

BY EMAIL

Dr Henrietta Hughes

National Freedom To Speak Up Guardian

Care Quality Commission

29 December 2018

Dear Henrietta,

Exclusion of certain whistleblowers' cases from case review by the National Guardian's Office and patient safety

Thank you for the 7 September 2018 presentation slides from your Office on review of your case review process. My initial comments on future case review process are as below. In short, I am concerned to see suggestions for more mission drift.

I do not think my question of 27 November 2018, below, has been answered yet. To clarify, what I was asking was whether you will consult openly with all stakeholders on any new, formal case review process and exclusion criteria that your Office drafts, before they are accepted as final?

As you know, there has been serious suffering during the pilot of your current, controversial case review process.

Some whistleblowers have been sacked after your Office declined to get involved. Some now face imminent homelessness. The handling of their patient safety concerns has not been reviewed by your Office and their concerns remain unresolved.

Accordingly, I would hope there is full consultation on your revised case review process before the next version is set in stone.

I see from the 7 September 2018 presentation slides that an evaluation report on your case reviews was being prepared and that your Office gave this undertaking:

“Subject to the report’s findings, we intend to continue with case reviews and at that point we will seek views of a wide range of stakeholders”

May I ask if the evaluation report is complete yet, and if so can it be published and shared.

If not, when will it be complete?

Also, is it your intention that stakeholders’ views will be sought regardless of the findings of the evaluation report? I was not clear about this from the phrasing of the above undertaking.

Many thanks,

Minh

Dr Minh Alexander

Cc Dr Sarah Wollaston Chair of Health and Social Care Committee

COMMENTS SO FAR REGARDING THE REMODELLING OF YOUR CASE REVIEW PROCESS

These are comments in response to this slide from your presentation of 7 September 2018:

Themes

We are seeking your views about two emerging themes:

- ▶ Terminology
 - ▶ Is 'Case Review' the best way to describe the process:
 - ▶ Does this imply that this relates to an individual?
 - ▶ Does this imply a remedy?
 - ▶ Does this best describe the process of learning and improvement?
 - ▶ What are your reflections
 - ▶ What alternatives do you have?
- ▶ Scope
 - ▶ Should case reviews focus on an individual case or look at emerging themes:
 - ▶ Should Case Reviews relate to a specific case?
 - ▶ Should they look at themes?
 - ▶ If so how should priorities be determined?
 - ▶ What are your reflections?
 - ▶ What are your suggestions?

1. I think you should remain grounded in the original reasons why your Office was proposed by Robert Francis - it was proposed primarily to benefit NHS whistleblowers who had no place to go, regarding the handling of their concerns.

["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"](#)

2. Francis also proposed that your Office should use its influence to ensure redress for harmed whistleblowers and patients who had suffered as a result of poor whistleblowing governance, page 168 Freedom To Speak Up Review:

["7.6.12 The INO should be authorised by these bodies to use his/her discretion](#)

to:

- *review the handling of concerns raised by NHS workers where there is cause for concern in order to identify failures to follow good practice, in particular failing to address dangers to patient safety and to the integrity of the NHS, or causing injustice to staff*

- *to advise the relevant NHS organisation, where any failure to follow good practice has been found, to take appropriate and proportionate action, or to recommend to the relevant systems regulator or oversight body that it make a direction requiring such action.*

This may include:

– addressing any remaining risk to the safety of patients or staff

– offering redress to any patients or staff harmed by any failure to address the safety risk – correction of any failure to investigate the concerns adequately”

3. I am very concerned that your Office has been drifting away from the core focus of righting wrongs in individual cases, to just learning *general lessons* that arise from cases.

4. A particularly serious concern is the continuing denial by your Office that it has any remit for helping to ensure redress, when this is plainly part of the original intention and was a principle accepted by the government. Redress in this context was clearly intended to be a patient safety mechanism, and it is disturbing that your Office has not accepted this.

5. I am even more concerned now to see the suggestion that your Office could decouple itself entirely from focus on specific cases and instead look at *themes*. In seeking to drop even the term “case review”, your Office marginalises whistleblowers even more and the fate of individual whistleblowers and patients harmed by suppression is given even less importance. This is serious mission drift.

6. I believe that if you continue to leave injustices uncorrected, this will be very damaging to Speaking Up culture. In time, these injustices will accumulate and be apparent to all, no matter what staff are told through official briefings.

7. You stated in your latest annual report that the victimisation of staff who speak up must stop:

"This type of behaviour has to stop."

