



The NHS Constitution and Whistleblowing

Consultation Report: September 2011

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The NHS Constitution and Whistleblowing

Consultation Report: September 2011

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Executive summary

On 12 October 2010, the Department of Health published a consultation paper “*The NHS Constitution and Whistleblowing – A Paper for Consultation*”, accompanied by a copy of the NHS Constitution.

Changes to the NHS Constitution will:

- insert an expectation that NHS staff will raise concerns about safety, malpractice or wrong doing at work which may affect patients, the public, other staff or the organisation itself as early as possible;
- insert an NHS pledge to support all staff in raising concerns about safety, malpractice or wrong doing at work, responding to and where necessary investigating the concerns raised; and
- highlight in the NHS Constitution the existing legal right for staff to raise concerns about safety, malpractice or other wrong doing without suffering any detriment.

Responses to the consultation were in the main very positive. Proposals were welcomed as an important affirmation of staffs’ right to speak up when they have concerns and of organisations’ responsibilities to foster a culture in which speaking up is welcomed and acted upon and in which staff need not fear negative repercussions as a result. Many respondents commented that these changes needed to be part of a wider programme of action to ensure a stronger and more consistent culture of openness and transparency in the NHS. Given the broad support for the proposals, the Government has decided to proceed with the changes to the Constitution, but in doing so has adopted a number of proposals for alterations to the text to ensure that it is accessible and gives staff the confidence to speak up without fear of reprisal. The full revised text of the amendments is set out at the end of this report.

Introduction

This report sets out the outcome of the consultation on proposed amendments to the NHS Constitution and whistleblowing.

The consultation took place over a three month period between 12 October 2010 and 11 January 2011 and was published on the Department of Health website. The Department e-mailed a weblink of the consultation paper to interested professional bodies, patient groups and professionals.

The Department has received 103 responses to the consultation and this analysis takes account of all replies. Generally, the Department aims to publish consultation reports within 3 to 6 months of the close of the consultation, however, it was not possible to do so in this case as many of the responses raised issues that were technical in nature and required further detailed consideration. A number of issues were also raised around the applicability of both the NHS Constitution and the Public Interest Disclosure Act 1998 (PIDA) in relation to students and GPs.

Proposed Amendments to the NHS Constitution

Over recent years, and especially since the serious failings at Mid-Staffordshire Foundation Trust, whistleblowing has become increasingly viewed as an important lever for improving patient safety. There are two distinct issues in relation to whistleblowing and the legislation relating to it (the Public Interest Disclosure Act 1998 (PIDA)). The first issue is around whether there are sufficient protections under PIDA for those who wish to raise concerns. The second is about creating and encouraging a culture of openness, where individuals who wish to raise concerns, feel confident enough to speak out and employers act upon these concerns as part of good governance.

PIDA, which amended the Employment Rights Act 1996, is part of the wider employment rights legislation. It provides legal protection against detriment in the work place to all workers in England and Wales who act in good faith and in the public interest by disclosing concerns, providing they follow the procedure set out in PIDA. The law therefore applies to all employees and workers (but not volunteers) working in the NHS. Concerns can be raised with the NHS funded organisation in which the individual works, to a legal adviser, a Minister of the Crown, or a person prescribed under PIDA, which includes the Care Quality Commission (CQC) or, in the case of Foundation Trusts, Monitor.

The Government considers that the current legal protection available to staff who wish to disclose concerns is strong, but implementation on the ground has not always been consistent or effective. Whilst the clinical instincts and professional ethos of NHS staff are the most effective guardians of safe, effective and respectful care, there have been times when staff who have spoken up for patients have found themselves punished rather than celebrated. This has been highlighted most recently by the relative absence of staff complaints at Mid Staffordshire NHS Trust.

The 2010 NHS Staff Survey results, published by the CQC in March this year show that overall 82% of all staff felt encouraged to report errors, near misses and incidents, compared with 80% in 2009, although this was lower in ambulance trusts (70% compared with 67% in 2009). A comparatively small proportion of respondents, only 11% (unchanged on 2009), felt that reporting of errors would lead to punishment or blaming of those involved. 60% of staff felt that incident reporting was handled confidentially (59% in 2009) whilst 55% (unchanged on 2009) felt action was taken to prevent similar errors occurring in the future.

Although reporting rates were high, only 35% of staff felt informed and 37% of staff had been given feedback on changes made as a result of errors, near misses and incidents reported. However, whilst these figures are an improvement on the 2009 survey and demonstrate progress in the right direction, we are clear that there is no room for complacency. The

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Department is committed to making further improvements and empowering all staff to speak out where they have concerns.

Giving frontline staff the ability to respond to systematic problems in the NHS will be a powerful lever to significantly improving patient care. The Government is therefore determined to give teeth to the current safeguards under PIDA for those wishing to disclose their concerns. The consultation document focused on reinforcing the NHS Constitution to make clear the rights and responsibilities of NHS staff and their employers in respect of whistleblowing.

The intended effect of the changes is that individuals working within the NHS will feel more confident about disclosing genuine concerns to their employer (or other appropriate bodies) regarding risks, malpractice or wrong doing in the public interest. It is anticipated that reinforcing existing rights and duties in the NHS Constitution will support changes in behaviours and working practices will change for the benefit of patients, public, staff and the organisations themselves.

Consultation Process

The consultation took place over a three month period between 12 October 2010 and 11 January 2011. In order to ensure that the views of whistleblowers were reflected in the consultation we included Public Concern at Work (PCaW) and NHS trade unions who support whistleblowers, and they were specifically invited to respond.

Respondents were asked to complete a questionnaire response form and return it either electronically or by post to the Department of Health. In total 103 responses were received by the closing date. All 103 responses were reviewed as part of the consultation process.

The responses received came from a mix of individuals and bodies, NHS organisations, healthcare professionals and patient representative groups in the fields of health and social care.

Annex A gives a numerical breakdown of the responses received to each of the questions in the consultation document. Below is a summary of the responses along with the Department's position on these.

Annex B identifies those who responded to the consultation, all of whom were happy for their names to be included.

Annex C sets out the final text of the amendments, reflecting the comments discussed in this report.

