Whistleblowers unheard by CQC

By Minh Alexander, Pam Linton, Clare Sardari and a fourth NHS whistleblower, 30 November 2016

Summary

Common decency and good governance requires that whistleblower's concerns are listened to, properly explored, analysed for patterns and transparently learned from. However, governments may deliberately put ineffective or inadequate structures and processes in place to deal with whistleblowers, to make it look as if something is being done when it is not. [1] The Public Interest Disclosure Act (PIDA) [2] is critically flawed partly because it does not set out the responsibilities of the bodies that have a legal duty to receive disclosures from whistleblowers – so called "prescribed persons". Since PIDA came into force in 1999, prescribed bodies have revealed little information about the nature and extent of whistleblowers' concerns.

The Care Quality Commission (CQC) is a prime example of such opacity, despite repeated promises to be transparent. The CQC has for years resisted proper, proactive use of whistleblower intelligence. The CQC has unparalleled whistleblowing data, yet it has still not provided a systematic, national picture of whistleblowing in health and social care. The CQC has responded reluctantly, scantily and sometimes inaccurately when asked for data about its analysis and use of whistleblower intelligence. Even with very incomplete and possibly inaccurate reporting by CQC, it seems there have well been over 33,347 whistleblowing contacts with CQC since its inception. From data for the year 2012/13, the great majority (86%) of whistleblowing contacts have related to social care.

However, there is very little data on the nature of concerns or how they were resolved. Only partial information has been provided under FOI, but even this shows that CQC is often informed about serious care failures and institutional cover ups. However, the data also suggests that CQC relies heavily on what employers say they have done to resolve staff concerns. Quite often, CQC does not even contact the regulated body and merely records very serious disclosures as "information noted for future inspections", with no further record of outcome.

[1] An example of this is the situation in Hungary where whistleblower protection law was passed, but no agency was established to receive or investigate disclosures.
http://blog.transparency.org/2013/11/12/hungarys-whistleblower-law-offers-no-real-protection/

[2] Public Interest Disclosure Act 1998
http://www.legislation.gov.uk/ukpga/1998/23/contents

Questions arise about CQC's past claim to Health Committee that it would investigate *"every single [whistleblower] case*". [3]

There is no evidence that CQC systematically tracks whether whistleblowers experience detriment after whistleblowing. CQC has made no effort to analyse intelligence supplied by Employment Tribunals about whistleblowing claims against employers. CQC largely does not reveal the numbers of whistleblowers in each organisation. This adds to isolation and marginalisation to which whistleblowers are sometimes deliberately subjected by employers.

CQC has not taken any evident action to deter still widespread use of gags in the NHS. It has not used its powers to remove any senior managers who have covered up and mistreated whistleblowers.

Whistleblowers are not properly protected. Unmet harm and need, and malfeasance identified by whistleblowers remain largely obscured, at a time of harsh public sector cuts when whistleblowers' voices need to be heard loud and clear.

CQC has failed whistleblowers and the public in the past. It still does not meet parliament's expectations on whistleblowing. CQC has also not acted properly on the recommendations of the Freedom to Speak Up Review on NHS whistleblowing.

We call on parliament to recognise that CQC has seriously failed and is unlikely to change its approach, and to ensure that there is now serious and credible whistleblowing reform.

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[3] Oral evidence by Mike Richards CQCChief Inspector of Hospitals 17 June 2014 to Health Committee inquiry on whistleblowing: ***"What we can say is that every single case will be investigated. We will look at those whistleblowing cases as we hear about them, or other patient concerns, and say, "Who is the most appropriate person to be dealing with that?" It may be one of our inspectors or it may be one of our managers, one of our heads of hospital inspection, but we will take it seriously every time."*** http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-committee/complaints-and-raising-concerns/oral/10801.html

1. Background

PIDA says remarkably little about the duties of prescribed persons. [4]

The government said in a report of March 2015 that this is the purpose of a prescribed person:

> *"The purpose of a prescribed person provides workers with a mechanism to make their public interest disclosure to an independent body that may be able to act on them. A worker will potentially qualify for the same employment rights as if they had made a disclosure to their employer if they report to a prescribed person."* [5]

[4] **43FDisclosure to prescribed person.**
(1)A qualifying disclosure is made in accordance with this section if the worker—
(a)makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
(b)reasonably believes—
(i)that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

[5] Department of Business, Skills and Innovation. Prescribed Persons guidance March 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415172/bis-15-201-Prescribed-persons-guidance.pdf

The response of prescribed persons to disclosures is un-standardised. The government says that prescribed persons ***may*** take a range of actions depending on their individual powers, but is vague about what these actions comprise. The same report also stresses the importance of *"managing the whistleblower's expectations"*.

And yet the government accepts that prescribed persons are crucially important when whistleblowers have been unable to progress their concerns internally:

> *"The prescribed person is particularly important where there is internal resistance to addressing the concerns raised, either deliberate or through inertia, or where the concerns are embedded within an organisation, systematically supported within its operations or occur at the highest levels."*

The government responded to criticism by the Public Accounts Committee in 2014 that whistleblower intelligence is under-used [6], by requiring that prescribed persons should publish data about the number of whistleblowing disclosures received and action taken in response to disclosures. [7] This duty comes into force in April 2017. The government's proposals in fact fall short of Public Accounts Committee's recommendations for more meaningful and proactive analysis:

> *"Departments should collect and apply intelligence on concerns raised by whistleblowers from the full range of arm's length bodies and other providers involved in their sectors. They should use and analyse the data to identify any systemic issues."* [6]

They also fall short of Public Accounts Committee's recommendations for active tracking of detriment to whistleblowers:

> *"24. Some departments acknowledged at our hearing that they do not collect good quality intelligence in connection with whistleblowing. We found, for example, that departments do not record even the most basic information on whether whistleblowing has been detrimental to an individual or damaging to their careers. None of the departments could tell us how many whistleblowers went on long-term sick leave after raising a concern. This indicator is one that is used by the US Congress and by European institutions to gauge whether arrangements are working appropriately.*

