

**WHISTLEBLOWER PROTECTION**  
**ASSESSMENT**  
**IRELAND**

**Country Report**  
**2009**



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## Introduction

This report is a Whistleblower Protection Assessment that seeks to provide a concise overview of the laws and practices pertaining to whistleblower protection in both the public and private sectors in Ireland and then present key results and recommendations. The report was produced by Transparency International Ireland and it is part of the 'Blowing the Whistle Harder: Enhancing Whistleblower Protection in Europe' project of Transparency International.

For the purposes of this report, whistleblowing is defined as “*the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that might be able to effect action.*”<sup>1</sup>

It is recognised that organisation members who 'blow the whistle' on the illegal or unsavoury activities of other members of their organisation are frequently the victim of reprisals for doing so<sup>2</sup>. For this reason, it is further recognised that measures to protect whistleblowers should be in place to encourage prospective whistleblowers if the formal provision of whistleblowing procedures is to have meaningful effect in practice. It is the policy of the Irish government to include whistleblowing provisions “where appropriate” in Irish law<sup>3</sup>.

The research conducted to produce the report consisted of a legal review both statute and case law provisions pertaining to whistleblowing and whistleblower protection, a review of codes of conduct and whistleblower facilitation practices (where applicable) in the public sector<sup>4</sup> and in the ten largest Irish companies by turnover where these could be obtained<sup>5</sup>, interviews with whistleblowing experts and area practitioners, and a review of the academic literature and print media coverage of whistleblowing in Ireland.

The report begins with an overview of formal whistleblowing protection provisions and some comment on their application in practice, it then examines whistleblowing procedure and practice in more detail, and it concludes with a summation of key results and a number of recommendations.

## Overview of Whistleblowing Protection Rules and Protection in Practice

### 1. What are the existing legal provisions covering whistleblowing in the public and private sector?

There is no free-standing whistleblower protection law in Ireland. A bill written to provide a generic whistleblower protection law was introduced by a member of an opposition party in 1999<sup>6</sup>. The bill was welcomed by the government and it was adopted onto the parliamentary programme of government in 2000<sup>7</sup>. The bill then spent the next six years on the order paper through two parliaments (the government having been returned to power in the general election of 2002)

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<sup>1</sup> Miceli and Near 1992 cited in Dwarkin and Baucus, Internal V. External Whistleblowers: A Comparison of Whistleblowing Processes, *Journal of Business Ethics* 17: 1281-198: 1998.

<sup>2</sup> See, for example, Dyck, I. J. Alexander, Morse, Adair and Zingales, Luigi, 'Who Blows the Whistle on Corporate Fraud?' (October 1, 2008).

<sup>3</sup> Tony Killeen TD, Minister for Labour Affairs, stating government policy favouring a 'sectoral' approach to whistleblower protection in 2006.

<sup>4</sup> The Civil Service Code of Standards and Behaviour.

<sup>5</sup> In descending order of size: CRH plc; AIB plc; Bank of Ireland plc; Smurfit Kappa Group plc; DCC plc; Kerry Group plc; Ryanair Holdings plc; Grafton Group plc; Experian plc; Total Produce plc. (source Bloomberg).

<sup>6</sup> The Whistleblowers Protection Bill was introduced on 24 March 1999.

<sup>7</sup> The then Minister for Finance indicated in the Dáil (lower house of parliament) on 30 March 2000 that whistleblower provisions would be adopted through amendments to the Whistleblower Protection Bill 1999.

receiving regular positive reference from government yet without being enacted. In 2006, the government withdrew the bill.

The government then enunciated its favoured policy of the provision of whistleblower protections on a 'sectoral' basis. That is, the attachment of whistleblower protections to legislation pertaining to limited classes of people reporting specified classes wrongdoing. These have been applied in both the public and private sectors.

A number of such limited whistleblower protection provisions had been enacted prior to the formal institution of the sectoral policy. These related to the protection of: persons reporting suspicions of child abuse or neglect to authorised persons; persons reporting alleged breaches of the Ethics in Public Office Acts; persons reporting breaches of competition law to the relevant authority (and also protections specific to employees for so doing); employees against penalisation for exercising any right under the workplace health & safety act, and to Gardai and Garda civilian employees reporting corruption or malpractice in the police force.<sup>7</sup>

Since the formal institution of the sectoral policy, whistleblower protections have been extended to protect: health care employees who report threats to the welfare of patients or the misuse of public funds; employees from reprisal for making a complaint regarding offences relating to employment permits or aiding any investigation thereof; any person making a disclosure to the relevant authority of an offence pertaining to the regulation of communications; to persons who would otherwise be liable for making a report regarding an offence under consumer protection law; certain offences relating to the use of chemicals; and, to protect those persons *obliged* to report suspected breaches of charities law from any liability arising from any such report.

It is notable that the Prevention of Corruption (Amendment) Act 2001 did not introduce any whistleblower protections into the main anti-corruption statute, the Prevention of Corruption Acts. The Prevention of Corruption (Amendment) Bill 2008 contains a provision for the immunity from liability for any person reporting in good faith to an appropriate person an offence under the Prevention of Corruption Acts together with a provision making reprisal a criminal offence, however this bill remains to be enacted at the time of writing.

