

Law and Corporate Behaviour

Integrating Theories of Regulation, Enforcement,
Compliance and Ethics

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Compliance within Business Organisations

I. Looking Inside: Why Internal Compliance is Relevant

It is apparent from previous chapters that much theorising about regulation and enforcement assumes that the imposition of traditional techniques of public or private enforcement on businesses will produce desired outcomes. Almost no attention has been devoted to *how* external legal techniques might bring about compliance, or *how* business structures operate and can be influenced, or *how* the behaviour of individuals working within businesses can be affected. One is compelled to a conclusion that most law on enforcement, and legal scholars, focus on *external* issues but are far less familiar with the *internal* issues of how business structures work, and why people who work in them obey, infringe or flout rules.

The arguments that businesses are able to internalise all external legal sanctions, to control the behaviour of all staff, and to control all of the businesses' impacts on the external world, are fundamental to theories of deterrence and rational economic action.

If the goal is to maximise compliance with rules by corporations, then it would be logical to examine how business organisations operate internally, and how their systems and cultures can contribute to or impede such compliance. It should also be asked whether internal or external levers are more effective in supporting compliance, and how such internal and external elements might sensibly be combined. Such an approach is strikingly lacking from much legal theory and literature, which is restricted to the external dimension, and based on the assumption that only external enforcement is necessary. This chapter examines the evidence on these issues.

II. Multiple Modes of Corporate Organisation

Cooperation between all those involved in an enterprise is a requirement in order to achieve a shared, or certain, end.¹ A mode of organisation is needed to enable coordinated collective

¹ CI Barnard, *The Functions of the Executive* (Cambridge MA, Harvard University Press, 1938) 4.

action by multiple actors.² Small businesses may have little formal structure, other than little more than an authoritative core, and few other organs or centres of decision making. Most complex organisations have at their disposal a host of financial, technical and administrative means that natural individuals do not have.³

Businesses exist in all shapes and sizes, and have multiple variations in modes of internal organisation. Mintzberg structured organisations into five types:⁴ Simple; machine bureaucracy (achieves coordination through standardisation of work processes); professional bureaucracy (standardisation of skills); divisionalised form (quasi autonomous entities coupled together by a central administrative structure, with coordination achieved by a performance control system) and adhocracy (designed for innovation, aiming to fuse experts).

Complexity stems from the number of parts and the number of different kinds of parts found within an organisation.⁵ Business architecture is founded on a categorisation of multiple functions that may (or may not) be needed in order that the commercial purpose of the organisation can be fulfilled, for example:⁶ Vision, strategies and tactics; customers, suppliers and competitors; initiatives and projects; organisation units; assets; products and services; capabilities; information and vocabulary; business processes; policies, rules and regulations.

It is not proposed to attempt to give here a comprehensive account of business organisation structures or modes of operation. But some important points can be drawn out that illuminate the focus on modes of 'enforcement' or compliance. We can start by contrasting two opposing models for the structure of organisations: A vertical bureaucracy and a horizontal dispersed model.

In a vertical bureaucracy, power is supposedly concentrated at the top, although elements of power are possibly delegated in decreasing amounts to lower tiers. Crozier set out a classic vertical organisational analysis of the structure of French work organisations (a clerical agency and an industrial monopoly) as at the early 1960s.⁷ He noted the existence of four basic characteristics.⁸ First, the creation of a vast body of detailed written and impersonal rules and procedures prescribing what is to be done in all conceivable situations. Second, decision making was centralised, creating great distance between those who had to decide and those who had the relevant information decisions. This situation led to the adoption of an impersonal decision-making style based on abstract principles of equity, equality and

² D Black, *The Behaviour of Law* (Bingley, Emerald Group Publishing Limited, 1976, special edition 2010) (organisation is the capacity for collective action); W Ulrich and N McWhorter, *Business Architecture. The Art and Practice of Business Transformation* (Tampa FL, Meghan-Kiffer Press, 2011) (organisations might be best thought of as a hive of individuals all generally working toward a common goal) 63; A Cohen, *Two Dimensional Man* (London, Routledge and Kegan Paul, 1974) 66 (A 'collectivity of people without organisation is not a group').

³ JK Galbraith, *The New Industrial State* (New York, Princeton University Press, 1976) 85–88; JS Coleman, *The Asymmetric Society* (Syracuse NY, Syracuse University Press, 1982) 21.

⁴ H Mintzberg, *The Structuring of Organisations* (Englewood Cliffs NJ, Prentice-Hall, 1979).

⁵ J Whelan and G Meaden, *Business Architecture. A Practical Guide* (Farnham, Gower, 2012) 30.

⁶ N McWhorter and W Ulrich, 'Defining Requirements for a Business Architecture Standard' (2009) at http://bawg.omg.org/Bus_Arch_Ecosystem_White_Paper_Draft.pdf.

⁷ M Crozier, *The Bureaucratic Phenomenon* (The University of Chicago Press, 1964, revised New Brunswick, Transaction Press, 2010).

⁸ This summary draws on the Introduction to the 2010 edition by E Friedberg.

precedent, and was often ill-adjusted to the problem that the decision was supposed to solve. Third, the existence of hierarchical strata insulated from each other and exerting great pressure for conformity on its members. Fourth, the 'creation of parallel informal power relations around the groups or individuals capable of coping with residual and unanticipated contingencies and uncertainties affecting the organization's capacity to function in a satisfactory way.'⁹ Together, these characteristics created 'vicious circles' of self-reinforcing behavioural patterns. Crozier argued that bureaucracy is a mode of organisation that is incapable of correcting its behaviour in the face of its results. It created self-reinforcing behavioural patterns that reinforced impersonality and centralisation. Change would not be piecemeal or incremental, but occur after crises.

In contrast to the ultimately sclerotic bureaucratic culture described above, a diametrically opposed mode of business organisation would reflect a flatter structure, in which power is devolved to multiple local groups. This would concentrate elements of information and authority in multiple discrete groups, so that informed, intelligent and swifter decisions could be facilitated, with innovation. Rapid extension of new technology into all sectors of the economy in the twentieth century has meant much greater devolution of responsibility inside organisations, accompanied by an enormous increase in self-employment.¹⁰ Globalisation of labour markets and economies has introduced a raft of culturally related complexities and challenges,¹¹ and challenges for management.¹²

Weber described large scale, bureaucratic organisations as having an oligarchical distribution of power, formally determined spheres of competency, an impersonal character, and a rational and impartial management on the basis and with the help of regulations.¹³ He developed principles for designing a hierarchy that effectively allocates decision-making authority and control over resources.¹⁴ Problems arise of external adaptation and internal integration.¹⁵ In this context, Teubner's ideas of the autopoietic character of different social sub-systems are illuminating.¹⁶ He argues that the 'legal discourse is closed ... and produces its own construction of reality'.¹⁷ Also relevant is Luhmann's idea of law as a system of communication, with own meanings not directly mapped onto the real world.¹⁸

⁹ *ibid.*

¹⁰ P Sedgwick, *The Enterprise Culture* (London, SPCK, 1992) 4.

¹¹ AS Bachmann, 'Melting Pot or Tossed Salad? Implications for Designing Effective Multicultural Workgroups' (2006) 26(6) *Management International Review* 721, 722.

¹² JE McLean and RD Lewis, 'Communicating Across Cultures: Management Matters' (2010) Summer *British Journal of Administrative Management* 30.

¹³ M Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehende Soziologie* 5th edn (Tübingen, Mohr, 1920, 5th edn 1980) 551–56.

¹⁴ HH Gerth and CW Mills (eds), *From Max Weber: Essays in Sociology* (New York, Oxford University Press, 1946); M Weber, *Economy and Society* G Roth and C Wittich (eds) (Berkeley, University of California Press, 1978).

¹⁵ E Schein, 'The Role of the Founder in Creating Organizational Culture' (1983) *Organizational Dynamics* 13, 14.

¹⁶ Autopoiesis is defined as a system which, though complete in its structural elements, can be defined in its regulatory contents on the basis of its continuous interaction with outward reality: G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239; G Teubner and A Febbraio (eds), *State, Law and Economy as Autopoietic Systems* (Milano, Giuffrè, 1992).

¹⁷ G Teubner, 'How the Law Thinks' (1989) 23 *Law and Society Review* 727–57, 745.

¹⁸ N Luhmann, *Law as a Social System* (K Ziegert trans, Oxford, Oxford University Press, 2004) 70–74.

Peters and Waterman's influential 1982 management text prescribed three key features of a successful organisation:¹⁹

1. An emphasis on methods to communicate key values and objectives and to ensure that action is directed towards these.
2. Delegation of identifiable areas of responsibility to relatively small units, which are encouraged to carry out their responsibilities with considerable autonomy and scope for initiative, but are subject to performance assessments which manifest a preservation of tight central control.
3. Use of a simple lean structure of management to avoid rigidities of bureaucracy, the complexities of the matrix, and the overheads of both.

Whatever the business structure, contemporary descriptions of business architectures form a consensus that business structures of any size are complex and contain multiple diverse organisational, and hence social, groups, each with their own purpose and social culture. The complexity of organisations is revealed in the multiple differing images that they present,²⁰ such as a machine bureaucracy, organisms, cultures, political systems and various other images.

Organizations have grown so complex in recent years that it is difficult to visualize or understand how all of the parts fit together. Every business unit has its own set of funded initiatives and it is difficult to see how or even if these initiatives align to a common business strategy.²¹

It would follow that controlling the behaviour and performance of a large multi-functional organisation would be a challenge.

