

AUTHOR QUERY FORM

Journal : INDLAW

Article Doi : 10.1093/indlaw/dwp027

Article Title : Combating Corruption through Employment Law and Whistle-blower Protection

First Author : Indira Carr

Corr. Author :

AUTHOR QUERIES - TO BE ANSWERED BY THE CORRESPONDING AUTHOR

The following queries have arisen during the typesetting of your manuscript. Please answer these queries by marking the required corrections at the appropriate point in the text

Q1	Please check the suggested running head.	
Q2	Please check that the author surnames have been correctly identified by a pink background. If this is incorrect, please identify the full surname of the relevant authors. This query is intended to ensure that the authors' full surnames are tagged correctly for online purposes.	
Q3	Please check whether the edits to the sentence 'Since the publication ...' are correct.	
Q4	Please check whether the edits to the sentence 'Similarly, in <i>Re A Company's Application</i> , ...' are correct.	
Q5	Please check whether the edits to the sentence 'At federal level, ...' are correct.	
Q6	Please provide volume number for 'Carr (2007)' in note 8.	
Q7	Please provide author names and initials in note 11.	
Q8	Please provide volume number for 'Boyle (2007)' in note 38.	
Q9	Please check if 'Cl.' and 'CII.' can be changed to 'Clause' and 'Clauses', respectively, in all the occurrences.	

	INDLAW	dwp027	HS
	JOURNAL NAME	MS No.	CE Code

NOT FOR
PUBLIC RELEASE

Industrial Law Journal, Vol. 39, No. 1, March 2010 © Industrial Law Society; all rights reserved. For permissions, please e-mail: journals.permissions@oxfordjournals.org.
doi:10.1093/indlaw/dwp027

Combating Corruption through Employment Law and Whistleblower Protection

INDIRA CARR* AND DAVID LEWIS**

Q2

ABSTRACT

5 This article examines the extent to which employment law has the potential to fight
corruption by imposing rights and duties on employers and workers and analyses the
extent to which the UN Convention on Corruption 2003 (UNCAC) protects those who
speak out about malpractices within an organisation. Section 2 focuses on UNCAC while
10 Section 3 focuses on the extent to which employment law imposes obligations on those
within the workplace to report corrupt activities and the circumstances in which those who
speak out about corruption are protected under UK employment law. It is argued that
because of the inadequacies of the existing legislation and the threat posed by disclosures
via the Internet, organisations have much to gain from devising effective policies on
15 both internal and external reporting that do not inhibit the exposure of corruption or
unnecessarily curtail freedom of speech. The authors conclude by welcoming the draft
recommendations from the Council of Europe's Parliamentary Assembly to draw up a
set of guidelines for the protection of whistleblowers and consider drafting a framework
convention.

1. INTRODUCTION

20 **M**odern day corruption is endemic in character and contributes to poverty.¹
It is a phenomenon that affects all levels and aspects of society from business
and politics through to government. Equally it knows no boundaries and neither
is it unique to developing countries, as the furore over the alleged BAE slush

*University of Surrey and University College, email: imcarr@btinternet.com.

**Middlesex University, email: d.b.lewis@mdx.ac.uk. The authors thank the anonymous reviewers and the editor for their constructive comments. Any infelicities remain our own.

¹Less corruption would enable monies meant for infrastructures and capacity building in poor countries to be spent on what it was meant for rather than lining the pockets of politicians, civil servants and contractors. See eg S. Alatas, *Corruption, Its Nature, Causes and Functions* (Aldershot: Brookfield, 1990); F. Bergsten and K. Elliott (eds), *Corruption in the World Economy* (Washington, DC: Institute for International Economics, 1997); HMSO, *Eliminating World Poverty: Making Globalisation Work for the Poor* (Cm 5006, 2000).

25 fund and the Al Yamamah defence contracts demonstrates.² Regulation is often
perceived as an effective means to curtail undesirable social behaviour. Most
countries have a panoply of national legislation that addresses corruption or
various aspects of it such as fraud, conflict of interest and illicit enrichment.³
However, given the international character of corruption, most national laws are
inadequate to deal with cross-jurisdictional dealings. In response, since the 1990s
30 the international community has adopted a number of regional and international
conventions.

One of the difficulties when dealing with a hidden crime like corruption is its
detection. Exposing cases of corruption using traditional investigative techniques
can take years and a highly sophisticated team of experts with substantial
35 resources. Even after spending a considerable time on investigations, it is not
unusual for the prosecuting authorities to drop a case owing to lack of evidence.
In some situations, external pressures that may impact upon national security
result in discontinuation of investigations, for example at BAE.⁴ In a developing
country lacking the necessary expertise and resources, too much reliance cannot
40 be placed on such techniques. However, there are other means, legal and extra-
legal,⁵ by which corrupt practices could be exposed from within an organisation.
For instance, employees acting in the public interest could expose corrupt practices
within their institutions and employment laws may also impose obligations that
require both employers and workers to report corruption. Once it is recognised
45 that disclosers can play a role in exposing corruption, the questions become: 'what
kinds of duties can be imposed by employment law and what protection from
discrimination and reprisals can be expected by workers who speak out in the
public interest?'

²The BAE case is in a long list of cases involving multinational companies that have been investigated recently about allegations of corruption. See for instance: C. Dougherty, 'Germany Battling Rising Tide of Corporate Corruption', *The New York Times*, New York, 15 February 2007, Business Day C1; E. Silverman, 'Bayer & Glaxo Linked to Bribes in Italy', 23 May 2008 <<http://www.pharmalot.com>> (accessed 19 September 2008); 'Cracking Down on Corporate Bribery' 6 December 2004 <<http://www.businessweek.com>> (accessed 19 September 2008); 'Kiwi Contractor Caught in UN Corruption Scandal' *The National Business Review*, Auckland, 2 May 2008, p 1. Note, however, that according to Transparency International's *Bribe Payers Index 2006*, the UK and Germany fall within Cluster 1 countries, that is countries from which businesses are least likely to bribe when doing business abroad. For more on the BAE investigation see I. Carr and O. Outhwaite, 'The OECD Anti-Bribery Convention Ten Years On' (2008) 5(1) *Manchester Journal of International Economic Law* 3.

³A number of international and regional anti-corruption conventions create offences of illicit enrichment. This offence is a controversial one since it reduces the State's burden of proof. The onus is on the accused to show how he or she obtained the funds. This may contravene rights imparted by human rights instruments in respect of a fair trial.

⁴See n 2 above.

⁵For instance, codes of conduct that reflect undertakings of corporate social responsibility (see below).

50 This article examines the extent to which employment law has the potential to fight corruption by imposing rights and duties on employers and workers⁶ and analyses the extent to which the UN Convention on Corruption 2003 (UNCAC)⁷ protects those who speak out about malpractices within an organisation. Section 2 focuses on UNCAC with a view to ascertaining whether (1) this Convention aims at protecting those who speak out in the public interest, (2) it contemplates
55 employment contracts and employee protection as a tool for exposing corruption and (3) if not, whether domestic laws on employment could be a useful tool for combating corruption. While there are a number of other anti-corruption conventions,⁸ for our purposes, this article focuses largely on UNCAC for a number or reasons. One, it is the only international convention,⁹ two, it has been ratified
60 by 140 countries, developing and developed and three, it is a comprehensive instrument that not only creates a number of criminal offences but also focuses on prevention by addressing issues such as integrity and accountability. However, reference is made to regional conventions where pertinent to see whether there are emerging best practices that could inform the legislative developments in states

⁶This article adopts the wider concept of worker as opposed to employee that is found in the UK legislation. The Employment Rights Act 1996 (ERA 1996) s 230(1) defines employee as: 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. It is a narrower category than 'worker', which is defined in s 230(3) as (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under)—(a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

⁷Entered into force on 14 December 2005. See I. Carr, 'The United Nations Convention on Corruption: Improving the Quality of Life of Millions in the World?' (2006) 3(3) *Manchester Journal of International Economic Law* 3.

⁸The conventions in force are (1) Organisation of American States Inter-American Convention Against Corruption (OAS Convention) (adopted 1996, entered into force 6 March 1997); (2) Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) (adopted 1997, entered into force 15 February 1999) (for further on this, see I. Carr and O. Outhwaite, 'The OECD Anti-Bribery Convention Ten Years On' (2008) 5(1) *Manchester Journal of International Economic Law* 3); (3) Council of Europe Criminal Law Convention on Corruption (COE Criminal Convention) and Civil Law Convention on Corruption (COE Civil Convention) (both adopted 1999, entered into force 1 July 2002); (4) African Union Convention on Preventing and Combating Corruption (AU Convention) (adopted 2003, entered into force 5 August 2006). For further information on this, see I. Carr, 'Corruption in Africa: Is the African Union Convention on Combating
Q6 Corruption the Answer?' (2007) *JBL* 111. 

⁹The other anti-corruption conventions listed in the footnote above are regional though it could be said that the OECD Anti-Bribery Convention is international since it enables non-member states to accede to the Convention provided they become full participants in the OECD Working Group on Bribery. In order to become a full participant in the Working Group on bribery, the state must adhere to the Revised Recommendations to the Anti-Bribery Convention.

65 that have ratified UNCAC. Section 3 focuses on the extent to which employment
law imposes obligations on those within the workplace to report corrupt activities
and the extent to which those who speak out about corruption are protected under
UK employment law. The UK is chosen for illustrative purposes for two main
70 reasons. One, many countries in the developing world have common law as the
basis of their legal system. Two, the UK has well-developed employment laws and
is one of the earliest countries in the world to have introduced specific legislation
protecting whistleblowers, that is workers who speak out about wrongdoing.