Question 1. Do you agree the NHS Constitution should be changed to highlight the rights of staff to raise legitimate concerns in the public interest?

- 82 (80%) respondents to this consultation supported the view that the NHS Constitution should be changed to highlight the rights of staff to raise legitimate concerns in the public interest.
- Only 1 (1%) respondent did not support this proposal, 2 (2%) respondents were unsure and 18 (19%) respondents did not answer the question.

A number of specific comments were raised:

- There was a general welcome for the proposals with most respondents agreeing that they would send a strong signal that patient safety is best served by empowering staff to raise concerns. There was equally a broad recognition, shared by the Government, that

amendments to the Constitution were a necessary but insufficient response to an issue that will need action on a wider front.

- The substantial majority of respondents were positive about the proposals, believing it would send a strong message to 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. Many agreed that it would help NHS staff to understand that it is safe and acceptable to speak up if they have a concern about serious malpractice, wrongdoing or a risk that affects staff, the public or the NHS itself. However, they also highlighted the need for continued efforts from all with an interest, both nationally and locally, to foster a culture of openness in which raising concerns was valued as a protection for patients and as a driver for quality improvement in services.
- Some respondents felt it would be helpful if the text could give greater clarity about what was meant by “the public interest” so that staff could be more confident about when they could and should legitimately take action. Some respondents suggested that the inclusion of specific examples in the Handbook would be useful in this context.
- Some respondents were concerned that volunteer workers were not offered the same protection as employees/workers by PIDA and commented that volunteers might also encounter concerns that needed to be addressed.
- There was concern that the use of the word “staff” might not give contracted and commissioned NHS workers, such as GPs, sufficient assurance that they were also covered by whistleblowing safeguards.
- Some respondents commented that the handbook should also point to the existing professional obligations of statutorily regulated staff, as part of the professional codes of conduct, to raise concerns.

Government response

In view of the broad level of support for the proposed changes to the NHS Constitution we intend to proceed with these amendments. However, in order to ensure greater clarity and to respond to points on the detailed text which are discussed in other sections of this report, we will also make a number of changes to the wording of the proposed amendments. These are set out later in this document.

The Government fully agrees with respondents that the changes to the Constitution alone will not provide sufficient action on this issue. Rather, it needs to be part of a broader strategy to foster greater openness in the health service and to build confidence amongst staff that they will be treated fairly and positively when raising concerns. The Department has already issued guidance (June 2010) on whistleblowing to employers which was developed in

partnership with Public Concern at Work (PCaW), NHS Employers, trades unions and others interested parties. The Government also agreed, in discussion with trades unions in September 2010, to amend the terms and conditions of NHS staff to include a contractual right and duty to raise concerns.

In addition, as part of the wider changes to the NHS set out in the White Paper *Equity and Excellence: Liberating the NHS*, we are considering further measures to provide a safe and independent authority to whom staff can turn when they feel that their own organisation is not listening or responding appropriately. Within this work, we will be considering suggestions from respondents that arose as part of the consultation process on the consultation, and any new measures will be subject to affordability. These again are set out later in this document.

Changes to the proposed amendments to clarify the term “public interest” are discussed later in this document.

Some respondents were concerned about protection for volunteer workers. PIDA is part of wider employment rights legislation and gives legal protection against suffering a workplace detriment to all employees and workers who make disclosures in the public interest, providing they follow the procedures set out in PIDA. It therefore applies to all employees and workers within the NHS. “Staff” is not a term used in PIDA, but in the context of the NHS Constitution and handbook it means individuals working on a paid, contractual basis for an NHS organisation. PIDA offers legal protection against workplace detriments and unfair treatment (for example, termination, demotion, pay decreases or refusing promotion) which flow from a person having made a protected disclosure. As volunteer workers are not employees or workers engaged under a contract by an NHS organisation, they cannot be subjected to these workplace detriments and these individuals are accordingly not covered by the legal protections under PIDA.

However, the Department shares respondents' concerns that volunteers can make an important contribution to the safety of care by raising concerns. The text of the handbook will therefore be amended to make it clear that the Government regards it as best practice for NHS organisations to enable volunteers to raise concerns and that their concerns should be valued and supported as much as those of employed workers.

Concerns were expressed that the use of the term “staff” would mean that workers such as GPs may not understand that they are also protected by PIDA and the Constitution in this context. A small amendment will therefore, be made to the handbook to clarify that “staff” is used as an inclusive term for these purposes. Whilst some respondents queried the legal position of GPs under PIDA, the Department’s legal advice is that a GP performing general medical services under a General Medical Services contract is specifically deemed to be a “worker” for the purposes of PIDA. Other GPs providing general medical services or performing/providing general medical services under a Primary Medical Services (PMS)

agreement may also be covered by the PIDA definition of “worker”. The amendment will clarify that point.

There are existing professional obligations on statutorily regulated staff raising concerns. The Handbook will be amended to refer to those obligations.

Question 2. 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?

- 83 (81%) respondents agreed that an expectation should be set out in the NHS Constitution that staff should raise any genuine legitimate concerns.
- 4 (4%) respondents did not support this proposal. 1 (1%) was unsure of this proposal and 15 (14%) respondents did not answer the question.

A number of specific comments were raised:

- Some respondents felt that the term “a genuine and legitimate concern” was too strictly defined and that qualifying words may make it harder for staff to know when they might legitimately speak up. Other respondents felt that more clarity and guidance was needed on what constituted a “genuine and legitimate concern”.
- A significant number of respondents felt that the term “expectation” was too weak and that, given the patient safety issues that might be at stake, the Constitution should place a “duty”, “requirement”, “ethical obligation” or “responsibility” upon staff to report their concerns. Others argued very strongly that the imposition of a duty would be counterproductive and might actually discourage staff from speaking out.
- Respondents felt that the position of students and trainees should be clarified to ensure a common expectation for all people working for the NHS.
- There was some discussion about whether the phrase “earliest reasonable opportunity” needed better definition or should be replaced with a term that expressed greater urgency, such as “immediately”. Others felt that the phrase “earliest possible opportunity” used elsewhere, gave an emphasis which might lead to unnecessary or inappropriate raising of concerns.
- Where concerns related to possible fraud, it was suggested that the document should set out the particular procedures for raising concerns in this context. Local procedures should provide details of how to raise concerns with regards to possible fraud, rather than the handbook.