The complex structure of the organisations involved means that it does not always appear possible for controlling organs, both within the organisations themselves and outside them, to become aware of potential problems sufficiently in good time. As a consequence, after the event it is often particularly difficult to determine whether or to what extent certain individuals can be held responsible for the course of events.²²

III. The Multiplicity of Cultures

Irrespective of the level of complexity or dispersal in a business, both sociological studies of organisations and recommendations by leading business consultants have focused on the fact that a business is comprised of multiple *individuals* operating within multiple localised

¹⁹ T Peters and RH Waterman Jr, *In Search of Excellence: Lessons from America's Best-Run Companies* (New York, Harper & Row, 1982); this summary is from M Parker, *Organizational Culture and Identity* (London, SAGE Publications, 2000).

²⁰ For an overview see G Morgan, *Images of Organization* (Beverly Hills, Sage, 1986); discussed B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993) 118–23.

²¹ Ulrich and McWhorter (n 2).

²² M Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge, Cambridge University Press, 1998) 4.

cultures.²³ The importance to business of culture and of recognising the existence of a diversity of cultures has been recognised at least since the 1950s:

The culture of the factory is its customary and traditional way of thinking and of doing things, which is shared to a greater or lesser extent by all its members, and which new members must learn, and at least partially accept, in order to be accepted into service in the firm. Culture in this sense covers a wide range of behaviour: the methods of production; job skills and technical knowledge; attitudes towards discipline and punishment; the customs and habits of managerial behaviour; the objectives of the concern; its way of doing business; the methods of payment; the values placed on different types of work; beliefs in democratic living and joint consultation; and the less conscious interventions and taboos.²⁴

Hofstede has demonstrated the diversity of people and cultures, and dismissed the idea that people are basically alike and will react similarly in similar situations.²⁵ Parker's study of a series of different organisations concluded that each had common notions about management as a response to a turbulent environment, and had a particular combination of people and circumstances that made each unique, with a series of internal localised cultures.²⁶ He identified three divisions between business units, and their connections with sponsoring or hindering change within an organisation: First, spatial/functional (geographic and/or departmental divides: 'Them over there, us over here'); second, generational (age and/or historical divides: 'Them from that time, is from this time'); and third, occupational/professional (vocational and/or professional divides: 'Them who do that, us who do this'). Parker concluded that all organised cultures are unique, yet they share some similar features, and some locations were more connected to others, which led to increased features of similarity in their local cultures.

Parker noted that to participate in organisation is to accept limits on individual freedom,²⁷ so as to gain the personal benefits of employment and remuneration, in return for assisting in the concerted benefits achieved by the organisation. However, the assumption that consensus is (and should be) the normal property of organisations, has not been found by research to exist in large organisations. Instead, many possible 'cultures of' exist within an organisation, and managerial intervention can never totally control outcomes.²⁸ Clans exist, allowing mutual socialisation of discrete units, as noted in Japanese companies.²⁹

Organizational culture is ... a continuing process of articulating contested versions of what the organization should be doing, who it should be responsible to and who does what for reward.³⁰

Given the existence of multiple sub-units within businesses, each with individual functions, groups of individuals, and sub-cultures, an idea that the behaviour of every internal group can be absolutely controlled so as to conform to every required norm, whether

²³ Parker (n 19) 231.

²⁴ E Jacques, *The Changing Culture of a Factory* (London, Tavistock, 1951) 251.

²⁵ G Hofstede and GJ Hofstede, *Cultures and Organizations: Software of the Mind* 3rd edn (New York, McGraw-Hill, 2010).

²⁶ Parker (n 19) ch 8.

²⁷ *ibid*, 232.

²⁸ *ibid*, 220, 231.

²⁹ W Ouchi, *Z Theory* (New York, Avon Books, 1981).

³⁰ Parker (n 19) 226.

the source of control emanates from an internal or—even less—external position, appears highly unlikely.³¹ Thus, theories that behaviour is controlled through deterrence or rational action appear to be questionable, and will certainly differ in force both between different organisations and within organisations.

Instead, a socio-legal approach would focus not on a single theory of how to 'control' the behaviour of organisations, but on the considerable variation in the types of organisations (and therefore in their different behaviours and responses to levers), and on the extent to which there exists within any given single 'business' a number—perhaps a multiplicity—of discrete individual socio-technical systems,³² each of whose behaviour has to be 'controlled' by particular individual means. Fisse and Braithwaite noted:

We find no single theory of how organisations make decisions to break the law, and how they hold actors accountable for them, of sufficient generality and explanatory power to be a practical guide to the design of a corporate criminal law appropriate to all types of organisations. It is not a matter of empirical evidence on organisations showing that the theories provide an overly simplified account of organisational diversity; the theories themselves posit a diversity which renders impossible a single model of legal responsibility consonant with organisational life.³³

It seems such an obvious and uncontroversial aspiration to define legal principles of responsibility for corporate crime consistently with the way organisations actually make decisions. Yet we have seen that organisation theory posits such diversity in the way organisations make decisions, in the way they are structured, in their cultures, and in the way they define responsibility, that positivist organisation theory can never give clear guidance to the law on this question.³⁴

IV. The Ideal of Unified Core Values

Given the existence of diversity within organisations, how do the multiple internal operational organs need to function cooperatively so as to enable the business to succeed? Establishing the function, goals and targets for each unit or individual may not be enough. Habermas assumes that an 'ideal speech situation' is needed, in which there is an equality of power and absence of deceit, as an implied possibility within all human communication.³⁵

Studies on the causes of sustained long-term business success have concluded that it is critical to establish clear *core values*, which are shared by all members of the workforce, form an ideology that is enduring and able to be applied consistently in different trading and geographical circumstances, whilst operational goals are constantly examined and developed.³⁶

A global visionary company separates operating practices and business strategies (which should vary from country to country) from core values and purpose (which should be universal and enduring within the company, no matter where it does business).³⁷

³¹ Whelan and Meaden (n 5) (There are many scenarios of communication failure).
³² FE Emery (ed), *Systems Thinking* (Harmondsworth, Penguin, 1969).

³³ Fisse and Braithwaite (n 20) 122.

³⁴ *ibid*, 131.

³⁵ J Habermas, *The Philosophical Discourse of Modernity* (Oxford, Polity, 1987).

³⁶ J Collins and JI Porras, *Built to Last: Successful Habits of Visionary Companies* 12th edn (London, HarperCollins, 1994, 2005).

³⁷ *ibid*, xxii.

The idea is that companies should set a high standard of values and performance that its people feel compelled to try to live up to.³⁸ This affords a way of unifying disparate internal functions and groups. Indeed, it was found that visionary companies focus primarily not on beating their competitors but on beating *themselves*.³⁹ Ideological control preserves the core while operational autonomy simulates progress. They develop a relentless, creative drive, constantly experimenting and innovating, Darwinianly discarding what does not work, but firmly retaining their core values.⁴⁰ Further, the existence of a charismatic visionary leader is absolutely *not required* for a visionary company.⁴¹ Indeed, it has been said that the qualities needed are a paradoxical blend of personal humility and professional will.⁴² However, similarity has been noted between highly successful companies and cults: Fervently-held ideology, indoctrination, tightness of fit and elitism.⁴³ They do not tend not to have much room for people unwilling or unsuited to their demanding standards.

V. Management Systems

An organisation cannot function operationally to achieve its goals without management systems and processes. If the management structure does not operate then nothing happens as intended.⁴⁴ The principal purpose of organisational structure is to control the way *people* coordinate their actions so as to achieve organisational goals and the means used to motivate them to achieve the goals.⁴⁵ The design and operation of organisational design has to achieve a balancing between three opposites: Differentiation and integration, centralisation and decentralisation, and standardisation and mutual adjustment.⁴⁶

International Standard ISO9000 series defines the key business processes that should be included in a management system.⁴⁷ These and similar standards provide general guidance and requirements on management practices, covering many business aspects, for instance, social responsibility (ISO 26000), risk management (ISO 31000:2009), quality management (ISO 9001:2008) and environmental management (ISO 14001:2004). Some ISO standards are industry specific, aiming at increasing safety and environmental protection, improving governance and decision making, minimising losses in such fields as, for example, energy, food safety, healthcare and others. The ISO standards are global in their character, and they are designed for different types of organisations. Therefore, they do not specify certain

³⁸ *ibid.*, xix.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² J Collins, *Good to Great* (New York, Harper Business, 2001). This was a review of 11 companies with average cumulative stock returns 6.9 times the general market in the 15 years following their transition point, compared with 11 direct comparisons and six unsustained comparisons.

⁴³ *ibid.*, 122.

⁴⁴ D Boehme and JE Murphy, 'Fear No Evil: A Compliance and Ethics Professional's Response to Dr Stephan' (2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1965733.

⁴⁵ GR Jones, *Organizational Theory, Design, and Change* (Harlow, Pearson, 2013) 30–31.

⁴⁶ *ibid.*, ch 4.

⁴⁷ This was first introduced in 1979 as BS5750. See C Hodges, M Tyler and H Abbott, *Product Safety* (London, Sweet & Maxwell, 1996) ch 14.

organisational designs, but rather provide general recommendations, codify best practices and advise the application of certain management systems.⁴⁸

The processual model produces the result that each organisation constructs for itself the meaning of compliance and law through managerial logic.⁴⁹

VI. Modes of Internal Compliance

By what means do businesses achieve internal compliance? This section will note four approaches: Authoritarianism, compliance systems, whistleblowing and culture.⁵⁰

A. Contractual and Disciplinary Systems

It can first be observed that, mirroring the traditional existence of 'command and control' modes for enforcement of criminal and public law, authoritarian approaches to internal discipline exist within private organisations, at least to some extent. The importance of contractual arrangements and terms in regulating the behaviour of actors in supply chains and employment arrangements has been noted in chapter two above.⁵¹ Virtually every organisation and employment contract provides for disciplinary proceedings, and the possibility of imposition of sanctions ultimately including dismissal from employment. Disciplinary techniques form a backdrop, but how much they are used is a different question.

