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To: CCG Clinical Leaders

cc: CCG Accountable Officers
NHS England Regional Directors
NHS England Regional Directors of HR & OD
NHS England Regional Directors of Operations and Delivery
NHS England Area Directors

2 May 2013

Dear colleagues

Update and advice for CCGs on the process for approval of severance payments and wording in constitutions on whistleblowing

You will be aware of the sensitive and complex issues relating to whistleblowing in the NHS and severance payments and, in particular, perceptions around the use of 'gagging' clauses. More recently, this has included stories to the effect that some CCG constitutions may have gagging clauses that prevent members from speaking out about the work of the CCG without the written approval of its governing body.

In my capacity as Chief Executive of the NHS in England, I wrote to Chief Executives and HR Directors of NHS Trusts, SHAs and PCTs on a number of occasions including 11 January 2012, emphasising the importance I place on every NHS organisation supporting NHS staff seeking to raise concerns in the public interest, and informing about the arrangements for approval of severance payments. This remains an important issue for all NHS bodies. Whistleblowing is an important part of our clinical governance and patient safety systems, with direct implications for patient safety outcomes.

Since the introduction of the Public Interest Disclosure Act 1998 (PIDA), whistleblowers have been legally protected when making public interest disclosures. I am writing now to reaffirm the importance that NHS England places on protecting and supporting those working in the NHS when making public interest disclosures, and to provide further advice on these issues.

Severance payments

It is essential that all NHS organisations are clear about their responsibilities and the governance arrangements required for handling the use of payments to staff in severance type situations. As NHS bodies we have a duty, not only to ensure that the use of all public money is both transparent and appropriate, but to ensure that we fully support staff to raise genuine concerns and to speak out where it is in the public interest. In doing so we will ensure that the culture we create fosters openness and has clear lines of accountability.

Existing guidance set out in '*Managing Public Money*' makes clear the need for due process and careful consideration of the use of public money in situations where such payments may be novel or contentious. For the avoidance of doubt, HM Treasury approval is required for any non-contractual payments made by an NHS body, including those arising as part of a settlement of employment issues. This includes any payments which are proposed under Judicial Mediation in the settlement of an Employment Tribunal.

All NHS bodies are required to obtain agreement from a relevant national body prior to any business case being submitted to HM Treasury for consideration. For CCGs, the Department of Health has confirmed that from 1 April 2013 approval is required from NHS England on the basis of the accounting relationship between our organisations. These arrangements relate only to special severance payments and do not otherwise affect the employment flexibilities afforded to CCGs as individual employers.

NHS Employers has recently issued guidance to assist NHS bodies in their handling of compromise agreements¹ and special severance payments². The guidance highlights the need to ensure that proper legal and audit advice is received prior to any cases being considered, and contains a business case template which should be used in all submissions to NHS England. I would encourage you to consider this guidance at your local Remuneration Committee as part of your own internal governance arrangements.

In line with recent statements by the Secretary of State, NHS England will not support special severance business cases for consideration by HM Treasury unless confirmation is given that an explicit clause has been included within the compromise agreement associated with the severance transaction. That clause must be to the effect that no provision in the compromise agreement seeks to prevent the individual from making a protected disclosure under the Public Interest Disclosure Act 1998.

This position was reiterated in a recent letter from Gavin Larner, Director of Professional Standards at the Department of Health, to professional regulators and trades unions. The letter also asks for each national body to use its communication channels to reinforce the messages to staff around their rights to speak up about matters of public concern. It is attached as **Annex 1** to this letter.

¹ Link to NHS Employers [Compromise Agreements and Confidentiality Guidance](#)

² Link to NHS Employers [Severance Payments Guidance](#)

In the event that you need to seek NHS England's approval prior to submission of a case to HM Treasury you should liaise in the first instance with the NHS England Regional Director of HR & OD in your area. Their contact details are attached as **Annex 2** to this letter. Please note that submission of a business case or approval from NHS England does not mean that approval from HM Treasury is guaranteed.

If you need any further advice or guidance on these arrangements please contact the Regional Director of HR & OD for your area.

CCG Constitutions

The second issue I am writing about is the perception of 'gagging' clauses in constitutions that prevent members or employees from speaking out about the work of the CCG without the written approval of its governing body. Having reviewed some of these clauses, we believe that the intention behind them is to ensure the consistency of media messaging among CCG members and staff, rather than to prevent disclosures that are in the public interest.

However, it is important that any such clauses, whether in an employment contract or a CCG constitution, are not perceived as an attempt to cut across the right of any individual, under the Public Interest Disclosure Act, to raise concerns in the public interest.

NHS England's Model Constitution Framework for CCGs (under Section 9 – the Group As Employer) states at paragraph 9.9:

"The group will adopt a code of conduct for staff and will maintain and promote effective 'whistleblowing' procedures to ensure that concerned staff have means through which their concerns can be voiced."

It is vital that all members of the governing body and its committees, and individuals employed by the CCG, feel that they are protected and can raise concerns in an environment that is safe and which values openness and transparency.

For the avoidance of doubt, we have drafted the following statement that could be adopted by CCGs:

"The group recognises and confirms that nothing in or referred to in this constitution (including in relation to the issue of any press release or other public statement or disclosure) will prevent or inhibit the making of any protected disclosure (as defined in the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998) by any member of the group, any member of its governing body, any member of any of its committees or sub-committees or the committees or sub-committees of its governing body, or any employee of the group or of any of its members, nor will it affect the rights of any worker (as defined in that Act) under that Act."

CCGs are therefore encouraged to:

- formally present an explicit minute at a public governing body meeting clarifying expectations and seeking formal adoption of the statement above; and
- include the statement in their constitutions making it clear that nothing in the constitution alters the right to make a protected disclosure.

NHS England will shortly be issuing guidance on the procedures to be followed by CCGs and NHS England when requesting a change to a constitution. This will set out that requests to amend constitutions should be sent to the relevant Regional Director of Operations and Delivery, who will be responsible for approving the changes. Their contact details are included at **Annex 3**.

Working with Providers

It is for each NHS body, and each provider of NHS services to assure itself that it has appropriate arrangements in place to support staff to raise concerns and arrangements covering severance payments and compromise agreements. However, CCGs will also need to work closely with providers to satisfy themselves that these arrangements are robust and in line with the requirements of the NHS contract.

I would like to thank you for your support in creating a culture in which all NHS staff feel protected and confident to raise concerns in an environment that is safe and which values openness and transparency. This is one of our greatest collective leadership challenges.

Yours faithfully

A handwritten signature in black ink, appearing to read 'D Nicholson', with a long horizontal stroke at the end.

Sir David Nicholson
Chief Executive