Developments in Whistleblowing Research 2015

edited by

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1. Introduction

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Those interested in this Ebook may like to know some of the background to its publication. In June 2009 a conference was held at Middlesex University to mark the fact that whistleblowing legislation had been in force in the UK for a decade. This event included a public lecture and attracted delegates from a range of backgrounds, including academics, legal and management practitioners, trade unionists, whistleblowers and students. At the end of the conference the decision to establish an International Whistleblowing Research Network (IWRN) was taken. People can join this network simply by consenting to their email address being put on a list and used for distribution purposes. At the time of writing, October 2015, there are over 150 members of the network. The current convenor of the network is David Lewis who can be contacted via d.b.lewis@mdx.ac.uk. Another outcome of this conference was the preparation of an edited book based on the papers presented. This was published by Edward Elgar in 2010 under the title "A global approach to public interest disclosure: what can we learn from existing whistleblowing legislation and research?"

Following the IWRN London conferences in 2011 and 2013, an Ebook (entitled "Whistleblowing and Democratic Values") and a special issue of the *E-Journal of International and Comparative Labour Studies* were produced respectively. Thus this Ebook, which uses material presented at the June 2015 IWRN conference held in Sarajevo, maintains the network's tradition of disseminating research papers. Of course, there are other important publications on the subject and the reader's attention is drawn in particular to the "International Whistleblowing Research Handbook" published by Edward Elgar in 2014.

The first three chapters of this Ebook raise questions about the role of law in the whistleblowing process. The following two chapters deal with whistleblowing as a factor in disaster risk reduction and the role of time in adjusting to the whistleblowing process. The remaining chapters focus on the value of procedures in the UK health service, and research on mental health and social care matters.

Tom Devine uses his extensive knowledge and experience to identify international best practices in whistleblowing statutes. His material focuses on five main themes: the coverage

of legislation, in particular the absence of “loopholes”; the possible forums for adjudicating whistleblowing rights; the tests a whistleblower must pass to prove that his or her rights have been violated; the remedies available for illegal retaliation and the issue of personal accountability; and the provision made for wrongdoing to be rectified. Finally, the author provides valuable lists of countries with dedicated whistleblower laws, those offering rights beyond the employment context and laws with significant national security or law enforcement “loopholes”.

In their chapter, **Richard Hyde and Ashley Savage** examine new empirical data on the extent of transnational disclosure -sharing in a range of industries, identify two sets of challenges demonstrated by this data and offer some tentative suggestions. Whistleblower protection is particularly complicated in cross-border cases, with the home jurisdiction of the whistleblower potentially offering no protection from dismissal or detriment, or failing to contemplate transnational disclosures within its regime. Does this suggest a need for a minimal level of international protection is needed to ensure that such whistleblowers are not subjected to dismissal or detriment? Further, the concentration on the protection of a whistleblower through careful handling by enforcers or regulators may diminish with transnational sharing, as the relationship between the individual and the information becomes more remote. Second, the information disclosed by a whistleblower needs to be transmitted to the participant in a regulatory network who is best placed to address the concern. This is complicated in a transnational case, where sharing between agencies is not routine. Different languages, content and format may hamper sharing. Is there a need for international intervention to ensure that information can be shared more easily? How should sharing be monitored in order to ensure that the shared disclosure leads to positive outcomes desired by the whistleblower and the sharing agency?

Flutura Kusari looks at whistleblowers’ rights in international missions and discusses the case of Maria Bamieh and Eulex (Kosovo). The chapter discusses the problematic application of international standards in this particular dispute. It assesses whether the EU has applied in Bamieh’s case the standards to protect whistleblowers established by the European Union, the Council of Europe, the European Court of Human Rights and other international instruments. Lastly, the chapter considers the whistleblowing procedures and protection mechanisms that Bamieh can employ to protect herself.

Radu Ionescu argues that whistleblowing has the ability to provide information about hidden vulnerabilities and reduce the risk of disasters. First, he introduces the disaster management domain and identifies the growing threat of complex disasters. The key concepts of hazard, risk, vulnerability, and cascading disasters, are briefly explained. Having identified the need for disaster risk reduction, Radu then considers some features of whistleblowing which make it relevant in the quest to save lives and resources. The next section highlights the prevalence of organisational misbehaviour in disasters and discusses

different approaches to the concept of risk. The final section discusses the appropriateness of including governance in whistleblowing/risk research. The author concludes with specific research questions which he suggests management can help to answer.

Kate Kenny draws on empirical data from research into whistleblowing to show that time plays a fundamentally important role in how people see themselves and construct a sense of self, albeit with ambivalent results. When engaged in a long dispute with one's organization, people's interpretations of time can contribute to a slow and effective undoing of the self; perceptions of time act as an obstacle to effective resistance. At the same time and somewhat paradoxically, other more long-term interpretations of time relating to past and future selves, can alleviate the anxiety caused by the experience of whistleblowing and form a source of support. This chapter draws on insights from organization theory and contributes to research on whistleblowing retaliation and resistant identities, by highlighting the powerful influence of time on resister struggles, and pointing to the political implications of this.

Prior to the 2014 Francis independent inquiry into whistleblowing in the UK health service, it had been argued that internal whistleblowing arrangements were desirable in principle i.e. that allegations of wrongdoing are likely to be dealt with more speedily without external pressure; that those raising a concern in accordance with a procedure were less likely to be victimised for disloyalty; and that such arrangements contribute to a form of organisational justice by providing opportunities for workers to use their voice. In the light of the data they obtained for this inquiry, **David Lewis and Wim Vandekerckhove** use their chapter to demonstrate that there is now empirical data which confirms that having a procedure and following it leads to better outcomes for both employers and whistleblowers. Thus the presence of a procedure is associated with it being more likely that concerns will be raised; if the matter was unresolved, following the employer's procedure made it more likely that a concern would be taken further internally and that the whistleblower would be satisfied with the response; finally, adhering to a procedure was associated with the taking of advice, investigations being conducted and whistleblowers being praised for the action they took.

In their jointly authored chapter, **Marianna Fotaki, Kate Kenny and Stacey Scriver** build on existing studies of whistleblowing retaliation to argue that the concept of mental health can be used as a weapon intended to defame and neutralize a person who discloses wrongdoing. The chapter presents a new theoretical perspective on whistleblowing retaliation that draws upon post-structural and psychoanalytic thinking. It begins with an outline of existing literature on organisational retaliation, with a focus on the role of mental health. Next a theoretical framework is outlined, drawing specifically on Foucault's analysis of the history of 'madness' and its role in processes of exclusion and 'Othering' of those deemed to be outside the social norm. This enables the authors to show how stigmatisation as a result of mental health struggles is not a 'given' but rather is historically contingent and

laden with power. The authors develop a psychoanalytically-based perspective derived from Butler's work on what constitutes liveable life that is worth protecting. They then examine their data on the experiences of whistleblowers in the banking and financial sector. In doing so, they illustrate how discourses of mental health were drawn upon by powerful organisations in order to construct the whistleblower as 'abnormal' and 'other'. The authors conclude by proposing contributions to existing literature on whistleblowing research and organisation studies more generally.

Angie Ash considers ethical issues raised by failures to act to stop the harm caused to citizens using health and care services, and presents a model to unpick this contextual complicity. The chapter draws upon the author's previous research which identified factors influencing social worker decision-making when dealing with the potential abuse of an older person. Among these factors was a professional unwillingness to rock the multi---agency boat that is adult safeguarding policy, and a reluctance to challenge poor care delivered in registered care homes. Social workers working with older people regarded these matters as everyday, unremarkable features of the resource-starved, fragmented service and regulatory framework in which they worked. These social workers did what they could to get by in the political, cultural and economic context in which they operated. Drawing on these research findings, the ethical model presented addresses this 'contextual complicity', as well as the conundrum that is whistleblowing in health and social care: why legislation, policies, procedures, the proliferation of regulatory paraphernalia, along with professional duties to report wrongdoing, fail both to protect the public and the professional who raises concerns. Taking as its foundation the contexts within which health and social care is delivered, this ethical model maps out how those contexts might cease to be complicit in poor care, and instead become cultures where speaking out about poor care becomes unremarkable.

The contributions in this Ebook indicate that the links IWRN maintains with whistleblowers, campaigners, advisers, and policy- makers ensure that whistleblowing research remains rooted in social realities. At the same time, this collection of chapters show whistleblowing research is entering a new era, building on research legitimating whistleblowing as pro-social behaviour, and taking it into areas of management and governance. This is an important broadening of the field, not only in terms of increasing research possibilities but also with regard to connecting with and influencing other research. Whistleblowing research is moving beyond analysing discontent and protest to also making an impact on good practice.

2. International Best Practices For Whistleblower Statutes

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The Government Accountability Project (GAP) is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers -- employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job. GAP has been a leader in the public campaigns to enact or defend nearly all United States national whistleblower laws; and played partnership roles in drafting and obtaining approval for the original Organization of American States (OAS) model law to implement its Inter-American Convention Against Corruption and whistleblower protection policies for staff and contractors at the African Development Bank, the Asian Development Bank, the OAS, and the United Nations.

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. Review of the track records for these and prior laws over the last three decades has revealed numerous lessons learned, which have steadily been solved on the U.S. federal level through amendments to correct mistakes and close loopholes.

GAP labels token laws as “cardboard shields,” because anyone relying on them is sure to die professionally. We view genuine whistleblower laws as “metal shields,” behind which an employee’s career has a fighting chance to survive. The checklist of 20 requirements below reflects GAP’s 35 years of lessons learned on the difference. All the minimum concepts exist in various employee protection statutes currently on the books. These “best practices” standards are based on a compilation of national laws from the 29 nations with minimally credible dedicated whistleblower laws, as well as Intergovernmental Organization policies, including those at the United Nations, World Bank, African Development Bank, Asian Development Bank, and Inter-American Development Bank. Nations covered by this study are identified in

Appendix 1, and copies of the laws can be downloaded from GAP's website, at: http://whistleblower.org/blog/112316-i-whistle-you-whistle-%E2%80%93-looking-best-practices-around-world .

Scope of Coverage

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.

Context for Free Expression Rights with "No Loopholes"

Protected whistleblowing should cover "any" disclosure that would be accepted as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. The consistent standard is for the whistleblower to reasonably believe the information is evidence of misconduct. Motives should not be a relevant factor, if the whistleblower believes the information is true. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. The key criterion is that public freedom of expression be protected if necessary as the only way to prevent or address serious misconduct. It is also necessary to specify that disclosures in the course of job duties are protected, because most retaliation is in response to "duty speech" by those whose institutional role is blowing the whistle as part of organizational checks and balances.

Subject Matter for Free Speech Rights with "No Loopholes"

Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties.

Right to Refuse Violating the Law

This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other

authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

Protection Against Spillover Retaliation

The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as "assisting whistleblowers," (to guard against guilt by association), and individuals who are "about to" make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a "reasonable belief" and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.

"No Loopholes" Protection for All Citizens With Disclosures Relevant to the Public Service Mission

Coverage for employment-related discrimination should extend to all relevant applicants or personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization's mission. It should not matter whether they are full time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organization, or even volunteers. What matters is the contribution they can make by bearing witness. If harassment could create a chilling effect that undermines an organization's mission, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since boycotting is a common tactic.

Most significant, whistleblower protection should extend to those who participate in or are affected by the organization's activities. Overarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings. An increasing number of global statutes do not limit protection to employees, but rather protect "any person" who discloses misconduct. A list of nations with rights broader than the employment context is enclosed as Appendix 2.

Reliable Confidentiality Protection

To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect. Confidentiality goes beyond just promising not to reveal a name. It also extends to restrictions on disclosure of "identifying information," because often when facts are known only to a few that information easily can be traced back to the source and are the equivalent of a signature. Further, almost no whistleblower can be guaranteed absolute confidentiality, because testimony may be required for a criminal conviction or other essential purpose. Under those circumstances, a best practice confidentiality policy provides for as much advance notice as possible to the whistleblower that his or her identity must be revealed.

Protection Against Unconventional Harassment

The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from civil liability such as defamation suits, and the most chilling form of retaliation – criminal investigation or prosecution.

Shielding Whistleblower Rights From "Gag Orders"

Any whistleblower law or policy must include a ban on "gag orders" through an organization's rules, policies or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech.

Providing Essential Support Services for Paper Rights

Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who are unemployed and boycotted. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. The U.S. Whistleblower Protection Act

includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on their behalf. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

Forum

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality.

Right to Genuine Day in Court.

This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual's case for any eventual day in a due process forum.

Option for Alternative Dispute Resolution with an Independent Party of Mutual Consent

Third party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower disputes, while circumventing the issue of whether Intergovernmental Organizations waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the U.S. Whistleblower Protection Act.

Rules to Prevail

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights, and win.

Realistic Standards to Prove Violation of Rights

The U.S. Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards for intergovernmental organizations such as the United Nations.

This emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur "because of" the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually to between 25-33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, to committing to one of these proven formulas to determine the tests the whistleblower must pass to win a ruling that their rights were violated.

Realistic Time Frame to Act on Rights

Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Six months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common law rights and are preferable.

Relief for Whistleblowers Who Win

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit and by holding the wrongdoer accountable.

Compensation with "No Loopholes"

If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

Interim Relief

Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication for unemployed, boycotted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years.

Coverage for Attorney Fees

Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums more than an annual salary.

Transfer Option

It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

Personal Accountability for Reprisals

To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. The OAS Model Law even extends liability to those who fail in bad faith to provide whistleblower protection. Another option is to allow

whistleblowers to counterclaim for disciplinary action, including termination. Some nations, such as Hungary or the U.S. in selective scenarios such as obstruction of justice, impose potential criminal liability for whistleblower retaliation.

Some Multilateral Development Banks have created hybrid systems of accountability that indirectly protect whistleblowers from harassment by bank contractors. The banks' policies are to apply sanctions or even stop doing business with contractors who engage in whistleblower retaliation.

Making a Difference

Whistleblowers will risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public – positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

Credible Corrective Action Process

Whether through 'hotlines', ombudspersons, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the draft report resolving alleged misconduct, to assess whether there has been a good faith resolution. While whistleblowers are reporting parties rather than investigators or finders of fact, as a rule they are the most knowledgeable, concerned witnesses in the process. In the U.S. Whistleblower Protection Act, their evaluation comments have led to significant improvements and changed conclusions. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the organization's website.

Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for Intergovernmental

Organizations is the ability to file for proceedings at Independent Review Mechanisms or Inspection Panels, the same as an outside citizen personally aggrieved by institutional misconduct.

Review

The foregoing criteria are to evaluate whistleblower laws on paper. Unfortunately, due to ambiguities, reliance on bad faith officials for enforcement or cultural resistance, in many instances the new rights in practice might be traps that victimize the naïve. Every whistleblower law should include a formal review process that tracks how many whistleblowers use the new rights, whether they have proven effective empirically, and what changes should be enacted based on lessons learned.

APPENDIX ONE

NATIONS WITH DEDICATED WHISTLEBLOWER LAWS

Australia, *Public Interest Disclosure Act 2013* (Aus. PIDA)

Belgium, *September 15, 2013. - Law on the Termination of a Suspected Violation of the Integrity in a Federal Administrative Authority by a Member of his Staff,* (Belgium WPA),

Bosnia, *Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina*, (Bosnia WPA) (2014)

Canada, *The Public Interest Disclosure (Whistleblower Protection) Act* (2006) (Canada PIDA)

Great Britain, *Public Interest Disclosure Act 1998* (UK PIDA)

Ghana, *Whistleblower Act* (2006) (Ghana WPA)

Hungary, *Act CLXV of 2013 on Complaints and Public Interest Disclosures* (Hungary PIDA)

India, *The Whistleblowers Protection Act, 2011* (India WPA)

Ireland, *Protected Disclosures Act 2014* (Irish PDA)

Israel, *Protection of Employees (Exposure of Offenses of Unethical Conduct and Improper Administration) Law,* 5757-1997 (Israel PEL)

Jamaica, *The Protected Disclosures Act 2011* (Jam. PDA)

Japan, *Whistleblower Protection Act (Act No. 122 of 2004)* (Japan WPA)

Korea, *Act on the Protection of Public Interest Whistleblowers,* Act No. 10472, Mar. 29, 2011 (Korea ACA)

Kosovo, *Law No. 04/L-043 on Protection of Informants* (Kosovo LPI)

Liberia, *Executive Order No. 62, Extension of Executive Order No. 43 Protection of Whistleblower* (Liberia EO)

Luxembourg, *Act 6104 of 13 February 2011* (Lux WPA)

Malaysia, *Act 711, Whistleblower Protection Act 2010* (Malaysia WPA)

Mozambique, *Witness and Protection Act 2012* (Moz. WPA)

New Zealand, *Public Disclosure Act 2000* (NZ PDA)

Norway, *The Work Environment Act 2005* (Norway Work Act)

Peru, *Law No. 29542, Law on Whistle-blowers' Protection in the Public Sector of June 2010* (Peru WPA)

Romania, *Romanian Law No. 571-2004, Law concerning the protection of personnel from public authorities, public institutions and from other establishments who signalize legal infractions* (Romania WPA)

Serbia, *2014-12-01 Law on the Protection of Whistleblowers* (Serbia WPA)

Slovakia, *Act of 16 October on certain measures concerning the reporting of antisocial activities and on amendments to certain laws* (Slovakia WPA)

Slovenia, *Integrity and Prevention of Corruption Act* (Slovenia Anticorruption Act), Articles 23-25. (Slovenia ACA)

South Africa, *Protected Disclosures Act of 2000* (S.A. PDA)

Uganda, *The Whistleblowers Protection Act, 2010* (Uganda WPA)

United States, *Whistleblower Protection Act of 1989* (WPA) and 48 private sector laws

Zambia, *The Public Interest Disclosure (Protection of Whistleblowers) Act, 2010*

(Act No. 4 of 2010) (Zambia PIDA)

APPENDIX 2

NATIONS WITH RIGHTS BROADER THAN THE EMPLOYMENT CONTEXT (13)

Australia PIDA, Provision (Prov.) sec. 10, 15. (all civil and criminal liability)

Bosnia WPA, Art. 6. (criminal liability)

Ghana WPA, Art. 18 (any civil and criminal liability)

Hungary PIDA, Art. 11 (all civil and criminal liability -- "any action … which may cause disadvantage")

India WPA, Ch. IV.11 (1) (protection extends to all persons or public servants, although only for protection against government retaliation)

Irish PDA Part III.14 and 15 (civil and criminal liability)

Jamaica PDA, Sec. 15(2) (civil and criminal)

Liberia EO (civil and criminal liability, including an affirmative defense against defamation actions)

Malaysia WPA, Sec. 7(b), 9 (civil and criminal liability)

New Zealand PDA, Sec. 18(1) (immunity from civil and criminal proceedings)

Serbia WPA, Art. 2(2) ("any natural person," including owners of corporations; Art. 2(7) -- all civil and criminal liability ("any action …. which puts [whistleblowers] at a disadvantage")

Uganda WPA, secs. 2-3, covers "a person"); sec. 10 (immunity from civil and criminal liability, including override of secrecy laws)

Zambia PIDA, sec. 56 (absolute immunity through public interest defense for any liability)

APPENDIX 3

WHISTLEBLOWER LAWS WITH SIGNIFICANT NATIONAL SECURITY OR LAW ENFORCEMENT LOOPHOLES (12)

The list below does not cover restrictions on disclosures of classified information. The criteria are restrictions for disclosures of unclassified information by national security/law enforcement whistleblowers, or due process anti-retaliation rights that are weak or non-existent compared to the rest of the whistleblower law.

Canada PIDA (No provision to override Official Secrets Act)

India WPA, Ch. I.2 (armed services exempt); Ch. IV. 24098 (1) (national security/foreign policy exemption for cooperation with investigation of disclosures)

Ireland PIDA, Pt. IV.18 (public disclosure rights limited beyond classified information)

Jam. PDA (No provision to override Official Secrets Act)

Japan WPA, Art. 7 (secondary intra-agency controlled parallel system for national security and military personnel)

New Zealand PDA, Sec. 12 (May only make disclosures to the Inspector General of Intelligence and Security)

Norway Work Act, Introduction (excludes military aviation)

Peru WPA, Sec. 7 (protections do not apply to national defense or intelligence employees)

Slovakia WPA, Secs. 1(3), 21 Law does not apply to military or intelligence operations, or to classified information.

South Africa PDA (No provision to override Official Secrets Act)

United Kingdom PIDA (No provision to override Official Secrets Act)

United States, 5 USC 2302(a)(2)(C) (government employees); 10 USC 2409(f), 41 USC 4712(f) (government contractors)

3. Whistleblowing Without Borders: The Risks And Rewards Of Transnational Whistleblowing Networks

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The authors have previously examined the increasing prevalence and importance of cross-border disclosures by whistleblowers (Savage and Hyde 2013b; Hyde and Savage 2013; Hyde *et al* 2013; Savage and Hyde 2015). These disclosures may take a number of forms; a worker may go directly to a person in a state other than that which is the governing law of the contract; information derived from a disclosure may be passed across national boundaries by authorities in one jurisdiction to authorities in another; information may be disclosure on the internet, on a site hosted in a jurisdiction different to that inhabited by the whistleblower, and this information may be accessed by a person in a third State. The choice about whether and to whom to make a disclosure regarding a transnational issue is therefore important.

A major problem for whistleblowers faced with cross-jurisdictional concerns is the variable nature of the national protections afforded to them (Vaughn 2013 chapter 13; Wolfe *et al* 2014). Any subsequent action taken by national courts is inevitably constrained by national boundaries, particularly with regard to any remedial action. Even if the whistleblower succeeds in their claim, any court order must by enforced extra-territorially often requiring assistance from courts and enforcement agencies in the respondent's jurisdiction. This lack of uniformity increases the likelihood of a whistleblower being penalised. Whilst their employment position can be placed at risk, they may also be at risk of criminal or civil law sanctions, which paradoxically, may not apply in the legal jurisdiction in which the concern was raised.

Another problem is the ability of whistleblowers to ensure that the information disclosed is used to achieve their goal of having the concern addressed. An audience in a different jurisdiction may not react to the disclosure in the manner desired by the whistleblower, either due to different moral or legal frameworks governing the matters disclosed or the inability to understand or use the information to take action against the person whose conduct is the subject of the disclosure.

The UK legislation does not appear to have properly engaged with the rationale for protecting whistleblowers. The Public Interest Disclosure Act 1998, which takes effect as Part IVA of the Employment Rights Act 1996 provides a flexible regime in which workers can

seek to obtain damages and or reinstatement if they suffer detrimental treatment or dismissal as a result of raising their concern. What it does not do is provide any form of framework for the effective handling of concerns by the recipients and, while it may have been inappropriate to include this in an employment rights protection, subsequent legislation, including Acts placing regulatory activities on a statutory footing have failed to include measures to support effective concern handling. The result of this oversight is evidenced in the disjointed and piecemeal attempts by agencies prescribed to receive whistleblowing concerns to effectively discharge their function. If these prescribed agencies are unable to provide effective service delivery for domestic whistleblowers raising domestic whistleblowing concerns, how can we be sure that they are able to support cross-jurisdictional whistleblowing?

The UK legislation allows for significant detachment between the concern and protecting the whistleblower. It also fails to properly articulate why only UK workers are seen as proper participants in the regulatory network, where third country workers may be better placed to provide valuable information to network actors. It is clear that there are certain circumstances, such as tax evasion or avoidance using foreign bank accounts where the UK can only act upon information provided by foreign workers, yet there are no mechanisms by which the national government can act to protect the foreign whistleblower. Similarly, workers in a foreign slaughterhouse who are aware of horsemeat issues are not incentivised to disclose to UK regulators.

UK regulators cannot provide incentives for individuals in foreign jurisdictions to provide information as PIDA is aimed at post-dismissal or post-detriment protection for UK but not foreign workers. This is in contrast to the position in the US, but reflects the prevailing approaches in Ireland and New Zealand which draw a degree of influence from the UK protection.[1]

Despite the aforementioned difficulties, whistleblowing concerns raised with regulators and enforcement bodies can provide the vital intelligence needed for those agencies to work effectively. Regulatory and enforcement agencies with responsibility for the oversight of organisations who operate across jurisdictional boundaries should have the capability to deal with those matters cross-border. Increased cross-border whistleblowing and increased intelligence sharing between agencies can improve efficiency (a welcome impact for countries enduring a current period of austerity). More importantly it opens the possibility for pro-active rather than re-active responses thus allowing agencies the scope to prevent disasters from happening in the first place.[2]

[1] Protected Disclosures Act 2000 (NZ) Protected Disclosures Act 2014 (IRE).

[2] By allowing regulatory, enforcement and oversight bodies to respond to minor concerns before they become major scandals subject to a public inquiry. This was highlighted by the public inquiry into the Tudor's meat scandal (Pennington 2009)

The purpose of the following discussion is first, to consider potential options to enhance the protection of cross-border whistleblowers. Second, in considering current examples of good practice, it will outline suggestions for the effective sharing of whistleblowing concerns by agencies. From the outset it is necessary to identify that the authors do not propose a simple, 'one-size fits all' approach to addressing this issue as to do so would ignore the full gamut of complexities, legal, practical and cultural.

Cross-Border Protection Of Whistleblowers

Protection By The Beneficiary Jurisdiction

One must consider whether it would be preferable for the legal jurisdiction which benefits from the disclosure to provide legal protection. The authors argue that there are two central motivations for why a beneficiary jurisdiction might be empowered to do so.

Firstly, the state may simply want to protect its own citizens or indeed visitors to the jurisdiction.[3] The state may be particularly motivated to protect against transportation safety risks or food supply or even where security risks might lead to an increased risk of terrorism or criminal activity.[4] In addition, the state may wish to protect the stability of its economy meaning that it has an interest in business transactions carried out on the world stage.

Second, the state may be motivated for paternal reasons, as a matter of national policy, to assist workers in developing countries (for example) where the focus in doing so may be to support efforts to stamp out corruption. Despite passage of the Bribery Act 2010 which is aimed at dealing with acts of bribery including those which might occur abroad, the UK chose to place emphasis on the activities of companies registered and or otherwise operating in the United Kingdom[5] jurisdiction. Moreover, it did not extend PIDA to include protection for workers based outside of the jurisdiction. Whistleblowers must satisfy an employment tribunal that they have a UK employment contract before it will proceed.

[3] This form of handling problems 'up stream' is well established. For example, in Latin America, the United States has provided financial support and training to police and armed forces personnel with the ultimate aim of reducing the flow of drugs into the United States since the 1970s (Huey 2014).

[4] Terrorist incidents caused by a bomb which exploded on board Air India flight 182 and a bomb which went off in a Narita Airport Japan after failures in baggage checks in an Vancouver Canada Airport (together with failings of the intelligence agency CSIS) prompted a change in global policy on security checks. See further, Rae 2005.

[5] See the relatively restrictive definition of "commercial organisation" in s. 7(5) Bribery Act 2010. Moreover, according to s.12 (4) of the Act, offences of bribing foreign officials are limited to those committed by British Citizens, and individuals "ordinarily resident in the United Kingdom." See also link to HM government website providing information for organisations: https://www.gov.uk/government/publications/bribery-act-2010-guidance (accessed 14/07/2015).

Where workers can show that they meet this condition they still face considerable evidential hurdles.

