Whistleblowing to Expose Criminal Activity in the Health Sector

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INTRODUCTION

Whistleblowing is the non-obligatory act of disclosing information about unethical or criminal activity in an organization. Although most instances of whistleblowing in the health sector relate to patient safety issues such as reporting on poor clinical outcomes involving a single individual over a period (Dyer, 2005; Bolsin et al, 2011), the health sector is not immune from criminal activity. Health care fraud – defined as an intentional deception or misrepresentation that the individual or entity makes knowing that the misrepresentation could result in some unauthorized benefit to the individual, or the entity or to some other party - is a major crime in most nations, accounting for 2% to 10% of total healthcare costs. In countries with universal health insurance such as UAE, health insurance fraud may account for up to 10% of total health insurance claims (Awofeso, 2017). The World Health Organization has cited fraud as one of 10 leading causes of inefficiency in health systems (WHO, 2010). The current global average loss rate of 6.19% attributable to health system fraud expressed as a proportion of 2013 global health budget of $7.35 trillion equates to $455 billion (Gee and Button, 2015).

In most other nations, (external) whistleblowing – leaking information to the press or independent healthcare complaints boards, for example, is discouraged due to reputational effects on the organization. Pertinent in this regard is the impact of vexatious whistleblowing, in which whistleblowers may accuse healthcare personnel of, for example, research fraud, without substantiating their claims – leading to incalculable damage to professional and organisational reputation (Wright, 2010). There is also a somewhat paternalistic reason why some organizations appear to discourage (external) whistleblowing – whistleblowers suffer substantial ostracization from colleagues and senior management, even if the whistleblower's accounts are true. (van de Verden et al, 2018). Whistleblowing situations are stressful and may cause physical and emotional health problems for both whistleblowers and non-whistleblowers (McDonald & Ahern, 2002).

Over the past three decades since the World Wide Web became established internationally, it has produced mixed results for both facilitating and preventing criminal activity in the health sector. With the expansion in online use of health care in payments, data storage and medical devices using online platforms, the risks to patient data confidentiality and cyberattacks on medical devices have increased exponentially. Since 2000, the American Medical Association gas deemed internet healthcare ethics an important sector, and implemented principles governing websites that its members use for health related purposes, such as; *"Medical websites, more than any other type of site on the Internet, should ensure visitors' personal privacy and prevent personal medical information, including patterns of use and interests, from being sold, purchased, or inadvertently entering the hands of marketers, employers, and insurers."* (Winker, Flanagi, Chi-lum et al, 2000). With internet technology being increasingly used in health care medical devices as well as in and health care research, risks related to hacking of medical

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devices and falsification of research data may increase. According to the 2018 Stericycle Recall Index report, there was a 126% increase in recalls of medical devices such as cardiac pacemakers between 2017 and 2018, mainly due to software hacking vulnerabilities (Stericycle Expert solutions, 2018). The use of internet-based media outlets enables whistleblower activities to reach every corner of the globe, with major adverse consequences for the organization and the whistleblower. These issues illustrate the nexus between healthcare, the internet and illegal or unethical activities.

Background

The role of the whistleblower in detecting healthcare fraud is perceived as important in some industrialized nations such as the United States, Australia and United Kingdom. For example, in the United States, Medicare processes over one billion fee-for-service claims per year through its contracts with regional insurance companies. Given the enormous volume of claims submitted under the Medicare program, the federal and state governments are not sufficiently staffed to effectively detect the fraud and abuse perpetrated by dishonest physicians, healthcare providers and suppliers. The Whistleblower Protection Act was made into federal law in the United States in 1989. The US Securities and Exchange Commission (SEC) has awarded more than $262 million to 53 whistleblowers since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators.

Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10 percent to 30 percent of the money collected when the monetary sanctions exceed $1 million. In December 2017, Australia introduced The Treasury Laws Amendment (Whistleblowers) Bill 2017, which introduces a specific whistleblower protection and compensation regime for those who expose misconduct in public health and safety, tax and corporate fraud affairs. Public companies and large private companies that fail to set up internal whistleblower policies before 1 January 2019 risk facing penalties of up to 60 penalty units (currently A$63,000 for a body corporate).

It is helpful to distinguish between internal whistleblowing, which entails employees reporting criminal or patient safety concerns to managers internal to their organization, from classic (external) whistleblowing, when an employee reveals information externally (or publicly) about wrongdoing within the organization, due to the ethical and consequential differences between both variants of whistleblowing. External Whistleblowers often end up choosing between failing in a duty to the public and failing in a duty to their employer, and they chose to fail in their duty to their employer, irrespective of whether the employer has a legitimate or moral standing in the issue concerned. Such violation of the *pro tanto* obligation to the employer impairs the moral standing of whistleblowers (MacDougall, 2016).

Ethical and Legal Aspects of Whistleblowing in Health Sector

Health care ethics is the field of applied ethics that is concerned with the vast array of moral decision-making situations that arise in the delivery of health services. Essential to the comprehension of moral issues that arise in the context of the provision of health care is an understanding of the most important ethical principles and methods of moral decision-making that are applicable to such moral issues. There are several core ethical approaches to understand whistleblowing in the health sector – utilitarian ethics, virtue ethics, organizational ethics, and deontological ethics. Utilitarianism is a variant of rule conse-

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