Government response

There was broad support for the inclusion of an expectation that staff should raise genuine legitimate concerns in the public interest at the earliest reasonable opportunity and the Department has decided to proceed with this amendment. In doing so, it will make a number of changes to reflect comments made during consultation.

The changes to the NHS Constitution are intended to give staff and employers a clearer understanding of their rights and responsibilities deriving from the existing legislation, in this case, PIDA. The use of the phrase “genuine and legitimate concern” is not a term from PIDA and it has been used with the intention of conveying, the protection that is legislated for in PIDA. The Department recognises that staff will often have to make a personal judgement in each circumstance about the appropriate course of action, and that at times these judgements may be finely balanced. In these circumstances staff should have access to independent advice, either from a confidential helpline such as the helpline currently funded by the Department and provided by Public Concern at Work; trades unions; or their professional regulatory bodies. Whilst the inclusion of examples, as suggested by some respondents, might help to clarify what constitutes a legitimate concern in the more obvious cases, it is not possible to set out a comprehensive set of examples which would clarify the wide diversity of circumstances about which staff may consider raising a concern and where a disclosure may be covered by PIDA. We will therefore amend the Handbook to make more clear that staff who are in doubt about whether to raise a concern, make a disclosure, or about whether they would be protected by PIDA, should have access to free and independent advice.

The Department has carefully considered the broad range of opinion on the degree of obligation that ought to be placed on staff with regard to raising concerns and whistleblowing. Responses from professional groups, where their regulators already place obligations through codes of conduct, tended to favour a clear duty. Patient groups and individuals who have experienced harm as a result of poor care also tended to share this view. Public Concern at Work considered this issue in depth in their response and argued that a general duty could be counter-productive, because such a duty would move the focus away from the key public interest issue and onto the acts or omissions of individual members of staff. They argued that individuals may feel obliged to instigate formal procedures to raise any concern, whether serious or not, through fear that they will be pursued or investigated if they do not act. They also argued that organisations may feel obliged to investigate members of staff for not pursuing concerns, instead of concentrating their efforts on establishing why concerns were not raised and on removing any barriers preventing staff from feeling safe to speak up. The Department believes that existing professional obligations placed upon statutorily regulated health professionals, combined with the expectation set out in the Constitution, are sufficient to encourage staff to think carefully when they witness wrongdoing, or other risks to patient and public safety whilst avoiding the counter-productive effects that Public Concern at Work have highlighted.

As PIDA makes specific provision to include students in training for employment or on work placements as part of a training course (other than where provided by an educational establishment) the text of the handbook will be amended to reflect this.

Some respondents to the consultation queried whether the term, “earliest reasonable opportunity” struck the best balance, as it is not a term used within PIDA itself and suggested that a specific timeframe for acting should be set out. The right time in which to take action will often vary depending on the nature of the concern. For serious matters of imminent threats to patient safety, the expectation would normally be for immediate action to be taken. For other matters, it may be reasonable to take a little time to clarify the position and take stock before raising concerns. Given the range of circumstances in which staff will need to make a judgement, or take advice before acting, we feel that it is probably not helpful to specify a particular timescale and we intend to retain the phrase “earliest reasonable opportunity”.

The Department will amend the Handbook to set out the particular procedures regarding the reporting of fraud. This will then read, “If your concern is related to a detected, or suspected, incidence of fraud or corruption, you should follow your local whistleblowing policy or the reporting procedure prescribed by the NHS Counter Fraud and Security Management Service by reporting directly to the Local Counter Fraud Specialist, Director of Finance, or via the fraud and corruption line or online reporting form where you are able to. You will still be entitled to make a whistleblowing complaint and receive protection under PIDA.”

Question 3. 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?

- 56 (55%) of respondents agreed with the proposed wording of new expectation on staff.
- 21 (20%) disagreed with the wording, 7 (7%) were unsure and 19 (18%) did not answer the question.

There were a number of particular comments on the text, which can be broadly grouped as follows.

- It may be helpful to provide a clearer explanation of the individuals and organisations to whom staff should report concerns, or make disclosures under PIDA. It may also be helpful to clarify the circumstances in which it is appropriate to make wider disclosures, for example, to the media or an MP.
- The Handbook should make clear that, in the first instance, staff should maintain confidentiality about their concerns when they raise them with line management.

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- The Handbook should make clear that if an individual needs to raise a concern, the employing organisation should be contacted in the first instance. If the concern is not acted upon then an outside organisation should become involved.
- There should be greater clarity on what is meant by “genuine” concerns.
- There was further extensive comment on the issue of whether the wording should express an expectation or an obligation upon staff to raise concerns.
- Respondents suggested a range of related comments on the definition and categories of concern that staff would be expected to report. Some suggested that the phrase “right appropriate, or lawful” should read, “professionally ethical, safe or lawful” to aid clarity. A significant number of respondents felt that bullet D, covering the safety of individuals, should be given pre-eminence in the list because of the particular importance of patient safety in a healthcare context.
- It was suggested that “Trade Union Official” should be added to the list of individuals explicitly identified as being suitable to be contacted in the event that all other channels are unsuitable or unavailable should an individual wish to raise a concern.
- There was concern that the wording of the pledge, in seeking to reflect the provisions in PIDA, was overly legalistic and sent mixed messages about where individuals could seek advice and where they could report concerns. It was argued that it would be preferable to reflect the more accessible text in the “Speak Up” guidance published in 2010.
- Some respondents commented that it would be helpful for the wording to make clear that breaches of patient confidentiality made in the public interest and poor information governance might also be the subject of a protected disclosure.
- Some respondents argued that reporting discrimination should be a disclosable concern under PIDA.

Government response

In light of these comments, the Department has reconsidered the proposed text for the section and, at the suggestion of PCaW, broadly adopted text derived from the “Speak Up For a Healthy NHS” guidance. This would read as follows:

Expectation

You should aim to raise any genuine concern you may have about a risk, malpractice or wrongdoing at work, (such as a risk to patient safety, fraud or breaches of patient confidentiality), 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 professionally ethical, safe, or lawful.

