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Björn FASTERLING, David B. Lewis

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**LEAKS, LEGISLATION AND FREEDOM OF SPEECH: HOW CAN THE LAW  
EFFECTIVELY PROMOTE PUBLIC INTEREST WHISTLEBLOWING**

Björn FASTERLING  
Professor of Law  
LegaleDHEC Research Centre  
EDHEC BUSINESS SCHOOL  
bjorn.fasterling@edhec.edu

and

David Lewis  
Professor of Employment Law  
Law School  
Middlesex University  
d.b.lewis@mdx.ac.uk

**ABSTRACT**

In this article we outline the differences between leaking and whistleblowing, and provide possible justifications for leaking. We argue that, as a matter of principle, leaking information outside an organization will normally not further any public interest and should only be used as a last resort where problems have not been resolved internally. As uncontrolled leaking may be hazardous, we believe that the opportunity to blow the whistle in accordance with structured procedures offers a more satisfactory mechanism for exposing financial and other forms of wrongdoing (Carr and Lewis 2010). Next we describe how freedom of speech, whistleblowing legislation and internal reporting procedures provide alternatives to leaking and explain how they all operate unsatisfactorily in certain respects. In our analysis we refer to international conventions and the laws of four countries (USA, UK, France and Germany) that we consider representative of the different approaches to the treatment of whistleblowers. In conclusion, we suggest that regimes which are aimed at encouraging public interest disclosures through organizational insiders need improvement. Without this, unauthorized leaking could be tolerable in certain situations. Finally, we observe that public interest disclosure regimes need to take the human right dimension into account.

# **LEAKS, LEGISLATION AND FREEDOM OF SPEECH: HOW CAN THE LAW EFFECTIVELY PROMOTE PUBLIC INTEREST WHISTLEBLOWING**

## **ABSTRACT**

In this article we outline the differences between leaking and whistleblowing, and provide possible justifications for leaking. We argue that, as a matter of principle, leaking information outside an organization will normally not further any public interest and should only be used as a last resort where problems have not been resolved internally. As uncontrolled leaking may be hazardous, we believe that the opportunity to blow the whistle in accordance with structured procedures offers a more satisfactory mechanism for exposing financial and other forms of wrongdoing (Carr and Lewis 2010). Next we describe how freedom of speech, whistleblowing legislation and internal reporting procedures provide alternatives to leaking and explain how they all operate unsatisfactorily in certain respects. In our analysis we refer to international conventions and the laws of four countries (USA, UK, France and Germany) that we consider representative of the different approaches to the treatment of whistleblowers. In conclusion, we suggest that regimes which are aimed at encouraging public interest disclosures through organizational insiders need improvement. Without this, unauthorized leaking could be tolerable in certain situations. Finally, we observe that public interest disclosure regimes need to take the human right dimension into account.

## **INTRODUCTION**

Both leaking and whistleblowing may be vital to the preservation of life and the promotion of healthy democracies. The disclosure of concerns about suspected wrongdoing by an organizational insider may become a critical source of information for those who are responsible for dealing with health and safety risks or combating financial crime. According to Agalgatti and Krishna (2004), the world's worst industrial disaster (Bhopal, India, 1984) "is a tragic example of what could have been averted by alert whistleblowing". At this Union Carbide plant, where thousands died as a result of gas escaping, the concerns of workers and a journalist were ignored by the local authority. Detailed investigations revealed that warnings were disregarded and cost-cutting measures had adversely affected work conditions and the maintenance of safety systems. In addition to helping to expose financial scandals, like those which occurred at BCCI,

Enron (Sterlin 2002) and WorldCom (Jeter 2003), public interest disclosures by organizational insiders remain important tools in the fight against corruption which itself contributes to poverty. Because corruption is notoriously difficult to detect and address through formal legal channels, especially in developing countries, it is important to provide other means by which corrupt practices can be exposed.

The usefulness of such public interest disclosure for remedying problems on the one hand and the vulnerability of the discloser on the other has motivated some to elevate "whistleblowing" to a fundamental right in employment (Lewis 2008). Although this demand has not been successful, there are laws which promote public interest disclosures by organizational insiders through protecting them from dismissal or from other forms of reprisal. This is generally achieved either through guarantees of freedom of speech at the workplace or through specific whistleblower legislation. Additionally some countries provide financial incentives for whistleblowers. Many employers have established internal reporting schemes that encourage the reporting of suspected wrongdoing, in some cases in response to a legal obligation or regulatory incentive. However, public interest disclosure in the form of "leaking" is rarely protected and often unlawful. Despite the threat of legal sanctions for leaking and the availability of whistleblower protections, organizational insiders continue to leak instead of disclose information through normal communication channels. We believe that this is not only a result of increased facilities to leak information but is also a symptom that existing protections and incentives for authorized disclosure are inadequate.

## **LEAKING AND WHISTLEBLOWING**

The word "leaking" commonly refers to the situation where a person gives confidential or unpublished information to somebody else. It covers political and commercial leaks in order to manipulate media coverage as well as leaks which are intended to expose wrongdoing at the workplace. Thus leaks may be made for personal gain and may not be motivated by any regard for the public interest. Indeed, the leaking of information solely for payment is the starkest illustration of the promotion of a private interest. Whistleblowing may also serve private interests, for example, exposing the fact that a personal grievance has not been rectified. Certainly it cannot be distinguished from leaking on the basis of whether the information is disclosed internally or externally, because in some situations concerns about wrongdoing are formally reported outside the organization that gives rise to them.