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[6] Public Accounts Committee, Inquiry report on whistleblowing, 1 August 2014
http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/593/593.pdf

[7] Department for Business, Skills and Innovation. Prescribed bodies. Annual reporting requirements on whistleblowing. March 2015.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411894/bis-15-2-whistleblowing-prescribed-bodies-reporting-requirements-government-response.pdf

> *…Departments should also consider how they can enhance their support for whistleblowers, looking for instance at measures like tracking employment skills and career progression and asking whistleblowers about their views on the whistleblowing process."* [6]

Public Accounts Committee has continued to criticise the government's lack of appetite for ensuring good whistleblowing governance. [8]

2. CQC's handling of whistleblower intelligence and approach to whistleblowers

2.2 Parliament's expectations

External whistleblowing disclosures to CQC represent, in most cases, a failure of governance by employers to create the conditions in which concerns can be safely raised and resolved.

Health Committee has asked CQC to show that it has taken action in response to whistleblowing disclosures:

> *"…in the most serious cases the CQC must do more than simply listen to the public and incorporate comments into risk profiles.* ***If the CQC is to genuinely treat feedback from the public as free intelligence then it must show that it can act swiftly on intelligence when serious complaints are made****."* [9]

Health Committee has gone as far as to recommend that CQC should refuse to register providers who do not create a safe reporting environment:

> *"A key element of this assessment should be a judgement about the ability of professional staff within the organisation to raise concerns about patient care and safety issues without concern about the personal implications for the staff member concerned.* ***An organisation which does not operate on this principle does not provide the context in which care staff can work in a manner which is consistent with their professional obligations. It should therefore be refused registration by the CQC****,"* [9]

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[8] Public Accounts Committee, Progress report on whistleblowing. 11 March 2016
http://www.publications.parliament.uk/pa/cm201516/cmselect/cmpubacc/602/602.pdf
[9] Health Committee report of accountability hearing with CQC, 2012
http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhealth/592/592.pdf

2.3 Key, relevant recommendations of the Freedom to Speak Up Review

In February 2015 Robert Francis advised via his report of the Freedom to Speak Up Review [10] that CQC and other regulators should do more to protect whistleblowers.

> *"I believe there is scope for the system regulators to play a bigger role in supporting staff who raise concerns. I recommend that they do more to exercise their powers to take regulatory action against any registered organisation that does not handle concerns, or the individuals who raise them in line with the good practice set out in this report. This should include protecting those who raise concerns directly with a regulator, as well as those who have difficulties with internal disclosures."*

He advised that if needed, regulators should seek changes in their powers in order to protect whistleblowers:

> *"CQC, Monitor, NHS TDA in consultation with the Department of Health should work together to agree procedures and define the roles to be played by each in protecting workers who raise concerns in relation to regulated activity.* ***Where necessary they should seek amendment of the regulations to enable this to happen"***

In his report of the Freedom to Speak Up Review, Robert Francis also recommended:

> *"All NHS organisations should publish in their Quality Accounts quantitative and qualitative data about formally reported concerns. This could then be used by the National Learning and Reporting System to identify safety issues that are common across the NHS, and to spread learning and best practice. This requires the NHS system regulators to adopt a common approach to data about concerns, with a shared understanding of what good looks like…"*

2.4 CQC's promises and performance on whistleblowing

An authoritative source once observed:

> *"CQC ended up with a role they don't understand or want.…Whistleblowing alerts were discussed between CQC inspectors and managers with a sigh.…What they*

[10] Freedom to Speak Up Review 11 February 2015 http://webarchive.nationalarchives.gov.uk/20150218150343/https://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

excel in is keeping a lid on whistleblowers….And that's what the Secretary of State really requires of the organisation."

CQC has been repeatedly criticised over failures to act appropriately upon whistleblowers' disclosures, both in health and social care cases. [11] [12] [13] There have been various elements to this failure.

2.4.1. CQC policy: In the first two and a half years of CQC's life, it did not even have any external whistleblowing policy to govern the handling of whistleblowing disclosures by the staff of regulated bodies. It was suggested to CQC in June 2011 – a month after Panorama had revealed the care scandal at Winterbourne View - that CQC should have an external whistleblowing policy with clear standards. [14] It was not until December 2011 that CQC published such a policy. [15] CQC has also indicated via various FOI disclosures that it only started recording whistleblowing contacts from June 2011.

2.4.2 CQC denial of responsibility for whistleblowing: In response to a 2014 FOI enquiry about whether it had conducted any analysis of whistleblowing intelligence, beyond simple numbers, CQC extraordinarily denied in December 2014 that it had any remit for whistleblowing concerns:

"To clarify CQC can only report on volumes/outcomes in relation to the whistleblowing concerns that we receive. ***However, it is not within the role of CQC to deal with whistleblowing concerns.***" [16]

Instead of a willingness to seek changes to its regulations to protect whistleblowers, as advised by Robert Francis, CQC has more often emphasised what it cannot do to protect whistleblowers.

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[11] Winterbourne View Serious Case Review 4 September 2012
http://sites.southglos.gov.uk/safeguarding/adults/i-am-a-carerrelative/winterbourne-view/

[12] Orchid View Serious Case Review June 2014
http://www.hampshiresab.org.uk/wp-content/uploads/June-2014-Orchid-View-Serious-Case-Review-Report.pdf

[13] Do you believe in the Care Quality Commission? Dr Phil Hammond 23 September 2015
http://www.drphilhammond.com/blog/2015/09/23/private-eye/medicine-balls-private-eye-1341/

[14] Letter from Minh Alexander to Jo Williams CQC Chair 23 June 2011
"I would also suggest that all public bodies have a whistle blowing policy that is not just for their own staff but covers other parties who may disclose to them. So for instance, that the CQC has a whistle blowing policy that it can routinely give to staff from all NHS organisations who may contact the commission to provide intelligence, which gives clear information on the CQC's relevant responsibilities in the matter, confidentiality, how the CQC will deal with the person's concerns, and timescales."

