

PRIVATE BOARD PAPER - NHS ENGLAND

Title: Whistleblowing in the NHS – Implementing <i>Freedom to Speak Up</i>
From: Jane Cummings, Chief Nursing Officer
Rationale for this Paper Being Discussed in the Private Session: Paper includes information not yet in public domain.
Purpose of Paper: To inform the Board about the commitments NHS England is making towards implementing <i>Freedom to Speak Up</i> , Robert Francis' report on whistleblowing, and how the organisation is likely to be affected by the Secretary of State's response, in particular in making NHS England a prescribed organisation under the terms of the Employment Rights Act 1996.
Recommendation: The Board is invited to. <ol style="list-style-type: none">i. agree to NHS England becoming a prescribed organisation under the terms of the Employment Rights Act 1996;ii. identify a Non-Executive Director to take a lead role on whistleblowing and define the nature of such a role, andiii. receive an update on progress in six months' time.

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**Whistleblowing in the NHS – Implementing *Freedom to Speak Up*
Board Meeting in Private – 23 July 2015**

1.0 PURPOSE

- 1.1 The purpose of this paper is to inform the Board about the commitments NHS England is making towards implementing Robert Francis' report on whistleblowing in the NHS, *Freedom to Speak Up*. The paper also sets out some of the implications for NHS England which will arise from the Secretary of State's planned response to the report.
- 1.2 The subject was discussed by the Audit and Risk Assurance Committee on 6 July 2015, who wanted the full Board to be informed.

2.0 BACKGROUND

- 2.1 In June 2014, the Secretary of State for Health announced that Sir Robert Francis QC would lead a public inquiry into whistleblowing in the NHS, which would examine the extent to which staff are able to raise concerns about patient safety. NHS England was one of a number of organisations which gave evidence to the inquiry. Robert Francis' final report, *Freedom to Speak Up*, was published in February 2015. It contained 20 principles and a number of recommendations to create the right climate and conditions for NHS staff to speak out. The Department of Health (DH) and Arm's Length Bodies (ALBs) accepted these principles upon publication, although the Department launched a consultation on implementation, which concluded at the beginning of June 2015. The Department's response to the consultation was published on 16 July.
- 2.2 A number of actions were identified by Robert Francis for NHS England to take forward. We were asked to establish how the *Freedom to Speak Up* principles should be adapted for the different circumstances of primary care. In partnership with Monitor and the Trust Development Authority (TDA), we were asked to publish an integrated policy for raising concerns and develop an Employment Support Scheme for whistleblowers whose performance was sound but who are having difficulty returning to employment in the NHS.
- 2.3 In addition, Robert Francis proposed to the Secretary of State that NHS England and Clinical Commissioning Groups (CCGs) become prescribed organisations, under the Employment Rights Act 1996. This measure would offer some limited protection to whistleblowers in Employment Tribunals. It does not, however, confer any duty to investigate concerns which are raised, although it does require records to be kept when staff raise concerns. An annual report must also be published.
- 2.4 In terms of responsibilities at NHS England as Senior Responsible Owner (SRO), National Director for Transformation & Corporate Operations, Karen Wheeler, has the lead role for NHS England staff and Chief Nursing Officer, Jane Cummings, the lead role for NHS policy regarding whistleblowers. This is along the same lines as the arrangements for complaints.

3.0 ISSUE

- 3.1 Good progress is being made in implementing NHS England's actions. We expect to publish (with Monitor and the TDA) an integrated policy for raising concerns by September 2015 and we expect to publish guidance on applying the *Freedom to Speak Up* principles in primary care by the end of September 2015, once we have concluded an engagement exercise.
- 3.2 We expect it will take longer to design an Employment Support Scheme that will win support from both employers and whistleblowers. We are having productive conversations with representatives of both sides and expect to bring a proposal to the Executive Group this Autumn.

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- 3.3 The DH has now confirmed that the Care Quality Commission (CQC) will host the National Officer proposed by Robert Francis. The CQC will shortly consult about this role and we are already talking to them about a Memorandum of Understanding between the ALBs about how the role will operate.
- 3.4 The immediate issue for the Board to note is the timetable for becoming a prescribed organisation. This is initiated by the Department for Business, Innovation and Skills (BIS). The DH is expected to submit information to BIS by mid-August and the new regulations are expected to come into force on 1 October 2015.
- 3.5 It seems appropriate that NHS England should become a prescribed organisation, as we regularly receive concerns from NHS whistleblowers. Although NHS England staff may advise whistleblowers who contact us from NHS Trusts, we usually signpost them to other organisations who are better placed to hear their concerns (eg. Monitor, TDA, CQC, General Medical Council (GMC) and Nursing & Midwifery Council (NMC)). Practice has shown, however, that NHS England is an appropriate body with which to raise concerns about primary care. Indeed, we have successfully investigated such concerns in recent months (such as the dental recall in Nottinghamshire). Robert Francis noted that there was a lack of clarity about where primary care staff could take their concerns, beyond their immediate organisation. He saw primary care staff as a vulnerable group and recommended that both NHS England and CCGs become prescribed organisations.
- 3.6 To reflect our role and experience, Neil Churchill has asked the DH to limit NHS England's prescribed status to primary care. He has also requested that CCGs be given a year to prepare, meaning that they would become prescribed organisations from October 2016.
- 3.7 Internally, we will also need to revise our policies and procedures. These will be informed by the new integrated policy for raising concerns and by our new role as prescribed organisation. To prepare for this, Karen Wheeler has already been appointed the *Freedom to Speak Up* Guardian for NHS England staff.
- 3.8 Robert Francis made a number of comments about the role of Boards in overseeing the way in which staff raise concerns:
- 'Visible leadership is essential to the creation of the right culture. Leaders at all levels, but particularly at board level, need to be accessible and to demonstrate through actions as well as words the importance and value they attach to hearing from people at all levels.'*
- 'It is the responsibility of boards to ensure that there is no victimisation of or retaliation against whistleblowers, and they should be held to account for it. This will require them to maintain constant vigilance, and effective systems to enable them to keep track of what is happening within an organisation where so many people are under pressure to deliver a service.'*
- 3.9 Robert Francis recommended that each Board should appoint a Non-Executive Director to oversee this area of work. He also recognised that organisations are different and that Boards will want to adapt the role to their circumstances. The Board will want to consider what is the right approach for NHS England as a commissioning organisation. I would suggest three elements:
- i. A point in extremis for NHS England staff whose concerns have not been addressed through other routes;
 - ii. A leadership role to make sure we have a culture that challenges bullying and encourage staff to raise concerns;
 - iii. An oversight role for our handling of external whistleblowing, including public recognition for whistleblowers;
- 3.10 In practice, few if any concerns are raised by NHS England staff. The vast majority come from staff in other NHS organisations. The role of the Board is critical, however, in setting the