Perhaps the main difference between the two is that many countries provide legal protection for whistleblowers in specified circumstances, whereas leaking is frequently tortious and sometimes criminal. In order to protect or reward whistleblowers their identity must be known. By way of contrast, it is a feature of leaking that disclosers are anonymous or insist on their names being kept confidential. Since it is not always possible to preserve anonymity and confidentiality, both whistleblowers and leakers are vulnerable.<sup>1</sup>

Given the lack of protection for leaking, we need to consider why people engage in this activity. Apart from the private and political gains mentioned above, it needs to be recognised that some leakers will feel that they are promoting the public interest. One scenario is that a leaker knows that an act is lawful but regards it as offensive or immoral. An example may be where a person feels that a state has abused its powers to classify information as an official secret. Indeed, it has frequently been argued that excessive secrecy poses a threat to national security. A more worrying situation is that people may resort to leaking because the normal channels for raising concerns have broken down or are simply unavailable. Thus if the disclosure of serious wrongdoing internally or to an external regulator does not lead to an organisation taking any necessary remedial action, should a whistleblower drop the matter or is the public interest served by leaking/reporting the situation to the media? There is an increasing trend for countries to have legislation that permits disclosures to the media as a last resort<sup>2</sup> but, where such reporting is not protected, individuals may become leakers. More generally, it could be argued that leaking is in the public interest wherever the law fails to protect those who disclose serious wrongdoing. One example is where reporting would amount to a criminal offence under official secrets legislation. Another is where statutory protection for whistleblowers is dependent on the discloser acting in good faith, as is normally the situation in the UK (Lewis 2008). A person who is uncertain about whether or not they will be protected may feel that they will be more secure if they leak anonymously.

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<sup>1</sup> Apart from accidental exposures, in some situations it will be possible to guess a leaker's identity from the nature and/or circumstances of the information disclosure.

<sup>2</sup> For a recent example see the Australian Capital Territory's Public Interest Disclosure Act 2012

Pre-internet, a person wishing to leak information had to identify a newspaper or journalist who was able to protect their identity and willing to publish (and possibly investigate) their concern. The internet now provides a speedy and efficient way to disseminate information while preserving anonymity. This can be done in isolation, for example, via blogs and Twitter, as well as through organisations like Wikileaks, GlobalLeaks etc. These organisations have websites that facilitate the uploading of documents and determine which information they want to publish. If they do not act in a timely fashion, the discloser may take the matter back into his or her own hands. One feature of offline compared with online disclosures is that pre-internet publishers were likely to scrutinise the documents provided and redact personal and/or dangerous information. Today there are more variable degrees of vetting. One effect is that some power has shifted from government, the media and employers towards leakers. As Hood (2011) puts it:

"`Wikileaks world'.....represents an approach to transparency quite different from that involved in freedom of information laws and corporate governance codes, in which formal obligations to disclose information have to be balanced against such considerations as security, privacy, and commercial confidentiality".

While the leaking of documents may cause governments to become more transparent, it could also have the opposite effect if they close themselves off from the media and the public. It has long been argued by politicians that leaking damages trust in government but so does unnecessary secrecy. In theory, freedom of information statutes could provide an alternative to leaking. However, there is little evidence of governments acting within the spirit of such legislation by proactively publishing information and ensuring that requests are responded to speedily and fully.

While information might be leaked about anything, whistleblowing has been associated with disclosures of malpractice, as well as illegal acts or omissions. The current definition used by Transparency International (the global coalition against corruption) is "the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action". One obvious problem is the lack of consensus about what constitutes 'wrongdoing'. Because there is no universally accepted definition of whistleblowing, the Australian Senate Select Committee on Public Interest Whistleblowing reached the conclusion that:

...what is important is not the definition of the term, but the definition of the circumstances and conditions under which

employees who disclose wrongdoing should be entitled to protection from retaliation.<sup>3</sup>

Whereas leaking normally refers to disclosures via the professional or social media, it is generally accepted that whistleblowing can be internal or external (Jubb 1999). Internal reporting would seem to offer advantages all round. The employer is given the chance to deal with concerns without external pressure and, from the worker's perspective, once a problem has been aired externally they are more likely to suffer reprisals. From a legal perspective, while disclosures to higher management might be perceived by supervisors as disloyal, it cannot be treated as a breach of the common law duty of confidence or fidelity. In addition, the public might gain from the speedy rectification of wrongdoing without the need for investigation or expenditure by government agencies. Conversely, it could be argued that internal disclosures are not necessarily in the public interest as they facilitate cover-ups and may conceal systemic failures.

**It is unfortunate that people may choose to leak information externally in circumstances where they would be protected if they reported through designated channels. One obvious reason for doing this may be that anonymous leaking is perceived as safer for the individual than other forms of disclosure. Unsurprisingly, there is a tendency to regard leaking as an illegitimate activity whereas whistleblowing in accordance with an employer or statutory procedure is viewed more positively. Thus if leaking is seen as a symptom of inadequate whistleblowing protection, the task for employers and Governments is to devise internal and external whistleblowing procedures that encourage confidential reporting to recipients who are in a position to take action in the public interest. Before examining some national provisions on whistleblowing, we briefly discuss the impact of international conventions.**

#### **WHISTLEBLOWING AND INTERNATIONAL CONVENTIONS**

Before we consider constitutional provisions, we should record that reliance is often placed on human rights and other international conventions to protect whistleblowers (see also Banisar 2011 for an overview).<sup>4</sup> For example, Article 10 of the European Convention on Human Rights states that:

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<sup>3</sup> Australian Senate Select Committee on Public Interest Whistleblowing, 1994 para 2.2.

<sup>4</sup> In their report to the Parliamentary Assembly, 2009, the Council of Europe's Committee on Legal Affairs and Human Rights recommended that the



"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.....

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In most circumstances countries which impose limitations on freedom of speech are able to justify their actions under Article 10(2). Thus in *R v Shayler*<sup>5</sup> the House of Lords (as it then was) found that the UK's Official Secrets Act 1989 inhibited the defendant's freedom of expression under Article 10(1) but found that this was justified under Article 10(2). Two notable exceptions are the decisions of the European Court of Human Rights (ECHR) in *Heinisch v Germany*<sup>6</sup> (which is discussed in the next section) and *Guja v Moldova*.<sup>7</sup> In the latter case there was held to be a violation of Article 10 when an employee of the Prosecutor General's office was sacked for leaking official letters to the press demonstrating political interference in ongoing investigations.

