

MEETING:	PUBLIC BOARD PAPER 29 July 2015
Agenda item and Paper Number	6 CM/07/15/06
Agenda Title	National Freedom to Speak Up Guardian
Sponsor	Eileen Milner, Executive Director of Customer & Corporate Services
Author	Charles Rendell / Sarah Bickerstaffe

PURPOSE OF PAPER:

The Board is asked:

- To **agree** the proposed approach to establish the National Guardian role in CQC including plans for appointment, ensuring independence, consultation and set-up.
- To **agree** to delegate sign-off for the National Guardian consultation to the Chair and Chief Executive, for publication in early September.

1. Introduction

In response to concerns about the culture in the NHS, the Secretary of State for Health commissioned Sir Robert Francis to carry out an independent review: 'Freedom to Speak Up' (FTSU). The review was asked to identify measures to foster a culture in the NHS in England where staff can feel safe to speak out about patient safety, as well as learning lessons by listening to those who have experiences to share, both positive and negative. The review was published in February 2015. One of the major recommendations directed at CQC was that an Independent National Officer is established, potentially to be hosted by CQC.

The Department of Health (DH) consulted on Sir Robert's recommendations between the 13th March 2015 to 4th June 2015. CQC's response to this consultation is attached at Appendix 1. Overall, the consultation received 103 responses from individuals and on behalf of organisations. The consultation received 75 responses regarding the National Guardian and the majority of these, 56, were in full support of the role being hosted by CQC. Although there were 19 respondents who felt that the role should sit elsewhere, there was no clear consensus on where this should be.

The government's consultation response concludes that given CQC's existing contact with staff raising concerns and its role in assessing staff concerns, CQC is the most suitable national body to host the National Guardian role. CQC's comment that the National Guardian role should be considered alongside the transfer of safety functions from NHS England and the potential creation of an independent investigations body was noted. However, the response concludes that the DH are of the view that the National Guardian needs establishing as soon as possible and waiting for the work around an independent investigations body to be concluded would delay the establishment of the National Guardian and the functions relating to the role.

2. Appointment of the National Guardian

Plans are progressing to appoint the National Guardian within CQC. A job description is being developed which describes the key functions of the National Guardian, based on those detailed in CQC's consultation response which were:

- To provide support and advice for the Local Guardians
- To provide support for the system, such as sharing good practice and reporting on common themes
- To advise providers (NHS Trusts);and
- To advise staff raising concerns.

The Job description will also detail governance arrangements for the role and how the role will be able to draw upon the powers of the Arm's Length Bodies. Timescales for appointing are dependent on a range of factors which we are addressing:

- CQC will need permission to go to external search for this role: Executive search is seen as a professional service so a Professional Services Business Case (PSBC) will be required as well as the normal procurement approvals. However, CQC is exploring with the DH if we can use the head-hunter they have on a draw down contract. If this is agreed we will be able to save time on the procurement process to appoint the search firm.
- CQC will need agreement for the salary band and appointment. For this the DH will need the Job Description from CQC which will be evaluated by NHS Business Service Authority to determine a salary range for the post. This has been sent to the DH, for evaluated and approval. It is proposed that the salary range is equivalent to a Deputy Chief Inspector.
- Once these two stages are cleared the search will progress with a view to appointing the National Guardian by December, and having them in post as quickly as possible, dependent on their commitments.

3. Ensuring the National Guardian's independence

The FTSU review states that the National Guardian must be independent of both providers and national bodies so it is able to review their practices and make recommendations without fear of interference. CQC is itself an independent regulator, and so locating the role within CQC provides the necessary independence from providers. We must, however, ensure that the way the function is established safeguards its operational independence from CQC and the other ALBs. We break this down into three areas:

- Governance arrangements (within CQC and between ALBs)
- Engagement arrangements; and
- Operational arrangements.

