

Whistleblowing – Avoiding the Hazards

Cathy James^a, Keith Plumb^{b,1}

^a Chief Executive, PCaW, 3rd Floor, Bank Chambers, 6 -10 Borough High Street, London, SE1 9QQ

^b Integral Pharma Services Ltd, The Cottage, Parbutts Lane, Church Street, Malpas, Cheshire, SY14 8PB, UK

Whistle Blowing – “Someone blows the whistle when they tell their employer, a regulator, customers, the police or the media about wrongdoing, risk or malpractice that they are aware of through their work” is an essential complementary hazard reporting procedure and an important tool for risk management.

The Royal Academy of Engineering and the Engineering Council have recognised this and are developing ‘Guidance on Whistleblowing for the Engineering Professionals’.

In our hospitals and banks, care homes, industrial corporations, newspapers and regulators, whistleblowers struggle to be heard and news stories paint a worrying picture. Yet the benefits of listening are easy for all to see, are highly relevant to the chemical and process industries and can make all the difference - a disaster prevented, a legal claim avoided, a reputation preserved, a company saved or an industry pulled back from the brink.

How do we ensure that organisations set the right tone and have the right approach to this key issue? What is the evidence around the whistleblower’s experience? How do we overcome the perception that to blow the whistle is to take a risk? What can organisations do to get it right? What is the role of motive in whistleblowing cases and how is this dealt with in the legal protection in the UK?

This paper presents a number of case studies that show how the failure of key decision makers to listen to whistleblowers has resulted in fatal incidents that could have been prevented if the warnings from whistleblowers had not been ignored and appropriate action had been taken. These case studies include some from outside of chemical industry as well as a number from within the industry.

As a complement to these case studies this paper also presents the legal protection for whistleblowers and the method by which an organisation can ensure that their employees and others connected with an organisation such as consultants, can be heard and that the potential hazards that they identify are seriously considered.

Introduction

As the case studies in this paper show a robust and effective company system to listen to and act upon whistleblowing at the earliest possible stages can have a significant impact on the avoidance of low frequency high impact process safety and environmental incidents and prevent damage to reputations that can have a major impact on the organisations involved and/or the whole industry.

The *Roads to Ruin* reportⁱ illustrates how a number of organisations have collapsed as a result of poor corporate governance that includes the inability of organisations to listen or to provide sufficient focus on low frequency high impact incidents. Organisations that have well managed whistleblowing procedures are more likely to overcome this issue.

Public Concern at Work (PCaW), the whistleblowing charity, is a leading authority in the field and has advised over 18,000 concerned individuals to date. The charity also works with organisations in order to develop best practice and has been instrumental in the development of the legal protections for whistleblowing in the UK.

Recent public surveysⁱⁱ show that the work of PCaW and the legislation has had a positive effect. In a two-year period (2012-2013), 1 in 10 workers said they had a concern about possible corruption, danger or serious malpractice that threatens them, their employer, colleagues or members of the public and two-thirds of these said they raised their concern with their employer. 83% of those surveyed said if they had a concern about possible corruption, danger or serious malpractice at work they would raise it with their employers and 72% view the term whistleblower as positive or neutral

Working with the University of Greenwich, PCaW have analysed the data from 1,000 whistleblowing cases. Their report *The Inside Story*ⁱⁱⁱ provides extensive background information on the state of whistleblowing in the UK and, sadly the detrimental impact on many whistleblowers

¹ Corresponding author Tel: +44 1948 861059
E-mail address: keith.plumb@integpharma.com

Relevance to the Chemical and Process Industries

*The Inside Story*³ indicated that the top six industries on the PCaW advice line are the health, care, education, charities, local government and financial services sectors. This does not mean that whistleblowing is not relevant to the chemical and process industries. Firstly, the statistics presented below by PCaW are for those people that contact them and this group is a self-selected group. The fact that these six areas dominate the statistics may be as much to do with how whistleblowing is treated within these sectors as it is to do with the problems that arise.

As our case studies illustrate disasters such as Piper Alpha, BP Texas Refinery, and Deepwater Horizon illustrate the relevance of this issue to process safety and major incidents. Other engineering related incidents also illustrate the importance of whistleblowing such the Herald of Free Enterprise disaster, the loss of the Challenger space shuttle and rail crashes during Railtrack’s tenure.

Health	148 (15%)
Care	143 (14%)
Education	111 (11%)
Charities	89 (9%)
Local government	69 (7%)
Financial services	67 (7%)
Retail	44 (4%)
Manufacturing	33 (3%)
Food/Bev	29 (3%)
Transport	27 (3%)
Construction	21 (2%)
Leisure/hospitality	21 (2%)
Utilities	16 (2%)
Science/Tech	12 (1%)
Insurance	9 (1%)
Central government	8 (<1%)
Police	7 (<1%)
Housing	6 (<1%)
Legal services	5 (<1%)
Pharmaceutical	4 (<1%)
Quango	4 (<1%)
Agriculture/Forestry	3 (<1%)
Armed services	2 (<1%)
Mining/Oil	2 (<1%)
Media	1 (<1%)
Other	100 (10%)
Unknown	19 (2%)

Impact on Companies and Industries

"There's an old saying that if you think safety is expensive, try an accident. Accidents cost a lot of money. And, not only in damage to plant and in claims for injury, but also in the loss of the company's reputation." – Trevor Kletz.

A reasonable alternative to this in the context of this paper would be:

“If you think whistleblowing cases can be expensive, try ignoring them”

Not only as we discuss later have BP staff questioning the cost reductions but it has been expensive ignore whistleblowers and so far it has cost BP the following as a result of Deepwater Horizon blowout:

\$18bn - The extra penalty BP could face after the latest court ruling by US district judge, Carl Barbier, ruled on September 4th 2014 that BP had been reckless as well as negligent.