Understand your own responsibilities and your organisation's arrangements for raising concerns and whistleblowing, including who you can approach for advice or to whom you should report any concerns.

Understand any professional obligations you may have as part of the Code of Conduct for statutorily regulated professions such as medicine or nursing.

If you have a concern about a risk, malpractice or wrongdoing at work, you should normally raise it first in confidence with your line manager or lead clinician, either verbally or in writing if you are able to do so.

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. If, for whatever reason, you feel unable to raise your concern at a lower level within your organisation, you may choose to take this action from the outset.

If you are unable to follow any of 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 to a regulator of health and social services or a regulator of health such as for example, the Care Quality Commission or Monitor.

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, regulatory body, trade union or a confidential helpline such as that currently funded by the Department and provided by Public Concern at Work.

In some cases, it will be a matter of judgement on how best to proceed. The helpline provides an independent and confidential service, staffed by legal experts, which can support staff who need advice. The current helpline number is 020 7404 6609.

If your concern is related to a detected or suspected incidence of fraud or corruption, you should follow your local whistleblowing policy or the reporting procedure prescribed by the NHS Counter Fraud and Security Management Service by reporting directly to the Local Counter Fraud Specialist, Director of Finance, or via the fraud and corruption line or online reporting form where you are able to. You will still be entitled to make a whistleblowing complaint and receive protection under PIDA.

In order to clarify the issue of wider disclosure, the following wording will also be included:

Wider disclosure

In certain circumstances, wider disclosures to bodies or persons other than your employer or a Minister of the Crown may also be protected by PIDA. A number of additional tests (aside from reasonable belief and good faith) will apply to assess whether such a disclosure is a “protected disclosure. Those additional tests will vary from case to case and may include consideration of the following factors:

- *the identity of the body/person to whom the disclosure is made (generally disclosures to the media are unlikely to be covered), and the seriousness of the alleged breach and whether*
- *it is “an exceptionally serious concern;*
- *there is a risk that evidence could be destroyed or concealed if the disclosure is made to the employer or another prescribed person;*
- *the disclosures amounts to a breach of confidence with the employer;*
- *the matter has already been raised’*
- *there is a good reason to believe that the individual will be the subject of a detriment by their employer if the matter were raised internally or with another prescribed person; and*
- *disclosure was reasonable given the circumstances.*

Staff considering such a disclosure are advised to take advice from the helpline, their trade union or their professional regulatory body before taking this step.

The use of the word “genuine” has been retained to remind staff that PIDA applies only to disclosures made in good faith.

The text is not being altered to include concerns about discrimination within the amendment, as these would generally be a matter to be pursued through local organisational grievance and disciplinary procedures, rather than a matter of general public interest. However, the Department does recognise that should systematic discrimination be witnessed, this could allow in certain circumstances, for a protected disclosure under PIDA.

Question 4. 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?

- 83 (81%) respondents agreed that the NHS Constitution should include a pledge that NHS organisations should support staff when they raise legitimate concerns.

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- No respondents disagreed. 1 (1%) respondent was unsure and 19 (18%) did not answer the question.

There were a number of specific comments:

- A number of respondents argued that the language in this section was insufficiently strong and that NHS organisations should have a new explicit legal obligation placed upon them to facilitate staff in raising and investigating concerns, or that effective organisational policies and cultures on whistleblowing should be a condition of registration with CQC.
- Some respondents suggested that whilst it is important that local and national policies should encourage and support whistleblowing, organisations should be careful not to over-formalise raising low level concerns at an early point and that many of these issues should generally be dealt with on a day-to-day basis as good line management practice and effective clinical governance.
- A small number of respondents suggested that there should be an independent body to which staff can report concerns when NHS organisations do not deal effectively with issues that are raised with them. Some of those respondents suggested that the CQC would be the appropriate home for this function.
- It was suggested that, to ensure consistency with the other proposed amendments, the wording of this section of the Constitution should include the phrase “at the earliest reasonable opportunity”.

Government Response

Given the overwhelming support for this proposal, the Department will proceed with amending the Constitution in this way.

On the issue of whether to impose additional statutory obligations on organisations, the changes to the NHS Constitution in respect of whistleblowing are designed to reflect the law as it currently stands. Under PIDA, there is no legal obligation on organisations to facilitate staff to raise concerns or to investigate them. The Department continues to expect that all NHS organisations have in place robust whistleblowing policies and has consistently issued guidance to this effect. The amendment to the Constitution is intended to highlight the existing protections and reinforce this with employers.

The Department agrees that all concerns should generally be addressed through day to day line management and good clinical governance but does not believe that the text of the proposed amendments is inconsistent with this aim or that it will lead to the unhelpful formalisation of low-level concerns.

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The Department of Health and the regulators are looking at how whistleblowing concerns are currently handled, and where appropriate, implementing improvements to systems for ensuring concerns are not overlooked. The Department is also considering whether there is a need for further developments such as those suggested by respondents, to both protect whistleblowers and ensure action is taken where necessary in response to concerns that have been raised. Any proposals will be set out in due course and will be subject to affordability.

The Department agrees that the wording should be changed to ensure consistency between the pledge and the expectation. The pledge will now include the words “to support all staff in raising concerns at the earliest reasonable opportunity about a risk or wrongdoing at work which may affect patients”.

Question 5. Do you agree with the wording of the pledge? If not, can you suggest how the pledge should be worded?

- 67 (65%) respondents agreed with the wording.
- 12 (12%) respondents disagreed. 5 (5%) respondents were unsure and 19 (18%) did not answer this question. .
- There were a number of specific comments, which generally sought to emphasise and strengthen the expectation that employers should actively and pro-actively support a culture of openness within their organisations:
- It was suggested that the second sentence “NHS organisations that do not have appropriate policies and systems are being encouraged to put them in place” should be deleted and that the wording of the pledge should include a reference to PIDA, as this should highlight the rights provided to employees.
- In addition, it was suggested that the pledge be reworded to read “In addition, NHS organisations are strongly encouraged to take sustainable action to regularly promote these policies and embed them in the organisations’ day to day operation. NHS organisations are encouraged to create an open and accountable culture, where staff are empowered to speak out where they have concerns and see these concerns acted upon.”
- Finally, it was suggested that the handbook should make clear that, consistent with PIDA, there should be no reprisal against staff raising concerns, even if this has resulted from a misunderstanding or because staff were mistaken, provided the concerns have been raised in good faith.

