Public Services International Research Unit (PSIRU)

WHISTLE BLOWING AND CORRUPTION

AN INITIAL AND COMPARATIVE REVIEW

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By

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UNICORN: A GLOBAL TRADE UNIONS ANTI-CORRUPTION PROJECT

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The PSIRU is part of the School of Computing and Mathematics in the University of Greenwich, London. PSIRU's research is centered around the maintenance of an extensive and regularly updated database of information on the economic, political, financial, social and technical experience with privatisation and restructuring of public services worldwide. This core database is financed by Public Services International (PSI), the worldwide confederation of public service trade unions. PSIRU is responsible for the UNICORN project which is a trade union anti-corruption network sponsored by TUAC, the Trade Union Advisory Committee to the OECD, the International Confederation of Free Trade Unions (ICFTU) and Public Services International (PSI) - part of the Global Unions family. Its mission is to mobilise workers to share information and coordinate action to combat international corruption.

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Preface

Trade unions have long been concerned with the protection of employees who expose malpractice or misconduct in the work-place. So-called 'whistle blowers' – referred to as *bell-ringers* in the Netherlands and *lighthouse keepers* in the USA as[1] – act as guardians of the public interest.

It is increasingly recognised that whistle blowers have an important role to play in combating bribery and corruption. As a result, in recent years, national and international anti-corruption policy agendas have begun to incorporate measures aimed at encouraging and protecting whistle blowers.

The aims of this briefing paper are two-fold. First it seeks to underline the need to have legislation in place that protects, and therefore encourages, whistle blowers. Secondly it aims to provide a critical overview of current *national* and *international* provisions for protecting whistleblowers.

Overall, it is hoped that the information compiled will provide a useful resource for *trade unionists* – as well as representatives of *civil society* and the *private* and *public* sectors - who work in the area of whistleblower protection.

Those working in the design and implementation of whistleblower legislation are encouraged to share their experiences and knowledge by sending any information comments or modifications to: *corruption@corruption.org*. Any information received will be incorporated into up-dated versions of this report, which will be published on the UNICORN web-site (www.psiru/corruption.org).

Definitions

Whistle blowing: is understood to mean the act of *disclosing information in the public interest*

Corruption: is understood to mean the *bribes* paid by the private sector to public sector officials, politicians or political parties.

Acknowledgements

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1 Aims and Structure

The overall aim of this briefing paper is to underline the importance of protecting whistleblowers in the context of curbing corruption and to review national and international initiatives with a view to identifying best practice and key lessons.

The briefing paper is structured as follows:

- *Section 2* introduces whistle blowing and underlines its importance as a tool for deterring corruption in both the public and private sectors;
- *Section 3* provides an overview of *national* whistle blowing legislation
- *Section 4* reviews the UK's *Public Interest Disclosure Act (PIDA)* in theory and in practice;
- *Section 5* sets out an overview of key *international* anti-corruption conventions and their provisions for protecting whistle blowing;
- *Section 6* describes professional and organisational initiatives that set out some of the obstacles, and solutions, to protecting whistleblowers;
- *Section 7* provides some preliminary conclusions;
- *Section 8* provides a check-list of questions aimed at encouraging those involved in the design and implementation of whistle blowing to share their experience and knowledge so as to help ensure that lessons on good practice can be made available and learnt;

2 Whistle blowing, corruption and the public interest

2.1 Understanding whistleblowing

The protection of whistle blowers – those who expose misconduct or malpractice in the public interest – is an issue that has traditionally been extremely important to trade unions who are concerned with the protection and well-being of workers. However, in recent years, encouraging, and therefore protecting, whistle blowers has become of increasing interest to national and international policy makers engaged in designing anti-corruption policy solutions.

According to the *UK Standing Committee on Standards in Public Life* (formerly known as the Nolan Committee but now know as the Wicks Committee [2]) whistleblowing is defined as "*raising a concern about malpractice within an organisation or though an independent structure associated with it*". However, others hold the view that there is no universally accepted definition of whistle blowing, agreeing with the Australian Senate Select Committee's that "*what is important is not the definition of the term but the definition of the circumstances and conditions under which the employees who disclose wrong-doing should be entitled to protection from retaliation.*"[3]

The potential value of employees coming forward and raising concern over workplace malpractice, with a view to defending the wider public interest, is largely self-evident. Investigations into a host of disasters that have taken place around the world, in both the public and private sectors, have revealed that employees were either aware of the problem and too worried about damaging their jobs and

careers to raise their concerns – or that employees had raised concerns but that these had been ignored (see *TABLE 1).* The cost of this silence – to human life, the environment, public health, livelihoods, employment, financial security and the public purse – is devastatingly high.

Despite Hollywood's efforts to glamorise whistle blowing (e.g. the trade unionist, Karen Silkwood's heroic battle against Kerr McGhee Plutonium Processing Plant in the USA) today's whistleblowers face a harsh reality. Those courageous enough to blow the whistle often do so at considerable personal cost. The findings of a study of whistle blowers in the USA (see BOX 1) illustrate the extent of the emotional stress suffered by whistleblowers – and underline society's dominant perception of whistleblowers as trouble-makers. The individual cases presented in BOXES 2-5 show that, without exception, the whistleblowers all suffered damage to their careers. The case of the Enron whistle blower (Case 5, Box 6), Sherron Watkins, is really about *not* blowing the whistle. Whilst the letter Ms Watkins wrote to Kenneth Lay outlining her concerns has proved extremely useful to the on-going investigation into Enron, Ms Watkins did not take action until the investigation was already underway.

The aim of whistle-blower 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.

2.2 Understanding corruption[1] and whistle blowing

As is the case with whistle blowing, there is no universally accepted definition of corruption. The traditional definition – *corruption is the abuse of public office for private gain* – is now understood to be unbalanced, unhelpful and is largely discredited.

Different organisations engaged in combating corruption have therefore tended to focus on different forms of corruption (see BOX 7). In the context of this report, corruption is understood to be an activity that involves two parties: *the bribe-maker* (the private sector individual or organisation) and the *bribe-taker* (the public sector official, politician or political party) who, driven by the prospect of making significant economic gains, engage in a 'win-win' transaction.

In recent years, the economic incentives to engage in bribery and corruption have increased dramatically as a result of prevailing liberalisation policies. These policies seek to limit the role of the state, in favour of the private sector, mainly through privatisation and contracting out. This has had two effects. First the boundary between the public and private sectors has blurred as the two sectors have become increasingly inter-connected. Secondly, private sector enterprises, in pursuit of profit, are provided with increased incentives, and opportunities, to engage in bribery.

[1] This briefing paper is focusing on grand or large-scale corruption, often committed in the context of privatisation and public procurement contracts. Grand corruption is different in nature and its policy solutions from petty corruption which is often driven by need rather than greed.

TABLE 1: THE COSTS OF SILENCE

SCANDAL	COUNTRY	DATE	ISSUE	IMPACT	FINDINGS
UNION CARBIDE INDIA LIMITED	India	1984	Gas Leak Safety	>3800 killed 40 total disability 2,680 partial disability [4]	Workers, together with a local journalist, had raised concerns, but these had been ignored by the local authority.
CLAPHAM RAIL CRASH	UK	1988	Safety	35 killed 500 injured	The Inquiry into the crash found that workers knew that there was risky loose wiring but had turned a blind eye.
PIPER ALPHA	UK	1988	Oil Platform Safety	167 killed	The Cullen Report found that workers were worried about their future employment and had not wishes to raise safety concerns
MOMBASSA FERRY	Kenya	1994	Safety/corruption	300 people killed	Allegations of corruption were ignored.
COLLAPSE OF THE BANK OF CREDIT AND COMMERCE INTERNATIONAL	UK	1991	Fraud/corruption	£2 billion over 19 years	The Bingham Enquiry found that there was a climate of intimidation and that staff did not feel that they could voice their concerns. An internal auditor who raised concerns was dismissed.
THE COLLAPSE OF ENRON	USA	2001	Fraud	Loss of jobs/costs to share-holders; loss of pensions and lifelong savings of employees	The 'non' whistleblower Sherron Watkins set out her concerns in a 7-page letter to the Chief Executive, Kenny Lay. However she did not blow the whistle externally. There is no comprehensive whistleblower protection for private sector employees in the USA.

BOX 1: SHOOT THE MESSENGER

A study of whistleblowers in the USA found that:

- 100% were fired - most were unable to find new jobs
- 17% lost their homes
- 54% harassed by peers at work
- 15% were subsequently divorced
- 80% suffered physical deterioration, 90% reported emotional stress, depression and anxiety
- 10% attempted suicide

Source: Irish Times, 29 May 2000

BOX 2: BLOWING THE WHISTLE TO INTERNAL MANAGEMENT

CASE 1

Who: Internal auditor, Colin Cornelius
Which organisation: Hackney Council, London
When: 1992
Where: UK
What: Fraud
Blew the whistle to: Internal management
Consequences: Sacked for gross misconduct; employment tribunal ruled against employer

BOX 3:BLOWING THE WHISTLE TO THE POLICE

CASE 2

Who: Eddie Cairns, Management Accountant
Which organisation: Enterprise Ayrshire
When: 1994
Where: UK
What: Financial irregularity
Blew the whistle to: the police after following advice of professional accountancy body CIMA
Consequences: sacked for breaching confidentiality; professional body powerless to help

BOX 4: BLOWING THE WHISTLE TO PARLIAMENTARIANS/PRESS

CASE 3

Who: Assist. Auditor: Paul Van Buitenen
Which organisation: European Commission
When: 1998-1999
Where: Luxembourg/Brussels
What: Fraud and mismanagement
Blew the whistle to: Member of European Parliament, then the Press
Consequences: suspended half-pay; reinstated/banned from auditing; hanging on ...

BOX 5: BLOWING THE WHISTLE TO PARENT COMPANY

CASE 4

Who: Assist. Auditor: Antonio Fernandes
Which organisation: Netcom Consultants
When: December 1999
Where: UK
What: Chief Executive false expense claims (£370,000)
Blew the whistle to: USA parent company
Consequences: dismissed; tribunal ruled unfair dismissal under PIDA (first case), awarded £300,000

BOX 6: NOT BLOWING THE WHISTLE

CASE 5

Who: Sherron Watkins, Internal Accountant
Which organisation: Enron
When: 2001
Where: USA
What: Accounting malpractice and fraud
Blew the whistle to: Chief Executive
Consequences: None. In fact Sherron Watkins didn't really blow the whistle. She wrote a letter to the Chief Executive outlining her concerns. Whilst this letter has been useful in the subsequent investigation, it did not initiate the investigation.

BOX 7: NO UNIVERSAL UNDERSTANDING OF CORRUPTION

WORLD BANK

(i) corruption = "offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution"

OECD

corruption = "bribery of foreign public officials in international business transactions illicit payments"

EUROPEAN UNION CONVENTION ON THE FIGHT AGAINST CORRUPTION INVOLVING OFFICIALS OF THE EUROPEAN COMMUNITIES OR OFFICIALS OF THE MEMBER STATES OF THE EU

corruption = "deliberate action of whosoever promises or gives, directly or through an intermediary involving officials of the European Union or officials of Member States of the European Union."

DRAFT UNITED NATIONS CONVENTION AGAINST CORRUPTION

corruption = "promising, requesting, offering, giving or accepting, directly or indirectly, of an undue advantage or prospect thereof that distorts the proper performance of any duty or behaviour required of the recipient of the bribe , the undue advantage or prospect thereof."

COUNCIL OF EUROPE – CRIMINAL LAW CONVENTION

corruption = "bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others"

In principle, whistleblowers provide potentially powerful mechanisms to deter bribery and corruption. Bribery and corruption are most likely to flourish where the likelihood of getting caught is low and the sanctions applied to those who are caught are insufficient. Protecting whistleblowers, and thus encouraging people to speak out, clearly increases the chance of detection. So long as sanctions are sufficiently severe, providing protection for whistleblowers should provide an effective deterrent.

There is now a vast amount of *policy* and *empirical* research that supports the case for including protection for whistle blowers in national and international anti-corruption policy initiatives. Two examples illustrate the point.

The first concerns *public procurement policy*. A recent EU-wide study[5], which aimed to analyse different national approaches to dealing with corrupt companies in the public tendering procedures, specifically identified the need to take action in relation to whistleblowers. It recommended that member states adopt "*a common approach to whistle blowers*" on the basis that "*the only way to find out about men of straw is to have a fresh pool of information*. More specifically, it recommended that member states:

- assign responsibility to central authorities for receiving information from whistleblowers;
- set up and monitor whistle blowing hot-lines; and
- adopt common standards of protection for whistle blowers.

The second concerns the findings of an experiment, undertaken by the Dutch public service Trade Union, the Federatie Nederlandse Vakbeweging (FNV), which set up a hotline for public service employees. Over 3 days, the hotline received 8000 calls and FNV representatives held in-depth discussions with 150 whistleblowers. Concerns fell into the following categories:

- abuse of power (33%);
- non-observance of regulations (20%);
- concealment of information (14%);
- multiple abuses including corruption, fraud, mismanagement of public funds (33%)

Earlier the same year, the FNV conducted a survey of public services employees that found that *25% of civil servants* had considered making disclosures about abuses, but had kept quiet due to fear of reprisal.

Both findings underlined the value of whistleblowers as potential source of information - as well as the need for their protection and encouragement.

2.3 Understanding the public interest

It is important to note that public sector employees are not the sole defenders of the public interest. *Private sector* employees, as well as citizens, can find themselves in the position of uncovering malpractice and wishing to disclose information in order to protect the public interest.

In relation to combating bribery and corruption, there is considerable potential for private sector employees to disclose information in the public interest:

- *first (*as previously discussed), the interface between the public and private sectors provides the primary source of bribery and corruption. Potential whistleblowers may work on either side of this interface (see *TABLES 2* and *3*);
- *secondly*, elements of the private sector play a fundamental role in serving the public interest. The accountancy profession is a prime and topical example. The recent collapse of Enron underlined the extent to which society relies on auditors to provide ensure that companies' financial information is accurate. Indeed a key lesson of the Enron affair is the need to have in place greater checks and balances to ensure that accountants and auditors discharge their public interest duty. *Cases 1-6* demonstrate the valuable role that accountants and auditors

have in disclosing information in the public interest on corrupt practices – and the need for their protection.

It is essential, therefore, that those seeking to encourage whistleblowers recognise the importance of protecting private as well as public sector employees.

