

Whistle while you work

The ability to raise concerns about a colleague's work is important for patient safety, but **Adrian O'Dowd**, **Josephine Hayes**, and **Deborah Cohen** discover that some NHS trusts make it hard

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► Feature: The price of silence (*BMJ* 2009 339: b3202)

► Feature: Aubrey Blumsohn—academic who took on industry (*BMJ* 2009;339:b5293)

On paper, whistleblowing is protected by law, written into all NHS trust policies, and supported by various bodies such as Public Concern at Work and the National Patient Safety Agency. Putting it into practice, however, is a different matter. Trusts write their own policy documents, and a recent *BMJ* analysis of the whistleblowing policy documents valid up to November 2009 from 118 of the 122 NHS foundation trusts shows widely differing approaches.

The *BMJ* obtained the policy documents from trust websites or through requests under the Freedom of Information Act. The documents were then compared against six standards set out in the *Whistleblowing Best Practice* guide produced by Public Concern at Work, an independent authority on public interest whistleblowing that also runs a helpline for NHS staff.¹ The standards are:

- The organisation takes malpractice seriously, giving examples of the types of concerns so that staff can distinguish a whistleblowing concern from a grievance
- Staff have the option to raise concerns outside of line management
- Staff are enabled to access confidential advice from an independent body
- The organisation will, when requested, respect the confidentiality of a member of staff raising a concern
- Details are given of when and how concerns may properly be raised outside the organisation (for example, with a regulator)
- It is a disciplinary matter both to victimise a bona fide whistleblower and for someone to maliciously make a false allegation.

Giving examples

The *BMJ* survey found that 22 of the 118 trust policies do not give examples of types of concerns to be raised. One school of thought is that giving too many specific examples might put people off because they could fail to see an example that resembles their own. But generic examples can be helpful, says Cathy James, deputy director of Public Concern at Work. "You shouldn't try to box yourself in, and why would you want to have exhaustive lists of problems that might come up? In our model speak-up policy

we mention staff might have a concern about fraud, danger, or malpractice that might affect others, the organisation, or the general public. In the context of health, patient safety would also be a key type of concern to be included in the policy."

Going outside a trust with concerns

Most trusts mention the option for a person to raise concerns outside the trust, although four do not. More than a third of trust policies (43) say staff can go outside the trust with a concern but put constraints on this such as having to go through management first, only after following internal procedures, or only when raising concerns with management was unsuccessful.

The majority of trusts' policies analysed give contact details for external organisations such as the National Patient Safety Agency or the Care Quality Commission that staff might want to contact with a concern, but five trusts do not provide this information.

Some trusts are helpful and supply contact details for staff if they are thinking of raising an issue with their local member of parliament (MP), but 47 trusts do not mention MPs.

Jane O'Brien, head of standards and ethics at the General Medical Council, says the GMC publishes detailed guidance for doctors who want to raise concerns about patient safety.²

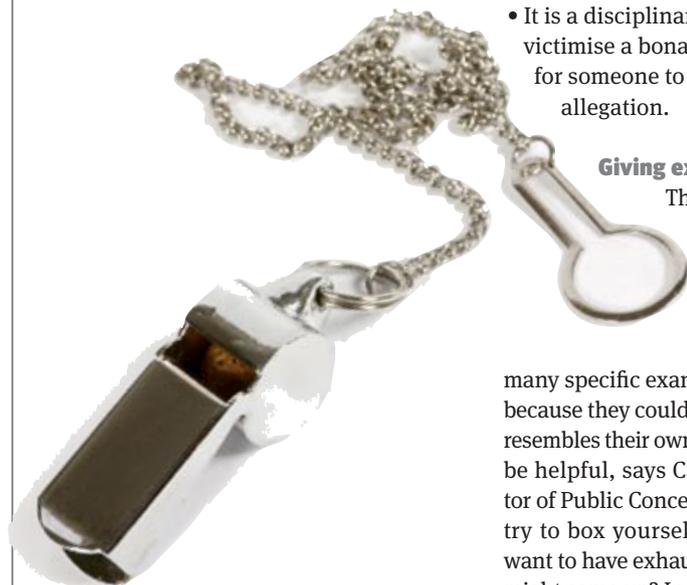
"The first line of approaching a problem should be to raise the matter internally within your organisation wherever you can," she says.

"If you have exhausted those routes and either you are not satisfied with the outcome or you feel you are being ignored, then you can go to an external person including a MP. They may be able to raise issues in different places and get the problem resolved.

"Clearly, patient confidentiality is always going to be an issue, and we would be concerned if patients were named or identifiable without their consent.

