Department of Health & Social Care

The Draft Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations 2018

Response to the consultation on protecting whistleblowers seeking jobs in the NHS

March 2018

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1. Introduction

1.1. Following the Freedom to Speak Up (FTSU) independent policy review report by Sir Robert Francis QC, published in February 2015[1], the Department has introduced a number of changes to help create a culture in the National Health Service (NHS) where staff feel able to raise concerns and where those concerns are acted on without reprisal.

1.2. Speaking up and raising concerns should be seen as "business as usual" in the NHS and is an integral part of ensuring patient safety and improving the quality of services. NHS organisations where staff feel comfortable about speaking up are healthy organisations and this should be the norm across the Health Service.

1.3. The NHS should welcome and support all staff to raise concerns wherever they spot them. The Government expects the NHS to investigate concerns and act on what is found, to ensure services improve and risks to patients are addressed, regardless of the employment status of the person raising the concern.

1.4. Changes in culture and behaviours will take time to happen across the whole NHS. Many NHS employers are already making good progress in how they support staff to speak up as evidenced by the National Guardian's Office Annual Report[2] , published in November 2017. But there is more to do.

1.5. We want the NHS to view staff who raise concerns as an important asset, whether they are existing staff or people applying for jobs with them. A worker who has previously had the courage and the compassion to speak up about problems in their previous employment should be considered as a valuable asset by an NHS body considering employing them.

1.6. The draft Regulations we are introducing prohibit an NHS employer from discriminating against a job applicant because it appears to the NHS employer that the applicant has made a protected disclosure ('whistleblowing'), and are aimed at making it clear that such individuals should be valued, supported and welcomed just as much as any other existing NHS staff.

[1] Report on the Freedom to Speak Up review - https://freedomtospeakup.org.uk/the-report/

[2] National Guardian's Office Annual Report 2017

2. Policy background

2.1. On 11 February 2015, Sir Robert Francis QC published the report of his whistleblowing review ("Freedom to Speak Up")[3] which considered how to build an open and honest reporting culture in the English NHS. The report expressed concern that the evidence he had seen indicated that individuals were suffering, or were at risk of suffering, serious detriments in seeking re-employment in the health service after making a protected disclosure (whistleblowing). The Freedom to Speak Up review included a recommendation that the Government should introduce protections from discrimination for people seeking NHS employment on the basis that they were perceived to have 'blown the whistle.' [4]

2.2. The Public Interest Disclosure Act 1998 amended the Employment Rights Act 1996 ("the 1996 Act") to provide employment protection for workers who make certain disclosures of information. In particular section 47B of the 1996 Act protects workers against detrimental treatment on the grounds that they have made a protected disclosure. Whilst 'worker' has a wide meaning in this context, it does not include job applicants.

2.3. If an individual is labelled as a whistleblower, it can be difficult for them to secure a new position. Individuals who want to move to a new job in the NHS may find that they have been unfairly labelled as a troublemaker.

2.4. The Government's policy aims are to prevent former whistleblowers suffering discrimination when they apply for jobs in the NHS and to make it clear that such individuals should be valued, supported and welcomed.

2.5. The Small Business, Enterprise and Employment Act 2015 inserted new section 49B into the 1996 Act, giving the Secretary of State a power, through regulations, to prohibit certain NHS employers in England, Scotland and Wales from discriminating against job applicants because it appears to the NHS employer that the applicant has made a protected disclosure within the meaning given by section 43A of the 1996 Act.

2.6. For the purposes of section 49B, an NHS employer discriminates against an applicant if the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract, office or post. An "applicant", in relation to an NHS employer, means an individual who applies to the NHS employer for a contract of employment, a contract to do work personally, or appointment to an office or post.

2.7. In March 2017 the Government consulted on draft regulations which implement these provisions. The consultation closed on 12 May 2017. The GB-wide consultation was issued by the Department in consultation with the two Health Departments in Scotland and Wales.

2.8. These Regulations will help promote openness, transparency and fairness within the NHS, making NHS organisations potentially more attractive places to work as well as

[3] Report on the Freedom to Speak Up review - https://freedomtospeakup.org.uk/the-report/

[4] The report recommended that the Government should: 'review the protection afforded to those who make protected disclosures, with a view to including discrimination in recruitment by employers (other than those to whom the disclosure relates) on the grounds of having made that disclosure as a breach of either the Employment Rights Act 1996 or the Equality Act 2010.' Para 7.3

improving trust from the public, and will fulfil the commitment made by the Government in responding to the Freedom to Speak Up report[5].

