

**Response to government consultation
on Employment Rights Act 1996 (NHS
Recruitment Protected Disclosure)
regulation 2017**

The National Guardian's Office (NGO) has provided formal submissions to the specific questions set out on p.16 of the consultation document.

In addition the NGO has also made additional comments on the regulations.

A. Answers to consultation questions

Q1. Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?

The proposed time limit of 3 months by which an applicant is required to bring a complaint to a tribunal is a reasonable one as is consistent with existing rules regarding bringing actions to employment tribunal. Further, we agree that it reasonable under regulation 5 to permit tribunals to exercise their discretion to allow applications to be made out of time, where it is just and equitable to so, as this provides additional protection for applicants.

Q2. Are there any types of cases that should be mentioned in regulation 5(3), as to the date of conduct for the purposes of calculating the 3 month time limit?

No, the types of cases of mentioned are sufficient.

Q3. Do you agree with the approach taken not to limit the amount of compensation, so that these regulations are comparable with existing whistleblowing claims?

Yes we agree that there should be no upper limit. It is important that these regulations are consistent with the existing practice relating to the settlement of whistleblowing claims. If the new regulations departed from current practice it would send a confusing and negative signal that while NHS whistle blowers should receive additional statutory protection, the harm from which they are protected is regarded as strictly limited.

Q4. Do you agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty?

We agree that a provision to permit an applicant to seek an injunction from the county or high court to prevent discriminatory action against them is important. Regulation 8 will provide additional support for whistle blowers who currently have no legal protection to prevent employers from imposing a detriment upon them, or

bringing any such detriment to an end. The absence of such 'protection' was highlighted in the Francis Freedom to Speak Up Review [paragraph 2.2.9] and the new breach of statutory duty regulation takes an important step in remedying the current lack of protection for NHS whistle blowers in this regard.

Q5. Are there any practical problems arising from regulation 8?

The costs of bringing actions in the county court and high court are higher than those incurred in bringing actions at employment tribunal. NHS workers seeking new employment may be unemployed and not have the financial resources to bring a case. We therefore ask that the regulations take account of this fact and make provision for the costs regime in those cases to apply for injunctive relief are the same as those at tribunal.

Further, we would also ask that consideration is given for provisions to be made within the regulations for injunctive relief to be available upon application to an employment tribunal, as well as to higher courts. This would have the effect of making the process simpler and more accessible for applicants as well as helping to reduce the burden of costs upon them.

Q6. Do you agree with the proposal that [...] discrimination against an applicant by a worker or agent of an NHS body, should be treated as discrimination by the NHS body itself in the above circumstances – and that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

Yes we agree with the proposals for vicarious liability under regulation 9, as well as the statutory defence provided for. This is consistent with protected disclosure provisions under s.47B Employment rights Act 1996. Importantly, we also agree that regulation 9 includes vicarious liability for the actions of agents as well as workers.

Q7. Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010? Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

As stated below in our response to question 8, as well as in our additional comments, the NGO has concerns that the regulations will extend the complexity of the laws relating to NHS whistle blowers. As a consequence, the new regulations will place an even greater burden on individuals who are seeking to access their legal

rights, which will be most felt by those who may already be suffering detriment by virtue of their protected characteristics.

Q8. Do you have any concerns about the impact of any of the proposals may have on families and relationships?

As stated in our additional comments below we feel that the new regulations, while extending important legal protections to NHS job applicants, also make the existing rules covering NHS whistle blowers more complex and less easy to understand for the individual. We believe that such rules will make litigation in this regard more stressful for the applicant, not less, as the benefits that may be gained from enjoying enhanced legal protection are outweighed by the difficulties in accessing those rights through confusing and complex rules. Such stresses upon the applicant will inevitably have a negative impact upon their relationships and family life.

B. Additional comments

Appearance of a protected disclosure

A key element in the regulations is that NHS applicants are protected from discrimination by NHS employers 'where it appears the applicant has made a protected disclosure'. However, there is no test set out in the regulations as to what an employer should have reasonably done or believed in these circumstances. What happens where an employer has not given any thought as to whether the applicant has previously made a protected disclosure? Will an employer be expected to go through specific steps when recruiting to reasonably satisfy themselves of this fact? Does the employer have to give reasonable consideration to the actual elements required in the making of a protected disclosure (i.e. the applicant must have reasonable belief that the information tended to show a relevant failure and that it was in the public interest to disclose such information.)

The regulations are not clear on any of these points. If the implication is that it should be for the courts to interpret them then that puts applicants at an immediate and unjust disadvantage as they will only be able to access such legal interpretations on which to base their decisions at potentially great expense.

Complicating existing law

While the regulations are made in compliance with primary legislation we observe that they do not simplify the legal environment from the point of view of the very job applicants they are intended to protect. The provisions are complex and sometimes vague and do not make the law more accessible, but rather less so. For example, to assist making the rules more accessible, we suggest that consideration be given to extending the definition of 'worker' under s.49 Employment Rights Act 1996 to include job applicants.

Similarly, as stated above, the draft rules relating the appearance of protected disclosure are unclear and surely make the laws more confusing for applicants.

Additional burdens upon applicants

By making the law more complicated the regulations place potential additional burdens upon those they are intended support. The National Guardian's Office is already well aware of the stresses and burdens, both financial and emotional, incurred by those who raise concerns in the NHS. By making the laws designed to assist such individuals more complicated the government is adding to those burdens, not reducing them.

For example, as stated in our answer to question 5 above, although the regulations provide for an important right for the applicant to seek an injunction against a prospective employer to prevent discrimination, this may only be done through the potentially expensive route via the county or high court. It must be expected that most applicants seeking to access this legal right will require potentially expensive legal support and may even be deterred from accessing that right because of the complexity and cost incurred.

It is therefore essential that the regulations, in order to fulfil their purpose of supporting potentially vulnerable individuals, are framed with absolute consideration for the needs and circumstances of the people they are intended to protect. As part of this consideration it must be remembered that the employer has access to resources that are beyond the scope of most applicants.

Extending legal protection beyond NHS job applicants

We accept that the need for these regulations exists. The Freedom to Speak Up Review that established our own organisation also highlighted the need for the very protection for NHS job applicants that are set out in the draft regulations. However, we also ask that serious consideration be given to extending the protection afforded by these regulations to those applying for jobs beyond the NHS. We observe that because it is necessary to provide legal protection for those applying for jobs in the NHS who have previously made a protected disclosure it must surely also be just and necessary to extend the same protection where that person is applying for

employment in another sector, for example in respect of any organisations in which NHS patients and service users receive care.

Extending legal protection to persons associated with making a protected disclosure

In the experience of the NGO those persons who provide support to an individual to make a protected disclosure can also be victims of discrimination. Such persons should receive equality of protection under the law. Therefore, we ask that consideration be given to providing protection for those who have supported an individual to make a protected disclosure, so that they are also protected from discrimination when applying for employment in the NHS.

Duty to refer to a regulator

We ask that consideration is given to include within the regulations a duty for a tribunal to refer a matter to the appropriate regulator where there is evidence that an employer has discriminated against an applicant for the purposes of regulation 3.