

Witness Name: Sybille Raphael

Statement No.: WITN7729001

Exhibits:

Dated: 13 October 2023

INFECTED BLOOD INQUIRY

WRITTEN STATEMENT OF MS SYBILLE RAPHAEL

I provide this statement in response to a request under Rule 9(1) and (2) of the Inquiry Rules 2006 dated 22 September 2023.

I, Sybille Raphael, will say as follows:

Section 1: Introduction

1. Please set out your name, address, date of birth and any professional qualifications relevant to the duties you discharge as the Legal Director of Protect.

1. Name: Sybille Raphael.

Address: The Green House, 244-254 Cambridge Heath Rd, London, E2 9DA.

Date of Birth: GRO-C 1976.

Relevant professional qualifications to my duties as Legal Director of Protect:
Practising solicitor (admitted in 2006), Avocat au Barreau de Paris (2001-2003),
Ancien Secrétaire de la Conference du Stage (2002)

LLM in English Labour Law, King's College London (2006)

Masters in employment law (DESS) and MA in general private law, Paris - Pantheon – Assas University (2000)

Master's degree, Service Public, Sciences Po Paris (1997)

2. Please provide a brief outline of the role and responsibilities of Protect, and your role as Legal Director.

2. Protect is the UK's whistleblowing charity, a leading authority on whistleblowing law and practice. Established as a charity in 1993, it has to date individually advised more than 50,000 whistleblowers and helped hundreds of organisations set up or improve their whistleblowing arrangements. It regularly provides evidence to Parliament and government departments. It has successfully intervened in numerous appellate cases involving the interpretation, scope and application of whistleblowing legislation. Protect is lobbying for legal reform of the Public Interest Disclosure Act 1998 as incorporated in the Employment Rights Act 1996 and has drafted new whistleblowing legislation. It has unparalleled insight and unique expertise in how whistleblowing works in practice.
3. I am a specialist whistleblowing lawyer working alongside employers, regulators and whistleblowers. I have in-depth knowledge of the law and the practical realities of whistleblowing and have a key role in Protect's legal reform campaign, pushing for improvement to the UK whistleblowing legal framework. I supervise Protect's free legal advice line and its team of legal advisers advising whistleblowers on how to raise their concerns in safe and effective ways and their legal rights. I also have wide-ranging expertise in helping organisations improve their whistleblowing arrangements and speak up culture, delivering training and consultancy.

Section 2: Public Interest Disclosure Act

3. Why does Protect consider that a reform of PIDA is needed?

4. Since 1998 the Public Interest Disclosure Act (PIDA) has made it unlawful to subject a worker to negative treatment or to dismiss them because they have raised a whistleblowing concern (protected disclosure). At the time it represented one of the first acts of its kind and made UK whistleblowing law one of the most supportive for whistleblowers in the world. Thousands of workers have used their employment rights either via tribunals or to negotiate settlements. It has also transformed many businesses who have created sophisticated whistleblowing systems to deal with wrongdoing and malpractice raised by their staff in banks, hospitals, schools etc. Yet whistleblowing protection has not been significantly reformed for 25 years¹.
5. There are several reasons we advocate for reform. First, after 25 years, **PIDA no longer reflects the modern workplace**. Following the growth of the 'gig economy' and the focus on less traditional forms of employment, large parts of today's workforce are excluded from protection.
6. Second, internationally PIDA is slipping behind reforms seen in Europe (driven by the EU Directive on Whistleblowing) and Australia. **PIDA is narrowly focused on compensation and, unlike the EU Directive, says very little on what is expected of organisations** in terms of systems they need to have in place to protect whistleblowers and investigate the concerns they raise. Our YouGov 2023 research found 45% of people surveyed said their employer had a whistleblowing policy, but 39% said they did not know or were not sure². The same research also found that only 30% of people said they knew how to raise a whistleblowing concern at work, with 33% saying they didn't but could find out if they needed to, 22% saying they didn't know and 15% were unsure³.
7. A third reason for reform is to address the UK's **piecemeal approach to developments of the whistleblowing law** shaped by the courts. Some decisions, such as *Day v Lewisham & Greenwich NHS Trust* [2017] EWCA Civ 329 and *Gilham*

¹ The last set of reforms were in 2013 which created an annual reporting duty on regulators and expanded those protected by the act to include student nurses, doctors and job applicants in the NHS.

