Supporting doctors in raising concerns
BMA discussion paper and member consultation
Supporting doctors in raising concerns

Summary
If the NHS is to have a truly open and transparent culture, a fundamental change in attitude towards reporting concerns and being honest about errors or poor care is essential. There are a number of ways in which staff can be encouraged and assisted in doing this, but improvements in process and support can only go so far. Ultimately what is required is demonstrable leadership, an example which staff can follow. Doctors have a unique role to play and, backed by their professional code, can be at the forefront of leading this crucial change in attitude.

The following discussion paper reviews the problems and challenges for doctors in this area, and poses thought-provoking questions throughout. Members’ responses to these will help inform forthcoming BMA recommendations for change. Your views are essential, and we would urge you respond to the questions via our website as fully as you can. http://bma.org.uk/working-for-change/the-changing-nhs/nhs-culture

Introduction
There are clear professional duties on doctors to be open and honest with patients if things go wrong and to raise and act urgently on any concerns they have about patient safety. Despite this, we know that doctors and other healthcare professionals can sometimes be fearful about reporting concerns and worried about the implications of doing so for their practice and their ongoing relationships with management and other colleagues. Doctors also report feelings of disempowerment, and feel unable to pursue their concerns or to press effectively for change. Junior doctors particularly have concerns in this area.

A number of the Francis Inquiry’s recommendations seek to tackle these issues by promoting a culture of openness, transparency and candour. However, it is clear that more needs to be done, at both an organisational and individual level, to facilitate real and genuine culture change. The expectation that staff will openly and regularly report concerns without fear is the cornerstone of a positive and transparent culture, and must be encouraged in the NHS. This paper considers the challenges facing doctors in this area, and proposes for discussion some ideas for change.

Q: Do you believe that a more open and honest culture is achievable in the NHS? Please give reasons for your response.

Difficulties in raising concerns
The BMA believes that professional practice in the NHS should be based on a culture of openness, where reporting concerns is seen as a normal, routine and everyday part of clinical governance. Since the publication of the Francis report, some positive steps have already been taken to encourage staff to raise concerns through the publication of new guidance and helplines, and through amendments to the NHS Constitution in England. In light of the perspective that junior doctors offer through their experiences of a variety of settings over the course of a short period of time, the GMC has launched a number of investigations arising out of their annual trainees’ survey. Further discussion on the specific difficulties facing junior doctors and medical students is coming soon.
Q: What might prevent you from raising a concern about patient care and/or following it up?

Doctors have reported ‘complaint fatigue’, fear of bullying and consequent impact upon their careers, confusion about whom to approach with their concerns, time pressures, fear of personal exposure, potential, perceived or actual conflicts of interests between professional and contractual duties, and lack of confidence about whether others will support their concerns, amongst other reasons.

Q: If you were worried about the personal implications of raising a concern, what additional safeguards would need to be in place to encourage you to do so?

Doctors’ duty to act

Despite the recognised difficulties, doctors accept that as professionals and as leaders they have a responsibility and a pivotal role in ensuring all concerns that they themselves raise, or that are raised with them, are taken seriously and acted upon in a timely fashion, regardless of whether or not they are in formal managerial roles. Our discussion paper on professionalism expands upon the role of the doctor further, as does our forthcoming paper on medical management and leadership.

The BMA’s updated guidance explains when doctors should act, what they should expect and, most importantly, the steps that they should take to raise a concern. Members can also access individual advice and support from our network of employment and industrial relations advisers who are on hand to help doctors through the process of lodging a concern. We also offer a dedicated counselling service for members and a Doctor Advisor Service that allows doctors and students the opportunity to talk through any issues in total confidence. The following sections of this paper consider how the process and assistance available for raising concerns could be improved to support all staff in taking action to eliminate poor patient care, but at the same time the BMA is reviewing its own role in working towards establishing an open and honest culture in the NHS.

Q: What more could the BMA be doing to encourage and support doctors in speaking up?

Process for raising concerns

One difficulty that doctors report is confusion about the method they should use to raise their concerns. Whilst it is positive that there are so many ways in which this can be done, it also has a diluting effect and can lead to a blurring of responsibility within an organisation about whose responsibility it is to deal with the problem. The BMA’s guidance advises that a doctor’s initial approach to raising concerns should be at the level of the immediate clinical team. However, if this is not appropriate or if the doctor feels uncomfortable doing so (for instance if the concern relates to managerial issues) there needs to be a clear process in place for doctors and other staff to follow.

