

From: Minh Alexander <***** >
Subject: NHS approach to individuals whom it considers
'vexatious'
Date: 18 September 2018 at 08:09:22 BST
To: Neil Churchill <***** >
Cc: Rob Behrens <***** >, Stephen Barclay
<*****>

Thanks very much for picking this up and taking it forward Neil.
Appreciated.

It would indeed be helpful to have clearer firmer, central guidance.

Could you possibly let me know who is the DHSC lead for this work, so
that I can liaise.

Thanks again and best wishes,

Minh

From: "CHURCHILL, Neil (NHS ENGLAND)" <*****>
Subject: RE: NHS approach to individuals whom it considers
'vexatious'
Date: 17 September 2018 at 14:06:33 BST
To: Minh Alexander <*****>
Cc: Stephen Barclay <*****>, Rob Behrens
<*****>

Hello Minh,

Thank you for your email.

NHS England does not believe that any complainant should be labelled
'vexatious'. NHS England's own complaints policy does not use this term
and refers instead to behaviour, rather than the individual. You
recognize the rare cases in which people can be abusive towards staff,
which would result in communications being channelled through a
named individual. In addition, we might also identify a single point of
contact if an individual's communication has been what we deem
'persistent and unreasonable'. In the main, this occurs when we believe
a complaint has been responded to as fully as we can and we are not

able to take any further action. In the event of a complaint which has been responded to in full, repeated contact to different staff at NHS England will not change this outcome and serves to frustrate the complainant even further. In all such cases, we communicate this decision to the individual concerned, all correspondence is reviewed, no tangible new issues are ignored and we review each case where a restriction has been applied on a six-monthly basis. We accept that a lack of communication on our part may frustrate the individual making the complaint. If people are not receiving call backs or updates because of poor communication from us and this results in repeated contact from them, we would not consider them persistent and unreasonable.

You may well be right that there is inconsistency across the wider NHS in terms of how and when action such as this is applied and it is true that we do not know if it is being used excessively or inappropriately. I share your concern that people with important information to tell us may have been labelled vexatious by NHS organisations in the past. Given the low numbers of complaints about primary care, I have not yet seen evidence to suggest that this is happening widely (as you know, NHS England does not have a remit over NHS Trusts or national Arms-Length-Bodies). However, neither NHS England nor NHS Improvement has the power to intervene with NHS organisations (locally or nationally) to change their decisions about individuals or audit their restriction of communications, although NHS England can recommend that a GP practice revise its complaints policy if we find that it does not reflect the regulations.

Having reflected on your email and the information shared on Twitter, we would support additions to the existing guidance on complaints, including the removal of the term 'vexatious complainant' and clarification about when and how communications might be managed through a named party and we will raise this with the Department of Health and Social Care who lead on the guidance. Although we do not have the power to audit such decisions being made locally, we would be interested in ideas about how and in what circumstances external auditing might be appropriate, including oversight by patient and public voice groups locally.

Neil

From: Minh Alexander [*****]
Sent: 28 August 2018 10:40
To: CHURCHILL, Neil (NHS ENGLAND)
Cc: Stephen Barclay *****; Rob Behrens*****
Subject: NHS approach to individuals whom it considers 'vexatious'

BY EMAIL

Neil Churchill
Patient Experience Director
NHS England

28 August 2018

Dear Neil,

NHS approach to individuals whom it considers 'vexatious'

Further to our twitter conversation, I write to pick up this issue. Thanks for engaging with it.

As you will have seen, patients, families and whistleblowers sometimes get labelled 'vexatious' or equivalent, when they challenge NHS organisations. This is stigmatising and can add to a spiral of deteriorating relationships with the individuals affected, disadvantaging them in very real terms. It can have an impact on a patient's clinical care, on whether a family seeking answers and justice is heard and on whether a whistleblower is taken seriously enough and their patient safety concerns are acted upon.

Many organisations which unfairly stigmatise those who challenge them as difficult or 'vexatious' often lack the skills to handle concerns effectively, and there may also be probity issues. It is easier for some organisations to project blame than to accept criticism. Their attitudes towards dissent actually cause the breakdown in relationships, and then they unfairly and ritually blame dissenters for that too, with the use of containment protocols where these are not justified.

There will of course be rare cases where organisations must protect their staff from genuinely abusive behaviour. But in too many cases the deployment of containment protocols is an abuse of process, and worst of all, it may be covert.