\$43bn - The amount so far set aside by the oil firm to cover all costs related to the Deepwater Horizon oil spill. Of the \$43bn:

- \$25bn on litigation and claims costs
- \$14bn on clean-up costs in the wake of the spill
- \$3.5bn on environmental pay outs, under the clean water act

Not only has BP faced significant fines it has seen its share price fall significantly since the Deepwater Horizon incident (naturally other factors may be impacting the share price) and it has fallen from the 2nd largest oil company in the world to 4th largest as it has had to sell off assets. Only time will tell if BP will be able to continue as an independent organisation.

Share Price and Volume Graph for BP plc - from 04/01/2010 to 04/01/2015



*Roads to Ruins*¹ a study of major risk events, it is pointed out that Northern Rock, Enron, Arthur Anderson and Railtrack are all large organisations that are no longer with us but may have been saved if there had been good procedures to handle whistleblowing. The now emasculated position of NASA tells a similar story.

So we can conclude that whistleblowing is highly relevant to the chemical and process industries as well the engineering industry in general.

Whistleblowing Defined

What is Whistleblowing?

The Whistleblowing Commission^{iv} defined whistleblowing in the following way:

“Whistleblowing is the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects OTHERS².”

² Author’s capitalisation.

It is important to note the use of the word “others” since this is an important distinction between whistleblowing and a personal complaint which affects the individual complainant. In terms of legal protection (at least in the UK) it is also important to understand the relevance of the public interest test as is discussed later.

How Often Does The Wrongdoing Take Place?

*The Inside Story*³ recorded that the wrongdoing reported to PCaW is recurring in the majority (86%) of cases and also in the majority of cases the wrongdoing was ongoing with more than 70% going on from 1 month to 5 years. On the other hand 86% reported that the wrongdoing went on for less than 2 years

Frequency of Wrongdoing		Duration of Wrongdoing	
One-off occurrence	140 (14%)	Anticipated	50 (10%)
Recurring	858 (86%)	Less than 1 month	67 (13%)
		1 - 6 months	161 (30%)
		6-24 months	175 (33%)
		2-5 years	55 (10%)
		More than 5 years	22 (4%)

Who Blows the Whistle and to Whom

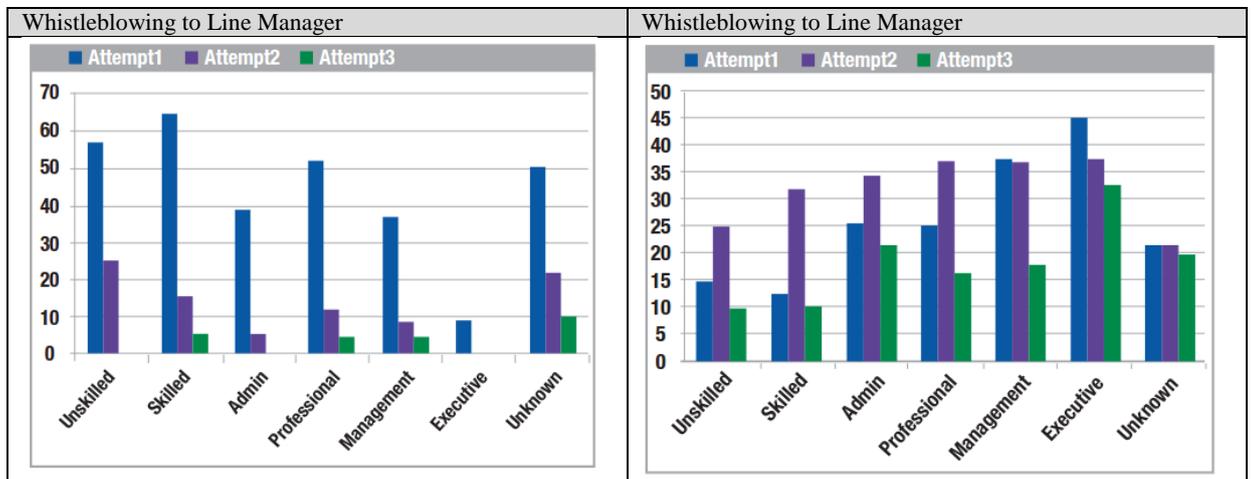
Whistleblowing occurs at all levels but it is executives that carry out the least whistleblowing (or at least they do not contact PCaW). It is relevant to this paper that more than 60% of whistleblowers fall into the skilled, professional or other (scientist, researcher, specialist etc.) category.

Whistleblower by Grade	
Unskilled	128 (13%)
Skilled	272 (27%)
Administrative	80 (8%)
Professional	261 (26%)
Managerial	150 (15%)
Executive	24 (2%)
Unknown	85 (9%)

However, the chosen route for whistleblowing differs with unskilled workers more likely to go to their line managers at the first attempt, professionals are split between line managers and high management and executives would tend to go to higher management. At the second attempt things move up the management chain.

Whistleblowing also occurs to the wrongdoer, (particularly at the first attempt), to specialist channels and grievance procedures (particularly at the third attempt).

Whistleblowing is far more prevalent than it would appear from media reports. As stated earlier a YouGov survey in 2013² for PCaW indicated that in the last two years, 1 in 10 workers (10%) said they had a concern about possible corruption, danger or serious malpractice at work that threatens them, their employer, colleagues or members of the public.



Whistleblowing Persistence

*The Inside Story*³ data indicates that a large proportion of whistleblowers (44%) raise a concern only once and a further 39% go on to raise their concern a second time. The majority (83%) will only try internal options once or twice and then give up.

Very few are persistent in raising their concern only 22 individuals from PCaW's research went on to raise their concern 4 or more times. Worryingly, 74% also say their concern was ignored.

It is also worth noting that persistence can increase the risk - dismissal rising from 11% at first attempt to 28% at the third attempt.

Internal Versus External Whistleblowing

In the 1,000 cases of the whistleblowers contacting PCaW a concern was raised 1,514 times (denoting multiple attempts), 82% of which was internal, 15% external, and 3% to a union.

