Dear Mr Townley,

Providing a ‘safe space’ in healthcare safety investigations

The British Medical Association (BMA) is an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care.

The Association welcomes the opportunity to respond to the consultation on providing a ‘safe space’ in healthcare safety investigations. Please find enclosed our submission.

The BMA’s response addresses key questions listed in the consultation document. We hope that our submission is useful – please do not hesitate to contact us for more information if required.

Yours sincerely

Raj Jethwa
Director of policy
Department of Health consultation:
Providing a ‘safe space’ in healthcare safety investigations

We strongly welcome the proposal to introduce ‘safe spaces’ into healthcare safety investigations in England. The public interest in appropriately supporting those who disclose information about patient safety issues has been emphasised in various reports including: the Freedom to Speak Up Review\(^1\); the PASC (Public Administration Select Committee) report Investigating clinical incidents in the NHS\(^2\); the DoH (Department of Health) report Maintaining High Professional Standards in the Modern NHS\(^3\), and in recent commitments made to ensure safety for whistle-blowers in medicine.\(^4\) If effective, safe spaces could provide much needed protection for doctors and other health professionals who wish to identify risks to patients but who have until now been concerned about possible repercussions.

We hope that the investigation framework will be designed and implemented in a way that can engender trust between providers and patients, building on the belief that doctors and hospitals are first and foremost committed to treating and helping patients. In doing so, it will be necessary to recognise the many practical, legal and ethical challenges involved in seeking a workable balance between the ranges of interests involved. We recognise, for example, that tension could arise between a ‘safe space’ for information about errors, a patient’s right of access to information about their care, including where they may have been harmed, and a doctor’s professional duty of candour.

As we discuss below, getting the balance right will be both challenging and essential to the success of the scheme. In principle though we fully support the intention to develop a culture in the NHS ‘in which healthcare professionals are able to report safety incidents, and participate in safety investigations secure in the knowledge that they will not be inappropriately blamed or penalized for any actions, omissions or decisions that reflect the conduct of a reasonable person under the same circumstances.’

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\(^4\) Rimmer, A. (2016) ‘Junior doctors will have whistleblowing protection added to contracts’ | BMJ Careers, available online: [http://careers.bmj.com/careers/advice/Junior_doctors_will_have_whistleblowing_protection_added_to_contracts](http://careers.bmj.com/careers/advice/Junior_doctors_will_have_whistleblowing_protection_added_to_contracts) (accessed 3 November 2016)
Which investigations and what information should the safe space apply to?

Question 1 – should the proposed prohibition apply to both investigations by HSIB, and to investigations conducted by or on behalf of NHS Trusts, NHS Foundation Trusts and other providers of NHS-funded healthcare?

Question 2 – for investigations undertaken by providers and commissioners of NHS-funded care, should the proposed prohibition on disclosure apply to maternity services in the first instance or all investigations?

As set out above, we welcome the proposal for a safe space as one element in encouraging a learning culture across the NHS.

As recognised in the consultation, healthcare regulation is complex involving a number of organisations, which also conduct investigations with statutory powers of calling for evidence and requesting information. In light of this complexity, we suggest applying the ‘safe space’ in HSIB investigations first before extending it to other investigations. This would allow any unintended consequences to be identified.

Question 3 – do you have any comments on the type of information that it is proposed will be protected from disclosure during healthcare investigations?

We agree with the proposals as outlined that information generally available to the public, and the initial statement of fact after an incident, will still be available. This allows for a necessary degree of transparency in order to ensure patient safety.

Obtaining a High Court order

Question 4 – Do you agree that the statutory requirement to preserve the confidentiality of investigatory material should be subject to such disclosure as may be required by High Court order?

Question 5 – Do you agree with the proposed elements of the test to be applied by the High Court in considering an application for disclosure?

In order to be sufficiently robust, and to ensure professional confidence, the creation of ‘safe spaces’ for information relating to patient safety incidents will need to be on a statutory footing.

The recording, processing and disclosure of data in health care is legally, ethically and practically complex. We hope that statute will introduce both clarity and a degree of legal certainty with respect to data held in, and transferred from, a safe space.

We agree with the stated purpose of statute to create a prohibition on the disclosure of information relating to certain health service investigations unless the High Court permits disclosure or one of a small number of exceptions applies. In this way, any health
professional considering disclosure will have a clear idea of how their data will be held, and any limits to non-disclosure.

If safe spaces are successful, it is likely that they will enable health professionals to disclose information about incidents effecting patient safety with greater confidence than at present. If the data are subsequently used to improve systems and practice in order to ameliorate risk, rather than to apportion blame or find fault, safe spaces are likely to be strongly in the public interest.

There are, however, a number of other rights, moral interests or obligations engaged in relation to the information that will be held in safe spaces. Although the list is not exhaustive, this will, or may include, the following:

- A patient’s prima facie right to information about any avoidable harm they may have suffered during a period of care
- Criminal justice interests where there may have been criminal activity or criminal negligence
- The interests of professional and regulatory bodies where there may have been unprofessional practice
- Patient safety – the right of patients to be protected from avoidable harm
- The professional duty of candour – the obligation on professionals to inform patients where they may have been avoidably harmed by individuals or health systems
- Accountability and good management within individual health care institutions

As discussed earlier, there will be times when these interests may be in tension with the presumptive prohibition on disclosing data held in a safe space. The consultation document goes some way towards setting out a hierarchy of rights or interests including the test to be applied by the High Court.