[15] CQC statement 14 December 2011 about the publication of an external whistleblowing policy
http://www.cqc.org.uk/content/quick-guide-raising-concern-about-your-workplace

[16] CQC FOI response 29 December 2014 https://minhalexander.files.wordpress.com/2016/09/cqc-foi-response-29-12-2011-wb-data-analysis-20141229-to-cqc-iat-1415-0691.pdf

CQC - through its Chief Inspector of Hospitals - promised Health Committee in June 2014 that "*every single [whistleblower] case will be investigated*". [3] However, CQC repeatedly tells whistleblowers that it has no remit to investigate individual matters. CQC's December 2014 report "Complaints Matter" stresses this:

> *"People with historic cases also contact CQC in the hope that we can help resolve their concerns or hold a provider to account for its actions. While each case provides learning for us about the problems that can occur, and how we need to mould our new methods of inspection to detect similar problems and take effective action,* ***we do not have the remit to resolve an individual case.*** *As with complaints, we believe there is a regulatory gap…" [17]*

CQC has also argued that oversight may "undermine" employers' responsibility for dealing with concerns:

> *"Finally, we would like to emphasise that the first responsibility for dealing with staff concerns has to be with providers. Any proposed changes that introduced further tiers or organisations into the system should avoid undermining the responsibility of providers." [18]*

2.4.3 CQC registration and rating of providers: As for parliament's recommendation that CQC should refuse to register providers on grounds that they have failed to create a safe reporting culture, we are not aware that CQC has ever done so. In fact, we are aware that CQC has rated organisations where whistleblowers have reported serious detriment as "Good" and even "Outstanding". Well known examples include Sheffield Teaching Hospitals NHS Foundation Trust, Homerton University Hospital NHS Foundation Trust, Basildon and Thurrock University Hospitals NHS Foundation Trust, Northumberland Tyne and Wear NHS Foundation Trust and the Christie NHS Foundation Trust. There have been multiple whistleblowers at these trusts. An account by one of the Homerton whistleblowers on CQC's failures to act properly upon concerns is published by parliament. [19]

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[17] Complaints Matter. CQC report on complaints and whistleblowing. December 2014 http://www.cqc.org.uk/sites/default/files/20141208_complaints_matter_report.pdf

[18] CQC submission to Freedom to Speak Up Review 17 September 2014 https://minhalexander.files.wordpress.com/2016/09/20140917-cqc-submission-to-the-francis-review-freedom-to-speak-out-up.pdf

[19] Written evidence by Pam Linton to Health Committee Inquiry on Complaints and Raising Concerns http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Health/Complaints%20and%20Raising%20Concerns/written/7200.html

Whistleblowers often say that CQC inspection reports dilute evidence of poor whistleblowing governance. An example of this is CQC's reporting about Sheffield Teaching Hospitals NHS Foundation Trust.

Sheffield Teaching Hospitals NHS Foundation Trust

The CQC rated Sheffield Teaching Hospitals in June 2016 as "Good" across the board. [20] CQC dealt minimally with whistleblowing disclosures in its inspection report. This is despite recent, multiple whistleblowing events and whistleblowers' dissatisfaction with the way in which CQC has responded to their disclosures about poor care, manipulated investigations and the trust's behaviour towards whistleblowers. CQC states in its inspection report:

> *"The trust had previously had concerns raised in a small number of services. These included concerns regarding clinical care and bullying and harassment. The information we received was taken into account by the teams inspecting the relevant core services. We did not find any evidence of bullying and harassment during the inspection.*
>
> *…Where issues had been identified, we saw they had been investigated. This included the trust commissioning external independent reviews in response. Some reviews had taken longer than expected and this meant findings and actions were not always implemented in a timely manner. We looked at the commissioned external reviews in cardiac surgery, plastic surgery and audio vestibular medicine and noted that there were no substantial clinical concerns identified"*

FOI data disclosed by CQC in fact revealed a total of 22 recorded whistleblowing contacts from Sheffield Teaching Hospitals staff since 2012 (data was also requested for 2011 but CQC advised that it did not start recording whistleblowing contacts until June 2011). [21] It was also evident that CQC mostly relied on what it was told by the trust about these matters. CQC initially refused to disclose the number of Sheffield whistleblowers on specious grounds of low numbers and potential identifiability, but eventually conceded that there it held more names than it originally claimed. In total, there were 7 named whistleblowers and an unknown number of anonymous whistleblowers. [22]

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[20] CQC inspection report on Sheffield Teaching Hospitals NHS Foundation Trust 9 June 2016 http://www.cqc.org.uk/sites/default/files/new_reports/AAAE8129.pdf

[21] CQC FOI data on whistleblowing disclosures received from Sheffield Teaching Hospitals NHS Foundation Trust staff https://minhalexander.files.wordpress.com/2016/09/20160803-sheffield-teaching-hospitals-whistleblowing-contacts_ir7989-v2.xlsx

[22] CQC FOI response about the number of whistleblowers at Sheffield Teaching Hospitals https://minhalexander.files.wordpress.com/2016/09/cqc-foi-response-number-of-sheffield-whistleblowers-6-september-2016.pdf

Such information is of great importance to whistleblowers for a variety reasons, but CQC inspection reports rarely provide complete data on the numbers of staff who have raised concerns.