- The majority of whistleblowers tend to raise their concern internally on two occasions.
- On the third attempt 60% of whistleblowers continue to raise a concern internally.
- The number of those making external disclosures increases as the journey continues. It does not, however, surpass the amount of those willing to make internal disclosures and there are still equal numbers of those making internal and external disclosures at the fourth attempt (47.6% for both) though this is based on the 22 cases where individuals raised a matter a fourth time.
- By the third and fourth attempt whistleblowers are most likely to pursue the matter via a grievance procedure.

The important point here is that at the first attempt whistleblowing is an internal activity with 90% being internal. It is only when this fails that whistleblowing goes external so that 50% of fourth attempts are external.

Whistleblowing to the media is a very rare occurrence with only 10 out of 1,514. Reports to a regulator or independent body is a more common (215 out of 1,514.)

Barriers to Whistleblowing

In his moral discussion Davis^v gives an insight into the barriers facing whistleblowers when he states, "Whistleblowers are not minimally decent Samaritans. If they are Samaritans at all, they are good Samaritans. They always act at considerable risk to career, and generally, at considerable risk to their financial security and personal relations."

As we discuss later Roger Boisjoly an engineer working on the "O"-rings on the space shuttle booster rockets blew the whistle on his employer, Thiokol by volunteering information, to the Rogers Commission and both his employer and many who relied on it for employment reacted hostilely. Boisjoly had to say goodbye to the company town, to old friends and neighbours, and to building rockets.

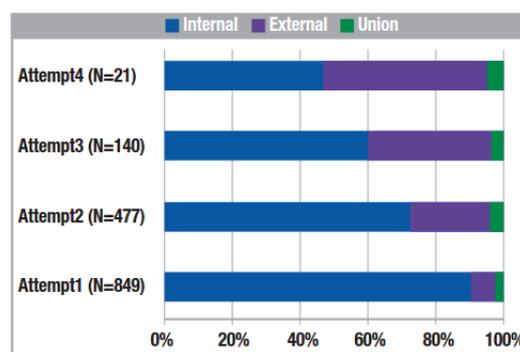
Risk to Career and Financial Security

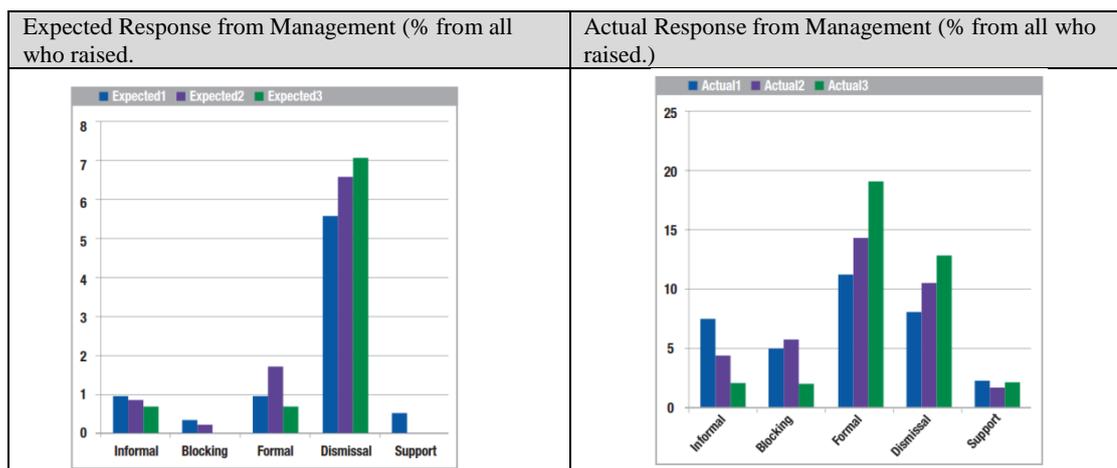
Whistleblowers can be expected to fear that they are risking their career and hence financial security but PCaW data suggests that fear of dismissal is far greater than that actually experience as the two graphs below illustrate.

In practice it is the other responses from management and colleagues that may have more impact on whistleblowers, these are:

- Informal: closer monitoring, ostracised, verbal harassment.
- Blocking resources: blocking access to emails, information, training, hours.
- Formal: relocation, demotion, job reassigned, suspended, or disciplined.
- Dismissal.
- Support: taking the issue seriously is also categorised as support. If an individual feels supported by their employer it is less likely that they will be seeking their advice and support that the PCaW advice line offers.

Support seems to have been the least likely response but this may be because supported whistleblowers did not contact PCaW.





It is also disturbing to see that more than 30% of whistleblowers who raised a work safety concern at the first and second attempt were dismissed which is higher than the other four categories considered. Only those making a second attempt to raise an ethical concern had the same risk of dismissal

As our case studies illustrate there is also significant anecdotal evidence that the dismissal and blacklisting of internal whistleblowers remains a major issue in some sectors of the chemical and process industries as well as within the construction industry.

Disloyalty to Your Employer

Michael Davis⁵ whilst questioning whether (external) whistleblowing is justified suggested that “To be a whistleblower is to reveal information with which one is entrusted. But it is more than that. The whistleblower does not reveal the information to save his own skin (for example, to avoid perjury under oath). He has no excuse for revealing what his organization does not want revealed. Instead, he claims to be doing what he should be doing.”

The entrusted point is important. Whistleblowers particularly those who disclose information to external bodies can appear to be being disloyal to their employer. This apparent disloyalty is perhaps reflected in the high level of formal responses shown in graph ‘actual responses from management’.

Another aspect of this perceived disloyalty to the employer leads to blacklisting of employees involved in whistleblowing. The Whistleblowing Commission noted:

“There are serious concerns that a whistleblower will not be able to find subsequent employment. This may be due to the fact that the worker is not given a good reference or because the worker is employed in a close knit industry or lives in a small community. This has been a concern in the construction industry, where blacklisting of workers who have raised health and safety issues is thought to be commonplace, and has been the subject of a report by the Scottish Affairs Select Committee and investigations by the Information Commissioner’s Office.”

