

Whistleblowing and the Virtuous Healthcare Worker

**South African HIV Clinicians Conference
Ethics and the Law Session
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Introduction

- Societal expectation: the Virtuous HCW honours the Bio-Ethical principles and always acts in the best interest of the patient
- Confusing times
 - Life Esidimeni
 - Tower Hospital
- When and how to whistleblow?

Advocacy

Purposeful action by health professionals to address the determinants of health which negatively impact individuals and communities by either informing those who can enact change or by initiating, mobilising and organising activities to make change happen, with or on behalf of individuals or communities with whom the health professionals act (Oandasan, 2015)

An Ethical Duty

Medical and health Practitioners have an **ethical** duty and a **professional responsibility** to act in the best interest of their patients. This duty includes **advocacy** for patients, both as a group (such as advocating for public health professionals) and as individuals (World Medical Association)

Different roles at different times:

Context-specific:

- Representative (speaking for people)
- Accompanying (speaking with people)
- Empowering (enabling people to speak for themselves)
- Mediating (facilitating communication between people/organisations)
- Modelling (demonstrating practice to people and policy-makers)
- Negotiating (bargaining with those in power)
- Networking (building coalitions)
- **Reporting**

Health Advocates Then and Now

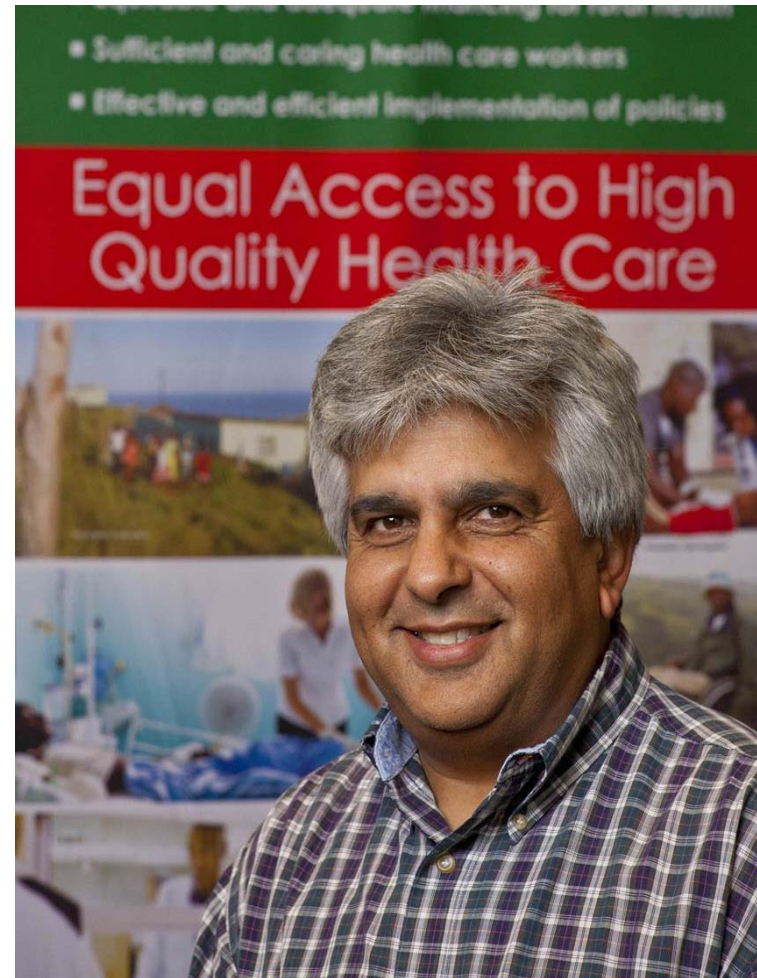
Prof Haroon Saloojee

Save The Babies Campaign – 273 signatures by pediatricians and child health practitioners, march, court action, call for PMTCT

“The campaign arose from our perception that although paediatricians dealt with the effects of the HIV/AIDS epidemic on a daily basis, our opinions on these very issues were not being effectively voiced and where they had been communicated to the Ministry of Health, our suggestions had been ignored. (Dr Haroon Saloojee, Second Applicant, High Court, between TAC and Minister of Health, MECs)”

Successful use of Scientific, Legal, Moral, Economic arguments

“In the 10 years since this decision, 327 000 children have not contracted HIV as a result of having access to PMTCT case.”