Significantly, Sheffield Teaching Hospitals had a high number of compromise agreements (228 over five years). Whistleblowers brought this to CQC's attention but there is no evidence in CQC's inspection report that it has examined any of these. [23]

2.4.4 CQC's response to Winterbourne View: After the Winterbourne View scandal in which a serious case review concluded that CQC had failed patients and whistleblowers, and was not capable of detecting the *"fact and extent of institutional abuse"* [11], the CQC promised that whistleblower disclosures would be tracked until resolved. [24] It produced guidance for its staff on how to process whistleblowing contacts. [25] CQC also promised that it would audit its handling of whistleblowing disclosures. CQC has not published any of the audits, but David Behan CQC chief Executive claimed in oral evidence to the Health Committee that internal audit showed 17 of a sample of 40 whistleblowing contacts triggered responsive inspections.[24] It is not clear what standards CQC audited itself against. These standards should be in the public domain and available for critique.

2.4.5 CQC failure to record whistleblowing outcomes: CQC's handling of whistleblowing did not improve despite the promises. Scandals continued to emerge. CQC's submission of September 2014 to the Freedom To Speak Up Review, via David Behan CQC chief executive [18] revealed that CQC - had up to 2014 - been failing to record the outcomes of whistleblowers' disclosures in thousands of cases. In 2013, 3154 of 9495 (33%) of whistleblowing disclosures to CQC had no recorded outcome. This submission by CQC was not initially published, and only reluctantly disclosed months after CQC was challenged about this lack of transparency.

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[23] FOI response by Sheffield Teaching Hospitals NHS Foundation Trust on compromise agreements https://minhalexander.files.wordpress.com/2016/09/sheffield-11-02-2016.pdf

[24] Oral evidence, Health Committee accountability hearing with CQC 2012 http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhealth/592/120911.htm

[25] CQC guidance for staff. Handling concerns raised by workers of providers registered with CQC. November 2013 https://www.whatdotheyknow.com/request/350100/response/855109/attach/3/CQC%20Whistleblowing%20Policy%20CQC%20IAT%201617%200300.pdf

2.4.6 External review of CQC's response to whistleblowers: In a written submission of February 2014 to Health Committee's inquiry into complaints and raising concerns, the CQC claimed that it would undertake a review of its performance as a prescribed person under PIDA and the support that it provided to whistleblowers:

> *"An external independent review will also be conducted looking at how CQC handles protected disclosures made to it as a 'prescribed person', under the Public Interest Disclosure Act (PIDA) by staff in care providers and can support people who approach the CQC under PIDA. The terms of reference of both of these reviews have just been finalised. It is anticipated that the reviews will be completed by Spring 2014."* [26]

The CQC was subsequently reluctant to provide much information about this exercise when asked to do so last year. It advised that it did not intend to publish the results of the review, which it admitted cost approximately £150K [27] and included the hire of a Capita consultant. CQC claimed that despite the significant expenditure, there was no report on the outcome of the exercise. It eventually disclosed correspondence by the Capita consultant to David Behan, which purported to serve as a progress report. [28] This correspondence gave no meaningful detail on how CQC's handling of whistleblowing had been or would be improved. Nevertheless, David Behan wrote to Health Committee to insist that CQC had been transparent. [29]

2.4.7 CQC whistleblowing data pilot: CQC claimed in correspondence on an overlapping matter that it was undertaking a pilot of data collection about whistleblowing events. When pressed for more information, CQC reported that it was experimenting with categorising the nature of concerns raised by whistleblowers based on an anticipated sample of 360 whistleblowing contacts. Of concern, CQC stated that it might not continue categorisation of whistleblowing disclosures a long term basis. [30] CQC also advised that it would not publish the outcome of the data pilot. [31]

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[26] CQC written evidence Feb 2014 to Health Committee's inquiry on Complaints and Raising Concerns
http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Health/Complaints%20and%20Raising%20Concerns/written/7294.html

[27] CQC FOI disclosure 1 October 2015 about cost of external review (this related both to responses to whistleblowers and other "customer care" issues)
https://minhalexander.files.wordpress.com/2016/09/cqc-foi-response-1-october-2015.pdf

[28] Email 2 February 2015 from Caroline Fawcett Capita consultant to David Behan CQC chief executive
https://minhalexander.files.wordpress.com/2016/09/cqc-iat-1516-0597-documents-for-disclosure.pdf

[29] Letter 24 September 2015 by David Behan to Sarah Wollaston MP Chair of Health Committee
https://minhalexander.files.wordpress.com/2016/09/cqc-ext-indep-review-behan-response-24-09-2015-20150924-pocu-1516-0181-letter-to-dr-sarah-wollaston-re-dr-minh-alexander.pdf

[30] Letter 26 August 2015 from David Behan to Minh Alexander
https://minhalexander.files.wordpress.com/2016/09/20150826-pocu-1516-0181-dr-minh-alexander-wb-intel-final.pdf

[31] Letter 15 September 2015 from David Behan to Minh Alexander
https://minhalexander.files.wordpress.com/2016/09/cqc-behan-letter-re-pub-wb-pilot-received-16-09-2015-copy.pdf

When recently asked to disclose the relevant reports from the pilot, the CQC initially claimed that it held no such data. When challenged, the CQC admitted that its initial response was incorrect. [32] It disclosed two reports, one dated 25 September 2015 [33] and an undated document that reported on a trial of a triage tool that was carried out in July 2015. [34] Neither of these report specifically on the 360 whistleblowing disclosures or how they were categorised. The reports focus largely on bureaucratic aspects of call handling, such as CQC staff workload, "efficiencies", "productivity" and responding to CQC inspectors' complaints that too many whistleblowing enquiries were coded as "high" priority. The outcome of the exercise was that almost half of calls coded as high priority were re-classified to medium priority. CQC concluded that:

> ***"…information could instead go directly to intelligence for analysis and reduced inspector workload" [33]***

So in short, it seems that the object of the exercise was not to so much a patient-centred attempt to improve learning from whistleblower intelligence, but an institution-centric exercise in cost cutting to reduce the inconvenience posed by whistleblowers.