TABLE 2: PUBLIC/PRIVATE SECTOR INTERFACE: A PRIMARY SOURCE OF CORRUPTION

COUNTRY	DATE	SECTOR	CONTEXT	DESCRIPTION
GHANA	2000	Water	Concessions	In March 2000, the World Bank cancelled a $100m water project loan because of corruption concerns. Enron subsidiary, Azurix, which was awarded the contract on a 'non-transparent basis', denies press allegations that the company paid a $5m bribe to senior officials to secure the contract. Peter Harrold, the World Bank's country director, who informed the government of its intention to kill the loan, said: "There were suspicions of corruption, and a draft schedule of payments by Azurix showed Dollars 5m upfront payment."[6]
THE PHILIPPINES	2001	Waste	Public Procurement	The Philippine Center for Investigative Journalism (PCIJ) is claiming that a consortium enjoyed unfair advantages over its competitors that allowed it to gain a multibillion-peso landfill contract for Metro Manila's waste. According to PCIJ, the 'Pro-Environment Consortium (PEC)' had *'sterling connections to the presidential palace'*. PEC involves four main investors including Rethmann Recycling and the Environmental Dynamics Corporation (EDC). PCIJ says that among EDC's incorporators are Frank Puzon, the personal pilot and high school classmate of Estrada at the Ateneo de Manila, and sugar trader Raul V. Gamban, a cousin of Guia Gomez, the former president's mistress and mother of one of his sons, Joseph Victor or 'JV.' The consortium denies that there has been any wrongdoing[7]
ITALY	2000	Waste water	Concessions	In March 2000, 'La Repubblica' revealed that a senior manager in Vivendi's water division planned to bribe local politicians in the majority and opposition parties on Milan city council in order to win the IT£200bn tender for a wastewater treatment plant in the south of Milan, Italy. The evidence includes a floppy disk containing a letter by Alain Metz, dated July 1998 in which Maetz stated he had "excellent contacts" with the rightwing majority coalition (Polo delle Liberta, whose leader is media tycoon Silvio Berlusconi), and planned to pay total IT£ 4bn bribes to politicians. About IT£ 2.3bn would go to the majority parties, IT£ 300mn to the opposition and other money would reach "experts" and "mediators" whose names were not revealed. Investigations have also found evidence that Maetz irregularly received a copy of the list of bidders from Massimo De Carolis, who was employed by Generale des Eaux as a "consultant". [8]
USA	2001	Water	Award of concession	In June 2001, in New Orleans the local Times-Picayuneas reported allegations that the Vivendi subsidiary Professional Services Group (PSG) had entered into a financial relationship with a member of the Sewerage and Water Board, in order to secure more favourable terms of contract.[9]

COUNTRY	DATE	SECTOR	CONTEXT	DESCRIPTION
EGYPT	2001	Wastewater Treatment	Public procurement	In August 2001, a Swiss subsidiary of ABB was found guilty of bid rigging by a US Court. ABB`s unit for the Middle East and Africa was ordered to pay $53million in fines after it admitted that in 1989 it paid rival firms $3.4million to persuade them not to bid on a $135million project to build wastewater facilities in Egypt. The project was being carried out by the US Agency for International Development (USAID). This latest conviction is one of a number that have been carried out in a long-running investigation into corruption in US AID contracting (see also whistle blowing example in *TABLE 3*).[10]
FRANCE	1989-	Construction	Public Procurement	The three largest construction groups in France - Bouygues, Suez-Lyonnaise, and Vivendi - are the subject of a major investigation by two judges, for a scandal which Le Monde (10 Dec 1998) described as "*an agreed system for misappropriation of public funds*". The companies participated in a corrupt cartel over building work for schools in the Ile-de-France region (around Paris) between 1989 and 1996. Contracts worth FF 28 billion (about $500m) were shared out by the three groups, The system also involved political corruption: a levy of 2% on all contracts was paid to finance the major political parties in the region (RPR, PR, PS, PC). Jacques Durand, commercial director of GTM - was indicted on 22 October for corruption, bribery, favouritism, and anti-competitive practices ("corruption, trafic d'influence, recel de favoritisme et pratiquesanticoncurrentielles").[11]
UGANDA	2000	Energy Construction	Private Sector Initiatives	In December 2000, it was reported that a police investigation undertaken between 1998 and 2000 revealed massive embezzlement within AES Nile Independent Power - the company established for the purposes of implementing the Bujugali power project. The Country Director, Charles Christian Wright denied that his company gave Kabayondo the money in order to bribe MPs and top Government officials to enable the company to take-off. Previously a letter from three members of Parliament had accused Richard Kaijuka, the then, Energy Minister of demanding bribes from Nile Independent, of US$500,000 (source: evidence submitted by Cornerhouse to UK International Development Select Committee).[12]
LESOTHO	1990-	Construction	Public Procurement	In May 2002, the former Chief Executive of the Lesotho Highlands Water Authority was found guilty by the Lesotho High Court on 13 counts of bribery. Sole was convicted on 11 counts of bribery and two of fraud for accepting about £3m in bribes over a period of more than a decade from an array of European, Canadian and South African multinational companies in return for contracts worth hundreds of millions of pounds.[13]
FRANCE	2000	Water	Privatisation	In March 2000, Grenoble City Council voted to return its water supply and sewerage to direct municipal management and operation. The management of the

COUNTRY	DATE	SECTOR	CONTEXT	DESCRIPTION
				service had been delegated to Lyonnaise des Eaux in 1989, in a corrupt deal (for which a Lyonnaise executive and mayor Alain Carignon received prison sentences for giving and receiving bribes). ADES (Association Democratie Ecologie Solidarite) called for transparency to be introduced in the management of water services. ADES also called for the reimbursement of surcharges imposed on consumers from 1989 to 2000, as a consequence of corruption and for setting new tariffs.[14]

TABLE 3: PRIVATE SECTOR WHISTLEBLOWERS: PROTECTING THE PUBLIC INTEREST

COUNTRY	DATE	SECTOR	CONTEXT	DESCRIPTION
USA	2001	Energy	Regulation	In June 2001, three former employees of Duke Energy told lawmakers that the company altered production and hampered maintenance in an apparent attempt to manipulate prices. A spokesman for Duke Energy denied the allegations, saying that they served only as a distraction from addressing the lack of supply in California. The hearing took place before a special Senate Committee investigating whether energy generators shut down plants to reduce supply. [15]
USA	2001	Water	Telecoms/ Accounting	On February 4 2002, Global Crossing received an inquiry from the SEC for the voluntary production of information in connection with issues raised in a letter from a former finance executive. The letter raised concerns that Global Crossing and its auditor, Andersen, was misleading investors about the accounting for certain long-term leases. It also emerged that Global Crossing had kept its auditors in the dark about a letter from a "whistleblower" claiming that the company had misled investors with its accounting. The letter, from Ray Olofson, its former vice-president of finance, was received in August 2001. The company disclosed that the SEC had asked it to hand over information related to the whistleblower's allegations.[16]
EGYPT	2001	Wastewater Treatment	Public Procurement	In April 2001, it was revealed that a group of international construction companies, going by the name of the Frankfurt Group, conspired for seven years to de-fraud the American government out of tens of millions of dollars earmarked for Egyptian water projects as part of the Middle East Peace Accords reached during the Carter administration. The group comprising a number of American subsidiaries based in Frankfurt, rigged Egyptian water project bids tendered to the US Agency for International Development in the late 1980s and early 1990s. Bribes and kickbacks were made to other potential contract-bidders. ABB, the Swiss engineering company, has agreed to pay US$63 million in fines and restitution for bribing rival companies to the tune of US$3.4m to submit artificially high tenders which allowed ABB to inflate its own tender to build a waste-water

COUNTRY	DATE	SECTOR	CONTEXT	DESCRIPTION
				treatment plant in Abu Rawash. ABB subsequently won the contract with their tendered bid of US$135m. Justice Department court records show that other companies involved in the scam were able to record profits of as much as 60% on the projects. Related court civil records show that the US$3.4m was paid to an unincorporated joint venture between Bill Harbert Construction and the J.A. Jones Construction Company, a subsidiary of Frankfurt-based Philipp Holzman A.G. Irregularities discovered by former Jones controller/treasurer Richard F. Miller pointed to proof of a wider rigging scheme which secured a US$107m sewer contract in Cairo. Activities uncovered by Miller's federal *whistleblower* suit included the wire transfer of US$3.5m to a company for fictitious "pre-construction costs" and a bogus "sales-leaseback" arrangement involving Sabbia, a Jones subsidiary company. US$14.4m in lease payments were made to Sabbia, but the US$4m equipment costs incurred by Sabbia were never paid. That money remained in a Swiss bank account to be used as a fund to disburse bribes to other members of the Frankfurt Group.[17]

3 National Legislation: A Comparative Overview

3.1 Overview

The first example of national whistle blowing legislation was introduced in the USA[2], as part of the Civil Service Reform Act of 1978, and then later amended by the Whistleblower Protection Act 1989. Since then a number of countries have recognised the need to protect whistle blowers - often in the wake of scandals - and introduced whistleblower protection legislation.

National whistle blowing legislation varies from country to country in terms of:

- *Who* is protected;
- The *disclosure routes* that are protected;
- The scope of *information* disclosures that is protected;
- The *motivation* that is protected.

TABLE 4 provides an overall summary of the whistleblower legislation that has been adopted by a selected number of countries[18]. It also identifies specific strengths and weaknesses, together with any additional relevant information: e.g. *amendments, origins, reviews.*

3.2 Who is protected: Public versus Private

The vast majority of national whistle blowing legislation is aimed at *protecting those in employment* from reprisal for disclosing information discovered in the work place in the public interest. This is the case for all the national legislation presented in *TABLE 4*, with the exception of Australia's *South Australia's Whistle blowing Protection Act (WPA), Capital Territory's Public Interest Disclosure Act*[19]*, Queensland Whistleblower Protection Act* and Western Australia, which cover *citizens* rather than simply employees.

In many cases, however, *employment-based legislation* only protects *public sector* employees. This exclusion of private sector employees from the protection offered by whistle blower legislation is a fundamental weakness especially in view of the importance of the *private-public sector interface* as a key source of corruption, together with the fundamental role that some parts of the private sector play in protecting the public interest (see *Section 2.3*).

This distinction between the public and private sector in the area of the protection of whistleblowers, which focuses on the detection and deterrent of public sector malpractice, was until recently mirrored in the anti-corruption policy agenda. The traditional, but now largely abandoned definition of

[2] There are a number of *federal statutes* that protect private sector employees in relation to violations of specific federal laws: e.g. relating to health and safety or the environment. Generally these tend to be much narrower in scope than the Whistleblower Protection Act. There are also a number of state laws that protect private and public or private or public employees.

TABLE 4: WHISTLEBLOWING LEGISLATION

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
USA								
Whistle blower Protection Act	1989	*Public*: federal workers The WPA excludes employees of the intelligence agencies: Federal Bureau of Investigation (FBI), as well as congressional and judicial staff. However they are protected by a parallel statute.	Any information that the employee *reasonably* believes violates law, rule or regulation, a gross waste of funds, gross mismanagement, abuse of authority or a significant and specific danger to public health and safety.	*Internal* and *external* disclosure channels. Any disclosure channel is protected including making allegations to the Press[20]	Good faith/ reasonable belief	i) protects any disclosure route ii) a specific agency set up to support whistle blowers and investigate and act on exposed misconducts iii) provides for disciplinary action against a federal employer found to have retaliated against a protected whistleblower[21] iv) protects employees who refuse to follow orders that would require them to violate the law v) support the anonymity of the whistleblower vi) protects	i) only covers federal employees. This is an important loophole in view of the weak employment laws in the USA. ii) experienced problems with the Federal Circuit Court of Appeals which has monopoly of review and to date has been responsible for hostile interpretations[22]	The WPA is the most important whistleblower protection law in the USA and is an amendment of the whistleblower protection contained in the Civil Service Reform Act of 1978. The law was strengthened in 1994 by amendments that expanded the scope of coverage. The United States *Office of Special Counsel* (OSC) was established in 1979 with the primary purpose of protecting whistleblowers in the federal employment sector. OSC operates a confidential

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
						whistleblowers who were about to make a disclosure vii) strong burden of proof: employees only have to show that legally protected disclosures were a contributing factor to the personnel action		disclosure channel.
UK								
Public Interest Disclosure Act (PIDA)	July 1999	*Public* and *private* sector employees (excluding the security service and the police)	A qualifying disclosure constitutes (i) a criminal offence; ii) a failure to comply with any legal obligation; iii) a miscarriage of justice; (iv) danger to the health and safety of any individual; v) damage to the environment; vi) deliberate concealment of information relating to any of the above has been, is	Prescribed disclosure channels: i) internal ii) prescribed routes iii) media	Good faith/ reasonable belief	i) covers private and public sector employees ii) linked to strong employment law that contains strong burden of proof iii) no limits in terms of disclosure routes iv) covers sub-contractors and trainees: not just employees v) creates incentives for employers to put in place internal	i) no provision for central monitoring of cases by government which makes it difficult to track. ii) doesn't compensate for the UK's cultural reluctance to "go public"	i) the UK legislation was used as the model for the South African legislation ii) the legislation has the added benefit of permitting workers to make disclosures about matters that occur outside the UK and which are not covered by UK law

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
			being, or is likely to be committed[23]			procedures		
SOUTH AFRICA								
Protected Disclosures Act	June 2000	*Public* and *private* sector employees - specifically excludes independent contractors	The same as the UK: criminal violations; violations of civil law; miscarriage of justice; danger to health and safety of an individual; damage to the environment; unfair discrimination or the concealment of information re these matters. However, the disclosure must relate to the conduct of an employer or an employee[3]	protects i) internal disclosures ii) disclosures to prescribed persons on the following conditions: a) reason to fear retaliation if makes internal disclosure b) fear that information will be hidden or destroyed c) no action has been taken within a reasonable time after the disclosure to the employer or a prescribed person	Internal disclosures: - good faith Other disclosures: *reasonable belief* that the misconduct is dealt with by the organisation or person to whom the disclosure is made as well as belief that the allegation is substantially true	i) provides for transference to another position	i) no independent agency to investigate whistleblower complaints	i) originally drafted as part of the *Open Democracy Bill* together with *Access to Information* ii) modelled on the UK's PIDA iii) like the UK, the legislation permits disclosures on violations that occurred outside South Africa iv) Like the UK the Act 'prefers' disclosures to be made to the employer itself

[3] David Lewis: Whistle blowing at Work: On what Principles Should Legislation be Based? Industrial Law Journal Vol. 30

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
				d) the matter is exceptionally serious				
NEW ZEALAND								
Protected Disclosures Act (PDA)	Jan 2001	*Public* and *private* sector employees including '*employees*' contracted to do work for the organisation	Wrong doing in or by an organisation: (a) an unlawful, corrupt or irregular use of public funds or public resources; or an act, omission or course of conduct that b) constitutes a serious risk to public health or public safety or the environment; or (c) constitutes a serious risk to the maintenance of law, including the prevention, investigation and detection of offences	Internal and prescribed external disclosure routes. Conditions external disclosure on the perceived failure of internal disclosure mechanisms – i.e. where they do not exist or where the person to whom the employee must report is believed to be involved in the wrong-doing. Does not permit disclosure to the media	Good faith/ reasonable belief and motivated by "a desire to see the serious wrong doing investigated"	i) does not exclude police and social security services but provides special rules ii) requires all public sector organisations to put in place internal procedures for dealing with whistleblowing and that these must be widely published. This is a key strength in terms of ensuring that government organisations take the lead in changing the culture	i) disclosures to the media are not protected at all ii) not at all clear how certain types of disclosure relating to the private sector (e.g. financial) are covered	

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
			and the right to a fair trial; or d) an act by a public official that is oppressive, improperly discriminatory or grossly negligent or that constitutes gross management					
CANADA[4] (DRAFT)								
S-6 Public Service Whistle blowing Act[5]	2001	Public: federal employees	About a person working for the public service who has by act or omission: violated a Canadian law; significantly wasted public money; endangered public health and safety or the environment; breached an established public policy	Limited disclosure routes: to a designated government official	Good faith/ reasonable belief	1) Commissioner has the power to investigate ii) As in the USA, the Act protects an employee who refuses an order to commit an act or omission contrary to the Act.	i) narrow in scope ii) limited disclosure routes	Bill provides for the designation of one of the Commissioners of the Public Service Commission as the "Public Interest Commissioner"[24]

[4] In addition, two of Canada's provinces also have statutes that protect whistleblowers: *New Brunswick's Employment Standard Act* which protects public and private sector employees *and Ontario's Public Service and Labour Relations Statute Law Amendment 1993* which protects only public sector employees

[5] AT the time of writing this report the legislation had not been passed and was at the Committee stage in the Senate – to be up-dated.