"If you are not happy with how an issue has been looked at internally, then either you can go externally with an 'anonymised' patient, or if you want to provide the kind of clinical detail that might identify a patient or to name a patient, then you would need their consent."

Doctors and other NHS staff should not be deterred from seeking the help of their MP, says Mike Parker, a council member of the Royal College of Surgeons with an interest in medicolegal matters.





Central Manchester University Hospitals NHS Foundation Trust's policy recognises staff have the right to seek the advice and guidance of their MP

"Clearly, patient confidentiality is always going to be an issue." Jane O'Brien, head of standards and ethics at the General Medical Council

Barnsley Hospital NHS Foundation Trust's whistleblowing policy mentions the word "disciplinary" 21 times

"There should be a no-blame culture like they have in New Zealand and Sweden." Mike Parker, Royal College of Surgeons

"There has been a problem with whistleblowing in that people have gone to management and then been warned not to do anything further for fear of bringing the trust into disrepute," he says.

"I don't support that. If someone has got a genuine concern, it's perfectly reasonable for a person to go to the body that they feel has the most appropriate position to speak out about something that needs dealing with."

Central Manchester University Hospitals NHS Foundation Trust's policy is particularly helpful in this area and says: "The Trust recognises that staff have a constitutional right to seek the advice and guidance of their Member of Parliament at any time when pursuing their concerns about health care matters." Milton Keynes Hospital, Papworth, and Peterborough Hospital are also good and say members of staff may wish or decide to consult their MP about a matter of concern relating to the health service and "this is, of course, their right."

Trusts that do give details of whom to contact, however, sometimes only give them with the caveat that a person must go through management first, have already raised the matter internally, or have exhausted internal procedures. Some policies mention that staff must go to an outside organisation "in good faith" and warn that there may be disciplinary action if they go to them unjustifiably.

Public Concern at Work believes that trusts'

policy documents should include options for external reporting as well as the opportunity for staff to obtain independent advice. Contact details of regulators such as the Care Quality Commission and Monitor, the National Patient Safety Agency should be included in all policies as well as those of health unions, professional bodies such as the BMA, and Public Concern at Work itself.

Confidentiality and protection

A fifth of trust policies (23 trusts) do not say that they will respect the confidentiality of the whistleblower or are not clear that they will do so.

Peter Gooderham, a law lecturer at the University of Manchester, says trusts should give assurances of protecting the whistleblower's confidentiality. "It's about making people feel comfortable with making a disclosure," he says. "It should be made clear that the finger won't be pointed at them if they take steps to raise a genuine concern."

However, 106 foundation trusts mention sanctions against any malicious or false claims made.

Protection of whistleblowers is crucial if people are going to feel able to come forward with genuine concerns, and 104 of the 118 trusts have measures to protect whistleblowers, although some are not clear that they do.

Some trusts have these measures in cases

where staff blow the whistle "in good faith" and have followed correct procedure.

Ms James says: "A good whistleblowing policy will say that the trust will not tolerate the victimisation of staff using the policy. It will also clearly indicate the trust takes malpractice seriously and that staff won't be at risk of losing their job if they raise a concern using the policy. Getting the policy tone right is essential and is something we work hard to try to help organisations to achieve."

"As long as the individual is reasonable and honest and they have a genuine concern about malpractice or wrongdoing, they will be protected by the law if they are subsequently treated badly or, worse dismissed. The Public Interest Disclosure Act (PIDA) has a stepped disclosure regime in which it is easiest to be protected by raising a concern internally with your employer or with a regulator. It will also protect an individual who raises an issue with an MP or with the media, but in those circumstances the individual has to demonstrate that it was reasonable for them to take this step looking at a number of issues. There is also a clear anti-gagging provision in PIDA."

Disciplinary action

The words "disciplinary action" feature often in some of the whistleblowing policies. The circumstances in which policies say such action may be used include "breach of duty of

CASE STUDY

“I DIDN’T SEE MYSELF AS HAVING ANY CHOICE”

“I didn’t see myself as having any choice,” says Nick Harper, deputy medical director at Blackpool, Fylde and Wyre Hospitals NHS Foundation Trust, speaking of his decision to raise serious concerns about a colleague.

Dr Harper joined the trust before it became a foundation trust as consultant anaesthetist working with several surgeons including general surgeon Steven Walker.

Within six weeks of starting, Dr Harper witnessed what he regarded as a serious incident when Mr Walker was operating on a patient who had come in for routine bowel surgery.

“There were certain individuals who were still not happy with me years later “

Dr Harper reported the incident to the clinical director, who in turn informed the medical director. For the next 10 months Dr Harper kept a log, which led to the trust’s medical director instigating an audit of all of Mr Walker’s patients. Shortly afterwards another serious incident occurred in which a patient who was having what should have been a routine bowel operation bled massively and had three cardiac arrests on the operating table.