There is no provision of a mechanism for for whistleblowing nor any whistleblower protections in the legislation governing the civil service; the Civil Service Regulation Acts. No whistleblower provisions were attached to the last act amending the Civil Service Regulation Acts which was enacted in 2005.<sup>8</sup> There is no mention of whistleblowing procedures or protections in the current Civil Service Code of Standards and Behaviour (published in 2004) nor is there mention of anything akin to a duty to inform of serious misconduct. An academic commentator, William Kingston, characterises the public service culture as one which incentivises the evasion of personal responsibility. The report<sup>9</sup> of the body charged with formulating policy a planned reformation of the civil service, the Task Force on the Public Service, does not discuss whistleblowing and, consequently, its recommendations do not include instituting a whistleblower protection policy in the civil service. A recent OECD report<sup>10</sup> on the Irish public service stated “success will depend on rethinking how the public service operates and putting the conditions in place to change behaviours” though the OECD Report also failed to consider whistleblower protections.

Certain public bodies, which operate outside of the civil service, do have whistleblower protection policies. As an example, the Financial Regulator instituted a whistleblowing process/protection

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<sup>8</sup> The Civil Service Regulation (Amendment) Act 2005.

<sup>9</sup> 'Transforming Public Services: Citizen Centred – Performance Focused'. The Report of the Task Force on the Public Service'. 2008.

<sup>10</sup> 'Ireland: Toward and Integrated Public Service'. OECD. 2008.

policy for its staff in May 2009 and its provisions include an external hotline provided by Public Concern at Work.

There is no general whistleblower provision in labour law as yet. Irish labour law is governed by many statutes and series of statutes and, to date, only those pertaining to workplace health and safety and the employment permit (visa) system have had whistleblower provisions attached. The Employment Law Compliance Bill 2008 proposes the extension of whistleblower protection provisions to the reporting of offences under eighteen employment law acts and series of acts. However, at the time of writing this bill has not been enacted.

There is no witness protection legislation enacted in Ireland, to date the witness protection programme has been run on an ad hoc basis by the police service, An Garda Siochana. A bill proposing to put the programme on a statutory footing has been mooted but one has yet to be entered in parliament. The programme has been used infrequently and only in cases of witnesses who testified in cases of serious organised crime. It has not been used for whistleblowers and it is difficult to foresee it being used for this purpose in future.

## **2. How common is the practice of whistleblowing in the country**

There are no statistics collated on the prevalence of whistleblowing in Ireland nor is there an anti-corruption hotline available to the public. The incidence of whistleblowing over time is not being tracked by any organisation. The prevalence of internal whistleblowing in the private sector is hard to discern as all but one of the private companies referenced in this report who operate whistleblowing procedures do not disclose information regarding the frequency of use and significance of that reported. The company that does is mandated to maintain a hotline by the Sarbanes-Oxley Act and also by the Combined Code on Corporate Governance to which it voluntarily adheres and it revealed that it recorded 215 hotline calls in 2007, up 35% from 2006<sup>11</sup>.

There have been few court cases involving whistleblowing in recent years and none in the past five years. The only significant case is ten years old. In *National Irish Bank v RTE*<sup>12</sup> an ex-employee of the bank had provided the state broadcaster with evidence supporting assertions that the bank had systematically facilitated the evasion of tax by its customers. There was no dispute that the information at issue was prima facie confidential as it amounted to the personal banking information of others gained by the discloser in the course of employment. However, the courts initially refused an injunction sought by the bank prohibiting publication of the information and this decision was later confirmed by the Supreme Court. The decisions of both courts noted the classic dictum that “there can be no confidence in an iniquity”<sup>13</sup> before finding that the public interest favoured the exposure of tax evasion over respecting the confidential nature of the material.

In a the most significant instance of whistleblowing in the private sector in recent years, a case taken by the Eugene McErlean, the dismissed head of Group Internal Audit in the state's largest retail bank, Allied Irish Banks plc (AIB) alleging breach of contract was settled before being heard in 2002. Other aspects of the matter have yet to be settled. Mr. McErlean had provided detailed reports of overcharging by the bank and highly questionable share dealings by one of its subsidiaries to the regulatory authority after internal reporting had yielded no action. The regulator did not make these allegations public at any stage during the period when Mr McErlean was forbidden from discussing the matter publicly under the terms of his settlement with AIB. Mr. McErlean has only recently been released from the non-disclosure term of the settlement and he is

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<sup>11</sup> CRH plc Corporate Social Responsibility Report 2007.

<sup>12</sup> *National Irish Bank v. RTE* [1998] 2 IRLM 196

<sup>13</sup> *Garside v. Outram* [1857] 26 L.J. Ch. 113, 114.

now in ongoing public dispute with the regulator over the exact nature of his disclosures and the subsequent actions of the regulator. The affair raises extremely disquieting questions as to the culture and the regulation of the financial sector in Ireland.

