Benchmark Witness
Name: Sybille Raphael
Statement No.: [XXXX]
Exhibits: [XXXX]
Dated: 4 March 2024

THIRLWALL INQUIRY

WITNESS STATEMENT OF SYBILLE RAPHAEL

I provide this statement in response to a request under Rule 9 of the Inquiry Rules 2006 dated 10 January 2024.

I, Sybille Raphael, will say as follows:

1. I am the Legal Director of Protect. I am a specialist whistleblowing lawyer working alongside employers, regulators and whistleblowers. I have in-depth knowledge of the law and the practical realities of whistleblowing and have a key role in Protect's legal reform campaign, pushing for improvement to the UK whistleblowing regulatory framework. I supervise Protect's free legal Advice Line and its team of legal advisers advising whistleblowers on how to raise their concerns in safe and effective ways and on their legal rights. I also have in-depth wide-ranging expertise in helping organisations improve their whistleblowing arrangements and speak up culture, regularly delivering training and consultancy.

2. This statement uses the term 'whistleblowing' which we define as the raising of concerns by a worker with someone in authority – internally and/or externally (e.g. regulators, media, MPs/MSPs) – about wrongdoing, risk or malpractice in the public interest. The NHS uses the term 'speak up' which encompasses whistleblowing.

A. Summary of Protect's work

3. Protect is the UK's whistleblowing charity, a leading authority on whistleblowing law and practice. Established in 1993, we have to date individually advised more than 50,000 callers and helped hundreds of organisations (employers and regulators) set up, or improve, their whistleblowing arrangements.

I. Advice work

4. Our advice is delivered through our free legal Advice Line. We provide free, confidential advice to workers on how they can raise their concerns as effectively and safely as possible, and on the protection they can get as a whistleblower under the Employment Rights Act 1996 (the law having been originally introduced as the Public Interest Disclosure Act 1998 commonly referred to as 'PIDA'). Protect advisers are experts in the specific legal rights that whistleblowers have at work. We provide guidance on how to assert these rights and, if necessary, bring a claim in the Employment Tribunal if they are infringed. We also provide practical advice on how our callers can most effectively raise their concerns in order to get them addressed, whether via internal or external reporting routes, while seeking to minimise the risk of victimisation.

5. Depending on our resources, policy priorities and the seriousness of the concerns raised, we can advocate on behalf of our callers. We can help to amplify their public interest concerns by engaging with regulators, MPs, journalists and other relevant stakeholders.

a. Our NHS callers

6. NHS callers have always featured heavily in our call numbers since the charity was founded in 1993: we have advised thousands of people working in the NHS on their whistleblowing concerns; since 2017 of all the people who have contacted us from the public sector, 38% are NHS workers.

7. Since 2017, the main concerns NHS callers asked for our help with have related to patient safety (40%). This is significantly higher than all the other categories of concerns: the next two biggest categories were working practices (18%) and ethical issues (13%) followed by abuse of vulnerable persons, work safety, financial malpractice, and other (all less than 10%).

8. Our NHS callers occupy a range of roles within the health service. Since 2017, the most common professions have been medical (18.2%) and nursing professionals (17.2%). After this, the most common are managers, directors and senior officials (8.1%), and administrative and secretarial professions (6.1%).

b. Signposting for our NHS callers

9. Our signposting to callers is generally for further legal support for those who are bringing Employment Tribunal claims and/or who need general employment law advice, and/or for mental health support. This signposting can be delivered via email or over the phone but is also available on our webpage on 'Organisations which can help you with areas of employment law that we cannot assist with'.

10. As our expertise lies in whistleblowing, we do not offer advice on other potential claims whistleblowers may have. However, many of our callers need general employment law advice, as they may need to explore other claims (such as ordinary unfair dismissal or discrimination claims) which can be brought alongside their whistleblowing claims. We therefore signpost our callers to other sources of free legal advice, such as the Equality Advisory and Support Service (EASS) for advice on discrimination issues.

11. Whistleblowers who want to bring a claim in the Tribunal also need signposting on how to find representation. Whistleblowing claims are complex and very hard to win without legal representation (see below), which can be very expensive. 44% of our callers have an annual income falling below £I&S while 23% of calls coming from those earning between £I&S and I&S We advise callers looking to bring a claim to check if they have legal expenses insurance, which may provide a route for obtaining legal representation. We advise callers who are members of trade unions to speak with their union's legal team to try and obtain representation. We also signpost to potential sources of free representation and/or litigation support through Advocate, FRU, Law Centres Network, Law Works, ELIPS, and the Law Society's 'Find a solicitor' webpage.

12. Protect has a Legal Support Network made up of solicitors and barristers, who are sometimes able to provide some pro bono support on cases that we have specifically identified as suitable because of certain factors (chances of success, seriousness of the concerns and/or the victimisation, whether the case raises an important point of law that we think needs to be addressed by the Courts and whether the caller has other recourse to paid legal support, etc). The support is obviously dependent on the willingness, resources and capacity of our Legal Support Network members at any given time.

13. We also explore with our NHS callers whether they have accessed other forms of support, and signpost to their Freedom to Speak Up Guardian, to the INWO in Scotland and/or professional bodies if relevant.

