

**Written evidence by Dr Minh Alexander to Health Committee and Social Care Committee for the hearing 12 March 2019 on the Kark FPPR Review report**

- 1. Summary:** It is welcome that the Kark Review proposes that the concept of Fit and Proper Persons should extend to arms length bodies as well as service providers, and recognises whistleblower reprisal and suppression as a form of serious misconduct. However, the Kark FPPR Review report is incomplete in its reporting of key evidence and fails to mention PHSO's criticism of CQC's handling of FPPR. The report is incorrect in claiming that there are a "low" number of NHS whistleblowing cases. It is silent about the role of the Department of Health and Social Care in perpetuating poor NHS culture. Despite all the lip service about culture, I am aware from FOI data that past ministers have given references to controversial NHS managers in at least two cases, which has enabled their recycling. The government, National Guardian and NHS regulators all permit continued use of super-gags. As you already know, the National Guardian does not track whether NHS whistleblowers' concerns are addressed. The Kark report proposes a higher level of proof for harassment than is required by the Equality Act 2010, and thus favours the interests of the powerful against the NHS frontline. It suggests a disbarring body should be located within NHS Improvement, despite the fact that NHSI continues to protect, appoint and recycle poor senior managers who are a risk to whistleblowers, patients and the public. Over four years have already been wasted trialling CQC Regulation 5 FPPR, in which time whistleblower and patient harm has continued to be covered up and millions have been wasted by serious mismanagement. There is no substitute for a properly independent accreditation and regulatory body for NHS managers. Nor is there a credible alternative for much needed reform of unfit UK whistleblowing law. Until there is personal liability for, and thus meaningful deterrence of poor managerial behaviour, it will continue.
- 2.** My main concern is that Tom Kark proposes yet another postponement of NHS managerial regulation, on the premise that more half measures should be trialled.
- 3.** CQC Regulation 5 Fit and Proper Persons (FPPR) has already been trialled in place of managerial regulation, resulting in several years of futile efforts which have not delivered accountability, meaningful deterrence of serious misconduct or removal of unfit directors who present significant risk to the public and to NHS staff.
- 4.** In the years in which the CQC has operated FPPR, serious harm and risk to patients has been brushed under the carpet and whistleblowers have been victimised and gagged with impunity.
- 5.** Serious mismanagement has cost the NHS millions because CQC has refused to do anything about poor senior managers. For example, I am aware of at least four FPPR referrals from different sources to the CQC that related to NHS directors implicated in the collapse of the £800 million UnitingCare Partnership contract, much criticised by the Public Accounts Committee. The FPPR referrals were made to CQC *before* the contract collapsed.

<https://publications.parliament.uk/pa/cm201617/cmselect/cmpublic/633/633.pdf>

6. The CQC did not act on any of these referrals, and in two instances took it upon itself to triage and arbitrarily discount the referrals. This was without investigation and despite claiming on other occasions that only regulated bodies themselves could make determinations.
7. Although a number of Tom Kark's specific recommendations are clearly reasonable, I believe that without being set in a proper overarching statutory framework that is truly independent of the government, they are very unlikely to work.
8. His proposal for a body with disbaring powers is made unworkable by the suggestion that it should be "housed within NHSI".
9. NHS Improvement (NHSI) is responsible for poor leadership. Tom Kark acknowledged:

*"There was recognition of the revolving door problem, and historically non-provider organisations within the NHS family have been seen as one of the repositories of the 'failed' directors. We were told that this route had now stopped, and that NHSI would not now facilitate sideways movement in the NHS which has been traditionally seen as one of its roles."*

10. But without producing any evidence of improvement in NHSI's culture and practice, Tom Kark went on to assert:

*"NHSI would in our view be the obvious organisation to house a disbaring service."*

11. Based on recent and *ongoing* evidence, NHSI is unsuited to making Fit and Proper Person determinations. For example:

- a) NHSI helped to recycle Paula Vasco-Knight to NHS board level jobs in 2015 and 2016 despite an Employment Tribunal finding of serious whistleblower reprisal. She was charged with fraud almost immediately after the second appointment.

<https://minhalexander.com/2016/09/24/cqcs-fit-and-proper-parade/>

- b) NHSI appointed Jon Andrewes former NHS trust Chair without checking his qualifications, which were fake. He was jailed for fraud against the NHS, and is currently being prosecuted for another fraud. NHSI gave little assurance that it improved its practices following this scandal.