In addition, article 33 of the UN Convention on Corruption (UNCAC) 2003 provides that:

"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".<sup>8</sup>

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Committee of Ministers "consider drafting a framework convention on the protection of 'whistle-blowers'." (Draft Recommendation 2.3)

<sup>5</sup> [2002] IRLR 11

<sup>6</sup> [2011] IRLR 922

<sup>7</sup> 2008. Application No. 14277/04

<sup>8</sup> This came into force in 2005. See also the Council of Europe's Criminal and Civil Law Conventions on Corruption (both 1999). For other international treaties see G20 Anti-Corruption Action Plan 2011. Page 4.

This protects all types of people and is not restricted to those who raise concerns from within an organisation. However, this measure also requires the discloser to have 'reasonable grounds' and it is unclear whether these are to be subjectively or objectively determined. It almost goes without saying that in some situations it will be difficult to distinguish between strong suspicions and reasonable grounds. Another problem is the non-mandatory nature of the provision - it does not require State Parties to have such measures in place but only that they consider providing protection for those who report concerns. Thus it is possible for States to argue that they have considered Article 33 but have decided not to adopt any measures as a consequence.

The OECD Anti-Bribery Convention does not contain any provisions that require the implementation of whistleblower protections. However, the OECD Working Group on Bribery in International Business Transactions recommended that states adopt appropriate measures that facilitate the reporting of foreign bribery (OECD 2009, recommendation IX). Further, in its "Good Practice Guidance" the Working Group appeals to companies to adopt effective measures for internal reporting and remedial action (OECD 2009, Annex II). While some signatory states have followed these recommendations and also include in their progress reports actions taken with regard to whistleblowing, the Convention does not create a binding obligation on signatories to have national whistleblowing legislation.

Mention should also be made of Article 5(c) of International Labour Organisation Convention No.158 on Termination of Employment<sup>9</sup> which states that:

...the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities' does not provide a valid reason for dismissal.

This narrow formulation, which is only relevant to employment and does not deal with detriments short of dismissal, is likely to have limited impact on those deliberating about whether or not to report suspected wrongdoing.

## **CONSTITUTIONAL PROTECTION FOR FREEDOM OF SPEECH**

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<sup>9</sup> 68<sup>th</sup> Session. 1982.

Some countries protect whistleblowers generally through guaranteeing constitutional freedom of speech at the workplace. In the four countries examined here, there are considerable differences in this respect. In Germany constitutional protection for freedom of speech is not only applicable in the public sector but also applies to horizontal (i.e. non-state to non-state) relationships. The latter is achieved through the theory of indirect third party effect (*mittelbare Drittwirkung der Grundrechte*), which obliges courts to take into account human rights when they interpret general clauses of the civil code, for example, good faith.<sup>10</sup> The Constitutional Court has clarified that employees can exercise their rights as citizens by reporting suspected criminal activities to the authorities and, unless there has been abuse of this process, the employee must not suffer adverse consequences for doing so.<sup>11</sup> The Federal Labour Court has applied this principle so that an employee who discloses information to public authorities only breaches the duty of loyalty towards the employer if the disclosure is considered to be disproportionate having regard to the latter's interests (cf. Rieble and Wiebauer 2010; or see Berthold 2010 for a collection and commentary of German jurisprudence). A proportionality approach means that the courts weigh the employee's freedom to report suspected illegal behaviour against the business and property interests of the employer. In particular, the interest in business not being disrupted can be matched against the employee's right to make a disclosure externally without making an internal report beforehand. Internal reporting is prioritised because it allows the employer to deal with the concern.<sup>12</sup> The seriousness of the suspected wrongdoing and the employee's expectations about whether or not the employer will effectively remedy the situation play an important role in determining whether the individual should have disclosed his or her suspicion internally before turning to an outside addressee.<sup>13</sup> Significantly, the final outcome of the investigation into the alleged wrongdoing is irrelevant to the decision about whether or not the employee was in breach of contract. Thus, suspected

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<sup>10</sup> Bundesverfassungsgericht 1 BvR 400/51 of 15 January 1958, BVerfGE 7, 198.

<sup>11</sup> Bundesverfassungsgericht 1 BvR 2049/00 of 2. July 2001, at [http://www.bundesverfassungsgericht.de/entscheidungen/rk20010702\\_1bvr204900.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20010702_1bvr204900.html) (last accessed 24. June 2011)

<sup>12</sup> Bundesarbeitsgericht of 3 July 2006, 2 AZR 235/02, *Neue Zeitschrift für Arbeitsrecht* 2004, p. 427 et seq.

<sup>13</sup> Bundesarbeitsgericht of 7 December 2006, 2 AZR 400/05, *Neue Zeitschrift für Arbeitsrecht* 2007, p. 502.

serious wrongdoing could justify an immediate external report even if the allegation turns out to be untrue.<sup>14</sup> Equally, reporting relatively minor concerns may be regarded as disproportionate even where wrongdoing is subsequently established.

The protection of whistleblowers through the constitutional right to freedom of speech in accordance with the principle of proportionality offers flexibility in many different circumstances that detailed legal rules could not cover exhaustively. The downside of this approach is its vagueness. Actual and potential whistleblowers in Germany face uncertainty about how the proportionality principle will be applied in their particular case. To clarify the rights and obligations of employees in a whistleblowing situation, the German government attempted in 2008 to replace § 612a of the German Civil Code by a new statute. To a large extent this measure would have summarised the above mentioned jurisprudence, but it would also have provided some clarification about the circumstances in which an employee is not obliged to report internally before informing the public authorities. Some argued that the measure would have expanded employee rights to disclose externally and would have undermined the recent efforts of organisations to establish internal reporting procedures. Thus, owing to widespread resistance in the business world, this legislative measure failed (cf. Döse 2009).

The weaknesses of relying on proportionality for whistleblower protection became manifest in the *Heinisch* decision of the European Court of Human Rights (ECHR).<sup>15</sup> In this case the applicant was dismissed after heavily criticizing and filing a criminal complaint against her state-owned employer (providing services for the elderly) alleging deficiencies in care resulting from staff shortages. While the applicant successfully challenged the dismissal in a German court of first instance, the judgment was later reversed by the state labour court of Berlin-Brandenburg. The *state labour court* found a significant breach of the duty of loyalty to the employer that could not be justified. Both the Federal Labour Court and the German Constitutional Court refused to hear appeals against this decision. When the applicant turned to the ECHR, this court accepted that the interference with the right to freedom of expression was "prescribed by law" and there was no dispute that the interference pursued the

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<sup>14</sup> Bundesarbeitsgericht of 7 December 2006, 2 AZR 400/05, *Neue Zeitschrift für Arbeitsrecht* 2007, p. 502.

