

'In a time of unreal deceit, telling the truth is a revolutionary act'

George Orwell

'Whistleblowers under the Spotlight: The cases of Japan and the UK'

Dr Stelios Andreadakis* and Dr Scott Morrison**

Introduction

The contemporary prevalence of complex or opaque business structures, and the limited resources and time of regulatory authorities charged with policing business organisations has increased the importance of whistleblowers. The necessity for whistleblowing also arises from the long-standing information asymmetry that exists between gatekeepers and companies. Whistleblowers can act as a reliable and a robust accountability mechanism in modern corporate governance.¹ The ability of whistleblowers to perform this function stems from their position as 'insiders' in companies; this position gives prospective whistleblowers access to privileged information and expertise exceeding that to which outside regulators can hope to obtain. As a result, workers who become whistleblowers can be significantly more effective in

* Lecturer in Law, University of Leicester.

** Senior Lecturer, Middlesex University.

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¹ See I. Carr and D. Lewis, 'Combating Corruption through Employment Law and Whistleblower Protection', (2010) 39(1) *Industrial Law Journal* 52-81; J. Bowers, M. Fodder, J. Lewis and J. Mitchell, *Whistleblowing: Law and Practice*, (2nd ed., OUP, 2012); A.J. Brown, D. Lewis and R. Moberly, *International Handbook on Whistleblowing Research*, (Edward Elgar Publishing, 2014); W. Vandekerckhove, *Whistleblowing and Organizational Social Responsibility: A Global Assessment*, (Ashgate, 2006).

detecting potential wrongdoing, disclosing risks and malfeasance in a timely manner and preventing fraudulent activities, thereby helping companies to avoid costly scandals and reputational damage as well as possible legal and regulatory liability or penalties.²

The effectiveness of whistleblowers is however dependent on the level of protection afforded to them by the law. It is also dependent upon the nature and frequency of the responses made to their disclosures. Despite the existence of a plethora of legislative provisions designed to protect whistleblowers and to ensure that all of the necessary procedures are in place to respond to whistleblowers' complaints in an efficient and effective manner³, there are reasons to doubt the adequacy of existing whistleblower protection, and to question the sufficiency of the monitoring of concerns and at a later stage the efficacy and consistency of enforcement actions in response to disclosures and corporate wrongdoing. There is an increasing number of stories reaching the headlines regarding scandals that arguably could have been prevented had whistleblowers had the confidence born of sufficient protections from employer retaliation to come forward. The occurrence and the increase in such seemingly preventable scandals and malfeasance in both developing and developed countries emphasises the need for better legal responses. It also raises the possibility, in view of legal protections for whistleblowers in some of these societies, that the law may not be a fully adequate answer.⁴ A careful examination of recent cases involving whistleblowers shows that there is a great diversity in the ways and means of handling workers' complaints, whether those responses are initiated by

² D. Lewis, *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research?* (Edward Elgar, 2010); S.M. Kohn, *The Whistle-blower's Handbook: A Step By Step Guide to Doing What's Right and Protecting Yourself*, (Lyons Press, 2011)

³ R. Calland and G. Dehn, *Whistleblowing Around the World: Law, Culture and Practice* (IDASA Publishers, 2004).

⁴ R.G Vagn, *The Successes and Failures of Whistleblower Laws* (Edward Elgar, 2012).

companies or by regulatory authorities. One reason for this diversity is the attention or the lack of attention the public accords to particular cases, which is in turn a function of the vigour with which the media reports the details of these cases and how they are portrayed by the media in that coverage.

The main aim of this article is to draw upon some recent examples of whistleblowing in the United Kingdom and Japan. In reflecting on the fate of whistleblowers in these two countries the article aims to contribute to the ongoing discussion in corporate governance literatures in relation to the effectiveness of the existing regulatory regime, a regime that is intended to encourage whistleblowing in general and to provide sufficient safeguards to whistleblowers – in particular from dismissal or retaliatory measures. The countries of the UK and Japan have been selected for this study and for comparative treatment because they exhibit contrasting business and employment practices and because the authorities charged with the oversight of business and commerce have adopted distinct regulatory approaches. The comparative analysis intends to support the claim that irrespective of the primary and secondary legislation in place in these two jurisdictions and the disparate corporate cultures existing in each, whistleblowers all too frequently end up as victims even though (or sometimes apparently because) they complied with the requirements and the procedures stipulated by the law, followed their conscience and reported wrongdoing.

The article proceeds with section A, which considers the recent history of corporate scandals and regulatory responses to them in the case of Japan. It begins with the seminal case: the global and highly successful company Olympus and the role of Michael Woodford. It then contrasts the rather successful outcome resulting from his

whistleblowing with those results that more typically befall Japanese nationals who choose to blow the whistle. This section considers the adequacy of the Whistleblower Protection Act 2004 ('the 2004 Act') and some unfolding developments in corporate governance in this, the third largest of the world's economies. Section B focuses on the United Kingdom, bringing the UK experience under the spotlight. The discussion commences with the recent domino of cases involving misconduct and whistleblowers in National Health Service (NHS) institutions before moving to examine the existing legislative framework and the regulatory responses to these cases. This section provides an assessment of the protection afforded to whistleblowers and reflects on the need for further reforms.

A) Blowing the Whistle in Japan: Rules, Scandals, and More Rules

The Unsung Whistleblowers

Whistleblowing in Japan came to prominence following the well-known collapse of the national economy in 1991; the four largest securities houses (Nomura, Daiwa, Yamaichi and Mikkō) improperly compensated valuable clients for losses sustained, followed by accounting scandals at these firm which attracted the sanctions of the Fair Trade Commission, the Ministry of Finance, and the US Securities and Exchange Commission.⁵ The traditional Japanese model of corporate governance began to weaken

⁵ M. D. West *Secrets, Sex and Spectacle: The rules of Scandal in Japan and the United States* (University of Chicago Press 2006), 47. In 1997, scandals emerged concerning the use of hired thugs (*sokaiya*) to intimidate shareholders, and to suppress corporate secrets.

and attention was turned from a management model (in which a board of directors actively managed the company), to a US inspired model (where the board focused on monitoring and supervision of the management, as an interposed layer.)⁶ The turn of the millennium ushered in an increase in whistleblowing; that year the public learned of Mitsubishi Motors covering up product defects over a period of three decades; in 2002 Snow brand was implicated in falsely labelling imported beef as domestic in the era of Mad Cow disease; in a harbinger of things to come the Tokyo Electric Power Company (TEPCO) was convicted of legal violations in connection with nuclear safety; the bank UFJ was found to have concealed bad loans from government inspectors (2003); the National public broadcaster NHK was revealed to have bowed to political interference by the Liberal Democratic Party (2005); the same year, as a result of whistleblowing by an officer, the Ehime Prefectural Police were found to be engaged in accounting fraud.⁷

The most famous corporate scandal in the recent history of Japan is undoubtedly that of the revered company Olympus, the multi-national high-tech optics and medical equipment manufacturer headquartered in Tokyo. Since the 1990s Olympus' executives had carried out a *tobashi* (loss-hiding) accounting scheme concealing in excess of ¥130 billion (US\$1 billion) in losses.⁸ Not least due to his popular book,⁹ Michael Woodford is widely credited with exposing the scheme. Olympus was unusual among the largest

⁶ B. E. Aronson 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?', (2013) 18 *Zeitschrift für Japanisches Recht/Journal of Japanese Law*, Issue 35, 85-106, 85.

⁷ West (n.5), 50.

⁸ J. Soble, 'Olympus used takeover fees to hide losses,' *Financial Times*, 8 November 2011; D. Hickey, 'Michael Woodford: Japan's whistleblower supreme speaks out' *Japan Times*, 8 November 2011. See also Aronson (n.6), 106.

⁹ M. Woodford, *Exposure: Inside the Olympus Scandal: How I Went from CEO to Whistleblower* (Penguin 2014). Woodford's story is currently being made into a feature film.

Japanese companies for having a high-level foreign president.¹⁰ The state and standards of corporate governance¹¹ and the phenomenon of whistleblowing in Japan have gained greatly from Woodford's actions both while in the employ of Olympus and subsequent to his dismissal in October 2011, less than one month after his appointment as CEO.

Less widely noticed is a further element to the story. Several months into his tenure as President of Olympus a little known Japanese-language business magazine *Facta* got the scoop on Woodford.¹² A freelance journalist, Yamaguchi Yoshimasa, documented and reported the *tobashi*; he has never revealed his sources within Olympus. The first whistleblower with respect to Olympus thus remains anonymous. In fact there are several, as Yoshimasa attributes his information to 'a number of loyal employees inside the company', who did not know each other.¹³ In all probability they will never receive credit for the role they played in revealing financial wrongdoing and ultimately setting Olympus on a better long-term course.¹⁴

The founder, publisher and editor of *Facta*, Shigeo Abe, was alone in the Japanese media in encouraging Yoshimasa to make public the findings of his

¹⁰ Nippon Sheet Glass Co, Aozora Bank and Renault Nissan are other exceptions to the general rule in this regard – KT Fung, ZY Gao, J Gonzalez and KL Alex Lau 'Corporate governance in Japan: the case of Olympus' (2014) *Company Lawyer*, 57; R. J. Jackson and C. J. Milhaupt, 'Corporate Governance and Executive Compensation: Evidence from Japan', (2014) *Columbia Business Law Review*, Vol. 2014, Issue 1, 111-171.