<https://minhalexander.com/2017/04/11/jon-andrewes-fraud-nhs-improvement-responds/>

- c) NHSI recently employed the former Chief Nurse of Mid Essex Hospitals NHS Trust after an Employment Tribunal criticised her in July 2018 for seriously harming a trade union representative and whistleblower who was “doing no more than his job” in raising issues. I have asked Dido Harding what she intends to do about this and await her reply.

<https://minhalexander.com/2019/02/07/the-unfair-sacking-of-andrew-smith-nhs-whistleblower-and-trade-union-representative-a-heady-cocktail-of-tainted-ingredients-or-how-cqc-nhs-improvement-mid-essex-hospital-services-nhs-trust-w/>

- d) NHSI permitted the recycling of Jo Williams former CQC Chair to the board of Alder Hey Children’s NHS Foundation Trust despite her troubled history as CQC Chair and her mistreatment of whistleblowers.

<https://minhalexander.com/2019/02/10/jo-williams-letter-of-25-november-2011-to-all-cqc-staff-about-two-cqc-whistleblowers-who-were-about-to-give-evidence-at-the-mid-staffordshire-public-inquiry/>

- e) NHSI has commissioned governance reviews by Deloitte at the Royal Wolverhampton NHS Trust and Derbyshire Healthcare NHS Foundation Trust after whistleblowing and sexual harassment scandals. These reviews employed a methodology of simply accepting information provided by the board members being reviewed.

<https://minhalexander.files.wordpress.com/2019/02/bates-v-the-post-office-judgment-no..2-strike-out-application-15-oct-18.doc>

<https://minhalexander.files.wordpress.com/2016/09/derbyshire-healthcare-agenda-pack-public-board-30-mar-2016-update2.pdf>

- f) NHSI has just appointed Paula Vennells Group Chief Executive of the Post Office to the Chair of Imperial Healthcare NHS Trust. This was despite her role in the handling of the Horizon computer scandal in which the Post Office sacked and prosecuted innocent subpostmasters.

<https://www.postofficetrial.com/2018/11/day-9-write-up-best-of-avdb-part-3.html>

The appointment to Imperial was also despite criticism, under her tenure, by the High Court of “undoubtedly aggressive and literally dismissive” legal tactics by the Post Office against subpostmasters.

<https://minhalexander.files.wordpress.com/2019/02/bates-v-the-post-office-judgment-no..2-strike-out-application-15-oct-18.doc>

**12.** Neither does the Kark Review report acknowledge the role of the Department of Health in poor NHS culture and cover ups, even with evidence from inquiries into disasters such as MidStaffs and Gosport. This is the elephant in the room. I am aware of at least two instances of controversial recycling of senior NHS managers involved in whistleblowing scandals, where references have been provided by past government ministers.

**13.** The government itself continues to resist real whistleblowing reform and it refuses to provide the legal and regulatory conditions in which whistleblowers might have any reliable, realistic chance of being protected. The government points to the National Guardian's Office as evidence that it has acted. However, whistleblowers continue to be silenced and harmed. The National Guardian has even produced joint guidance with NHS Employers on settlement agreements which still normalises the use of super-gags, that hide even the existence of agreements. As I have already informed the Committee, the National Guardian does not trouble to track data on whether NHS whistleblowers' concerns are addressed.

<https://minhalexander.files.wordpress.com/2018/09/letter-to-parliament-29-09-2018-uk-government-does-not-track-whether-whistleblowers-concerns-are-addressed.docx>

**14.** Any venture which remains under the government's line of management will be de facto captured from inception.

**15.** I am concerned that Tom Kark overlooks failings by the CQC. His report makes much of the fact that CQC had no *direct* powers to remove unfit NHS managers under Regulation 5 FPPR. However the CQC itself acknowledged to me and other whistleblowers that it could exert *indirect* pressure through other regulations.

**16.** The Kark report does not properly acknowledge the many procedural infractions by the CQC that whistleblowers have experienced when making FPPR referrals. CQC is instead painted as the hapless recipient of unworkable regulations.

**17.** Nor does Tom Kark mention recent criticism by PHSO of CQC's FPPR process and a finding of maladministration regarding CQC's poor handling of the FPPR referral on Paula Vasco-Knight. This is despite being apprised of the PHSO's criticism.