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
			or directive in the written record of the public service; or engaged in gross mismanagement or abuse of authority.					
AUSTRALIA								
The Workplace Relations Act **(Federal**)	1996	Private sector employees	Violations of laws and regulations	Competent admin. authorities				In Australia there is no general protection for federal public officials who disclose misconduct by government officials. [25]
South Australian Whistleblower Protection Act (WPA) (State)	1993	Persons – not just employees or workers	Wider in scope than other Australian state legislation Information that shows that a public officer is guilty of mal-administration as well as any 'public interest' information relating to any person or body	Appropriate authorities including the *Ministry of the Crown* and in the case of fraud and corruption the *Police Complaints Authority* or the *anti-corruption branch* of the police force In some circumstances	Reasonable belief and good faith			i) The rationale for putting in place legislation to protect whistleblowers in all of the Australian states was as a measure to combat corruption ii) this statute applies outside the employment field

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
			involved in: i) an illegal activity; ii) irregular or unauthorised use of public money; iii) substantial mismanagement of public resources; iv) conduct that causes a substantial risk to public health or safety to the environment;	disclosures may be made through external routes including the media				
Australian Capital Territory's Public Interest Disclosure Act 1994 (PIDA)	1994	Person rather than employees	The scope of the information protected is wide. However, it is the performance of the public official that is of concern ' (a) a person has engaged, is engaging or proposes to engage in disclosable conduct; (b) public wastage; (c)	A 'proper authority': government agencies, the Ombudsman and the Auditor-General		i) permits the relocation of public employee whistle blowers to another agency		i) The rationale for putting in place legislation to protect whistleblowers in all of the Australian states was as a measure to combat governmental corruption ii) This statute is not restricted to employment but allows anyone to make a public interest disclosure

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
			that a person has engaged in an unlawful reprisal; or (d) that a public official has engaged is engaging or proposes to engage, in conduct that amounts to a specific danger to the health and safety of the public.					
New South Wales' Public Disclosures Act 1994 (PDA)	1994	Public sector employees The whistle blower must have been a public employee at the time when the alleged misconduct occurred[26].	The information protected is fairly narrow in scope: only concerned with information that shows *corruption*, *maladministration* and *substantial waste* in the public sector	i) Independent Commission Against Corruption or the Ombudsman, or Auditor-General; ii) the public agency affected by the misconduct iii) MP or journalist only if disclosed to appropriate government authority as well			i) Disclosure must be substantially true in cases of external disclosure ii) the disclosure must be made voluntarily – i.e. not be part of the official duties of the whistleblower	
Queensland	1994	*Protects 2*	Official	Appropriate	Reasonable	i) includes a		i) The rationale

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
Whistleblower Protection Act (WPA)		*categories:* i) Public sector employees who disclose official misconduct or maladministration ii) Any person who discloses risk relating to the environment, or the health and safety of a person with a disability or that a reprisal has been taken against a person for making a public interest disclosure	misconduct or maladministration that adversely affects someone else's interests: a substantial waste of public funds; as well as substantial and specific danger to public health or safety or to the environment	public sector entity	belief	witness protection programme[27] ii) provides a whistleblower support programme[28]		for putting in place legislation to protect whistleblowers in all the Australian states was as a measure to combat governmental corruption
Western Australia Anti-Corruption Commission Act of 1998[29]		Any person including private or public employees.	Information concerning corrupt, criminal, biased or dishonest conduct by	Protects disclosures made to the Anti-corruption Commission				This Act came about specifically as a result of concerns regarding the corruption of public officials.

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
ISRAEL								
Employees Protection Law	1997	Public and Private sector employees	Different for public and private sector employees: *Private*: Violation of the law applicable to the work place; or violation of a law relating to the activities of the employer *Public:* violations of public trust or of the proper administration of the work place	Protects internal and external disclosures including the Media.	Good Faith	i) protects disclosure to the media ii) covers public and private sector employees		
KOREA [30]								
	2001	Public and private sector employees	Only protects disclosures on corruption	Internal and prescribed external routes		Has a number of key strengths: i) provides protection for an employee who is investigating corruption – i.e. who is trying to establish their facts before making a disclosure	i) very narrow in focus – the legislation is specifically focused on corruption and threats to the environment and miscarriages of justice ii) needs to specify the test necessary to meet	

LEGISLAT.	DATE	WHO IS PROTECTED	INFORMATION PROTECTED	DISCLOSURE ROUTES PROTECTED	MOTIV	STRENGTHS	WEAKNESS	ADDIT. INFORMATION
						ii) provides for investigation of misconduct by a government-wide Board of Audit and Inspection and not by an agency investigating itself iii) provides for witness protection – body guards iv) provides for protection of employees who are performing their duties (unlike for example some of the Australian statutes) v) protects against gagging clauses that would over-ride protected speech in whistleblower laws vi) protects disclosures regarding violations of other nations' laws -	the burden of proof that is on employers to show that they would have taken the same action	

corruption – *corruption is the abuse of public office for private gain* – firmly places corruption in the public sector and ignores any private sector (supply-side) involvement.

However, in recent years the debate in relation to corruption has moved on, with policy-makers clearly recognising the importance of tackling the private sector element of corruption (see Section 2.3). As a result, there has been a host of national and international initiatives aimed at deterring private sector bribery and corruption.

Evidence of similar requirement for balance in approach to protecting public and private sector whistleblowers can be demonstrated by considering the:

- effectiveness of codes of conduct – the private sector's response to protecting whistleblowers;
- need to support national anti-corruption legislation – the case of the USA.

3.2.1 Codes of Conduct

One approach to the protection of *private sector* whistleblowers has been the adoption of *codes of conduct* that include provisions for protecting whistleblowers.

Recent years have witnessed the 'rise and rise' of the *corporate social responsibility* (CSR) agenda, with the result that companies today can choose from a vast array of private sector codes of conduct, many of which include anti-corruption policies and practices.

However, the findings of a recent survey, which aimed to identify the extent to which Multinational Companies (MNCs) have in fact adopted anti-corruption and whistle blowing policies[31], provide considerable cause for pessimism.

First it found that out of a sample of 82 MNCs, whilst 87% of respondents (50% of the total sample) reported having introduced anti-corruption policy statements, only 49% - just 33% of the total sample – had put in place measures to protect whistleblowers. This is likely to be the maximum number of companies that provide protection for whistle blowers as non-respondents to the survey are likely to be poor performers in relation to both anti-corruption and whistleblower policies.

However, the report also found the translation of policy into practice to be weak: "*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*." Hence in fact fewer than 25% of companies had clearly defined management systems and lines of accountability to deliver their policy commitments – the type of procedures that would be need for whistleblower protection to work.

The case of Enron provides further cause for scepticism. *In principle*, Enron was wholly committed to *Corporate Social Responsibility* (see BOX 9). However, Sherron Watkins, the Enron non-whistleblower (see Case 5), in her evidence submitted to the investigation, stated that she did not

BOX 8: CODES OF CONDUCT IN PRACTICE

THE GOVERNANCE OF BRIBERY AND CORRUPTION

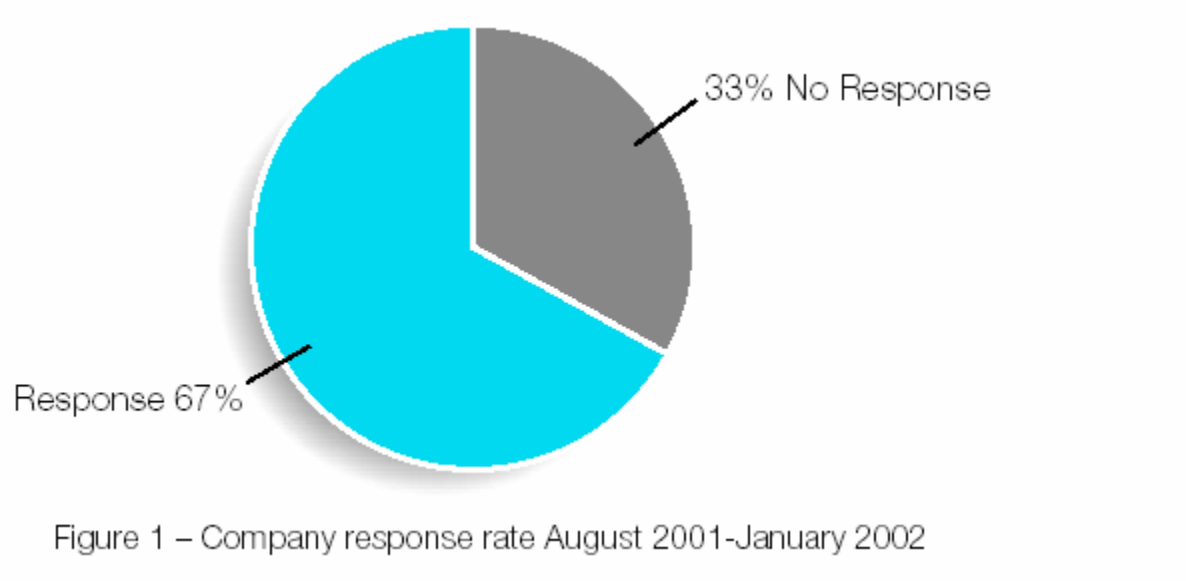

Figure 1 – Company response rate August 2001-January 2002

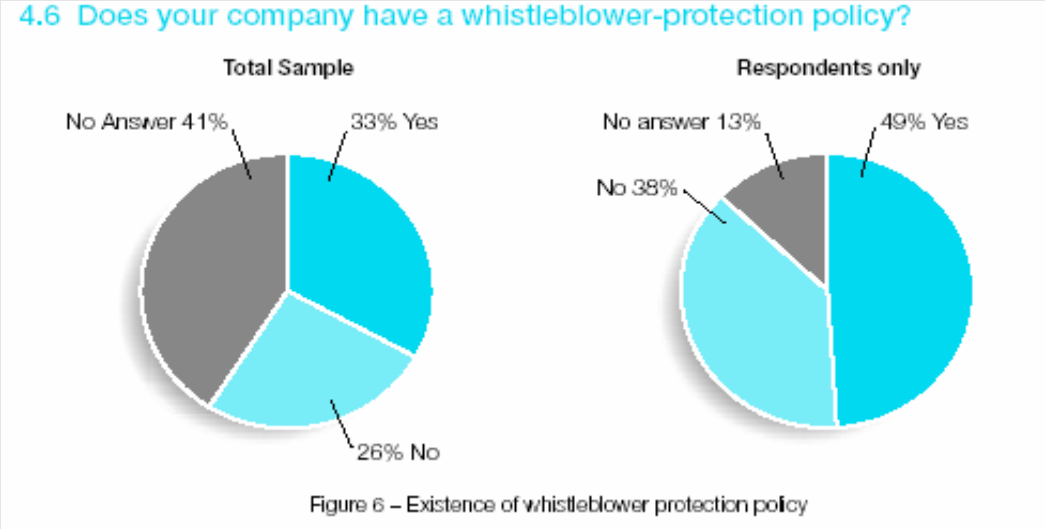

Figure 6 – Existence of whistleblower protection policy

Source: *Friends, Ivory & Sime*[32]

BOX 9: PRIVATE SECTOR CODES OF CONDUCT

PRIVATE SECTOR CODES OF CONDUCT

ENRON ON ETHICS…

"Enron's Code of Ethics is published in English, Spanish, and Portuguese and distributed with universal acknowledgement and agreement to comply by its employees. Among other areas of coverage, the Code of Ethics specifically reinforces Enron's Principles of Human Rights and the Environmental, Health and Safety Principles; and states that business is to be conducted in compliance with all applicable local and national laws and regulations and with the highest professional and ethical standards"

ENRON ON THE FCPA…

"Throughout the year, Enron's legal staff holds training sessions for all companies or groups that conduct business internationally including all upper management, accounting, legal, business developers, project managers, traders, new employees, and anyone who deals with government, officials. The objectives of the training include: educating employees about the basic FCPA law and applicable Enron policies and procedures; providing employees with basic information to identify FCPA issues and encourage consultation with legal when making FCPA decisions; establishing a single channel for employee inquiries, concerns, and issues for consistency in recording, reporting, and compliance; fostering consistency in providing advice and implementation of Enron policy and procedures; and, identifying joint ventures that need bribery/ethics policies and assist in development where appropriate. This year, Enron conducted over sixty anti-corruption training sessions around the world and developed an ethics policy addressing FCPA and India bribery law for Dabhol Power Company".

