



# **The NHS Constitution and Whistleblowing**

*A paper for consultation*

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# The NHS Constitution and Whistleblowing

*A paper for consultation*

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# Executive summary

On 9 June 2010, in his statement to the House of Commons about the public inquiry into events at Mid Staffordshire NHS Trust, the Secretary of State for Health announced a range of measures to build on and give teeth to the current safeguards for whistleblowers in the Public Interest Disclosure Act 1998 (PIDA). This included amendments to the NHS Constitution.

This consultation document seeks views on proposals amending the NHS Constitution to:-

- 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 a 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 staff legal right to raise concerns about safety, malpractice or other wrongdoing without suffering any detriment.

# Proposed Amendments to the NHS Constitution

## Introduction

1. The Public Interest Disclosure Act 1998 (PIDA) 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, (the NHS Constitution is only applicable in England) who act in good faith and in the public interest by raising concerns, providing they follow the procedure set out in the Act. It therefore applies to all staff (other than volunteers) working in the NHS. Concerns can be raised with the NHS funded organisation in which the individual works, to a legal adviser, to a Minister of the Crown, or to a person prescribed under the act; this includes the Care Quality Commission or Monitor in the case of Foundation Trusts.
2. The dismissal of an employee will be automatically considered unfair if the reason (or principal reason) for their dismissal is that they have made a protected disclosure. Employees are also protected from being subject to any detriment (such as threats, disciplinary action, loss of pay or damage to career prospects) on the grounds that they have made a protected disclosure.
3. These rights are reflected in the Handbook to the NHS Constitution, which includes the staff right 'to protection from detriment in employment and the right not to be unfairly dismissed for 'whistleblowing' or reporting wrongdoing in the workplace'. This right, and rights related to other employment legislation, are summarised in the NHS Constitution, which indicates that staff "can raise an internal grievance and if necessary seek redress where it is felt that a right has not been upheld".
4. The current legal protection available to staff who wish to raise concerns is therefore 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, all too often 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.
5. The Government is committed to improving protection for NHS staff, and empowering them to speak out and protect patients or raise other issues concerning NHS organisations, without the fear of victimisation. Giving frontline staff the ability to respond to systemic problems in the NHS will be a powerful lever for significantly improving patient care.
6. The Government is therefore determined to enhance the protection that is available to staff and to give teeth to the current safeguards under PIDA for those wishing to raise concerns. In his statement to the House of Commons on 9 June 2010 about the Mid-

Staffordshire Inquiry, the Secretary of State for Health announced a range of initiatives including:

- Reinforcing the NHS Constitution to highlight the rights and responsibilities of NHS staff and their employers in respect of whistleblowing;
  - Seeking through negotiations with NHS trade unions, to amend terms and conditions of service for NHS staff to include a contractual right to raise concerns in the public interest;
  - Issuing unequivocal guidance to NHS organisations that all their contracts of employment should cover staff whistleblowing rights;
  - Issuing new guidance to the NHS on supporting and taking action on concerns raised by staff in the public interest (the Social Partnership Forum published revised guidance *Speak up for a healthy NHS* on 25 June) and;
  - Exploring with NHS staff further measures to provide a safe and independent authority to whom they can turn when their own organisation is not listening or acting on concerns.
7. This consultation document focuses on the first of those bullet points; reinforcing the NHS Constitution to make clear the rights and responsibilities of NHS staff and their employers in respect of whistleblowing. Making these changes to the NHS Constitution will highlight and make clearer the rights of staff to raise concerns without fear of detriment. However, these will only be successful and effective as part of a broader strategy.

