

Council, 20 May 2010

Whistleblowing guidance for Health Professions Council registrants

Executive summary and recommendations

Introduction

At the Council meeting on 20 May 2009, the Council considered whether the HPC should provide specific advice to its registrants on whistleblowing in the workplace. The Council agreed that further research on the topic should be carried out, and that a guidance document on the issue should be drafted and submitted for the Council's consideration. The paper proposes that formal published guidance in addition to existing HPC standards and guidance is not necessary, and alternative forms of advice can be given to registrants.

To assist the Council's consideration, this paper covers the legal basis for whistleblowing in the UK, significant recent whistleblowing cases, the HPC's current advice for registrants on raising and escalating concerns, and the range of whistleblowing advice provided by other health-related organisations.

Decision

The Council is invited to agree to the proposed actions in paragraph 6.5.

Background information

Committee paper 20 May 2009:

<http://www.hpc-uk.org/assets/documents/1000287220090520Council-enclosure14-Raisingconcernsaboutservicestandards.pdf>.

Resource implications

The resource implications are accounted for in the Policy and Standards department workplan for 2010-2011.

Financial implications

None

Appendices

None

Date of paper

10 May 2010

Whistleblowing guidance for Health Professions Council registrants

1. Introduction

- 1.1 At the Council meeting on 20 May 2009, the Council considered whether the HPC should provide specific advice to its registrants on the correct procedures to follow when they need or wish to raise concerns about serious issues they are concerned about in their places of work—informally known as ‘whistleblowing’. The Council agreed that further research on whistleblowing should be carried out, and that a guidance document on the issue should be drafted and submitted for the Council’s consideration. As a result of the research undertaken—which is discussed in this paper—we propose that formal published guidance in addition to existing HPC standards and guidance is not necessary. Instead, we have proposed a number of alternative methods of providing further advice for registrants.
- 1.2 To assist the Council’s consideration, this paper covers the legal basis for whistleblowing in the UK, significant recent whistleblowing cases, the HPC’s current advice for registrants on raising and escalating concerns, and the range of whistleblowing advice provided by other health-related organisations.

2. Background

- 2.1 Over past years there have been a number of high profile cases involving the reporting of major problems in the provision of health services in the UK. Recent cases to note include systemic failures of health service provision at the Mid-Staffordshire NHS Foundation Trust, and poor care given to elderly patients at Royal Sussex County Hospital in Brighton. The HPC Conduct and Competence Committee has also considered a fitness to practise case which touched on issues surrounding whistleblowing. These cases raise issues around whether health professionals who were working for those organisations, or who observed other professionals whose behaviour was concerning, could have acted as whistleblowers and raised concerns earlier—or in some cases, whether they should have raised those concerns in more appropriate ways.
- 2.2 Whistleblowing is defined as the disclosure by an individual to the public, or those in authority, of mismanagement, corruption, illegality, or some other form of wrong-doing in the workplace. In the UK, whistleblowers are legally protected for the public interest, to encourage people to speak out if they find malpractice in an organisation or workplace. The Public Interest Disclosure Act 1998 inserted provisions into the Employment Rights Act 1996 to give protection to whistleblowers who raise concerns by making a ‘protected disclosure’ about serious fraud or malpractice at their place of work, against victimisation or dismissal—provided they have behaved in a responsible way in dealing with their concerns. The provisions allow an

exception to an employee's normal contractual duty of confidentiality. Qualifying disclosures can cover:

- Criminal offences;
- Failure to comply with legal obligations;
- Miscarriages of justice;
- Health and safety dangers;
- Environmental risks; and
- A deliberate attempt to cover up any of the above.

2.3 The legal protection applies if the qualifying disclosure is made in good faith to the employer; in certain cases to a government minister; or to a person (or organisation) prescribed by the Secretary of State—which can include some regulatory bodies. In some limited circumstances, whistleblowers are able to make disclosures to a non-prescribed person. This applies in circumstances when there is such an exceptionally serious failure in a workplace that the whistleblower does not need to go through the normal channels but can publicly 'blow the whistle' straight away. However, the issue must be a matter of fact that something is a genuinely serious failure. An example could be an exceptionally serious practice that placed workers' or service users' lives in danger. The conditions given for making the concerns public do not apply if the person:

- makes the disclosure in good faith;
- reasonably believes that the information is substantially true;
- does not act for personal gain; and
- acts reasonably taking into account the circumstances.