2. CONTROLLING CORRUPTION, THE INTERNATIONAL ANTI-CORRUPTION FRAMEWORK AND THE UNCAC

75 A. Defining and Drawing the Perimeters of Corruption

In order to appraise the international anti-corruption legal framework, it is
important to understand the nature of the phenomena we are endeavouring to
control. It would be normal to expect a legal instrument on anti-corruption to
define the concept that it is trying to tackle. None of the conventions in force
80 provide a definition and this is attributable to the complexity of the subject matter.
In everyday language, corruption is used in a number of contexts, for instance, from
subjective perceptions and value-oriented judgments to objective statements about
practices that undermine the moral and social fabric of society or standing of an
institution. By way of illustration, it can refer to changes in a person's character for
85 the worse, the irregular practices on the part of an institution that undermine the
sense of fair play and justice or degeneration of social mores owing to emerging and
novel practices that go against the established culture. Further, corruption is also
riddled with cultural nuances since a practice accepted or tolerated in one culture
may well be unacceptable in another. The differences in attitudes and acceptability
90 may be partly attributable to social and political structures. Many cultures still
follow patrimonial models where it is perfectly acceptable for the tribal leader to
distribute largesse as he (or she) sees fit and where the decision-making processes
are not necessarily guided by principles of anti-discrimination and equality.¹⁰

¹⁰In a patrimonial society, no distinction is drawn between the private and public assets of a leader (where the leader's authority is derived from tradition), so the use of public assets for private needs is acceptable. One of the problems, for instance in Africa, is that African leaders largely seem to operate within this patrimonial framework despite structures left by the colonials. Since they do not derive their authority through tradition, they resort to purchasing power through patronage. For an interesting account, see S. N. Eisenstadt, *Traditional Patrimonialism and Modern Neopatrimonialism* (London: Sage, 1973); C. Leys, 'What is the Problem About Corruption?' (1965) 3 *The Journal of Modern African Studies* 215, 226–7. See also I. Carr, 'Corruption, the Southern African Development Community Anti-Corruption Protocol and the Principal-Agent-Client Model' (2009) 5 *International Journal of Law in Context* 147.

95 Since the concept of corruption cuts across social mores, cultural norms and moral values, it is almost impossible to give a satisfactory generic definition that would take into account all its facets. There is much truth in what R. J. Williams says:

100 . . . [t]he study of corruption is like a jungle and, if we are unable to bring it to a state of orderly cultivation, we at least require a guide to the flora and fauna. This need has impelled many writers to find a precise definition which will accurately characterise the phenomenon . . . [yet] it is important to note that there are nearly as many definitions as there are species of tropical plants and they vary as much in their appearance, character and resilience. The point is that the search for the true definition of corruption is, like the pursuit of the Holy Grail, endless, exhausting and ultimately futile.¹¹

105 Given the difficulties in formulating a generic definition, all regional and international conventions have chosen the safe option of listing specific acts which are treated as offences for the purposes of that convention.¹²

110 Other than the OECD Anti-Bribery Convention, which addresses only bribery on the supply side of a foreign public official (active bribery), the other anti-corruption conventions include (apart from active and passive bribery)¹³ embezzlement, trading in influence and the controversial offence of illicit enrichment. Undoubtedly, UNCAC is the most comprehensive of all these conventions by including within its list of criminal offences bribery of national officials (art 15), foreign public officials and officials of public international organisations (art 16), bribery in the private sector (arts 17 & 22), trading in influence (art 18), illicit enrichment (art 20), abuse of function (art 19) and laundering or concealing the proceeds of corruption (arts 23 & 24).

B. Raising Integrity and Protecting Those Who Speak Out

120 Like drug trafficking and money laundering, corruption is a hidden activity. Enforcement authorities therefore find investigating and the gathering of evidence extremely difficult with the result that there are hardly any prosecutions against those who engage in this activity even in developed countries. Investigations to

Q7 ¹¹‘The Problem of Corruption: A Conceptual and Comparative Analysis’ (1976) 22 *Political Action Committee Bulletin* 41.

¹²The anti-corruption conventions that are in force can be neatly divided into two Groups I and II. Group I consisting of the OAS Convention and the OECD Anti-Bribery Convention focus on corruption in the public sector. In Group II, COE Convention, the AU Convention and UNCAC focus on corruption in both the public and private sectors.

¹³Active bribery refers to the offering or granting of a benefit to a public official in return for the doing or not doing of an act and passive bribery refers to the solicitation and acceptance by a public official of a benefit in return for an act or omission.

125 a large extent rely on third parties coming forward with vital information. In an employment context, the people likely to come forward with information about corruption by or within an organisation are the workers. Not unnaturally, those who provide such information will require assurances that they will not suffer reprisals. Otherwise such disclosers may end up as victims.

UNCAC art 33 provides that:

130 Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

135 Article 33 protects all types of people and is not restricted to those who speak out in the public interest from within the organisation. The phrase ‘unjustified treatment’ is sufficiently wide to include discrimination within an employment context. This provision also requires the discloser to have ‘reasonable grounds’. It is unclear whether these are to be subjectively or objectively determined. The distinction between strong suspicions and reasonable grounds may be very difficult to draw at times.

140 The downside of this provision is its non-mandatory character—it does not require State Parties to have such measures in place but only that they consider incorporating measures for protecting those who speak out. It is perfectly feasible for a State to say that they have considered art 33 but have not adopted any measures as a consequence. If the effort to fight corruption is to be taken seriously, 145 it is important that international conventions make their provisions mandatory rather than importing an element of flexibility. It is also essential that those who speak out in the public interest, be they members of the public or those working within an organisation, are given protection that they can rely on.

150 As a means of preventing corruption, UNCAC addresses a number of issues that fall within the broad field of human resource management. Article 7 focuses on the retention, promotion, equitable pay scales and rotation of officials within the public sector. However, there is no mention of or recommendation to use employment law as a means for combating corruption. The discussions leading up to the UNCAC are also silent on this matter. This means that any potential that 155 employment law may have to curb corruption is dependent on national law and is likely to vary from country to country.

160 Despite the silence in respect of the use of employment law, UNCAC art 12 expects State Parties to promote the development of standards and procedures designed to safeguard the integrity of private entities, including ‘the correct, honourable and proper performance of the business’. One way a State Party could improve the integrity of organisations and their staff is by providing legislation that encourages workers to report wrongdoing and offers adequate protection to

165 those who make disclosures in the public interest. Although UNCAC has been widely adopted, only a few of the State Parties have introduced legislation to protect whistleblowers. For instance, among the sub-Saharan countries which have ratified UNCAC, only South Africa¹⁴ and Ghana¹⁵ have legislation for the protection of whistleblowers.

170 Of the regional conventions¹⁶ which have specific provisions requiring states to have whistleblower legislation, the Council of Europe is taking major strides in promoting the protection of whistleblowers. The Council of Europe in Civil Law Convention on Corruption 1999 art 9 requires parties to ensure

. . . appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons authorities.

175 However,  up of States against Corruption (GRECO)¹⁷, a body set up in 1999 to monitor compliance with Council of Europe's anti-corruption legal instruments, noted in its Second Evaluation Report (2003–06) that staff who reported cases of corruption in public administration received no special protection.¹⁸ Its Seventh General Activity Report¹⁹ noted that

180 . . . despite the widespread existence of requirements for officials to report corruption [it] has rarely found that these have helped change the culture of silence that corruption can breed. The main reason for this appears to be fear of repercussions at work and doubt as to whether action will be taken internally to address the problem.

185 The Report also outlined the issues that need to be addressed by the policy makers of contracting states and these include the following: (1) whether a specific law devoted to whistleblowers is needed or whether general employment law can provide the necessary protection through provisions on unfair dismissal and unfair treatment; (2) whether whistle-blowing in both the private and public sectors should be covered within the same legislation or they should be treated in a single piece of law; (3) whether to adopt a stepped approach to reporting (that is where reporting is encouraged initially at the internal level and progresses to independent regulators and the media depending on the circumstances) or whether

¹⁴ Protected Disclosures Act 2000 and Companies Act 2008 s 159.

¹⁵ Whistleblowers Act 2006.

¹⁶ The AU Convention (art V) and the OAS Convention (art III(8)) also require states to provide protection to whistleblowers.

¹⁷ The acronym is from the French title Groupe d'Etats contre la corruption.

¹⁸ <[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports\(round2\)_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports(round2)_en.asp)> (accessed 18 October 2009).

¹⁹ <[http://www.coe.int/t/dghl/monitoring/greco/documents/2007/Greco\(2007\)1_act.rep06_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2007/Greco(2007)1_act.rep06_EN.pdf)> (accessed 18 October 2009).

195 to report externally without going through internal reporting procedures; (4) the level of suspicion acceptable for the reporting of incidents; (5) confidentiality in respect of the whistleblower's identity; (6) whether good faith is an essential factor for the reporting to be lawful; (7) whether in making a report an employee or official could be disciplined for breaching the duty of confidentiality that he or she may be subject to under the employment contract; (8) obligations on employers to establish whistle-blowing procedures; (9) mechanisms available to
200 whistleblowers who suffer reprisals and (10) compensation for whistleblowers who suffer retaliation.