B. Compliance Systems

Many companies have compliance and risk departments as integral parts of their internal management systems. This is always found within firms of any size that operate in regulated sectors, and compliance activities are strongly related to firm size.⁵² Most prevailing corporate governance regimes require extensive risk management and control systems.⁵³

⁴⁸ K Grabovets, *Organizational Design and Tort Law: A Synthesis of Organizational Studies and the Economic Analysis of Tort Law*, PhD thesis, Erasmus University, Rotterdam, 2014.

⁴⁹ LB Edelman and SA Talesh, 'To Comply or Not to Comply—That isn't the Question: How Organizations Construct the Meaning of Compliance' in C Parker and V Lehmann Nielsen (eds), *Explaining Compliance. Business Responses to Regulation* (Cheltenham, Edward Elgar, 2012) ch 5.

⁵⁰ For a management analysis of achieving change, see Jones (n 45) chs 10–14.

⁵¹ F Cafaggi and H Muir Watt (eds), *The Regulatory Function of European Private Law* (Cheltenham, Edward Elgar, 2009).

⁵² Although 2012 interviews with UK business people found that only one-quarter of businesses reported that they employed somebody specifically to deal with compliance: *Business Perceptions Survey 2012* (London, IFF Research, 2012) para 1.22. A survey of companies found that some compliance action related to competition law had been taken in the previous year by over 92% of companies with over 50000 employees, falling to 26% for those with 200–499 staff: *The Deterrent Effect of Competition Enforcement by the OFT. A Report Prepared for the OFT by Deloitte* (Office of Fair Trading, 2007) OFT962, para 5.99.

⁵³ BJ Schoordijk, 'Risk Management Alshoeksteen Van Corporate Governance' in SHA Dumoulinea (ed), *Tussen Themis en Mercurius, Bedrijfsjuridische bijdragen aan een Europese beleidsconcurrentie*, Lustrumuitgave Nederlands Genootschap van Bedrijfsjuristen (Deventer, Kluwer, 2005) 309–29; DAMHW Strik, Deel II—Aansprakelijkheid voor falend risicomanagement, in *Ondernemingsbestuur en risicobeheersing op de drempel van*

A formal compliance system is only one aspect of the management structure of an organisation: The allocation of tasks, authority and means of coordination and control within organisations.⁵⁴ It does not stand alone sending unambiguous messages and instructions.⁵⁵

From an internal perspective, a compliance system is a vital function, since compliance with regulatory requirements is essential in order for the firm to continue to market products or services, and to support a reputation for quality as shown in high and consistent levels of performance.⁵⁶ From an external perspective, reliance on an internal compliance system recognises that non-compliance can usually be identified more swiftly, frequently and cheaply than by external observers and authorities.

Corporate compliance programmes have attracted criticism that their existence is to improve their corporate image and that they do not have any actual effect.⁵⁷ Nevertheless, their use is widespread, and has been increasingly encouraged or mandated by law and regarded as both acceptable and effective.⁵⁸ They are now high profile in certain sectors, notably financial services, environment,⁵⁹ competition,⁶⁰ health and safety, food safety and various aspects of healthcare.⁶¹ Miller has described the compliance function as a form of internalised law enforcement which, if it functions effectively, can substitute for much of the enforcement activities of the state.⁶² He has also noted the transformation in importance and authority of internal risk and compliance functions.⁶³ In many businesses,

een nieuw decennium: een ondernemingsrechtelijke analyse, Preadvies van de Vereniging 'Handelsrecht' 2009 (Deventer, Kluwer, 2009); J Eijssbouts, *Corporate Responsibility, Beyond Voluntarism. Regulatory Options to Reinforce the Licence to Operate* (Inaugural lecture, Maastricht University, 2011).

⁵⁴ H Mintzberg, *Structure in Fives: Designing Effective Organizations* (Englewood Cliffs, Prentice-Hall, 1983).

⁵⁵ C Parker and S Gilad, 'Internal Corporate Compliance Management Systems: Structure, Culture and Agency' in C Parker and V Lehmann Nielsen (eds), *Explaining Compliance. Business Responses to Regulation* (Cheltenham, Edward Elgar, 2012).

⁵⁶ 15 minute telephone interviews with 2,294 UK business people in 2012 found a strong link between a reputation for compliance and business success: *Business Perceptions Survey 2012* (London, IFF Research, 2012). 80% agreed that 'If my business was found to be non-compliant, I would be concerned that it would affect our relationships with customers' and 69% agreed that 'It matters to our business that our customers know that we invest in compliance.' A similar survey was undertaken in 2010.

⁵⁷ KD Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 *Washington University Law Quarterly* 487, 491; Parker and Gilad (n 55).

⁵⁸ F Cafaggi and A Renda, 'Public and Private Regulation: Mapping the Labyrinth' CEPS Working Document No 370, 2012.

⁵⁹ For USA: Environmental Protection Agency, 'Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations', *Fed Reg* 60 (1995), 66706; revised Environmental Protection Agency, 'Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations', *Fed Reg* 65 (2000), 19618.

⁶⁰ For USA, see ABA Section of Antitrust Law, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors* (Chicago, ABA Publishing, 2005). In UK see *How your Business can Achieve Compliance with Competition Law: Guidance* (Office of Fair Trading, 2011) at http://www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness/compliance/oft1341.pdf. Discussions at A Stephan, 'See No Evil: Cartels and the Limits of Antitrust Compliance Programmes' (2010) 31(8) *The Company Lawyer* 3; K Voss, 'Preventing the Cure: Corporate Compliance Programmes in EU Competition Law Enforcement' (2013) 16(1) *Europarättslig Tidskrift* 28.

⁶¹ For USA: Department of Health and Human Services (HHS), Office of Inspector General (OIG), 'Publication of OIG Compliance Program Guidance for Clinical Laboratories' *Fed. Reg.* 63, no 163 (1998): 45076-87; Department of Health and Human Services (HHS), Office of Inspector General (OIG), 'Publication of OIG Compliance Program Guidance for Hospitals' *Fed. Reg.* 63, no 35 (1998): 8987-98; Department of Health and Human Services (HHS), Office of Inspector General (OIG), 'Publication of OIG Compliance Program Guidance for Third-Party Medical Billing Companies' *Fed. Reg.* 63, no 243 (1998): 70138-52.

⁶² GP Miller, 'The Compliance Function: An Overview' New York University School of Law, Law & Economics Research Paper Series, Working Paper No 14-36.

⁶³ GP Miller, 'The Role of Risk Management and Compliance in Banking Integration' New York University School of Law, Law & Economics Research Paper Series, Working Paper No 14-34.

compliance management has been elevated from 'box ticking' so as to provide a paper trail as a defence mechanism against external interference to a very senior function, capable of shutting down non-compliant operations on their own authority.⁶⁴

Compliance monitoring programmes have assumed particular importance in the USA,⁶⁵ as a mitigating factor under sentencing guidelines⁶⁶ or as a shield from criminal liability.⁶⁷ Despite their importance in the American legal system, and the fact that many companies have strengthened their compliance programmes, there is mounting concern at the ongoing incidence of workplace misconduct and fraud.⁶⁸ By contrast, in the UK, the Bribery Act 2010 section 7(2) provides a defence for a commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct. Sigler and Murphy argued in 1988 that immunity should be granted for firms that implement corporate compliance programmes beyond a certain standard.⁶⁹ However, some ambivalence has been noted in official attitudes towards compliance systems.

US and EU competition enforcers, for example, have been resistant to giving credit for companies who operate such systems, and who regard them as failures if a single violation occurs,⁷⁰ as contrasted with more positive encouragement for programmes given by others such as the Canadian Competition Bureau⁷¹ and the Competition Commission of Singapore.⁷²

⁶⁴ An example is an Australian mining firm: GA Smith and D Feldman, *Newmont Mining Corporation: Community Relationships Review: Global Summary Report* (Foley Hoag LLP, 2009).

⁶⁵ For an overview see GP Miller, 'An Economic Analysis of Effective Compliance Programs' (2014) New York University School of Law, Law & Economics Research Paper Series, Working Paper No 14-39. Miller concludes that there is no universally accepted definition of an effective compliance programme, and that various official models differ somewhat.

⁶⁶ See chs 4 and 10 above. Such as the Environmental Protection Agency, 'Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations', *Fed Reg* 60 (1995), 66706; revised Environmental Protection Agency, 'Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations', *Fed Reg* 65 (2000), 19618. The audit policy offers a complete elimination of the gravity-based penalties for corporations that satisfy all nine conditions. If they meet all conditions except the first, 75% mitigation is given. The conditions are:

- i. Systematic discovery; discovered through an environmental audit or a compliance management system
- ii. Voluntary discovery
- iii. Prompt disclosure
- iv. Independent discovery and disclosure
- v. Correction and remediation
- vi. Prevent recurrence
- vii. No repeat violations
- viii. Excluded types of violations
- ix. Cooperation.

⁶⁷ S Oded, *Corporate Compliance: New Approaches to Regulatory Enforcement* (Cheltenham, Edward Elgar, 2013). See the US Federal Department of Justice, Antitrust Division, *Corporate Leniency Policy* (August 10, 1993), which aims at encouraging offenders to step forward and report their own violations.

⁶⁸ MD Greenberg, *Transforming Compliance: Emerging Paradigms for Boards, Management, Compliance Officers, and Government* (Los Angeles CA, RAND Corporation, 2014).

⁶⁹ JA Sigler and JE Murphy, *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (New York, Quorum Books, 1988).

⁷⁰ Boehme and Murphy (n 44).

⁷¹ See Competition Bureau Canada, 'Corporate Compliance Programs' (2010), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

⁷² See <http://www.ccs.gov.sg/content/ccs/en.html>. In addition, in the US at least one court has accepted evidence of a compliance programme to prove that a company effectively withdrew from a cartel. *United States v Stolt-Nielsen SA* No 06-cr-466 (ED Pa, November 29, 2007).