## NHS Constitution

8. The NHS Constitution codifies NHS principles and values, and the rights and responsibilities of patients and staff. The White Paper *Equity and Excellence: Liberating the NHS* makes clear that the coalition Government will continue to uphold the NHS Constitution. It supports the principle of 'mutuality' where patients, the public and staff have a shared responsibility for improving service quality.
9. The NHS Constitution also recognises that the provision of high quality care requires high quality workplaces, with NHS-funded organisations being committed to being good employers; where professionals have greater freedoms, leading to better staff engagement and better patient care.
10. The NHS Constitution emphasises that staff possess extensive legal rights, embodied in general employment law and equalities legislation, thus raising the profile of these rights for NHS staff. All staff rights are set out in the Handbook to the NHS Constitution. The proposed revision of the Constitution set out in this document is intended to highlight the rights and responsibilities of NHS staff and their employers in respect of whistleblowing, rather than introduce new rights and responsibilities. Alongside the other actions set out by the Secretary of State, this should raise the profile of whistleblowing within the NHS.

## NHS Constitution and Whistleblowing

11. The intended effect is that individuals working within the NHS will feel confident about raising genuine concerns with their employer (or other appropriate bodies) regarding risks, malpractice or wrong doing in the public interest. It is anticipated that behaviours and working practices will change for the benefit of patients, public, staff and the organisations themselves.

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

## Proposed amendments

### 1) New expectation on staff to raise concerns

12. Section **3b Staff - your responsibilities** of the NHS Constitution includes a range of duties and expectations. It is proposed to insert an additional expectation that staff would raise concerns about safety as follows:

“You should aim

- to raise any genuine concern you may have about a risk, malpractice or wrongdoing at work, which may affect patients, the public, other staff, or the organisation itself at the earliest reasonable opportunity”

The Handbook to the NHS Constitution would also be amended to explain exactly what the new expectation would mean for individuals as follows;

#### “Expectation

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

#### What this means in practice

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

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

If you have a concern about a risk, malpractice or wrongdoing at work, you should raise it first with your line manager or lead clinician, either verbally or in writing. Those categories of wrong doing that should be reported upon are:

- A. that a criminal offence has been committed, is being committed or is likely to be committed,
- B. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- C. that a miscarriage of justice has occurred, is occurring or is likely to occur,
- D. that the health or safety of any individual has been, is being or is likely to be endangered,
- E. that the environment has been, is being or is likely to be damaged, or

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

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

If you are unable to follow these channels, or if you feel that the matter is so serious that you cannot discuss it with any of the above, you can contact a legal adviser, a Minister of the Crown, or a prescribed person as described in the Schedule of the Public Interest Disclosure (Prescribed Persons) Order 1999, such as the Care Quality Commission or Monitor”.

**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?**

**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?**

## 2) Pledge to support staff that raise concerns

13. To complement the new expectation on staff, and emphasise the support available to staff, it is proposed to 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 about safety, malpractice, or wrongdoing at work, responding to and, where necessary, investigating the concerns raised.”

This would 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 whether they are about safety, malpractice, or wrongdoing at work, responding to and, where necessary, investigating the concerns raised.**

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. NHS organisations that do not have appropriate policies and procedures are being encouraged to put them in place. 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.

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.”

**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?**

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

### 3) Staff right to raise concern

14. 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.
15. It is proposed to give greater clarity for staff around the right to raise concerns. The NHS Constitution would be amended 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 would also be supported by a number of amendments to the Handbook to the Constitution.

i) 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 others, and is where an individual raises 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. ”

ii) A new section would 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.”

iii) 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 would be amended to read

“Under the Public Interest Disclosure Act 1998 (PIDA), workers who act honestly and in good faith when making a disclosure to specified persons receive automatic protection. The disclosure must relate to raising genuine concerns about risks to patients, financial malpractice, or other wrongdoing from the following categories:

- a criminal offence;
- breach of any legal obligation
- miscarriage of justice
- danger (or potential danger) to the health and safety of an individual
- damage (or potential damage) to the environment; and
- the deliberate concealing of information about any of the above.

Disclosures that are protected within PIDA are concerns within the above categories about risk, malpractice or wrongdoing which affect others provided they are raised by a worker in accordance with PIDA (i.e. to a Prescribed Regulator, in good faith and based on objectively reasonable belief). The disclosure for example could relate to colleagues, patients or the public. It should not be confused with a grievance (see reference 6, page 86), which is usually a personal complaint about an individual’s own employment situation.