² YouGov 2023 total sample size was 2088 adults. Fieldwork was undertaken between 1st -2nd August 2023. The survey was carried out online. The figures have been weighted and are representative of all UK adults (aged 18+).

³ Ibid.

v Ministry of Justice [2019] UKSC 44 extended the scope of the law to junior doctors and district judges but the statute has not been amended to reflect this. This creates legal uncertainty, as Parliament has not confirmed for instance the extent to which office holders should be protected. It is unfair for legal developments to be left to individual whistleblowers who have to bring often expensive claims through the tribunal system. It also badly serves the public interest to have such a piecemeal approach to legal reform.

8. A fourth reason for reform is **access to justice**. The law is little known - less than half of UK adults are aware there is a law that protects whistleblowers⁴ – complex, little understood and hard to access for whistleblowers. Whistleblowing law is notoriously difficult, with various legal tests to go through for a claim to ultimately succeed at Tribunal (Was it a disclosure of information rather than a mere allegation? Was there a reasonable belief? Was the disclosure made in the public interest? Was the disclosure about one of the 6 categories of wrongdoing? Etc.). Specialist legal advice is vital, research has found whistleblowing claims are more likely to be successful if the whistleblower has legal representation⁵. Yet, only 45% of freestanding whistleblowing claimants are legally represented⁶ compared to 90% of employers. There is a clear **disparity in arms** many whistleblowers face when bringing a claim to the employment tribunal. Time limits are also particularly punitive for whistleblowers. Whistleblowing is usually a long journey, with workers raising their concerns informally first, then having to escalate their concerns when ignored. The three-months (or seven days in interim relief cases) time limit to bring a claim makes little sense in real life.
9. In Protect's view there should be a number of specific reforms⁷ to strengthen the legal framework, and most of these will impact the speak up culture and practice of the NHS. We summarise below the key ones that are particularly relevant to the healthcare sector.

⁴ Taken from YouGov commissioned survey, carried out in 2023 total sample size was 2088 adults. Fieldwork was undertaken between 1st - 2nd August 2023. The survey was carried out online. The figures have been weighted and are representative of all UK adults (aged 18+).

⁵ Whistleblowing with Discrimination at Employment Tribunal, The British Academy and others, page 11
<https://gala.gre.ac.uk/id/eprint/31407/1/%23Legalsupportmatters%20December%202020.pdf>

⁶ *ibid*

⁷ For more details see our draft whistleblowing protection bill: <https://protect-advice.org.uk/campaign-for-a-new-whistleblowing-bill/>

Legal requirements to have effective whistleblowing arrangements

10. At present, there is no legal requirements for employers to have any whistleblowing arrangements. A few sectorial regulators have issued guidance (including in the health sector), but these vary. And pharmaceutical companies for instance have no obligation to have any whistleblowing arrangements in place. Indeed, there is no obligation to tell staff how and to whom they could or should report wrongdoing. We advocate for this information to be included in the statement of initial employment particulars that employers must give to new staff⁸. We would also like to see a proactive duty on employers to prevent whistleblower victimisation, and a requirement that they must respond to concerns raised with them, within a reasonable time frame, investigate and give feedback to whistleblowers. The NHS England Speak Up Policy, which is a template policy used widely, creates an expectation that feedback will be given in some circumstances but there are no specific timeframes. On the Protect advice line we have examples of callers waiting months for a response and of promised deadlines being frequently missed. We generally find a lot of inconsistencies between Trusts and between different areas of the NHS. This duty would not be onerous - a similar duty is already imposed to all organisations with 50 or more staff across Europe while a duty to prevent victimisation of a whistleblower could be compared with the new duty to prevent sexual harassment in the workplace, introduced by the Worker Protection (Amendment of Equality Act) Act now before Parliament.