For example, for external disclosures (i.e. those not to an employer or his/her agents) they can make a disclosure to a prescribed person but their concern must fit within the class or description of that organisation.[6] This is likely to be more difficult for a whistleblower working out of the jurisdiction. First their disclosure may not be within the remit of the person prescribed and, second, due to language issues or awareness of the legal principles the person may raise the concern with the wrong regulatory agency or may not disclose to a person prescribed at all. Wider public disclosures are protected by PIDA[7] these are not without territorial restriction.[8] Therefore an individual in the United Kingdom could raise a concern to a body based in a different jurisdiction and could be protected for doing so.[9] Likewise, a worker outside of the United Kingdom could still raise a concern to a UK regulatory or enforcement protection if they have a UK employment contract. The tribunal would focus upon the recipient to which the disclosure was made and would ask whether the disclosure was 'reasonable in all of the circumstances.'[10] In contrast, a whistleblower working outside of the UK jurisdiction with a contract of employment based in another jurisdiction will struggle to satisfy the tribunal that their claim should be heard, even where the respondent business is based in the UK.[11]

Part of the difficulty with the UK approach is that there is a disconnection between the tribunal and any action taken by a regulator or enforcement body. PIDA is entirely reactive in the sense that it only allows a tribunal to grant remedies post-detriment or post-dismissal. In order to provide a gateway between the tribunal and the prescribed persons, a regulatory referral scheme was set up whereby individuals could tick a box on their ET1 claim form (see below). Research conducted by Public Concern at Work found that the system does not work well at present. This supports the author's own enquiries identified as an experience of sending freedom of information requests to prescribed persons (Savage and Hyde 2013a).

[6] Section 43F Public Interest Disclosure Act 1998.

[7] Disclosures to the wrong regulator may result in the whistleblower being unable to obtain protection. For an example of this see *Dudin v Sailsbury District Council* (2003) ET 31022631/03. It was further suggested in *Re A Company* [1983] 2 All ER 36 that disclosures of information to a regulator without the jurisdiction to look into the matters complained of would not be protected by the common law public interest defence in breach of confidence cases. See further Hyde and Savage 2015.

[8] Following the repeal of s.196 Employment Rights Act by the Employment Rights Act 1999.

[9] Provided that the individual can convince an Employment Tribunal that they have a UK employment contract.

[10] For a full list of evidential requirements, see further s.43F Public Interest Disclosure Act 1998.

[11] See further: *Foxley v GPT Special Project Management Ltd* (2011) (22008793/2011). For further consideration of jurisdictional matters see: *Clyde & Co LLP and another v Bates van Winkelhof* [2013] EWCA Civ 1207 [75]-[84].

The United States arguably leads the way on protecting whistleblowers based outside of the jurisdiction. By providing legislation such as the Foreign Corrupt Practices Act 1977 and the False Claims Act 1863 (as amended). Both may be utilised by workers based outside the jurisdiction to obtain a financial reward for raising the concern. Brown suggests that for workers based in the UK there are considerable advantages in using the United States provisions compared with the UK PIDA (Brown *et al* 2013; Brown 2014). In terms of the role of regulators, the provision of US legislation in this area means that a regulatory/ enforcement organisation, namely the US Securities and Exchange Commission's (SEC) Enforcement Division takes a much more 'hands on' approach from the outset of the whistleblowing disclosure.[12] This is in direct contrast to the UK regulatory referral scheme which would require the HM Courts and Tribunals Service to send the tribunal judgment to a prescribed person following the outcome of a case.[13]

The longstanding problem associated with judicial action on matters based outside of the jurisdiction is enforcement. For example, the United Kingdom has long since grappled with the extra-territorial enforcement of *Norwich Pharmacal* orders.[14] These orders require a party to provide the applicant with the identity of an alleged wrongdoer. Failure to comply can result in contempt of court proceedings brought under the Contempt of Court Act 1981 and a fine plus a maximum sentence of two years imprisonment. A number of internet companies with orders made against them have simply chosen not to acknowledge the jurisdiction of the court order making any further action extremely difficult (see further Savage 2013). Section 16 provides scope for action to be taken against individuals who fail to comply with monetary penalties. If based in the UK jurisdiction, the court could appoint bailiffs to seize goods and property to the value of the award. Outside of the jurisdiction enforcement requires the co-operation of courts based in the wrongdoer's domestic jurisdiction, and where necessary, the support of law enforcement agencies. Extradition may of course be possible, however, this costly and time-consuming process is dependent upon the jurisdiction who made the initial order having an extradition agreement in place with the jurisdiction in which the wrongdoer resides.[15]

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[12] However, in lieu of this neither provisions provide express pre-detriment or pre-dismissal protection codified in the legislation.

[13] The whistleblower could of course choose to contact a regulator in the mean-time but there may be tactical implications with regards to any financial settlement. The Civil Procedure rules (1998) (UK) (governing how courts and tribunals and advocates conduct cases) specifically require parties to attempt settlement, see in particular CPR R.26 and R.36.

[14] *Norwich Pharmacal Co & Others v Customs & Excise Commissioners* [1974] AC 133.

[15] Whilst extradition is notably easier in the European Union due to the usage of European arrest warrants and the extensive co-operation and co-ordination between Europol and Eurojust outside of the EU, the system is reliant upon extradition treaties. The UK Crown Prosecution Service provide a list of countries: http://www.cps.gov.uk/legal/d_to_g/extradition/annex_c_-_extradition_with_territories_outside_the_european_union_/ (accessed 14/07/15). The wrongdoer can, of course, move outside of the jurisdiction in question to one where there is no agreement in place thus frustrating the process further.

Protection By Regulators, Enforcement Bodies And Those Tasked To Investigate Matters Of Public Concern

One should consider whether an official organisation tasked with the investigation of wrongdoing or malpractice should also bear the responsibility for protecting the whistleblower who provided the information.[16] The current position in the UK suggests that regulators could and should do more. In 2013 the authors conducted extensive research of 48 national bodies with a regulatory function prescribed by PIDA to receive concerns and 408 local authorities. There were considerable differences in the way that regulators were handling concerns or even categorising concerns as coming from whistleblowers. The lack of a shared understanding of terminology and a baseline standard of protocols for handling concerns means that many regulators lack the capacity to share information even on a national level. The way that regulators handle concerns can have a knock- on effect on whether or not the whistleblower needs to seek legal protection. For example, if because of poor handling the regulator, enforcement or oversight body tips-off the alleged wrongdoer that the information came from a whistleblower then that individual is much more likely to suffer detriment or dismissal requiring them to seek protection using whistleblower protection laws. Careful handling, whether due to statutory base-line standards or soft law arrangements can assist the whistleblower and in many cases can help to safeguard their position. Where this is not possible one must consider whether the regulator/ enforcement body themselves should effectively sanction the wrongdoer for subjecting the whistleblower to any form of detrimental treatment. United Kingdom regulators currently lack this capacity in comparison to the Anti-Corruption Civil Rights Commission (ACRC) based in South Korea. The organisation is forbidden from revealing the identity of a whistleblower without their consent, they are able to order reinstatement of employees, can provide protection against disciplinary measures, can order the transfer of employees to another part of the organisation and can award of up to $2million.[17] Clearly, as a starting point safeguards to ensure the confidentiality of whistleblowers would be a positive step to protect whistleblowers including those potentially in a precarious position overseas. However, cross-border action by regulators is again likely to require judicial and criminal justice co-operation in the alleged wrongdoer's jurisdiction.

Protection By Organisations With Contractual Agreements

The use of contractual agreements to protect whistleblowers provides a potentially effective private law solution to a public international law problem. Whilst breach of

[16] Whilst it is acknowledged that the focus of the authors' research is based on the work of national regulators and local authorities performing a regulatory function, it is appreciated that other jurisdictions may use alternative terminology for these organisations. The authors' primary focus in this section is to consider the role of official recipient organisations whose day to day activities are focussed upon maintaining oversight and accountability of public and private organisations.

[17] Act on Anti-Corruption and the Foundation of the Anti-Corruption & Civil Rights (South Korea) and ACRC webpages: http://www.acrc.go.kr/eng/board.do?command=searchDetail&method=searchList&menuId=020312 (accessed 15/07/15).

contract can lead to litigation and court action, the authors argue that it is likely to be most effective where the breach of contract leads to termination and therefore a loss of revenue. Many large western based co-operations outsource services to places such as India. In doing so they place a degree of reputational risk in the hands of companies based in those jurisdictions. Reputational risk can shed light on issues and potentially lead to resolutions. Moreover,where matters of concern arise, western corporations have expressed a willingness to seek to resolve issues. For example, fires in the factories of clothing manufacturers in Bangladesh led to a compensation scheme and the signing of an accord to work towards improving building safety (BBC News 2013).[18] Provision of clauses in commercial contracts which include monetary penalties with the ultimate option of termination could incentivise the organisation based in another jurisdiction to treat the whistleblower with respect and to deal with the concern.[19]

Protections By International Mechanism

A level of common protection for whistleblowers might be grounded in the decisions of the European Court of Human rights in the series of cases concerning whistleblowers. The Strasbourg decisions contain a wealth of public interest jurisprudence. In relation to whistleblowing, a series of recent cases are worthy of note: *Guja v Moldova, Bucur and Toma v Romania,*[20] *Heinisch v Germany,*[21] *Rubins v Latvia.*[22]

In *Guja*, the Court chose to adopt a whistleblowing-specific framework to conduct the proportionality analyses. It identified the following considerations:

- Whether the applicant had alternative channels for making the disclosure
- The public interest in the disclosed information
- The authenticity of the disclosed information
- The detriment to the Employer
- Whether the applicant acted in good faith
- Severity of the Sanction

[18] See further Primark website: http://www.primark.com/en/our-ethics/news/rana-plaza (accessed 15/07/15).

[19] It is notable also that the United Kingdom is moving towards more contractual recognition of whistleblowers (in the contracts of employment of NHS staff). See further Powell 2015.

[20] (2013) (Application no. 40238/02).

[21] (2011) (Application no. 28274/08).

[22] (2015) (Application no. 79040/12).

The Strasbourg court has since followed the framework in *Heinisch v Germany*, *Bucur and Toma v Romania*, however, it has also sought to 'cherry pick' certain parts of the framework and use it alongside of other relevant jurisprudence. This was evident in the case of *Rubins v Latvia* whereby the court decided that the applicant's case did not centrally concern an act of whistleblowing per se. Whilst the aforementioned framework provides scope for comprehensive consideration and proportionality balancing it can also lead to uncertainty where the Strasbourg court chooses to disregard certain parts of the framework and rigorously focus on others. Moreover, the Strasbourg court is not bound by judicial precedent.

There are also issues with the domestic application of the *Guja* principles. Firstly, whilst employment tribunals have obligations under the Human Rights Act 1998 to consider Convention rights and jurisprudence of the court (s.2 and s.6 respectively), s.2 does not force the court to apply the *Guja* framework or any other framework or decision of the Strasbourg court. Also, because the employment tribunal judgments are placed on a closed register, it is difficult for researchers to determine the application and effectiveness of these provisions in practice.

The authors suggest that it is necessary to consider whether there is a need for an international convention which provides protection for whistleblowers. One possibility is for the European Union to create a framework that provides protection for whistleblowers (Lewis 2011). In the United Kingdom, provided that the UK Parliament does not choose to 'opt out' of the legal measures adopted at EU level, the EU law will be given primacy over any conflicting UK legal provisions. This is arguably a stronger instrument to the Human Rights Act 1998 (UK). Section 2 (4) European Communities Act 1972 provides scope for judges to temporarily dis-apply or set aside law where it conflicts with the relevant EU provisions.[23] The HRA only allows for courts to make a declaration of incompatibility using s.4 HRA if they are unable to read down language to make the UK law compatible. This does not impact on the instant case before the court and therefore its potential as a safeguard may be diminished. Another option is to consider the provision of bilateral agreements between states with common borders, trade agreements and or common goals. Bilateral agreements exist to support shared criminal justice goals. The Police Co-operation Convention for South East Europe allows for the facilitation of joint working and information sharing. Ultimately, the ideal course of action would be the provision of multilateral agreements facilitated by an international organisation such as the United Nations. Multi-national agreements already exist in global aviation, administered by the International Civil Aviation Organisation, which is a UN agency.[24]

[23] The EU Charter for Fundamental Rights further enhances protection. However, because of the operation of the closed employment tribunal register it is not clear how this is being applied in whistleblowing cases at present.

[24] See further, organisation website: http://www.icao.int/Pages/default.aspx (accessed 14/07/15).

Cross-Border Sharing Of Information

Whilst protection of whistleblowers is central to encouraging disclosures, once a disclosure has been made it is necessary to ensure that the information is available to those who can take appropriate action to tackle the subject of the disclosure. The most appropriate body may be situated in a different jurisdiction than the information. The centrality of such information sharing can be seen in, for example, article 38 of the UN Convention against Corruption. Therefore, the information must be shared across borders. Both the legal regime and the practical procedures for the transfer of information must be put in place.

Currently, this is not the case in many circumstances and the transfer of information is therefore inhibited. Information sharing, when it takes place, is often ad hoc and informal, involving personal contacts between individuals within different states. This approach to data sharing is precarious, depending on awareness of the appropriate destinations for data in order for the risks to be properly addressed and the decision-making of the recipients of the disclosure, who must make the decision to share the information.

The legal regime is often seen as inhibiting the sharing of information, with actors taking a risk averse approach to data-sharing in order not to be exposed to potential sanctions for breaching data protection and confidentiality requirements (Law Commission 2014). In many cases the legal framework is appropriate to allow the sharing of data, but if possible should be made clearer to ensure that the benefits of information sharing can be achieved, whilst of course continuing to protect individuals. Where there are formal schemes, the best practice derived from these schemes should be utilised to develop standards to support the sharing of data derived from whistleblowing disclosures and such principles must be put into practice more widely.

The Legal Regime

In order to share information the underlying legal regime must permit the information to be shared. In the EU the Data Protection Directive limits the sharing of information between entities. A data controller, which will include any recipient of a whistleblowing disclosure, cannot process personal data, which includes transferring the data to a third party, without complying with the data protection principles. Further, national legal systems impose restrictions on the transfer of information that is confidential.

The transfer of information must only be conducted where it is necessary. In the case of information derived from a whistleblowing disclosure this hurdle will be easily surmounted. Whether the disclosure concerns an identifiable individual or could identify the whistleblower, it will be necessary to transfer information where such a transfer can prevent or reduce a risk to third parties. This is an acknowledged ground justifying processing of personal data. However, the damage to the data subject should be

considered, and data must not be processed where the damage to the data subject is disproportionate to the gain from processing the data. However, in most cases it will be proportionate to process where this will prevent harm to a third party. Similarly, confidential information can be shared when it is in the public interest to do so.

In some cases the data derived from a disclosure will not amount to personal data, as the data will concern an inanimate object. In this case the data can be shared more freely, as the data protection principles need not be complied with. Those wishing to share data across borders must therefore be careful when identifying the data that needs to be shared. Where the data can be confined to the risk, and not an identifiable individual responsible for the risk, then the Data Protection Directive will not apply. This data can then be shared.

Sharing personal data beyond the borders of the EU may present a challenge. In such cases the data controller must be satisfied that the jurisdiction to which information is shared provides the same level of protection as is provided within the EU.[25] This protection may be general, or guaranteed in relation to a specific case. Where the data is shared on the basis of a co-operation agreement between entities, it is therefore essential that the co-operation agreement deals with the protection of personal data shared under the agreement, and it will be necessary that all future multilateral agreements governing the sharing of information between state bodies consider the protection of that data, drawing on international principles and the increasing acknowledgement of data protection as an aspect of the right to private and family life (and indeed as a human right on its own account). Such agreements must not, however, be interpreted so rigidly as to prevent the sharing of information. The immense public good of sharing information must not be inhibited by unfounded concerns, and therefore drafting should be clear and precise, and allow sharing where necessary.

Best Practice In Information Sharing

Drawing on the different examples of information sharing in a number of different contexts it is possible to make suggestions about best practice. A number of mechanisms exist that allow information derived from whistleblowers to be shared across borders. These systems can be either digital or analogue, but in all cases the ground rules governing the sharing of data exist before the information is received by the recipient who wishes to share. Some mechanisms utilise information systems that can transfer the information to those who may require such information -once the information is in the system it will be accessible to others with access to it. Other mechanisms are driven by proactive decisions to share information with those for whom it may be relevant.

[25] Data Protection Directive article 25(1).

Information disclosed regarding unsafe products can be shared through the RAPEX database set up under the General Product Safety Directive.[26] Regulators in all EU member states, plus Norway, Switzerland and Liechtenstein, have access to the database, and can use the information to take action against unsafe products, including withdrawing them from the shelves or recalling them from the hands of consumers. A similar database, known as RASFF, exists for food risks.[27] These databases automatically share information with those regulators who have access, and are therefore driven by the receiving State deciding to upload. A similar database is the Thetis database set up under the Paris Memorandum of Understanding, which contains details, amongst other things, of ships requiring Port-State controls. Once a ship identified on the database enters territorial waters then action can be taken.

An alternative is a system driven by the state that requires information in order to take action. The state could search a database in order to discover whether there is any information regarding the action that it wishes to take. An example of this sort of database, which is drawn from the criminal justice field, and which does not contain data derived from whistleblowers, is the system created by the Prum Decision of the EU Council,[28] which allows certain EU member states to inquire whether other states hold biometric data (particularly fingerprints and DNA profiles) matching those found at crime scenes. The problem with such databases holding data derived from whistleblowing is that searches tend to be reactive, and therefore such mechanisms for data-sharing are ill suited to preventing risks arising prior to the risk eventuating, which is often the goal of whistleblowers.

Sharing information on a one-off basis is the alternative mechanism for sharing information across borders. The information is provided to the person seen as best placed to respond to the risk disclosed in the information. The recipient is determined by the person in possession of the information. This person may have difficulty identifying the most appropriate person, particularly in another jurisdiction, where the State may operate in a different way, and the division of responsibility between different levels of government and different parts of the executive may be unfamiliar and confusing. This may lead to information not being shared, or information being shared with a person who is unable to take action to address the concern. This problem could be lessened by the imposition of a legal duty to transfer information to an appropriate person. Such a legal duty is imposed [29]

[26] Directive 2001/95 on general product safety, articles 11 – 13 and annex II. The database contains information about unsafe products derived from a number of sources, but it can include information derived from whistleblowing disclosures.

[27] Regulation 178/2002

[28] Decision 2008/615/JHA.

[29] For example, see Commission for Children and Young People Act 2012 (Victoria) section 61

Whether the information is shared using a system existing prior to the sharing or whether it is shared ad hoc, a number of best practices should be followed. In particular, there is a need for a shared language to be agreed. This does not necessarily mean that the information shared should be shared in one language, but that there must be a common understanding of the content of information to be shared and the terminology to be used. In previous studies it is clear that terminology means different things to different regulators at a national level (Savage and Hyde 2013a), this problem is likely to be increased and exacerbated at an international level. Therefore, agreements between regulators should carefully define the content, terms and format of information to be shared.

One problem with an information systems approach are the start-up costs necessary to create such systems. Whilst the costs are seen as worthwhile when it is anticipated that large amounts of data will be shared through the system, in cases where there are only small amounts of data shared it may be better to share on an ad hoc basis.[30] Therefore, systems should be used by the maximum number of states in order that the benefits are shared. This strengthens the case for a multilateral approach. Further, the information systems must be usable by all those who might wish to invoke it. File formats, metadata and hardware should be taken into account, and systems designed to be widely accessible by entities in different states.

The best system is one where there is an appropriate level of automation in the transfer, but which provides an opportunity for decisions regarding more or less extensive sharing to take place where this is necessary either to ensure that the concerns raised are addressed or that the whistleblower is properly protected. It is also necessary to ensure that there is sufficient commonality between the data shared between different states to ensure that the data shared can be used to support action.

Conclusion

Cross-border cases present particular problems for protecting whistleblowers. In an increasingly networked globalised market place there is an identifiable need for cross-border arrangements for whistleblowers Whilst there are some positive indications (for example, in the US) that a whistleblower could raise concerns to another legal jurisdiction and receive a monetary reward for doing so, this situation is a-typical.[31] The United Kingdom currently lacks the legal and regulatory framework to encourage and facilitate cross-border

[30] As an example, the sharing of data about aircraft safety between the UK and Tanzania was seen to be ad hoc Savage and Hyde 2013b. Whilst the sharing between UK and Tanzania might be at a small scale, a multi-national system may be both efficient and useful.

[31] The authors are not advocating monetary rewards for whistleblowers but rather the need to support cross-border whistleblowers. To consider monetary rewards would be beyond the aims and scope of this paper.

whistleblowing. The authors have presented some possible options for legislators to consider options for protecting cross-border whistleblowers. These suggestions all require an agreed solution to a common problem. In order for any of the aforementioned suggestions to work, effective cross-border co-operation and agreement is required at all levels from the organisations, the regulators and enforcers, to the judiciary and legislature. These suggestions do not offer simple solutions yet this complexity should not overshadow the benefit associated with facilitating and protecting cross-border whistleblowing to those who are tasked to effect action.

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4. Whistleblower Rights In European Union Civilian Missions: EULEX Leaks

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In the aftermath of the armed conflict between Serbia and Kosovo, the international community put forward two missions in an effort to mediate and build peace in the country, namely the United Nations Mission to Kosovo (UNMIK), established in 1999 by Resolution 1244 (currently in force) of the United Nations Security Council (UNSC) and the European Union Rule of Law mission (EULEX). The latter took force in 2008 by invitation of the Kosovar government with a view to advising, mentoring and monitoring the three pillars of the Kosovar government, including the judiciary, police and customs, while additionally assuring that the government in place takes steps toward European integration.

As the largest civilian mission ever deployed by the European Union (EU), EULEX operates through a unified chain of command under the EU High Representative for Foreign and Security Policy and the auspices of EU Member States. To date, EULEX is funded by an annual budget of €89 million and has approximately 1600 employees, of which 800 are locals (EULEX Mission Description n.d.). Since its commencement, EULEX's scope for assistance includes providing international prosecutors and judges for cases involving criminal offences such as hate crimes, abuse of official position, corruption and war crimes.

Even though UNMIK enabled state-building in Kosovo by establishing the entire legal, judicial and governmental institutions, it lost credibility after some years and was even accused of, *inter alia*, human rights violations (Knoll 2008, Murati 2014). EULEX was thus perceived as a fresh mission that would bring and apply EU practices itself, having been mandated after the controversial UNMIK era. After seven years in service, EULEX's reputation would appear to have diminished somewhat and its professionalism could even be considered to have been compromised by local corruption (Kursani 2013). However, it cannot be denied that EULEX has managed to deliver over 566 verdicts on corruption, organized crime and war crimes, which have included former judges, police officers, assembly members, prosecutors and other high-level officials (Implementation of rule of law n.d).

The Mission's reputation received further scrutiny when whistleblower Maria Bamieh, former EULEX prosecutor, publicly accused the EU mission of internal corruption. In 2012, she requested an internal investigation within the mission after receiving information that some of her colleagues might allegedly be involved in illegal activities and misconduct. In October 2014, Bamieh was suspended for allegedly breaching EULEX's Code of Conduct

followed by an investigation for disclosure of information and for bringing the EULEX mission into disrepute. In March of the following year, Bamieh filed a lawsuit against EULEX and the Foreign & Commonwealth Office of the United Kingdom for unfair dismissal.

Whistleblowers in Europe and worldwide have been encouraged to come forward with a guarantee of protection under (evolving) national and international legal frameworks. The United Nations, Council of Europe, European Commission, and European Court of Human Rights (case law), and various other organizations have promoted whistleblowing protection.

The European Union aspires to lead the world in human rights, individual liberties and justice (Worth 2013). With the Maria Bamieh whistleblowing process as a case study, this chapter submits that the right to freedom of expression as a fundamental human right has yet to become a guaranteed right within the European Union notwithstanding its proclamation of human rights. The chapter suggests that EU Civilian Missions (EUCM) have no transparent whistleblowing protection policies and that the existing legal framework for safeguarding whistleblowers lacks implementation powers.

The first part of the chapter describes the context in which the whistleblowing occurred and the reactions of EU mission officials to whistleblowing. The second part examines the existing legal framework, including ECtHR case law on the protection of whistleblowers and its applicability to international missions. The third part explores available whistleblowing protection mechanisms for employees working for EUCM.

EULEX Modus Operandi: Shoot The Messenger

Among the most essential processes to keep organizations accountable to society (Lewis & Brown 2014), whistleblowing is defined as "the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action" (Near & Miceli 1985: 4). Transparency International defines whistleblowing as the disclosure or reporting of wrongdoing whilst a whistleblower is any public or private sector employee or worker who discloses information about these types of wrongdoing and at risk of retribution.[1] The EULEX

[1]Full definition by Transparency International: "Transparency International defines whistleblowing as the disclosure or reporting of wrongdoing, which includes corruption, criminal offences, breaches of legal obligation, miscarriages of justice, specific dangers to public health, safety or the environment, abuse of authority, unauthorised use of public funds or property, gross waste or mismanagement, conflict of interest, and acts to cover up any of the aforementioned. A whistleblower is any public or private sector employee or worker who discloses information about these types of wrongdoing and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees or interns, volunteers, student workers, temporary workers, and former employees."

case is one of the more recent cases of whistleblowing in Europe.[2] A description of the events and facts of the case is considered to be essential for understanding its context and analyzing the legal implications of whistleblowing in international missions.

Maria Bamieh, a UK lawyer with over twenty years of experience in criminal prosecution, was deployed as a prosecutor to fight corruption in Kosovo, first for UNMIK in 2007 and then for EULEX in 2008.[3] The Foreign & Commonwealth Office of the United Kingdom seconded[4] her to the EULEX with the duty of investigating high-profile cases involving financial crimes and corruption.

In May and June 2012, during the investigation of the permanent secretary of the Ministry of Health, Ilir Tolaj, for misuse of public office, fraud and tax evasion, Bamieh overheard people claiming to be intermediaries while listening to legally obtained interceptions involving Tolaj. As such, it was allegedly claimed by intermediaries that secret meetings with EULEX judges and prosecutors were held, as a means of influencing the removal of Maria Bamieh from the case. Additionally, further allegations from Bamieh involved an Italian judge for accepting a sum of €300,000 to acquit individuals suspected of murder (Green 2014).

The following month, she filed a request for an internal investigation within EULEX, which failed to take any steps to address Bamieh's allegations against her colleagues. On the contrary, she was investigated for wrongful parking and claims that she was being victimized

[2] Other recent cases are: Luxleaks/Antoine Deltour – whistleblower who disclosed hundreds of tax agreements that had been organized by Luxemburg tax authorities on behalf of global companies. The documents proved that Luxemburg helped multinational companies to save millions in taxes to the detriment of its neighboring countries. Since December 2014, whistleblower Antoine Deltour is on trial for leaking information. See:

Simon Bowers, 'Luxembourg Tax Files: How Tiny State Rubber-Stamped Tax Avoidance on an Industrial Scale' [2014] *The Guardian* <http://www.theguardian.com/business/2014/nov/05/-sp-luxembourg-tax-files-tax-avoidance-industrial-scale> accessed 3 March 2015.

HSBCLeaks/Hervé Falciani –whistleblower who leaked HSBC Swiss Private Bank files leading to criminal prosecutions in several countries. He was employed at the bank as a systems specialist and is suspected of stealing documents to sell to other banks. In 2013, Swiss authorities indicted Falciani on charges of data theft and he risks trial in absentia. See:

Martha M. Hamilton, 'Whistleblower? Thief? Hero? Introducing the Source of the Data That Shook HSBC' [2015] *The International Consortium of Investigative Journalists* <http://www.icij.org/project/swiss-leaks/whistleblower-thief-hero-introducing-source-data-shook-hsbc> accessed 12 March 2015.

Jill Treanor, 'HSBC: Swiss Bank Searched as Officials Launch Money-Laundering Inquiry' [2015] *The Guardian* <http://www.theguardian.com/news/2015/feb/18/hsbc-swiss-bank-searched-as-officials-launch-money-laundering-inquiry> accessed 12 March 2015.