The legislation providing whistleblower protection provisions mainly provide for redress to be sought at the Labour Relations Commission where complaints are heard by the Rights Commissioner employment law forum. Cases alleging unfair dismissal are heard at the Rights Commissioner initially if both parties agree or, if not, or on appeal, at the Employment Appeals Tribunal (EAT). Decisions of the Rights Commissioner are not published. EAT decisions are only now becoming available on its website with older decisions remaining unavailable. Those cases that are appealed from the EAT to the Labour Court are published more frequently. Employment law specialists interviewed confirmed that whistleblower protection provisions are invoked occasionally. As an example, in June 2009 a hairdresser was awarded €20,000 in compensation by the Labour Court after complaints he made about health and safety resulted in dismissal. The court ruled the complaints that he made about the quality of gloves used in handling colouring agents were the “operative reason” for his dismissal.

### **3. Organisational culture: to what extent is a positive awareness of whistleblowing provisions promoted by the government ministries and private companies**

There have been no state-funded public information campaigns promoting public awareness of whistleblowing.

Formal whistleblowing policies and enabling procedures are now the norm in large Irish companies but it is difficult to state with a reasonable degree of confidence any further generalities as to the true *de facto* strength of these *de jure* processes and thus as to the true nature of corporate culture because data is so scarce. An expert on corporate governance interviewed<sup>14</sup> acknowledged the lack of public disclosure but stated the view that whistleblower policies are acting as an important tool for positively changing corporate culture over time. The majority of the largest companies do not release information about the level and nature of the use of the use of of internal whistleblowing procedures. The available evidential signals are mixed as, for example, one of the ten largest companies reported on condition of anonymity while their policy was promoted heavily when introduced and periodically since, their hotline was used “very rarely if at all.” Another of the companies<sup>15</sup> publicly publishes its whistleblower protection policy together with a “comply or disclose” policy in its code of conduct mandating reporting of breaches and suspected breaches of the code.

Six of the ten largest Irish corporates have whistleblowing policies; the four remaining do not mention whistleblowing in their annual reports nor do they publish any such policies elsewhere and they did not respond to requests for information. In smaller companies, whistleblower policies are rarer. A 2005 report found that only 36% of companies had whistleblower policies<sup>16</sup>

Only one of the largest corporates makes any more than a perfunctory reference to whistleblowing in its annual reports (in this case in its annual corporate social responsibility report rather than annual report proper). It publishes the statistics of the use of its Sarbanes-Oxley mandated hotline; most calls are from its north American divisions and some 78% refer to HR related issues and none were deemed serious enough to refer to the audit committee<sup>17</sup>. No current annual report of the ten

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<sup>14</sup> Niamh Brennan, Professor of Corporate Governance, University College Dublin.

<sup>15</sup> Smurfit Kappa plc.

<sup>16</sup> RSM Robson Rhodes 2005, quoted in Transparency International National Integrity Systems Report Ireland 2009.

<sup>17</sup> CRH plc Corporate Social Responsibility Report 2007.

largest companies features instances of whistleblowing as examples of positive staff behaviour.

#### **4. Cultural Context: what is the public attitude towards the act of whistleblowing?**

The position of whistleblowing in the wider culture has undergone a significant positive change in recent decades. Historically, 'the informer' has been held in the highest odium. In 1973's *Berry v. The Irish Times*<sup>18</sup> McLoughlin J wrote colourfully of “the spies and informers of earlier centuries who were regarded with loathing and abomination by all decent people.” In 1999 a member of parliament stated in a debate on the whistleblower protection bill “Irish people have an abhorrence of being called a tell-tale or of informing on another. This stems from our history when we were, for 800 years under the yoke of the British crown.<sup>19</sup>”

However, a great deal has changed. In the past two decades and more, public discourse has been dominated by scandals which have led to an erosion of public faith in institutions and the conduct of commerce. An amount of this wrongdoing has come to light due to the actions of some celebrated whistleblowers (notably in respect of a number of scandals in the healthcare and planning systems). Most recently, public discussion of child abuse in clerically run institutions led to a bout of national soul-searching with much public comment upon the notable absence of whistleblowing leading to suggestions of a national collective guilt.

While no survey data on Irish public attitudes to whistleblowing exists; an analysis of media coverage of the subject suggests that support for whistleblowers is strong among the general population, or at least regarding the individual cases of whistleblowing documented in the media. The subject has received regular positive commentary in the media due to instances of whistleblowing exposing corruption in the planning process, wrongdoing in financial services, and in the healthcare system. Earlier this year RTE Television broadcast in prime time 'Whistleblower', a dramatised account of the whistleblowing of student nurses who exposed the grotesque malpractices of a consultant obstetrician/gynaecologist in a small regional hospital. Much of the comment in the media has commended the bravery of whistleblowers.

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<sup>18</sup> [1973] IR 368

<sup>19</sup> Nora Owen TD, Dail Debate, Whistleblower Protection Bill (second stage), 16 June 1999.

## Part B

### Extent of Whistleblowing Protection Rules and Their Application in Practice

#### *Scope of personnel protected by Whistleblower legislation*

The legislative whistleblower protections which apply widely to “persons” are under:

- the Ethics Acts;
- the Protections for Persons Reporting Child Abuse Act 1998;
- certain of the provisions section 103 of the Health Act 2007 as amending section 55 the Health Act 2004;
- s50(1) of the Competition Act 2002;
- the Communications Regulation (Amendment) Act 2007 as amending the Communications Regulation Act 2002;
- the Consumer Protection Act 2007;
- the Chemicals Act 2008.

