HCSA
The hospital doctors' union

SPEAKING UP ON SAFETY

UNDERSTANDING THE EMPLOYERS' PLAYBOOK

The **professional** *association and trade union for hospital doctors, wherever you are in your career*

www.hcsa.com

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ABOUT THIS GUIDE

This document aims to enlighten doctors about the Employers' Playbook. This is a series of actions which may be deployed against you when you speak up. You may think it will never happen to you, but, if you are a conscientious doctor and you speak up as the GMC instructs us to do when we see poor practice, then there is a chance it will.

HCSA urges you to contact us if you are thinking of making a protected disclosure or if you have expressed patient safety concerns and are worried about what this means for you personally. We can offer support and assist you to speak up while also safeguarding yourself.

Remember, if you need advice, HCSA is with you every step of the way.

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INTRODUCTION: What is the Employers' Playbook?

*Senior management often deploy a predictable method when a doctor who speaks up is in their sights. **This is The Playbook.***

As doctors the GMC tells us that we must speak up if we observe patient safety concerns.

Its Good Medical Practice requires doctors to raise concerns around "inadequate premises, equipment or other resources, policies or systems" which put patients a risk, and to "act promptly if you think that patient safety or dignity may be seriously compromised," whether through systems or by the practice of other doctors.

Employers similarly say that staff should speak up – at least in official policy.

In practice, you are walking a tightrope between highlighting concerns and highlighting yourself as a "problem" and someone who may damage the reputation of your employer.

Senior management often deploy a predictable method when a doctor who speaks up is in their sights. **This is The Playbook**. It is essential that you know how to spot the early signs and seek advice.

In HCSA's experience the pattern is all too common. A doctor raises patient safety concerns then suddenly finds themselves facing a Maintaining High Professional Standards (MHPS) investigation — an entirely internal process.

Possibly this is triggered by malicious allegations made by their clinical colleagues to the medical director. After an investigation, the doctor who raised concerns faces dismissal. Typically, the initial safety concerns they raised are not investigated.

HCSA has produced this guide to explain what should and shouldn't happen when you need to raise a concern — and to expose some of the methods used by employers so that you are forewarned and forearmed.

Knowing what to expect and when to seek help is crucial to being able to navigate this landscape and survive. Remember — if in doubt, seek advice.

SPEAKING UP: RAISING A CONCERN

Raising your concern

What does 'raising a concern' actually mean?

Sometimes simply mentioning that a service doesn't seem to be working well, or outcomes are not what they should be, could be enough to identify you as a potential whistleblower in your employer's eyes. You do not have to go as far as raising the concern to your line manager — it's possible that clinicians allied to management in your department will report your actions upwards.

While the GMC is clear on our responsibilities to raise concerns as doctors, employers often have different priorities. That means that you should always take steps to protect yourself, including writing everything down and keeping records of communications, verbal and written, from the very start.

Collect and store evidence securely away from employer systems, and consider finding allies of the same grade to bring a shared concern to light — doing so makes it less likely you will be singled out.

IMPORTANT

It is important that you **keep meticulous contemporaneous records of everything that is going on**, however insignificant these may seem.

The **records need to be kept on a personal device** where your employer cannot access it or delete the records. You could for instance use a secure personal drive such as Dropbox or Google Drive.

Create a timeline document and use this to log email communications and factual events which occur. Doing so will make the process much easier further down the line.

Remember to **only use your personal email** when communicating with the HCSA or any other significant party.

Informal versus formal

Should I raise a concern formally or informally?

It is likely that you will raise a concern informally in the first instance. You may have mentioned something to a colleague or in a multi-disciplinary team. Hospital policy will also encourage you to try to sort things out informally.

HCSA would strongly advise that you do not take any formal action without talking to us first.

The options for reporting a concern internally include:

- Direct communication with your line manager or non-clinical manager
- A Datix or Ulysses report
- An exception report (for trainees)
- Approaching the Freedom to Speak Up Guardian.