Since the publication of the GRECO Report's other developments have taken place and, on 14 September 2009, the Parliamentary Assembly of the Council of Europe published its Report on the protection of whistleblowers (Doc. 12006). The draft resolution recognises the importance of whistle-blowing to strengthen accountability in the fight against corruption and mismanagement and invites all the member states to review their legislation concerning the protection of whistleblowers. In this, they are to be guided by a number of principles, such as the comprehensiveness of the legislation, whether the legislation provides a safe alternative to silence and mechanisms that evaluate the implementation and impact of the legislation on the effective protection of whistleblowers. The draft resolution also stresses that 'legislative improvements must be accompanied by a positive evolution of the general attitude towards "whistle-blowing" which must be freed from its former association with disloyalty or betrayal'. It also regards non-governmental organisations as playing an important role in contributing to the evolution of a positive attitude towards whistle-blowing. The Report makes a number of recommendations which include that the Committee of Ministers should draw up a set of guidelines for the protection of whistleblowers and consider drafting a framework convention for their protection. Both these suggestions are positive in that they will help in establishing best practice that can be referred to by states that are not members of the Council of Europe.

225 In accordance with good practice, many organisations have adopted a self-regulatory approach by introducing whistle-blowing policies and procedures which deal with the reporting of wrongdoing and the protection of those who do so. These can be viewed as part of corporate governance²⁰ or their corporate social responsibility (CSR) agenda.²¹ The CSR agenda has, in turn, been largely

²⁰ As I. Daugareilh states, 'In the name of ethics, individual workers are called upon to step in and report anyone who is likely to damage the interests of the firm' ('Employee Participation, Ethics and Corporate Social Responsibility' (2008) 14(1) *Transfer* 93, 95).

²¹ Companies use a variety of terms for CSR—these include sustainable development, corporate citizenship and business responsibility.

230 influenced by the OECD Guidelines for Multinational Enterprises²² and the UN Global Compact that provides a platform for companies to commit to its 10 universal principles covering human rights, labour and corruption.²³ However, it is unclear how widespread this practice is since a survey of 82 multinational companies conducted in 2001–02 found that while 50% of the sample reported the introduction of anti-corruption policy statements, only 33% had introduced measures to protect whistleblowers.²⁴

235 There is no uniform definition of CSR, as the various definitions provided as illustrations indicate. CSR according to The European Commission Green Paper²⁵

240 . . . is essentially a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.

The organisation Business for Social Responsibility defines CSR more expansively as

245 . . . operating a business that meets or exceeds the ethical, legal, commercial public expectation that society has of business. CSR is seen by leadership companies as more than a collection of discrete practices or occasional gestures, or initiative or motivated by marketing, public relations or other business benefits. Rather, it is viewed as a

²²These Guidelines were initially published in 1976 but revised in 2000. They include recommendations in respect of standards of good practice to multinational enterprises. They are self-regulatory and have no legal effect. Chapter VI of the Guidelines focuses on combating bribery and was added in the 2000 revision. Adhering governments to the Guidelines actively promote the Guidelines through a National Contact Point which collaborates with employee organisations and the business community among others. The text of the Guidelines is available at <<http://www.oecd.org>> (accessed 18 September 2009).

²³Principle 10 addressing corruption was added in 2004 after the adoption of UNCAC and reads: Businesses should work against corruption in all its forms, including extortion and bribery.

²⁴ISIS Asset Management, *The Governance of Bribery and Corruption: A Survey of Current Practice* (London: Friends, Ivory and Sime, 2002). (<http://www.online.bg/coalition2000/eng/bilb/Bribery_and_Corruption_130202.pdf> (accessed 18 October 2009).) According to this Report in relation to putting policies into practice, 'the majority of companies may be relying on the presence of a code alone to ensure sufficient protection against corruption. In practice, awareness and understanding of codes may not reach beyond head office level'. It must be noted that at the time of this survey, Principle 10 of the UN Global Compact had not been published and the anti-bribery provisions in the OECD Guidelines for Multinational Enterprises had just been adopted. A recent survey of the companies listed in *The Times* (London) as part of an Arts & Humanities Research Council project on 'Corruption in International Business: Limitations of Law' found that the majority of the respondents did not view corruption as a problem or as a threat to their business operations. See I. Carr and O. Outhwaite, 'Corruption and Business Integrity: Law, Policy and Company Practices' (2009) 6(3) *Manchester Journal of International Economic Law* 16.

²⁵<http://www.europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper.htm> (accessed 18 October 2009).

comprehensive set of policies, practices and programs that are integrated throughout business operations, and decision-making processes that are supported and rewarded by top management.²⁶

250 Despite the lack of a uniform definition some common elements emerge—it is a voluntary commitment regarding the role of business towards issues ranging from the ethical to the social that impact on society in a beneficial manner.

Nevertheless, there are many who view CSR as a concept that is alien to corporate behaviour on the reasoning that businesses use resources to maximise profits and their focus is on shareholders' financial interests²⁷ rather than other stakeholders, such as the community. The Marxist viewpoint is similar in holding that CSR and business ethics generally are both impossible and irrelevant. According to William Shaw, it is

260 impossible because capitalism itself tends to produce greedy, over-reaching and unethical behaviour . . . irrelevant because focusing on the moral or immoral conduct of individual firms or business people distracts one's attention from the systemic vices of capitalism.²⁸

This negative view of CSR has led academics such as Reich to hold the view that the only practical way to get businesses to behave in a socially responsible manner is through legal regulation.²⁹

265 It is possible to sympathise with such negative views of CSR as result of the disregard of health and safety standards and breaches of human rights by multinational companies, such as Union Carbide in Bhopal, India, Rio Tinto in Namibia and Unocal in Myanmar. However, external pressures from non-governmental organisations, such as Earthrights International, International Labour Rights Forum and Global Witness, and international organisations such as the International Labour Organisation, together with the use of the Alien Torts Claim Act 1789 in the US courts,³⁰ are all contributing towards a greater willingness

²⁶ <<http://www.bsr.org/resourcecenter>> (accessed 18 October 2009).

²⁷ According to M. Friedman, *Capitalism and Freedom* (Chicago University Press, Chicago, 1962), there is only one social responsibility of business and that is to engage in activities that maximises its profits as long as it does this without deception or fraud.

²⁸ 'Marxism, Business Ethics and Corporate Social Responsibility' (2009) 84 *Journal of Business Ethics* 565.

²⁹ R. Reich, *Supercapitalism: The Transformation of Business, Democracy and Everyday Life* (New York: Knopf, 2007).

³⁰ The Act grants jurisdiction to US federal courts over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. This Act has been used to sue multinational corporations for violations of international law outside the USA thus creating the opportunity for increase accountability on the part of companies. See R. Vosper, 'US Oil Company UNOCAL Liable' <<http://www.globalpolicy.org/component/content/article/221-transnational-corporations/46794.html>> (accessed 18 October 2009); C. Kahn, 'Settlement Reached in Human Rights Cases Against Royal Dutch Shell' <<http://www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30/47879.html>> (accessed 18 October 2009).

275 by companies to adopt codes of conduct that enshrine social and environmental objectives as essential parts of their business policy. To illustrate, Rio Tinto adopted its Rossing Communities Policy (2002–06) for its mine at Rossing in Namibia which hinged on five principal themes including social responsibility, corporate–community partnership, environmental stewardship and community health.

280 One aspect of behaving in a socially responsible manner would be to provide confidential reporting/whistle-blowing procedures to encourage the raising of concerns about suspected wrongdoing.³¹ Indeed, the UK Government expects public bodies to have a whistle-blowing policy and the whistle-blowing arrangements in local authorities and the National Health Service in England are assessed as part of their external audit and review. The emergence of the British Standards Institution Code of Practice on Whistleblowing in 2008,³² developed to assist in all sectors, confirms the view that measures to facilitate the disclosure of wrongdoing are an important part of the CSR agenda. Nevertheless, while voluntary codes of conduct can be useful, particularly if they are discussed with and monitored by trade unions and non-governmental organisations, they should not be regarded as being an effective substitute for legislation.

290 As stated in Section 1, this article has chosen to evaluate the robustness of UK employment law in dealing with corruption in the workplace and the protection of whistleblowers from within organisations. Thus, the following section examines the legal position in the UK.

3. UK EMPLOYMENT LAW

295 However, before examining the mechanisms available in UK employment law for curbing the corrupt activities of those working within an organisation, it is necessary to outline the framework within which the employment relationship operates by considering the relevant common law, legislation and Codes of Practice.³³

³¹In 2005, the Committee on Standards in Public Life identified the need to create a culture of encouraging reporting with the law as a ‘backstop’. *Getting the Balance Right* (Cm 6407, 2005), para 4.46.

³²British Standards Institution, *Whistleblowing Arrangements Code of Practice* (2008) <<http://www.bsigroup.com/en/sectorsandservices/Forms/PAS-19982008-Whistleblowing/>> (accessed 18 October 2009). At the international level, the International Chamber of Commerce (ICC) has issued its *Guidelines on Whistleblowing* (2008) <[http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20as%20adopted%204_08\(2\).pdf](http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20as%20adopted%204_08(2).pdf)> (accessed 18 October 2009). These should have an international impact since the ICC plays a central role in all aspects of international business from standard trade terms, payment mechanisms through to arbitration and conciliation in international business transactions.

³³These are not legally binding but are admissible as evidence.

