

Silence is not always golden



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Ailbhe Jordan investigates the risks doctors face in trying to highlight problems in the health service

Throughout the long and protracted process of negotiating the consultant contract, one of the most contentious battles was fought over the issue of a proposed 'gagging clause'.

The negotiating team representing the Department of Health and its former minister Mary Harney wanted some form of confidentiality clause that would prevent doctors from speaking out in public about internal hospital matters, while consultants fought tooth and nail against such restrictions.

So crucial was this issue, that IHCA assistant secretary general Donal Duffy told the Medical Independent, any gagging clause would have meant no contract as far as its members were concerned.

In its present form, the contract states that consultants "may advocate on behalf of patients, service users or persons awaiting access to service" and that "in the first instance such advocacy should take place within the employment context through the relevant clinical director or other line manager".

The contract also states that "information given to the public should be expressed in clear and factual terms. It must never cause unnecessary public concern or personal distress nor should it raise unrealistic expectations."

On paper, it seems reasonable enough. In reality, however, an increasing sense of fear and frustration seems to be brewing amongst Irish doctors over what many perceive to be a health system which entangles the profession in a web of PR-controlled spin, preventing clinicians from communicating freely with the public on important issues. Professor John Crown, whose outspoken criticisms helped spark the reform of cancer services in Ireland, has experienced this first-hand.

The Crown Affair

In what has become known as the Crown Affair, the consultant oncologist in St Vincent's Hospital was invited to participate in a four-member panel discussion on the Late, Late Show about cancer services in Ireland in October 2007, only to be mysteriously dropped a couple of days before the show aired.

Minister Harney and then HSE Chief Executive Professor Brendan Drumm had declined invitations to appear on the show. RTE Director General Noel Curran, who was then head of television, argued that including Prof Crown would have skewed the panel, which already included journalists Mary Raftery and Eamon Dunphy.

While RTE said it came to the decision following an internal discussion between management and the production team, the State broadcaster was accused of bowing to pressure from the HSE to drop Prof Crown because of his outspoken views on the Irish health service.

"I don't believe there will ever be an explanation, but my own personal belief is that it was communicated to RTE that the Department of Health at its highest level was unhappy about the composition of the panel," Prof Crown tells the Medical Independent.

"Whether the interference went further than that I don't know. My position is very clear on this. The Minister and the HSE were invited to send representatives to the panel and they decided not to come. So I coined the phrase 'censorship by proxy'. When people don't actually go to a meeting, they enforce a censorship by enforcing a balance for somebody who isn't there. In other words, if I don't go, you can't go either."

Prof Crown describes the efforts to introduce the gagging clause at the time of the consultant contract negotiations as "outrageous".

"The idea that doctors who work for an organisation should not be allowed to criticise that organisation in public – that may be an appropriate disciplinary status in a company that makes tinned beans or something like that, but it's not in the health services. My job is not to make either the CEO of my hospital or the Minister for Health or the HSE to look good, my job is to look after and, I believe, advocate on behalf of the patients".

Gagging clause or not, Prof Crown believes that the Department of Health and the HSE under Minister Harney became increasingly censorious of doctors being openly critical of any aspect of the health system.

"I think that the official position of the Department of Health and the HSE would be to try and limit it," Prof Crown says.

"All of the efforts are going towards having official hospital spokespeople, having extremely highly-paid corporate affairs departments and having really lucrative public relations contracts. Our health service is full of public relations contracts. Harney was an extremely spun minister, she had a very well-developed PR system. Her own husband was for a longtime chairman of a PR agency."

Speak no evil

Mr Donal Duffy says there is a "definite concern" among consultants that speaking out will damage their career prospects or that funding or resources could be withheld or reduced as a punishment.

While it is "extremely difficult to prove such a thing", he acknowledged, individual consultants have in the past expressed these concerns to the IHCA, which has on occasion made a public statement in order to highlight the issue and protect the specific consultant from being identified and potentially targeted.

He advises members to contact the IHCA if they feel they are at risk of being in this situation and says the Association will stand fully behind them.

Prof Crown believes that the Department wields the threat of service and funding withdrawal as a subtle threat to keep hospital consultants from being openly critical of where they work.

“I was put under huge pressure when I first came back to Vincent’s to shut up, because a communication was made from the Department to Vincent’s that there might be a chilling of funding for new developments in Vincent’s if they couldn’t shut me up,” he says.