Formal reporting would include anything put in writing within your employer, but also reporting the concerns externally, for example to the GMC or the Care Quality Commission.

The Freedom to Speak Up Guardian (FtSUG) will normally signpost you internally to management, and many doctors have reported an unsatisfactory outcome. HCSA has been lobbying for improvements to reporting processes and protections for doctors.

In the meantime, if you do report your concern FtSUG it is important to record the outcome, including if the guardian is ineffective and your concern appears to have been ignored.

SPEAKING UP: RAISING A CONCERN

IMPORTANT

Ensure you get written confirmation of receipt

All too often it is claimed that documents are lost or were never received. When you raise a concern in writing, make sure that you ask for confirmation that any email you send has been received and passed on to the right person. Follow this up if you do not receive confirmation.

What is whistleblowing and what is a protected disclosure?

The term whistleblowing is often used colloquially to describe "speaking up" and may indicate that there is discomfort being expressed about single or multiple patient safety issues.

A protected disclosure is blowing the whistle in a prescribed fashion, and if done correctly will afford the doctor limited legal protection. A protected disclosure must be shown to have satisfied all the relevant statutory requirements under the Employment Rights Act 1996 (ERA 1996). This means:

- There must be a "qualifying disclosure" under the terms of the ERA 1996
- It must be in the public interest
- It must have been made to an appropriate or prescribed person or body.

The terms of ERA 1996 which are relevant to a qualifying disclosure that a doctor might make are that the health and safety of an individual has been, or is likely to be, endangered.

"An appropriate or prescribed person or body" would include your employer, senior management of your organisation, or a prescribed organisation from the official list, which includes the CQC, GMC and NHS England, among others. It does not yet include trade unions, something which HCSA is lobbying for.

A protected disclosure that satisfies ERA 1996

requirements grants some legal protections, including the right not to be dismissed or suffer detriment. These rights are set out in the Public Interest Disclosure Act 1998 (PIDA).

Examples of detriment would be being overlooked for training opportunities or being subjected to spurious disciplinary investigations.

However, employers may also claim that the concern you raised was not actually a protected disclosure, and that you are therefore not protected.

Although PIDA grants some legal protections over whistleblowers, it is not always possible to prove that an individual has been dismissed or suffered detriment principally due to a protected disclosure.

It is important to seek early advice if you think that your concern may qualify as a protected disclosure. HCSA can assist with signposting to appropriate advice.

WHAT YOUR EMPLOYER SHOULD DO, AND WHAT OFTEN HAPPENS INSTEAD

Patient safety versus employer reputation

Logically, if patient safety is the priority that it is claimed, the most sensible thing to do once a concern is raised is to explore it adequately and, where required, put steps in place to resolve the issue. There will be established policy which should be followed in such cases.

However, patient safety is not the only factor considered by employers. All too often they are focused on suppressing the fact that a concern has been raised, and this creates a risk for the doctor who does so. Any ensuing investigation may be less about the patient safety issue and more about stopping the concern spreading and becoming public knowledge.

Your employer will not want any bad publicity. If your workplace has a previous history of clinical concerns then your employer is likely to be even more wary of further negative news. If a patient safety concern you raise becomes public knowledge it is unlikely to work in your favour.

You are seen as the threat

Do not presume that because you have done the right thing and spoken up that you will be respected for doing so. When an employer ranks reputation above your safety concern then it follows that you will be seen as a threat and its goal will be to silence you — more so if your concern is significant and valid.

You may have colleagues who are on the alert for staff who may speak out about patient safety issues and who work closely with your employer's management. In such cases, when you raise your head above the parapet you will be noticed, reported on and risk being targeted.

This may seem extraordinary to you, but any NHS whistleblower will confirm that it is a true picture. It's important to understand that it could happen to you too.

Doctors may find that they go from being a well-respected clinician who is included in discussions and whose opinion is counted, to being isolated and shunned. Your colleagues may not want to be seen with you or talk to you.

