

“FREEDOM TO SPEAK UP”

AN INDEPENDENT REVIEW INTO CREATING AN OPEN & HONEST REPORTING CULTURE IN THE NHS

PROCEDURES PROTOCOL

1. INTRODUCTION

- 1.1. “Freedom to Speak Up” (“the Review”) is an independent review into creating an open and honest reporting culture in the National Health Service. The Review, which was commissioned by the Department for Health (DH), is looking at what further action is necessary to protect those individual NHS workers who speak out (commonly referred to as whistleblowers). This Protocol addresses the procedure that has been adopted by the Review Chairman (Sir Robert Francis QC) for the conduct of the Review.
- 1.2. The Review is investigating issues of public concern and the intention is that it will do so in as open and transparent a manner as possible. It will not conduct formal hearings or sit in public but will keep the public informed of its activities and processes through updates on its website. The Review aims to conduct a rigorous and fair examination of the material and to produce a comprehensive analysis in a prompt and open manner. This Protocol is intended to reflect those intended features.
- 1.3. For the Review to operate most effectively and efficiently it needs to operate flexibly. As a result, the procedures set out in this Protocol may be subject to amendment as the Review progresses; any such amendments will be published on the Review’s website.

- 1.4. This Protocol is not intended to cover every procedural issue which might arise in the course of the Review. When procedural decisions are necessary they will be made by the Review's Chairman. Any resulting changes to procedure will be published on the Review's website.

2. FOIA/DPA

Freedom of Information Act 2000

- 2.1. The Review is not a 'public authority' within the meaning of s.3(1) of the Freedom of Information Act 2000 (FOIA). The Review is not therefore subject to FOIA and so is not obliged to respond to any requests for information it may receive under FOIA.
- 2.2. Furthermore, given the Review is separate from and independent to DH, the Review does not hold its information on behalf of DH and so information held by the Review is not information "held" by DH within the meaning of section 3(2) FOIA, except where the same information has either been provided from DH to the Review or provided from the Review to DH (such that DH holds the same information on its own behalf).
- 2.3. DH has provided the Review with physical and electronic facilities to store information to which only members of the Review have access. All access to the information is controlled by members of the Review. DH does not provide any other assistance in, or make any decisions in respect of, creating, recording, filing or removing the information.

Data Protection Act 1998

- 2.4. The Review will register with the Information Commissioner's Office as a data controller.

3. RETENTION OF DOCUMENTS

- 3.1. The Review will not retain people's data for longer than is necessary.
- 3.2. After the Review has provided its Report it will give consideration to those documents which it needs to retain and the period of time for which it needs to retain them.
- 3.3. Once it is no longer necessary for the Review to retain documents it intends to adopt the following approach:

Hardcopy documents provided by individuals: hardcopy documents will be destroyed securely.

Documents provided electronically by individuals or stored by the Review electronically: documents held electronically will be deleted.

Documents generated by the Review: these will be destroyed or archived at the Review's discretion.

4. PAST AND CURRENT CASES

- 4.1. The focus of the Review is to identify measures to foster an open culture of reporting and protect those workers who do speak out in the future. The Review will look at previous and current practice and it encourages individuals who have experience of whistleblowing within the NHS to share that experience, positive or negative, with it. Nonetheless the Review has no power to, and will not, investigate the grievances and complaints of individual whistleblowers and nor will the Review pass judgment on individual cases. Nothing which the Review does should be taken as indicating that it has ruled on individual cases or intends to do so.

The making of a 'protected disclosure' to the Review

- 4.2. As far as allowed to by law the Review will respect the confidentiality of information provided to it in confidence. The Review is not a person or body to which a 'protected disclosure' (as defined by section 43A of the Employment Rights Act 1996) may be made. Where a worker makes a

disclosure to the Review, which the Chair considers would have the potential to be a 'protected disclosure' if the disclosure had been made to a person or body in accordance with sections 43C to 43H of that Act, the Review will liaise with the worker about where their disclosure should properly be directed.

- 4.3. The Review will only pass such disclosures to the Department of Health (through its Correspondence Unit), the relevant employer or appropriate regulator, and without the agreement of the worker, if the matter appears to the Chair to be of a serious and urgent nature and it is in the public interest to do so. Otherwise disclosures to third parties will only be made without the agreement of the worker where the Review is required to do so by law.
- 4.4. Where a disclosure is passed to DH's Correspondence Unit it will process the disclosure as if it had been made directly to it.