Three particular challenges to the effectiveness of compliance systems may be noted. First, the particular forms of compliance that come to be understood as legal and rational may vary across social contexts and legal jurisdictions.⁷³ Second, the imposition of ever more and detailed legal rules produces an internal response within organisations of creating new offices and developing written rules, procedures and policies in an attempt to achieve legal legitimacy, while simultaneously limiting law's impact on managerial power and unfettered discretion over employment decisions.⁷⁴ Law becomes 'managerialised', misunderstood and diluted.⁷⁵ Third, employees have been shown to develop a 'culture of regulatory resistance' within firms, with managers and staff refraining from doing anything more than minimally comply with existing regulations (rather than seeking to go beyond compliance) and frequently to resist agency enforcement efforts.⁷⁶ The strategy of 'creative compliance' is also identified, involving finding ways of behaving in ways that can be claimed to comply with the letter of rules but not their spirit.⁷⁷ These tendencies will be enhanced where deterrent enforcement is applied excessively, indiscriminately or in ways that are perceived to be morally illegitimate. Shapiro and Rabinowitz concluded that 'if the government punishes companies in circumstances where managers believe that there has been good faith compliance, corporate officers may react by being less cooperative with regulatory agencies'.⁷⁸ The same applies to internal compliance, discipline and managerial systems.

Key elements for the success of compliance systems are widely agreed to be:⁷⁹ The support of senior management⁸⁰ and status within the organisation,⁸¹ the existence of 'an internal

⁷³ S Tesh, 'The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law' (2009) 43 *Law & Society Review* 527-62.
⁷⁴ PJ DiMaggio and W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147-60; LB Edelman, 'Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace' (1990) 95 *American Journal of Sociology* 1401-40; LB Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law' (1992) 97 *American Journal of Sociology* 1531-76.

⁷⁵ Edelman and Tesh (n 49) ch 5.
⁷⁶ E Bardach and R Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia, Temple University Press, 1982).
⁷⁷ D McBarnet, 'Law, Policy, and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?' (1988) 15 *Journal of Law and Society* 113-21; D McBarnet and C Whelan, 'Challenging the Regulators; Strategies for Resisting Control' in C McCrudden (ed), *Regulation and Deregulation* (Oxford, Clarendon Press, 1999); D McBarnet and C Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *MLR* 848; and other essays collected in D McBarnet, *Crime, Compliance and Control* (Aldershot, Ashgate, 2004).

⁷⁸ S Shapiro and R Rabinowitz, 'Punishment versus Cooperation in Regulatory Enforcement: A Case Study of OSHA' (1997) 14 *Administrative Law Review* 713-62, 718.
⁷⁹ See Parker and Gilad (n 55) ch 8.
⁸⁰ Many studies and official statements support this. J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany, State University of New York Press, 1985) 61; DP McCaffrey and DW Hart, *Wall Street Policies, Itself: How Securities Firms Manage the Legal Hazards of Competitive Pressures* (New York, Oxford University Press, 1998) 174; J Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (Chicago, University of Chicago Press, 1994); *How your Business can Achieve Compliance* (Office of Fair Trading, 2005) OFT 424, 10; KS Desai, 'Antitrust Compliance Programmes' *The European Antitrust Review* 2006 (Global Competition Review, 2006) Nov Supp 15-21; J Joshua, 'Antitrust compliance programmes for multinational companies' [2001] *International Financial Law Review Supplement* (Competition and Antitrust, 2001); ABA, *Antitrust Compliance*, 2005, 81.

⁸¹ M Weait, 'The Role of the Compliance Officer in Firms Carrying on Investment Business' (1994) 9(8) *Butterworth's Journal of International Banking and Financial Law* 381-83.

constituency advocating and working for compliance;⁸² communication of the policy and practical implications to all staff, including by training and regular refreshers, auditing, and employees' internalisation of the values and practical actions involved in carrying out daily procedures, operations, reward and performance review systems.⁸³

Parker and Nielsen found that each of six central elements of formal compliance systems is associated with the organisation managing compliance better in practice: (1) A written compliance policy; (2) a dedicated compliance function; (3) a clearly defined system for handling complaints from customers or clients; (4) a clearly defined system for handling compliance failures; (5) induction for new employees that includes compliance training; and (6) external review of the compliance system.⁸⁴

A good compliance programme will use the full range of management techniques to support understanding and compliance, and prevent and detect misconduct.⁸⁵ The Canadian Competition Bureau's Bulletin on compliance programmes includes the following techniques:⁸⁶

- Compliance controls;
- an executive-level chief ethics and compliance officer directly responsible to the board of directors;
- active board oversight;
- background checks and disqualification of those who would undercut the compliance programme;
- ongoing communications and training;
- a system that encourages reporting without fear of retaliation;
- audits, monitoring and other forms of checking;
- periodic evaluation of the programme;
- discipline (including for failure to take steps to prevent violations);
- use of incentives to promote the programme;
- system to investigate and resolve allegations of misconduct; and
- a benchmarking to keep up with industry practice.

The US Sentencing Commission's Federal Sentencing Guidelines Manual has established a detailed definition of compliance management systems, operation of which will be taken into account by courts and prosecutors in the imposition of fines and jail sentences for violations of criminal laws, such as the antitrust laws and the anti-bribery laws.⁸⁷ These

⁸² J Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London, Routledge and Kegan Paul, 1984) 359; V Braithwaite, 'The Australian Government's Affirmative Action Legislation: Achieving Social Change through Human Resource Management' (1993) 15 *Law & Policy* 327–54; J Rees (n 80) 92, 98–99, 108; S Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform*, (Stanford, Stanford University Press, 1984).

⁸³ A Newton, *The Handbook of Compliance: Making Ethics Work in Financial Services* (London, Financial Times Prentice Hall, 1998) 74.

⁸⁴ C Parker and VL Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41 (1) *Administration & Society* 3.

⁸⁵ Boehme and Murphy (n 44).

⁸⁶ *Bulletin: Corporate Compliance Programs*, Competition Bureau of Canada, 2010, [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

⁸⁷ The US Federal Sentencing Guidelines, Compliance Program Requirements http://www.ussc.gov/Guidelines/2010_guidelines/Manual_HTML/8b2_1.htm.

guidelines, therefore, are an example of inducement of companies to adequate self-regulation in the fields of substantive legislation. There are two major modules:⁸⁸

- A. *A Compliance and Ethics Programme*, which involves self-policing activities undertaken by corporations to prevent, detect, and investigate employees' violations. Seven criteria are stated for the establishment of an 'effective' compliance and ethics programme:
 - i. Establishment of standards and procedures
 - ii. Oversight by high-level personnel
 - iii. Due care in delegating substantial discretionary authority
 - iv. Effective communication for employees at all levels
 - v. Active monitoring
 - vi. Incentivising and disciplinary mechanisms
 - vii. Preventing recurrence.
- B. *A Self-Reporting Mechanism*, containing seven criteria for the establishment of an 'effective compliance and ethics program':
 - i. Establishment of standards and procedures
 - ii. Oversight by high-level personnel
 - iii. Due care in delegating substantial discretionary authority
 - iv. Effective communication for employees at all levels
 - v. Active monitoring
 - vi. Incentivising and disciplinary mechanisms
 - vii. Preventing recurrence:
 - a. self-reporting,
 - b. cooperating with the investigation, and
 - c. affirmative acceptance of responsibility for the misconduct.

C. External Information and Advice

Compliance—or enforcement—can be supported by a range of third parties, in addition to the classic bilateral relationship between regulator/enforcer and business. The options include standardisation organisations, accreditation agencies, ranking institutions, credit rating agencies, auditors, in-house counsel, external lawyers. These are usually repeat players that serve many clients by acting as 'reputational intermediaries'.⁸⁹

⁸⁸ US Sentencing Commission, *Federal Sentencing Guidelines Manual: Chapter Eight—Sentencing of Organizations* (2009) 495. JM Kaplan, 'Corporate Sentencing Guidelines: Overview' in JM Kaplan and JE Murphy (eds), *Compliance Programs and the Corporate Sentencing Guidelines: Preventing Criminal and Civil Liability* (St Paul MN, Thomson/West, rev 2009); RJ Maurer, 'The Federal Sentencing Guidelines for Organizations: How Do They Work and What Are They Supposed to Do?' (1993) 18 *Dayton Law Review* 799–833; NE Clark, 'Corporate Sentencing Guidelines: Drafting History' in Kaplan and Murphy (n 88); JC Coffee, Jr, 'The Attorney as Gatekeeper: An Agenda for the SEC' (2003) 103 *Columbia Law Review* 1293–316; JR Steer, 'Sentencing Guidelines: In General' in Kaplan and Murphy (n 88); IH Nagel and WM Swenson, 'The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and some Thoughts about their Future' (1993) 71 *Washington University Law Quarterly* 205–59; JS Parker, 'Rules without...: Some Critical Reflections in the Federal Corporate Sentencing Guidelines' (1993) 71 *Washington University Law Quarterly* 397–442.

⁸⁹ Oded (n 67).

UK government research in 2012 found that many businesses use external agents as a source of information and advice in complying with regulation (70 per cent, up from 64 per cent in 2010).⁹⁰ Around half of businesses had used trade associations, government department websites, insurance companies and accountants to help them comply with regulation. Four in ten mentioned the Businesslink website in relation to advice on regulatory requirements, whilst one in three mentioned their local council and around a quarter mentioned direct contact with a government department.⁹¹ Businesses were more likely to use external agents as a source of information in cases of employment law (86 per cent) and company law (81 per cent), and less likely to use agents for food safety (44 per cent) and fire safety (55 per cent).⁹²

Most businesses expected regulators to provide some help and guidance rather than simply enforcing rules and regulations only. Four-fifths thought that the role of regulators was to enforce regulations and to provide advice rather than only to enforce rules and regulations, but only two-fifths agreed that 'Regulators help my business to address regulatory risks and prevent non-compliance from happening' and 'Regulators provide clarity about what regulatory requirements apply to my business.'⁹³

In a 2007 survey in relation to competition law, the commonest compliance measure was taking external legal advice (40 per cent of companies).⁹⁴ Other relatively common measures were a policy code (34 per cent), seminars on competition law (26 per cent), employing a dedicated competition compliance officer (20 per cent), taking economic advice (16 per cent) and requiring employees to take an online training programme (nine per cent).⁹⁵

Engagement by a firm of third party monitors, appointed to oversee internal compliance management system, to disrupt misconduct, has become a typical condition in the USA of Deferred Prosecution Agreements.⁹⁶

VII. Corporate Social Responsibility

Strengthening of the relationship between businesses and social values can be seen in the development of corporate social responsibility (CSR). CSR has been defined by the European Commission as 'a concept whereby companies integrate social and environmental concerns

⁹⁰ *Business Perceptions Survey 2012* (London, IFF Research, 2012) para 1.27. The survey comprised 15 minute telephone interviews with 2,294 business people.