To increase awareness and for clarity, the BMA recommends that explanation of an employer’s policy should form part of induction processes and there should be at least one named contact within each organisation whose primary role should be to investigate and act on concerns raised in relation to standards of care and patient safety. In larger organisations it might, for example, be appropriate to have one person per site. In smaller organisations such as GP practices a named partner or senior practice manager, or the CQC registered manager, could fill this role.
This person should:

- Make themselves widely known to all groups of staff
- Make the process for raising concerns widely known, and explain how their role integrates with other processes within the organisation for quality improvements
- Undertake, or cause to be undertaken, a robust investigation into concerns that are raised
- Respond to the complainant, explaining what steps will be taken to address their concerns and if, after investigation, no action is required, why that is the case
- If further action is to be taken, what this is and the timescale
- Advise on how to escalate the concern outwith the organisation if necessary e.g. to the CQC, Monitor/NHS Trust Development Authority, the GMC (if the concern relates to an individual doctor's practice)
- Notify the complainant of the employer's whistleblowing policy
- Notify the complainant of other sources of information such as the NHS Whistleblowing Helpline, Public Concern at Work, the GMC confidential helpline, the BMA etc
- Have the power to pass on information to relevant departments and to require corrective action.

The BMA believes that better and more consistent application of good practice in managing and dealing with concerns at a local level, founded on robust and consistent governance processes, would provide doctors and other health care professionals with greater confidence. This should be reinforced by the active promotion of local policies on raising concerns and the protections offered by the Public Interest Disclosure Act (PIDA). The joint NHS Employers and Social Partnership Forum toolkit for making employees aware of how to raise concerns, originally launched in 2011 (the "If you see something, say something" campaign) is to be welcomed and should be widely promoted.

Effective mechanisms for handling concerns are not currently widely embedded across the NHS. In a recent Pulse survey for example, nearly a third of GPs who complained about their local hospital’s care of patients within the past year, found their concerns were not acted upon, whilst an RCN survey highlighted similar issues.3

Q: Do you agree that it would be helpful to have an individual who is a named contact in every organisation to investigate and act on concerns? Is this practical in every organisation? Should this individual be bound by requests for confidentiality and anonymity? Would they require any clinical knowledge?

Please also let us have any examples of good practice in this area at your workplace.

As discussed, concerns about patient care are managed in a different and inconsistent manner across the NHS. The BMA is considering whether the development of a standard procedure for provider organisations to use could increase awareness and drive up reporting. Any procedure would need to be sufficiently flexible to allow smaller organisations or non-standard ones (such as Universities that employ clinical and medical academics) to comply without incurring major costs or requiring significant structural change.
Q: Do you agree that there should be a standard process to report concerns across all NHS providers? Should there be flexibility in the process to allow different organisations to apply its principles accordingly?

**Employers’ wider duty to listen and learn**

It is evident that there is a lack of consistency in how complaints and concerns are handled, and those who report concerns have mixed experiences of doing so. However, there is currently no statutory duty on providers to have a policy on raising concerns or on whistleblowing, although all organisations are strongly encouraged to have one by the Department of Health, NHS Employers and the CQC. The newly revised **NHS Constitution in England**, which applies to all NHS bodies, confers a legal right, and a personal duty, on staff to be able to raise concerns. It also states “the NHS commits to encourage and support all staff in raising concerns”.

An enforceable (possibly statutory) duty on healthcare providers ‘to listen and learn’ may therefore be required. Organisations should be obliged to have in place a process where concerns and complaints are investigated and resolved quickly and governing bodies should regularly review complaints information. Board-level scrutiny of complaints was a key recommendation of the recently published **Clwyd review** of the NHS complaints system. Events or near-misses that led to the complaint should be considered more widely as opportunities for learning and improving the service. This would send a positive and reassuring signal to staff that speaking up is welcomed and that they will be listened to without fear of punitive action. Promoted widely and led by the named contact within each organisation, it would encourage the development of a more open culture and one in which it is expected that lessons will be learned from mistakes made. We also believe such a process would discourage harassment and bullying of the individual through:

- speaking up being regarded as a positive rather than a negative step;
- as far as possible, keeping the ‘concerns’ department separate from clinical teams, by ensuring the investigation is fully independent. (Smaller organisations such as GP surgeries would need to review the practicalities of such a system. Even with sufficient flexibility to implement its principles, associated costs may be prohibitive);
- the contact having the necessary expertise to deal with individual concerns;
- confidentiality being maintained as far as possible; and
- there being a policy of no recrimination.

It would also help to develop an understanding amongst staff that the provider expects its employees to report concerns on a regular basis as a way of learning and improving their service to patients.
Q: Do you agree that all organisations employing doctors should be required to have a clear policy on a) raising concerns and/or b) whistleblowing? Would you support a statutory duty on healthcare providers to listen to comments and act appropriately on concerns that are raised?

