

## Public Concern at Work

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Whistleblowing Consultation Team

Department of Health

Room 2N11

Quarry House

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11 January 2011

Dear Sirs,

### **Consultation: NHS Constitution and Whistleblowing**

We welcome the aim of the proposed changes to the NHS Constitution to highlight the expectations and responsibilities for NHS staff and NHS organisations on whistleblowing issues. We have set out below our comments on the consultation questions. You will see that we have suggested a number of changes particularly to some of the proposed wording so as to avoid an overly legalistic approach to speaking up and whistleblowing, which could otherwise reduce the impact of these changes to the Constitution.

By way of background, Public Concern at Work (PCaW) is an independent self-funding charity which seeks to empower individuals who witness wrongdoing or malpractice in the workplace to raise their concern early and effectively. We also work with organisations to help them create more open and accountable workplaces and manage risk responsibly. In 2008 we won a three year contract to provide a confidential whistleblowing advice service for all NHS staff in England. A third of the calls on the helpline come from the care and health sectors. We worked with the Social Partnership Forum to produce whistleblowing guidance: 'Speak up for a healthy NHS' to help NHS organisations to implement, review and promote their whistleblowing or 'Speak Up' arrangements. Last year we worked with the Nursing and Midwifery Council to provide guidance for all nurses in the UK on raising and escalating concerns in the workplace.

### **Q1. Do you agree the NHS Constitution should be changed to highlight the rights of staff to raise legitimate concerns in the public interest?**

We agree that the NHS Constitution should be changed to highlight the rights of staff to raise legitimate concerns in the public interest. We believe this will send a strong message to all staff and patients that there is a commitment from the leadership in the NHS to embed a culture of openness and transparency within the NHS. It will also mean that all NHS staff understand that it is safe and accepted to speak up if they have a concern about serious malpractice, wrongdoing or a risk that affects staff, patients, the public or the NHS itself.

### **Q2. Do you agree there should be an expectation set out in the NHS Constitution that staff should raise any genuine legitimate concerns around safety, malpractice, wrongdoing or other risks at the earliest reasonable opportunity? If not, why not?**

We agree with the expectation set out in the NHS Constitution.

We would add that we do not believe that a duty to blow the whistle should be imposed upon NHS staff. This does not mean that there may not be a separate professional duty to protect

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patient safety within the NHS (for example for a doctor or nurse, professional standards may dictate a duty to protect patient safety and to speak up where this is at risk).

However we would assert that imposing a general duty to blow the whistle or to raise a concern across all staff would be counter-productive. This is because such a duty would move the focus away from the public interest issue raised and onto the acts or omissions of individual members of staff. This could have a chilling effect as individuals either may feel they have to instigate formal procedures to raise any concern they might have (whether serious or not) as otherwise a breach will have occurred. This can also create problems when organisations feel they have to pursue staff members for not raising a concern as opposed to asking why this did not happen and considering the barriers that exist to making it safe for staff to speak up.

As an expectation stops short of a duty, we believe that this is sufficient to encourage staff to think carefully when they witness wrongdoing, malpractice or a safety risk, sending the right message to staff that they have a responsibility to speak up, but avoids the difficulties highlighted when imposing a general duty.

**Q3. Do you agree with the proposed wording of the new expectation on staff? If not, can you suggest how the new expectation should be worded?**

We suggest that the wording provided in the consultation is problematic for a number of reasons:

- a. It is overly legalistic - the changes to the NHS constitution are meant to make it clear to staff that they will be protected when raising a serious risk about wrongdoing, malpractice or a risk that affects others. This is underpinned by the statutory framework set out in the Public Interest Disclosure Act 1998 (PIDA). However, we would suggest that rather than repeating the legal tests set out in PIDA, it would make more sense to mirror what is said in the Social Partnership Forum 'Speak Up' guidance. This would mean that the NHS constitution clarifies what an organisation is encouraged to say in a whistleblowing or Speak Up policy. The categories for types of concern in the current wording in the consultation have been taken straight from the PIDA which is an overly legalistic approach and will be confusing for a concerned individual. We have set out below our suggested changes to the consultation wording. It is entirely right that the legal tests are referenced in the NHS constitution, but that should not form the basis of the new expectation.
- b. Independent advice - there is a mixed message in the guidance which states that individuals could get advice from either a regulator or a Minister. There needs to be distinction between getting advice from Public Concern at Work or union and speaking to a regulator or Minister which is likely to be a disclosure and not an advice option. The Minister/regulator will likely have to take action (or explain why no action is necessary)

With these comments in mind, we would suggest that the consultation wording (suggested in Question 3 and relating to the explanation to be found in the Handbook to the NHS constitution) is amended as follows:

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## “Expectation

You should aim to raise any genuine concern you may have about a risk, malpractice or wrongdoing at work, such as a risk or danger to patient safety, which may affect patients, the public, other staff, or the organisation itself at the earliest reasonable opportunity.

### What this means in practice

Set an example to your colleagues in your day-to-day activities by questioning behaviours and practices that you believe may not be right, appropriate, or lawful.

Understand your organisation’s whistleblowing arrangements, including who you can approach for advice or to whom you can report any concerns.

If you have a concern about a risk, malpractice or wrongdoing at work, you should raise it first with your line manager or lead clinician, either verbally or in writing.