Expanding PIDA's protection to include Non-Executive Directors and volunteers

11. There are a large range of people in today's workplaces who are not covered by the protection of whistleblowing law. These include the genuinely self-employed, trustees, volunteers, and non-executive directors. The NHSE Speak Up policy⁹ gives a specific role to organisations with boards to ensure that there is a non-executive director

⁸ Amendment of Section 1 of the Employment Rights Act – Statement of initial employment particulars to insert: "Any procedure workers should use to report protected disclosures as defined in Section 43A"

⁹ [PAR1245i-NHS-freedom-to-speak-up-national-Policy-eBook.pdf \(england.nhs.uk\)](#)

responsible for Freedom to Speak Up who could provide “*independent support for the guardian; provide a fresh pair of eyes to ensure that investigations are conducted with rigour; and help escalate issues, where needed*”. However, should a non-executive director themselves wish to escalate concerns, they would have no whistleblowing protection and would have no remedy if they lost their position or were treated detrimentally. The current definition of who is protected is too narrow to reflect the reality of working life, and protection should be extended to include all who may witness workplace wrongdoing and who may wish to raise whistleblowing concerns, including contractors and suppliers. Whistleblowers in the supply chain may have had an important role to play in stopping infected blood being used. An additional change should be to include those who are mistakenly identified as whistleblowers, who are also currently without redress

Simplifying the law and making it more accessible

12. The law is also overly complex and places the burden of proof on the whistleblower. We propose to reverse the burden of proof, as well as bringing whistleblowing claims more in-step with other employment claims like discrimination. We also propose that the test for whistleblower dismissal is brought in line with that for detriment, so that whistleblowing only has to be a material factor not, as now, the principal reason for dismissal. The current law has led to cases such as *Kong v Gulf Bank International* [2022] EWCA Civ 941 in which the whistleblowing can be separated from the upset caused, and the employer can be found to have dismissed for the (almost inevitable) breakdown in relationship that follows. This is a common issue: in Protect’s recent survey of callers to our Advice Line almost 80% said that their whistleblowing had upset or offended someone at work. Increasing time limits and providing legal aid would help whistleblowers get personal redress for the victimisation they too often suffer. Enabling the judges to make recommendations (as in discrimination cases) and sanction employers who have been found liable for whistleblowing victimisation (maybe on the model of the 25% uplift for non-respect of an ACAS code practice) will ensure a longer-term impact on whistleblowing practice at their (ex) employer which so many whistleblowers would want to see.

Making disclosure to a Trade Union representative protected

13. Trade unions can often be the first point of contact for whistleblowers to seek advice and support, but currently the legal tests for approaching a trade union or staff representative are the same as disclosures to the media. This is inconsistent with the fact that raising concerns with a trade union lawyer has the same (easier) legal test as a disclosure to the employer¹⁰ and does not reflect PIDA's aim to encourage raising concerns internally and treat press disclosure as a last resort. We would like to see the protection whistleblowers receive when obtaining legal advice extended to trade union and staff representative

4. What legal and/or regulatory reforms would be needed to create a culture and practice of speaking up in the healthcare service in the UK?

14. Ignoring NHS whistleblowers can be a matter of life and death – as the awful events at the Countess of Chester Hospital reminded us¹¹. Whistleblowing is a vital early warning system and is fundamentally about accountability: those who speak up want harm addressed.

15. Following the Mid-Staffs public inquiry and Sir Francis' Review¹² all staff are likely to have heard about "Speaking Up" but numerous press stories and Protect's evidence¹³ suggest that **the issue is not about speaking up but about listening up**. 76% of the NHS whistleblowers¹⁴ contacting our Advice Line have tried to raise their concerns¹⁵ before speaking to Protect for advice, typically to a line manager. Most NHS whistleblowers also said they believe their **concerns have been ignored (36%) or**

¹⁰ Disclosures made to trade union or staff representatives are protected under 43G other disclosures, or sometimes termed a wider disclosure, while disclosures made to a trade union lawyer are protected under 43D of the Public Interest Disclosure Act 1998.