2.4.8 CQC inspection methodology: CQC promised parliament in February 2014 that it would develop a methodology for inspecting regulated bodies' whistleblowing governance:

> *"We have also made a commitment to 'inspect the way hospitals listen and respond to complainants and whistleblowers…' and are in the process of developing a methodology that will allow us to do this across health and social care as part of our new approach to inspections." [26]*

Famously, CQC recruited a whistleblower via a six month secondment to help improve its response to whistleblowers. Whilst this earned CQC an endorsement and CQC used this venture for much public relations gain, there is no substantive account or evidence of changes that CQC actually made as a result of this work. It is suggested in a blog published by CQC four days after the Freedom to Speak Up Review was released, that

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[32] CQC FOI correspondence 21 November 2016
https://minhalexander.files.wordpress.com/2016/09/20161121-final-decision-notice-cqc-iat-1617-0511.pdf

[33] CQC internal report 25 September 2015 from Responding to Concerns Programme
https://minhalexander.files.wordpress.com/2016/09/document-one-cqc-iat-1617-0511.pdf

[34] Undated CQC report from staff focus groups on a new triage tool
https://minhalexander.files.wordpress.com/2016/09/document-two-cqc-iat-1617-0511.pdf

there were subsequent "trials" and evaluation. To our knowledge the outcomes of these trials and evaluations have never been transparently reported by CQC:

> *"Although my secondment ended last year, I was involved in the evaluation of the work once the trials had been completed. I have been keeping a close eye on things as they develop at CQC; I have every faith in them – and that perhaps things can change for the better."* [35]

Similarly, CQC employed a high profile "National Adviser for Patient Safety", who gave oral evidence to Health Committee's inquiry on complaints and raising concerns. At a hearing on 17 June 2014, the National Adviser reported that CQC was developing a framework for inspecting whistleblowing governance by regulated bodies. [3] However, we are not aware of any subsequent, specific CQC guidance to inspectors on how to inspect whistleblowing governance. There are only some brief supporting notes to inspectors about the basics of whistleblower legislation. CQC's report "Complaints Matter" gave indications of broad areas of inspection, but there was no detailed methodology. [17] Examination of generic CQC inspection frameworks [36] reveals no clear standards, only general questions with no associated measures. For example:

> *"Do both leaders and staff understand the value of staff raising concerns? Is appropriate action taken as a result of concerns raised?"*
>
> *"Does the culture encourage candour, openness and honesty?"*
>
> *"How are lessons learned from concerns and complaints, and is action taken as a result to improve the quality of care? Are lessons shared with others?"*

A letter to CQC by whistleblowers in October 2015 about CQC's lack of credible methodology for inspecting whistleblowing governance [37] did not result in any effective action by the CQC.

2.4.9 CQC's intelligent monitoring: CQC acknowledges that it has "… *a unique overview of quality across the health and adult social care sector"* but it has published little organisation-level whistleblowing data.

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[35] Blog for CQC by Kim Holt, 16 February 2015
http://www.cqc.org.uk/content/whistleblowers-story

[36] CQC inspection frameworks
http://www.cqc.org.uk/content/inspection-frameworks-hospital-and-ambulance-core-services

[37] Letter 19 October 2015 to David Behan by whistleblowers, on CQC inspection methodology
https://minhalexander.files.wordpress.com/2016/09/c2a0letter-to-cqc-19-october-2015.pdf

CQC's so-called 'intelligent monitoring' reports sometimes flag whether specific organisations have been subject to 'whistleblowing alerts', but they give no indication of number and themes. For example, for over three years, North Cumbria University Hospitals NHS Trust has been the trust with the most staff whistleblowing disclosures to CQC (more information is provided later in this report). However, from the public's point of view, all that is visible is five intelligent monitoring reports that acknowledge there have been whistleblowing alerts. [38]

2.4.10 CQC annual reports: CQC annual reports have also provided limited and incomplete information on whistleblowing, in inconsistent formats. CQC has received well over 33,347 whistleblowing contacts since inception. The full total is unknown because CQC has not provided data for three out of seven years.

Table 1. Data in CQC annual reports about whistleblowing

Year	Data given in annual report about whistleblowing disclosures received by CQC
2009/10	No specific mention of whistleblowing
2010/11	A few anecdotal references to whistleblowers's disclosures to CQC, but no statistical data provided
2011/12	In response to failures exposed at Winterbourne View, the CQC claimed that it had established a whistleblowing team to specifically deal with concerns received, that it was receiving an average of 400 whistleblowing disclosures a month, and that it was undertaking ***"periodic audits of a sample of cases to analyse how whistleblowing information is being used. "*** [Assuming that the rate of contacts was 400/ month through the whole year, this gives a total of 4800 whistleblowing contacts for the year]
2012/13	CQC reported that the numbers of whistleblower disclosures had doubled to 8643 over the year, and that **the vast majority related to social care – 7456 (86%)**
2013/14	CQC reported that it had received 9473 whistleblower disclosures and that it had asked an NHS whistleblower to advise it on improving its processes.
2014/15	No data provided on whistleblowing disclosures, apart from one case example. [In oral evidence to parliament, David Behan stated that CQC had received 1573 whistleblowing contacts in the period 1 April 2014 to June 2014]
2015/16	CQC reported that whistleblowing disclosures formed 11% of all 80,530 concerns received by CQC. [This gives 8858 whistleblowing

[38] CQC intelligent monitoring reports on North Cumbria University Hospitals NHS Trust http://www.cqc.org.uk/provider/RNL/reports

	disclosures]
Total	**The above gives a total figure in excess of 33, 347 whistleblowing contacts to CQC, to date**

2.4.11 CQC publication of data: As above, Robert Francis had an expectation that all NHS organisations should regularly publish *"quantitative and **qualitative** data"* on whistleblowing concerns raised by their staff.