In considering each of these, there are certain requirements in terms of accountability:

- The Chief Executive is Accounting Officer, and is responsible for ensuring appropriate stewardship of public funds. Therefore expenditure that relates to the National Guardian's role and activity must be appropriately managed and subject to relevant financial controls, and be subject to the Chief Executive's ultimate oversight.
- The Commission consists of the Board (including committees), Chief Executive and employees. Whatever the manner of appointment, the Board will require some oversight of the National Guardian role, given its own accountability for CQC to Ministers and Parliament.

- There needs to be a formal arrangement with Monitor, TDA and NHSE that governs their responsibilities in terms of funding, and expectations in terms of input into the delivery of the role.

3.1 Governance arrangements

Within CQC:

The National Guardian will be an appointment by the Chief Executive of CQC on behalf of the Board. The appointee will be managed by the Chief Executive but the National Guardian will not be a member of the Executive Team, allowing the role to operate independently of the executive function of the CQC.

The National Guardian will have a page in CQC's 2016/17 Business Plan and they will be required to write an annual report on staff concerns. This will be presented to the CEOs and Board of CQC, NHSE, TDA and Monitor.

The appointing panel will be the CEO of CQC, a non-Executive Director, and representatives of the other three ALBs.

With other Arm's Length Bodies:

Although the role is independent the National Guardian will act with the authority of CQC, Monitor, TDA and NHS England, and will not have any statutory powers itself. The relationship with the ALBs will need to be addressed in the consultation.

The role will need sufficient authority from CQC, Monitor, TDA and NHSE to ensure that reviews and recommendations made by the National Guardian are taken seriously and acted upon quickly. To ensure that this happens the following areas will need to be considered:

- Clear Memorandums of Understanding with the ALBs (and professional regulators such as the General Medical Council and Nursing and Midwifery Council)
- An arrangement to manage accountability to the ALBs through an annual steering group or an advisory committee. It is expected, at a minimum, that the National Guardian would write an annual report which would be presented to each Board and potentially the National Quality Board.
- Clear guidance on the independence of reports published by the National Guardian and clarity on how these reports will be signed off.

The issue of the independence of reports is an important one. We intend to consult on the proposal that the National Guardian's reports, despite sharing CQC branding (see 3.2 below) will not be signed off by the ALBs or CQC. We expect this would be clarified through an amendment to CQC's scheme of delegation. This would mean that the National Guardian would be free to point out where any ALB had not followed good practice. We would anticipate that hosting the National Guardian within CQC would provide us with the opportunity to benefit directly from their expertise and ensure that our own processes are in line with best practice, so avoiding a situation where the National Guardian would need to criticise CQC in a report. However, it is important that the National Guardian is free to do so if they feel it is necessary.

Is the Board content for us to consult on this proposal?

We are in discussion with Monitor, TDA and NHS England about these issues and will develop our consultation proposals with them.

3.2 Engagement arrangements

Engagement arrangements will be crucial to ensuring the National Guardian's real and perceived independence. We will consult on:

- The National Guardian sharing communication channels with CQC, including website, customer service call centre and press office
- The use of CQC branding for any reports or other communications from the Office of the National Guardian

3.3 Operational arrangements

As with engagement, the operational functions of the National Guardian need to be independent.

An important area that we need to consider is storage of information. We expect this could follow our current approach to storing information from staff raising concerns, but need to understand what information if any, may need extra levels of protection. Mechanisms would need to be agreed for the National Guardian to pass information to others outside and within CQC, for example conveying concerns to Chief Inspectors.

We will also use the consultation to clarify the nature of any advice published by the National Guardian. This would not have statutory force (because the Guardian will not have its own statutory powers) and we intend to position it as advice on good practice in implementing existing formal guidance from others, such as Monitor, TDA and NHS England.

4. CQC consultation on how the National Guardian will operate

As detailed above it is our intention to recruit the National Guardian as quickly as possible, so that the appointed individual can play a full role in designing how the function will operate. To support this we intend to consult on how the function could operate before the National Guardian is appointed, so that they can reflect on the feedback received when they arrive in post.

We plan to publish in early September, for up to 12 weeks of formal consultation, during which we will run events to ensure we are engaging with key stakeholders including people who have raised concerns.

