much information as possible on the workings of the United Nations? Amongst some of the gossip, there have been some revelations that have shown wrongdoing at State level and one such example is the detail around the atrocities in Sri Lanka. Arguably this type of information is in the public interest – but we then move to the question, how are such issues best raised?

In the UK the question of leaking Government secrets and whistleblowing protection for civil servants often vexes Government; for Government to run smoothly there needs to be trust between civil servants and elected Ministers. However, what happens where civil servants believe they have come across wrongdoing or malpractice, such as maladministration within the department they work? What protection do civil servants have to raise their concerns safely? Will the WikiLeaks coverage make it more dangerous for them to speak up? And will anonymous leaks to the media become the order of the day?

Existing protection for UK whistleblowers

In 2009 the Council of Europe recognised the UK’s whistleblower protection – the Public Interest Disclosure Act 1998 (“PIDA”) – as one of the most comprehensive in the world. There are only a handful of countries (Ghana, Japan, New Zealand and South Africa) which offer the same level of legal protection to public sector and private sector employees from the day they start working (there is no qualifying period of employment).

The types of wrongdoing that can be raised are wide in scope and includes information tending to show:

- a criminal offence,
- breach of a legal obligation,
- a miscarriage of justice,
- a health and safety danger, a danger to the environment,
- or an attempt to cover up one of the preceding categories has taken place, is taking place or is likely to take place (as defined in s 43B of the Employment Rights Act 1996 (“ERA 1996”).

PIDA sets out a tiered disclosure regime, providing employment protection for those who raise concerns internally (see s 43C of ERA 1996), and/or with regulators (s 43F of ERA 1996) while also recognising the role of wider accountability,

providing protection to individuals who raise concerns with the media or MPs (s 43G of ERA 1996).

Essentially, the law is there to protect the reasonable and honest whistle-blower who has raised an issue of genuine public interest.

In recent years, the case law around PIDA has extended its scope of protection to cover:

- post-employment detriment: *Woodward v Abbey National plc* [2006] EWCA Civ 822;
- concerns raised in previous employment: *BP plc v Elstone* [2010] UKEAT 0141/09/3103; and
- PIDA has been likened to discrimination law: *Fecitt v NHS Manchester* [2010] UKEAT 0150/10/2311).

Despite the development of case law, the knowledge about the legal protection for whistle-blowers is relatively low – surveys carried out by YouGov found that around 22–23 per cent of workers are aware there is a law to protect whistle-blowers.

Whitehall leaks and the Civil Service Code

The leaking of Government information is not a new thing and was happening long before the WikiLeaks storm. For civil servants the position can be complicated as they are signatories to the Civil Service Code (“the Code”) which enables them to raise a concern internally.

However the Code does not offer clear guidance on how they can raise a concern externally and the only option is to raise concerns with the Civil Service Commissioners, who have limited powers to investigate and do not report directly to Parliament.

The Code suggests that if they are unhappy with the way in which the matter is being dealt with or cannot raise their concern internally, civil servants can only consider raising a concern externally if they resign. This was true in the case of Elizabeth Wilmshurst, the Foreign Office lawyer, who raised concerns about the legality of the Iraq War following her resignation.

The message in the Code is at odds with the employment protection for individuals who raise concerns externally with regulators (such as the Health and Safety Executive), or if they go wider to the media or to an MP. As a result, some civil servants may feel that their only option is to raise their concern anonymously to the media or worse still, not speak up at all.

Moreover, if the civil servant is raising a concern about security and intelligence matters, defence, international relations and law enforcement, matters covered by the Official Secrets Act 1989 (“OSA”), and he/she is in breach of the OSA, they are not protected under PIDA (see s 43B(3) of ERA 1996). Thus, there needs to be clear channels for a civil servant to raise a concern externally from their Departments.

Leaks and whistleblowing in Whitehall: the report

In November 2008 the arrest of Damian Green MP and the civil servant Christopher Galley, for the leaking of Home Office

“The leaking of Government information is not a new thing and was happening long before the WikiLeaks storm”

Employment

MAKING WHISTLEBLOWING WORK

Public Concern at Work (“PCaW”) – an independent, self-funding whistleblowing charity – was set up in 1993. It runs a free confidential helpline on 020 7404 6609 for people with whistleblowing concerns. It also promotes the public interest through its policy work; and advises public bodies, business, regulators and unions on how to create more open and accountable cultures. The charity’s work has been commended by Ministers, the Court of Appeal, leading newspapers, the Committee on Standards in Public Life and various public inquiries.

For more information visit: www.pcaw.co.uk

information, sparked an inquiry by the Public Administration Select Committee (“PASC”) into leaks and whistleblowing in Whitehall. PASC heard from a number of civil servant whistleblowers including Derek Pasquill, Katharine Gun and Carne Ross.

Recommendations made in PASC’s subsequent report, “Leaks and Whistleblowing in Whitehall” (2009, HC 83) included:

- the Civil Service Commissioners should have the power to report to Parliament evidence indicating that the Government was misleading Parliament or the public, or the fact that the Civil Service has refused to act on a justified complaint;
- the Commissioners should also conduct independent investigations of breaches of confidentiality by special advisers, and report their findings to Parliament if

Ministers do not act on them;

- the leaking of information should only be a criminal matter where there is a breach of the OSA or there is evidence of serious criminal misconduct in addition to the leak itself, for example accepting payment; and
- the Cabinet Office, Heads of Departments and the Civil Service Commissioners should do more to ensure that potential whistleblowers know how to raise concerns and have the confidence to come forward with them.

Work to be done

The recommendations show that there is some work to be done by Government, to ensure that there are safe routes for civil servants to raise their concerns, so that the anonymous leak is not the preferred option.

The relatively low knowledge of PIDA and the current coverage around WikiLeaks is likely to confuse UK civil servants even more about how they can raise a concern safely outside their Department, or Government, and at times with the relevant Parliamentary Select Committee.

The Civil Service Code was updated in November 2010 and is heading in the right direction. However, the Government has not yet produced the revised guidance set out in the PASC report.

As the WikiLeaks story continues, the Government would be wise to address this situation. ●



Shonali Routray, barrister, is the Senior Client Services Officer at Public Concern at Work.