[5] https://www.gov.uk/government/publications/learning-not-blaming-response-to-3-reports-on-patient-safety

3. The draft Regulations

3.1. The draft Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations 2018 provide protection from discrimination for job applicants who appear to the prospective NHS employer to have previously made a protected disclosure i.e. 'blown the whistle'. Applicants have a legal recourse should they feel they have been discriminated against, with appropriate remedies should their complaint be upheld.

3.2. The draft Regulations:

- prohibit discrimination by certain NHS employers in relation to the recruitment of an applicant because it appears that the applicant has made a protected disclosure (regulation 3);
- give the applicant a right to complain to an employment tribunal if they have been discriminated against on this basis (regulation 4);
- set out a timeframe of three months in which a complaint to the tribunal must be lodged (regulation 5). The three month period begins with the date of the conduct to which the complaint relates. This is consistent with the time limits for employment claims generally. In addition, the draft Regulations give the employment tribunal a discretion to consider a complaint out of time if, in all the circumstances, it considers it just and equitable to do so. The "just and equitable" test is comparatively easier to meet than the "not reasonably practicable" test which applies to existing whistleblowing claims brought under the 1996 Act, and the reasons for setting this test are outlined at paragraph xxx. The draft Regulations also make provision as regards the date of particular types of conduct. This includes provision for situations when it might not be immediately apparent that discrimination has occurred, i.e. where discrimination involves an omission to do something such as to entertain a job application. In those circumstances, time starts to run from the end of the period within which it was reasonable for the employer to have acted.
- set out the remedies which the tribunal may or must award if a complaint is upheld (regulation 6) A declaration must be made, the employer may be ordered to pay compensation and the tribunal may recommend the employer to take specified steps;
- make provision as to the amount of the compensation which may be awarded, which must be such as the tribunal considers just and equitable in all the circumstances (regulation 7);
  provide for contravention of the prohibition on discrimination to be actionable as a breach of statutory duty (such a claim would lie in the civil courts). The intention is to give job applicants additional protection including the opportunity to apply to the court for the purpose of, amongst other things, restraining or preventing discriminatory conduct. Generally, the draft Regulations envisage dual proceedings in limited circumstances only as they state that an applicant cannot complain to an employment tribunal and bring an action for breach of statutory duty in respect of the same conduct except for the purpose of restraining or preventing the employer from contravening the prohibition on discrimination (regulation 8); treat discrimination of an applicant by a worker (in the course of employment) authority) or agent with the authority of the prospective employer (NHS employer),as if it was discrimination by the NHS employer itself (regulation 9). The draft Regulations state that it does not matter if the employer knows about or approves the worker’s conduct. There is no similar provision in respect of the

agent, as we cannot envisage a circumstance where an employer has authorised an agent's conduct, yet is not aware of it nor has approved it;
to ensure application of the early conciliation regime to employment tribunal proceedings under the Regulations. The early conciliation regime requires a prospective claimant to submit details of their claim to the Advisory, Conciliation and Arbitration Service (ACAS) so that the claim can be attempted to be conciliated before it can be lodged in the employment tribunal. The intention was to facilitate conciliation of disputes without the need for employment tribunal proceedings. The early conciliation regime applies to most claims to the employment tribunal. This should help ensure that only cases which cannot be resolved through other methods are brought to the employment tribunal.

3.3. Section 49B(6) of the 1996 Act defines “NHS employer” as an NHS public body[6] prescribed by regulations. Section 49B(7) defines "NHS public body" by reference to a list of bodies. The draft Regulations prescribe all the NHS public bodies referred to in section 49B(7).

[6] Each of the following is an “NHS public body” (which may therefore be prescribed): the National Health Service Commissioning Board; a clinical commissioning group; a Special Health Authority; an NHS trust; an NHS foundation trust; the Care Quality Commission; Health Education England; the Health Research Authority; the Health and Social Care Information Centre; the National Institute for Health and Care Excellence; Monitor; a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006; the Common Services Agency for the Scottish Health Service; Healthcare Improvement Scotland; a Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978; and a Special Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978.

