

Shared Insights: External Investigations

Andy Hopkin is a Partner at Browne Jacobson specialising in criminal and regulatory work, defending public and private sector corporate bodies and individuals in prosecutions brought by the police and other regulators such as the HSE and CQC.

Andy provided legal advice on the steps organisations should take if they are subject to an investigation by the police, Health and Safety Executive or CQC. He was joined by Steve Murray, Head of Legal Services at University Hospitals of Leicester NHS Trust, who spoke about how internal investigations sit alongside external ones. They set out practical advice based on their experiences.

The Shared Insights were:

No NHS organisation has been successfully prosecuted for corporate manslaughter - yet. It has been difficult for the police to meet the very high thresholds required to prove that a death was caused by corporate manslaughter. There have been cases where individual doctors and nurses have been successfully prosecuted for gross negligence manslaughter.

In a fatal incident the police will investigate first and will take primacy, although they may take advice from the CQC or HSE. If the police rule out corporate manslaughter and gross negligence manslaughter, the investigation may then go to the CQC or HSE.

The Trust needs to be clear from the outset what offences are being investigated and by whom, what their powers are and under what provisions their requests for information are being made. It is sensible to appoint a key contact both within the Trust and within the investigating authority, to facilitate clear and consistent communication from the outset.

Stop and think at every stage. Manage disclosure to the investigator in a structured way. Think about GDPR, whether the whole document is required, whether further documents are required for context, and ensure versions of policies provided are those relevant at the time of the incident. Keep copies and a full list of everything you disclose.

These incidents are time critical - the police may be there within a matter of hours of an incident. Trusts must centralise the process quickly by putting together a team of people right at the start to manage the organisation's response. The team should include senior decision makers and appropriate clinical input. We advise organisations to develop a written protocol which sets out how the organisation will respond in the early stages of an external organisation, so you have a plan or who to contact and can quickly draw a team together. We are able to provide further assistance with drafting protocols.

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Alongside external organisations looking into the Trust, a number of internal processes may also be going on. Liaise with regulators and police about what the Trust is doing by way of internal investigation and what you are telling the family. Pick someone suitably qualified and experienced as the author of any internal reports, give clear instructions about remit, scope and purpose of the report and remember that as soon as the draft report comes out it can end up being disclosable.

Clinical professionals are usually at the centre of any investigation and it is important to think about whether the Trust has referred to the relevant professional bodies and to be able to demonstrate that those steps have been taken.

Support witnesses and staff where possible but bear in mind that individuals may have union support or independent legal representation. If witnesses are providing a statement make sure you know the basis upon which this is being taken. If the police have advised it is an interview under caution, it is key that the witness has legal representation.

Debriefing after incidents is useful but care needs to be taken with debriefing notes which don't attract legal privilege and can be disclosable. Set out a structure in your protocol for hot debrief sessions and what might be included, e.g. no opinions, a short factual piece and nothing about who may have done something wrong.

Keep your media team involved. Manage communications as a project. Be cognisant of the fact that press interviews or media statements given at the time may of an incident may come back to bite you further down the line.

Successful prosecution causes extensive reputational damage. In addition, the fines imposed on organisations can run to hundreds of thousands of pounds and in the worst-case individuals can be imprisoned. The importance of how the organisations handles any external investigation from the outset cannot be overstated and the investigation will shape decisions about prosecution.