14. In relation to mental health support, we encourage our callers to seek support from their own GPs and signpost to charities such as Mind, Anxiety UK and Samaritans, depending on the caller's particular needs.

II. Training and consultancy work

15. Our free legal Advice Line is funded primarily by the sale of our business services. We provide training and consultancy services to organisations in relation to their internal whistleblowing arrangements. Our training consists of both sessions which anyone is able to book onto (open training) and bespoke in-house training for organisations which we arrange directly with clients. Our open trainings are made up of sessions on Whistleblowing Essentials, Investigating a Whistleblowing Concern and Preventing Whistleblower Victimisation – we also run masterclasses on other specialist topics.

16. We also provide consultancy and have developed a unique in-depth benchmarking tool that allows organisations to audit their whistleblowing arrangements against best practice in a thorough and holistic way. We have produced guidance for employers (for example our Preventing Whistleblower Victimisation Guide) and for regulators (Better Regulators: Principle for Recommended Practice). We offer membership packages and currently have several hundreds of members across a range of sectors.

17. We have a long history of providing support to NHS organisations. We ran a dedicated confidential whistleblowing advice line for. and funded by, the NHS in England for many years until 2012 when the contract was passed to Mencap. We ran a similar service for NHS Scotland called the NHS Alert Line from 2013 to 2020. Because any worker is free to call our general Advice Line, we continue to be a source of independent advice for a large number of NHS whistleblowers and appear as such in the NHS England Freedom to Speak Up National Policy[1], and in the NHS Scotland National Whistleblowing Standard[2]. We have reason to believe that we feature in many NHS organisations as a source of independent free advice for their staff.

[1] PAR1245i-NHS-freedom-to-speak-up-national-Policy-eBook.pdf (england.nhs.uk), in the NHS Wales https://www.gov.wales/sites/default/files/publications/2023-09/speaking-up-safely-framework.pdf
[2] https://inwo.spso.org.uk/sites/inwo/files/Standards/NationalWhistleblowingStandards-AllParts.pdf

18. Protect was commissioned by Health Education England to provide initial training to the very first Freedom to Speak Up Guardian (FTSUG) cohort across the country, develop whistleblowing e-learning for FTSUGs, and organise a one-day specialist conference in London for all FTSUGs. We believe the training of the new FTSUGs was afterwards provided by the National Guardian Office.

19. We have previously provided a substantial amount of support, training and consultancy to NHS organisations. However, since the creation of the National Guardian Office, very few NHS Trusts now work directly with us. Only three NHS Trusts are Level One members - our lowest tier of membership. We delivered in-house training to two NHS Trusts in 2023.

20. Over our 30 years' existence, we have also provided whistleblowing training to a large number of the UK's health regulators such as the Nursing and Midwifery Council ('NMC'), the General Medical Council ('GMC'), the General Dental Council ('GDC'), and the General Pharmaceutical Council.

21. Protect was also asked by the Scottish Government to be part of the steering committee for the formation of the Independent National Whistleblowing Officer in 2019. We had a significant role in shaping their whistleblowing standards.

III. Campaigning and policy work

22. The third element of Protect's work is our campaigning, policy and research work. This includes our Legal Reform Campaign[3] to improve the UK whistleblowing law as well as research into whistleblowing within specific sectors and whistleblowing-related issues. In recent years, we have conducted research on whistleblowing in the tech sector[4], financial services[5] and education[6], on whistleblowing during Covid-19[7], on how 'prescribed persons' (regulators or professional bodies) handle whistleblowing disclosures[8], on best practice for preventing whistleblower victimisation[9] and maintaining confidentiality, and on environmental whistleblowing[10].

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[3] https://protect-advice.org.uk/campaign-for-a-new-whistleblowing-bill/
[4] https://protect-advice.org.uk/news/reports-tech-workers-guide/
[5] https://protect-advice.org.uk/silence-in-the-city-2/
[6] https://protect-advice.org.uk/whistleblowing-in-schools-report/
[7] https://protect-advice.org.uk/the-best-warning-system-whistleblowing-during-covid-19/
[8] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://public-concern-at-work.s3.eu-west-1.amazonaws.com/wp-content/uploads/images/2022/08/30095958/Annual-Whistleblowing-Reports-Best-Practice-Guide.pdf
[9] https://protect-advice.org.uk/preventing-victimisation-guide/
[10] https://protect-advice.org.uk/environmental-whistleblowing-toolkit/

23. We also work with government and shadow ministers, MPs, MSPs, trade unions, charities, campaigning organisations and other whistleblowing stakeholders to promote whistleblowing and improve the legal and regulatory landscape around whistleblowing.

Campaigning and policy work in relation to the NHS

24. Protect's views on, and critiques of, whistleblowing arrangements in the NHS are detailed below. Protect has communicated these views over the last few years to a variety of policy makers, trade unions and politicians. In the last two years, the policy makers we have engaged on these issues include:

i. The National Guardian's Office,
ii. The British Medical Association Medico Legal Committee,
iii. The Hospital Consultants and Specialists Association (HSCA),
iv. The Department of Health, and
v. The Infected Blood Inquiry.[11]

B. Challenges facing NHS whistleblowers

25. Our work with whistleblowers has provided us with us with deep insight into the challenges facing those who want to raise concerns at work. We know from the many NHS whistleblowers that we have advised that those speaking up in the NHS experience many of the same challenges whistleblowers across different sectors face, but we have also identified particular difficulties specific to the NHS.