¹¹ For examples of corporate scandals and also valuable background on the historical development and present condition of corporate governance and its relation to mergers and acquisitions, see S. Givens, 'Corporate Governance and M&A' in G.P. McAlinn (ed.), *Japanese Business Law* (Wolters Kluwer, 2007) 143-172, at 145-148.

¹² Woodford (n.9), 5-10; the article appeared in print (in Japanese) in the August issue, 'Olympus Scandal Exposes the Shortcomings of the Japanese Media,' January 16 2012, Nippon.com, http://www.nippon.com/en/currents/d00013/#auth_profile_0. *Facta's* English webpage no longer exists – its Japanese version is at <http://facta.co.jp>. The original story (Japanese only) is available at http://zasshijournalismsyo.jp/pdf/12_taisho_olympus.pdf

¹³ *Ibid.*

¹⁴ Ultimately at least some of the truth was admitted – three former executives pleaded guilty regarding the *tobashi* scheme, and may be liable to up to ten years in prisoner and fines up to ¥10 m. Reuters, 'Olympus and Ex-Executives Plead Guilty in Accounting Fraud', *New York Times*, 25 September 2012, http://www.nytimes.com/2012/09/26/business/global/guilty-pleas-in-trial-over-olympus-scandal.html?_r=0

investigation.¹⁵ This is evidence supporting the general observation that the Japanese mass media is reluctant to challenge the status quo by delving into controversial or risky subjects;¹⁶ the *Facta* story did not elicit wider attention, although as a result of Woodford's actions (and no doubt as a result also of his considerably higher profile) the Olympus scandal has since received wider coverage both inside Japan and abroad. Although not the only route open to prospective whistleblowers, as the Olympus case illustrates – in Japan at least – confidential reporting to a journalist, while possible, is exceptional. And such disclosure's efficacy requires not only a whistleblower but also a reporter and editor willing to incur potential legal liability as well as commercial loss, measured in advertising revenue and readership.¹⁷

Unlike the case of Michael Woodford, who left Tokyo to return to London, repatriation is not an option for Japanese whistleblowers and exile is seldom an option; expatriation is seldom an option readily contemplated or exercised. The prospects of a handsome out-of-court settlement¹⁸ to soften the landing into unemployment is low indeed for Japanese whistleblowers, and the potential compensatory cushion is very thin and would invariably arrive too late to offer much assistance – particularly for less senior employees. Should a company refrain from dismissing a Japanese employee who has

¹⁵ 'Olympus Scandal Exposes the Shortcomings (n.12); D. McNeill, 'Stop the presses and hold the front page' *Japan Times*, 8 January 2012, <http://www.japantimes.co.jp/life/2012/01/08/general/stop-the-presses-and-hold-the-front-page/#.VRD1nzq-R-U>

¹⁶ J. Soble, 'Japan's timid media in spotlight,' *Financial Times* 28 October 2011 indicates that weekly tabloids, the traditional venue for reporting scandals, have been hampered by defamation lawsuits. Yoshimasa's story was turned down multiple times. As he retrospectively reflects: 'Only the editors in question could say for sure why so many magazines rejected my proposals. But the likely reasons are not hard to infer. Unless the story developed into a public scandal as a result of an official investigation by government prosecutors, there was a risk that publications carrying the story might expose themselves to a lawsuit'. See 'Olympus Scandal Exposes the Shortcomings (n.12).

¹⁷ Abe stated the reason *Facta* could cover the story was because the magazine has no advertisements or commercial ties to anyone; it subsists on subscriber fees and donations. See McNeill (n.15).

¹⁸ For an unfair dismissal and breach of contract suit in Michael Woodford's case, he received £10m – see Hickey (n.8).

reported on unfavourable company matters, there remain lesser ways in which they may decide to make life uncomfortable for that person. Unfavourable transfer, demotion or lack of promotion as well as ostracism are examples of retaliatory practices that are by no means unique to Japan but number prominently among the fears of employees in this country.

Another response to whistleblowers, which may be peculiar to Japan, is the relegation of the offending worker to the *madogiwazoku* – literally, to the ‘tribe’ with a window seat (*madogiwa*). Shifting from a desk without a view to one with a window in proximity could be seen as a sign of promotion. However, in Japan it can also serve as a punishment for disloyalty, when it comes along with the withdrawal of work: nothing to do all day but to look out of the window. As Dan Rosen writes, getting the window seat is a ‘punishment, a kind of sensory deprivation chamber designed to break the employee’s will’.¹⁹

Management and corporate practices notwithstanding a succession of Japanese governments have sought to legislate protections for whistleblowers in recognition of the potential value of their information and as an element in a policy of improving corporate governance.

The Whistleblower Protection Act 2004 (‘the 2004 Act’)

¹⁹ D. Rosen, ‘Reserving the Window Seat’, (2013) *The Chuo Law Review* 119, No 9-10, 165-193, 166. The full impact of this treatment is not apparent absent a discussion of corporate and general culture in Japan more extensive than can be set out here. The less tangible or quantifiable cost and the stigma against whistleblowers (as well as attendant additional difficulties securing subsequent employment) should not be underestimated, whether in Japan or elsewhere. See also G. Thüsing and G. Forst (eds), *Whistleblowing: A Comparative Study*, (Springer, 2016).

Motivations for Parliamentary action regarding whistleblowers included a variety of corporate scandals in the last years of the 20th and the early years of the 21st century. Most prominently among these as mentioned above Mitsubishi Motors' concealment of recall data, food frauds (additionally, Yukijirushi Shokuhin and Nippon Meat Packers), and – what now appears a harbinger of things to come with the March 2011 Dai-Ichi nuclear disaster in Fukushima – TEPCO's concealment of data.²⁰ Sources of inspiration for this statute included the UK's Public Interest Disclosure Act 1998, the US Whistleblower Protection Act 1989 and the Sarbanes-Oxley Act 2002, together with whistleblower legislation from Australia, Israel and South Africa.²¹

In response the Whistleblower Protection Act 2004 ('the 2004 Act')²² states that its purpose is the protection of whistleblowers from dismissal and other unfavourable treatment and 'to promote compliance with the laws and regulations concerning the protection of life, body, property, and other interests of citizen'.²³ The subject matter of a worker's²⁴ report covered by the 2004 Act includes events that are about to occur not

²⁰ H. Mizutani, 'Whistleblower Protection Act', (2007) 4(3) Japan Labor Review 95-120, 95.

²¹ L. Wolff, 'New Whistleblower Protection Laws for Japan' (2004) 17 Zeitschrift fur Japanisches Recht [Journal of Japanese Law] 209.

²² Act No 122 of 2004 entered into force on 1 April 2006.

<http://www.cas.go.jp/jp/seisaku/hourei/data/WTA.pdf> -- unofficial translation into English. There is a précis on the rationale and on the 2004 Act under 'Consumer Policy Regime in Japan' published by the International Affairs Office Quality of Life Policy Bureau, Cabinet Office September 2006 at <http://www.consumer.go.jp/english/cprj/>. Also for a comparison with other jurisdictions see Wolff, (n. 18).

²³ Continuing: 'and thereby to contribute to the stabilization of the general welfare of the life of the citizens and to the sound development of socioeconomy' (Article 1 2004 Act). Whistleblowers in the act are 'workers' as per Article 9 of the Labor Standards Act (Act No 49 of 1947); they must communicate a 'Reportable Fact' regarding a 'Business Operator' to an 'Administrative Organ' with power to sanction the Business Operator – Article 2(1); Article 10 prescribes measures that the Administrative Organ must take in response, investigations and appropriate measures (Article 10(1)) and the application of criminal procedures (Article 10(2)) where relevant; as well as the provision of information by the Administrative Organ to the Whistleblower (Article 11).

²⁴ Board members and company directors, who are also board members, are not covered on the grounds that they do not receive instructions from an employer; they are governed by the Companies Act – Mizutani (n.20), 103. However, directors, who serve concurrently as employees as is commonly the case in Japan,

only those that have occurred (Art 2(1)). In order to be covered the reported fact must be of a criminal nature or satisfy one or more of a variety of considerations in a broadly drafted, indicative list.²⁵

Article 3 invalidates dismissal in case of whistleblowing provided that the reported event does occur or the worker satisfies a variety of conditions regarding knowledge and belief about the reported fact (Art 3(iii) a-e). Article 4 proscribes the cancellation of the contract of a ‘dispatched worker’ on the basis of whistleblowing;²⁶ dispatched workers are temporary workers employed by an outside agency, where the principal employer subcontracts out for additional temporary labour.²⁷ Article 5 prohibits ‘disadvantageous treatment’ giving examples of ‘demotion’ or ‘a salary cut’ (Section 1).²⁸

Notwithstanding the requirement of reporting to an Administrative Organ, Article 9 creates a duty for companies to respond to written complaints from worker(s) ‘that the business operator has taken measures to stop the Reportable Fact or other necessary measures.’ This implies the duty to take such measures. However, in cases of confidential or third party reporting, it (impliedly) does not apply unless in the latter case the communication is to be intermediated.²⁹

are deemed workers and therefore covered despite their formal status as directors – Koueisya Incident, Supreme Court, First Petty Bench, 9 February 1995, *Hanrei Jibo* [Law Cases Reports], no 1523:149.

²⁵ Or the ‘protection of interests such as the protection of individuals’ lives and bodies, the protection of interest of the consumers, the conservation of the environment, the protection of fair competition, and the protection of citizen’s lives, bodies, property and other interests’ (Article 2(3)i). This section also cross-refers to an ‘attached list’ of other statutes and a residual clause restating the interests cited in the previous footnote, from (Article 2(3)i).