The legislative whistleblower protections which apply to “employees” are under:

- the Safety, Health and Welfare at Work Act 2005;
- certain of the provisions section 103 of the Health Act 2007 as amending section 55 the Health Act 2004;
- the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007: applies to members of An Garda Síochána and “members of civilian staff”;
- s50(3) of the Competition Act 2002;
- Employment Permits Act 2006

The definition of “employee” in each of the above acts varies slightly but none include those employed under “contracts *for services*” which would typically exclude consultants and contractors. The definition of employee does not extend to applicants for employment or funding nor family members of employees.

There are a number of mandatory reporting provisions imposed on professional advisers. Though such provisions fall without most definitions of whistleblowing, as failure to report is in itself an offence, but it is arguable that they are within Near & Miceli's definition. The relevant provisions in Irish law are:

- s59 of the Charities Act 2009 obliges auditors, trustees, and investment advisers to charities or any person involved in producing a charity's annual report to report suspicions of any offences under the charity legislation. Sections 60 and 61 provide protections for persons who so disclose. S63 provides protection from reprisal to employees;
- s83 of the Pensions Act 1990<sup>20</sup> obliges 'relevant persons' to report suspicions of breaches of the Act to the Pensions Board and s84 provides protections for relevant persons so doing;
- designated bodies are required to report suspicious transactions of clients to the Revenue

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<sup>20</sup> As inserted by s38 of the Pensions (Amendment) Act 1996

Commissioners (tax authority) and the Gardai under the Criminal Justice Act 1994 Regulations 2003. These regulations transpose the Second Money Laundering Directive into Irish law;

- s192(6) of the Companies Act, 1990, as amended, requires that where a disciplinary tribunal of a recognised body of accountants has reasonable grounds for finding that an indictable offence has been committed by a person while that person was a member of that body, the body shall inform the Director of Corporate Enforcement. Section 58 of the Company Law Enforcement Act 2001 contains a similar provision relating to misconduct by receivers and liquidators;
- s194(1)(b) requires an auditor must notify of any failure of a company to keep proper books of account;
- s194(5) requires auditors to report to the ODCE any reasonable suspicions that an indictable offence under the Companies Acts has been committed;
- s195(6) provides an immunity for liability for an auditor from any matter arising from compliance with the above provisions;
- s59 of the Criminal Justice (Theft and Fraud) Offences Act 2001 requires auditors to report to the Gardai information indicating that specified offences under that act have been committed. The section provides further that such good faith disclosure shall give rise to no liability;
- s1079 of the Taxes Consolidation Act 1997 obliges auditors to report certain taxation offences and subsection 11 provides that no liability shall accrue for doing so.

#### *Subject matter (definition of wrongdoing)*

Whistleblower protections are provided in legislation in respect of the reporting of:

- Non-compliance by public office holders, holders of designated directorships or positions, or special [political] advisers with their obligations to register certain economic interests of theirs or persons connected to them. This protection is *not* extended to the reporting of equivalent offences at local administration level as provided by the Local Government Act 2001;
- Child abuse and/or neglect by any person;
- Any Article 81 or Article 82 type offence carried out by an undertaking or group of undertakings;
- Offences relating to unsafe work practices;
- Relating to the provision of health and social services (this is a précis of very complex provisions):
  - (1) Threats to the health or welfare of a person receiving a health, mental health, or personal social service or in the operation of a residential centre or nursing home amounting to: a risk to the health or welfare of the public; the failure to comply with any legal obligation; the substantial misuse or *waste of public funds* by the state health or social services providers or thereby sub-contracted providers.
  - (2) A complaint to the regulatory authority a healthcare profession;
- Offences pertaining to the non-EU worker employment permit system;

- Offences pertaining to the system of communication regulation;
- Unfair, misleading, or aggressive consumer practices and pyramid schemes;
- Corruption or malpractice in the police force.

As may be clear from the above, there is little coherence as to the nature of the matters subject to protected disclosure. The majority of the protections above have been attached to legislation creating new public bodies exercising oversight functions in the respective subject areas.

There are no sectoral whistleblowing provisions provided in *inter alia* environmental law<sup>21</sup>, company law, or relating to the provision of financial services.

Apart from a single provision in the Health Act 2007, there are no whistleblower provisions relating to the reporting of maladministration and waste in the public sector.

There are significant extensions to the sectoral provision of whistleblower protections contained in proposed legislation currently under consideration by the legislature. The Employment Law Compliance Bill proposes to extend whistleblower protection provisions to substantially the entire corpus of employment law. The Prevention of Corruption Amendment Bill proposes to extend whistleblower protections to the reporting of all offences under the Prevention of Corruption Acts.