300 **A. Common Law Implied Terms and Fiduciary Obligations**

The obligations of an employee are derived from the following sources:

- (1) express terms contained in the contract of employment;
- (2) implied terms, including the duty of good faith and fidelity and
- (3) equity, which imposes fiduciary obligations.³⁴

305 A distinction must be made between the application of common law implied undertakings and fiduciary obligations. The former affects all employees regardless of their position within an organisation, whereas the latter is dependent on a person's status within an organisation and applies, for instance, to managers, directors or as a result of a specific undertaking.³⁵ The notion of loyalty is central
310 to the fiduciary obligation and Lord Millett in *Bristol and West Building Society v Mothew*³⁶ explained the nature of the fiduciary obligation thus:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is
315 entitled to the single-minded loyalty of his fiduciary. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They
320 are the defining characteristics of the fiduciary.³⁷

The obligation of fidelity which is found in common law has now evolved into the duty of trust and confidence, the latter now being imposed on both the employer and the employee.³⁸ The concepts of trust and confidence, as apparent
325 from Lord Millet's statement above, are also to be found in fiduciary obligations and this has inevitably resulted in some confusion about the distinction between fiduciary obligations and the duty of good faith or fidelity implied into contracts of employment. For example, in *Neary v Dean of Westminster*,³⁹ the duty of trust and confidence was seen as creating a fiduciary relationship. Some academic writers also argue that there is no difference between fidelity and fiduciary obligations.

³⁴ According to the literature on law and economics, fiduciary relationships have been created to deal with 'lack of control and the resulting problems of detection of wrongdoing', V. Sims, 'Is Employment a Fiduciary Relationship?' (2001) 30 *ILJ* 101, 107.

³⁵ See below for more on the fiduciary obligations of directors and senior managers.

³⁶ [1998] 1 Ch 1 (Ch).

³⁷ At p 18.

³⁸ For an interesting article on the mutual implied duty of trust and confidence as a relational norm, see M. Boyle, 'The Relational Principle of Trust and Confidence' (2007) *OJLS* 633.

³⁹ [1999] *IRLR* 289 (HL).

330 According to Flanagan's analysis, *Robb v Green*⁴⁰ was the first case to refer to a
duty of fidelity and 'like faith, faithful and good faith, it is a synonym for loyalty
and fiduciary accountability'.⁴¹ In his view, the duty of fidelity is not distinct from
a fiduciary obligation or duty of confidence but is merely another description of it.
335 Indeed, he asserts that 'whether or not judges today generally recognise it, courts
have been imposing fiduciary obligations on all employees on a status basis for
the past two centuries'.⁴²

However, a distinction can be drawn between fiduciary obligations and the
common law implied term of good faith and fidelity. The concept of fiduciary
duties requires a party to a relationship to perform obligations which are not
340 mutual but demands that one party act solely in the interests of another.⁴³ On the
other hand, the duty of fidelity (or good faith) which is implied by common law,
requires a party to take into consideration the interests of another but they do not
have to act in that other's interests.⁴⁴ Thus, the traditional view is that fiduciaries
have a positive duty to disclose information which is not imposed on 'ordinary'
345 employees via implied contractual terms.

As stated earlier, a person's position within an organisation determines whether
he or she is under a fiduciary obligation to the employer. Apart from their
obligations as employees,⁴⁵ directors also have a duty not to avail themselves of
opportunities that might conflict with their duties to the company.⁴⁶ For instance, in
350 *Horcal Limited v Gatland*,⁴⁷ the Court of Appeal recognised an implied obligation
to disclose secret profits and, in *Tesco Ltd v Pook*,⁴⁸ where a senior manager was
found to have taken a bribe, it was held that there was a duty to disclose breaches
of fiduciary obligations. This obligation to act in the best interests of the employer
was again highlighted in *Item Software v Fassihi*,⁴⁹ a case involving a secret profit.

355 Directors are also placed under certain legal obligations to act in the best
interests of the company. In relation to the directors' common law duty of care,
Parker J. has stated that, 'Directors have, both collectively and individually, a
continuing duty to acquire and maintain a sufficient knowledge and understanding

⁴⁰ [1895] 2 QB 315 (CA).

⁴¹ At p 281.

⁴² At p 288.

⁴³ See generally P. Finn, *Fiduciary Obligations* (Cambridge: Cambridge University Press, 1977).

⁴⁴ In practice, the duty to 'have regard to' the employer's interest can all too easily be treated as an obligation to act in the employer's interest.

⁴⁵ There are many cases that confirm that directors may also be employees. See, for example, *Clark v Clark Construction Initiatives Ltd* [2008] IRLR 364 (EAT); *Nesbitt v Secretary of State for Trade and Industry* [2007] IRLR 847 (EAT) and *Sellars Arenascene Ltd v Connolly* [2001] IRLR 222 (CA).

⁴⁶ See *Ultraframe Ltd v Fielding* [2005] EWHC 1638.

⁴⁷ *Horcal Ltd v Gatland* [1983] IRLR 459 (CA).

⁴⁸ [2004] IRLR 618 (Ch).

⁴⁹ [2004] IRLR 928 (CA).

of the company's business to enable them properly to discharge their functions as director'.⁵⁰ More recently, the Companies Act 2006 (CA 2006) s 174(2)(a) requires a director to exercise

general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company.

Additionally, CA 2006 s 172(1) imposes a general duty to promote the success of the company

... for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to ... (b) the interests of the company's employees, ... (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, ...

Taken together, these provisions could be construed as imposing an obligation on directors to look out for and deal with corruption.

As for those who are not subject to directors' obligations, the common law implied duty of fidelity requires that employees must not put themselves in a position where their interests conflict with those of their employer. Thus, in *Boston Deep Sea Fishing & Ice Company v Ansell*,⁵¹ it was held that an employee who took a commission of which his employers were unaware was lawfully dismissed. Although the defendant had fiduciary obligations as a managing director, this case has been treated as authority for the general proposition that employees who improperly exploit their position to make a secret profit will be in breach of the duty of fidelity. Over a century later, *Nottingham University v Fishel*⁵² provided a useful discussion about the circumstances in which it is appropriate to imply fiduciary obligations. Here, the plaintiff attempted to recover damages from a scientist who had used other employees to undertake private work without informing the university. In the earlier cases of *Attorney-General v Blake*⁵³ and *Neary v Dean of Westminster*,⁵⁴ employment had been treated as an example of a fiduciary relationship. However, in *Fishel*, the Employment Appeal Tribunal maintained that a contract of employment does not in itself establish such duties. According to Elias J. (as he then was), to decide whether a fiduciary relationship arises 'it is necessary to identify with care the particular

⁵⁰ *Re Barings plc (No 5)* [2000] 1 Butterworths Company Law Cases 523, 535.

⁵¹ (1888) 39 Ch 339 (CA).

⁵² [2000] IRLR 471 (EAT).

⁵³ [1998] 2 WLR 805 (HL). It is worth observing that, Lord Woolf stated, 'Not every breach of duty by a fiduciary is a breach of fiduciary duty, and a fiduciary may commit a breach of contract without committing a breach of fiduciary duty' [at 843].

⁵⁴ [1999] IRLR 290 (HL). In this case, the duty of trust and confidence was treated as creating a fiduciary relationship.

390 duties undertaken by the employee, and to ask whether in all the circumstances
he has placed himself in a position where he must act solely in the interests of
his employer'.⁵⁵

By way of contrast, Flanagan describes it as an 'analytical error to deny fiduciary
accountability where there is a limited access arrangement, which is invariably
395 the case for employment'.⁵⁶ While Flanagan is right in his observation that the
courts have in effect been imposing fiduciary obligations on employees for a long
time, this does not necessarily mean that it is desirable to treat the employment
relationship as a fiduciary one. One consequence of regarding employment as a
400 status fiduciary relationship might be that the beneficiary of the status duty (the
employer) might have a fiduciary obligation to the status fiduciary (the employee)
to provide a mechanism for reporting corruption. However, it might equally be
argued that the implied duty of trust and confidence (see below) already requires
reporting procedures to be made available.⁵⁷

As for the common law position on reporting obligations, *Sybron Corporation*
405 *v Rochem Ltd*⁵⁸ provides authority for the proposition that there may be an
implied contractual obligation to report the wrongdoings of others even if that
requires the disclosure of one's own impropriety. However, the common law
principle remains intact that employers generally do not have to disclose their
own breaches of contract.⁵⁹

410 The current implied duty of trust and confidence has its origins in the duty
of fidelity which applies to both parties. This duty was originally imposed on
employees (in the shape of obedience and faithful service) and developed into an
'affirmative obligation on the part of the employee to use his or her best efforts
to ensure the efficient running of the enterprise'.⁶⁰ However, a duty to cooperate
415 has now been extended to employers and, in the form of trust and confidence,
is regarded as a fundamental term in contracts of employment.⁶¹ In *Johnson v*

⁵⁵ Para 97.

⁵⁶ *Ibid*, p 290.

⁵⁷ See D. Lewis, 'Whistleblowing in a Changed Legal Climate: Is it Time to Revisit Our Approach to Trust and Loyalty at the Workplace?' (2009) Middlesex University Law Department Working Paper No. 1/2009.

⁵⁸ [1984] Ch 112 (CA). This case was argued on the basis of contractual rather than fiduciary obligations and the Court of Appeal held that a senior employee was in breach of duty in not disclosing that fellow employees had established rival organisations and were trading in competition with Sybron.

⁵⁹ See *BCCI SA v Ali* [1999] IRLR 226 (CA).

