



FINDINGS AND RECOMMENDATIONS: 19 March 2015

CIVIL SERVICE CODE

COMPLAINT TO THE CIVIL SERVICE COMMISSION

AP 000122

FINDINGS OF THE PANEL OF INVESTIGATION

AUTHORITY

1. The Constitutional Reform & Governance Act 2010 requires the Minister for the Civil Service to publish a code of conduct for the Civil Service (known as the 'Civil Service Code'). The Act also prescribes the minimum requirement for this Code, namely that:
 - a. civil servants must carry out their duties to assist the administration they are employed to serve, whatever its political complexion;
 - b. civil servants must "carry out their duties with integrity and honesty; and with objectivity and impartiality".
2. The 2010 Act also outlines the functions of the Civil Service Commission. It gives as one of the functions, in relation to the Civil Service Code:

9 (5) The Commission –

 - a. *Must determine procedures for the making of complaints and for the investigation and consideration of complaints by the Commission;*
 - b. *After considering a complaint, may make recommendations about how the matter should be resolved.*

OUTLINE OF THE COMPLAINT

3. The complaint concerned the letting of contracts, in some cases dating back to 2002, by the Ministry of Defence (MOD), in what is now the Defence Equipment & Support (DES). The complainant alleged that MOD commercial staff had routinely let contracts without competition, in contravention of procurement law and internal guidance, and that significant amounts of public money could be being wasted as a result. There was a subsidiary allegation that staff who challenged this were treated less favourably by management than those who were prepared to comply with, or turn a blind eye to, this practice.

4. The complainant had originally raised concerns about these cases informally with his line managers in 2008, and more formally within the MOD in 2010, but had been met by successive responses from his management chain to the effect that he was not entitled to raise these concerns in this way because they did not affect his personal work environment or conscience.

5. In July 2012, frustrated with the protracted investigation by MOD the complainant raised his concerns with the Commission. The Commission decided that it should focus on getting the MOD to consider the key elements of the Civil Service Code rather than proceed with an investigation.

6. In August 2012 the MOD accepted the complainant had a right to raise his concerns through the formal channels and to expect them to be investigated, so the Commission advised him to pursue matters through the Department's internal process.

7. The complainant was not satisfied with the formal response from MOD after they had carried out an investigation so returned to the Commission in March 2013. The Commission wrote to the complainant in December 2013 giving its decision not to investigate the complaint, *as there was no evidence of a possible breach of the Civil Service Code.*

8. In February 2014, the complainant contacted the Commission and contested the conclusion not to investigate. The Commission agreed to overturn the original decision and investigate the case.

METHODOLOGY OF INVESTIGATION

9. The investigation of this complaint was conducted by a panel of Civil Service Commissioners:

- Sir David Normington (Panel Chair, and First Civil Service Commissioner)
- Andrew Flanagan
- Dame Moira Gibb
- Angela Sarkis

10. The Commission does not have the resources nor the expertise to mount a full-scale investigation of the MOD's procurement processes, nor did the panel consider that it was necessary for the Commission's purposes to

reach its own view as to whether those processes were consistent with the Code. Our role is to consider and decide a complaint that the Civil Service Code had been breached. We decided to base our assessment on an examination of the MOD's internal investigations - the facts these uncovered, the conclusions drawn and the actions taken as a result. We have assessed these findings, and MoD's response to them, independently against the requirements of the Code in order to reach our own conclusions.

EVIDENCE

11. The panel had access to a range of evidence supplied by both the complainant and the MOD. These included, in particular:

- A. Correspondence between the complainant and his line management chain regarding his concerns.
- B. Three police reports relating to investigations carried out by different branches of the MOD Police (MDP) – the Criminal Investigation Department (CID – two reports, both from 2011) and the Fraud Section (one report, from 2012).
- C. An assessment (dating from January 2012) from the MOD's Internal Audit manager.
- D. Correspondence, regarding the complaint, between several of the MOD's senior managers.