[3] Previously, Maria Bamieh served as a barrister and public prosecutor in the United Kingdom.

[4] Seconded and contracted staff differ in that the former are paid directly by their own goverment while the latter are paid by the mission. Around half of the EULEX staff is seconded. See: Jelle Janssens, 'International Police Reform and Project Management: Empirical Observations on EULEX Kosovo' (2014) 1(4) European Journal of Policing Studies.

for blowing the whistle within the mission.[5] While her contract ran until the end of November 2014, she was nevertheless dismissed a few weeks in advance on 23 October for allegedly leaking information to the press. Interestingly enough, Bamieh was suspended three days before a local newspaper's publication of the first story on alleged corruption and misconduct at EULEX. Both Bamieh and the local newspaper *Koha Ditore*, which first reported the alleged corruption at EULEX, deny that she was the source (Rettman 2014). During the suspension, after she had been escorted by security out of EULEX premises, Bamieh publicly blew the whistle, accusing the EU mission of neglecting internal investigations (Luck 2014), unfair treatment and dismissal (Borger 2014).

Once confidential information is published by the whistleblower, some organizations will attempt to contain the damage and shift the attention of media, usually by lodging a smear campaign against the whistleblower as a means of retaliation. While the techniques of retaliation may differ, the Government Accountability Project[6] has concluded that "many IGO managers attempt to 'shoot the messenger' rather than address his or her substantive disclosure" (Walden & Edwards 2014).

For instance, in the case of James Wasserstrom, EULEX's predecessor UNMIK used the 'shoot the messenger' method to deal with the case. Whistleblower Wasserstrom was arrested after reporting on corruption within UNMIK in 2007. Following his arrest, his property was seized and illegally searched. It has been suggested that individuals within UNMIK leaked defamatory information about the investigations to the media in an attempt to damage the whistleblower's reputation (Walden & Edwards 2014). The case of Wasserstrom is linked to Bamieh because both occurred in Kosovo during international missions empowered to bring best international practices, and both involved their colleagues who were allegedly involved in corruption with local third parties.

Similarly, EULEX attempted to take revenge against whistleblower Bamieh by leaking defamatory information to the press. According to a leaked e-mail authored by the current head of EULEX, Gabriele Meucci, it is suggested that there may have been a plan to discredit Bamieh. Currently, the whistleblower is accused of leaking information and documents to the Kosovo daily newspaper *Koha Ditore* (EULEX 2014).

[5] Maria Bamieh, 'Whistleblowing in Europe: The Case of EULEX and Maria Bamieh (notes are taken during the Speech of Maria Bamieh at Ghent University)' (2014).

[6] The Government Accountability Project is a whistleblower protection and advocacy organization. GAP litigates whistleblower cases, helps expose wrongdoing to the public, and actively promotes government and corporate accountability. See more: Government Accountability Project, 'We Are a Nation of Laws. We Are Also a Nation of Whistleblowers' <http://www.whistleblower.org/we-are-nation-laws-we-are-also-nation-whistleblowers> accessed 5 February 2015.

Experienced EU officials have opted to deal with the whistleblower by "shooting the messenger" instead of applying existing legal mechanisms to protect whistleblowers, hence leading by a destructive and negative example in a transitional country such as Kosovo.

Protection Of Whistleblowers On Paper – What Has The EU Proclaimed?

Whistleblowers clearly have a significant role in safeguarding the application of transparency and accountability principles in public and private sectors. The United Nations, Council of Europe, European Union, European Court of Human Rights and other international and domestic instruments have established a wide-ranging legal framework to shield whistleblowers.

Internationally, the United Nations Convention against Corruption, Inter-American Convention against Corruption, African Union Convention on Preventing and Combating Corruption contain specific provisions aiming to strengthen the international legal framework for countries to establish effective whistleblower protection laws (OECD 2013).

In Europe, the Council of Europe (CoE) has constantly promoted the protection of whistleblowers. In 2015, Parliamentary Assembly of Council of Europe adopted Resolution 2060 on Improving the Protection of Whistleblowers. This called on Council of Europe member and observer States, the European Union and the USA to enact whistleblower protection laws which include employees of national security or intelligence services, grant asylum to whistleblowers threatened by retaliation in their home countries and allow Edward Snowden to return without fear of criminal prosecution under conditions that would not allow him to raise the public interest defence. In 2014 Council of Europe adopted a Recommendation (2014)7 on the Protection of Whistleblowers, urging Member States to provide a legal framework enabling channels for whistleblowers to report public interest concerns and protection against retaliation. The CoE had previously sought protection for whistleblowers by adopting the 2010 Parliamentary Assembly resolution on the Protection of Whistleblowers, the Criminal Law Convention on Corruption (1999) and the Civil Law Convention on Corruption (1999).

Similarly, the European Commission has reiterated the need for an adequate whistleblowing mechanism, particularly after the disturbing findings regarding the (perception of) corruption in EU Member States (Eurobarometer 2014). According to a Eurobarometer survey, at the European level, 76 per cent of those surveyed responded that corruption is widespread in their own country while 26 per cent of them consider themselves directly affected by corruption.

Furthermore, at the EU level, the Charter of Fundamental Rights of the European Union, a binding document in the EU since the entry into force of the Treaty of Lisbon in December 2009, provides the legal basis of whistleblower protection: freedom of expression,

protection from unjustified dismissal and the right to effective remedies. The European Union has also called on Member States to provide protection for whistleblowers through two EU Directives, namely the Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, and the Directive on Safety of Offshore Oil and Gas Operations. From an administrative point of view, the Staff Regulation of Officials of the European Commission is the most important document setting the rules, principles and conditions of European civil service employees. The updated 2004 version contains two provisions referring to the protection of whistleblowers, namely article 22a and 22b. The rules are considered to have a two-tier structure involving the right to report (if certain conditions are met) and protection of employees from harassment (Rohde-Liebenau 2006).

Employees enjoy the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights. This right may be limited and restricted and the ECtHR has developed case law to determine to what extent the freedom of expression of employees is guaranteed. Article 10 of the ECHR states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ECtHR case law on the protection of whistleblowers is considered to be one of the most obvious impacts of Article 10 on employers' rights (Voorhoof & Humblet 2014). Cases of whistleblowing raise complications insofar as the duty of employees to be loyal and maintain confidentiality or secrecy during their work.[7] In order to balance such conflicting rights, the Grand Chamber has considered a set of six relevant criteria to help determine the necessity of interference with a whistleblower's freedom of expression (*Guja v Moldova*,

[7] Dirk Voorhoof, 'Whistleblowing in Europe: The Case of EULEX and Maria Bamieh (Welcome and Introduction Note by Prof. Dr. Dirk Voorhoof during a Speech of Maria Bamieh Organised on December 2, 2014 at Ghent University)' (2014).

ECtHR 2008). In this case, the applicant Iacob Guja was dismissed from his position as the Head of the Press Department of the Moldovan Prosecutor General's Office for leaking two documents contrary to internal regulations revealing that Vadim Mişin, the Deputy Speaker of the Parliament had exercised pressure on the Public Prosecutor's Office. Based on article 10 of the ECHR, he complained to the ECtHR, who found a violation of the right to freedom of expression. In assessing the case, the Court would look for whether the whistleblower had alternative channels for disclosure, the authenticity of disclosed information, damage suffered by the public authority, whether the whistleblower acted in good faith, the motive behind the action and the penalty imposed.

EU Review Wrongly And Superficially Applied Guja V. Moldova Case

From the office of the High Representative of the European Commission, Federica Mogherini ordered a review of EULEX's handling of corruption allegations (EEAS 2014). The final report drawn up by law professor Jean Paul Jacqué for the EC and published on 14 April 2015 reveals that European Union institution employees reporting irregularities do not enjoy protection under the right to freedom of expression (Jacqué 2015). In examining whether Bamieh could be considered to be a whistleblower, Jean Paul Jacqué erroneously applied the cases of *Guja v. Moldova and Heinisch v. Germany, ECTHR 2011*. While the report refers to these two cases, it nevertheless fails to apply the six criteria correctly, since it mentions four of the principles but only examines three while omitting the other three.

An assessment of the Guja v. Moldova principles applied in Bamieh's case was published in the Strasbourg Observer (Kusari 2015).

> *Public interest* – the report's assessment erroneously confuses this principle with the criterion of good faith (motive of the whistleblower). According to the report, "she [Bamieh] stated that she had chosen this solution on account of her suspension. If that were the case, she would not have been acting in the public interest." The Court, however, established that when assessing public interests, one should consider whether the public has a legitimate interest in being informed of important matters (see §88 in Guja v. Muldova). The information provided by Bamieh concerning EULEX's failure to properly handle her request for internal investigations, which is also confirmed with the review report, is clearly a matter of public interest.
>
> *Alternative channels for disclosure* – the report states that Bamieh could not be considered to be an external whistleblower because "the information was disclosed to the public before the international procedures and judicial proceedings were completed". Firstly, it is not clear why the report made a distinction between internal and external whistleblowers. Secondly, whether international or judicial procedures have been concluded is not an ECtHR requirement. The Court has instead established that when the prescribed procedure for reporting such matters is unavailable and the alternatives are ineffective, external reporting, even to newspapers, could be

justified. The report confirms that EULEX operated without any rules on whistleblowing and consequently the reporting alternatives were ineffective because, as the report bears out, an investigation should have been opened from the outset, which did not happen.

Authenticity of disclosed information – the report initially mentions but fails to apply this principle when evaluating Bamieh's status. Neither EULEX nor the EU review report contested the authenticity of the documents leaked to media.

Good faith – as mentioned above, the report wrongly applied this principle. The ECtHR has established that an act motivated by personal grievance, personal antagonism or with the expectation of personal advantage would not justify a particularly strong level protection (Guja v. Moldova § 77). The report suggests that Bamieh blew the whistle because of her suspension. While the motive behind such an action is not easily established, it is incorrect to suggest that since it is a matter of fact (as the report confirmed) that she made the request for an internal investigation two years before she was suspended.

Penalty imposed – the report neither refers to nor applies this principle. In assessing the sanction, the ECtHR considers the repercussion on the applicant's career and the chilling effect upon other employees. Bamieh was suspended several days before her contract expired and was accused of "gross misconduct" without the results of investigations concerning who had leaked the documents. Bearing in mind that to date, neither EULEX nor the EU review report has ascertained the identity of the leaker of the document, the sanction could negatively affect the future career of Bamieh.

Detriment to the employer – the report neither mentions nor applies this principle. The ECtHR has found that it is in the public's interest to maintain confidence in public institutions (Guja v. Moldova §90). The conclusion drawn by newspapers that a few employees of EULEX are allegedly corrupt certainly had a negative effect on public confidence in rule of law institutions. However, the public interest in being informed on how EULEX handles allegation for internal corruption is important in a democratic society and might even outweigh interests in safeguarding public confidence in this mission.

Legal Framework To Report Irregularities In European Union Civilian Missions: Which Legal System Is The Right One?

Existing legislation and mechanisms protecting the disclosure of irregularities within the public and private sectors are best put to the test when employees blow the whistle and become eligible for protection. As elaborated above, there is a legal and judicial-legislative

framework in place that aims to protect whistleblowers, though it has been considered to be weak (Worth 2013). Whistleblowers reporting fraud, abuse, illegal activities or other misconduct are in a more problematic legal position when they work for EU civilian missions. Walden and Edwards rightly argue that whistleblowing in international governmental organizations is particularly challenging as whistleblowers "operate in a multinational environment [where] international governmental organizations are not subject to the legal regime of any one Member States in most types of dispute" (Walden & Edwards 2014).

Employees working for EUCM, particularly when seconded by their governments, are exposed to three or more legal and judicial systems, thus legal uncertainty puts them in a difficult position to claim their rights in case of violation thereof.

First, their employment contracts are signed with the government of their home country, therefore making one judicial system available, which, in the case of whistleblower Bamieh, would be the United Kingdom. Secondly, the seat or headquarters of the mission is usually in another country. For instance, EUCM operates from Brussels, which makes the Belgian judicial system also relevant for employees if the contract employment is governed by Belgian law. Thirdly, EUCM operates in a third country, commonly in developing countries, where the alleged violations of employees' rights actually occur. In such countries, the local judicial system is less important, bearing in mind that International Governmental Organizations enjoy legal immunities that prevent staff members from accessing national courts in labor [and other] disputes " (Walden & Edwards 2014). EUCM members operating in Kosovo enjoy diplomatic immunity under the Kosovo Law on the Status, Immunities and Privileges of Diplomatic and Consular Missions. In other words, national courts have no jurisdiction in their cases.

For any individual blowing the whistle, it is crucial to have proper internal procedures for reporting misconduct and available courts to file lawsuits against the employer in case of dismissal. Procedures to report irregularities in public and private sectors should be transparent and easily accessible for employees. In international governmental organizations, whistleblower rights are mainly symbolic, and employees risk retaliation believing that they enjoy protection when in fact they do not (Walden & Edwards 2014).

Turning to the present EULEX case, "there is an obligation in all civilian CSDP missions for the staff to report any and all irregularities to the hierarchy. Apart from this provision, there are no specific rules on whistleblowers within EULEX Kosovo" (Council of the European Union 2015). The EU Ombudsperson who closed the inquiry into the Bamieh case noted that "that the EULEX Code of Conduct and Discipline does not provide for any sort of external reporting channel which would allow persons who wish to report potential irregularities within EULEX to turn to a person or authority outside EULEX itself" (EU Ombudsperson 2014). EULEX claims that its Code of Conduct and Discipline is restricted and has not let the

public gain access to it.[8] Further, although this document is not available at the EULEX website, it was disclosed by the General Secretariat of the Council of the European Union after a request for access to public documents. As established by the EU Ombudsperson, the Code does not allow external reporting of potential irregularities.

In the case of EUCM, the issue seeks to determine the available legal framework for whistleblowers. The disclosure of irregularities within the EU and its institutions is regulated under Staff Regulations of Officials of the European Communities. In this regard, an employee can be protected under Staff Regulations wherein Article 22a provides a three-step test to meet to be eligible for protection: (1) the employee shall without delay inform his immediate superior, (2) information should be submitted in writing and (3) the official should act reasonably and honestly.

Bamieh was not an employee of the European Commission or its 'institutions' to qualify primarily for protection under Staff Regulations. However, as she was seconded by the Foreign & Commonwealth Office, she worked for EULEX *de facto*. In assessing whether EULEX can be considered to be an institution of the European Union and consequently whether its staff is bound to the same rules and regulations as EC staff, particular attention should be to the recent opinion of the Advocate General of the ECJ in the case of *Elitaliana v. Eulex Kosovo* that concluded that Eulex Kosovo is not an EU organ or a body but a joint mission of Council and Commission (*Elitaliana v Eulex Kosovo* Case C-439). Bearing in mind the fact that ECJ declared EULEX a mission and not a legal entity, EUCM employees have fewer avenues for exercising their rights.

Given that there is legal uncertainty regarding whistleblower protection for employees of EU international missions, they should be sheltered by their home country jurisdiction when employed by their governments, however this would depend from national legal and judicial system.

Employed as a full-time staff member of the FCO, one could argue that the Bamieh disclosure is entitled to protection under the Public Interest Disclosure Act of 1998 (PIDA). PIDA is among the most comprehensive whistleblower statutes and among the best in the world. Moreover, the UK is considered to be a leader in protecting whistleblowers (Guyer & Peterson 2013). The prosecutor disclosed her allegations of corruption within EULEX to FCO after she initially raised her concerns about bribery and corruption with her line managers. PIDA contemplates the three-step test for protected disclosure. The worker has the right to disclose information to the employer, a regulator or a wider 'audience' (Vandekerckhove 2010). According to PIDA, a "qualifying disclosure" of information is one that tends to show that a criminal offence has been committed, is being committed or is likely to be committed, that a person has failed, is failing or is likely to fail to comply with any legal obligation to

[8] Dragana Solomon Nikolic, Deputy Head of Communication Office of Eulex, 'Request for Access to Public Documents' (23 March 2015).

which he is subject, that a miscarriage of justice has occurred, is occurring or is likely to occur, that the health or safety of any individual has been, is being or is likely to be endangered and that the environment has been, is being or is likely to be damaged. Qualifying disclosures can be made to the relevant regulator if a worker has a reasonable belief that it is made in the public interest. Bamieh disclosed her allegations to EULEX, FCO and media.

Additionally, in Great Britain, overseas workers seeking to bring whistleblowing claims must prove sufficiently strong connection to Great Britain. Several cases involving territorial scope of unfair dismissal have defined how courts would interpret such cases. The case of *Lawson v Serco* established the principle that, in certain circumstances those working outside Great Britain (GB) can make unfair dismissal complaints in GB under the Employment Rights Act 1996 (Higgings 2006). Recently, in *Creditsights Ltd v. Dhunna 2014*, a British national who worked for British subsidiary of a USA company was dismissed for alleged gross misconduct. He was able to bring unfair dismissal claim in Great Britain because, among other circumstance, the Court of Appeal took into consideration the way the employee was being paid. In the case of Bamieh, the British Government paid the prosecutor. However, in *Smania v. Standard Chartered Bank 2014* an Italian living and working in Singapore was dismissed for blowing the whistle. The Employment Appeal Tribunal concluded that the employment tribunal did not have jurisdiction to hear the unfair dismissal claim because the only connection his case had with the UK was that Bank head office was in UK.

It is difficult to establish the rationale behind FCO's decision not to undertake any measure regarding the EULEX case, albeit they were informed about it. The mere fact that FCO 'delegated' the duty to manage Bamieh as an employee to EULEX is insufficient grounds to designate EULEX as the sole institution responsible for protecting Bamieh's disclosure, In my opinion, the UK Employment Tribunal should have been given the authority to deal with this case.

Conclusion

The Maria Bamieh case addressing corruption incidents within the European Rule of Law Mission to Kosovo contributed to the deterioration of EULEX's public image in Kosovo. Public disclosure in international missions proves to be challenging, since many judicial systems and jurisdictions are involved. The Bamieh case raised questions concerning employer and employee rights. This chapter analyzed both the available and the unavailable legal mechanisms on whistleblowing in the European Union International Civil Missions, using the European Union Rule of Law Mission to Kosovo as a case study.

To begin with, it was argued that the case of whistleblower Maria Bamieh revealed that the largest European Union civil mission, costing EU taxpayers approximately €100 million per

year, has no transparent policy on whistleblowing or public interest disclosure. Individuals working for EU missions should have clear disclosure and reporting channels for irregularities, and such procedures should be transparent and available to all employees.

Secondly, as the mission empowered to facilitate Kosovo's path to the European Union and to bring best European practices into this new country, EULEX per se failed to abide by EU legal and legislative practices. The European Commission has committed itself to guarantee protection for disclosure of misconduct by staff regulations and other instruments, though implementation on the ground has proved to be lacking still. Members of the EU missions should enjoy the right to freedom of expression as guaranteed under Article 10 of the European Convention of Human Rights and many other mechanisms.

Thirdly, employees seconded to work for EULEX are exposed to over three legal systems, thus creating legal uncertainty should they seek to claim any right (viz., judicial system of their country, of the country in which the seat of the international organization is located, and of the country where they operate).

While providing a conclusive assessment of the available mechanisms for whistleblowers and potential whistleblowers is a daunting challenge, this analysis argues that whistleblowers should primarily be protected by appropriate mechanisms by the country that seconded staff.

Lastly, the posture taken by EULEX toward whistleblowers could negatively affect the reactions of Kosovar public institutions to potential whistleblowing. The concept of whistleblowing is still relatively new and their reactions could thus discourage potential Kosovar whistleblowers.

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5. Whistleblowing and Disaster Risk Reduction

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> *"Disciplined ordering of the issues may be helpful in many cases, but where the number of imponderables is great, all that may result is the cloaking of ignorance with a layer of false precision." (Turner & Pidgeon, 1997)*

Disasters can be seen as complex systems failures. Irrespective of hazard, misbehaviours generate vulnerability within the system. This chapter will argue that whistleblowing has the ability to inform about hidden vulnerabilities and reduce the risk of disasters. Given that a) whistleblowers tend to first disclose internally and b) there is limited whistleblowing research at management level, the driving question for this chapter is: to what extent is whistleblowing seen as risk reduction by managers? The chapter is structured as follows. First, we introduce the disaster management domain and identify the growing threat of complex disasters. The key concepts of hazard, risk, vulnerability, and cascading disasters, are briefly explained. Having identified the need for Disaster Risk Reduction (DRR) we next look at whistleblowing and some of the qualities it possesses and which make it relevant for our quest to save lives and resources. The following section highlights the prevalence of organisational misbehaviours in disasters, further strengthening the argument for whistleblowing as a way of reducing the risk of disasters. We will then discuss the idea of risk and its different approaches. This section is particularly relevant because understanding how risk is theorized and operationalized by various branches of the academic spectrum is absolutely necessary if we are to carry out scientific research on the whistleblowing/risk pair. The final section discusses the appropriateness of including governance in whistleblowing/risk research. We conclude with specific research questions that management can help answer.

Disasters

Definitions

Disasters represent serious disruptions of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own

resources. Until recently most differentiated between natural and man-made disasters. It has been observed that while the trigger might differ, the way disasters manifest is quite similar and this distinction is hardly ever used these days. Both The United Nations Office for Disaster Risk Reduction (UNISDR, 2015) and International Federation of Red Cross and Red Crescent (IFRC, 2015) distinguish between various types of hazards while avoiding the use of the term 'natural disaster'.

Hazards are events or physical conditions that have the *potential* to cause fatalities, injuries, property damage, infrastructure damage, agricultural loss, damage to the environment, interruption of business, or other types of harms or losses (FEMA, 1997). We focus here on hazards capable of forcing a disaster; cigarette smoke, though a hazard to public health is unlikely to cause an event large enough that it requires the attention of the disaster management community. A nuclear power plant failure, on the other hand, could.

Risk can have different meanings depending on the context. The variance may stem from its dual origins. The Arabic *risq* means "anything that has been given to you [by God] and from which you draw profit" (Kedar, 1970), perhaps hinting at why some use it to refer to opportunities. A more appropriate source for its use in disaster management, where it is always used with a negative connotation, seems to be the Latin *risicum*, denoting sailor's attempts to circumvent dangers. One of the simplest and most used interpretations of risk is that which equates it to the likelihood of an event materialising multiplied by its consequences, were it to occur: risk = likelihood x consequences (Ansell & Wharton, 1992).

Vulnerability is the reason why two identical events cause a minor disturbance in one country or organisation and a disaster in another. It simply represents the propensity of a system to incur the impact of a hazard. Vulnerability and *resilience* (propensity to avoid loss) are the opposite ends of an axis. The axis is made up of the extent and grade of social, political, economic and psychological means that the disaster impacted person/group/organisation/society has at its disposal so it can respond to the disaster, short and long-term (Blaikie *et al*, 1997; Coppola, 2007; Wisner *et al.* 2004; Cardona 2004).

Cascading disasters happen when two or more disasters occur at the same time, with one disaster triggering a secondary hazard. Fukushima is an example of a cascading processes where the primary hazard (earthquake) generated a secondary hazard (tsunami), which in turn created a third hazard (nuclear meltdown). These types of disasters make risk management and response and recovery operations more difficult and increase the risk of harm to victims and respondents (Coppola, 2011).

Disaster Management

Disasters have negatively affected humans throughout history. As a response, societies have made attempts to reduce exposure to the effects of these disasters, develop measures to deal with the initial impact, and recover. Irrespective of approach, all these efforts serve the same purpose: disaster management. In May 1994 UN member states developed the

Yokohama Strategy and Plan of Action for a Safer World. Below are some of the principles that the participating member states agreed to be applied to disaster management within their own countries.

1. *Risk assessment* is a required step for the adoption of adequate and successful disaster reduction policies and measures.

2. *Disaster prevention* and preparedness are crucially important in reducing the need for disaster relief.

3. *Early warnings* of impending disasters and their effective dissemination are key factors to successful disaster prevention and preparedness (ISDR, 1994).

Disaster management typically has a four-phase approach:

1. Mitigation (reducing or eliminating the likelihood or the consequences of a hazard, or both)

2. Preparedness (equipping people who may be impacted by a disaster with the means to increase their chance of survival and to minimize their losses)

3. Response (acting to reduce or eliminate the impact of disasters that have occurred or are on-going)

4. Recovery (returning to 'normal', or even better, a state of increased resilience)

Every country, every society, and every organisation is unique in terms of: a) its vulnerabilities and the root causes of these vulnerabilities, b) risk perception and the methods used to identify and analyse it, c) the structures and systems designed to manage risk, d) the statutory authorities that manage risk and the events that do actually occur, e) the mechanisms that respond to disaster events and their capacity (Coppola, 2011)

Disasters adversely affect development by diverting portions of GDP to manage the disaster consequences such as the destruction of critical infrastructure (bridges, airports, sea ports, communications systems, power generation and distribution facilities, and water and sewage plants) that takes years to rebuild. Effects are much larger for poor countries. On a global scale the number of disasters, as well as their cost, is increasing at an alarming rate. Thirty years ago, the economic impact from any given disaster rarely reached the billion-dollar mark, even after accounting for inflation. Today, several each year reach this level. By the year 2000, the cost of disasters had reached $60 billion per annum, as measured by the international reinsurance firm Munich Re.

If we take the classical view and split disasters into technological and natural, we find that since 1980, the number of reported technological disasters has increased significantly, at a much higher rate than that seen in the increase of natural disasters. Also, disasters on the whole are becoming less deadly; however, the number of people dying as a result of technological disasters is rising (See Figure 1) (Coppola, 2011)

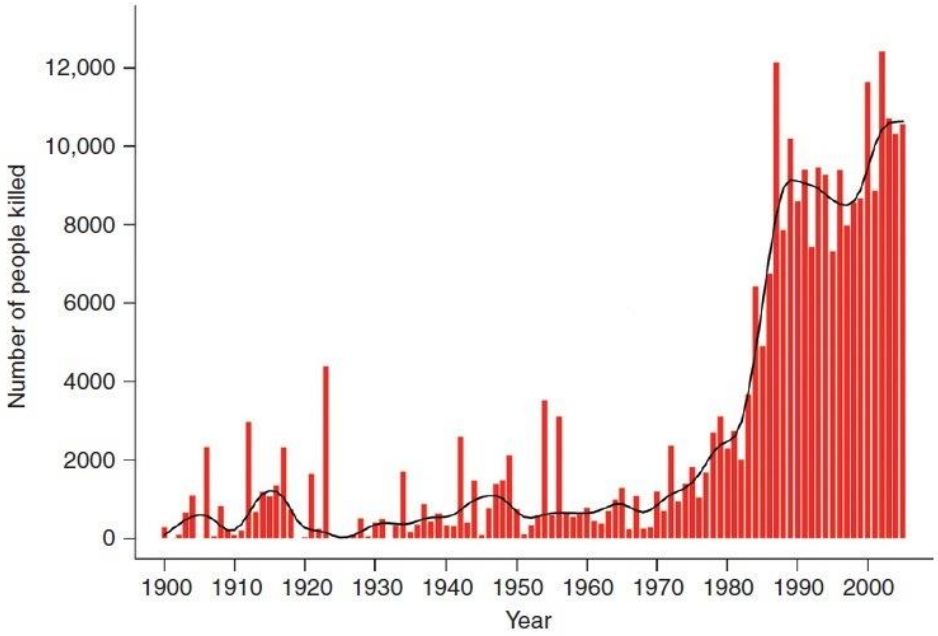

FIGURE 1 Total number of people killed in technological disasters, 1900–2005. (From the International Disaster Database, www.em-dat.net; in Coppola, 2011)

An argument can be made that there is no such thing as a natural disaster. The seismic, meteorological, hydrological, and other forces that result in natural hazards are natural processes that occur irrespective of the actions or existence of humans. Tsunamis have washed the shores of Japan since before man lived beside them. Disasters are the result of humans placing themselves directly into the path of these normal natural events. The United Nations' risk reduction document *Living with Risk* embodies this concept, saying, "While most natural hazards may be inevitable, disasters are not" (ISDR, 2004). United States Geological Survey (USGS) scientists Susan Hough and Lucile Jones aptly captured this line of thought when they wrote that "earthquakes don't kill people, buildings do" (Hough & Jones, 2002). This gives us a sense of how important mitigation, the first phase of disaster management, is, and how it becomes crucial to identify hidden vulnerabilities before they are put to the test by a hazard.

