

Optical Confederation and LOCSU response to the Department of Health's consultation *Providing a 'safe space' in healthcare safety investigations*

Question 1 - Do you consider that the proposed prohibition on disclosure of investigatory material should apply both to investigations carried out by HSIB, and to investigations conducted by or on behalf of NHS Trusts, NHS Foundation Trusts and other providers of NHS-funded health care?

The Optical Confederation represents the 12,000 optometrists, 6,000 dispensing opticians, 7,000 optical businesses and 45,000 ancillary staff in the UK, who provide high quality and accessible eye care services to the whole population. The Confederation is a coalition of the five optical representative bodies: the Association of British Dispensing Opticians (ABDO), the Association of Contact Lens Manufacturers (ACLM), the Association of Optometrists (AOP), the Federation of Manufacturing Opticians (FMO) and the Federation of Opticians (FODO). As a Confederation we work with others to improve eye health for the public good.

The Local Optical Committee Support Unit (LOCSU) provides quality, practical support to Local Optical Committees (LOCs) in England to help them to develop, negotiate and implement local objectives in respect of primary ophthalmic services.

The Optical Confederation and LOCSU recognise that the procedures for managing investigations to which the proposed statutory safe space would apply will need to be agreed predominantly between investigatory bodies, such as HSIB and the relevant regulator, which for our sector would be the General Optical Council. At this early stage we therefore have only limited comments on the detail of the proposals set out in the consultation document.

We would however highlight that the community optical sector is low risk and already has robust investigation and resolution processes at organisational, local/regional and national levels as well as through our regulator and a dedicated sector consumer complaints service. Therefore, while we support in principle the creation of a safe space to enable non-punitive investigations aimed at learning from mistakes to be carried out, these processes must work with and not duplicate existing effective investigatory frameworks. The consultation document recognises that investigations to which the proposals apply may take place in parallel with these frameworks and HSIB should seek to limit unnecessary duplication of effort.

Question 2 - for those investigations undertaken by or on behalf of providers and commissioners of NHS-funded care, should the proposed prohibition on disclosure apply only in relation to investigations into maternity services in the first instance or should it apply to all investigations undertaken by or on behalf of such bodies?

We support testing the proposed prohibition on disclosure of investigatory material in one sector first and learning from implementation challenges before applying these processes more widely.

Question 3 - Do you have any comments about the type of information that it is proposed will be protected from disclosure during healthcare investigations?

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?

Question 6 - Do you have any views on the proposed exceptions that would apply to the prohibition on disclosure of material obtained during investigations by the HSIB and by or on behalf of providers and commissioners of NHS service?

Question 7 - Do you have any views on where the bar should be set on passing on concerns to other organisations whose functions involve or have a direct impact on patient safety?

Question 8 - Do you consider that the exceptions proposed could undermine the principle of 'safe space' from the point of view of those giving evidence to investigations?

Question 9 - Do you support the principle of a 'Just Culture' (that would make a distinction between human error and more serious failures) in order that healthcare professionals might come forward more readily to report and learn from their mistakes without fear of punitive action in circumstances that fall short of gross negligence or recklessness?

The Optical Confederation and LOCSU strongly support the principles set out in 'Learning not Blaming' (i.e. openness, honesty and candour; finding and facing the truth; learning from failures; apologising when things go wrong) and in our view regulatory action should be a last resort, except in the most serious cases. We therefore support this proposal and agree that investigations should wherever possible be non-punitive and respects individuals' and organisations' need for confidentiality.

However, we are not clear about the distinction that has been made between human error and more serious failures. Errors can be a result of human error, negligence or system failure. The degree of severity of impact does not necessarily depend on which is the cause. We would argue that there is a critical distinction in the case of human errors between those which are unlikely to be repeated and/or would not cause serious harm (i.e. a one-off oversight) and those which are habitual and/or have grave consequences. The latter may in fact constitute negligent behaviour or system failure and may call into question the fitness to practice of an individual or business. The thresholds and process for informing the regulator in these cases must be clearly established in the interests of patient safety.

Question 10 - If you consider that the prohibition on disclosure should be subject to an exception allowing for the disclosure of certain information to patients and their families, what kind of information do you consider should be able to be disclosed in that context? And when would be a sensible, workable point for patients/families to have access to information - eg, should they see a pre-publication draft report for comment?

Question 11 - Do you see any problems in a requirement that investigatory bodies (such as professional regulators, coroners and the police) must apply to the High Court if they wish to gain access to information obtained during investigations by the HSIB or by or on behalf of providers or commissioners of NHS-funded care?

Question 12 - Do you have any concerns about the use of the phrase “safe space” in relation to this policy; and, if so, do you have an alternative preference?

Question 13 - Do you see any problems in exempting information obtained during healthcare investigations from access under the Freedom of Information and Data Protection regimes?

Question 14 - Do you agree that guidance, or an alternative source of support, should be developed?

We support the development of further guidance that is clear, proportionate and flexible enough to support the variety of settings where health care is delivered. Regrettably, guidance is frequently developed with NHS trusts in mind, with primary care at times seemingly given lesser priority and, in particular, with no account taken of optical care settings or the open market-driven nature of the optical sector. As a result it is often unduly prescriptive and burdensome and, in some cases, simply unfeasible or inappropriate. We therefore urge that tailored guidance for primary care be produced, and that primary care providers be specifically consulted on the draft. NHS England’s pre-consultation and consultation on its guidance ‘Freedom to speak up in Primary Care: Guidance to primary care providers on supporting whistleblowing in the NHS’ is an exemplar of how this should be undertaken.

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; and, if so, do you have any suggestions for the areas that such a set of principles should cover?

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?

Question 17 - Do you have any concerns about the impact of any of the proposals on families? If you envisage negative impacts, please explain.