



The draft Health Service Safety Investigations Bill and “Safe Space”

**Briefing by
Action against Medical Accidents**

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Background

The draft Health Service Investigations Bill¹ was published by the Department of Health in September 2017. (This is the “patient safety bill” which was heralded in the Queen’s Speech).

The Bill makes for the provision of the Health Service Investigation Body (HSSIB) as an independent body, replacing the current Healthcare Safety Investigation Branch (which is a branch of NHS Improvement). This element of the Bill is broadly to be welcomed, as are most of the powers conferred on the HSSIB. There may be a few points of detail which need to be considered but the proposal itself is uncontentious and in line with the recommendation of the Expert Advisory Group established to advise on the establishment of the HSIB.

However, the Bill also provides for a so-called “safe space” which would prohibit the sharing of information obtained through HSSIB investigations, even from patients/families where treatment is subject to the investigation. This is highly contentious and in direct contradiction to the recommendations of the Expert Advisory Group.

Even more controversially, the Bill provides for the accreditation of NHS trusts and foundation trusts to conduct their safety investigations under the ‘safe space’ prohibition on disclosure of information basis.

This briefing explains why we think the ‘safe space’ provisions in this Bill are grossly unfair and dangerous for public trust in the NHS and patient safety investigations, and what the other likely unintended consequences are.

Would applying ‘safe space’ in safety investigations (i.e. prohibiting disclosure of information from patients/families achieve its policy objectives?

The policy intentions have been described as helping staff feel more confident to take part in investigations by protecting them from ‘unfair’ consequences, improving local investigations and spreading a ‘just culture’ in the NHS.

We believe it is true to say that some staff are anxious about taking part in investigations fully and frankly. However, when asked what they are worried about, it is almost always the case that they are worried about how they will be treated by their boss/employer. ‘Safe space’ as set out in the draft bill does little or nothing to protect staff from this. The vast majority of staff we speak to would not want information relevant to what happened to a patient to be withheld from them/their family. It is hard to see how patients/families seeing evidence that is obtained about their or their loved one’s treatment could in any way be seen as “unfair”. The Secretary of State has indicated that one of the intentions is to prevent such material being used in a legal action (for example over clinical negligence). This is based on what we believe is a completely false assumption that a major if not the main reason staff feel anxious about taking part in investigations, is because patients/families may see the information and use it to seek compensation through the courts. However, even if this did occur, there is nothing “unfair” about injured patients seeking compensation for harm caused, and NHS staff are not personally liable as the NHS takes vicarious liability.

What would be the unintended consequences?

Far from contributing to a ‘just culture’, imposing a prohibition on disclosing relevant information to patients/families could destroy trust in investigations. In our experience patients/families are much more likely to seek confrontational resolution of their concerns if they are not dealt with openly and honestly. We would anticipate people taking precipitative legal action and raising formal complaints about individual staff if they are unable to trust the investigation that the NHS will conduct.

Patients/families could not be fully involved in investigations if they are not able to see the evidence collected about their own treatment. Neither will they be able to challenge erroneous

¹ <https://www.gov.uk/government/publications/health-service-safety-investigations-bill>

evidence provided. This would result in poorer investigations and less learning. Patients/families may be denied the full truth if what happened.

Whether intended or not, the inability of patients/families to access all the information discovered by investigations could lead to people being unable to access justice. Specialist lawyers confirm that accessing such evidence can be vital to unlocking a case. This could leave vulnerable people harmed through no fault of their own unable to obtain the compensation they need and deserve.

Is 'safe space' acceptable if restricted solely to the HSSIB?

We believe there is no practical benefit of applying 'safe space' to HSSIB investigations; the same ethical objections apply; and there would be other unintended consequences. It would certainly be harmful to public trust in the HSSIB. It is important to note that the Expert Advisory Group on HSIB recommended that all relevant information about a patient's treatment must be shared with them or their family, and that they should be free to do whatever they wish with that information. The Expert Advisory Group² was made up of an impressive range of experts in patient safety and investigations. It included the current Chief Executive of the HSIB, Keith Conradi, who was Chief Executive of the Air Accident Investigation Branch.

Whilst usually, any incident investigated by HSSIB will already have been investigated elsewhere and been subject to the normal requirements such as the Duty of Candour, new information may well come to light about an individual incident which the patient would want to know, but HSSIB would be prohibited from sharing this.