This doesn't necessarily happen overnight — the Playbook followed by employers contains steps which pave the way. It's vital, when you speak up, that you are aware of the common tactics used against doctors and the symptoms that your employer has you in their sights.

HOW TO TELL IF YOU'VE BEEN IDENTIFIED AS A THREAT OR A TROUBLEMAKER

The employer's aim and how they plan to get there

There is a chance that a bad employer will want to silence a doctor who speaks out. In many cases the outcome is dismissal. The route that is often taken is this:

- A doctor raises patient safety concerns
- Colleagues who are allied to management identify or fabricate conduct or capability issues and feed these back to the medical director
- The medical director triggers an MHPS investigation
- The outcome is dismissal.

> *The most effective way to silence a doctor is to instigate the MHPS process as this is the main way that a doctor is dismissed in the NHS. In order to do this the medical director needs to be provided with ammunition.*

Doctors who have been in this position report common tactics used in order to build a case under MHPS, the Maintaining High Professional Standards framework.

The tactics used

The most effective way to silence a doctor is to instigate the MHPS process as this is the main way that a doctor is dismissed in the NHS. In order to do this the medical director needs to be provided with ammunition.

This is the most crucial part of the process and where HCSA is likely to be able to guide you most effectively in order to minimise the impact of any allegations.

Employers can initiate an MHPS process under three categories — capability, conduct or health. If an issue is both capability and conduct then it must be investigated as a capability issue.

Importantly, if a doctor is investigated over capability or health issues the recourse is usually not dismissal. For capability it is retraining and for health issues it is rehabilitation. This means that where an employer wishes to force out a doctor they need to ensure that an investigation falls under the conduct category or the legal loophole of "some other substantial reason (SOSR)". In both these cases the outcome may well be dismissal.

The risk that an employer will be able to proceed on a conduct basis can be reduced by ensuring that your own behaviour, in person, phone and in particular email, is beyond reproach. Where appropriate, ensure you are communicating in the presence of a reliable witness who can vouch for your behaviour.

In order to seek advice from HCSA you will need to be able to recognise what is going on around you. Often doctors only realise with hindsight what has been happening. This means that employers are able to "get ahead" and gather evidence because the doctor in question just thinks they were speaking up appropriately.

DOCTORS' EXPERIENCE: COMMON TACTICS USED BY EMPLOYERS

HCSA has talked to doctors in this situation who found themselves put through an MHPS process. Their testimony exposed common symptoms and employer tactics used against those deemed a threat for speaking up.

EVIDENCE-GATHERING

- You may be able to spot the signs that an evidence-gathering campaign is being run against you. This can include reviews of your electronic record notes and letters
- Crucial evidence may be altered and/or destroyed.

YOUR PRACTICE

- You may find yourself under close observation or face interference with your treatment pathways
- Colleagues may encourage other staff to make complaints about you, for example allegations of incompetence or outdated/inappropriate practice, over-investigation etc
- You may face unnecessary referrals to Occupational Health/counselling with the suggestion that your judgement was flawed
- You may be excluded and/or subjected to restrictions on your practice that you consider unreasonable and/or in breach of employer policy
- There may be mismanagement of patients by others in order to "show you up" or trap you in some way.

YOUR COLLEAGUES

- You may find yourself being watched by colleagues. This is particularly the case where there are potential conflicts of interest, either in direct relation to the safety issues you have raised or because of personal friendships with those connected to the issues
- Staff that were supporting you may be threatened or punished
- Those who are campaigning against you may try to exert influence with the medical director or their staff
- You may encounter a lack of moral courage on the part of neutral colleagues who turn a blind eye, fail to offer support, or say they have no memory of incidents that they must have observed which would have assisted in your defence.

