Written evidence from Hugh Wilkins

Written submission regarding the Kark report reviewing the Fit and Proper Persons Test (FPPT)

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(in a personal capacity)
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Summary

- **High level recognition of the seriousness of the mistreatment of NHS whistleblowers**
  There is increasing evidence that senior leaders in the NHS, DHSC and Parliament understand that NHS staff who speak up when things are not right are a vitally important resource, and that there is a serious problem of reprisals against them by misguided managers.

- **Failure to nip NHS scandals in the bud, despite staff knowing of problems at an early stage**
  A series of investigations into NHS scandals[1] show a clear pattern that staff knew at an early stage about major problems in the delivery of patient care within the organisation where they worked. Some spoke up about them but were ignored /bullied/ defamed/ sacked; others did not speak up. If staff did not raise concerns, despite knowing of serious problems, this was presumably because they were too afraid to do so because of the risk of adverse consequences to themselves and their careers - or because they considered that raising concerns would be a waste of time because no action would be taken in response.

- **Questionable statement in the Kark report about levels of NHS whistleblowing cases**
  There are some 48 references to whistleblowers/whistleblowing in the Kark report, and the authors make clear their opposition to the suppression of whistleblowers by directors. However, the statement that there are *"relatively low levels of whistleblowing cases in the NHS"* is unhelpful (para 10.14, p.120). Whilst the authors explain that references in their report to 'whistleblowing' mean the process of making a protected disclosure in accordance with the Employment Rights Act (para 10.9, p.119), this subtlety may be lost to others (including some who may wish to downplay the hostile environment faced by many staff who have spoken up).

- **Weakness and ineffectiveness of legislation claimed to protect whistleblowers**
  Para 10.11 (p.119) states *that "If a worker makes a "**protected disclosure**" then he or she receives protection from any subsequent retaliation from the employer in form of a detriment or a dismissal".* This may be true in theory, but in practice, as found by Sir Robert Francis QC, the legislation which supposedly protects whistleblowers[2] is "weak"[3] and "limited in its effectiveness"[4].

- **Vicarious responsibility of directors for misconduct etc by subordinate managers**
  The Kark review remit is focused on consideration of the fitness of directors of NHS organisations to undertake their roles. However, directors are dependent on the information provided to them by others. Some NHS trusts have created substantial numbers of new management posts in recent years, and there is evidence that this has led to filtering and suppression of whistleblower concerns by middle managers. Whilst the Kark report

identifies the need for misconduct, incompetence and mismanagement by directors to be addressed under the FPPT, it does not address the fitness of subordinate managers in the management hierarchy. This appears to be a lacuna.

- **Need for a Code of Ethics, Standards and Conduct for all NHS managers and directors**
  I welcome the proposal to define serious misconduct (Recommendation 5), and inclusion within this definition the list of behaviours given in para 13.5.2 (p.138). I would like to see a Code of Ethics, Standards and Conduct applying to all NHS managers and directors.

- **The NHS is a *national* service**
  I think that the first of the 'fundamental issues' noted by the authors in their Introduction (para 9, p.11) requires further consideration. The report refers to 'atomised' semi-independent states (paras 5.14 & 5.15, pp 75, 76) and (the pursuit of) foundation trust status linked with the appalling care at Mid Staffs and the Liverpool Community Health NHS Trust. However there are limits to the independence of NHS Trusts – they are expected, for example, to abide by the Nolan principles of public life and the NHS Constitution.

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1. Introduction

1.1 I contributed to the Kark review, initially through a meeting with the authors, followed up with a written submission to them. My reason for contributing, and for submitting this further evidence to the Health and Social Care Committee, is that I have become aware of serious consequences to a number of NHS staff who have raised valid concerns in the public interest, including loss of career and worse. I would like to add my voice to those of others who are seeking a radical change to the current culture which permits hostility by some NHS managers towards whistleblowers who have spoken up when things are not right.

