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Nurses blowing the whistle on poor care

A Norwegian case study

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Introduction

The care failings and appalling practice at Mid Staffordshire Hospital brought to light the systemic breakdowns in identifying early warning signs and inconsistencies in the reporting culture that sometimes exist within the English National Health Service (NHS), especially when it comes to raising concerns against poor care and unprofessional behaviour. The Francis public inquiry report stresses the importance of transforming culture and attitudes, developing robust safeguarding strategies and implementing effective complaint handling and recording systems. The report also calls for an end to the 'gagging clauses' that limit public disclosures, and instead to foster a culture of openness, transparency and legally binding duty of candour[1]. The Department of Health has commissioned Donald Berwick to lead a review and report on making 'zero harm' a reality within the NHS. [2]

If we are to effectively improve existing national and local whistleblowing procedures, there is merit in learning from good practices in other health care systems and utilising this learning to inform health policy and practice. For example, whistleblowing procedures in Norway have helped to create a culture of openness and transparency, where health professionals are empowered to raise concerns with minimal fear of reprisal and a strong trade union voice is present at board level with an equal vote on all board decisions. This briefing will outline the mechanisms (system, organisational and legislative procedures) behind this reporting culture in Norway and identify lessons in effective complaint handling that will be useful for England.

A Norwegian case study

Norwegian whistleblowing legislation

The *Norwegian Work Environment Act* from 1977 was revised in 2005 (WEA 2005) following numerous 'whistleblowing' cases reported between 1998 and 2005 that led to major media exposure and calls for stronger legislation and employee protection at a national level. The Act's new sections on whistleblowing became active in 2007, imposing strict statutory requirements and duties for employers and employees to adhere to. It stipulates that employees have a legal duty to notify their employer and/or safety representative of incidents that cause harm to their patients or others.[3] Employees are required to follow the appropriate internal procedures for reporting; however if the incident is not appropriately dealt with internally or there is a conflict of interest with internal reporting systems, such as labour relations within the organisation are damaged, then it is appropriate to report wrongdoings to union representatives, health and security inspectors and/or supervisory authorities.[4]

[1] The Mid Staffordshire NHS Foundation Trust Public Inquiry Final report. http://www.midstaffspublicinquiry.com/report
[2] Health Service Journal (2013). *Berwick: I'm optimistic about the future of the NHS.* http://www.hsj.co.uk/5057603.article?referrer=e40
[3] Lewis D & Trygstad S. (2009). Protecting whistleblowers in Norway and the UK: a case for mix and match? *International Journal of Law and Management 51(6)*:374-388
[4] *Ibid*

Norwegian employers are required by law to consider developing procedures to facilitate 'internal notification' for reporting incidents, however there is no mention of external disclosures in the legislation, allowing employees, if they so choose to raise concerns directly with the media.[5] The WEA 2005 protects employees against retaliation.

In the event of a dismissal or any negative reprisal due to whistleblowing, employees in Norway can seek compensation, and it will be the responsibility of the employer to prove that no retaliation had occurred.[6] This is different in the UK where it falls on the employees to prove that retaliation did occur for whistleblowing claims. However, for *unfair dismissal claims* in the UK some burden of proof does fall on the employer to prove that unfair dismissal did not occur.

Reporting complaints and concerns

In most Norwegian health trusts and hospitals, staff (registered nurses, doctors, physiotherapists, consultants, etc.) have online access to the electronic complaint handing system where they can report concerns, which are then escalated to senior management and the hospital board. Concerns are categorised and colour coded based on level of severity and priority with 'green' as low priority, 'orange' as medium and 'red' as high priority, requiring immediate action.

All concerns listed under the 'red' category will be automatically flagged with the Norwegian Knowledge Centre for the Health Services (NOKC) (also known as Meldeordningen)[7], a national body responsible for upholding quality standards and improving patient safety within the Norwegian health care system. As of July 2012, a new system became operational obliging health trusts, hospitals and specialist care services to report high priority (red category) concerns within 24 hours. The emphasis is to address adverse events immediately and protect patient safety. Health professionals can also confidentially report concerns directly with NOKC who will investigate the issue and advice on individual cases.

Culture of whistleblowing in Norway

In Norway, almost eight out of ten employees blow the whistle on poor care– a very high proportion compared to global whistleblowing statistics.[8, 9] Despite these national public sector figures, the system is not perfect. According to the Norwegian Nurses Organisation, there is still room for improvement, especially in the community and municipalities where reporting systems are not as robust as the acute sector.

Main reasons for improved reporting statistics[10, 11] are:

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[5] Lewis D & Trygstad S. (2009). Protecting whistleblowers in Norway and the UK: a case for mix and match? *International Journal of Law and Management 51(6)*:374-388

[6] Bjorkelo B & Matthiesen SB. (2012). *Whistleblowing and democratic values*.