¹¹ <https://www.bbc.co.uk/news/uk-66120934>

¹² <http://freedomtospeakup.org.uk/the-report/>

¹³ Data from a two-year period between September 2021- September 2023 providing analysis from 300 cases where Protect provided advice to NHS whistleblowers

¹⁴ Data from a two-year period between September 2021- September 2023 providing analysis from 300 cases where Protect provided advice to NHS whistleblowers

¹⁵ The top three types of concerns that NHS whistleblowers either raise or are considered to raise included Patient safety (46%) Working practices (which includes things like governance, recruitment, bullying, discrimination) (32%) and Ethical concerns (16.7%)

denied (10%)¹⁶. 31% say that their concerns were under investigation, 9% admitted, 3% resolved (11% unknown or unreported)¹⁷. Worryingly, raising concerns in the NHS seems to result far too often in whistleblowers being retaliated against – being bullied, dismissed or reported to their professional bodies. We have found that NHS staff face slightly **higher rates of victimisation compared to other sectors**. 73% of NHS whistleblowers calling our Advice Line said they were victimised, dismissed or felt they had to resign after raising concerns, compared to 67% among all other sectors¹⁸. Some NHS staff – often those who raised concerns about colleagues - spend months if not years on suspension as a result of retaliatory accusations.

16. The issue does not seem to be so much the lack of willingness to speak up but the **inability to listen, to investigate the concern and avoid victimising the whistleblower**. At Protect, we have worked with hundreds of organisations to improve the effectiveness of their whistleblowing arrangements. We believe that strengthening accountability and oversight at Board level, having mechanisms to amplify the whistleblower's voice, imposing standards on NHS trusts or healthcare providers and ensuring the regulators properly enforce these would strengthen the culture and practice of speaking up in the healthcare service.

4.1 Oversight and accountability at Board level

- (i) ***Boards should be accountable for ensuring the effectiveness of whistleblowing within their organisation***

¹⁶ Full NHS whistleblower data set: Denied 10%, Ignored 36%, Admitted 9%, Resolved 3%, Under investigation 31%, Unknown 5%, NA/Unrecorded 6% Sample size: 227.

¹⁷ Ibid

¹⁸ NHS (UK wide) whistleblower data: Disciplined/victimised by management, 35%, Bullied by coworkers 7%, Suspended 5%, Dismissed 13%, Resigned 13%, no victimisation 18%, Thanked 2%, Unknown/NA 7%. Sample size: 228. Out of these 228 cases where NHS whistleblowers had already raised their concerns, 117 were raising patient safety concerns.

Breakdown for victimisation for this group was as follows:

Victimised or disciplined by management = 39 (33.3%)

Bullied by coworkers = 11 (9.4%)

Suspended = 6 (5.1%)

Dismissed = 20 (17.1%)

Resigned = 13 (11.1%)

No victimisation = 17 (14.5%)

Thanked = 3 (2.6%)

Unknown/NA = 8 (6.8%)

Data from other sectors: Victimised/bullied/suspended/disciplined 51%, dismissed 29%, resigned 20%. Sample size: 1590 Data taken from 2356 cases, where 1590 (65.5%) reported victimisation.

