

BY EMAIL

Rt Hon Jeremy Hunt
Secretary of State for Health

11 April 2017

Dear Mr Hunt,

Will the National Freedom to Speak Up Guardian help individual whistleblowers?

I have seen recent correspondence from the National Guardian's Office to a current NHS whistleblower which made the claim:

"... the National Guardian's Office is not able to intervene in the personal circumstances of individuals"

This is deeply concerning, as this was not the vision of the Freedom to Speak Up Review Report, which explicitly proposed that the Independent National Officer [National Guardian] should give unhappy whistleblowers someone to whom they could turn, who might challenge others to look again at their cases. *

The NHS whistleblower who received the above rebuff by the National Guardian's office later wrote to you personally to question the National Guardian's claim. However, they received a reply from your department which appeared to support the National Guardian's position, but was not totally clear.

"The response to the consultation The National Guardian for the NHS – Improvement through openness included consideration of how far the NGO should become involved in individual cases and is quite clear about the remit of the NGO in this respect, stating:

We understand that some individuals feel that where the 'system' has failed them, they would like the ability to escalate their case for independent investigation and resolution based on the merits of the case. However, this proposal exceeds the role of the National Guardian's Office as currently define

What it will do is create a very clear process under which the National Guardian will be able to undertake independent reviews of how cases have been handled, where there is evidence that local processes may have failed to follow good practice. This will include feeding back the findings of reviews to local providers

and providing clear recommendations for improvement, as well as holding these providers to account, through the relevant national regulators.”

Upon receiving this, the distressed whistleblower again wrote to you personally to clarify if you were indeed supporting the National Guardian’s claim that she could not intervene at all in individual whistleblowers’ cases.

The whistleblower asked you very specifically:

*“To avoid any misunderstanding, may I clarify if it is your understanding that the National Guardian will implement Robert Francis’ recommendations and **“challenge or invite others to look into cases which did not appear to have been handled in line with good practice or where it appeared that a person raising a concern had experienced detriment as a result of raising the concern”?**”*

I have now seen a further reply from your department, which ignores this key question.

The correspondence instead only contains the standard Department of Health claims and disclaimers that are so familiar to many NHS whistleblowers:

“Thank you for your further correspondence of 20 March to Jeremy Hunt about the National Guardian’s Office. I have again been asked to reply on behalf of Mr Hunt.

The Government is committed to improving openness in the NHS and ensuring whistleblowers are considered as an asset and receive proper support. The Department of Health is working with employers, unions and NHS Staff to eradicate bullying and harassment in the NHS.

The NHS needs to be the safest, most transparent healthcare system in the world and to achieve this, individuals must feel able to raise concerns and feel confident that action will be taken. A number of measures were introduced in response to the Mid-Staffordshire and Freedom to Speak Up reports, including an independent National Officer for whistleblowing at the CQC, and local guardians at individual Trusts, who will be the first point of call for people who do not feel that their concerns are being addressed appropriately by their organisation.

The Department of Health does not intervene in employment-related matters, which are best dealt with locally. It has no power to intervene in individual cases and would not wish to circumvent or duplicate existing processes where other organisations have relevant statutory powers or are more appropriately placed to investigate.

With regards to historic whistleblowing cases, the Department cannot interfere with due legal process. It believes that the best way to achieve the necessary cultural change around whistleblowing is not to look back into historic cases but to take valuable lessons learned from the past, so that it can focus on improving behaviour and processes in the future. This was the aim of the Freedom To Speak Up Review, which set out 20 principles and a programme of action to help achieve these goals.

I am sorry I cannot be of more direct assistance but hope this reply is helpful.

In the meantime, I received correspondence from David Behan CQC CEO which similarly claimed that the National Guardian's actions in refusing to intervene in individual whistleblower cases was in keeping with the outcome of CQC's 2016 consultation, Improvement Through Openness**:

Firstly, you may have seen the response to the consultation exercise 'The National Guardian for the NHS – Improvement through openness' (May 2016). The consultation exercise included consideration of how far the NGO should become involved in individual cases and is quite clear about the remit of the NGO in this respect, stating:

"We understand that some individuals feel that where the 'system' has failed them, they would like the ability to escalate their case for independent investigation and resolution based on the merits of the case. However, this proposal exceeds the role of the National Guardian's Office as currently defined.

What it will do is create a very clear process under which the National Guardian will be able to undertake independent reviews of how cases have been handled, where there is evidence that local processes may have failed to follow good practice. This will include feeding back the findings of reviews to local providers and providing clear recommendations for improvement, as well as holding these providers to account, through the relevant national regulators."

The NGO's stance on not intervening in individual cases is in keeping with the outcome of this public consultation.

<https://minhalexander.files.wordpress.com/2017/03/joint-response-by-behan-stevens-and-mackey-re-ng-policy-20170309-pocu-1516-0181-dr-minh-alexander-concerns-about-the-national-freedom-to-speak-up-guardians-office-1.pdf>

Your department is wrong to repeat the Care Quality Commission's assertions that the consultation held by the Commission ("Improvement through Openness") resulted in a clear decision that the National Guardian should not intervene in individual whistleblower cases.

That is simply an arbitrary and baseless claim.

In fact, the CQC consultation outcome report noted that not only were the majority of consultation respondents in favour of individual cases being reviewed, but there were also recommendations that the National Guardian should **protect** whistleblowers:

"Consultation question 6

Do you agree with our proposal that the National Guardian should review how concerns have been handled in individual cases, where serious issues appear to exist, and do you have additional ideas for how this should be delivered?