In the short term whistleblowing may have a negative effect on a whistleblower’s employer but our case studies outline that an employer will encounter far greater negative effects if the whistleblower is ignored than if they make a disclosure to an external body. By far the best way for an employer to prevent an external disclosure is to act on the information from the whistleblower the first time that the concern is reported internally.

Disloyalty to Your Colleagues

22% of the respondents to the YouGov survey² for PCaW were worried about the response of their colleagues. The graph above shows actual response from management and the informal problems that arose for 7% of the first attempt cases.

The Challenger space shuttle disaster illustrates an even stronger response from colleagues of Roger Boisjoly who testified before the Challenger Commission. He continued to suffer and was ostracised by some of his colleagues.

Whistleblowing and Corporate Governance

In *Roads to Ruin*¹ the Analysis looked at the impact of corporate governance on major risk events. This report states:

“For the whole period of his tenure as CEO of BP, Lord Browne, the charismatic leader of BP, was seen as a standard-bearer of excellence and cost-effectiveness, but history is being reconsidered. His era has come to be seen as one in which management (no doubt inadvertently) focussed on cost-saving and efficiency to the detriment of a sound safety culture. We do not know whether the BP board questioned the foundations of BP’s success under Lord Browne, but the external evidence that this happened is sparse.”

This illustrates that the concerns being expressed at a lower level in the company were simply not reaching the top. One of the risks identified by this report is “Defective Communication” and on the BP Texas City Refinery it states:

“The background to the Texas City Refinery fire included poor vertical communication, which meant that there was no adequate early warning of problems and no means of understanding the growing problems on the site. BP’s approach to decentralisation also meant that top management had not effectively communicated its priorities, including those on safety, to its operating units.”

This report also looks at the impact of poor communication in other corporate disasters and concludes that poor communication had an impact in virtually all of the cases that it looked at.

The Whistleblowing Commissions Report⁴ opening statement is also relevant to this point.

“Effective whistleblowing arrangements are a key part of good governance. A healthy and open culture is one where people are encouraged to speak out, confident that they can do so without adverse repercussions, confident that they will be listened to, and confident that appropriate action will be taken. This is to the benefit of organisations, individuals and society as a whole.”

Is Whistleblowing an Ethical Requirement for Professional Engineers

Whistleblowing and Professional Ethics

In a lecture by The Right Honourable Lady Justice Smith DBE, Chair of the Shipman Inquiry to PCaW she said;

“Willingness to blow the whistle when wrongdoing or incompetence is suspected is an important public interest responsibility. It is a responsibility that may fall upon any of us, whatever our job or position in society. This evening, I want to talk about the public interest responsibility of professional people, with particular reference to their duty to report any concerns they may have about the practice of other professionals or the working practices at their place of work. It is, in my view, a special responsibility for reasons which I will later explain.”

She goes on to say;

“How can a profession expect to command the respect and confidence of the public if its members are not prepared to report wrongdoing and incompetence? ”

Naturally Lady Smith was talking about the medical profession in the context of the Shipman Inquiry but her words are just as relevant to professional engineers as they are to the medical profession.

Lady Smith is suggesting that whistleblowing is an ethical requirement of all professionals and there is evidence from the engineering community that others agree with her.

IChemE Code of Conduct

IChemE’s own Code of Conduct makes no specific reference to whistleblowing but a number of the clauses indicate the whistleblowing is ethically acceptable. The following are clauses extracted from the Code of Conduct

4. (i) Accept appropriate responsibility for work carried out under their supervision
- (ii) Treat subordinates fairly and without bias
- (iii) Encourage others to advance their learning and competence
5. (i) Avoid where possible real or perceived conflict of interest
- (ii) Advise affected parties when such conflicts arise
6. Observe the proper duties of confidentiality owed to appropriate parties
7. Reject bribery and other corrupt practices.

These rather weakly suggest that members of IChemE should consider whistleblowing when it is appropriate. IChemE is at the time of writing working with the Engineering Council to provide guidance on whistleblowing.

Engineering Council Code of Ethics

THE FOLLOWING IS A SELECTION OF THE RELEVANT PARAGRAPHS FROM THE ENGINEERING COUNCIL’S CODE OF ETHICS.

- *NOT KNOWINGLY MISLEAD OR ALLOW OTHERS TO BE MISLED ABOUT ENGINEERING MATTERS*
- *AVOID DECEPTIVE ACTS, TAKE STEPS TO PREVENT CORRUPT PRACTICES OR PROFESSIONAL MISCONDUCT, AND DECLARE CONFLICTS OF INTEREST.*
- *ACT HONOURABLY, RESPONSIBLY AND LAWFULLY AND UPHOLD THE REPUTATION, STANDING AND DIGNITY OF THE PROFESSION.*
- *BE AWARE OF THE ISSUES THAT ENGINEERING AND TECHNOLOGY RAISE FOR SOCIETY, AND LISTEN TO THE ASPIRATIONS AND CONCERNS OF OTHERS.*

- *BE OBJECTIVE AND TRUTHFUL IN ANY STATEMENT MADE IN THEIR PROFESSIONAL CAPACITY.*

AGAIN THESE RATHER WEAKLY SUGGEST THE REGISTRANTS SHOULD CONSIDER WHISTLEBLOWING. HOPEFULLY THE PLANNED GUIDANCE FROM THE ENGINEERING COUNCIL WILL CLARIFY THE SITUATION.

Specific Whistleblowing Codes of Conduct

Ontario Guidance for Professional Engineers

The Province of Ontario in Canada^{vi} and has formal guidance with respect to internal reporting (whistleblowing as defined by PCaW) that includes:

“The duty to report is an essential component of an engineer’s commitment to professionalism. In fact, it is so fundamental that most engineers probably don’t realize that they are doing this daily when they identify designs, processes and procedures that are unsafe, unhealthy, or uneconomical (which is detrimental to the public welfare) and then take action to correct these problems. Indeed, no professional engineer should disparage or renege on his or her duty to report.”

The guidance then has a complete section recommending how to carry out internal reporting. The reader is referred to the guidance document to see the whole of the guidance. However, it is clear that what the authors consider to be internal whistleblowing is considered to be the duty of professional engineers by the Ontario guidance, but the guidance implies that external whistleblowing should only be considered when internal reporting (whistleblowing) has been exhausted.