“[Blowing the whistle] wasn’t something I did lightly, but I knew it was something that somebody needed to look at because it was a patient safety issue,” says Dr Harper. “I was treated perfectly reasonably by my employer. The potential problem for me was with my colleagues and the risk that they would treat me badly because I had done the one thing that you don’t do—blowing the whistle on a colleague.”

Dr Harper went to speak to trust management and said because he was not a surgeon, he could not be sure whether what he was witnessing was acceptable surgical practice, so he wanted the practices to be investigated. “There was bad feeling towards me from some of the medical staff, but I was well supported by my anaesthetic colleagues and there was a body of support for me,” he says.

“At the time, it felt uncomfortable, but I expected that. I had to do a lot of soul searching, and I knew I was going to be isolated and that there would be suspicion about me. But all I could do was what I thought was the right thing for my patients.”

Mr Walker was suspended in 1999 and was found guilty of serious professional misconduct by the General Medical Council for being professionally negligent in 10 cases, including four deaths. He was struck off the medical register in November 2001 for performing surgery “beyond the limit” of his confidence and skill. He appealed, and a year later was restored to the register on condition that he did not operate. However, a lengthy police investigation led to a manslaughter conviction in respect of the death of Dorothy McPhee, a 71 year old patient who died after a liver operation. Mr Walker, who pleaded guilty, received a 21 month jail sentence suspended for two years and was struck off the medical register.

Dr Harper says that colleagues’ attitude towards him changed over time: “There were certain individuals who were still not happy with me for years. Once the surgeon was actually found guilty of manslaughter, a number of those colleagues came up to me afterwards and said they had been wrong and should have supported me.

“It did not hamper my career, and I went on to become the clinical director of my department and I am now deputy medical director. It’s not held me back and the management of the organisation saw what I was doing as courageous and proper.”



Whistleblower Nick Harper



PETER JORDAN/PA

Surgeon Steven Walker: struck off medical register

confidentiality/loyalty to employer,” “failure to follow internal process for raising concerns,” and “if staff go to MPs or media.”

Twenty two foundation trusts mention “disciplinary” in their policies—a term unlikely to make potential whistleblowers comfortable in coming forward with a concern.

Barnsley Hospital NHS Foundation Trust says staff can go outside the trust with a concern, but there is potential disciplinary action if they go outside unjustifiably. This policy document mentions the word “disciplinary” 21 times.

The Walton Centre NHS Foundation Trust, however, does not use the word “disciplinary” at all.

Public Concern at Work say that although it is understandable that disciplinary action be mentioned for cases of malicious and false claims, the phrase could be taken by some staff to mean that the trust is threatening employees with disciplinary action if they blow the whistle.

Ms James, commenting on Barnsley’s policy, says: “Who is going to use that policy? The message is ‘do this at your peril’ and ‘you will be in trouble.’”

Public Concern at Work will launch a policy pack, developed in conjunction with a Social Partnership Forum working group, on whistleblowing for distribution throughout the NHS at the NHS Confederation conference in June. This includes a model policy that does not mention disciplinary action but does say that individuals cannot expect the same assurances about their position if they raise something that is both malicious and untrue.

Loyalty to the trust or patients?

The concept of loyalty or duty of an employee to their employer is often mentioned in the documents. Thirty trusts state that staff have a duty, implied duty, or loyalty to the trust as well as a duty of patient confidentiality.

Mr Gooderham says: “The mention of loyalty to the employer is dreadful. That phrase should not appear at all.

“I don’t have a problem with reinforcing the need for patient confidentiality, but in order to raise a concern within an organisation, it is likely to be necessary to identify the patient. It should be made clear how one can identify patients, and it should be reinforced that unjustified breach of confidentiality is not allowed, but to be threatening in the way that one words it is unnecessary and likely to be counterproductive.”

One foundation trust policy says: “Employees also have an implied duty of confidentiality and duty to their employer. Breach of this duty may result in disciplinary action.”

Ms O’Brien says GMC guidance “is very clear that the first obligation that doctors have is the safe provision of care to their patients and that the safety of patients must come first.

“Doctors enter into contracts with organisations and there is an aspect of good care, which means that patients’ trust in the hospital or care provider as a whole is not unjustifiably undermined. Those are issues that doctors will want to take into account, but in our view, patient safety trumps all of that if it comes down to a choice between them.”

Model policy

So what should a model whistleblowing policy look like? Public Concern at Work recommends that trusts audit, review, and check how their whistleblowing policies are performing in practice and promote their use to staff regularly.

