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Genuine protection for whistleblowers – also in the health services

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SVEIN AXEL WANNAG

E-mail: a.wannag@getmail.no

Svein Axel Wannag, retired, former senior medical consultant in the Norwegian Labour Inspection Authority.

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If whistleblowers are to be protected, we need new legislation and a dedicated whistleblower ombudsman. Organisations must respond with sanctions against those who have overstepped the mark – irrespective of what the matter concerns. The power imbalance between the whistleblower and the ‘power’ in the organisation must be redressed.

In her editorial article on #metoo, Ragnhild Ørstavik refers to the crucial stages in all whistleblowing cases (1). Firstly, individuals must speak out. Secondly, there must be someone to whom they can address themselves. And thirdly, the whistleblowing must have consequences for the offender.

In all the whistleblowing issues that I have worked with since the late 1990s, the approach has generally – against the advice of experts (2) – been that the ‘whistleblowing problem’ should be solved from below. We should be encouraged to blow the whistle, and it should be safe to do this internally in the organisation, pursuant to sections 2 A-1 to 2 A-4 of the Working Environment Act. Every organisation should also have procedures for managing internal whistleblowing, according to Section 2 A-3 of the Working Environment Act.

Anyone familiar with organisations and the life of organisations could have said in advance that this ‘self-monitoring system’ would not sufficiently protect whistleblowers (3), and thus years passed with the continuous publication of new newspaper reports and studies showing that apparently the situation with regard to whistleblowing was deteriorating in both private and public organisations (4). Unfortunately, the words of the law professor Henning Jakhellns from more than 20 years ago where he states ‘if you’re thinking of blowing the whistle – don’t do it’, still hold true. He is not alone in this opinion (5).

The power imbalance

What the #metoo disclosures have highlighted for us better than ever before are the generally skewed power relations in whistleblowing cases. It is a case of the individual against the power of the organisation, generally represented by the management, and the

management most often 'protects' the target(s) of whistleblowing. Ørstavik's third point, that whistleblowing must entail consequences for the offender, has seldom been applied. Why then should a person shoulder the costs of blowing the whistle?

For conditions in society other than whistleblowing, we have inspection bodies. Correspondingly, we need a whistleblowing ombudsman or inspectorate with the necessary competence, resources and, not least, means of sanction, as previously proposed (3, 5).

New opportunities

The Norwegian Government has now appointed a committee to review the conditions for whistleblowing in Norway. The committee should draw the following conclusion: We need independent legislation that protects the whistleblower, irrespective of the subject matter of the disclosure (2). Current legal protection only applies to disclosures about corruption or financial matters, or violation of some vague provisions concerning ethical issues.

Irrespective of what the disclosure concerns, whistleblower protection is essential for healthcare personnel who should obviously be protected when making disclosures about dangerous or harmful conditions in the health services.

Current rules on internal whistleblowing can be retained, but they require that the organisation should have a clear addressee for the disclosures, and that this person should be responsible for a sufficient response by the organisation to the disclosure. The internal disclosure should be simultaneously accompanied by a report to a body external to the organisation to ensure that the disclosure is adequately followed up without repercussions for the whistleblower, and that possible consequences are implemented. The power in an organisation should no longer be able to feel itself safe and unseen. If the external body is not satisfied with the organisation's treatment of the whistleblowing disclosure or of the whistleblower, the whistleblowing inspection authority must become involved.

The consequences of the disclosure should be twofold. Breaches of the law must, as now, be reported and dealt with by the police and the judicial system. But there must also be repercussions for those who have failed in their responsibility and have thereby lost the organisation's trust. As a minimum, there should be a visible loss of position and not simply a reassignment at the same level, as Ørstavik believes is often the case today.

New times

It is this type of new accountability for actions that we can observe during the #metoo campaign. Persons who have 'overstepped the mark' are now resigning from positions or being forced by their organisation to do so. It makes an individual's own position less secure than today, but this is precisely what we need in order for everyone to know that they risk repercussions if they overstep the mark. Until now, those whose conduct is reprehensible have largely 'got away with it'. Putting a stop to this is long overdue.

The resistance to this type of accountability with the possibility of repercussions will be centred on the key phrase 'rule of law' for those who have overstepped the mark. However, in very many whistleblowing cases we do not find ourselves in a legal situation with clear laws and rules. It is therefore crucial that we introduce responsibility, with loss of trust and repercussions also for undesired actions that do not entail clear breaches of the law. Today's situation only benefits those who overstep the mark, and it is the whistleblowers who suffer the consequences. The balance in the relationship must be redressed.

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