Institution of Civil Engineers

The Institution of Civil Engineers^{vii} in the UK have provided guidance on whistleblowing to their members. However like the Ontario guidance this is based on a definition of whistleblowing that is external. Their definition is:

“‘Whistleblowing’ can be defined as ‘publicly raising concerns about misconduct within an organisation where internal reporting systems do not exist or are ineffective.’”

The guidance goes on to say that external whistleblowing may be required.

“In the first instance, therefore, ICE members who are concerned about apparent wrong-doing in their organisations should consult their employer’s code or procedures for reporting wrong-doing. However, there may have been good reason not to use the employer’s internal procedures, e.g. they have already proved to be ineffective or not to have protected whistleblowers, in particular where their livelihoods and professional prospects have been compromised.”

There are two implications of the guidance. Firstly the Institution of Civils Engineers expects its members to carry out internal reporting and that whistleblowing (by their definition) is acceptable. However in a later section of the guidance it does say that whistleblowing (by their definition) should be the last resort.

Whistleblowing Case Studies

Challenger Space Shuttle

Challenger flight 51-L was the tenth launch of the Challenger space shuttle, the Challenger flight ended tragically some 73 seconds into its flight on 28 January 1986 killing all seven members of the crew.

The immediate cause of the disaster was the failure of the “O” ring seals in one of the booster rockets that were not designed for the sub-zero temperature that existed at the time of the launch. Problems with “O” ring sealing system been known for some time and the management had been warned that this was a critical safety issue.

At a team meeting, before the launch, the engineers familiar with the “O” ring warned that a launch at a sub-zero ambient temperature involved considerable risk. The engineers from the booster manufacture were overruled by their own management and the launch went ahead with disastrous consequences.

Roger Boisjoly the leader of the team looking into the “O”-ring seal design had been expressing his concern about this critical safety risk but the time pressures and culture within NASA and his employer meant that his concerns were ignored. After the disaster Boisjoly testified before the Challenger Commission which led to him being ostracised by some of his colleagues. Boisjoly spent the rest of his life travelling to engineering schools around the world, speaking about ethical decision-making and sticking with the data.

The Challenger disaster had a profound impact on the US population and in the end it had a profound impact on NASA on the US space industry. NASA is now emasculated and all space development in the US is in the hands of private companies.

The Herald of Free Enterprise

The Herald of Free Enterprise, a roll on-roll off ferry, sank on 6th March 1987 outside Zeebrugge as a result of the failure to close the bow doors, 193 people lost their lives. A major cause of the incident was the lack of indication of the status of the bow doors on the bridge.

This is a clear example of a disaster that could easily have been prevented by the fitting of appropriate indication on the bridge of the ship. The inquiry found that in five occasions the problems had been reported (internal whistleblowing) by senior operating persons and in one case by a captains but no action was taken. The required indication was only fitted to the company’s fleet after the disaster.

In 1987 seven individuals involved at the company were charged with gross negligence manslaughter, and the operating company was charged with corporate manslaughter, but the case collapsed but set a precedent that corporate manslaughter is legally admissible in English courts. The disaster was one of a number that influenced thinking leading to the Public Interest Disclosure Act 1998.

Piper Alpha

The Piper Alpha Disaster in 1988 killed 167 oil rig workers in the North Sea. Lord Cullen found that employees did not raise their safety concerns because they did not wish to embarrass the company and possibly lose their jobs. He also found that the responsibility for safety was in the same hands as the people who were responsible for rapid production of oil.

The close knit groups on oil rigs make whistleblowing particularly difficult because of the tight loyalty to fellow workers and the risk that it will be very difficult to keep whistleblowing confidential. Working in close knit groups can also lead to a "groupthink"³ environment where everyone in the group think that they are doing the right thing because they do not have any outside reference points.

The problems for whistleblowers on North Sea rigs does not appear to have gone away. John Bynorth writing in Herald Scotland stated, *"North Sea oil workers who whistleblow about safety issues are routinely sacked, creating a 'culture of fear' 20 years after the Piper Alpha disaster, one of Scotland's leading trade unionists has claimed."*

Bynorth also quotes Ian Tasker, assistant secretary of the STUC, who said, *"I have been told that some people who raise safety concerns are told all of a sudden when they are due to leave the platform or soon afterwards 'don't bother coming back.' It suggests that some employers are not really interested in promoting good health and safety practices if they are willing to dismiss people who raise these issues."*

Much of the information on oil rig workers appears to be anecdotal but this evidence appears to be backed up by the PCaW data that indicates that whistleblowers reporting safety issues are the more likely to be dismissed than any other group. See Section 0, above.

BP Alaska, Texas City Refinery and Deepwater Horizon

BP's activities in the USA fit together into one case study that is so large and complex that it can only be summarised here. The problems appear to have arisen directly from the approach taken by the CEO Lord Browne and his desire to grow BP into a leading global player with a low cost operation.

As noted in *Roads to Ruin*¹ 70% of BP's executive bonuses were based on financial performance and only to 15% attributed to safety. It is also important to note that bonuses attributed to safety were based on reportable personal safety (slips, trips and falls etc.) and not to low frequency high impact process safety. There was plenty of evidence that BP's reportable safety incidents were falling and the team at Texas Refinery and Deepwater Horizon had made award winning progress in this area.

However, other statistics on safety and environmental problems tell a very different story as shown in the table below.