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Dual Loyalties

Dual Loyalties and Human Rights:

HCWs may experience split loyalties and it shows up in the conflicts between the ethics of the profession, duty to the user and duty to the state/employer

To act in the best interest or well-being of your patients is your primary professional & ethical duty

SA Public Service Regulations of 2001, updated 2012:

Health care providers are expected to raise any problems with their immediate supervisor and are **not to criticise government policy** “irresponsibly” in the public domain.

However.....

The same regulations also state health care providers must put the **public interest** first in the execution of duties.

A Legal Duty

Sometimes **internal or external “reporting”** of health care challenges and patient right violations is required, which can be done **confidentially** and anonymously >

How to do so **safely, ethically, strategically?**

When do you “Report”?

- Reporting wrongdoing is about ensuring that “malpractice, fraud, corruption, dangers **that compromise patient health and safety**” –are dealt with in a manner that promote individual responsibility and organisational accountability
- It is not only a right but also a duty to report conduct that is prejudicial to public interest

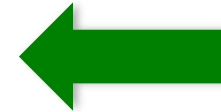
* Protected Disclosures Act

Practical guidelines for employees (No. 702 31 August 2011)

Protected Disclosures

Protected Disclosure Act: four doors to legal protection

Door you must go through



Land of legal protection

1: Internal Processes

2: Legal Advisor

3: Regulatory Authority

4: General disclosure (media/press)

What about the confidentiality clause in my contract?

- The contract is invalid if it conflicts with the Protected Disclosures Act and Public Service Act which says:

“An employee, in the course of his or her official duties, **shall** report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence or which is prejudicial to the public interest.”

What am I protected against?

Occupational detriment

- This includes harassment, dismissal, transfer against the will of the employee, non-promotion, a denial of appointment, or “otherwise adversely affected”
- Only minimal onus necessary to show the link between the disclosure and the detriment

Are there risks?

- Yes
- Tower Hospital most recent case
- **Real patient rights were violations reported**
- Health Ombud's main critique of Tower Hospital Case was:
 - Whistleblower reported inaccurate facts
 - Whistleblower didn't follow proper procedure
 - But no mal-intent...
- Overstated, Humiliating, Political
- Educate rather than Punish

Door 1: Internal

- Through your internal process:
 - This must be done in good faith
 - There should be “substantial” compliance with relevant procedure – all internal complaints procedures should be exhausted
 - Can also make a disclosure to the Minister or MEC, but should start further down

Door 2: Legal advisor

- Legal advisor/unions:
 - To seek advice about your concern and how to raise it
 - Everything you say to a legal advisor is **CONFIDENTIAL**
 - Good faith does not apply



Door 3: Regulatory authority

- Office of the Public Protector or Auditor General or South African Human Rights Commission
 - Must be done in good faith
 - This concern does not have to be raised with employer first
 - It should be substantially true



Door 4: “General Disclosure”

- The Public, Police, Media ...
 - This should never be used for personal gain.
 - There should be an honest and reasonable belief that it is substantially true
 - You should also be able to demonstrate that there is “good cause” for going outside; and
 - It must be “reasonable” to do so

What constitutes 'good cause'?

- The concern was raised internally or with a prescribed regulator, but has not been properly or adequately addressed within a reasonable time period;
- The concern was not raised internally or with a prescribed regulator because the HCW raising the alarm reasonably believed he or she would be disciplined, dismissed or victimised;

What constitutes 'good cause'?