ENRON ON ANTI-CORRUPTION AND BRIBERY…

"Enron maintains and disseminates a clear anti-corruption policy prohibiting the payment, solicitation, and receipt of bribes in any form. We strictly adhere to the Foreign Corrupt Practices Act in our business dealings and operations worldwide. All employees are expected to comply with our policy; non-compliance can result in dismissal. Officers, employees and other company agents are encouraged to report possible violations either in writing or by calling a confidential hotline".[33]

OECD MULTINATIONAL ENTERPRISE GUIDELINES

The Guidelines provide a set of multilateral rules *for business that have been negotiated and accepted by governments.* Enterprises are obliged to comply with all the recommendations, which represent a shared view of what OECD governments consider to constitute "good corporate behaviour".

Section II of the Guidelines, *General Policies*, states, inter alia, that enterprises should "*refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.*" [34]

approach her two managers with her concerns on the grounds that this would be "fruitless" and might cost her job. Hence, *in practice*, despite elaborate policies, Enron's internal mechanisms for encouraging and protecting whistleblowers were inadequate.

In this context, the *OECD Guidelines for Multinational Enterprises* provide a welcome step forward (see BOX 9). The Guidelines provide the only example of a comprehensive code of conduct that has been endorsed, and is enforced, by government.

Overall, however, whilst codes of conduct are extremely useful, if subject to monitoring by governments, trade unions or civil society, they have limitations and should be seen as an addition to, *not a substitute for*, government regulation.

3.2.2 Supporting National Anti-corruption Legislation: The USA

The USA's Foreign Corrupt Practices Act (FCPA) was adopted in 1977, making it a criminal offence for USA companies – as well as those foreign companies whose securities are listed in the United States – to pay bribes to foreign government officials. The FCPA however does not provide whistle blower protection.

Given USA labour laws, this is a significant weakness. Whilst federal employees receive protection under a federal, civil whistleblower law (see TABLE 4) - and some states have enacted similar laws to protect state employees – there is only patchwork protection for private sector employees. U.S. common law rule construes employment as a relationship which may be terminated at will by either party for a good reason, a bad reason, or no reason at all. Although there has been some erosion to the common-law rule from state statutes and case law, the prevailing rule remains *employment-at-will*. There are strong policy arguments in favour of legislative enactment of *just-cause protections*, which would allow employers to impose adverse employment actions against employees only for just cause. Such legislation is common in Western Europe and Canada, but has only been enacted in one state – Montana – in the United States. Thus, under the current legal regime, employers, particularly in the private sector, can demote or terminate whistleblower employees without fear of legal consequences. The employment-at-will doctrine provides a major disincentive to would-be whistleblowers and undermines a potentially valuable deterrent to corruption. Whereas collective bargaining provides a means of securing employment contracts with a just-cause provision – i.e. an agreement that employers may impose an adverse employment action on an employee only for a just cause – only 8% of workers in the private sector are organised and able to benefit from the negotiation of such agreements.

Indeed, the fact that the USA Government had to draft a post-Enron Whistleblowers Reform Bill is testimony to the inadequacy of existing whistleblower protection provisions for private sector employees (see BOX 10).

BOX 10: PROTECTING WHISTLE BLOWERS: SHUTTING THE STABLE DOOR…

USA

POST ENRON SUPPORT FOR WHISTLEBLOWERS

In mid April 2002, the Senate Judiciary Committee unanimously approved a compromise version, negotiated by committee Chair Sen. Patrick Leahy (D-Vt) and Iowa Republican Senator Charles Grassley, of the "Corporate Fraud and Criminal Accountability Act of 2002," which consists of post-Enron whistleblower rights for corporate employees. The bill now moves to the floor of the Senate for approval.

According to the Government Accountability Project (GAP), a Washington, D.C.-based good government organization "if approved, this bill would create state-of-the-art whistleblower protection," said Tom Devine, GAP legal director, "as the strongest law of its kind on the federal books."

Devine pointed out that the bill combines the modern burdens of proof in the Whistleblower Protection Act of 1989 with a choice of forum that virtually guarantees whistleblowers have a fair day in court. "Most importantly," Devine noted, "the legislation closes the loopholes that have meant that whistleblowers proceed at their own risk when warning Congress, shareholders or even their own management or Board Audit Committees of financial misconduct threatening the health of both their own company and, in some cases, the nation's economy."

"It means employees can warn shareholders, management, Congress and law enforcement agencies of corporate crime without being legally defenceless against professional martyrdom. "

3.3 Type of Disclosure Route Protected: Internal versus External

A second characteristic by which national whistle blowing legislation varies is the protection afforded to different types of *disclosure routes* (see TABLE 4).

The *USA* represents one end of the scale. Its legislation protects disclosures made by federal employees *irrespective of the disclosure route used*. This means that public sector whistleblowers are protected from reprisal, even in cases where they blow the whistle to the media.

The UK legislation (*PIDA*) represents a mid-way position and takes a 3-pronged approach:

- first, it encourages whistleblowers to use *internal mechanisms*, so as to give the company a chance to address the problem;
- secondly, in cases where these internal mechanisms either do not exist or fail to work, the legislation encourages whistle blowers to use *prescribed external agencies*;
- finally, and under a strict set of conditions, the legislation protects whistleblowers that make wider disclosures to, for example, the media. This applies in the event of a particularly serious issue, where there is fear of reprisal or cover up, or where the matter has been reported internally or to the prescribed person but has not been dealt with properly.

Canada's proposed *Public Service Whistle blowing Act* provides an example of legislation that does not provide for any external disclosures.

The issue of what represents good practice does not command consensus.

For many the UK's *Public Interest Disclosure Act* provides a model, as its emphasis on first using internal disclosure routes gives the organisation the opportunity to respond to the problem and provides the basis for good industrial relations. Yet, at the same time, whistle blowers who in certain circumstance,use the media still fall under the protection of the Act.

Others, however, argue that disclosures should be protected irrespective of the routes they use - as is the case in the USA - and that encouraging whistleblowers to use internal routes may be counter-productive.

According to the Government Accountability Project (GAP) in the USA[35], there is plenty of evidence from the USA to suggest that authorities will not start an investigation once they know that employers were given "early warning" and thereby the chance to destroy the evidence as a result of first making an internal disclosure.

GAP questions the assumption implicit in the UK model that organisations will act in 'good faith': an assumption that indeed looks naïve in the light of recent actions by Enron and Arthur Andersen.

Overall, however, there *is* consensus that whistle blowing legislation that protects only internal reporting internally is insufficient and that there is a need for whistleblowers to be protected for disclosing to external organisations - and if need be to the Press.

The recent case of Enron once again perhaps underlines the point. According to one Senator, the Enron management had created 'almost a culture of corporate corruption"36 . In such a case it is hard to imagine how internal systems of whistle blowing, based on reporting internally to management, could have ever succeeded.

3.3.1 Types of information disclosures protected: Public and Private

Another issue for consideration in the design of whistle blowing legislation is the scope of protection as regards the *type of information* that is disclosed.

The descriptions provided in TABLE 4 once again demonstrate a large range and once again highlights the unequal treatment of public and private sectors in the protection afforded by whistle blowing legislation. In the UK and South Africa the legislation provides for a broad disclosure base. However this is not the case for the Australian statutes or New Zealand's Protected Disclosure where it is not at all clear whether disclosures relating to the private sector would be protected.

In the context of combating bribery and corruption, it is essential that whistle blowing legislation provides equal protection to the disclosure of information in the public interest irrespective of whether it concerns the public or private sector.

3.3.2 Motivation for disclosure

All the legislation provides protection on the basis that there is good faith and reasonable belief. Whilst on the face of it this seems uncontroversial, David Lewis, a UK-based academic, argues that that this focus on motivation is misplaced: "*if workers have reasonable grounds to believe that their information is true or likely to be true why should their motive for disclosing be relevant.*" [37] Lewis argues his position on the basis that the public interest may not be served if a whistle blower is deterred from raising truthful concerns due to the possibility of their motives being examined.

4 A Case Study of National Legislation: UK PIDA

This section presents the UK's Public Interest Disclosure Act as a case study of national legislation. It sets out the motivation behind the act and the key characteristics of the Act before going on to look at the implementation in practice. Whilst it is still early days in terms of assessing the Act's implementation and impacts it is nonetheless useful to document any lessons that are emerging even in these early stages.

4.1 Motivation

The UK's Public Interest Disclosure Act (PIDA), was introduced in the wake of a number of disasters in the UK including the collapse of the *Bank of Credit and Commerce International (BCCI)* in which investigations found that a corporate climate of fear and intimidation prevented employees from voicing their concerns and the Clapham rail disaster which killed 35 people and after which an investigation found that workers had been aware of but not voiced their concerns over safety of wiring systems. In addition, there was considerable controversy over so-called gagging clauses[38], which placed unreasonable restrictions on employees, contained in the contracts of public service as well as a growing consensus over the need to tackle the culture of secrecy that permeated public service in the UK.

4.2 Description

The Public Interest Disclosure Act 1998 aims to protect whistleblowers from victimisation and dismissal, where they raise genuine concerns about a range of misconduct and malpractice.

It covers virtually all employees in the public, private and voluntary sectors, and certain other workers, including agency staff, home-workers, trainees, contractors, and all professionals in the NHS. The usual employment law restrictions on minimum qualifying period and age do not apply.

A worker who blows the whistle will be protected if the disclosure is made in *good faith* and is about:

- a criminal act
- a failure to comply with a legal obligation
- a miscarriage of justice
- a danger to health and safety
- any damage to the environment
- an attempt to cover up any of these.

PIDA extends protection given to health and safety representatives to individuals who raise genuine concerns about health, safety or environmental risks. (The Employment Rights Act 1996 already gives some legal protection to employees who take action over, or raise concerns about, health and safety at work.)

Whistleblowers will be protected when in *good faith* they:

- raise concerns internally;
- raise concerns with the relevant Government minister if they work in quangos or in the National Health Service;
- make disclosures to prescribed persons, such as the Health and Safety Executive, the Inland Revenue, the Audit Commission and the utility regulators (see Appendix 2)
- make wider disclosures (which could include to the media, MPs or the police), where the matter:
    - is exceptionally serious;
    - is not raised internally or with a prescribed regulator, because the worker reasonably feared that he/she would be victimised;
    - is not raised internally because the worker reasonably believed that there would be a cover-up and there is no prescribed person;
    - was raised internally or with a prescribed person, but was not dealt with properly.
- Such wider disclosures must be *reasonable* in all the circumstances.

Where a whistleblower is victimised following a protected disclosure, he/she can take a claim to an employment tribunal for compensation (appeals can be made to the Court of Appeal). Employment tribunals normally consist of a labour representative, a management representative and a judge. If a whistleblower is dismissed, he/she can apply for an interim order to keep his/her job, pending a full hearing. There is no qualifying period for bringing an unfair dismissal claim under PIDA and the awards of compensation that may be made are not limited.

Furthermore, confidentiality clauses, such as gagging clauses in employment contracts and severance agreements, which conflict with the protection provided by the Act, will not be legally binding.

The existence of external disclosure routes provides an incentive for employers to put in place internal whistle blowing procedures: NHS taken the lead.

4.3 Implementation

4.3.1 Assessing the Evidence

PIDA does not require employers to put in place organisational whistle blowing policies. However, as discussed above, the fact that the Act provides for external disclosure gives them a strong incentive to do so. The National Health Service has taken the lead in the UK and the UNISON Guide to Whistle blowing "Speaking Without Fear" provides model procedures.

However, over and above putting in place policies, to be effective organisations need to support implementation through adequate allocation of resources for monitoring, training and awareness.

The University of Middlesex undertook a survey of Higher and Further Education organisations in England and Wales in order to assess the level of support for the implementation of PIDA.

The survey results, based on responses provided by 349 Higher and Further Education institutions, showed that whereas the majority (90%) had put policies in place, most of these had never been used and only c14% were supported by training. A detailed breakdown of the results is presented in ANNEX 2.

Hence, overall it seems that whilst PIDA has been highly effective in terms of stimulating organisation to put in place organisationally-based compliance policies there is a lack of meaningful support for these policies.

4.3.2 Role of the Trade Unions

Trade unions have played an active role in England and Wales both in campaigning for and supporting PIDA. This action has included:

Pre-legislation

- Campaigning for legislation to be put into place and working with other civil society organisations in this respect;

Post-legislation

- Production of a guide to the Act which is primarily targeted at trade union branch officers and stewards. However this guidance has also been used by the Department of Trade and Industry in its promotion of the Act: *Speaking Out Without Fear: UNISON Guide to Whistle blowing*

- Producing a model whistle blowing Policy and Procedure (See ANNEX 1 of this report and ANNEX 1 of UNISON's guide)

- Negotiating with employers on disclosures routes – enabling a trade unionist to disclose to his/her trade union representative and advising and providing training on whistleblower procedures.

4.3.3 Overall assessment

The key strengths and weaknesses of PIDA are summarised below in TABLE 5.

TABLE 5 PIDA: STRENGTH AND WEAKNESSES

STRENGTHS	WEAKNESSES
Process: consultative and consensual	Individuals not protected if disclose to Trade Unions which are not a prescribed disclosure channel. However in the UK this is being addressed in local agreements whereby employers agree that employees may wish/need to speak to their trade union representative first and trade unions agree that they will act responsibly.
Legitimacy: legislation is a vital first step towards de-stigmatization	No provisions for class action: any collective entity such as a trade union branch cannot be covered – this is a difficulty for organisations that work on a collective basis.
Wide scope of protection: public and private sector employees are protected (this should be a cornerstone of all whistle blowing legislation) as are disclosures covering a wide range of information types.	Protection of non-employees: it is not clear whether students or unpaid employees are covered. This is an important consideration in sectors like health, where student nurses and doctors may have concerns that they wish to voice.
Compensation: No upper limits on compensation	Exclusion of the security services: at the moment the police are excluded.
Encourages employees to blow the whistle internally first. According to UNISON this is good practice as it is the basis of good industrial relations.	No provisions for monitoring: there is no requirement to centrally compile PIDA cases, therefore not easy to monitor cases. If cases are settled privately then they remain confidential.
Encourages employers to put in place internal whistleblowing procedures: by protecting external disclosures the Act provides an incentive for employers to put in place internal procedure as it is in the employer's interest that	Limited disclosure routes - e.g. for health
Clear guidance on procedures and disclosure	Awareness: observers in the UK consider that promotion of PIDA has been weak 39. Despite being in place over 2 years, there is still limited awareness of it.
Has the commitment of trade unions	The influence of a culture of secrecy that prevails in the UK (as well as the Official Secrets Act) weakens PIDA.
Underpinned by strong employment laws	Implementation: empirical work carried out by the University of Middlesex 40 in health and other sectors has shown that whilst employers have put in place procedures, these are not being backed up by adequate training and support resources. Also there is no cross-referencing with other procedures.

