

Briefing on Department of Health proposal to extend “safe space” arrangements to all patient safety investigations

1. Introduction

In October 2016 the Department of Health launched a consultation “Providing a ‘safe space’ in healthcare safety investigations”. See www.gov.uk/government/consultations/providing-a-safe-space-in-healthcare-safety-investigations

This briefing explains the concerns of Action against Medical Accidents (AvMA) about the proposals and offers alternative suggestions. It focuses in particular with the proposal to legislate for a ‘safe space’ approach to all NHS patient safety investigations (see pages 30-32 of the consultation), which would allow the withholding of information found by investigations from patients/families - even when that information is directly relevant to what happened in their or a loved one’s treatment. The aim of this briefing is to help patients and families and other stakeholders gain an informed view of different perspectives and encourage them to make their own response to the consultation. The deadline for responding is 16th December.

AvMA is the independent charity for patient safety and justice. We provide specialist advice to people who have been affected by ‘medical accidents’ – things that go wrong in healthcare that are believed to have caused harm. We support around 3,000 such people a year and have 35 years’ experience. We work with the NHS, Government departments, regulators and other public bodies to improve systems for improving patient safety and how medical accidents are dealt with. The needs to improve the quality of NHS investigations and develop a genuinely ‘just culture’ are long held priorities for the charity.

2. ‘Safe Space’ and ‘Just Culture’

There is widespread agreement amongst most stakeholders, including AvMA that more needs to be done to address the ‘fear of blame’, and protect staff from unfair or disproportionate treatment as a result of honest mistakes, providing evidence to investigations, or indeed sharing information with patients. However, we have strong concerns about the way that the ‘safe space’ has been provided for with respect to the Healthcare Safety

Investigation Branch (HSIB), and even stronger concerns about proposals to extend the same or similar approach to all serious incident investigations.

The key challenge is how to create a ‘just culture’ which both addresses the fear of blame and stays true to the principle that patients (or their families) should be guaranteed full openness and honesty about what happens with respect to their own treatment. We would question whether a culture which deliberately allowed for the withholding of such information from patients / families could possibly be called a ‘just culture’.

We believe that there is a real prospect that the way that HSIB has been designed, and the way that it is purposed to extend the ‘safe space’ provisions to all healthcare safety investigations would undermine public confidence in the NHS and undo the good work that has been done so far in creating a duty of candour and working towards an open and fair culture.

The Expert Advisory Group for HSIB recommended that a ‘just culture taskforce’ be established to consider the complex issues that are involved in creating a genuinely just culture. We agree, and think that initiatives which potentially impact on just culture should be informed by that work rather than policies which may have unintended consequences being brought in in a piecemeal fashion.

3. HSIB

The Expert Advisory Group advising the Secretary of State on HSIB, gave long and careful consideration to these issues. It concluded that whilst supporting the general ‘safe space’ principle, that all relevant information about a patient’s treatment uncovered by an investigation ‘*must*’ be shared with the patient / family.

Notwithstanding the EAG recommendation, the Department of Health’s Directions created for HSIB say that the Chief Investigator ‘*may, when requested*’ disclose such information ‘*but such disclosure may only be made... to such an extent that the Chief Investigator judges... to be consistent with the safe space principle*’. It is clear from this that there is a distinct possibility that patients / families will have information relevant to their treatment

withheld from them. Indeed, they would have to ask for it for the Chief Investigator to be able to disclose it to them and even then he has discretion to keep it from them, even if it directly relates to what happened in their treatment.

AvMA welcomes the creation of HSIB and also the broader principles of 'safe space' as qualified by the EAG. However, we fear that public confidence in HSIB and therefore its effectiveness if it starts off under a cloud of controversy and suspicion that it will withhold relevant information from patients/families. The Chief Investigator of the HSIB, Keith Conradi, agrees that HSIB's Directions should be amended to address this issue and that relevant information should be shared with patients/families.

We understand it is relatively quick and easy for the Secretary of State to amend Directions, and recommend that he does so to reflect the recommendation of the EAG.

4. Local Investigations

We think that it is already worrying and contrary to the spirit of the NHS constitution and duty of candour even if the above approach was restricted to HSIB. However, the recently published consultation on safe space envisages it being extended to all NHS safety investigations. This has even more serious and far reaching implications.

For example, if the current HSIB 'safe space' approach was extended to all local safety investigation in England it would apply to around 30,000 serious investigations a year.