Statements are not enough and your Office needs to take proactive measures as set out originally in the report of the Freedom To Speak Up Review, to help reverse harm to whistleblowers and patients in specific cases.

8. I repeat my request that you stop the blanket exclusion of cases from review on the basis that there is an active employment process. This excludes the most serious cases for years, as they languish in the Employment Tribunal. It is vital that all issues relating to poorly handled patient safety issues are examined as a matter of priority, whether or not you side step the employment issues. Although I think the latter would be a shame, as whistleblower detriment is also ultimately relevant to patient safety. Inaction and delay allow great harm to be wreaked in whistleblowing cases, and early intervention was acknowledged to be important by the Freedom To Speak Up Review (Principle 8 and Principle 9).

From: "Staite, Ellie" <redacted>

Subject: RE: Exclusion of certain whistleblowers' cases from case review by the

National Guardian's Office and patient safety

Date: 19 December 2018 at 09:48:22 GMT

To: Minh Alexander <redacted>

Dear Dr Alexander,

My apologies, please let me know if you have any issues with the version I've now attached.

Kind regards,

Ellie Staite
Correspondence Officer
National Guardian's Office
151 Buckingham Palace Road
London
SW1W 9SZ

**National Guardian
Freedom to Speak Up**

Who can you speak up to?

**#SpeakUp
ToMe**

From: Minh Alexander [<mailto:redacted>]

Sent: 18 December 2018 17:56

To: Staite, Ellie <redacted>

Subject: Fwd: Exclusion of certain whistleblowers' cases from case review by the National Guardian's Office and patient safety

Dear Ellie,

Thank you for the attachment but I am unable to open it without obtaining additional software. (You may recall that this happened with a previous document that you sent me).

Would you mind re-sending in an accessible format?

Thanks,

Minh

From: "Staite, Ellie" <redacted>

Subject: RE: Exclusion of certain whistleblowers' cases from case review by the National Guardian's Office and patient safety

Date: 18 December 2018 at 17:15:25 GMT

To: "'Minh Alexander <redacted>

Dear Dr Alexander,

Thank you for your further email.

The NGO consulted our AWG and ALB at meetings in September and are considering the responses that have been given to us. We will use these to inform our next steps in the process. We will also use the feedback given to us by the individuals that have already taken part in the case review process during its pilot stage.

For your information, please find attached the slides used during the last AWG meeting, which helped inform the discussions had around this subject.

I do hope that this information is helpful for you, but please let me know if I can assist further.

Kind regards,

Ellie Staite
Correspondence Officer
National Guardian's Office
151 Buckingham Palace Road
London
SW1W 9SZ

From: Minh Alexander [redacted]
Sent: 27 November 2018 14:38
To: Staite, Ellie <redacted>
Cc: Hughes, Henrietta <redacted>
Subject: Exclusion of certain whistleblowers' cases from case review by the National Guardian's Office and patient safety

Thanks Ellie.

Will the NGO consult on any proposed, new case review guidance and exclusion criteria?

Thanks,

Minh

From: "Staite, Ellie" <redacted>>
Subject: RE: Exclusion of certain whistleblowers' cases from case review by the National Guardian's Office and patient safety
Date: 27 November 2018 at 13:54:40 GMT
To: "'Minh Alexander <mailto:redacted >>

Dear Dr Alexander,

Thank you for contacting the National Guardian's Office and for giving us your views on this matter.

The NGO is currently reviewing its case review guidance and we will consider the points

you have made in this regard.

Kind regards,

Ellie Staite
Correspondence Officer
National Guardian's Office
151 Buckingham Palace Road
London
SW1W 9SZ

From: Minh Alexander [<mailto:redacted>]
Sent: 31 October 2018 09:21
To: Hughes, Henrietta ,<mailto:redacted> >>
Cc Redacted
Subject: Exclusion of certain whistleblowers' cases from case review by the National Guardian's Office and patient safety

BY EMAIL
Dr Henrietta Hughes
National Freedom To Speak Up Guardian
Care Quality Commission

31 October 2018

Dear Henrietta,

Exclusion of certain whistleblowers' cases from case review by the National Guardian's Office and patient safety

Some time ago, there was debate about whether or not the National Guardian's Office (NGO) would accept cases in which there were ongoing processes, and about what would be counted as an 'ongoing process'.

The NGO's [2017 guidance on case reviews](#) did not explicitly exclude cases where a whistleblower has an active case in the Employment Tribunal.

