Whistleblowing: a legal commentary

Reporting a colleague for an incompetency or inappropriate action is not easy, says Marc Cornock, which may explain why so few nurses choose to do so.

Abstract
This article examines the legal position of a nurse who believes that a colleague is performing below the level of competence required, witnesses inappropriate action by a colleague, or who believes that the care environment is putting patients at risk.

Keywords
Whistleblowing, under-reporting, patient safety

As the case of Margaret Haywood demonstrates (Edemariam 2009), nurses can receive serious professional censure as a result of whistleblowing; in Ms Haywood’s case this was her removal from the professional register. Ms Haywood was subsequently reinstated after an RCN campaign on her behalf, instead receiving a one-year caution from the Nursing and Midwifery Council (NMC). However, Ms Haywood’s case, along with that of Terry Bryan, who went public about poor practice at Winterbourne View (Bryan 2011), also demonstrates that without individual whistleblowers poor and inadequate care will continue unchecked. This article examines the legal position of a nurse who believes that a colleague is performing inappropriately or below the level of competence required, or who believes that the care environment is putting patients at risk.

According to the NMC, children’s nurses ‘champion the rights of children and young people to be treated as equal members of society, to achieve their full potential and, wherever possible, to have their views and preferences taken into account’ (NMC 2010). Children’s nurses must be ready to speak up on behalf of their patients when there is something amiss in their care or treatment – even when the problem lies with a colleague, or with managers.

In these situations, the nurse does not have a personal choice as to whether to raise the concern, but a legal obligation and professional duty to report it. The legal obligation arises under the standard of care required of a nurse (Cornock 2011). With regard to professional duty, the NMC (2004) code of conduct contained an explicit statement that covered the professional responsibilities of the nurse with concerns about a colleague or a colleague’s actions. That the existing code (NMC 2008) does not have this paragraph does not mean that this duty no longer exists. The NMC has clarified its application to all potential areas of concern by stating that nurses should ‘act with integrity and uphold the reputation of your profession’ (NMC 2008).

Other parts of the existing code that are applicable include: ‘you must act without delay if you believe that you, a colleague or anyone else may be putting someone at risk’; ‘you must report your concerns in writing if problems in the environment of care are putting people at risk’; and ‘you must act immediately to put matters right if someone in your care has suffered harm for any reason’ (NMC 2008).

This professional duty has been placed on nurses because they are in the best position to judge another colleague’s performance. They understand the pressures and can gauge when something is amiss or is an isolated incident that is no one’s fault.

When a nurse is concerned about the behaviour or actions of another and reports these concerns to a third party, after or instead of discussing them with the individual concerned, it is termed ‘whistleblowing’. This appears to be an easy process to follow; the nurse witnesses inappropriate action by a colleague and reports this to the relevant authority. However, in practice, it is not so simple.

Connotations
Whistleblowing is associated with many negative connotations. For instance, Yamey (2000) likens whistleblowers to bees noting that the ‘whistleblowing employee has only one sting to use, and using it may lead to career suicide’. It has been estimated that colleagues report only 15 per cent of incidents to the relevant authorities (BBC 2004).
The reasons for not reporting fall into three areas (Box 1). Legal protection for people who highlight information in the public interest is provided by the Public Interest Disclosure Act 1998, which came into effect in July 1999. The act extends the rights that existed under the Employment Rights Act 1996 which specifically covered disclosures aimed at protecting health and safety, for example exposing unsafe working practices (Cornock 2009).

To call on the Public Interest Disclosure Act 1998, ‘the whistleblower is expected to comply with any procedures that the employer has set up to deal with whistleblowing. Where they believe that they will suffer detriment if they make the disclosure to their employer, they can make their disclosure to another authority’ (Cornock 2009). The whistleblower also needs to meet the conditions contained in the act; to make the disclosure in good faith, reasonably believe that the information disclosed, and any allegation contained in it, is substantially true; and not make the disclosure for purposes of personal gain.

The effect of the 1998 act is to protect an employee from suffering detriment and, if such detriment occurs, give a course of action for the employee to bring against the employer. However, nurses should not need it when expressing their concerns. Whistleblowing should be seen as part of clinical governance arrangements. The NHS Executive believes that one of the benefits of developing clinical governance is to establish ‘clear mechanisms for the identification and management of poorly performing clinicians [and] routes for other clinicians to voice their concerns about performance of their colleagues’ (National Health Service Executive 1999).

Even so, it is not an easy decision to blow the whistle on a colleague, but it is the patient and their safety that is and should remain the nurse’s priority. But to whom do you report your concerns? The statutory or professional duty would not be discharged if a nurse merely expresses a concern to a friend who is also a nurse. Advice is available from organisations and trade unions like the RCN for nurses who are concerned about a colleague’s performance or affects patient safety should be discussed. the organisation they can approach, they should consider turning to one of these.

In addition, guidance is provided by various NHS bodies on how to raise concerns. The Department of Health (2006) provides a leaflet for health professionals who have concerns about a colleague’s performance and are unsure about what to do next. Independent organisations such as Public Concern at Work (2011) also provide free advice ‘to people with whistleblowing dilemmas’ as well as offering professional support to organisations.

### Box 1  Reasons for under-reporting of incidents

<table>
<thead>
<tr>
<th>Reasons for not reporting</th>
<th>Examples given</th>
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<tr>
<td>Fear of what will happen to whistleblower as a consequence.</td>
<td>- The information is not treated confidentially.</td>
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<td>- The person who makes the report is treated as blameworthy.</td>
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<td>- Their identity becomes known; they report to the person whose practice gives rise for concern; they become known as a ‘troublemaker’ or they are isolated and without support from their organisation.</td>
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<td>- Removal from the workplace so as not to come in contact with the person about whom they made a disclosure.</td>
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<td>That there is no reason to report the incident.</td>
<td>- A belief that the authority who received the report will not treat it seriously and no action will be taken.</td>
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<td>- The result of any investigation will be out of proportion to the incident and the penalty too severe.</td>
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<td>- The incident can be handled informally without the need for any external agencies or management to be involved.</td>
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<td>- Involving external agencies is letting the team down.</td>
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<td>Uncertain what action to take.</td>
<td>- Individuals are unaware of who to report their concerns to.</td>
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### Conclusion

The role of a children’s nurse is to protect and provide care for their patients. To achieve this, any concerns about a colleague’s performance or aspect of the environment, including management systems, that affects a nurse’s ability to undertake their role or affects patient safety should be discussed. The organisations mentioned provide support for nurses in this position and, if a nurse feels there is no-one in the organisation they can approach, they should consider turning to one of these.

### References


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### Conflict of interest

None declared

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