26. The challenges identified below are supported by statistics from the Protect Advice Line and from our conversations with NHS whistleblowers. As part of our evidence, we collated cases from NHS whistleblowers who called us in 2023 with serious or very serious public interest concerns. We also ran in-depth interviews with several NHS whistleblowers.

I. Being Ignored

27. All the NHS whistleblowers and potential whistleblowers calling our Advice Line want to ensure their concerns (often about patient safety), are addressed. However, one of the significant challenges they face is getting their concerns listened to.

[11]https://public-concern-at-work.s3.eu-west-1.amazonaws.com/wp-content/uploads/images/2023/11/30142652/WITN7729001-Written-statement-of-Sybille-Raphael-Protect-redacted.pdf

28. Since 2017, only 8 out of the 931 NHS whistleblowers who contacted us after having raised concerns were thanked by their organisation, while 31% told us their concerns had been ignored. In 2023, only 2 of the NHS whistleblowers we spoke to who had already raised concerns, reported that their concerns were resolved.

29. Failure to investigate whistleblowing concerns means that vital opportunities to address patient safety concerns are missed. It is also extremely damaging to the speak-up culture of the organisation. Re-raising or escalating concerns can be daunting when the problem(s) remains unacknowledged or unaddressed. Whistleblowers lose faith in the process and becomes reluctant to raise new concerns in the future. Whistleblowers tell us there is nothing more dispiriting than the feeling that raising a concern is akin to "throwing a pebble in a black hole". Research has identified that the belief that raising a concern is futile as nothing will be done to address it is the main reason why whistleblowers in the NHS stay silent[12].

II. Being victimised

30. The law offers protection to workers who raise whistleblowing concerns, in recognition of the real risk of whistleblowers facing negative and retaliatory treatment. Since 2017, 63% of our NHS callers who had raised public interest concerns faced some sort of negative treatment. This can take a range of forms, including ostracism or bullying from colleagues, disciplinary sanctions, suspension or performance reviews and dismissal or forced resignation. NHS whistleblowers, alongside other whistleblowers in the health sector, also face additional risks, particularly in relation to the possible weaponisation of at-work reporting mechanisms.

31. Callers to our Advice Line and trade unions have told us that Datix (a risk management system where staff can report incidents they witness in the workplace) is sometimes used as a retaliatory tool against those who have blown the whistle. The malicious use of Datix to log untrue or exaggerated incidents about colleagues has been reported in the Journal of Clinical Nursing.[13] One of our callers told us they were the subject of 17 malicious Datix reports after whistleblowing. Another told us that Datix reports were used in their organisation to create a culture where staff were fearful to raise concerns about internal issues.

32. Another form of victimisation specific to the health sector is the use of retaliatory referrals to professional bodies. An investigation by a professional body can be disastrous for a

[12] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://nationalguardian.org.uk/wp-content/uploads/2023/06/Fear-and-Futility-NHS-Staff-Survey-1.pdf
[13] https://onlinelibrary.wiley.com/doi/full/10.1111/jocn.15691

whistleblower's reputation and career. These investigations can often take several years, leaving whistleblowers in limbo and unable to move on whilst waiting for an outcome. This issue was identified in Sir Francis' Freedom to Speak Up Review[14] (The Francis Report). Our callers have reported facing referrals to the GMC, NMC and GDC after raising concerns about issues within their workplaces. The widely publicised case of Peter Duffy, who was referred to the GMC after a Tribunal had condemned the Trust that employed him for whistleblowing victimisation, is another illustration[15]. We understand that although referrals to the GMC should make it clear that the person referred to has blown the whistle (following the Francis Report's recommendation), this is not always done. Our fear is also that when it is done, it is not properly policed, and the GMC fails to investigate whether the referral is actually whistleblowing victimisation and/or hold the organisation to account when it so.

33. These methods of retaliatory action are particularly concerning, as they abuse processes that were introduced with the aim of effectively protecting patient safety. Instead, too often they are being weaponised to shift the blame onto the whistleblowers themselves and to victimise them for whistleblowing.

34. Another challenge reported by our NHS callers is a poor workplace culture within particular teams, with levels of bullying a particular concern. This is not unique to the NHS, but our statistics show a particularly acute problem: 11.5% of our NHS whistleblowers since 2017 reported that the whistleblowing concern itself that they wished to raise regarded bullying, compared to 5.8% amongst all our other callers in the same period. Other NHS callers mention a culture of bullying as a contextual factor, contributing to a fear of victimisation or a reluctance to speak up internally.

III. Freedom to Speak Up Guardians

35. For whistleblowers, having someone on their side to support them raising concerns is often crucial. Our callers regularly tell us that without our help, they would not have pursued the concern. As an example, the following quotes are taken from some of the feedback we received about our own Advice Line over the last three months (not specifically from NHS whistleblowers): *"A lifeline. The service is incredibly useful to people who are vulnerable as a result of whistleblowing or feel compelled to do so. The service is invaluable." "I want to express my gratitude for your invaluable assistance. I couldn't have achieved this without your help." "Your listening, availability, advice, information and signposting has*

[14] http://freedomtospeakup.org.uk/the-report/
[15] Medical regulator drops probe into NHS whistleblower Peter Duffy amid dispute over email evidence | Computer Weekly

been invaluable in this process. And have also been intrinsic to my ability to hold on to my sanity". NHS staff need to feel supported in raising their concerns, or they will not speak up.