### *Internal Disclosure Channels*

The civil service code of practice does not contain whistleblower protections nor does it specify mechanisms for raising complaints of wrongdoing internally other than to state that civil servants who are unsure as to the legality of a proposed action they are required to take in the course of their duties should raise the matter with their line management for direction. The State Claims Agency maintains an Employee Assistance Service helpline for the civil service but as this is intended only to allow civil servants report personal employment grievances, it is not a whistleblowing mechanism, its primary function appears to be to reduce the state's liability in negligence for claims against it by its employees.

The private sector whistleblowing policies reviewed for this paper provide clear internal disclosure channels. Of these, only one does not also provide for a parallel, or alternative, disclosure channel through an externally maintained hotline.

Employment law solicitors have expressed the view that protection considerations regarding internal whistleblowing reports are a concern for companies. Where these reports identify individuals it is likely that they may be deemed 'personal data' under the Data Protection Acts and so would be subject to the full panoply of obligations regarding personal data under those acts including disclosure to the subject upon their request which could, of course, have the effect of identifying the discloser should the discloser's identity be obvious from the circumstances of the disclosure.

A recent research paper<sup>22</sup> inquiring into attitudes to whistleblowing among employees in a unit of a

<sup>21</sup> Save a provision in the Chemical Act 2008 provides immunity from liability but no employment specific protections

<sup>22</sup> Whistleblowing – The Case of a Large Irish Financial Services Company. Conor Buckley, Derry Cotter and Mark Hutchinson. A competitive paper for IAM Accountancy and Finance (2008) and also published in an abbreviated form in Accountancy Ireland, October 2008.

large Irish financial services organisation found ambivalent attitudes to whistleblowing among those surveyed. The survey presented three scenarios of increasingly serious wrongdoing and found that at very best at least 78% of respondents would report the wrongdoing with 22% ignoring it. While it is not suggested that any firm conclusions can be drawn from this, it may go some way to indicating that the formal promotion of whistleblowing in the private sector may yet to have changed the culture prevailing among a significant cohort of employees. It is notable that of the four reasons for not reporting offered: a sense of loyalty to the company; fear of a negative reaction by co-workers; a belief that reporting the incident would have a negative impact on their career; and a belief that reporting the incident was outside the realm of their responsibility, a fear of reprisal was cited least. The preference for internal over external reporting was marked with 85% reporting a preference for internal reporting.

The legislative provisions do not, in the main, provide for internal disclosure, the predominant model is to protect those who disclose to external oversight bodies. The main exception to this is various of the provisions of the Health Act 2007 which provide for disclosure to an 'authorised person' appointed by the relevant healthcare organisation (other provisions of the same act provide for external disclosure to the relevant oversight body). The Garda Regulations provide for a curious hybrid where anonymous disclosure may be made by a serving Gardai to a nominated 'confidential recipient' with the nominated individual then reporting the complaint to the Garda Commissioner for investigation. The system is still in its infancy and it has been the subject of serious criticism as to its structural flaws and limitations<sup>23</sup>. It has received three disclosures in its first year, the complaints related respectively to the failure of certain officers to act, 'dereliction of duty' and disclosure by an officer of being prevented in acting by a superior officer<sup>24</sup>

#### *External disclosure channels*

The majority of legislative whistleblower protection provisions are framed on the protection of external disclosure to the relevant sectoral oversight or regulatory public body in the first instance. These include, where applicable, disclosure to the Health Service Executive, the Standards in Public Office Commission, the Competition Authority, the Health & Safety Executive, the Commission for Communication Regulation, the Consumer Protection Agency, and, where appropriate, the Gardai.

The most common proviso requires the discloser to have acted *reasonably and in good faith*:

- the Protections for Persons Reporting Child Abuse Act 1998;
- the Ethics Acts;
- the Competition Act 2002;
- the Consumer Protection Act;
- the Health Act 2007;
- Garda Siochana (Confidential Reporting of Corruption or Malpractice) Regulations 2007; and
- the Chemicals Act 2008 (good faith requirement but no requirement of reasonableness)

Others are not subject to good faith provisions:

- Safety, Health, and Welfare at Work Act 2005;
- Employment Permits Act 2007.

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<sup>23</sup> Pat Rabbitte, Member of Parliament, former leader of the Labour Party, and sponsor of the Whistleblower Protection Bill, was heavily critical of the 'confidential recipient' model in interview with the author of this report.

<sup>24</sup> Source: report in the Sunday Tribune, 22 November 2009.

Several of the largest companies have hotlines manned by external organisations but as the purpose of these lines is to facilitate internal reporting they cannot be classed properly as external reporting. *Additional disclosure channels – media, elected representatives, civil society organisations.*

There is no provision in legislation or work practice policies facilitating or protecting additional disclosure to the media, elected representatives, or civil society organisations.

Where the acts complained of comprise professional malpractice there is the option of reporting to the appropriate professional regulatory body but this lies without whistleblower protection provisions.

However, it is notable that in the two legal cases in recent years taken on foot of employee disclosure to the media, the courts found in favour of the disclosure. Both involved disclosure to the state broadcaster, RTE. One was discussed earlier and in the second, in which a journalist gained employment in a home for the elderly to secretly film abusive practices, an attempt by the nursing home to assert employee confidentiality was quickly dismissed by the court.