[https://www.ombudsman.org.uk/sites/default/files/page/0463\\_FPPR\\_Report\\_Accessible.pdf](https://www.ombudsman.org.uk/sites/default/files/page/0463_FPPR_Report_Accessible.pdf)

**18.** Tom Kark does not mention the fact that CQC has tried to keep some adverse FPPR findings secret by not mentioning them in its inspection reports, even though this evidence was sent to him.

<https://minhalexander.com/2018/01/16/the-flexible-cqc-fppr-kettering-general-hospital-nhs-foundation-trust/>

19. A number of the Kark Review recommendations are welcome, such as the reiteration that whistleblower suppression and reprisal should be treated as a form of serious misconduct. Also welcome is the suggestion that the Fit and Proper Persons concept should be extended to arms length bodies.
20. Less welcome is the stipulation that bullying, victimisation and harassment must be proven to be “deliberate”, before they can be accepted as serious misconduct justifying barring.
21. Whilst evidence of deliberate intent would certainly add to the gravity of a case, it is not necessary to have proven intent for there to be serious harm done to the victim(s). There should be leeway to disbar managers in some circumstances where intent is not proven. For example, if there have been many repeated, seriously harmful acts.
22. The parallel to this is the unfeasibly demanding series of legal tests that whistleblowers must currently pass in the Employment Tribunal. A large number of whistleblowers do not ‘win’ to any degree because the Tribunal very often determines that although whistleblowers suffer detriment, it is not because they have whistleblown. The Tribunal sometimes bends backwards to quite an astonishing degree to not find a causal link.

<https://minhalexander.com/2018/01/25/uk-whistleblowing-law-is-an-ass-helen-rochester-v-ingham-house-ltd-and-the-complicit-cqc/>

23. Tom Kark’s emphasis on *deliberate* mistreatment replicates this arrangement. If accepted, it will likely allow too many destructive managers off the hook and cause more injustice to seriously harmed whistleblowers. This would perpetuate the chilling effect.
24. Equally, Tom Kark’s proposal to set a higher bar on proof of managerial harassment when existing employment law does not require evidence of intent, is not fair to the NHS frontline.

Section 26.1(b) of the Equality Act 2010 defines harassment as “conduct that the purpose OR effect of...”

<https://www.legislation.gov.uk/ukpga/2010/15/section/26>

25. I have concerns about references to “rehabilitation and the passage of time”, and possible problems with Kark’s proposal for a five year time limit, as currently drafted:

*“We recommend that there be a statutory time limitation period of five years in relation to historic complaints about Serious Misconduct, unless there are exceptional circumstances and the public interest requires action to be taken.”*

- 26.** Former CQC chair Jo Williams' recent recycling might be exempt from such a Fit and Proper Test, depending on the whims of a disbarring body. I suggest the rules should be written to ensure that where an individual has been so criticised previously, including by parliament and by a public inquiry, and not just on issues of capability but of character, there is a reasonable chance of scrutiny.
- 27.** Simple skills deficits are more likely to be remediated than issues of character and misconduct. It would not be logical to apply a blanket time limit in the same way to these two different issues. This is particularly if the issues of character relate to evidence of an enduring pattern of behaviour.
- 28.** Tom Kark objects to the inclusion of "being privy to serious misconduct" and proposes that it be removed from the Fit and Proper Person test because of ambiguity.
- 29.** He does not offer a replacement in his recommendations, despite having commented that an alternative wording could describe a failure to speak up:
- "If the words mean that the individual has been aware of serious mismanagement but failed to speak up when they should have done, the wording does not make that clear."*
- 30.** I suggest that "a failure to speak up about serious misconduct or mismanagement" should be included in the test, in place of "being privy". Complicit inaction can be just as damaging.
- 31.** The Kark Review report is seriously inaccurate in its claim that there are a "low" number of whistleblowing cases in the NHS. I have already provided the Committee with the evidence regarding this.
- <https://minhalexander.com/2019/03/01/number-of-nhs-whistleblowing-cases-a-disagreement-with-tom-kark-qc/>
- 32.** I am very concerned that the Department of Health and Social Care would have known that the report was seriously inaccurate in this respect, but DHSC Deputy Directors failed to assist Tom Kark. They seemingly did not provide the full picture and instead facilitated the publication of false statistical information.
- 33.** Lastly, I copy below a record of an evidence session that I and two other NHS whistleblower colleagues had with Tom Kark and Jane Russell on 31 August 2018. Accuracy has been agreed with the Kark FPPR Review team.