CQC has not held itself to this standard, either with respect to reporting on whistleblowing by its own staff, or whistleblowing by staff of the organisations that it regulates. CQC gave no information on whistleblowing by its staff in the two annual reports published after the Freedom to Speak Up Review. Moreover, CQC has decided that its own local Freedom to Speak Up Guardian should not relate to the National Guardian. [39]

> *"The decision by CQC to appoint its own internal Guardian is separate to the arrangements for the National Guardian and there will be no formal working relationship between the two roles."*

The structural isolation of CQC's local Guardian and CQC's lack of accountability about its internal whistleblowing affairs set a poor example to the organisations that CQC regulates.

2.4.12 CQC FOI disclosures about whistleblowing contacts: In May 2014, via FOI, CQC provided data on the number of whistleblowing disclosures about the NHS in the year between May 2013 and April 2014. [40]

This disclosure revealed a total of 981 contacts by the staff of English NHS trusts over the year. Analysis of the data reveals a range of 1 to 33 whistleblowing contacts (average of 4.8) per trust. Twenty five trusts, mostly acute, were the subject of 10 or more whistleblowing contacts to CQC. They accounted for almost half of all whistleblowing contacts to CQC (402 of 981). Mental health trusts accounted for almost a quarter of the whistleblowing contacts (222 of 981). [41] The 25 trusts with the highest

[39] CQC FOI response 25 January 2016
https://minhalexander.files.wordpress.com/2016/09/cqc-local-guardian-appt-nat-guardian-foi-response-25-01-2016-iat-1516-0638.pdf
[40] CQC FOI data May 2014
https://minhalexander.files.wordpress.com/2016/09/cqc-foi-on-wb-disclosures-may-2013-to-april-2014.xlsx
[41] Analysis of disclosures to CQC about mental health trusts 1 May 2013 to 30 April 2014
https://minhalexander.files.wordpress.com/2016/09/wb-disclosures-to-cqc-on-mh-trusts-may-2013-to-april-2014.xlsx

number of whistleblowing contacts are given in Table 2. Many of the names will be very familiar to whistleblowers.

Table 2. Trusts with the highest number of staff whistleblower disclosures to CQC

NHS Trust	**Number of staff whistleblowing contacts made with CQC May 2013- April 2014**
North Cumbria University Hospitals NHST	33
Barts Health NHST	27
Yorkshire Ambulance Service	25
University Hospitals of Leicester NHST	24
Colchester Hospital University NHSFT	23
Oxford University Hospitals NHSFT	22
Norfolk and Suffolk NHSFT	19
Heatherwood and Wexham Park Hospitals NHSFT	18
Mid Yorkshire Hospitals NHST	15
East Lancashire NHST	15
Heart of England NHSFT	14
Wirral University Teaching Hospital NHSFT	14
Croydon Health Services NHST	13
Nottingham University Hospitals NHST	13
Tameside Hospital NHSFT	13
Dorset Healthcare University NHSFT	12
Hull and East Yorkshire NHST	12
United Lincolnshire Hospitals NHST	12
St Georges Healthcare NHST	12
Brighton and Sussex University Hospitals NHST	11
St Georges Healthcare NHST	12
Liverpool Community Health NHST	11
Northern Lincolnshire and Goole NHSFT	11
University Hospitals of Morecambe Bay NHSFT	11
Leeds Teaching Hospitals NHST	10

Significantly, CQC stated in this FOI response that ***"CQC has not performed any central analysis of the reasons behind each whistleblowing concern we have received."*** Clearly, this information has the potential to seriously embarrass the government, but such analysis is vital to understanding systemic problems and risks to patients and social care users.

A glimpse into CQC's vast pool of whistleblowing data was afforded when the media reported on an FOI about the nature of NHS whistleblowing disclosures to CQC. [42] The CQC declined to provide all the data requested, but even its partial disclosure on staff concerns in five trusts with the highest number of whistleblowing reports revealed serious and disturbing matters. [43] The five trusts were North Cumbria, Oxford University, Colchester, Mid Yorks and Barts. There were allegations that NHS managers ignored concerns and risks to patients, manipulated the system and told staff to "lie to CQC inspectors".

For example, these were some of the staff disclosures about the very troubled Colchester Hospital University NHS Trust:

> *"Complaint about lack of permanent staff- only temps. Also lack of transparency re investigations. Staff are unable to raise issues with managers, as they discriminate. Also allegation that managers employ more staff prior to CQC inspection."*
>
> *"Concerns with staffing levels on ward. Allegation elderly SU are being neglected."*
>
> *"Allegations of a bullying/blame culture from senior management leading to staff fearing to raise whistle blowing concerns. Also concerns that patients are at risk due to patients being offloaded from ambulances and left in corridors with minimum facilities and support for extended periods of time."*

An update FOI to CQC revealed that the rate of whistleblowing contacts by NHS trust staff has continued at broadly the same rate over the financial years 2013 to 2016, with a total of 2959 contacts and an average of 986 a year, with an average of 3.9 contacts per trust per year. [44]

North Cumbria, one of the 14 "Keogh" trusts [45], remains the trust that whistleblowers complain about the most to CQC. In the three financial years 2013 to 2016, there were a

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[42] Whistleblowing NHS staff complained about hospital failings including drug dealing and poor care, Matthew Davis, Mirror 26 April 2015
http://www.mirror.co.uk/news/uk-news/whistleblowing-nhs-staff-complained-hospital-5584699

[43] CQC FOI data on whistleblowing disclosures by NHS staff
https://minhalexander.files.wordpress.com/2016/09/cqc-foi-20150330-cqc-iat-1415-0865-enquiries-top-5-internal-review-for-disclosure.xlsx

[44] CQC FOI disclosure 24 October 2016 on whistleblowing disclosures
https://minhalexander.files.wordpress.com/2016/09/20161019-final-information-for-disclosure-cqc-iat-1617-0427.xlsx

[45] Review into the quality of care and treatment provided by 14 hospital trusts in England: Overview report, Bruce Keogh, NHS England 16 July 2013
http://www.nhs.uk/nhsengland/bruce-keogh-review/documents/outcomes/keogh-review-final-report.pdf

total of 83 disclosures, many of which relate to bullying, failure to listen to staff, unsafe staffing, whistleblower reprisal, alleged manipulation and dishonesty in the management of the trust.

