

Department of Health - Workforce Policy Directorate

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Consultation on raising a concern in the public interest (whistleblowing) framework and model policy

### Response from BMA Northern Ireland

5 September 2022

Dear Sir/Madam,

The British Medical Association (BMA) is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

#### Introduction

BMA Northern Ireland welcomes the opportunity to respond to this important consultation.

We would like to first note that the consultation document suggests:

*HSC Trusts and Trade Unions have collaborated in development of a draft framework policy which sets out the accountability and governance within HSC organisations to*

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*encourage people to engage with the process for raising a concern and ensure they feel safe while doing so.*

Whilst we don't doubt that engagement and collaboration has taken place with trade unions in the development of the framework and model policy, we regret that the BMA, as the largest medical trade union in Northern Ireland, has not been adequately involved to date.

The existing policy and the proposed policy are broadly similar, with a number of key changes. It would have been of benefit to the scrutiny of this policy if, alongside its publication, a clear outline of the changes to the existing policy was also published, including rationale for the amendments. In some instances, it's difficult to assess the impact of the policy, without an understanding of why certain changes are required.

The vast majority of our members in Northern Ireland are GMC registered, and as such, have a professional duty, under Good Medical Practice (paragraph 25), to raise concerns about anything that impacts patient safety or could impact patient safety. It may be helpful to consider how this policy aligns with GMC guidance for raising concerns, as well as guidance provided by other professional and regulatory bodies, to avoid any confusion for staff.

Throughout, there are instances where the framework refers to 'Trusts', however, this wouldn't accurately cover other HSC organisations, such as NIMDTA as the Single Lead Employer for Junior Doctors. This should be amended to enhance the clarity of the policy and its application across all HSC organisations.

There are number of instances where the framework is poorly worded, and the whole document requires proofing, for example, one paragraph in the 'At a Glance...' section reads:

*If you raise a concern in the public interest then you are have rights in law that you cannot be treated badly (detriment) or victimised because you made a raised a concern. This is what the legislation says...."A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.....A worker may present a complaint to an industrial tribunal that he has been subjected to a detriment." (NIAO guide page 57). This is the case where you are a worker – this means that if you are a member of the pubic this legislation isn't relevant*

This is confusing and doesn't support the aim of improving clarity. Other areas of the document are similarly confusing and require improvement. A further example is that there are two Appendix As.

## Consultation response

- 1. Do you agree our approach to the definition of the term "Raising a Concern" is successful in clearly demonstrating the breadth of the concerns which fall within the scope of the model framework and when the process for raising a concern should be used?**

*Agree in part*

The framework and model policy was last updated in 2017, at which time we commented that:

*'The use of the terms 'whistleblowing' and 'raising concerns' are used inconsistently throughout the document making it difficult to determine whether or not there are differences between the two.'*

It's clear that throughout the revised framework, efforts have been made to refer consistently to 'raising concerns' in the public interest which is welcome and our preferred terminology. We do however acknowledge that some people may wish to identify themselves as whistleblowers and may see that term as helping them to validate their actions. We're pleased that this is appropriately reflected in the framework.

Some efforts to clarify this definition, however, may require further revision. For example, in the current framework paragraph six states: *'Whistleblowing can also be broadly defined as simply 'raising a concern''*. In this proposed framework, this has been amended to say: *'Raising concerns in the public interest can also be broadly defined as simply 'raising a concern''*. This does not aid clarity to the definition and instead reads as if the term 'whistleblowing' has been arbitrarily replaced. Where amendments have been made, it's important that they support a better understanding of raising concerns, rather than adding confusion.

A further clarification from the current policy is the applicability of the policy to the general public and their ability to raise concerns under this policy where appropriate. However, there is little further guidance for how such concerns would be handled. Further clarity would be welcome on this.

There have also been welcome changes to language throughout to remove reference to a need to raise only 'genuine' or 'legitimate' concerns, recognising that such language may act as a barrier to raising a concern when someone has a reasonable belief that wrongdoing has taken place.

The framework refers to the Mid Staffordshire report to support the definition of raising a concern, however, this may not be immediately familiar to everyone, and may benefit from explanation. The framework also seems to suggest that most instances of wrongdoing are related to financial mismanagement, but we would question whether this is the case in a health and care context and may be misleading. This could discourage reporting of other concerns, for example, around health and safety or patient care.

## **2. Do you agree that the guidance within the model framework is clear in addressing legislation and best practice documents?**

*Agree in part*

The framework, for the most part, successfully captures what can be quite complex regulations and presents them in an accessible way. This is of benefit to those wishing to raise concerns, as well as employers who adopt the policy.

The Department may wish to consider including information about how any detriment to an individual brought about through raising a concern can be addressed, with a particular reference to the three-month time limit to raise a claim with the tribunal contained in the regulations.

