

Quality, CQC and Investigations Team  
Room 2E11 Quarry House  
Quarry Hill  
Leeds  
West Yorkshire  
LS2 7EU

12 May 2017

Dear Quality, CQC and Investigations Team,

## **Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations**

The British Medical Association (BMA) is an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care.

*Q1. Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?*

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.

*Q2. 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 three month limit?*

Again, we believe that the three month period should not start until the point at which not only has the conduct taken place but the applicant has become aware of the relevant facts.

*Q3. Do you agree with the approach taken not to limit the amount of compensation, so that these regulations are comparable with existing whistleblowing claims?*

We agree with and welcome strongly the approach taken not to limit the amount of compensation.

*Q4. Do you agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty?*

We agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty.

*Q5. Are there any practical problems arising from regulation 8?*



It may be difficult in some cases for an applicant to obtain information about discriminatory conduct that has occurred or is likely to occur in time to be able to take action to prevent or restrain it. We would emphasise, however, that this should not be treated as a basis for removing the provision that makes discrimination actionable as a breach of statutory duty. It is important that in cases where the applicant can obtain the information in time they should be able to take action.

*Q6. 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 – 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?*

We agree that discrimination by a worker or agent of an NHS body should be treated as discrimination by the NHS body itself. However, given the degree of control that NHS bodies can exercise over their recruitment, we do not agree that the NHS body should have a defence if it can demonstrate that it took all reasonable steps to avoid the conduct. Where an NHS body is using a third party to provide recruitment services, it is open to that body to obtain an indemnity to protect itself against any breaches of these regulations caused by the third party. However, there should be a single person who can be held responsible for compliance with these regulations to avoid the need for legal proceedings against multiple parties.

*Q7. 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?*

We have no specific points about these issues to make here.

*Q8. Do you have any concerns about the impact any of the proposals may have on families/relationships?*

We have no specific points about these issues to make here.

*Additional comment*

We believe that these draft regulations should be treated as part of a wider cultural change that normalises the raising of concerns and the protection of the employees who raise them. It will be important to raise awareness among employers of the prohibition of discrimination against whistleblowers in recruitment and the compensation which may be awarded for such discrimination.

Yours sincerely,

A handwritten signature in dark blue ink that reads "Raj Jethwa". The signature is written in a cursive style with a long horizontal stroke underneath the name.

**Raj Jethwa**  
Director of Policy