5 International Anti-corruption Instruments

5.1 Overview

In recent years, the increasing priority given to combating international corruption has resulted in a number of regionally-based international anti-corruption instruments, such as the Anti-corruption Convention of the Council of *Europe* and the *OECD* Anti-bribery Convention. This trend is likely to culminate in the new United Nations Anti-corruption Convention, which is in the process of being drafted at the time of writing this report (July 2002).

A summary of key international anti-corruption initiatives is provided in *TABLE 6*.

5.2 Whistle blowing Provisions

The performance of the various international conventions in relation to the protection of whistleblowers ranges from *requiring* that signatories put in place protection for whistle blowers legislation (*European Council's Criminal Law Convention on Corruption)* to having no general provisions regarding the protection of whistle blowers (OECD Anti-bribery Convention).

5.2.1 The European Council's Criminal Law Convention on Corruption

The European Council's Criminal Law Convention, which is the broadest in scope of all the international anti-corruption conventions, is the only Convention that *requires* signatories to protect whistleblowers.

Article 22 of the Convention *obliges* member states to provide protections in their domestic laws for whistleblower.

"Each Party shall adopt such measures as may be necessary to provide *effective* and *appropriate* protection for:

a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b) witnesses who give testimony concerning these offences.

The term "*witnesses*" refers to persons who possess information relevant to criminal proceedings concerning corruption offences and includes whistleblowers.

5.2.2 The Inter-American Convention Against Corruption

The *Inter-American Convention Against Corruption*, which entered into force in March 1997 and was the first international instrument against corruption (see ANNEX 4), creates legally binding obligations under international law, as well as a series of preventative measures that Parties *agree to consider establishing.* It is distinctive in that it places a strong emphasis on *prevention*, reflecting its dual goals of *deterring and controlling* corruption.

In line with its emphasis on prevention, Article III, Section 8 of the Convention specifically provides for protection for whistleblowers. It requires members of the Organisation of American States to *consider* creating, maintaining and strengthening, inter alia, "*systems for protecting public servants and private citizens who in good faith report acts of corruption, including protection of their identities in accordance with their Constitutions and the basic principles of their legal systems*".

However these provisions are not legally binding and in 2001 a monitoring survey carried out by OAS found that only 18% of signatories to the Convention had put in place a national law that protected public servants and private citizens who in good faith report acts of corruption.[41]

Additionally, however, the Organisation of American States (OAS) has undertaken a range of initiatives aimed at supporting countries' implementation of the Convention, including the adoption of *model* whistle blowing legislation (see *BOX 12*). This model legislation was drawn up by the Government Accountability Project (GAP) - an NGO in the USA that actively campaigns for, and supports, protection for whistleblowers in the USA.

Overall, however, whilst progress is slow, the Convention is still in the early stages of implementation and its active promotion of whistle blower protection as a deterrent to corruption is to be welcomed.

5.2.3 The Draft United Nations Anti-corruption Convention

The Draft United Nations Anti-corruption Convention, which is still under negotiation, also provides for whistleblower protection under Article 16, once again in the context of a series of preventative measures that parties "agree to consider". The protection envisaged covers *public sector employees* as well as *private citizens*.

5.2.4 The OECD Convention on Combating Bribery of Foreign Public Officials

The *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, which came into force in 1999, comprises two parts: binding commitments provided by the Convention, as well as provisions set out in its 1997 Recommendations. Signatories, who include all 30 OECD members as well as 5 non-members, accept the provisions of both.

The Convention's overall aim is to prevent bribery in international business transactions by requiring OECD countries to criminalise the act of bribing foreign *public* officials. It only covers the conduct of the person or enterprise offering or making the bribe and does not cover bribes paid to private persons or bribes paid to public officials for reasons other than for obtaining or retaining business or other

improper advantage in international business transactions. [6] As such, the focus of the OECD Convention is extremely narrow.

The OECD Convention does not impose any general obligations on governments regarding whistle blowing, although its *Revised Recommendations 1997* provide that countries put in place mechanisms to encourage auditors to report bribery (see BOX 11).

BOX 11: OECD ANTI-BRIBERY CONVENTION WHISTLEBLOWING PROVISIONS

OECD CONVENTION – REVISED RECOMMENDATIONS
SECTION V: ACCOUNTING REQUIREMENTS, EXTERNAL AUDIT AND INTERNAL COMPANY CONTROLS

B. Independent External Audit

i) member countries should consider whether requirements to submit to external audit are adequate.
ii) member countries and professional associations should maintain adequate standards ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.
iii) **member countries should require the auditor who discovers indications of a possible illegal bribe to report this discovery to management and as appropriate to corporate monitoring bodies.**
iv) **member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities**.
Source: Revised Recommendation of the Council on Combating Bribery in International Business Transactions

The OECD Convention is therefore lagging behind in terms of providing for support to whistleblowers. This is an area in which trade unions, represented through the TUAC – the Trade Union Advisory Committee to the OECD – are actively campaigning.

[6] First Annual Report to Congress on the Inter-American Convention Against Corruption

TABLE 6: INTERNATIONAL ANTI-CORRUPTION PROVISIONS

INTERNATIONAL ORGANISATION	KEY ANTI-CORRUPTION INSTRUMENT	BRIEF DESCRIPTION	WHISTLEBLOWING PROVISIONS	ASSESSMENT	ADDITIONAL COMMENTS
ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT	**The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**	The Convention aims to prevent bribery in international business by requiring countries to criminalise the act of bribing foreign public officials.	The Convention does not impose any general conditions on signatories in relation to whistle blowing. However its recommendations do encourage signatories to provide whistle blowing support for accountancy professionals	The absence of whistleblower protection provisions in the OECD Convention is a significant weakness, given first the lack of national whistleblower legislation in many OECD countries and the fact that where legislation does exist, often only public sector employees are covered. Given the fact that the OECD Convention is focusing on the supply side of corruption – the private sector - then this represents a serious loophole.	The TUAC - Trade Union Advisory Committee - is working with the OECD *Working Group on Bribery* to ensure that, first the *1997 Recommendations* and then the Convention itself, are changed to include whistleblowing provisions.
THE COUNCIL OF EUROPE	**Criminal Law Convention on Corruption**	The Convention obliges Parties to criminalise a wide range of acts of corruption. It defines corruption as the "*requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts*	Article 22[42]: Protection of collaborators of justice and witnesses. "Each Party shall adopt such measures as may be necessary to provide *effective* and *appropriate* protection	A pioneering aspect of the Convention is that it extends criminal responsibility for bribery to the private sector. This reflects recognition of the	Monitoring is undertaken by Greco – the Group of States Against Corruption. The aim of GRECO is to improve the capacity of its members to fight

INTERNATIONAL ORGANISATION	KEY ANTI-CORRUPTION INSTRUMENT	BRIEF DESCRIPTION	WHISTLEBLOWING PROVISIONS	ASSESSMENT	ADDITIONAL COMMENTS
		the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or prospect thereof." This includes giving as well as receiving bribes and private sector as well as public sector corruption. The Convention aims to develop common standards concerning certain corruption offences and deals with substantive and procedural law matters, which closely relate to these corruption offences and seeks to improve international co-operation. It is broader in focus than both the OECD Anti-bribery Convention and the Inter-American Convention Against Corruption, as it does not limit the context for bribing foreign public officials to international business transactions nor to the public sector.	for: a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities; b) witnesses who give testimony concerning these offences The grounds for disclosure must be *reasonable grounds* and *good faith.*	need to limit the differences in rule applicable to the private and public sectors and specifically the transfer of public functions to the private sector – whose new functions are now of great social importance. The Convention is consistent therefore in recommending that countries protect public and private sector whistleblowers.	corruption by monitoring compliance of countries with their commitments in this field.
ORGANISATION OF THE AMERICAS (OAS)	**Inter-American Convention Against Corruption**	Aims to "promote and strengthen the development by each of the States Parties to ensure the effectiveness of measures and actions to prevent, detect and punish and eradicate corruption; and to promote, facilitate and regulate the cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the	Article III, Section 8 provides that members of the Organisation of American States agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen, inter alia the establishment of "*systems for protecting*	The OAS is usefully promoting model whistle blowing legislation.	A Committee of Experts has been established under the monitoring mechanism to the OAS Convention.

INTERNATIONAL ORGANISATION	KEY ANTI-CORRUPTION INSTRUMENT	BRIEF DESCRIPTION	WHISTLEBLOWING PROVISIONS	ASSESSMENT	ADDITIONAL COMMENTS
		performance of public functions and acts of corruption specifically related to such performance. The Convention was the first multilateral corruption instrument. It contains criminally binding requirements, as well as a series of preventative measures that Parties agree to consider establishing. Its emphasis on prevention distinguishes it from other anti-corruption Conventions. It is narrower in scope than the Council of Europe's Convention as it only addressed bribery when a public official is involved.	*public servants and private citizens who in good faith report acts of corruption, including protection of their identities in accordance with their Constitutions and the basic principles of their legal systems*"		
UNITED NATIONS	**Draft United Nations Convention Against Corruption**	Negotiations to agree a United Nations Convention Against Corruption were begun in Vienna on 21st January 2002. Currently there is a draft containing more than 80 proposed articles[43] . These will be finalised during 2 further sessions.	Article 16 (l): "systems for (safeguarding and) protecting public (servants) officials and other persons (private citizens), who, in good faith report, acts of corruption, (witnesses, informers and experts who participate in proceedings against individuals who have allegedly committed acts of corruption,) including protection of their identities, in accordance with their constitutions and fundamental principles of their domestic law.	This Convention is still being drafted.	

INTERNATIONAL ORGANISATION	KEY ANTI-CORRUPTION INSTRUMENT	BRIEF DESCRIPTION	WHISTLEBLOWING PROVISIONS	ASSESSMENT	ADDITIONAL COMMENTS
			(Those systems shall also establish the necessary mechanisms for promoting confidence in public officials and for encouraging citizens to report acts of corruptions[44]		
CODES OF CONDUCT					
OECD	**Guidelines for Multinational Enterprises**	The Guidelines provide a set of recommendations on good corporate behaviour that are endorsed and ultimately enforced by governments. Whilst the codes are voluntary they are not optional. All OECD multinational enterprises are bound by the codes of conduct and are required to comply with all the recommendations. Trade Unions and other elements of civil society are able to bring cases against companies which have breached any of the Guidelines.	*II General Policies* 9. Refrain from discriminatory for disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities on practices that contravene the law, the Guidelines or the enterprise's policies.	These are no substitute for government regulation. However, given that they are externally enforced, they are helpful in that enterprises, signed up to the codes by their governments, are required to put in place provisions to protect whistleblowers and can be held to account for not doing so.	Cases can be brought by trade unions or other elements of civil society to the relevant National Contact Point for alleged breaches of the codes of conduct.

BOX 12: OAS MODEL WHISTLEBLOWER LEGISLATION

MODEL INTERNATIONAL WHISTLEBLOWER PROTECTION ACT

This model legislation was developed by the Government Accountability Project (GAP) and adopted by OAS. Its plan was to implement the legislation in 5 pilot countries.

1**. (Protected activity)** It shall be illegal to engage in material discrimination through employment-related actions, civil or criminal prosecution or other harassment, against a person, because that person refuses to violate, or makes any disclosure not specifically prohibited by law, evidencing violations or failure to comply with the authoritative provisions of international, national, or institutional law, convention, treaty or covenant, for any covered institution.

2**. (Due process)** Within one year of learning the occurrence of prohibited discrimination, any person may file suit in an independent judicial forum, with trial by jury where available, and is entitled to the

most complete due process available by national law. The person filing suit may choose an Alternative Disputes Resolution forum, including arbitration or mediation, to conduct proceedings on the alleged discrimination.

3. **(Burden of proof)** If the person demonstrates by a preponderance of evidence that protected activity was a contributing factor in any alleged discrimination, that person will prevail in the suit unless the defendant demonstrates by clear and convincing evidence that it would have taken the same action for independent, lawful reasons.

4**. (Relief)** If the person alleging discrimination for protected activity prevails, that person is entitled to all relief necessary to be made whole so that protected activity does not result in any direct or indirect prejudice. This includes but is not limited to cancellation of the discriminatory action; payment and any other compensation necessary to neutralize all direct or indirect consequences of discrimination; interim relief during the proceeding or on appeal; transfer or other relocation if requested; and attorney fees and all other necessary costs incurred to prevail in the suit; and discipline or other accountability for those who engaged in prohibited discrimination. If the forum hearing the discrimination case determines the person made protected disclosures, it shall make authoritative referrals for official investigation and corrective action by relevant national or international authorities, free from conflict of interest, on the person's disclosure of alleged violations of law, convention, treaty or covenant.

6 Organisational Initiatives

Multilateral organisations, whether concerned with the development of the European single market or the alleviation of poverty in developing and transitional countries, in recent years have without exception recognised and sought to eliminate the damaging effects of corruption from their project and policies.

The following sections present two examples: the World Bank and the European Commission.

6.1 World Bank

The World Bank has taken steps to encourage and protect both internal and external whistleblowers.

6.1.1 Internal: World Bank Employees

The author could not obtain a copy of the World Bank's internal procedures for protecting employees who make disclosures concerning the public interest. However, a report by Robert Vaughan[45] (2000) described a draft version of the Bank's proposed "*Standards and Procedures for Inquiries and Investigations*" which sets out the conditions under which an employee who discloses information is protected.

According to Vaughan, *"Bank procedures would protect an employee who in good faith discloses information which the employee reasonably believes evidences misconduct, mismanagement, and waste of resources or abuse of authority. The procedures also would protect employees who refuse to participate in such activities. In addition, employees of the World Bank would be able to make such disclosures anonymously."* A key strength of the provisions is that they are based on strong burdens of proof such that employers would have to demonstrate by "clear and convincing evidence" that the personnel action taken against the employee would have been taken anyway.

6.1.2 External whistleblowers: Public Procurement Procedures

The World Bank recognises that public procurement, which provides the main interface between the public and private sectors, is a major source of corruption. It also recognises that potential whistleblowers lie outside its organisation.

The World Bank has accordingly set up a hotline for dealing with any concerns affecting any of its projects. However, the only 'protection' offered by the World Bank's is 'confidentiality' – which makes it harder for a whistleblower's report to be substantiated and thus reduces the actual and potential impact of whistle blowing.

6.2 The European Commission

The European Commission has recently taken steps to encourage internal whistleblowers, but so far has not taken action to harmonise whistle blowing throughout the member states.

6.2.1 Internal: European Commission Employees

In late November 2000, following a corruption scandal that was exposed by a whistleblower and which led to the resignation of all the Commissioners (see Case 3 in Section 2 of this report), the European Commission started the process of putting its house in order.