⁹¹ *ibid.*

⁹² *ibid.*, para 1.27.

⁹³ *Business Perceptions Survey 2012* (London, IFF Research, 2012) paras 1.16 and 1.17.

⁹⁴ *The Deterrent Effect of Competition Enforcement by the OFT. A Report Prepared for the OFT by Deloitte* (n 52).

⁹⁵ *ibid.*

⁹⁶ See LD Thompson, Deputy Attorney General, *Memorandum for Heads of Department Components United States Attorneys: Principles of Federal Prosecution of Business Organizations* (US Department of Justice, Office of the Deputy Attorney General, January 20, 2003) available at: http://www.justice.gov/dag/cftf/corporate_guidelines.htm; GG Grindler, Acting Deputy Attorney General, *Memorandum for Heads of Department Components United States Attorneys: Additional Guidance on the use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (US Department of Justice, Office of the Deputy Attorney General, May 25, 2010), available at: <http://www.justice.gov/PrintOut2.jsp>. Discussed in Oded (n 67). See statistics at: 2014 *GibsonDunn.com/publications/default.aspx*. *Corporate Deferred Prosecution and Non-Prosecution Agreements* (Los Angeles, Gibson Dunn, 2014) at <http://www.gibsondunn.com/publications/default.aspx>.

in their business operations and in their interactions with stakeholders on a voluntary basis' and as concerning 'actions by companies over and above their legal obligations towards society and the environment.'⁹⁷ The relationship between basic economic conditions and corporate behaviour is mediated by several institutional conditions, such as: Private and public regulation; the presence of other organisations that monitor corporate behaviour; institutionalised norms regarding appropriate corporate conduct; associative behaviour among corporations, and organised dialogue between corporations and stakeholders.⁹⁸

The Commission stated that because CSR 'requires engagement with internal and external stakeholders, it enables enterprises to better anticipate and take advantage of fast changing societal expectations and operating conditions', and that building trust is critical: 'By addressing their social responsibility enterprises can build long-term employee, consumer and citizen trust as a basis for sustainable business models. Higher levels of trust in turn help to create an environment in which enterprises can innovate and grow.'⁹⁹ The Commission noted the increasing importance of a strategic approach for the competitiveness of enterprises. 'CSR in its core is nothing more than decent business, perceived as such by society'.¹⁰⁰

CSR is in reality the alignment of business operations with social values.¹⁰¹ The assumption underlying CSR is that the ethical substance of a norm remains constant, so if it is strongly valued in the community in which a firm operates, it can also be applied by the firm in its internal behaviours and especially in its interaction with the relevant external community (internalisation or management of externalities).¹⁰² One theoretical approach seeks to balance or reciprocate the receipt by businesses of privileges from society, as part of a social licence to operate.¹⁰³ This draws historically on Rousseau's social contract theory, revived in terms of corporate citizenship under the influence of John Rawls¹⁰⁴ and Amartya Sen.¹⁰⁵ The licence to operate theory has been noted above as expounded by Gunningham

⁹⁷ Communication A Renewed EU Strategy 2011–14 for Corporate Social Responsibility COM(2011) 681, 25.10.2011, http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=7010. See also definition at International Standard guidelines for social responsibility (SR) ISO 26000 released on 1 November 2010.

⁹⁸ J.L. Campbell, 'Why would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility' (2007) 32(2) *Academy of Management Review* 946.

⁹⁹ *ibid.*
¹⁰⁰ Rapport van de Commissie Burgmans over de verhouding MVO en corporate governance, uitgebracht op 6 november 2008 aan de Staatssecretaris van Economische Zaken (www.ez.nl).

¹⁰¹ AV Joseph, 'Successful Examples of Corporate Social Responsibility' (2009) 44(3) *The Indian Journal of Industrial Relations* 402, 403.

¹⁰² Eijssbouts (n 53). Eijssbouts' normative description of CSR is the responsibility of corporations to meet the legitimate expectations of society for the firm to conduct its businesses in ways that produce economic, social and ecological benefits to relevant stakeholders and society at large.

His operational or process description is: CSR as a process is the structured and systematic approach by which firms are embedding all aspects of the applicable CSR-norms in their daily operations at all relevant levels, monitoring compliance and results and reporting to relevant stakeholders and society at large.

¹⁰³ T. Donaldson, *Corporations and Morality* (Englewood Cliffs NJ, Prentice Hall, 1982). See also SC de Hoo, *In Pursuit of Corporate Sustainability and Responsibility: Past Cracking Perceptions and Creating Codes Inaugural Lecture Maastricht University*, 2011, 11, referring to the principle of reciprocity, also a corporate social contracts based approach.

¹⁰⁴ The presumption of justice as fairness: J. Rawls, *A Theory of Justice* (Boston MA, Harvard University Press, 1971).

¹⁰⁵ A. Sen, *The Idea of Justice* (London, Allen Lane, 2009) 361–64 on human rights.

in relation to corporate environmental responsibility,¹⁰⁶ it chimes with the concept of meta-regulation and Parker's Open Corporation.¹⁰⁷

CSR has been subject to criticism that it has no teeth and is therefore ineffective.¹⁰⁸ Whether that is true or not, the phenomenon of CSR, which is now fairly widely found, constitutes some attempt by business to be open to the values expressed by local communities or more general populations. Doing the 'right thing' has been recognised as having commercial value in at least some circumstances, producing financial or reputational benefit.¹⁰⁹

Authoritative guidance on CSR is provided by internationally recognised principles and guidelines, in particular the recently updated OECD (Organisation for Economic Co-operation and Development) Guidelines for Multinational Enterprises, the 10 principles of the United Nations Global Compact,¹¹⁰ the OECD Guidelines for Multinational Enterprises,¹¹¹ the ISO 26000 Guidance Standard on Social Responsibility,¹¹² the ILO (International Labour Organization) Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy,¹¹³ and the United Nations Guiding Principles on Business and Human Rights.¹¹⁴

The UN Human Rights Guiding Principles on Business and Human Rights are based on a 'Protect, Respect and Remedy' Framework proposed by Professor John Ruggie.¹¹⁵ Ruggie clearly distinguished and specified the state *duty to protect* and the corporate *responsibility to respect* human rights. This corporate responsibility to respect human rights is not a legal responsibility, but a 'universal baseline expectation' from society, so an uncoded social norm.¹¹⁶ The third pillar of his framework relates to adequate remedies, both judicial and non-judicial. The 2011 Guiding Principles specify how corporations should live up to their responsibility to respect human rights. Under a 'risk based due diligence' approach, corporations should on a continuous basis assess whether and in what ways their actual or

¹⁰⁶ N Gunningham and P Grabosky, *Smart Regulation. Designing Environmental Policy* (Oxford, Oxford University Press, 1998).

¹⁰⁷ C Parker, 'Meta-regulation: Legal Accountability for Corporate Social Responsibility' in D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Milton Keynes, The Open University, 2007) ('it is possible, in principle at least, to imagine (and even to see partial examples) of meta-regulation that holds business organisations accountable for putting in place corporate conscience processes that are aimed at substantive social values') 207ff.

¹⁰⁸ C Mayer, *Firm Commitment: Why the Corporation is Failing us and How to Restore Trust in it* (Oxford, Oxford University Press, 2013) 241; SJ Padfield, 'Corporate Social Responsibility & Concession Theory' (2015) 6 *William & Mary Business Law Review* 1.

¹⁰⁹ T Gillis and N Spring, 'Doing Good is Good for Business' (2001) 18(6) *Communication World* 23-26.

¹¹⁰ <https://www.unglobalcompact.org>.

¹¹¹ <http://www.oecd.org/daf/inv/mne>.

¹¹² <http://www.iso.org/iso/home/standards/iso26000.htm>.

¹¹³ http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

¹¹⁴ J Ruggie, *The Special Representative of the Secretary-General, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Business Corporations and other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, 21 March 2011.

¹¹⁵ J Ruggie, *The Special Representative of the Secretary-General, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: a Framework for Business and Human Rights*, delivered to the Human Rights Council, A/HRC/8/5, 7 April 2008.

¹¹⁶ Eijssbouts (n 53).

intended operations run the risk to impact on the human rights of others and take preventive or remedial steps. This assessment of the relevant substantive CSR norms is a process of contextualisation: Each company will have to analyse its position based on its specific industrial characteristics and the given societal context and this in a continuing dialogue with the relevant stakeholders in that same context.