4. Responses to the consultation

Summary of responses to the consultation

4.1. The consultation on the draft Regulations which ran from 20 March 2017 to 2 May 2017 gathered 45 responses[7]. Responses were mainly received from individuals, some of whom were whistleblowers and some students/ universities, as well as Royal Colleges, NHS bodies, and legal organisations. There was one response from a Scottish Royal College and one response from a Welsh NHS organisation.

4.2. Overall, there was broad support for the draft Regulations but there was some concern over how they would work in practice.

4.3. Responses to the specific questions and the main themes raised are summarised below. Annex B provides a detailed breakdown of responses. Not all respondents answered all questions so the figures relate to the numbers who answered each question.

Q4: Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?

4.4. Respondents were split, with a small majority (56%) in favour of the 3 month time limit for bringing an application to the employment tribunal. This is the same time-frame that applies to most employment claims in the employment tribunal. However, nearly half of respondents (44%) had concerns that the 3 month timeframe was not long enough and most of these preferred 6 months. There were concerns that:

- it might take claimants longer to be able to turn their minds to making a claim, given the stress they are under;
- it might take longer than three months before an applicant became aware that they had suffered discrimination, for example it could be a number of months before someone is informed they have not been appointed.

"We do not agree with the time limit of three months unless the three month period starts at the point when not only has the conduct taken place but the applicant has become aware of the relevant facts. The discrimination may well be covert and the applicant may not become aware of the relevant facts until a considerable time after the date of the conduct. Moreover, the applicant may be able to obtain information about the conduct only by use of time consuming procedures under the Data Protection Act."

British Medical Association (BMA)

4.5. A number of respondents queried whether applicants would be clear when the time limit starts to run from. Under the draft Regulations, the three month period begins with the date of the conduct to which the complaint relates. The proposed three month time limit in which to bring a claim to an employment tribunal is consistent with the time limits for the vast majority of employment claims. In addition, the Regulations give the employment tribunal a discretion to consider a complaint out of time if, in all the

[7] https://www.gov.uk/government/consultations/protecting-whistleblowers-seeking-jobs-in-the-nhs

circumstances, it considers it just and equitable to do so. The draft Regulations also make provision as regards the date of particular types of conduct.

4.6. This includes provision for situations when it might not be immediately apparent that discrimination has occurred, i.e. where discrimination involves an omission to do something such as to entertain a job application. In those circumstances, time starts to run from the end of the period within which it was reasonable for the employer to have acted.

4.7. We have amended the drafting of the Regulations to make clear that in the case of a decision by an NHS employer not to employ or appoint an applicant, the three month time limit starts from the date that decision was communicated to the applicant.

4.8. We therefore consider that the draft Regulations adequately deal with the types of concerns expressed.

4.9. A number of respondents questioned why the test for late discrimination claims was the "just and equitable" test rather than the "not reasonably practicable" test which applies to existing whistleblowing claims brought under the 1996 Act. The just and equitable test is comparatively easier to meet and was considered more appropriate bearing in mind the situation of former whistleblowers seeking employment and the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing. This includes considerations which were mirrored in certain consultation responses as set out above such as the fact that it might be harder to establish that discrimination has occurred because of apparent whistleblowing.

4.10. Our view is that the draft Regulations make appropriate provision as regards time limits in the context of claims to the employment tribunal from NHS job applicants.

Q5: Are there any types of cases that should be mentioned in Reg5 (3) as to the date of conduct for the purposes of calculating the 3 month time limit?

4.11. A small majority of people (52%) who responded on this question were content with the provision in regulation 5(3) as regards the point from which the three months will be calculated, depending on the conduct in question, and felt that these seem appropriate.

4.12. There were some suggestions to include other types of cases such as:

- failure to short-list or interview;
- not following the organisation's own policies and procedures on recruitment;
- zero-hours contracts; an employer appoints an individual (in order to avoid breaching these Regulations) but then declines to give them any work to do.

4.13. Our view is that some of these situations would already be covered. Thus we consider that a failure to short-list or interview would fall within an omission to "entertain and process an applicant's application". In the case of a failure to follow policies and procedures, it is the date of the accompanying discriminatory conduct which would be relevant, for example the date on which, in breach of policies and procedures, a job applicant was refused employment or was not invited for an interview.