### *Confidentiality*

- There are no confidentiality provisions in the Protections for Persons Reporting Child Abuse Act;
- the Standards in Public Office Commission is precluded from investigating an anonymous complaint but it may refuse to disclose the identity of a complainant “where the interests of justice so require”;
- the Competition Authority will accept anonymous complaints and it will also respect the confidentiality of the discloser in the course of an investigation;
- there are no confidentiality provisions relating to complaints to the Health & Safety Executive under the Safety, Health, and Welfare at Work Act 2005;
- the Health Act 2007 does not make explicit provision for confidential disclosure;
- the Employment Permits Act 2006 does not provide for confidential disclosure;
- the confidential disclosure provisions of the Communications Regulation (Amendment) Act are strong: the Commission *may not* disclose the identity of the complainant except as may be necessary for the investigation of the matters complained of without first obtaining the person's consent. The act states further that this is the case regardless of any other enactment or rule of common law to the contrary;
- the Consumer Protection Act does not provide for confidential disclosure to the Consumer Protection Agency;
- under the Garda Regulations, the identity of the discloser (termed a confidential reporter) remains confidential unless the confidential recipient and the either the Garda Commissioner or the Minister for Justice believe that knowledge of the identity of the confidential reporter is essential for the proper examination of the confidential report or investigation of the alleged corruption or malpractice concerned;
- none in the Chemicals Act 2008.

### *Time scale*

There no provision in any of the legislation regarding a time limit from the date of knowledge of the matter complained of for the ability of a disclosure of wrongdoing by the whistleblower to attract protection however inordinate delay would likely be a significant factor in evaluating the good faith of the discloser should this be at issue.

The normal limitation provisions would apply to the addressing of the wrongdoing itself where these constitute criminal offences (these are complicated with time limits varying for summary offences and none existing for indictable crimes though lengthy delay presents in practice very serious problems for bring a case to trial much less securing a conviction). Several of the acts have provisions extending time for the prosecution of summary offences under the respective acts to 2 years from the statutory default of six months.

There are some time limits pertaining to the length of time after which an employee can take an action alleging a reprisal or other detriment arising as a result of having made a protected disclosure after having suffered the detriment alleged. These are contained in the Safety, Health, and Welfare at Work Act 2005, the Health Act 2007, the Competition Act 2002, the Consumer Protection Act 2007, the Employment Permits Act 2007, and the Protections for Persons Reporting Child Abuse Act 1998. These mandate a limit of six months which may be extended for a further six months at the discretion of the forum for the hearing of the complaint, the Rights Commissioner.

### *Protection against reprisal/retaliation*

The Unfair Dismissals Act provides a general restriction on the dismissal of employees. A dismissal demonstrated to be a reprisal for whistleblowing would be deemed unfair. The general protection afforded by unfair dismissals law is, however, limited in significant ways: the definition of “worker” is narrow and so excludes contractors/consultants and those working less than eight hours a week. The act does not apply at all to persons who have been employed for less than one year.

It is standard that the relevant legislation provides that dismissed employees may choose to seek remedy under the relevant sectoral whistleblower protection provision or the Unfair Dismissals Acts but not both.

The respective legislative provisions protecting whistleblowers are:

- the Protections for Persons Reporting Child Abuse Act 1998: “shall not be liable in damages any other form of relief” and regarding employment “ an employer shall not penalise an employee”;
- the Ethics Acts: “no cause of action shall lie against the person, and no disciplinary action shall be taken against him”;
- the Competition Act 2002: “shall not be liable in damages or from any other form of relief” and “an employer shall not penalise an employee”;
- the Safety, Health, and Welfare at Work Act 2005: the employee is protected against “any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment.”
- The Health Act 2007: “a person is not liable in damages in consequence of a protected disclosure . . . [or] any other form of relief” and “an employer shall not penalise an employee.”;
- the Employment Permits Act: “an employer shall not penalise an employee . . . any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment.
- Communications Regulation (Amendment) Act: “ incurs no civil or criminal liability”; employment provisions are included *inter alia* “If an undertaking, an associate of an undertaking or an association of undertakings causes detriment to a person . . . disadvantage

- or adverse treatment in relation to a person's employment . . . the person has a right of action in tort against the undertaking, associate or association;" and
- Chemicals Act: "no one shall have a cause of action against that person."

As can be seen from a cursory examination of the above; the protections afforded to employees vary markedly between the acts. A serious criticism of the more restrictive provisions is that they do not appear on the face of it to capture a significant portion of the range of actions and omissions seen in whistleblower reprisal. The provision in the Ethics Acts is the weakest, it protects the whistleblower against only [formal] "disciplinary action." Others forbid the employer from penalising the employee: this level of protection is at least open to a narrow interpretation as being limited to the formal sanction of the employee. The protections afforded by the Safety, Health and Welfare at Work Act and the Communications regulation (Amendment) Act are should be seen as the model as they are drawn widely enough to capture immediately many of the tactics used against whistleblowers such as "white-walling" (giving no work to the employee) or the denial of previously available overtime and benefits which it could be argued are not captured by the more restrictive definitions.