²⁶ This type of worker is defined with reference to statute at Article 2(1)ii.

²⁷ K. Shire and D. Van Jaarsveld, ‘The Temporary Staffing Industry in Protected Employment Economies: Germany, Japan and the Netherlands’, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126820.

²⁸ Article 6 deals with matters of construction, and 7 deals with ‘National Public Employees’ as defined with reference to statute cited in the article.

²⁹ Although there is no indication of this in the statutory language.

There is a countervailing pressure incorporated into the 2004 Act: a section that is evidently not intended to protect whistleblowers, but rather to prevent frivolous claims, which is in itself a reasonable policy goal; Article 8 stipulates that any whistleblower ‘shall make efforts not to damage the justifiable interest of others and the public interests’. Due to the broad drafting, however, this article could be used by accused companies to find fault with whistleblowers’ claims and by doing so attempt to deny them the protections afforded at Articles 3-5.³⁰ Arguably, it is likely to discourage whistleblowing even where a complaint may be meritorious, should the individual in question have (as is likely often the case) any doubt about their information or evidence, or about the consequences (for the company) of reporting it. For example, a purely financial scandal is a more difficult case than one where lives or human health are at risk; in the latter there is no reasonable public interest argument opposed to reporting. However, reporting a financial scandal, even a financial crime, will (at least in the short term) cause the share price to drop (among other things), harming investors which may include a broad swath of the general public, for example if institutional investors in the company include pension funds.

Regarding securities and publicly listed companies specifically, in June 2006 the Diet (the Japanese Parliament, or Congress) passed a law similar to the US Sarbanes-Oxley Act, nicknamed J-SOX: the Financial Instruments and Exchange Act of 2006 (‘the

³⁰ Mizutani (n.20), 101, cites Osaka Izumi Co-operative Society (Whistleblowing) Incident, Osaka District Court, Sakai Branch Judgment, June 18 2003, Rodo Hanrei [Labor Reports], no.855:22, to the effect that the findings regarding the report are relevant to how the court assess wrongfully damaging the company: if the claims made are false or unreasonable, then it has a significant impact on the reputation and credibility of the company, whereas if true it ‘may offer a chance for the organization to ameliorate its management, method, etc.’ and if the truth is damaging to the company ‘it is reasonable to interpret that even if the whistleblowing injured the organization’s reputation, credibility, etc. the organization may not dismiss the whistleblower in a disciplinary action for the damage made to the organizations reputation, credibility, etc.’

2006 Act’).³¹ The 2006 Act set out financial reporting requirements and enhanced criminal penalties for misreporting. Regarding provisions of Sarbanes-Oxley specific to whistleblowing, there is in Japan no counterpart to the US Securities and Exchange Commission (SEC) or to its centralised Office of the Whistleblower. Instead the ‘Administrative Organs’ references in the 2004 Act are the recipients of reporting.³² Some Japanese companies have set up ‘risk hotlines’ structures whereby employees may report to third parties, typically lawyers, who investigate claims and in turn notify company compliance officers of findings.³³

A Council of Experts³⁴ has been charged with drawing up a Corporate Governance Code³⁵ which employs the familiar ‘comply or explain’ method; it is voluntary in nature and is expected to come into force within months. It includes a principle on whistleblowers:³⁶ given its broad, but succinct, formulation it is more of a

³¹ Act No 65 of 2006 and the Act for the Development, etc. of Relevant Acts for Enforcement of the Act for the Amendment of the Services and Exchanges Act, etc (2006 Act No 66); <http://www.fsa.go.jp/en/policy/fiel/index.html>. According to Mizutani, ‘Sarbanes Oxley is an inspiration for institutionalizing whistleblowing in Japan’, see Mizutani (n.20), 96.

³² Or as the discussion above indicated the company itself, viz. Article 9.

³³ For example, the institutional architecture set out by Toshiba:

http://www.toshiba.co.jp/csr/en/performance/fair_practices/compliance.htm. This webpage includes some figures of reports received – in FY 2013 (April 2012-March 2013), 4 reports received by the attorney’s office, 3 of which were anonymous, whereas 57 (32 anonymous) were received by the internal secretariat, indicating either a general preference to report internally or conversely a reluctance to report externally relying on the reporting architecture in place.

³⁴ A history of this Council (and current composition and membership), which was jointly established by the Tokyo Stock Exchange (TSE) and the Financial Services Agency (FSA) is available at <http://www.jpx.co.jp/english/equities/listing/cg/index.html>. Minutes are available at <http://www.fsa.go.jp/en/refer/councils/corporategovernance/index.html>

³⁵ Japan’s Corporate Governance Code [Final Proposal] Seeking Sustainable Growth and Increased Corporate Value over the Mid to Long Term, The Council of Experts Concerning the Corporate Governance Code (March 5, 2015), 1-39.

³⁶ Principle 2.5 ‘Companies should establish an appropriate framework for whistleblowing such that employees can report illegal or inappropriate behavior, disclosures, or any other serious concerns without fear of suffering from disadvantageous treatment. Also, the framework should allow for an objective assessment and appropriate response to the reported issues, and the board should be responsible for both establishing this framework, and ensuring and monitoring its enforcement’. Supplementary Principle (2.5.1) recommends the establishment of a third party or outside contact independent of management and measures to preserve confidentiality and ‘prohibit any disadvantageous treatment’.

reminder of legal obligations under the 2004 Act than it is an innovation or fortification of the protection of whistleblowing.³⁷

Criticising the 2004 Act

It should be noted that the 2004 Act does not penalise offending companies;³⁸ this feature limits its effectiveness as a deterrent against retaliation on the part of an employer. Also, in order to benefit from the protection of the Act, the whistleblower must remain at the company;³⁹ in practical terms this increases the onus on a worker and this may discourage workers from coming forward in the first place. It also increases the burden upon someone who has come forward, since they will lose any benefit from the protections of the 2004 Act should they change employers.⁴⁰

In the Japanese media there has been some criticism of the 2004 Act and of its implementation. For example, *Mainichi* (Daily) offers the evidence of a Consumer Affairs Agency (CAA) report showing that ‘7% of whistleblowers or those who consulted their bosses or administrative organs about wrongdoing at their workplaces have been dismissed, and 21% have been unfavorably treated or harassed’.⁴¹ The article

³⁷ An additional code relevant to corporate governance is the Stewardship Code. Signatories and guidance regarding which are available at the Financial Services webpage, <http://www.fsa.go.jp/en/refer/councils/stewardship/index.html>

³⁸ Y. Kageyama, ‘Olympus takes whistleblower to highest court Japanese Whistleblower not protected’ *Japan Times*, 29 September 2011. The article details other distressing treatment to which some whistleblowers have been subjected.

³⁹ Ibid

⁴⁰ Even as the reputation for whistleblowing will continue, being a matter of public record once a lawsuit has commenced.

⁴¹ Editorial ‘Strengthen system to protect whistleblowers’ *Mainichi*, 18 August 2014 <http://mainichi.jp/english/english/perspectives/news/20140818p2a00m0na011000c.html>.

also observed that ‘whistleblowers tend to be viewed by their colleagues or employers as traitors’.⁴²

Another CAA report found a case where an anesthetist informed the Health, Labor and Welfare Ministry and senior officials at the hospital where he worked regarding a dentist who had anesthetized patients without having a license to do so, which in one instance resulted in a death. He was forced to resign; the Ministry rejected his complaint on the ground that ‘the Whistleblower Protection Act does not apply to retirees’ and that ‘it is prefectural governments that are authorized by the law to receive complaints from whistleblowers and issue recommendations to or take punitive measures against offenders’. In 2014 an article in the same venue ‘Nagasaki Pref. gov’t passed on names of whistleblowers in power abuse case’, the names of nine whistleblowers who had reported on abuse of power were provided to the human resources department responsible for their employment, in a breach of confidentiality, although not one that led to reprisals.⁴³

Any law, no matter how well constructed, will only be as effective as it is widely known. A 2010 survey by the CAA revealed 65 percent of the 3,000 participants stated they had no knowledge of whistleblower protection legislation; 44 percent said they would not consider reporting malfeasance in their company; the most common reason given for this response was fear of unfair treatment.⁴⁴

⁴² Ibid

⁴³ Ibid

⁴⁴ J. Ryall, ‘Who Guards the Guards?’ *BCCJ Acumen*, undated (2011) <http://bccjacumen.com/features/cover-story/2011/12/who-guards-the-guards/>. The CAA has more recently embarked on an effort to disseminate information, and provide education regarding the 2004 Act - Consumer Affairs Agency report, July 2013, ‘Outline of the Whistleblower Protection Act’ http://www.oecd.org/site/adboecdanti-corruptioninitiative/WhistleblowingInJapan_Tsunoda_CAA_July2013.pdf.

A Sample Legal Victory for a Japanese Olympus Employee

In October 2012 and April 2013, a CAA survey found that national and prefectural governments complied with their duty to maintain a reporting desk (100 percent) and municipalities slightly increased from 47 percent to 49 percent.⁴⁵ It also found there were roughly 3,000 or 4,000 cases in which investigations were undertaken following reporting; the survey does not indicate how many reports were made, nor how many of these or the investigated cases pertained to corporate failures.