We are developing the National Guardian role with a consideration of its likely costs and benefits to CQC and all stakeholders affected. We will seek external stakeholders' views on the costs and the benefits to them when we seek to consult on the new role in September; this may be in the form of an impact assessment or a section in the consultation document. The Economics Team is liaising with the Department of Health to determine whether a full regulatory impact assessment is necessary. When we confirm and implement the final policy in April 2016 we will publish our final assessment of the costs and benefits of the policy.

We propose that the consultation should cover:

- The purpose of the role, defined through the four key functions described in detail in Appendix 1
- The independence of the role in terms of governance (as agreed by ET in section 3.1), relationship with other ALBs, engagement and operations
- Options for the Office of the National Guardian will operate in practice to deliver the four functions.
- An assessment of the costs and benefits associated with the National Guardian function.

Two issues in relation to the operation of the role are of particular importance, and although covered in Appendix 1, we draw them out below for clarity:

- The National Guardian's focus will be on concerns arising from the time of their appointment onwards and not on historic concerns
- The scope of the role will be limited to NHS trusts in the first instance, and we will only consider extending the role to primary care when there is clarity over how local FTSU guardians might operate in this sector.

5. Set-up of the Office of the National Guardian

5.1 Funding

Funding for the National Guardian role and functions are being explored. To date:

- Next year's costs will be identified through the business rounds with the Department of Health as this will be seen as an additional cost to CQC. We are currently awaiting a response from the DH with regard to what the preparation of a business case will involve.
- Start-up costs will be absorbed by CQC. Costs of 283K have been identified for in year (2015/16). These include consultation analysis and funding for a transition team.

5.2 Transition team

It is proposed that in the immediate future current CQC teams will undertake tasks such as the development of the consultation, engagement and recruitment activities using existing resources. Once the appointment of the National Guardian has been agreed we suggest the following approach:

- Up to two individuals to be appointed, either internally or externally, in October / November, to manage engagement, policy, governance, and operational set-up of the National Guardian's office.
- A Private Secretary will be appointed when the National Guardian is appointed.
- All posts will be on a six month fixed term contract in the first instance.

5.3 National Guardian Team

Once appointed we would expect the National Guardian to appoint the Deputy and the rest of the permanent team and to have these roles in post as soon as possible from April 2016, using the budget agreed for the role and its functions in 2016/17.

It is suggested that the team consists of a Deputy National Guardian and a small team of staff. The size of the team will be informed by the outcomes of the CQC consultation.

6. Conclusion and next steps

With the agreement of the Board we will draft the consultation document as set out in section 4. As the Board is not meeting in August, we recommend that responsibility for signing-off the final consultation be delegated to the Chief Executive and Chair, to enable publication of the document in early September. At the same time, we will continue to work towards the appointment and establishment of the National Guardian Functions by April 2016.

Appendix 1 - CQC response to DH consultation

Background Papers

Name Sir Robert Francis
Title: Freedom to Speak Up: An independent review into creating an open and honest reporting culture in the NHS
Date 11 February 2015

Name Department of Health
Title: Draft Consultation response on the implementation of the recommendations, principles and actions set out in the report of the Freedom to Speak Up review.

The following people have been involved in the preparation of this paper

ET	7 th July meeting
Tracey Dennison	HR Lead
Rebecca Lloyd-Jones	Director Legal Services and Information Rights
Sarah Bickerstaffe	Strategy Lead
Molly Corner	Parliamentary Accountability Manager
Amanda Marriner	Delivery Lead
Tricia Hamilton	Head of Customer Experience Improvement
Adrian Hughes	Deputy Chief Inspector
Susan Eggleston	Senior Business Performance Analyst
Roderick Clarkson	Legal Manager (ASC)
Emily Hutchison	Economic Advisor
Susan Robinson	Healthwatch England
Lynn Pitchford	Head of Customer Support Services

Appendix 1

CQC's response to the Department of Health consultation on the implementation of the recommendations, principles and actions set out in the report of the Freedom to Speak Up review

CQC appreciates the opportunity to respond to this consultation. We strongly welcomed the publication of the Freedom to Speak Up Review, to which we provided evidence, and the advice it provides to organisations and individuals on working together to create a more open and honest reporting culture across the NHS.