The proposed test involves weighing the need for disclosure against the adverse impact on HSIB’s investigatory processes and the duty to ensure continuous improvement in the healthcare system.

We accept that the High Court test will necessarily develop on a case by case basis and, over time, how the court will apply the test will become clearer. This may take a considerable amount of time depending on the frequency and nature of the investigations being undertaken. The uncertainty which this may create in the meantime could be a disincentive to individuals to participate in a safe space.

**Exceptions to the ‘safe space’ principle**

**Question 6 – Do you have any views on the proposed exceptions to the prohibition on disclosure?**

We agree with the need to ensure that safety concerns are addressed in a consistent and proper manner and that the relevant bodies should be involved wherever there is an issue relating to wrongdoing, negligence or patient safety. This should be addressed at the
earliest possible instance, i.e. as soon as the investigator is alerted to concern of this nature.

**Question 7 – Do you have any views on the threshold for passing concerns to other organisations who are involved in patient safety?**

We note the consultation document has defined patient safety concerns in differing manners, making reference to: ‘serious’ and ‘continuing risk to patient safety’ (paragraph 4.35 and 5.30); an ‘active and ongoing threat’ (5.8); and an ‘immediate risk to patient safety’ (5.39).

Paragraph 5.8 details the statement to be made by HSIB investigators explaining that information may be disclosed where there is an ‘active and ongoing threat’ to patient safety. The terminology of ‘active and ongoing threat’ also has differing connotations to ‘serious’ and ‘continuing’ risk – ‘active and ongoing’ does not necessarily indicate any level of seriousness to the safety concern or whether the concern poses significant consequences for patients involved.

In terms of defining the threshold for disclosing information to other bodies, we suggest that one uniform definition of patient safety concern be used with an explicit articulation of its scope, explaining the seriousness of the potential concern.

As identified previously, the investigative context of the NHS is complex and poses several questions over where the HSIB investigations will sit in relation to other procedures. We acknowledge the importance of aligning the processes with those of other investigative bodies to provide a uniformity of approach as identified in paragraph 5.26 of the consultation document. Although this uniformity refers to instances where High Court disclosures of information may be needed (see our response to question 11 below), we suggest that further detail be given as to the pathway of the investigation should the HSIB investigator be alerted to a ‘serious’ and ‘continuing’ risk to patient safety. As this is one of the key exceptions listed in the consultation document, further explanation of how the concern is dealt with by the HSIB investigator in reporting it to the Trust’s investigative staff or another relevant regulatory body is essential.

**Question 8 – Could the exceptions undermine the principle of a safe space?**

There is a risk that the exceptions will undermine the safe space. Individuals will understandably be concerned about their own position, and they and their colleagues may also lose faith in the concept of a safe space going forward.

To address this, we suggest the investigative body detail a non-exhaustive list of example scenarios of exceptional circumstances in both the statutory wording and any safe space policy documents. This would serve to better indicate to an individual whether they should raise their concern with another, more relevant body or follow different procedural channels. It would also protect the integrity of the safe space, making clear from the outset the basis for its use.
We also suggest the HSIB investigation inform the individual(s) raising the concern and/or involved in the investigation as early as possible of its decision to refer the matter to another organisation, the possible implications, and the support, advice and guidance available to them.

**Question 9 – Do you support the principle of a ‘Just Culture’ (making a distinction between human error and more serious failures)?**

Please see our comments in relation to question 7 above and the importance of clarity about what is meant by an active and ongoing patient safety concern.

**Questions 10 – Should the exceptions allow for disclosure of information to patients and their families? What kind of information should be disclosed in that context? When should it be disclosed?**

We strongly support a professional duty of candour, and believe that patients have a right of access to information where they have been avoidably harmed during an episode of care. As suggested in the consultation document, there may well be times when this is in tension with the strong prohibition on non-disclosure. Any information relating to a patient that is relevant to their current or future care must, in almost all circumstances, be disclosed to them promptly. The only possible exception, in very rare circumstances, would be where the patient may be further harmed by the disclosure without it providing any benefit to them. We believe that this may be a sufficiently important principle for it to be considered as a further exception to the prohibition of disclosure.

It may be possible here to draw distinctions between information necessary to appropriately inform patients, and the identification of individual staff who seek to disclose information. We recognise the real challenge here but would very much like to see further discussion about how it is intended that statute will seek to balance the relevant interests here.

**Impact on other processes**

**Question 11 – Do you see any problems in a requirement that investigatory bodies must apply to the High Court if they wish to gain access to information obtain during investigations by HSIB?**

We foresee this will cause delay in investigations for other regulatory bodies with the potential for further increasing the stress involved in these investigations for the individuals concerned.

**Question 12 – do you have any concerns about the use of the phrase ‘safe space’?**

We have no concerns about the use of this phrase.