⁶⁰ S. Deakin and G. Morris, *Labour Law*, 4th edn (Oxford: Hart, 2005) at p 332. For an example of the employee's duty to cooperate being viewed from the commercial perspective of the employer, see *Secretary of State v ASLEF* [1972] 2 AER 749 (CA).

⁶¹ See D. Cabrelli, 'The Implied Duty of Trust and Confidence: An Emerging Overarching Principle?' (2005) 31 *ILJ* 284.

420 *UNISYS Ltd*,⁶² Lord Steyn described trust and confidence as an ‘overarching obligation implied by law as an incident of the contract of employment’ and, in *Mahmud v BCCI*,⁶³ it was observed that ‘the major importance of the implied duty of trust and confidence lies in its impact on the obligations of the employer’. According to Browne-Wilkinson J. (as he then was) in *Woods v WM Car Services Ltd*⁶⁴, employers must not ‘without reasonable and proper cause, conduct themselves in a manner calculated to or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’.⁶⁵ If they do so, one consequence is that employees might argue that they have been constructively dismissed.

430 The importance today of the implied term of trust and confidence should not be underestimated. According to Brodie, ‘the open-textured nature of the term makes it an ideal conduit through which the courts can channel their views as to how the employment relationship should operate’.⁶⁶ More specifically, Hepple asserts that this duty imposes a duty to respect the employee’s human rights.⁶⁷ Thus, in the context of corruption, this might include an obligation to allow workers to speak out about perceived wrongdoing. In *Malik v BCCI SA*,⁶⁸ trust and confidence was central to the employees’ claims that their prospects had been damaged by the fraudulent conduct of the bank. In this case, Lord Steyn was of the opinion that it was unnecessary for the employer’s conduct to be targeted at the employee as an individual or for the employee to be aware of the breach while it was occurring. More generally, Lord Nicholls regarded the implied term of trust and confidence as a vehicle for dealing with ‘harsh and oppressive behaviour or any other form of conduct which is unacceptable today’.⁶⁹ As the discussion below suggests, trust and confidence has the potential to play a substantial role as an anti-corruption device.

B. Using UK Law to Deal with Corruption at the Workplace

445 The combination of express terms, implied terms and fiduciary obligations places the employer in a strong position to curtail the activities of the employee. For the purposes of this article, the question is how this combination impacts upon

⁶²[2001] IRLR 279 (HL).

⁶³[1998] AC 20 (HL), 46.

⁶⁴[1981] IRLR 347 (EAT).

⁶⁵By way of contrast to Flanagan, Sims observed that: ‘this term is not some watered down version of a fiduciary obligation; it is a separate concept which (unfortunately) shares the same terminology as a fiduciary relationship’ (2001) *ILJ* 101 at 104.

⁶⁶D. Brodie, ‘The Heart of the Matter: Mutual Trust and Confidence’ (1999) 28 *ILJ* 121.

⁶⁷B. Hepple, ‘Human Rights and Employment Law’ (1998) 19 *Amicus Curiae* 22.

⁶⁸[1997] IRLR 462 (HL).

⁶⁹At 465.

corrupt activities within an organisation and how far employment legislation protects those who report their suspicions.

(i) Dealing with Workers Who Are Believed to Have Acted Corruptly

450 A worker can engage in corrupt behaviour in a number of ways, ranging from
misappropriation of funds or false accounting through to bribery. An obvious
example would be where a worker promises or offers a bribe to a third party (eg
455 a public official) for the purposes of obtaining a sales contract or solicits a bribe
from a third party (eg from a sales manager of a private enterprise) in order to
place an order with the organisation. The worker's behaviour need not necessarily
be restricted to bribes, where there is mutual exchange of favours with third
parties outside the organisation. It could well take place within an organisation
between two workers, for instance, in the case of false expense claims between a
salesperson and a worker in the finance department. The corrupt behaviour could
460 include other abuses, such as the misappropriation of funds legally entrusted to
them in their formal capacity and false accounting. Without doubt employees who
engage in corrupt behaviour that impacts on the employer will be in breach of
the implied duty of fidelity and/or trust and confidence.⁷⁰ Alleged corruption on
the employee's part could be classified as misconduct or 'some other substantial
465 reason' for dismissal depending on the circumstances.⁷¹ Thus where there are
express terms or rules about financial wrongdoing, in the form of a 'conflict of
interest' policy or code of conduct indicating the acceptable or unacceptable
kinds of payments and/or behaviour, the alleged behaviour will be classified as
misconduct. Where there are doubts about whether the employee realised that his
or her activities amounted to misconduct, for example, where the organisation has
470 failed to give guidance on facilitation payments and bribes⁷² while doing business
with foreign public officials, some other substantial reason is more appropriate.

⁷⁰For instance, in *Neary v Dean of Westminster* [1999] IRLR 289 (HL), where an organist failed to disclose profits made from recording contracts, trust and confidence was viewed as part of the test for gross misconduct.

⁷¹In some sectors, the Employment Rights Act 1996 s 98(2)(d) might be invoked, ie 'the employee could not continue to work in the position which he held without contravention (either on his part or on that of this employer) of a duty or restriction imposed by or under an enactment'.

⁷²The OECD Anti-Bribery Convention makes a distinction between bribes and facilitation payments for the purposes of the offence of bribery. Para 9 of the Commentaries states: Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of para 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

475 While it might be fairly easy to dismiss someone who acted corruptly and was aware of the consequences, this course of action is likely to be more difficult where there are genuine doubts about whether the employee's behaviour was improper, for instance where the employer has not made clear the company policy on facilitation payments to public officials. In these circumstances, it might be reasonable to consider alternative employment, for example, if a worker with a previously unblemished record was willing to move to a position where corruption could not recur.⁷³

480 Obtaining evidence in corruption cases is always difficult and employers are subject to a number of legal constraints which, in some cases, may be dealt with by suitable clauses in the employment contract. The first is the right to privacy enshrined in European Convention on Human Rights art 8.⁷⁴ Another constraint is the statutory tort of unlawful interception of communications on a private network created by the Regulation of Investigatory Powers Act 2000.⁷⁵ In determining whether an interception was lawful or not, attention will focus on consent. Again this could be evidenced by a contractual term giving the employer the right to monitor communications. In addition, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000⁷⁶ legitimize interceptions that would otherwise be unlawful even when objections have been raised. In particular, Reg 3(1)(a)(iii) allows employers to monitor or record communications without consent 'for the purpose of preventing or detecting crime'. However, Reg 3(2) requires the 'system controller' to make 'all reasonable efforts to inform every person who may use the system' that interceptions may occur. Such information could easily be conveyed by either contractual documents or company policies. Information derived from the interception of communications is likely to be covered by the Data Protection Act 1998 and can only be processed in a way that does not violate the data protection principles.⁷⁷ These principles require individuals to be informed in advance about the uses to which processed

485
490
495

⁷³ See *Hamilton v Argyll & Clyde Health Board* [1993] IRLR 99 (EAT).

⁷⁴ Article 8(1) states that 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

⁷⁵ S 1(3) provides that: Any interception of a communication which is carried out at any place in the UK by, or with the express or implied consent of, a person having the right to control the operation or the use of a private communication system shall be actionable at the suit or instance of the sender or recipient, or intended recipient, of the communication if it is without lawful authority and is either— (a) an interception of that communication in the course of its transmission by means of that private system; or (b) an interception of that communication in the course of its transmission, by means of a public communications system, to or from apparatus comprised in that private telecommunication system.

⁷⁶ S.I. 2000/2699.

⁷⁷ Data Protection Act 1998 Schedule 1. The Information Commissioner's Employment Practices Code para 3.4. suggests that covert monitoring should only be used in exceptional circumstances and should be part of a specific investigation.

500 ‘personal data’ about them will be put and the people to whom it will be disclosed. Schedule 2 contains exemptions which would cover the collection and use of personal data for the prevention and detection of corruption.

Where management are in possession of data alleging corruption received in confidence or anonymously, reliance on such information may cause difficulties, especially where due process may be jeopardised by the need to protect those who have provided information. In such circumstances, ‘a careful balance must be maintained between the desirability to protect informants who are genuinely in fear, and providing a fair hearing of issues for employees who are accused of misconduct’.⁷⁸ However, recent dismissal cases based on information given in confidence suggest that it may not be essential for statements to be detailed.⁷⁹ It must also be noted that, according to a House of Lords decision in 1979,⁸⁰ discovery of confidential documents can be ordered where it is necessary to dispose fairly of proceedings. Since then tribunals have acquired considerable experience of using statements to conceal the identity of their makers.⁸¹

515 There is no doubt corruption will be regarded as a fair reason for dismissal but cases of suspected corruption may be more difficult to handle. According to the Court of Appeal in *Panama v London Borough of Hackney*,⁸² fairness demands that serious allegations of dishonesty be put with sufficient formality and at an early enough stage to provide a full opportunity for answer. It also cited with approval the approach taken in *British Home Stores v Burchell*,⁸³ where it was stated that tribunals had to decide whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee at that time. This issue is not determined by an objective standard, ie whether or not the employer’s belief that the employee was guilty of the misconduct was well founded. Instead the question is to be answered by establishing whether the employer believed that the employee was guilty and was entitled to so believe having regard to the investigation conducted.⁸⁴ As long as these requirements are met, it is irrelevant that the employee is acquitted of criminal charges or that they are dropped.