Following a number of proposals the Commission produced a consultation document entitled "*Raising Concerns About Serious Wrong-doing*" which after first a process of internal consultation (until March 2001) and then inter-institutional consultation resulted in a Commission Decision "*On Raising Concerns about Serious Wrong-doings*" being adopted on the 4th April 2002.

The rules make it clear that all staff have a duty to report concerns and that managers have a responsibility to follow up any such reported concerns.

The Decision provides for the following *internal* disclosure routes:

- immediate line manager;
- Director General;
- Secretary General of the Commission.
- independent European anti-fraud office (OLAF).

The Decision also provides protection for employees who make *external* disclosures using the following prescribed routes:

- President of the Court of Auditors;
- Council of the European Union;
- European Parliament;
- European Ombudsman

However, protection is qualified in that the external disclosure must be:

- made in good faith;
- *and* must have already used internal disclosure routes and;
- have allowed reasonable period of time (to be defined) for appropriate action to be taken.

Employees who make disclosures to the media are not protected.

In terms of the adequacy of the legislation, the Government Accountability Project (GAP) [46]considers that the EC's procedures amount to an entrapment. Its main points of concern provide a useful check-

list of issues for any other organisations that are developing their own whistle blowing policies and procedures:

- *Scope of protected speech*: the provisions do not specify what constitutes professional misconduct or the types of disclosures that are protected. This is common practice in national whistleblowing legislation;
- *Motivation:* it is unhelpful and unreliable to condition protection on motivation;
- *Location:* no need to restrict protection to disclosures concerning misconduct discovered on the job. In terms of public interest and the public benefit it is not at all clear that this should be of any relevance;
- *Gagging clauses*: anti-gagging clauses should be included to establish the rule's supremacy over any disclosure restrictions imposed in contracts by individual agencies;
- *The type of employee protected*: protection could be expanded to include former employees and applicants, as well as contractors (given the importance of contracting out as a source of bribery and corruption then this would seem to be an important part of the work force to cover);
- *Restricted external disclosure routes*: according to GAP the lack of disclosures to the public represents a major loophole;
- *Conditional disclosure beyond OLAF*: this provides a long stop and ensures that the potential "impact of whistleblowing will be no greater than OLAF's good faith and performance;
- *The need to define adverse consequences*
- The need to clarify arrangements regarding the *burden of proof (*which in the case of the World Bank are considered to be strong);
- *The need to set out provisions for* compensation

6.2.2 External: European Commission

The European Commission has not to date imposed any obligations on its member states to introduce legislation that protects whistleblowers.

Yet the Commission has explicitly identified public procurement as a key source of corruption within and between member states. A recent EU-wide study[47], which aimed to analyse different national approaches to dealing with corrupt companies in the public tendering procedures, specifically identified the need to take action in relation to whistleblowers, recommending that member states adopt "*a common approach to whistle blowers.*

7 Learning from Experience

7.1 What we know

Whilst the preceding sections have shown that there is no one model for protecting whistleblowers and that the experts disagree in relation to a number of issues including the relative strengths and roles of internal and external disclosure routes and whether or not protection should be conditioned on motivation, there are nonetheless some clear areas of agreement:

- Legislation that protects whistleblowers from retaliation de-stigmatises, provides legitimacy and facilitates a change in culture;
- There is a need to protect private sector as well as public sector employees – voluntary codes of conduct are helpful (particularly if externally enforced) but are not a substitute for legislation;
- That there is need to go beyond the provision of internal and prescribed and disclosure routes and allow for external disclosures to MPs and the Press;
- That there is a need to ensure that the full range of workers are included – especially contractors- particularly in the context of today's changing labour practices and the new public management model of government that is spawning privatisations and contracting out.

However, it is essential to note that putting in place a legislative framework that protects *private and public* sector employees from retaliation for exposing malpractice is simply not enough. Legislation provides a vital back-stop, but efforts should not stop there.

Trade unions and civil society have important roles to play to support the implementation of legislation:

- *Promoting awareness* of legislation – in the UK a key criticism of PIDA is that it has not been promoted by government. Trade unions can play a potentially crucial role in raising awareness in the workplace;
- *Monitoring implementation*: again in the case of the UK, there is no provision for monitoring cases under PIDA. Trade unions and/or civil society can play an important role in gathering this information together and thus providing a mechanism for review and learning from experience;
- *Providing advice and training* on making procedures effective: again experience in the UK shows that whilst procedures have been put in place, they are often weak and employees can be largely unaware of their existence.

In particular *public sector trade unions* can play a key role in ensuring that government departments take the lead by creating a culture in which whistle-bowing is supported from the top.

Finally, it is important to note that the success of internal whistleblower procedures, in terms of deterring corruption, will depend on there being effective enforcement agencies in place that will impose sanctions on those found guilty of corruption. Hence efforts to protect and support whistleblowers must be accompanied by institutional strengthening and increasing attention to meeting the challenges of holding the private sector as well as the public sector, to account.

7.2 What we don't know

There are a number of outstanding questions in relation to whistleblower protection policy and practice that will only be answered by the on-going collation, analysis and sharing of information and experience.

The final section of this report contains a questionnaire that aims to facilitate better understanding of the:

- adequacy of legislation;
- challenge of implementation – what are your experiences?
- additional steps that facilitate a change the culture
- need for incorporating witness protection
- specific challenges facing, and solutions for, the accountancy and other professions

8 Research Questionnaire

UNICORN is the trade union anti-corruption network. It is undertaking policy and empirical research on a range of issues aimed at detecting and d UNICORN is supported by the TUAC (Trade Union Advisory Committee to the OECD), Public Services International (PSI) and the ICFTU (International Confederation of Free Trade Unions).

As part of its research, UNICORN has undertaken a comparative review of whistle blowing legislation and is engaged in the on-going collection of information on whistleblower protection initiatives, as well as whistleblower cases.

If you have any information on *national* or *international* whistleblower protection legislation, or are involved in *campaigning* for, or *implementing*, whistleblower protection initiatives, then we would like to hear from you.

The questions below provide a guide to the type of information we would like to receive. Please either complete the relevant sections below, or simply send us an email telling us what you are doing, attaching any relevant documentation (in English, if possible).

We look forward to hearing from you
corruption@psiru.org

NATIONAL LEGISLATION

BACKGROUND

1. Country:
2. Title of legislation:
3. Date of legislation:
4. Date of any amendments to legislation:
5. What was the motivation for the legislation?
6. What was the model, if any, for the legislation?
7. What is the legal basis of the legislation?
8. Are there any plans or campaigns to amend the legislation?
9. Please provide background information that you think may be relevant:

COVERAGE OF LEGISLATION

10. Who is covered by the legislation?

☐ Public sector employees	☐ Citizens
☐ Public and private sector employees	☐ Other

Please add any notes of explanation:

11. Are there any exceptions to this sectoral coverage: e.g. in the USA FBI agents are not covered by the Whistleblowers Act?

☐ YES ☐ NO

Please specify:

12. What information disclosures are protected?

13. Are the disclosure routes prescribed?

☐ YES ☐ NO

If YES, please specify below and add any notes of explanation

☐ Internal	☐ the Media	☐ Other
☐ Prescribed external routes	☐ MPs	
☐ The police	☐ Trade Unions	

14. What grounds of disclosure are protected by the legislation?

☐ Good faith ☐ Reasonable belief ☐ Other

MONITORING

15. What provisions have been made for monitoring cases brought under the legislation?
16. Is any organisation responsible for compiling cases brought under the whistleblower protection legislation? If YES, please specify

KEY STRENGTHS AND WEAKNESSES

17. What do you consider to be the key strengths of the legislation?

18. What do you consider to be the key weaknesses of the legislation?

19. In your view what improvements could be made?

20. On the basis of your experience what are the key lessons that should be learnt?

INTERNATIONAL LEGISLATION

21. Have you knowledge or experience of campaigning for, designing or implementing whistle blowing provisions in any of the following international Conventions?

☐ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (accountancy provisions)
☐ Council of Europe's Criminal Law on Corruption
☐ Inter-American Convention Against Corruption
☐ Other Please specify

Please share your experiences/views:

NATIONAL/INTERNATIONAL CODES OF CONDUCT

22. Have you knowledge or experience of designing or implementing whistle blowing provisions in the context of private sector codes of conduct? Please share your experiences/views:

TRADE UNION INITIATIVES

23. If your trade union has been involved in any activities relating to whistleblower protection then please provide details:

☐ campaigning for legislation	☐ the Media	☐ Other
☐ consultee on draft legislation	☐ MPs	
☐ negotiating collective agreements with employers that include whistleblower protection	☐ Trade Unions	

Please provide details.

OTHER WHISTLE BLOWER PROTECTION INITIATIVES

24. If you are a civil society organisation or public sector organisation working in the area of whistleblower protection then please provide details:

WHISTLEBLOWING CASES

25. Please provide details of any whistle blowing cases. These may illustrate any of a number of points; the need for whistleblower protection; the strengths or weaknesses of particular legislation; the effectiveness, or lack of effectiveness of private sector codes of practice; the role of trade unions or civil society; the dilemmas and challenges facing the accountancy professions; or something we haven't thought of! Report the cases however you like, but it would be helpful if you could include the following:

    25.1. Name and position of the whistle blower
    25.2. Name and location of organisation
    25.3. Type of organisation (public/private)
    25.4. The nature of the disclosure
    25.5. The route of disclosure (to internal management , parent company, external regulator, the police, the media)
    25.6. A description of how the public interest was served
    25.7. The consequences for the whistleblower
    25.8. The role of any whistle blower protection/agreements
    25.9. The role of the accountancy profession if any
    25.10. The role of trade unions or other support organisations
    25.11. Your assessment of the points illustrated/lessons to be learnt by the case

25.12. Source of further references

WITNESS PROTECTION PROGRAMMES

26. Please provide details of legislation providing for witness protection.

AND FINALLY … WHO ARE YOU?

Name:

Organisation name:

Organisation type:

☐ trade unions	☐ public sector	☐ other
☐ civil society	☐ private sector	

Please provide any additional information on your organisation:

Tel:

Email:

Many thanks indeed
…and don't forget to send in any supporting information.

ANNEXE 1: PIDA IN DEPTH

EMPLOYERS AND WHISTLEBLOWING POLICIES

While the Public Interest Disclosure Act 1998 does not require employers to adopt whistleblowing policies, it gives them every reason to do so. Unless there are effective procedures in place, which demonstrate an organisation's willingness to listen to and address concerns, workers are more likely to take their concerns outside (to prescribed persons, or to the media, MPs or the police) – and be protected by the Act in doing so. An effective whistleblowing policy can also help foster good relations, avoid crisis management, and minimise damaging incidents and unpleasant publicity.

If your workplace has no whistleblowing systems, you could explain the benefits of introducing a new procedure for workers. For example, a whistleblowing procedure:

- demonstrates an organisation is committed to ensuring its affairs are carried out ethically, honestly, and to high standards
- does not cost a great deal to introduce
- is good employment practice
- shows an organisation is keen to introduce procedures to protect public safety and public money
- will help develop a culture of openness, accountability and integrity
- will encourage workers to raise matters internally, making wider disclosures (to non-prescribed persons, or to the media, MPs or the police) less likely
- will contribute to the efficient running of the organisation and the delivery of services
- will help curb corruption, fraud and mismanagement
- will help uphold the reputation of the organisation, and maintain public confidence.

A WHISTLEBLOWING POLICY

A whistleblowing policy is designed to encourage employees to raise concerns about malpractice, danger and wrongdoing internally.

But it should do nothing to deter staff from making disclosures to prescribed persons, such as the Health and Safety Executive, the Audit Commission or the utility regulators. The policy should also ensure any public sector workers, whose employer has a Government appointed member on its board, are aware that they may disclose information direct to the Secretary of State, and will not be victimised or dismissed for doing so.

It may state the organisation is committed to achieving the highest possible standards in the delivery of public services, and wishes to encourage freedom of speech to help achieve this.

A whistleblowing policy should:

- be in writing
- say who and what it applies to
- provide for concerns to be dealt with quickly, preferably within clearly set out time limits
- ensure feedback is provided about the progress and outcome of the investigation
- make it clear the employer is committed to tackling malpractice and wrongdoing
- ensure staff know malpractice and wrongdoing will be dealt with seriously
- ensure confidentiality for the whistleblower, if this is requested
- ensure concerns and responses to them are properly recorded
- set out the relationship between the whistleblowing policy and the employer's other procedures (e.g. disciplinary, grievance, , harassment)
- allow concerns to be raised independently from line management
- recognise employees may lawfully raise concerns externally
- explain that employees wanting to raise concerns can seek the help of their trade union representative.

A Whistleblowing Procedure

It is important to agree a proper whistleblowing procedure with your employer, because the Act lays down rules whistleblowers must follow to be legally protected.

Any whistleblowing procedure you agree should ensure trade union representatives can advise and represent members during investigations.

There may be occasions when the concern raised is so serious that an inquiry may need to be held. You should ensure any whistleblowing procedure you agree includes arrangements for inquiries. It should state that the union will be involved in all stages of the inquiry, and a union representative will be a member of the panel. You should also ensure your employer agrees to negotiate with the union over the implementation of the inquiry's recommendations.

It can be very helpful if your employer agrees that the most senior person in your organisation has an 'open door' policy, which encourages trade union representatives or whistleblowers to raise serious concerns with them directly.

If your employer agrees to proper procedures and has an open door policy which encourages individuals to raise concerns, it will help create an open culture where workers feel their concerns will be heard and acted upon.

Alongside a whistleblowing policy and procedure, it is important to negotiate a procedure for evaluating standards of service delivery in your workplace. It should ensure the trade union is involved in any monitoring and evaluation exercises.

Your employer's disciplinary procedure will also need to be amended to take account of the whistleblowing policy and procedure. The disciplinary procedure should make it clear that harassing

or victimising a whistleblower (including informal pressures) will be considered a serious disciplinary offence, and will be dealt with under the disciplinary procedure.

The main steps you could include in any whistleblowing procedure are:

Role of Trade Unions

The employer should recognise the right of whistleblowers to be advised and represented by their union when raising concerns under the whistleblowing procedure.

Designated Officer

The employer should appoint a designated officer to be a point of contact for concerns raised under the whistleblowing procedure. He/she should be a senior officer, and report directly to the most senior person in the organisation. The designated officer should be impartial and capable of taking an independent view on the concern raised. Large organisations may appoint several designated officers.

Raising a Concern

An employee should normally raise concerns about wrongdoing and malpractice with his/her immediate manager first. The manager would notify the matter to the designated officer.