Duty on staff and providers to be honest when things go wrong

The Francis report argued that existing obligations on individuals to report concerns did not go far enough in enforcing the need for staff to disclose important information, and made two key recommendations for both staff and providers: a statutory obligation to observe a duty of candour and the introduction of criminal sanctions against those obstructing the duty of candour.

The Government has signalled its intention to include a statutory, as well as a contractual, duty of candour on secondary care providers in the first instance. The contractual duty would be a requirement imposed by commissioners when commissioning services. The statutory duty has been written into the Care Bill (currently at the House of Lords report stage) and would require providers to ensure information they make available about patient care is accurate and comprehensive, with criminal penalties for breaching this provision.

The BMA believes that the introduction of further legislation in relation to an individual duty of candour backed by criminal sanctions could create the wrong sort of culture change, encouraging defensive practice rather than a professional commitment to openness and partnership. The Berwick review of patient safety in the NHS took the same view and agreed that existing professional duties were sufficient. Good Medical Practice requires doctors always to act with honesty and integrity (paragraphs 65-71) and to put matters right if patients have suffered harm or distress:

“Being open and honest with patients if things go wrong

30 If a patient under your care has suffered harm or distress, you must act immediately to put matters right, if that is possible. You should offer an apology and explain fully and promptly to the patient what has happened, and the likely short-term and long-term effects.

31 Patients who complain about the care or treatment they have received have a right to expect a prompt, open, constructive and honest response including an explanation and, if appropriate, an apology. You must not allow a patient’s complaint to affect adversely the care or treatment you provide or arrange.”

The BMA believes that instead there is a need to address the underlying culture in the NHS, which can prevent doctors reporting concerns, and to look at alternative ways of ensuring that doctors feel able and supported in reporting their fears.
Q: Do you think a new statutory obligation on individuals, backed by criminal sanctions, is necessary? Please give reasons for your answer

Q: What impact could a statutory duty of candour on organisations have if also applied to GP providers?

BMA Action

- The BMA wrote to the Prime Minister in March, outlining our position on a number of issues, including the duty of candour.
- The Association is involved in ongoing lobbying against the establishment of an individual statutory duty of candour with criminal sanctions, through briefing on the Care Bill and other routes.

External routes for raising concerns and whistleblowing

In addition to local processes, doctors can make protected disclosures to external organisations in a number of ways, including to Monitor and the CQC. The BMA has welcomed the introduction of new, confidential avenues for doctors to raise concerns, such as the patient safety question in the GMC’s annual trainees’ survey6 and the GMC’s whistleblowing helpline. The BMA can offer support to members who raise concerns and advise them during the process, including how to notify external organisations and regulators if local processes have not proved fruitful.

Public Interest Disclosure Act

If concerns have become serious, and steps taken by the provider or regulator have not been adequate, staff may wish to consider raising a concern more publicly to bring about more effective action. This is usually termed ‘whistleblowing’. The Public Interest Disclosure Act 1998 (PIDA) sets out a framework for public interest whistleblowing which protects workers from reprisal because they have raised a concern about malpractice. The most readily available protection under PIDA (s.1, s.43 C) is where a worker, who is concerned about malpractice, raises the matter within the organisation or with the person responsible for the malpractice.7

To ensure that the legislation provides appropriate protection for those raising concerns and works in practice, the Government recently made a number of amendments to PIDA through the Enterprise and Regulatory Reform Act 2013. Whilst it is important to have a robust framework in place, the matter of how this framework is applied locally is key to improving the experiences of those who raise concerns and bringing about a more open culture. In part to address that, Public Concern at Work has set up a Whistleblowing Commission which is examining the existing arrangements for workplace whistleblowing and intends to make recommendations for change. The BMA provided a detailed response, calling for consideration to be given to establishing a standard mechanism for staff to raise concerns and a number of amendments to the Act to ensure that the protection it offers covers:

- Student nurses, doctors, healthcare professionals and social workers
- General Practitioners in the health service, regardless of their contractual arrangements8

The BMA remains concerned that the protections provided to employees under the PIDA do not apply to GPs who provide primary medical services as independent contractors engaged under general medical services (GMS) contracts for services by local area teams.9 Protection is required for these doctors and others who have a statutory role as members of Clinical Commissioning Groups but who may have concerns about the patient safety implications of aspects of their Group’s commissions.
We also feel that greater advertising of the routes by which doctors could raise concerns is required in order to raise awareness and encourage more reporting. Currently, it is clear that there is limited understanding of both the existence of the legislation and the protection it offers. We also believe that a register of claims should be re-introduced, having been removed by statute in 2001, in order to provide greater transparency and highlight the fact that a culture of openness and reporting should be a normal, routine and everyday part of clinical governance.