⁷⁸ P. Wood, *J. Linfood Cash & Carry v Thomson* [1989] IRLR 235 (EAT) at 237. While every case will depend on its own facts, the EAT provided a 10-point guide for employers.

⁷⁹ For instance, in *Ramsay v Walkers Snack Foods Ltd* [2004] IRLR 754 (EAT), the Appeal Tribunal held that the employers had fairly dismissed for theft on the basis of statements made by fellow employees who insisted that they should not be identified. This was notwithstanding the fact that the statements lacked detail and witnesses were not questioned by the managers involved in the disciplinary process.

⁸⁰ *Science Research Council v Nasse* [1979] IRLR 465 (HL).

⁸¹ See *Asda Stores v Thompson* [2004] IRLR 598 (EAT).

⁸² [2003] IRLR 278 (CA).

⁸³ [1978] IRLR 379 (EAT).

⁸⁴ See *Sainsburys Ltd v Hitt* [2003] IRLR 23 (CA).

530 It is possible that a group of workers within the organisation may collude in
corrupt practices. Where the employer has a reasonable suspicion that one or
more workers within a group have acted corruptly, it is not necessary for the
employer to identify which of them so acted.⁸⁵ Thus, provided certain conditions
are satisfied, an employer who cannot identify which member of a group was
535 corrupt can fairly dismiss the whole group, even where it is probable that not all
were guilty.⁸⁶

(ii) Workers' Duty to Report Suspected Corruption

'Ordinary' employees have no general duty to investigate allegations of corruption
unless they have a supervisory role, for instance in the finance department.⁸⁷ The
540 lack of clarity in respect of the implied obligations (fiduciary or otherwise) of
employees to disclose wrongdoing highlighted in Section 3.A above means that
the employer may wish to include express terms that place the worker under
an obligation to report corruption.⁸⁸ How far these clauses will be effective will
depend on their precise wording. For example, in *Swain v West Ltd*,⁸⁹ it was held
545 that a general manager's duty to 'provide, extend and develop the interests of the
company' required him to report his managing director's wrongdoing. However,
such a clause would be too vague to be enforced against non-managerial employees.
Whether such 'duty to report corruption' clauses will in practice persuade workers
to reveal their own misdeeds is highly debatable.⁹⁰

550 If an employee had a duty to report corruption by others, either through an
express term or implied fiduciary obligation, a failure to do so could result in
dismissal on the grounds of misconduct. In the absence of an express term or
fiduciary duty, the employer could rely on some other substantial reason as a
potentially fair reason for dismissal. It is important to note that it is sufficient

⁸⁵ See *Parr v Whitbread plc* [1990] IRLR 39 (EAT).

⁸⁶ These conditions are (1) the act must be such that if committed by an identified individual it would justify dismissal; (2) the employer had conducted a sufficiently thorough investigation with appropriate procedures; (3) the investigation led the employer to reasonably believe that more than one person could have been corrupt; (4) the employer had acted reasonably in identifying the group of workers who could have been corrupt and each member of the group was individually capable of being so and (5) the employer could not reasonably identify the individual perpetrator.

⁸⁷ On the position of 'senior' employees, see *RBG Resources plc v Rastogi* [2002] EWHC 2782.

⁸⁸ On the ethical implications of doing so, see E. Tsahuridu and W. Vandekerckhove, 'Organisational Whistleblowing Policies: Making Employees Responsible or Liable?' (2008) 82 *Journal of Business Ethics* 107.

⁸⁹ [1936] 3 All ER 261 (CA).

⁹⁰ In *Bell v Lever Brothers Ltd* [1932] AC 161 (HL), the House of Lords rejected the argument that the defendants, who had made secret profits by speculating in the business of a subsidiary, had a duty to reveal their own wrongdoing.

555 for employers to show that they genuinely believed a reason to be fair and that they had it in mind at the time of dismissal.⁹¹ Thus an employer's belief, even if it was mistaken, that an employee was corrupt or had breached an obligation to report the corruption of others could constitute a potentially fair reason for dismissal.⁹²

560 The Public Interest Disclosure Act 1998, which inserted ERA 1996 Part IVA,⁹³ also enables workers to make a 'protected disclosure'. ERA 1996 s 43A defines a protected disclosure as a 'qualifying disclosure' which is made to the worker's employer or to another responsible person or in the course of obtaining legal advice; to a Minister of the Crown; to a person prescribed by the Secretary of State or, in limited circumstances, to any other person. The s 43B(1) defines a 'qualifying disclosure' as one which a worker reasonably believes⁵⁶⁵ and tends to show one or more of the following: (1) a criminal offence; (2) a failure to comply with any legal obligation; (3) a miscarriage of justice; (4) danger to the health and safety of any individual; (5) damage to the environment or (6) the deliberate concealment of information tending to expose any of the matters listed above. The remedies available are unlimited compensation (plus interim relief and re-employment if the complainant has been unfairly dismissed).⁹⁴ Only employees can claim unfair dismissal and s 103A ERA 1996 makes it automatically unfair to dismiss if the reason was that the employee had made a protected disclosure.

570 Information about corruption will amount to a qualifying disclosure and fall within s 43B(1) ERA 1996, although there is no qualifying disclosure if the worker 'commits an offence by making it'.⁹⁵ ERA 1996 s 43B(2) also protects information which relates to corruption occurring in another country.⁹⁶ *Parkins v Sodexho Ltd*⁹⁷ has confirmed that the words 'any legal obligation' in ERA 1996 s 575 43B(1)(b) include any failure to comply with a duty which arises from a contract of employment. Thus, a worker would be entitled to disclose a breach of an express term relating to the reporting of corruption, the implied terms of fidelity

⁹¹ See *Ely v YKK Ltd* [1993] IRLR 500 (CA).

⁹² See *Bouchaala v Trust House Forte* [1982] IRLR 382 (EAT).

⁹³ See generally J. Bowers and others, *Whistleblowing: Law & Practice* (Oxford: OUP, 2007).

⁹⁴ ERA 1996 ss 124(1A) & 128. Apart from actual loss suffered, employees can be compensated for injury to feelings and may recover aggravated damages. See *Virgo Fidelis School v Boyle* [2004] IRLR 268 (EAT).

⁹⁵ ERA 1996 s 43B(3). This obviously applies to those covered by the Official Secrets Act 1989. See *R v Shayler* [2003] AC 247 (HL).

⁹⁶ '... it is immaterial whether the relevant failure occurred ... in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory'. This inclusion can be explained on the basis of the UK's ratification of the OECD Anti-Bribery Convention. If employees are to come forward with information about the payment of bribes by an undertaking while doing business abroad, it is important to protect such disclosures.

⁹⁷ [2002] IRLR 109 (EAT).

585 or trust and confidence or a fiduciary obligation. Fortunately, the Court of Appeal has confirmed that the reasonable belief in wrongdoing must be based on the facts as understood by the worker and not as actually found to be the case.⁹⁸ This is important because it enables people to make a qualifying disclosure if they reasonably believe there is corruption but are in fact wrong.

590 Although ERA 1996 s 43A allows a qualifying disclosure to be made to a variety of recipients, the legislation does not impose a specific duty on them to take action in relation to anything that is revealed. Except where the recipient is a legal adviser,⁹⁹ the worker's disclosure must be made in good faith. To date the only guidance provided by the Court of Appeal on the meaning of good faith was in the case of *Street v Derbyshire Unemployed Workers Centre*.¹⁰⁰ Here, it was stated that more than a reasonable belief in the truth of the information disclosed
595 was needed. However, according to the court, employment tribunals should only find a lack of good faith where they are of the opinion that the dominant or predominant purpose of making the disclosure was for some ulterior motive. Since the possibility of motives being examined may well deter some important disclosures relating to corruption, there are strong grounds for arguing that
600 motive should be irrelevant if a worker has reasonable grounds to believe that their information is true.¹⁰¹

While it might be easier, quicker and safer for a worker to disclose information internally and highly desirable from the employer's point of view, it is unfortunate that the ERA 1996 does not require employers to have reporting procedures.¹⁰²
605 Workers who seek legal advice about concerns and reveal to their adviser the issues about which a disclosure may be made are protected by ERA 1996 s 43D. However, no general advice agency has been created by the legislation so those concerned about possible corruption will need to find their own way to relevant bodies, for example the Financial Services Authority, the Audit Commission or
610 HM Revenue & Customs. ERA 1996 s 43F provides that disclosures made to

⁹⁸ *Babula v Waltham Forest College* [2007] IRLR 346 (CA).

⁹⁹ Bad faith is tolerated in these circumstances because legal advisers are normally prohibited from revealing what their clients have told them.

¹⁰⁰ [2004] IRLR 687 (CA).

¹⁰¹ In the Fifth Report of the Shipman Inquiry 'Safeguarding Patients: Lessons from the Past—Proposals for the Future' (Cm 6394,2004), Dame Janet Smith stated: . . . I think there should be public discussion about whether the words '*in good faith*' ought to appear in the PIDA. In my view, they could properly be omitted.

¹⁰² Empirical research demonstrates that a very high proportion of employers in the sectors surveyed have introduced confidential reporting/whistle-blowing procedures. Since it may be difficult to report concerns about fraud and malpractice elsewhere, it is understandable why these issues were the most frequently reported via whistleblowing procedures. See D. Lewis, 'The Contents of Whistleblowing/Confidential Reporting Procedures in the UK: Some Lessons from Empirical Research' (2006) 28 *Employee Relations* 76.

persons prescribed by the Secretary of State are protected¹⁰³ and the bodies just mentioned are included in the Schedule to the Regulations. In order to rely on this section, the worker must reasonably believe both that the matter falls within the remit of the prescribed person and that the information and any allegation contained in it are substantially true.¹⁰⁴ Unfortunately, if a concern about corruption is raised which is not within the remit of the recipient that person is not obliged to refer it to an appropriate person. Additionally, neither the ERA 1996 nor the Regulations impose a duty on prescribed persons to investigate and deal with concerns.