Where it is not appropriate to go via normal management reporting channels, because the matter is sensitive and serious (for example, if the whistleblower believes his/her manager is involved), he/she should contact the designated officer.

Employer's Response

The designated officer or line manager would, if requested, arrange an initial interview. At this stage, the whistleblower would be reassured he/she would be protected from possible victimisation, would be asked if he/she wanted confidentiality and/or wanted to make a written or verbal statement. In either case, the designated officer or line manager would write a brief summary of the interview, which would be agreed by both parties.

The designated officer or line manager would report to the most senior person in the organisation, who would set up any further necessary investigation.

Where exceptionally the concern is about the most senior person, the chair of the board/governing body would decide on how to proceed. This may include an external investigation.

The Investigation

It may be necessary that certain investigations would be carried out in strict confidence (with the employee under investigation not being informed until necessary). Where there are allegations of ill treatment of patients/clients/customers, the employee under investigation may have to be suspended.

The designated officer would give feedback on the outcome of the investigation to the whistleblower.

If the investigation shows there is a case to be answered, the disciplinary rules and procedures would be used.

If there is no case to answer, the designated officer would ensure the employee is protected, provided the disclosure was made in good faith.

Disciplinary action would only be taken where a false allegation is made maliciously.

Inquiries

Where the concern raised is sufficiently serious, an inquiry may need to be held.

The union should seek to negotiate its involvement in the inquiry, including drawing up the terms of reference and deciding on the membership of the panel, and the implementation of the recommendations of the inquiry.

After the Investigation

The most senior person would brief the designated officer about the outcome of the investigation. The designated officer would then arrange a meeting with the whistleblower to give feedback on any action taken. (This would not include details of any disciplinary action, which would remain confidential.) The feedback would be provided within agreed time limits. Where the issue has been raised and dealt with by the line manager, the line manager will provide feedback as above. A note of the concern raised and how it was resolved will be lodged with the designated officer.

If the whistleblower is not satisfied with the outcome of the investigation, he/she would be notified of their right to make an external disclosure to a prescribed person, such as the Health and Safety Executive, or where justified, elsewhere, notwithstanding the result of the investigation.

Time Limits

Time limits should be allocated for each stage of the procedure. If the time limits pass without any satisfactory action being taken, the concerns should be raised at the next level.

PRESCRIBED PERSONS

Disclosures of information may be made to the following persons, who have been prescribed by the Government:

1. *Health & Safety risks:* HSE and local authority
2. *Environmental issues*: the Environment Agency
3. *Utilities*: OFTEL, OFFER, OFWAT, OFGAS, Rail Regulator
4. *Financial Services & the City*: Financial Services Authority (and pending its full operation, its predecessor bodies); HM Treasury (insurance)

5. *Fraud & fiscal irregularities*: Serious Fraud Office, Inland Revenue, Customs & Excise
6. *Public sector finance*: NAO, Audit Commission, Accounts Commission for Scotland
7. *Company law:* Department of Trade & Industry
8. *Competition & consumer law*: Office of Fair Trading and local authority
9. *Others*: Certification Officer (Trade Unions), Civil Aviation Authority, Charity Commission, Criminal Cases Review Commission, Data Protection Registrar, Occupational Pensions Regulatory Authority.

WHISTLE BLOWING AT WORK

INTRODUCTION

1. The word whistleblowing in this Policy refers to the disclosure internally or externally by workers of malpractice, as well as illegal acts or omissions at work.

POLICY STATEMENT

2. (Employer's name) is committed to achieving the highest possible standards of service and the highest possible ethical standards in public life and in all of its practices. To achieve these ends, it encourages freedom of speech. It also encourages staff to use internal mechanisms for reporting any malpractice or illegal acts or omissions by its employees or ex-employees.

OTHER POLICIES AND PROCEDURES

3. (Employer's name) has a range of policies and procedures, which deal with standards of behaviour at work; they cover Discipline, Grievance, Harassment and Recruitment and Selection. Employees are encouraged to use the provisions of these procedures when appropriate. There may be times, however, when the matter is not about your personal employment position and needs to be handled in a different way. Examples may be:

- Malpractice or ill treatment of a patient/client/customer by a senior member of staff
- Repeated ill treatment of a patient/client/customer, despite a complaint being made
- A criminal offence has been committed, is being committed or is likely to be committed
- Suspected fraud
- Disregard for legislation, particularly in relation to health and safety at work

The environment has been, or is likely to be, damaged

- Breach of standing financial instructions
- Showing undue favour over a contractual matter or to a job applicant
- A breach of a code of conduct
- Information on any of the above has been, is being, or is likely to be concealed

This list is not exhaustive.

(Employer's name) will not tolerate any harassment or victimisation of a whistleblower (including informal pressures), and will treat this as a serious disciplinary offence, which will be dealt with under the Disciplinary Rules and Procedure.

ROLE OF TRADE UNIONS

4. (Employer's name) recognises employees may wish to seek advice and be represented by their trade union(s) officers when using the provisions of this policy, and acknowledges and endorses the role trade union officers play in this area.

DESIGNATED OFFICERS

5. The following people have been nominated and agreed by (employer's name) as designated officers for concerns under this procedure. They will have direct access to the most senior person in the organisation.

X	address	telephone
Y	-	-
Z	-	-

ROLE OF THE DESIGNATED OFFICER

6. Where concerns are not raised with line manager, the designated officer will be the point of contact for employees who wish to raise concerns under the provisions of this policy. Where concerns are raised with him/her, he/she will arrange an initial interview, which will if requested be confidential, to ascertain the area of concern. At this stage, the whistleblower will be asked whether he/she wishes his/her identity to be disclosed and will be reassured about protection from possible reprisals or victimisation. He/she will also be asked whether or not he/she wishes to make a written or verbal statement. In either case, the designated officer will write a brief summary of the interview, which will be agreed by both parties.

THE ROLE OF THE MOST SENIOR PERSON IN THE ORGANISATION

7. The designated officer will report to the most senior person in the organisation, who will be responsible for the commission of any further investigation.

COMPLAINTS ABOUT THE MOST SENIOR PERSON IN THE ORGANISATION

8. If exceptionally the concern is about the most senior person in (Employer's name), this should be made to the chair of the board/governing body, who will decide on how the investigation will proceed. This may include an external investigation.

THE INVESTIGATION

9. The investigation may need to be carried out under the terms of strict confidentiality i.e. by not informing the subject of the complaint until (or if) it becomes necessary to do so. This may be appropriate in cases of suspected fraud. In certain cases, however, such as allegations of ill treatment of patients/clients/customers, suspension from work may have to be considered immediately. Protection of patients/clients/customers is paramount in all cases.

9.1 The designated officer will offer to keep the whistleblower informed about the investigation and its outcome.

9.2 If the result of the investigation is that there is a case to be answered by any individual, the Disciplinary Rules and Procedure will be used.

9.3 Where there is no case to answer, but the employee held a genuine concern and was not acting maliciously, the designated officer should ensure that the employee suffers no reprisals.

9.4 Only where false allegations are made maliciously, will it be considered appropriate to act against the whistleblower under the terms of the Disciplinary Rules and Procedure.

INQUIRIES

10. If the concern raised is very serious or complex, an inquiry may be held.

10.1 (Employer's name) recognises the contribution the trade union(s) can make to an inquiry, and agrees to consult with the trade union(s) about the scope and details of the inquiry, including the implementation of the recommendations of the enquiry. (Employer's name) recognises that in many cases it will be desirable that a trade union(s) representative will be appointed to the panel of the inquiry.

FOLLOWING THE INVESTIGATION

11. The most senior person in the organisation will brief the designated officer as to the outcome of the investigation. The designated officer will then arrange a meeting with the whistleblower to give feedback on any action taken. (This will not include details of any disciplinary action, which will remain confidential to the individual concerned). The feedback will be provided within the time limits (to be specified).

11.1 If the whistleblower is not satisfied with the outcome of the investigation, (Employer's name) recognises the lawful rights of employees and ex-employees to make disclosures to prescribed persons (such as the Health and Safety Executive, the Audit Commission, or the utility regulators, or, where justified, elsewhere.

THE LAW

12. This policy and procedure has been written to take account of the Public Interest Disclosure Act 1998, which protects workers making disclosures about certain matters of concern, where

those disclosures are made in accordance with the Act's provisions. The Act is incorporated into the Employment Rights Act 1996, which already protects employees who take action over, or raise concerns about, health and safety at work.

ANNEX 2: IMPLEMENTING PIDA IN EDUCATION

SURVEY OF WHISTLE BLOWING PROCEDURES, HIGHER EDUCATION, ENGLAND AND WALES[48]

NOS. SURVEYED	
Universities	87
Further and Higher Education, England and Wales	514
RESPONSE RATE	
Universities	58.6%
Further and Higher Education, England and Wales	58%
WHISTLE BLOWING PROCEDURES IN PLACE	
Universities	90.6%
Further and Higher Education, England and Wales	88.5%
% of Procedures in place less than 12 months	56.7
USE OF WHISTLE BLOWING PROCEDURES	
% of procedures never used	88.5
% of procedures invoked on less than five occasions	11.5
The procedure was proportionately more likely to be invoked where the number of employees was greater than 1000.	
TYPE OF CONCERN	
Universities	1. Malpractice
	2. Fraud
Further and Higher Education, England and Wales	1. Malpractice
	2. Harassment
PROMOTION	
Universities	Web pages
	Printed policy documents
	Employee handbooks
Further and Higher Education, England and Wales	Employee handbooks
	Printed policy statements
	Induction
% SUPPORTED BY TRAINING	14.4
REASONS FOR INTRODUCING PROCEDURES	1. Good practice
	2. Compliance with the law
	3. Management Initiative
TRADE UNIONS	
% consulted with trade unions	78.4
ACCESS TO PROCEDURES	Employees, students, contractors
RECIPIENTS OF COMPLAINTS	
Universities	Secretary/Registrar, Line Manager
Further and Higher Education,Colleges England and Wales	Line managers, Principals
INVESTIGATOR OF COMPLAINTS	
Universities	Auditors
Further and Higher Education,Colleges England and Wales	Clerk-Secretary to the organisation
ACCESS TO OTHER PERSON/EXTERNAL ORGANISATIONS IF	87.9

DISSATISFIED	
MONITORING	77.4
	76.7 annually

ANNEX 3: WHISTLE BLOWING IN THE USA

The United States has had forms of whistle blowing legislation for decades, but there is no comprehensive federal law that prohibits employers from retaliating against employees who disclose potential corporate or governmental violations of law. Rather there exists a series of safeguards on specific points.

1. **Constitutional Protection-** Under the First and Fourteenth Amendments to the U.S. Constitution, state and local government officials are prohibited from retaliating against whistleblowers.

2. **Environmental Laws-** Employee protection provisions of the Toxic Substances Control Act [15 U.S.C. 2622], the Superfund [42 U.S.C. 9610], the Water Pollution Control Act [33 U.S.C. 1367], the Solid Waste Disposal Act [42 U.S.C. 6971], the Clean Air Act [42 U.S.C. 7622], the Atomic Energy and Energy Reorganization Acts [42 U.S.C. 5851], and the Safe Drinking Water Act [42 U.S.C. 300j-9] , contain whistleblower provisions which protect employees who disclose potential violations of these environmental laws.

3. **Conspiracies to Intimidate Witnesses and Obstruct Justice in Federal Court Proceedings [42 U.S.C. 1985(2)]**-This clause, which was passed as part of the Reconstruction era, anti-Ku Klux Klan civil rights legislation, contains very broad provisions prohibiting conspiracies to intimidate parties or witnesses in proceedings before courts of the United States.

4. **False Claims Act-** The whistleblower protection provision of the False Claims Act [33 U.S.C. 3730(h)] is extremely liberal and protects "any employee" who is discharged or discriminated against on the basis of assisting in the preparation of litigation or in filing an action under this Act.

5. **Surface Transportation Assistance Act-** This Act [49 U.S.C. 2305 [Appendix 13]] protects employee whistleblowers (generally truck drivers) who file a complaint, testify in or cause to be instituted proceedings to enforce a commercial motor vehicle safety rule, regulation or standard.

6. **Occupational Safety and Health Act-** OSHA [29 U.S.C. 660(c)] protects employees from any form of retaliation for raising complaints concerning workplace health and safety. This has been interpreted to include a right to refuse hazardous work under certain specified and limited circumstances.

7. **Federal Mine Health and Safety Act-** This Act, 30 U.S.C. 815(c) (1977), provides for an administrative remedy for any miner, miner's representative or applicant for employment in a mine, who files or makes a complaint regarding a potential violation of the Act.

8. **National Labor Relations Act-** The NLRA , 29 U.S.C. 158(a)(4), protects from retaliation employees who testify or file charges alleging a violation of the Act.

9. **Other Statutory Protections-** Other employee whistleblower protection provision can be found in the Surface Mining Control and Reclamation Act [30 U.S.C. 1293]; Job Training and Partnership Act [29 U.S.C. 1574(g)]; Civil Rights Act of 1871 [42 U.S.C. 1983]; Jones Act (Maritime employees) [46 U.S.C. 688]; Employee Retirement Income Security Act [29 U.S.C. 1140]; Fair Labor Standards Act [29 U.S.C. 215]; Civil Service Reform Act [5 U.S.C. 2302]; Longshoreman's and Harbor Worker's Compensation Act [33 U.S.C. 948(a); Migrant and Seasonal Agricultural Workers Protection Act [29 U.S.C. 1855]; The Safe Containers for International Cargo Act [46 U.S.C. 1501 et. seq.]; and Title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e, et. seq.] (administered by the Equal Employment Opportunity Commission).

ANNEX 4: INTER-AMERICAN CONVENTION AGAINST CORRUPTION

INTER-AMERICAN CONVENTION AGAINST CORRUPTION

Article II, Purposes

The purposes of this Convention are:
1. To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and
2. To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.

Article III, Preventive Measures

For the purposes set forth in Article II of this Convention, the States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen:
1. Standards of conduct for the correct, honourable, and proper fulfilment of public functions. These standards shall be intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to government officials in the performance of their functions. These standards shall also establish measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions. Such measures should help preserve the public's confidence in the integrity of public servants and government processes.
2. Mechanisms to enforce these standards of conduct.
3. Instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities.
4. Systems for registering the income, assets and liabilities of persons who perform public functions in certain posts as specified by law and, where appropriate, for making such registrations public.
5. Systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems.
6. Government revenue collection and control systems that deter corruption.
7. Laws that deny favourable tax treatment for any individual or corporation for expenditures made in violation of the anti-corruption laws of the States Parties.
8. Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.
9. Oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts.
10. Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.
11. Mechanisms to encourage participation by civil society and non-governmental organizations in efforts to prevent corruption.
12. The study of further preventive measures that take into account the relationship between equitable compensation and probity in public service.