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tone, both by encouraging staff to raise concerns about safety and by supporting and thanking staff who have done so. NHS England displayed such leadership when it thanked, through media interviews, the whistleblower who raised concerns about the dental practice in Nottinghamshire. Robert Francis and other stakeholders will be looking to the NHS England Board to provide such visible leadership on an ongoing basis.

4.0 RISKS

- 4.1 NHS England has very short window to prepare for becoming a prescribed organisation and will need to put the necessary steps in place to make this work. Members of staff who receive concerns will need to make records on a central database. We will also need to assure ourselves that we are responding to staff who raise concerns in keeping with the principles published by Robert Francis. For example, we should be consistently signposting people to the Whistleblowing Helpline and we need to demonstrate care and manage expectations when it comes to confidentiality and anonymity. Some feedback to the whistleblower is also needed on the steps which have been taken about the concern which has been expressed. In the medium term, Robert Francis expects that staff will have training in raising and handling concerns (subject to a curriculum to be developed by Health Education England). Neil Churchill is chairing a Task and Finish Group reporting to the Customer Contact Programme Board, chaired by Karen Wheeler. An action plan has been written and will be updated in line with the newly published DH response to their consultation.
- 4.2 The number of staff who come to NHS England with concerns may increase as a result of us becoming a prescribed organisation, although this is hard to quantify in the absence of an accurate overall record of the numbers of people who are already coming to us with concerns. There is therefore an associated risk that we will be overstretched in responding to such concerns. For example, some whistleblowers raise concerns directly with Medical Directors.. I understand that this has involved low numbers at regular intervals – perhaps one every two months for each Medical Director. Medical Directors are now covering larger geographical areas and may have more cases to handle. The addition of NHS England to the list of prescribed organisations may also result in whistleblowers contacting us via the Customer Contact Centre, which will need to be passed onto the relevant manager for a response. If more concerns are raised from staff in primary care, this may also increase the number of investigations which are needed.

5.0 LEGAL/REGULATORY

- 5.1 There are a number of legal and regulatory issues to note:
- i. The Secretary of State has already made it illegal to discriminate against staff on the basis of them having raised concerns. A regulation making power was added to the Small Business, Enterprise and Employment Act 2015 (SBEEA) to prohibit discrimination against whistleblowers (or applicants believed by the prospective employer to have been whistleblowers) when they apply for jobs with NHS employers.
 - ii. From 1 October 2015, NHS England will become bound by the prescribed organisations regulations issued by BIS. It should be emphasised that this will not change NHS England's duty to investigate concerns. It is intended as a limited protection to whistleblowers in Employment Tribunals. The move will, however, require us to keep records of staff who raise concerns and publish an annual report about what we have been told and how we have acted. It is envisaged that this could be published alongside or as part of the annual report we already publish about patient complaints. The wording of the prescribed organisation regulation is important, if we are to define and restrict our role to primary care. Legal advice will be sought in August on how to achieve this.
 - iii. A memorandum of understanding will need to be agreed between the ALBs about how we will work with the National Officer, likely to be located within the Care Quality Commission.

6.0 RESOURCES REQUIRED

- 6.1 No resources are being requested here. However, it should be noted that current informal arrangements for responding to whistleblowers are dealt with from existing resource on an ad hoc basis. In future, more formal arrangements will be required as a result of us becoming a prescribed organisation, such as the ability to record and track cases for evidential purposes using the Contact Centre Customer Relationship Management system. In addition, we will be expected, along with other organisations, to train staff in raising and handling concerns. These changes will have some resource implications.
- 6.2 It is noted, too, that Robert Francis expects NHS England, Monitor and the TDA to fund the Employment Support Scheme. This will need to be factored into negotiations with DH and into the Business Plan for 2016/17. The cost of such a scheme, which presumably would be split three ways, will depend on the number of whistleblowers who qualify for it. An early estimate is that the scheme could cost £400,000 a year, initially.

7.0 NEXT STEPS

- 7.1 The detailed work to make NHS England a prescribed organisation will take place in August and September 2015. This will come into effect on 1 October 2015.
- 7.2 NHS will complete its own actions to implement *Freedom to Speak Up* between September 2015 and March 2016.

8.0 RECOMMENDATION

- 8.1 It is recommended that the Board:
- i. agree to NHS England becoming a prescribed organisation under the terms of the Employment Rights Act 1996,
 - ii. identify a Non-Executive Director to take a lead role on whistleblowing and define the nature of such a role, and
 - iii. receive an update on progress in six months' time.

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