CONSIDERATION OF THE EVIDENCE

The MOD's procedures for dealing with Code complaints

12. The MOD's procedures for dealing with Civil Service Code complaints was, at the time of the complaint (and up to March 2014), covered in the policy document- " HANDLING MATTERS OF CONSCIENCE, REPORTING CONCERNS AT WORK AND " WHISTLEBLOWING IN THE MOD- THE PUBLIC INTEREST DISCLOSURE ACT (PIDA) 1998".

13. The procedure for employees and managers is split into 3 tasks: 1. Understand the Principles behind reporting matters of conscience at work (which includes the Civil Service Code); 2. Understand how to report a personal matter of conscience or concern at work; 3. Understand how to make a qualifying disclosure under the public interest disclosure Act (PIDA) 1998 (i.e. whistleblowing). Under tasks 2 and 3 there is a procedure for raising, dealing and escalation of concerns.

14. However, this particular MOD guidance on raising concerns under the Civil Service Code is not compatible with the text in the Code itself, specifically it prevents civil servants raising concerns about the actions of others. This omission would, and did, allow managers to avoid addressing concerns such as that of the complainant.

MOD's handling of the current complaint

15. Despite the fact that the complainant had, in his correspondence, referred to the fact that the actions at the centre of his concern might represent a breach of values in the Civil Service Code, the MOD's initial investigations focused on the fraud/criminal activity aspects of the complaint and did not touch on compliance with the Code.

a. The Ministry of Defence Police CID concluded (January 2011) "that there was indeed 'bad practice'" and there was evidence to show "a flagrant disregard for competition which could possibly indicate criminality". However, they considered it was unlikely that there would be sufficient evidence to secure a successful prosecution and there was no appetite within MOD to secure evidence against personnel or contacts that were 5-10 years old, not least since, with the introduction of new governance policies, the bad practices had all but stopped.

b. The Ministry of Defence Police Fraud Squad concluded (February 2011), in response specifically to concerns about a particular recent contract, that it had been reasonable for the complainant to have raised concerns about the letting of this contract without competition, but after consideration of the issue, including discussion with MOD parties, recommended that no further action should be taken.

c. The Ministry of Defence Police CID concluded (June 2011) that the issues identified by the complainant appeared to be "genuine areas of concern" and there was evidence to demonstrate failure to comply with MOD guidelines and EC procurement Regulations.

d. The Head of MOD Internal Audit (which oversees the Defence Fraud and Audit Unit) confirmed (January 2012) that there was no evidence of fraud and was content that the matters the complainant reported had been fully investigated. He saw no point in reopening the cases at this stage on the grounds that "any recommendations to processes as a result of MDP investigation should have been implemented by DE&S, that the bad commercial practice which was uncovered was not replicated in future contracts".

e. The way in which the findings of those investigations was reported to the complainant by senior management did not reflect the seriousness of the MOD's own findings. The complainant had ongoing communication with his line management chain but was finally told (in March 2012) that:

- no evidence had been found of any fraud;
- there had been "poor practice" but that appropriate checks and balances were now in place to identify such cases in future; and that
- in respect of one recent contract ("Contract X"), the EU Procurement Regulations were not broken, but the procurement had been unusual, and the contract was now terminated.

16. In the same letter, the MOD disputed the fact that the complainant had raised issues of personal conscience and therefore concluded he did not have the right to raise his concerns under the part of their guidance that related to breaches of the Civil Service Code.

17. When, after Commission intervention, the MOD accepted that the complainant had a right to raise concerns through normal channels the subsequent investigations appear to have been cursory and, as before, just focused on the fraud/criminal activity aspects, much of which referred back to the previous police and internal audit assessments.

18. The MOD - perhaps understandably - did not wish to reopen the investigation of the oldest cases, but neither did it revisit its conclusions in relation to those cases through the prism of the Code, and reach a view as to whether what had been found in those cases was compatible with the requirements of the Code.