In July 2012 the Supreme Court of Japan awarded an Olympus employee named Masahuru Hamada ¥2.2 m (US\$27,500 at the exchange rate of the time) in damages upholding a lower court's decision to restore his position after three (unfavourable) transfers to posts following his reporting regarding the management's improper recruiting of an engineer from a trading partner in 2007. He had demanded ¥10 m. Following the ruling he told NHK (the national public broadcaster): 'I feel very grateful. It was worthwhile that I fought for a long time, I hope the company will tell the truth to the employees about this case'.⁴⁶

In marked contrast to Woodford's case, Masahuru Hamada made a low monetary demand (and won a still smaller award), the case went on much longer and proceeded to trial, and the claimant suffered a number of negative consequences whilst awaiting judgment. He did ultimately keep his job, however. The reasons for the discrepancy between these two cases are certainly attributable to the nature of the malfeasance

⁴⁵ Ibid, 10. For a simplified outline of 'reportable fact' see also at 6.

⁴⁶ 'Olympus losses case against pre-scandal whistleblower' 2 July 2012, <http://phys.org/news/2012-07-olympus-case-pre-scandal-whistleblower.html>. Masahuru Hamada wrote a book in 2012 (untranslated from Japanese) on his experiences – *Confronting the Dark Side of Olympus*, cited by Rosen (n.19), 192.

reported, the rank or position of the whistleblower, and the inability of Hamada to attract the (national and international) attention that Woodford did. However, it remains quite clear that Masahuru Hamada, not Michael Woodford, is the better representative example of the two regarding both whistleblowing in Japan and the remedies available under the 2004 Act.

Countervailing Legislative Pressure and the Advent of Anonymous Online Reporting

Coming into force almost a decade after the 2004 Act, the Act on the Protection of Specially Designated Secrets ('the 2013 Act')⁴⁷ aims to keep confidential information in the exclusive possession of administrative and government bodies; it concerns itself with information the disclosure of which would 'risk of causing severe damage to Japan's national security' (Art 2(4)). The 2013 Act makes provision for more severe penalties⁴⁸ which could – depending upon the exercise of state and prosecutorial discretion – sweep up journalists or private employees (in addition to public workers, who are also covered by the 2004 Act), particularly those working in sensitive corporate sectors, for example IT or military supply or procurement.

Although there are not as yet documented cases of the 2013 Act being used against journalists or whistleblowers, the Act has met considerable popular resistance on civil liberty grounds. Balancing the interests of security and freedom is a perennial

⁴⁷ Act No 108 of 2013; unofficial translation into English available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2231&vm=04&re=02>. A plethora of Japanese and international media have covered the unpopularity and resistance to the Act, and explored the political background – US encouragement and approval for the Act. For example, no author 'Japan enacts controversial state secrets law', RT.com, 7 December 2013, <http://rt.com/news/japan-enacts-state-secrets-law-871/>.

⁴⁸ Chapter VII, Articles 23-27. In 2014, 382 secrets were designated for purposes of the Act, 'Ministries designated 382 secrets last year', *Japan Times* 9 January 2015.

challenge for any society and this article will not attempt to say how that balance should be struck in Japan, but it would at least be observed that there is a tension between the 2013 Act and the 2004 one and the core purposes of each, as there is also between the legitimate value of secrecy (corporate or governmental) and the value of disclosure from within as well as the corollary of it: the protection of those who do document and disclose wrongdoing, whether in the public or private sector.

One year after the passage of the 2013 Act, in an example of the societal resistance to the increase in governmental secrecy, a Japanese economics professor developed an anonymous webpage for whistleblowers, suitably enough called ‘whistleblowing.jp’.⁴⁹ Unlike Wikileaks, the site will not publish its own information but will rather serve as a clearing house for reports from others.⁵⁰ It is too early to judge the effectiveness of this site and it would also be premature to try to assess how (or whether) it will assist in investigating and substantiating claims (and revealing corporate or other malfeasance), or whether its creator may be subject to prosecution (possibly under the 2013 Act itself).

Reflecting on Japan’s reality

Although the preceding case studies and analysis of Japan has not attempted a full-scale ethnography of corporate culture in that country it is apparent that practices and attitudes do pose some unusual, if not unique, challenges for a prospective whistleblower.

⁴⁹ T. Osaki, ‘Scholar offers secure way for employees to blow the whistle’ *Japan Times* 22 January 2015. See also T. Kasai, ‘Japanese activist challenges secrets law with whistleblower tool’, *Reuters*, 19 December 2014, <http://www.reuters.com/article/2014/12/19/us-japan-secrets-activist-idUSKBN0JX14F20141219>. The site is secured with TOR (The Onion Router).

⁵⁰ Kasai, *ibid.*

It is also apparent that consciousness both of the value from a policy and economic standpoint of freedom to report wrongdoing (or preferably to constructively discuss issues before they reach an extreme or criminal level within a company) and of the necessity of offering effective legal protections to whistleblowers is on the increase, albeit slowly, in Japan. As in other areas (such as the value of foreign directors and board members), internationalisation and Japan's relationship with and attitude towards the world and emerging 'best practices' are integral elements in this change.

Led by the government and by public responses to corporate crimes when they have been discovered (and publicised by the media) the government of Japan has consulted the UK and US models in particular and tailored the 2004 Act, inadequate though it may be in some respects as elaborated above, to the specificities of the Japanese company, and also tailored it to Japanese culture. The absence of monetary incentives is one example: should a whistleblower reap a financial reward, this would likely discredit their motives in the eyes of others.

Such an approach in the final analysis makes demands upon workers and equally upon management and their superiors, and this perhaps remains the weakest component of the system designed for the protection and the maximisation of the value of whistleblowing in Japan. As is apparent from the continuing anonymity of the Japanese workers, who blew the whistle on the *tobashi* scheme of Olympus, the confidence to rely upon legal rights and protections is still not what it would need to be to encourage a more openly and more vocally critical engagement between workers and their corporate employers.

B) Blowing the whistle in the UK: is there something missing?

Unlike Japan, the UK lacks any recent and famous corporate scandal comparable to that of Olympus. There is nevertheless ample evidence regarding the potential importance and efficacy of whistleblowers. The UK boasts the reputation of being the most competitive global financial hub and a pioneer in the area of corporate governance regulation. However, a number of cases have surfaced in recent years regarding questionable practices that resulted in the maltreatment of patients in NHS institutions. Although the list is not conclusive, as there are no Court of Appeal or Employment Appeal Tribunal's decisions examined, an independent review was commissioned with the aim of providing advice and recommendations for the creation of a more open and honest reporting culture in the NHS.

This part of the article will commence with an overview of the most notable cases involving whistleblowers within the NHS before moving on to consider the existing legislative framework, including the Employment Rights Act 1996 (ERA 1996) and the Public Interest Disclosure Act 1998 (PIDA 1998). Then, the treatment of this jurisdiction will take up the dilemma that whistleblowers face and the sometimes painful balancing exercise that they have to perform before they decide whether or not to speak out about what they have witnessed. The last section will indicate the likely impact that culture has on the attitude of potential whistleblowers and of their willingness to attract attention and possible adverse consequences for the sake of the public interest and the righting of existing (and the prevention of future) wrongs.

NHS: A Domino of Cases

The following cases represent only a small fraction of individuals who decided to speak out and raise concerns over serious issues that came to their attention during their period of service in the NHS, including declining standards of care, diminishing patient safety and the existence of staff bullying. Although they had no ulterior motives and they simply wanted to put an end to a series of wrongdoing, instead of praise or recognition, the vast majority of these people became subject to harassment, threats, and retaliatory actions in some cases rising to the level of being dismissed from their employment. This set of cases will be examined for the purpose of identifying common patterns of behaviour and comparing the treatment of similar cases by the relevant authorities. It will also assist in evaluating the degree to which the existing legislative framework has in fact achieved its goals and where it might be further improved.

The NHS has often occupied a central focus of media and societal attention in the past and it rose to particular prominence following structural changes implemented at the end of the 1980s, at which time there were debates about upholding a right to free speech in the public sector. Debates also emerged regarding the relations between NHS staff and the media, and the use of confidentiality clauses in employment contracts.⁵¹ The cases of Helen Zeitlin and Graham Pink garnered considerable publicity. This was the first time that the treatment of whistleblowers in the NHS was raised, but evidently conditions were not yet ripe and no decisive actions were taken; this may have been a result of the political sensitivity surrounding the NHS and its provision of health services and medical treatment for the population. The Public Interest Disclosure Act 1998 was the outcome of a long process of reflection and encouraged workers with legitimate concerns to speak

⁵¹ See L. Vickers, *Protecting Whistleblowing At Work*, (The Institute of Employment Rights, 1995)

up. However, as will be shown below, this was not the end of unfair dismissal cases, retaliatory practices and reprisals against whistleblowers.

Dr Hayley Dare was dismissed after 20 years working in the NHS for raising concerns over patients' safety and care, and staff welfare. In addition, after she raised concerns with her employer she was asked to pay more than £93,000 in legal costs for acting 'vexatiously, abusively, disruptively or otherwise unreasonably'⁵² and for failing to act in good faith – as was the legal requirement at the time. There was a lacuna in the law that prevented her claims from being considered, as they were not deemed to have been made in good faith, although this condition for reporting has since been removed.⁵³ Whilst the West London Trust acknowledged that Dr Dare's claims were in fact made in good faith, she never received a full apology; there was no response in relation to her concerns about safety and care or to her allegations of staff bullying and harassment.⁵⁴ It was not surprising that the 2014 NHS staff survey found that the Trust was below the national average and indeed in the most poorly rated 20 percent of all mental health trusts in a number of areas.⁵⁵ This was confirmed by the 2015 Quality Report, which identified that the culture and the governance of the organisation required improvement.⁵⁶

Dr David Drew was dismissed after 37 years in service for gross misconduct and insubordination, after expressing serious concerns about the treatment of a young boy in

⁵² A. Payne, J-P. Waite and J. Dixey, *The Employment Tribunals Handbook: Practice, Procedure and Strategies for Success*, (3rd ed., Bloomsbury, 2011), 309.