4.14. A respondent expressed concern that the Regulations do not cover discrimination by employers who appoint an individual on a zero-hours contract but then fail to give them any work. However, in such cases, the individual might be able to bring a claim for

detriment against their employer under existing protections for whistleblowers under the 1996 Act.

4.15. There were a number of comments that the draft Regulations are only aimed at the new employing organisation, whereas often the problem arises when a previous employer provides a poor reference, or informally briefs against employing a whistleblower. The draft Regulations would be made under provisions in primary legislation which are aimed at the conduct of NHS employers to whom job applications are made. However, in cases where a previous employer has subjected a whistleblower to detriment on the grounds that they have made a protected disclosure, the individual might be able to bring a claim against their former employer under existing protections for whistleblowers under the 1996 Act.

Q6: Do you agree with the approach taken not to limit the amount of compensation so that these Regulations are comparable with existing whistleblowing cases?

4.16. There was very significant agreement (92.5%) with this from respondents.

"Yes, this is consistent with both whistleblowing and discrimination claims and acts as a strong deterrent to unlawful conduct. The prospect of high value claims encourages employers to ensure that those involved in the recruitment process receive comprehensive training on their obligations and maintain proper records in the event that their decision-making is scrutinised."

Employment Lawyers Association (ELA)

4.17. A respondent commented that it should be clear that an applicant who had no intention of taking a job should not be entitled to compensation. Regulation 7 provides that the amount of compensation which may be awarded must be such as the employment tribunal considers just and equitable in all the circumstances and that when considering the amount of compensation, the discriminatory conduct and any loss sustained must both be had regard to. We think these provisions sufficiently enable the employment tribunal to consider the situation where an applicant had no intention of taking a job.

Q7: Do you agree that the Regulations should provide for discrimination to be actionable as a breach of statutory duty?

Q8: Are there any practical problems arising from Regulation 8?

4.18. Regulation 8 enables the job applicant to bring an action for breach of statutory duty in respect of a breach of the prohibition on discrimination. Such a claim would be in the civil court. The intention is to give job applicants additional protection including the opportunity to apply to the courts to restrain or prevent discriminatory conduct by an employer.

"We agree that a provision to permit an applicant to seek an injunction from the county or high court to prevent discriminatory action against them is important. Regulation 8 will provide additional support for whistle blowers who currently have no legal protection to prevent employers from imposing a detriment upon them, or bringing any such detriment to an end. The absence of such 'protection' was highlighted in the Francis Freedom to Speak Up Review [paragraph 2.2.9] and the new breach of statutory duty regulation takes an important step in remedying the current lack of protection for NHS whistle blowers in this regard."

NGO's office

4.19. There was strong support for this proposal (92% of those who responded). Comments mainly focused on questions about how it would work in practice and we have considered the main themes raised in turn:

- The overlap between bringing a claim for breach of statutory duty in the civil court and a claim of discrimination in the employment tribunal. Some respondents commented that there could be duplication of claims and two sets of proceedings, i.e. action for breach of statutory duty in a civil court alongside a complaint to the employment tribunal.
  However regulation 8(4) provides that an applicant cannot bring an action for breach of statutory duty to the court and complain to an employment tribunal for the same conduct. The only exception to this is where this is done for the purpose of restraining or preventing the NHS employer from discriminating. Therefore the Regulations envisage dual proceedings in limited circumstances.

- The dual process would involve significant cost – both to the employee and to the employer/government.
  Respondents felt that the costs for individuals of bringing actions in the civil court are higher than those incurred in bringing actions at an employment tribunal, as they include fees payable to the courts as well as the cost of paying for legal advice.
  Employment tribunal fees have recently been abolished so these concerns are allayed to some extent. In any event, the Regulations do not envisage dual proceedings except in limited circumstances.

- Legal organisations also mentioned:
  - prospects of success: the effect on an employer's ability to recruit while being restrained,(given current staff shortages and the need to recruit quickly);

  Under the draft Regulations, the court has discretion to make such order as it considers appropriate for the purpose of restraining or preventing the employer from contravening the prohibit on discretion. In deciding whether to make an order, we would expect a court to take into account all the circumstances of each case, including the urgency of the employer's need to recruit.

  - the risk of whistleblowers maliciously using regulations for personal gain.