What you said

Of the 60 respondents who answered question 6, 52 agreed with the proposal to review how staff concerns have been handled while 8 disagreed.

A number of respondents to this question referred to the need for a National Guardian to protect those who speak up and challenge those accountable for responding to their concerns, as well as learning from best practice to encourage improvements. Other points included specific response timescales for the National Guardian and sharing information, to improve transparency.

The Whistleblowers' Forum was concerned about the National Guardian's capacity to respond to the volume of enquiries that may be referred to the office but felt that there should be no cap on the number of cases reviewed. The forum also stressed the importance of protecting those who speak up. They were concerned about them being victimised or finding it hard to seek subsequent employment."

In other commentary in this consultation report, the Care Quality Commission noted that consultation respondents thought that:

- 1) **The purpose of the National Guardian reviewing individual cases was to protect those who had spoken up.**
- 2) **The National Guardian should turnaround cases quickly enough for her reviews to be of practical help to the individual whistleblowers involved.**

This is the relevant section of the consultation report:

“There was general agreement that the National Guardian should review how concerns have been handled in individual cases, where serious issues appear to exist. There were two main reasons given for this support.

The first was that this would encourage learning from individual cases. Many respondents said there was a lot to be learnt from positive stories, and that these should also be highlighted.

The second was the need to protect people who speak up, and that the best way of achieving this would be to review the process by which individual cases are handled and to hold to account the organisations who failed to respond effectively to concerns raised. **Respondents said an efficient review of individual cases was needed. They suggested a quick turnaround time was very important for people involved in such cases, and that the office should work to clearly defined timescales.** It was generally agreed that the National Guardian should support and advise providers, with an emphasis on collaboration to achieve positive change. Respondents agreed that the National Guardian should provide challenge and support to the system leading to greater visibility of bad practice and encouraging good practice.”

It is difficult to accept the Care Quality Commission’s claim that the National Guardian’s recent refusal to help individual whistleblowers, in the terms set recommended by the Freedom To Speak Up Report, is based on the results of the above consultation. It is simply not the case.

In the light of this, I would be grateful if you could please urgently:

- 1) Advise if you will lend any assistance to the individual whistleblower who contacted you about these matters, and if you will ask the National Guardian to stop inappropriately washing her hands of this person’s case.

This whistleblower, who has given the NHS many years of service, lost an appeal against dismissal after the National Guardian refused to help.

- 2) Give me your answer to the outstanding question:

“Is it your understanding that the National Guardian will implement Robert Francis’ recommendations and **“challenge or invite others to look into cases which did not appear to have been handled in line with good practice or where it appeared that a**

person raising a concern had experienced detriment as a result of raising the concern?"

Yours sincerely,

Dr Minh Alexander

NHS whistleblower and former consultant psychiatrist

cc Chris Smyth Health Editor Times

Meg Hillier Chair of Public Accounts Committee

Sarah Wollaston Chair of Health Committee

Bernard Jenkin Chair of Public Administration and Constitutional Affairs Committee

This letter is also blind copied to the above-mentioned NHS whistleblower.

***Report of the Freedom to Speak Up Review February 2015**

http://webarchive.nationalarchives.gov.uk/20150218150343/https://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

"7.6.5 It became apparent during the course of the Review that there is a gap in the mechanisms for oversight of how an NHS body deals with concerns raised by staff. The Government concluded in its response to the 'Whistleblowing Framework Call for Evidence⁹³' that since neither the Employment Tribunal nor the legislation specifically deal with concerns raised that: 'the regulators are ultimately viewed by the whistleblower as the solution to addressing their concerns. This expectation of the 'prescribed persons' role is often not lived up to leading to a lack of confidence in the role of these bodies.' I therefore believe there is merit in having a mechanism for external review of how concerns have been handled at local level and the impact on the individual where there is legitimate cause for concern."

"7.6.10 The deficiencies in the way concerns are investigated, and subsequent victimisation of individuals have been addressed in 6.4 and 7.5 respectively. What seems to be missing is any sort of external review mechanism, not to take over investigation of the concerns, but to provide a non-legalistic option to review what has been done locally, and make recommendations for further action as appropriate. This is to be compared with the more legalistic position adopted with regard to whistleblowers in the financial sector in the USA by the Securities and Exchange Commission through its Office of the Whistleblower. Under the Exchange Act 1934 section 21F1 the Commission takes action against companies which discriminate against those who provide the Commission with information. In June 2013 the Commission took enforcement action against a company requiring it to pay \$2.2million to settle charges of retaliation⁹⁴. While I do not see the need to go as far as this, certainly at this stage, I do see a need for some form of external review mechanism.

Independent National Officer

7.6.11 To achieve this, I propose that an Independent National Officer (INO) should be jointly established and resourced by the CQC, Monitor, the NHS TDA and NHS England, so that it is clear that the officer operates under the combined aegis of these bodies.”

“7.6.17 The INO [National Guardian] would in essence fulfil a role at a national level similar to the role played by effective Freedom to Speak Up Guardians locally. They would not take on cases themselves, but could challenge or invite others to look into cases which did not appear to have been handled in line with good practice or where it appeared that a person raising a concern had experienced detriment as a result of raising the concern.”

** Improvement Through Openness, CQC consultation outcome report May 2016

https://www.cqc.org.uk/sites/default/files/20160526_consultation_response_document_v8_for_publication_01.pdf