BIS consultation - Whistleblowing call for evidence - looking at the legal protections for individuals who raise concerns

The NHS Employers organisation represents employing organisations in the NHS in England on workforce issues and helps employers to ensure the NHS is a place where people want to work. This includes providing advice and guidance on employment practices, as well as representing NHS organisations to policy makers.

In recent months whistleblowing has very been the central focus of a number of news stories, reports and inquiries, including Francis, Berwick, Cavendish and Keogh which highlight the need to for openness and transparency in relation to raising concerns. Some of the common themes emerging, further reinforce the results we saw in the 2012 NHS Staff Survey in relation to the fact that workers remain too scared to speak up because of the fear of victimisation, or are discouraged from raising concerns because of the perception that no action will be taken by their employer.1

In view of the extensive work we are already doing in partnership with the Department of Health, National Whistleblowing Helpline, Trade Unions and other interested parties such as Public Concern at Work and Patients First to revise guidance across the NHS and Social Care; we were particularly keen to engage with our networks to provide an employers’ perspective. Feedback has been sought by conducting an online survey during September-October 2013 and through our regional employer engagement teams; the key points of concern have been outlined below.

- **Section 1 - Categories (Questions 1 and 2) Do these categories capture all potential instances of wrongdoing that may require a protected disclosure?**

  Legal advice tends to lean towards treating every grievance as a 'disclosure'. All too often whistleblowing concerns are turned into a employment/personal performance issue instead of tackling the original concern being raised. Given this, we have concerns that this will lead to 'protected disclosures' being a 'catch all' if greater clarity about the type of instances of wrongdoing is not given either within legislation itself or within non statutory guidance.

  In particular, it would be helpful if there was a specific reference to patient/public safety or safeguarding more generally, with examples of what would be regarded as a wrongdoing.

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1 Stats from the 2012 NHS staff survey report reflects that 90% of staff reported that they know how to report a concern (89% in 2011), 72% stated that they felt safe to raise a concern (73% in 2011) with 55% saying that they felt confident that their employer would respond (54% in 2011).
Other categories to be considered might include:

- breach of standards of conduct/professional standards (not necessarily criminal) which could also include behaviours which may damage the reputation of the organisation
- professional malpractice (such as financial malpractice, or other such fraudulent activities).

**Section 2 - Methods of disclosure (Questions 3-11) Are the conditions that need to be met to ensure that the disclosure is protected clear and understandable?**

In the main, it is considered that the methods of disclosure are clear and set out the framework by which concerns can be raised. However, the only true test of this will be through Employment Tribunal cases. For this to be effective, the internal/external disclosure must be properly managed and staff need to fully understand the process and route to escalate concerns appropriately and safely. See further comments at point (4) below.

We also need to be very clear that 'protected' does not always mean 'anonymous' and describing the limitations around this, particularly when trying to navigate through a grievance v disclosure process.

'Reasonably believes' is always going to be an area for debate and essential that further clarity and guidelines around this will be essential to ensure consistency across the country.

More clarity is required about the boundaries of protection i.e. what happens if individuals do not raise their concern with the correct prescribed body/person.

**Section 3 - Prescribed persons (i) (Questions 12-15) Should this system be amended to one where the prescribed bodies/persons list can be updated by the Secretary of State without the need for a statutory instrument?**

100% of the respondents to our survey stated that they thought that the prescribed person/body list should be updated without the need for a statutory instrument on the basis that this would be the most effective way of ensuring the list remained accurate and up to date without the timely process of having to work it's way through the Parliamentary passage. However, there were concerns about how updates might be managed and communicated.

**Section 4 - Prescribed persons (ii) (Questions 16-19) Would it be more helpful to replace the list with a more general description with general characteristic which prescribed bodies/persons can be recognised by?**

Having a clear list of who the prescribed bodies/persons are, enables workers to find a clear route into raising a whistleblowing concern with the right body and therefore reducing the risk of them escalating their concern more widely and losing the protections afforded to them under PIDA and also reducing the risk of reputational disrepute of the employer concerned where directed to the media without giving them the opportunity to deal with the concern being raised.
NHS organisations are regulated by many different regulators which makes it difficult for staff to know who to escalate their concerns to, especially if they have raised the concern internally without success. There is a strong need for a better understanding of the roles and responsibilities of Government, employers and the regulators and professional bodies.

Having a more generalised list of characteristics is likely to lead to further lack of clarity.

Staff Side can often become involved in assisting staff to raise a whistleblowing concern, however the Trade Unions are not included on the list of prescribed bodies/persons. We would therefore ask for this to be considered in your review.

Whistleblowing concerns are also raised with Members of Parliament, either centrally by approach to the Department of Health or at a local level, we would also therefore suggest that this route be considered for inclusion.