3. Recent cases

3.1 A number of recent whistleblowing cases have raised issues which need to be taken into account in the Council's consideration of whether the HPC should provide specific advice to registrants on raising and escalating concerns in the workplace. A sample of these cases are summarised below.

3.2 While people who choose to raise concerns are legally protected in the specific circumstances outlined in the previous section, there have been some cases when because a whistleblower had raised legitimate concerns in a way which was not protected by the law, they were then subject to disciplinary and/or fitness to practise action—usually because they had breached employer policies or professional standards in doing so. In other situations, employees have not raised concerns at all, possibly because they were concerned that they would be subject to such action. The main issue stemming from these cases is that if health professionals do not know how to make a protected disclosure and raise concerns in an appropriate way, or are dissuaded from raising concerns because they are afraid of the consequences for them personally, the safety of the public using health services can be put at risk.

Margaret Haywood

- 3.3 In 2005 Margaret Haywood wore a hidden camera to film the poor conditions on an acute care ward at the Royal Sussex County Hospital in Brighton. The footage was taken without the permission of the patients she filmed, and was subsequently aired in a television programme which publicly raised concerns about the standards of care at the hospital. Because Ms Haywood's actions broke the professional code of conduct for nurses, she was subject to fitness to practise action by the Nursing and Midwifery Council (NMC). In this case the NMC panel had to balance Ms Haywood's duty to protect patient confidentiality with her duty to raise concerns about poor standards of care. The NMC initially found Ms Haywood not fit to practise as a result of her actions and she was struck off their register in April 2009. Following legal action, the NMC settled with Ms Haywood in October 2009, allowing her to return to practice as a nurse. As a result of this case, the NMC is producing advice for their registrants on raising and escalating concerns—more details of which are provided in the following section on the whistleblowing advice provided by other health organisations.

Mid-Staffordshire NHS Foundation Trust

- 3.4 In 2007, concerns were raised by members of the public about standards of care at the Mid-Staffordshire NHS Foundation Trust. In 2008, the Health Care Commission (now the Care Quality Commission) launched what proved to be the first of a series of inquiries into the unusually high death rates and apparent poor standards of care at the trust. The most recent inquiry, completed in March 2010, was carried out independently and chaired by Robert Francis QC. The inquiry report concluded that between 2005 and 2009, patients were routinely neglected by a trust that was preoccupied with cost cutting, targets, and processes, and which had lost sight of its fundamental responsibility to provide safe care. The inquiry found that staff who spoke out about the standards of care at the trust felt ignored, and there is strong evidence that many were deterred from doing so through fear and bullying. The Francis inquiry recommended that 'the trust board should give priority to ensuring that any member of staff who raises an honestly held concern about the standard or safety of the provision of services to patients is supported and protected from any adverse consequences, and should foster a culture of openness and insight'.

HPC fitness to practise case

- 3.5 In 2008, the HPC Conduct and Competence Committee considered the case of a registrant who raised concerns with senior colleagues relating to insufficient and incomplete witnessing of procedures their place of work. After raising those concerns, it was found that the registrant had photocopied patient records they were concerned about and taken them home, in doing so breaching the employer's policies and creating the risk of a breach of patient confidentiality. The registrant was then disciplined by their employer, and their conduct was reported to the HPC. The panel found that the registrant's fitness to practise was not impaired although their actions in taking copies of records home had amounted to professional misconduct. In coming to its decision, the panel accepted that

while the registrant had not followed the correct procedures in raising a concern there had been no bad faith on their part, and also accepted that they had been motivated by a strong wish to safeguard patients from the potential risks presented by deficient record keeping.