ERA 1996 ss 43G & H enable workers to make wider disclosures in limited circumstances.¹⁰⁵ For example, where employers do not deal with allegations of corruption to the worker's satisfaction or the worker is unhappy with the performance of a prescribed person,¹⁰⁶ a disclosure to the media might be contemplated. However, only rarely will the extensive requirements of ERA 1996 s 43G be met and it is even less likely that the conditions laid down in ERA 1996 s 43H will be satisfied. In relation to the latter, not only must the alleged corruption constitute an 'exceptionally serious failure'¹⁰⁷ but regard will also be

¹⁰³ See the Public Interest Disclosure (Prescribed Persons) Order 1999 S.I.1999/1549 [as amended].

¹⁰⁴ On the distinction between information and an allegation, see: *Cavendish Munro Professional Risks Management Ltd v Geduld* [2009] UKEAT 0195_09_0608.

¹⁰⁵ ERA 1996 s 43G provides that, in order to be protected workers must:

- (i) act in good faith;
- (ii) reasonably believe that the information and any allegation contained in it are substantially true;
- (iii) not act for personal gain (see below);
- (iv) have already disclosed substantially the same information to the employer or to a person prescribed under s 43F, unless they reasonably believe that they would be subject to a detriment for doing so, or that the employer would conceal or destroy the evidence if alerted; and
- (v) act reasonably.

For these purposes regard shall be had, in particular, to:

- (a) the identity of the person to whom the disclosure is made (for example disclosure to an Member of Parliament may be reasonable but not to the media);
- (b) the seriousness of the matter;
- (c) whether there is a continuing failure or one likely to recur;
- (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to another person;
- (e) any action the employer (or prescribed person) has taken or might have been expected to take in relation to a previous disclosure;
- (f) whether the worker has complied with any procedure authorised by the employer for making a disclosure.

¹⁰⁶ Perhaps through lack of timely feedback.

¹⁰⁷ Since this term is undefined, the worker will only learn after the event whether their disclosure was protected.

had to the identity of the recipient of the information. In most cases, it will only be reasonable to put concerns in the public domain if the relevant authorities have been given the opportunity but failed to deal with the allegations.

630 Two further points need to be made about the operation of the protected disclosure provisions. First, ERA 1996 s 47B(1) introduced the right not to be subjected to any detriment 'on the ground that the worker has made a protected disclosure'. This means that it is necessary to show that the protected disclosure has caused or influenced the employer to act (or not to act) in the way complained of.¹⁰⁸ Regrettably, it seems to be limited in scope and does not protect an individual
635 who suffers a detriment for trying to investigate. Thus, in *Bolton School v Evans*,¹⁰⁹ the Employment Appeal Tribunal accepted that the school had genuinely believed that Mr Evans had hacked into the computer system without authority and had been disciplined for that reason:

640 it seems to us that the law protects the disclosure of wrongdoing, or anticipated wrongdoing, which is covered by Section 43B. It does not protect the actions of the employee which are directed to establishing or confirming the reasonableness of that belief.

Similarly, the Court of Appeal was of the view that the whole course of conduct should not be regarded as an act of disclosure so that the hacking was part of
645 it.¹¹⁰ This creates the unfortunate situation whereby protection is not afforded to workers who have a reasonable belief. They also have no redress if they are penalised for investigating whether or not they have grounds to sustain their belief. Unless employment tribunals carefully examine arguments that detriments were imposed because of acts related to the disclosure rather than because of the disclosure itself, the protection available to those who wish to report corruption
650 will be seriously undermined. Second, the ERA 1996 does not assist those who are victimised for attempting to make a protected disclosure. This leaves rooms for employers to punish those who are in the process of exposing corruption but are yet to complete it.

655 (iii) Employers' Duty to Report Corruption

Just as workers can engage in a variety of corrupt activities, so too can employers. Indeed, they may well enlist the help of their workforce in this endeavour. At present, there is no rule which requires the employer to disclose any wrongdoing. In *BCCI v Ali*,¹¹¹ Lightman J. thought that

¹⁰⁸ See *London Borough of Harrow v Knight* [2003] IRLR 140 (EAT).

¹⁰⁹ [2006] IRLR 500 (EAT).

¹¹⁰ [2007] IRLR 58 (CA).

¹¹¹ [1999] IRLR 226 (CA) at 231.

660 there is indeed much to be said for relaxing the rule which exempts employers and employees alike for any duty to disclose to the other their breaches of duty, for disclosure may be essential to enable the other party to take urgent steps to cure, control or mitigate the consequences of such breach: such disclosure may be necessary to protect the other's physical, financial and psychological welfare.

665 Nevertheless, despite developments in the law of trust and confidence, he concluded that 'a duty to confess wrongdoing whether on the part of the employer or employee may be thought to require standards extravagant and unattainable at the workplace'. It therefore seems that there is no general duty on either party to a contract of employment to admit to corruption.¹¹² However, as indicated below, there are a range of statutory provisions that require workers to cooperate with the authorities.¹¹³

670 Under the Proceeds of Crime Act 2002 ss 330–332, it is an offence not to disclose information about money laundering which is acquired 'in the course of a business in the regulated sector'. More generally, employees have a duty to provide information in relation to investigations under the Banking Act 1987 s 41, Building Society Act 1986 s 55(3) and Companies Act 2006 s 1038. Lastly, 675 had the Corruption Bill 2007¹¹⁴ been enacted, s 1 would have introduced new corruption offences and s 8 would have imposed a duty on 'a person exercising any public function' to 'disclose as soon as reasonably practicable and in the prescribed manner'. Where the employer had established a procedure, disclosures 680 would have been made in accordance with it (and to a constable) and a failure to report would have been an offence, as would victimisation of a person making a disclosure under s. 8.¹¹⁵ Those who fulfilled their duty to disclose would have been treated as making a protected disclosure under ERA 1996 Part IVA.¹¹⁶

685 At common law, although there is a longstanding duty to obey their employer's orders, employees are not required to follow those that are unlawful. Thus, an

¹¹² See the *Sybron* case (n 58 above) on the duty to report the wrongdoing of others.

¹¹³ Employees also have a duty to report concerns about health and safety, for example, under Regulation 14 of the Management of Health and Safety at Work Regulations 1992 S.I. 1992/3242.

¹¹⁴ HL Bill (2006–7) 126 (Private Member's Bill).

Q9 ¹¹⁵ Corruption Bill 2007 Cl. 9 & 10.

¹¹⁶ Corruption Bill 2007 Cl. 8(4). In 2003, the UK Government published its Draft Corruption Bill (Cm 5777, 2003) following the model proposed by the Law Commission in its Report *Legislating the Criminal Code: Corruption* (Law Com No 248, 1998). The Bill was not enacted due to widespread criticism about lack of clarity and complexity. At the request of the Home Office, the Law Commission published a consultation document (see Law Commission, *Reforming Bribery* (Consultation Paper 185, 2007). This was followed by the Law Commission document *Reforming Bribery* (HC 928, 2008). The Bribery Bill 2009 has been laid before Parliament. This Bill creates an offence of failure by a commercial organisation to prevent bribery (cl. 5) but allows the commercial organisation the defence that it had in place adequate procedures that were designed to prevent it committing the offences of bribery (cl. 1) or of bribery of a foreign public official (cl. 4) while performing services for or on behalf of the organisation.

instruction which requires an employee to pay a bribe to a third party could be refused without there being a breach of contract or fair dismissal.¹¹⁷ However, non-compliance with orders of itself is insufficient to expose wrongdoing. Something more is required and this is recognised by the long-established public interest defence to an action for breach of the duty not to disclose confidential information acquired in the course of employment. In *Gartside v Outram*,¹¹⁸ for instance, it was established that the disclosure of financial information could be permitted if the employer had been engaged in fraud. As Wood V-C, said

there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part.¹¹⁹

Subsequently, in *Initial Services Ltd v Putterill*,¹²⁰ the Court of Appeal held that the disclosure of a price protection ring to a newspaper was in the public interest. Similarly, in *Re A Company's Application*,¹²¹ an injunction sought to prevent the disclosure of alleged tax improprieties and breaches of the Financial Investment Management Rules were refused on the basis that the duty of confidentiality should not be used to inhibit disclosures to appropriate regulatory bodies. Q4

(iv) Vicarious Liability for Corruption

Where it has been made clear to staff that they must never act corruptly, the fact that corruption has benefited the employer, for example where a bribe has been used to secure a commercial contract, will not prevent the organisation from taking disciplinary action against the employee for failure to obey orders or breach of trust and confidence. However, the situation is different if the employee has been authorised to use 'any necessary means' to obtain a contract. Here, the employee is likely to argue that adherence to instructions cannot amount to either misconduct or a breach of trust and confidence even though she or he may have committed a criminal offence. For instance, if he or she has offered a bribe to a third party who is a public official, then the individual would have committed an offence under s 1 of the Public Bodies Corrupt Practices Act 1889 (as amended by the Prevention of Corruption Act 1916 and the Anti-Terrorism Crime and Security Act 2001).