VIII. Corporate Responsibility

Various initiatives have taken a broader approach to corporate responsibility. The UK government built on the established foundations of corporate social responsibility as part of its response to the 2008–2012 financial crisis,¹¹⁷ by launching a generalised initiative on *corporate responsibility* (CR) in 2013. It defined CR as the voluntary action businesses take over and above legal requirements to manage and enhance economic, environmental and societal impacts.¹¹⁸ The government expressed several aims: To align approaches to responsibility in the UK with various global approaches; to encourage increased reporting and disclosure against consistent, comparable and voluntary metrics; to strengthen supply chain management;¹¹⁹ to encourage more small and medium-sized enterprises to adopt responsible business activities; to strengthen the relationship between business and society; to strengthen business observance of human rights; to determine the scope to expand professional development in corporate responsibility and in the role of consumers.¹²⁰ The policy issued in 2014 noted that CSR had evolved from philanthropy to a core activity for an increasing number of businesses, and ‘from how businesses spread their money to how they earn it’.¹²¹ This transformation had been supported by wider realisation of the economic benefits to businesses, such as: Staff recruitment and retention; managing risk in supply chains; driving innovation and productivity; and opening up new markets and new business models.¹²² Respondents to the debate noted the fact that variations in business size, sector, complexity and communities in which they operated, led to differences in how CR was practised. They also called for the need to support forms of collaboration, and to bridge a disconnection between business and society.

In 2013, the European Commission has also adopted a broad approach in seeking to define the core propositions that frame effective voluntary multi-stakeholder action, in the context of a wide range of voluntary and self- and co-regulation processes, and ‘profound

¹¹⁷ This is discussed in detail in ch 20.

¹¹⁸ *Corporate Responsibility. Good for Business and Society: Government Response to Call for Views on Corporate Responsibility* (Department for Business, Innovation & Skills, 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300265/bis-14-651-good-for-business-and-society-government-response-to-call-for-views-on-corporate-responsibility.pdf.

¹¹⁹ This issue was highlighted by a scandal over use of horsemeat in food, in which the ingredients appeared to have been correctly identified at source (eg in Romania) but to have become wrongly passed on at some stage in a lengthy supply chain.

¹²⁰ *Corporate Responsibility: A Call for Views* (Department for Business, Innovation & Skills, 2013) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209219/bis-13-964-corporate-responsibility-call.pdf.

¹²¹ *Corporate Responsibility. Good for Business and Society: Government Response to Call for Views on Corporate Responsibility* (n 118) para 2.1.

¹²² *ibid*, para 1.2.

world-wide patterns of change.¹²³ The initiative was launched by the Commission's Directorate-General Connect, in the context of its expanding digital agenda. The Commission adopted the description 'Effective Open Voluntarism', defined as good design principles for self- and co-regulation and other multi-stakeholder actions, and invited bodies and organisations to sign a code that would commit to mutual sharing of their overall experience of the application of the code and undertake to seek the broader application by other parties of the approach set out in it. The Commission aimed to establish a principle of open governance for activities, open for ownership and participation at various levels by all public or private actors. The Code stated the following principles: Clear objectives; representativeness; legal compliance; good faith; learning through an iterative process; accountability for participants' roles, monitoring of performance against each actor's performance; reporting of performance monitoring results by each actor for discussion; a compliance system allowing complaints by non-participants and participants to be evaluated by independent assessors; with any panel comprising a majority of independent individuals, and publication of evaluation results; non-compliance shall be subject to a graduated scale of penalties, with exclusion included, and without prejudice to any consequences of non-compliance under the terms of the Unfair Commercial Practices Directive. The Commission also stated:

Success requires without exception that an initiative:

- Secures broad support among, and participation from, interested parties;
- Defines effective rules for rapid collective and individual action;
- Sets clear performance indicators, agreed with interested parties;
- Mandates regular and open reporting on performance and provides a mechanism to take account of feedback in adapting the approach and improving delivery;
- Makes available the resulting body of knowledge to drive better policy making.¹²⁴

IX. Whistleblowing

A. Reporting, Barriers and Inertia

As noted above and in chapter 19, business systems operate on the basis of continual circulation and evaluation of information. '[T]he first people to know of any risk will usually be those who work in or for the organisation.'¹²⁵ However, in some circumstances, notification may not occur. At one extreme is a situation in which data is generally circulated but one or more individual items are omitted, and, at the other extreme, there may be a general failure to circulate relevant information at all, and even to conceal the true picture. The latter

¹²³ *Consultation about a Code for Effective Open Voluntarism* (European Commission DG INFSO, 2012).

¹²⁴ *ibid.*

¹²⁵ *Code of Practice on Whistleblowing Arrangements* (British Standards Institution), para 1.2. This states that the main reason enlightened organisations implement whistleblowing arrangements is that they recognise that it makes good business sense, as able to deter wrongdoing; pick up problems early; enable critical information to get to the people who need to know and can address the issue; demonstrate to stakeholders, regulators and the courts that they are accountable and well managed; reduce the risk of anonymous and malicious leaks; minimise costs and compensation from accidents, investigations, litigation and regulatory inspections; and maintain and enhance its reputation.

situation can occur where the business culture itself is poor, failing or fraudulent. In such situations, channels for reporting major issues, internally and perhaps externally,¹²⁶ may be important. This 'unusual' reporting arrangement is generally known as whistleblowing. Whistleblowing has been defined as the raising of a concern, either within the workplace or externally, about a danger, risk, malpractice or wrongdoing which affects others.¹²⁷ A key element is that the communication is usually about an issue that the communicator feels cannot be raised through normal internal management channels so is raised by some external or other route, which the corporation may regard as a breach of internal procedures, duties of employment or discipline.

Examples of the relevance of whistleblowing exist from diverse sectors.¹²⁸ A prominent example of is Edward Snowden's leaking of United States documents to Wikileaks. Whistleblowing has been formally recognised by numerous international bodies as an effective instrument against corruption.¹²⁹ In its 2012 Report, the Association of Certified Fraud Examiners found that 50.9 per cent of reported fraud within organisations is identified by tip-offs from employees or contractors.¹³⁰ In 2014 the Association calculated that three times as many frauds are discovered by tip-offs than by any other method.¹³¹ Disclosure may be the first means by which wrongdoing comes to the attention of an external authority, although meta-sharing and analysis may be required. The Francis Inquiry into the Mid Staffordshire NHS Foundation Trust concluded that

communication of intelligence between regulators needs to go further than sharing existing concerns identified as risks, and it should extend to all intelligence which when pieced together with that possessed by partner organisations may raise the level of concern.¹³²

However, there are frequent references to the problem that individuals may not report concerns because of the fear of adverse personal consequences. This is especially so in relation

¹²⁶ 'Whistleblowers are a vital source of information for regulators as they can provide a perspective that is not readily available in other ways. Collating management information on whistleblowing cases can provide valuable intelligence on areas that need further examination or controls': *Making a Whistleblowing Policy Work* (London, National Audit Office, March 2014) para 3.14.

¹²⁷ *The Whistleblowing Commission: Report on the Effectiveness of Existing Arranges for Workplace Whistleblowing in the UK* (London, Whistleblowing Commission, November 2013), available at <http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf>, para 2.

¹²⁸ Feldman and Lobel cite important examples of information being provided by whistleblowers in World-Com and Enron, Wigand in relation to tobacco, Moore at HBOS, and Adams at Hoffman-LaRoche: Y Feldman and O Lobel, 'Individuals as Enforcers: The Design of Employee Reporting Systems' in C Parker and V Lehmann and Nielsen (eds), *Explaining Compliance. Business Responses to Regulation* (Cheltenham, Edward Elgar, 2012).

¹²⁹ The G20 Anti-corruption Action Plan 2013–2014 (<http://dialogues.civil20.org/file/301363/download/326897>); the OECD whistleblowing toolkit (<http://www.oecd.org/cleangovbiz/toolkit/whistleblowerprotection.htm>); the OECD whistleblowing toolkit (<http://www.oecd.org/cleangovbiz/toolkit/whistleblowerprotection.htm>); the OECD whistleblowing toolkit (<http://www.oecd.org/cleangovbiz/toolkit/whistleblowerprotection.htm>); the Council of Europe (Parliamentary Assembly of the Council of Europe resolution for the protection of whistleblowers, 2010, (<http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm>)). Parliamentary Commission on Banking Standards, 'Changing Banking for Good' June 2013, para 142.

¹³⁰ *Report to the Nation on Occupational Fraud Abuse: 2012 Global Fraud Study* (Association of Certified Fraud Examiners, 2012) at http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rtn/2012-report-to-nations.pdf.

¹³¹ Schumpeter, 'The Enemy Within. Fraud Within Companies is a Risk that can Never be Eliminated, just Managed' *The Economist* (London, 1 March 2014) 73.

¹³² *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry*, HC 947, Public Inquiry, Chaired by Robert Francis QC, February 2013, para 3.15. Following this, the regulators Monitor and the Care Quality Commission have committed to share information between them: Comptroller and Auditor General, Monitor, Regulating NHS Foundation Trusts, Session 2013–14, HC 1071, National Audit Office, February 2014.

to reporting practices that are systemic or undertaken by more senior staff. There are three aspects here: Not only is prevailing practice illegal or unethical, but a significant number of individuals either condone or ignore this, and the firm's management appears to the informer to be incapable of changing the situation for the better. Accordingly, the informer feels unable to report through normal managerial channels, and often seeks to blow the whistle through an external route.

The Francis report exposed unacceptable levels of patient care and a staff culture that deterred whistleblowers from raising concerns.¹³³ Many staff felt that if they raised concerns about poor care they would not be listened to,¹³⁴ or would be victimised. Similarly, the Parliamentary Commission on Banking Standards stated:

[T]he Commission was shocked by the evidence it heard that so many people turned a blind eye to misbehaviour and failed to report it. Institutions must ensure that their staff have a clear understanding of their duty to report an instance of wrongdoing, or 'whistleblow', within the firm. This should include clear information for staff on what to do. Employee contracts and codes of conduct should include clear references to the duty to whistleblow and the circumstances in which they would be expected to do so.¹³⁵

Research for the Institute of Business Ethics has shown that while one in four workers are aware of misconduct at work, more than half (52 per cent) of those stay silent.¹³⁶ A 2008 study of 333 participants found that the likelihood and the manner of reporting varied depending on the type of illegality, and is strongly correlated to perceptions of legitimacy of organisational rules, job security and voice within the workplace.¹³⁷ Comparing illegality, employees preferred to report clear violations by rank and file employees, rather than violations by managers. At the same time, external reporting to government or media entities was most likely when violations involved the organisation as a whole, or implicated top management.

