

Response from the British Medical Association to the Freedom to Speak Up Review

The British Medical Association (BMA) is the voice of doctors and medical students in the UK. We are an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care. We have a membership of over 153,000, which continues to grow every year.

The role of doctors in raising concerns

All doctors are acutely aware of the importance of preventing harm to patients – this is a fundamental pillar of doctors' professionalism. Reinforcing this, the General Medical Council (GMC) expects doctors to make the care of the patient their first concern and to take prompt action if they think that patient safety, dignity or comfort is being compromised. Doctors work in learning organisations, where they need a constant stream of reports on all the ways in which care has gone off the intended path – adverse incidents and near misses. Every healthcare organisation should have an incident reporting mechanism and all doctors should use it regularly to report things that do not go according to the best plan. Discussion with their managers - or, for junior doctors, with the postgraduate dean - may be necessary. Sometimes, however, they may feel that their employer's response has been inadequate and that they need to take things further.

In practice, it can be hard for doctors to know whether they should do this – whether they should go beyond reporting to disclosure, more widely or even publicly, i.e. whether they should blow the whistle.

The key questions for doctors are whether the situation, if allowed to carry on, is likely to result in harm to others and whether their responsibility to protect and promote the health of patients and the public is best discharged through speaking out. Decisions on these issues can be very difficult for doctors and are often best taken through discussion with trusted colleagues or their medical defence organisation.

In some cases where a doctor raises concerns regarding issues that relate to standards of healthcare, this disclosure can potentially be a 'protected disclosure' as it will be in the public interest that the concerns are investigated. A doctor making a protected disclosure is protected against detriment or dismissal; the employer must not act against them for making such a disclosure. The protection lies in the doctor's ability to take legal action for compensation.

Many BMA members – and indeed their legal representatives - believe, however, that the Public Interest Disclosure Act does not give them adequate protection. The main difficulty in practice lies in showing that the detriment or dismissal is linked to

the disclosure. Legally there will be grounds to take action only where it can be shown that the protected disclosure has 'materially' influenced the employer's treatment of the whistleblower. In many cases this will not be clear. For example, if the concern is raised in the context of a dispute with a colleague, a forthcoming reorganisation or a threat of disciplinary action, this may create doubts as to whether the employer's subsequent actions have been influenced by the disclosure. The Freedom to Speak Up Review might wish to devise ways of strengthening the legislation.

The role of the BMA in supporting doctors who raise concerns

The BMA provides support to doctors who raise concerns through its employment advice services. Although doctors may contact us when they initially raise their concerns, we normally become involved at a later stage when the doctor believes themselves to be suffering a detriment. We then refer potential tribunal claims to our solicitors for a 'merits assessment' and, when the cases pass that assessment, we support those claims.

We also provide emotional support for whistleblowers through our Doctors for Doctors Unit. Further information about that unit is available at the address below. A whistleblower can contact either BMA Counselling or the Doctor Advisor Service. <http://bma.org.uk/practical-support-at-work/doctors-well-being/about-doctors-for-doctors>

Our careers team, library team and conference unit provide a variety of relevant workshops and webinars. These include courses that develop workplace communication skills or confidence and assertiveness as well as general management courses.

We provide guidance on whistleblowing on our website at the following address. <http://bma.org.uk/practical-support-at-work/whistleblowing>

Proposals for change

The BMA would like to see a change in NHS culture that will encourage staff to raise concerns. 46% of 807 hospital doctors responding to a survey conducted by the Medical Protection Society admitted they remained fearful of the personal consequences of raising concerns. In a recent BMA survey 8% of doctors who had raised concerns over patient care felt penalised for doing so. We are also concerned that, although bullying and harassment may not be as widespread in the NHS as is sometimes believed, doctors may be put off from raising concerns by a fear that they may be bullied or harassed.

We think that placing a duty on healthcare providers 'to listen and learn' could send a positive and reassuring signal to staff that they can raise their concerns without fear of punitive action. This duty would not be one that has to be enforced by courts. It would be among the duties on NHS employers as custodians of public resources and chief executives would be held to account for whether it was discharged.

We believe that NHS employees who raise concerns but are not satisfied with the response from their employers should be able to get their concerns referred to an independent body that can investigate whether there is a public interest issue and can advise - and, if necessary, criticise - the employer. In practice, this could prove to be a means of avoiding unnecessary disputes. Employers would not be permitted to use referral to such a body as an excuse for having failed to act on the concerns themselves.

We do not believe, however, that trade unions such as the BMA should be specifically designated as bodies with whom NHS employees should raise concerns about patient care. There is a risk that, since our primary role is to advise and support members, such a role could create a conflict of interest for us. Our dedication to patient care is expressed through our work to uphold the professionalism of doctors, to support the educational and scientific activities of doctors and to influence how the workforce develops in response to patient needs.

There would also be a practical difficulty for us in undertaking a formal role in dealing with concerns about patient care because, since we have no statutory or regulatory responsibility for it, we could do little more than transmit the concerns raised with us to the bodies which do have such a responsibility. Moreover, concerns about patient care differ from some other potential public interest concerns in that they cannot be investigated properly without knowledge of who has raised them. Doctors have a responsibility, therefore, to raise such concerns directly and in a transparent manner with the GMC in their role as regulated professionals and with the Care Quality Commission (CQC) in their role as NHS employees.

One difficulty that doctors report is confusion about the method they should use in order to raise their concerns within organisations. Whilst it is good that there are so many ways in which to raise concerns, it can lead to a blurring of responsibility in relation to who should deal with the issues raised. Doctors are normally expected to raise their concerns initially within their team or with their manager or immediate superior. However, if this is not appropriate or if the doctor feels uncomfortable about doing so (for example if the concern relates to managerial issues), there needs to be a clear process in place for them to follow.

To raise awareness among doctors the BMA recommends that explanation of an employer's policy should form part of induction processes and that there should be at least one named contact within each organisation whose primary role is to investigate and to act on concerns raised in relation to standards of care and patient safety. In larger organisations it might be appropriate to have one person per site. In smaller organisations such as GP practices a named partner or senior practice manager, or the CQC registered manager, could fill this role. This person should:

- make themselves widely known to all groups of staff
- make the process for raising concerns widely known and explain how their role integrates with other processes within the organisation for quality improvements
- undertake, or cause to be undertaken, a robust investigation into concerns that are raised

- respond to the complainant, explaining what steps will be taken to address their concerns and if, after investigation, no action is required, why that is the case
- if further action is to be taken, what this is and the timescale
- advise on how to escalate the concern outside the organisation if necessary, for example by raising it with the CQC, Monitor, the NHS Trust Development Authority or the GMC (if the concern relates to an individual doctor's practice)
- notify the complainant of the employer's whistleblowing policy
- notify the complainant of other sources of information such as the NHS Whistleblowing Helpline, Public Concern at Work, the GMC confidential helpline, the BMA etc
- have the power to pass on information to relevant departments and to require corrective action

We also have a concern that commercial settlement of employment disputes is much less likely in whistleblowing cases, leading to wasted resources, entrenched positions, damaged careers and failure to learn from and act on the concerns originally raised. There appears to be a reluctance to settle on the part of employers that stems partly from the high level of media attention attracted by these cases and a fear of being seen to pay off the claimants (perhaps fuelled by misleading reporting of some recent cases in relation to "gagging"). We are therefore calling for a review of the rules governing commercial settlements to prevent this perverse outcome and the unnecessary anxiety that it engenders among healthcare professionals.

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