



INFORMATION FOR NURSES

Blowing the whistle



Royal College
of Nursing



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Blowing the whistle

Introduction

The Public Interest Disclosure Act 1998 became law on 2 July 1999 (applicable in England, Scotland and Wales). Equivalent provisions apply in Northern Ireland (the Public Interest Disclosure Order, 1998). This Act reflects public concern about the difficulties for workers in being able to speak out when they believe something is seriously wrong in their workplace. Many individuals feel they may be victimised and that they need protection if they are to raise their concerns.

Recently, there have been a number of well-reported tragic incidents where investigation has revealed that employees had serious concerns but were too frightened to speak out. It is not just the fear of reprisal that gags these individuals but often it is the organisational culture. Some organisations discourage openness, with managers turning a 'deaf ear' or accusing staff of disloyalty.

The NHS has had its share of scandals,

which could have been prevented had staff felt able to raise their concerns about health care matters.

This leaflet summarises the whistle-blowing legislation and describes how nursing staff can disclose facts about work situations causing them concern.

Protection provided by the Act

The Act protects whistle-blowers from victimisation and dismissal when they speak out, but their concerns must be genuine and must have been raised (unless there are very good reasons for not doing so) internally or with a specified, 'prescribed' person.

- ◆ If a whistle-blower is victimised, they can take a claim to an employment tribunal for compensation.
- ◆ If a whistle-blower is dismissed, they can apply for an 'interim order' to keep their job, pending a full hearing. Interim 'relief' or compensation is also available for a dismissed employee who makes a

claim to an employment tribunal within seven days of dismissal.

- ❖ There is no qualifying period for bringing an unfair dismissal claim under the Act and awards made under it are unlimited.

Confidentiality clauses, such as gagging clauses in employment contracts and severance agreements, which conflict with the protection provided under the Act, are not legally binding.

Who is entitled to protection?

According to the Act all workers are protected. Workers include employees and anyone who contracts personally to work for another. Agency nursing staff, health care assistants, nurse cadets, trainees and students are covered. It does not cover the self-employed or those working abroad. There is no minimum qualifying period or age.

Which disclosures qualify for protection?

The Act seeks to ensure workers who act responsibly receive protection. The

disclosure must be of a specific nature and may only be disclosed through specified channels. The Act provides no protection to those seeking to use it to wage political campaigns, to resolve personal disputes or who have some other motive for their disclosure.

In order to be protected, the disclosure has to show one or more of the following has occurred:

- 1 a criminal act
- 2 a failure to comply with legal obligation (including negligence, breach of contract, including contract of employment, and breach of administrative law)
- 3 a miscarriage of justice
- 4 danger to health and safety
- 5 damage to the environment
- 6 an attempt to cover up any of these.

It is sufficient for the worker to have a reasonable belief that their information is correct. This means that the worker will not have to prove their disclosure is accurate, but they will need to demonstrate that they acted in good faith.

Health professionals can blow the whistle on concerns about, for example, risks to patients or financial malpractice. The Act, and its

protection, applies whether or not the information is confidential, or whether the wrongdoing occurred in the UK or overseas. However, the disclosure will not be protected if by making it the worker commits a criminal offence, for example, breaching the Official Secrets Act 1989.

How should the disclosure be made?

Whistle-blowers will only be protected if they make their disclosure in specific circumstances.

- 1 Internally, to an employer or other responsible person.
- 2 To a third person where there is a procedure set up at their place of work allowing disclosure to that person.
- 3 To a legal adviser in the course of obtaining legal advice.
- 4 With the relevant government minister if the worker is employed in a QUANGO or in the NHS.
- 5 To prescribed persons such as:
 - ◆ a health and safety executive for matters affecting the health and safety of any individual at work

- ◆ the Audit Commission in respect of the proper conduct of public business, fraud or corruption in the health service
- ◆ the Data Protection Registrar on compliance with the requirements of the data protection legislation, and various industry regulators.

The worker must reasonably believe that it is appropriate to be disclosing the information to that particular prescribed person.

- 6 People other than the above (for example, police, media, MPs), if it is reasonable in all the circumstances to do so, and the disclosure is not made for personal gain. The worker, however, must satisfy the following additional conditions:
 - ◆ reasonable belief that they would be victimised if they raised the matter internally or with a prescribed person
 - ◆ there is no prescribed person, and reasonable belief that the evidence would be concealed or destroyed
 - ◆ the concern had already been raised with the employer or prescribed person.

From 1 October 2003, the National Care Standards Commission has been added to the list of prescribed persons in respect of providing regulated care services.

In addition to identifying the people to whom the disclosure must be made, the Act sets out specific factors which decide whether the disclosure was warranted:

- ❖ the seriousness of the wrongdoing and whether it is continuing
- ❖ whether the employee complied with procedures on disclosure adopted by the employer
- ❖ whether the disclosure breached a duty of confidentiality owed by the employer to some other person.

These conditions can be put aside *only* where the wrongdoing is of an exceptionally serious nature.

Employers' responsibility

While the Act does not require employers to adopt whistle-blowing policies, it gives them every reason to do so.

A whistle-blowing policy is distinct from a complaints or grievance procedure. Under a whistle-blowing policy, the worker raises the matter so others may investigate it; it is not for the employer to prove the case or to dictate the response.

The NHS Health Service Circular HSC 1999/198 (applicable in England) sets out the minimum requirements every NHS trust and health authority should have in place in response to the Act. This should include a senior person who has responsibility for addressing concerns outside the management chain; guidance for staff who have concerns, and unequivocal guarantees that staff will be protected against victimisation.

If you have concerns, what steps should be taken?

If you have serious concerns about a situation in your work place that you believe should be disclosed you can:

- ❖ raise the issue internally first (wherever possible), for example with your line manager, or, if you feel uncomfortable about this, a trusted mentor, senior colleague or clinical supervisor. Law gives greater protection to internal disclosure
- ❖ consult local whistle-blowing procedures
- ❖ give the employer a reasonable opportunity to respond before taking any further action
- ❖ talk through the issue with an independent person who will help you clarify whether action needs to be taken
- ❖ seek advice from your local RCN office. As an RCN member, you are entitled to help. Officers can advise you about whether, and how, disclosures should be made and what protection you have
- ❖ contact the RCN's free confidential counselling service (available to members on work and non-work related matters). To find out more, phone 0845 769 7064 (calls charged at local rate)
- ❖ contact other useful helplines: the NMC Professional Advice Service 020 7333 6541/6550/6553 and Public Concern at Work (dedicated to whistle-blowing advice) 020 7404 6609; www.pcaw.co.uk



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