Feldman and Lobel's research also found that workers are most likely to report their co-workers when they witnessed localised employee theft, than environmental illegality, sexual harassment, corporate financial fraud and safety issues.¹³⁸ People believe that they themselves will report more frequently than other people, and that others are motivated by different rationales than themselves. Women are more likely to report corporate misconduct, and are motivated to report by different factors than men. Generally people prefer to confront illegal behaviour from within their organisation, rather than reporting it externally, as long as they believe that internal reporting will be effective. The existence of a duty to report can make a huge difference.

¹³³ *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry*, HC 947, Public Inquiry, Chaired by Robert Francis QC, February 2013.

¹³⁴ A review of 150 NHS complaints found failings in the handling of over one third, and that 28 should have been investigated as a Serious Untoward Incident: *Press Release, Ombudsman finds Variation in Quality of NHS Investigations into Complaints of Avoidable Death and Avoidable Harm* (Parliamentary and Health Service Ombudsman, 7 February 2015).

¹³⁵ Parliamentary Commission on Banking Standards, 'Changing Banking for Good' (June 2013), para 142.

¹³⁶ British Standards Institution, *Whistleblowing Arrangements Code of Practice*, PAS 1998: 2008, July 2008.

¹³⁷ Y Feldman and O Lobel, 'Behavioral Versus Institutional Antecedents of Decentralized Enforcement: An Experimental Approach' (2008) 2 *Regulation and Governance* 165–92; Y Feldman and O Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality' (2010) 87 *Texas Law Review* 1151–212.

¹³⁸ *ibid.* See summary at: Feldman and Lobel (n 128).

B. The Relevance of Culture

Whistleblowing carries a connotation of exposing extensive unethical practices within an organisation that the majority of employees, relevant managers or firm's culture condone or to which they turn a blind eye. A series of official reports have highlighted that the underlying problem lies with the *culture* of the firm or relevant group of employees.

Thus the Committee on Standards in Public Life has highlighted the role which whistleblowing plays 'both as an instrument in support of good governance and a manifestation of a more open culture.'¹³⁹ The Whistleblowing Commission, a charity, considers:

Effective whistleblowing arrangements are a key part of good governance. A healthy and open culture is one where people are encouraged to speak out, confident that they can do so without adverse repercussions, confident that they will be listened to, and confident that appropriate action will be taken. This is to the benefit of organisations, individuals and society as a whole.¹⁴⁰

Dame Janet Smith commented in her report on the inquiry which followed the conviction of Harold Shipman, a GP who had killed at least 215 of his patients over a period of 24 years:

To modern eyes, it seems obvious that a culture in all healthcare organisations that encourages the reporting of concerns would carry with it great benefits. The readiness of staff to draw attention to errors or 'near misses' by doctors and nurses, and the facility for them to do so, could have a major impact upon patient safety and upon the quality of care provided.¹⁴¹

I believe that the willingness of one healthcare professional to take responsibility for raising concerns about the conduct, performance or health of another could make a greater contribution to patient safety than any other single factor.¹⁴²

C. Official Statements on Whistleblowing

Whistleblowing arrangements are recommended by various official bodies, or required by law, especially since the 2008 financial crisis.¹⁴³ The legal framework typically requires a firm to have a reporting structure for reporting outside normal channels, and provides some protection for whistleblowers against recrimination or discrimination.

Thus, the UK Financial Conduct Authority encourages organisations to have whistleblowing arrangements in place.¹⁴⁴ The UK Financial Reporting Council's Corporate

¹³⁹ Committee on Standards of Public Life, 'Getting the Balance Right: Implementing Standards in Public Life', Tenth Report of the Committee on Standards in Public Life, 2005, para 4.31, at <http://www.official-documents.gov.uk/document/cm64/6407/6407.pdf>.

¹⁴⁰ The Whistleblowing Commission: *Report on the Effectiveness of Existing Arranges for Workplace Whistleblowing in the UK* (Whistleblowing Commission, November 2013), available at <http://www.pcaw.org.uk/files/WBC%20Report%20Final.pdf>.

¹⁴¹ Fifth Report of the Shipman Inquiry, 'Safeguarding Patients: Lessons from the Past—Proposals for the Future' (9 December 2004) para 11.50.

¹⁴² *ibid*, para 81.

¹⁴³ M Schmidt, 'Whistle-blowing' Regulation and Accounting Standards Enforcement in Germany and Europe: An Economic Perspective' (2005) 25 *International Review of Law and Economics* 153–61.

¹⁴⁴ Financial Conduct Authority Handbook, at <http://fshandbook.info/FS/html/FCA>.

Governance Code 2012 recommends that listed companies should have whistleblowing policies in place, or explain why they do not have them.¹⁴⁵

In the USA, significant financial incentives can apply for people to inform. The US False Claims Act allows private citizens to recover a percentage of the amount of a procurement fraud. A 1986 amendment to prohibits retaliation against employees who sue. The Sarbanes-Oxley Act of 2002 strengthened the protections offered to whistleblowers in publicly traded corporations. Reporting is encouraged by offering a financial incentive, which was significantly expanded under the Dodd Frank Act of 2010. An employee who related key facts to the US Department of Justice concerning employer JP Morgan's issue of mortgages, in relation which the involvement of guarantees by state entities brought the issue under the False Claims Act, was paid \$63,870,000 after JP Morgan settled the case by paying \$614 million.¹⁴⁶

Following that approach, the European Union Market Abuse Regulation requires financial service organisations and their regulators to have whistleblowing arrangements in place, and permit Member States to provide financial incentives to whistleblowers.¹⁴⁷ However, the UK government firmly rejected making payments to incentivise whistleblowing, saying that there is no empirical evidence that such incentives lead to an increase in the number or quality of disclosures received by regulators, and that the culture should be that speaking up should become normal business practice.¹⁴⁸

The UK created a new offence in 2010 of failing to prevent bribery. Commercial organisations commit the offence if employees or other associated persons commit offences of bribery.¹⁴⁹ It is a defence if the organisation proves that it had adequate procedures in place. In the government guidance accompanying the Bribery Act 2010 whistleblowing or 'Speak Up' policies are recommended¹⁵⁰ as part of the adequate procedures to prevent bribery. The British Standards Institution's standard for Anti-Bribery Management Systems includes whistleblowing arrangements and sectoral guidance exists.¹⁵¹

Given that revealing internal information to the public may breach employment or public laws, a line has to be drawn between disclosure that is legitimate or not. The essential criterion that has emerged is whether disclosure is in the public interest,¹⁵² and thus

¹⁴⁵ The UK Corporate Governance Code (C.3.5) states for companies listed on the London Stock Exchange it is a matter for the Board, and specifically the Audit Committee, to ensure that arrangements are in place for staff to raise concerns in confidence about possible financial and other improprieties, and for such concerns to be proportionately and independently investigated and followed up. Available at: <http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>.

¹⁴⁶ 'Whistleblowers. A \$64m Question' *The Economist* (London, March 15th 2014) 73.

¹⁴⁷ Reg (EU) No 596/2014 on market abuse (market abuse regulation) and repealing Dir 2003/6/EC of the European Parliament and of the Council and Commission Dirs 2003/124/EC, 2003/125/EC and 2004/72/EC, art 29. See H Fleischer and KU Schmolke, 'Financial Incentives for Whistleblowers in European Capital Markets Law? Legal Policy Considerations on the Reform of the Market Abuse Regime'. ECGI—Law Working Paper No 189/2012.

¹⁴⁸ *Financial Incentives for Whistleblowers* (Prudential Regulation Authority and Financial Conduct Authority, 2014).

¹⁴⁹ Bribery Act 2010, s 7.

¹⁵⁰ *Bribery Act 2010: Guidance about Commercial Organisations Preventing Bribery* <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

¹⁵¹ *Anti-Bribery and Corruption Guidance* (BBA, May 2014), available at https://www.bba.org.uk/wp-content/uploads/2014/05/ABC_guidelines_designed-final.pdf.

¹⁵² In relation to disclosure by public officials: *Making a Whistleblowing Policy Work* (National Audit Office, March 2014). In general, the Law Society said 'There is widespread support for the notion that

overrides other obligations of confidentiality.¹⁵³ The problem in practice is that a public interest test can only be validated after an individual disclosure has taken place. Accordingly, some systems provide a process solution, which encourages confidential disclosure to particular internal or external officers. Research has found that raising a concern with a regulator decreases the chance of dismissal.¹⁵⁴ In 2013 the UK government published a list of prescribed people and bodies to whom malpractice can be reported other than to an employer, updated in 2015.¹⁵⁵

In order to attempt to shield whistleblowers from recognised behaviour of adverse consequences, some legislative protections have been enacted. In the UK, employees who report wrongdoing have been provided a remedy since 1988 should they suffer any detriment or be dismissed as a result of blowing the whistle.¹⁵⁶ Various reforms were made in 2013–2015.¹⁵⁷ First, an individual who has suffered a detriment from a co-worker as a result of blowing the whistle, such as bullying or harassment, may bring a claim against that individual and the employer may be vicariously liable for the actions of the co-worker.¹⁵⁸ Second, individuals who bring a claim at the Employment Tribunal must show a reasonable belief that their disclosure was made in the public interest.¹⁵⁹ Third, it is no longer a requirement for a disclosure to be made in good faith.¹⁶⁰ If made in bad faith, it may reduce any compensation awarded to the worker by up to 25 per cent.¹⁶¹ Nevertheless, The Whistleblowing Commission called in 2013 for making whistleblowing policies mandatory, introducing rewards, extending protection to a wider category of workers, and an exemption from tribunal fees for whistleblowing claims.¹⁶² In 2015, workers have the right not to

encouraging those who witness wrongdoing to report what they have seen is right as a matter of principle and is in the public interest': *The Whistleblowing Framework: Response to the BIS call for evidence* (Law Society, November 2013) available at <http://www.lawsociety.org.uk/representation/policy-discussion/documents/whistleblowing-call-for-evidence---law-society-response/>.