  Our view is that such cases are likely to be rare and that unfounded complaints based on malice would have low prospect of success.

- Including an award for 'ill-feelings' was mentioned – we believe the respondent may have meant 'injury to feelings'.
  An employment tribunal may order compensation to be paid and the amount must be such as it considers just and equitable in all the circumstances. We consider that this could include an amount to reflect injury to feelings.

- A respondent commented that it seemed odd to make an award of compensation for something that may not have actually happened, i.e. where a potential breach is prevented.
  The draft Regulations enable an employment tribunal to order compensation to be paid where there has been actual breach of the prohibition on discrimination. Whilst in an action for breach of statutory duty a court would be able to decide that a breach of the prohibition on discrimination is likely to occur, and damages can be awarded in an action for breach of statutory duty, the power to award damages is discretionary - ultimately it is for the court to decide whether damages should be awarded. We would expect the court to take into account all relevant factors when deciding whether it is appropriate to award damages and to act fairly.

4.20. In summary, we do not consider that any practical problems will arise out of regulation 8 but will consider issuing guidance on how the Regulations are intended to apply.

Q6: Do you agree with the proposal that, for purposes of the Regulations, discrimination against an applicant by a worker or agent of an NHS body should be treated as discrimination by the NHS body itself in the above circumstances – and that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

4.21. Draft regulation 9 provides that discrimination by a worker or agent of an NHS employer is to be treated as discrimination by the NHS employer itself where this happens in the course of the worker's employment or, in the case of an agent, with the authority of the employer. This is similar to the position under section 47B of the 1996 Act in respect of vicarious liability of employers for acts subjecting whistleblowers to detriment.

4.22. There was significant support for the first part of this proposal which was welcomed by the majority of respondents (94%).

4.23. With regard to agents, there were some concerns about how the Regulations would affect agencies.

"Employers within the NHS are responsible for ensuring external agencies they contract with meet the requisite employment law requirements. However any complaint an applicant has about the manner in which an agency has handled their application should not carry vicarious liability for a client of the agency where all reasonable steps have been taken to ensure the agency adheres to the standards required and there has been a deliberate act or omission on the part of the agency."

National Clinical Assessment Service (NCAS), NHS Resolution

4.24. The second part of the question related to the defence set out in regulation 9 for the NHS employer if it can show in proceedings in respect of things alleged to have been done by a worker or agent that it took all reasonable steps to prevent the worker or agent from doing that thing. About a third of respondents (31%) had concerns about providing the NHS employer with such a defence. However, the Government thinks the inclusion of the statutory defence in the Regulations is fair and reasonable. There is precedent for providing such a statutory defence within legislation on whistleblowing (see section 47B of the Employment Rights Act 1996). We will review practice but at this stage we do not consider that there is any need to amend the draft Regulations.

4.25. We consider that the draft Regulations adequately address this concern as they provide that it is a defence for the NHS employer to show that it took all reasonable steps to prevent the worker or agent from doing things alleged to have been done. We have [also] made a change to regulation 9(2) which originally provided that it did not matter whether the employer knew about or approved the conduct of the worker or agent. On reflection we cannot envisage a circumstance where an employer has authorised an agent's conduct, yet is not aware of it nor has approved it. Regulation 9(2) is now, therefore, limited to the worker's conduct such that it states that it does not matter whether the employer knows about or approves the conduct of the worker.

Q9: Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010? Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

4.26. Over four-fifths of those who responded on this question (86%) did not have any concerns about the impact of the draft regulations on people sharing protected characteristics. Particular concerns that were raised included:

- difficulties for those who speak English as a foreign language in dealing with the legal system;
- difficulties for staff recruited from overseas who leave the UK and have to litigate from abroad;
- the complexity of the law could be confusing and will impact particularly on people sharing protected characteristics.

"The NGO has concerns that the regulations will extend the complexity of the laws relating to NHS whistle blowers. As a consequence, the new regulations will place an even greater burden on individuals who are seeking to access their legal rights, which will be most felt by who those who may already be suffering detriment by virtue of their protected characteristics." (NGO)

4.27. 35% of respondents felt that the Department could do more advance equality of opportunity and to foster good relations between people sharing protected characteristics and others.