Government Response

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The Department accepts these suggestions as they reinforce the key messages around PIDA and rights and responsibilities. We will incorporate them within the text of the amendments.

Question 6. Do you agree that the NHS Constitution should be amended to make clear 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?

- 79 (77%) respondents agreed that the NHS Constitution should be amended to make clear that staff are able to raise any concern with their employer.
- 4 (4%) respondents disagreed. 1 (1%) respondent was unsure and 19 (18%) did not answer this question.
- There was broad support for this proposal, with the bulk of dissenting comments underlining the need for these changes to be supported by wider action to tackle whistleblowing.

Government Response

Given the support for the proposal, the Department will amend the NHS Constitution as proposed to make clear that staff are able to raise concerns with their employer without fear of reprisal.

Question 7. Do you agree with the wording proposed for inclusion in the NHS Constitution? If not can you suggest other wording to use?

- 60 (58%) respondents agreed with the proposed wording.
- 12 (12%) respondents disagreed. 10 (10%) were unsure and 21 (20%) did not answer the question.

There were a number of specific comments on the text.

- It was suggested that the word “reprisal” should be used instead of the “detriment” and that in general terms this section of text was overly legalistic. It was proposed that the section of text on the law in the guidance “Speak up for a Healthy NHS” should be adopted instead.
- Some respondents thought that greater clarity could be provided about the distinction between a grievance and a whistleblowing concern.

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- The wording should be consistent between the pledge, expectation and the staff right to raise a concern. Therefore, it should read either “safety, malpractice and wrongdoing” or “safety, malpractice, wrongdoing or other risk”.
- A number of responses argued for specific duties for NHS managers in the handling of concerns raised or whistleblowing cases.

Government Response

The Department agrees that the text of the amendment should draw on the text in the recent guidance to employers and this amendment will be reworded to read as follows:

“The Public Interest Disclosure Act (PIDA) gives employees and workers the security of knowing they have a remedy if they suffer a reprisal by any act, or any deliberate failure to act, by their employer for disclosing a genuine concern, whether it be a risk to patients, financial malpractice, or other wrongdoing. PIDA’s tiered disclosure regime promotes internal and regulatory disclosures, and encourages workplace accountability and self-regulation.

Essentially, under PIDA, employees and workers who act honestly (in good faith) and reasonably are given automatic protection from victimisation for raising a matter internally. In the NHS an internal disclosure can go up to the highest level and includes going to the Minister at the Department of Health. Protection is also available to individuals who make disclosures to prescribed bodies (such as the CQC and Monitor).

PIDA covers all temporary workers including temporary agency staff, persons on training courses and self-employed staff who are working for and supervised by the NHS. It does not cover volunteers, but the Department of Health regards it as good practice for NHS organisations to include volunteers within the scope of their whistleblowing policies, to ensure that they are provided with information about how to raise concerns, and given assurances that they will not be victimised if they do so. PIDA also makes it clear that any clause in a contract that purports to gag an individual from raising a “protected disclosure” is void.

Where an individual is subjected to reprisals by their organisation for raising a concern or is dismissed in breach of PIDA, they can bring a claim for compensation in an Employment Tribunal. Awards are uncapped.

Individuals should obtain their own legal advice which can be obtained free of charge to the individual via the helpline run by Public Concern at Work. Organisations such as Public Concern at Work publish material etc. including information about the law which can be found at www.pcaw.co.uk/law/legislation.htm

On managers, the Department agrees that local leadership and local procedures are vital in ensuring that whistleblowers are properly treated and in shaping a culture of openness in

which they are valued and supported. The recent Command Paper, *Enabling Excellence – Autonomy and Accountability for Healthcare Workers, Social Workers and Social Care Workers*, announced that the Department would commission independent work to draw up standards of behaviour and competence for senior NHS leaders. This work will address the need for NHS leaders to ensure that culture and practice in their organisations supports a healthy whistleblowing environment.

Question 8. Previous Questions have asked about the specific changes to the Constitution. Is there anything else you would like to add about these changes, in particular in relation to their impact?

- 51 (50%) respondents did have further comments to make in relation to the impact these changes would have. 28 (27%) respondents had no further comments and 24 (23%) did not answer.

Respondents made a range of further points about the issue of whistleblowing and how a culture of openness in the NHS could be enhanced.

- Many respondents felt that the changes to the Constitution would be an important and helpful reminder to staff and employers about their rights and responsibilities on this issue.
- Some respondents were sceptical about whether the changes in themselves would have significant impact on the culture of some NHS organisations and felt that further measures were needed to bring about change. Concern was expressed about the use of “gagging clauses” in contracts.
- Some respondents suggested that specific training and induction on raising concerns should be provided to NHS staff and that education and training programmes should include material about their professional responsibilities and rights.
- It was suggested that it would be helpful if data on local instances of whistleblowing were collected and published centrally to enable monitoring of trends.
- Some respondents were concerned that the term “whistleblowing” itself had negative connotations and suggested that use of the term “protected disclosure” might be better perceived.
- Many respondents commented on the need for sustained national and local publicity for the new whistleblowing provisions in the Constitution to ensure that both staff and employers were aware.

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- Some respondents sought assurances that the provisions would apply to all staff treating NHS patients, whether they were NHS bodies, private companies or third sector organisations.
- It has been suggested that staff should be provided with a clear privacy notice setting out how an individual's personal information will be handled when they raise concerns in the public interest.

Government response

The Department agrees that the NHS Constitution on its own is insufficient to ensure an open culture within the NHS. The Department is also therefore considering whether there is a need for further developments such as those suggested by respondents at Q4, to both protect whistleblowers and ensure action is taken where necessary in response to concerns that have been raised. Any proposals will be set out in due course and will be subject to affordability.

In addition, the Department will be commissioning the production of a new code of conduct for senior NHS leaders, which will encompass whistleblowing responsibilities. Shifting the culture to make the raising of concerns the norm and so that those who speak up are consistently valued will require everyone in the NHS, whether clinician or manager, to join in creating an attitudinal shift within the NHS system.