<sup>15</sup> See note 5 above

legitimate aim of protecting the reputation and rights of others i.e. the business interests of her employer. Thus what had to be decided was whether the interference was 'necessary in a democratic society', in particular, whether there was a proportionate relationship between the interference and the aim pursued. The ECHR concluded that:

"the public interest in having information about shortcomings in the provision of institutional care for the elderly by a State-owned company is so important in a democratic society that it outweighs the interest in protecting the latter's business reputation and interests".

The conflicting conclusions reached by the ECHR and German courts do not assist in clarifying how the principle of freedom of speech applies to whistleblowing about workplace wrongdoing. Further, the ECHR noted that the employer was state-owned, which leaves some uncertainty about whether a different weighing of interests would occur in privately owned companies.

The French Labour Code applies the fundamental freedoms guaranteed by the constitution to the workplace irrespective of whether the employment is public or private. To take into account the legitimate interests and freedoms of the employer, French law also invokes a proportionality measure: Art. L 1121-1 of the Labour Code specifies:

*"No restrictions to individual and collective human rights and civil liberties could be undertaken if they are not justified by the nature of the task and are proportional to the aim of such task."*

This differs from the German position in that French employment law provides for the direct "horizontal" applicability of fundamental freedoms. This has consequences where there is a potential conflict between the employee's loyalty towards the employer and freedom of speech. Save in abusive cases, French employees do not breach their duty of loyalty if they exercise their freedom of expression in a whistleblowing situation (Morvan 2009, Adam 2010, Leborgne-Ingelaere 2011).<sup>16</sup> Proportionality analysis may - as in German law - suggest that internal reporting channels must be used by the employee under certain circumstances but in French law there is no principle of prioritising internal reporting (for a discussion see Adam 2010).

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<sup>16</sup> Note that Art. L 2281-1 to L 2281-3 of the French labour code protect employees from termination when they express their opinions about work contents and organization collectively in meetings that are held during workhours. Art. L 1121-1 is more general as it covers any kind of expression.

The French *Cour de Cassation* has recently dealt with Art. L 1121-1 of the Labour Code in two whistleblowing cases decided on the same day and confirmed French jurisprudence that is comparatively permissive with regard to freedom of expression at the workplace.<sup>17</sup> In one the employee claimed damages for wrongful termination despite the fact that her allegations of sexual harassment by her superior were unproven. The court upheld the claim because the employee's right to freedom of speech had not been abused - the fact that the allegations could not be proved was insufficient to establish that the report was made in bad faith. The second decision involved a woman employed by a Member of Parliament. She was dismissed after she had reported to the public prosecutor and the press that her employer had created a fictitious post for his daughter. The termination of employment was considered wrongful whether or not the Member of Parliament had actually broken the law and independently of the fact that the prosecutor discontinued the investigation. Despite French employment law being relatively protective of whistleblowers, a serious obstacle remains. In order to claim wrongful dismissal the employee must not only prove that a disclosure of wrongdoing was made but also that the employer terminated the employment relationship because of this - something that may be difficult to establish in practice. It is worth noting that, in relation to allegations of corruption, if an employee shows that a concern was raised, the employer must prove that the dismissal was for reasons other than this (see Adam 2010).

In the US, the First Amendment protection<sup>18</sup> in private employment relationships is restricted by the fact that the potential violation of the Constitution requires a 'state action'. In essence, this excludes any 'horizontal' application of constitutional protections. However, U.S. courts have exceptionally applied the First Amendment in certain private cases, where a public function<sup>19</sup> or public forum was involved or if there was a close nexus between the state and the private party concerned. Outside these narrow

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<sup>17</sup> See *Cour de Cassation, Chambre Sociale*, 29 September 2010, n° 09-42.057, F-D, *Mme M. c/SA Spring Technologies*; *Cour de Cassation, Chambre Sociale*, 29 September 2010, n° 09-41.544, F-D, *M. J. c/ Mme K.* See also the commentary of the judgments by Leborgne-Ingelaere (2011).

<sup>18</sup> The First Amendment to the US Constitution provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

<sup>19</sup> See *Marsh v. Alabama* 326 U.S. 501 (1946)

confines private sector employees are not able to use freedom of speech to protect themselves, for example, against a wrongful termination (Morvan 2009, p. 1023 et seq; Mendelsohn 2009, p. 726; Barry 2007, p. 268 et seq). Thus legal protection for whistleblowers in the U.S. is largely dependent upon the scope of federal and state statutes. An example for limited protection of freedom of speech through statutory law is the protection offered to employees under section 7 of the National Labor Relations Act.<sup>20</sup> The protection is limited because not all employees are covered, only "concerted employee action" qualifies for protection, and protected reports under the law's "mutual aid and protection" requirement are confined to work condition issues and therefore do not necessarily cover reports that are made more generally in the public interest.<sup>21</sup>

Following the Sarbanes -Oxley Act 2002, there has been a trend for US companies to introduce codes of ethics which offer disclosers of specified types of wrongdoing protection against reprisals. Whether particular non-retaliation guarantees will be regarded as legally binding will depend on the form of words used and whether the undertakings given are without prejudice to the application of the employment 'at will' doctrine (Moberly and Wylie 2011). It remains to be seen if such corporate practice effectively improves the conditions for employees to blow the whistle (we discuss corporate reporting systems below).

By way of contrast, US government employees can comment on their employer's activities and have free speech guaranteed. The First Amendment has been applied to public employees and interpreted to protect both state and local government whistleblowers. Remedies are available through the federal courts and include damages and costs as well reinstatement and back pay. Nevertheless, public sector employees may also face considerable difficulties (Barry 2007, Morvan 2009, Mendelsohn 2009). For example, in *Garcetti v Ceballos*<sup>22</sup> a deputy district attorney filed a civil rights complaint alleging that he had suffered reprisals at work because he wrote a memorandum recommending the dismissal of a case about governmental misconduct. In denying his claims, the Supreme Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties". Thus it is argued that

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<sup>20</sup> 29 U.S.C. §§ 151-169 (2000)

<sup>21</sup> For a criticism of the narrow scope of protection in section 7 NLRA from a freedom of speech perspective see Estlund (1992).