4. Current HPC guidance and standards

- 4.1 At present the HPC does not provide separate specific guidance to our registrants on how to raise or escalate concerns they may have in their workplace, beyond the general principles which are found in our standards of conduct, performance, and ethics, and some related guidance on confidentiality.
- 4.2 We expect our registrants to raise concerns about service user or patient safety with an appropriate authority or person. Standard 1 of the standards of conduct, performance, and ethics requires our registrants to act in the best interest of service users, and they are obliged to act immediately if they become aware of a situation where a service user may be put in danger, and to take appropriate action to protect the rights of children and vulnerable adults who are at risk. We require our registrants to place the safety of service users before any personal or professional loyalties at all times. Standard 4 requires our registrants to tell us (or any other relevant regulators) any important information about their own, or other registrants' or health professionals' conduct or competence.
- 4.3 The HPC has also produced the document *Confidentiality—guidance for registrants*, which provides advice about some of the issues related to whistleblowing and how registrants should handle information about service users. While it is not designed to replace local procedures, it provides a tool kit which registrants can use to make informed and reasonable decisions relating to issues of confidentiality in line with the HPC standards. One section of the guidance covers the issue of disclosing confidential information without consent if it is in the public interest to do so—such as in a situation where it is necessary in order to prevent serious harm to other people.

5. Guidance provided by other organisations

- 5.1 A number of other UK health-related organisations and regulators provide, or are in the process of developing different forms of advice or guidance for organisations, managers and employees, or registrants on how raise or escalate concerns in the workplace. The range of guidance provided by some of these organisations is summarised below.

NHS

- 5.2 The NHS Social Partnership Forum working with the charity Public Concern at Work has recently produced a draft information pack: *Speak up for a Healthy NHS*, which is designed to help employers to achieve best practice when devising, implementing, and auditing their whistleblowing arrangements. The draft guidance provides a step-by-step guide, covering what employers should know before developing whistleblowing policies, practical advice for managers in receiving and responding to concerns, suggestions for how to foster a positive environment which would allow staff to staff raise concerns, case studies

of how particular complaints could be dealt with, and a policy template to be adapted for use in individual organisations.

Nursing and Midwifery Council (NMC)

5.3 As a result of the Margaret Haywood case, the NMC decided that nurses and midwives needed clearer information about how to appropriately raise and escalate concerns in a way that is safe for patients and that will not bring the whistleblower into conflict with the NMC code of conduct. The NMC has recently consulted on its draft whistleblowing guidance document. The draft guidance sets out registrants' rights under the Public Interest Disclosure Act, the difference between raising a concern and making a complaint, the differing roles of practitioners and employers in raising or dealing with concerns, guidance on confidentiality requirements, and then the general steps a whistleblower should always take when raising a concern. One of the potentially most useful tools in the guidance is a flowchart which sets out sequentially the steps and basic issues to be considered when raising or escalating any concern. The guidance concludes with a list of organisations nurses or midwives can contact for further advice or assistance.

General Medical Council (GMC)

5.4 The GMC has produced a general guidance document for its registrants on how to raise concerns about patient safety for any reason. The guidance is based on the GMC's core guidance for doctors, which is similar to the standards the HPC sets for its registrants. After detailing the appropriate way to raise and escalate a concern through internal channels, the guidance also advises registrants on situations in which it is appropriate to raise concerns with external authorities including:

- If the registrant cannot raise the issue with the responsible person or body locally because that person or organisation is part of the problem;
- If there is an immediate risk to patients from a colleague and an external body needs to be alerted straight away (though in such cases the registrant should also make the employing/contracting body aware of the concerns and the action taken);
- If they have raised concerns through local channels but are not satisfied that the responsible person or body has taken adequate action.

5.5 The GMC also advises its registrants that it may be appropriate to make their concerns public, provided that patient confidentiality is not breached.

Care Quality Commission (CQC)

5.6 The CQC has produced whistleblowing guidance aimed at regulated care organisations and staff employed in those organisations. The aim of the guidance is to ensure that care service providers know how internal whistleblowing arrangements can help safeguard the interests of people using their services, and that staff in regulated care services know they can make whistleblowing disclosures to the CQC and that CQC will respond appropriately when they do. The guidance covers the issues care

organisations should consider when developing and putting effective whistleblowing policies in place, as well as practical guidance for staff in those organisations about how to raise concerns, their rights under the Public Interest Disclosure Act, and sources of additional information.

General Dental Council (GDC)

- 5.7 The GDC has produced a guidance document on whistleblowing: *Principles of Raising Concerns*, which sets out the principles its registrants should consider when raising concerns, based on the standards set for the dental professions. The aim of the guidance is to help and encourage dental professionals to raise concerns they have that patients might be at risk because of a colleague's health, behaviour, or professional performance, or because of any aspect of the clinical environment. As well as setting out the principles for the behaviour required of registrants, the guidance also advises registrants on when to contact the regulator or other bodies to make complaints, and refers them to other sources of useful information.