5. REVIEW STAFF AND CONTACT DETAILS

- 5.1. The following have been appointed to the Review:
 - Joanna Donaldson is Director to the Review
 - Cheryl Cavanagh is Deputy to the Director of the Review
 - Tracey Eckersley is Deputy to the Director of the Review
 - Amy Key is Head of Communications
 - Simon Lynch is Legal Adviser to the Review
 - Joseph Smith is Knowledge Management and Governance Manager
 - Rosena Hynes is Secretariat Support to the Review
- 5.2. The Chair may also appoint additional staff and such advisers or other individuals to the Review as necessary to fulfil his Terms of Reference.
- 5.3. The Review secretariat and any additional appointees to the Review will provide undertakings of confidentiality to the Chairman regarding the information and

documents which they acquire or become acquainted with in the course of their work for the Review.

- 5.4. Correspondence should be addressed to the Director of the Review and sent to:

Freedom to Speak Up
Room 305a
Skipton House
80 London Road
London SE1 6LH

Additional contact details for the Review will be published on its website www.freedomtospeakup.org.uk and are available upon request to the Director.

6. OFFERING INFORMATION TO THE REVIEW

- 6.1. If any person wishes to submit information to the Review for consideration they should send it addressed to the Secretariat by Wednesday 10 September 2014. See www.freedomtospeakup.org.uk for details on how to contribute.
- 6.2. No original documents should be submitted to the Review. Documents submitted to the Review will be destroyed at its conclusion (see paragraph 3.3 of this Protocol).
- 6.3. The Chair may at any time before the conclusion of the Review invite individuals or organisations to set out their position in writing on specific matters.

Requests for information

- 6.4. The Review may seek relevant information and documents from any individuals and organisations it considers to have knowledge or control of material relevant to the Review's Terms of Reference.
- 6.5. In order to meet the Review's reporting timetable, recipients of a request for information will be asked to respond promptly in order to facilitate review of the documents. Those responding to the invitation to share their experience and views on the Freedom to Speak Up website should do so by Wednesday 10 September at the latest.
- 6.6. Where a request for information is made by the Review, recipients should ensure that they:

- Provide full contact details of an individual responsible for assisting with the request on behalf of their organisation (address, telephone number, and e-mail);
 - Take immediate steps to preserve potentially relevant material; and
 - Put practical arrangements in place for searching holdings, in anticipation of further guidance and requests from Review staff.
- 6.7. The Review may request disclosing parties to complete an information questionnaire so that there is clarity as to:
- The scope and nature of the searches undertaken;
 - The categories of material held and considered of relevance, their format, volume and proposed method of review; and
 - Any confidential or sensitive information together with any grounds for such claim.
- 6.8. In the event that fresh information or documents come to the attention of a person providing the Review with information, or if there is a material change in relation to the status of material previously given to the Review the fact must be notified to the Review immediately.

Confidentiality

- 6.9. Those submitting documents or giving evidence to the Review are invited to indicate (ideally in advance) any areas which may be of a confidential or sensitive nature, with grounds for the claim. Subject to any overriding legal obligation to the contrary and subject to paragraph 4.3 of this Protocol, the Review will treat such information as confidential.
- 6.10. The Chairman will only use confidential material in his Report where it is considered relevant and will use best endeavours to present the material in such a way as not to breach any express or implied obligation of confidentiality, including, if appropriate, anonymising it and ensuring that individuals cannot be identified from it.
- 6.11. All documents generated and information communicated by the Review staff, witnesses and other persons or organisations reporting to the Review are to be treated as confidential unless and until they are published, or upon receipt of written

authorisation from the Review and/or any other person to whom the confidence is owed.

- 6.12. Any unauthorised use or breach of confidence in relation to communications, information and documents generated by the Review and during the course of its business may be actionable.
- 6.13. The Review reserves the right to seek written undertakings from individuals before disclosing particular documents and information to them. Further guidance and instructions will be issued as appropriate.