<sup>22</sup> 547 U.S. 410 (2006),

a US government employee has more legal protection speaking on a public platform or taking allegations to the media than reporting to a supervisor.

Compared to the situation in the U.S., the applicability of human rights in private employment relationships is less confined in UK law. Practical effect is given to the European Convention of Human Rights through Section 3(1) of the Human Rights Act 1998 (HRA). This states that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". In addition, Section 6(1) makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right". Since this applies to courts and tribunals adjudicating on private disputes, it might be argued that the HRA produces the indirect horizontal effect achieved through the interpretational obligation of courts under German law. Certainly, the UK has not gone as far as achieving a partial direct applicability of fundamental freedoms in employment law as stipulated by the French Labour Code. Before the Public Interest Disclosure Act 1998 (now Part IVA Employment Rights Act 1996 (ERA 1996) came into force, little protection was afforded to whistleblowers by the common law and freedom of speech arguments were rarely deployed in cases where breach of confidentiality was alleged. To date the courts and tribunals have not been keen to accept submissions about freedom of speech in applying Part IVA ERA 1996, although there has been widespread recognition that retaliation against whistleblowers should be treated as a form of discrimination.<sup>23</sup> As we will see in our discussion of whistleblowing legislation below, in some circumstances the UK statute does not offer the protection that has been afforded by the ECHR in its interpretation of Article 10 of the European Convention (see *Heinisch* case above).

## **THE ROLE OF LEGISLATION IN ENCOURAGING AND PROTECTING WHISTLEBLOWERS AS LAW ENFORCERS**

It follows from what has been discussed so far that international comparisons which focus solely on specific legislation and do not take into account the level of constitutional freedom of speech at the workplace will result in a distorted view (see for example Parliamentary Assembly of the Council of Europe 2009). France and Germany, two countries, that have few specific laws on whistleblower

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<sup>23</sup> See, for example, *Fecitt v NHS Manchester* [2012] IRLR 64.



protection, have relatively high levels of protection for freedom of speech at the workplace which offer some succour to employees who blow the whistle. Indeed, where whistleblowing statutes limit the scope or nature of the disclosures that will be protected, the assistance provided by constitutional rights may be more valuable. For example, section 806 of the US Sarbanes Oxley Act 2002 only protects disclosures pertaining to infringements of that statute and other U.S. Federal securities laws. Broader legislation, such as Part IVA ERA 1996 in the UK, also puts limits on the circumstances in which protection will be afforded. For example, the 'good faith' requirement that must be met in almost all situations could well inhibit the disclosure of serious wrongdoing if a worker fears that his or her motive may become an issue (see Lewis 2008). By way of contrast, in applying a proportionality test under freedom of speech provisions, malice could be a relevant factor but it would not necessarily exclude protection. It would be put in the melting pot but may be outweighed, for example, by the severity of the wrongdoing and the quality of the evidence provided.

Under a principle of general freedom of speech at the workplace, employees may exercise their freedom on any subject and using any communication channel they wish, but this exercise may be limited in cases of abuse or in order to protect conflicting legitimate interests. By way of contrast,, legal systems that have sparse freedom of speech guarantees for employees in private work relationships and that rely on statutory whistleblower provisions start from the reverse principle. In these systems, organisation insiders may not have an express right to report wrongdoing and may be required to report through designated procedures.

The advantage of freedom of speech becomes most apparent when specific whistleblower protection is not available for a particular type of perceived wrongdoing. For example, criticism of work conditions that do not amount to a breach of legal obligations would not fall within the ambit of many whistleblower statutes but would be treated as the exercise of freedom of speech. The well-known French "Clavaud" ruling that an employee of the Dunlop Company acted within the limits of freedom of expression when he gave an interview in a newspaper criticizing work conditions,<sup>24</sup> would not have been possible under much whistleblowing legislation. If constitutional guarantees of workplace freedom of speech are equivalent to or more valuable than specific whistleblowing laws, and if the primary goal is to facilitate the reporting of wrongdoing, the

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<sup>24</sup> Cour de cassation, chambre sociale, 28 April 1988, Bull. civ. V., No. 257

debate about improving protection for whistleblowers should bear that in mind. Information technology that facilitates both speech and its surveillance and the increasing power of large corporations justify a discussion about the balance and legitimacy of the interests involved (Barry 2007).

We contend that much whistleblower legislation has not only been used to protect speech and promote openness at the workplace but also, or even primarily, to encourage organization members to engage in public and private compliance schemes. Thus it can be argued that statutes protecting whistleblowers are aimed at improving the effectiveness of legal enforcement. On an international level, this holds particularly true with regard to the campaign against international bribery (see section 3 above on conventions). A prime example of a national provision that enlists private individuals for law enforcement purposes is the U.S. False Claims Act (FCA), which was introduced in 1863 and revised in 1986. Under the FCA, an individual (the "relator"), who is often a former employee, can file a *qui tam* action against federal contractors claiming that the government has been defrauded. The government may join the action and, depending on the circumstances, the relator may receive between 15-30% of the damages awarded if the action succeeds. Given the apparent success of the FCA (see for example Carson et al. 2008 and Callahan et al 2004) it comes as no surprise that the *qui tam* approach has been expanded in recent U.S. legislation. In 2011, the U.S. Securities and Exchange Commission (SEC) adopted a final rule implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act's "Securities Whistleblower Incentives and Protection" measures (see US SEC 2011). These offer rewards of between 10-30% of the compensation that the SEC and the other authorities are able to collect to whistleblowers who report potential violations of U.S. Federal securities laws directly to the authorities.<sup>25</sup> When the rules were initially proposed, companies were worried that people would bypass internal whistleblowing procedures, thereby weakening them, or would delay reporting in order to increase the reward. To some extent the final rules alleviate these problems by providing incentives for employees to report internally first and without delay (US SEC 2011, p.5-6). However, the SEC rejected the notion that exhausting internal reporting processes should

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<sup>25</sup> See Section 21F of the U.S. Securities Exchange Act of 1934 and the SEC rules section 240.21F-1 to 240.21F-17. The Rules are accessible at <http://www.sec.gov/rules/final/2011/34-64545.pdf> (last accessed 21. June 2011). The first award was in 2012 and was for the maximum of 30%.

be a prerequisite for rewards (SEC 2011). The difference between the SEC's approach and *qui tam* is that in the former the whistleblower does not become a party to the action initiated against the company. Nevertheless, from an enforcement perspective these mechanisms are functionally equivalent. In both the state enlists private citizens to acquire information for the public benefit and the private individual may receive part of the damages awarded against the defendant.

