**Freedom to Speak UP (FTSU): Does the NHS have the right culture?**

A paper jointly presented by Doctors for NHS, WhistleblowersUK and ourNHSourconcern

**Introduction**

Following the Mid Staffordshire NHS Foundation Trust Public Inquiry (2013) Sir Robert Francis had made a number of recommendations pertaining to the culture of the NHS (1) A further independent review in 2015 (2) concluded that there was a serious issue within the NHS in the way whistleblowers were treated. Two factors stood out from the evidence: fear of the repercussions that speaking up would have for the individual and for their career; and the futility of raising a concern because nothing would be done about it. The report observed that there was a real need for a culture in which concern raised by staff were taken seriously, investigated and addressed by appropriate corrective measures. Above all, behaviour by anyone which was designed to bully staff into silence, or to subject them to retribution for speaking up must not be tolerated.

Following the Francis report in 2015, NHSE produced guidance to Trusts on FTSU in 2016 and again in 2019 (3,4,5).

The NHS Staff Survey in 2019 (6) average results revealed 40.9% thought that communication between senior management and staff was effective, 32.4 % stated thar senior managers acted on staff feedback and 13.1% reported being bullied by managers.

As recently as this year, staff were gagged, forbidden or bullied from speaking up (7)

The above demonstrates that the NHS has not established the type of culture recommended in 2015. This paper states the current structures in place to support FTSU at local and national levels, what the problems are and present the solutions.

**Current structure and responsibilities**

**Local level**

1. All executive directors have responsibility for creating a safe culture and an environment in which workers are able to highlight problems and make suggestions for improvement.

2.a. Chief executive is responsible for appointing the FTSU Guardian and is ultimately accountable for ensuring that FTSU arrangements meet the needs of the workers in their trust.

b. Chief executive and the chair role-model high standards of conduct around FTSU and are responsible for ensuring the appropriate annual report is presented.

3.a. The non-executive lead for FTSU is responsible for role-modelling high standards around FTSU.

b. The non-executive lead for FTSU should challenge the executive board to reflect on whether they could do more to create a healthy and effective speaking up culture.

4. Director of Human resource also has a responsibility to ensure the above.

5. The appointed FTSU Guardian is the designated person to seek all necessary resources are provided, process all complaints, to prepare annual reports and to provide appropriate assistance to the complainant.

.6. Confidentiality – Any person raising a concern must have the right to be anonymous.

**National structure**

1. The National Guardian sets standards, receives reports, provides training for local guardians in addition to accepting appeals.

2. Structure for whistleblowers is the same but a ‘protected disclosure’ is covered by a specific law The Public Interest Disclosure Act 1988 (8). The Francis report noted that the legal position of whistleblowers was not clear.

**Processes available to staff to raise concerns**

Step one – contact line manager, lead clinician: if not satisfied

Step two – Approach Local FTSU Guardian: if not satisfied

Step three – Contact CEO, medical director, nursing director or finally, non-executive director

Step four – National Guardian

Step five – ACAS

Step six – Employment Tribunal

**What are the problems?**

1. All the people concerned in the process described above are on the pay roll of the trust and many of whom also hold some managerial appointment. As noted already, staff work in an environment of fear and this makes most members of staff reluctant to approach them or the local Guardian. In the event of a minor event or when an individual is raising a concern on behalf of a team or department, one may well approach any of these people.

2. There is no assurance that the identity of the individual will remain confidential and the rules around confidential reporting are fragmented and confusing, in addition many staff do not recognise that they are making a ‘Protected Disclosure’ (whistleblowing). The Guardian normally takes the concern to the CEO and the matter rests there. Rarely is anyone informed if any action has been taken; this is compounded when the complainant was anonymous. However there is an argument that when the Local Guardian is aware of the ‘whistleblower’ that they should update them on the action taken. This small adjustment to the process is likely to significantly reduce the number of ongoing concerns, escalations of concerns and improve trust and confidence across the NHS.