4.28. Respondents also mentioned the need to monitor the impact of the proposals on people sharing relevant protected characteristics. The ideas suggested were varied. For example individuals suggested that the Department should:

- carry out work to investigate, measure and monitor the impacts on protected groups and design interventions;
- ensure “Have a Voice” representatives are available;
- mandate unconscious bias training;
- have BME whistle-blowers on recruitment and disciplinary panels;
- improve education about whistle-blowers in the NHS;

4.29. The Department has considered the impact of the policy on groups sharing protected characteristics under the Equality Act 2010. It is our understanding that on balance the impact of the policy proposal will be fundamentally positive for all groups, including people sharing relevant protected characteristics under the Equality Act 2010.We will keep the impact under review.

Q10: - Do you have any concerns about the impact of any of the proposals on families and relationships?

4.30. 61% of those who responded on this question did not have any concerns about the impact of these proposals on families and relationships.

4.31. 39% of those who responded thought that the proposed Regulations would put a strain on family relationships, for example that the added stress and cost of having to go through a legal procedure could affect family relationships adversely.

4.32. We will keep the impact under review.

Other comments

4.33. There were a number of comments that these draft Regulations should not just apply to the NHS but to other employment sectors. However the Small Business, Enterprise and Employment Act 2015 only provides power for the Secretary of State to make regulations in respect of the health service. Sir Robert Francis made his recommendation about whistleblowers applying for roles in the NHS just as this legislation was passing through Parliament and the Government was keen to accept and implement the recommendation as soon as possible.

4.34. Protecting whistleblowers as job applicants involves additional regulation on employers who are recruiting. In the case of the NHS recruiting for work with vulnerable people, we expect high standards in any case. But the impact that measures like this have on employers across the economy would have to be considered carefully, weighing it up against the potential benefits.

"…as a matter of principle, such a remedy should also be available to whistleblowers in other industries. PIDA [the Public Interest Disclosure Act] 1998 applies to public and private employers so these regulations are a move away from uniform protection nationally towards sectoral/industry rights."

David Lewis, Middlesex University

5. Changes to the draft Regulations

5.1. In summary, the responses to the consultation were concerned with how the draft Regulations would operate in practice and, whilst we consider that the Regulations are sufficiently clear about this, we will consider issuing guidance on the Regulations. Where there were particular concerns expressed on the substance of the Regulations - such as the time limit for complaining to the employment tribunal - we have set out the rationale for the provisions and responses to the queries raised.

5.2. We do not consider that the public consultation has highlighted the need for changes to the draft Regulations that were published alongside the consultation document in March 2017. However, the Government has made some changes, as noted in Chapter 4, in particular:

- to make clear that in the case of a decision by an NHS employer not to employ or appoint an applicant, the three month time limit starts from the date that decision was communicated to the applicant. (regulation 5(3); and
- to make a change to regulation 9(2) so that the provision it made that it did not matter whether the employer knew about or approved the conduct of the worker or agent is now limited to the worker.

Early Conciliation

5.3. The Regulations make consequential amendments to primary legislation including an amendment to section 18 of the Employment Tribunals Act 1996 (regulation 10(4)) to ensure application of the early conciliation regime to employment tribunal proceedings under the Regulations. The early conciliation regime requires a prospective claimant to submit details of their claim to the Advisory, Conciliation and Arbitration Service (Acas) so that the claim can be attempted to be conciliated before it can be lodged in the employment tribunal. The intention was to facilitate conciliation of disputes without the need for employment tribunal proceedings. The early conciliation regime applies to most claims to the employment tribunal. This should help ensure that only cases which cannot be resolved through other methods are brought to the employment tribunal.

5.4. Before making a claim a prospective claimant must provide their name and address and those of the prospective respondent(s) to Acas. The prospective claimant will have an opportunity to try and settle the dispute without going to the Tribunal by using Acas's free 'Early Conciliation' Service.[8] However, the prospective claimant is not obliged to conciliate and if they do not wish to do, or if conciliation is not successful, Acas will issue the prospective claimant with an EC certificate so that they can present their claim to the employment tribunal.

8 More details can be found at: 'Early Conciliation' service

6. Conclusion

6.1. The Department is grateful for the responses received to the consultation. In summary, the proposed Regulations were mainly supported by respondents and we have clarified the queries raised on how the draft Regulations would work in practice in this response. However, we plan to keep the Regulations under review and consider whether further guidance is needed.