The Standards in Public Office Commission is of the view that the protection afforded to employees by s5 of the Standards in Public Office Act 2001 is too weak and it needs to be strengthened. There have been a low number of complaints to the Commission and a significant number of initial approaches from prospective complainees have failed to be translated into formal complaints as potential complainees have not been assured by the protection afforded by the act.

### *Right to refuse*

There is no explicit provision regarding an employee's right to refuse to participate in illegal activities in any of the legislative provisions. This may be because a duty upon all persons not to engage in illegal behaviour is presumed.

### *Legal liability*

Legal liability for the reporting of false allegations is a feature of many of the legislative provisions. In addition, knowingly reporting false allegations would, in many circumstances, leave a person liable to criminal or civil sanction (such as in defamation or malicious falsehood).

The Acts which provide no explicit penalty for false reporting are:

- The Employment Permits Act 2007;
- the Safety, Health, and Welfare at Work Act;
- the Ethics in Public Office Acts;
- the Garda Regulations.

The penalties provided for reporting false allegations are:

- the Protections for Persons Reporting Child Abuse Act 1998: £1,500 or 12 months summarily or £15,000 or to imprisonment for a term not exceeding 3 years on indictment;
- the Communications Regulation (Amendment) Act 2007: to a fine not exceeding €5,000 summarily and to a fine not exceeding €50,000 on indictment;
- the Consumer Protection Act 2007: on a first summary conviction for any such offence, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both;

- the Competition Act 2002: summarily to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 6 months or both.

Part 14 of the Health Act 2007 is an extremely complex section inserting whistleblower protection provisions into numerous other acts. It runs to some fifteen pages and as such stands to demonstrate the the practical difficulties of the 'sectoral' approach to enacting whistleblower protections when faced with an area itself governed by a patchwork of legislation. It contains a most unwelcome provision whereby “a person who makes a disclosure who knows or *reasonably ought to know* is false is guilty of an offence.” The penalties then provided are a fine not exceeding €5,000 and/or 12 months imprisonment upon summary conviction and a fine not exceeding €50,000 and/or 3 years upon conviction on indictment.

Thus the Health Act's provisions are the most difficult to decipher and they provide for the most severe of the penalties upon the lowest level of (objective) culpability. This can but provide little comfort to the prospective whistleblower.

### *Whistleblower participation*

There is in general no legislative right for the whistleblower to participate in the follow-up procedure.

The Communications Regulation (Amendment) Act provides that the Commission shall, so far as practicable and in accordance with the law, notify the person of the outcome of any investigation into the matters to which the disclosure relates.

Where a whistleblowing report would result in criminal charges, the whistleblower would have no input into the prosecution as victims and witnesses have no input into the conduct of a criminal case under Irish law.

### *Independent review*

The model for independent review of the complaint of a whistleblower alleging detriment in contravention of a whistleblower protection provision is through the making of a complaint by the whistleblower to an employment tribunal body, the Rights Commissioner in the first instance in most cases. Findings of the Rights Commissioner may be appealed to the Employment Appeals Tribunal or the Labour Court as provided for in the relevant legislation.

The provision under the Communication Regulation (Amendment) Act deems reprisal in contravention of the Act to give rise to liability in tort and so the complainee would sue for damages in the courts, either in the Circuit Court or the High Court depending on the quantum of damages sought. All the whistleblower protection provisions thus create potential causes of action at judicial or quasi-judicial forums.

### *Offered remedies*

A provision common to most of the acts is that the whistleblower may take a case to the Employment Appeals Tribunal for unfair dismissal (where applicable) or, otherwise, to the Rights Commissioner where an award of up to 104 weeks pay may be made. These are contained in the Health Act 2007, the Competition Act 2002, the Consumer Protection Act 2007, and the Protections

for Persons Reporting Child Abuse Act 1998.

An maximum award of 104 weeks pay is clearly inadequate to compensate in any case marked by serious and/or sustained harassment and the low limit may well operate to dissuade a person from whistleblowing when they compare the economic effect of loss of employment as against a time consuming process to claim, at very most, two years pay in compensation.

The Safety, Health, and Welfare at Work Act 2005 and the Employment Permits Act 2007 provide that the Rights Commissioner may require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances. This should be regarded as the model provision for any further legislation in the area. It is regrettable that the Prevention of Corruption (Amendment) Bill and the Employment Law Compliance Bill both propose caps on compensation at 104 weeks pay.

There are no mechanisms to provide rewards to whistleblowers.

## **Key results and Recommendations**

The failure to adopt the Whistleblower Protection Bill 1999 was an opportunity missed. The Act upon which it was based, the UK's Public Interest Disclosure Act 1998 (PIDA) applies to the private and public sectors equally (subject to its exemption for information covered by the Official Secrets Act) and it has operated successfully in that jurisdiction for more than ten years. PIDA is now recognised as the international benchmark for best practice in whistleblower protection.

The Irish government dropped the Whistleblower Protection Bill in 2006, stating “a single all-encompassing legislative proposal on whistleblowing would be complex and cumbersome, take considerable time to enact, and would not be user friendly to the public.<sup>25</sup>” The UK's Public Interest Disclosure Act applies to all industries and to the public and private sectors yet it runs to a mere nine pages and its provisions are clear to a lay reader. By contrast, the sectoral provisions of the Health Act 2007 alone run to some fifteen pages and are entirely impenetrable to the lay reader. It is thus difficult to reconcile the stated reasoning of the government with an examination of the legislation.