- The concern was not raised internally because the person raising the alarm reasonably believed a cover-up was likely and there was no prescribed regulator to approach; or
- The concern was exceptionally serious

Concern versus Complaint

CONCERN!

- Someone who blows the whistle are raising a concern about activity that affect others
- The whistleblower should not be expected to prove the malpractice
- Difference between telling “the Truth” and being Truthful

COMPLAINT

- Usually regards a personal interest
- Complainant is expected to be able to prove their case

Source: Corruption Watch: The Whistleblower Handbook

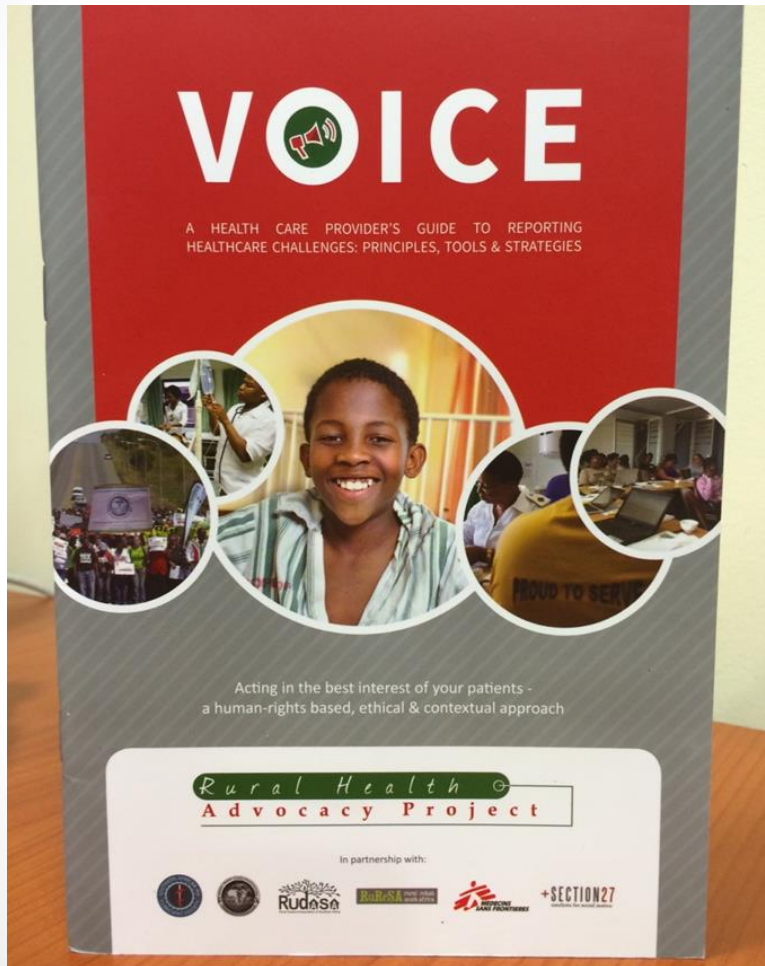
Virtue and Practical Wisdom

- Assess the situation to determine the best response
 - What is the issue?
 - How are patients health and safety compromised?
 - What do I know/ state the key facts truthfully?
 - Which policy or legal frameworks are involved or violated?
 - What response is most appropriate (obtain advice if needed)
 - Can I use the internal communication channels / available systems, procedures and to advocate for improvements?
 - **Is it ok to address this problem alone, or would a group action be more effective?**
 - Do I need to speak out for others, with others, or enable others to speak out for themselves?

Next step in society's discussion and stance on whistleblowing

- Society-wide support to whistleblowers
- Whistleblowing in a broken health system
 - Scarcity: The tension between reporting and clinical duties
 - At times principles conflict
 - Triaging guidelines ?
- Practical Wisdom and Advice

How to report health care issues



A HealthCare Provider's Guide to Reporting Health Care Challenges: Principles, Tools and Strategies

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