PIDA covers all workers including temporary agency staff, persons on training courses, contractors and self-employed staff, who are working for and supervised by the NHS. It does not cover volunteers.

If staff follow procedures laid down in PIDA, they will be given the full protection of the law. There is also a confidential helpline that staff can use when considering raising concerns, which is run by Public Concern at Work and staffed by legal experts. The helpline number is 020 7404 6609.

A Guide to Law and Practice of the PIDA can be found on Public Concern at Work website: [www.pcaw.co.uk](http://www.pcaw.co.uk)”

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

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

## Impact Assessment

16. The recent events at Mid Staffordshire NHS Trust and other incidents have highlighted the need to encourage NHS staff to raise concerns in the public interest. Recent guidance published through the Social Partnership Forum provides advice to NHS organisations on the introduction (and maintenance) of whistleblowing policies and procedures.
17. Evidence gathered through the NHS staff survey suggests that over 80% of staff know how to raise a concern and over 60% say that there is a process in place within their organisation to raise concerns confidentially. Despite this there still seems to be a reluctance to raise concerns in practice. The Department of Health does not collect data on whistleblowing concerns and it cannot therefore make an assessment about the reasons for this apparent reluctance and the impact the changes to the NHS Constitution will have. It would therefore be helpful if respondents could also consider the following questions

**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?**

**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?**

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

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

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

# Consultation Questions

## 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?

## 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?

## 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?

## 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?

## Question 5

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

## Question 6

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

## Question 7

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

## 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?

### 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?

### Question 10

What proportionate measures could address those issues?

### 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?

### Question 12

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

# Consultation – Next Steps

Individuals and organisations are invited to submit comments on this consultation on amending the NHS Constitution in respect of the raising of legitimate concerns in the public interest.

## Response to the Consultation

Replies to this consultation should be received no later than 20 January 2011. Please respond using the question template provided on the website. If you cannot access the question template, please e-mail the address below or write to us and we will send the consultation document and/or template to you. If you e-mail your response please do not send a duplicate hard copy.

The document is available on the Department of Health website at <http://www.dh.gov.uk/en/Consultations/Liveconsultations/index.htm>.

You can respond by e-mail to [HRDListening@dh.gsi.gov.uk](mailto:HRDListening@dh.gsi.gov.uk)

You may also respond in writing to:

Whistleblowing Consultation Team  
Department of Health  
Room 2N11  
Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

Attachments to e-mails should be in Microsoft Word or pdf format only please.

Please indicate whether you are replying as an individual or on behalf of an organisation or group of people. Your response may be made public but if you would prefer it to remain private please make this clear in your reply.

## Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please

**contact**      Consultations Coordinator  
Department of Health  
3E48, Quarry House  
Leeds  
LS2 7UE

**e-mail**      [consultations.co-ordinator@dh.gsi.gov.uk](mailto:consultations.co-ordinator@dh.gsi.gov.uk)

**Please do not send consultation responses to this address.**

### Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's [Information Charter](#).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and, in most circumstances, this will mean that your personal data will not be disclosed to third parties.

### Summary of the consultation

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the Consultations website at:

<http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm>

# Code of Practice of Consultation

## Criteria for consultation

This consultation follows the 'Government Code of Practice', in particular we aim to:

- formally consult at a stage where there is scope to influence the policy outcome;
- consult for at least 12 weeks with consideration given to longer timescales where feasible and sensible;
- be clear about the consultation's process in the consultation documents, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;
- ensure the consultation exercise is designed to be accessible to, and clearly targeted at, those people it is intended to reach;
- keep the burden of consultation to a minimum to ensure consultations are effective and to obtain consultees' 'buy-in' to the process;
- analyse responses carefully and give clear feedback to participants following the consultation;
- ensure officials running consultations are guided in how to run an effective consultation exercise and share what they learn from the experience.

The full text of the code of practice is on the Better Regulation website at:

[Link to consultation Code of Practice](#)

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