17. Effective whistleblowing is a key to leadership, accountability and integrity, three of the seven Nolan Principles of Public Life¹⁹. Protect suggests that every board member in a healthcare setting should be asked to sign that they have read, understood, and will abide by the seven Principles of Standards in Public Life. Trust boards and senior leaders are required by NHSE Speak Up Policy to “*receive a report at least annually providing a thematic overview of speaking up by our staff to our Freedom to Speak Up guardian(s)*”. In our view this is insufficient – not all whistleblowing concerns will come via the guardians, and **leaders need to be asking the right questions about whether whistleblowing in their trust is working effectively**. This includes reviewing whether staff are confident to raise concerns, and outcomes that demonstrate that concerns they are acted on.
18. Leaders should model the behaviour they want to encourage and need to be **trained** to be good recipients of bad news. Protect also supports calls for **senior managers and directors to be held to professional standards, subjected to a fit and proper persons test and banned from holding senior managerial positions where it has been shown they have ignored or victimised a whistleblower** as recommended by the Kark review of the Fit and Proper Person Test²⁰. This may encourage directors to treat misconduct regarding whistleblowing in the same “serious” category as crime and dishonesty. Effective enforcement will be vital. In the financial sector for instance, **regulatory references**²¹ set out the fitness and propriety of senior managers and are required when they move jobs internally and externally to prevent the rolling bad apple²².
19. It should also be regularly re-asserted that it is **board members’ clear responsibility and duty to escalate whistleblowing concerns to the regulator**. In the Civil Aviation industry, the safety of aircraft comes first, and it is everyone’s duty to report when things go wrong²³. The ‘Just Culture’ in aviation has been developed not with a view

¹⁹ <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2>

²⁰ Kark review of the fit and proper persons test - GOV.UK (www.gov.uk)

²¹ <https://www.handbook.fca.org.uk/handbook/SYSC/22/Annex1.html>

²² <https://www.kingsleynapley.co.uk/insights/blogs/employment-law-blog/fca-and-pra-regulatory-references-what-the-new-rules-mean-in-practice>

²³ The CAA stipulates various requirements on what should be reported and how to report incidents. Mandatory Occurrence Report has been a part of the fabric of UK aviation operations since 1976. Reporting is mandated by UK Regulation 376/2014 which requires the reporting of safety related occurrences involving UK airspace users. For more details, please see <https://www.caa.co.uk/our-work/make-a-report-or-complaint/report-something/mor/occurrence->

to punishing or blaming the wrongdoer, but to ensure lessons are learned. Action against the wrongdoer is only taken in cases of wilful malpractice, or gross negligence. Speaking up about safety has become a “no brainer” in aviation because of the clarity of the message. **Any breach of the duty of candour and any evidence of victimisation should be taken very seriously both by the service provider and the regulator.**

20. In a similar vein the GMC’s new ‘Good Medical Practice’ guidance²⁴ says doctors in leadership roles should take active steps to create an environment where staff feel it is safe to raise concerns. Making the link between leadership on speaking up and professional standards is welcome. Particularly important is the word “active”: **leaders should not just respond appropriately when concerns are raised but be responsible – and held to account - for creating the right working environment.**

21. Policies may state that victimising whistleblowers has consequences, but if those who treat whistleblowers badly continue in their post, this is the opposite message that leaders send to staff. **Those who suppress whistleblowing or treat a whistleblower badly should have their fitness to be a senior health service leader challenged.** This practice is already recognised in financial services. The Financial Conduct Authority rules make clear that they take seriously any evidence that a firm they regulate had victimised a whistleblower and that anyone found to do so may have their fitness and propriety to perform a senior role questioned²⁵.

(ii) ***Boards should nominate one director as whistleblowing champion***

22. The former chief executive of Countess of Chester hospital suggested in the press that the hospital’s board of directors were kept in the dark about Lucy Letby’s crimes and the missed opportunities to stop her²⁶. We know from the whistleblowing teams of

reporting/

²⁴ [Draft Good medical practice 2024 \(gmc-uk.org\)](https://www.gmc-uk.org/guidance/draft-good-medical-practice-2024)

²⁵ SYSC 18.3.9 The *FCA* would regard as a serious matter any evidence that a *firm* had acted to the detriment of a *whistleblower*. Such evidence could call into question the fitness and propriety of the *firm* or relevant members of its staff, and could therefore, if relevant, affect the *firm’s* continuing satisfaction of *threshold condition* 5 (Suitability) or, for an *approved person* or a *certification employee*, their status as such.
<https://www.handbook.fca.org.uk/handbook/SYSC/18/?view=chapter>