“It was shocking and awful. It was said to me at a medical board meeting. I remember on another occasion going to a meeting with the Department of Health to discuss the truly appalling cancer service in the 1990s and when we finally got into the Department of Health, the first thing they said was that they didn’t want to read about it any more in the papers, ‘then fix it, you won’t’ I said.”

Dr John Barton, a consultant physician at Portiuncula Hospital was surprised to receive correspondence from Minister Harney herself after writing to the Irish Independent letters page in July 2009 questioning the morality of consultants receiving pay rises of up to €25,000 as part of their contracts at a time when an Board Snip Nua was recommending increased out-of-pocket costs for hospital attendances and medication costs for patients.

“It was a very controversial letter and I ended up in the papers and on radio. Then about two days later I got a call from management here in the hospital to say that the Minister had been in contact with HR and had instructed our management to write me a letter,” he recalls.

“I then got a letter which I believe the minister wanted me to receive which was to say ‘we note your disappointment at the rise in your salary Dr Barton and we’d be more than happy to return you to your old pay scale if you wish’. She was irked about the fact that a consultant would ring in and say in the middle of an economic crisis that giving our profession a huge increment was maybe not good.

“I’d be aware that I shouldn’t necessarily speak about services in my own hospital, but there was nothing to stop me speaking about the health services in general as I understood it,” says Dr Barton, who ran for office with Fine Gael during the last election.

“About the minister's decisions, about our health service or policy, I would feel very free to speak about that. I’ve never looked at my contract to see if I am allowed to do that, whether there are gagging clauses. I couldn’t give a damn to be honest. I’ll say what I feel and I’ll speak the truth.”

Other countries

In some respects, Irish doctors enjoy greater freedom of speech than several of their European counterparts.

In the UK, for example, where the rights of doctors to speak out about wrongdoings in their health system is protected under the Employment Rights Act 1996, there is plenty of evidence to suggest that speaking out or ‘whistleblowing’ is rarely rewarded.

Anaesthetist Dr Stephen Bolsin was hailed as a hero in the media after his disclosures led to the Bristol Royal Infirmary inquiry in the late 1990s, which found that up to 100 babies may have died unnecessarily after undergoing complex heart surgery as a result of incompetent surgical practices at the hospital.

The profession apparently did not agree, however, and the doctor ultimately had to move to Australia, as he could not find employment in the UK in light of his disclosure.

There has also been much controversy over recent contracts drawn up by the UK government for hospital doctors working in the NHS.

In 2008, hospital doctors in England voted to reject a new NHS contract, and the UK government has to date refused to renegotiate.

In 2009, the UK Department of Health published a sample contract as part of a plan to allow trusts to implement new contracts locally, which consultant groups said contained a “gagging clause”.

“You have an obligation not to disclose any information of a confidential nature concerning patients, employees, contractors or the confidential business of this organisation,” the contract stated, adding that “any disclosure other than to members of NHS staff immediately and properly concerned, or as required or permitted by law, will render you subject to disciplinary action and could be regarded as gross misconduct and make you liable for dismissal”.

In addition, a report in the London Evening Standard last August uncovered an extensive network of gagging showing that 71 NHS trusts had entered into confidentiality agreements with 170 doctors. The overall number of gagging orders could be higher as many trusts failed to provide figures under a Freedom of Information request.

Another probe by the Bureau of Investigative Journalism and Channel 4 showed how millions of pounds had been spent on negotiating contracts that would deter doctors from going public about incompetence and errors in patient care. The investigation further found that nearly 90 per cent of severance agreements between NHS trusts and departing or retiring doctors contain confidentiality clauses.

A high profile example came to light last year when it was revealed that Dr Kim Holt, a paediatric consultant, repeatedly raised the alarm about children’s services at St Ann’s Hospital in Haringey North London, more than a year before the tragic death of Baby P in 2007.

The 17-month old boy died after suffering more than 50 injuries over an eight-month period, during which he was visited on numerous occasions by local child protection services. The infant’s mother Tracey Connelly, her boyfriend, Steven Barker, and his brother Jason Owen were all convicted of causing or allowing his death. Dr Holt was said to have refused an offer of £120,000 from her employer, Great Ormond Street Hospital, to stay silent.

A 2009 BMA survey found that more than one in seven hospital doctors in England and Wales had reported that their trusts had indicated that speaking out could negatively affect their employment.

Legal threats

There has also been a raft of legal actions against doctors in recent years by pharmaceutical companies.