YOUR EMPLOYER HAS INITIATED AN MHPS INVESTIGATION AGAINST YOU

IMPORTANT

Each employer will have its own set of policies including additions to MHPS. The guidance in this section is a brief indication only and the actual process may vary from employer to employer. It is important to note that not all MHPS investigations will result in the doctor being dismissed. However, the process itself can be extremely damaging to the doctor in question.

What should and shouldn't happen during the MHPS investigation process

Investigation prior to decision on whether there is a case to answer

- The process should begin with a meeting between you and the medical director to discuss the issues and to be informed of any clinical restrictions or suspension
- A letter should be sent out to you within seven days of this meeting which confirms the issues and informs you that you are going to be investigated under MHPS. You should be provided with:
  - The terms of reference
  - Names of the case manager, case investigator and designated board member
  - Contact details for help that you may be able to access
- You should be invited to provide a list of witnesses that you think should be interviewed
- Interviews are carried out by the case investigator with you and the witnesses
- The case investigator compiles the interviews and evidence and hands it to the case manager, who decides whether there is a case to answer
- The case manager issues an outcome letter
- If they deem that there is a case to answer then a hearing will be arranged.

COMMON FLAWS IN THE MHPS PROCESS

HCSA and doctors who have been placed through MHPS have identified a number of common issues in employers' handling of the investigation process.

If you are facing an MHPS investigation then it is important that you contact HCSA at the earliest opportunity. If you experience any of these issues then you should note them and inform the HCSA national officer who is assisting you.

ISSUES WITH PROCESS

Just because there is a written MHPS policy, it doesn't mean your employer will follow it. Often this amounts to deliberate obstruction or abuse of the process. Some of the issues commonly experienced include:

- A meeting with the medical director is not held before the MHPS process is initiated
- No letter is sent within seven days of meeting with the medical director
- Terms of reference are changed or added to during the course of the investigation
- Unreasonable delays or prolonging of your case
- Inadequate time to prepare for your interview
- Inadequate opportunity to present your case at interview, or not being listened to or treated neutrally
- No opportunity to present further evidence following the investigation that would help to support your case
- Being prevented from putting forward relevant witnesses
- Failing to investigate a protected disclosure which was made during your interview
- Misclassification of your case, for instance classifying it as conduct or SOSR (some other substantial reason) rather than capability
- The case investigator failing to obtain all relevant evidence in terms of witnesses and documentation
- Failure to clearly explain the allegations levelled at a doctor
- Failure to examine disputed evidence prior to the hearing
- Failure to provide notes of your interview to check before the investigation outcome letter is sent out.

ISSUES WITH FAIRNESS AND BIAS

Although in theory the MHPS process should be conducted fairly and involve neutral parties, unfortunately these checks and balances often do not exist in reality.

Doctors who have raised safety concerns and faced MHPS have reported issues including:

- Failure of the medical director to apply rigorous impartial judgement
- The designated board member being ineffective, disinterested or unresponsive
- Unreasonable terms of reference
- Issues which had previously been dealt with informally being resurrected and added to the terms of reference
- Disproportionate treatment of you compared with fellow staff — for instance, minor technical breaches of policy being raised within the terms of reference when these are widely accepted when it comes to fellow colleagues
- Malicious allegations made to the medical director included in the terms of reference
- Unfair outcome letter following the investigation
- Reliance on unfair reports written by an external expert
- Failure to call an external expert as a witness, preventing the doctor from questioning them on their findings.

ISSUES WITH YOUR TREATMENT DURING AN INVESTIGATION

During an investigation it is common for an employer to take interim steps against a doctor. These may include being placed on restricted duties or being suspended from clinical practice. This creates another range of issues, such as:

- A doctor being placed on restricted duties or being suspended without a satisfactory reason
- Failure to review the restriction or suspension regularly
- Failure to address requests from union or other representatives to lift restrictions or suspension.