Similarly, the policy could provide advice to those raising concerns to keep their own records of their concerns and the actions they have taken, as per the GMC guidance.

The framework also describes the distinction between raising a concern in the public interest and raising a grievance, however in doing so refers to 'the HSC Grievance Policy'. We understand that each Trust and organisation will have its own grievance policy, so perhaps this could be reworded as appropriate.

**3. Do you agree that the monitoring arrangements stipulated within the framework are sufficient in gathering data that will be effective in determining the success of the process?**

*Disagree*

BMA Northern Ireland notes three significant changes that will impact effective monitoring that may impair organisations' ability to determine the success of the policy.

Firstly, the proposed policy appears to limit recording of concerns raised to those only done so formally. The existing policy doesn't specify that only formal concerns are to be recorded on a central register, instead it refers to 'all concerns raised'. By limiting the concerns that are recorded, the employer could be missing out on crucial information and placing a significant amount of responsibility on line-managers to appropriately deal with any informal concerns raised.

Secondly, the proposed policy also removes reference to providing the Department of Health an annual return on caseload, actions and outcomes. BMA NI is deeply concerned that the Department is removing itself from this process, given that responsibility for patient safety lies with the Department. This has potential to be a valuable source of information that enables greater transparency and an opportunity for the Department to identify any wider trends in concerns that are made across the full range of applicable employers.

Finally, the current policy says that organisations will '*review the effectiveness of this policy and local processes at least annually, with the outcome published and changes made as appropriate*'. This appears to be missing in the proposed version.

In each instance, there is no rationale provided as to why these valuable source of information will be lost, or the impact that this will have on determining the success of the policy.

**4. Do you agree that the approach set out within the framework clearly demonstrates that the process ensures all staff and others who raise a concern will receive appropriate protection?**

*Disagree*

BMA Northern Ireland has previously raised the unique situation of junior doctors, where they undergo training in a programme organised by NIMDTA, which is responsible for appointing them to a series of training placements. In each placement they were contracted to work for an employer, usually an HSC trust but general practice trainees are also employed by GPs for part of their training. This created a situation where junior doctors were protected from detrimental treatment by the host organisation, but not NIMTDA.

Due to the more recent move to a single lead employer, this situation has changed with NIMDTA now the employer, rather than individual HSC organisations. As such, we would welcome absolute clarity that junior doctors are protected from detriment from both NIMDTA and their host organisation under the proposed policy. This would be in line with the position elsewhere in the UK where, due to an agreement with Health Education England (HEE), NHS Employers and the Department of Health and Social Care to ensure that junior doctors will have legal protection if they are subjected to detrimental treatment by HEE as a result of raising a concern<sup>1</sup>.

Furthermore, we believe that the coverage of this policy should apply across the health and social care sector whether in the public or private sectors. There should not be different levels of protection for staff and patients depending on the ownership model of the provider. The quality and safety of the care received by patients and users should be protected irrespective of which bodies are responsible for organising it.

Finally, we also recommend that a more tailored version of the policy should be produced for primary care providers to reflect their status as independent contractors, and as stated, further clarity is needed on how members of the public who raise concerns will be protected.

**5. Do you agree that the approach taken in designating roles and responsibilities within the organisation in relation to handling the process for raising a concern will establish confidence in the integrity of the process?**

*Agree in part*

We welcome the additional clarity to the designated roles and responsibilities, for example, specifying in more detail the roles of the board, the assigned non-executive director, and the naming of advisors 'raising concerns advocates'.

As stated, there appears to be a change in emphasis in the role of line-managers to deal with informal concerns and act upon them appropriately. For the most part, this is to be welcomed, as where concerns can be raised and addressed at the earliest opportunity, this should be encouraged. However, given that there also seems to be the removal of a need to record informal concerns made, it will be difficult to monitor the success, or otherwise, of line-managers in dealing with such concerns. We would support measures that ensured as much openness and transparency as possible remains in the policy whether concerns are raised informally or otherwise.

The framework also describes how if wrongdoing or a potential risk to patient safety is raised with a manager, it should be taken seriously and dealt with immediately, however there are no timeframes or means of assurance that this will happen in a time-appropriate manner. A clearer indication of expected timeframes to deal with such concerns would be welcome.

Moreover, whilst the designation of clear roles and responsibilities is important, the processes themselves and the whole organisational culture are key to the success. These can breakdown when individuals with responsibility make mistakes, and risk undermining trust. A clearer focus on a wider organisational culture of openness and transparency is vital.