Some whistleblowers have found from Subject Access Requests that the CQC 'manages' them according to such protocols, for no reason other than evidence-based dissent. I am aware of one whistleblower for whom the CQC even has a flow chart. Some of these protocols are conducted and coordinated by the office of the CQC Chair and CEO. This is insidious behaviour because it flags to the rest of the organisation that whistleblowers are persona non grata, and automatically removes the benefit of the doubt. It encourages staff to view the individual with a particular bias. The same applies to patients and families who receive such treatment.

This is an extraordinary 2010 CQC policy which reveals how much emphasis CQC places on containing people once it has decided that their complaints are 'vexatious', see section from page 14 onwards:

https://minhalexander.files.wordpress.com/2018/08/cqc-board-paper-complaints-whistleblowing-2010-cm0031008_complaints_whistleblowing_-1.doc

CQC's policy is very weak on how complaints are deemed 'vexatious' in the first place. There is no clear policy mechanism for ensuring that the decision is made rigorously and at a suitably senior level of the organisation, or that there is any element of independent review. The definition of 'vexatiousness' is made only in the most general terms:

Key principles

A small minority of people who use the Corporate Complaints Procedure may seek to misuse the system. Their motivation may be driven by a strong conviction (despite evidence to the contrary) that their complaints are reasonable or by other factors not necessarily evident to us.

Any perception that a complaint is of a vexatious nature, or is being made with unwarranted persistence, must be balanced with an objective consideration of the issues being presented.

Those whose conduct is considered to be difficult or unreasonably persistent in nature will be the subject of an explicit approach. This will

balance their right to use the complaints procedure for legitimate purposes, the rights of employees to be protected from victimisation and harm whilst at work, and the fair and efficient exercise of our full range of functions.

CQC's policy simply assumes that the organisation is right, and that this gives it the right to deploy measures such as telling staff to give 'scripted responses'.

The policy contains nothing about mediation or arbitration by an independent third party. The approach is confrontational and jumps to telling the individual they can escalate by bringing a legal adviser to meetings or complaining to PHSO if they are unhappy.

This policy example reflects the lived experience of many patients, families and whistleblowers of many other NHS organisations.

I would be grateful to know if NHS England could help ensure that there is a national approach to reducing the risk of abuses, and that this development work involves affected parties. The process by which individuals are identified as 'vexatious' needs to be much more rigorous and should ideally involve an element of independent review. Also, I think it is important that whenever an NHS organisation manages anybody with a containment protocol, whether or not they have been explicitly deemed 'vexatious', that this must be done openly and with clear justification. This is essential for fairness as individuals cannot challenge that which is hidden.

Such transparency is also necessary for good Equality practice. If deleterious actions are secret, any patterns showing bias and institutional discrimination would be hidden. As you have kindly acknowledged, there are also diversity implications in declaring individuals 'vexatious'. It is not acceptable for NHS organisations to discriminate against whistleblowers simply for being whistleblowers, and to tar them (whether explicitly or implicitly with the application of a containment protocol), when it may affect future employment and when the law now prohibits this.

Treating people as 'vexatious' is a very serious step, and there should be central oversight of how the NHS does this, as a safeguard against pockets of arbitrariness and abuse.

In the Courts, the management of 'vexatious litigants' is extremely formal. The NHS should equally respect the rights of individuals whom it seeks to deem as 'vexatious'.

Lastly, as Prof Brian Jarman has often pointed out, a key structural problem in ensuring that serious concerns are fairly handled is that Independent Review Panels were abolished:

[Quality of patient care and safety: The way forward after MidStaffordshire](#)

I would be grateful to know how these issues can be taken forward.

I copy Dr Sara Ryan whom I understand discovered that she had been labelled as 'vexatious' through correspondence by a senior commissioner, and whose treatment by NHS staff was criticised by the [Crown Court](#).

I also copy it to Ann Reeve, who experienced similar difficulties in the long struggle to seek justice for the victims of the Gosport disaster and was also branded 'vexatious', and to Bishop James Jones' office in respect of ongoing discussions on follow up action after the Gosport inquiry.

I also copy Julie Bailey who has experienced a great deal of derogatory treatment as a result of raising concerns about the MidStaffs disaster, including by senior figures.

With best wishes,

Minh

Dr Minh Alexander

Cc Rt Hon Steve Barclay

Dr Sara Ryan

Ann Reeve

Julie Bailey

Prof Brian Jarman

Bishop James Jones

Rob Behrens PHSO