It takes great courage for health professionals to raise concerns about poor care and so they must be reassured that when they do come forward that they will not suffer as a result. No one should be punished for acting in the public's best interest. As Sir Robert Francis's review highlights, while there are some services that are reporting and acting on concerns about poor care as a matter of routine, sadly we know that this is not happening all of the time. This means that vital information about safety and quality is going unreported and risks can remain. Every organisation needs to create and nurture an open and transparent culture of safety and learning.

In this response, we set out:

- CQC's role in relation to staff raising concerns
- The importance of the proposed Local Guardians
- The implications of the review for primary care and adult social care
- The National Guardian's purpose and creation
- CQC's activities in relation to other FTSU recommendations

CQC's role in relation to staff raising concerns

CQC has a dual role in relation to staff raising concerns about poor care: we look at how well the providers we regulate respond to staff concerns, and we also want to receive information about poor care from staff directly in order to inform our overall assessment of individual providers.

Every planned CQC inspection now looks at how well services handle complaints and other concerns about poor care, as this can be an indicator of the quality of leadership and a reflection of how safe and responsive the culture is.

We have found care services that support staff in raising concerns about poor care, confident in the knowledge that they will be listened to and that action will be taken to address any issues that exist – but we have also found many that do not. It is important that services can learn from those that do this well, so that this can become a reality across the system.

Every concern about poor care is an opportunity for services to improve and for CQC to understand more about the quality of care being provided. We want staff to tell us if they know about poor care and many already do. We use this information to inform our regulatory activities. We know we need to do more to explain why we want to hear about poor care, what action we can take when people bring us information, and to provide greater clarity for individuals over what we can, and cannot do, for them personally.

CQC takes responding to all concerns about poor care very seriously, particularly information brought to us by staff. Whereas complaints by members of the public about a provider tend to follow an actual experience of poor care, concerns raised by staff are often an attempt to prevent poor care and something going wrong in the future. Staff draw on their knowledge and experience of service delivery, and the issues they raise provide vital information about potential risks of poor quality care or potential harm.

The importance of the Local Guardians

We believe that the local 'freedom to speak up guardians' who Sir Robert has recommended should be appointed within every NHS trust could make a key difference to staff being able to raise concerns. A culture of safety and learning can only be developed if providers take prime responsibility for encouraging staff to raise concerns, and handling this in an open and transparent way. The Local Guardians can help to ensure local ownership of this issue, and their effective functioning will be critical to the success of the national role, as discussed below.

Local ownership will mean a degree of local flexibility is needed in how the roles should operate. However, we believe that they should be underpinned by a consistent framework, including person specifications, and that post holders should receive standard training. We believe that the Local Guardians should report directly to the Chief Executive of the NHS Organisation that they work for rather than to the National Guardian (our preferred title for the Independent National Officer), thus ensuring that the emphasis remains on local ownership.

The implications of the review for primary care and adult social care

CQC is the regulator for the entire health and adult social care market, and staff working in all sectors contact us to share concerns about care quality. CQC's experience suggests that there are different issues for staff raising concerns in primary care and adult social care, primarily due to the context of small organisations.

Sir Robert Francis has proposed that his recommendations be applied, with appropriate amendments, to primary care, and we welcome the work that NHS England is leading to take this forward. In particular, defining the role of the Local Guardian will be critical. We would welcome similar work to explore the issues around staff raising concerns in adult social care, which is where the vast majority of concerns about poor care raised with CQC originate.

The National Guardian's purpose and creation

We do not believe the title 'Independent National Officer' provides sufficient clarity about the nature of the role. We propose an alternative title – the National Freedom to Speak Up Guardian, or National Guardian. This provides more information about the role while still avoiding the term 'whistleblowing', which staff have told us they do not like. It also emphasises the important link to the local Guardians.