⁵³ Section 18 of the Enterprise and Regulatory Reform Act 2013 removed the requirement that a worker or employee must make a protected disclosure 'in good faith'. Instead, tribunals will have the power to reduce compensation by up to 25 percent for detriment or dismissal relating to a protected disclosure that was not made in good faith.

⁵⁴ Witness Statement of Dr Hayley Dare in the Watford Employment Tribunal (14 September 2014), <http://www.lgcplus.com/Journals/2014/10/07/y/r/q/Hayley-Dare-Witness-Statement.pdf>

⁵⁵ See <http://www.nhsstaffsurveys.com/Page/1042/Past-Results/Staff-Survey-2014-Detailed-Spreadsheets/>

⁵⁶ Care Quality Commission, West London Mental Health NHS Trust Quality Report, http://www.cqc.org.uk/sites/default/files/new_reports/AAAD5828.pdf

Walsall Manor Hospital and in relation to the failure to refer the case to the social services. Kim Holt, a consultant paediatrician, found herself in a very similar situation when her complaints about poor record-keeping and under-staffing at St Anne's Clinic in North London were ignored. She claimed that the management offered her £120,000 to withdraw her complaints in connection with the death of a 17-month old infant.⁵⁷ The Clinic denied the alleged offer of payment. However, in 2011 Ms Holt received formal apologies from Great Ormond Street Hospital and Haringey Primary Care Trust, which co-managed St Anne's Clinic. In each of the two cases mentioned in this paragraph, the authorities failed to detect and prevent an emergent risk, which resulted in patient mistreatment and in the latter case in the loss of life. In addition, the authorities failed to send a message that the system for receiving and assessing whistleblowers' complaints must be improved so that similar cases would be prevented and reduced or altogether eliminated in the future. In January 2015, the Health Select Committee stated that 'the treatment of whistleblowers remains a stain on the reputation of the NHS'⁵⁸ and underlined the legal right for staff to raise concerns about safety, malpractice or other wrongdoing without suffering any detriment, as per the NHS Constitution.⁵⁹

Annabelle Blackburn, a practice nurse for over 30 years, was blacklisted and forced to work in another county after warning the NHS Oxfordshire Primary Care Trust about unprofessional conduct at a General Practice surgery in Oxfordshire. The conduct included the failure to respond to a very large number of emails and a failure to report

⁵⁷ C. Dyer, 'Great Ormond Street and Baby P: was there a cover up?' (2011) *BMJ*, vol 343, 286, 287.

⁵⁸ Health Select Committee, *Complaints and Raising Concerns*, HC 350 2014-15, 21 January 2015, 3, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhealth/350/350.pdf>. See also Thomas Powell, 'NHS whistleblowing procedure in England', Briefing Paper, CBP06490, 18 September 2015.

⁵⁹ The NHS Constitution for England, <https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england>

test results. Despite the fact that she lost the employment case that she lodged, alleging constructive dismissal, the Tribunal hearing her claim acknowledged that the Trust had failed to consider and to act upon her concerns.⁶⁰

In a similar manner Professor Narinder Kapur was dismissed after raising issues about patient safety and poor standards of care resulting from a staff shortage. The Employment Tribunal talked about ‘an irredeemable breakdown in trust, confidence and communication’ as a result of disagreements over management style and working methods, without clarifying whether the act of whistleblowing was the (principal) reason for any detriment suffered.⁶¹ However, the Tribunal expressly and unreservedly condemned the way in which the NHS dealt with Professor Kapur’s allegations.⁶²

In this case and in the case of Annabelle Blackburn, there is a notable change in the approach adopted by the Tribunal; although the judges did not or perhaps could not rule in favour of the claimants on the basis of the employment law provisions, they used their authority to reprimand the employing institutions in the NHS. It is a positive development that the Tribunals went beyond the narrow ambit of their duties to adjudicate employment claims and made statements regarding the overall conduct of the defendants. Such practices can definitely result in positive change as they provide guidance to employers at least in the same sector, and may discourage repetitions of past practices that resulted in unfavourable Tribunal treatment.

⁶⁰ P. Sawyer and L. Donnelly, ‘Doctor Ignores Urgent Emails, Fails to Tell Patients of Their Cancer’, *Business Insider*, 06 October 2013, <http://www.businessinsider.com/whistleblower-doctor-ignores-urgent-emails-fails-to-tell-patients-of-their-cancer-2013-10?IR=T>

⁶¹ Clinical Human Factors Group, ‘Patients First: Submission to the Whistleblowing Commission’, June 2013, 39, http://www.chfg.org/wp-content/uploads/2013/07/Whistleblowing_Commission_submission_Final_-2.pdf

⁶² Cambridge University Hospitals, ‘Statement on Narinder Kapur employment decision’, 10 July 2012, <http://www.cuh.org.uk/news/statement-narinder-kapur-employment-decision>

There are also several cases where the Tribunal found in favour of whistleblowers. Dr Raj Mattu was dismissed following an 8-year suspension after he had raised concerns about patient safety and cost-cutting practices in the Walsgrave Hospital in Coventry. Dr Mattu persisted and, following the longest-running and most expensive whistleblowing case in the NHS history, he won his case for unfair dismissal before the Employment Tribunal in April 2014.⁶³ Due to the comparatively recent date of the decision, however, it is still too early to treat this case as a turning point in the history of whistleblower protection. It should also be remembered that the positive outcome came only after a protracted, expensive and onerous process.

In another controversial case, Mrs Sharmila Chowdhury, a radiology service manager, was suspended as a result of an ungrounded allegation of fraud made against her by a colleague whom she had reported for breach of patient safety. She was then dismissed, after service of 27 years. She had repeatedly informed her superiors regarding incidents of dishonesty and moonlighting involving senior doctors at Ealing Hospital.⁶⁴ Although the Employment Tribunal ordered the reinstatement of Ms Chowdhury, her post was made redundant due to new technology and after almost two years she reached an out-of-court settlement with Ealing Hospital NHS Trust. A large proportion of that settlement went to legal fees and Ms Chowdhury had great difficulty securing another job in the health sector.⁶⁵ This case shows the extent to which retaliatory practices by an employer can affect the whistleblowers, even in spite of a ruling in favour of the worker

⁶³ *Mattu v The University Hospitals of Coventry and Warwickshire NHS Trust* [2011] EWHC 2068 (QB)

⁶⁴ P. Sawyer and L. Donnelly, 'Meet the NHS whistleblowers who exposed the truth', *The Telegraph*, 11 February 2015, <http://www.telegraph.co.uk/news/health/news/11398148/The-NHS-whistleblowers-who-spoke-out-for-patients.html>

⁶⁵ R. Kline and M. Preston-Shoot, *Professional Accountability in Social Care and Health: Challenging Unacceptable Practice and its Management*, (SAGE, 2012), 181.

by the Employment Tribunal. It is important to note that Employment Tribunal rulings are not binding and those who prove unfair dismissal do not have a statutory right to insist on reinstatement or reengagement. Equally, an employer who refuses to re-hire a worker/whistleblower when ordered to do so by a tribunal, does not face any punitive damages nor any criminal sanction. The difficulties that many whistleblowers face in finding a job in the same sector in which they worked, before losing or leaving their job, highlights the effect that whistleblowing has on the reputation of a worker and the negative impact it can have on their employability⁶⁶ and upon their professional prospects.

Clearly no legislation can prevent or ever fully compensate for these forms of adverse treatment. It becomes apparent that the system of whistleblower protection is insufficient in providing all the necessary safeguards to those who decide to speak out. There is a degree of hypocrisy in the conduct of modern corporations when they treat whistleblowers as trouble-makers and *personae non gratae* when what they have done is little more than assist the authorities in performing their duties and when they have helped to expose irregularities. Instead of treating such workers as examples and using them as evidence of the commitment to transparency and accountability, companies and management teams seem to favour instead a culture of silence and not rocking the boat rather than a culture of honesty and openness.⁶⁷

⁶⁶ M. Ramsey, 'Blowing the Whistle at Work', (2013) 37(5) Company Secretary's Review 33, 34.

⁶⁷ See B. Bjørkelo, S. Einarsen, M.B. Nielsen and S.B. Matthiesen, 'Silence is Golden? Characteristics and Experiences of Self-Reported Whistleblowers', (2011), European Journal of Work and Organizational Psychology, 20, 206-238. See also J. Blenkinsopp and M.S. Edwards, 'On Not Blowing the Whistle: Quiescent Silence as an Emotion Episode' in W.J. Zerbe, N.M. Ashkanasy and C.E.J. Härtel (eds.), *Research on Emotion in Organizations: Emotions, Ethics and Decision-Making* (Emerald, 2008), 181-206.