36. Since the Mid-Staffordshire NHS Foundation Trust Inquiry and the Francis Review that followed, all NHS Trusts in England have a "Freedom to Speak Up Guardian" (FTSUG) – often a senior nurse who is tasked with supporting whistleblowers in their Trust and improving the culture around speaking up. NHS whistleblowers are encouraged to speak to their local FTSUG for support with whistleblowing. Protect supported the introduction of FTSUGs and continues to support the idea that there should be an individual(s) inside Trusts to support those speaking up. While FTSUGs play an important role in whistleblowing, they are only part of the picture – much whistleblowing does not involve the FTSUG.

37. For example, only a minority of our NHS callers seem to use the FTSUG system – and whey they do, few seem satisfied. We found that from the 38 NHS whistleblower that contacted us with public interest concerns that we classified as serious or very serious, only 8 reported having interacted with FTSUGs, and only 3 mentioned that this had been a positive experience. Many of our callers tell us that the FTSUG they contacted failed to provide any meaningful support. We have also been told that some FTSUGs appear confused as to what their role is. There is uncertainty as to whether the role is only to provide support to the whistleblower or whether it is also to escalate the concern and/or hold the trust to account when the concern is not properly addressed.

38. Research suggests a wide variability in how Trusts implement the role, and that many FTSUGs are under-resourced[16], which may result in whistleblowers being unable to access adequate support. The Freedom to Speak Up policies used in the NHS define "Speak Up" very broadly and include issues that might be classed as inter-personal grievances, as well as whistleblowing. We understand that FTSUGs are often dealing with numerous bullying and individual grievances as well as other serious whistleblowing concerns. While the former may impact on patient care, asking the FTSUG to take on all these cases risks overloading them with grievance matters and limiting the time and resources available for supporting whistleblowers with public interest concerns, some of which are extremely serious.

[16] Implementation of 'Freedom to Speak Up Guardians' in NHS acute and mental health trusts in England: the FTSUG mixed-methods study — University of Birmingham

39. Other issues with FTSUGs include their position being perceived as a junior role, meaning that they struggle to hold their organisations to account where whistleblowing concerns have not been handled properly. There is also a perception from some of our callers that FTSUGs are not independent and are too closely connected with managers. If a whistleblower wants to raise concerns that involve managers, they may therefore hesitate to approach FTSUGs for support.

40. Whistleblowers are often very stressed and more so if they are in a vulnerable position already, either because they are very junior or part of an existing marginalised group. Having a FTSUG who share the characteristics of the whistleblower would increase their accessibility. For some whistleblowers, having a FTSUG who is very senior within the Trust can also be daunting. We have been told of health care assistants reluctant to contact their FTSUG because they were the Trust's Chief Nurse. The FTSUGs need to be accessible, inspire trust and be sufficiently removed from the Trust's hierarchy.

IV. Duty of Candour

41. From our experience on the Advice Line, the duty of candour does not have a major impact on whether or how NHS whistleblowers raise concerns. This is not something whistleblowers often mention to us. The duty of care that medical professionals owe to their patients seems to be much more at the front the whistleblowers' mind. In our view, cultural factors such as whether a whistleblower will be listened to, or whether they fear victimisation or losing their job present more current barriers to speaking up.
42. Some concerns in the NHS stem from a difference in medical opinion. A doctor may consider that the care given to a specific patient is not adequate (and therefore harmful) because of a disagreement with another doctor on best practice. It is difficult to define clearly what pertains more to a difference in medical opinion and what is more objectively wrongdoing, risk or malpractice. Concerns can also be raised about a lack of resources in a particular team that may endanger patients' safety. Because the law requires whistleblowers to provide sufficiently specific and factual information, Tribunal cases on the interpretation of whistleblowing law have shown that a difference of medical opinion or a strategic disagreement on how best to allocate the scarce resources of a particular team[17] are less likely to qualify for protection under whistleblowing law. This can leave those raising concerns at more risk of retaliation from co-workers.

[17] See for instance chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://assets.publishing.service.gov.uk/media/655348580feb2900141cab51/Mr_M_Pitman_v_Hampshire_Hospitals_NHS_Foundation_Trust___1_Other_-_1404274.2021_-_Reserved_Judgment.pdf

43. Some whistleblowers have expressed to us feelings of there being a culture of blame reigning within the NHS for clinical staff, which makes raising concerns particularly dangerous to the whistleblower brave enough to do so. While health professionals need to be held to rigorous standards, systems failures can often be the reasons for mistakes and wrongdoing. We are aware that the NHS is trying to implement a 'just' culture[18] inspired by what is in place in civil aviation[19] where staff are encouraged to raise concern without attracting blame and therefore retribution. The reality on the ground does not seem to reflect this aspiration.

44. Conversely, there is a perceived lack of accountability of NHS leaders when they are found to have fallen short of standards (particularly when they have been found to have victimised a whistleblower by an Employment Tribunal). Whistleblowers expect senior managers and/or board leaders to be held to account for serious failures which occur on their watch.