¹¹⁷ See *Morrish v Henllys Ltd* [1973] ICR 482 (NIRC) where there was an instruction to falsify accounts.

¹¹⁸ (1857) 26 Ch 113 (Ch).

¹¹⁹ At p 114.

¹²⁰ [1968] 1 QB 396 (CA).

¹²¹ [1989] 1 Ch 477 (Ch).

720 Where the organisation has authorised corrupt behaviour, it may find itself liable for losses suffered by third parties which result from the employee's wrongdoing, for example where it can be demonstrated that a third party would have obtained a commercial contract but for the payment of a bribe. Even if corrupt activities were expressly prohibited, vicarious liability may be imposed on the basis that the action in question was so closely connected with what the employer authorised or expected of the employee in the performance of his/her duties that it would be fair and just to conclude that the employer was vicariously liable. *Dubai Aluminium Ltd v Salaam*¹²² supports this view. This was a case involving an elaborate fraud and Lord Millett had no hesitation in stating that

730 . . . it is no answer to a claim against the employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty . . .¹²³

735 The *Dubai* case also provides authority for the proposition that corrupt activities undertaken for the sole benefit of the employee, for example, in order to obtain commission on a deal, is legally capable of being in the ordinary course of employment and can render the employer vicariously liable. This means that employers have a clear incentive not only to have policies and procedures in place that deal with corruption but also to ensure that they are complied with.

4. CONCLUSION

740 Corruption is a complex, multifaceted global phenomenon and it would be unrealistic to expect employment laws alone to combat it. Nevertheless, alongside criminal laws that have been influenced by regional and international anti-corruption conventions, employment law and whistleblower protections offer further tools for fighting corruption. An analysis of UK law suggests that more could be done to ensure that corruption is both deterred and exposed. Employment law impacts on corruption through a variety of contractual mechanisms: express terms, the implied terms of obedience, fidelity, trust and confidence, fiduciary obligations and statutes. However, there is considerable uncertainty about the scope of implied duties, particularly on whom fiduciary obligations are imposed. The law of unfair dismissal offers limited remedies to those who feel compelled to resign from a corrupt organisation but makes it fairly easy to sack corrupt employees on the grounds of misconduct or some other substantial reason. Unfortunately, the ease with which

¹²² [2003] IRLR 608 (HL).

¹²³ At para 121.

the latter reason can be established and the range of reasonable responses test mean that inadequate protection is afforded to those who are wrongly suspected of corruption. The UK public interest disclosure provisions were designed 'to protect individuals who make certain disclosures of information in the public interest'¹²⁴ yet their limitations mean that workers may not be encouraged to run the risk of raising concerns about corruption.¹²⁵

Where they exist, whistleblower protection laws in other jurisdictions which aim to facilitate the disclosure of corruption¹²⁶ also have their drawbacks. For example, the vast majority of the nine Australian states and territories exclude the private sector¹²⁷ from the scope of their public interest disclosure legislation and those who are victimised have no ready access to legal redress.¹²⁸ Similarly, in many of the states in the USA that offer protection to whistleblowers who suffer detriments, the ordinary court processes have to be invoked and the laws on termination of employment are notoriously weak.¹²⁹ At federal level, the False Claims Act (FCA) 1863 as amended in 1943 and 1986 has been successful in encouraging the reporting of fraud against the Government.¹³⁰ The FCA encourages informers to come forward with information in return for a share of the fine in respect of such fraud and empowers citizens¹³¹ to bring suit on



¹²⁴ Preamble to the Public Interest Disclosure Act 1998.

¹²⁵ According to the Public Services International Research Unit report in 2003 entitled *Whistleblowing and Corruption: An Initial and Comparative Review*, 'the aim of whistleblower legislation is to ensure that those workers who speak out in the public interest are protected, and thereby encouraged, by de-stigmatising whistleblowing, contributing to a change in the prevailing culture and providing a real alternative to silence' (para 2.1).

¹²⁶ See Whistleblowers Protection Act 1993 (South Australia) s 3 and Protected Disclosures Act 1994 (New South Wales) s 3. The Commonwealth legislation anticipated in 2010 is likely to include corruption as an illustration of serious wrongdoing; see Recommendation 7 of the *Report of the Inquiry into Whistleblowing Protection within the Australian Government Public Sector, 2009*, Commonwealth of Australia <<http://www.aph.gov.au/house/committee/laca/whistleblowing/report/fullreport.pdf>> (accessed 19 September 2009).

¹²⁷ One effect of government policies which promote privatisation and contracting out is that the boundary between the public and private sectors has become blurred. Another is that, in the pursuit of profit, private sector organisations have been given greater opportunities to engage in bribery.

¹²⁸ It is worth noting that South Africa's Protected Disclosure Act 2000 is modelled on the UK legislation but there is no employment tribunal system available to those who wish to exercise their rights. See D. Lewis and T. Uys, 'Protecting Whistleblowers at Work: A Comparison of the Impact of British and South African Legislation' (2007) 49 *International Journal of Law and Management* 76.

¹²⁹ In particular, the common law doctrine of employment-at-will. See E. Callahan and others, 'Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest' (2004) 44 *Virginia Journal of International Law* 879.

¹³⁰ False Claims Act settlements and judgments have totalled over \$17 billion and virtually all whistleblowers have recovered a million dollars or more—even though the majority of suits are settled. See T. Dworkin, 'SOX and Whistleblowing' (2007) 105 *Michigan Law Review* 1757.

¹³¹ Also known as 'relator' since the action is brought on relation of the citizen.

770 behalf of the Government. This action, known as a *qui tam* action,¹³² however, is
775 complicated to pursue. As the Council of Europe report notes, not all European
countries have whistleblower protection legislation and where there are laws they
are by no means uniform. Of the countries that have relevant legislation, France's
Law No 2007-1598 creating Art L 1161-1 of the Labour Code, for instance,
780 applies only to corruption-related offences and covers only the private sector.
Belgium does not have a uniform national legislation but Community of Flanders
has adopted a decree (adopted 7 May 2004 modifying decree of 7 July 1998)
that is applicable only to the civil servants. Similarly, Romania's Whistleblower's
Law (Law No 571/2004) applies to public sector employees. Germany adopted
its Civil Service Status Law, which enables civil servants to expose suspected
cases of corruption,¹³³ and is currently discussing drafts for the protection of
whistleblowers in the private sector. According to the Council of Europe report,
a number of other European countries are working on draft legislation and these
include Hungary and Croatia.

785 One consequence of the lack of whistleblower protection laws and perceived
inadequacies of existing protective legislation is that workers (and others) may use
the Internet to expose suspected corruption.¹³⁴ To the extent that anonymity can
be maintained, the speedy global dissemination of information may be regarded
as both low risk and very effective. From an employer's perspective, uncontrolled
external exposure is potentially dangerous because published allegations may
790 have no foundation and could be made for malicious rather than altruistic reasons.
While UK unfair dismissal law facilitates the dismissal of those who make use of
the Internet to damage their employer (see above), it is clear that organisations
have much to gain from devising effective policies on both internal and external
reporting that do not inhibit the exposure of corruption or unnecessarily curtail

¹³² Short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur* (who pursues this action on our Lord the King's behalf as well as his own). The origin of *qui tam* or common informer action is traceable to 13th century Britain (see *Prior of Lewes v De Holt* (1931) 48 Selden Society 198) and by the 16th century it was included in statutes to overcome the difficulties in enforcing penal laws. However, owing to its abuse by informers, especially in the context of the Lord Day's Observance Act 1781 and the Sunday Observance Act 1677, the *qui tam* action was abolished by the Common Informers Act 1951. Nevertheless, a recent consultation document from the UK Home Office entitled *Asset Recovery Action Plan* (May 2007) suggests that the government is seriously considering whether they should follow the US route of enlisting the help of citizens through the recognition of *qui tam* actions.

¹³³ BGBI, 2008 I, p 1010.

¹³⁴ There is a whistle-blower website called Wikileaks.org where information can be posted anonymously (<<http://wikileaks.org>> (accessed 18 October 2009)). This website contains numerous leaks about bribery involving business and public officials in various parts of the world.

795 freedom of speech.¹³⁵ Indeed, it is appropriate to impose a statutory duty on
employers to establish and maintain whistle-blowing procedures and to train
staff in their use.¹³⁶ We welcome the draft recommendations from the Council of
Europe's Parliamentary Assembly to draw up a set of guidelines for the protection
800 of whistleblowers and to consider drafting a framework convention. It is hoped
that the Council of Europe will bring these recommendations to fruition soon and
seriously consider making it a free-standing convention which non-member states
can accede to. This will provide the opportunity to harmonise the laws on whistle-
blowing which, in turn, should assist in the fight against corruption.

805

FUNDING

British Academy for the project 'CSR as a Tool for Combating Corruption in
Developing Countries' to I.C.

¹³⁵European Convention on Human Rights art 10(1) states that: 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. Article 10(2) refers to the necessity for restrictions on this freedom in order to prevent, for example, the disclosure of confidential information.

¹³⁶The Protected Disclosures Act 2000 (New Zealand) s 11 provides that: (1) Every public sector organisation must have in operation appropriate internal procedures for receiving and dealing with information about serious wrongdoing in or by that organisation . . . (3) Information about the existence of the internal procedures, and adequate information on how to use the procedures, must be published widely in the organisation and must be republished at regular intervals.