¹⁵³ It has been argued that whistleblowing is constitutionally a form of free speech and expression of citizenship: Bovens (n 22) 195. Bovens gives examples of justification as identification of: Knowledge of penal offences; a substantial and specific danger to public health, safety, or the environment; a gross waste or unauthorised use of public funds; the misleading of controlling or supervising bodies.

¹⁵⁴ *Whistleblowing: The Inside Story—A Study of the Experiences of 1,000 Whistleblowers* (Public Concern at Work and the University of Greenwich, 2013).

¹⁵⁵ *Blowing the Whistle to a Prescribed Person: List of Prescribed People and Bodies* (Department for Business, Innovation & Skills, February, 2013); *Blowing the Whistle to a Prescribed Person: List of Prescribed People and Bodies* (Department for Business, Innovation & Skills, January, 2015).

¹⁵⁶ The Public Interest Disclosure Act 1998 inserted Part IVA into the Employment Rights Act 1996. Only the UK, Hungary and Slovenia operate comprehensive legislative frameworks, while a number of others have implemented legislation which addresses whistleblowing in certain sectors and industries only.

¹⁵⁷ In addition to points mentioned, the definition of 'worker' in s 43K of the Employment Rights Act 1996 (ERA) was amended to include certain new contractual arrangements within the NHS so that individuals working under such contracts are covered by the whistleblowing protections. Alongside this, a power was introduced to enable the Secretary of State to make any further changes to the definition of 'worker' by secondary legislation.

¹⁵⁸ Enterprise and Regulatory Reform Act 2013, s 19, referring to the Employment Rights Act 1996, s 47B. Detrimental acts of one co-worker towards another who has blown the whistle are treated as being done by the employer, therefore making the employer responsible; subject to a defence for an employer who is able to show that they took all reasonable steps to prevent the detrimental treatment of a co-worker towards another who blew the whistle.

¹⁵⁹ Enterprise and Regulatory Reform Act 2013, s 17, amending the Employment Rights Act 1996, s 43B.

¹⁶⁰ *ibid*, s 18(1).

¹⁶¹ *ibid*, s 18(4) and (5).

¹⁶² *Whistleblowing Commission: Strengthening Law and Policy* (London, Whistleblowing Commission, April 2013) available at <http://www.pcaw.org.uk/whistleblowing-commission-public-consultation>.

be unfairly dismissed or suffer a detriment as a result of making a 'protected disclosure', as defined, made either internally to their employer or another responsible person or to various specified external bodies.¹⁶³

D. Theoretical Insights

Whistleblowing has been said to involve a triangular relationship between the reporting individual, the detected organisational misconduct at a particular institutional setting, and the regulatory regime that defines the contours of legality.¹⁶⁴ I would suggest that the role of co-workers is also important, and the external context is not merely a regulatory regime but the social culture and norms.

Whistleblowing has been viewed as functioning within concepts of 'new governance' and wider accountability for organisational compliance at a time in which the role of the state in regulation is changing.¹⁶⁵ It alters the balance between 'voice' and 'exit'.¹⁶⁶ Feldman and Lobel have summarised the position thus:¹⁶⁷

The tension—promoting internal compliance as a matter of corporate culture, while at the same time ensuring the ability of individuals to speak out against their organization's noncompliance—is at the root of the puzzle. How do organizations effectively promote compliance? From Aristotle to Rawls, political philosophers have recognized that individual good citizenry includes multiple obligations, which can be classified into three categories: obedience, loyalty and participation.¹⁶⁸ Obedience involves recognition of rational authority and compliance with its rules and processes. Loyalty involves respect for and service to the community as a whole. Participation includes civic engagement which entails voicing orderly dissent and reporting noncompliance. Much like polity citizenship, individuals within organizations frequently voluntarily behave in ways that are beneficial to the organization, quite absent direct or explicit commands or reward systems. Organizational citizenship behaviour (OCB) is the social science term used to describe the range of behaviours that individuals engage in within their institution beyond explicit acts of following orders. These behaviours include compliance with organizational norms, altruistic behavior toward others and participation in one's institution.

It has been noted above that the ultimate cause of the perceived need by an individual to raise what are believed to be serious concerns is deficiency in the culture of the

¹⁶³ The Small Business, Enterprise and Employment Act 2015, s 148, inserting s 43FA into the ERA.

¹⁶⁴ MP Miceli and J Near, *Blowing the Whistle: The Organizational and Legal Complications for Companies and Employees* (New York, Lexington Books, 1992); Feldman and Lobel (n 137), 'Behavioral Versus Institutional Antecedents of Decentralized Enforcement: An Experimental Approach' (n 137).

¹⁶⁵ O Lobel, 'Interlocking Regulatory and Industrial Relations: The Governance of Worker Safety' (2005) 57 *Administrative Law Review* 1071–152; Feldman and Lobel, 'Behavioral Versus Institutional Antecedents of Decentralized Enforcement: An Experimental Approach' (n 137); Y Feldman and O Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality' (n 137).

¹⁶⁶ A Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Cambridge, Harvard University Press, 1970) 78.

¹⁶⁷ Feldman and Lobel (n 128) 267.

¹⁶⁸ Footnote from original source: BS Turner, *Citizenship and Social Theory* (Thousand Oaks CA, Sage Publications, 1993); J Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford, Oxford University Press, 2000); D Heater, *A Brief History of Citizenship* (Edinburgh, Edinburgh University Press, 2004); W Maas, *Creating European Citizen* (Lanham MD, Rowman and Littlefield, 2007).

organisation.¹⁶⁹ The situation will give rise to a serious imbalance between the norms and behaviour inside the organisation and those that apply in the outside society. There may well be a belief that reporting internally will produce no significant improvement, and may lead to recrimination, and the absence of internal observance of norms and fair procedures is so serious that only an external disclosure will satisfy the conscience of a reporter who acts in good faith and/or produce normalisation. Accordingly, official recommendations stress the need for best practice in policies, accountability, governance, multiple routes for information (including line management, leapfrogging, human resources, audit, audit committees, directors, external routes), feedback and publication after reporting, providing reassurance,¹⁷⁰ briefing managers, checking awareness of staff.¹⁷¹ In short, the conclusion is that the diagnosis and prescription in relation to 'whistleblowing' are the same as for best practice under 'normal' business practices. Arrangements and requirements might support desired practice, but only motivational culture can inspire the best behaviour.

X. Conclusions

This chapter has noted that a focus exclusively on external public 'regulatory' or 'enforcement' systems fails to note the existence of even more extensive management and compliance systems that operate within every business. Firms of any size have substantial management and compliance systems with extensive technical, information technology and human resources. The ability of firms to influence the behaviour of some other firms and of employees is significant but not absolute. Firms and their relevant personnel face the same problems of control, access to information, and effecting change that are faced by external public authorities.

Tallberg argued a decade ago that what used to be seen as alternative and conflicting perspectives on compliance—public enforcement and internal management—are in fact most effective when combined.¹⁷² Further, he asserted that the architecture of many EU regulatory systems inherently consists of the combination of both, first, centralised, active and direct 'police-patrol' supervision conducted by the EU's supranational institutions and, second, decentralised, reactive and indirect 'fire-alarm' supervision, where national courts and societal watchdogs are engaged to induce state compliance.

The analysis in chapter 19 finds that many EU regulatory systems inherently rely on both internal and external elements, which are designed to operate collectively as part of a coherent holistic system.

¹⁶⁹ *Whistleblowing and Corporate Governance, the Role of Internal Audit in Whistleblowing* (London, Chartered Institute of Internal Auditors, 2014): 'There is a symbiotic relationship between whistleblowing and an organisation's culture. Effective internal whistleblowing arrangements are an important part of a healthy corporate culture. But it is also crucial to have the right organisational culture which encourages people to speak out without fear.'

¹⁷⁰ Of 1,000 whistleblowers who contacted the PCaW advice line between 20 August 2009 and 30 December 2010, 56% raised a concern more than once, and 60% received no response from management either negative or positive: *Whistleblowing: The Inside Story—A Study of the Experiences of 1,000 Whistleblowers* (Public Concern at Work and the University of Greenwich, 2013) para 1.3.

¹⁷¹ *Making a Whistleblowing Policy Work* (National Audit Office, March 2014).

¹⁷² J Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) 56(3) *International Organization* 609.

It has been found by experience that issues of culture are significant in affecting the behaviour of employees. The larger the organisation, the more the sub-cultures that exist. Various studies have noted that when organisational structures or rules change, behaviour stays rigid.¹⁷³ Accordingly other means are required to affect institutionalised and localised culture.

A notable corporate movement has occurred under the title of Corporate Social Responsibility in which some firms engage with external stakeholders in relation to achieving wider social goals that temper classic economic goals of business. The CSR movement originated in the environmental field but has widened to any social aspect. Whilst some have criticised CSR arrangements as lacking effective sanctions, it is the widening of goals that is relevant to the analysis of this book. CSR has now widened to general issues of corporate responsibility, encouraged by the European Commission in its Effective Open Voluntarism initiative in the communications sector. That approach chimes with the Open Corporation concept noted in chapter 11 above.

Allied to these issues, and certainly spurred by problems in the financial services sector noted below in chapter 20 and in healthcare and national secrecy and security, has been a resurgence of interest in encouraging whistleblowing. However, it will be seen in chapter 20 below, especially from the civil aviation sector, that whistleblowing is essentially irrelevant if a firm has an open and culture of sharing information, supported by a general 'no blame' environment and enforcement policy.

¹⁷³ For a management analysis of achieving change, see Jones (n 45) chs 10–14.