V. Protected Characteristics

45. At Protect we collect data related to our callers' protected characteristics. For instance, in 2023, an analysis of all our callers (not just NHS) revealed 23% of our callers identify as having a disability, and 19% identify as Black, Black African, mixed, other or Asian.

46. From our conversations with our callers, we know that whistleblowers with protected characteristics often have additional vulnerabilities that make them feel even more isolated. They will also often be more reluctant to raise a concern, feeling that both the risk of victimisation and the risk of them not being listened to are increased because of their existing vulnerabilities. Callers fear that there is both an additional threat of facing discrimination in the workplace alongside whistleblowing victimisation, and the perception that underlying discrimination negatively impacts the way in which a whistleblowing report will be received and/or interpreted.

47. The Francis Report[20] found that Black and minority ethnic staff in the NHS were more likely to not blow the whistle due to fear of victimisation, as well as being more likely to report victimisation due to their whistleblowing than their white counterparts. This suggests NHS staff with protected characteristics may be more averse to raising whistleblowing concerns

[18] https://www.england.nhs.uk/patient-safety/patient-safety-culture/a-just-culture-guide/
[19] https://www.caa.co.uk/general-aviation/the-ga-unit/just-culture/
[20] http://freedomtospeakup.org.uk/the-report/

due to fear of facing worse victimisation, as blowing the whistle compounds the threat of detriment vulnerable staff already face.

48. Whistleblowers with protected characteristics can also face additional challenges at the Employment Tribunal. A report by the University of Greenwich and the Equality and Employment Law Centre[21] found that claimants bringing a whistleblowing claim had a 12% success rate. When a joint whistleblowing and discrimination claim was brought, the chances of winning the whistleblowing claim dropped to 4.5%.

VI. Mental Health

49. Whistleblowing can often have a significant impact on the whistleblower's mental health. This can occur throughout all stages of raising whistleblowing concerns. It is usually an isolating and emotionally difficult experience deciding to speak up, and stressful waiting for a response or an investigation to conclude. Both the fear and reality of facing victimisation in response to raising whistleblowing concerns can add further distress. Consequently, many whistleblowers' mental health suffers : one research study in the Netherlands found that the levels of depression and anxiety among whistleblowers was comparable to levels people reported soon after being involved in a major disaster.[22] The following quotes - taken from the feedback we received in 2023 on our Advice Line (not just NHS callers) evidence how isolating and damaging whistleblowing can be: *"It was a big relief to find someone who was able to provide me with some guidance and sensible advice at a time when I felt completely lost and alone"* and *"I feel a bit more confident and not so alone now."* and *"I've needed a shoulder to lean on for so long - this is why I reached out to you*".

VII. The Employment Tribunal

50. Access to justice is a real challenge to all whistleblowers making it very difficult for them to enforce their rights against whistleblowing detriment and dismissal.

51. The law is little known - less than half of UK adults are aware there is a law that protects whistleblowers.[23] It is also notoriously complex, with various legal criteria to go through for a claim to ultimately succeed. Specialist legal advice is vital: research has found

[21] https://gala.gre.ac.uk/id/eprint/31407/1/%23Legalsupportmatters%20December%202020.pdf
[22] https://journals.sagepub.com/doi/10.1177/0033294118757681
[23] Taken from YouGov commissioned survey, carried out in 2023 total sample size was 2088 adults. Fieldwork was undertaken between 1st-2nd August 2023. The survey was carried out online. The figures have been weighted and are representative of all UK adults (aged 18+)

whistleblowing claims are more likely to be successful if the whistleblower has legal representation.[24] Yet, only 45% of freestanding whistleblowing claimants are legally represented[25] compared to 90% of employers having legal representation. This clear disparity in arms is a significant obstacle which many whistleblowers face when bringing a claim to the Employment Tribunal.

52. Time limits for bringing employment tribunal claims (three months less 1 day) are also particularly challenging for whistleblowers. Whistleblowing is usually a long journey, with workers raising their concerns informally first, then escalating them if and when ignored. The interaction of concern-raising and victimisation can create a complex factual matrix and timeline, which presents challenges for whistleblowers in ensuring they bring their claim in time, particularly when they remain focused on getting their public interest concerns addressed. In this context, the three-months (or seven days in interim relief cases if the whistleblower has been dismissed) time limit to bring a claim makes the process very difficult in practice.

53. Because the law is complex – and because the whistleblowing itself often raises complex issues - whistleblowing claims are amongst those which require the longest Tribunal sitting days. Whistleblowing claims are usually listed for five days or more, making legal representation very expensive – and free pro bono representation is very difficult to access as barristers or solicitors are understandably reluctant or unable to commit to such long periods of time. As mentioned previously, Protect routinely signposts callers to free legal services but these generally provide only ad-hoc and limited help. It is very difficult for employment tribunal claimants to receive free or low-cost support from the start to end of their case[26]. Legal aid is very rarely (if ever) accessible to whistleblowers as the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed all employment cases from legal aid's scope, except in cases of discrimination or modern slavery. As a result, the estimated spend on both legal help and representation in employment cases has been reduced from around £ I&S [27].