Dr Minh Alexander NHS whistleblower and former consultant psychiatrist

3 March 2019

**Kark Review of FPPR**  
**Independent Whistleblowers Evidence Session**  
**Note of Meeting**  
**31<sup>st</sup> August 2018**

**Attendees**

Dr Minh Alexander  
Clare Sadari  
Mick Start  
Tom Kark QC  
Jane Russell  
Jonathan Smith (DHSC)

Minh and Mick were delayed due to transport problems. Tom and Jane kindly extended the meeting time and a full hour's meeting was held.

The evidence contributed related mainly to FPPR from the collective perspective of whistleblowers, and to a wide range of cases.

The following represent summarised bullet points of key issues from the meeting:

- One attendant gave a detailed account of a complaint about CQC's handling of an FPPR complaint about whistleblower reprisal and suppression, which the PHSO are currently investigating
- It was contended that CQC has been unfair, arbitrary and unreasonable in its approach to FPPR, and perverse in its interpretation of the regulations, and left a whistleblower feeling devalued whilst protecting two proven abusers
- There was concern that CQC was wilfully blind to the serious findings of an Employment Tribunal, and closed the related FPPR referral on flimsy evidence, about which it was secretive.
- There was concern that the CQC accepted a report as exonerating evidence on the report of a trust, when a proper reading would have shown that it demonstrated that the referred manager had breached the NHS manager's code of conduct.
- Another attendant described a similar experience, and how they received a vague CQC response to an FPPR referral which amounted to a refusal to take any action. The reply was so poor that it was difficult to understand.
- This was despite very serious, evidenced issues being flagged to the CQC in the referral.
- As a result of the CQC refusing to act on very serious FPPR evidence, an NHS manager went on to play a key role in the much criticised collapse of the £800

million UnitingCare contract, which was subject to multiple investigations and a Public Accounts Committee Inquiry.

- There was concern that CQC was so unresponsive in one case that a referrer had to submit an FOI request to the NHS trust in question to find out the outcome of the FPPR referral.
- The trust provided a copy of the CQC FPPR 'closure letter'. It was agreed that a copy would be sent to the FPPR Review team.
- There was a concern that CQC hid the outcome of this FPPR case from the referrer because CQC wished to allow the manager in question to be promoted without any opposition.
- It was agreed that it would be helpful in future if explicit 'red lines' could be written into FPPR rules, which would prevent the trivialisation of whistleblower reprisal and suppression as has happened in cases handled by the CQC.
- For example, red lines should include:
  - Unfairly sacking a whistleblower
  - Trying to improperly influence/interfere with an investigation about a whistleblower
  - Attempting to or actually perverting the course of justice.
- It was suggested that the Fit and Proper Person test should apply to the directors of central NHS bodies and the DHSC as well as provider bodies.
- It was pointed out that the CQC is biased and hostile towards whistleblowers and cannot fairly process the FPPR referrals that it receives from them.
- CQC has admitted breaching confidentiality of whistleblower's identity in three cases and has been accused of doing so in more cases. However, it has refused to audit its practice in this area. International legal best practice is to protect whistleblowers' right to anonymity.
- The CQC itself through its instances of poor behaviour should be subject to a Fit and Proper Person test for its directors.
- Whistleblowers have discovered from disclosed personal data that the CQC operates covert containment protocols against them.
- A general point was made that culture comes from the top. Bruce Keogh previously stated to one of the attendants that he was working on an NHS code of conduct that went all the way up to minister and the select committee. Whistleblowers find that it

is not just employers who are responsible for serious governance failings but also regulators and government departments.

- It was suggested that the Fit and Proper Person Test should apply to the leaders of all NHS bodies including arms length bodies and the DHSC as well as providers.
- It was agreed that two examples of poor governance by the DHSC which might justify such a policy could be sent in after the meeting

<https://minhalexander.files.wordpress.com/2019/02/kark-submission-21-september-2018-evidence-about-wider-application-of-fpp.docx>

- It was suggested that an independent body outside the line management of the DHSC is needed to operate FPP, because the conduct of the DHSC and ALBs has come into question and they cannot hold themselves to account.
- The role of the DHSC in allowing continuing, inappropriate gagging of NHS staff, despite spurious claims in 2013 that gagging has been banned, was discussed.
- An additional specific example of poor FPPR handling was discussed – Derbyshire Healthcare NHS Foundation Trust and the response of the CQC and NMC.
- It was agreed that relevant data about this case including a link to the ET judgment in question, about a case of covered up harassment by a trust board member, would be sent to the FPPR Review team.