Disaster management is a complex undertaking. Nations seem to agree that risk assessment, disaster prevention and early warnings are keys to a safer world. At the same time disasters are becoming more costly and affecting more people, with variations in institutional readiness becoming more important. In this context the author next introduces the concept of whistleblowing, a sort of early warning system that can make risk assessment and disaster prevention easier.

Whistleblowing

'Whistleblowing is the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to affect action' (Near & Miceli, 1985: 4). The health of institutions and modern regulatory processes depends on their ability to allow organizational insiders to speak up about wrongdoing and to take appropriate corrective measures. The subject is therefore far-reaching in terms of its complexity and consequences (Lewis et al, 2014).

Whistleblowing research has focused on the whistleblower (Bjørkelo, 2010), on the nature of the disclosure (Park & Blenkinsopp, 2009; Park et al, 2008), on the type of organisation involved (King, 1997), on retaliation (Near & Miceli, 1996; Rehg et al, 2008) and on protection offered to whistleblowers (Vandekerckhove, 2006). Cultural and legislatorial changes are pushing organisations to act, or at least to seem to act, in an ethical manner. Stakeholders' role in management decisions has increased. In spite of all this there is relatively limited research at management level (Roberts et al, 2011; Vandekerckhove et al, 2014).

Rothschild and Miethe (1999) give whistleblowing the role of watchdog for society vis-à-vis the unethical behaviours of organisations. It is a way to save lives, prevent injury and death, stop corruption, waste and exploitation. For Miceli et al (1991) it is a pro-social behaviour that can prevent or remedy organisational wrongdoing. It is inter-connected with political accountability, freedom of information and human rights making it a very complex issue and as such in need of further understanding (Latimer & Brown, 2008; Vinten, 2000; Edwards et al, 2009). Rehg et al (2008) think whistleblowing is important for organisations because of the rate at which it seems to be increasing and because the legal environment is becoming less supportive of organisations that retaliate. Disseminating information allows, for reasoned choices on significant issues, debate and wise decision making aiding the democratic process (Johnson et al, 2004).

Whistleblowing can be seen as an aid for the democratic process (Johnson et al, 2004), as a watchdog for society regarding firms unethical behaviour (Rothschild & Miethe, 1999), as an additional cost to hiding fraud (Schmidt, 2005), as a tool to monitor emerging risks (Johnson

et al, 2004), or as a way of reducing risks associated with sloppy or unethical management (DeCelles & Pfarrer, 2004; Pidgeon & O'Leary, 2000; Blagesu et al, 2005).

Whistleblowing in an organisational context has been researched since the 1970s but only recently has society validated it outside academic circles by offering whistleblowers protection. Different governments protect different types of whistleblowing against different types of retaliation. Various reasons are put forward by governments that choose to protect those that make the disclosures. Legislation usually avoids the term whistleblower, sometimes because of its negative historical connotations, particularly in countries where delation of political opponents was encouraged (Lewis et al, 2014). Some see it as a way of saving money, others as a way of averting disasters (Vinten, 2000; Ionescu, 2012). Flowing from their underlying thinking these policies protect only certain disclosures. Sometimes, as is the case in Romanian legislation (Legea nr. 571, 2004), there is a role-prescribed duty to blow the whistle (Leys & Vandekerckhove, 2014). This is doesn't appear to be feasible (Vandekerckhove & Tsahuridu, 2010) as the zero number of people brought to court for not blowing the whistle in Romania since the law was enacted in 2004 does seem to indicate. In 2012 the US has extended whistleblower protection in direct link with safeguarding *critical infrastructure* (WPEA, 2012).

The differences whistleblowing research observes between countries, industries or policy areas are relevant variations on underlying themes derived from 'the reality that corruption and malpractice can arise in any institutional setting, as can the reporting of it' (Lewis et al, 2014: 3). Whistleblowers will normally report internally to the organization before they decide to blow the whistle externally (Lewis et al, 2014). Given that the average loss that a company sustained because of fraud in 2007 was US$3.2 million and that whistleblowers were the most effective source in detecting corporate crime (Price Waterhouse Coopers, 2007), it is becoming increasingly clear there is a need to analyse the attitudes and behaviours of those who receive these disclosures. However, 'there is no research that explores managers' perceptions of whistleblowing in relation to the contributions it can make to the accomplishment of organisational objectives and [Enterprise Risk Management] ERM' (Tsahuridu, 2011).

Whistleblowing is a complex issue because of the nature of what is revealed and because of its far-reaching consequences. Though there seems to be accord in academia on its societal merits and countries increasingly legislate to protect whistleblowers there is limited research on the way managers frame this resource.

Whistleblowing Is Disaster Risk Reduction

Approaches To Disasters

The way disasters are understood by academia and practitioners varies considerably. Overall three perspectives stand out (Hilhorst, 2004). The first is a top-down approach where the hazard comes from outside society (except for technological disasters where it stems from a socio-technical realm) and poses a measurable risk to people, buildings or the environment. The elements at risk are vulnerable and by supplying them with technical know-how and financial support they will become more resilient. The aim is to reduce risk by reducing its likelihood or its consequences should it materialise (Coppola, 2007; Alexander, 2002; Wisner et al, 1999; Bankoff et al, 2004).

The second is a bottom-up approach where the hazard (though not negated) is seen as a triggering factor. Social, political and economic systems interact and generate differences in access to resources (of any kind) as well as exposure to hazards, making some vulnerable and others resilient (Wisner et al, 1999). Technical solutions are portrayed as culturally or economically inapplicable or inadequate (Cardona, 2004). The solutions are to be found at the grass roots level with local people using local knowledge to increase their resilience.

The third is a complex systems approach. Particularly with socio-technical disasters one can see how complex systems (an oil storage facility, a space ship, a nuclear power plant) that have predictable interactions between their components can suddenly and massively change structure (it all explodes) with only minute variations in their components. It‘s not the variations but the interactions of those variations that amplify to produce the consequences. When another complex system (i.e. humans) is added to this equation the number of interactions and descriptions or interpretations of those interactions greatly increases. This vast number of interactions might indicate that there can be multiple perspectives, one not necessarily excluding the other. From these perspectives corresponding solutions flow (Hilhorst, 2004). What this means is that the same issue (a disaster of one kind or another) can have multiple, equally effective, solutions. One way of finding a solution is to look at the nodes (the connection points where multiple interactions intersect). It is argued that whistleblowing’s ability to inform on hidden vulnerabilities makes it one of these nodes and, as such, a part of DRR.

The Disaster Of Misbehaviour

Two commonalities stand out when looking at the seemingly different Deepwater Horizon oil spill in the Gulf of Mexico - 2010, the Three Miles Island accident - 1979, the Exxon Valdez Oil Spill - 1989, the Piper Alpha oil rig explosion - 1988, the capsizing of the Alexander L Kielland rig – 1980, the collapse of Enron - 2001, the Bhopal gas leak - 1984, and the Space Shuttle Challenger in-flight breakup – 1986. First, the inquiries that followed them tended to contain ‘a sad litany of what went wrong, procedures bypassed and ignored, and undue risk taken’ (Vinten, 2000). Second, we observe that in many, if not all, of these cases there were

individuals that were in the know, potential whistleblowers, who may have spoken up but were over-ruled or silenced (Vinten, 2000).

One cannot blow the whistle on an earthquake. Yet when we analyse what makes us vulnerable to that earthquake, or other hazards, we find there is plenty to speak up about. The case of Fukushima is a telling one. It was a nuclear meltdown that followed a magnitude 9.0 earthquake and a 15-metre tsunami and it was quite simply an interactive complex systems failure (Hilhorst, 2004; Perrow, 1999). Some sub-systems were technical, some were psychological while others were sociological (the list if far from exhaustive). It was also typical of cascading disasters. The earthquake and tsunami acted as stressors on the system. One weak node was that Tokyo Electric Power Company (TEPCO) management falsified safety records (Reuters, 2011), making the plant vulnerable to this exact scenario. Yet again we see a clear need for whistleblowing research at management level.

Risk

The complexity of both whistleblowing and risk makes their combination rewarding for researchers interested in exploring the subject. Tsahuridu (2011: 56) notices that 'despite the overlap between whistleblowing and the identification of risk, these attempts [to improve corporate governance] appear to be independent and to have different processes and objectives.' The author agrees and would like to expand this point by showing the high variability to be found in risk construction and interpretation. It is this variability, among other things, that might lead to different processes and objectives. To make meaningful steps in scientifically linking risk with whistleblowing we first need to understand how risk is constructed and processed.

It was stated earlier that Fukushima was an interactive complex systems failure with some sub-systems technical, others psychological, while others were sociological. It seems reasonable then to mirror this complexity when analysing risk construction and interpretation, for it is only when these different perspectives complement each other can we make full use of them.

From a *technical analysis* perspective risk appears simple. One anticipates potential undesirable effects (quantifiable losses/fatalities) and then uses statistical data or modeling hoping to reveal the cause of the unwanted effect. Its function is to share or reduce risk (Coppola, 2007; Perrow, 1999, Renn, 1992; Turner & Pidgeon, 1997).There are however some very serious limitations when looking at risk this way. First, people's interpretation of undesirable effects is modulated by beliefs and values (Dryden & Branch, 2008). In other words, the same effect can be interpreted as positive by one and negative by another. If HSBC Holdings becomes insolvent because of gross mismanagement, investors and the general public will likely perceive this in a negative fashion. On the other hand, those who

bought cheap credit default swaps on account of its 'A' rating will generally agree it has been quite a good day.

Second, psycho-socio-technical systems generate vastly more complex interactions than average probabilities (Cardona, 2004; Hilhorst, 2004). It is nearly impossible to answer the question 'what determined this event' as we simply cannot replicate it. If we try this in an unbounded system, typical of all the disasters exemplified throughout the chapter, we just end up getting different results every time.

Third, numerically combining likelihood and consequences implies they both matter equally which leads to similar values for very different events (Renn, 1992).Using a quantitative tool (Patterson & Neailey, 2002) such as Risk = Likelihood x Impact one can arrive at the technically valid conclusion that long-tailed risks, low probability/high impact (Taleb, 2012), such as Fukushima are equal in value to a high probability/low impact risk. R=1x9=9x1. The fallacy here is not recognizing that falling one time from nine meters is not the same as falling nine times from one meter[40].

The *economic perspective* of risk moves from predefined lists of unwanted effects to subjective satisfaction vis-à-vis potential consequences. Risk is therefore made a part of cost/benefit analysis and thus becomes useful for individual decision making. The key word here is 'individual' because it leads to contradictory results depending on who is doing the analysing. First, we have communities and organisations that simply choose to live with the risk because the costs associated with mitigating it are prohibitive. A simplified example that highlights the cost-benefit scenario is the use of the automobile. At the moment, over a million road fatalities occur world-wide each year. This is clearly a great risk. With higher costs, car manufacturers could make the cars much safer and significantly reduce fatality rate. This would, however, make cars too expensive for the average consumer. The loss of over a million lives per year is thus accepted for the benefit of having affordable cars (Coppola, 2011).

Second, political and social dimensions influence the economics of an acceptability decision (Viscusi, 1996). Some of the most common criticisms of the process by which risk acceptability is determined are: a) Those with money and vested interests can influence the process of determining the acceptability of risk. Determining risk acceptability, mitigation spending, and regulations, is influenced by politics, so it becomes possible for interest groups to influence those decisions (Mauro, 1995). Not all companies have power, legitimacy and/or urgency on their side in their relationship with the contextual stakeholders (legal, political) but some do (Kroger, 2005, Jennings, 2003; Bratton, 2002). Salient is the balancing between conflicting stakeholders claims (Mitchell, 1997) b) Setting a monetary figure (in cost–benefit analyses) on a human life is unethical. This refers to

[40] For a similar point on risk, vulnerability, and the concept of antifragility - the property of systems to gain from stress and volatility, see Nassim N. Taleb (2012)

involuntary risks that transactions can impose on third parties (Renn, 1992). To the person whose life is placed at risk most monetary figures will seem an inappropriate trade-off. Most risk assessment studies (at least the ones publicly available) do not quote the amount of money to be saved per human life loss accepted. Viscusi (1996) puts the figure at $2.8 million per life saved as an acceptable cost. Any cost greater than $2.8 million per life fails the cost–benefit test. 3. Risk management is usually an undemocratic process (Coppola, 2011). Quite simply those who may be harmed are not identified or asked if the danger is acceptable to them.

> 'Often a determination is made as to how much "cost" it is worth to save that life, usually 2 million dollars. Cost–benefit analysis often overestimates the costs of regulation. It also tries to quantify the unquantifiable, or translate the noneconomic—pain and suffering, illness, and disease—into money. Many consider this unethical.' (Coppola, 2011: 173)

Cost-benefit analysis, as put forward by the economic perspective, does very little to explain risk construction and interpretation, mostly because people use vastly different pathways to make decisions[41]. This brings us to the *psychological perspective*. It focuses on the individual and notices that risk interpretation and corresponding behaviours are modulated by perceived context. In other words, behavioural response is regulated by interpretation of risk and not cause-effect reality (Armas, 2006; Bless *et al*, 2004; Dryden & Branch, 2008; von Winterfeldt & Edwards, 1986). Two people can respond differently to the same event. The event is the same; their interpretation of it is not. It's the interpretation that shapes behaviour, not the event itself. Because risk has to do with *potential* events, something that may or may not happen, to a lesser or higher degree, and with a smaller or larger impact, it requires a higher degree of abstraction. It is this abstraction, the way we think of risk, which shapes behaviours and not the objective risk[42] (see Figure 2). The distance between objective risk probabilities and the probabilities people guess is called 'risk ambiguity' (Camerer & Weber, 1992; Etner *et al*, 2012). Risk ambiguity only holds for high frequency events (house fires, car crashes, earthquakes in Japan) where we have enough data to offer reasonably objective probabilities.

Uncertainty, as a key component of risk, is processed through heuristics (Crisp & Feeney, 2009; Kahneman et al, 1982, Zebrowitz, 1990). Heuristics are 'rules of thumb' that people use to problem solve complex situations and judge probabilities. They have been widely researched since the mid-70s (Tversky & Kahneman, 1974) with Daniel Kahneman receiving the Nobel prize in 2002 for his work on probabilistic theory (a descriptive model of how people choose probabilistic alternatives that have risk, when they know the probabilities)

[41] See bounded rationality. Primarily Herbert A. Simone (1955,1957) but also Ariel Rubinstein (1998)

[42] See cognitive-behavioural mechanisms. A good starting point is Aaron T. Beck (1979) and going a bit further back, Seneca the Younger (1969)

(Kahneman & Tversky 1979). Some of the more widely used ones in research are: a) availability – the easier it is to think of examples of events the higher their perceived probability, b) anchoring – the tendency to rely on the first piece of information, and c) representativeness – incorrectly asserting that the probability of two events is higher than that of either of the two, based on how representative or prototypical one is of that event. Psychological research also offers us ample research on cognitive-emotional characteristics such as locus of control (Riechard & Peterson, 1998), perceived self-efficacy (Kallmen, 2000), or anxiety (Butler & Mathews, 1987), and the role they have in shaping risk perceptions. It seems then quite important that we have a reasonably thorough understanding of these mechanisms if we are to have some success in understanding the dynamics between whistleblowing and risk.

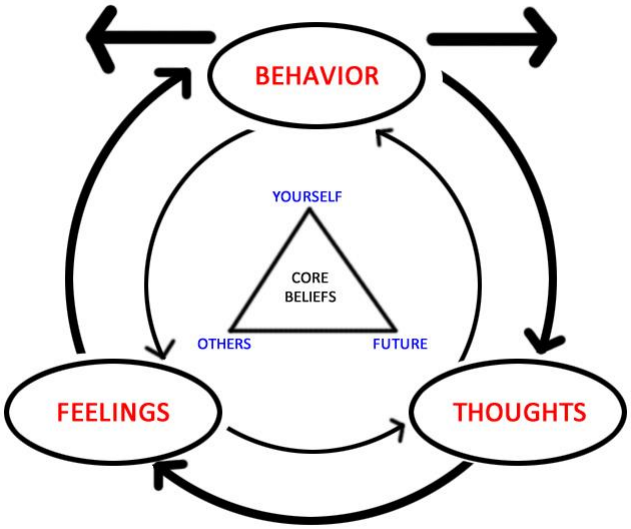

FIGURE 2 Emotions, thoughts, and behaviours all influence each other. Notice the absence of any direct, unmediated, influence of what is outside (objective reality) on behaviours. (From Cognitive Behavioural Theory, https://goo.gl/GtkPj8)

The *sociological perspective* moves from the individual and sees risk as a part of a larger social unit. It looks at social systems, such as communities or organisations, and how they share knowledge about risks through communication (Bankoff et al, 2004). Risk thus becomes a social construct reflecting the values/norms of the group. One of the major limitations of this perspective is that social complexity is reduced to manageable chunks through subjective selection based on that person's/group's theoretical perspective and/or interest (Renn, 1992).

One such model, of how social norms impact risk behaviour at decision-maker level, is Turner's (Turner & Pidgeon, 1997), which although extremely useful in pointing out how organizational life can impact safety, assumes that decision-makers either don't have

enough information or that they are part of a “bounded decision zone” because of culturally accepted beliefs and norms. The underlying assumption is that it happened “despite the best intentions” (Pidgeon & O’Leary, 2000). What the model seems to ignore are the instances where decisions are made rationally, well informed, and without being bounded by norms (albeit as much as they can be), the instances where the “best intention” is directed solely at the decision-maker him/herself (DeCelles & Pfarrer, 2004; Hesst & Ford, 2008). Again, we see plenty of room for whistleblowing to reveal such vulnerabilities.

In our quest to see how whistleblowing might be helpful in reducing risk we have so far looked at some of the major perspectives on risk: (1) the technical perspective is useful for high frequency/low impact events (car crashes, house fires, etc.) but is of limited help when addressing disasters, which are intrinsically low frequency/high impact, (2) the economic perspective and its subjective satisfaction might explain why some will choose to impose risk onto others (usually without the latter being aware of it), (3) the psychological perspective which seeks to discover what cognitive-emotional characteristics modulate risk perception and the behaviours that follow, and (4) the sociological perspective where risk is shaped by beliefs and norms. It is only by understanding how risk is approached, theorised, and, most importantly, operationalized, that we can begin to make the link between whistleblowing and risk part of empirical research.

Governance

Hazard, risk, resilience and vulnerability are all linked. There is no risk if there is no hazard and there is no vulnerability if there is no risk. The way one chooses to interpret hazard, risk, vulnerability and resilience will guide our approach to risk assessment, communication and management. If the acquisition manager of a company is corrupt and accepts low quality pipes for their installation the risk of a hazardous leak or explosion increases and the company and the community they operate in become vulnerable. Surely good governance should be able to resolve this issue? This might be the case. However, if we again look at Fukushima we see that Japan is considered to be a country with very good governance (World Bank Institute, 2010) and yet risk management failed to protect a nuclear power plant from an earthquake and a tsunami in a country that is prone to big earthquakes (Aydan et al, 2001) and where the word ‚tsunami’ comes from.

Good governance can be characterized by open processes, a professional bureaucracy, an accountable executive branch all linked by a strong civil society and all acting under rule of law (Blagescu, 2005). If Japan fits that description then the question is how did its regulatory arm, which also has high quality indicators (World Bank Institute, 2010), interact with TEPCO? By just looking at the numbers Fukushima should have not happened.

The relationship between government agencies and non-state organizational actors is important because a healthy one seems to be a sign of good governance and good

governance seems to encompass good risk management (Hoti, 2004). One might therefore be inclined to look at governance when researching whistleblowing/risk reduction. There are however some issues with both defining and measuring what a healthy relationship actually means in this context. The first is that organizations may interpret scrutiny as a threat (Mannarelli, 1996). This is relevant because if that is the case then one could ask how the organization might respond to such a perceived threat. It is people that make decisions in companies/organizations and people's responses to threats will generally fall under three categories: fight, flight or freeze (Bracha, 2004). Companies can and will influence the political and legal arenas through corruption (Mauro, 1995). If one looks at how a regulating body (stakeholder)(Mitchell, 1997) influences the company then why not also look at it the other way around and see how the company (now a stakeholder) might influence the regulating body. When balancing between conflicting stakeholders claims (Mitchell, 1997); what if some of the claims can be made to go away at a lower price than actually honouring them would involve? There appears to have been a tacit understanding in Japan between its nuclear regulating body and TEPCO (IAEA, 2011) whereby regulators came to work for the organization later on in their careers (Reuters, 2011). If that is the case then one could argue the leadership of this organization chose to fight. Once again we see how disclosure of the state of affairs might have made the organization more resilient.

The second has to do with government agencies. The people in these agencies should represent the interests of the populace by regulating the risks that organizations within their jurisdiction can impose on others (Coffee Jr., 2002; Office for Nuclear Regulation, 2011; Thomas 1998). If the agency is accountable to the society of which it is a proxy (Vandekerckhove, 2006: 284), this should work. The issue is that this rests on the underlying assumption that the people there have a superior capacity to predict disaster when compared to the people that will suffer from the disaster. Expert predictions from risk assessors, or "the new breed of shamans" as Perrow (1999) calls them, seem to have as many errors as the predictions made by non-experts (Taleb, 2007)(for sources of errors, see Heuristics above).

The author sees limited applications for the concept of governance in the scientific study of whistleblowing and risk. The issue is that good governance seems to be a label, that cannot be operationalized, with limited explanatory power and which is constructed on behaviours (controlling corruption, lowering economic risks, maintaining political stability, etc.), and is then measured by looking at those same behaviours. This is similar to the circularity found in trait psychology where the reasoning is A: Why does Daniel get into fights? B: Because he is aggressive. A: How do we know if he is aggressive? B: We measure how often he gets into fights. It's likely more effective, in terms of the scientific quality of our outputs, to limit ourselves to the study of measurable constructs such as risk and whistleblowing, without necessarily aiming to make governance part of the picture.

Conclusion

The links one can find in academic literature between disasters and whistleblowing typically put forward the idea that the latter might help us avoid the former. While this is encouraging it should be noted that in almost all of these articles the links tend to, rightly so, act as justification for why whistleblowing is relevant as a research subject (Bashir et al, 2011; Bok, 1980; Dehn & Borrie, 2001; Lewis *et al*, 2001; Miceli & Near, 1994; Park *et al*, 2005; Sprague, 1998). However, they very rarely focus extensively on disasters and Disaster Risk Reduction. To the author's knowledge there are only three articles that deal primarily with the disaster / whistleblowing pairing: Vinten (1993, 2000) and Uys (2006). There is also a strong argument for whistleblowing management as enterprise risk management initiated by Tsahuridu (2011). There is no empirical research.

People will continue to live in the path of hazards. Our exposure is only likely to increase if current global trends continue. It thus becomes relevant to look for alternative ways to reduce vulnerability. It is observed that organizational misbehaviours create, hide, and externalise risks. Employees are the first to spot vulnerability within their organization and they tend to disclose it internally. Future research[43] should therefore explore this avenue by asking such questions as:

- To what extent is whistleblowing seen as risk reduction by managers?
- Do organisations have the competency and resources to provide internal channels for disclosure of information?
- To what extent does relevant legislation impact current arrangements?
- What is the nature of expected benefits to flow from setting up internal disclosure channels?

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[43] We are currently carrying research in to the way managers perceive whistleblowing as a risk reduction measure. Our research team is Professor Dr. Iuliana Armas and myself. We are based at the 'The Centre for Risk Studies Spatial and Dynamic Modeling of Terrestrial and Coastal Systems' of which Dr. Armas is the head, at the Faculty of Geography, University of Bucharest. We are currently carrying research in to the way managers perceive whistleblowing as a risk reduction measure.

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6. Constructing Selves: Whistleblowing And The Role Of Time

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In this chapter, I draw on empirical data from research into whistleblowing to show that time plays a fundamentally important role in how people see themselves and construct a sense of self, albeit with ambivalent results. When engaged in a long dispute with one's organization, people's interpretations of time can contribute to a slow and effective undoing of the self; perceptions of time act as an obstacle to effective resistance. At the same time and somewhat paradoxically, other more long-term interpretations of time relating to past and future selves, can alleviate the anxiety caused by the experience of whistleblowing and form a source of support. This chapter draws on insights from organization theory and contributes to research on whistleblowing retaliation, and resistant identities, by highlighting the powerful influence of time on resister struggles, and pointing to the political implications of this.

Whistleblowers frequently experience retaliation in response to their disclosures. This is particularly so in the case of those who are forced to go outside of their organization in order to make their claims. Retaliation can take a number of forms from bullying and intimidation to blacklisting in one's industry and in some cases outright dismissal, all of which can lead to suffering (Miceli & Near, 1985; Rothschild & Miethe, 1999). While researchers have, for a number of years, reported on such cases, few studies focus specifically on the concept of time and its subtle impacts on whistleblower experiences. Time passes slowly when one is involved in a dispute with one's organization. Energy levels for the fight deplete, sources of support can grow uninterested and look elsewhere, and one can begin to feel increasingly isolated. Time is, therefore, a significant feature of the aftermath of whistleblowing (Alford, 2001), and has important effects on the outcome of people's struggles.

In this chapter, I draw on recently gathered empirical data to examine the role of time in whistleblower disputes. I specifically focus on the impact of time on a person's sense of self and identity, and argue that time has ambivalent effects, both helping to construct a coherent sense of self that enables a whistleblower to cope with the stress of their situation, while also acting to dismantle and upset such a sense of coherence. In this way, the chapter also contributes to organization studies of resistant selves, an area that has tended to remain silent on the important topic of whistleblowing.

Time and identity

In social theory, it is well established that notions of time are important in people's construction of self identity, their 'identity work' (Clegg et al., 2007; Kuhn, 2006; Petriglieri & Stein 2012; Sveningsson & Alvesson 2003; Thomas & Linstead, 2002; Ybema, 2010). This involves a somewhat unusual perspective on time, one that moves away from notions of 'clock time' that persist in contemporary discourse. Instead of seeing time as somewhat 'homogeneous, linear and uniform in its flow', a phenomenon that is 'objective and absolute' (Lee & Liebenau, 1999: 1038), time is seen as a social construct that varies from one person to another and, as such, is subject to complex social, cultural, and political influences. The different perspectives and experiences that we have of time affects how we see ourselves, and specifically, it influences how the organizations we encounter, influence our sense of self (Brown, 2006; Clegg et al., 2007: 508; Cunliffe, Luhman & Boje 2004: 262).