“Policies should have very easy to use, plain English,” says Ms James. “All too often because one policy is copied from another policy and it might have come through a lawyer, they can end up being very legalistic and overly procedural. The whole point of this is to give people genuine options, and you need flexibility of approach to make this work.

A policy that closely follows the legal tests for protection in PIDA misses the main point of a whistleblowing policy, which is to make it safe for staff to speak up. The law is there to protect individuals if it all goes wrong and should not be the starting point. Enlightened organisations recognise this and see a whistleblowing policy as being in their best interest, helping them to better manage risk.”

Mr Gooderham believes that it is time for a centralisation of whistleblowing policies so that the wording is carefully prepared and appropriate.

“I would tend towards a model disclosure policy produced by the Department of Health. Individual trusts would need to have good reasons for changing it and those should be signed off by the department.

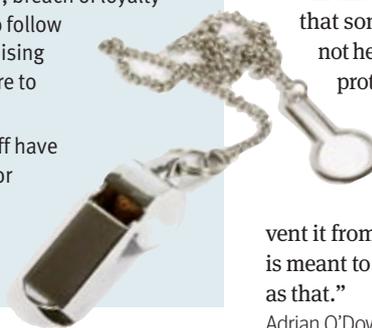
“The reason is that it has become apparent that some trusts presumably are getting their solicitors to draft these documents and they contain phrases like ‘utmost fidelity towards the employer,’ which are inappropriate.

“The increasing diversification of the NHS

HOW WHISTLEBLOWING POLICIES STAND UP

Findings of *BMJ* analysis of policies from 118 NHS foundation trusts, November 2009:

- 22 do not give examples of types of concerns to be raised
- 4 trusts do not mention the option for a person to raise concerns outside of the trust
- 43 policies say staff can go outside the trust with a concern but insist that a person goes through management first
- 47 trusts do not mention MPs at all as one possible option for staff to approach with a concern
- 5 trusts do not provide contact details for external organisations that staff might want to approach such as the National Patient Safety Agency or the Care Quality Commission
- 23 trusts do not specifically say they will respect the confidentiality of the whistleblower or it is unclear that they will do
- 106 foundation trusts mention sanctions against any malicious claims made
- 14 trusts do not have measures to protect whistleblowers
- 22 trusts mention “disciplinary” in their policies, sometimes in relation to breach of duty of confidentiality, breach of loyalty to employer, failure to follow internal process for raising concerns, or disclosure to media or MPs
- 30 trusts mention staff have a duty, implied duty, or loyalty to the trust as well as to patient confidentiality



suggests that the scope for that sort of thing and getting it wrong is going to increase rather than decrease.”

Some trusts’ policies work well, he says, and in the private sector he has heard of whistleblowers being recognised and promoted.

“On whistleblowing, I think the NHS has failed badly over the past 10 years. I think it boils down to culture change. The policies need to be user friendly and worded in such a way that it encourages people to raise concerns. They need to be widely advertised.

“We need some positive recognition for people who have raised concerns and who have been proved to be correct or people who have raised concerns which at the time looked as if there might be a serious problem even if there wasn’t. They shouldn’t be treated as troublemakers, ostracising them, suspending them from work, and so on.”

The BMA is also aware of the problems that some whistleblowers can face. Mark Porter, chairman of the BMA’s consultants committee, says: “We get very concerned about people who fall foul of these whistleblowing policies.

“This is anecdotal because of the very nature of the subject, but people continue to raise examples with us, and there are high profile cases, some of which take place in organisations that have good policies.”

Culture of silence

The NHS still has a culture of silence around raising concerns, according to Mr Parker.

“A lot of us in medicine feel there should be a no-blame culture like they have in New Zealand and Sweden I believe,” he says. “It’s exceptionally good practice because nobody feels under threat and if you don’t feel threatened, you will tell the truth and you will probably come up with things more frequently to try to improve patients’ welfare.

“In this country we have this constant threat that somebody is going to get you, and it’s not healthy. I would welcome anything that protects both whistleblower and also the person concerned. If they have done something that’s wrong, we can sort it out as long as nobody comes to harm and probably prevent it from happening again. Whistleblowing is meant to be a positive thing, but it’s not seen as that.”

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Competing interests: None declared.

Provenance and peer review: Commissioned; not externally peer reviewed.

- 1 Public Concern at Work. *Whistleblowing best practice*. www.pcaaw.co.uk/organisations_pdf/best_practice_guide.pdf
- 2 GMC. *Raising concerns about patient safety—guidance for doctors*. www.gmc-uk.org/guidance/ethical_guidance/raising_concerns.asp.

Cite this as: *BMJ* 2010;340:c2350