Ms Kay Sheldon was acting non-executive director of the Care Quality Commission. However, when she raised concerns over the concealment of failings during the Mid Staffordshire NHS Foundation Trust Public Inquiry, she was immediately suspended and her statements discredited by association with her history of depression and the possibility that she could be suffering from paranoid schizophrenia. She was also invited to sign a gagging order. She refused. This case highlights the use of gagging orders or contractual clauses, which are commonly used in similar cases. A gagging clause is a confidentiality clause incorporated into a contract. It takes effect only at the end of an employment relationship. It is intended to prevent future disputes between the (former) employee and employer, and it is usually accompanied by a payment to the worker, who waives his or her entitlement to pursue any legal claims he or she may have against the employer.⁶⁸ In other words, a gagging clause is part of a compromise agreement that aims to protect a certain party's interests – invariably those of the employer. A gagging clause is unenforceable insofar as it purports to preclude a worker from making a protected disclosure.⁶⁹ However, there have been reports of over 400 compromise agreements that outlined special severance payments for departing NHS staff between 2008 and 2011; in monetary terms these summed to a total of £14.7 million of taxpayers' money spent on compromise agreements, most of which included gagging clauses to silence whistleblowers.⁷⁰ Such practices go far beyond the safeguards

⁶⁸ D. Pyper, 'Whistleblowing and Gagging Clauses: The Public Interest Disclosure Act 1998', (2014) Briefing Paper No 00248, House of Commons Library, 18.

⁶⁹ Section 43J of the Employment Rights Act 1996. See also T. Miette, *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste and Abuse on the Job*, (Westview Press, 1998).

⁷⁰ NHS 'gagging clauses' must end, says health secretary, BBC News, 14 March 2013 (<http://www.bbc.co.uk/news/health-21780425>). See also 'Former Mid Staffs chief executive may have been 'gagged' when he resigned, MP claims', The Telegraph, 26 March 2013

necessary to protect confidentiality of disclosures and whatever other interests they were intended to protect. The intended outcome cannot be to prevent workers from bringing poor standards or actual violations to the attention of the public.

The use of gagging clauses and compromise agreements attracted significant attention recently in relation to the case of Gary Walker. Mr Walker, former Chief Executive of the United Lincolnshire Hospitals Trust, was dismissed for gross professional misconduct as a result of allegedly swearing at a meeting. He agreed to sign a compromise agreement containing a gagging clause, yet subsequently decided to break the deal and spoke about his experience at the NHS. He had repeatedly warned about extreme pressure to meet set targets for non-emergency patients, and about the resulting poor treatment of patients and the consequent risk of another scandal like that which had occurred at the Mid Staffordshire NHS Foundation Trust.⁷¹ Instead of any form of positive action in response to his concerns, he was threatened by the East Midlands Strategic Health Authority and told to make no reference to capacity issues and problems associated with hitting targets. The ‘culture of threats and intimidation’⁷² and the compromise agreement were only the tip of the iceberg in Walker’s case, as he is still being treated in a way that clearly conflicts with existing legislation and the Government’s commitments attendant to it.

Mr Roger Davidson, former head of media and public affairs for the Care Quality Commission, was dismissed after revealing that a quarter of NHS trusts had failed to

(<http://www.telegraph.co.uk/news/health/9954044/Former-Mid-Staffs-chief-executive-may-have-been-gagged-when-he-resigned-MP-claims.html>)

⁷¹ Among others, ‘Mid Staffordshire Trust Inquiry: How the Care Scandal Unfolded’, The Telegraph, 6 February 2013 (<http://www.telegraph.co.uk/news/health/news/9851763/Mid-Staffordshire-Trust-inquiry-how-the-care-scandal-unfolded.html>)

⁷² House of Commons - Health Committee, *After Francis: Making A Difference – Third Report of Session 2013-14*, (The Stationery Office Limited, 2013), 63 (Health Committee - Evidence)

meet basic hygiene standards and that there was an orchestrated attempt to limit negative publicity about the NHS.⁷³ He was forced to sign a gag agreement when he departed. However, the Francis inquiry into the failings at Mid Staffordshire NHS Foundation Trust confirmed the details of political pressure exerted from within governmental circles and attempts to suppress negative publicity about the NHS prior to the 2010 elections. Roger Davidson is now the Head of Media at NHS England. This resolution contrasts sharply with the outcome experienced by Mr Gary Walker, who never succeeded in getting his job back, in spite of his letter/request to Jeremy Hunt, ex-United Lincolnshire Hospitals Trust boss as well as the chief executive of NHS England, Simon Stevens, and shadow Health Secretary Andy Burnham. Roger Davidson's case is a useful illustration of how the impact of a whistleblower's conduct can be maximised and how rewarding a whistleblower can be an effective means of raising awareness and giving incentives to whistleblowers to come forward.

At the same time, there is another category of whistleblowers who were treated in a totally different way and whose experience bears no resemblance to the traumatic experiences of the individuals in the cases mentioned above. For instance, Ms Helene Donnelly, who raised more than 100 complaints about poor care and record falsification during her service as a nurse at Stafford Hospital's Accident and Emergency, was appointed an Officer of the Most Excellent Order of the British Empire (OBE) in recognition of her role in supporting hospital staff, raising concerns and improving care for patients. She also became an ambassador for cultural change at the Staffordshire and Stoke-on-Trent Partnership NHS Trust, assisting the Department of Health with

⁷³ Health Committee, 'Written evidence from James Titcombe (CQC 05)', 23 August 2013, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/526-i/526we06.htm>

whistleblower training for NHS staff.⁷⁴ It would be ideal to have an increasing number of examples of this kind, as these practices send an undisputable message that there is recognition for whistleblowers who are brave enough to step up and to follow their conscience. It is not about the actual benefit received, but primarily about the fact that society has started to reward law-abiding citizens with ethical standing and a moral compass, especially in the UK, a country that was amongst the first that offered legal protection against reprisals resulting from whistleblowers' disclosures.

PIDA 1998, a Bundle of Reports and a Law Reform to Come

In the UK the protection of workers, who make whistleblowing disclosures, is governed by Pt IVA of the ERA 1996, inserted by the Public Interest Disclosure Act 1998 as well as the provisions of the PIDA 1998, as updated through the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) and the whistleblowing provisions of ERA 1996.

Unless there is any express provision in the contract of employment which removes the implied duty, workers are subject to a legal duty to maintain confidentiality; this duty prohibits them from disclosing certain types of information that they have obtained in the course of their employment. If the information disclosed by a whistleblower is not of a kind protected by the ERA 1996 and the PIDA 1998, the worker is not protected and is liable to be found in breach of this duty. The common law offers limited protection in the event of such breaches, doing so by means of the 'public interest

⁷⁴ Staffordshire and Stoke-on-Trent Partnership NHS Trust, 'Trust Cultural Change Ambassador Recognised in Queen's New Year Honours', 31 December 2013, <https://www.staffordshireandstokeontrent.nhs.uk/BoardMeetings/HeleneDonnellyobe.htm>

exception'. This exception provides only a defence to legal proceedings in cases of alleged breach of the duty of confidentiality; it does not extend to protect workers from suffering detriment at work, or dismissal, for having made a disclosure, as was the rationale for enacting the PIDA in 1998.

PIDA 1998 represents an attempt to promote and to protect open whistleblowing by means of a tiered disclosure system,⁷⁵ which emphasises internal reporting, regulatory oversight and wider accountability. The overarching aim was clearly to prevent wrongdoing and to combat corruption within companies, with the ultimate goal of setting a regulatory benchmark internationally. As the cases mentioned above have indicated, the UK regime is theoretically sound and efficient, but in practice there are loopholes and escape routes, the accumulated effect of which is a reduction in the likelihood of whistleblowing occurring.

Nevertheless, recognition should be given to the government for its efforts to actively respond to recent developments and existing needs and shortcomings. The government has been engaged in a number of initiatives to update and strengthen whistleblower protection. As mentioned above in this section, the ERA 2013 underlined the (new) public interest orientation of the UK whistleblower regime, as distinguished from that existing previously, which was guided by a good-faith standard. There is also now vicarious liability for employers in case a worker is subjected to detrimental treatment by co-workers after making a protected disclosure. This new addition targets

⁷⁵ Public Concern at Work, 'Is the Law Protecting Whistleblowers?: A Review of PIDA Claims', (<http://www.pcaw.org.uk/files/PIDA%20REPORT%20FINAL.pdf>). See also A. Myers, 'Whistleblowing—The UK Experience', in R. Calland and G. Dehn (eds), *Whistleblowing Around The World: Law, Culture and Practice*, (ODAC, PCAW, 2004) and M. Cover and G. Humphreys, 'Whistleblowing in English Law', in G. Vinten (ed.), *Whistleblowing: Subversion or Corporate Citizenship?* (Sage Publications, 1994).

retaliation tactics and the victimisation of whistleblowers within their working environment; it is intended to eradicate expressions of bias against whistleblowers. As Alford has argued, ‘the fate of a whistleblower illuminates the problems of our society. Modern organisations do little to foster civil values, but they often seem committed to the destruction of the individual who displays them. In other words, the values of the workplace are undermining the values of the rest of our lives’.⁷⁶

The reforms were not limited to legislative intervention only, but took the form of public inquiries and independent reports.⁷⁷ Initially the focus was the standard of care in the Mid Staffordshire NHS Foundation Trust during the period 2005-2009. In addition to the ‘appalling and unnecessary suffering’ inflicted at Staffordshire hospitals, the government-appointed inquiry talked about failure ‘at every level’ of the health service, giving rise to widespread public concern about the NHS, its model of management and its culture. Robert Francis QC referred to a ‘system which ignored the warning signs and put corporate self-interest and cost control ahead of patients and their safety’ and recommended a radical change of culture in the health service.⁷⁸

⁷⁶ F. Alford, *Whistleblowers: Broken Lives, and Organizational Power*, (Cornell University Press, 2001), 35. See also R. Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (Norton, 1998).