Applying the current 'safe space' approach would directly cut across the statutory Duty of Candour adopted following the Mid-Staffordshire public inquiry. Under the duty of candour, any NHS provider is under a statutory obligation to be open and honest with patients or their families when something goes wrong that appears to have caused harm. This applies equally to new information gleaned from investigations as it does to incidents that are recognised at the time of treatment. The 'safe space' arrangements as currently framed would mean that relevant information could be withheld and patients / families might not get to hear the full truth about what happened in their treatment. The current approach to 'safe space' is also at odds with the well-established professional standards for doctors and other health professionals. They all have an absolute duty of candour.

There is a huge difference between an independent organisation like HSIB, with no conflict of interest, having the discretion to withhold information and NHS organisations who are investigating themselves being allowed to. The conflict of interest is obvious.

We would also urge the Department of Health and others to look at evidence from overseas about what effect applying the safe space principle by making information found from investigations legally privileged. We are not aware that this has been found to have a beneficial effect where it has been applied in parts of the USA, Australia and Canada. On the other hand, ironically, Sweden makes everything obtained in investigations available to patients/families. The Department of Health holds Sweden out as a model of good practice when it comes to learning from mistakes (see the recently announced Rapid Resolution and Redress proposals).

The NHS currently faces huge challenges – not least in improving the quality of investigations. Now is not the time to bring in such a radical change even if the issues of principle can be addressed. HSIB should be given time to prove itself and the approach should be evaluated. The NHS should not be forced to run before it can walk with respect to investigations.

Keith Conradi, chief investigator of HSIB agrees that the 'safe space' provisions should be restricted to the HSIB and is not appropriate for local NHS organisations.

5. What do professionals want protection from?

The concept of a 'safe space' is based on the understanding that fear of unfair or disproportionate consequences which might be applied to individuals providing evidence to investigations might deter them from giving full, honest evidence. However, it is worth looking more closely at what health professionals most fear and want protection from. In our own conversations with many health professionals, it is invariably fear of unfair treatment by their employers or regulators that is top of their list. Few if any self-respecting health professionals would condone the deliberate withholding of information relevant to a patient's treatment from the patient or their family.

6. Conclusion

AvMA will, subject to final agreement by its trustees, be responding to the consultation asking for the proposal to extend the safe space approach to local investigations to be dropped; for amendment of the HSIB Directions to reflect the need to share all relevant information with families; and for establishment of the 'just culture taskforce' recommended by the HSIB Expert Advisory Group. We urge all like-minded individuals and organisations to do likewise.

AvMA wholeheartedly supports appropriate steps to ensure that staff are not unfairly blamed or punished for unintentional mistakes or system failures, or for giving evidence or speaking out. However, denying patients / families the full information relevant to what happened in their treatment is not what health professionals want and can never be the right thing to do. The 'safe space' proposals as currently framed would undo the progress that has been made since Mid-Staffordshire on moving towards an open and just culture and introducing a statutory duty of candour.

Of course, a balance needs to be struck, and we believe that the broad church of patient safety experts represented on the Expert Advisory Group for HSIB did just that. The broad principle of 'safe space' can be adopted and much more could be done to protect staff from unfair or disproportionate treatment by employers or regulators. However, the ethical imperative to require full openness and honesty with patients / families about what happens in their care must be preserved. All relevant information an investigation finds concerning a patient's treatment should be shared with them.

The word 'relevant' is very significant. Neither the Expert Advisory Group nor AvMA have argued that *all* information uncovered by an investigation should have to be shared with patients / families - only information relevant to their own or family member's treatment.

We recommend that the HSIB Directions be amended to reflect the recommendations of the Expert Advisory Group.

We recommend that the proposal to extend the safe space approach to local investigations (whether amended or not) be dropped, the just culture taskforce be established, and HSIB be given time to prove it can work and for lessons to be learnt from its approach.

In discussing 'safe space' the Department of Health has often suggested it is not intended to withhold relevant information from patients / families. However, the Directions for HSIB specifically give HSIB the power to do just that.

In considering the notion of 'safe space' we suggest that respondents to the consultation and the Department of Health ask themselves:

Should application of a 'safe space' arrangement ever be allowed to trump the ethical, statutory and professional duty to share all relevant information discovered about their treatment with patients / families?

The NHS Constitution pledges that the NHS will: "*ensure that when mistakes happen or if you are harmed while receiving health care you receive an appropriate explanation and apology*". In the light of how of the 'safe space' is currently being framed, this would need the words "*unless the safe space principle applies*" added.

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