[7] The Norwegian Knowledge Centre for the Health Service website. http://www.melde.no/systemsider/reporting-and-learning-central

[8] Skivenes M & Trygstad SC (2010). A Global Approach to Public Interest Disclosure. *Chapter 7: Loyalty and whistleblowing in Norway: how roles come into play* http://www.elgaronline.com/view/9781848448995.00014.xml

[9] Ibid 5

[10] Skivenes M & Trygstad SC (2010). When whistleblowing works: the Norwegian case. *Human Relations 63(7)* 1071-1097

- strong model of labour relations where employees are supported by legislation as well as trade union backing. There is also a sense of high job security;
- transparency at hospital board level as board meetings are held in public and employees are encouraged to attend;
- a healthy organisational culture is evident where it is 'normal' to raise concerns with senior management. Employers are also duty-bound to properly investigate and address wrongdoings; and
- the State provides extensive welfare services for all unemployed citizens, reducing the fear of retaliation that reporting can sometimes lead to.

Norwegian statistics on whistleblowing[12] demonstrate that:

- 76 per cent of people in the public sector (including health) who observe wrongdoing in the workplace report this incident to their immediate supervisor or another person, either inside or outside the organisation;
- 83 per cent of Norwegians stated that they received positive reactions to their whistleblowing reports; and
- 64 per cent of whistleblowers reported seeing improvements in their workplace after concerns were raised internally.

Strong trade union presence at board level

Norway has a strong labour relations model, consisting of a "high degree of unionisation, centralised agreements and coordinated bargaining at several levels together with extensive worker representation at both the company and the community level".[13] This open workplace culture is visible in whistleblowing cases, especially as employees and trade unions have a clear opportunity to influence corporate/employer decisions, using both internal and external approaches to expose misconduct or malpractice.[14]

Trade unions like the Norwegian Nurses Organisation (NNO) are a vital artery of Norwegian society and as such play an important role in supporting the community to raise concerns and represent staff concerns at board level. Trade unions work closely with politicians, hospital trusts and other key stakeholders to improve the reporting culture within the health care sector and are often recognised as equal partners in influencing health care reforms.

Within a health trust, there are two 'board level' tiers that a trade union representative like the NNO has a seat on:

1) the executive board level where a trade union representative participates as an equal, permanent member, voting on all board decisions including budgetary issues; and

[11] Lewis D & Trygstad S. (2009). Protecting whistleblowers in Norway and the UK: a case for mix and match? *International Journal of Law and Management 51(6)*:374-388

[12] Ibid10

[13] Ibid 11

[14] Ibid 10

2) a level below the executive board called Arbeidsmiljøutvalg (working environment board) where all whistleblowing cases are discussed and addressed.

The working environment board meet regularly (at least once a month) to discuss all the concerns that hospital staff have raised through the electronic reporting system. All reported cases are flagged on a monthly basis, however cases registered under the 'red' category are treated with a high level of priority. In these cases, the board makes a decision on how to address the issue and improve care. All board meetings are open and transparent, encouraging staff to attend.

The NNO highlighted that sometimes a conflict of interest might arise due to its dual function as a trade union representative at board level within a health trust or hospital and its role as a trade union supporting its membership. However, the benefits of having a voice at board level outweigh the minimal risks. For example, a seat at board level allows the NNO to represent the nursing voice and raise patient safety concerns at executive level. It also allows them to push for changes within the organisation that benefit nurses and patients such as safe staffing levels on wards, reducing unnecessary paperwork that takes time away from bedside care and supporting staff who raise concerns.

Whistleblowing culture and system in England

Public disclosure legislation

The *Public Interest Disclosure Act 1998 (PIDA 1998)* (applicable in England, Scotland and Wales) is legislated to protect whistleblowers who report concerns in the workplace from retaliation such as a job dismissal or failure to get a pay rise from their employer. Northern Ireland has similar provisions under the *Public Interest Disclosure Order* 1998. The Act requires disclosures be made in 'good faith' and must be raised internally in the first instance, either to the specified contact person within the organisation (i.e. line manager or HR adviser) or prescribed body (i.e. Care Quality Commission in England; Scottish Commission for the Regulation of Care in Scotland; Health Inspectorate Wales in Wales; and Regulatory and Quality Improvement Authority in Northern Ireland).