To the extent that lawmakers view whistleblowing as an instrument to regain societal control over powerful private organizations (cf. Callahan et al. 2004), and taking into account that whistleblower legislation provides support for speech about specific types of wrongdoing, it is appropriate to situate whistleblowing statutes which do not provide financial rewards in the same private enforcement context as *qui tam* schemes. We would argue that such statutes, by offering protection against retaliation rather than financial incentives, rely on the various other motivations that may induce individuals to disclose suspected wrongdoing in the public interest (on the various motivations see Miceli et al. 2008). Some countries have been reluctant to offer rewards to whistleblowers on the grounds that this would undermine the moral quality of disclosing in the public interest. However, given recent financial scandals and health and safety disasters, monetary incentives may now be viewed in a rather different light. One objection to 'informers' was that they profited from causing distress to others. However, if those that suffer as a result of disclosures are engaged in serious wrongdoing which threatens life or economic viability then society may view rewards as desirable if not necessary.

Empirical evidence demonstrates that rewards improve the success of whistleblowing, if 'success' is measured in terms of willingness to report wrongdoing (see, for example figures reported by Carson et al. 2008, Callahan et al. 2004, Dyck et al. 2010.) Rewards offset the substantial personal risks that disclosers incur despite the existence of whistleblowing legislation. Between October 1987 and October 2010 the amount rewards actually paid to whistleblowers under the US False Claims Act was \$2.877 billion. However, it is also necessary to mention the disappointing level of protection for whistleblowers under section 806 Sarbanes Oxley Act 2002 (see Dworkin 2007, for an empirical study see Moberly 2007). It would seem that protection without financial reward may promote the moral reputation of whistleblowing. However, from a law enforcement perspective, protection without reward is low cost recruitment of the private citizen which is not particularly effective. If the state's primary objective is to

encourage openness in organizations and safeguard individuals who feel the need to report wrongdoing, wish to express indignation or simply an opinion, the obvious road to take would be to introduce the broadest possible safeguards for freedom of speech. This does not exclude the possibility of having specific whistleblower laws if they expand and clarify the protection that fundamental rights already provide.

## **CORPORATE COMPLIANCE, THE CONTROL OF INFORMATION AND THE PUBLIC INTEREST**

In all four jurisdictions discussed here organisations establish internal whistleblowing policies and procedures as part of their compliance programmes. There are various reasons why organisations adopt internal whistleblowing measures. First and foremost, they are established in order to secure and control potentially sensitive information that, if disclosed to third parties, could endanger the employer's interests. Controlling information improves an organisation's capacity to manage risks and to detect criminal or other conduct for which it would be vicariously liable. Research shows that whistleblowing procedures are designed to encourage the disclosure of a wide range of wrongdoing that could result in a loss of reputation and not just breaches of the law (see Lewis 2006). Thus internal whistleblowing arrangements can also be seen as a tool in the management of a company's brand image. This might suffer if there was a perception that the organisation complies with the law but behaves unethically.

While internal procedures might be helpful to an employee facing a dilemma about whether or not to disclose information and facilitate the exercise freedom of speech, we would argue that this is not their primary purpose. The control purpose of internal whistleblower schemes can be illustrated by the way in which external ombudspersons are used in Germany (see Rohde-Liebenau 2011). These are usually law firms retained by the company. This has the effect that only communications between the ombudsperson and the company are privileged; the whistleblower is unprotected unless a contractual agreement between the company and ombudsperson establishes rights. By using external ombudspersons, the company contracts out the collection of information from whistleblowers but retains full control over it. If the organisation wanted to offer help solely to employees, it could set up funds from which they could draw in order to consult a lawyer. This person would then advise the employee about the legal risks involved in disclosing information and the most appropriate steps to take. A confidential reporting facility would not be necessary in such a case, since the employee would be the

client and his or her communication with the lawyer would be privileged. However, we are not aware of companies that provide such a facility.

Apart from the desire of organisations to control sensitive information for risk management purposes, an internal whistleblowing procedure may also be part of a compliance programme that is required or incentivized by legal provisions. However, apart from specific and clearly delimited areas such as money-laundering, anti-bribery, anti-terrorism, or health and safety laws, there are hardly any explicit legal obligations on employers to establish whistleblowing arrangements in the countries we are considering. It is more common that laws encourage or put pressure on organisations to integrate internal whistleblowing into their compliance management functions. For example, section 406 of the U.S. Sarbanes Oxley Act 2002 requires companies to state that they have adopted a code of ethics for senior financial officers or explain the reasons why not. In implementing section 406, the SEC states in its rule § 229.406 (a) (4)<sup>26</sup> that such "codes of ethics" must promote the "prompt internal reporting of violations of the code to an appropriate person or persons identified in the code". Similarly, Section 7(2) of the UK Bribery Act 2010 provides a complete defence to the crime of failing to prevent bribery if the organisation can prove that it had "adequate procedures".<sup>27</sup> For an example outside the context of economic crime, there is the obligation under § 12 of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz - AGG*)<sup>28</sup> to take necessary measures to ensure protection against discrimination. To comply with this law, companies typically adopt ethics codes with internal whistleblowing mechanisms.<sup>29</sup> Finally, there may be judicial incentives for the adoption of internal whistleblowing schemes. The U.S. Federal Sentencing Guidelines give judges

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<sup>26</sup> See 17 CFR Ch. II (4-1-10 Edition), p. 430, at [http://edocket.access.gpo.gov/cfr\\_2010/aprqtr/pdf/17cfr229.406.pdf](http://edocket.access.gpo.gov/cfr_2010/aprqtr/pdf/17cfr229.406.pdf) (last accessed 21. June 2011)

<sup>27</sup> The general whistleblowing provisions in Part IVA Employment Rights Act 1996 indirectly encourage the establishment of whistleblowing procedures. Employers who have them can argue that an external disclosure was unreasonable because an internal arrangement existed and this was not invoked by the worker. See Sections 43G & 43H ERA 1996.