Company	From 01/01/1999 to 01/06/2009		From 01/01/2000 to 21/10/2010
	Total OSHA violations	Total Alaska Occupational Safety and Health Violations	
BP	518	52	\$108,911,950
Chevron	240	3	\$170,620
ConocoPhillips	193	7	\$200,685
Exxon	108	0	\$359,740
Shell	217	13	\$306,675

Spills Greater than 50 Barrels in the Gulf of Mexico Between 2000 and 2009			
Company	Volume Spilled (Barrels)	Number of Oil Spills	Oil Produced (Barrels)
BP	8,638.88	23	879,356,448
Shell	5,546.97	21	1,339,203,125
Chevron	3,465.77	19	592,998,061
Noble	1,474.58	8	29,877,928
Apache Corporation	1,118.63	7	144,674,625
Stone	1,192.78	6	40,898,883
Murphy	1,641.60	6	77,618,538
Anadarko	2,107.30	5	93,437,525
Devon Energy	704.20	5	89,445,419
Mariner	2,322.62	5	28,055,560
W & T	1,351.42	5	31,285,206

³ 'Groupthink' may be defined as a psychological phenomenon that occurs within groups of people. Group members try to minimise conflict and reach a consensus decision without critical evaluation of alternative ideas or viewpoints. The reasons for such a state of affairs may vary. – See "Roads to Ruin" ¹

In the case of both safety and health and spills BP stands out as being significantly worse than other oil companies.

Jeanne Pascal was a senior attorney for the United States Environmental Protection Agency (EPA) for 26 years and spent 12 years working with BP. Pascal speaking to ProPublica on 26th October, 2010^{viii} after her retirement stated just how much whistleblowing was taking place:

“I’d had whistleblowers come forth before, like one or two, maybe three,” she said. “I’ve never had 35 to 40 people come before me.”

Pascal also stated that her phone kept ringing, and workers began sending her documents and internal company e-mails to support their claims. Among them were documents from the mid 1990s describing BP’s decision to put off or cancel corrosion maintenance in order to save money and meet Lord Browne’s budget targets. Other documents showed that BP had delayed replacing the gas detectors that warn of a potential explosion.

In Pascal’s opinion BP was in its own league. On her watch she would see BP charged with four federal crimes—more than any other oil company in her experience. By late 2009 she was warning the government and BP executives themselves that the company’s approach to safety and environmental issues made another disaster likely.

BP’s Prudhoe Bay and Texas City units had been automatically blocked from government contracts during her time at the EPA—that’s the minimum debarment action after a prominent air or water pollution crime in the United States—but she had never been able to get the company to change.

However, the Deepwater Horizon disaster led to complete debarment of BP in the USA through a complex series of actions. This debarment was released by the EPA on 3rd March 2014 by a detailed administrative agreement which will be in place for five years. This agreement includes the following requirement:

“BP p.l.c. shall continue to maintain an independent Ethics & Compliance function (not reporting to the operating businesses) to support the operating businesses and the BP Covered Entities ...”

We can therefore conclude that by failing to listen to whistleblowers, by failing to protect whistleblowers and by having an executive bonus scheme that focused on financial considerations above safety that BP at the highest level was unable to see what impact their tight cost controls were having on low frequency high impact incidents. We can also conclude the financial impact in the terms of fines, sales of business units and the loss of revenue as a result of EPA debarment must be in the same order if not greater than the money that was saved by their cost control measures.

Legal Protection for Whistleblowers

Public Interest Disclosure Act

In the UK, The Public Interest Disclosure Act (PIDA) sets out a clear and simple framework for raising and addressing genuine concerns about malpractice by providing protection for workers who raise such issues in accordance with its provisions. The law’s essential features are:

- A focus on protecting the public interest by covering individuals in the workplace who make disclosures about wrongdoing (whether it is about environmental damage or a breach of a legal obligation);
- A step-by-step approach which encourages internal whistleblowing where possible (or to the person legally responsible), facilitates disclosures to statutory regulators and, allows wider disclosures, such as to the press, when justified;
- Allows whistleblowers who have suffered any detriment to go to a tribunal (the Employment Tribunal) which deals with cases more quickly than the court system
- Removing the limit on compensation which may be ordered by the tribunal if a whistle-blower is dismissed;
- Making dismissal and victimization for whistleblowing automatically unfair.

As an independent, self-funding charitable organisation, PCaW played a leading role in developing this first comprehensive whistleblowing law in Europe along with the Campaign for Freedom of Information. The law was passed with cross-party as well as union and business support. The focus on whistleblowing and the work of PCaW started in the aftermath of a number of disasters, bank failures and political scandals in the UK in the 1980s and early 1990s. Many of the official inquiries set up to examine what went wrong and why found that workers were often aware of the danger but had been too scared to sound the alarm or had raised the matter with the wrong person or in the wrong way. PCaW was set up to in 1993 to:

- Provide free confidential advice to people concerned about wrongdoing in the workplace who are unsure whether or how to raise their concern;
- support to organisations on their internal arrangements, policy and law of whistleblowing;
- campaign on public policy; and
- promote whistleblowing as a matter public interest and good governance.

In 1995, the work of PCaW was endorsed by the UK Committee on Standards in Public Life, which accepted that unless staff thought it safe and acceptable to raise concerns internally and to appropriate external bodies, they would see no alternative to silence or to leaking the information.

Good (and Bad) Faith

The requirement of good faith has long been a feature of whistleblowing legislation. The good faith requirement examines the motive of the whistleblower when they make a disclosure. It is sometimes the very first step to establishing whether a whistleblower is protected in the eyes of the law and in many jurisdictions a whistleblower must act in good faith not simply when making regulatory and wider disclosures but also when making internal disclosures.

Whistle Blowing Motivations

Lucy Vickers in her 1996 PhD Thesis^{ix} suggests that there are two type of whistleblowers:

“Watchdog whistleblowing”, refers to the case where the employee discloses a current and avoidable danger to health and safety, or serious financial malpractice.

“Protest whistleblowing” can be used to denote the case where an employee uses his/her experience at work to participate in a debate on issues of public importance, often using his/her position inside an organisation to shed new light on issues already being debated in public.

Vickers suggests that both types of whistleblowing can be said to serve the public interest although the public interest in favour of watchdog whistleblowing is stronger, given its ability to avert imminent disaster. She argues that the different types of whistleblowing raise slightly different issues, and therefore deserve different levels of protection.