⁷⁷ Indicatively, Commission for Healthcare Audit and Inspection, ‘Investigation into Mid Staffordshire NHS Foundation Trust’, March 2009, (https://www.rcn.org.uk/__data/assets/pdf_file/0004/234976/Healthcare_Commission_report.pdf), A. Clwyd MP and T. Hart, ‘A Review of the NHS Hospitals Complaints System: Putting Patients Back in the Picture’, Final report, October 2013, (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255615/NHS_complaints_accessible.pdf), B. Keogh KBE, ‘Review into the Quality of Care and Treatment provided by 14 Hospital Trusts in England: Overview Report’, 16 July 2013, (<http://www.nhs.uk/NHSEngland/bruce-keogh-review/Documents/outcomes/keogh-review-final-report.pdf>)

⁷⁸ R. Francis QC, Press Statement, 6 February 2013, (<http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/sites/default/files/report/Chairman%27s%20statement.pdf>)

The PIDA 1998 has been quite influential in transforming the perception of whistleblowers from snitches to ‘courageous, public-spirited citizens’ who play a key role in holding companies accountable for their failings.⁷⁹ The introduction of the ERRA 2013 was a welcome addition to the whistleblower protection framework, as PIDA was in need of a makeover, but it was not sufficient to fill all of the gaps.⁸⁰ The most recent addition to the UK regulatory framework came as part of the new EU market abuse regime⁸¹ as EU Member States are required to have the appropriate mechanisms in place for reporting actual or potential breaches to the competent authorities (secure communication channels, follow-up procedures and personal data protection) and for adequately protecting whistleblowers against retaliation or discrimination in the workplace. These provisions together with the rules introduced by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) in October 2015 for the financial services sector⁸² reveal an intention to improve accountability, raise awareness about reporting mechanisms and ultimately initiate a change of culture.⁸³

⁷⁹ J. Gobert and M. Punch, ‘Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998’, (2000) 63(1) *Modern Law Review*, 25-54, 26.

⁸⁰ D. Stilitz, ‘The New World of Whistleblowing: Bringing Back the Public Interest?’ (2013) *Employment Lawyers Association, Annual Conference 22nd May 2013*, 11, (http://www.11kbw.com/app/files/Articles/ELA_Whistleblowing_May_13_Final_1_.pdf)

⁸¹ Article 32 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014) and Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation (OJ L 332, 18.12.2015).

⁸² Financial Conduct Authority, ‘Whistleblowing in Deposit-Takers, PRA-Designated Investment Firms and Insurers’, Policy Statement PS15/24, October 2015, (<https://www.fca.org.uk/your-fca/documents/policy-statements/ps15-24>). See also Prudential Regulation Authority and Financial Conduct Authority, ‘Whistleblowing in Deposit-Takers, PRA-Designated Investment Firms and Insurers’, Consultation Paper FCA CP15/4 and PRA CP6/15, February 2015, (<http://www.fca.org.uk/your-fca/documents/consultation-papers/cp15-04>)

⁸³ C. Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, (Hart, 2015), 524. See also I. MacNeil, ‘Enforcement and Sanctioning’ in E. Ferran, N. Moloney and J. Payne (eds), *The Oxford Handbook of Financial Regulation*, (OUP, 2015), 287.

‘Creating an ethical culture is the only way businesses can position themselves to keep up with the requirements of tighter regulations, transparency and accountability’.⁸⁴ As evidenced by the cases discussed in this section above and the findings of public inquiries, companies continue to adopt retaliatory practices against whistleblowers; blacklisting, intimidation and gagging clauses are also quite common and without clear procedures in place, there is no strong incentive for potential whistleblowers to step up and change the culture of silence. In the same way that the Zeebrugge Ferry and the Piper Alpha disaster or the Clapham Rail crash in the 1980s followed by the Robert Maxwell and the Barings Bank scandals in the 1990s paved the way for the PIDA 1998, the recent NHS cases can be used as catalysts for the necessary change of culture through the injection of integrity, transparency and honesty. To paraphrase the words of Andrew Bailey in his last speech as Chief Executive of the PRA, regulators are not able, and should not try, to determine the culture of firms. They cannot write a regulatory rule that settles culture. Rather, it is the product of many things, which regulators can influence, but much more directly which firms themselves can shape.⁸⁵

Reflecting on the United Kingdom’s Reality

Without going in-depth into a cultural ethnography and an enquiry into the regulatory traditions of the United Kingdom, it is apparent that perceptions of whistleblowers have been gradually changing. It is also widely recognised that whistleblowing is a modern regulatory tool that can help stimulate corrective response to

⁸⁴ *Weiss v United States* 122 F.2d 675, 681 (Ct. App. 5th Cir. 1941).

⁸⁵ Bank of England, Culture in Financial Services – A Regulator’s Perspective’, Speech by Andrew Bailey, City Week 2016 Conference, 09 May 2016, (<http://www.bankofengland.co.uk/publications/Documents/speeches/2016/speech901.pdf>)

corporate wrongdoing, even as it needs to be complemented by efficient legal protections, so that potential whistleblowers are not intimidated, victimised or otherwise discouraged. In 2013 Public Concern at Work found that 22 percent of workers were discouraged from blowing the whistle for fear of reprisals and damage to their careers.⁸⁶ Daniel Ellsberg famously argued that after he blew the whistle his former friends and colleagues regarded him with ‘neither admiration nor censure, but with wonder, as though he were a space-walking astronaut, who had cut his lifeline to the mothership’.⁸⁷

In contrast to the case of Japan, change in the UK will not come as a result of the interaction with emerging ‘best practices’ from abroad, but from the realisation that the current regime fails to fulfil its aims. Such realisation is of paramount importance, because it allows time for planning reforms and the ability to be pro-active rather than merely reactive. The changes introduced through the ERRA 2013 illustrate this very point and show that the UK government has the ability to identify shortcomings and to address them appropriately. There is still much room for improvement of the regulatory framework, depending on the direction that the government wishes to follow, for instance, making whistleblowing procedures mandatory, appointing a Whistleblowing Ombudsperson; placing the burden of proof throughout on employers who impose a detriment; introducing criminal sanctions for retaliation; removing Tribunal fees or providing legal aid.

⁸⁶ <http://www.pcaw.org.uk/files/PRYouGovFINAL%202013.pdf>

⁸⁷ Alford (n. 76), 5. See also D. Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers*, (Viking Press, 2002).

However, as recently highlighted by the Francis Report,⁸⁸ the focus of change should be in the culture, both within individual companies and within the business community in general. The value of whistleblowing in the UK will be enhanced if there is more active involvement of companies, and management in particular, in creating the right environment for whistleblowers to operate. Internal reporting, and whistleblowing on individual initiative, are in line with the UK corporate culture and can be the two basic pillars upon which the new era of whistleblowing will be based in the aftermath of the recent NHS cases. In a manner similar to Japan, the UK culture suggests receptivity towards a more ethical approach to whistleblowing, in contrast with the US where a system of monetary reward appears to be more apt. Both the UK and Japan exhibit the effectiveness of individual initiative and sensibility rather than reliance on a bounty – which might undercut the force of whistleblowers’ disclosures.

There are numerous examples of cases where the law in theory is different from the law in practice and the application of certain provisions fails to do justice and ensure adequate protection. The starting point is always the assessment of the legislative framework, its effectiveness and its fitness for purpose. If it is found that the legislative framework is well-designed without notable gaps or omissions, then the emphasis should be placed on the implementation of the rules either because it is defective or it fails to bring the expected outcomes due to factors not related to the letter of the law and this is where the cultural element is added in the equation.

⁸⁸ R. Francis QC - The Mid Staffordshire NHS Foundation Trust Public Inquiry, ‘Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry’, February 2013, HC 947, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279124/0947.pdf

Stronger protection in practice, not only on paper, is the missing piece of the regulatory jigsaw puzzle in the UK; this is why independent inquiries and reports make extensive reference to the role of culture and highlight the transformation of culture from one of silence and intimidation to one of openness and respect for divergent opinions. Such a transformed culture will encourage an improved engagement between workers and companies and will significantly improve corporate governance, either through more transparency or through a more efficient response to disclosures.

It is not easy to draw parallels between the UK and Japanese corporate cultures due to their diametrically different points of departure and their diverse legal and social traditions. However, with regard to whistleblowing, it can be argued that they have more similarities than might initially be apparent. Although the same set of rules would not be appropriate for both countries, each country can benefit from the other's experience as they work to change long-established cultures and perceptions of whistleblowing, thereby encouraging fearless and open reporting with all the benefits flowing therefrom not only to whistleblowers, but to companies and society at large.

Concluding Remarks

This article's selection of some recent examples of whistleblowers in Japan together with their treatment by employers, regulatory authorities, the media and the public highlight the need for further study of both the corporate culture and national or

regional culture generally in engaging with issues of whistleblowing and the part it does or does not, and may or may not, play in corporate governance and public policy.⁸⁹

Whistleblowing is a rather complex legal construction, and its effectiveness is dependent upon the wider social setting in which it takes place.⁹⁰ Cultural differences play a central role in the understanding of whistleblowing as a phenomenon and its perception by companies, employees and regulators. A wide range of culture-specific factors need to be taken into account during the process of formulating the rules and the procedure for the expression of concerns and protected reporting. It is important for potential whistleblowers to know that speaking up will make a difference, that their concerns will not be ignored, that they are not going to be unduly prejudiced or victimised and that they will receive recognition rather than retaliation, praise instead of reprisals and protection instead of condemnation. The creation of such an environment undoubtedly takes time, as it is closely related and dependent upon the embedded legal, economic and social background and, largely, the cultural values of each country.⁹¹

The moral atmosphere of an organisation is the part of its organisational structure that deals with ethical problems and the resolution of moral conflicts. A positive moral

⁸⁹ To cite one example and Michael Woodford's (admittedly sometimes self-serving) portrayal of events, he writes that he asked the compliance officer at Olympus, Mr Hisaashi Mori, about the suspicious transactions that he had found. After initially refusing to answer Mr Mori eventually asked him who he worked for. Thinking that he would say 'Olympus' Mr Woodford was surprised when Mr Mori answered for him saying: 'I work for Mr. Kikukawa. I am loyal to Kikukawa' Woodford (n.9), 25. Mr Kikukawa was the Chairman of the Board.