19. Even though the the internal MOD assessment of the more recent cases (October 2012), found the complainant to have raised reasonable concerns (that there were known instances where contracts were let or extended without competition, or without full compliance with normal procurement practice) the senior manager who was advising the Permanent Secretary and Chief of Defence Materiel on how to respond to the complainant's concerns nevertheless described the complainant as a "vexatious litigant".

20. The findings of the assessment were conveyed to the complainant (January 2013) as follows:

"I have looked at the recent cases you have identified and satisfied myself that there were understandable and reasonable judgements made at the time, both by the requestors of the requirement and the commercial staff in reviewing the options. Some of the cases included very senior MOD management input and sensitive issues, which may not be immediately obvious. I accept that the judgements on the procurement route and choice of consultants were appropriate, taken in good faith and considered all the circumstances of the day...."

"I respect your right to raise concerns over procurement action and understand that from the information available to you they might appear to be questionable. However, having reviewed the cases in some detail, my judgement and conclusion is that the recent cases are exceptions that are justified by business imperatives, and that we have already in place the means, through senior officials' input, to manage such cases. The older cases have already been examined and reported upon. I see no sense in repeat examination since it would be unproductive and not relevant to our current ways of working."

21. The specific issue of whether or not the Code was breached was, again, not addressed.

The treatment of the complainant

22. The complainant expressed concern in his original complaint that there was a culture where he worked whereby those who challenged poor practice were penalised for doing so, including by being moved to other jobs, having his flexible working arrangements (linked to caring responsibilities) curtailed and being passed over for promotion.

23. The complainant that attempts were made to move him to another role, or limit his flexible working arrangements (which were linked to caring responsibilities) and that these were linked to the fact that he had raised concerns about practice within the team.

24. From the evidence that the panel has seen, it seems that this happened in 2008, two years before the complainant raised his concerns formally. However, the complainant states that he had raised the same concerns informally with his line managers some time earlier, and that those concerns pre-dated the proposal to move him to another post.

25. The panel has seen no evidence that, at any point, the MOD sought to investigate to assure itself that there had been no victimisation as a result of concerns being raised, either formally or informally. When the complainant escalated his complaint to the Permanent Secretary and the Chief of Defence Materiel (CDM) in early 2013, the senior manager advising them dismissed those concerns: "I have not commented on [the complainant's] various personnel complaints; they seem to me to be distractions from the main issue and I doubt CDM wishes to become embroiled in why he wasn't promoted over the last decade."

FINDINGS

26. The panel concluded that the Civil Service Code has been breached, within the MOD, in a number of ways.

The MOD's approach to dealing with whistle-blowers and Code complaints has been inadequate

27. Some breaches of the Code relate to the individual contracts raised in this complaint. Before we deal with these, we want to set out the Commission's serious concerns relating to the procedures for, and attitudes to, dealing with whistle-blowing and Code complaints within the MOD.

28. Paragraph 18 of the Code states:

"If you become aware of actions by others which you believe conflict with this Code you should report this to your line manager or someone else in your line management chain; alternatively you may wish to seek advice from your nominated officer. You should report evidence of criminal or unlawful activity to the police or other appropriate regulatory authorities...."

29. The MOD's procedures for dealing with such complaints **were not compliant with this requirement** because the complainant was told that he was not entitled to raise a concern about matters that did not directly concern his own work. This reflects a fundamental misunderstanding about the nature of the Code. The Commission raised concerns about this with the MOD in 2012 and asked the Department to update its procedures in line with the Code.

30. The MOD introduced revised procedures "Whistleblowing & Raising Concern Policy and Procedures" in March 2014. Bringing a complaint under the Civil Service Code is now clearly addressed within the document- "*Civil Servants are afforded an additional route for raising concerns in that they can take their concern direct to the Commission if they consider another civil servant is in breach of the Civil Service Code*". The Commission considers that the new guidance remains flawed in a number of respects-

- It only provides for a complaint to the Commission in respect of others.
- The statement that staff will not be punished for raising "genuine" complaints - and the repeated references to "genuine complaints" throughout the document is ambiguous. It is almost certainly intended as a deterrent to staff raising malicious complaints. But it risks also deterring staff from raising things about things they cannot prove conclusively and fearing that, if their suspicions about wrong-doing are not borne out by the full facts once uncovered or if their complaint is not upheld, they could face punishment.
- The procedure for appealing to the Commission is not consistent with the arrangements the Commission already has in place under the Act.