<sup>28</sup> Allgemeines Gleichbehandlungsgesetz vom 14. August 2006 (BGBI. I S. 1897), translation and guidelines available at: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg\\_wegweiser\\_engl\\_guide\\_to\\_the\\_general\\_equal\\_treatment\\_act.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_wegweiser_engl_guide_to_the_general_equal_treatment_act.pdf?__blob=publicationFile)

<sup>29</sup> Schneider and Sittard (2007) raise doubts whether these are sufficient measures.

the discretion to mitigate sanctions for companies that have an effective compliance and ethics programme in place. For these purposes internal whistleblower arrangements can be treated as a relevant (Hess 2007).

Chareirre Petit and Surply (2008, 127 et seq) put forward a possible development for internal whistleblowing procedures. They suggest that corporate policing through internal whistleblowing arrangements could help to reduce information asymmetries between management and shareholders, if employees acted as "agents" of the shareholders controlling the top and senior management. If we follow this idea, viewing internal whistleblowing as a corporate governance instrument is appropriate if it facilitates the communication of suspected wrongdoing to board level. Some companies have formal reporting hierarchies in place that reach the ethics, risk management or audit committees. For example, a company could empower a chief compliance officer to report directly to a board committee (or a supervisory board if top management behaviour is involved), and offer special protection against termination in order to ensure the compliance officer's independence of top management.

When legislation attempts to protect whistleblowers or offers incentives to those who report suspected wrongdoing directly to competent authorities, it could be argued that the state competes with employers for the disclosure of information. This is the case even where the relevant law also encourages internal whistleblowing. Corporate compliance systems can also be viewed as a private enforcement mechanism whereby the state enlists self-policing into its law enforcement. The competition exists because it is not guaranteed that corporate compliance systems always operate in the public interest. An internal system will only serve the public interest in the reporting and rectification of wrongdoing to the extent that this is consistent with the organisation's risk management interests (see above). If these interests do not converge, there may be situations where employers do not want to reveal wrongdoing that they become aware of, perhaps because they have not dealt with it. Whistleblower protection or incentive laws do not make internal reporting a prerequisite, because this would amount to a prioritization of the company's risk management interests over the public interest in learning about wrongdoing. The more whistleblower laws encourage external whistleblowing by offering generous rewards, the more companies will feel pressurised to design effective internal reporting infrastructures. To be effective such policies and procedures should be clearly communicated, make advice available to potential whistleblowers, offer financial incentives and

provide feedback about the results of investigations etc. (for good practices see: British Standards Institute Publicly Available Specification. 2008)

## **SOME LEGAL IMPLICATIONS OF HAVING INTERNAL REPORTING PROCEDURES**

Increasingly, corporate compliance programmes spell out the disclosure 'duties' of employees. Analyzing the contents of ethics policies of 56 large European companies, Hassink et al. (2007) record that nearly two-thirds of these 'required' employees to disclose information about wrongdoing. In different national laws, the employment relationship is characterized by the use of implied terms, such as loyalty, trust, good faith and fidelity that give rise to rights and obligations. Through such terms the law integrates not only policy considerations but also the expectations of the parties, which may shift with the prevailing moral and economic climate. The increased incidence of internal whistleblowing procedures, irrespective of whether they directly create legal rights and obligations, is legally relevant because they generate expectations which affect the interpretation of terms. For example, where there is no express term, it might be argued that an implied duty to cooperate obliges employees to invoke a procedure if it is applicable.<sup>30</sup> In jurisdictions that do not or hardly protect freedom of speech at the workplace there are few legal barriers that prevent companies from imposing contractual duties on staff to report wrongdoing. In the US, the First Amendment's guarantees could only prevent lawmakers from adopting laws that introduce general whistleblowing duties for all employees (Rutzel 1995, p. 43 et seq). General whistleblowing duties of employees should not be confused with the role of gatekeepers (such as lawyers, auditors, etc), whose reporting duties could resemble forms of compulsory whistleblowing (see Tippett 2006). Further, it is not uncommon for top managers, or for managers with specific compliance and oversight functions within a company to be treated as fiduciaries and to have duties to whistleblow imposed upon them.<sup>31</sup> Apart from these cases, workers face

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<sup>30</sup> Apart from any legal obligation, as Tsahuridu and Vandekerckhove (2008) observe, the mere encouragement of employees to raise concerns internally may give rise to a moral obligation to blow the whistle.

<sup>31</sup> See, for example, *Ranson v Customer Systems plc (2012) EWCA Civ 841*. This could have the effect of lightening the burden on less senior employees to speak up or, alternatively, it might encourage them to do so. See for reporting duties of compliance officers the German Federal Court in *Bundesgerichtshof, 5 StR 394/08 of 17. July 2009*.

considerable difficulties when confronted by a duty to report wrongdoing, particularly in ascertaining what evidence or level of suspicion is required for the obligation to come into play. Some of the practical problems have been discussed elsewhere (see Lewis 2011a) so it is sufficient to note here that the imposition of an obligation to report wrongdoing may turn out to be counter-productive in terms of compliance management.