1.2 This is not a criticism of the vast majority of NHS managers. However, amongst their ranks are some who have seriously mistreated staff who have raised concerns - as healthcare professionals are obliged to under their professional codes of conduct. Directors and other senior managers set the cultural tone of organisations, and it is self-evident that they should be Fit and Proper Persons. The current FPPT has permitted the employment and re-employment of a number of senior managers whose actions raise serious questions about their competence and honesty. I have come to know a number of whistleblowers who have been subject to life-changing retaliation and reprisals by NHS organisations after raising concerns, and think that the Kark review is an opportunity to address this serious problem.

2. The moral abhorrence and operational foolishness of the mistreatment of whistleblowers

2.1 The fact of shocking retaliation/reprisals against NHS staff has been clearly established by, amongst others, the 2015 Freedom To Speak Up Review[5]. The Health Select Committee has described the treatment of NHS whistleblowers as a stain on the reputation of the NHS[6]. The Secretary of State has publicly stated that whistleblowers are doing the NHS a great service … yet, sadly, all too often they're ignored, bullied and worse: forced out. Making someone choose between the job they love and speaking the truth to keep patients safe is morally abhorrent and operationally foolish[7].

3. Proper response to whistleblowers prevents/lessens NHS scandals

3.1 NHS staff are frequently exhorted to show leadership. Those who spoke up as the problems with Bristol paediatric heart surgery and Mid Staffordshire, amongst other NHS scandals, became apparent demonstrated leadership. Those who did not ducked the leadership challenge. Given the realities of retaliation against whistleblowers it is not hard to see why many staff prefer to keep their heads below the parapet.

3.2 Many policy documents from DHSC, NHS and related organisations emphasize the need for clinical leadership. Appropriate challenge is a key component of leadership, but experience shows that, all too often, such challenge by staff exhibiting leadership is discouraged, and suppressed by managers overly keen to provide assurance to those to whom they report.

3.3 Development of the NHS 'Workforce Implementation Plan' is a current opportunity to provide proper protection of staff who raise concerns in the public interest[8]. *"To deliver on this vision of 21st century care will not simply require 'more of the same' but a fundamental shift in the skill mix, types of roles, culture and ways of working for our workforce"*[9].

4. The number of whistleblowers who have suffered serious harm

4.1 Different people interpret the phrase *"whistleblowing cases"* in different ways.

4.2 The authors appear to have drawn their conclusions about the levels of whistleblowing cases in the NHS on a Freedom of Information response from NHS Improvement, to which they give a link (para 10.14, p.120).

4.3 However, this FOI response only refers to times when Monitor were contacted by NHS staff members wishing to "blow the whistle" on their employers. This is only a sub-set of a larger, possibly much larger, number of NHS whistleblowing cases.

4.4 The true extent of whistleblowing and bullying of whistleblowers in the NHS is unknown. I think it is time to re-visit the Health Committee's 2015 recommendation, that *"there should be a programme to identify whistleblowers who have suffered serious harm and whose actions are proven to have been vindicated, and provide them with an apology, and practical redress".* [10]

4.5 Linked to possible differing interpretations of what constitutes a whistleblowing case is ambivalence about the terms *whistleblower* and *whistleblowing*, given the pejorative perception of whistleblowers in the eyes of many. See for example Roget's Thesaurus, which provides a list of negative synonyms for whistleblower, including: rat, snitch, sneak, betrayer, double-crosser, traitor etc[11]. No wonder many are uneasy about the term.

5. Need for reform of whistleblower legislation

5.1 Current legislation which supposedly protects whistleblowers is weak and ineffective. Many feel that there is an urgent need for legal reform in this area. Employment Tribunals are an inappropriate vehicle for dealing with whistleblower cases; experience shows that they frequently lead to further bullying/harassment. Their adversarial nature promotes conflict rather than truth, justice and reconciliation. They are expensive, wasteful of significant

resources, non-compassionate, and also inconsistent with other aspects of the current NHS drive to support the workforce. They do not provide remedies which are in the interests of patients, taxpayers, NHS organisations or staff. It is time to ask whose interests are being served by the current system in which unfairly dismissed whistleblowers are funnelled into the employment tribunal system, in which they face a huge inequality of arms. Effective independent peer review would be a much better way of dealing with concerns raised by whistleblowers, rather than the present mess in which managers create employment disputes which obscure the original issues raised (which are typically to do with patient safety, fraud, and mistreatment of staff by bullying managers).