31. In addition to these defective procedures, it appears from the evidence we have seen that there was a lack of appetite within the Department either to consider the concern against the framework of the Code or to take account of the evidence that their own internal investigations had uncovered. The fact that the Commission has been able to identify very clear breaches of the Code based only on the evidence that the MOD's internal investigations identified and reported at the time suggests a lack of will to acknowledge the problem within the context of the Code. We deal with this issue in detail below.

The MOD investigation of this Code complaint was inadequate and breached the Code requirement on objectivity

32. Paragraph 16 of the Code requires Departments to consider concerns raised by civil servants under the Code.

33. Although the MOD considered the complainant's concerns, there is no clear evidence, at any point, that they have referred to the requirements of the Civil Service Code nor whether the actions complained about were consistent with the Code. They have considered whether or not there was criminal activity that could be pursued through the courts. They have considered

whether or not there was fraud. But not whether there was a breach of the Code. **They have therefore failed to fulfil their responsibilities under paragraph 16.**

34. Those responsible for investigating Code complaints are, themselves, bound by the Code, including the requirement of paragraph 11 (objectivity) that states:

“You must not ignore inconvenient facts or relevant considerations when providing advice or making decisions.”

35. The Commission’s review of the MOD’s own internal investigations – which were available to those responsible for dealing with the complainant’s original concerns – demonstrates (see paragraph 40) that there was evidence available that highlighted clearly that the Code had been breached. The MOD’s failure to recognise this, whether intentional or not, is a serious matter. We therefore consider that those responsible for investigating the complaint within the MOD **contravened the paragraph 11 requirements on objectivity.**

The MOD failed to satisfy itself that the complainant had not been penalised for raising concerns under the Code

36. Although Human Resources considerations are explicitly excluded from the Code, paragraph 16 of the Code states that Departments have a responsibility to *“make sure that [civil servants] are not penalised for raising [concerns under the Code]”*.

37. The complainant expressed concern in his original complaint that there was a culture in the office where he worked whereby those who challenged poor practice were penalised for doing so, and referred to several incidents within his personal experience that he believed illustrated that.

38. Although the evidence that the panel has seen does not indicate a connection between the formal complaint under the Code in 2010 and the incidents relating to the complainant being asked to move jobs in 2008, the complainant maintains that those incidents took place shortly after he had raised similar concerns informally with his line management chain. We have not seen any evidence that MOD managers took seriously the allegation that he had been penalised as a result of raising concerns under the Code or investigated to establish what had happened. The Commission is unable to reach a view as to whether the complainant was or was not penalised as a result of raising his concerns under the Code. **However, it is clear that the MOD’s failure to establish whether or not the complainant had been penalised as a result of raising concerns is a contravention of the Department’s responsibilities under paragraph 16.** This is a serious omission by the MOD.

Some contracts were let in a way that breached Code requirements on integrity

39. Paragraph 6 of the Code, which deals with Integrity, states that civil servants must, among other things:

“always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings;

“carry out your fiduciary obligations responsibly (that is make sure public money and other resources are used properly and efficiently); ... and

“comply with the law and uphold the administration of justice.”

40. As explained in paragraph 10 of this document, we have not investigated these cases independently but have, instead, relied on the findings of the MOD's internal investigations. These identified that, in relation to the earliest contracts that are the subject of this complaint, there was "'bad practice' which by definition was against EU Regs, MOD policies and good commercial practice" and "a flagrant disregard for competition". The panel has no reason to doubt the professional competence of those reaching those conclusions. While recognising that the police's area of expertise is on criminal investigations rather than specifically procurement practice, the panel notes that MOD advised the Commission that these police investigation reports were the only investigations on which the Department based its assessment about how to respond to the complainant's concerns. On the basis of this evidence, the panel's independent judgement is that **the Code was contravened** in the letting of the early contracts about which the complainant raised concerns.