**How should the creation of a safe space be supported?**

**Question 14 – Do you agree that guidance, or an alternative source of support, should be developed?**
Question 15 – Do you think it would be helpful for NHS staff to be supported by a set of agreed national principles around how they would be treated if involved in a local safety incident investigation? If so, do you have suggestions for the areas that such a set of principles should cover?

The BMA acknowledges the need for guidance and national principles for NHS staff and doctors. In line with our comments set out above, we support measures to clarify how doctors will be affected by the healthcare safety investigation framework as set out and what options are open to them in terms of support in using a safe space.

There are a variety of ways in which concerns can be addressed within the healthcare system. It will be essential to provide clarity about which pathways doctors, healthcare staff and patients can go down to raise concerns. We suggest that the proposed introduction of the HSIB into an already complex system is accompanied with clear written guidance on how it fits with the other investigative and regulatory procedures.

In terms of the statement by the HSIB investigator at the outset of an investigation, we agree that this should inform the individual involved in the investigation of the type of information that will be protected from disclosure by HSIB investigations.

In addition, we recommend that the statement refers in detail to the exceptional circumstances (see our comments in response to question 7 above). This would provide further clarity for the individual involved as to whether the information they wish to discuss in the safe space will be subject to the non-disclosure policy or not.

We support a statement of the intention of the investigation and the avoidance of apportioning blame, as per the statement above and the legislative framework of the AAIB (Air Accidents Investigation Branch) detailed in paragraph 5.9. A statement of this nature would reassure doctors who wish to raise a concern that the aim will be to identify the issues and potential solutions, rather than seeking to target who is responsible. This could form part of a formal policy on safe space conduct (referred to above).

We would suggest that the proposed investigative framework provide information on whether doctors working in local authorities in public health may also need protection. This is dependent on whether the HSIB investigations will operate within the NHS only – if so, thought may need to be given to potentially extending the remit of HSIB in future to consider doctors working in other settings.

Medical students on clinical placements may also witness members or staff or other students acting unprofessionally, or may experience discrimination. It is important that students in this situation are also aware of how to raise any concerns and are clear about whether it is possible to do so within the safe space framework as detailed by the HSIB.

The consultation document only makes reference to staff throughout, so it is unclear whether students will also be welcome to utilise the safe space. We suggest that clarity be given to whether medical students will be included. If they are not, we recommend that any guidance documents be accompanied with relevant signposting to resources available
for students in raising concerns. These may include the guidance offered by the GMC,\(^5\) or by specific medical schools such as UCL\(^6\) and King’s College London.\(^7\)

We are also committed to ensuring that appropriate recognition is given to the impact on patients and their families, and would recommend that written guidance be provided for these groups on the operation of the safe space investigation. It will be essential for such documentation to identify how patients can be effectively informed while also protecting individuals raising confidential concerns from disclosure.

**Equality implications**

**Question 16 – Do you have any concerns about the impact of any of the proposals on people sharing protected characteristics as listed in the Equality Act 2010?**

The introduction of a safe space is of critical importance to many marginalised groups – there is evidence to suggest that BME (black and minority ethnic) doctors believe they are more likely to receive an unfair outcome in a fitness to practice investigation if a complaint is made against them.\(^8\) Studies have also found that BME doctors and non-UK trained doctors are ‘overrepresented’ in fitness to practice procedures.\(^9\) An RCP (Royal College of Physicians of London) working party also discovered that the culture in medicine tended to be hostile toward doctors with disabilities, and that patient safety is occasionally used as an excuse to exclude these doctors.\(^10\)

It is therefore essential that any HSIB investigators are aware that, the safe space procedure operates in a wider system where significant issues of bias and discrimination exist.

To mitigate against any potential adverse impact of an HSIB investigation, we suggest:

- express reference to the protection from discrimination based on protected characteristics in any policy document on conducting safe space investigations
- training for HSIB investigators conducting safe space investigations on a broad spectrum of equality issues including cultural awareness and unconscious bias (see below)

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\(^6\) UCL Medical School (2016) ‘Raising concerns’ | University College London, available online: [https://www.ucl.ac.uk/medicalschool/quality/raising_student_concerns](https://www.ucl.ac.uk/medicalschool/quality/raising_student_concerns)

\(^7\) KCL Medical School (2016) ‘Raising concerns’ | King’s College London, available online: [https://www.kcl.ac.uk/lsm/education/meded/quality/Raising-Concerns.aspx](https://www.kcl.ac.uk/lsm/education/meded/quality/Raising-Concerns.aspx) (accessed 5 December 2016)


\(^9\) Ibid.

• regular monitoring and evaluation of the impact of safe space investigations on individuals sharing protected characteristics.

In answering question 14, we recommend that HSIB investigators in charge of safe spaces receive formal equality training in order to appropriately tackle any instances where an individual or group is suspected of being unfairly discriminated against. With regard to question 15, the presence of a trained HSIB investigator would also improve the confidence of the individual raising the concern in using the safe space, in the knowledge that their issue will be dealt with by an individual qualified in addressing equality issues.