54. 55% of our NHS callers tell us they are not unionised and therefore have no way to access the support that a trade union of a professional body could provide. Even for the 45% who can ask for their trade union's help, this is not always satisfactory as not all trade unions representatives understand the differences between grievances and whistleblowing.

[24] https://gala.gre.ac.uk/id/eprint/31407/1/%23Legalsupportmatters%20December%202020.pdf
[25] ibid.
[26] https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf pg. 30
[27] https://researchbriefings.files.parliament.uk/documents/CBP-8910/CBP-8910.pdf

VIII. Impact of failures of whistleblowing processes

55. The impact of failing whistleblowing processes and culture has time and time again shown to have severe consequences for NHS patients. The NHS is no different from any other sector in finding that whistleblowers are the eyes and ears of any organisation.

56. The crimes of Lucy Letby are an example of managers and leaders in the Trust both failing to listen or outright ignoring concerns raised by staff, with the effect that more murders were committed. An example can be found from coverage of the trial in the Guardian, where whistleblower Dr Stephen Brearey detailed how his concerns were ignored by senior managers: *"So, following the staff debrief, I phoned the duty executive on call, Karen Rees, senior nurse in the urgent care division. She was familiar with our concerns already. I explained what had happened and I didn't want nurse Letby to come back to work the following day or until this was all investigated properly. Karen Rees said 'no' to that and that there was no evidence." "I put it to her was she happy to take responsibility for this decision in view of the fact that myself and my consultant colleagues all wouldn't be happy with nurse Letby going to work the following day. She responded she was happy to take that responsibility. We had further conversations with executives the following week and action was taken."*[28]

57. This is unfortunately a too common response to whistleblowers. On the Advice Line, 31% of our NHS whistleblowers say their concerns are ignored.[29] Whistleblowers are often raising concerns about risk, as well as wrongdoing or poor practice that has occurred, and vital opportunities to address issues and mitigate those risks are lost where whistleblowers are not listened to. If something is raised, actions must be seen to happen. Accountability is crucial to any organisation keen to avoid creating a feeling of impunity and to deter wrongdoing effectively.

58. A culture of aggression towards whistleblowing, where staff concerns aren't just ignored but where those who have come forward are victimised, should also be of real concern when considering patient safety. Too many scandals reveal that staff knew that there was something wrong but were afraid to speak, just like the member of staff who did not raise concerns about the poor care mothers and babies received at Shrewsbury and Telford NHS Trust because of the fear of repercussion: "*'I am sorry and I know that sorry is not*

[28] *'Lucy Letby: doctor asked for nurse to be removed from duties, trial hears'* Guardian article, 14 March 2023, https://www.theguardian.com/uk-news/2023/mar/14/lucy-letby-doctor-asked-for-nurse-to-be-removed-from-duties-trial-hears

[29] Since 2017 NHS whistleblowers who raised concerns told us their concerns were: 30.83% ignored, 17.78% denied, 9.56% admitted, 25.13% under investigation, and 4.19% resolved.

enough but by engaging with this review we hope that our voices will finally be acknowledged and that change will happen so that there are robust and independent places for clinicians to speak out that acknowledge what we are saying, what needs changing and act on this without fearing reprisals".[30]

C. Protect's proposals for change

59. Our concern is that the current Freedom to Speak Up system is not sufficient to hold executives and board members to account for the top-down whistleblowing culture and practices that exist in NHS institutions. We also think the expectations on how NHS leaders respond to whistleblowing concerns, or how they should treat whistleblowers are not strong enough. The whistleblower who has been ignored and victimised is left to escalate concerns in a complex matrix of health sector regulators and use the tribunal system to get redress for any victimisation they have suffered. However, the tribunal system will not address the concerns raised and the lessons an organisation can get from the employment tribunal about the detrimental treatment of one individual are not the same as organisational learning about the concern. Apart from placing a lot of pressure on whistleblowers, it does not serve NHS patients to have this imbalance of responsibilities. This is why we would like to see clearer whistleblowing rules put in place in the NHS.

I. Reforming the FTSUG system

60. The FTSUG system was an innovation when it was first created and Protect continues to support the idea of an individual in each Trust helping whistleblowers to speak up. However, the dual roles of supporting individuals and changing cultures are not working well everywhere. There is a perception that many FTSUGs lack the independence, seniority and resources to really challenge senior executive or board members. As stated previously, many whistleblowers do not use the FTSUG to raise concerns, for example, preferring to go to their line manager, the Medical Director or Chief Nurse about patient concerns, or to other departments and bodies (for example, to raise matters of NHS fraud).

61. We believe FTSUGs need to be more accessible and diverse, ideally with some FTSUGs sharing protected characteristics with the staff that find it particularly daunting to speak up. We recommend Trusts identify which groups within their workforce they do not hear from and put in place measures to empower them to speak up.

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[30] 5.73, p.g. 36 of the Ockenden Report- Final, 30th March 2022: chrome-https://assets.publishing.service.gov.uk/media/624332fe8fa8f527744f0615/Final-Ockenden-Report-web-accessible.pdf

62. FTSUGs also need ringfenced time and resource (including mental health support) to dedicate to their role and direct access and support from a 'Whistleblowers Champion' (see below). FTSUGs deal with a wide variety of different issues in the workplace. In our view, both advising whistleblowers and being a force for cultural change within the organisation can make the role overwhelming. It often means FTSUGs are fighting individual fires whilst also dealing with bigger cultural issues. This is only exacerbated by the fact usually their role is done in addition to a substantive role in the organisation. As identified in Professor Aled Jones' review of the FSTU system "*many FTSUGs identified how a lack of available resources, especially time scarcity, negatively and significantly affected their ability to effectively respond to concerns; their opportunities to collect, analyse and learn from speaking-up data; and, more generally, the extent to which they developed their role and speak-up culture*"[31].