In relation to 'gagging clauses'; contracts of employment are a matter between the employing organisation and its employee. It is likely that most contracts will include some form of confidentiality clause, as employees will have access to sensitive patient and commercial information which should not be released. However, PIDA provides that any clause or term in a contract, policy, or other agreement between a worker and their employer, is void insofar as it purports to preclude the worker from making a protected disclosure. The Department has consistently produced guidance/advice on this point.

In relation to the suggestion that Trusts should specifically address the raising of concerns in training and induction sessions; whilst the Government agrees this could be useful in some circumstances any additions to training/induction is a matter for individual employing organisations.

In relation to collection of whistleblowing data centrally; each whistleblowing concern is likely to be unique, it is therefore unlikely that such a data collection would be amenable to sufficiently robust analysis that would enable the performance of different organisations to be compared. To produce a meaningful local culture of openness, success will be dependent on the will of local boards, local leaders and local staff, rather than a top-down attempt to impose compliance. The [NHS Staff Survey](#) asks specific questions of those who work within the NHS about raising concerns. The survey specifically asks, "if an individual was concerned about negligence or wrongdoing in the work place would that person know how to report it, would

they feel safe when raising concerns and are they confident the Trust would address the specific concern”.

The Department is of the opinion that whistleblowing is the term that is best understood by individuals in raising these types of concern. It is also hoped that by using this phrase more often and in a positive way, any negativity that is attached to the word will be reduced – safe and high quality organisations encourage whistleblowing and value whistleblowers.

The Department will work with NHS Employers, trades unions and regulatory bodies to publicise the changes to the NHS Constitution and would expect local NHS bodies to do so locally.

All NHS bodies and private and third sector providers supplying NHS services are required by law to take account of the NHS Constitution and as such these amendments would apply to all staff and employers providing services to NHS patients.

Whilst confidentiality for whistleblowers is not specifically provided for in PIDA, where possible managers should discuss with staff raising concerns how they wish their privacy to be managed. Employers may wish to use Privacy Notices setting out how their personal information will be handled in whistleblowing situations. A privacy notice, otherwise known as a fair processing notice, basically makes it clear to people how information about them will be used.

Question 9. 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?

- 49 (48%) respondents perceived that there are barriers to achieving equitable protection for staff. 25 (24%) respondents did not perceive such barriers and 29 (28%) respondents did not answer the question.
- Some felt that junior staff may find it more difficult to blow the whistle due to reasons of age, experience or level of qualification. Language barriers may also lead to concerns not being raised.
- Some respondents argued that because legal expenses are not funded for those who suffer a detriment and NHS bodies have substantial funds for legal costs, those with relatively low incomes might be less likely to risk their livelihoods by raising concerns.

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- Staff with learning disabilities may not understand the term “in the public interest”. This may lead to staff either not raising concerns or raising issues which do not fall into this definition.
- It may be helpful to suggest that links between aspects of equality and diversity and raising concerns should be explored in mandatory training on equality and diversity with all levels of staff.

Government response

The Department recognises that some groups and individuals may find it more difficult to raise concerns. The Department is clear that all NHS organisations should strive to create an environment where all individuals feel able to raise concerns and also have the ability to do so. The Department has published guidance aimed at organisations for this purpose. It is partly for reasons of accessibility that the Department funds the independent advice line for NHS staff currently provided by PCaW.

On the issue of legal costs, trade unions will generally provide legal support to members who have a case to challenge unlawful detriment under PIDA

The Department agrees that NHS organisations should consider how training could best be used to explore the raising of whistleblowing concerns and how they link with equality and diversity.

Question 10. What proportionate measures could address those issues?
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Respondents made a number of suggestions.

- There needs to be an induction for all new staff within their first week of employment within the organisation, so that individuals are aware of the process of raising concerns.
- Thought needs to be given to having an individual allocated in an organisation to whom staff feel able to raise concerns with.
- Whistleblowing policies should be reviewed regularly to ensure they are operating effectively.
- Guidance needs to be provided on what to do when concerns that are raised are ignored.
- Successful whistleblowing stories should be promoted, with a whistleblower award for organisations/individuals who have handled whistleblowing well.

Government response

We agree with these comments and these are reflected in the guidance to employers on how to implement and review whistleblowing arrangements within their organisations. The guidance is available at www.socialpartnershipforum.org. However, we consider that a whistleblowing award would be likely to be expensive and cumbersome to administer and we are not convinced that it would represent the best use of public money.

Question 11. 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?

Specific responses to this question included:

- The changes will help build a culture where staff feel able to work to the best of their abilities and will support identification of poor practice, which would help to improve patient safety for all.
- All staff will understand they have an individual responsibility to disclose concerns and individuals should be reassured of their employer's responsibility to ensure robust protective measures are in place.

Government response

Whistleblowing policies are designed to improve working practices, **limit/reduce** risk and benefit patient safety. We are content that by making these changes improvements will be made for all, including members of these groups. We were unable to identify any significant relative detriment that any specific group would experience, though we note the comments made about accessibility.

Question 12. What proportionate measures might we implement that could enhance this positive effect?

Suggestions included:

- An anonymous system of reporting should be available for staff who feel unable to speak out without anonymity.
- The changes to the NHS Constitution and whistleblowing legislation as a whole should be promoted and publicised.

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- Emphasis needs to be placed on the fact that PIDA applies to all grades and roles within the NHS not just “health professionals”.
- The NHS Staff Survey could be utilised to pick up on how supportive organisational cultures are.
- All NHS organisations should sign up to the changes to the NHS Constitution and local policy should reflect this.

Government response

Staff belonging to an NHS organisation are already currently able to report a whistleblowing concern anonymously. Individuals are, however, encouraged to report concerns openly as they are much easier to investigate this way. However, should a person feel unable to do so, anonymous reporting is possible, although it should be recognised that an anonymous disclosure could affect the ability of the employer to investigate the matter.

The Department of Health plans to publicise these changes within the NHS, working with NHS employers, trades unions and regulatory bodies.

PIDA does apply to all grades and roles within the NHS, which is why the word staff is used within the amendments to the NHS Constitution.