As HSSIB will be independent and will only conduct around 30 investigations a year, 'safe space' is certainly less worrying if it applies solely to them and not to local NHS investigations. However, HSSIB is supposed to set a good example. The case has not been made as to how applying the so-called 'safe space' would help. HSIB has not reported any problems with getting staff to cooperate fully with investigations under its current arrangements.

Comparisons with the 'safe space' applied to air accident investigations and HSIB or NHS investigations are inappropriate. It has always been the case in the NHS that information about a patients' own treatment remains ultimately the patients'. The relationship between a patient consenting to treatment by the NHS is not comparable to an airline passenger agreeing to fly.

Would the HSSIB accrediting local NHS trusts to conduct 'safe space' investigations be an adequate safeguard?

The implications of this are enormous when it comes to local investigations by NHS trusts. The Department of Health estimates that there are around 24,000 patient safety incident investigations in England each year.

We would like to see HSSIB having a role in driving up the quality of local NHS investigations, and perhaps accrediting them. However, the Bill's provisions only permit NHS trusts to conduct their investigations under the 'safe space' requirements. This means that trusts investigating themselves would be able to deny their patients access to relevant information about their own treatment if accredited at "level 2" to conduct 'internal' investigations in that way.

No doubt HSSIB would try to assess the culture of the organisation and the integrity of NHS trust investigators before accrediting them. However, this does not take away the obvious conflict of interest in an NHS trust investigating itself. HSSIB feeling confident about the quality of investigations and the people conducting them when they conduct an accreditation in no way guarantees that this would be the case thereafter.

Whilst the 'fact sheets' say that the provisions would apply only to "certain" investigations, the wording of the Bill does not reflect this. As currently worded an accredited trust could conduct any of its investigations into patient safety incidents under the 'safe space' arrangements.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522785/hsibreport.pdf

Would the Duty of Candour be affected?

The 'fact sheets'³ published alongside the draft Bill suggest that the Duty of Candour pertaining to NHS bodies would not be affected in any way because the existing regulations are not changed. However, if passed as primary legislation the provisions in the Bill would mean that an accredited trust conducting a safe space investigation which found new information directly relevant to what happened in one of its patient's treatment would not be able to disclose that information to the patient/family of the patient. It thus overrides the Duty of Candour.

What information would be prohibited from disclosure from the patient/family of the patient whose treatment is subject to the 'safe space' investigation?

The Bill and the 'fact sheets'⁴ are very clear that the prohibition on disclosure applies literally to any information held in connection with the investigation which is not already in the public domain. Clause 28 (2) says:

"The HSSIB or the accredited trust must not disclose to any person any information, document or other item which is held by it in connection with an investigation"

There is even a prohibition on letting anyone know that the information which they are prohibited from seeing exists. Clause 28 (6) (c) says the prohibition applies to:

"Information about any such information, documents, equipment or items."

What about the exceptions?

There are exceptional circumstances where the prohibition on disclosure of information would not apply. These are: if the information is already in the public domain; when there is evidence of a criminal offence; a continuing risk to the safety of any patient if it is considered serious; evidence of misconduct; for safeguarding purposes; or if an application is made to the High Court and the High Court makes an order.

For most of the exceptions the HSSIB or accredited trusts are given discretion whether or not to disclose information to the appropriate bodies. So, for example, the HSSIB or accredited trust might obtain evidence suggesting a criminal offence has been committed but choose not to report to police (as the wording in the Bill is "may" not "must"). Similarly they "may" report in the other circumstances but they are not obliged to.

What do the exceptions do mean is that even when the HSSIB or accredited trusts were in possession of evidence of such serious matters pertaining to their own or loved one's treatment, whilst that information might be disclosed to a whole raft of organisations, there is still a prohibition on sharing it with the patient or family concerned!

What about patients'/families' ability to apply to the High Court?

In terms of applications to the High Court, for patients/families to have to apply to the High Court to obtain information held relevant to their own treatment appears to us to be perverse. This would be a daunting task and potentially financially prohibitive for many people. Furthermore, how would a patient /family know there was information to apply to see, as the HSSIB and accredited trusts would be prohibited from disclosing "any information about any such information"? Also, case law in the aviation field suggests that the High Court would probably not order disclosure.

³ <https://www.gov.uk/government/publications/health-service-safety-investigations-bill>

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