6. Vicarious responsibility of directors for misconduct etc by subordinate managers

6.1 In practice directors may be unaware of whistleblower suppression within their organisations. Managers reporting to them may provide them with misleading information, particularly if they have distorted/concealed the concerns raised and invented an employment dispute. Speaking up culture would be rapidly improved if those who bully whistleblowers were truly held to account. The main culprits in this respect may be middle managers. Whilst this does not remove the responsibility of directors, they may have been misled by subordinate staff.

6.2 Recommendation Six of the Kark report, that the words "been privy to" be removed from Regulation 5 (3) (d) of the Regulations may actually make the situation worse for whistleblowers, if directors have been misinformed. There are important questions about the vicarious responsibility of directors for misconduct, incompetence and mismanagement of middle managers reporting to them.

7. Code of Ethics, Standards and Conduct

7.1 I agree with others who have reported that the current Code of Conduct for NHS managers lacks teeth and should be strengthened[12]. It should explicitly include the need for ethical behaviour and observance of relevant standards, and apply to directors as well as other NHS managers.

7.2 This is particularly important given that NHS managers and directors are unregulated *per se*, yet have powers to wreck the careers of healthcare professionals who are required by their regulators to raise concerns in the public interest.

8. There are limits to the autonomy of local Trusts

8.1 There should be accountability for wilful transgressions of national policy, binding guidance and system-wide values – and indeed of local self-proclaimed organisational values.

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[1] Such scandals include: Bristol paediatric heart surgery, Mid Staffordshire NHS Foundation Trust, Gosport, Paterson, Baby 'P', … There are many others which could have been averted, or their magnitude reduced, if whistleblowers had been properly listened to and appropriate action taken by managers.

[2] The Employment Rights Act (ERA), as amended by the Public Interest Disclosure Act (PIDA). Many would say that ERA/PIDA is ineffective, and does not protect whistleblowers from detriment/dismissal.

[3] Freedom To Speak Up Review (2015), para 9.17, p.193 (accessed via http://freedomtospeakup.org.uk/)

[4] Freedom To Speak Up Review, Executive Summary (2015), para 12, p.4 (accessed via http://freedomtospeakup.org.uk/)

[5] Freedom To Speak Up Review (2015) http://freedomtospeakup.org.uk/

[6] Complaints and Raising Concerns (2015), p.40, https://publications.parliament.uk/pa/cm201415/cmselect/cmhealth/350/35002.htm

[7] Speech by the Secretary of State for Health and Social Care at the Royal Society of Medicine, 6 February 2019. https://www.gov.uk/government/speeches/getting-the-right-leadership-is-vital-for-patient-safety

[8] Workforce Implementation Plan. https://improvement.nhs.uk/news-alerts/highly-experienced-trust-chief-executive-lead-development-nhs-workforce-implementation-plan/

[9] New Chief People Officer to help build the NHS workforce of the future. https://www.england.nhs.uk/2019/03/new-chief-people-officer/

[10] House of Commons Health Committee, Complaints and raising concerns, Fourth report of session 2014-15, p. 40, para 115 https://publications.parliament.uk/pa/cm201415/cmselect/cmhealth/350/35002.htm

[11] Roget's Thesaurus synonyms for 'whistleblower': https://www.thesaurus.com/browse/whistleblower

[12] Shin & Manuel, On the regulation of NHS managers: it's time to revise the Code of Conduct for NHS managers. *BMJ 2017;357:j2101* https://www.bmj.com/content/357/bmj.j2101/rr