Comparing our 'past selves' with our present situation, and evaluating these against future selves we aspire to be, is an important aspect of this self-construction (McAdams, 1996, p.307, see also Gabriel, 2012; Sievers, 1986). When we draw on aspects of time in this way, it can help us to establish a comforting sense of self-unity and coherence (Petriglieri and Stein, 2012; Ibarra and Barbulescu 2010). This provides support when we encounter anxieties and difficulties in our present situations, not least our workplace experiences (Brown and Humphreys, 2006; Brown 2006; see also e.g., Czarniawska 1997: 48)

Certain discourses, or shared understandings, of time can dominate in specific organizational contexts. These discourses can provide support for resistant subjects, or can pose challenges to resistant selves. The influence of time on resistant subjects is not predetermined, but rather temporalities can shape different discursive resources in different ways, in particular localities (Kuhn, 2006: 1339). The challenge, argues Kuhn, is for studies of control and resistance to account for the various local ways in which temporality is experienced (see also Brown & Humphreys, 2006).

So we see that time is important in the way people construct identities in relation to their workplaces, and that this particularly comes to the fore in difficult situations. At such moments, if our sense of self has been damaged or challenged by a dramatic change in our circumstances, we are compelled to engage in repair work. It is at such moments therefore that identity work intensifies (Beech, 2008; Ibarra 1999; Lutgen-Sandvik, 2008; Thomas & Linstead 2002). It appears therefore that whistleblowing provides an ideal context in which to examine such dynamics. Speaking out about wrongdoing and, in many cases, jeopardizing one's position, one's professional connections and one's personal relationships, represents the kind of intense personal crisis that is likely to trigger serious identity work. These observations lead to questions of how the experience of disclosing wrongdoing affects a whistleblower's sense of self, and moreover, what role is played by time in this process?

Research Methods

In exploring this, I draw upon data from a recent empirical project that examined, in-depth, people's experiences of having 'blown the whistle' on the financial services firms for which they worked, and engaging in a subsequent dispute with the organization. Over 20 interviews were carried out across the UK, Ireland, Switzerland and the U.S. with whistleblowers from firms including Lloyds, HBOS, AIB, Irish Nationwide, Citigroup and JP Morgan. This data was complemented by analyses of secondary accounts, transcripts of parliamentary debates and public inquiries, interviews with industry experts, and various media sources.

Data analysis began with close reading of the electronic material. Initially it emerged that time, the sheer longevity of the experience of whistleblowing, was a distinct feature of people's accounts. It was common for years to have passed between the initial recognition and reporting of wrongdoing, and a final resolution of the case, if the latter ever was achieved. Reporting wrongdoing, waiting for a response, trying to arrange meetings, waiting for court dates, waiting for settlement agreements, all of these things take significant time. This initial observation led to a deeper exploration of the specific ways in which time affected people's experiences, particularly one's sense of self. I followed a process of open coding in order to identify key sub-themes (Strauss & Corbin, 1990). As with all in-depth, qualitative research, a panoply of important concepts emerged (Alvesson & Willmott, 2002), but I chose to focus on five apparently dominant aspects that related to people's experiences of time: self-esteem, money, the temptation to quit, and past and future selves. In what follows, these are presented in turn. A full presentation of data in the form of relevant quotations is not possible in the space allocated, so indicative excerpts are presented instead.

Findings

Time And Self Esteem

When a person has already been through the process of speaking out about wrongdoing, to then be subjected to a long wait for the resolution of the case, can drain one's self esteem. What counts as 'resolution' differs from situation to situation; for some it is an investigation of the alleged wrongdoing. For others it is its rectification, or formal admission and apology for retaliation suffered. In each case, waiting can be a drawn-out process. As one interviewee noted, whistleblowing can lead to:

> …Not just problems in your own family, but you know, your health is affected. You know… It's a long and lonely road to be honest.

The sheer length of this lonely journey has specific effects, as will be described here.

Long-term unemployment and self-esteem

Being out of a job is difficult to cope with, particularly when unemployment drags on for years. This kind of long-term unemployment is unfortunately a feature of whistleblowing more generally. Despite in many cases having stellar credentials and years of positive evaluations from their bosses, known whistleblowers tend not to be hired again in similar posts (Rothschild & Miethe, 1999). Certainly long-term unemployment greatly affected those interviewed for this study. Eileen Foster[44], who spoke out about the fake documents being used to grant customer mortgages at Countrywide/ Bank of America and recently won the Ridenour Whistleblower Prize for her courage, could not find work after having been let go. She applied for 145 jobs before finally securing one that pays half of what she would have been making at BoA[45]. Yvonne Meehan who blew the whistle on unsavoury lending practices at INBC, has been turned down for over 60 positions. She now believes that, having spoken out, 'I am totally unemployable in financial services'[46]. Linda Almonte, who filed a whistleblower claim against J.P. Morgan in 2010 having been fired for speaking out about fraudulent sales of credit card debt, agrees:

> You Google me, and my name is everywhere… Any company that would hire me will see that. I can never live that down[47]

These highly-qualified, senior people struggle to find work in an industry that requires their skills. Moreover, the perceived longevity of this situation is perhaps unique to blacklisted workers, including whistleblowers— the statistics are frightening in their assurance that people will never again be employed in the role for which they are qualified. As Linda Almonte notes 'I will *never* live that down', while Yvonne Meehan is resigned to the fact that 'I will *never* work in financial services again' [emphasis added]. Studies emphasise the negative consequences of long-term unemployment on one's mental health (Jahoda, 1982; Warr, 1987), but in the case of whistleblowers who are engaged in struggles with their former employer, this can be exacerbated by a perceived sense of finality.

Unemployment and self-esteem: a vicious circle

The long-term unemployment faced by many whistleblowers is of course related to the informal blacklisting that persists in many industries, and notably in banking and finance. However, blacklisting is not the only influence. To be long-term unemployed is itself a

[44] Where data exists in the public domain, individuals have been named. In cases where data refers to personal interviews, names have been changed.

[45] Hudson, M. (2011). Countrywide protected fraudsters by silencing whistleblowers, say former employees. Available: http://www.publicintegrity.org/2011/09/22/6687/countrywide-protected-fraudsters-silencing-whistleblowers-say-former-employees

[46] http://www.ft.com/intl/cms/s/0/e5c1cf4e-4876-11e3-a3ef-00144feabdc0.html#axzz2m9AspXXp

[47]http://www.huffingtonpost.com/2012/05/07/linda-almonte-jpmorgan-chase-whistleblower_n_1478268.htm

stigmatized position, and creates the paradoxical situation of making it even more difficult to feel confident enough to seek work. Gareth Salter had been an internal auditor at a large retail bank before speaking out about the millions of pounds of liabilities that were concealed from pension policy-holders. He discusses the impact that being out of work has on one's self esteem:

> Of course that becomes a kind of…can become a vicious circle, because your low esteem…you know, you find yourself becoming shy even meeting other human beings.

Here, he describes the almost violent change in self that seems to accompany this experience; a well-qualified senior manager has become nervous to even 'meet other human beings.' Time itself, it seems, exacerbates this further:

> After a time, somebody who was, you know, good at their job, successful at it, can turn into somebody who can't even conceive of working with other people in a business environment. They have lost the confidence to even face that situation.

For some whistleblowers, it is important to maintain the charade of being in work, in order to counter a sense of stigma. Some, for example, set up consultancies and other means of providing a 'face' of being employed. Whether they are performing or not, it appears clear that for many whistleblowers, the person who turns up to the job interview has been damaged and depleted in many ways; they are fundamentally different to the confident senior manager that began the struggle.

Self-esteem, time and retaliation

An important point to note is that this severe depletion of self-esteem is frequently related to the tactics adopted by a person's organization. When a whistleblowing claim spirals and reaches the attention of the media and the public, the organization against which the claims have been made can often respond stridently with statements that are intended to discredit the whistleblower. Returning to Gareth Salter, he felt that he had been exposed to this in the course of his struggle against his bank, both in their internal communications about him, and in statements made in court:

> Employers… the easiest thing to do with an opponent, whether a political opponent or a whistle blower, is to brand them….to blacken their name.

In his case, this blackening involved noting in official reports that he had struggled with mental health issues. That these issues had been greatly exacerbated because of the stress of his whistleblowing experiences, was not mentioned. This lead to the ironic situation whereby it was the fact that he had spoken out at all, and been the victim of subsequent retaliation, that had lead to mental health difficulties. Overall therefore, we see how time can exacerbate the depletion of self-esteem experienced by whistleblowers. As time passes, it

becomes more difficult to cope with darker moments, to remain steadfast and continuously oblivious to the negative voices, and particularly when one finds oneself alone in the struggle. The way that time can chip away at one's sense of self was apparent in most of the stories gathered for this research. Importantly, this feature is often hidden; when we pick up the newspaper and read about a whistleblower and their struggles, it is very easy to forget this long drain of time.

Time And Money

Time costs more than self-esteem for the whistleblowers interviewed for this project, it costs money too. People who have been dismissed from their organization find themselves without an income, or on a severely depleted one. In the case of Linda Almonte, who spoke out about the fraudulent sales of credit card debt to external debt collection agencies, it was her limited circumstances after years of struggling that led her to move her family into a Texas motel, simply to keep her children in their schools[48].

In addition to the cost of supporting families, whistleblowers have new drains on their income in the form of legal fees, and frequently counselling costs to cope with the stress of what they are experiencing. As the months pass, these costs grow.

Impacts of financial depletion

Being broke means that you don't have the resources for expensive lawyers. This is a problem when the financial services firm that you are fighting typically has significant means and can thus afford the best representation. Michael Winters, who spoke out about drug money being laundered at a large U.S. bank, describes how it is to be involved in a long and drawn out court case:

> It's David against Goliath. And Goliath has $800-dollar-an-hour lawyers coming out their ears…

So each hourly unit of time that passes represents a difference of 800 dollars between the whistleblower and the organization.

In addition, the longer one is without income, the more likely that one's family will suffer, and this leads to significant self-questioning and pain on the part of individual whistleblowers. Michael Winters continues, describing the pressure he faced:

> The stakes are very, very high. And if you lose, you have lost your job; you've lost your livelihood. And you look at your wife and your three kids and you feel, "I've let

[48] http://www.huffingtonpost.com/jerry-ashton/even-jpmorgan-chase-takes_b_1352870.html

> you down so, so bad. If I'd have kept my mouth shut, everything would be going along fine[49]".

Other whistleblowers frequently described being torn in this way. While many felt that they would have been able to cope with the slow drain of resources alone, watching the impact on one's family was almost unbearable.

Finance and self-esteem: a vicious circle

Interestingly, the high financial costs that accompany prolonged whistleblowing campaigns, also works in tandem with the depletion in self-esteem noted above: something of a vicious cycle emerges in which finance and esteem are intertwined.

A social stigma accompanies poverty and this was keenly felt by the people I interviewed. In fact, one interviewee explicitly asked me not to mention the fact that he was existing on a few euro a week, borrowed from friends, when writing about his experiences. This man was happy for me to discuss the most private details of his case, the suffering he experienced, the impact on his personal relationships and so on; his only stipulation was that I not mention his financial struggles. He kept a smart blazer for interviews with journalists and academics, to give the impression of being well-off. In his view, being seen as poor would do more to discredit his story in the eyes of bankers and financial regulators, than would anything else.

Time And The Temptation To Quit

All of the above mean that the desire to quit can be very strong. Gareth Salter cynically notes how tempting it is, given all of the pressures that time can place on the whistleblower. He writes on his website:

> There appears to be a universal assumption that if they stonewall you long enough you will eventually go away; they are nearly always right in this.

He describes how time has worked in his case:

> It's depressing to fight against so many people. And to be let down time and time and time again. You think maybe *this* person will give me a remedy and you know, it doesn't happen. It's completely gut wrenching, to be honest.

For Linda Almonte at JP Morgan, the pressure of moving her family into motel rooms prompted her to accept a diminished settlement from her bank and stop fighting to highlight the systemic credit card fraud she had witnessed. While settling with the company naturally has problems, it is a very tempting decision. Paul Moore found himself in a

[49] Interview on PBS "Need to Know", 1st June 2010, Available: http://www.pbs.org/wnet/need-to-know/economy/getting-dirty-money-clean/1121/

situation where he was being offered a large sum by HBOS to settle his case. The price would be his silence; he was not allowed to speak out about the problems he had seen in the bank. The pressure was intense; he was stressed and upset having been subject to repeated slurs by the bank, not least through the production of a report by its consultants. This document was ostensibly an investigation into his claims but in fact, as it turned out, it was a damning account of his own shortcomings- the report had the effect of negating his claims. He was in a bad position:

> On the one hand, I wanted truth and justice. On the other hand I had a family and a future to consider. It was a 'right versus right' dilemma... I had to move on[50].

Time had got the better of him, he needed now to move forward. He decided to take the settlement and agree to silence:

> And I must tell you that I did feel schizophrenic and in two minds about it[51].

From these instances, it is clear that the temptation to quit the whistleblowing process, and give up the struggle, is a strong one. Financial pressure, the stress of the ongoing dispute and a wish to return to some level of normal life, are strong incentives to give up the fight entirely, or take a settlement where it is offered[52].

Overall, we see how time appears to impact on people's sense of self in a negative way, involving a slow depletion of one's self-esteem, financial resources and will to continue the struggle. These all affect people's sense of self, whether as family breadwinner, as an employed professional or as a confident and engaged whistleblower who is able to persist. The slow grind of time appears to chip away at all of these subject positions.

Time And Self-Identity

Not all temporal experiences were negative, involving a dismantling of self. People's accounts focused on another more productive aspect of time, relating to past and future selves. While their 'present' experiences were rife with anxiety as described above, it seemed that many found solace in projecting themselves forward into the future, or back into the past, and identifying with this 'temporally distinct' self.

[50] Interview with Paul Moore on Radio 4's The Choice with Michael Buerk, November 3rd 2009. Available: http://www.moorecarter.co.uk/media.html

[51] BBC News (2009), Hardtalk: Sherron Watkins and Paul Moore, 3rd April, Available: http://www.bbc.co.uk/programmes/b00jfdmt

[52] In addition to these pressures, there is often significant encouragement from one's legal representatives, to take a settlement.

Time and past selves

Ronald Eiser evokes his 'twenty-year-old self' when discussing his present commitment to sticking with his campaign to reveal how he was mistreated by his former employer for blowing the whistle on its facilitation of large-scale offshore tax evasion. He describes a commitment to "doing the right thing" that he had long held and was not going to give up on:

> Even at the age of twenty or twenty-two, I played soccer in Switzerland and the UK. They tried to bribe me and I didn't take the bribe. Actually, I did the contrary to what they wanted me to do.

He discusses how his 'present' self relates to this past ethical stance:

> [Now] I think I'm pretty solid in that point, even though I could have used the money very well… I think, basically, I haven't changed that much I would say, but I have learned a lot[53].

Gareth Salter describes how, in his family, there is a legacy of truth-telling that stretches back to his ancestors who worked diligently as social reformers and philanthropists, often acting against the wishes of the powerful in society.

> I am descended from a long line of social reformers: all mad! One has his portrait hanging in the Trade Union Congress House. People like him were the fighters of their day. And *his* sister was a philanthropist who fought to improve conditions for girls in workhouses. She was a fighter. Hated by the establishment.

For Gareth, his ancestors, like him, were the kinds of people who stood up against wrongdoing. Not only did they form a source of inspiration by their good deeds, but he felt that there was almost a biological determinism in their genetic influence on his own actions today:

> These things are genetic; in my family there's a tendency towards refusing to kowtow. My family has a slogan: "by damned!" The moment someone tries to put on you, you resist. We dig our heels in and we don't move. So yes, I suppose I have a strong moral sense.

So, for him, a strong legacy of truth-telling is located in his own family's past.

Time and future selves

This temporal perspective stretches back into the past, but also reaches forward as whistleblowers envisage future selves, and future others.

[53] Eiser interview

For Yvonne Meehan, it was her future self that concerned her, when blowing the whistle. She discusses how she decided to be the person to testify in court against a problematic bank CEO who had engaged in highly unethical lending practices:

> Somebody had to do it. I was chosen from above, I don't know… But somebody had to do it. I would personally say, "Stand up and be counted…" Looking back, I don't want to be [saying] in twenty years' time, thirty years' time, "I wish I had done something."

Yvonne cannot bear the thought of her future self-regretting her silence, had she done nothing. As with many others however, her actions were not without consequences:

> I did it, I have done it, but I will never get a job in financial services again… You know, it's been tough, but I will not be one of these people… I won't be one of the people that I worked with for ten years, I won't be one of these people….um….who has been in the bank for a long time, looks back and says, "God I wish I had the opportunity [again]…"

For Yvonne, regardless of how difficult things become as she finds herself ostracized from employment opportunities in her chosen industry, she is adamant that she will never 'be one of those people' who have traded a secure and long-term position, for ignoring the terrible problems that were taking place. Staying true to her future self seems to be an important source of strength.

In addition to Yvonne's future self, for others, the influence that their act of 'speaking up' will have on future generations was central. The idea that one's actions will be respected and valued by those to come, appears to be very important for people. As Michael Winters put it so well, when discussing the difficulties experienced by whistleblowers:

> ...At the end of the day though, when your grand-kids Google you, what do you want them to find out about you?[54]

For him, the final judgement, 'at the end of the day' is going to be the legacy he leaves his, as-yet unborn, children's children.

While we saw above that one's historical ancestry was influential for people like Gareth Salter, here we see that for other whistleblowers, they themselves represent the starting point of such a legacy. They hope that their actions will be treasured by future generations. Overall therefore, whether relating to past or future, it seems that many whistleblowers themselves as being temporally located in a long history made up of different selves and different others.

[54] Winters interview

Discussion

Time plays an ambivalent and paradoxical role in people's whistleblowing experiences. On the one hand, it acts as an insidious dismantler of a coherent sense of self, draining people's capabilities for resistance. On the other, temporal aspects that include past and future selves paradoxically appear to help repair this self-coherence, contributing to a stronger and more unified sense of 'who one is'. Moreover it is this very sense that grants such whistleblowers some comfort from the stress, anxiety and pain of the struggles in which they find themselves. In this way, temporal constructions appear to support and uphold the adoption of a courageous stance, and to enable it to be maintained. Time therefore can act as both the weapon, and the salve that heals.

This speaks back to debates on time and the role of self-identity in organizational resistance struggles. When observing such a dispute that drags on for years and years, we can often assume that the person who emerges at the end of the process is 'the same' as the individual who began it, is self-identical to the employee who raised the issue all those years ago. However, here we see how the slow draw on of time can change a person (Rothschild and Miethe, 1999), in ways that are not easy to foresee or predict. In addition to these insights, the following points merit further consideration.

Performative Aspects Of Time And Stigma

In this case, we saw the somewhat paradoxical situation in which particular aspects of time act to reinforce each other. The obstacles described above: depletion of self-esteem, of money and of the will to continue, do not 'stand alone' but rather are intertwined in a mutually reinforcing relation. So for example the experience of long-term unemployment contributes to a depletion of self-esteem, which works against people performing well at interview and getting a new job. Similarly, the depletion of financial income can lead to an internalization of societal stigma around poverty, which can in turn drain a person's confidence and self-esteem, along with their ability to resist 'giving in'. So these dynamics act together to reinforce one another.

Most interestingly, we see some whistleblowers strengthening and exacerbating the very obstacles that oppress them. We see people pretending to be busy and employed, even where they are not, or pretending to be more well-off than they are. Such performances surely inform the interested onlooker that the whistleblower's situation is better than it actually is, hiding some of the more difficult aspects.

Political Implications Of Time

An important feature of time is that it is something that the whistleblower cannot control; time is generally in the service of the organization. Being more powerful, it is easier for the organization to decide how time can be managed and deployed as a resource, than it is for the whistleblower. It can therefore be used as a useful method to silence a person who has

spoken out. Dragging a court case out, for example, is easier if you are a large corporation with abundant resources for financing a legal team. This can negatively impact one's self esteem (Fotaki, Kenny & Scriver, this volume). Maintaining a long and protracted media campaign against a whistleblower is another way in which time can be used. Watching as the income of the whistleblower dwindles and savings gradually disappear, and the effect that this can have on their resolve to pursue the fight, is a further "temporal" advantage of the organization.

Limitations

Finally, it is important to note that as researcher, I played a somewhat unwitting role in the generation of data, that must nonetheless be acknowledged. In an interview setting, the interviewee is asked to 'account for themselves' in a number of ways, and articulate their experiences and their place in the world. To do so, people draw on available ideas, descriptions and categories that help with this sensemaking and articulation: the discourses available to them at that particular time. The interview, in short, yields particular accounts that arise in particular settings, and that might have been interpreted and narrated differently in another place and time. As Harding (2007) notes 'memories are acted upon by the peculiar environment of the interview… the interview is (thus) a… self-constituting device' that brings both interviewee and interviewer into being as subjects.'

Conclusion

Research into whistleblower retaliation is important, and as part of this it is vital to draw on lesser-used methods including in-depth interpretive approaches. In doing so, we can add to our understandings of the ways in which less-obvious aspects of whistleblowers' experiences, including time, can have significant impacts into both these experiences, and their eventual outcomes.

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Table 1: Interviewees cited in this chapter

Person	Position	Country	Original observation	Data sources
Paul Moore	Head of risk in Halifax retail bank	UK	Overheated sales culture in mortgage departments posed serious risk to bank's stability and to customer assets.	Radio interview TV interview x 4 Newspaper articles x 12 Testimony to banking inquiry x 3 Telephone discussion
Linda Almonte	Assistant vice president at large retail bank, credit card debt division.	US	Documents were not adequately checked and sometimes falsified, before outstanding loans were resold to debt-collection agencies.	Interview with advocacy representative Discussion with lawyer News reports x 3 Newspaper articles x 3 Court transcripts Email communications
Michael Winters	Money laundering reporting officer	UK	Billions of dollars of Mexican drug money laundered via currency exchanges in knowledge of bank.	Interview News reports video x 2 Newspaper articles x 8
Yvonne Meehan	Senior manager banking building society	Ireland	Inappropriate mortgage lending practices, and false accusation of a colleague.	Interview TV interviews x 2 Book excerpts
Ronald Eiser	Chief operating officer in international bank's offshore location	Switzerland/ international	Bank was helping clients to evade tax in their countries of residence.	Interview TV interviews x 3 Newspaper articles x 8
Gareth Salter	Internal auditor, retail bank	UK	Auditors enabled life insurance companies conceal billions in liabilities, depriving policyholders of deserved income during a banking takeover.	Interview Newspaper articles x 6 Testimony to banking inquiry x 1 Court submission x 1

7. Does Following A Whistleblowing Procedure Make A Difference? The Evidence From The Research Conducted For The Francis Inquiry.

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Although the following definition does not match statutory ones in the UK or elsewhere, researchers frequently rely on it: "The disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action" (Near & Miceli,1985: 4). Using this formulation academics in the US and elsewhere have been conducting empirical studies of whistleblowing and whistleblowers for over three decades (Brown et al., 2014). For example, in the UK surveys have been conducted in schools, further and higher education, local government and the National Health Service (see Lewis, 2006) as well as the FTSE Top 250 firms (Lewis & Kender, 2010).In Australia, a major study in 2006 surveyed 7763 employees from 118 public sector organisations (Brown, 2008). More recently, the UK whistleblowing charity Public Concern at Work and the University of Greenwich published a study of the experiences of 1000 callers to the charity's helpline (PCAW & University of Greenwich 2013).

In June 2014 the Secretary of State for Health, Jeremy Hunt, appointed Sir Robert Francis Q.C.to chair an independent review into creating an open and honest reporting culture in the NHS. The Review was established in response to ongoing disquiet about the manner in which health service employers dealt with whistleblowers and the concerns they raised. In recent years, unsafe treatment and care had been exposed but there was evidence that NHS staff felt unable to speak out or were ignored when they did (Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry 2013). As part of the Francis review (Francis, 2015), the authors were commissioned in 2014 to a) establish a confidential online system for collecting data through surveys, b) to conduct document analyses, and c) interviews.

In this chapter we present our findings in relation to the question: does following a whistleblowing policy/procedure make a difference for the whistleblowing outcome? We first set out the data collection methods used for the surveys, document analysis, and the interviews. This is followed by a section indicating limitations of the methods and samples. We start reporting findings from section three onwards, beginning with results from the document analysis on the nature and content of whistleblowing policies and procedures. We also present our survey findings on this in section three. In the sections after that, we

present our results from the different methods in a triangulating way rather than separately. Hence except for section three, we present the survey results and use findings from the document analysis and the interviews to validate our interpretations. Section four looks at types of concerns, section five at outcomes and management of concerns, and section six at fear and experience of victimization. We then focus on two aspects of the process of using the procedures: availability of advice for whistleblowers (section seven) and the involvement of trade unions (section eight). Finally we draw some conclusions in section nine.

Research Methodology

In August and September that year surveys were conducted of workers in NHS primary and secondary care settings and NHS Trusts. Mechanisms do not exist to communicate directly with each individual member of NHS staff or individual persons working in GP practices and community pharmacies. As a result, these surveys could never be a comprehensive survey but instead aimed to give a flavour of the experiences and views of a sample of staff. For the trust staff it was necessary to use a cascade mechanism set up by NHS England to publicise the survey. NHS England arranged for the NHS Trust Development Authority & Monitor to distribute letters to the CEOs of each trust. It was then left to each CEO (or their team) to determine how best to publicise and disseminate the survey within their organisation, for example, an email to all staff, link in a bulletin, publicity on the intranet etc. An informal telephone check suggests that this mechanism is, at best, variable, with some Trusts using multiple routes to publicise the survey, some adopting one approach and others taking no known action. 15,120 people responded to this survey. However, it is not possible to provide a response rate as there was is no baseline figure for recipients.

In relation to primary care staff, members of the review team sent details of the survey to all Clinical Commissioning Groups and asked that they forward the information to all GP practice managers in their area. They also asked the General Pharmaceutical Council (GPhC) to send details of the survey to all registered pharmacy professionals working in England. 4644 responded to the survey. To our knowledge, these surveys constitute the largest ever piece of research on staff experiences and views about raising concerns.

60 trusts submitted responses, which is a quarter of English trusts. More than one person from some trusts provided responses to the survey. Indeed, overall 411 responses were sent on behalf of trusts and the findings below are based on the number of responses rather than the number of trusts. Although the results may not be representative of trusts generally, there has been a sufficient number of responses to provide a useful picture of how whistleblowing and whistleblowers are being handled in this sector. All the surveys were completely anonymous.

In relation to the document analysis, a ranking of 233 Trusts was compiled by the Review Team based on results from seven questions from the 2013 staff survey (NHS, 2013) relating to raising concerns, error reporting, bullying, and harassment.[1] Thirty trusts were selected from this list (10 top -third, 10 middle -third, 10 bottom -third, randomly).

These were asked to send their whistleblowing policy and procedure, which were often in one document. The Review Team received 21 whistleblowing policies/ procedures: 6 top, 7 middle, 8 bottom. A framework of 17 items was used.[2] These were derived from the analysis of international whistleblowing guidelines (Vandekerckhove and Lewis, 2012) and from the whistleblowing Code of Practice produced by the Whistleblowing Commission for Public Concern at Work in 2013. We think the fact that most of these items overlapped increases the validity of the framework.

In relation to the interviews, a first call for participants was made through the Freedom to Speak Up website which allowed people to put themselves forward. The call was open to everyone working in the NHS i.e. those working both in Trusts and in primary care. The call was administered by Mencap, independently from the Review Team. The call was open from 20 July-15 August 2014 and there were 29 respondents. From these, 22 participants were selected based on their role in the whistleblowing process and the type of Trust they worked in. A second call was then made by Mencap, targeting HR managers and Directors from the 30 Trusts selected for the policy review. This resulted in 9 additional participants. Finally, we completed our sample composition through 'snowballing'[3] 11 additional participants. In total we selected 42 participants but 5 withdrew before the interview took place. This resulted in the following sample (Table 1):

[1] These items were: 1) My organisation encourages us to report errors , 2) My organisation blames or punishes people who are involved in errors, 3) If you were concerned about fraud, malpractice or wrongdoing would you know how to report is, 4) Would you feel safe raising your concern, 5) Would you feel confident that your organisation would address your concern, 6) In the last 12 months how many times have you personally experienced harassment, bullying or abuse from managers or colleagues, 7) The last time you experienced harassment etc did you or a colleague report it?