In the event of a wrongful dismissal and/or victimisation, the employee can file a claim with the employment tribunal requesting compensation or apply for an 'interim order' to keep their job, pending a full hearing under PIDA 1998[15]. Depending on the nature of the grievance following a public disclosure, an employee can put in a whistleblowing claim or an 'unfair dismissal claim' to receive compensation. Each of these claims require a varied set of criteria to be met, offer different compensation amounts and outline different timelines for when the claim needs to be filed with the employment tribunal (this is usually 3 months from the date of dismissal/bullying/personal injury etc).

[15] RCN (2001). *Blowing the whistle*.

Confidentiality clauses (also known as gagging clauses) in English employment contracts and severance agreements can conflict with the protection provided under the PIDA 1998. The Health Secretary Jeremy Hunt has called for the gagging clause included in severance packages to be banned, effective immediately (March 2013).[16]

The NHS Constitution

In England, employers are offered indirect incentives to develop internal complaint handling procedures and to ensure that their employees are aware of these policies. Furthermore, in 2012 the NHS Constitution was amended and a few pledges were added to increase whistleblowing safeguards and promote a culture of transparency and openness.

According to the new NHS Constitution[17, 18]:

- NHS staff are expected to raise concerns at the earliest reasonable opportunity on safety, malpractice and wrongdoings in the workplace, and act consistently with the PIDA 1998;
- an NHS pledge to support staff who raise concerns whereby NHS employers will address concerns in a timely fashion with the backing of a full investigation. An independent contact person (outside of the department) will be made available to support staff who raise concerns;
- NHS staff should foster a 'climate of truth' where errors are reported and learned from to encourage an open and transparent system; and
- the legal rights for staff to raise concerns are clearly outlined to prevent whistleblowers from reprisal or victimisation.

Despite these amendments and pledges, there is still some criticism that the additional safeguards will not be sufficient because the NHS constitution does not currently provide legal rights. [19, 20]

Whistleblowing culture within the NHS

Nurses are duty bound to report incidences of poor care, neglect, clinical errors and harm towards patients as part of their professional code of practice. Unfortunately, a culture exists within some NHS trusts that tends to discourage staff from reporting errors or incidents; and nurses who do report when things go wrong are sometimes blamed, bullied or ignored.[21]

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[16] http://www.bbc.co.uk/news/health-21780425

[17] NHS Constitution 2012. http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_132958.pdf

[18] NHS Constitution: the NHS belongs to us all. 2013 (revised). https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/170656/NHS_Constitution.pdf

[19] Nursing Times (2011). *Whistleblowers seek better legal protection*. http://www.nursingtimes.net/nursing-practice/clinical-zones/management/whistleblowers-seek-better-legal-protection/5037504.article

[20] http://www.nhsemployers.org/employmentpolicyandpractice/ukemploymentpractice/raisingconcerns/pages/whistleblowing.aspx

[21] Nursing Times (2011) *Whistleblowers being ignored, RCN survey finds.* http://www.nursingtimes.net/nursing-practice/clinical-specialisms/management/whistleblowers-being-ignored-rcn-survey-finds/5038788.article

A recent Nursing Times survey discussing unsafe staffing levels on wards in England showed that 73.4 per cent of nurses have filled out an incident report for an adverse event over the past 12 months; however, 75.5 per cent stated that they did not receive any feedback or response to their incident report from senior management.[22] 51.7 per cent of surveyed UK nursing staff said that raising concerns in their workplace led to a negative consequence for the whistleblower. The main barriers to raising concerns were failure to act on concerns by the line manager (24 per cent) and risk of being viewed as a troublemaker by the employer (27 per cent).[23]

The RCN along with 28 other organisations (such as trade unions, royal colleges, NHS Employers, the Nursing and Midwifery Council (NMC)) have signed a whistleblowing charter called '*Speaking Up*' which pledges to support staff who raise concerns from retaliation.[24] Through its *Frontline First*[25] campaign and *Whistleblowing*[26] hotline, nurses and health care assistants have repeatedly stressed that care is being compromised due dangerous understaffing and overstretched wards and services, resulting from short-sighted cuts to deliver 'efficiency savings'. The RCN has strived to continually bring concerns to the attention of the necessary system regulators, department of health and NHS employers. The RCN also encourages members to raise concerns with the Care Quality Commission if concerns are not addressed promptly or comprehensively by their employer and patient safety has been put at risk. The RCN has produced guidance to support members to raise concerns against poor practice.[27, 28]

Lessons for England

The Norwegian experience highlights the influence of 'professional culture' on fostering an open and transparent work ethic and environment. Some lessons that we can take from this example include:

Supporting nurses to raise concerns:

- In Norway, whistleblowing safeguards protect employees from reprisal. In cases of compensation, it is up to the employer to prove that retaliation did not occur. However, this is not the case in England where the onus falls on the employee to prove that retaliation did occur in whistleblowing disputes.
- Norwegian employers are taken to task if they wrongly dismiss an employee for raising concerns. Moreover, health professionals are legally required to report wrongdoings when they