²⁶ <https://www.theguardian.com/uk-news/2023/aug/24/lucy-letby-victims-families-treated-appallingly-former-hospital-boss-susan-gilby>

financial institutions we work with that they find it very useful to have a designated whistleblowing champion appointed at board level²⁷. Having a board member whose duty it is to concentrate on whistleblowing and is expressly held responsible for the effectiveness of the whistleblowing function means a **much more direct oversight**. The champion is also a **very personal and therefore effective advocate for speaking up for the rest of the organisation**²⁸. The FCA states in their rules “A firm must allocate to the whistleblowing champion the responsibility for ensuring and overseeing the integrity, independence and effectiveness of the firm’s policies and procedures on whistleblowing including those policies and procedures intended to protect whistleblowers from being victimised because they have disclosed reportable concerns”²⁹. The NHS should follow the financial services model and expressly make the whistleblowing champion liable for the whistleblowing system.

(iii) **Boards should have a global oversight of all incidents raised**

23. Speaking up is pointless without the organisation listening up. Whistleblowing is a dialogue. A key part of a speak up culture is the **need for the organisation to listen to the concern, deal with it and learn from it**. But it is very hard for any organisation to learn from individual incidents if they are only dealt with one by one, without the ability to see trends, or a bigger picture. The infected blood’s tragedy is that there seems to have been clear knowledge of the danger of some products – but this knowledge was not shared and actioned properly.

24. At Protect, we believe it is key organisations take a **holistic view of all incidents, whether they were raised by complaints from patients, safety report or grievances from staff, or observations by members of the public**. NHSE England policy suggests that Boards receive an annual review of the concerns raised with FTSUGs – but this suggests that whistleblowing only happens via that route, when we know from our Advice Line that many whistleblowers raise concerns with managers or

²⁷ SYSC 18.4.1G10/12/2018RPA UK SMCR banking firm is required under SYSC 24.2.1R to allocate the FCA-prescribed senior management responsibility for acting as the firm’s whistleblowers’ champion. The FCA expects that a firm will appoint a non-executive director as its whistleblowers’ champion.

²⁸ NHSE contract says that there should be a senior lead and a non-executive board member responsible for whistleblowing, but it is not clear that they are held responsible for the effectiveness of their speak up arrangements

²⁹ SYSC 18.3 (Internal Arrangements) published by the FCA.

others, without the support of FTSUGs. Protect recommends having a multi-disciplinary risk register at board level where all incidents, whatever their source, are gathered (following the model used by some financial institutions) so that trends and patterns become obvious, and actions and outcomes are included.

4.2 Imposing standards on organisations

25. At Protect, we work with several hundreds of organisations who want to improve their speak up culture. We have developed a **360-benchmark tool to assist organisations measure the effectiveness of their whistleblowing arrangements**. The tool has been designed to help organisations at each stage of the process to consider what they should improve or put in place. It covers:

- governance: accountability, written policy and procedures, review and reporting
- engagement: communication and training
- operations: support and protection, records and investigations, and resolution and feedback.

26. The person responsible for managing the organisations' whistleblowing policies should complete the tool to assess where their organisation measures against the standards. Following completion, organisations are provided with a report indicating how they have performed against similar organisations, in terms of size or sector. The BMA has publicly announced they would support the introduction of a benchmarking tool in the healthcare sectors to assist organisations measure the effectiveness of their whistleblowing policies³⁰.

27. A key good practice recommendation is to ensure that **whistleblowing is explained** – and the various options for staff to report concerns both internally and externally clearly set out – as part of the **induction** of every new member of staff. This should be refreshed and repeated regularly, with **regular training**. Communicating on 'lessons learnt' should be a key part of how and why speaking up is what is expected of all staff. We also recommend that **exit interviews** are conducted (by someone other than the

³⁰ <https://www.bma.org.uk/advice-and-support/complaints-and-concerns/raising-concerns-and-whistleblowing/legislative-reforms-and-whistleblowing>

usual line manager) with a question asking the employee about to leave if they want to raise a concern, and if so, why they did not feel able to raise it before. Our research with whistleblowers in the financial services sector found that 32% of whistleblowers took nearly two years to raise their concerns³¹.