[2] 1. Who does the policy apply to? 2. What is the scope of concerns that can be raised? 3. Does the policy identify recipients at successive tiers? 4. Is the procedure operated in-house or through an external provider? 5. Does the policy describe the process of what happens with concerns that have been raised? 6. Is the policy clear on confidentiality and anonymity? 7. Is whistleblowing a right or a duty? 8. Are the policies clear on protection and sanctioning reprisals? 9. Does the policy avoid referring to motive? 10. Are whistleblowers rewarded? 11. Are whistleblowers encouraged to seek independent advice? 12. Is there any training provided in relation to the policy? 13. How are concerns registered? 14. How is the policy monitored and who reports on that? 15. Who has overall responsibility for the policy? 16. Are unions and other stakeholders involved in developing and monitoring the policy? 17. Does the policy foresee a review?

[3] 'Snowballing' is the process whereby existing participants suggest additional participants.

Table 1. Composition of interview sample

Role in whistleblowing	n=37
People who had raised a concern	14
HR managers or Directors	11
Other managers or Directors	4
Others: - regulator case handlers - independent case handlers - union experts - support organisation members - coaching experts - solicitors	 2 1 1 1 2 1

Interviews were conducted using questions based on the three elements of Ajzen's theory of predicted behaviour, as developed in Vandekerckhove, Brown and Tsaharidu (2014): attitudes, social norms, and perceived behavioural control.

Research Limitations

Since people were free to choose whether or not to participate in the surveys the respondents can be described as self-selecting. In large surveys of this nature it is inevitable that some potential respondents will have more interest, knowledge and experience than others. For example, those who have raised a concern (successfully or otherwise) might be more willing to participate than those who have not done so or seen others do so. Additionally, those who have had a bad experience or witnessed others being victimised may be more inclined to report than those who were satisfied with the way their concerns were handled.

However, it is worth noting that the proportion of responses received from staff in particular types of trust is comparable to the returns from the trusts themselves. In addition, it can be seen the profile of respondents to the staff surveys closely reflects that of the health service generally in terms of gender, age, ethnic background and direct contact with patients. However, our survey respondents seem to have longer periods of service than staff generally in the health service. This is not surprising since people with lengthy service may have greater commitment to their employer as well as more experience of the raising and handling of concerns at the workplace.

As regards the document analysis, in the ranking of NHS Trusts based on an aggregated score of selected staff survey questions, we relied on data from 2013. Further analysis should take into account the upward or downward trend of the particular Trust over the last 3 years. In relation to the interviews, although the sample included many stakeholders of NHS Trust whistleblowing policies, it was not possible to compose 'nested' samples i.e. which would interview different stakeholders of a particular organisation and hence a particular policy/ procedure. Although it seems immensely difficult to accomplish this, further research would benefit from such samples.

The Nature And Content Of Nhs Whistleblowing Procedures And Policies

The Findings From The Document Analysis

The policies included in our sample showed a considerable variation in how elements of the procedure and policy were worded. However, for ease of reference the findings below are set out in accordance with recognisable headings(Vandekerckhove and Rumyantseva, 2014).

To whom does the policy apply?

Whistleblowing policies should make clear that they can be used for all who work at the organisation regardless of their employment status (employee, volunteer, contracted worker, student, etc). The policies in our sample fell into two groups, with one set of policies clearly indicating that staff includes agency workers, volunteers, and employees of contractors. Other policies are not clear at all about who they apply to. For example, 'staff' and 'all employees' are interchanged without further description; a policy used the wording 'individuals directly employed by the Trust' throughout the text and only extended this in the last paragraph; a number of policies gave a broad description on the header sheet under 'target audience' but not in the text itself.

What concerns can be raised?

Policies should use a broad category of concerns that are relevant to the type of activities of the organisation. In our sample we saw very good examples of contextualised distinctions between grievances and public interest concerns. One policy had a table giving examples of each, e.g. 'an employee's complaint about the type of work he or she is being asked to do that is not covered by his or her contract' would be a grievance, whereas 'a disclosure that an individual has been instructed to carry out actions that he or she believes to be illegal' is a public interest disclosure; or 'An employee's complaint about the hours that he or she is expected to work' would be a grievance, whereas 'A disclosure that the requirements imposed on a group of staff breach the working time legislation' is a public interest disclosure. Such a contextualised table gives more confidence in a policy than an abstract definition. However, many policies simply adopt PIDA stipulations without any

contextualisation. There were also policies in our sample that merely put 'public interest' as a requirement but give no further description of what that is.

Does the policy identify potential recipients at different tiers?

Good policies identify multiple recipients at various hierarchical levels, as well as appropriate external and regulatory recipients. The policies in our sample did identify multiple tiers where staff can raise a concern. Potential recipients at top level include CEO and/or non-executive Directors. All but one also specified external recipients. Some policies included awkward lists, i.e. omitting CQC from recipients, or listing regulators together with advice organisations (without making any distinction). A small number of impressive whistleblowing policies also mentioned the possibility of raising a concern with an MP or the media. However, other policies include a warning against 'rash disclosures' to the media, or even mention media disclosures as unjustified external disclosures.

Is the procedure operated in-house or through an external provider?

All policies we have seen are operated in-house, i.e. there is no whistleblowing 'hotline' operated by an external provider. However, all policies in our sample mentioned the availability of external advice. This included unions, the NHS Whistleblowing Helpline operated by Mencap, and Public Concern at Work.

Does the policy describe the process by which concerns are handled?

Good policies allow various modes for raising concerns (verbal, written, electronic) and will explain the organisational processes for dealing with concerns that have been raised, i.e. how these are investigated and how communication with whistleblowers proceeds. Most policies in our sample opt for raising concerns verbally with the line manager, but require writing beyond that stage. One policy included a specific form in its appendix. Another two policies left it open as to how staff could raise a concern but required managers to keep a log. The sample showed a huge variety in how concerns are processed.

Is the policy clear about confidentiality and anonymity?

Whistleblowing policies need to explain the difference between confidentiality and anonymity, guarantee confidentiality but also accept concerns that are raised anonymously. The policies in our sample often confused confidentiality and anonymity, with the worst examples either not mentioning anonymous concerns at all, or writing 'If you wish to retain anonymity your confidentiality will be preserved.' The best examples were policies that encouraged openly raising concerns, guaranteed confidentiality if requested by the person raising the concern, and also offered the possibility of anonymously raising a concern while explaining the implications for communication and protection.

Is whistleblowing a right or a duty?

Policies need to strike an appropriate balance between whistleblowing as a right as opposed to a professional duty. The acknowledgement of whistleblowing as a statutory right opens the door to the imposition of whistleblowing as a duty through internal organisational policies (Tsaharidu & Vandekerckhove, 2008). To a certain extent this is even conceptually desirable. However, such a duty risks bringing about unreasonable expectations about employees, e.g. making them liable for not raising a concern in organisational cultures that are unsafe with regard to raising concerns (Vandekerckhove & Tsahuridu, 2010). A small number of policies in our sample were problematic in this regard. For example, one policy stated that raising concerns about patient safety was a professional duty but that this was not allowed if the disclosure itself is a criminal offence. Another example is where raising concerns is described as a responsibility under the title 'duties and responsibilities' but no-one seems to have a responsibility to prevent reprisal.

Are the policies clear about protection and the sanctioning of reprisals?

Policies need to establish the organisational framework to make raising a concern safe. To that end, they need to both guarantee protection from reprisal and explicitly state that reprisals will be sanctioned. Nearly all policies in our sample include a statement that those who raise a concern will not suffer detriment, often stating that reprisals will not be tolerated. However, we favour the stronger, positive wording that reprisals against those who raise a concern will be sanctioned. About half of the policies make no mention of sanctioning reprisals. Two policies used problematic wording. One stipulated that reprisals had to be reported as a grievance, and that disciplinary action would be taken if a concern was raised 'frivolously, maliciously, or for personal gain'. Another stated that one 'should raise concerns without fear' and, although it said reprisals would be sanctioned, it did so in the same sentence as stating that unjustified disclosures would be a disciplinary matter.

Does the policy avoid referring to motive?

One of the recent changes to PIDA was the removal of the 'good faith' test. This followed a consensus amongst whistleblowing scholars (Roberts, 2014) and increasingly also amongst policy- makers[4] that malicious whistleblowing occurs if a person raises a concern that she or he knows to be false. The opposite is raising a concern when one has a reasonable belief that it is true. Motive-tests introduce arbitrariness in whistleblowing protection schemes and are counter-productive. It was striking to see that almost all policies included expressions like 'good faith' and 'genuine concern', which carry strong connotations of motive. Three policies even went as far as explicitly identifying good faith, genuine concern, and honesty as conditions for protection. We also saw policies that worked consistently

[4] The Council of Europe Recommendation on whistleblower protection can be seen as the most recent culmination point of a consensus that had been growing over the last decade. See Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, 30 April 2014.

with the recommended 'reasonable belief', but others introduced confusion by using 'genuine' or 'good faith' in addition to 'reasonable belief'. One policy had an original take on this by stating first using 'reasonable belief' but further on stating employees had to raise 'genuine concerns that you reasonably believe are in the public interest'.

Are whistleblowers rewarded?

None of the policies in our sample mention rewards. This is not surprising as there is no consensus on the desirability of rewards (or its effectiveness) in the financial sector, let alone for health care organisations.

Are whistleblowers encouraged to seek independent advice?

It is generally assumed that whistleblowers can benefit from independent advice on how to raise a concern so that they are aware of conditions and requirements at the various stages of the process. In our sample, all but two policies gave at least two suggestions where staff could get independent advice on how to raise a concern or use the policy. This always included unions, and either or both the NHS Whistleblowing Helpline (operated by Mencap) or Public Concern at Work. One policy also listed the CQC as an advice line.

Is there any training provided in relation to the policy?

Research suggests that the aspect of whistleblowing which organisations need to develop most is that of appropriately responding to concerns that are raised (Vandekerckhove, Brown, & Tsahuridu, 2014). Although there is no clear norm as to what constitutes effective training for this, the policies in our sample did not give this item a lot of thought, or left unspecified how they see links with leadership training. Four policies mentioned some management training. However, two of these only provided training for designated leads but not for line managers. A number of policies totally omitted to mention training. Three policies said training consisted of policy awareness only. Two of these mentioned this was to be dealt with at induction. Two policies stated 'training' means updating information on the intranet, and two policies explicitly stated no specific training was needed. One policy seemed to totally miss the point of training by suggesting it is something done after the fact: 'Human Resources Business Partners and Senior Managers across the Trust will be responsible for training and education relating to compliance with this policy in the event that an individual need arises'.

How are concerns registered?

There was a huge variety of approaches to this in our sample policies. A good number did mention the registration of a concern that had been raised as a management responsibility. Others were less stringent. One policy asked managers to 'consider reporting to the Board'. Another policy did not indicate when or how managers needed to register concerns, but did

set out procedures and minuting specifications for 'investigative meetings' with whistleblowers.

How is the policy monitored and by whom?

The policies in our sample also showed a huge variety on this item. Monitoring and reporting on how the whistleblowing procedures and policies work is clearly an element that is not thought through or where Trusts lack established practice. One document stated that the whistleblowing policy would be monitored by considering the number of incident reports. Another indicated that it would do this by looking at grievance and employment tribunal data. Yet another said monitoring would be based on the staff survey data. There was also a policy that stated there were indicators, without specifying what these were. On the other hand, there were also some good examples where policies expressly provided that monitoring would be based on the number and nature of the concerns raised, together with other identified indicators measuring organisational culture. Other good practice seen in sample policies was explicitly stating who would report to whom and when. However, one policy stated HR would annually audit itself.

Who has overall responsibility for the policy?

The majority of policies in our sample identified HR (or the Director of Workforce) as having overall responsibility for the policy. Exceptions were: non-executive Director, Chief Nurse, Governance Team, CEO, Director of Corporate Governance & Facilities.

Are unions and other stakeholders involved in developing and monitoring the policy?

All policies in our sample had involved 'staff side' in the latest update of the document. Unions were also consistently mentioned as a source of advice for staff who wanted to raise a concern.

Does the policy provide for a review?

All policies in our sample mentioned the date of the next policy review. This was nearly always in 3 years' time. However, for two policies it was 2 years, and for one it was 5 years.

The Survey Results

In the light of the longstanding guidance from the Department of Health that trusts should have arrangements in place for whistleblowing, the trusts survey did not ask whether or not trusts had a procedure. However, we did ask who had overall responsibility for their procedure. Of those respondents who knew, 56.6% pointed to the chief executive and 34% to Human Resources. Information was sought about whether the trust has a policy which offers guidance on how to raise a concern about suspected wrongdoing and what protection staff might get if they do so. 78.2% of respondents claimed that such a policy

existed. When asked how such a policy was described, the most frequent responses were "whistleblowing policy" (52.8%) and "policy for reporting concerns" (23.2%). We do not believe that the title of a policy or procedure is particularly vital so long as interested persons (especially potential users) can find it. Thus we suggest that intranet search engines in all sectors should also provide access when people offer any of the following illustrative descriptions: "confidential reporting", "speak up", "public interest disclosure" or "protected disclosure" policies.

By way of contrast, we felt it appropriate to see if staff were aware that their trust has a whistleblowing/ confidential reporting etc procedure. 75% of trust staff and 68.8% of primary care staff stated that this was the case. Although these figures might be regarded as acceptable, we believe that any significant level of staff ignorance about whistleblowing procedures is potentially problematic. This view is reinforced by the results discussed below which suggest that following a procedure can have significant advantages (in terms of safety, satisfaction, etc) for both staff and employing organisations.

When asked who could use their procedure, trust respondents identified a wide range of persons. Most frequently mentioned were employees (78% of responses); volunteers (39.1%); agency workers (38.7%); contractors (26.3%); self-employed (20.8%) and sub-contractors (19.7%). It is particularly encouraging to see that access is afforded to groups who would not have statutory protection under Part IVA of the Employment Rights Act 1996 (ERA 1996), for example, volunteers, patients (18.6%)and members of the public (16.1%). It is not only good practice to allow the widest possible access to whistleblowing arrangements but a matter of self-interest. However, the results from the document analysis are in line with the survey finding that only a minority of trusts identify a broad range of persons that can invoke the procedure. If organisations do not encourage the use of their whistleblowing procedure they risk potentially damaging external disclosures or people remaining silent about suspected wrongdoing.

Trusts were asked whether their procedure encourages people to use particular mechanisms for reporting concerns. The most frequently mentioned methods were: oral reports in person (70.8% of responses); paper reports (60.2%); email (51.3%) and telephone (48.7%). This accords with good practice which recognises that people with concerns often wish to report them informally to their line manager at first instance.[5] However, a range of alternatives should be provided in case these are needed or preferred. Our interview data indicates that problems can arise with the transition from informally raising a concern to raising the matter via a formal procedure:

> "[T]here's a modus operandi which means that you raise concerns about something that someone doesn't want to hear and they start to suggest that you've got performance issues, when they've never suggested it before. So all of a sudden HR is

[5] See below and BSI (2008)

involved, […] deciding to performance manage you because you're raising concerns about something they don't want to hear about. So there isn't any independence at that point. Then you raise concerns more formally, but you're already considered to be a troublemaker because someone's trying to make you look that way." (management coach).

The NHS Terms and Conditions Handbook stipulates that "all employees working in the NHS have a *contractual right and duty* to raise genuine concerns they have with their employer about malpractice … etc".[6] By way of contrast, the NHS Constitution for England states that "staff *should aim to* raise any genuine concern [they] may have about a risk… at the earliest reasonable opportunity" (DoH, 2013: 15 emphasis added). In the light of these provisions, trusts were asked if their procedure states that people should report concerns about suspected wrongdoing and, if so, what form such an obligation takes. Of the 68.5% of responses offering a view, 92% indicated that people should report a concern. For 43.8% of these this took the form of a duty to report, 35.2% pointed to an expectation that staff will report and 13.3% mentioned a request to report. It is clear that a duty to report may cause serious practical problems. For example, the making of allegations prematurely for fear of being in breach of the obligation to disclose information about suspected wrongdoing and the issue of enforcement by management if it becomes clear that many people have failed to report. Thus we think that it is preferable to indicate to staff that, given the existence of detailed whistleblowing arrangements at the workplace (which include safeguards for those who invoke them, training, feedback etc), there is an expectation that they will be used when appropriate.

The Concerns Raised

35.4% of trust staff and 21.6% of primary care staff respondents indicated that they had raised a concern about suspected wrongdoing in the health service. Table 2 shows the reasons staff gave for not raising a concern.

[6] Section 21.1 (Pay Circular) 4/2014.(emphasis added)

Table 2: Reason for not raising a concern about suspected wrongdoing in the health service among trust and primary care staff

Reason trust staff never raised a concern about suspected wrongdoing	**%**	**Reason primary care staff never raised a concern about suspected wrongdoing**	**%**
You have never had any concern	56.5	You have never had any concern	68.8
You had a concern but you didn't know how to raise it	5.3	You had a concern but you didn't know how to raise it	8.2
You had a concern but you didn't trust the system	17.9	You had a concern but you didn't trust the system	7.5
You had a concern but you feared being victimised	14.8	You had a concern but you feared being victimised	10.4
Other	5.5	Other	5.0
TOTAL	100 (n=8851)	TOTAL	100 (n=3341)

Unsurprisingly, the main reason given was that staff did not have a concern. More troubling are the numbers stating that they did not trust the system, feared victimisation or did not know how to raise a concern.

Staff who had raised a concern were asked whether they had used their employer's whistleblowing/confidential reporting procedure. 36.5% of trust staff and 47.5% of primary care staff respondents indicated that they had. Our interview data suggests that people may only look for whistleblowing procedures once they identify themselves as whistleblowers. However, this might be after they have already raised their concern:

> "I've become aware that there are a good number of us that are unknowingly whistleblowers and those that are knowing. There are many employees that raise concerns in the workplace either verbally or in writing and aren't quite aware of what they've done or the potential repercussions of being targeted for it." (whistleblower)

Table 3 reveals the reasons staff gave for not using the employer's procedure.

Table 3: Reason for not using the employer's procedure when raising a concern among trust and primary care staff

Reason for trust staff not using employer's procedure when raising a concern	**%**	**Reason for primary care staff not using employer's procedure when raising a concern**	**%**
Did not know how to use the procedure	12.1	Did not know how to use the procedure	9.3
Had a reason not to use the procedure	33.3	Had a reason not to use the procedure	37.1
Some other reason	54.5	Some other reason	53.6
TOTAL	100 (n=2357)	TOTAL	100 (n=321)

Those who had raised a concern were also asked on how many occasions they had done so in the last five years. Trust staff most frequently stated 2-3 occasions (41.7%) and primary care respondents most frequently indicated that a concern had been raised on one occasion (39.1%). In both surveys those using the relevant procedure were more likely to have raised concerns one or more times than those not using the procedure or not knowing whether one existed.

66.9% of responses from trusts indicated that people should initially report a concern to the line manager. As regards alternatives if needed, 37% of respondents referred to the Head of Department, 24.1% to a person designated by the trust to receive concerns, 23.7% mentioned Human Resources and 18.4% suggested that it depended on the concern or circumstances. Staff who had raised a concern were asked with whom they first raised it. 96.6% of trust staff and 79.7% of primary care staff indicated that they had raised their most recent concern internally. Consistent with the data from trusts discussed above, Table 4 shows that a majority of staff respondents indicated that they first raised a concern with line managers.

Table 4: With whom trust and primary care staff first raised a concern

With whom staff first raised a concern	% among trust staff	% among primary care staff
Datix	6.6	n/a
Line Manager informally	52.3	49.4
Line Manager in writing	7.3	5.4
Head of Department	9.9	n/a
Chief Executive	2.0	1.9
Head/Chair of Audit Committee	0.0	n/a
Clinical director	1.5	n/a
Human Resources	4.9	3.1
Senior Partner	n/a	7.9
Internal Hotline	0.1	0.3
Chair of Governors	0.3	n/a
Senior manager/leader	n/a	10.0
Incident report form	2.5	4.3
A designated person	2.7	8.5
Other internal	7.6	6.5
Other external	0.2	2.6
TOTAL	100 (n=4303)	100 (n=680)

Interestingly, primary care staff who used the procedure were less likely to raise a concern informally with a line manager first, but more likely to go to a designated person or senior partner than those who did not follow the procedure or were unaware of its existence. When asked if they were satisfied with the response to the concern raised internally, 39.5% of trust staff and 53.1% of primary care respondents said they were satisfied. It is noteworthy that in both surveys those who did not follow or were unsure about the existence of an employer's procedure were least likely to be satisfied.

Overall 38.2% of trust staff and 39.1% of primary care respondents took the matter further within their organisation. Perhaps unsurprisingly, those who did not use or were unsure about the existence of the employer's procedure were less likely to do so. Respondents were asked whether the matter was resolved when the concern was taken further within the organisation: 17.7% of trust staff and 14.6% of primary care respondents stated that the

matter was resolved. In the trust staff survey, those who were unsure about the existence of the employer's procedure were considerably less likely to say that the matter was resolved whereas in the primary care survey those who did not use the procedure were least likely to so indicate.

10.9% of trust staff took their concern outside their organisation and those who used the procedure were most likely to do so. By way of contrast, 42% of primary care respondents went outside the organisation with those who were unaware about the existence of the procedure least likely to go outside. One explanation for these results is that procedures themselves provide for unresolved matters to be raised externally, although the findings from our document analysis differ widely on which external routes are identified. Those who were unaware about the existence of a procedure may have been apprehensive about the possible reaction to an external disclosure. In both staff surveys the main reason given for raising concerns externally was lack of confidence in the internal procedure. Our interview data supports this finding and in particular suggests there is a lack of trust in HR independence and in middle management.

> "But a lot of people won't dare to do [raise a concern informally]. And whereas when people are raising issues and just being cut dead, they're taking it as 'oh well maybe it's not my place' and they've not got the confidence to go back and do it again. But I do keep going back and doing it again. […] I tried all the right channels and then thought 'oh you know what, sod it' and just went to the top and spoke to the chief execs." (whistleblower)

No doubt it was with this in mind that the Francis report suggests the establishment of Freedom to speak up guardians. Apart from the practical advantages of having a system of specialist trained recipients of concerns with access to the Board in place, its very existence might suggest to potential whistleblowers that the organisation will take their concerns seriously.

Table 5 shows the external bodies most commonly approached by NHS staff.

Table 5: To whom trust and primary care staff raised their concern externally with

	% among trust staff	% among primary care staff
Professional Body	35.0	53.7
Trade Union	38.0	12.3
MP	7.7	3.7
Health Service Regulator	24.1	32.1
Police	6.2	3.7
Media	1.8	1.9
Public Concern at Work	4.0	3.1
External Hotline	4.0	1.2
Ombudsmen	2.2	2.5
Other	32.1	27.8
TOTAL	100 (n=274)	100 (n=162)

Again, trade unions and professional bodies were more likely to be contacted by those who invoked the employer's procedure than those who did not or were unaware of such a procedure.

The Outcomes And Management Of Concerns

Trusts were asked about the outcome on the most recent occasion their whistleblowing procedure was used. Of the 94 responses, only 1.9% stated that the concern did not merit investigation. 42.3% indicated that there was an investigation but no wrongdoing was identified and exactly the same number said that wrongdoing was identified.[7] 30.8% of responses maintained that the person raising the concern was informed of the outcome and 28.8% stated that such a person was thanked. In terms of who investigates, 42.5% of respondents said that it depends on the concern or circumstances, 32.5% stated that it was the line manager and 25.9% mentioned Human Resources. Staff respondents were asked whether an investigation of their concern was carried out. Overall 42.9% of trust staff and 48.9% of primary care staff indicated that an investigation was conducted. In both surveys those who used the employer's procedure were most likely to indicate that an investigation took place and those who were not aware of the existence of a procedure were least likely.

[7] The wrongdoing was stated to be dealt with in 21.2% of responses but not dealt with in 3.8% of responses.

As regards the outcome of the investigation, overall 73.4% of trust staff and 79.4% of primary care respondents indicated that they were informed about it. In both surveys, those who were not aware of the existence of a procedure were least likely to be told the outcome. 68.1% of trust staff and 75.3% of primary care respondents maintained that wrongdoing was found to have occurred. 82.5% of trust staff and 82% of primary care respondents asserted that the wrongdoing was dealt with. In the trust staff survey, wrongdoing was least likely to be dealt with where the respondent was not aware of the existence of a procedure and in the primary care survey it was least likely to be dealt with where the procedure was not invoked.

The Fear And Experience Of Victimisation

Table 6 shows the detriments incurred by staff after supporting a colleague who raised a concern.

Table 6: Detriment suffered by trust and primary care staff after supporting a colleague who had raised a concern

Type of detriment suffered	% among trust staff	% among primary care staff
Ignored by colleagues	25.4	15.2
Ignored by management	48.2	48.2
Victimised by colleagues	25.6	23.2
Victimised by management	56.3	61.6
Other	13.1	12.8
TOTAL	100 (n=2042)	100 (n=336)

When asked the reason for not raising a concern about suspected wrongdoing in the health service, 14.8% of trust staff and 10.4% of primary care staff respondents said they 'feared being victimised'. As regards the treatment from co–workers and management after raising a concern, 17.3% of trust staff and 16.2% of primary care staff respondents alleged that they were victimised by management. Both trust and primary care staff who used the procedure were noticeably more likely to be praised than those who did not use the procedure or were unaware of its existence.

In relation to the perceived level of safety after raising a concern, more trust staff respondents felt unsafe or very unsafe (30.5%) than safe or very safe (23.1%). Those who were not aware of the existence of a procedure were most likely to feel unsafe or very unsafe and least likely to feel safe or very safe. 29.4% of primary care staff felt safe or very safe and 24.9% felt unsafe or very unsafe. Those who used their employer's procedure were most likely to feel safe or very safe and those who were not aware of the existence of a procedure were most likely to feel unsafe or very unsafe. Overall 41.8% of trust staff said that they would be highly likely to raise a concern again if they suspected serious wrongdoing, although the figure for those not aware of the existence of a procedure is 29.7%. By way of contrast, 77.6% of primary care staff respondents indicated that they were highly likely or likely to raise a concern again. Those who were not aware of the existence of a procedure most frequently stated that they were unlikely or highly unlikely to raise a concern again (22.7%).

The Availablity And Take-Up Of Advice

Trusts were asked whether their procedure states that independent advice is available to a person reporting a concern or considering doing so. 56.3% of responses were "don't know" but, of those who knew, 60.4% indicated that such advice was available. Staff were asked whether they took advice before raising a concern and, if so, from whom. 44.5% of trust staff and 44.7% of primary care staff respondents indicated that they took advice. In both staff surveys, those who used their employer's procedure were noticeably more likely to have taken advice than those who did not use the procedure and those who were unaware that one existed. Trust staff were most likely to obtain advice from a work colleague (70.5%), a trade union (28.2%) or a professional body (16.9%). Trade unions, professional bodies and both internal and external helplines were most likely to be the sources of advice when the procedure had been invoked. Our document analysis showed that most trust procedures gave at least two suggestions where staff could get independent advice on how to raise a concern or use the policy. Primary care staff respondents were also most likely to get advice from a work colleague (61.7%) but a professional body was the next most frequently mentioned source (37.7%). In this survey, trade unions were most likely to be the source of advice where the respondents were unaware that a procedure existed.