Table 3. Some of the most worrying disclosures about North Cumbria were as follows:

Date of disclosure	Nature of concern disclosed to CQC	Action that CQC says it took in response to disclosure
December 2013	Concerns that incidents are not being properly investigated and closed in order to manipulate performance figures	Information noted for future inspection
January 2014	Concern about monitoring and control of the bacteria Pseudomonas in the hospital water supply	Discussed with Trust chief executive
March 2014	Concerns that incidents are not being properly investigated in order to manipulate performance figures.	Information noted for future inspection
April 2014	Concern that lessons not learned from recent never event reviews	Information noted for future inspection
April 2014	Concerns that a whistleblower was badly treated after raising concerns with management and a culture of bulllying and harassment.	Information noted for future inspection
September 2014	Concerns about incident reporting, that management do not investigate incidents appropriately and allegation that investigation outcome figures are manipulated.	Information noted for future inspection
November 2014	Concern that management are pressurising staff to sign to say they have had training when they have not. Staff have to train themselves to use equipment. Lack of consistency in training/competence across wards.	Head of Hospitals Inspection informed Noted for future inspection
March 2015	Concerns about poor staffing levels compromising care of service users and manipulating of results to make the department look good	Head of Hospitals Inspection informed Noted for future inspection
March 2015	Concerns about manipulating/misplacing results causing patient care to be compromised	Head of Hospitals Inspection informed Noted for future inspection
April 2015	Concerns about manipulating results	Noted for future reviews

It is of great concern that repeated allegations of falsification by North Cumbria management were simply noted by CQC for future inspection. A key standard recommended by Robert Francis and adopted by the government is that healthcare organisations should publish truthful data. A more responsive approach is surely required when there are allegations that organisations are reporting dishonestly.

Of the 83 whistleblowing disclosures by North Cumbria staff, 67 were simply "noted for future inspection" or "noted for future review". Of these 67, a Head of Hospitals Inspection was informed in 12 instances. The most that CQC did in response to whistleblower disclosures was to occasionally discuss the issues with the Trust. Nowhere is there any reference to active, external review of the trust. In fact, when one whistleblower complained that concerns that were disclosed to the Keogh review team had not resulted in meaningful action, CQC also simply noted this for future action. Whilst the picture that emerges from this data is disturbing, it correlates with the experience of many whistleblowers who have reported being fobbed off by the CQC.

The data certainly does not support a claim made to parliament by CQC's Chief Inspector of Hospitals on 17 June 2014:

"What we can say is that every single case will be investigated." [3]

Indeed, the data and inspection reports provide almost no evidence that the CQC followed up the grave disclosures with checks on North Cumbria whistleblowers' well being, and whether they perceived detriment after whistleblowing. This is one of the most disappointing aspects of CQC's response to whistleblowers. Parliament has advised that it is important for public bodies to record and monitor detriment experienced by staff who raise concerns. Robert Francis advised that CQC should assess the way NHS providers treated whistleblowers as part of the "Well Led" domain. CQC has approached this superficially in most of its inspection reports. It reports primarily on staff willingness to raise concerns, and usually avoids any accounts of reported detriment to whistleblowers.

CQC's inspection reports on Northern Cumbria have not revealed the gravity of staff disclosures. They refer mostly to the fact that disclosures have been made, but not what they comprise. CQC reports referred to problems of culture, without reporting that these include serious allegations of dishonesty. The inspection reports contain no reference to Fit and Proper Persons, other than comments on the trust's compliance with bureaucratic process. Despite the staff reports of serious management misconduct, CQC asserted: *"Many of the concerns could and should have been addressed directly by managers with staff."* This is a minimisation of the severe risks and obstacles that staff face where there are management cover ups.

It also evident that at national level, CQC is still not analysing the themes from whistleblowing disclosures. On 13 September 2016 CQC advised that *"currently the CQC has not conducted any analysis of enquiries recorded as whistleblowing".*[46] On 21 September 2016, CQC advised that the whistleblowing data it holds centrally relates only to the numbers of disclosures, and no other information has been centrally collated. [47]

Of course, a failure to analyse data has the effect of protecting CQC from Freedom of Information requests, and under the rules, enables CQC to refuse requests for data on the national picture on grounds of cost.

2.4.13 There is a question over the accuracy of CQC's whistleblowing figures. In an FOI response of 13 September 2016, CQC claimed that it had received a total of 254 whistleblowing contacts from the start of financial year 2016/17. Pro rata, this gives a number of 609 for the year, which is a sharp drop from the previous year. However, CQC has denied that its method of counting whistleblower contacts has changed.

2.4.14 CQC handling of intelligence from Employment Tribunals: As a prescribed body, CQC receives notifications from Employment Tribunals about legal action taken by whistleblowers against regulated bodies, on grounds of whistleblowing detriment. This information is a very important indicator of likely cover ups and mistreatment of whistleblowers. However, FOI data reveals that CQC has also failed to properly analyse this intelligence:

> *"We do not currently log or record ET1 forms [ET1 forms are summaries of individual claims to the Employment Tribunal] in a central database and have not conducted an overall analysis. Instead, any ET1 form we receive is logged against our records for the relevant provider."* [48]

CQC refused to provide national data on ET1 forms received, on grounds of purported cost. A data disclosed on 24 November 2016, on a sample of trusts known to have had significant whistleblowing problems, reveals relatively low numbers of notifications by the Employment Tribunal.