[22] Nursing Times (2013). *Full survey results: how will the Francis report affect nursing*. http://www.nursingtimes.net/5054518.article?referrer=e1
[23] Nursing Times (2013) *Full survey results: are you safe to speak out?* http://www.nursingtimes.net/5055714.article?referrer=e1
[24] Nursing Times (2012). '*Whistleblowing' charter launched*. http://www.nursingtimes.net/nursing-practice/clinical-zones/management/whistleblowing-charter-launched/5050632.article
[25] RCN Frontline First. http://frontlinefirst.rcn.org.uk/
[26] RCN whistleblowing hotline: http://www.rcn.org.uk/support/whistleblowing_hotline
[27] RCN (2013). Raising concerns: a guide for members. http://www.rcn.org.uk/__data/assets/pdf_file/0015/510180/004391.pdf
[28] RCN (2013). Raising concerns: a guide for RCN representatives. http://www.rcn.org.uk/__data/assets/pdf_file/0017/510182/004392.pdf

occur as stipulated in the legislation, encouraging and **normalising** a culture of reporting adverse events or incidents of misconduct immediately following an incident.

- Strong labour laws and a trade union voice at the executive board and working environment board level have helped to improve the hospital reporting culture in Norway. In England, poor workplace culture/attitudes need to be dealt with promptly and forceful action must be taken against bullying and retaliation behaviours. Senior management need to encourage staff to foster an atmosphere of openness where errors are reported immediately and learned from to improve care.

Developing strong nurse leadership:

- The nursing voice in the UK needs to be strengthened. Nurses are often aware of system and workplace shortcomings but they also have the solutions to address these problems. To encourage nurses to raise concerns, it is important to first strengthen nursing representation within the organisational leadership frameworks and at executive level. The RCN has continually lobbied for nursing representation on the boards of hospital trust, and most recently and with success, on the newly created Clinical Commissioning Groups (CCGs). Developing nursing leadership is fundamental as nurses often advocate for patients and they need support from senior clinicians and general management to voice concerns against poor practice.

Encouraging a 'culture' of transparency:

- Norwegian nurses and health professionals have an ingrained culture of plain speaking in the workplace. Staff are supported by the law, professional code of practice and workplace complaint protocols, which enable them to file incident reports when they witness wrongdoings. Employees also report less fear of reprisal because of the high job security support initiatives in place. In England, strategies to strengthen reporting behaviours are continually debated at a national and local level, however more concrete action is required. Moreover, addressing NMC fitness to practice backlog cases should be paramount if the health and social care sector is to tackle poor care and unprofessional behaviours systematically and promptly.
- Open hospital and health trust board meetings have encouraged a culture of transparency in the Norwegian health care system. The complaint flagging system is designed to recognise early warning signs and rapidly address one-off or systemic workplace issues at an organisational level but also escalate priority cases to the NOKC within 24 hours. This whistleblowing system puts more ownership on individual health care providers to address poor care immediately and take steps to mitigate risk.
- In England, the Francis report has made significant recommendations to improve complaint handling procedures and the overall NHS 'culture' by calling for a statutory obligation to observe a duty of candour. Empowering all staff to develop confidence to report care failures (on a small or large scale) would be a step towards progress, however it is also critical for employers to investigate all concerns in a comprehensive manner and take the necessary actions to escalate serious concerns to the appropriate system and professional regulators.

The RCN's view

Nurses have a professional duty to report cases of poor care in keeping with their code of practice. As advocates for their patients, nurses are continually striving to provide high quality, safe patient care. However, lack of transparency, too much bureaucracy and poor reporting processes can encumber the overall delivery of optimal outcomes.

The Norwegian experience offers a unique perspective and possible solutions for England. For example, its stresses the benefits of fostering a positive workplace culture; promoting organisational transparency and having a strong trade union voice or presence at board level to mitigate risk at an early stage, address systemic failures in a timely manner and represent nursing concerns at top level.

The RCN believes that the complaint handling processes and reporting structures need to improve within the NHS and independent sector if we are to succeed in protecting patients from harm. NHS and private health and social care providers should make it their top priority to take action quickly and comprehensively when cases of poor care or unprofessional behaviour are reported. Furthermore, strong legislation and robust early warning protocols are essential to support nurses, health care assistants and other health professionals to raise concerns without fear of retaliation or having to endure workplace bullying. Positive workplace culture is often strongly dependent on the openness and transparency of the organisation. Good organisational culture is mostly set at top level and supported by right leadership attitudes, a focus on delivering high quality and compassionate care, and empowers staff to safely raise concerns.