The Importance Of Procedures And Trade Union Involvement In The Whistleblowing Process.

Prior to the research conducted for the Francis Review, it had been argued that internal whistleblowing arrangements were desirable in principle i.e. that allegations of wrongdoing are likely to be dealt with more speedily without external pressure; that those raising a concern in accordance with a procedure were less likely to be victimised for disloyalty; and

that such arrangements "contribute to form of organisational justice" by providing opportunities for workers to use their voice (Skivenes and Trygstad, 2015: 18). In the light of the evidence acquired for Francis, it can now be said that there is empirical data which confirm that having a procedure and following it leads to better outcomes for both employers and whistleblowers.[8] Thus the presence of a procedure is associated with it being more likely that concerns will be raised and that this would be with line managers or other designated persons. If the matter was unresolved, following the employer's procedure made it more likely that a concern would be taken further internally and that the whistleblower would be satisfied with the response. Finally, adhering to a procedure was associated with the taking of advice, investigations being conducted and whistleblowers being praised for the action they took.

Conclusions

Whistleblowing policies and procedures provide the norm for whistleblowing behaviour in an organisation. Those who want to raise a concern will look for guidance and instructions in the whistleblowing policy/procedure, as will those who receive or investigate concerns, or oversee due process within the organisation. Hence we can expect that if policies and procedures are to drive behaviour and interactions within an organisation, it is important that they contain the elements and processes considered to be best practice.

In the light of qualitative evidence acquired for Francis, there remain questions as to how the quality of policies/ procedures relates to the culture of raising a concern or speaking up. Indeed, management interviewees acknowledged that the procedural landscape is often a maze that is easy to get lost in. In so far as it provides evidence that those who follow their employer's procedure when raising a concern have better outcomes than others, the quantitative research for Francis is consistent with the findings of Skivenes and Trygstad (2015) to the effect that institutional arrangements really matter: "whistleblowing procedures in fact render such reporting less risky and increase the opportunities for success."

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8. Whistleblowing And Mental Health: A New Weapon For Retaliation?

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Whistleblowing involves speaking out, often jeopardizing one's own position and that of one's colleagues. It involves breaking existing norms of silence and taking risks with unknown outcomes. All of this means that whistleblowing is a stressful endeavor. For this reason, most whistleblowers understandably seek counselling at some point in the process (Alford, 2001; Rothschild & Miethe 1999). Jean Lennane, the former President of Whistleblowers Australia, wrote about the impact of whistleblowing on mental health in the 1990s and described the resulting isolation, removal of normal work, denigration, demanding or impossible orders and referral for psychiatric assessment (Lennane, 1996/2012). She also explained how these lead to many whistleblowers losing their jobs and homes, facing expensive lawsuits, divorce, alcohol abuse, attempted suicide and bankruptcy. Despite such interventions, existing literature on whistleblowers' experiences in organizations tends to overlook the issue of mental health.

Whistleblowers occupy something of an ambivalent position in society. Though the logic of democratic institutions is dependent upon courageous individuals speaking up to publicize wrongdoing in government (Harding, 2014), public (Fotaki and Humantito, 2015) and commercial institutions (O'Brien, 2003; Kenny, 2014), such individuals are often seen as either 'traitorous violators' of a code of fidelity to their organization, or as heroes: martyrs to the cause of transparency and openness (Grant, 2002). Within this prevalent 'saint or villian' dichotomy, there is little in-depth understanding of the high price that whistleblowers often pay for their decision to disclose wrongdoing. The 'afterlife' of many whistleblowers, once the media and public attention their disclosures attract is over can involve a broken career, personal and financial problems, and mental health issues (Smith, 2014).

There is considerable evidence that persons who raise concerns about a danger, risk, malpractice or wrongdoing that affects others in the workplace, can suffer reprisals at the hands of an employer or fellow workers (Burrows, 2001). According to an NBES report,

[1] We are very grateful for the assistance of advocacy groups including: *Transparency International Ireland, the Government Accountability Project, Washington DC, and Whistleblowers UK.*

more than one in five (22 percent) of workers who reported misconduct in 2011 in the USA also said they experienced retaliation for doing so, representing a 15 percent increase from two years ago. Employers and fellow workers may resort to reprisals against those who raise concerns in order to protect the reputation of the organization or of a fellow (often senior) worker (General Medical Council, 2015). Those who utilize an external reporting channel are more likely to be retaliated against (Mesmer-Magnus & Viswesvaran, 2005; Vandekerckhove et al., 2014). Crucially, the characteristics of the wrongdoing - its frequency and whether or not it is deeply systemic - are positively associated with the likelihood and severity of retaliation (Mesmer-Magnus & Viswesvaran, 2005). The level of retaliation often reflects the magnitude of threat represented by the whistleblower's disclosure to the organization's future performance (e.g. Miceli & Near, 2002). This suggests that some organizations will respond defensively to whistleblowers' reports of wrongdoing by deploying all means at their disposal to protect themselves against what is perceived to represent a threat to their survival, even if it hurts and often destroys whistleblowers. This can lead to a cycle that begins with informal bullying and ostracization, dismissal from work and concomitant financial problems, all way thorough to a broken career, the depletion of one's own resources and support networks, and mental health problems for the whistleblower.

The aim of this study is to move beyond the dichotomy of whistleblowers as saints or villains in order to examine these psychological and social implications for individuals who perform their duty and/or act selflessly in protecting the public interest. Our aim is to use psychosocial frames to extend theorizing on how individuals are implicated in the flows of power through their act of transgressing the social norms operating in the organizations they work for, and how organizations punish and discipline them for such transgression. We then examine how, when one finds oneself outside of the social norms, an individual's perception of self is put in question and a painful sense of alienation can result. We take theoretical inspiration from the post-structuralist philosophy of Michel Foucault and Judith Butler who develops his theories by inflecting these through Lacanian psychoanalysis. We discuss these theories in brief before we present our methodology and findings. The study concludes by discussing implications for theory development and policy.

Theoretical Framework

Michel Foucault's work on social norms acting as a discursive form of power can shed light on how definitions of mental illness can construct boundaries around what is considered normal, and how these boundaries can change over time (Foucault, 2006). Systems of knowledge are co-implicated with the in power relations they are meant to serve and are simultaneously a product of these relations. The power-knowledge nexus is expressed through dominant discourses in any given historical period. Foucault has shown how madness, for example, is not a pre-given entity, but something constituted historically

through discourses as both an object of knowledge and a target of institutional practices. Madness is the product of a discourse. Meanwhile 'professional' psychiatric knowledge invents, molds, and carves out its object: mental illness (Townley, 1993). For Foucault however, power is multidirectional and productive; individuals internalize it as they subject themselves to social norms, but they also resist it by transgressing and interpreting them in accordance with their desires -the exercise of power by authorities is never total and complete. This contention is important for understanding both the whistleblower's motivation to report wrongdoing, and their predicament following the disclosure which can act as a form of power interplay between individual and the organization.

Judith Butler, a feminist philosopher and an avid reader of Foucault's work, elaborates on the processes by which individuals internalize these norms through affective appropriation that allows them to exist socially. She developed this by infusing it with psychoanalytic conceptions of subjectivity from Jacques Lacan (Butler, 1997a). Specifically, we draw on her idea that a longing for recognition by our immediate environment (friends, family, co-workers etc.) and through symbolic values (such as loyalty to profession and living through one's own ethics) is a precondition for having a socially viable existence. This recognition through societal norms is conveyed to us by others from an early life, and in fact constitutes us as subjects according to Lacan. The Lacanian subject does not possess a defined and retrievable identity but discovers this through a chain of symbolic significations in relation to literal others (e.g. a carer early on in life) and symbolic norms and prohibitions encountered later on in life (the big Other) while continuously negotiating its desire in relation to these (for a fuller explication, see Fotaki, 2009). Butler uses this notion to theorize individuals' attachments to their identities. Such attachments might even cause subjects to detach themselves from their own embodied feelings, so they can exist socially (Butler, 1990). Kenny (2010) applied Butler's development of the concepts of *ek-stasis* and passionate attachment to explain why people denigrated in the workplace still cling to their jobs.

In this chapter, we use the concept of passionate attachments by individuals to their own identity as dutiful, loyal and committed to his/her organization to explain how whistleblowers may find themselves outside of organizational and social norms while trying to live by and uphold them. Next we discuss methodology and the findings of the study, before proceeding with their analysis in light of the proposed framework.

Methodology

This study utilizes a qualitative interview methodology for data collection and an inductive approach to data analysis that adapts the methodology set forth by Gioia et.al. (2013) for use in this context. Fifteen semi-structured in-depth interviews were conducted with whistleblowers in Ireland, the UK, the US and Europe. The majority of interviews were carried out face-to-face with a small number conducted over the phone where interviewees

were unavailable for in-person interviews. Most interviews were conducted on a single occasion, with two interviews carried out over two sessions.

Data Collection

Interviewees were identified through whistleblower networks, searches in newspapers and on-line media under the term 'whistleblower' and 'whistleblowing', via advocacy groups[2] and through a snowballing methodology once interviews began. A key informant interview with a psychologist who works with whistleblowers was also conducted, resulting in a total of 15 interviews. A short interview guide was prepared with open-ended questions designed broadly to allow interviewees to narrate their 'story'. Interviewees were given scope to provide narrative responses with interviewers following the natural arc of the 'conversation' seeking clarification or asking further questions as they arose naturally. Interviews lasted between 30 minutes and 2 hours. Interviews were voice recorded and then transcribed verbatim. In the following account we have anonymized participants' names.

Ethical Considerations

Whistleblowing is often a psychologically harrowing experience. To minimize any potential distress caused through participation in the interviews, all interviewees were fully informed about the nature of the study prior to participation. Consent was sought for participation and to use the results of the interview in subsequent publications. Interviewees were also informed of sources of support, such as whistleblowing organizations. In some cases, consenting interviewees were put in contact with one another following the interviews in order to facilitate peer support. These measures were considered important to avoid unnecessary distress; indeed, many of those interviewed for this project spoke about the anxiety they felt in even revisiting the painful memories of the past, and sharing their experiences with us. However, studies on interviewing with vulnerable populations have found in the main that participation in research is often a positive experience and most research subjects do not suffer adverse consequences (Biddle et.al. 2013).

Data Analysis

The analysis for this paper followed an inductive, iterative process that consisted of multiple stages of analysis followed by reflection and validation and further analysis, in accordance with what Hammersley & Atkinson describe as 'a reflexive process operating through every stage of the project' (1995:24). Analysis of interview texts involved content analysis carried out through an adaptation of the approach outlined by Gioia et.al. (2013). This, as the authors explain, 'provides a systematic approach to new concept development and grounded theory articulation that is designed to bring "qualitative rigor" to the conduct and presentation of inductive research' (Gioia et al. 2013: 15). This approach was selected for

[2] We are very grateful for the assistance of advocacy groups including: *Transparency International Ireland, the Government Accountability Project, Washington DC, and Whistleblowers UK.*

the following reasons: to avoid researcher bias, to provide space for the subject's 'voice' to be heard and to ensure the greatest possible rigor and validity to the findings.

Findings

Our findings are presented in two parts. First, we outline the ways in which mental health struggles came to the fore at different stages in the process of whistleblowing. From initial spotting of wrongdoing and gathering evidence, through to making one's claim to the organization and on to the aftermath of whistleblowing, stress is everywhere. We present people's experiences to illustrate this. The second part of our findings details the *actual* impact of mental health problems on the process and the outcomes of whistleblowing attempts. Here we show that mental health and stress are not 'neutral' phenomena but in fact have distinct material and political effects that must be taken into account. Discussion of the literature is woven through our data presentation, for the sake of continuity. For reasons of space, we are limited in the data we can present here, but further details are available elsewhere (Kenny, Fotaki and Scriver, forthcoming).

Part 1: Mental Health And Phases Of Whistleblowing

While every person's story is different, many whistleblower experiences have some basic 'phases' in common. At the outset, the person becomes aware of the problems that they feel are unacceptable and must speak out about. Typically, one next raises these issues with a superior or an external body. If the problem is not dealt with by this party, one can find oneself locked in an ongoing struggle with the organization that can lead to resignation or redundancy on the part of the whistleblower. The journey rarely ends there, and can lead to years of conflict through for example protracted legal struggles. As will be detailed here, each stage can give rise to distinct stresses and yield mental health problems for the person involved.

Stage 1: Preparing to whistleblow and the associated stresses

Whistleblowers interviewed for the project described what it was like to go through the actual processes of whistleblowing. It typically involved secrecy, as people gathered the information that they would need in order to make their claims heard about the wrongdoing they witnessed. This secrecy was a key source of stress. One respondent described the nature of the stress she felt, and how it was ever-present:

> *I didn't cry. I think I was more… you're on an emotional roller coaster. You are up and down, and up and down, all the time [Joyce].*

Similarly, another respondent talked about how he felt an ever-present fear of being

caught.

> *It was awful, like, to be honest. I was lying to everybody [Adam].*

As many others found, the 'early' part of the whistleblowing process, when the person is secretly involved in gathering information about what has happened, is stressful. The cause of stress often relates to the internal conflict of having to fight against one's organization. Let us not forget that many whistleblowers are often the most loyal employees, who tend to disclose from a genuine desire to help their organization (Alford, 2001; Rothschild & Miethe, 1999).

Stage 2 Stresses: Challenging the Organization

The next stage for many whistleblowers involves a public or at least overt challenge to the organization. This is particularly the case where internal whistleblowing procedures have failed to offer an effective means of making one's disclosure, as was the case with all our respondents. For many, this is the beginning of an ongoing battle in which the whistleblower is trying to seek support and gain attention for the problems they have witnessed. This phase, the struggle with the organization, is rife with stress.

For example, Joyce speaks of a creeping self-doubt that came about from trying to defend herself during her court case against her former employer, after she spoke publicly about the problems at a big building society operating in Ireland.

> *To prove anything like that, it was really, really stripping me apart. I had to have everything, but how do you prove that? You have to be so [sure], one hundred per cent sure that everything is right…*

Liam who reported a case of corruption involving arms contracts notes how it was almost the source of his undoing:

> *They really… they almost got me. They almost got me. Psychologically they almost got me. I think it had been working on me for some time [Liam].*

He describes his wife's reaction at the time:

> *I know that at one point in time she was very worried about me as to whether I was going to survive. You know, I went through a horrible, depressive year [Liam].*

In Liam's case, as with many others, challenging the organization was a difficult process.

Stage 3 Stresses: Retaliation from the organization and mental health

Many, not all, whistleblowers experience retaliation from their organization, having spoken out. Retaliation can come in many forms, but it often consists of what one respondent described as a strategy of: 'deny, delay, destroy'. Each of these moves on the part of the organization can have its own part to play in diminishing the mental health of a whistleblower.

In Georgia's case, when she spoke out about problems in her former organization, its response was to continually chase her husband for outstanding mortgage loans and demand that these would be immediately repaid. Her husband had worked for the same organization, a bank. Naturally this was a very difficult task indeed:

> *What they did, because obviously they wouldn't give him the finance to finish the houses….then they sacked him, so he didn't have a source of income. And they were threatening him because obviously if you don't have any money, you can't pay the mortgage and yet they were threatening etcetera., etcetera., over arrears.[Georgia]*

It was the struggle against the bank and the severe retaliation that resulted from their side, that led to mental health issues. Georgia describes also the frequent bullying and harassment that she experienced, noting that it was a deliberate ploy to grind her down: '*They wanted to see me break'.*

As with other whistleblowers, in John's case, the organization dictated that he go through some mental health counseling, as a prerequisite. John felt that having been put on psychiatric support essentially undermined the validity of his whistleblowing claims

> *So, basically, then what happened is that I'm then… then they put me on psychiatric support at the Priory Clinic. So, what they do here is they pacify you as somebody with mental health issues. Therefore, there's no validity [John].*

Retaliation by the organization can, as others' testimony shows, take its toll on one's mental health.

Stage 4 stresses: Being outside of the organization

A common aspect of whistleblowing involves leaving the organization as a result of one's disclosure, either by choice or being "forced out". Finding oneself alone and unemployed can be a key source of stress:

> *Even though you know in your heart of hearts you have done the right thing…um…it is terribly difficult not to… If I'm unemployed…..you know, your sense of self esteem is going to be destroyed. [Greg]*

As Greg points out, knowledge that one has done the right thing is some comfort but offers scant assistance when one's financial situation, health and self-esteem have been damaged.

Health and self-esteem, he notes, are related to being part of a 'normal working environment, and so can be damaged when this source is cut off:

> *So, yes, I mean, you know…if you are out of a job because you are a whistle blower and you are cut off from the normal working environment, you know, colleagues etc., etc., you are not….you don't have that fundamental measure of your worth, which is a salary…um…you know, you're self esteem will be very badly affected. [Greg]*

Michael describes how it is to be on the outside of the organization, all of a sudden, and how this can feel from a mental well-being perspective:

> *You are not at work, right? You're at home, right, because you're on sick leave or because you're on … anyway. So all day long, you're churning this. You're not sleeping right, whereas they've got a job to do and they're not thinking about it at the same intense levels and at the same analysis that you apply to it [Michael]*

What Michael notes could be considered as situational- his mental well-being is fundamentally changed because of the situation that he finds himself in. It is interesting to see how it feels to be on the outside looking in. This response, to ask the whistleblower to leave albeit temporarily, is a common one in organizations. Such a situation can lead to something of a spiraling downwards as prolonged unemployment leads to further deterioration of self-esteem, which in turn contributes to a difficulty in getting work. Furthermore, those who are accused of wrongdoing also suffer stress if suspended pending investigation; a long wait for a verdict is difficult to cope with as for example in Tom's and Greg's case.

Our study also showed that contributing to this is a sense of isolation that emerges from the many cases in which whistleblowers find that their former colleagues don't want to keep in contact with them, because of the stigma that they bear. Interestingly, for some whistleblowers, they preemptively isolate themselves, being already reflexively aware that their whistleblowing status renders them somewhat stigmatized in their organizations. Overall, we can see how being outside of the organization, whether one has left voluntarily or been forced out, has many sources of stress and pain attached.

Stage 5 Stresses: When one's name is public

Some whistleblowers find that because of their disclosures, their names have become public. This can itself lead to much difficulty from a mental health perspective. Georgia for example described how seeing her name in the newspapers for speaking out about her bank had led to panic attacks. It came to a head one night, when the widely-publicized TV program was to be screened, which featured her interview and accusations against her former employer:

Yeah, like I'd get palpitations and a few panic attacks when that used to happen, and I opened that front page [Georgia].

This stress was not unfounded, some people reacted badly to the news and publicly accused her of disloyalty. Even some of her neighbors ostracized her because of the publicity:

There are people… across the road who won't speak to me. And another man who kept telling me, you know, "What you should do is, you should leave the country, just leave the country, leave the country…" Like ,you tell me to leave the country like, "go!" A lot of people are like that [Georgia].

Georgia is not alone, research into whistleblowing shows that while people can find themselves isolated and singled out in their own organizations, they can likewise be shunned by those outside, even for years afterwards (Rothschild, & Miethe, 1999, Devine & Maassarani, 2011, p.16-17).

Part 2: The Consequences Of Mental Health Issues

Having outlined the various ways in which stress develops and builds, and mental health issues emerge during the whistleblowing process, it is important to turn to the effects of these. Experiences of stresses by whistleblowers are not neutral, but have distinct results.

Consequence 1: The temptation to give up

Whistleblowers often find that the stresses described above are just too much to cope with, and they give up. One whistleblower for example describes the strong temptation to "give up the fight' because of the sheer difficulty in coping with this kind of issue

I feel hugely….It's depressing to fight against so many people. And to be let down time and time and time again. You think maybe this person will give me a remedy and you know, it doesn't happen. It's completely gut wrenching to be honest. I mean…..um, you know, um, I don't know, people I suppose, quite often people do give up. I mean a lot of other people go on and get nowhere [Greg].

So although he disagreed with the idea of settling and wanted to continue the struggle, the pressure he was under eventually forced a settlement. This was not uncommon. Tudor gave up the fight against the bank too:

I probably did the wrong thing and instead of standing my ground, I actually took the easy way out, which was take the other job just simply because by now my health was beginning to suffer so I'm starting to have anxiety problems, stress related issues, not sleeping, psoriasis, abdominal problems and I just wanted out. I just didn't

want to deal with it anymore [Tudor].

Again, the stress is 'just too much' and he wants out any way possible. It is paralyzing. A number of others found themselves in this situation, that is, they felt forced to settle with the organization because the stress was overwhelming. Respondents' concerns for the wellbeing of their families who provided emotional support, often contributed to these considerations when they decided to settle.

Consequence 2: Whistleblower actively silences the stress through self-censoring, because of the stigma that accompanies it

For many whistleblowers, they are distinctly aware that mental health issues bear a stigma and so they remain silent about them. They do so out of the fear that if people find out about it, they will not be believed. For this reason, whistleblowers often engage in significant emotional labor in order to suppress and hide this aspect of their experiences. Tudor's struggles while whistleblowing were exacerbated by the mental health issues he was experiencing. He described how he could not even tell his friends about what had happened and the mental health issues that resulted, partly because his wife still worked for the same organization:

Some of that social circle know us and, you know, I was known in the bank as well and we've had to … we've never lied to anyone but we've been economical with the truth. [Tudor].

Again, we see how societal stigma, in relation to mental health, came to affect this whistleblower's ability to gain help in the form of support for his struggle by telling his friends.

Whistleblowers respond to the stigma by actively managing and controlling their outward appearance. We noted that many whistleblowers were quite aware that even minor emotional outbursts can be interpreted as someone acting in an extraordinary and problematic manner. Ernest discusses how difficult it was not to get emotional, despite his family being intimidated by private detectives hired by the bank.

You have to control your emotions, even though you know you are being harassed [Ernest].

The self-management of mental health problems and sense of stigma were distinguishing features of those we interviewed. This even emerged during the data collection process, in some cases we were told about mental health problems but asked not to include this in the research, for fear it would somehow damage the interviewee's reputation and lessen their validity in the world.

Consequence 3: Organizations actively use mental health issues as a weapon for retaliation

Above, Tudor described how his organization's poor response to helping him with his mental health problems was simply to do with ignorance in how to deal with mental health, and a creeping stigma around the issue. However, for other whistleblowers, they perceived that their organizations used this issue for their own ends, in a more deliberate manner.

In Ernest' case, his emotional response to being pursued by the bank, after he had blown the whistle, was then used by the bank in their statements to the media, as proof that Ernest was somewhat unhinged. The media often appeared to be in favor of the bank in the dispute, tagging Ernest as a disgruntled employee at best, or at worst, a madman and a mentally ill person.

For Tudor, the relationship had deteriorated after a certain stage, and it came to the situation where his organization appeared to be trying to use his diagnosis against him. He found himself in a psychiatric hospital where he was heavily medicated and in receipt of CBT therapy, EMDR therapy among others.

> *And unfortunately, by this time, the relationship had pretty much deteriorated because it was an 'us versus them' scenario. By the time they came to want to put me in front of an independent psychiatrist, they were sending me medico-legal experts, not clinicians [Tudor].*

In short, the organization had listened to Tudor's disclosures but they had then used his mental health struggles against him in their aim to delegitimize his disclosure. This form of retaliation affects other whistleblowers (Devine & Maassarani, 2011). Accusations related to mental health "work" because we live in a society in which a certain stigma continues to surround this issue, as detailed earlier. It is an insidious ploy, however, because it is often self-reinforcing; people who go through such a painful process generally do struggle with emotional issues at some point in the process and naturally seek help.

Discussion: Paying The Price For Breaking The Norm

In summarizing our findings, we can see from Part 1 that mental health struggles are pervasive, almost ubiquitous, in whistleblowers' stories. For a company planning a strategy of discrediting, however, this provides a wonderful opportunity, as illustrated in Part 2. There are real and material consequences of whistleblowing that can radically reduce the person's likelihood of success. The whistleblower is more likely to simply give in, the more oppressive the struggle with mental well-being. In addition, mental health issues can be actively suppressed by the whistleblower, thus taking them off the table and out of sight,

exonerating the organization from any criticism of these impacts on the person. Finally, organizations can in some cases use information about psychiatric assistance and other related issues, to further demean the person making the claims.

On these issues, we can learn from Foucault's conceptualization of power and from psychoanalytic theorists who have had a lot to say about how we internalize the views of those around us. Clearly, organizations display their disciplinary power vis-a-vis loyal employees who by becoming whistleblowers are cast as deviant and/or mentally unstable so their disclosure can be delegitimized and not trusted. This appears to be the case even as the whistleblowers disclosures save public money and protect the public interest. Mental illness is one of the chief weapons that power configurations in organizations/societies deploy in their struggle for domination. As suggested by Foucault (2006), discourses of madness are drawn upon and legitimized in an absence of fixed biological or pre-discursive essence to the mental illness per se.

Yet, we argue, Foucault's theory alone cannot explain why and how whistleblowers find themselves in such a predicament. Our data demonstrate that anxiety, fear and a significant degree of uneasiness precedes the act of whistleblowing. This suggests at least a partial awareness by potential transgression by potential whistleblowers. Thus, although Foucault acknowledges the productive properties of power, his theory does not offer conceptual tools for understanding the active role that whistleblowers themselves assume in that power play as they ostensibly resist the totalizing imposition of the dominant discourses both by speaking out and realizing the negative consequences this has for them. In short, by focusing on domination Foucault underplays the role of resistance and the methods individuals use to oppose it.

Here, it is useful to turn to Butler who builds on Foucault to note that we are connected to other humans in ways that we cannot avoid. We gain our sense of self-understanding from other people. This offers us a sense of comfort; we feel accepted and recognized as "valid" human beings, when we are seen to fit into the norms and expectations of a social group about which we care (see also Bourdieu, 1990). When we don't, however, this can be existentially challenging; when we are denied recognition by others we feel it painfully. Respondents in this study express the pain of having to forego this vital aspect of being recognized by a social group (be it colleagues or the neighbors). The loneliness and alienation that comes from being positioned outside of the social norm leads to self-doubt, and if prolonged can cause mental stress, illness or even suicide (see Meyer, 2003 on gay and lesbians; and Butler, 1993). For this reason, as Butler notes, we tend to cling to certain accepted ways of behaving and thinking, even where doing so has the potential to hurt us (Butler, 1997a; p. 17). This is evidenced in empirical studies of whistleblowing, where a strong attachment to one's former organization can persist, even when a person has been a victim of retaliation by this party (see for example Kenny, forthcoming). This theorization helps us explain why whistleblowers suffer and feel victimized for acting in the public

interest as we have illustrated above. Butler (1997b) elaborates on the power of social norms, particularly in the case of public 'name-calling'. She notes that individuals can ultimately identify with an injurious term if no other viable identity is available.

This impact extends to our working lives and to how we see ourselves in society. As others have noted, such dynamics can lead to willful blindness in organizations that prevents people from speaking out even if they observe and are privy to cases of egregious wrongdoing (Heffernan, 2012, p. 174). The fact that whistleblowers see themselves as loyal employees who will go to extreme lengths to, as they see it, prevent this wrongdoing, merely intensifies the pain that is experienced when they are ostracized and 'called by an unexpected name'. We see this in the case of Georgia for instance. However that as time passes, people can begin to relate and perhaps also respond to unjust and even derogatory callings, internalizing the ostracization. Such experiences do not leave people untouched, as our respondents reported, but rather yield a deep imprint on an already-wounded sense of self.