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[46] CQC FOI response 13 September 2016
https://minhalexander.files.wordpress.com/2016/09/pam-linton-cqc-foi-correspondence-september-2016.pdf

[47] CQC FOI response 21 September 2016
https://minhalexander.files.wordpress.com/2016/09/cqc-correspondence-21-09-2016-only-numbers-held-centrally.pdf

[48] CQC FOI disclosure 27 October 2016
https://minhalexander.files.wordpress.com/2016/09/cqc-foi-response-et1-intelligence-27-october-2016.pdf

We believe the ET1 data supplied by CQC is unreliable:

> Although we are unable to comply with your request in full, we have been able to conduct some key word searches against the enquiries and attachments logged against each of the five Trusts, since 2010.
>
> We used the following key words: "ET1", "employment" and "tribunal" to try and identify information within the scope of your request.
>
> **Please note that the numbers resulting from our key word searches below do not show that no further ET1 forms/information have been received. This could only be established by conducting full manual searches against all of the Trusts in question.**
>
> 1. Basildon and Thurrock University Hospitals Foundation Trust – nil return
> 2. University Hospitals of Morecambe Bay NHS Foundation Trust – nil return
> 3. Heart of England NHS Foundation Trust – references to 2 employment tribunals (but no copies of ET1 forms located)
> 4. Northumbria Healthcare NHS Foundation Trust – nil return
> 5. Croydon Health Services NHS Trust – 1 copy of ET judgement located (but not ET1 form)

2.4.15 CQC has not to our knowledge systematically measured whistleblowers' experience of its process.

Instead, CQC is averse to challenge and has on occasion sought to characterise its critics as difficult. It has at times responded legalistically and threatened or imposed communication bans. CQC has also tried to resist requests for information by threatening to declare or actually declaring requests as "vexatious". For example, CQC deemed an FOI request about David Behan, David Prior and Winterbourne View as "vexatious". The information commissioner subsequently overturned this. [49]

CQC also frequently refuses to hear from whistleblowers about their experiences of victimisation, claiming that employment matters are not within its remit, when in fact reprisal against whistleblowers is in fact a very serious governance issue.

[49] ICO decision notice 20 August 2014
https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1021508/fs_50532615.pdf

2.4.16 CQC's failure to apply Regulation 5 Fit and Proper Persons: In addition to CQC's wilful blindness and relative silence about whistleblower detriment, CQC has also not used its powers under Regulation 5 Fit and Proper Persons (FPPR) to remove any senior managers who have suppressed and harmed whistleblowers. [50] [51] Its general failure on FPPR has been so serious that even Robert Francis, a CQC non executive director, has publicly acknowledged that FPPR is not working. [52]

2.4.17 CQC's failure to regulate the use of compromise agreements: Robert Francis advised in the Freedom to Speak Up Review report that CQC should inspect the compromise agreements used by employers. CQC claimed that it would do so if "necessary". There is in fact no evidence from a review of all inspection reports on NHS trusts that CQC has examined any compromise agreements. [53] Ongoing FOI work shows that gagging remains widespread in the NHS and that some employers use gagging clauses as standard.

3. Conclusions

CQC's repeated failures to act appropriately upon whistleblowers' concerns have damaged public confidence. There is no substantive evidence of change.

CQC's inspection methodology on regulated bodies' whistleblowing governance is not rigorous. It lacks clearly defined standards and so does not lend itself to audit and measurement.

CQC's responses to whistleblowers' disclosures are too often passive and reluctant.

CQC still does not analyse themes in whistleblowing disclosures.

CQC does not seem to have stored whistleblower intelligence received from Employment tribunals in a systematic matter, and it has not analysed this vital information.

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[50] CQC's Fit and Proper Parade. Minh Alexander 29 July 2016
https://minhalexander.com/2016/09/24/cqcs-fit-and-proper-parade/

[51] Fit and Proper Mess. Minh Alexander 19 October 2015
https://minhalexander.com/2016/10/19/fit-and-proper-mess/

[52] Robert Francis calls for regulation of senior managers. Health Service Journal 9 November 2016
https://www.hsj.co.uk/topics/workforce/exclusive-robert-francis-calls-for-regulation-of-senior-managers/7013089.article

[53] NHS gagging. How CQC sits on its hands. Minh Alexander 22 September 2016
https://minhalexander.com/2016/09/23/nhs-gagging-how-cqc-sits-on-its-hands-2/

From the perspective of whistleblowers' experience, whistleblowing is a highly risky venture. Risk of reprisal increases if staff persist in raising their concerns or make disclosures outside of their organisations. Where staff are brave enough to take the added risk of contacting the CQC, this often does not result in satisfactory or proportionate system responses. Employers may be tipped off (even if disclosures are made anonymously), and they can realistically count on the CQC not to take much real action or fully reveal the extent of governance failures.

CQC is not rigorously tracking whistleblowers' experience, either of employers' or CQC's processes, and is not in a credible position to judge whether employers have good whistleblowing governance. CQC reports very superficially on how organisations treat whistleblowers.

This regulatory wilful blindness gives employers a free hand to intimidate and victimise staff. CQC's failure to report clearly on the numbers of whistleblowers for each organisation also has the effect of reinforcing the isolation and marginalisation that employers deliberately impose on whistleblowers, to disempower and intimidate them.

These failures are all the more serious because they persist over seven years after CQC was established. This level of repeated failure calls into question whether CQC wishes to support better whistleblowing governance. We do not believe on the evidence available that CQC prioritises the public interest or whistleblowers' welfare.

We believe that parliament should stop patching up an unrepairable, unreliable regulatory model. Much more fundamental reform of whistleblower protection is needed. This should include substantive law reform, robust and independent investigation of whistleblowers' concerns when needed, and much greater transparency about the system response to whistleblowers.

END