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<sup>1</sup> <https://www.bma.org.uk/advice/employment/contracts/junior-doctor-contract-2016/whistleblowing-protection-faqs>

To this end, BMA Northern Ireland has long advocated the introduction of Freedom to Speak Up Guardians, and a National Guardian office. The stated purpose of Freedom to Speak Up Guardians is to support workers to speak up when they feel that they are unable to in other ways. This further supports a culture of openness and transparency, where health care staff are encouraged to raise concerns, whether in the public interest or otherwise, rather than punished for doing so. In England, where this system is already in place, 20362 cases were raised between 1 April 2021 and 31 March 2022<sup>2</sup>. Without an equivalent body in Northern Ireland, this suggests that there are many concerns currently not being raised, when they could or should be, with the right system in place. We urge the Department of Health to introduce Freedom to Speak Up Guardians in Northern Ireland to demonstrate its commitment to identifying and addressing concerns quickly and effectively.

The roles set out in the appendix are welcome but would benefit from further clarity around the responsibilities individuals have to confidentiality, where appropriate.

#### **6. Do you agree that the process laid out in appendix B is clear and comprehensive?**

*Agree in part*

Appendix B is a useful illustration of a practical implementation of the policy. It's helpful that numbers of each stage have been removed in the proposed policy. Whilst, in general, we would support escalation through these steps as a means of raising concerns, it's also the case that this may not always be possible or appropriate. Individuals shouldn't feel as though step by step escalation is their only option, especially when dealing with serious concerns that need a more immediate response.

The process adds a 'screening' phase, however there is a lack of clarity as to what this actually means, beyond identifying the appropriate process to follow. It's not clear who will do this or on what criteria they will base a decision. Furthermore, it's concerning that if a change to the process does take place, e.g. the concern is considered under the bullying and harassment policy rather than the raising a concern policy, the proposed policy no longer says that this will be discussed with the individual raising the concern, as is the case in the existing policy.

The process also outlines that:

*'If you choose to bypass the routes available for you to make a disclosure (directly to the Trust or via outside organisations referred to in the legislation) and instead approach the media with your concerns, it is likely you will lose your right to protection under Whistleblowing legislation'*

Whilst this can be the case, whether or not protection is lost is dependent on particular circumstances, set out in regulation. We agree that the policy should make clear of the risks involved in making a disclosure outside of the policy framework, however this may, on rare occasions, be necessary. In these instances, it's not true to say that this will 'likely' mean individuals lose their right to protection, as it depends on the nature of the specific situation.

We welcome additional clarity in relation to agency staff, who are covered by this policy, as opposed to the situation currently where they are subject to a process undertaken in conjunction with their agency, which may not offer as strong protections.

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<sup>2</sup> <https://nationalguardian.org.uk/#>

- 7. Do you agree that the process laid out in appendix B successfully ensures individuals who raise a concern are given appropriate feedback in a timely manner?**

*Agree in part*

As mentioned, if during screening the process is changed to consider the concern under another policy, there is no longer a specific requirement to discuss this with the individual. This should be reviewed.

Similarly, there is a change in the proposed policy which means that only in the event that an investigation is deemed necessary, does the requirement to provide six, ten and twelve week updates apply. This seems to be a regressive step.

- 8. Do you agree that the approach to monitoring and reporting within the framework ensures that lessons learned will be identified and applied appropriately to enable improvements in service.**

*Disagree*

As set out in response to question two, BMA Northern Ireland notes three significant changes that will impact effective monitoring that may impair organisations' ability to determine the success of the policy. Without this, it will be difficult to ensure that lessons learned will be identified and applied appropriately to enable improvements in service.

In summary, these changes are:

- Limiting recording of concerns raised to those only done so formally.
- Removing reference to providing the Department of Health an annual return on caseload, actions and outcomes.
- Removing organisations' explicit obligation to review the effectiveness of its raising concerns in the public interest policy and local processes at least annually.

- 9. Do you agree that the approach taken in this framework creates a safe process where staff can raise concerns within a culture of openness and transparency where learning for improvement will be encouraged?**

*Agree in part*

Subject to the improvements we have identified, we broadly agree with this and support continuing efforts to develop a culture of openness and transparency where learning for improvement will be encouraged.

- 10. Do you agree with the outcome of the Impact Assessment Screenings? Have you any comments on either the Equality/Human Rights or Rural screening documents? Have you anything you believe we should be considering in future Equality/Human Rights or Rural screenings or future impact assessments?**

We have no specific comments on the Impact Assessment Screenings.

Once again, we would like to thank the Department for the opportunity to respond to this important consultation. Should you have any questions in relation to this response, please contact Samuel Stone, senior policy advisor, in the first instance via [sstone@bma.org.uk](mailto:sstone@bma.org.uk).

Yours sincerely,



Dr Tom Black  
Chair  
BMA NI Council