Conclusion

This study has suggested that whistleblowers experience multiple instances of stress, anxiety and fear before and during the whistleblowing process, while the active retaliations very often deployed by organizations causes them to suffer from a variety of mental conditions that can be used against them in order to delegitimize their disclosures. Drawing on poststructuralist and psychoanalytic theories of subjectivity and power, we proposed that individuals are often implicated in the exercise of power by organizations that utilize dominant discourses around mental health, to which the whistleblower can resist but to which they also can find themselves submitting, even unwittingly or unconsciously. This exercise of power is made possible because organizations can call upon social norms that we all uphold such as the questioning of the probity or even worse, the mental stability of whistleblowers. The mental health of litigants can be used by organizations in defending allegations of retaliation, for example, stating that the claimant was mentally ill and not acting in the public interest, and/ or in good faith. This can result in diverting attention away from the seriousness of disclosure. As long as we as society play along and turn a blind eye to the whistleblower's plight, the organizations who are in reality the true transgressors will continue to have their way.

Whistleblower protection is essential for encouraging the reporting of misconduct, fraud and corruption, and speaking truth to power for upholding democratic governance.

A growing number of countries are implementing legislation that aims to protect whistleblowers from retaliation by their employers (OECD, 2012); this is crucial for recognizing the importance of candor and speaking up against wrongdoing. Yet many of the diverse legal approaches, initiatives and measures that are meant to address these issues do

not extend to all organizations, sectors or job types. In such cases, legal recognition is merely symbolic, providing insufficient protection and offering little support to whistleblowers when they most need it. By presenting the lived experiences of whistleblowers, we contribute to counteracting the discourses that powerful organizations often use to construct the whistleblower as 'abnormal' and 'other', as someone who does not act in good faith nor protects the public interest.

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9. Whistleblow Or Walk On By? Ethics, And Cultures Of Collusion In Health And Social Care

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Whistleblowing And The Ethical Void

Raising concerns – whistleblowing – about the quality of care provided in health and social care services is not always action advised for faint-hearted professionals. Despite a statutory duty of candour on regulated professionals working in the NHS (National Health Service), adult social care, dental and independent healthcare in England (CQC 2015); regardless of professional obligations built into the requirements of formal registration and statutory regulation of professionals (GMC 2014; CCW 2015; NMC 2015); and notwithstanding legislative protection for those making protected disclosures in the public interest under the UK's Public Interest Disclosure Act 1998 (PIDA), the fate of many who have drawn attention to shortcomings, failures or dangers in health or care delivery is salutary. Outcomes such as victimisation, the loss of livelihood, health, family and career, and thoughts of suicide, are not ones anyone would sensibly wish for themselves or others speaking up about poor practice (Kmietowicz 2015). To walk on by, rather than whistleblow, may start to look like a rational response to the irrationality of these retributions.

Retrospective inquiries and investigations into disasters such as that reported in the public inquiry into England's Mid Staffordshire NHS Foundation Trust (Francis Report 2013), tragedies such the unnecessary death or brain damage suffered by children undergoing heart surgery in Bristol Royal Infirmary (Kennedy Report 2001), or the abuse and mistreatment of people with learning disabilities in Winterbourne View, England (SGASB 2012), have often depicted the same themes, even though time and place has differed (Ash 2014). That sameness has included, depressingly, the following: some staff raised concerns about poor or dangerous practice but these were ignored and they were marginalised, scapegoated or blamed; the poor practice was, or became, normalised and people stopped noticing; routine regulation and inspection by myriad bodies failed to recognise or react to information that clearly should have given cause for concern.

This wider system failure – an ethical void – in the care and treatment of people at their most vulnerable, needing medical, health and social care at times of life where they may be in pain, in trauma or near to death, is encapsulated in muddles of action, inaction, blame and retaliation that disasters and tragedies in health and social care lay bare. Despite protection that statute is supposed to provide to those who make protected disclosures in

the public interest under whistleblowing legislation it seems, in cases where things have gone badly wrong, that health and social care management, leadership, regulation and inspection systems have seemed driven to blame, cover-up or close-down critical scrutiny.

It is also clear that the culture and power dynamics in these settings have a superordinate influence on the way individuals behave and respond to something causing them concern. Fitting into the team, being a team player, turning a blind eye to poor practice to get the job done, are all social responses of the person to a situation they find themselves in (Ash 2013; Ash forthcoming). Inquiry after inquiry has described the influence of the contexts and cultures in which people have worked on how they have done their work (for example, Kennedy Report 2001; Francis Report 2013), yet most have side-stepped the messy business of deconstructing the regulatory and policy apparatus to better understand its unintended, negative consequences on professional behaviour. Blaming an individual without looking at the context to their behaviour is like blaming a farmer for crop failure, without considering the weather.

This paper makes a case for embedding ethical behaviour – right action – throughout the health and social care systems that the patient or service user, employees, managers and leaders, as well as the whistleblower, find themselves in. It is argued that to whistleblow, or to walk on by, are moral actions, with moral consequences. Expecting professionals and staff to discharge their obligations and duties as health or social care workers impeccably, in organisations, service systems and units that are managed and led politically in ways that are anything but just and impeccable, is an ethical double-bind. Patient lives may be avoidably lost, professionals may contemplate taking their own lives under the stress of investigation (Bourne *et al* 2015).

This discussion takes as its starting point the futility or, worse, the danger posed by cosy conclusions of lesson-learning and standard-tightening that so often follow inquiries, reviews, whistleblower sackings and justifications thereof. In particular, this paper develops the case for considering how elements of an ethic of care – as originally put forward by Berenice Fisher and Joan Tronto, and developed subsequently by Tronto (Fisher and Tronto 1990; Tronto 1993; 2013) – might be embedded into ethically-driven health and social care service systems, policy and practice that would expect and support staff and service users to raise concerns and blow the whistle, when necessary, rather than walk on by.

This paper considers whistleblowing in health and social care services in the UK. Four substantive parts follow this introduction. The next section sets out the broad context to the paper's argument and discusses the social, interpersonal and relational dimensions of morality and ethical action in health and social care. It considers what it is to act with integrity, above and beyond the exigencies of professional codes of practice. The third section considers the act of whistleblowing as an ethical challenge to power and organisational privilege, as well as poor professional practice. The cases of two NHS whistleblowers in England are discussed, and moral dimensions of the action they took are

identified. Fourth, elements of Fisher and Tronto's (1990) ethic of care are considered, and the case made for these four elements – attentiveness, responsibility, competence and responsiveness – to be hard-wired into health and social care systems. The fifth section maps out, in a practical way, how an ethic of care might manifest at three conceptual levels in health and social care systems: one-to-one care and treatment; at the organisational level; and at the wider regulatory, policy and political level. Lastly, and overall, the paper argues that the question 'whistleblow or walk on by?' is a moral question.

Ethics In Context

Many people working in health and social care, and not only the whistleblower, will hear, see and witness poor or corrupt practices that, if attended to and acted upon, could provide organisations with the early warning that systems, structures and processes are not working as they should (Ash 2013). In drawing attention to the wrong and trying to have it put right, the whistleblower can teach the organisation something about itself. Except, of course, the organisation and its political backcloth have to be open to learning, to hearing, attending to and making changes. That wider context, the all-enveloping situation that surrounds what doctors, nurses, healthcare professionals, social care and social workers do, profoundly shapes and constrains how they do their work. Looking at that bigger organisational and political picture, with a sharply critical eye, has to be crucial to commentary on whistleblowing and the experience of whistleblowers who speak out, and who frequently take the hit for their trouble, be it loss of financial security, career, relationship, family, health.

From a social, or collective, perspective, Rest regarded morality as a 'particular type of social value, that having to do with how humans cooperate and coordinate their activities in the service of furthering welfare, and how they adjudicate conflicts among individual interests' (Rest 1986, p.3). This gets to the *relational* nature of morality – to collaboration and cooperation to do good, as well as to resolution of individual interests and conflicts. People work with people to deliver health and social care to those who need it. They engage in relationships that are defined by certain values. People learn to understand each other and express those understandings in what Walker (2007, p.10) called 'practices of responsibility'. These responsibilities may be accepted or deflected. Morality is present, part of, and exists within practices that show what is valued. These practices involve making moral judgments of each other, of paying attention, visiting blame, making excuses, making amends: all ways in which we express senses of responsibility.

In this way, morality is fundamentally *interpersonal*. Morality makes people accountable to each other. It exists in real space and real time, between real people. It is present and part of everything that happens in health and social care (Ash 2010). Moral knowledge is co-created in relationship with others. It is produced, reproduced, and modified in what goes

on between or among people, whether at home, in the workplace or anywhere people act and interact together. Morality is *collaborative*: what transacts and passes between people is formed, de-formed and made intelligible by common understandings of what people do, are supposed to do, and what can be expected from others, individually or collectively (Walker 2007).

Cracking The Integrity Codes

The public expects healthcare and social care workers to act with integrity. Statute demands that registered professionals comply with their professional code of practice. These are similar but they are not the same; the former is far wider than the latter. The word integrity, from the Latin *integritas*, means soundness, uprightness and honesty, and 'wholeness' without any part removed or taken away. It's the real deal; the whole thing. To act with integrity brings up some deeply moral questions.

Banks (2010) identified three versions of what it is to act with moral integrity in professional life. First, integrity is the conduct and compliance of the individual with their professional code, the guidelines or rules of the profession. These provide some 'do/don't' rules to follow, important insofar as they guide, give direction and offer some public protection, but dangerous when those tasked with compliance become unthinking rule-followers, box-tickers or jobsworths without the skill or will to question more deeply the impact of those rules on themselves or people they are paid to care for, support or treat.

Second, Banks suggested integrity could be understood as 'standing for something', that is, showing commitment to particular values and principles in a social context. In this, the individual is tasked with the commitment, but the situation and social context in which they are expected to deliver that commitment remains unexamined and untouched. It may manifest deeply iniquitous structural features that render ridiculous the individual's efforts to conduct their work with integrity. The person may become burned out or uber-zealous in the process of trying to resolve structural problems through individual effort.

Thirdly, Banks described moral integrity as a capacity to think about and make sense of the continuous, dynamic and ever-present nature of the world. This capacity is not the static structure of the 'good self', but is reflexive and evolving. Again, the organisational or social situation within which this capacity is exercised itself requires reflection and examination. Banks believed all three elements of integrity overlapped. They were not linear, sequential or either/or.

Banks (2014) suggested ethics, which are located in the lives of people, and situated in human and social relationships, embrace four dimensions: conduct (actions and behaviours considered right or wrong); character (moral qualities viewed as good or bad); relationships (responsibilities attached to relationships between people, communities, others); and the good society (where people are free and flourish harmoniously with other sentient beings in their shared natural environment).

In health and social care, codes of conduct and statements of ethics typically collapse these four dimensions into knowledge and competence, and respect of individual rights and choice (even though the resources necessary to realise those rights may be lacking) (GMC 2013; CCW 2015; NMC 2015). In doing this, codes mainly aim to prevent harm, rather than promote rights, care or ethical practice (Banks 2014). They are bottom lines, not top notes. But ethical practice is more than simply following rules; it is reflexively engaging with those rules to keep the *point* of the rules to the fore – the wellbeing, health and care of the other person.

The Whistleblower's Ethical Challenge

Whistleblowing is a political act: the whistleblower challenges power and, sometimes, privilege. Practices that whistleblowers draw attention to are positioned in a professional world shaped by public policy and regulation, and human engagement and activity in it. The whistleblower may raise concerns about practices that may be illegal, pose risk to people or the natural world, or cause suffering to others. In this, the act of whistleblowing seeks to stop or put right the wrong, and to seek justice.

Many stories of whistleblowers have a familiar story arc: the employee raised concerns; the concerns were ignored so the person raised them again; the person making the disclosure was marginalised or victimised in the workplace; they suffered professional and financial detriment; the employee lost their job and, very likely, the possibility of working and progressing in their sector, workplace, profession again (Hammond & Bousfield 2011; Smith 2015).

Two NHS cases in England illustrate this, those of consultant doctors David Drew and Raj Mattu. David Drew, a consultant paediatrician in the English Midlands who spoke out about a child safeguarding matter and about shortcomings in patient care, was eventually sacked. In his account, Drew (2014) described raising concerns about child safeguarding arrangements and the unlawful killing of 16-month old Kyle Keen, and about the very low ambient temperature in his hospital ward for newborn babies and sick children.

To raise these concerns, Drew had to first of all to *notice* what was going on. He had to *pay attention* to sick and vulnerable children he was paid to treat and to serve. To care enough to treat the sick, and to raise concerns, Drew had to respond to their needs, to display and act with *responsiveness* as an experienced clinician. And Drew had to be *competent* in his practice. He had to have the integrity, grit and the sheer guts to raise, and keep on raising, concerns: he had to act with *responsibility*.

Raj Mattu, a consultant cardiologist, also in the English Midlands but in a different health Trust[1] area, also blew the whistle, in his case about overcrowding in hospital spaces designed for four cardiology beds, not five as he discovered was the practice. Mattu was concerned that because the number of beds in these cubicles was five not four, patient safety – human life – was compromised if equipment such as oxygen or mains electricity could not reach the fifth bed.

Prior to Mattu's disclosures, the Commission for Health Improvement[2] (CHI) had reviewed this particular service. CHI criticised 'the unacceptable risk to patients of putting five beds in bays designed for four', and it reported that senior staff felt intimidated about reporting their concerns (CHI 2001, p.vi; p.vii). When the hospital Trust's chief executive rejected the CHI findings, Dr Mattu made a protected disclosure under PIDA– he blew the whistle. As is often the case, a counter-allegation (of bullying) was made against Mattu, who was suspended from work, his public interest disclosures rebadged as employment matters and thus falling outside whistleblower protection, such as it is, afforded by PIDA. This one counter-allegation snowballed to over 200, all of which, eight years later, were found to be false. In April 2014, 13 years after Mattu first raised his concerns, an employment tribunal awarded Mattu compensation (Smith 2015).

These are two cases where clinicians acted ethically in response to clinical concerns about potential or actual risk and danger to people they were professionally charged to care for. The ethical dimensions of their actions were eclipsed by concerted retaliation by their employers and the lawyers they hired, at public expense and over many years, to silence these doctors. Both doctors acted in line with the requirements of their registration as medical practitioners, that is, to take prompt action when patient safety was seriously compromised. They were, in other words, doing their job, taking right action. Those right actions (no matter what procedural niceties either doctor may have gotten wrong along the way in drawing attention to these problems) cannot not be sustained however, when the system surrounding them extinguishes ethical expression, denies the undeniable, or substitutes sense with soundbite (as when 'we take patient safety very seriously' becomes bland cliché).

[1] In NHS England, hospitals are managed by Trusts. Trusts are charged with making sure hospitals provide high quality care and spend money efficiently, and with employing the majority of the workforce (including medical, nursing and ancillary staff).

[2] The Commission for Health Improvement (CHI) was set up under the 1999 Health Act to review clinical governance in NHS bodies in England and Wales and carry out investigations of NHS health providers. CHI ceased operation in 2004.

An Ethic Of Care

Both the cases of Drew and Mattu involved their paying attention or noticing, their caring enough to respect, respond and act, and their being competent to know what should or should not happen in those situations. Those qualities are ones which Fisher and Tronto (1990) located in their particular development of an ethic of care.

From their broad definition of care as a 'species activity that includes everything that we do to maintain, continue and repair our "world" so we can live in it as well as possible, that includes our bodies, ourselves and our environment, all of which we seek to interweave in a complex life-sustaining web' (Tronto 1993, p.103), Fisher and Tronto's identified four elements of an ethic of care. Each of these elements can be recognised in the cases of Drew and Mattu above, as well as of other whistleblowers across different sectors, not only health and social care.

The first element of an ethic of care is *attentiveness* – paying attention to what is happening, to the needs of the other, to the impacts of actions and inactions on another. In a moral framework, not attending, in these and other ways, becomes a moral failing. The second element is *responsibility*, that is, the ability to respond to the needs of others within the cultural practices that pertain, rather than just obeying rules, following orders and meeting rulebook obligations. The third element, *competence,* is necessary to provide care and to take care of – incompetent care is a moral failing, whatever the intention. The fourth element of an ethic of care is *responsiveness*, of and between the care-giver and care-receiver. If we need care we are, at that moment, vulnerable. How our vulnerability is responded to is a moral matter, with moral consequences.

This exposition of an ethic of care allows for thinking about care in a broad, public and relational way. Care is *action*, it is *relationship*, and it is care *with* and *for* each other. The ethical qualities associated with 'attentiveness' require a suspension of self interest and the capacity to understand and pay attention to the needs of the other, responding to human need and being competent to care. It means caring for right action (Tronto 1995).

Where this ethic of care intersects with the whistleblower's dilemma lies in the interaction between the person needing care, and the organisation providing it. When the quality of care is poor or dangerous, alarm bells should ring. It is the whistleblower who often sounds the bell. Tronto (2010, p.163) identified a number of 'warning signs' that flag up poor functioning in care situations. Tronto was thinking about institutional care, but these red flags can be used to understand large-scale organisational functioning and behaviour across health and social care more widely.

One of Tronto's warning signs was an organisation that regarded health or care needs as fixed or given, rather than being personal, negotiated, relational, changing and context-dependent. At the stark, crude and readily recognisable end of a spectrum, are organisations (or local services within them) that are infected by callous, rigid, dehumanised

practices, such as leaving older people lying in their own excrement or in hospital corridors (or both), ignoring requests for help with bodily needs and functions, calling patients by their condition or bed number, rather than by their name.

Another red flag for Tronto was the commodification of care, where care is reduced to a timed, standardised commodity – a 'unit' of care – rather than a transactional process within a relationship of power, dependency, need and vulnerability. Once care becomes commodified like this, scarcity, rationing and deficit-driven thinking quickly follow. They can result in the shocking parody of anything-but-care that are 15 minute hit-and-run domestic 'care' slots for a minimum-wage care worker to wash, dress and provide food and drink to an adult unable to do those things for themselves (Leonard Cheshire Disability 2013). This debases care to a basic subsistence level of existence. It narrows care down just to care-giving, devoid of attentiveness, responsiveness or responsibility.

A further warning sign is pegging the wages of the lowest paid when organisations, faced with budget shortfalls cut care worker hours, or undercut UK minimum wage law by not paying the carer for travel time between one service user to another (Gardiner 2015), rather than halting pay rises of managers and leaders, who are in any case likely to be paid 10 or 20 times the care worker's hourly rate. In a nutshell, as Tronto observed (2010, p.165), when 'care givers find themselves saying that they care despite the pressures and requirements of the organisation, the institution has a diminished capacity to provide good care'.

The Making Of 'Bad Apples'

These warning signs may be precursors of problems, shortfalls and deficits of standards and safety of health and social care that whistleblowers and others raising concerns are alert to. These are seldom isolated one-offs that the 'bad apple', sometimes bad 'barrel', accounts foreground in the public sorry-saying, lesson-learning and must-never-happen-again apologias offered up by leaders or politicians after failures of health or social care. These disasters occur in a context. They have social, cultural, political, economic backcloths – all wider, and mostly out of scrutiny when it comes to the 'name, blame and shame' of an individual or service. That infamous bad apple and its bad barrel don't spring from the ground like some alien life force. The bad barrel *makers*, to borrow Zimbardo's phrase (2007; 2008) are the regulatory, resourcing and organisational surrounds to health and care that are always, somehow, slightly out of shot when the picture of failure is presented for public consumption. Whistleblowing, and ethical action, exist in that context. Even if the whistleblower doesn't walk on by from raising concerns, those surrounds can be the obstacle that trips them up.

Putting An Ethic Of Care Into Health And Social Care

Fisher and Tronto's ethic of care had four elements, and it has been argued that whistleblowers who call attention to failures act in concert with each of them. So what might an ethic of care bedded into health and social care practice, organisations, and the wider political and policy system look like?

Figure 1 maps out Fisher and Tronto's four elements of an ethic of care, alongside three levels of health and social care systems. These three conceptual levels are first, the individual practitioner level, where the professional delivers health and social care to the patient or user of the service; second, the organisation that employs them; and third, the wider political, regulatory and policy system they operate within. These levels are not separate, discrete layers of operation; each intrinsically impacts on the other.

Attentiveness

The first element of an ethic of care is *attentiveness*. At the direct one-to-one health or care-giving, the practitioner and professional manifesting attentiveness would need to be alert to the needs of the patient or client of the service. That much is obvious, and is a requirement written into professional codes of practice and registration requirements for doctors, nurses and social care workers (GMC 2014; CCW 2015; NMC 2015).

Things get more tricky at the organisational level. Manifesting organisational attentiveness to human need requires a bit more than rules and procedures, as necessary as they are. Organisations that walked the talk of attentiveness would put effort into creating and sustaining organisational cultures that expected and supported its employees to raise concerns, give feedback and actively demonstrate, routinely, that they were paying attention to meeting needs. These would be organisations whose leaders and managers lived and breathed lesson-learning in real time by paying attention to how the needs of people using services they were paid to run were actually met. These would be places that, authentically, paid attention to what staff and patients and service users told them about their services. They would want their employees to raise concerns (and would ensure there were a variety ways of them to do that, routinely), because they knew such concerns were often the early warning signs of potential system failure.

Level	Practitioner[1]	Organisation[2]	System[3]
Element of an ethic of care			
Attentiveness	Alert to and attends to the needs of the person using health and social care services.	Attends to making and maintaining organisational cultures intolerant of poor or marginal quality care, and of not speaking out.	Attends to the impact of name, blame and shame cultures on the nature and quality of health and care delivered.
Responsibility	Style and approach shows an ability to respond to the individual health or social care needs of the person.	Systems, structures, processes and practices in the organisation underscore rules as the means, and not the end, of quality health and social care delivery.	Held to account for realistic resourcing of health and social care, for and supporting the routine raising of concerns.
Competence	Properly skilled to do the job, and show care in doing it.	Support, lead and manage services to ensure adequately-resourced employees can deliver competent support.	Fit-for-purpose law, statute, regulation, education and training of health and social care staff.
Responsiveness	Responds to risks of poor care. Speaks out about poor care.	Organisations walk the talk of self-challenge, critical thinking; expect reports of sub-optimal practice; are concerned if there are none.	Listen, protect and respond to the whistleblower. Criminalisation of retaliation against the whistleblower.

Figure1. Mapping an ethic of care into health and social care

Developed from the original work of Fisher and Tronto (1990) and Tronto (1993).

[1] 'Practitioner' refers to health and social care staff, eg doctors, nurses, social workers, social care workers, who deliver one-to-one health and social care.

[2] 'Organisation' is the health or social care agency, eg, a hospital; social services agency; private regulated health and social care services.

[3] 'System' depicts the policy, regulatory and political context to health and social care delivery.

Within an ethic of care, the third, wider, regulatory and political system level would display attentiveness to the impact on patient care of name, blame and shame cultures that lead to defensive practice and to hedging decisions in medicine. A regulatory system working first and foremost from an ethic of care, would take steps to find out why it was that one in five doctors subjected to fitness to practice investigations by the General Medical Council (the regulatory body for doctors licensed to practise in the UK) felt victimised after whistleblowing, why 38 per cent felt bullied, and over a quarter had over one month off

work (Bourne *et al* 2015; Francis Report 2015). These are stark patterns calling for the *attention* of regulation and policy-making.

This wider system would pay careful attention to ask *why* billions of pounds of public money has been spent clearing up messes created because the concerns of people working in health and care weren't attended to earlier (Hammond and Bousfield 2011). Operating ethically, these would be regulators and policy-makers who paid attention to disincentivising health and care organisations who opened 'their' (*sic*) wallet to pay top-end legal fees every time something went wrong.

Responsibility

The second element of the ethic care is *responsibility*. Outside ethics, and at its most reductionist, responsibility gets conflated with blame – you or they were responsible. Blame-finding relies on rules of evidence to show the connection between *x* and *y* and harm suffered, for evaluating intentions, motive and consequences. Blame-finding (distinct from, say, NHS adverse incident reporting schemes) typically sidesteps the structural and social processes that constrain and influence people in the complex webs of unjust social structures. A blame-finding paradigm is often oblivious to those with the greatest power getting the greatest pay-off when things go wrong, usually far away from those who came to harm or who took the rap for it.

In an ethical frame, however, responsibility at the one-to-one level, is better understood as an *ability*, a style or an approach, of the health or care practitioner to *respond* to the needs of the patient or service users. At the organisational level, responsibility understood in this way would regard *rules as the means and not the end of good quality care*, and view a person raising concerns as acting responsibly.

At the wider system level, responsibility within an ethical frame would ensure realistic resourcing for organisations to discharge their responsibilities properly, and to be alert to shortcomings and 'near misses' in practice (Macrae 2014). This wider regulatory, policy or political system level would call to account organisations that threw money at silencing the whistleblower, by any legal means necessary, without checking if the smoke they drew attention to wasn't an out-of-control blaze.

Competence

Competence is the third element of an ethic of care. Like the other elements, this is obvious and easily understood at the individual level, the direct giving of health or social care. Competent staff are properly skilled to do the job, *and they demonstrate care when doing it*.

At the organisational level, competence within this ethical frame would include management and leadership that was fit for purpose in the delivery of health and care. That is, management and leadership that understood it was paid, first and foremost, to support

health and social care delivery, to consider what competent professional told leaders, rather than simply servicing a complex, resource-devouring regulatory machine that was, in any case, just a means, and most certainly not the end, of high quality health and care delivery.

Competence displayed at the wider system level would find regulators, politicians and policy-makers reticent about over-claiming what regulation could achieve. Policy and regulation would ensure that fit-for-purpose statute, regulation, education and training of health and social care staff and those paid to lead and manage health and care services evolved, as patient and citizen needs and expectations changed.

Responsiveness

Finally, the fourth element of an ethic of care is responsiveness. At the person-to-person level, the worker manifesting responsiveness in this ethical frame would be alert to the human dimensions of health and care, such as the need for connection, kindness, respect and compassion. Responsiveness at the organisational level would be displayed, for example, in organisations that lived and breathed patient care, and who publically and openly valued staff and patients drawing attention to shortcomings in practice. These would be organisations where managers and leaders would perk up if they *didn't* hear concerns raised (within or without any procedures for reporting concerns) and would want to know why. They would be sharp enough to know that no news was not always good news, and would ask intelligent questions of the mass of data they collect, to find out what it could tell them about the quality, standard and patient experience of health and care delivered. They would be organisations whose first response to the whistleblower would be to listen intently, fact-find and assess; and not pour public money into paying legal fees to quash the whistleblower, come what may.

A political, policy and regulatory level that exhibited responsiveness within this ethical frame would effectively demand organisations better listen to, support and act on the concerns of whistleblowers. This systemic level would place legislation on the statute book to criminalise those taking retaliatory action against whistleblowers, to mark out an ethical space where wilful blindness to wrongdoing and organisational spite against those drawing attention to it were put beyond the pale of right action in public life.

Whistleblow Or Walk On By?

Without an ethical imprint throughout health and social care systems, the delivery of effective high quality care to people who need it, the response to whistleblowers and those raising concerns about that quality of health and social care, is likely always to fall back into defensiveness, blame and punishment. If wider health and care systems impede, block and obstruct a keen, dispassionate attempt to understand the problem and put it right, without

first of all calling in the lawyers to nail the hapless whistleblower, then we are all whistling in the wind.

When this happens the collateral damage, the long-lasting impact on the whistleblower, on the person raising concerns, on those who bore witness but did not speak out, as well as those who came to harm, lives on. This corrodes and corrupts the integrity of care delivery, and leans in ever more harder on individuals, teams and groups of people who day-on-day go the extra mile to deliver the best health and social care they possibly can. To rely on people to get round the system, rather than their being able to rely on *it* to support their work, is a curious corruption of morality and ethics. And it is the whistleblower who too often acts as the canary in the coalmine, so to speak, raising concerns when others walk on by. 'Whistleblow or walk on by?' is fundamentally a moral question, and it is one that demands a moral response.

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