+SECTION27 incorporating the AIDS Law Project

catalysts for social justice

Whistleblowing and the Role of Advocacy and Activism for the HCW

"The most revolutionary thing one can do is always to proclaim loudly what is happening." – Rosa Luxemburg

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Overview

- Why is advocacy necessary? Why is it possible?
  - Inequality
  - Rural HCW at the coal face
- The law: How to whine and moan safely
- Examples of advocacy by doctors

Why is advocay necessary:Inequality and rural health

+ Equal access to quality care?:
  + Inequality in access;
  + Poor quality
  + Poor planning
  + Poor policy
  + Poor implementation

= Health needs not catered for;

The Constitutional Injunction for advocacy

- Section 29 + Section 27 (the mandate)
  - "Every child has the right to ... Basic health care services.."
  - "Everyone has the right to have access to health care services... "
  - No one may be refused emergency medcail treatment

The Constitutional Permission

- Section 7 + Section 16 + Section 19
  - The State must respect, protect, promote and fulfil the rights in the Bill of rights..
  - Everyone has the right to freedom of expression ..
  - Every citizen ... has the right to campaign for a cause

Practical guidelines for employees (N0. 702 31 August 2011)

+ By remaining silent about corruption, offences or other malpractices taking place in the workplace, an employee contributes to, and becomes part of, a culture of fostering such improprieties which will undermine his or her own career as well as be detrimental to the legitimate interests of the South African society in general. Every employer and employee has a responsibility to disclose criminal and other irregular conduct in the workplace.

The Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act

+ A practitioner **shall** at all times - (a) act in the best interests of his or her patients; (b) respect patient confidentiality, privacy, choices and dignity; (c) maintain the highest standards of personal conduct and integrity.

Why is advocacy possible? Expected?

- The HCW at the coalface:
  - What do you witness?
  - What do you hear understand?
- Can you practice medicine and not be an advocate?

Law: your duties

- Code of Conduct for the Public Service
  - "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."

Public Service Act (Proclamation No. 103 of 1994)

+ a complaint or grievance concerning an official act or omission should be reported to a relevant minister, premier or MEC, among others, and if the complaint is not resolved to the satisfaction of the employee, it should be referred to the Public Service Commission for investigation

What if this doesn’t work?

+ Protected Disclosure Act: four doors to legal protection

Door you must go through

Land of legal protection

What to disclose: “impropriety”

+ crime, failure to comply with any legal duty (including negligence, breach of contract, breach of administrative law), miscarriage of justice, danger to health and safety, damage to the environment, discrimination and the deliberate cover-up of any of these. It applies to concerns about past, present and future malpractice.

“But what about the confidentiality clause in my contract?!”

+ Invalid if it conflicts with the Act!

Door 1:

- Legal advisor:
  - To seek advice about concern and how to raise it
  - Confidential!

Door 2: Internal

- Through your internal process:
  - Good faith
  - “substantial” compliance with relevant procedure

Door 3: Regulatory authority

- Office of the public protector or Auditor General
  - Good faith
  - Reasonable belief that PP or AG deals with this kind of stuff
  - Does not have to be raised with employer first
  - Substantially true

Door 4: “General Disclosure”

- Police, Media ..
  - Not made for personal gain and honest and reasonable belief that it is substantially true
  - “Good cause” for going outside

The 4 good causes

+ the concern was raised internally or with a prescribed regulator, but has not been properly addressed

+ the concern was not raised internally or with a prescribed regulator because the whistle-blower reasonably believed he or she would be victimised.

The 4 good causes

+ the concern was not raised internally because the whistle-blower reasonably believed a cover-up was likely and there was no prescribed regulator, or
+ the concern was exceptionally serious

What am I protected against?

- Occupational detriment
  - Very broad, definition includes: harassment, dismissal, transfer against the will of the employee, non-promotion, a denial of appointment, or “otherwise adversely affected”
  - But, there are limits to the reach of the law

Examples of HCW advocacy

- The campaign for a PMTCT programme:
  - Dr Costa Gazi v Minister of Health
  - TAC and Others v Minister of Health
  - 'Save Our Babies' – Haroon Saloojee
- Outcome:
  - After ten years vertical transmission reduced to 3.5% at 6 weeks

Is there a line?

+ How much is expected?
+ Individuals versus organisations

"Armies cannot stop an idea whose time has come" – Victor Hugo