3. For the majority of staff the National Guardian is seen as the last chance of having concerns dealt with. The National Guardian has no statutory powers and is committed to using soft power to engage and encourage the trust to follow standard and statutory processes to address concerns.. Given the fragmentation of the system and the known shortcomings and concerns about it it is impossible to know how many people do not share their concerns. A significant factor in this failure to report lies with a fear of retribution or the feeling that nothing will change. The significant of this can be found in the National Staff Survey (6)

4. The culture in most trusts is one of embedded fear, seeming failure to value staff and lack of transparency. Suffice it to say that since the Francis report the culture has not improved.

5. The legal position of whistleblowers remain unclear.

6. Those individuals who have experienced retribution and subsequently found to be innocent often end up with permanent loss of career and other problems. The time it takes to resolve these issues is not acceptable and contributes significantly to the impact on the whistleblower and the culture of the NHS.

7. The local disciplinary processes to which many of the whistleblowers are subjected as part of the cycle of abuse that they are subjected (9). A major issue is transparency of the process and the fact that the panel deciding is not independent and frequently consists of those acused of wrongdoing.

**Solutions and discussion**

1.a. Independent Office for the Whistleblower should be available as an alternative to the current structure. It is acknowledged that some concerns may be dubious, malicious or vexatious, but this can be managed professionally using experienced and expert triaging. Anonymous concerns received or in the case that a whistleblower wishes to remain anonymous would be no barrier to communicating issues to the Trusts. This office would ensure that steps are taken to maintain anonymity as well as offering assistance with investigations. The office would be the custodian of the identity of the whistleblower ensuring that identifying features are eliminated from the submissions and feedback is provided. This would build trust in the system and generate trust in NHS speak up pathways and those responsible for investigating.

1.b. In the case that this independent office is unable to take up the case it would be able to provide advice, support and signposting or referrals to appropriate associations.

1.c. It is important to set up a system that will encourage staff to speak up without fear of their identity being revealed. The record held will be helpful to know which trusts are involved, the natures of concerns and the staff status. Such anonymised information will be helpful to pass to interested organisations and NHSI and National Guardian. In addition this data would assist in the assessment of the culture in individual trusts and even individual units or departments.

1.d. The independent office should be independently funded from outside of the control of any NHS structure. We propose that this independent office be supported and in part staffed by voluntary bodies concerned with NHS matters. working as a collaborative activity.

2.a. The legal position of whistleblowers should be clarified by the introduction of a new law. This change should enable the independent office to impose fines and penalties on both the trust or an individual identified as the culprit or in the absence of these, the CEO. We believe that this change would be another catalyst to effectively driving a more positive change in the culture. One of the barriers within the existing framework is an absence of real accountability, the introduction of fines and penalties is likely to be both controversial and effective as it would impact the individuals directly and reduce the burden on the taxpayer while driving up performance across the NHS.

We believe that it should be a criminal offence to retaliate against whistleblowers or fail to investigate allegations this would place greater responsibility on the CEO and the Board and although we anticipate resistance to this we believe that it is both essential and necessary if the kind of incidents that have been exposed by the Covid Crisis are to be avoided in future.

2.b. Whistleblowers should be protected from any disciplinary action until their concern has been investigated.

2.c. NHS institutions and trusts must be banned from using Settlement Agreements in whistleblowing case that include ‘Confidentially’ or ‘gagging clauses’ under any circumstance.

3. Action is urgently required to address the culture of fear that pervades across the NHS when it comes to speaking up. The introduction of new legislation and an Independent Office of the Whistleblower is only part of the solution. Energy must be properly invested in ensuring that accountability is embedded into the DNA of the NHS without exception at all levels. The introduction of NED’s who have not only the mandate but the support of the board to hold them to account is also required. It is time to put an end to the revolving door appointments that currently apply to these roles. A further measure that would drive trust and confidence and embed accountability is the introduction of elected boards and that membership is time limited to three years. These boards should be elected by the staff and be properly representative of the diversity of the the community both staff and patients A separate referenced document on this subject is available.

In conclusion, at the risk of stating the obvious, it is impossible to foresee any improvement in Freedom to Speak Up without a radical overhaul of the structures that support it. Cultural change requires innovation and the introduction of new ways of engaging with staff at all lvels empowering them to speak up. Organisations will be increasingly judged by their speak up culture and we would like to see the NHS not only driving this here in the UK but globally.

The authors commend this paper for implementation

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