General Optical Council (GOC)

- 5.8 While the GOC has not produced specific guidance of its own for its registrants, it has supported a Council for Healthcare Regulatory Excellence (CHRE) cross-regulatory statement on whistleblowing, and posted the statement on the standards section of its website. The statement covers the general responsibilities of healthcare professionals to protect patients and service users, and the legal rights and responsibilities of employees and employers.

6. Our proposals

- 6.1 While we recognise the value of producing useful advice to our registrants on their rights and responsibilities regarding raising and escalating concerns in the workplace, there are a number of issues the Council should consider before we can do so.
- 6.2 Any advice the HPC does provide would necessarily need to be high-level, in order to be relevant to all the professions we regulate. However, we would want to avoid providing advice that was so general in nature that it was not useful for registrants, or duplicating information readily available elsewhere. Because of the wide range of employment situations and organisations our registrants work in, some of the best advice the HPC may be able to provide would be to direct registrants with concerns to the most appropriate places to access further information or assistance. This could include referring registrants to relevant employer policies or procedures for raising and escalating concerns.
- 6.3 If the HPC decided to produce a formal guidance document on raising and escalating concerns, a period of formal consultation on an approved draft guidance document would be needed, followed by a process to finalise the guidance reflecting the responses received. This process would take a period of up to 18 months.
- 6.4 The Council may be aware that the Policy and Standards department regularly provides advice to registrants who ask for clarification of the HPC standards in relation to employment and the policies and practices carried

out in different organisations. While we are often asked to respond to queries relating to concerns about professional behaviour or workplace standards, a very small proportion of the matters we have been made aware of are serious enough to be considered as whistleblowing issues.

6.5 We propose that the HPC should provide advice on whistleblowing to its registrants through a variety of means rather than producing than formal guidance. Ways of producing and disseminating this information could include:

- Relevant information posted on the HPC website, including advice on which of our standards apply to registrants who wish to raise or escalate concerns, and links to relevant external organisations or useful and authoritative resources on whistleblowing issues;
- Articles on whistleblowing and associated issues for registrants to consider to be published in Infocus—the HPC’s regular bi-monthly newsletter;
- Producing an informal flowchart setting out the general process for raising and escalating concerns—this could be published either in Infocus or on the website as appropriate.

7. References

CHRE joint draft healthcare regulator’s statement on whistleblowing, General Optical Council,

http://www.optical.org/goc/filemanager/root/site_assets/codes_of_conduct/chre_whistleblowing_statement.pdf.

Guidance on raising concerns about patient safety, General Medical Council, http://www.gmc-uk.org/static/documents/content/Raising_concerns.pdf, September 2006.

Guidance: whistleblowing arrangements in regulated care services, Care Quality Commission, http://www.cqc.org.uk/db/documents/whistleblowing_arrangements.doc, January 2007.

Guide to the Public Interest Disclosure Act, Public Concern at Work, <http://www.pcaw.co.uk/law/uklegislation.htm>, 2003

Notice of Decision and Order, HPC Conduct and Competence Committee, 28 October 2008.

Nursing and Midwifery Council and Royal College of Nursing press release on Margaret Haywood case, http://www.rcn.org.uk/newsevents/press_releases/uk/joint_nmc_and_rcn_statement_on_margaret_haywood_high_court_verdict, 12 October 2009.

Principles of raising concerns, General Dental Council, <http://www.gdc-uk.org/NR/rdoonlyres/29694F3A-B730-40B6-A47E-A9F431303FBB/0/RaisingConcerns.pdf>, October 2009.

Protection of Whistleblowers, Direct Gov website,
http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/Whistleblowingintheworkplace/DG_10026552.

Raising and escalating concerns: guidance for nurses and midwives, draft guidance, <http://www.nmc-uk.org/aDisplayDocument.aspx?DocumentID=7322>, Nursing and Midwifery Council, January 2010.

Report of the Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005 – March 2009, http://www.midstaffsinquiry.com/assets/docs/Inquiry_Report-Vol1.pdf, March 2010.

Speak up for a Healthy NHS, draft guidance, NHS Social Partnership Forum and Public Concern at Work, March 2009.