The Department will consider whether the staff survey could be used to assess whether organisations are implementing the NHS Constitutional pledges effectively

All organisations treating NHS patients are legally required to have regard to the NHS Constitution, including the provisions that will be included on raising concerns and whistleblowing-

Conclusion

We are grateful to those who took the time to respond to the consultation. Overall, the response has been very positive, but the insights and expertise of organisations and individuals has helped to clarify the proposed amendments and make them more accessible to staff and the organisations for whom they work.

In terms of next steps; the Department of Health has decided to go ahead with making amendments to the NHS Constitution and handbook. In order for these changes to take effect both the NHS Constitution and handbook will require amendment and will be done so at the earliest opportunity.

Annex A

The below shows a numerical breakdown of those who responded to the consultation.

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

	Support	Not Support	Unsure	Not Answered
Number	82	1	2	18
%	80	1	2	17

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?

	Agree	Disagree	Unsure	Not Answered
Number	83	4	1	15
%	81	4	1	14

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?

	Agree	Disagree	Unsure	Not Answered
Number	56	21	7	19
%	55	20	7	18

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?

	Agree	Disagree	Unsure	Not Answered
Number	83	0	1	19
%	81	0	1	18

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

	Agree	Disagree	Unsure	Not Answered
Number	67	12	5	19
%	65	12	5	18

Q6: Do you agree that the NHS constitution should be amended to make clear 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?

	Agree	Disagree	Unsure	Not Answered
Number	79	4	1	19
%	77	4	1	18

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

	Agree	Disagree	Unsure	Not Answered
Number	60	12	10	21
%	58	12	10	20

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

	Yes	No	Not Answered
Number	51	28	24
%	50	27	23

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?

	Yes	No	Not Answered
Number	49	25	29
%	48	24	28

Annex B

Listed below are the consultation respondents, all of whom are content to be named.

Action Against Medical Accidents
Alan Leyin
Alcuin Wilkie
Amanda Cains
Birmingham Community Healthcare NHS Trust
British Dietetic Association Trade Union
British Medical Association
Cambridge University Hospitals NHS Foundation Trust
Care Quality Commission
Carole Gerada
CIFAS, Fraud Prevention Service
Council for Healthcare Regulatory Excellence
Council of Deans of Health
Coventry LINK
D Rodriguez
Daphne Austin
David Drew
Denice Gately
Doctors for Justice
Dominic Holbourne
East Midlands Ambulance Service NHS Trust
Enfield Community Services Joint Staff Committee
Eve McGrath
Federation of Clinical Scientists
Foundation Trust Network
General Dental Council
General Medical Council
Greater Midlands Cancer Network, User Partnership Group
Guild of Healthcare Pharmacists
Halton LINK
Health Foundation
Health Professions Council
HR Department Royal Bournemouth Hospital
Information Commissioner
Institute of Chartered Secretaries and Administrators
Jane Wooldridge
Julie Dalphinis
Karen Johnson
Kay Gillman
Keele Medical School
Kim Holt
Kingsley Napley LLP
Lancashire Teaching Hospitals NHS Foundation Trust
Lloyd Barker

London Specialised Commissioning Group
Loretta Bellman
Mark Clarke
Medical Protection Society
Medical Women's Federation
Mencap
National Patient Safety Agency
NHS Bristol, University Hospitals Bristol, North Bristol Trust
NHS Counter Fraud and Security Management Service
NHS County Durham and Darlington
NHS Doncaster
NHS Dorset
NHS East of England
NHS Employers
NHS South Gloucestershire
NHS Warwickshire
NHS Yorkshire and the Humber
Norfolk Community Health and Care NHS Trust
Nottinghamshire County LINK
Nursing and Midwifery Council
Outer North East London Community Services
Parliamentary and Health service Ombudsman
Patients Association
Peter Gooderham
Phil Edwards
Plymouth LINK
Public Concern at Work
Rachel Osborne
Rita Pal
Rose Laverne
Royal College of General Practitioners
Royal College of Nursing
Royal College of Physicians
Royal College of Physicians of Edinburgh
Royal College of Radiologists
Royal College of Surgeons of England
Royal College of Surgeons Patient Liaison Group
Royal Pharmaceutical Society
Russell Dunkeld
Shamila Chowdhury
Social Partnership Forum East of England
South Central Strategic Health Authority
South Essex Partnership University NHS Foundation Trust
South Staffordshire Primary Care Trust
The Association for Perioperative Practice
The Royal Orthopaedic Hospital NHS Foundation Trust
The Shrewsbury and Telford Hospital NHS Trust
Umesh Prabhu
West Cheshire PCT
Worcestershire Acute Hospitals NHS Trust

Worcestershire LINK

3 Staff responses from NHS Great Yarmouth and Waveney

Annex C

1) New expectation on staff to raise concerns

Expectation

You should aim to raise any genuine concern you may have about a risk, malpractice or wrongdoing at work, (such as a risk to patient safety, fraud or breaches of patient confidentiality), which may affect patients, the public, other staff¹, 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 professionally ethical, safe, or lawful.

Understand your own responsibilities and your organisation's arrangements for raising concerns and whistleblowing, including who you can approach for advice or to whom you should report any concerns.

Understand any professional obligations you may have as part of the Code of Conduct for statutorily regulated professions such as medicine or nursing.

If you have a concern about a risk, malpractice or wrongdoing at work, you should normally raise it first in confidence with your line manager or lead clinician, either verbally or in writing if you are able to do so.

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

¹ The term "staff" is used to include employees, workers, students on training placements, and, for the purposes of PIDA, agency workers and general practitioners who meet the wider PIDA definition of being a "worker" (e.g. those performing general medical services under General Medical Services Contracts). Whilst volunteers are not covered by the provisions of PIDA, guidance to employers makes clear that it is good practice to include volunteers within the scope of organisations local whistleblowing policies.

Foundation Trusts you may consider a member of the Non Executive Board. If, for whatever reason, you feel unable to raise your concern at a lower level within your organisation, you may choose to take this action from the outset.

If you are unable to follow any of 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 such as for example, the Care Quality Commission, Monitor.