6.2. The Government is committed to introducing the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations 2018 for affirmative resolution to further strengthen the rights of whistleblowers at the earliest opportunity.

Annex A

List of respondents to the consultation

Carolyn Jones	Institute of Economic Rights
Dr. Sukhomoy Das	Individual
Anonymous	Not known
John Baines	Individual
Bernie Rochford	Not known
Sheleen Sheils	Individual
Prof Narinder Kapur	Individual
Prof David Lewis	Middlesex University
Corrie Drum	Royal College of Radiologists (RCR)
Lesley Jayne Welsh	Individual
Raj Jethwa	British Medical Association (BMA)
John Blenkinsopp	Individual
Andrew Mullinex	Royal College of Surgeons of Edinburgh (RCSED)
Sheila Cullinane	Individual
Karen Murray	Individual
Elizabeth Pycroft	Individual
Helen Phillips	Royal College of Psychiatrists
Kenneth Hall	Individual
Ann-Marie Richardson	Individual
Gabrielle Bourke	Royal College of Midwives
Lorna Bramley	Individual
Christine Brown	Mencap
Aprill Laura Sedman	Individual
Sarah Wiles	Individual
Leanne Butler	Individual
Les Small	Individual
Josie Irwin	Royal College of Nurses
Andrew Fyles	Association of Anaesthetists of Great Britain & Ireland (AAGBI) and the Royal College of Anaesthetists (RCoA).
Tracey Harrison	Individual
Andrew Davies	NHS Wales Directors of Workforce and Organisational Development
Richard Huxley	Individual
Scott Curtis	Individual
Henrietta Hughes	National Guardian
Richard Huxley	Individual
Simon King	Individual
Rita Edward	Individual
Wadzai Bakuri	Individual
Tayah Neild	Individual
Vicki Voller	National Clinical Assessment Service (NCAS), NHS Resolution
Lindsey Woods	Employment Lawyers Association (ELA)
Zoe Holmes	Individual
Nyla Cooper	NHS Employers
Hugh Donaldson	Individual
Rebecca Haslam	Individual
Anonymous	Not known

Annex B

Summary of questions and answers to the consultation

Question 1: What is your name?

Question 2: What is your email address?

Question 3: What is your organisation?

Q4: Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?

Total	Total Yes and No responses	No	%	Yes	%	Other *
42	41	18	44%	23	56%	1

Q5 Are there any types of cases that should be mentioned in regulation 5(3), as to the date of conduct for the purposes of calculating the 3 month time limit?

Total	Total Yes and No responses	No	%	Yes	%	Other *
38	21	10	48%	11	52%	17

Q6: Do you agree with the approach taken not to limit the amount of compensation, so that these regulations are comparable with existing whistleblowing claims?

Total	Total Yes and No responses	No	%	Yes	%	Other *
40	40	3	7.5%	37	92.5%	0

Q7: Do you agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty?

Total	Total Yes and No responses	No	%	Yes	%	Other *
41	38	3	8%	35	92%	3

Q8: Are there any practical problems arising from regulation 8?

Total	Total Yes and No responses	No	%	Yes	%	Other *
33	25	8	32%	17	68%	8

Q9a Do you agree with the proposal that, for the purposes of the regulations, discrimination against an applicant by a worker or agent of an NHS body, should be treated as discrimination by the NHS body itself in the above circumstances?

Total	Total Yes and No responses	No	%	Yes	%	Other *
41	34	2	6%	32	94%	7

Q9b Do you agree…that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

Total	Total Yes and No responses	No	%	Yes	%	Other *
39	32	10	31%	22	69%	7

Q10a Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010

Total	Total Yes and No responses	No	%	Yes	%	Other *
30	28	24	86%	4	14%	2

Q10b: Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

Total	Total Yes and No responses	No	%	Yes	%	Other *
31	26	17	65%	9	35%	6

Q11: Do you have any concerns about the impact of any of the proposals may have on families and relationships?

Total	Total Yes and No responses	No	%	Yes	%	Other *
38	36	22	61%	14	39%	2

Not all respondents answered all questions so the percentages relate to the numbers who answered each question

*Other includes replies that were not applicable, for example they raised other issues.

Annex B