

GMC's Response to the Department of Health's Consultation on the NHS Constitution and Whistleblowing

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

Yes.

The GMC supports the proposed changes to the NHS Constitution as part of a suite of measures to highlight and strengthen the rights of staff who raise concerns about safety or malpractice. We acknowledge that changes to the Constitution will not, in and of themselves, bring about the culture change that the Secretary of State for Health is seeking, but they will send a strong signal that patient safety is best served by empowering staff to raise concerns and by addressing those concerns in an appropriate, fair and timely manner.

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.

Yes.

We agree that it is in the public interest to ensure that concerns about risk, malpractice and wrongdoing are raised with the appropriate person or organisation as soon as is practicable, and support the suggestion that the NHS Constitution should highlight this. We would further suggest that consideration be given to making this a duty rather than an expectation, at least in relation to issues of patient, public and staff safety.

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?

No

We recognise that the suggested 'categories of wrong-doing' have been derived from the *Public Interest Disclosure Act 1983* and are included here because such disclosures qualify for protection under the Act. However, in the context of advice to NHS employees and employers about their rights and responsibilities, these categories are in some cases unclear and do not appear to capture all the various types of issue that might legitimately prompt an NHS employee to raise a concern. We therefore suggest that the wording of this expectation should not be limited to the wording of the Act.

We consider that the current point d. ('the health or safety of any individual has been, is being or is likely to be endangered') should be promoted to point a. to make clear that patient safety is the first priority for NHS staff. We also feel that this point could be expanded to make clear the types of risk involved as 'health and safety' might be read as meaning only immediate and obvious risks and fail to encompass wider concerns such as substandard care. Point e. 'the environment has been, or is likely to be damaged' could likewise benefit from expansion and clarification. In our own guidance we advise doctors that they must take action 'to protect patients from risk of harm posed by another colleague's conduct, performance or health' (GMP paragraph 43) or where they 'have good reason to think that patient safety is or may be seriously compromised by inadequate premises, equipment, or other resources, policies or systems' (GMP paragraph 6).

We are uncertain about the inclusion of point c. ('a miscarriage of justice has occurred, is occurring or is likely to occur') as this term is usually read as referring to criminal proceedings and unsafe convictions. It seems unlikely that an NHS employee would encounter such a situation in the course of his or her employment, but if the point is, in context, intended to refer to misuse or failure of disciplinary or investigative proceedings, this should be stated in the text.

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?

Yes.

We acknowledge in our guidance for doctors that one of the main barriers to raising concerns is the fear of being personally penalised for doing so. An explicit pledge on the lines suggested, if backed up by practical implementation measures to ensure that the pledge is honoured in practice, would go some way to removing this barrier. However, cultures within organisations can be deeply ingrained, and those in leadership roles will need to take active steps to support staff who raise concerns.

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

Unsure

The second sentence ('NHS organisations that do not have appropriate policies and systems are being encouraged to put them in place.') qualifies and dilutes the message of the first, which emphasises the duty on NHS organisations to have these policies in place. We therefore recommend that this sentence be deleted from the text. We also suggest strengthening the pledge to promote whistleblowing policies and promote a culture of openness, by phrasing this as something that NHS organisations 'should', rather than 'are encouraged' to do.

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?

Yes (see response to Q4).

Q7. Do you agree with the wording proposed for inclusion in the NHS Constitution? If not, can you suggest other wording to use?

Unsure

Re: i) We agree that it is helpful to explain the distinction between a grievance and a whistleblowing concern, but suggest that the latter should not be defined solely as relating to others. It is possible to envisage a situation where a member of staff might wish to raise a concern about a risk, malpractice or wrongdoing that affects them directly.

It is not clear what is being referred to in the third sentence of the second paragraph ('This provides that all employers have to have in place...'). The sentence could perhaps be simplified to read 'All employers should/must have in place minimum statutory procedures for dealing with dismissal, disciplinary action and grievance in the workplace.'

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?

No.

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?

All staff have the same legal rights and protections. Some staff may still feel disadvantaged in raising concerns and may require a greater degree of support in doing so but we have no information to suggest that this reluctance is specific to any particular equalities strand.

Q10. What proportionate measures could address those issues?

Identifying barriers to reporting and addressing them. For example:

- Fear of victimisation or being regarded as disloyal to colleagues: ensure confidentiality is maintained; wherever possible take forward concerns through an independent inquiry without involving the whistleblower
- Fear of causing distress to colleagues: ensure response to a concern is proportionate and sensitive (eg where staff have mental health or addiction problems)

Finding ways to link raising concerns with positive outcomes for individuals

See also Q12.

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?

If implemented effectively, this policy will encourage and support appropriate whistleblowing and provide NHS employees with assurance that they will not suffer any detriment if they can raise concerns about safety, malpractice or risk in the public interest. It will also help to ensure that concerns raised are addressed appropriately. The benefits of this in terms of patient safety and standards of service within the NHS will apply across all the equality strands.

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

Practical and focused training on human rights/discrimination issues would help to ensure that all staff identify where patients or colleagues are put at risk of receiving poor or less favourable treatment as a result of reasonable adjustments not being made.