ANNEX 5: EC WHISTLEBLOWER PROTECTION

Adopted by the Commission under C(2002)845 on 4 April 2002

1

COMMISSION DECISION

on raising concerns about serious wrongdoings

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to Regulations (EC) N° 1073/1999 and (Euratom) N° 1074/1999 of 25.05.1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.05.1999, p. 1ff)

Having regard to the Interinstitutional Agreement of 25.05.1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by OLAF (OJ L 136, 31.05.1999, p. 15).

Having regard to Commission Decision 1999/396/EC, ECSC, Euratom of 2.06.1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests (Adopted by the Commission under C(2002) 845 on 4 April 2002)

Whereas:

the White Paper on Reforming the Commission stated that the European institutions also needed provisions which, as a last resort and in exceptional circumstances, would permit staff to raise concerns with external bodies without fear of adverse consequences;

HAS ADOPTED THIS DECISION:

Article 1

1. Any official or servant, who becomes aware in the course of or in connection with the performance of his or her duties of evidence, which gives rise to a presumption of the existence of illegal activity including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials or servants of the Communities liable to result in disciplinary or, in appropriate cases, criminal proceedings, or to comply with the analogous obligations of members of staff not subject to the Staff Regulations, shall inform without delay his or her Head of Service or Director General or, if he or she considers it useful, the Secretary General, or the persons in equivalent positions, or the European Anti-Fraud Office direct.

2. Any official or servant receiving such information shall transmit without delay to the European Anti-Fraud Office any evidence of which he or she is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

3. An official or servant shall not suffer any adverse consequences from the Commission alone as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he or she acted reasonably and honestly.

Article2

1. An official or servant who further discloses information as defined in Article 1 outside the Commission or the European Anti-Fraud Office shall not as a result suffer any adverse consequences from the Commission alone provided that all of the following conditions are met:

a) The official or servant honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;

b) the official or servant has previously disclosed the same information to the European Anti-Fraud Office or to the Commission and has allowed a reasonable period of time for the Office or the Commission to take the appropriate action; and

c) the disclosure is made to the President of the Court of Auditors or of the Council of the European Union or of the European Parliament, or the European Ombudsman.

2. For the purposes of subparagraph (1)(b), and subject to paragraph (3), a reasonable period shall be the period which the Office or the Commission, as the case may be, has indicated as being necessary to carry out the investigations and, where necessary, take appropriate action. The official or servant shall be duly informed.
3. Paragraph (2) shall not apply where the official or servant can demonstrate that the period or periods indicated by the Office or the Commission is or are unreasonable having regard to all the circumstances of the case.

Article3

The protection provided under Article 2 is without any prejudice to any personal liability which the official or servant making the disclosure may incur under relevant provisions of national law.

Article4

This Decision shall take effect on the day of its adoption by the Commission.

Done at Brussels, [.]

For the Commission
[.]
Member of the Commission

ANNEX 6 : A PRACTICAL CHECK-LIST

According to the Government Accountability Project (GAP), whilst whistleblower protection laws have become increasingly popular, its concern is that too much of the legislation is symbolic and therefore counter-productive. In particular, GAPS' concerns focus on the fact that employees think they are protected from retaliation when in reality blowing the whistle turns out to be hugely costly to their careers. In such a case the existence of legislation produces more whistle blowing victims than if none existed at all.

GAP, usefully labels token laws as "cardboard shields," and genuine whistleblower laws as "metal shields,"

GAP is keen that the lessons of the long track record of whistle blowing in the USA are learned. Its checklist of 21 requirements below reflects GAP's assessment of minimum requirements in relation to whistle blowing.

1. "No loopholes" protected speech. Protected whistle blowing should cover "any" disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate law enforcement functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of institutional leadership, or to designated law enforcement or legislative offices.

2. Realistic scope of subject matter. Whistleblower laws should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, as well as any other information that assists in implementing or enforcing the law or achieving its purpose.

3. Duty to disclose illegality. This provision helps switch the whistle blowing context from a personal initiative for conflict, to a public service duty to bear witness.

4. Right not to violate the law. This provision is fundamental to stop fait accompli and in some cases prevent the need for whistle blowing. Significantly, however, an employee who refuses to obey an order on grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court subsequently determines the order would not have required illegality.

5. Protection for the full scope of activity that leads to harassment. The law should cover all common scenarios that could have a chilling effect on responsible exercise of free speech rights. Representative scenarios include employees who are perceived as whistleblowers, even if mistaken (to guard against guilt by association), and employees who are "about to" make a disclosure (to preclude pre-emptive strikes to circumvent statutory protection). These indirect contexts often can have the most significant potential to lock in secrecy by silencing employees.

6. Coverage for all employees performing public service functions. Coverage should extend to all employees who are challenging betrayals of the public trust, whether the employer is public or private. Public whistleblower statutes should protect all who are paid with taxpayer funds to carry out government functions, including employees of government contractors or corporations.

7. Coverage for confidential disclosures. To maximize the flow of information necessary for accountability, protected channels must be available for those who choose to make anonymous disclosures. As the WPA sponsors recognized, denying this option creates a severe chilling effect.

8. Protection for the full scope of harassment. The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who "don't want to know" why subordinates have targeted employees for an action.

9. Anti-gag order provision. Any whistleblower law must include a ban on "gag orders" through an employer's rules, policies, or nondisclosure agreements that would otherwise override free speech rights and impose prior restraint.

10. Prominent posting of rights. As a practical matter whistleblowers are not protected by any law, if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace.

FORUM

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest. The records of administrative boards and grievances have been so unfavorable that as a rule, laws adjudicated in these settings are Trojan horses. Two settings have a track record of giving whistleblowers a fair day in court.

11. Right to a jury trial. This option institutionalizes normal judicial due process rights, the same available for citizens generally who are aggrieved by illegality or abuse of power. Most significant, it means that whistleblowers will be judged by a jury of peers from the citizens whom they purport to defend.

12. Option for Alternative Disputes Resolution with an arbitrator selected by mutual consent. Arbitration can be an expedited, less costly forum for whistleblowers, if the decision-maker is selected by mutual consent through a "strike" process.

RULES TO PREVAIL

13. Modern burdens of proof. The federal Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights.

The current standard, which since 1989 has been adopted consistently in federal laws, is that a whistleblower established a prima facie case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination. The discrimination does not have to involve retaliation, which could require personal hostility, but only need occur "because of" the whistle blowing. Once a prima facie case has been made, the burden of proof shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the federal government switched the burden of proof in whistleblower laws, the rate to prevail on the merits has increased from 1-5% annually, which institutionalizes a chilling effect, to 25-33%, which gives whistleblowers a fighting chance to successfully defend themselves.

14. Realistic statute of limitations. Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. A one year statute of limitations is consistent with common law rights and has proved functional.

RELIEF FOR WHISTLEBLOWERS WHO WIN

15. Full scope of consequences. If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect, and future consequences of the reprisal.

16. Interim relief. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years. Relief should be awarded during the interim for employees who prevail after their day in court. Awards of back salary would be conditional, to be returned if the initial decision is overturned subsequently.

17. Attorney fees. Attorney fees should be available for all who substantially prevail. Otherwise whistleblowers could not afford to assert their rights, or even to win. The fees should be awarded if the whistleblower obtains the relief sought, whether or not it is directly from the legal order issued in the litigation. Otherwise, employers can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Employees can be ruined by that type victory, since attorney fees not uncommonly reach five to six figures.

18. Transfer preference. It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. In order to prevent repetitive reprisals that cancel the law's impact, those who prevail must have a strong transfer preference for any realistic chance at a fresh start after winning.

19. Personal accountability for wrongdoers. To deter repetitive violations, it also is indispensable that those responsible for whistleblower reprisal must be held accountable. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is that they won't get away with it, and they may well be rewarded informally for trying. The most effective option to prevent retaliation is personally liability for punitive damages by those found responsible for violating whistleblower laws. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. The most superficial is to make compliance with the whistleblower law a critical element in every manager's performance appraisal, and for decision makers in reprisal cases to refer responsible officials for investigation to determine if sanctions are appropriate for violating this element.

20. Laws that are additive, not substitutive. Because of some recent court decisions, legislatures that pass whistleblower laws must specify they are not substitutes that cancel out pre-existing constitutional or common law rights. Otherwise, the new law risks being an inferior substitute and significant retreat.

MAKING A DIFFERENCE

21. Action against wrongdoing exposed by whistle blowing disclosures. Federal studies repeatedly have confirmed that the primary reason would-be whistleblowers remain silent is not fear of retaliation. It is that they will not make a difference. Otherwise, there is no point to risking harassment. An effective whistleblower law should have provision to channel reasonable disclosures of misconduct for appropriate legislative or executive investigation, whether or not retaliation occurs.

ANNEX 7 KEY RESOURCES

KEY WHISTLE BLOWING SITES

UK: Public Concern at Work is the leading charity in the UK on public interest whistle blowing. It provides a range of support services including: providing free advice and assistance to individuals who are concerned about malpractice in the workplace; offering professional training and support to employers and organisations; and influencing public policy through research and campaigning.

USA: Government Accountability Project (GAP): started in 1979 and aims to protect the public interest and promote government and corporate accountability by advancing occupational free speech, defending whistle blowers and empowering citizen activists. GAP has produced a Whistleblowers Survival Guide. In addition to supporting whistleblowers and campaigning activities in the USA, GAP is also working internationally: e.g. it is working with the Organisation of American States (OAS), in the context of the Inter-American Convention Against Corruption to develop and implement whistleblower protection legislation in five Central American nations.

South Africa: Open Democracy Advice Centre which aims to support democracy in South Africa by promoting access to information and advising whistle blowing so as to build open and accountable public and private institutions

TRADE UNIONS

UK: UNISON (the public service union): Speaking out Without Fear – UNISON Guide to Whistle blowing. This Guide was adopted by the Department of Trade and Industry to support its promotion of the Public Interest Disclosure Act (PIDA).

ACADEMIC RESEARCH

David B Lewis: Middlesex University, Professor of Employment Law and Head of the Centre for Industrial and Commercial Law of Middlesex University

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[1] *Tom Devine: Government Accountability Project*
[2] *This is a standing committee set up by the UK Parliament to safeguard standards in public life and first chaired by Lord Nolan. The Nolan Committee produced three reports. In its first (1995) it recommended that all civil servant departments in the UK should nominate a member of staff to hear the concerns of employees in confidence; its second and third reports recommended that local authorities should introduce codes of practice and procedures for whistleblowing*
[3] *David Lewis: Whistleblowing at Work: On What Principles Should Legislation be Based; Industrial Law Journal, Vo. 30 No.2 June 2001*
[4] *http://www.bhopal.com/review.htm*
[5] 'Procurement and Organised Crime': - An EU-wide study: Edited by Simone White
[6] *Financial Times, February 12, 2002, Tuesday London Edition 3*
[7] *(Transparent Accountable Governance 2001 http://www.tag.org.ph/whatsnew/default.htm)*

[8] *17/03/2000 www.repubblica.it*
[9] *The Times-Picayune, New Orleans 01/06/2001*
[10] *International Construction News 28th August 2001*
[11] *Le Monde: 10th August 1998*
[12] *Africa News: 08/12/2000*
[13] *International Rivers Network: 20th May 2002*
[14] *ADES web site http://www.france-asso.com/ades/dossiers/eau/index.html*
[15] *Contra Costa Times: 23rd June 2001*
[16] *Financial Times 8th February 2002*
[17] *Transparency International: www.transparency.org*

18 Information has been compiled for countries for which either information is available in English and which in many cases has been assessed by other researchers (e.g. USA, Australia, UK, Korea) or on the basis of interviews with trade unionists (Netherlands, Sweden).

[19] However, whilst both protect any *person* who discloses information, protection is restricted to information disclosures concerning a *public official.*

[20] *Kaplan, E. 2001The International Emergence of Legal Protection for Whistleblowers*
[21] *Comparative Whistleblower Provisions: Robert G Vaughan, American University, Washington College of Law*
[22] *Interview with Tom Devine, GAP May 2002*
[23] *Public Interest Disclosure Act (1998)*
[24] *Kaplan, E. 2001The International Emergence of Legal Protection for Whistleblowers*
[25] *Comparative Whistleblower Provisions: Robert G Vaughan , American University, Washington College of Law*
[26] [26] *Comparative Whistleblower Provisions: Robert G Vaughan , American University, Washington College of Law*
[27] [27] *Comparative Whistleblower Provisions: Robert G Vaughan , American University, Washington College of Law*
[28] [28] *Comparative Whistleblower Provisions: Robert G Vaughan , American University, Washington College of Law*
[29] *Comparative Whistleblower Provisions: Robert G Vaughan , American University, Washington College of Law*
[30] *The information on Korea is taken from a testimony provided by Tom*
[31] *A Governance of Bribery and Corruption: A Survey of Current Practice: Friends, Ivory& Sime*
[32] *The Governance of Bribery and Corruption: A Survey of Current Practice, February 2002*
[33] Source*:* Enron's Corporate Responsibility Annual Report 2000
[34] *The OECD Guidelines on Multinational Enterprises: A Users Guide - TUAC*
[35] *Telephone Interview held with Tom Devine: May 2002*
[36] *Senator Byron Dorgan, Financial Times, 03/02/02: http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT31LW2E9XC&live=true&tagid=ZZZZV1CYA0C&Collid=ZZZ563ECC0C*
[37]
[38] *clauses in contracts which set unreasonable restrictions on what employees were able to speak out about*
[39] *telephone interview with Guy Denn of Public Concern at Work*
[40] *telephone interview with Professor David Lewis*
[41] *First Annual Report to Congress on the Inter-American Convention Against Corruption – April 2001*
[42] *Council of Europe – ETS no. 173 – Criminal Law*
[43] *www.odcp.org/corruption.html*
[44] *Ad Hoc Committee for the Negotiation of a Convention Against Corruption: First Session, Vienna, 21 January – 1 February 2002 (p.20)*
[45] *Comparative Whistleblower Provisions, Robert Vaughan, American University, Washington College of Law*
[46] *GAP is a USA based NGO that provides a range of services in relation to the protection of whistleblowers*
[47] 'Procurement and Organised Crime': - An EU-wide study: Edited by Simone White
[48] *Report of a Survey on Whistle blowing Procedures in Further and Higher Education: David Lewis, Catherine-Anne Ellis, Anna Kyprianou and Stephen Homewood; March 2001*