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, regulatory body, trade union or the Department of Health funded confidential helpline currently provided by Public Concern at Work.

In some cases, it will be a matter of judgement on how best to proceed. The helpline provides an independent and confidential service, staffed by legal experts, which can support staff who need advice. The current helpline number is 020 7404 6609.

If your concern is related to a detected or suspected incidence of fraud or corruption, you should follow your local whistleblowing policy or the reporting procedure prescribed by the NHS Counter Fraud and Security Management Service by reporting directly to the Local Counter Fraud Specialist, Director of Finance, or via the fraud and corruption line or online reporting form where you are able to. You will still be entitled to make a whistleblowing complaint and receive protection under PIDA.

Wider disclosure

In certain circumstances, wider disclosures to bodies or persons other than your employer or a Minister of the Crown may also be protected by PIDA. A number of additional tests (aside from reasonable belief and good faith) will apply to assess whether such a disclosure is a “protected disclosure Those additional tests will vary from case to case and may include consideration of the following factors:

- the identity of the body/person to whom the disclosure is made (generally disclosures to the media are unlikely to be covered), and the seriousness of the alleged breach and whether
- it is “an exceptionally serious concern;
- there is a risk that evidence could be destroyed or concealed if the disclosure is made to the employer or another prescribed person;
- the disclosures amounts to a breach of confidence with the employer;
- the matter has already been raised’

- there is a good reason to believe that the individual will be the subject of a detriment by their employer if the matter were raised internally or with another prescribed person; and
- disclosure was reasonable given the circumstances.

Staff considering such a disclosure are advised to take advice from the helpline, their trade union or their regulatory body before taking this step.

2) Pledge to support staff that raise concerns

To complement the new expectation on staff, and emphasise the support available to staff, the Department will include in the NHS Constitution a pledge on behalf of NHS organisations to support staff who wish to raise concerns. This is not a new right, but clarifies existing pledges to staff. This would involve amending Section 3a Staff – your rights and NHS pledges to you in the NHS Constitution by inserting:

Under the heading “The NHS commits”:

“To 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 and acting consistently with the Public Interest Disclosure Act 1998.”

This will then be explained further in the NHS Constitution Handbook. An additional entry would be inserted:

“The NHS commits to 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 and acting consistently with the Public Interest Disclosure Act 1998.

All NHS organisations should have policies and procedures in place to support and encourage staff to raise concerns at the earliest reasonable opportunity, and respond to those concerns. The Social Partnership Forum (Department of Health, NHS Employers and trades union) has developed a guide for NHS organisations to assist them in developing robust arrangements to support their staff to raise concerns. The guidance is available at:

<http://www.socialpartnershipforum.org/CurrentWorkProgrammes/Pages/Launchofnewwhistleblowingguide.aspx>

In addition, the NHS is being encouraged to take action to promote these policies and create a culture built on openness and accountability, where staff are empowered to speak out where they have concerns. There should be no reprisal against staff raising concerns, even if this has resulted from a misunderstanding or because staff were mistaken, provided the concerns have been raised in good faith.

NHS bodies have a role in building trust and confidence across the NHS. A responsible attitude to supporting staff who raise concerns helps each organisation to promote a healthy workplace culture built on openness and accountability. As part of this, the NHS will encourage staff to raise any serious concern they may have about malpractice or serious risk at the earliest reasonable opportunity. They will also respond appropriately when concerns are raised.

3) Staff right to raise concern

The NHS Constitution currently summarises the existing staff right to “raise an internal grievance and if necessary seek redress, where it is felt that a right has not been upheld”. The Handbook to the Constitution further explains that this right includes the right to raise concerns under the Public Interest Disclosure Act.

The Department will give greater clarity for staff around the right to raise concerns by amending the Constitution to include a further heading within the staff rights section to make it clear that staff:

“Can raise any concern with their employer whether it is about safety, malpractice or other risk, in the public interest.”

This will also be supported by a number of amendments to the Handbook to the Constitution.

The explanation of the right “to have disciplinary and grievance procedures conducted appropriately and within internal and legal requirements would be amended to read :

“A grievance is usually a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him/her, and should not be confused with a whistleblowing concern, which is about a risk, malpractice or wrongdoing which affects or relates to others, and is where an individual discloses information as a witness (see 6a page 90).

Your organisation should have a written procedure for handling any disciplinary or grievance issues. This will set out the process which should be followed. This provides that all employers have to have in place minimum statutory procedures for dealing with dismissal, disciplinary action and grievance in the workplace. ”

A new section will be inserted after the above as follows:

“6a: Can raise any concern with their employer whether it is about safety, malpractice or other risk, in the public interest.”

The current text concerning the right to protection from detriment and the right not to be unfairly dismissed for “whistleblowing” or reporting wrongdoing in the workplace will be amended to read

“The Public Interest Disclosure Act (PIDA) gives employees and workers the security of knowing they have a remedy if they suffer a reprisal by any act, or any deliberate failure to act, by their employer for disclosing a genuine concern, whether it be a risk to patients, financial malpractice, or other wrongdoing. PIDA’s tiered disclosure regime promotes internal and regulatory disclosures, and encourages workplace accountability and self-regulation.

Essentially, under PIDA, employees and workers who act honestly (in good faith) and reasonably are given automatic protection from victimisation for raising a matter internally. In the NHS an internal disclosure can go up to the highest level and includes going to the Minister at the Department of Health. Protection is also available to individuals who make disclosures to prescribed bodies (such as the CQC and Monitor).

PIDA covers all temporary workers including temporary agency staff, persons on training courses and self-employed staff who are working for and supervised by the NHS. It does not cover volunteers, but the Department of Health regards it as good practice for NHS organisations to include volunteers within the scope of their whistleblowing policies. PIDA also makes it clear that any clause in a contract that purports to gag an individual from raising a “protected disclosure” is void.

Where an individual is subjected to reprisals by their organisation for raising a concern or is dismissed in breach of PIDA, they can bring a claim for compensation in an Employment Tribunal. Awards are uncapped.

Individuals should obtain own legal advice which can be obtained free of charge to the individual via the helpline. Organisations such as PCaW publish material etc. including information about the law which can be found at www.pcaw.co.uk/law/legislation.htm”