~~Those categories of wrong doing that should be reported upon are:~~

~~that a criminal offence has been committed, is being committed or is likely to be committed, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,~~

~~that a miscarriage of justice has occurred, is occurring or is likely to occur,~~

~~that the health and safety of any individual has been, is being or is likely to be endangered,~~

~~that the environment has been, is being or is likely to be damaged, or~~

~~that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.~~

If you feel unable to do this, you may raise it with the designated officer within your employing organisation. You should find details of the designated officer in your employer’s whistleblowing policy.

If you have raised your concern with the designated officer or your line manager, but feel it has not been addressed properly, or that inadequate action has been taken, you should raise your concern with someone higher in your employing organisation. For example to your department manager, head of midwifery, director of nursing, medical director or chief executive. In Foundation Trusts you may consider a member of the Non Executive Board. You may also choose to take this action from the outset if, for whatever reason, you feel unable to raise your concern at a lower level within your organisation.

If you are unable to follow these channels, or you feel the matter is so serious that you cannot discuss it with any of the above, you may wish to consider raising the concern externally with a regulatory body that has authority to investigate the issue. This could be a to a regulator of health and social services or a regulator of health professionals ~~can contact a legal advisor, a Minister of the Crown, or a prescribed person as described in the Schedule of the Public Interest Disclosure (Prescribed Persons) Order 1999~~, such as for example, the Care Quality Commission, ~~or Monitor~~, the GMC or the NMC<sup>1</sup>.

<sup>1</sup> While the GMC and NMC are not prescribed regulators it would be reasonable to go to either one in appropriate circumstances. See also S43(C)(2)PIDA where including reference to this in the constitution may mean that going to the GMC or NMC are authorised by the employer

*Before reporting your concerns externally, it makes sense to seek advice so that you receive appropriate support and guidance in these difficult circumstances. This could be from a representative of your professional body, trade union or the independent whistleblowing charity Public Concern at Work (PCaW)(see appendix for contact details of PCaW and other useful organisations<sup>2</sup>)*

*For further information about the law that protects whistleblowers under the Public Interest Disclosure Act 1998, please see appendix<sup>3</sup>”*

**Q4. Do you agree that the NHS Constitution should include a pledge that NHS organisations should support staff when they raise legitimate concerns as defined by PIDA, in the public interest? If not, why not?**

We agree.

**Q5. Do you agree with the wording of the pledge? If not, can you suggest how the pledge should be worded?**

We agree with the wording used.

**Q6. Do you agree that the NHS Constitution should be amended to make it clearer that staff are able to raise any concern with their employer, whether it is about safety, malpractice or other risks, in the public interest without fear of detriment?**

We agree that the Constitution should be amended. We suggest using “reprisal” instead of “detriment” as the latter is overly legalistic.

**Q7. Do you agree with the wording proposed for inclusion in the NHS Constitution? If not, can you suggest other wording that can be used?**

Please see answer to question 3 above. We suggest the description of the law follows the wording that is in ‘Speak up for a Healthy NHS’ (see p6 of that guidance). This wording was agreed by NHS employers, unions and DH legal department and we see no reason not to repeat this explanation in the constitution. Moreover there could be a link to further information on the PCaW website: <http://www.pcaw.org.uk/law/uklegislation.htm>

If the wording for the constitution follows what is provided in the consultation document then it must be amended as at present it is not legally correct. Firstly the paragraph explaining the protection does not contain any reference to a disclosure to the employer (an important first step in the PIDA disclosure framework). Secondly there is reference to an objective test of reasonableness in the test on reasonable belief, which is wrong.

That said we agree with the final 3 paragraphs on page 11 of the consultation document and the reference to the available support from PCaW.

**Q8. Previous questions have asked about specific changes to the Constitution. Is there anything else you would like to add about these changes, in particular in relation to their impact?**

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<sup>2</sup> We suggest an appendix of useful contact details should be included in amended constitution.

<sup>3</sup> We would suggest that the explanation of the law to be found in the ‘Speak Up for a Healthy NHS’ guidance would suffice for an explanation of PIDA – together with a reference to the PCaW website. Alternatively, we would be happy to consider and/or draft an explanatory note on the law.

We suggest that whistleblowing continues to be an issue that is promoted through success stories, the NHS Counter Fraud experience and also that regulators such as the CQC and Monitor understand the pledge that is set out in the constitution for NHS organisations. Regulators are in a position to encourage and ensure NHS organisations carry out best practice and so their attitude and approach to whistleblowing will be key if the expectation and pledges in the new constitution are to work in practice.

**Q9. Are there any barriers to achieving equitable protection for staff who wish to raise concerns about safety, malpractice, or other risk from the perspective of ethnicity, gender, disability, age, sexual orientation, religion/belief, socio-economic or rural/geographical considerations?**

We are not aware of any barriers but the focus has to be on creating a culture with strong messages from the leadership within the Department of Health and NHS organisations themselves. If there are barriers we recommend that staff are pointed towards and encouraged to seek independent advice from either their trade union, their professional body or from PCaW.

**Q10. What proportionate measures could address those issues?**

We recommend there be access to independent advice.

We also recommend success stories be promoted and would welcome the setting up of a whistleblower award for individuals or organisations who have handled whistleblowing well. These individuals could perhaps receive a thank you from the Secretary of State and/or be invited to the Queen's Garden party.

**Q11. What are the positive impacts that might result from implementing this policy from the perspective of ethnicity, gender, disability, age, sexual orientation, religion/belief, socio-economic or rural/geographical considerations?**

The positive impacts will be to create a culture where staff can speak up.

**Q12. What proportionate measures might we implement that could enhance this positive effect?**

Please see answer to Q10.

We would be happy to talk to you in further detail about our comments and suggestions set out in this response.

Yours sincerely,

*Cathy James*

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