41. Some of the more recent contracts may also have breached the requirements on integrity, despite the new procedures introduced within the MOD in 2006 that have led to some improvement. The Commission can see from the papers supplied by the MOD that the Department's internal investigations of these cases, in response to the complainant raising concerns, were superficial. While that does necessarily not mean their findings were wrong, it casts doubt over them.

42. The Commission is concerned that the MOD did not consider it necessary to look in more detail at those cases after concerns were raised about them. The assurance provided by the Internal Audit team – that simply referred to the police investigations that related to the older cases – seems inadequate. MOD senior managers should regularly satisfy themselves about current procurement practices within their business, perhaps through an internal audit, assessing whether previous faults have been eradicated. Without assurance that this is undertaken we are not confident that problems with procurement practices will be identified and rectified.

RECOMMENDATIONS

43. The law requires civil servants to comply with the Code and the values set down by Parliament: honesty, integrity, objectivity and impartiality. The Code provides a mechanism for individuals who are concerned that these are being breached to raise those concerns privately, within their own Department and – if necessary – then with the Commission. It is in everyone's interests – including the wider national interest – that those working in particularly sensitive areas should feel confident that they can raise concerns without penalty and that those concerns will be taken seriously.

44. The Commission's clear finding is that the MOD breached the Code in a number of respects. Despite the improvements to procurement practices, we still have serious unease about how far these practices are embedded. There is clear evidence of a culture which discourages dissent and does not take allegations of breaches of the Code seriously. This is not a technical matter. It goes to the heart of whether from the top to the bottom of the organisation there is a clear unwavering commitment to the values of integrity and honesty which are fundamental to the Civil Service. On the evidence we have seen, we cannot say with certainty that there is.

Recommendation 1 (report to Commission by 30 April 2015)

45. We recommend that the MOD updates and corrects the "Whistleblowing and Raising a Concern" policy document to bring clarity to those sections that relate to the Civil Service Code, specifically civil servants bringing their concerns directly to the Commission without review by the MOD in the first instance and civil servants being able to raise concerns about themselves being personally asked to carry out tasks which are contrary to the Code. The MOD should consult the Commission on the detail within the policy document.

Recommendation 2 (report to Commission by 30 July 2015)

46. The Commission does not see any merit in the MOD carrying out any further investigation of historical procurement cases. Future effort should focus on any necessary improvements to procurement practices. In addition we recommend that the MOD takes active steps to promote the Civil Service Code and the updated procedures for investigating concerns raised under the Code. This needs to include ensuring that all senior managers understand their responsibilities under the Code, including the responsibility to ensure that staff are not penalised for raising concerns.

Recommendation 3 (report to Commission by 31 March 2016)

47. In view of the seriousness of this case, we would like the Department to report to the Commission, in a year's time, on the progress it has made in embedding a culture that has at its heart the Civil Service values. In particular, we expect to see clear evidence of:

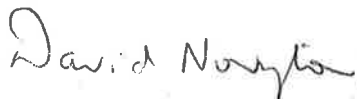
- a) senior management taking the lead in changing the culture and reinforcing the values;
- b) a commitment to regular review to make sure the desired changes are taking hold everywhere; and
- c) a more welcoming attitude to dissent and whistleblowing on questionable practices.

REQUEST FOR REVIEW

48. There is no mechanism for appealing against the decision of the Civil Service Commission in a Civil Service Code complaint case.

49. The Commission will, however, consider representations from complainants, or those complained against, for a review of the Commission's decision and recommendations that suggest that it has made factual errors or errors of factual interpretation in its decision making.

50. The Commission will not normally accept a request to review its decision or recommendations if the request is received more than 20 working days after the date of its findings.



Sir David Normington

Chairman of the panel and First Civil Service Commissioner

Civil Service Commission

19 March 2015