Q: Do you think that there is a need for better communication about the protection offered by legislation? Do you think that there is a need to publish an open register of PIDA claims? How could the PIDA be simplified or improved?

**BMA action**

- Responded to Public Concern at Work’s consultation on establishing a ‘Whistleblowing commission’.
- The Association is currently developing a response to the Department for Business, Innovation and Skills’ call for evidence on the whistleblowing framework.

**Making a protected disclosure: Settlement agreements and gagging clauses**

On rare occasions, doctors’ actions in raising their concerns about patient care can have consequences for their continuing employment, and for the benefit of both parties, a settlement agreement (formerly known as a compromise agreement) is sometimes used as a method of ending the employment contract. There is significant confusion in the health sector about the use of settlement agreements and particular clauses which feature in such agreements, commonly referred to as ‘gagging clauses’. For this reason, we have taken steps to clarify the BMA’s position and explain how these agreements should be applied.

A ‘settlement agreement’ is a standard method of terminating employment on mutually agreed terms. In particular, such agreements are often used where there has been a dispute between the employer and an employee which ends with the employee leaving employment. Such disputes often relate to entrenched employment difficulties, in which both the employer and employee recognise that the employment relationship should end. The employee would always, as part of the agreement, have independent legal advice on the terms of the agreement, paid for by the employer. The BMA recognises the value of such agreements for both parties. They usually contain confidentiality clauses to ensure that the terms of severance remain confidential. For example, they may contain clauses that prohibit the parties from reporting details about the terms of the separation. Such clauses are widespread in settlement agreements within all types of workplaces and are mutually beneficial to all parties.

A ‘gagging clause’ goes beyond this, seeking to prevent the raising of a protected disclosure. The BMA condemns such clauses entirely and does not support agreements or employment contracts which include clauses which prohibit an employee from raising a concern about patient safety issues. Whilst clauses which seek to prevent an individual from raising such a concern under the Public Interest Disclosure Act 1998 (PIDA) are not enforceable in law, it can sometimes be hard to determine the meaning of particular clauses, especially if an employee is involved in a termination of employment and feels burdened by the experience. The Department of Health has taken steps to **clarify that gagging clauses must not be used in settlement agreements** and that staff remain able to make protected disclosures under PIDA.
Q: Do you feel it is now sufficiently clear to staff and employers that gagging clauses are inappropriate and should not be used?

BMA Action

• The compromise agreements that the BMA's uses when supporting doctors leaving employment have been redrafted, in consultation with external legal advisors.
• Further training and advice has been provided to the BMA's regional advisers.

Thank you for responding to our consultation. Your responses will direct the BMA's recommendations on influencing and changing NHS culture.

References

1 Unpublished feedback from BMA members following Francis report publication, February 2013
2 http://www.pulsetoday.co.uk/your-practice/francis-inquiry/up-to-third-of-gps-raising-alarm-over-hospital-care-see-complaints-ignored/20002784.article
3 http://www.bbc.co.uk/news/health-22252425
4 A statutory obligation should be imposed to observe a duty of candour:
   On healthcare providers who believe or suspect that treatment or care provided by it to a patient has caused death or serious injury to a patient to inform that patient or other duly authorised person as soon as is practicable of that fact and thereafter to provide such information and explanation as the patient reasonably may request;
   On registered medical practitioners and registered nurses and other registered professionals who believe or suspect that treatment or care provided to a patient by or on behalf of any healthcare provider by which they are employed has caused death or serious injury to the patient to report their belief or suspicion to their employer as soon as is reasonably practicable
5 Good Medical Practice, published by the General Medical Council: http://www.gmc-uk.org/guidance/good_medical_practice.asp,
6 Five per cent of trainees (2,392) raised concerns. Of these, 76 per cent of the issues were already known to postgraduate medical deaneries and the GMC, analysis shows. Six hundred trainees raised concerns that were not known about. The GMC is working with deaneries to address all reported concerns, which were mainly about inadequate staffing out of hours, and general service delivery.
7 Further background can be found here: http://www.pcau.org.uk/guide-to-pida#introduction
8 Briefing on Enterprise and Regulatory Reform Bill: Public Concern at Work briefing, July 2012
9 As highlighted in a correction to a Parliamentary written question by Anne Milton, Parliamentary Under Secretary of State for Health:
   www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110309/wmastext/110309m0001.htm