A London plastic surgeon, Dr Dalia Nield, found herself threatened with a libel action by cosmetics company Rodial after stating in the Daily Mail that she believed it was “highly unlikely” that the company’s “boob job cream” product could do all it claimed.

Consultant cardiologist Dr Peter Wilmshurst is currently embroiled in a legal battle with NMT medical, who sued him for libel after he criticised its research at a US cardiology conference in 2007. He was threatened with libel action again over subsequent comments he made about the case on BBC Radio Four’s Today programme.

The British subsidiary of American company General Electric has taken legal action to prevent Copenhagen-based doctor Henrik Thomsen from talking about his investigations into the possible side-effects of the drug Omnican, after some kidney patients at his hospital contracted a potentially deadly condition after being administered the medication in 2006.

The Guardian newspaper also recently reported that one of its columnists Dr Ben Goldacre has also been sued by a vitamin manufacturer for questioning claims that its products could treat HIV and AIDS.

In France, whistle blowing is considered an offence by Le Conseil d'Etat, the highest administrative court in France. In addition, a disturbing pattern of legal actions has emerged involving medical experts and lobby groups for the country's most profitable industries such as tobacco, salt and alcohol.

In 2006 for example, medical researcher Pierre Méneton became the first French healthcare professional to be sued for libel after the Comité de Salines, France's agent for the salt industry, took legal action over his claims that consumers were being misinformed by publicity from the salt industry and that national recommendations for dietary salt intake should be in line with worldwide guidelines.

Mr Gérard Dubois, Professor of Public Health at Amiens University Hospital successfully defended himself in 2009 against a legal action by Confédération des Buralistes (the French tobacconists' union) after he stated on French television that cigarettes kill two smokers a year for every tobacconist. The union has since appealed the case.

The public interest

Public health expert Dr Alain Braillon was sacked last year from his position as senior consultant in the Department of Public Health at the University Hospital of Amiens in a move that many in the French medical community believe was linked to his high profile stance on several public health issues.

Dr Braillon publicly condemned a law passed in July which allowed the advertising of alcohol on the Internet, and has in the past criticised the French Association of Urology for continuing to promote the prostate specific antigen screening test for prostate cancer, even though its effectiveness as a screening tool has been questioned by professionals outside France.

The university said his sacking was not connected with this activity. However Dr Braillon told the Medical Independent that he suspects he was sacked as a result of taking "a clear position against various policies in France".

"I write in papers and in medical journals like the British Medical Journal. It can be about screening for cancer or hepatitis policies, which in France are the worst I have seen in the world, or the promotion of tobacco," Dr Braillon said. While the option of legal action is open to him, the expense is prohibitive as he is unemployed and unable to work due to restrictions imposed by his sacking. Ultimately, he believes it would be a fruitless exercise.

"My career is finished," he said. "People are afraid to help me. When you whistleblow, the problem is not the guy you whistleblow at, no one can reach him. The people you have against you are those who accepted the situation as it was. It reflects badly on the people who were in charge and who accepted the situation. That's a lot of people."

An Irish context

A HSE spokesperson told the Medical Independent that it has never taken legal action against any Irish doctor over public comments, criticisms and/or alleged defamation.

They said that health service employees must, in the first instance, “disclose matters of concern to an authorised person under the Procedures for Protected Disclosure of Information, which were established under Section 103 of the Health Act 2007.”

Adding that, “The range of matters which may qualify as protected disclosures under the Act include risk to health or welfare of the public; failure to meet legal obligations; and misuse or substantial waste of public funds. Employees who make a disclosure in good faith have statutory protection against penalisation in their employment and also against civil liability.” GPs are considered “independent contractors and therefore can make a complaint according to their Service Level Agreement (SLA)”.

When asked what would qualify as a breach of the protected disclosure legislation, the spokesperson said that all HSE employees, with the exception of GPs who are bound by the terms of their contracts, “must abide by the HSE’s Code of Standards and Behaviour, which stipulates that employees must seek to resolve grievances and concerns through agreed channels and ensure any actions taken maintain public confidence in the HSE and its good name”.

The HSE also confirmed that “breaches of the code may result in the disciplinary procedure being invoked” and said that these sanctions “could include anything from an oral warning to dismissal or disciplinary action short of dismissal”.

Dr Simon Mills, who is a doctor and a practising barrister, argues that the protected disclosure policy does little to encourage doctors to be open and honest regarding any concerns they may have about either their workplace or colleagues.