⁹⁰ W. Vandekerckhove, 'Rewarding the Whistleblower – Disgrace, Recognition or Efficiency?', in M. Arszulowicz and W. Gasparski (eds), *Whistleblowing: In Defence of Proper Action*, (Transaction Publishers, 2011), 21. See also J.P. Keenan, 'Comparing Indian and American Managers on Whistleblowing', (2002), *Employee Responsibilities and Rights Journal*, 14(2/3), 79-89; MacNab et al., 'Culture and Ethics Management: Whistleblowing and Internal Reporting within a NAFTA Country Context', (2007) *International Journal of Cross Cultural Management* 7(1), 5-28; R. L. Sims and J.P. Keenan, 'A Cross-Cultural Comparison of Managers' Whistleblowing Tendencies', (1999) *International Journal of Value-Based Management*, 12(2), 137-151.

⁹¹ J.P. Near and M.P. Miceli, 'Whistleblowing: Myth and Reality' (1996) *Journal of Management* 22(3), 507-526

atmosphere will allow people to feel free to express themselves and to express diverse and even controversial or unwelcome points of view. On the other hand, should a negative and intimidating atmosphere prevail, it will have the effect of censoring disclosures, limiting openness and undermining a common ideology of accountability.⁹² The commitment to honesty, to the principle of individual responsibility, accountability and an active concern for the public good should be found in the core of each company's mission and should permeate every level of the corporate structure, from the senior management down to the lowest ranking employees.⁹³ Compliance with the law should go hand in hand with integrity, honesty and ethics. Otherwise whistleblowers will continue to be side-lined, victimised, seen as rebels without a cause, 'ethical resisters'⁹⁴ or troublemakers.

Modern corporations are under tremendous pressure to combat corruption and fraud, and to manage risks effectively. They are under pressure to establish corporate governance mechanisms, and there is some momentum supporting whistleblowing and enhanced protection for whistleblowers. It is not imperative to determine whether whistleblowers are heroes or not. It is undeniable that whistleblowers are brave and courageous individuals, who dared to do the 'right thing'; they decided to take an active stand against practices they have witnessed in their workplace that threatened to endanger the future of their company or undermine the public interest.⁹⁵ They can be regarded as heroes for refusing to endorse a culture of fear and silence and the perception of

⁹² L.A. Ponemon, 'Whistleblowing as an Internal Control Mechanism: Individual and Organizational Considerations', (1994) *Auditing: A Journal of Practice & Theory*, 118–130, 118.

⁹³ M.P. Glazer and P.M. Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry*, (Basic Books, 1989), 5-7. See also M. Biegelman and J. Barrow, *Executive Roadmap to Fraud Prevention and Internal Control: Creating a Culture of Compliance*, (2nd ed., Willey, 2012).

⁹⁴ Glazer and Glazer, *ibid*, 5.

⁹⁵ *Ibid.*, 5-6.

whistleblowers as disloyal or as trouble-makers.⁹⁶ At the same time, they are not activists confronting their employer and their colleagues; they are complying with the legal requirements, expecting to receive the protection provided by the law. They have not violated a code of conduct; they have simply exercised independent judgment and shown personal courage to challenge misdeeds or illegalities in their working environment.

The perception that whistleblowers are scapegoats has been created, because there is often more emphasis given the breach of loyalty and trust rather than the positive outcomes that can result from whistleblowers' disclosures. Even though they show integrity and are willing to speak out with a view to safeguard their company, they rarely receive the recognition they deserve for exposing their company's malpractices. Research has shown that a considerable number of them have experienced some form of retaliation, including but not limited to termination, harassment, blacklisting and civil or criminal prosecution.⁹⁷ All these events place the whistleblowers in a serious dilemma, as doing the right thing is associated with numerous stressful situations, which can have a negative impact on their financial, emotional, social and health condition.⁹⁸ It is not surprising that

⁹⁶ See K. Walters, 'Your Employee's Right to Blow the Whistle', (1975) 53(4) Harvard Business Review 26-34, 27. See also P. Secunda and S. Estreicher (eds), *Retaliation and Whistleblowers*, (Kluwer, 2009), 438.

⁹⁷ Among others, see Public Concern At Work and University of Greenwich, *Whistleblowing: The Inside Story – A Study of the Experiences of 1000 Whistleblowers*, (2013), <http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>; See also J. Lennane, 'What Happens to Whistleblowers, and Why' (2012) 6(4) Social Medicine 249-258 and T. Devine and T.F. Maassarani, *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth*, (Berrett-Koehler Publishers, 2011), 4-7.

⁹⁸ Among others, see M. Parmerlee, J. P. Near and T.C. Jensen, 'Correlates of Whistleblowers: Perceptions of Organizational Retaliation', (1982) Administrative Science Quarterly, 27(1), 17-34; S. Dasgupta and A. Kesharwani, 'Whistleblowing: A Survey of Literature (2010), The IUP Journal of Corporate Governance, 9(4), 1-15; G. Rapp, 'Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers' (2007) Boston University Law Review, 87(1), 91-156; J. Rothschild and T. Miethe, 'Whistleblower Disclosures and Management Retaliation: The Battle to Control Information about Organization Corruption', (1999) Work and Occupations, 26(1), 107-128; K. Soeken and D. Soeken, 'A Survey of Whistleblowers: Their Stressors and Coping Strategies', (1987) Proceedings of the Hearing on HR, 25(1), 156-166.

anonymity of the whistleblowers and its protection has become one of the top priorities recently.⁹⁹ Anonymous reporting happens when ethical discourse becomes impossible, when acting ethically is tantamount to becoming a scapegoat. If everybody has to hide in order to say anything of ethical consequence, then the problem of values in the workplace becomes more serious.¹⁰⁰

Whistleblowers are uniquely positioned to identify and report corporate misconduct as their placement within the organisational structure of a company gives them the opportunity to have a clearer, more complete picture of the company's affairs as compared with that enjoyed by external monitors and gatekeepers.¹⁰¹ Employees can offer invaluable help as internal monitoring agents or as a kind of assistant gatekeepers, but they need credible guarantees that they will be safe from retaliation by their employer; it is counter-productive for societal (as well as often company) interests if they are demoted, discharged or suspended for bringing wrongdoing to light.¹⁰² Even if we do not subscribe to the views about a 'sinister and dystopian' culture of cover-up,¹⁰³ the argument of this article with respect to both Japan and the United Kingdom is that the law does not offer sufficient assurances to potential whistleblowers and as a result there remain estimable deterrents to employees to speak up; even when a whistleblower case does reach an Employment Tribunal, it does not necessarily mean that the wrongdoing

⁹⁹ T. Devine and T.F. Maassarani, *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth*, (Berrett-Koehler, 2011), 44-45. See also F.A. Elliston and R. Coulson, 'Anonymous Whistleblowing: An Ethical Analysis' (1982), *Business & Professional Ethics Journal*, Vol. 1, No. 2, 39-60.

¹⁰⁰ Alford (n. 76).

¹⁰¹ R. Moberly, 'Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers', (2006) *BYU L. Rev.* 1106, 1107.

¹⁰² S. McDonough, 'Whistleblowers Rake in the Dough', *Seattle Times*, 27 November 2004, A28. See also M. Biegelman and J. Bartow, *Executive Roadmap to Fraud Prevention and Internal Control: Creating a Culture of Compliance*, (2nd ed., Wiley, 2012)

¹⁰³ L. Donnelly, 'NHS whistleblower wins landmark dismissal case', *The Telegraph*, 17 April 2014, (<http://www.telegraph.co.uk/news/nhs/10774088/NHS-whistleblower-wins-landmark-dismissal-case.html>)

will be dealt with since tribunals are not empowered to investigate disclosures or order rectification where wrongdoing is established.¹⁰⁴ This became obvious from the cases discussed earlier as there was neither uniformity in the approach adopted by the Employment Tribunals nor legal certainty as to the outcome of the cases. These cases and the publicity they received was a blessing in disguise, as they put an end to the attitude of complacency and pointed to the shortcomings of the existing regime. If a further reform is decided, then the government should focus not only on creating an efficient whistleblowing policy that will generate accurate and reliable information about companies, but on promoting an environment of accountability and responsibility within corporations.¹⁰⁵

¹⁰⁴ D. Lewis, 'Resolving Whistleblowing Disputes in the Public Interest: Is Tribunal Adjudication the Best that can be Offered', (2013) 42(1) *Industrial Law Journal*, 35-53, 35.

¹⁰⁵ Vandekerckhove (n. 90). See also, B. FASTERLING and D. LEWIS, 'Leaks, Legislation and Freedom of Speech: How Can the Law Effectively Promote Public Interest Whistleblowing?', (2014) *International Labour Review* 153, 71-92.