"What types of cases cannot be reviewed? The National Guardian will only consider reviewing those cases where it practicable to do so. Cases which may not be practicable to review could include those where it is difficult to obtain evidence about the

original concern due to the length of time which has elapsed since it took place. The National Guardian is not able to investigate the merits of the original concern to determine whether there was evidence to support that concern or not. Such an investigation is the responsibility of other bodies, including the relevant NHS trust. The National Guardian cannot review cases that are the subject of a criminal investigation or an investigation by NHS Protect.”

However, on 4 July 2017 by the National Guardian’s Case Review manager advised a whistleblower of an additional exclusion criterion which does not appear in the NGO’s published list of exclusion criteria:

“...I can confirm that outstanding decisions relating to a particular case include those to be made by an employment tribunal...Therefore, as you have informed us that you have submitted your case for consideration by an employment tribunal, I can confirm that we are unable to currently consider your case for review.”

This can have very serious consequences because Tribunal processes can take years to conclude, especially if there are appeals. Previous [research by Dr Ashley Savage formerly of Liverpool University](#) found that it takes an average of 37 weeks just for a whistleblowing claim to be heard by the Employment Tribunal. A great deal of irreparable harm can be done to a whistleblower during the years in which the NGO proposes to disregard such cases.

Moreover, excluding whistleblowers from case review for years does not seem compatible with the primary objective to protect patients, as also stated in the NGO’s 2017 case review guidance:

“...the National Guardian will prioritise those cases where there is evidence that the handling of a concern caused significant harm to staff or patients, or created the risk of such harm.”

It is of concern that an additional exclusion criterion, which is not part of the NGO’s published exclusion criteria, appeared to be cited by the NGO in the case of a mass referral by 24 Brighton and Sussex University Hospitals staff. In your letter of 18 April 2018 to the referrers, you advised that a review by the NGO

[“...could inhibit the organisation from making the improvements we understand are currently underway at the trust”.](#)

It seems questionable that as a public body, the NGO should have published rules but then creates additional, ad hoc rules in vivo. This appears arbitrary.

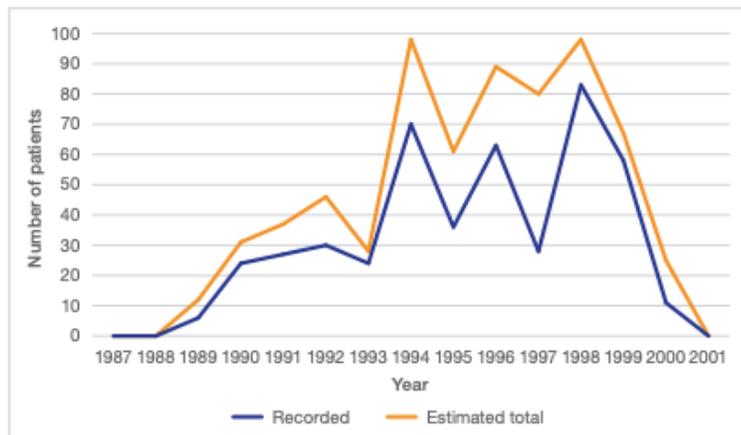
The NGO said that it would review its case review criteria and procedures. I wonder when this will be taking place, and whether there is any intention to revise exclusion criteria so that it is at least clear that the protection of patients genuinely has priority, regardless of whether the whistleblower is still in an active process.

For example, if the whistleblower has a grievance, a disciplinary process or an Employment Tribunal claim for detriment in train, I think this should not stop the NGO from urgently reviewing any allegations that their patient safety concerns have been badly handled by their employer.

As we can see from the Gosport disaster, there can be a very narrow window of opportunity for action in some whistleblowing cases, because some whistleblowers who are bullied and left unsupported simply go to ground. As Gosport equally shows us, failure to act appropriately on a disclosure can lead to hundreds of deaths.

To illustrate, if a similar situation arose today and the NGO declines to review a whistleblower's case on grounds that they are still in an active process, the fatalities could soon mount. This is [the timeline of non-clinically indicated opiate use at Gosport](#), in the context that the last whistleblowing at Gosport occurred in the early 90's:

Figure 2: Opioid use without appropriate clinical indication, 1987 to 2001, numbers per year



Many thanks and best wishes,

Minh

Dr Minh Alexander

Cc National Guardian's Accountability and Liaison Committee

Dame Moira Gibb NED NHS England

Sarah Harkness NHS Improvement

Sir Robert Francis Chair Healthwatch England

And

Imelda Redmond National Director Healthwatch England

Steve Barclay Minister of State for Health

Rob Behrens PHSO

Sam Stone PHSO

Health and Social Care Committee

Bishop James Jones' Office