7. MEETINGS

Meetings

- 7.1. Where the Chair considers the Review will be assisted by discussions with any individual, he will invite them to meet with him or a member of the Review. Such meetings may be conducted in person, by telephone or by video-link having due regard to the security and sensitivity of the matters to be discussed.
- 7.2. Any person who is invited to a meeting (an attendee) may be notified, in advance, of any particular topics or questions which may be discussed. Where the Review wishes an attendee to comment on a particular document the Review will ensure that they are provided with a copy of that document. The Review may require attendees to address topics or questions in writing, ahead of the meeting.
- 7.3. All attendees will be sent a brief factsheet giving them information about the practical arrangements for their meeting with the Review.
- 7.4. In the unlikely event that the Review identifies material disputes of fact or areas of potential criticism of any person or individual likely to be identifiable in the final report, before the meeting takes place, the attendee will (so far as possible and subject to any requirements of confidentiality) be notified of these, provided with an indication of the basis for them and given an opportunity to respond.
- 7.5. Meetings will be conducted by the Chair or other members of the Review team at the Chair's discretion and a transcript or record of the meeting will be kept for the duration of the Review on the understanding that it is confidential as between the Review and any attendees with whom it is shared. In the case of meetings with

individuals a copy of the transcript or record will be made available to the attendee for their review as soon as practicable after any meeting has taken place.

- 7.6. Those who are invited to attend a meeting may be accompanied by another person. Attendees who intend to be accompanied should inform the Review in advance of the identity of the person who will accompany them. Any person accompanying an attendee maybe required to sign a confidentiality undertaking. The Chair or Review team member conducting the meeting may permit them to ask supplementary questions.
- 7.7. The Review reserves the right to exclude from a meeting any persons who do not conduct themselves in accordance with the directions of the Review.

Clarification of information provided to the Review

- 7.8. Both before and after any meeting/s, but before the conclusion of the Review, an attendee may address in writing any matter s/he wishes to bring to the attention of the Review, concerning their own evidence.
- 7.9. Further provision of information to the Review by attendees must be received promptly following their meeting with the Review, unless the Review considers there to be exceptional circumstances and the attendee has received from the Review written agreement to extend time to a specified date and time.
- 7.10. If, as a result of other meetings or the provision to the Review of new documents or fresh information, the Review becomes aware of any conflicts of evidence or areas of potential criticism against any individual or organisation likely to be identifiable in the final report where there has not been prior notice, that person (or in the case of an organisation, its nominated representative) will be given an opportunity to respond in writing or by way of a further meeting as appropriate.

Expenses

- 7.11. Attendees who are civil servants, or employees of the NHS should contact their departments for payment of expenses and comply with their employer's requirements for such claims. In other cases the Review will consider paying reasonable travel, accommodation and other reasonable expenses of attendees on written application to the Secretariat. Receipts will be required for all claims. It is not expected that attendees will require to be legally represented or advised and in any event the Review will not pay for or contribute to the costs of any legal representation.

8. MEDIA

- 8.1. The Review intends to be open and transparent in its workings. As noted in paragraph 9 the Review intends to publish on its website frequent updates of its work. Nonetheless, the Review recognises that it is likely to deal with highly sensitive and highly confidential material, for example relating to individual whistleblowers. With this in mind all meetings will be in private unless otherwise agreed. The media is asked to act with sensitivity and care in its reporting of the Review.
- 8.2. The Review will not facilitate media interviews with individuals who have provided information to the Review and neither will it respond to queries regarding individuals.
- 8.3. All media enquiries about the administration of the Review should be directed to Amy Key.

9. REPORTING

- 9.1. The Chair intends to publish frequent updates on the progress of the Review on the Review's website. Otherwise important decisions about the running of the Review, press notices and other information about the Review will be published on the Review's website if and when the Chair considers appropriate.
- 9.2. The Review intends to provide a report to the Secretary of State for Health by the end of November 2014.
- 9.3. In the event that any individual or organisation is the subject of any allegation or potential or actual criticism and they are likely to be identifiable in the final report, that person (or in the case of an organisation, its nominated representative) will be provided with an opportunity to comment on the substance of the criticism before the report is finalised and published. Any such disclosure will be subject to paragraph 6 above. It is not the Chair's intention that individuals and organisations who are offered the opportunity to comment will be entitled to or offered sight of the draft report or any part of it.
- 9.4. The final report will be published by Sir Robert Francis QC.

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