28. **Accountability maps** setting out the roles and responsibilities of management for dealing with reporting and investigating concerns, communicating with and supporting whistleblowers as well as implementing recommendation and learning from the whistleblowing concerns will also make it easier to identify who is responsible for a cover up or the continuation or repetition of a wrongdoing. In the financial sector, senior managers have **statements of responsibilities** that set these out clearly what they are responsible and accountable for³². We have many other suggestions to offer and recommend each specific organisation seeks tailored recommendations.

4.3 Amplifying the whistleblower's voice: resourcing Freedom to Speak Up Guardians

29. Since the mid-Staffs inquiry and Sir Francis' Freedom to Speak Up Review³³ that followed it, all NHS Trusts in England have a "Freedom to Speak Up Guardian" (FTSUG) – often a senior nurse who is tasked with supporting whistleblowers in their trust and changing the culture. FTSUGs are often dealing with numerous bullying and individual grievances as well as other serious whistleblowing concerns. Speak Up in the NHS is a very wide funnel and includes items that might be inter-personal grievances as well as whistleblowing. While the former may impact on patient care, asking the FTSUG to take on all the cases risks their being overloaded with grievances. Research suggests **a wide variability in how trusts implement the role, and that many FTSUGs are under-resourced**³⁴.

30. In our view **expecting FTSUGs on their own to both advise whistleblowers and**

³¹ <https://protect-advice.org.uk/silence-in-the-city-2/>

³² Senior Managers Regime | FCA

³³ <http://freedomtospeakup.org.uk/the-report/>

³⁴ Implementation of 'Freedom to Speak Up Guardians' in NHS acute and mental health trusts in England: the FTSUG mixed-methods study — University of Birmingham

drive cultural change is too much. They need **ringfenced time and resource** (including mental health support). They also need to **have direct access to and be supported by a Whistleblowing Champion at board level.** FTSUG should be a full-time role (or at least, like Trade-Union representatives, FTSUGs should be able to take reasonable time-off during their working hours to carry out their FTSUG activities) and consideration should be given to whether they should be centrally appointed by a national guardian rather than NHS organisations. **Clear independence of the role, outside of the management structure of the trust may improve the status of and/or confidence in FTSUGs.** Some Trusts have indeed chosen to appoint independent guardians providing “independent and confidential staff liaison”³⁵.

4.4 Proper enforcement by the regulators

31. Standards are at high risk of being ignored if they are not properly enforced. In any case, whistleblowing is an important barometer to test an organisation’s culture and purpose. Healthcare regulators need to inspect whistleblowing arrangements and issue sanctions where they are found defective. **Pharmaceutical companies, healthcare providers and the NHS should be held to a legal minimum standard when it comes to whistleblowing arrangements.** Any breach of duty of candour, any failure to action learnings and any whistleblower victimisation should be taken very seriously by the regulator. In Wales, there are now specific requirements applying to NHS Wales³⁶. In Scotland, the choice was made to appoint an Independent National Whistleblowing Officer (INWO) undertaken by the Scottish Public Services Ombudsman. The INWO has powers to **make recommendations for action to be taken by Boards delivering NHS services in Scotland** and has a national leadership role providing support and guidance to relevant bodies with a focus on early resolution where possible, recording, reporting, learning and improvement. It has developed a set of **National Whistleblowing Standards** that set out the high-level principles and a detailed procedure for investigating concerns³⁷. Crucially, it can **hold senior managers and ultimately the Board to account, publishing its findings and**

³⁵ <https://www.theguardianservice.co.uk/>

³⁶ www.gov.wales/sites/default/files/publications/2023-09/speaking-up-safely-framework.pdf

³⁷ <https://inwo.spsso.org.uk/about>

presenting them to the Scottish Parliament if necessary³⁸. While NHS England sets the general policy, there is no comparable body to INWO to set and enforce whistleblowing arrangements in all trusts.