63. NHS England could consider following the model set up in Scotland where an Independent National Whistleblowing Officer can investigate concerns raised if the NHS Board fails to respond appropriately. While the approach encourages individual hospitals and clinical settings to address concerns, it provides a vital backstop for whistleblowers. In England, there are several regulators a whistleblower might go to (NHS England, CQC, etc) but none are devoted to considering whistleblowers' concerns and none are tasked with ensuring that organisations treat whistleblowers well.

64. We also believe that the 'changing culture' role of FTSUGs needs to be at the very least shared with (if not totally transferred to) a senior leader at Board level. While all Boards should have someone with responsibility for overseeing the Speaking Up arrangements in the Trust, there is no one with a focus on serious risks that whistleblowers can identify. Recasting the Board non-exec role as "the Whistleblowers' Champion" could ensure that the right questions are asked at Board level. Whistleblowing, as noted above, does not only happen via FTSUGs and we are concerned that Boards may not be collating whistleblowing data from all sources and interrogating what the data shows. The Whistleblowers' Champion should also be given the role of ensuring that there is a supportive workplace culture, leaving the FTSUG role one of handling day-to-day case work. A Whistleblowers' Champion Board member could also be a personal, and therefore effective, advocate for speaking up for the whole organisation.

[31] Implementation of 'Freedom to Speak Up Guardians' in NHS acute and mental health trusts in England: the FTSUG mixed-methods study ttps://pubmed.ncbi.nlm.nih.gov/35995060/

65. From our experience of working with a wide range of financial services employers, the role of the Whistleblowers' Champion is valuable and ensures that the Board take whistleblowing seriously. NHSE contracts says that there should be a senior lead and a non-executive board member responsible for whistleblowing, but it is not clear that they are held responsible for the effectiveness of their Trust's speak up arrangements. This is to be contrasted with the Financial Conduct Authority's approach which requests that firms allocate to the Whistleblowers' Champion *"the responsibility for ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing including those policies and procedures intended to protect whistleblowers from being victimised because they have disclosed reportable concerns"*.[32] We know whistleblowing teams working in financial institutions find it helpful to have a director overseeing the whistleblowing system, having a champion on the board creates a more direct and effective oversight for the whistleblowing system.[33] The Board should understand through regular reports what trends of issues whistleblowers within their organisation are raising and, where appropriate, recognise this via risk registers. Boards should be trained specifically on whistleblowing – its importance, the risks of ignoring whistleblowers, and how to proactively prevent whistleblower victimisation. We want to stop a repeat of what the former chief executive of Countess of Chester hospital suggested in the press: that the hospital's board of directors were kept in the dark about Lucy Letby's crimes and the missed opportunities to stop her.[34]

II. Duty to Investigate

66. There are currently no legal standards on how employers should handle whistleblowing concerns they receive from staff: they do not have to report on disclosures received, investigate concerns or even to have whistleblowing procedures in place. This is due to the fact the Employment Rights Act 1996 that contains whistleblowing law is focused almost exclusively on awarding compensation for the victimisation of a whistleblower.

67. The essential next step is for UK law to set down strong standards that employers must follow, creating a legal duty on employers to, at the very least, consider a whistleblowing concern when it has been raised. Failure to consider the concern, investigate or explain why an investigation is not deemed necessary should result in the organisation and its

[32] 18.4.4 from Chapter 18 the FCA Handbook, chrome-https://www.handbook.fca.org.uk/handbook/SYSC/18.pdf
[33] NHSE contract says that there should be a senior lead and a non-executive board member responsible for whistleblowing, but it is not clear that they are held responsible for the effectiveness of their speak up arrangements
[34] Lucy Letby: victims' families treated 'appallingly', says former hospital boss, the Guardian, https://www.theguardian.com/uk-news/2023/aug/24/lucy-letby-victims-families-treated-appallingly-former-hospital-boss-susan-gilby

Board (including its Whistleblowers' Champion) being held to account. Ultimately, we would like to see Directors and Board members removed from their positions where they are shown to have ignored or victimised a whistleblower.

III. Oversight and Accountability

68. The tone and attitude towards whistleblowing and whistleblowers is set from the top. Senior staff are more likely to take whistleblowing seriously if it is communicated as a priority, and if the Board are known for dealing with concerns. The opposite is also true: when whistleblowing is seen as a tick-box exercise or whistleblowers are ignored or victimised, then this will set the culture for the rest of the organisation. Leaders should model the behaviour they want to encourage and need to be trained to be good recipients of bad news.

69. Effective leadership is therefore vital, and key to this is the Board exhibiting, accountability and integrity; two of the seven Nolan Principles of Public Life.[35] Our view is that every board member in a healthcare setting should sign a document to say they have read and understood the Nolan Principles.