Given CQC's existing contact with staff raising concerns and our role in assessing providers' handling of staff concerns, we do feel that CQC is a suitable national body to host the National Guardian. However, we believe that the creation of the National Guardian role should be considered alongside the transfer of safety functions from NHS England and the potential creation of an independent investigations body (as recommended by the Public Administration Select Committee). The co-location of all

safety functions could help to align all guidance for NHS organisations relating to investigations and as such, an independent investigations body could also be a suitable national body to host the National Guardian.

The most important key to success for the National Guardian will be clarity from the outset about its intended purpose. Stakeholders, including staff who have raised concerns, need to be clear what the role can and cannot do to support them, or expectations will be set that cannot be matched. Of primary importance is the need to clearly communicate that the National Guardian will not manage or investigate individual cases. Second is the need to set a clear expectation that individuals should first raise concerns with their local organisations, utilising the new Local Guardians, and should only contact the National Guardian for advice if they feel their organisation is not responding appropriately.

We believe the purpose of the National Guardian should have four elements:

- To provide support and advice for the Local Guardians

The National Guardian should support the Local Guardians, building a strong national network, for example through convening regular meetings and sharing learning. The National Guardian should have a key role in designing the consistent framework within which Local Guardians operate, and the training they receive. While we believe that Local Guardians should report to the Chief Executive of their organisation to ensure local ownership, the National Guardian should be there to provide professional support and advice.

As set out above, we believe that the local roles are critical for creating the local leadership needed to deliver a learning culture that values staff concerns. The Local Guardians should be the first point of call for individuals who do not feel that their concerns are being dealt with appropriately through the usual systems (for example, having raised with their line manager they do not believe the issue has been considered). Given this critical role, we believe that any decision not to proceed with the implementation of Local Guardians would require a reconsideration of the National Guardian role.

- To provide support for the system

The National Guardian should have a highly visible role in providing support to the system. This should include the sharing of good practice, reporting on common themes in concerns raised and actions taken, identifying barriers to improvement and how these might be overcome, and reporting on progress towards the creation of a safe and open culture. For this reason, the National Guardian should have a role in recording the types and number of concerns raised and actions taken locally, so that information can be gathered to offer a national perspective.

- To advise providers (NHS Trusts)

The National Guardian should advise providers on good practice in responding to staff concerns. This could be through the publication of guidance and also responding to direct requests from providers. Where a specific case is raised with the National Guardian (either by a provider or staff member), the National Guardian should provide advice on processes, including identifying where good practice has not been followed and suggesting actions to correct this. However, it should not actively intervene in on-going provider processes or employment disputes.

The National Guardian should act with the authority of CQC, Monitor, the NHS Trust Development Authority (NTDA) and NHS England rather than having any statutory powers itself. Where the National Guardian finds that a provider has not followed good practice, it should be able to refer issues to CQC, Monitor, NTDA or NHS England.

As set out above, we believe that the National Guardian role should be limited to NHS Trusts initially. Further work is needed to understand the issues for staff raising concerns in primary care and adult social care, and to consider whether a National Guardian approach is the best way to support culture change in these sectors. In particular, we do not believe the National Guardian role should be extended to any sector until Local Guardians, or an equivalent local role, are in place. To do otherwise would risk shifting ownership of the problem away from frontline providers and would not support the creation of a learning culture.

4. To advise staff raising concerns

The National Guardian should provide advice to individual members of staff who have raised concerns, in situations where it appears good practice has not been followed locally and the individual has suffered detriment and / or safety and quality issues raised have not been investigated and resolved. The advice should focus on achieving local resolution and may also include advising the provider on actions they should take (as above).

As the National Guardian would not have any statutory powers, this would not be a system of case management, would not involve investigation, and would not be a means of appeal. The National Guardian would simply provide advice based on good practice. Where the National Guardian felt further action was needed, it would be able to refer issues to CQC, Monitor, NTDA and NHS England.