32. Today in the health sector there are many regulators who can investigate concerns whether it is about fraud or patient safety. But **none that can look into the victimisation of a whistleblower**. The Medicines and Healthcare Products Regulatory Agency (MHRA) only have an email address as a means for whistleblowing disclosures to be made³⁹ and does not publicise on its website that it is keen for whistleblowers to contact them – or that they should report whistleblowing victimisation⁴⁰. Webforms and email addresses can be intimidating, some may want to discuss their concerns before deciding to make a formal disclosure. From our discussions with healthcare whistleblowers, we know that the regulators' communication with whistleblowers is often patchy, leaving whistleblowers unsure of whether their concerns are being looked at or not. There should be **clear expectations on what feedback regulators can provide to whistleblowers**, not least because whistleblowers can be ongoing eyes on the ground for regulators as to whether problems have been truly rectified.

33. The Care Quality Commission (CQC) has never – to our knowledge – sanctioned any senior health leader for victimising or silencing whistleblowers⁴¹. Indeed, it seems the CQC is not prepared to investigate whistleblowing victimisation concerns on their own. By comparison, the FCA took action against the Barclays' CEO for a breach of whistleblowing rules, imposing on him a hefty fine and agreeing ongoing requirements with Barclays⁴². In 2019, a similar agreement was reached with Lloyd's⁴³. In December 2020, a voluntary requirement was imposed on Tokio Marine Kiln Insurance⁴⁴ (i) to

³⁸ <https://inwo.spsa.org.uk/what-expect-when-we-receive-complaint-about-your-organisation> - for an example, see <https://www.thetimes.co.uk/article/nhs-board-failed-to-address-whistleblower-concerns-rfkr3cnc>

³⁹ <https://www.gov.uk/guidance/contact-mhra#whistleblower-referrals>

⁴⁰ <https://www.gov.uk/government/organisations/medicines-and-healthcare-products-regulatory-agency>

⁴¹ We have been unable to find any reports or data showing that the CQC have removed a Director for being responsible for the victimisation of a whistleblower which is considered a serious misconduct or mismanagement issue under Regulation 5 of their Fit and Proper Person Test. <https://www.cqc.org.uk/guidance-providers/regulations-enforcement/fit-proper-persons-directors>

⁴² <https://www.fca.org.uk/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements>

⁴³ <https://www.bankofengland.co.uk/news/2019/december/pr-a-announces-special-requirements-regarding-whistleblowing>

⁴⁴ <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/regulatory-action/vreq-tokio-marine-kilns->

improve awareness of how to recognise a possible whistleblowing disclosure, and (ii) to improve effective handling of such disclosures, including avoiding actual or perceived whistleblower detriment.

34. We would recommend health regulators adopting the FCA's approach that **treating whistleblowers badly could itself lead to regulatory intervention**. In our view, when staff report whistleblower victimisation this should not just be seen as an individual employment matter, it should be a **clear indicator of an unsafe working culture**. The health regulators should also impose on organisations they regulate that they:

- ensure effective assessment, grading and escalation of reportable concerns, to the appropriate regulator
- put reasonable measures in place to prevent victimisation of whistleblowers
- provide feedback where this is feasible and appropriate
- keep records of reportable concerns and treatment of concerns and outcomes.

35. Speaking up stops harm. But only if organisations are willing and able to listen, with the right structure and support to encourage, investigate and learn from concerns. Whistleblowing is not just the ability to report and address wrongdoing, it is also what holds organisations and governments to account, playing a vital role in upholding the rule of law. Our health service - just like our parliamentary democracy - relies on whistleblowers being willing and able to speak up. Protect's chief concern is that silence is contagious when speaking up is seen as futile and coming with a heavy personal cost for the individual, with the health service and its patients paying the ultimate price. Ultimately cover-up benefits no-one.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed

GRO-C

Dated: 1 November 2023