70. We also believe Boards should seek to see all whistleblowing concerns raised through the system to build a complete picture of the organisations whistleblowing culture. Currently, according to the NHSE Speak Up Policy, the Board are to "receive a report at least annually providing a thematic overview of speaking up by our staff to our Freedom to Speak Up guardian(s)".[36] Only a minority of our NHS callers seem to use the FTSU system, leaders need to be asking the right questions about whether whistleblowing generally in their trust is working effectively. This includes reviewing whether staff have the confidence to raise concerns, and outcomes that demonstrate that concerns are acted on.

71. At Protect, we work with hundreds of organisations who want to improve their speak up culture and whistleblowing arrangements. We have developed a diagnostic and benchmark tool to assist organisations measure the effectiveness of their whistleblowing arrangements. The tool has been designed to help organisations consider what they

[35] "1.2 Integrity: "Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships." 1.4 Accountability: "Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this." https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2

[36] P.g. 9 https://www.england.nhs.uk/wp-content/uploads/2022/06/PAR1245i-NHS-freedom-to-speak-up-national-Policy-eBook.pdf

should improve or put in place. It covers governance (accountability, written policy and procedures, review and reporting, leadership), engagement (communication, training, awareness, and trust) and operations (support, protection, records, investigations, resolution and feedback).

72. The organisation completes the assessment following which Protect provides a report indicating how they have performed against our standards and compares their scores to similar organisations, in terms of size or sector. The BMA has publicly announced they would support the introduction of a benchmarking tool in the 12 healthcare sectors to assist organisations measure the effectiveness of their whistleblowing policies.[37]

IV. Holding the board to account

73. Leaders should model the behaviour expected of staff; they should be setting the standards for the whole of the organisation, but we have heard anecdotally from many whistleblowers that holding senior executives and board members to account is almost impossible.

74. We would like to see active leaders in the NHS who do not just respond to whistleblowing concerns but are held to account where they fail to create a safe environment for concerns to be raised. This could be achieved by looking at the GMC's new 'Good Medical Practice' guidance says doctors in leadership roles should take active steps to create an environment where staff feel it is safe to raise concerns.[38] Making the link between leadership on speaking up and professional standards is welcome.

75. Protect supports calls for senior managers and directors to be held to professional standards, subjected to a fit and proper persons test and banned from holding senior managerial positions where it has been shown they have ignored or victimised a whistleblower (as recommended by the Kark review of the Fit and Proper Person Test[39]). This may encourage directors to treat misconduct regarding whistleblowing in the same "serious" category as crime and dishonesty. Effective enforcement will be vital. In the financial sector for instance, regulatory references[40] set out the fitness and propriety of senior managers and are required when they move jobs internally and externally to prevent the rolling bad apple[41].

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[37] Legislative reforms and whistleblowing, https://www.bma.org.uk/advice-and-support/complaints-and-concerns/raising-concerns-and-whistleblowing/legislative-reforms-and-whistleblowing
[38] Point 76, p.g.23, GMC Good Medical Practice Guide https://www.gmc-uk.org/-/media/documents/gmp-2024-final---english_pdf-102607294.pdf
[39] Kark review of the fit and proper persons test - GOV.UK (www.gov.uk)
[40] https://www.handbook.fca.org.uk/handbook/SYSC/22/Annex1.html
[41] https://www.kingsleynapley.co.uk/insights/blogs/employment-law-blog/fca-and-pra-regulatory-references-what-do-the-new-rules-mean-in-practice

76. Whistleblowing or Speak Up policies are important; they provide a written framework that sets expectations from the organisation when they respond to whistleblowing concerns. But the success of the policy will always come down to how these ideals are implemented in practice. Those who suppress whistleblowing or treat a whistleblower badly should have their fitness to be a senior health service leader challenged. This practice is already recognised in financial services. The Financial Conduct Authority rules make clear that they take seriously any evidence that a firm they regulate has victimised a whistleblower and that anyone found to do so may have their fitness and propriety to perform a senior role questioned.[42] We would like the CQC, NHS England and the other health regulators to be as explicit and firm in their approach. In our view, it should be regularly re-asserted that it is the Board's clear responsibility and duty to escalate whistleblowing concerns to the regulator. Evidence of a breach of the duty of candour or victimisation of a whistleblower should be take very seriously by both the service provider, and the regulator.

77. Speaking up stops harm. But only if organisations are willing and able to listen, with the right structure and support to encourage, investigate and learn from concerns. Whistleblowing is not just the ability to report and address wrongdoing, it is also what holds organisations and governments to account, playing a vital role in upholding the rule of law. Our health service - just like our parliamentary democracy - relies on whistleblowers being willing and able to speak up. Protect's chief concern is that silence is contagious when speaking up is seen as futile and coming with a heavy personal cost for the individual, with the health service and its patients paying the ultimate price.

Statement of Truth

78. I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Signed:

[42] SYSC 18.3.9 The FCA would regard as a serious matter any evidence that a firm had acted to the detriment of a whistleblower. Such evidence could call into question the fitness and propriety of the firm or relevant members of its staff, and could therefore, if relevant, affect the firm's continuing satisfaction of threshold condition 5 (Suitability) or, for an approved person or a certification employee, their status as such.

Personal Data

Dated: 4 March 2024