There are additional legal issues that need to be considered in devising internal whistleblowing procedures. First, there is the need to comply with data protection and privacy laws. In the authors' opinion it is perfectly possible to reconcile reporting procedures (including anonymous hotlines) with such provisions if detailed attention is paid to protecting the identity of both whistleblowers and those who are the subject of allegations (Lewis 2011b, Pagnattaro and Peirce 2008). For example, we would argue that those who are the subject of allegations have the right to be notified of that fact but not until there has been a preliminary investigation to see if there are grounds for suspicion.<sup>32</sup> In most situations it would be unhelpful to reveal the identity of those making unfounded allegations as it might deter others from whistleblowing in more meritorious cases. However, when knowingly false information has been supplied which causes damage to an individual that person may wish to learn who was responsible so that legal proceedings can be brought.<sup>33</sup>

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<sup>32</sup> We would contend that the employer's duty of care requires him or her not to cause stress by conveying unfounded allegations.

<sup>33</sup> A special problem occurs when foreign laws impose the adoption of reporting systems that may conflict with domestic data protection laws. The shifting policies of the French data protection agency (Commission nationale informatique et libertés, CNIL) illustrates the issue. After initial reservations "of principle", the agency, under the pressure of French companies or French subsidiaries of foreign companies subject to the Sarbanes Oxley Act, adopted a policy of "single authorization" in 2005 that facilitated the adoption of corporate reporting systems. This policy had to be amended following the French Cour de Cassation's ruling regarding the code of business conduct of Dassault Systèmes (of 8 december 2009, n° 08-17.191, D. 2010. 548). The CNIL had to clarify that the exclusive purpose of data collection and recording under the "single authorization" is to address concerns in the fields of anti-competitive practices, accounting, financial, banking and corruption, and to comply with laws (cited are French laws, the U.S. Sarbanes Oxley Act and the Japanese Financial Instrument and Exchange Act of 2006). The reporting of any other concern is not covered by the single authorization anymore. Either employees should report such concerns through the other reporting channels e.g., through line managers, employees' representatives, public authorities, or, if the whistleblower system is used, no data may be collected and recorded (cf. CNIL, 8 December 2010, Official Journal of the French Republic No. 0284, No. 95).



More problematic is the fact that, in jurisdictions that guarantee fundamental rights at the workplace, internal procedures might be illegal to the extent that they attempt to prevent external disclosures of information. Conversely, the right to silence in order to avoid self-incrimination might also have an impact.<sup>34</sup> In a legal system that provides for the direct 'horizontal' effect of constitutional provisions in private employment relationships the imposition of a general whistleblower duty might be challenged on the grounds that it is disproportionate. For example, Coeuret and De Sevin (2006) argue that whistleblower obligations in company policies would be void under art. L 120-2 (today art. L 1121-1) of the French Labour Code. Countries that provide freedom of speech protections through the interpretative obligation of the courts (for example, Germany) would produce a similar result. The proportionality test would apply in the context of interpreting the employee's loyalty or 'thoughtfulness' (*Rücksichtsnahme*) obligations or the law relating to unfair contract terms. A general duty to report any wrongdoing would probably fail the test. The notion of proportionality would give rise to questions about whether there are any other measures available that are also effective for detecting and preventing wrongdoing which are less intrusive. Such alternatives would be encouragement through rewards, transparent reporting procedures (including information on how disclosures are managed) and guarantees of protection. The employer's expectation that staff will make use of internal whistleblowing procedures would only harden into a legal duty in exceptional cases, for example, when it could be demonstrated that an employee's disclosure could effectively prevent substantial damage to the undertaking.

## **CONCLUSION**

The technological possibilities that now facilitate leaking put pressure on employers to provide more functional communication systems and on countries to devise constitutional and/or statutory rights that encourage and protect the reporting of wrongdoing and ensure that necessary remedial actions are taken. Given the piecemeal nature of the current international conventions and the uneven protection afforded to whistleblowers by ILO member states, it might be

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<sup>34</sup> The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 of the European Convention on Human Rights.

argued that this issue should now be addressed with some urgency.

When analysing protections for whistleblowers, it is too simplistic to solely focus on whistleblower laws. The scarcity of specific whistleblower legislation in countries such as France and Germany is compensated not only by a generally high level of employment protection but also by recognition of the right to freedom of speech at the workplace. However, we have also identified considerable problems that dissuade whistleblowers from using normal reporting channels to address wrongdoings. In the US, where whistleblower statutes have the effect that private citizens are enlisted for law enforcement purposes, employees and other organizational insiders are provided with incentives to report certain violations, yet only within the limited scope of existing statutory provisions. The United Kingdom is more difficult to situate in the analysis undertaken here. It can be argued that the legislation on protected disclosures promotes freedom of speech in both the public and private sectors. Equally, the law also facilitates private enforcement objectives. Yet, it remains to be seen how these two objectives - law enforcement through private enlistment and the promotion of freedom of speech at the workplace - can be achieved in situations of conflict.

This article raises awareness that whistleblowing can only be dealt with in a broader context of fundamental rights of employees. Our intention is to broaden discussion about how freedom of speech can be underpinned at the workplace. In this context it is worth noting that in 1997, two pressure groups, *Freedom to Care* and *Whistleblowers Australia*, jointly proposed an amendment to ILO Convention 111 on Discrimination (Employment and Occupation) 1958.<sup>35</sup> This would have offered protection to employees who blow the whistle on matters of public interest and would have taken the form of an amendment to the definition of discrimination in Article 1. In the authors' opinion, reprisals against whistleblowers are a form of unequal treatment that constitutes a violation of human rights. We therefore endorse the view that victimisation against whistleblowers should be equated with other forms of discrimination and would urge that an ILO Convention should protect those who disclose all types of serious wrongdoing. Failing that, a Convention might cover specific types of reporting, for example, about corruption, bullying and harassment and risks to health and safety.

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<sup>35</sup> 42nd Session, 1958.

Finally, although it might be possible to “dry out” leaking platforms by prosecuting operators and leakers, we do not think that this would provide a constructive or long lasting solution. We believe that better protection for freedom of speech, together with comprehensive statutory whistleblower protection and more effective internal reporting procedures would make repressive measures unnecessary. Leaking would become less attractive. Today, no country or company can claim to have perfect communication systems in place. This being the case, we assert that when systems break down it is in the public interest to learn about serious wrongdoing via leaks rather than not to hear about it at all.

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