- **Should prescribed bodies/persons be under a reasonable obligation to investigate a disclosure?**

  This is in line with current requirements within the NHS Constitution for employers in the NHS to pledge that they *will encourage and support all staff in raising concerns at the earliest reasonable opportunity about safety, malpractice or wrongdoing at work, responding to and, where necessary, investigating the concerns raised*.  

  The issue we have around this is perhaps more around encouraging managers to maintain communications with staff who raise concerns which attributes to the general perception that their concerns are not taken seriously or no action being taken. We continue to work closely with employers to reiterate the importance of providing feedback to staff, within reasonable limits, when they raise concerns.

- **Section 5 - Definition of a worker (Questions 20-22) Does the current definition of worker exclude any group that may have the need of protections afforded to whistleblowers?**

  We welcome the broader scope of the definition of worker in the recent amendment under ERA which provides for primary care, contractors and trainees. The contractual arrangements within the NHS are complex, and there remains a risk of exclusion in relation to partners in GP practices, Governors and non Executive Directors in Foundation Trusts, trainees and student nurses.

  We understand the complexities in relation to volunteers who are also excluded under current legislation - within the NHS, a large number of organisations have local policies which include provisions for their volunteers, which we would advocate as best practice. It would be useful for strengthened good practice principles to be issued as non-statutory guidance.
Section 7 - Financial incentives (Questions 25-28) Would a system of financial incentives be appropriate in the UK whistleblowing framework?

We would not be supportive of introducing financial incentives for those who raise public interest concerns.

There are many examples of staff in the NHS who have raised concerns without the need or drive for financial endorsement. There is a potential here of encouraging staff to raise concerns in the belief that they will receive money rather than on the strength of the belief that their concern is being made in the public interest - this seems somewhat at odds with the intention of PIDA which states that protections are afforded where concerns are raised in 'good faith' and not for personal gain.

We have concerns about any potential increase in the resource and financial burden on employers, apportioning value against the issue being raised is likely to be a minefield to manage.

We would also have concerns about the potential of escalating bad press and media attention which is likely to worsen the stigma which already surrounds whistle-blowing rather than remove it.

Section 8 - Non statutory measures (Questions 29-30) How would the introduction of non-statutory measures (e.g. a Code of Practice or best practice principles for employers) make a difference?

There is a potential benefit in producing supplementary guidance which supports the legal framework in providing practice advice and support rather than introducing a further code of practice for employers to comply with. This would help in assuring some kind of consistency and transparency across sectors and across the country. Good practice principles might include:

- providing a positive/constructive argument around the benefits of encouraging staff to raise concerns (whistleblowing) and help employers
- clear principles which organisations to abide by to help embed a culture in which matters of concern can be raised so that staff feel safe in doing so, and know they will be dealt with
- recommendation for ‘champions’ within organisations with support from the Board - Helene Donnelly who was a whistleblower at the Mid Staffordshire NHS Trust has been appointed at the Ambassador of Culture Change within Staffordshire, Stoke and Trent NHS Foundation Trust which delivers a very strong message to staff
- clarity around how to deal with concerns that are raised in malice and what happens if the person is using this to cover their own wrongdoing
- clarity to establish whistleblowing v grievance.
- guidelines on people management - managing team dynamics after a concern has been raised, particularly important if we are to remove the risk of bullying, harassment and victimisation.

Section 9 - Any other issues (Question 31) Any other issues

While not specifically the focus of this review. The amendments under ERA place a vicarious liability on employers where a whistleblower is
victimised by a member of staff as a consequence of them raising a concern, and the employer cannot evidence that they have taken all reasonable steps to prevent this.

The steps an employer will need to take to avail itself of the 'reasonable steps' for defence in this case are likely to be very different to the necessary steps you would expect under current discrimination law. Discrimination is generally based on identifiable characteristics, so an employer can provide training to ensure that employees appreciate what conduct is prohibited and who has protection and can introduce procedures to minimise the risk of discrimination. However, the detrimental treatment in a whistleblowing claim will have taken place after an event that the employer will probably not have anticipated and senior management may not even be aware of.

It will therefore be important to provide clarity and support for managers around what steps need to be taken to meet the test and what could be done to avoid and prevent improper conduct. It will also be useful to have clarity around what level of management will failings be seen to have undermined the employer's ability to rely on the defence.

We are supportive of amending the current law and see this as an important driver to ensure inclusivity and clarity on the process. A lot of progress has already been made in the NHS but there is a lot more work to do around driving the cultural and behavioural change if we are to fully support our workforce to raise concerns appropriately and safely. Once the outcome of this consultation is known, we would very much welcome the opportunity to continue to work closely with yourselves and other key stakeholders who have a common interest in this agenda to scope the next steps to help drive this change forward.

I hope you find this information helpful. If you need any further clarification or information please do not hesitate to contact: Nyla Cooper, Programme Lead - Professional Standards nyla.cooper@nhsemployers.org or Helen Bogan, Senior Programme Officer helen.bogan@nhsemployers.org.