Michael Davis in *Some Paradoxes of Whistleblowing*⁵ suggests in his Complicity Theory that, “*Few, if any, whistleblowers are mere third-parties like the Good Samaritan. They are generally deeply involved in the activity they reveal.*” Davis goes on to say, “*that complicity invokes a more demanding obligation than the ability to prevent harm does. We are morally obliged to avoid doing moral wrongs.*”

Davis’s thoughts on whistleblowing are interesting because they suggest the whistleblowers may also be motivated by a moral need to avoid being complicit in the wrong doing. However, it is worth noting that Davis’s definition of whistleblowing refers to external whistleblowing and his moral discussion only considers the moral implications of disclosing information to an external third party.

Peter Roberts in his analysis ‘Motivations for Whistleblowing’, indicates that the motivation of whistleblowers can range from a purely altruistic desire to protect the public interest to self-interested motives that seek to better their own personal position. Roberts categorises different altruistic motivations for whistleblowing. Policy disagreements, ethical breaches, legal obligation to report and personal morality are among the motivations described in a survey of public sector whistleblowers in Australia. On the other side of the spectrum complaints about bullying and harassment and self-protection were identified as self-interested motives.

“(The) distinction goes to the heart of the issue of differentiating between public interest matters and those where motivation arises from the individual’s perspective of wrongdoing that affects them directly.”^x

Silence in the City, a research project conducted by Public Concern at Work (PCaW) with the assistance of Slater and Gordon looked at motivation of whistleblowers in financial services. For the research a sample of 320 cases of workers who contacted the PCaW advice line between 2007 and 2012 were reviewed. Overall the findings pointed to a lack of trust in the system with mixed motives for raising a concern.

Of those that mentioned their motivation, 22% of callers raised or intended to raise their concern for personal motives (e.g. to support an employment tribunal claim, to support a grievance or because of a personal dislike of an individual). 6% were motivated by worries over their own liability and 10% by a professional duty to raise the concern. 55% of callers were motivated either by a desire to protect the public (34%) or by a desire to protect the company they work for (21%).^{xi}

Contribution to Wrongdoing

In *The Inside Story*¹ the ethical distance between the whistleblower and the concern was considered. In the vast majority of cases (92%) the whistleblower stated that they had not contributed to the wrongdoing, while 8% admitted that they had been involved.⁴ Research undertaken by Griffith University in Australia entitled ‘Whistling While They Work’^{xii} also demonstrates that whistleblowers tend to show much higher levels of altruism than self-interest.

Legal Protection for Bad Faith

In summary it is often the case that whistleblowers act out of a mixture of motives and so to exclude legal protection as a result of bad faith will likely be a barrier to a large number of potential whistleblowers. If the aim of legal protection is to encourage more whistleblowers and to provide protection for those who suffer for raising a concern, this approach is problematic.

⁴ Whistleblowing: the inside story (PCaW 2012)

This has been a pattern that has developed in the UK in relation to case law. The leading legal authority was *Street v Derbyshire Unemployed Workers Centre*.^{xiii} In this case the Employment Tribunal found that Mrs Street lacked good faith because her disclosures were motivated by her personal antagonism towards another employee, even though, according to the Tribunal, she had reasonable grounds for believing her allegations to be true. This was upheld at EAT. The Court of Appeal held that an employee can fail the good faith test and lose PIDA protection where a tribunal finds that their dominant or predominant motive for making the disclosure was unrelated to the public interest objectives of the Act.

At the time PCaW submitted that this was contrary to what Parliament had intended for the interpretation of good faith under PIDA 1998 and that it should be the case that where a disclosure is made honestly, even though made negligently or without due care it should still be protected.^{xiv}

The risk with this approach is that it acts as a further barrier to whistleblowers when raising concerns. The reality is that whistleblowers may have a number of different motives for making their disclosures. Interpreting grudges or personal antagonism as vitiating good faith, may discourage disclosures. A more sensible approach would be that where there is an honest reasonably held belief, motive should not matter.

Amendments to PIDA

In 2013 the UK Government passed the Enterprise and Regulatory Reform Act which amended PIDA. The Government introduced the public interest test to apply to disclosures made on or after the 25 June 2013. At the same time good faith was dropped from liability to remedy, as the requirement for good faith was no longer deemed to be a requirement for establishing a claim. Where a whistleblower has acted in bad faith, they do stand to lose up to 25% of any compensation awarded. The effects of these changes remain to be seen, as they apply to disclosures after 25 June 2013.

Regulators as Prescribed Persons

One of the key provisions of the legal framework provided by PIDA is the way in which regulators (referred to in the legislation as Prescribed Persons) are specifically signposted as an external option for those making disclosures of public interest information. However there is no oversight mechanism for these provisions and regulators are not expected to account for the way in which they structure their whistleblowing programmes. For this reason one of the recommendations of the Whistleblowing Commission set up by PCaW and discussed in more detail below is that Prescribed Persons should monitor and assess those organisations they regulate in relation to whistleblowing activity and their whistleblowing arrangements.

If regulators used a Code of Practice to measure performance, it is envisaged that organisations will consider best practice as part of their day to day compliance activities, as this would be something that their regulators are interested in and regulate against. The UK government is likely to require further action by regulators in this regard in the near future as at the time of writing there is a legislative proposal passing through parliament which imposes a statutory reporting requirement upon UK regulators.

The Department of Business, Innovation and Skills has published a document, *Blowing the Whistle to a Prescribed Person - List of Prescribed Persons and Bodies*.^{xv}

This document includes a number of prescribed persons that are relevant to the chemical and process industries.

1. The Environment Agency
2. The Scottish Environment Protection Agency
3. The Food Standards Agency (FSA)
4. The Health and Safety Executive

Making Whistleblowing More Effective

In General

If we are to avoid the outcomes illustrated in this report by the numerous case studies then more should be done to ensure that whistleblowing arrangements within organisations are effective. How to monitor this when so much turns on the culture within an organisation and culture is difficult to assess and measure is an ongoing challenge and one that was considered by the Whistleblowing Commission. Effective whistleblowing arrangements are one part of a healthy and open culture and how whistleblowing operates within our workplaces is, in a sense a useful cultural barometer. To this end, it helps to see whistleblowing arrangements as a key part of good governance.

