

LETTER TO ROBERT FRANCIS 11 AUGUST 2020, CC MATT HANCOCK, DIDO HARDING, TOM GRIMES

Dear Sir Robert,

National Guardian handling of confidentiality

Thank you for enquiring about Dr Julian Campbell's case.

I simply would like an explanation for the way that confidentiality was handled by the National Guardian, as it appeared contrary to the National Guardian's written undertakings to NHS staff, currently displayed on her website under "privacy statement":

"We share the personal data we receive only when the individual concerned has given us their consent to do so and, where we have such consent, we share it with those persons or bodies whose role is to support individuals to speak up, for example Freedom to Speak Up Guardians. We will only share personal data without consent in exceptional circumstances where there is evidence of a need to protect individuals from the risk of harm, or from actual harm, for example with safeguarding authorities."

There does not seem to me from the information available that there was an exceptional circumstance in Dr Campbell's case which permitted the National Guardian to share his personal data without consent.

It caused him severe distress in an already very difficult situation. For some very vulnerable whistleblowers in despair, this sort of action could be a last straw, and that is a Safeguarding issue that I would be grateful if the Accountability and Liaison board would resolve.

Some additional, transparent particularisation in general of what the National Guardian considers an appropriate threshold for breaching confidentiality would be useful, for the sake of any NHS staff considering whether to make disclosures to her in the future.

In any instance that the National Guardian decides to breach whistleblowers' confidentiality, I would expect at the very least that the National Guardian would:

1. Urgently make the affected individual aware that their data had been shared without consent,
2. Offer support to manage any difficulties that the breach of confidentiality might cause them.

As these last two steps do not currently feature in the National Guardian's published undertakings, and no such steps were taken by her in Dr Julian Campbell's case. I wonder if the Accountability and Liaison board would ensure that they are adopted and added to the published information for NHS staff.

As regards a complaint being made on my behalf, that was not what I requested.

I have now twice made serious complaints about the National Guardian and each time found the complaints process disappointing.

The process is flawed by a major conflict of interest: complaints about the National Guardian herself are investigated by NHS Improvement, a body which is she supposed to hold to account, but which part funds her. Ditto the adjudication of the complaints is provided by NHS Improvement or the other two regulators that part fund the National Guardian (indeed, you adjudicated one of my complaints). The circularity in this arrangement is of very serious concern.

In other words, having raised a concern about the National Guardian's handling of a case in which conflict of interest was a central issue, I am now offered a complaints process which is itself flawed and invalidated by conflict of interest.

I would simply prefer to receive an explanation as requested and an improvement and clarification of the National Guardian's procedures and her improved adherence with her own standards.

Central flaws of the Freedom To Speak Up model and the need for genuine, robust reform

You previously advised at the conclusion of the Freedom To Speak Up review that major reform of UK whistleblowing law would take too long. You contended that work on culture (through the Freedom To Speak Up model of local and national Guardians without powers, "oiling the wheels" as you put it) would be more expeditious.

"Although the existing legislation is weak, I have not recommended a wholesale review of the 1996 Act for two reasons. First, I do not think legislative change can be implemented quickly enough to make a difference to those working in the NHS today. What is needed is a change in the culture and mindset of the NHS so that concerns are welcomed and handled correctly. If this can be achieved, fewer staff will need recourse to the law

http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

Five years have passed. There appears to be no diminution in the flow of harmed NHS whistleblowers. NHS culture is substantively unchanged as demonstrated by all the suppression and victimisation during the pandemic, with the government providing a terrible model of disinformation, some outright lies and bullying of critics.

The word "independent" appeared 88 times in your report of the Freedom To Speak Up Review.

Yet conflict of interest is the central flaw at the heart of the Freedom To Speak Up model. It is unworkable for an employee (the trust Speak Up Guardian) with no powers to hold their

employer to account. Their unenviable choices, when meeting employer resistance, are to collude or risk being victimised.

You stated in the report of the Freedom To Speak Up Review that local trust Speak Up Guardians should have “courage” and “tenacity”, implicitly acknowledging that some will face victimisation.

Your chapter on local Speak Up Guardians is entitled “Internal and independent Support for Staff. Yet an employee cannot be truly independent.

I continue to hear of not only staff who are failed by the National Guardian and local trust Guardians, but of trust Freedom To Speak Up Guardians themselves being harmed by their employers and let down by the National Guardian’s Office when they seek help.

The National Guardian acknowledged in her last annual survey of local trust Speak Up Guardians that the role causes stress:

“But, of more concern, is the suggestion from this survey that guardians also receive ‘push-back’ from leaders and others in their organisation. They are not always valued. Sometimes, they are treated with suspicion. They are not always thanked. Speaking up is not always used as an opportunity to learn and improve, but is treated as a problem that needs to be shut down....The behaviours that guardians encounter, and the more negative cultures in which they may operate, are symptomatic of a closed mindset that has its origins in defensive and uncaring leadership.”

https://minhalexander.files.wordpress.com/2020/08/ftsu_guardian_survey_report_2019.pdf

This was entirely foreseeable, and indeed whistleblowers have warned you of this from the outset of the Freedom To Speak Up project.

However, instead of reflecting on whether the Speak Up Guardian role is unworkable because it simply creates additional victims, the National Guardian’s response has been to increase occupational health and well being services for local Speak Up Guardians, and to state in her annual survey report that it is unacceptable for trusts to mistreat their Speak Up Guardians.

Neither of these interventions are adequate for those Speak Up Guardians who are facing severe victimisation, dismissal and post dismissal victimisation such as blacklisting and vexatious referrals to professional regulators, as has happened.

To merely admonish the worst employers who will go as far as victimising their own Speak Up Guardians is like shaking a stick at a hurricane.

It is in my view very unkind and unfair to, by policy, continue creating victims in the form of local Speak Up Guardians who are given impossible choices.

The model does not work and needs to be scrapped, to make way for real reforms.

We could have been well into the legal reform process by now if you had recommended law reform to the government five years ago.

I do urge you as a judge to go where the facts lead. The facts seem to me to be very obviously pointing to the need to accept that the Freedom To Speak Up experiment that you and the government devised has not succeeded, and should be let go.

Yours sincerely,

Dr Minh Alexander

Cc Matt Hancock Secretary of State for Health and Social Care
Dido Harding Chair of NHS Improvement
Tom Grimes, Head of Whistleblowing for NHS Improvement and NHS England