THE DISCIPLINARY HEARING

What should and shouldn't happen during the disciplinary hearing process

What should happen

Should the case manager decide following investigation that an MHPS hearing should take place, there are a number of things which will happen next. If the process is being followed correctly by your employer, these should happen promptly within a set timeframe:

- In general, the hearing should take place no more than 15 working days after the conclusion of the investigation
- You should be informed at least five working days before the date of the hearing
- All paperwork including your statement of case and any other evidence must be made available to all parties at least five working days before the date of the hearing. The same applies for the employer
- All witnesses should be informed at least five working days before the hearing.

The panel will be made up of the hearing manager (senior clinician) and HR representation, as well as an expert in the clinical field, if required, who will advise but not take part in the decision-making process.

You have the right to be accompanied by a trade union official or a workplace colleague.

HOW THE RULES ARE BENT AND WHAT TO QUERY

It's important to know what you might expect at a hearing in order to be able to prepare yourself. Here are a few of the things that doctors who have spoken up and subsequently faced at an MHPS hearing have reported:

ISSUES OF PROCESS

- Failure to comply with the employer's hearing policy
- Failure to address disputed evidence
- Failure by the employer to call witnesses who made malicious allegations
- Lack of opportunity to cross-examine the employer's witnesses
- Inadequate time given to write your appeal
- Failure to provide the details of an impartial person with no involvement in the original case to send the appeal to
- Failure to forward the minutes or notes of the hearing in good time
- Inaccurate minutes or notes.

ISSUES WITH FAIRNESS AND BIAS

- The employer may hire a barrister, while a doctor is supported by a trade union official or solicitor, or is representing themselves
- Biases among panel members or between the panel and witnesses which are not addressed
- Your witnesses may be afraid to appear over potential reprisals by your employer
- The employer's witnesses may lie openly under cross-examination, but the hearing manager states in their outcome letter that they "prefer" the evidence this witness has given
- An unfair outcome letter.

APPEALING MHPS FINDINGS

Your right to appeal

Whatever the outcome of the initial MHPS hearing you do have a right to appeal. You will however want to be sure that there are solid grounds for challenging the initial decision.

As was noted in the previous section, sometimes your employer may fail to voluntarily provide the information they should do to enable your appeal.

Having support from HCSA may prove vital in assisting you in getting things right.

What should happen at appeal

The appeal panel make-up

The appeal panel is made up of three members, none of whom should have had any direct involvement in the case previously. If you have been dismissed as a result of an MHPS hearing, then the appeal panel should be of board level seniority.

The process

Once you have decided you have reason(s) to appeal then you should follow your local employer policy. It will commonly state that you indicate that you are appealing in writing to the director of HR within 10 working days of the date of the letter confirming the sanction.

They should then appoint a secretary to the appeal panel, usually from HR, who has not had any previous involvement with the case and will deal with administrative matters.

The appeal hearing should take place within six weeks of the date of the sanction. This is important as the clock will have started ticking on the possibility of taking your case to an employment tribunal (ET) should this path be required. The deadline to contact Acas regarding an ET is three months, less one day, from the date of the sanction letter.

Your statement of case for the appeal, and the employer's, should be provided to the secretary at least seven days before the date of the appeal hearing ready for exchange to both parties.

The appeal panel will hear the case and will then issue its findings and any recommendations.

DOCTORS' EXPERIENCES OF APPEALS

These are some of the negative observations made by doctors who have spoken up and consequently been through an MHPS appeal hearing:

- Bias amongst the panel or between the panel and the witnesses and the conflict of interest was not declared
- The appeal hearing was unfair
- The outcome letter was unfair
- The process did not comply with MHPS
- The appeal panel made recommendations but they were not implemented.

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HCSA IS HERE FOR YOU

You have a professional obligation to speak out on safety. However, HCSA urges you to contact us if you are thinking of making a protected disclosure or if you have expressed patient safety concerns that have attracted the interests of your managers.

We can offer support and signpost you to the right way of doing things.

Remember, if you need advice, HCSA is with you every step of the way.

Contact our advice team via our Member Portal, via Advice@hcsa.com, or by phone on 01256 770 999.

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