It is now some 20 years since the whistleblowing charity Public Concern at Work (PCaW) was established and some 15 years since the Public Interest Disclosure Act, designed in the UK to protect whistleblowers, was put on the statute book. Yet the charity still sees many cases where whistleblowing has not worked either for the individual or the issue (as illustrated by the research – *The Inside Story*³). It is against this background that PCaW decided to set up an expert independent commission (The Whistleblowing Commission) to review all aspects of whistleblowing, including the current legal and governance arrangements, best practice and societal attitudes and to make recommendations for change.

Whistleblowing Commission Recommendations

The Whistleblowing Commission considered evidence from several pieces of research including a public consultation to which there were 142 responses, a YouGov survey of public attitudes to whistleblowing and a survey of business practice with Ernst and Young. They also considered the analysis of 1,000 cases from the PCaW advice line contained in the report *The Inside Story*³.

The Whistleblowing Commission published their report in November 2013. It concluded that there is a movement towards requiring organisations to have effective whistleblowing arrangements in place but no specific legal requirements in the UK upon organisations to have effective arrangements. This situation could change in the near future as both the financial services and health industries are likely to have new regulation on the issue in the near future^{xvi}.

The Whistleblowing Commission reached the conclusion that it would be undesirable, at least at the present time, to require employers by statute to have in place whistleblowing arrangements. But the Commission believed that the UK Government should take further steps to make it more likely that employers have effective whistleblowing arrangements. The key recommendation of the Commission is the creation of a statutory Code of Practice which can be taken into account by courts and tribunals considering whistleblowing issues. The Commission also recommended that this Code could be used by regulators as part of their inspection and assessment regimes.

Whistleblowing Code of Practice

The Code of Practice contains 15 recommendations for the operation of organizational policies and procedures, including the best practice around written policies, the assurances required, day to day operation of the arrangements and periodic audit/review. A review might include not only consideration of the number and types of concerns raised and outcomes of investigations, but also feedback from individuals who have used the arrangements, any complaints of victimisation or failure to maintain confidentiality, looking at other existing reporting mechanisms and adverse incidents that could have been identified by staff (e.g. consumer complaints, publicity or wrongdoing identified by third parties), and any relevant litigation. In addition the Code of Practice suggests that staff awareness, trust and confidence in arrangements should be measured in order to get a full review of the culture around whistleblowing.

Duties of Professional Engineers

Understanding the Motivations

As discussed earlier there are three motivations for whistleblowing.

1. Watchdog or altruistic whistleblowing
2. Complicity whistleblowing
3. Protest whistleblowing

From the previous discussion it is likely that whistleblowing in the first two categories will be in the public interest and in good faith. It is possible that protest whistleblowing may not be in the public interest and may not be in good faith.

The Professional Responsibility for Whistleblowing

From the earlier discussion on profession ethics it is clear that whistleblowing in the public interest and in good faith is not only ethically and morally sound but is a professional responsibility for all professional engineers who has uncovered or witness wrongdoing.

Responding to Whistleblowing

It is also clear that professional engineers being in receipt of whistleblowing reports that are in the public interest and in good faith has a responsibility to respond to the whistleblowing and to support the whistleblowing.

Not to do so is likely to lead to public harm and to significant loss of reputation for their employer and for their industry as a whole.

Internal Procedures for Whistleblowing within Engineering Companies

Internal procedures for whistleblowing should be based on the Code of Practice proposed by the Whistleblowing Commission⁴

Engineering Council Guidance for Whistleblowing

At the time of writing this guidance is currently in hand but can only progress with the agreement with the Professional Engineering Institutions that are members of the Engineering Council.

In the opinion of the authors this guidance is urgently required and should be based on the Code of Practice proposed by the Whistleblowing Commission⁴.

References

- ⁱ Roads to Ruin – The Analysis. A Study of Major Risk Events: Their Origins, Impact and Implications. A report by Cass Business School on behalf of Airmic and sponsored by Crawford and Lockton.
- ⁱⁱ YouGov Survey (2013)
- ⁱⁱⁱ Whistleblowing: The Inside Story A Study Of The Experiences Of 1,000 Whistleblowers. A research project by PCaW and University Of Greenwich
- ^{iv} The Whistleblowing Commission, Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK, November 2013.
- ^v Davis, M., Some Paradoxes of Whistleblowing, *Business & Professional Ethics Journal*, Vol 15, No. 1
- ^{vi} Professional Engineers Ontario – Guideline, Professional Engineering Practice
- ^{vii} ‘Whistleblowing’ – Guidance to ICE members
- ^{viii} Furious Growth and Cost Cuts Led To BP Accidents Past and Present, Abrahm Lustgarten, ProPublica, 26th Oct, 2010
- ^{ix} Whistleblowing at Work: the legal implications for employees of making disclosures of confidential information. Lucy Vickers, PhD Thesis, Oxford Brookes University, December 1996.
- ^x P. Roberts, ‘Motivations for whistleblowing’, *International Handbook on Whistleblowing Research*, (eds A.J. Brown, D. Lewis, R. Moberly, W. Vanderkerckhove) p.224
- ^{xi} Silence in the City (PCaW 2012)
- ^{xii} http://www.griffith.edu.au/_data/assets/pdf_file/0007/159199/whistling-july09-full-report.pdf
- ^{xiii} [2004] EWCA Civ 964
- ^{xiv} G Dehn, Mrs F M Street v Derbyshire Unemployed Workers Centre Submission (9 March 2004) available at <http://www.PCaW.org.uk/street-derbyshire-submission>
- ^{xv}] Blowing the Whistle to a Prescribed Person - List of Prescribed Persons and Bodies, Department of Business, Innovation and Skills, October 2014
- ^{xvi} Both the banking industry and the health industry have had public inquiries where the issue of whistleblowing has been considered (refs to follow – Francis inquiry and banking commission inquiry)