“I think it’s fairly disgraceful that the HSE has formed a view, as it seems to have done on occasions, that doctors aren’t permitted to criticise services in the workplace,” Dr Mills said.

“I think they’re under a moral and professional obligation to do so and as far as anything that they do amounts to a protected disclosure within the whistleblowing act, the HSE has no business issuing restrictions on what doctors may or may not say.

Dr Mills believes the policy offers no further options to doctors who make complaints to ‘authorised persons’, which are subsequently ignored.

“Whistleblowing is not about going to the media. It’s about going to institution and getting the institution to change,” he pointed out.

“Clearly where the institution won’t change, it may be that clinicians are entitled to and may even be obligated to ventilate to a wider audience. Sometimes you might be able to point to a gagging clause in a contract, and say if we want to maintain faith in the health services these things must be dealt with in house and we’ll fix it. The problem of course arises where you’ve got a criticism of the health service and you’re not allowed to express it publicly. You’ve done everything you can to express it privately. The organisation isn’t responding and therefore you feel you have no choice but to go public. In those cases it depends on what you’re saying, the way in which you are saying it and what’s in your contract.”

Change needs to happen both in policy and in culture, he believes. “Although the Health Act allows for people to make protected disclosures and makes all sorts of promises about how protections will be afforded to people who make these protected disclosures, certainly the experience of doctors in, for example, the UK has been that you won’t be thanked for whistleblowing,” Dr Mills says.

“I’m not aware that there has been a significant episode of whistleblowing in Ireland by an Irish doctor and there are a couple of possible explanations for that. Firstly, that there hasn’t been an incident that required whistleblowing, and secondly, that the whistleblowing, if it was done, was done anonymously. But the third possibility is that there is a chilling effect created by the concerns doctors have about how they will be treated, whatever the legislation says, by their colleagues in the event that they whistleblow. You can see that in the Medical Council guidelines, where they more or less say, if you have a concern about a colleague, you deal with it with your colleague first and foremost. Bring your concern to the attention of your colleague first of all and only if they are unwilling or unable to change their behaviour, do you bring it to the attention of the authorities.”

Legal reforms

The recent spate of legal actions against doctors and medical researchers has forced the issue of professional gagging onto the political agenda in the UK. Their government recently indicated that the Defamation Bill, which is due to be published in the coming weeks, will contain stronger public interest defense, which could protect expert debate about science, evidence and healthcare from the strict libel laws that currently exist.

Dr Brailon believes the EU needs to enact legislation similar to the US False Claims Act, which enshrines the right to whistleblow in law, to help protect those in the medical community from constant threat of legal action.

“We must have a directive to protect whistleblowers. The best example is the US,” he said. “In the US over the past 20 years, the government has enforced \$20 billion worth of penalties against pharmaceutical industries. 75 per cent of these penalties have occurred in the past five years. That is possible because there is the False Claims Act. We need a false claims act in the EU.”

At a national level, Professor Crown believes the whole system by which the HSE communicates with its own staff and in turn the public needs to be reformed.

“I have a very profound belief that in the public service there should be no public relations contracts,” he said.

“I believe that all public servants should do their own public relations. I believe that people, whether they be Ministers of Health, heads of departments in the civil services, heads of bureaus, heads of hospitals or whatever, that there should be a certain amount of time that they make available per week to answer questions that are put to them by people asking on behalf of those who pay their salaries and that the relationship PR companies have is essentially an attorney client relationship.

“The PR companies don’t work for the people, they work for their client, and their job is to make their client look good. I think it’s an appropriate relationship for say, privately-funded businesses or for political candidates. I think it’s all wrong in the health service.”

Dr Chris Luke, a consultant in emergency medicine at the Mercy University Hospital in Cork, has clashed with HSE administration on numerous occasions over his outspoken views on many issues including ED crisis and the NCHD staffing shortage.

“I think that in [Mary Harney’s] time we have seen a sustained effort coming from the highest level to contain, neutralise and silence the profession because they are regarded as a political thorn in the side,” he said of Ms Harney’s relationship with consultants.

With a change of government on the horizon, Dr Luke is hopeful for the future. “I am hugely buoyed up by the fact that we have Micheál Martin at the top of Fianna Fail, Enda Kenny at the top of Fine Gael and Eamon Gilmore at the top of Labour,” he said.

“There is a sense that all three are very decent individuals, that they are honest, that they are people of integrity who will not resort to the dark arts of spinning and silencing professionals because they say things that are inconvenient.”