The Minister further cited “complex legal advice” relating to the proposed bill's operation with the Central Bank's confidentiality regime, the Official Secrets Act, intellectual property law, and the mandatory reporting of suspicious transactions by designated bodies. While space precludes the addressing of these arguments directly it is worth noting that the UK is the jurisdiction in the world which most resembles our own and its central bank is independent as is ours and is subject to similar obligations under international agreements, the UK legislation has a simple 'carve-out' for matters under the Official Secrets Act, its intellectual property law is virtually identical, and the mandatory reporting of suspicious transaction requirements are derived from European law and so should be functionally identical in both jurisdictions. PIDA has operated for more than ten years without legal mishap.

The paramount recommendation of this report is that legislation modelled upon the Public Interest Disclosure Act be enacted in this jurisdiction.

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<sup>25</sup> Minister for Labour Affairs, Tony Killeen TD, in a statement to the Dail on 4 April 2006.

In the absence of an overarching whistleblower protection enactment, the secondary recommendations of this report are that sectoral whistleblower protection provisions be extended to the reporting of serious violations of company law and to the reporting of wrongdoing in the financial services sector.

Irish company law contains over four hundred offences, some two hundred of which are crimes which may be tried upon indictment. The Company Law Review Group (CLRG), the body established by the Company Law Enforcement Act 2001 and whose recommendations for changes in Irish company law are generally enacted in time, was asked in early 2007 by the Minister for Finance to consider the inclusion of a whistleblower provision in the forthcoming Companies Consolidation and Reform Bill. The CLRG received strong submissions in support of such a provision from both the Irish Congress of Trade Unions and the Office of the Director of Corporate Enforcement (ODCE). Despite these favourable submissions, the CLRG recommended a year later against inclusion of whistleblower provisions in the Companies Consolidation and Reform Bill and consequently none are likely to be included in it.

The CLRG<sup>26</sup> began its discussion proper of whistleblowing and company law by stating “one cannot say that there is any evidence of endemic failure in relation to corporate governance or its enforcement in Ireland that negatively affects the investment climate and which requires enhanced ‘whistleblowing’ provisions.” This statement was debatable when made in 2007 and it is one which it is submitted the review group might find difficult to make in 2009.

The CLRG repeatedly raises fears of a profusion of reports of minor technical violations, these could be avoided easily though a de minimis requirement to exclude trivial matters.

The CLRG's finding that “internationally the trend is not to make provision for whistleblowing . . . which relates to the registration, governance and duties of companies and their officers” appears a non sequitur as it follows mention of such provisions in the US, UK, Canada, Australia, New Zealand, South Africa (through a mix of broad and specific whistleblower protection provisions), and the adoption of requirements similar to those of Sarbanes-Oxley in “some EU states.”

Finally, the CLRG rejects whistleblowing provisions on the primary basis of the “risk of negative connotations attaching internationally to the heretofore positively perceived Irish business sector . . . mischievously, for having an underlying disregard for good corporate governance practice, which is patently not the case” and “Ireland’s reputation as a lightly regulated economy could suffer.”

We submit that in 2009, Ireland's reputation for corporate governance and regulation would benefit from the insertion of whistleblower protection provisions for the reporting of serious offences under company law.

The second sectoral provision we recommend is the provision of legislative whistleblower protection provisions to those who report suspected offences to the Financial Regulator. It is unclear why such provisions were not attached to the act creating the Financial Regulator in 2003 given that the sectoral provision model has been to attach such provisions to legislation creating new oversight bodies. Perhaps fears similar to the CLRG's as to Ireland's positive reputation for good governance under light touch regulation prevailed. It is clear that events in interim have demonstrated that a more effective regulation regime for the financial services industry is required in this jurisdiction and whistleblower protection provisions appear an ideal aid to the enforcement of mandated standards and behaviours in the industry are overwhelmingly in the public interest.

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<sup>26</sup> Company Law Review Group Annual Report 2007.

In summation, the UK's Public Interest Disclosure Act provides an ideal model for legislation in this jurisdiction but should sectoral provision remain the favoured approach, we recommend extending protection provisions to company law and to matters relating to the provision of financial services.

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## **Media Analysis**

Media analysis was conducted by reviewing every mention of the phrases 'whistleblowing' or 'whistleblower' or 'good faith reporting' or 'public interest disclosure' in Irish newspapers from 1 January 2005 to 17 June 2009 as retrieved from the Lexis-Nexis database on 17 June 2009.

## **Interviews**

Professor Niamh Brennan, Professor of Corporate Governance, University College Dublin.

Esther Lynch, Legislation and Social Affairs Officer, Irish Congress of Trades Unions.

David Waddell and Brian McKeivitt, Standards in Public Office Commission.

Emily O'Reilly, Ombudsman and Information Commissioner.

John Buckley, Comptroller and Auditor General.

Larry Broderick, Irish Bank Officials Association.

Pat Rabbite, Labour Party.