Were the National Guardian role to be hosted by CQC, our next steps would be to:

- Appoint a search company to recruit the National Guardian
- Consult on CQC's proposals for how the role would operate
- Establish a CQC transition team to ensure the new function is operational by April 2016.

A consultation on how the role would operate within CQC would include:

- The purpose of the National Guardian (as above)
- Contact arrangements for the National Guardian
- Recording and sharing of activity undertaken by the National Guardian, and whether there should be national reporting of local activity
- Agreements needed between CQC, Monitor, NTDA, NHS England and other national bodies to establish the role
- Governance arrangements so that the role has appropriate independence
- Resources needed to carry out the National Guardian function

CQC's activities in relation to other FTSU recommendations

Sir Robert Francis made a number of other recommendations that relate to how CQC assesses provider handling of staff concerns and bullying as part of well-led, and how we assess providers' Fit and Proper Person Requirement (FPPR) processes.

From October 2014, in every comprehensive inspection and as part of assessing an organisation's leadership, CQC looks at processes in place to handle staff concerns. Through our new approach we assess the leadership and culture of the organisation in more depth than previously attempted. Staff confidence about raising concerns is an indicator of openness in an organisation and how it might want to learn and improve.

Some key lines of enquiry and prompts that we ask as part of assessing leadership in a service include:

- How does the leadership and culture reflect the vision and values, and encourage openness and transparency and promote good quality care?
- Does the culture encourage candour, openness and honesty?
- How are staff supported to question practice and how are people who raise concerns, including whistleblowers, protected?
- Is the value of staff raising concerns recognised by both leaders and staff? Is appropriate action taken as a result of concerns raised?

CQC inspections now include specialist professionals who play a key role in helping teams understand whether there are problems with the way staff concerns are handled. We encourage members of staff to raise any concerns with our inspectors. For example, on hospital inspections we hold focus groups with junior doctors, run by a junior doctor who is on our inspection team, to encourage them to share any concerns. Other staff forums are conducted by a peer on the inspection team and are held with senior doctors, junior nurses and care assistants, senior nurses and administrative staff.

We offer to speak to people who have contacted us to raise concerns directly and confidentially, one- to-one or at a drop-in sessions. We also provide comment cards that people may complete and send to the inspection team, to provide their views about services. We always interview key staff, including HR directors and non-executive directors, and we are able to review a sample of closed investigations.

As we learn more about how our new approach is working in practice, we will consider our learning in light of the recommendations of the Freedom to Speak Up review, and decide whether any improvements can be made.

From November 2014 for NHS Trusts, and for all registered providers from April 2015, CQC has also assessed whether providers have appropriate processes for ensuring their directors meet the statutory fit and proper persons requirement (FPPR). The introduction of this requirement for directors is an important step towards ensuring an open, honest and transparent culture.

CQC considers FPPR when considering applications for registration, and applications from existing providers to vary registration, and when we inspect NHS trusts. Using the 'well-led' key question, CQC confirms that the provider has undertaken appropriate checks and is satisfied that, on appointment and subsequently, all new and existing directors are of good character and are not unfit. This may involve checking personnel files and records about appraisal rates for directors. The inspection team will check providers' awareness of the various guidelines and that they have implemented approaches in line with good practice.

When we receive concerns about the fitness of directors from the public or members of staff, we will usually request a response from the provider. The response will either satisfy the Chief Inspector of Hospitals, or a person designated by them, that due process has

been followed or will lead to a request for further dialogue with the provider, a follow-up inspection, or regulatory action.

As the statutory fit and proper persons requirement is a new regulation, we expect to learn from what we find. We will share our learning from the early stages of implementation and aim to publish this when there is a sufficient body of information available. As with our inspection approach, we will take into account the findings of the Freedom to Speak Up review as we review our learning.

Conclusion

In conclusion, we welcome the opportunity to respond to this consultation and believe that the implementation of the proposals of the Freedom to Speak Up review – particularly the proposed Local Guardians – will help organisations and individuals to work together to create an open learning culture across the NHS.